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THE RIGHT HONOURABLE SIR RICHARD WILD, GBE, KCMG, ED

Sir Richard Wild served as Chief Justice of New Zealand for 12 years. He was appointed on 18 January 1966 and resigned through ill-health almost exactly 12 years later on 20 January 1978. It was with great sadness that the profession learned of his death on 22 May so soon after his retirement. It was gratifying though that early this year his work was suitably recognised by conferring on him the Honour of Knight Grand Cross of the Civil Division of the Most Excellent Order of the British Empire (GBE).

Sir Richard led a full life in which he distinguished himself as soldier, lawyer, Solicitor-General and finally as Chief Justice and it is almost unfair to single out any one for special mention. Nonetheless to lawyers he is likely to be permanently remembered for his infusion of a businesslike approach to the offices he held. His reorganisation of the Crown Law Office was spectacular and so increased its status that young men of ability eagerly sought appointment. He surrounded himself with able men including the present Solicitor-General and the Secretary for Justice. His substantial term as Solicitor-General undoubtedly prepared him superbly for the difficult task of dealing with Ministers of the Crown, particularly over delicate issues such as review of administrative action.

On appointment to the Bench he brought that same approach to the business of the Courts. Promptness and efficiency in the administration of justice were his keynotes. The extent of his reforms has yet to be appreciated and indeed they are not yet complete.

He was the driving force behind the creation of the Administrative Division of the Supreme Court and the reform of the extraordinary remedies including as it did the creation of a power of judicial review. These reforms were achieved by successive amendments to the Judicature Act 1908 and taken together ensured the Supreme Court permanent jurisdiction in Administrative matters.

The current reconstruction of the Supreme Court Rules, while not finally conducted under his own chairmanship, owes much of its impetus to his personal inspiration and support. Likewise with the reorganisation of the Courts. Sir Richard

perceived advantages in the much-criticised suggestion of his predecessor, Sir Harold Barrowclough, that there be a separate Crown Court to deal with criminal matters and so relieve the Supreme Court of this work. It had simply been mooted before its time. Although originally a critic himself he changed his position from opposition, to strong support for the proposal. His drive for better organised Courts resulted in the establishment of a Royal Commission on the Courts under the Chairmanship of Mr Justice Beattie.

It was during Sir Richard's term of office that the Government and Privy Council were encouraged to authorise New Zealand Judges to sit on the Privy Council and he sat several times himself. He was constantly concerned to preserve the status and emoluments of Judges and the dignity of the Courts.

These represent notable achievements in the judicial and forensic fields – fields where stability is a virtue, but one that occasionally outlives its time. Change here, even when needed, does not come easily, and the habits of yesterday yield only to those who are strong, able and dedicated.

So our sorrow at his passing may be tempered by the thought that Sir Richard is one of that small band of men whose life creates its own memorial. He will be remembered not because his name is scratched on stone, nor only while memory lasts, but because his life and work has left a permanent mark on that most human of institutions – the Courts of Justice.

Tony Black

SALE OF LAND

SOLICITORS' APPROVAL AGREEMENTS AGAIN

By BRIAN COOTE, *Professor of Law, University of Auckland.*

In an article on agreements subject to solicitor's approval at [1976] NZLJ 40, and subsequently in a note at [1976] NZLJ 326, attention was drawn to the unreported judgment of Casey J in *Robin v RT Shields & Co Ltd and Boote* in which it was held that the use of the words "this offer is subject to my solicitor's approval" had not prevented the formation of an immediately binding, albeit conditional, contract. What had distinguished that case from *Buhrer v Tweedie* [1973] 1 NZLR 517 was the further fact that the solicitor's approval was to be given "within seven days from acceptance date". The use of the word "acceptance" showed that an immediate contract was intended.

The Court of Appeal, sub nom *Boote v RT Shields & Co Ltd and Robin* (judgment delivered on 3 November 1977) has now dismissed an appeal from the decision of Casey J. The judgment of the Court, which was delivered by Cooke J, is concerned mainly with whether an initial confusion over the land to be sold had prevented the formation of a contract. (It was affirmed that it had not.) On the appeal it seems not to have been argued that the "solicitor's approval" clause had prevented the formation of a contract. Nor had either party sought to resile from the contract before the solicitor's approval had in fact been given. Accordingly, the Court of Appeal had no need to consider under what constraints the solicitor's power to give or withhold his approval could have been exercised. The Court did however make the comment (obiter) that:

> ". . . we think that the solicitor's approval could not be withheld capriciously or merely on the instructions of his client, but was meant to ensure that the conveyancing aspects of the transaction were satisfactory from the purchaser's point of view. The case thus resembles *Caney v Leith* [1937] 2 All ER 532 rather than *Frampton v McCully* [1975] 1 NZLR 270, 277."

That the solicitor was under a constraint of some kind and could not withhold consent merely because his client had so instructed him, follows from the finding that a conditional contract had been formed before consent was called for. Without a constraint, there would have been no present consideration provided by the purchaser, because he would not have undertaken any immediate legal obligation. What is interesting is that the constraint suggested is a two-fold one and covers both the attitude of mind which must be brought to bear and also the matters which can be taken into account.

In suggesting that the solicitor need not act reasonably but only that his decision be not capricious, the Court appears to have been endorsing the test formulated by Farwell J in *Caney v Leith* (supra). That case concerned an assignment of lease stated to be "subject to the purchaser's solicitor approving the lease". After a detailed review of the authorities, Farwell J concluded in effect that there was no call for a party relying on a refusal of consent to call evidence of the factors taken into account by the solicitor. If the court, having looked at the lease, concluded that approval

could have been withheld bona fide without unreasonable (in the sense of capricious) conduct on the part of the solicitor, it was bound to say that the condition had not been fulfilled. On the other hand, Farwell J seems to have accepted that if it could be shown that the solicitor had refused consent solely because his client had instructed him to do so that would be to show bad faith on the solicitor's part and a non-exercise of his discretion.

The Court of Appeal's second constraint, that the solicitor's consideration be only of the conveyancing aspects of the transaction, seems also to be an echo of the judgment in *Caney v Leith.* The lease to be approved in that case contained a covenant restricting use of the premises to that of a private dwellinghouse or boarding or lodging house. In the face of such a clause, Farwell J held, it could not be said that consent had been withheld mala fide or capriciously. There was also a reference by Farwell J in the course of his judgment to *Chipperfield v Carter* (1895) 72 LT 487 where an agreement to grant a lease, the essential terms of which had already been agreed, was expressed to be subject to the condition "such lease to be approved in the customary way by my solicitor". There, it was held that the condition went only to the form of the lease.

As already indicated, the approval in *Caney v Leith* was to have been of an existing lease and, in *Chipperfield v Carter,* of a memorandum of lease yet to be drawn, but of which the essential terms had already been agreed. Neither case is therefore necessarily on all fours with an argeement for sale and purchase in this country. Given, however, that in a particular case an immediate contract for sale and purchase was intended on terms set out in detail in a signed form of agreement, the analogy with the *Chipperfield* case is quite strong. Indeed, if the parties are agreed on the terms of an immediate, albeit conditional, contract, why should a solicitor's approval extend to any thing more than "conveyancing matters"? One might go further and ask why it should be possible for the solicitor to withhold consent on any ground other than the merely capricious? Ought he not to have to act reasonably? Certainly, Farwell J in *Caney v Leith* affected to see a difference between approval of an existing lease (the case before him) and approval of a lease to be drawn on terms already agreed in substance, the solicitor's powers in the latter case being seen as somewhat narrower.

As it stands, the Court of Appeal's suggested constraint is narrow so far as it relates to subject matter and broad as it relates to state of mind, and may have been intended as a reasonable compromise. It has to be emphasised, though, that the obiter dictum related to the particular contract before the Court. As in all cases involving conditions, the question was one of construction rather than of the application of rules of law.

In conclusion, though it may be merely beating the air to say so, parties whose real intention is to reserve to the purchaser a unilateral right to resile from a sale and purchase would be much safer to eschew "solicitor's consent" agreements altogether and enter instead into a simple option for consideration.

Diminishing returns – "Hidden beneath these issues, however, is the question – how much offending should we tolerate, and I refer in this context to real crime as well as breaches of regulatory or licensing provisions. No society that I know of succeeds in punishing every breach of the law. To do so would involve an apparatus of detection, prosecution and punishment that could well swallow up most of a nation's resources. As Sir Leon Radzinowicz says in a recent book *The Growth of Crime,* crime is a price the world must pay for certain social and economic arrangements. A related question is how one should apportion the resources that can be devoted to internal security between attacking and hopefully reducing the causes of offending and preventing or punishing specific criminal acts.

"The issue in truth is not only one of resources but of values. The prevention of offending cannot be the sole value in any society. In New Zealand we probably assign it a higher priority than do many other Western countries. Whether the means we use are particularly effective to that end is another matter. But here as in other countries there are many other values to be protected and advanced, some of which we group under the loose but convenient term freedom. There must be a balance between the evil to be checked and the price of its suppression. Accordingly it is necessary to reject the simplistic approach that any powers given to the State and its agencies and any limitations of liberty are justified if they might, or even if they manifestly would, assist in reducing crime. (I hasten to add that this is certainly not the philosophy reducing crime. (I hasten to add that this is certainly not the philosophy of the police themselves). The logical consequence of such an attitude would be unlimited police powers and the constant surveillance of all citizens. In considering a proposed new power or restriction therefore one cannot simply apply the test – will it help to attack crime?" Justice Department Annual Report.

TORTS

NUISANCE — JUDICIAL ATTACK ON ORTHODOXY

By ROBERT S CHAMBERS *LIB Hons. (Auckland); Salvesen Fellow, New College Oxford*

If the views expressed in *Clearlite Holdings Ltd v Auckland City Corporation* [1976] 2 NZLR 729 and intimated in *Paxhaven Holdings Ltd v Attorney-General* [1974] 2 NZLR 185 are right, then the law of private nuisance has changed, changed utterly. In both cases, judgment was delivered by Mahon J.

The facts of *Clearlite Holdings* are interesting. The Auckland City Corporation was laying new drainage pipes in various parts of Auckland. A tunnel was excavated for this purpose under the plaintiff's land. This caused cracks to appear in the floor of the plaintiff's factory, and there was subsidence. The plaintiff thereupon sought to recover its monetary loss sustained by reason of structural damage. It sued in negligence and nuisance. It failed in negligence; Mahon J.'s findings on that branch of the case will not be discussed here. But it succeeded in nuisance.

The objection to the plaintiff's claim was that "the actionable conduct giving rise to the nuisance took place upon the land of the plaintiff" (p. 731). But Mahon J. considered that this objection was not fatal to the plaintiff's success. He held that the statement in *Salmond on Torts* (16th ed.), p. 52, to the effect that "as nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his occupation", was incorrect, as were the cases decided on that principle. He first looked at a number of decisions from last century where harm was caused to the plaintiff by wrongful conduct occurring partly on or over his land: some of these cases were in fact decided in nuisance, he said. He dismissed the famous definition of Lord Atkin in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 — that nuisance is "a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself" (ibid., 896) — as not exhaustive, and then went on to show that in some recent cases certain dicta had been expressed in support of the view that the defendant need not be an occupier of land.

With the greatest respect, it is submitted that Mahon J.'s reasoning and his synthesis of the cases were wrong. It is proposed to examine these in detail. The order in which Mahon J. dealt with cases has been preserved.

As His Honour concedes, certainly in origin the assize of nuisance and subsequently the action on the case as a remedy for the tort of nuisance were concerned with the interference of A's enjoyment of his land by activities conducted on the land of A's neighbour, B. If the harm was caused by B's activity on A's land, then the appropriate remedy was the writ of trespass (later simply an action for trespass). But His Honour alleges that this distinction was largely ignored by the 19th century, and he cites four cases, all with superficially similar facts, in which, he says, "fine distinctions came to be drawn . . . where harm had been caused to the plaintiff's land, or to his rightful use of that land, by wrongful conduct which occurred partly on or over the plaintiff's land" (p 732). It is disputed that the distinctions between trespass and nuisance were or are fine : all of these cases should have been decided in trespass.

Lawrence v Obee (1815) 1 Stark, 22; 171 ER 389 and *Pickering v Rudd* (1815) 4 Camp. 219; 171 ER 70 were both decisions of Lord Ellenborough C J. The report of the former is so short as to be useless; anyway, the Chief Justice came to no decision, but merely "inclined to the opinion that the form of action should have been case and not trespass" (1 Stark 22, 22; 171 ER 389, 390), without giving any reasons. In the latter, the defendant nailed upon his house a board which projected over the plaintiff's adjoining garden. The plaintiff sued in trespass for the breaking of his close. Lord Ellenborough thought that if any damage arose from the projection, the remedy must be by way of case, and not trespass, for he thought it to be no "trespass to interfere with the column of air super-incumbent on the close" (4 Camp. 219, 220; 171 ER 70, 70), a view which has subsequently been repudiated *(a)*. Thus, should these facts recur today, the correct form of action would seem to be trespass.

(a) *Kenyon v Hart* (1865) 6 B & S 249, 252, per Lord Blackburn; *Kelsen v Imperial Tobacco Co. (Of Great Britain & Ireland) Ltd* [1957] 2 QB 334; *Pollock's Law of Torts* (15th ed.), pp 262-263.

In *Holmes v Wilson* (1839) 10 Ad. & E 503, the defendants in the course of making a road erected buttresses on the plaintiff's land which adjoined the road. The plaintiff had recovered damages for the original invasion of her property, but the defendants had refused to remove the buttresses. On a second suit for wrongfully continuing a building on a plaintiff's land, the defendants argued that the proper form of action (if any) was not trespass, but case. But Lord Denman C J (with whom Littledale, Patteson and Williams JJ. agreed) had no doubt that the continued use of the buttresses was a fresh trespass, and that trespass was the correct form of action (ibid., 511).

Lord Abinger C B in the Exchequer of Pleas reached a similar conclusion in *Hudson v Nicholson* (1839) 5 M & W 437, where the plaintiff alleged that the defendant wrongfully kept and continued certain shores and timbers on the plaintiff's land. His Lordship said:

> "I still adhere to the opinion that this is properly the ground of an action of trespass, and not of case ... these timbers were put into the soil of the plaintiff for the purpose of supporting the defendant's house, and they were continued there by the defendant himself, rendering him substantially a trespasser, as much as if he had stuck a pole in the land of the plaintiff" (ibid 445).

But since the form of action – in case – had not been challenged by the defendant until after verdict, it was considered too late to take objection.

Mahon J submits that the reason why plaintiffs elected to sue for continuing trespass rather than in case was that, in trespass, they could recover successive awards for damages, whereas in case, once damages had been recovered for nuisance, then the defendant was under no liability for the continuing wrong (p 733). This motive was certainly not suggested in any of the judgments; indeed, Patterson J observed, in arguendo, in *Holmes v Wilson*, 10 Ad & E 503, 508:

> "A recovery of damages for a nuisance to land will not prevent another action for continuing it."

Mahon J then confronts *Konskier v B Goodman Ltd* [1926] 1 K B 421, a case in line with the decisions cited above. A firm of builders, engaged in pulling down the upper storeys of No. 84 Houndsditch, obtained from the then owner of the adjoining house, No 87, a licence to pull down part of the chimney stack of No. 87 on condition that they rebuilt it and made good any damage caused to No. 87 in doing any of the works. The builders, after pulling down the chimney stack, did rebuild it, but failed to clear from the roof a quantity of rubbish which they had allowed to fall there. The plaintiff shortly thereafter became the tenant of No. 87. The rubbish, being carried down by a drain pipe from the roof, choked a gully in the basement, and this caused the basement to be flooded during a heavy rainstorm. The plaintiff succeeded in trespass.

Mahon J confessed to "great difficulty in seeing how the act or omission of the defendant could have constituted a trespass [for] [t]he rubble was deposited on the plaintiff's roof with the leave and licence of the plaintiff's predecessor in title. The wrong committed by the defendant was in failing to remove the rubble, an act of omission which could hardly be described as a trespass" (p 734). He thought that a possible interpretation of the decision might be that the Court of Appeal had abstained from referring to nuisance on the traditional basis that a plaintiff must be considered incapable of recovering for a nuisance committed on his own land.

It is surely significant that neither counsel nor the Appeal Court Judges referred at any stage to nuisance. With respect, it is submitted that the decision was correctly decided in trespass, and that Mahon J (and Goodhart too *(b)*) erred in failing to distinguish between unqualified licences and limited or qualified licences. If a landowner, A, says to B, "You may come onto my land for a day", then B, when he does so come, commits no tort: his normal duty not to trespass on A's land has been waived by A's granting him a licence. If A says to B, "You may come onto my land for a day, providing you pay me $1 now", then B's licence is qualified: his duty is waived only from such time as payment is made. An entry without payment would be a trespass. There can be no difference in principle between that situation and the case where A says to B, "You may come onto my land for a day, providing at the end of it or a reasonable time thereafter you pay me $1". The duty not to trespass is waived, but only conditionally.

This last example reflects the facts of *Konskier v B. Goodman Ltd.*, where the licence waiving the duty of the defendants not to trespass on No. 87 was conditional on their fulfilling two obligations. If either obligation was unfulfilled (and the second was), then the duty was not waived. The act of allowing the debris to fall on the plaintiff's roof became wrongful ab initio once the defendants had failed to remove them within a reasonable time of completing the building operations. Thus, Greer L J said:

(b) (1939) 55 LQR 123, 124. Goodhart, while doubting the decision, did not suggest that the case should have been decided in nuisance.

> "The defendants' act of allowing rubbish to fall and remain on the plaintiff's premises would have been a trespass but that it was done under a licence permitting it for the time being; but when the licence came to an end *(c)* the act was as much a trespass as if there had been no licence" (ibid, 428).

Mahon J was right when he said that there was no "trespass *ab initio* in terms of the *Six Carpenters' Case* (1610) 8 Co. Rep. 146a; 77 ER 695" (p. 734). That case was quite different from *Konskier v B Goodman Ltd.* There was initially an unqualified licence to enter the inn. The carpenters' failure to pay for the bread and wine was wrongful, but they did not become, because of that omission, trespassers ab initio, for their entry was lawful. In *Konskier v B Goodman Ltd.* on the other hand, the licence was conditional. When the conditions were not met, those who had entered the property did become trespassers ab initio. The licence had never come into effect.

Sedleigh-Denfield v O'Callaghan is usually thought to support the orthodox view of the nuisance action. But Mahon J believes that that case at the least leaves open the view that a nuisance can be committed on one's own land. Lord Wright had indeed said that in private nuisance "[t]he ground of responsibility is the possession and control of the land from which the nuisance proceeds" (ibid., 903), and Lord Atkin had put the matter similarly, but their Lordships were merely referring "to the normal type of liability" (p 735). For if this were an exclusive definition, their Lordships would be overruling by implication all the "watching and besetting" cases and that line of cases where defendants had been held liable for noise or disturbance created by their conduct in parks and other public places.

But where in their Lordships' judgments is there any suggestion that the passages of Lords Wright and Atkin were meant to be other than all-embracing? Three of the Law Lords stressed that liability could fall only on "an occupier of land" *(d)*. To hold that does not mean that the "watching and besetting" cases (where defendants have been held liable although not occupiers) have been overruled. Their Lordships were not concerned with those cases for they are not, strictly speaking, cases of private nuisance at all *(e)*. They are all based on Lindley M.R.'s erroneous decision in *J Lyons & Sons v Wilkins* [1899] 1 Ch. 255, 267; the Master of the Rolls founded his judgment on a number of private nuisance decisions, in all of which the defendant and plaintiff were occupiers of different closes, a relevant point ignored by his Lordship *(f)*. The "watching and besetting" cases are better seen as cases of public nuisance *(g)*, in which the plaintiff, as a member of the public, has a private remedy because he can show that he has suffered a particular injury beyond that suffered by the rest of the public, that his injury was direct, and that it was of a substantial character *(h)*. Alternatively, they may be explained on the basis that a "private right of access" has been interfered with *(i)*. To interfere with this right does not necessarily mean that the wrongdoer will be liable either in public nuisance or in private nuisance *(j)*. The right exists at common law *(k)* and is for the owner's or "frontager's" benefit *(l)*.

Mahon J then cites *Hall v Beckenham Corporation* [1949] 1 K B 716, which is illustrative,

(c) Or put more clearly perhaps, "when the conditional licence failed to become unconditional".

(d) Ibid., 894, per Viscount Maugham; 896, per Lord Atkin; 903, per Lord Wright.

(e) The principal cases are *Ward, Lock & Co. Ltd v The Operative Printers' Assistants' Society* (1906) 22 TLR 327 and *Torquay Hotel Co. Ltd v Cousins* [1968] 3 WLR 540.

(f) This case was recently doubted in *Hubbard v Pitt* [1976] 1 QB 142, 175, per Lord Denning MR.

(g) To obstruct the highway to an unreasonable or excessive extent is a public nuisance: *R v Clark (No. 2)* [1963] 3 WLR 1067; *Tynan v Balmer* [1967] 1 QB 91, 105, per Widgery J; *Bird v O'Neal* [1960] AC 907.

(h) *Wilkes v Hungerford Market Co.* (1835) 2 Bing NC 281, 293, per Tindal CJ *Benjamin v Storr* (1874) LR 9 CP 400, 406-407, per Brett J.; see also *Culp and Hart v Township of East York* (1956) 6 DLR (2d) 417, 422, per Ferguson J.

(i) *Lyons v The Wardens, &c., of the Fishmongers' Co.* (1876) 1 App. Cas. 662, 675, per Lord Cairns LC,; *Fritz v Hobson* (1880) 14 Ch.D 542.

(j) However, if a theatre with a very popular show insisted on its customers queueing on the footpath, so as to block the access to a neighbouring shop it might be liable in private nuisance, for maintaining on its premises "a state of affairs . . . which [made] it probable that for some time to come there would be this collection of crowds outside": *Barber v Penley* [1893] 2 Ch 447, 458, per North J.

(k) *Ching Garage Ltd v Chingford Corporation* [1961] 1 WLR 470, 477, per Lord Radcliffe; 485, per Lord Morris of Borth-y-Gest.

(l) *St Mary, Hewington v Jacobs* (1871) LR 7 QB 47, 55; *Fritz v Hobson*, 14 Ch.D 542; *Tottenham Urban Council v Towley* [1912] 2 Ch 633, 644, per Cozens-Hardy MR; *Forster v Medicine Hat* (1914) 6 WWR 548, 549, per Walsh J; *Marshall v The Mayor, Aldermen and Burgesses of the County Borough of Blackpool* [1935] AC 16, 22, per Lord Atkin; *Toronto Transportation Co v Swansea* [1935] 3 DLR 619, 620, per Davis J. In private nuisance, possession, rather than ownership, is the criterion for title to sue.

he says, of a line of authority holding defendants liable in nuisance "for noise or disturbance caused by their conduct in parks and other places" (p 735). But in that case the defendant corporation was "certainly invested with the management and control of [the recreation ground]" and it is significant that the plaintiff sued it rather than those flying the model aircraft *(m)*. Thus, this case does not conflict with the definition of nuisance given in *Sedleigh-Denfield v O'Callaghan.*

Hooper v Rogers [1975] Ch 43 further confirms the traditional view, and, as Mahon J ackowledges, Scarman L J even cites with approval the very passage from *Salmond* with which Mahon J disagrees. The plaintiff was the occupier of the threatened farmhouse; the defendant was the co-occupier of the land on which the state of affairs threatening the harm was maintained.

Mahon J then considers three judgments in which he sees sympathy for his view that the defendant need not be the occupier of the land from which the harm emanates. First he cites the view of Devlin J in *Southport Corporation v Esso Petroleum Co Ltd* [1953] 2 All ER 1204 1207, to the effect that there is no principle that "the matter complained of ... must emanate from land belonging to the defendant". But that view was repudiated on appeal, where Denning L J said under the heading "Private Nuisance" ([1954] 2 QB 182, 196):

> "In order to support an action on the case for a private nuisance, the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land. 'The ground of responsibility', said Lord Wright in *Sedleigh-Denfield v O'Callaghan,* 'is the possession and control of the land from which the nuisance proceeds.' Applying this principle it is clear that the discharge of oil was not a private nuisance ..."

Denning L J's opinion was approved by Lord Radcliffe in the House of Lords ([1956] AC 218, 242).

Mahon J sees support for Devlin J's view in *Hargrave v Goldman* (1963) 110 CLR 40, where Windeyer J stated it was "not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant, although commonly it does" (ibid., 60). It is submitted that all Windeyer J meant was that the land need not necessarily "belong to the defendant" – it is well established that the defendant in a nuisance action may be a lessee, a licensee (providing he has sufficient control over the state of affairs from which the harm emanates), and even, in certain circumstances, an independent contractor. Usually, however, the defendant will be, as Windeyer J said, the owner/occupier of the land. That this is what his Honour meant is shown by his well-known dictum on the incidence of liability in nuisance:

> "In nuisance liability is founded upon a state of affairs created, adopted, or continued by one person (otherwise than in the reasonable and convenient use by him of his land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land" (ibid, 59).

That dictum, which is not consistent with Mahon J's view, was confirmed in *Benning v Wong* (1969) 43 ALJR 467, 483, where Windeyer J. stressed that, although the defendant in an nuisance action need not hold the land by virtue of legal title, he must nonetheless have control over the land from which the harm emanates.

The third case relied on by Mahon J is *Kraemers v Attorney General for Tasmania* [1966] Tas SR 113. But that case is simply an example of a licensee's being held liable in nuisance. The harm emanated from a state of affairs clearly within the scope of the licence. The Public Works Department had "ample powers of control and management and was ... in actual occupation of the area adjacent to the quarry ... It was, therefore, in the situation of an occupier" (ibid, 135, per Gibson J). Burbury C J said:

> "I am content to say that I agree with my brother *Neasey* J's conclusion that in accordance with the principles stated by Professor Street on Torts, 3rd edn., p 229, the extent of control over the land which the respondent was authorised to exercise and did exercise as licensee constituted sufficient management and control of the land to found liability for nuisance emanating from it " (ibid, 118).

Those expressions are in accordance with the orthodox opinion, and fully justify PFP Higgins's view that the suggestion that "a person who creates a private nuisance will be liable even though he has never occupied the land on which the nuisance is created ... appears to have been decisively rejected in Australia" *(Elements of Torts in Australia* (1970), p 177) *(n)*.

Thus, it is submitted with respect that none of these cases supports the thesis presented by Mahon J. All seem to point in the opposite direction – towards the view that nuisance is primarily an action between two neighbouring

(m) [1949] 1 KB 716, 727. It is true that there is some suggestion, by way of obiter dictum, that the "actors" might well be liable in nuisance as well.

(n) See *Beaudesert Shire Council v Smith* (1966) 40 ALJR 221, 213.

occupiers, one of which (the defendant) has so used his property that he has interfered with the enjoyment of the other (the plaintiff).

Mahon J then turns to consider a selection of cases which, although never described as nuisance cases, nevertheless are in principle (according to his Honour) nuisance cases. All the cases concern damage caused by animals. His Honour also sees their having in common the fact that the damage resulted from actionable conduct occurring on the plaintiff's land (p 736).

The first is *Hilton v Green* (1862) 2 F & F 821; 175 ER 1302. The plaintiff was tenant from year to year of a farm, over which the defendants had shooting rights. They arranged for hundreds of rabbits to be turned onto the farm. The plaintiff's crops were trampled down and eaten. "The ground of action [was] the turning on rabbits" (ibid, 826; 1304, per Erle C J). It is actionable as trespass to land intentionally to place an animal or to drive it onto the plaintiff's land without the plaintiff's permission *(o)*. The cases, therefore, turned on whether, by the terms of the grant, the plaintiff had given his permission. That is exactly the way in which Erle C J approached the case.

The facts of *Birkbeck v Paget* (1863) 3 F & F 683; 176 ER 313 were rather similar. The defendant, who had shooting rights over the plaintiff's farm, let loose pheasants, foxes, hares and rabbits on the plaintiff's land, with resulting damage to crops. The case was brought in trespass. The question for adjudication was whether the plaintiff had knowingly acquiesced in the defendant's action. As for the rabbits, the plaintiff agreed that he had not objected to some rabbits being turned down, but he said that the defendant had abused this licence and turned down an excessive number. Thus again this is a trespass case, and has nothing to do with nuisance.

The facts of *Farrer v Nelson* (1885) 15 QBD 258 as reported are open to two interpretations. The plaintiff was the tenant of a farm (exclusive of the woods and coppices, which were reserved to the landlord, one Strickland); as well, the sporting and shooting rights over the farm were reserved to Strickland, who later, by indenture of lease, granted his interest to the defendants. On one interpretation of the facts, the defendants "reared in coops elsewhere than on the plaintiff's farm" 1500 pheasants, and carried 450 of them "into a coppice wood". From there, some of them escaped into the plaintiff's field and damaged his crops. On those facts, judgment for the plaintiff could be justified on the sic utere etc. (nuisance and *Rylands v Fletcher*) principle. The defendants maintained on land in their control a state of affairs which threatened harm to their neighbour's land, and harm was in fact caused. Mahon J thinks that the argument of counsel for the defendants shows that some pheasants were actually released on the plaintiff's land (p 737). On those facts, the plaintiff could recover, as in *Hilton v Green* and *Birkbeck v Paget*, for trespass to land.

In *Seligman v Docker* [1949] 1 Ch 53, the landlord defendant had reserved the exclusive right of sporting and preserving game and had kept possession of an area of grassland within the farm leased to the plaintiff tenant for game-rearing purposes. Pheasants kept in the defendant's coverts strayed and damaged the plaintiff's crops. The decision can be justified on the *sic utere*, etc principle as in *Farrer v Nelson (p)*.

It is submitted that the interpretation of these cases given in *Clerk & Lindsell on Torts*, 14th ed., para. 1402 is correct. They are either examples of liability for trespass to land, where the animals were intentionally introduced onto the plaintiff's land, or of *Rylands v Fletcher* or nuisance, where they strayed there from the defendant's land. They do not support His Honour's thesis.

It is submitted with respect that the error in His Honour's judgment stems from an incorrect view of "the gist of the action" (p. 739) – "Unlawful interference by the defendant with the use by the plaintiff of his land" (p 739) or "a disturbance by the defendant of rights in land" (p. 740). That is only half the story. Nuisance is based on the maxim *sic utere tuo at alienum non laedas: so use your own land* that you do not harm your neighbour's. It must be proved not only that the plaintiff's use of his land has been interfered with but also that the defendant maintained on his land a harmful state of affairs which caused that interference *(q)*. Mahon J asserts that this orthodox view gives rise to anomalies. He gives

(o) *R v Pratt* (1855) 4E & B 860, 864-865: *Buckle v Holmes* (1925) 42 TLR 147, 148; PM North, *The Modern Law of Animals* (1972), p 171.

(p) The plaintiff's action in fact failed because Romer J thought, on the authority of *Giles v Walker* (1890) 24 QBD 656, that the pheasants being ferae naturae and present in the ordinary course of nature, no liability could be established. In *Farrer v Nelson*, on the other hand, the birds had been artificially introduced onto the land. Whether or not this is a valid Distinction today in the light of *Goldman v Hargrave* [1967] 1 AC 645 is doubtful.

(q) See, eg *Street on Torts*, 6th ed.; p 225; *Salmond on Torts*, 17th ed, pp 51-52; *Hargrave v Holdman* (1963) 110 CLR 40, 59, per Windeyer J; *Stone v Bolton* [1949] 2 All ER 851, 855, per Jenkins LJ;

as an example the case of a continually barking dog: "so long as the dog remains within his owner's territorial boundary, a neighbour suffering substantial annoyance would have a right of action for public nuisance. But as from the moment when the barking dog crossed the boundary into the plaintiff's property all rights of action would be extinguished" (p 739).

But this case is solved without anomaly if the "state of affairs" approach is adopted. An occupier of property may still be liable in nuisance if his dog crosses the boundary into his neighbour's and there barks because the defendant's "fault" *(r)* was his keeping his land in such a way that his dog, which was likely to bark and so interfere with his neighbour's enjoyment of his land, was able to cause that interference. The defendant should have muzzled the dog at night or kept it in a sound-proof kennel.

The reason for insisting on the "state of affairs" or orthodox approach is not simply that such an approach is consistent with the action's history. Rather, the reason is that it preserves the fundamental balancing process (which has always been the hallmark of the nuisance action) between the right of a man to use his land as he wishes and the right of his neighbour not to be disturbed in the enjoyment of his. One use is weighed against another. It is the emphasis on "use" or "state of affairs" rather than "personal conduct" which, inter alia, distinguishes nuisance from negligence. All this is lost under Mahon J.'s test:

"All that is required in a case of this kind is a positive act creating the damage" (p 740).

Indeed, this test produces anomalies. A is driving along the road when suddenly he swerves and hits B's car. A is not negligent. If B's car is parked outside his house on the road. A will not be liable. If his car is parked in his driveway, A will be liable for "a positive act creating the damage."

It is with the greatest hesitation that one ever criticises a judgment of Mahon J. At least in this case, however, having done so, one can still applaud the result, if not the reasoning. For the defendant in this case did have control over the area of soil occupied by the pipes *(s)*; that area was outside the control of the plaintiff. If the plaintiff had dug up the pipes, he would have been liable in trespass. In *Benning v Wong*, the Australian Gas Light Co. (the real defendants) occupied the area of sub-soil containing their pipes under statutory authority, and "had control of the pipe up to the point of escape, to the complete exclusion of the plaintiff" *(t)*. Thus, the Auckland City Corporation could have been found liable on the ground that its actions in that part of the sub-soil under its control caused harm to the plaintiff's land. In the final analysis, this is not a case where "the nuisance was committed on the plaintiff's land" because the part of the land from which the harm emanated had ceased to be within the plaintiff's control.

The Author thanks Mr John W. Davies, Fellow of Brasenose College, Oxford, for his help and advice in the writing of this article. Mr Davies does not necessarily agree with all the views expressed in it.

Titus v Duke (1963) 6 WIR 135, 136 per Wooding CJ; *SCM (UK) Ltd v W J Whittall and Son Ltd* [1970] 2 All ER 417, 430, per Thesiger J; *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106, 112, per McMullin J.

(r) Using that word in the sense suggested by Windeyer J. In *Benning v Wong*, 43 ALJR 467, 485.

(s) Whether that control stems from statute or from a licence granted by the plaintiff is not made clear in Mahon J's judgment. The former would seem more likely, although His Honour seems to suggest that the Corporation was the plaintiff's licensee at p 739.

(t) 43 ALJR 467, 486, per Windeyer J. To similar effect, *North-Western Utilities Ltd v London Guarantee and Accident Co* [1936] AC 108, 118, per Lord Wright; *Midwood v Manchester Corporation* [1905] 2 KB 597; *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772, 779-780, per Lord Summer.

CRIMINAL LAW

WHAT HAPPENED AFTER BOARDMAN

By FRANK BATES, *Senior Lecturer in Law, University of Tasmania.*

The case of *Boardman v DPP* [1974] 3 All ER 887 is, as the writer Hoffman has said *(a)*, the most important case on similar fact evidence to be decided since *Makin v A-G for New South Wales* [1894] AC 97. The facts in *Boardman* were that the accused, who was the headmaster of a language school where there were a number of young pupils, had been convicted of attempted buggery and incitement. He had been charged with three offences involving three pupils: the first, of which he was acquitted but convicted of the attempt, charged him with the offence of buggery with S, a 16 year old boy. The second and third charged him with inciting H, a 17 year old boy, and another boy to commit buggery with him. At first instance, the Judge had pointed out, in his summing up, that it was a common feature of the first and second counts that the behaviour involved was of a particularly distinctive kind: in each case the accused, an adult, had attempted to incite acts of buggery in which he would play the passive role and an adolescent boy the active. Thus, the Judge stated, it was open for the jury to find corroboration of S's evidence in H's story and vice versa. The accused appealed on the grounds that such evidence was only admissible to rebut the defences of innocent association or mistaken identity and, as those defences had not been raised, the evidence could not be received. His appeal was dismissed by both the Court of Appeal (Criminal Division) *(b)* and the House of Lords.

In the House of Lords, Lord Morris (p 893) and Lord Hailsham (p 905) adopted the general remarks of Hallett J in *R v Robinson* (1953) 37 Cr App Rep 95, 106, where it was said that, "If a jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense". Lord Hailsham added (p 906) that similar facts could be found either in objective facts, as was the case in the earlier cases of *R v Smith* (1915) 84 LJKB 2153 and *R v Straffen* [1952] 2 QB 911, or in a striking similarity in witnesses' accounts of disputed transactions. "For instance", the Lord Chancellor stated, "whilst it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room or an esoteric symbol written in lipstick on the mirror, might well be enough. In a sex case ... whilst a repeated homosexual act by itself might be quite insufficient to admit the evidence as confirmatory of identity or design, the fact that it was alleged to have been performed wearing the ceremonial head-dress of an Indian chief or other eccentric garb might well in appropriate circumstances suffice" (p 906). Especial emphasis was laid on the difficulty of finding a suitable verbal formula *(c)*, but Lord Morris's reference (p 895) to, "... a close or striking similarity as such an underlying unity that probative force could fairly be yielded" seems to be the nearest approximation to which the court would commit itself. On the facts of the case, Lord Cross *(d)* (and his view was endorsed by the other members of the Court) said that, "It is no doubt unusual for a middle-aged man to yield to the urge to commit buggery or try to commit buggery with youths or young men, but whether it is unusual for such a middle-aged man to play the pathic rather than the active role, I have no idea whatever...." Their Lordships were, however, also of the opinion that the similarity of the boys' evidence and, in particular, visits to the boys' dormitories at night were of such a nature that it could not be said that the similar fact evidence was inadmissible. In general terms, the House of Lords held that a Judge had a discretion to admit evidence as described by Lord Morris (p 895) if he was satisfied that its probative force outweighed its prejudicial effect and there was no possibility of collaboration between the witnesses.

Boardman is a many faceted case *(e)* and

(a) LH Hoffman, "Similar Facts after *Boardman*" (1975) 91 LQR 193.

(b) Sub nom *R v Boardman* [1974] 2 All ER 295. This Court did uphold his appeal on the third count however.

(c) See ibid at p 905 per Lord Hailsham.

(d) Ibid at p 912. See also: ibid at p 895 per Lord Morris, ibid at p 898 per Lord Wilberforce, ibid at p 907 per Lord Hailsham and ibid at p 914 per Lord Salmon.

(e) For instance, it refuted the notion, advanced

many of its features will become apparent in the following discussion, the purpose of which is to examine developments in case law after *Boardman* and from then, to attempt to ascertain the present state of the law relating to similar fact evidence.

The first case to be decided in the English Courts on the issue after *Boardman* was *R v Rance and Herron* (1975) 62 Cr App Rep 118. In that case, the first-named defendant (R) was charged with corruptly procuring a payment to the second-named defendant (H), the payment allegedly being a bribe to secure the award by the council, of which H was a member, of a building contract to the company of which R was managing director. The cheque was signed by R and the payment was shown in the company's records as being for sub-contract work done by H, that work being authenticated in the records by a certificate also signed by R. R's defence was that he must have been tricked into signing both cheque and certificate. Evidence was admitted relating to two other transactions where substantial sums of money had been paid to councillors, the transactions having been given the appearance of legitimate transactions in the company records by documents signed by R. Both R and H were convicted and appealed on the grounds that the evidence was inadmissible. The Court of Appeal (Criminal Division) rejected their appeal; Lord Widgery CJ referred (pp 120–121) to various passages from *Boardman* and stated (p 121 that he was of the opinion that too much importance should not be attached to the phrase, "uniquely or strikingly similar", which had been used by Lord Salmon in *Boardman* (at p 913). The Lord Chief Justice interpreted *Boardman* as saying that, "... similar fact evidence is admissible if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged" (p 121). On the facts of *Rance and Herron,* the Lord Chief Justice considered that the evidence of the other two transactions went further than showing merely that R was an individual who was not above passing a bribe, "The essence of each of these three cases is that a bribe was paid out to a councillor in respect of a contract in which Rance's company was interested and in every case ... there is the bogus document of some kind with Rance's signature on it which is the basis upon which the bribe was to be covered". Although there can be no doubt that the decision on the facts in *Rance and Herron* is correct, one must feel some qualms about Lord Widgery CJ's formulation. His use of the term "positively probative" is redolent of the dictum of Orr LJ in the Court of Appeal in *Boardman (f),* where it was suggested that similar fact evidence was admissible, "... because of its inherent probative value". From the various comments made directly by Lord Morris and Lord Salmon in *Boardman* in the House of Lords, which have been quoted earlier (pp 895, 913), and the implications of Lord Hailsham's graphically expressed descriptions (p 906), their Lordships would not be prepared to extend the scope of admissibility so far as Orr LJ and Lord Widgery CJ.

The next case, which also came before the Court of Appeal, was *R v Tricoglus* (1976) 65 Cr App Rep 16 *(g),* where the accused had been convicted of raping a Miss A, although a similar charge in respect of a Mrs G had been dismissed. At the trial, there was scientific evidence which linked Miss A's and Mrs G's experience and that evidence, coupled with Miss A's evidence was enough to enable a prima facie case to be made out against the accused. The manner of the rape was peculiar in that the rapist had odd sexual inclinations. He had picked up Miss A in his Mini car early one morning and, instead of taking her home, had driven her elsewhere and committed the offence. The prosecution sought leave to call Mrs G and two other women, a Mrs M and a Miss C; all three, it was thought, would establish that, in the relevant area, late at night, there was a man in a Mini car who was given to accosting and trying to pick up women. Mrs M and Miss C were to testify that they had each had an unpleasant experience when they were accosted by a "kerb crawler". Mrs G failed to identify the accused as her assailant at an identification parade but said that his car was a 1000 (when, in fact, it was a Mini 1100). The trial Judge admitted the evidence of all three women under the similar fact rule, Mrs G then further claimed that she had identified the accused's car in the police yard and identified the accused in the dock. In his summing up, the trial Judge did not remind the jury of the discrepancy in Mrs G's evidence about the cars nor did he warn them of the dangers of dock identification. The Court

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by Lord Sumner in *R v Thomson* [1918] AC 221, 235, that cases involving homosexual behaviour fell into a special category. See [1974] 3 All ER 887, 909 per Lord Cross. This reinforced the view expressed by Lord Reid in the earlier case of *Kilbourne v DPP* [1973] 1 All ER 440, 456. For comments on the various facets of *Boardman* see LH Hoffman supra note (a); R Cross, "Similar Fact Evidence in the House of Lords" [1975] Crim LR 62; R B Sklar, "Similar Fact Evidence – Catchwords and Cartwheels" (1977) 23 *McGill LJ* 60; F Bates, "Similar Facts and the Hallmark Doctrine in England and Australia" (1975) 38 J Crim L 283.

(f) [1974] 2 All ER 958, 962.

(g) This case was also on appeal from the same Crown Court as was *Rance and Herron.*

of Appeal upheld the appeal and quashed the conviction. Lawton LJ referred (pp 19–20) to the passage in Lord Salmon's judgment in *Boardman* where reference was made to, ". . . a uniquely or strikingly similar method . . ." (p 962) and, in view of the general circumstances in which the rapes had been committed, was of the view (p 20) that the evidence given by Mrs G was prima facie admissible as a matter of law. However, Lawton LJ was also of the opinion (p 20) that the evidence of the other two women was not admissible as it had no bearing on the issue as to whether Miss A had been raped. "The prosecution", he said (p 20), ". . . was calling evidence of a type which was bound to lead the jury to think that this appellant had a propensity towards approaching women who were strangers to him and trying to get them into his motorcar for the purposes of sexual intercourse. As has been pointed out many times in this Court and the House of Lords, it is not permissible to call evidence to show that a man has a propensity to commit a particular type of crime". Lawton LJ further refuted a suggestion by counsel that the women's evidence showed that the accused was a man who possessed the kind of car in which Miss A had been raped on the grounds that the link was far too tenuous to justify the admission of the evidence. In the event, Lawton LJ held that, taken into account with the other circumstances of the difference in evidence regarding the cars and the dock identification, Mrs G's evidence was also inadmissible on the basis that its probative value was outweighed by its prejudicial character. There can be no clearer application of the *Boardman* principle than *Tricoglus:* there was no doubt that the evidence given by Mrs G was of a conceptually different kind from that given by Mrs M and Miss C in that it directly referred to the unusual modus operandi of the rapist, whilst that of the others referred merely to propensity. Even this evidence, despite its striking nature, was held inadmissible in the general context of the case. *Tricoglus,* it is suggested, is a more accurate reflection of what was actually decided in *Boardman* than was *Rance and Herron.*

The issue of striking similarity was raised in *R v Yusuf Mustafa* (1976) 65 Cr App Rep 26, which was also concerned with evidence of identification. The accused was alleged to have bought about $20 worth of meat from two shops using a stolen Barclaycard and forging the signature. There was strong evidence of identification given by assistants at both shops as well as staff from a third shop where he had been seen behaving in a suspicious manner. Evidence was also admitted that a stolen Access card had been found at the accused's house a week after the offences and the accused had admitted that he had been copying the signature on it. He was convicted and appealed on the grounds that the evidence of the employee of the third shop and the Access card had been wrongly admitted. As regards the first item of evidence, the Court of Appeal held that, as there was no reason to suppose that the trial judge had wrongly exercised his discretion in balancing probative right and prejudicial effect, they would not interfere with it. Scarman LJ, who delivered the judgment of the court, noted (p 30) that he himself thought that there was a striking similarity between the ways in which the meat was being fraudulently collected in all three shops. "Of course", said Scarman LJ, "[the evidence] had some prejudicial effect. The question is whether its prejudicial effect was, or was likely to be, such that its probative value would be over-estimated because of its prejudicial effect. This is always a difficult question and we have reached the conclusion that the judge acted rightly in admitting it" (p 30).

The evidence of the stolen Access card gave rise to a rather novel contention by counsel for the defence. After referring to various passages from *Boardman* and emphasising the necessity for a striking similarity as required by that case, counsel contended that there was nothing particularly striking about the evidence as there was nothing especially idiosyncratic about being in possession of a stolen credit card and attempting to forge the signature on it. It is, he submitted, a very ordinary criminal activity and, as such, did not warrant the admission of the similar fact evidence. The Court of Appeal, perhaps not altogether surprisingly, rejected (p 31) this ingenious suggestion: Scarman LJ referred (p 31) to certain particularly significant similarities, including the fact that the Access card was found in a Barclaycard folder and the paper containing the practice signatures, and concluded that the evidence was sufficiently striking *(h). Mustafa* is, as Scarman LJ pointed out (p 31), a case which illustrates, not any innate difficulty in the *Boardman* rule, but the problems inherent in applying that rule to particular cases, where there may be great differences of fact and degree.

The subsequent case of *R v Johannsen* (1977) 65 Cr App Rep 101, another Court of Appeal decision, is factually closer to *Boardman* and,

(h) Scarman LJ also (ibid at pp 31–32) was of the opinion that the evidence of the Access card was admissible on the basis of *R v Reading and others* (1966) 50 Cr App Rep 98 which decided that evidence of possession of incriminating property, even though the property has not been used in any crime charged, may be admissible as tending to negative alleged mistake in identification by a Crown witness.

additionally, involved the element of possible collaboration between witnesses. In *Johannsen,* the accused had been charged with both buggery and gross indecency with each of five schoolboys aged 14 and 15 and, at trial, counsel sought to sever the indictment so that there would be separate trials or each of the coupled counts on the grounds that there were no striking similarities between each of the coupled counts so as to make the evidence on one admissible on the others. The trial Judge decided that the boys' depositions did reveal striking similarities: the accused had accosted the boys in the same kind of place, amusement arcades, his methods of enticing the boys to his accommodation as well as the particular methods which the accused used to gratify his homosexual inclinations. Except in the case of one boy, each of the others gave evidence about one or more incidents. The accused was convicted on all counts and appealed, inter alia on the grounds that the depositions revealed that the four other boys all knew each other and that two of them were close friends and, from that factor, the trial Judge should have inferred that there was a real chance that the four boys had conspired to produce a false story and, that, hence, the indictment ought to have been severed. The Court of Appeal dismissed the appeal, being of the view that the similarities in what happened to each boy were sufficiently striking to permit each boy's evidence to corroborate that of the other *(i).* Furthermore, the Court considered (p 104) that, since there was nothing disclosed on the depositions, to establish more than a speculative possibility that the boys might have conspired to give false evidence, the trial judge, in his discussion, was correct in refusing to sever the indictment. Lawton LJ, who delivered the judgment of the court, referred to comments made by Lord Wilberforce and Lord Cross in *Boardman.* Lord Wilberforce had said (p 897) that the possibility of the concoction of false evidence in sexual cases was a real possibility and that, "... something more than mere similarity and the absence of proved conspiracy is needed if this [similar fact] evidence is to be allowed". Similarly, Lord Cross had said (p 910) that, if there were any real chance of a conspiracy having occurred the similar fact evidence ought to be excluded. Lawton LJ came to the conclusion (p 104) that these statements were obiter but that they should be followed unless there were sound reasons for not doing so. Lawton LJ went on (p 105), however, to analyse the broader policy issues involved in the application of these views. He rejected any idea, quite correctly, it is suggested, that a trial Judge should infer a conspiracy in every case in which witnesses were acquainted with one another; such a course would inevitably lead to many instances of child molesters escaping since, in some of the more common cases, particularly those against schoolmasters and others in continual contact with the young, the victims and/or witnesses will almost certainly know each other. "In our judgment", he said, "their Lordshops' comments should not be understood as meaning that if the depositions contain no evidence of a conspiracy to give false evidence the Judge can use his imagination to decide that there may have been one.... In our judgment their Lordships' comments were directed to the exercise of judicial discretion but if such discretion is to be exercised there must, in our judgment be a factual basis disclosed in the depositions to show there is a 'real chance' that there has or may have been a conspiracy" (p 105). As we have seen *(j),* a discretion exists to exclude evidence if its prejudicial effect outweighs its probative value and, in *Johannsen* and like cases, Lawton LJ's formulation of the approach to be adopted would seem to be an eminently realistic one.

Homosexual behaviour was, once again, in issue in the case of *R v Novac and others* (1976) 65 Cr App Rep 107, where the indictment contained 19 counts against four defendants *(k)* and where the facts were extremely complex. For the purposes of this article, however, the most important matter was that Bridge LJ reiterated the test of "uniquely or strikingly similar manner" enunciated by Lord Salmon in *Boardman* (p 913) and, thus, refused to hold that evidence relating to other instances of buggery in the bed of one of the defendants constituted a striking enough similarity to justify its admission. Assuming a homosexual propensity, it is clear that this view is correct, but, when one compares it with the evidence of the activities described by the court in *Johannsen* (p 103), one can only assume that the additional circumstances (the approaches in amusement parks and so on) gave rise to the striking similarity.

Johannsen, together with *Boardman, Rance and Herron* and *Novac,* was subsequently considered by the Court of Appeal in *R v Scarrott* (1977) 65 Cr App Rep 125, a case which it strongly resembles factually. The accused had been charged with various offences against young boys and his

(i) See *Kilbourne v DPP* [1973] 1 All ER 440.

(j) *Boardman* at p 895; also *Selvey v DPP* [1970] AC, 304.

(k) The form of the indictment was strongly criticised by Bridge LJ (ibid at p 118).

counsel applied to have the indictment severed on the grounds that the similar fact evidence was not admissible to corroborate the various counts. The trial Judge did not accept the submission and left to the jury, who convicted the accused, the issue of whether the boys had conspired to invent their stories. The similarities involved in this case referred to the ages of the boys, the geographical location where the offences took place, the nature of the offences and the inducements and rewards held out to the boys. Perhaps the most important part of *Scarrott's* case is that Scarman LJ sought (p 129) to explain Lord Salmon's, by now well-known, formula. Scarman LJ emphasised that it, "... is no more than a label. Like all labels it can mislead; it is a possible passport to error. It is, we repeat, only a label and it is not to be confused with the substance of the law which it labels". Scarman LJ then went on to adopt the comments about the formula which Lord Widgery CJ had made in *Rance and Herron* (p 121) and stated that, "Positive probative value is what the law requires, if similar fact is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link – an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so common place as that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration". One can only reiterate the comment made about the decision in *Rance and Herron:* the principle is too widely drawn, in much the same way as Orr LJ in *Boardman* in the Court of Appeal *(l)* drew the principle, and one must do the House of Lords the credit of assuming that the formulations enunciated directly by Lords Salmon and Morris and, indirectly, by Lord Hailsham in *Boardman* in the House of Lords were intended to be different, and, indeed, more strict, than those of Orr LJ. It is further suggested that, if the "positively probative" test is too closely applied one can come perilously close, in fact if not in theory, to receiving evidence of propensity. The acts perpetrated by Scarrott would, on a reading of the cases and given both accused's homosexual propensities, seem to be even less out of the ordinary than those of Johannsen.

The dictum of Lord Widgery CJ in *Rance and Herron* was applied in a rather different factual situation by the Court of Appeal in *R v Mansfield* [1978] 1 All ER 134. There, the accused was employed as a kitchen porter at one hotel, but lived at another, which was used by the company which employed him as a hostel for its employees. On 12 December 1974 a fire broke out in the hostel which resulted in the deaths of seven people. Soon after the alarm was given, the accused was seen in the street outside the hostel wearing day clothes whereas most of the occupants of the hotel had to escape in night clothes. When the accused was questioned by the police about the fire he told lies. On 19 December, a fire broke out in the hotel where the accused worked outside the storeroom where he worked. He made no effort to put it out and, again, lied to the police when asked about the fire. In relation to both these fires, there was ample evidence that the accused had been in their vicinity and had had ample opportunity of starting them and had, afterwards, behaved in a suspicious manner. During the night of 28–29 December, a third fire broke out in the staff quarters of the hotel where the accused worked. A waste paper bin from the accused's room had been found near where the fire had started, there was evident that he had been in the vicinity of the fire and, yet again, he lied to the police when questioned about it. It was further discovered that all three fires had been started by sprinkling inflammable liquid onto a carpet and setting fire to the liquid. At his trial, he submitted that there should be separate trials for each of the three charges of arson on the grounds that the similarities between them were insufficiently striking to justify admission of the evidence to all of them in respect of each of them. The trial Judge rejected this contention and he was upheld by the Court of Appeal. Lawton LJ, after referring to *Rance and Herron,* said (p 139) that, "I suggested to both counsel in the course of argument that another way of putting the test is for the Court to ask itself whether the evidence can be explained away as coincidence, and only if it cannot does the question of admitting it as a method of proof come to be considered at all". In addition, Lawton LJ appeared to accept counsel's suggestion that a trial Judge must approach the problem with some caution. The Court of Appeal, it appears (p 138), queried the formulations of Lords Morris and Cross and the illustrations provided by Lord Hailsham on the basis that similarity may depend on pieces of evidence which have no striking or unusual qualities about them. With respect, it is suggested that, at least in part, the Court of Appeal have misunderstood the House of Lords: Lords Morris and Salmon, it is suggested, were referring, not merely to the nature of the evidence itself (though as Lord Hailsham seemed to suggest, innately striking evidence is helpful) but to the striking nature of the *similarity.* Lawton LJ is, indeed, correct when he says

(l) Supra note (f).

that courts should proceed with some caution, as the admission of mildly or even quite similar evidence would undermine the whole doctrine which restricts the use of similar fact evidence, which, in turn, might lead to unjust or, if taken too far, absurd results. As has been suggested, in the homosexual cases at least, similar fact evidence has been admitted which refers to the kind of behaviour which might almost be expected of homosexuals. What, one might ask, is the real difference between that kind of evidence and evidence of propensity. Another way of looking at some of these cases is to say that the Court of Appeal, Criminal Division, has been putting homosexual cases in a special class, which, in view of the House of Lords decisions in *Boardman* and *Kilbourne,* is no longer permissible.

Before leaving the English cases, it is worth noting that *Boardman* was applied by the Court of Appeal in a civil case, *Mood Music Publishing Co v De Wolfe* [1976] 1 All ER 763. This case bears on the earlier cases because of a comment made by Lord Denning MR. "The criminal courts", he said (p 766), after referring to *Boardman,* "have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue. . . ." What, one might ask, is the difference between *positively probative,* as used by the Lord Chief Justice in *Rance and Herron,* and *logically probative,* as used by Lord Denning in the *Mood Music* case? Or, are they both merely labels, like the formulations of Lords Morris and Salmon in *Boardman,* to be disregarded whenever the trial Judge considers it, in his discretion, to be reasonable?

There have been two cases on the matter to be decided since *Boardman* in New Zealand: *R v Geiringer* [1976] 2 NZLR 436 and *R v Katavitch* [1977] 1 NZLR 398, 403. In the former case, the accused, a doctor, had been charged with rape and the prosecution sought to adduce evidence from four other women to the effect that the accused had assaulted them sexually in one form or another, although only in one case did actual sexual intercourse take place, when they went to visit him for the purpose of gynaecological examination. In the event, Beattie J held that only the evidence of the witness who claimed that she also had been raped should be admitted. The other evidence, where the women claimed they had been interfered with in a lesser way, should not be admitted because, first, its prejudicial effect would outweigh its probative value, second, because it did not bear a striking enough similarity or underlying unity with the complainant's evidence. Beattie J was of this opinion because of the evidence given by the three women to the effect that they were uncertain when the medical examination had ceased and the assault had begun. Finally, the Judge stated (p 403) that, ". . . this branch of evidence is in my opinion not of such a cogent and compelling nature as a matter of degree I consider in the interests of justice it must necessarily go before the jury". Beattie J paid considerable attention to *Boardman* (pp 402–403) and, particularly, to passages from the judgments of Lords Wilberforce, Cross and Hailsham which emphasised the high probative nature of such evidence if it is to be admitted; indeed, the phrase "cogent and compelling", earlier quoted and used by Beattie J at the conclusion of his judgment, is a clear example of the approach taken in *Geiringer.* Thus, *Geiringer* represents a straightforward adoption of the principles laid down in *Boardman,* without any attempt to open up the doctrine still further.

In *Katavitch,* the accused, the manager of a sauna bath, was charged with being the manager of premises used as a place of resort for the purposes of indecent acts. Direct evidence was given of homosexual acts taking place on 3 and 4 June 1976 but there was no evidence of the accused having been in that part of the premises at the time the acts took place. The Crown then sought to adduce evidence of homosexual acts having taken place between November 1975 and March 1976. The purpose of this evidence was directed to the issues of whether the premises where a place of resort and whether the accused knew that the premises were so used. Henry J held that the evidence was admissible. However, *Katavitch* does not mask any extension of the *Boardman* principles in the same way as the Court of Appeal decisions, as Henry J was at great pains to point out (p 439) that the evidence was admitted to rebut three defences raised by the accused, namely: lack of knowledge, that the business was genuine and that the proven homosexual acts were coincidental. This exception to the general rule prohibiting the admission of similar fact evidence goes back, in fact, to *Makin's* case. Thus, of the two reported New Zealand cases in which reference was made to *Boardman,* the first provides unequivocal support for *Boardman* and the other really says nothing new.

Conclusions

Although *Boardman v DPP* opened up the law relating to the admissibility of similar fact evidence from the conditions laid down in *Makin* and placed, it is suggested, it on a realistic basis for use in modern law, the cases in the English Court of Appeal, Criminal Division, have not been a particularly happy collection. In effect, it is suggested, they have drawn the principle far too widely and have, thus, paved the way for the reception of evidence the prejudicial effect of which is likely far too outweigh any probative value it might have and, hence, lead to unjust results. The fact that, in the cases themselves, no serious injustices have been done is largely coincidental. At this stage of the law's development, with jury trial still an integral part of the system of criminal law, the approach to the problem, and problem it is, of similar fact evidence to be preferred is that represented by the House of Lords in *Boardman* and Beattie J in the New Zealand case of *Geiringer.*

Confiscation of motor vehicles.

Hon Dr A M Finlay (Henderson) to ask the **Minister of Justice:** (1) How many vehicles have been confiscated and sold under the provisions of the Criminal Justice Amendment Act (No 2) 1976; (2) what arrangements were made for their sale and custody pending sale; (3) what happens in the event of a successful appeal; and (4) in which, if any, of the cases in the answer to question (1) above could the same result not have been attained by invoking powers vested in the court prior to the passing of the Criminal Justice Amendment Act (No 2) 1976, in particular the power of attaching conditions to a probation order?

Hon David Thomson (Minister of Justice) replied: The information sought is as follows: (1) one vehicle has been confiscated and sold under the provisions of the Criminal Justice Amendment Act (No 2) 1976 and confiscation orders only made in respect of five motor cycles. No further action has been taken pending the outcome of appeals; (2) the motor vehicle was stored on the court premises and sold by public auction. Four motor cycles have not yet been surrendered. The fifth one (allegedly rebuilt from stolen parts) is held by the Police while its ownership is determined; (3) in the event of a successful appeal against the making of a confiscation order or against conviction the order would be of no effect. In those cases involving the five motor cycles no subsequent action will be taken until the outcome of the appeals against conviction and sentence is known; and (4) the owner of the confiscated motor vehicle was fined and disqualified from driving for 6 months. The owners of the motor cycles were either fined or sentenced to imprisonment or borstal training. In no cases were the offenders placed on probation by the court. Had the offenders been placed on probation it would have been open to the court, if it wished, to impose a special condition that they should not either alone or jointly own or have in their possession any specified article of any specified class.

Towards a philosophy for family bars – It seems to me that the emphasis in the legislation is on special provision for family groups where parents can, to a degree, relax and some kind of attraction (other than merely being installed behind a large glass of lemonade) can be provided for children who are not necessarily old enought to endure for very long the strain of making polite conversation with adults or the torture of remaining in the same spot for more than two minutes at a time. – J E Millar SM.

SCHEDULE OF LEGAL PARTNERSHIP RULES

(1) Where there is only one partner, the other partner is "and Co".

(2) Where there are two partners, one only can be the sleeping partner.

(3) When there are three partners, only one can sleep at any one time.

(4) Where there are four partners, they shall sleep two only at any one time, in shifts.

(5) Where there are five partners, one shall watch the others, and shall be called the sleepless partner.

(6) Where there are six partners, there shall not be more asleep on the couch than three, who shall have clean hands.

(7) Where there are seven partners, the eighth shall always be overhead.

(8) Where there are nine partners, there shall be no sleep for any of them.

(9) When there are ten or more partners, there shall be no rules, and no holds shall be barred.

(10) On the death of any partner his share (if any) of the assets shall be distributed forthwith amongst the surviving partners in accordance with the doctrine known as the Rule in Underhand v Rafferty.

ACB