COMMENTS

LUTHERAN CHURCH OF AUSTRALIA v. FARMERS CO-OPERATIVE EXECUTORS AND TRUSTEES LTD.

DELEGATION OF TESTAMENTARY POWER

The difficulty in reconciling the principle that a testator may not delegate his testamentary power with the well established practice of creating powers of appointment in wills is well-known, but a matter that has usually provoked academic[1] rather than judicial debate. The point was, however, raised directly before Bray C.J. in *In re Stapleton*[2] and, on appeal, before the High Court in *Lutheran Church of Australia* v. *Farmers' Co-operative Executors and Trustees Ltd.*[3] The clause which provoked this discussion was in a home drawn will and read: "My Trustees have discretionary power to transfer any mortgages, and property, and Shares in Companies invested in my name to the Lutheran Mission 20 Marlborough Street, St. Peters, S.A., for building Homes for Aged Blind Pensioners after All expenses paid, and I desire that there shall be no subsequent adjustment or apportionment therefore between any of the beneficiaries under my Will"; in essence, therefore, it amounted to a grant of a power to the trustees to appoint the residuary estate to a specified body to hold on charitable trusts. Bray C.J. held that the clause amounted to a delegation of testamentary power and hence failed for uncertainty. In the High Court McTiernan and Menzies JJ. agreed with him that the gift failed, while Barwick C.J. and Windeyer J. thought his decision wrong; but since the High Court was equally divided on the point the decision of Bray C.J. was affirmed.

Although Bray C.J. appeared to consider the question of delegation of testamentary power as an aspect of the more general issue of uncertainty, it is hard to see that there is any uncertainty about the clause under review. The clause created a power to appoint an ascertainable fund to a specified institution, and the donees of the power were clearly identified. Had the clause been contained in a settlement *inter vivos* it is inconceivable that it would have been regarded as uncertain. McTiernan and Menzies JJ. did not bother to find the gift uncertain, but simply held it invalid as a delegation of testamentary power; it is submitted that this is the only basis on which the decision may legitimately rest. Even at this level, however, there is some disagreement between the reasons given by Bray C.J. and the members of the High Court who upheld his decision. Bray C.J., relying on the well-known *dictum*[4] of Viscount

1. D. M. Gordon, "Delegation of Will-Making Power" (1953) 69 L.Q.R. 334; O. R. Marshall, "The Failure of the Astor Trust" (1958) 6 C.L.P. 151.
2. [1969] S.A.S.R. 115.
3. (1970) 44 A.L.J.R. 176.
4. "My Lords, by the law of Scotland, as by that of England, the testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest only if he has made a valid disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may indeed provide that a special class of persons invested by law with the capacity of

Haldane in *Houston* v. *Burns*[5], held that the only exceptions to the rule of non-delegation are (1) that "if a testator indicates a class defined with sufficient precision as the object of his bounty he can validly confer on his trustee a power to select within that class"; and (2) that "if he sufficiently indicates a general intention to benefit some form of charity or charity at large he can validly confer on his trustees a power to select the particular charities to be benefited". It should be remembered that Viscount Haldane added that the former exception is justified only "because [the testator] has disposed of the beneficial interest in favour of that class as his beneficiaries". Taken literally, this view would render all special powers of appointment in wills (as distinct from powers in the nature of a trust which enable the donee merely to select among beneficiaries) invalid as delegations of testamentary power. McTiernan and Menzies JJ. evidently did not intend to go so far, since they said in their joint judgment that "here there is . . . no special power of appointment" and that "the cases on special powers are distinguishable from this case". It is, however, extremely difficult to accept a distinction between the power under review and a special power of appointment. Traditionally the distinction between special powers and general powers has been based on the idea that with respect to the former the donor of the power has restricted the range of its objects while with respect to the latter he has not[6] (though where the donee specifies a class which enables the donor to appoint among a very wide class including himself but with some individuals or classes of persons excluded from the range of appointees the power has been classified as "hybrid");[7] and apart from this distinction, the special power has not been the subject of express definition. If the distinctive feature of a special power is the restriction of its objects to a specified class a power to appoint to a particular individual or institution would seem to be a paradigm case of a special power. One may acknowledge that there is a distinction between a power to appoint to A (but if it is not exercised then the property subject to the power should go to the next of kin of a testator) and a power to appoint to A or B or C (but if it is not exercised then the property subject to the power should go to the next of kin of a testator); but to draw practical consequences in terms of the validity of either would seem to be nothing short of perverse. If the normal special power of appointment is valid even in a will, then there is a very clear *a fortiori* case to be made for the validity of a similarly created power to appoint "to A"; and if it is the *a fortiori* case which McTiernan and Menzies JJ. have held to be invalid, there is no possible justification for holding ordinary special powers of appointment valid if they are in wills. For all their denials of any wish to affect the validity of special powers of appointment in wills, McTiernan and Menzies JJ. have either made a distinction which is

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persons to hold property are to take in such shares as a third person may determine . . . ."

5. [1918] A.C. 337.

6. See *e.g.* Sugden, *Practical Treaties of Powers* (8th ed., 1861), 394; Farwell, *A Concise Treatise of Powers* (3rd ed., 1916), 8; Megarry and Wade, *The Law of Real Property* (3rd ed., 1966), 258; Cheshire, *Modern Real Property* (11th ed., 1967), 194-5.

7. *In Re Park* [1922] 1 Ch. 500; *Re Jones* [1945] Ch. 105; *Re Harvey* [1950] 1 All E.R. 491; *Re Triffitt's Settlement* [1958] Ch. 852; Fleming, "Hybrid Powers" (1948) 13 Conv. (N.S.) 20.

completely insupportable or have embraced a view which results in the invalidity of special powers of appointment if they are created in wills.

At this point it may be instructive to examine the reasons given by Barwick C.J. and by Windeyer J. for upholding the validity of a power created by a will to appoint to a particular institution or person. Neither expressly identified the power under review as a special power; but Barwick C.J. argued that a validly created special power of appointment was a valid disposition of property for the purposes of the Wills Act and that there was no "reason why a discretionary power to appoint to a named person should be in any worse case than such a discretionary power to appoint among a named class to whom no gift is made by the will". Windeyer J., whose judgment is on this point unusually vehement, asserted that "it is now I think too late for a court to declare a power in the nature of a power of appointment invalid as an attempted delegation of testamentary capacity"; and he also pointed out that the strictness of the rule against the delegation of a testamentary power "must be accommodated to, and qualified by, the well-established power of a testator of giving a dispositive power of appointment to, or among, specified objects of his bounty". It may consequently be asserted with considerable confidence that if Barwick C.J. and Windeyer J. did not call the power created by clause 6 a special power of appointment they treated the question of its validity as determinable according to precisely the same criteria as are applicable to special powers. It is submitted that on this matter the views of the Chief Justice and of Windeyer J. are a great deal sounder than those put forward by McTiernan and Menzies JJ.

If this be true, then the effect of the decision in the *Lutheran Church* case has been to prejudice the validity of special powers of appointment created in wills. As a matter of abstract reasoning it may be that this conclusion follows from the principle against delegation of testamentary power. Nevertheless, it is clearly at variance with common practice[8], and there is no authority which compels it. All the cases which assert the rule against delegation have concerned provisions which failed for uncertainty and the consequences of the rule in the context of special powers have rarely been the subject of judicial comment. Indeed the cases which refer to the principle of non-delegation have, with impressive consistency, concerned trusts or powers for the furtherance of wide and general purposes[9] and, with a notable exception, have not dealt with powers to be exercised directly in favour of individuals at all. The exception is, of course, *Tatham* v. *Huxtable*[10], where Kitto and Fullagar JJ., in the course of holding that a power given by a testator to his executor to distribute the residue of his estate "to the beneficiaries of this my Will, and Testament, in addition to amounts already speci-

8. There is, for instance, no warning in the section on Wills in the *Australian Encyclopaedia of Forms and Precedents* (Butterworths, 1960) Vol. 16, that special powers in Wills may not be valid.

9. *Blair* v. *Duncan* [1902] A.C. 37; *Grimond* v. *Grimond* [1905] A.C. 124; *Houston* v. *Burns* [1918] A.C. 337; *Attorney-General* v. *National Provincial Bank* [1924] A.C. 262; *Attorney-General of New Zealand* v. *New Zealand Insurance Co.* [1936] 3 All E.R. 888 (P.C.); *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341; *Re Stratton* dec'd [1970] W.A.R. 178; on appeal: *Stratton* v. *Simpson* (1970) 44 A.L.J.R. 487. Though see *Re Wood* (1949) Ch. 498; and *Re Hughes* [1921] 2 Ch. 248.

10. (1951) 81 C.L.R. 639.

fied or to others not provided for who, in my [*sic*] opinion have rendered service meriting consideration by the testator" failed for uncertainty, embarked on a discussion of the validity of powers in wills. They concluded that general powers are valid since they are equivalent to a gift to the donee of the power of the property over which the power may be exercised; Kitto J. held that the validity of a special power depends on the certainty of description of the class or group within which the testator authorises a selection to be made, and expressly said that the concept of a "disposition" of his property by a testator must be taken "in a practical rather than a technical sense" so that a power to appoint among a class where no trust for the class is implied may be valid; and Fullagar J. held that where there is no trust for the class or for persons to take in default of appointment "there does seem to be a departure from principle if we say that the creation by will of a special power to appoint among a class is a testamentary disposition of property, but to say so represents a natural 'latitude' of view, which is perhaps characteristic of a system which has never regarded strict logic as its sole inspiration". Neither, therefore, was prepared to hold special powers created by will invalid, and the tenor of their reasoning is certainly such as to include among the ranks of valid powers a power to appoint to a particular person or institution. Fullagar J. thought that "hybrid" powers (e.g. powers to appoint to anyone except specified individuals or powers to appoint to anyone alive on a given day) are invalid if they are created in wills, though they do not offend any tests of certainty, and it may be that Kitto J. sympathised with this view. Even if this is right (the distinction between a case in which there is a special power to appoint among a very wide class and the case in which there is a "hybrid" power is likely to be very narrow and is not susceptible of any precise definition, and once the validity of both general and special powers has been conceded it would seem the height of technicality to hold void any power with sufficiently certain objects and which, in terms of breadth, falls somewhere between them) the power under review in the *Lutheran Church* case could not conceivably have fallen within the class of "hybrid" powers. It is submitted that it is quite clear that there has been no authority which would compel any court to question the validity of special powers of appointment in wills until the *Lutheran Church* case and that there was no reason to expect that the power under review in that case would be held anything other than valid.

In the High Court Windeyer J. was emphatic that it is "too late for a court to declare a power in the nature of a power of appointment invalid as an attempted delegation of testamentary capacity". It has already been suggested that no valid distinction may be drawn between a power to appoint to an individual and a power to appoint among several individuals; consequently the case must place at risk the validity of provisions in wills which have been and are being administered as well as provisions in wills which have been executed and but have not yet come into effect. In such fields as the validity of deeds and wills it has usually been thought that the paramount necessity is that the law should be certain and that courts in particular should be slow to adopt rules which may affect already existing documents; despite the protestations of McTiernan and Menzies JJ. the decision in the *Lutheran Church* case apparently violates this principle and does it in a way which, as Windeyer J. again emphasized, will frustrate the wishes of a great many testators. There is no need to labour the undesirability of all this.

In the circumstances it is not surprising that Barwick C.J. sought to avoid the consequences of any rule prohibiting the delegation of testamentary power by arguing that the grant of a valid special power of appointment in a will amounted to a valid testamentary disposition of that property. Even granted that the whole of existing practice and authority (*cf.* such well-known cases as *In re Weekes*[11] and *In re Combe*)[12] appears to support this view, and that the undoubted principle that when property passes by virtue of the exercise of a special power it does so as from the testator and not as from the donee of the power is consistent with it, it still seems at first sight artificial to look on the grant of a power to dispose of property as equivalent to a disposition of the property itself (such a statement is imprecise even in the case of the grant of a general power[13]). It is nevertheless submitted with some diffidence that in the context of the Wills Act such an interpretation is justifiable. The purpose of the Wills Act[14] is now clearly enough to enable a person to deal freely with his property by will, subject to provisions designed to ensure that the document alleged to be the will does in fact contain the wishes of the deceased person as to the future of his property (in this way safeguarding the interests of the individual, by protecting his estate against fraud), and the grant of a power to appoint property is a perfectly normal and useful method of dealing with it. A testator who wishes to create a power of appointment in his will is sufficiently protected first by the provisions relating to formal execution of the will and secondly by the power of the courts to control the exercise of the power of appointment; given these safeguards there is no reason to suppose that the Wills Act was ever intended to place (or retain) general restrictions on the way in which a testator chooses to deal with his property. This reasoning supports Barwick C.J.'s conclusion that "a bare power to appoint among a class . . . is a valid 'disposition' or its equivalent for the purposes of the Wills Act"—a conclusion which, as he pointed out, is one which accords with the views of Lord Hardwicke expressed as long ago as 1743[15].

It follows from this line of argument that any power of appointment contained in a will is valid, provided that the will has been properly executed and that the power is drawn with the certainty the courts require in order to be able to supervise its exercise. Where, then, does this leave the rule against delegation of testamentary power? It has been said that "analysis seems to make it plain that there cannot possibly be an anti-delegation rule to which both general and special powers of appointment are exceptions; for then the exceptions would eat up the rule"[16]. It is surely time to acknowledge not only that this is true but that the scope of the rule against delegation has been grossly exaggerated in recent pronouncements. A man may not delegate his testamentary power in the sense that he must know what the provisions of his will are and may not leave it to another person to determine what its con-

11. [1897] 1 Ch. 289.
12. [1925] Ch. 210. See also *Re Perowne* [1951] Ch. 785.
13. *Drake* v. *Attorney-General* (1843) 10 Cl. and F. 257; *O'Grady* v. *Wilmot* [1916] 2 A.C. 281.
14. Wills Act 1936-1969 (S.A.).
15. *Cook* v. *Duckenfield* (1743) 2 Atk. 562.
16. Gordon, *supra* n.1, at 342. Though a grant of a power to A to appoint to persons nominated by B might still be thought within the rule: *cf. Re Wood* (1949) Ch. 498.

tents may be; and he must frame the provisions of his will in such a way that his executor knows what he has to do and the court can ensure that his wishes are being carried out. Beyond those matters (the former of which is a matter for the probate court and the latter of which is the doctrine of uncertainty) the rule has no legitimate place; in particular, it should not be used to prevent a man from dealing with his property by will in any way in which he may deal with it by deed. Despite the *dicta* recognising the rule and the analysis in *Tatham* v. *Huxtable* no decision before the Lutheran Church case is inconsistent with this proposition; it is consistent with the fact that neither Halsbury[17] nor the major treatises on powers[18] or on wills[19] give any warning against the validity of powers created by will; and it is consistent with the fact that Halsbury[20] and two of the main treatises on wills[21] treat the rule against delegation solely in relation to the principle of uncertainty and a third[22] solely in relation to the rule that a testator must know what documents he intends to be testamentary and what their contents are. The difficulties caused by the rule against delegation stem only from its misapplication.

Until this is made clear, however, South Australian practitioners and courts will have to cope with the problem of the status of powers in wills. The easiest way to deal with the *Lutheran Church* case may well be to limit the decision to its facts (a power to appoint residuary estate to a specified individual or institution), however inelegant the state of the law would then be; but it has already been seen that the principle on which Bray C.J. decided the case scarcely admits of this approach. If this is not done, however, one may expect the courts to have recourse to a number of devices so as to avoid frustrating altogether the wishes of testators. The most obvious device is to employ a strained construction of the words used: in the *Lutheran Church* case Windeyer J. was prepared to construe the words "discretionary power" as imposing an imperative trust, the discretions being confined to such matters as the manner and time of payment. Whatever sympathy one may feel for the objective that he thereby sought to achieve, such an approach falls little short of being a total abuse of the language and could bring no credit to the law. With respect to special powers it is possible that the doctrine of the power in the nature of a trust or of a trust for the objects of the power being implied where there is no exercise of the power and no gift over in default of appointment will be revived: the High Court has not committed itself to the view that the implication of the trust depends on the ability of the court to discern an intention on the part of the testator that the class should take in any event[23], rather than on a presumption that this was the intention of the testator. Dixon J., indeed, was careful to leave the question open in

17. Halsbury, *Laws of England,* (3rd ed.), Vol. 30, 214; *ibid.*, Vol. 39, 1088.
18. Sugden, *supra* n.6; Farwell, *supra* n.6.
19. Jarman on *Wills* (8th ed., 1951), Ch. 24; Theobald, *Wills* (12th ed., 1963); Williams on *Wills* (2nd ed., 1961), 340-1. (The discussion of the effect of the rule against perpetuities on the objects of a special power must presuppose that such powers may be valid).
20. Vol. 39, 1001.
21. Jarman, *supra* n.19, 500; Williams, *supra* n.19.
22. Theobald, *supra* n.19, ss.77, 101.
23. *In Re Weekes* [1897] 1 Ch. 289; *Re Coombe* [1925] Ch. 210; *Re Perowne* [1951] Ch. 785.

Perpetual Trustee Co. v. *Tindal*[24], pointing out that there is a great deal of authority in favour of the implication of a trust in these circumstances. But despite the fact that Windeyer J. mentioned the point and again left it open, it may be that the courts will construe provisions in such a way as to avoid reconsideration of the doctrine, since Fullagar J. in *Tatham* v. *Huxtable* referred to cases in which the intention is to benefit the class of potential appointees as the normal ones, and in the *Lutheran Church* case itself Barwick C.J. remarked that "generally speaking, the will creating a special power of appointment upon its proper construction will have created a beneficial interest in the objects of the power in the property subject to it". A third possibility available in some cases might be to adopt the course followed by Barwick C.J., who held that even if a general rule of invalidity of powers in wills does exist, a power to appoint to a particular charity is an exception to it; but this proposition must be treated with some caution since it was rejected by McTiernan and Menzies JJ., who pointed out that the reason why a testator may leave the selection of charitable institutions to benefit from his will to other people is because the law regards his gift as having been an effective one to charity in a general sense. Such cases as *Smith* v. *West Australian Trustee and Agency Co. Ltd.*[25] consequently do not support the validity of a power to appoint to a particular charity or charities. None of these devices is particularly desirable, and none lends elegance to the law; but it is perhaps only to be expected that use will be made of such shifts as are available when once the law has adopted an imperative rule, based on no very clearly defined policy, which nevertheless operates to frustrate the desires of testators.

*J. F. Keeler**

R. v. WEST

BANKRUPTCY, EVIDENCE AND THE OFFENCE OF CONCEALING PROPERTY

The Intermediate Court of South Australia (the Local and District Criminal Court) has done much to create speedier justice in this State. But although the Court has removed with remarkable efficiency a backlog of cases it has set high standards in doing so. This is evidenced by a recent judgment of White J., *R.* v. *West*[1], as yet unreported.

The point is interesting and important. The accused was charged with concealing property of a bankrupt. The evidence against the accused consisted of the transcript of a cross-examination made of him before the Registrar in Bankruptcy under s.81 of the Bankruptcy Act 1966-70 (Cth.). This section is contained in Part V of the Act, which is entitled "Control over Person and

24. (1940) 63 C.L.R. 232, at 261-262.

25. (1950) 81 C.L.R. 320.

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1. No. 32 of 1971.

Property of Debtors and Bankrupts". This Part of the Act requires the bankrupt to assist in discovering his property and to otherwise assist the Official Receiver. S.81 complements this by entitling the Court or Registrar on application of the trustee or creditor to summon the bankrupt or a spouse or "a person known or suspected to have in his possession any property of the bankrupt, or who is supposed to be indebted to the bankrupt or to be able to give information respecting the bankrupt or his trade dealings, property or affairs" to attend and give evidence "relating to the bankrupt or his trade dealings, property or affairs". S.81(9)(a) further provides that the transcript of the s.81 examination is admissible in any subsequent proceedings against the bankrupt or a witness. On this basis the prosecution rested its case entirely on the transcript of the cross-examination of the accused.

Objection was taken to using the transcript as evidence despite s.81(9)(a). It seems that the accused did have some property belonging to the bankrupt and had for a short time concealed it, but, before the s.81 examination, he had returned it. Thus the whole object of the s.81 examination was to establish that the accused was guilty of offences against the Act. It seems that this was normal practice and His Honour refused to accept that the examination was other than bona fide. The essence of the argument for the accused was that a s.81 examination was confined to two objects: (a) to discover assets of the debtor, and (b) to obtain evidence for use in enforcing the trustee's claim to the newly discovered assets. If incidentally the witness gave evidence implicating himself in a crime under the Act this could be used against him, but an examination could not be carried out with the object of fishing for evidence against a witness. If evidence was so obtained it could not be admissible under s.81(9)(a), being outside the scope of s.81. Nor could it be admissible under the general rules of evidence, either because it amounted to an involuntary confession, or it was obtained unfairly, and under the general judicial discretion ought to have been excluded.

This argument was accepted by Judge White. He emphasized that s.81 should be read in the context of Part V of the Act which dealt with discovering and controlling the bankrupt's property. He noted that s.81 only allows examination of witnesses who can give evidence respecting the bankrupt's property and s.81 specifically states that the witnesses must attend and give *such* evidence. The views of Cave J. in *Re Easton ex p. Davies*[2] were quoted to emphasize that the cross-examination is made for the benefit of the creditors and not for any other purpose. In the instant case the creditors had obtained the advantage of the property which had been in the accused's possession and Judge White could not see what benefit would flow to the creditors in having the accused convicted of previously concealing such property.

Judge White further argued:

> "If the accused is to be prosecuted, there does not seem to be any reason why the accused should not have been interviewed by the Commonwealth police or other officer, who at that stage would have had sufficient information from the Official Receiver to support a reasonable

2. (1891) 8 Mor. 168, at 171.

> suspicion that an offence had been committed by the accused. Such officer would have been obliged to caution the accused before further questioning him. After such caution, the accused may have made no admissions. The s.81 examination appears to have been used as a substitute for police interrogation without the restrictive requirement as to cautioning the accused."

It should be noted that s. 81 does not, even where used properly, compel a witness to answer incriminating questions (compare s.69 of the Bankruptcy Act) and thus not only was the object of the examination improper, but also the procedure, for the witness should at least have been advised that he could not be compelled to answer incriminating questions. Judge White felt obliged to exclude the evidence. He referred to a passage by Latham C.J. in *Kempley* v. *The King*[3] where the late Chief Justice noted that although as a general rule evidence taken under compulsion of law is admissible in subsequent proceedings the examination must have been legally proper and the accused must have been given the opportunity of making objections to answer incriminating questions where this is permitted.

In the instant case the accused considered he was obliged to answer all questions put to him. He was not, and therefore his answers were held inadmissible against him. Confessions are excluded by the criminal law if they are taken in circumstances where they are likely to be untrue, or, as was the position in the present case, where they are true but have been obtained by persons who have abused their authority. Bankruptcy officials must not abuse their powers under the Bankruptcy Act. To discourage such abuse any evidence obtained by such methods ought to be excluded in criminal proceedings. For this reason Judge White excluded the transcript.

The decision is in the writer's opinion correct. Only one elaboration seems relevant. S.81(9)(a) does specifically allow the transcript of the cross-examination to be used in criminal proceedings against the witness under the Act. Thus the Act does envisage that to some extent the cross-examination may be used to obtain evidence against a witness. The question is to what extent? Judge White rejected the argument that the trustee in bankruptcy has a duty to report offences against the Act to the Court and can use s.81 to discover such offences. He confined s.81 to ascertaining the nature and extent of the property of the bankrupt. When looked at in context it is submitted that the section has this object. S.81(9)(a) is accommodated by arguing that if, when asked questions concerning the bankrupt's property, the witness incidentally implicates himself in a crime and, if he has been told he need not answer questions tending to incriminate him, then such evidence will be admissible. This is a little clumsy but to give s.81(9)(a) wider scope goes against the spirit of the Act.

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3. (1944) 50 A.L.R. 249, at 251.

BATIVALA v. WEST

LIABILITY FOR ANIMALS

The Law Reform Committee of South Australia in its report of 1969 concerning liability for animals, regarded the law relating to animal trespass and "in particular animals trespassing on roads" as being in a most unsatisfactory state[1]. This, it felt, was due to the anachronistic decision of *Searle* v. *Wallbank*[2]. This decision of the House of Lords established that the owner of land abutting the highway was under no duty to keep hedges, fences or gates to prevent his animals straying, nor was there any duty as between the landowner and users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from escaping onto the road. The basis of this decision was to be found in history dating from the time when land was unenclosed, highways few and traffic negligible. The House sought to apply this ancient rule to totally different modern conditions. This led to anomalous decisions, with negligent land owners escaping liability for their animals' dangerous behaviour on busy thoroughfares.

Because of such injustices, the Committee recommended that the liability of an owner of land abutting the highway should be determined in accordance with the ordinary laws of negligence[3]. As yet, the Committee's recommendations have not been followed by the Legislature, and the law in South Australia remains the Common Law. English decisions since *Searle* v. *Wallbank*[4] are thus of importance. There are two areas in which the stringency of that decision has been avoided. One is instanced by the case of *Deen* v. *Davies*[5] in which it was stated that if an owner brought his animals onto the highway himself, then he was responsible for their subsequent behaviour under the ordinary principles of negligence. A further area seems to be in the process of evolution; this is shown by the recent case of *Bativala* v. *West*[6].

In that case, the defendant, Mrs. West, carried on a riding school on fields leased by her opposite a busy urban highway. She often held gymkhanas on this land, which was separated from the road by a thick hedge. In the hedge was an open, unattended gate. On the day in question, a gymkhana was in progress. During an event called a saddle-up race, in which competitors were required to saddle their ponies against the clock and then ride to the finish line, one young girl failed to adjust her saddle properly and as a consequence fell. The loose saddle continued to slip until it was under the pony's belly, with the stirrups flapping against its sides as it ran. The pony bolted in fright and ran out through an open gate and onto the highway, where it collided with a car, causing injury to both the driver and the passenger of the vehicle. The plaintiffs, Mr. and Mrs. Bativala, sued Mrs. West in negligence, arguing that in all the circumstances in which the gymkhana was held, and realising

1. 7th Report of the Law Reform Committee of South Australia to the Attorney General, "Law Relating to Animals" 1969, at 3.
2. [1947] 1 All E.R. 12.
3. 7th Report of the Law Reform Committee of South Australia to the Attorney General, "Law Relating to Animals" 1969, at 4.
4. [1947] 1 All E.R. 12.
5. [1935] All E.R. 9.
6. [1970] 3 All E.R. 332.

the likely ways of frightened horses, Mrs. West should have foreseen that as a reasonably likely result of holding a saddle-up race such an accident would occur, and that she would be responsible, as organizer of the gymkhana.

Bridge J., sitting alone in the Queen's Bench Division, found that if the ordinary criteria of negligence did in fact apply, Mrs. West would indeed be liable on the evidence before him. A slipping saddle was always a recognized hazard in any equestrian event, and particularly so in a saddle-up race for young competitors. Indeed, the defendant explicity recognized this by warning the competitors that the tightness of their girth straps would be checked at the end of the race. There was further evidence from expert witnesses that flapping stirrups from a loose saddle would probably cause a horse to bolt, and that if it did so, it would not be exceptional for it to run out onto the road as happened in this case. Thus Mrs. West should accept responsibility for the accident which could have easily been prevented by her by posting someone at the gate to open and shut it, if the ordinary principles of the tort of negligence were applicable. Counsel for the defendant argued that they were not. He claimed that the case fell within the exception to negligence found in the decision of *Searle* v. *Wallbank*[7]. Bridge J. acknowledged that the rule, though out-of-date, was binding on him if indeed it applied to the facts of the case before him. He referred to two limitations that had previously been expressed to the application of the rule in *Searle* v. *Wallbank*[8]. The first was the well-known limitation that once the owner of an animal took it onto a road, then the ordinary duty of care of the owner to highway users applied. The second, Bridge J. said, was to be found in a passage from the judgment of Lord Du Parcq in *Searle* v. *Wallbank*[9]. In this passage, Du Parcq said that "special circumstances" could take a case outside the rule and impose liability for negligence on the owner. Du Parcq mentioned the old case of *Mitchil* v. *Alestree*[10] as an example of a case where the ordinary principles of negligence had been applied. In that case, a horse escaped from the field where the defendant was breaking it in. He was held liable as the field was one often used by the public and therefore inapt for such a purpose. This was an early example of the application of the rules of negligence where special circumstances existed. Having regard to Du Parcq's passage and later decisions on animal liability, Bridge J. then asked himself what factors could amount to special circumstances so as to displace the rule.

Counsel for the defendants relied on passages from the judgment of Lord Evershed M.R. in the case of *Brock* v. *Richards*[11] as establishing the claim that "mere topographical circumstances such as the relative positions of the field and the highway, the amount of traffic on the highway, and the like, can never be relevant or certainly can never amount to special circumstances, for that would be to entrench on the well-established rule that there is no duty to fence"[12] and that "the sole admissible category of special circum-

7. [1947] 1 All E.R. 12.
8. *Ibid.*
9. *Ibid.*
10. [1676] 1 Vent. 295.
11. [1951] 1 All E.R. 261.
12. [1970] 1 All E.R. 332, at 339, 340.

stances [is] a known special propensity arising not from extraneous factors, but from the character of the animal itself"[13]. Such a propensity would be to behave in an unusual and dangerous way. It had already been testified in this case that the pony in bolting had reacted in a totally normal way and that it was an altogether quiet animal with no vicious or mischievous traits.

Lord Evershed M.R. did indeed appear to take a very narrow view as to what factors could amount to special circumstances. In three separate passages, he seemed to deny that a special circumstance could be created other than by a peculiarity in the character of the animal itself. In the first two instances, he denied that the topography of the place in question could ever be relevant, and in the third, he stated categorically that in order to impose liability, the special circumstance had to be constituted by vicious or mischievous characteristics in the nature of the animal itself. At first sight, this seems to be a denial of the possibility that a normal reaction by an animal to extraneous circumstances, whether topographical or not, could ever amount to special circumstances to take the case outside the rule in *Searle* v. *Wallbank*[14].

However, Bridge J. referred to the passage in the judgment of Ormerod L.J. in the case of *Ellis* v. *Johnstone*[15] which attempted to rationalize Lord Evershed M.R.'s opinion. Ormerod L.J. considered that His Lordship's comments were intended to be confined to the facts of the case before him. In that case, the fact that the horse jumped over the hedge onto a road which was at a lower level than the field was not sufficient to create liability, as the leaping was only a form of straying, and the topography of the place in those circumstances could make no difference. Ormerod L.J. further recognized that the same reasoning applied to the case he himself was judging. In that case, a dog which had been left to its own devices, ran out onto the road and caused an accident. As its running out was only a form of straying which the rule in *Searle* v. *Wallbank*[16] allowed, the topography of the surrounding area could not be enlisted to create liability. Only the proof of a dangerous propensity, other than straying, could establish liability in such a case. However, Ormerod L.J., together with Donovan and Pearson L.JJ. did recognize that circumstances other than those relating only to the character of the particular animal, could amount to special circumstances in some instances. Although they were referring particularly to the application of topographical circumstances, Bridge J. utilized their observations to establish a rule that special circumstances need not consist only of the peculiar characteristics of the animal itself and that, amongst others, topography or the manner in which an activity was carried on, could amount to such circumstances.

He was further aided by the case of *Wright* v. *Callwood*[17]. In that case, a calf being driven across the road became startled by the starting of a lorry engine, and, as a result, bolted across the road and injured a passerby. The judge held the owner of the calf liable on the ground that he must have realised that there was a lorry nearby and that this constituted a special

13. *Ibid.*
14. [1947] 1 All E.R. 12.
15. [1963] 1 All E.R. 286.
16. [1947] 1 All E.R. 12.
17. [1950] 2 K.B. 515.

circumstance. The decision was reversed in the Court of Appeal, but only on the ground that there was no evidence that the owner of the calf knew there was a lorry present. Bridge J. acknowledged that this was clear authority against the proposition that special circumstances could only be constituted by special characteristics in the animal itself, and could not arise from a normal and foreseeable reaction on the part of an animal to its surroundings.

Bridge J. decided the case in favour of the plaintiffs. His main reason for doing so can be found in the following passage: "reason and justice call out for [the rule] to be displaced by dangerous behaviour on the part of the animal, arising not only from a special propensity in the character of the animal, but also from a foreseeable reaction on the part of the animal to an incident of the activity in which the animal is engaged"[18]. This reasoning was consistent with the decision in *Wright* v. *Callwood*[19] and also accorded with the case of *Mitchil* v. *Alestree* cited by Lord Du Parcq as an example of a fact situation taking a case outside the rule in *Searle* v. *Wallbank*[20]. Bridge J. confessed that he found it hard to distinguish any difference in legal principle between the case of a horse bolting because of a mischievous propensity to do so and a horse bolting because it was enraged in a gymkhana in circumstances from which an organizer could readily foresee an accident would occur. His Honour went on to say that Lord Evershed M.R. could not have had any intention of casting doubt "on the correctness of the view implied in *Wright* v. *Callwood*, that special circumstance may be constituted by a docile animal's foreseeable reaction to extraneous circumstances"[21].

He also added that in the majority of cases in which the rule in *Searle* v. *Wallbank*[22] had been applied, the animal in question had strayed from a situation in which it had properly been left to its own devices. He recognized that in such cases, local topography could not often amount to a special circumstance. This is in fact borne out by the case of *Ellis* v. *Johnstone*[23], where, in the absence of a known propensity to behave in a dangerous way in the nature of the animal itself, topographical circumstances were found to be insufficient to create liability. Bridge J. then went on to say that "where the animal has escaped . . . from a situation in which it was under direct human control, *a fortiori* if, as in the present case, the animal was engaged in an activity which can only be carried on under a high degree of human control, totally different considerations arise"[24]. This was an additional reason for deciding the case as he did.

It thus appears that the English courts are not anxious to expand the operation of the rule in *Searle* v. *Wallbank*[25] because of its inapplicability to today's road conditions. The case of *Bativala* v. *West*[26] affords two possible methods of

18. [1970] 1 All E.R. 332, at 342.
19. [1950] 2 K.B. 515.
20. [1947] 1 All E.R. 12.
21. [1970] 1 All E.R. 332, at 342.
22. [1947] 1 All E.R. 12.
23. [1963] 1 All E.R. 286.
24. [1970] 1 All E.R. 332, at 342.
25. [1947] 1 All E.R. 12.
26. [1970] 1 All E.R. 332.

avoiding the rule and there may be others. The expansion of the scope of topographical circumstances may provide another way of escaping the full stringency of the rule.

In the area of liability for animals in negligence where the owner brings them on the road himself, certain modifications have recently evolved which may further narrow the application of the rule in *Searle* v. *Wallbank*[27]. The N.S.W. Court of Appeal's decision in *Hill* v. *Clark*[28] contains phrases which may be read as extending the "*Deen* v. *Davies*[29] exception" as it is often called. In the former case, Asprey J. made a general statement that any person who undertook operations of one kind or another on or *in the immediate vicinity of the public highway* on which others might lawfully travel, owed a duty of of care towards them. His Honour seemed to be expanding the principle of liability for animals brought onto the road by their owner to persons dealing with animals in the immediate vicinity of the road.

It is even possible that the South Australian courts will follow the lead given by the N.S.W. District Court in the case of *Reyn* v. *Scott*[30]. In that case, Cross D.C.J. refused to follow *Searle* v. *Wallbank*[31], relying on statements of the Privy Council in the decision of *Australian Consolidated Press* v. *Uren*[32]. His Honour distinguished *Searle* v. *Wallbank*[33] on the basis of the different conditions in relation to the traffic of animals which must exist between Australia and the U.K., and on the ground that conditions must have changed even since the decision of *Searle* v. *Wallbank*[34] itself. He therefore applied the general law of negligence to the situation.

Thus there is ample scope for our state courts to avoid the full stringency of the rule[35] or even to disregard it as happened in *Reyn* v. *Scott*[36]. It is probable, however, that the courts would prefer to use those methods of distinguishing formulated in *Bativala* v. *West*[37] or an extended interpretation of *Deen* v. *Davies*[38], at least until the High Court has expressed its view on the question of the applicability of the rule to Australian conditions.

*Gail Payne**

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27. [1947] 1 All E.R. 12.
28. (1970) 91 W.N. (N.S.W.) 550.
29. [1935] All E.R. 9.
30. 2 N.S.W. District Court Reports 13.
31. [1947] 1 All E.R. 12.
32. (1967) 41 A.L.J.R. 66.
33. [1947] 1 All E.R. 12.
34. *Ibid.*
35. Another type of situation was also held to constitute "special circumstances" in an unreported decision of the Local Court of Port Pirie (*Smythe* v. *Welch*, 12th Dec., 1967). Grubb S.M. distinguished *Searle* v. *Wallbank* on the ground that special circumstances were created by the fact that the owner had been informed that his cattle were straying before the accident, but had done nothing about it, resulting in a collision of a heifer with the plaintiff's car. This, coupled with the fact that cattle were known to be prone normally to jump out onto the road unexpectedly created special circumstances.
36. 2 N.S.W. District Court Reports 13.
37. [1970] 1 All E.R. 332.
38. [1935] All E.R. 9.

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SAMUELS v. HALL

COUNCIL BY-LAWS — ARREST UNDER S. 75 POLICE OFFENCES ACT, 1953-1967 — OFFENSIVE OR DISORDERLY BEHAVIOUR

Samuels v. *Hall*[1] is a judgment of a majority of the Full Court (Chamberlain and Walters J.J.; Mitchell J., dissenting) dismissing an appeal against a judgment of Zelling A.J. (as he then was),[2] in which he answered certain questions put to him by a magistrate in a special case stated. In September, 1970, leave to appeal against that majority decision was refused by the High Court.

The case arose from an incident in February, 1969, when the defendant Hall, a conscientious objector, was standing on the footpath outside the G.P.O. in King William Street, handing out pamphlets which sought to encourage persons eligible for National Service not to register. A by-law had been passed by the Corporation of the City of Adelaide, prohibiting *inter alia*, the distribution of pamphlets to passers-by and bystanders. When approached by a member of the police force he refused to hand over his bundle of pamphlets and he refused to give his name and address. A police officer then arrested him. Hall went limp and had to be carried to the police van. He was charged with two offences against the Police Offences Act, 1953-67, namely:

(1) Behaving in a disorderly or offensive manner in a public place, contrary to s.7; and,

(2) Committing an offence contrary to by-law IX, s.3(19), and on being required to state his full name and address refusing to do so, contrary to s.75.

The learned magistrate stated five questions of law for the opinion of the Supreme Court (Zelling A.J.) and these provide convenient headings for the comments which follow.

1. *Whether the powers of a member of the police force under s.75 of the Police Offences Act apply to a breach of the by-law IX, 3(19).*

S.75, Police Offences Act provides:

> "75. (1) Any member of the police force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit, any offence."

Sub-section (2) provides, *inter alia*, that,

> "Any member of the police force may require any such person to state his full name and address;".

Sub-section (3) makes it an offence for "any such person" to refuse "to comply with any such requirement". Part IX, s.163 of the Local Government

1. [1969] S.A.S.R. 310.
2. *Samuels* v. *Hall* [1969] S.A.S.R. 296.

Act, 1934-67, confers power on a council officer or person authorized by the council to request any person found committing an offence against council by-laws to give his full name and address. Sub-section (3) of s.163 gives power to a council officer or authorized person or a *police officer* to arrest without warrant any person who refuses to comply with the request.

The major contention on behalf of the defendant, with respect to the application of s.75 to by-laws, was that Part IX, s.163 of the Local Government Act constituted a code relating to the arrest of persons who commit breaches of by-laws and that that "ousts" the jurisdiction given to the police by s.75, Police Offences Act. The majority of the Full Court on appeal confirmed the rejection of this argument by Zelling A.J. In the words of Chamberlain J.:

> "By s.75 a member of the police force may require 'any such person', that is to say, 'any person whom he finds committing an offence or has reasonable cause to suspect . . . etc. . . .' to give his name and address, whether or not the suspect is arrested. By subsec. (3) refusal of the requirement or the giving of false particulars is an offence, and one for which an arrest would be warranted under subsec. (1). Under this provision the offence does not arise unless the requirement has been made by a police officer. Under subsec. (3) of s.163 (Local Government Act), an arrest may be made by a police officer if, and only if, the demand has been made (and refused or met with false information) by a council officer or authorized person.
> S.163 therefore adds to the powers conferred by s.75, but it takes nothing away from them. The two provisions can stand together[3]."

Thus the majority of the Full Court rejected any argument based on the maxim *generalia specialibus non derogant;* that the general powers of s.75 did not apply to the area of specific power, s.163. However, Mitchell J. in a dissenting judgment accepted that argument:

> "In my view, the Local Government Act in s.163 contains the exclusive provisions concerning arrest for a breach of a by-law, and is not to be read in the light of s.75 of the Police Offences Act. If this is so, then s.75 has no application in the case of offences to which s.163 applies[4]."

Samuels v. *Hall* confirmed that the power given to police in S.A. to arrest without warrant applies, not only to felonies, misdemeanours or serious breaches of public peace[5], nor only to offences created or recognized by statute[6], but to breaches of local council by-laws as well. There seems little doubt now that s.75 confers the widest powers of arrest without warrant in

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3. [1969] S.A.S.R. 310, at 311-312.
4. *Ibid.* at 567.
5. At common law a constable can only arrest without warrant where:
   (1) a person is reasonably suspected of having committed a *felony; Beckwith* v. *Philby* (1827) 108 E.R. 585.
   (2) A person is *found committing* a felony, misdemeanour or serious breach of the peace. *Gelberg* v. *Miller* [1961] W.L.R. 153.
   See also *Timothy* v. *Simpson* 149 E.R. 1285.
6. *E.g.* Criminal Law Consolidation Act, 1935-1969, Police Offences Act, 1953-67, Road Traffic Act, 1961.

Australia[7]. It applies in both the day and night[8] to persons found committing or reasonably suspected of having committed[9] or being about to commit[10] an offence[11]. It also confers authority on a policeman to enter private property to exercise arrest under the section[12]. Yet to say that the powers are wide is not necessarily a foundation for adverse criticism. In the words of a witness before the 1968 Victorian Statutory Law Revision Committee;

> "Power of any description is a commodity capable of easy abuse, and should be sparingly bestowed and only to the extent that the recipient can be entrusted to use it wisely and in the spirit it is given. Where a group of people prove themselves incapable of exercising their authority in a responsible manner, action can be taken to circumscribe and limit their powers and area of discretion. The police in this State have shown themselves worthy of the trust and public confidence reposed in them, and in return have been enabled to give the public a reasonable standard of service and protection from the anti-social element."

Opposed to that is the view that the powers are far wider than is actually needed in practice, and the "liberty of the individual" is more effectively achieved by legal restrictions than by the high sense of responsibility which no doubt exists at present in the S.A. police force, but which can only be guaranteed in future to the same degree as the police force's tradition of responsibility and service.

2. *Whether By-Law IX, 3(19) is a valid exercise of the Adelaide City Council's power to make by-laws.*

By-law IX, 3(19) provides:

> "In respect of good rule and government;
>
> S.3. No person shall—
>
> (19) Upon any street, footway or other public place give out or distribute to by-standers or passers-by, any handbills, placards, notices, advertisements, books, pamphlets or papers."

The main heads of power, in the Local Government Act, relied upon to validate the by-law were:

> S.667(28) For regulating the management of any lands, etc.
>
> (31) For the suppression and prevention of nuisances.
>
> (47)IV. For regulating or controlling pedestrian traffic on streets, etc.

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7. See Report of 1968, Vic. Statutory Law Revision Committee, para. 45; generally paras. 45-53.

8. *Cf.* N.S.W.—s.352(2)(b) Crimes Act, 1900 (N.S.W.).

9. *Cf. Beckwith* v. *Philby* (above)—only for felonies.

10. *Cf.* s.352(2)(b) Crimes Act 1900, (N.S.W.); applies only to felonies at night. See also s.8A Crimes Act, 1914-60 (Cth.)—no arrest in such a situation.

11. No distinction between serious and minor offences—applies to by-laws, (*Samuels* v. *Hall*).

12. *Dinan* v. *Brereton* [1960] S.A.S.R. 101, per Napier C.J.

S.669(25)I. For preventing the obstruction of any streets, footways, water channels and watercourses.

(25)XII. For prohibiting or regulating the throwing or discharging of handbills or other printed matter in the streets, roads or public places.

S.667(50) For any other purpose in respect of which the council is authorized by this or any other Act to make by-laws, and,

(51) Generally for the good rule and government of the area and for the convenience, comfort and safety of the inhabitants thereof.

Zelling A.J. began by adopting the remarks of Mann J. (as he then was) in *Shire of Mildura* v. *Jenner*[13] where the learned judge agreed that "the descriptive heading to the by-law here in question is not conclusive as to the real nature of the by-law, or as to the Council's authority to make it." Zelling A.J. then proceeded to uphold the by-law under the specific powers of s.667(28) and s.667(47), but he was not prepared to base his decision on s.667(51), which he held to be neither a general nor a specific power and therefore subject to special requirements. The Crown argued that the placitum was supplementary to the specific powers, and it supported by-law IX, 3(19) as coming within a genus which belongs to local government. The appellant argued for a restrictive interpretation of s.667(51) by which by-law IX, 3(19) could only be supported if the by-law were *eiusdem generis* with a specific power, or could be aided by a specific power. Zelling A.J. held that a by-law made under placitum (51) "must bear a factual relation to the good rule and government of the area and the convenience and safety of the inhabitants"[14]. Since the argument was between the police and the defendant, the Corporation was precluded from showing a factual basis, and in its absence, his Honour felt unable to rely upon the placitum as a head of power.

Chamberlain J. held that the specific powers in s.667(31) and s.667(47)IV related to a subject of the same genus as the questioned by-law and could be aided by the general power in s.667(51). Walters J., in a concurring judgment, was prepared to uphold the by-law under the power to make by-laws "for the good rule and government" of the municipality but, in the event, agreed in the judgment of Chamberlain J. The learned judge did, however, comment on the clear intention of the legislature to entrust to local councils "powers with respect to the general oversight of streets within its area," and he did not think that the by-law was "inconsistent with that intention"[15]. He added that on the principle that local government by-laws should be supported if possible[16], in the present case the by-law should be given an interpretation which would put it within the law-making powers of the council "and not make it abortive."

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13. [1926] A.L.R. 396, 400.
14. [1969] S.A.S.R. 296, at 307.
15. [1969] S.A.S.R. 310, at 330.
16. His Honour referred to *Kruse* v. *Johnson* [1898] 2 Q.B. 91, 99; *Widgee Shire Council* v. *Bonney* (1907) 4 C.L.R. 971.

Mitchell J., dissenting in the Full Court, considered that the by-law was *ultra vires* the Adelaide City Council. Her Honour felt unable to justify the by-law under any of the specific placita discussed[17]. With respect to s.667(51) she was "unable to envisage what Zelling A.J. had in mind" regarding the necessity of establishing a "factual nexus" between the by-law and the placitum[18]. She held herself free to consider whether the by-law could be supported under s.667(51). It was her opinion that s.667(51) should be construed restrictively, and agreed with counsel for the defendant that there were no specific powers with which by-law IX, 3(19) could be said to be *eiusdem generis*, or in aid of which such a power could be used[19].

3. *Whether the arresting officer was entitled to arrest the defendant Hall*

5. *Whether the defendant Hall was entitled to resist his arrest.*

On the basis of the conclusions thus reached, the majority in the Full Court agreed with Zelling A.J. that the arresting officer was entitled to arrest Hall, and that Hall was not entitled to resist his arrest. Mitchell J., believing the arrest to be illegal[20] and the by-law invalid, was of the contrary opinion.

4. *Whether the conduct of the defendant amounted to disorderly or offensive behaviour under s.7 of the Police Offences Act.*

(i) Offensive Behaviour

Zelling A.J. took the very definite view that what was in question was the *behaviour* of the defendant and not the contents of the pamphlet[21]. For the purpose of offensive behaviour, what was contained on the outside of the pamphlet, (an invitation to encourage defiance of the National Service Act), was immaterial, but the general nature of the pamphlet (an anti-conscription pamphlet) *was* material to the defendant's behaviour. By the reasoning inherent in his judgment, it would appear to be his Honour's view that anything more detailed than the general nature of the pamphlet could not be relevant to the defendant's *conduct*, since a passer-by would only react to the general nature of what was being handed to him, and any reaction to the contents would occur *after* the "conduct" had been "completed". The learned judge agreed with counsel for the defendant that to have handed out anti-conscription pamphlets in front of the R.S.L. Headquarters would have been offensive. Therefore, the other relevant consideration seems to have been *to whom* the pamphlets were being handed out. His Honour referred to *Ball* v. *McIntyre*[22] where it was not considered to be offensive behaviour, in the circumstances, to climb on to a public statue of George V during a political demonstration, the better to display a political placard. Zelling A.J. accepted that case as supporting the proposition that conduct incidental to political protest is not regarded these days as offensive. Thus, the defendant's conduct in handing out anti-conscription pamphlets to various and sundry passers-by,

17. See *supra.*
18. [1969] S.A.S.R. 310, at 324; the majority did not defer to the "difficulty".
19. *Ibid.*, 571.
20. See *supra.*
21. [1969] S.A.S.R. 296, at 308.
22. (1966) 9 F.L.R. 237.

in King William Street, was incidental to political protest and therefore not offensive. Presumably, handing out the same pamphlets in front of R.S.L. Headquarters would be offensive because it is not incidental to political protest against Government conscription generally, but is aimed specifically and personally at a sector of the community which would undoubtedly be offended and affronted.

Mitchell J. was not prepared to exclude from her consideration of the defendant's conduct the words which appeared on the *outside* of the pamphlet and which clearly incited people to defy the National Service Act. Yet, nevertheless, she considered that his behaviour was not offensive. She characterized his conduct as "the mere expression of political views" which, in *Worcester* v. *Smith*[23], was not considered to be offensive "even when made in the proximity of the offices of those whose opinions or views are being attacked"[24]. In that case it was held that the carrying of banners, outside the U.S. consulate, and criticizing U.S. presence in Korea, did not support a charge of offensive behaviour.

It might be thought that this position is directly contrary to the view adopted by Zelling A.J., that to have handed out anti-conscription pamphlets outside R.S.L. Headquarters would have been offensive behaviour. But there is a possible distinction. To stand outside the U.S. consulate protesting at U.S. foreign policy might well be regarded as "a mere expression of political views" and "incidental to political protest", since the consulate would be purely symbolic of the U.S. government. But to stand outside the R.S.L. Headquarters protesting at conscription might be regarded as the expression of views of a more specific and personal nature; even insinuating.

In the context of the whole incident as "the mere expression of political views", her Honour evidently considered that the words on the outside of the pamphlet "though they are in one sense offensive to very many people in the community"[25], were not significant enough, in the circumstances, to make the conduct "offensive within the meaning of the Act".

The majority of the Full Court, Chamberlain J., (with whom Walters J. concurred) characterized the defendant's behaviour as conduct calculated to encourage people to defy the law with regard to National Service. It seems to have been the object of Chamberlain J.'s reasoning to point out that the words on the outside of the pamphlet, and hence, what they implied, would be clearly visible to a passer-by[26]. Thus, not only the general nature, but the specific nature of the pamphlet as well was a material consideration:

> "The outside of the pamphlet which was being handed to passers-by bears *a picture of a soldier in uniform* and presumably in action, and *in conspicuous type* the words 'Why register for National Service', 'If your son or boyfriend is due to register please pass this on to him' "[27]. (Emphasis added.)

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23. [1951] V.L.R. 316.
24. *Ibid.*, at 318.
25. [1969] S.A.S.R. 310, at 328.
26. *Cf.* Zelling A.J.; *supra.*
27. [1969] S.A.S.R. 310, at 316.

The learned judge held that the handing out of such a pamphlet could be considered offensive behaviour. He added that it was "a flagrant breach" of s.7A of the Commonwealth Crimes Act[28]. Later in his judgment, Chamberlain J. remarked of the defendant:

> "Although I do not think it matters[29], I think his answers in the witness box support the idea that he desired to make the most of his arrest in order to create a scene and thereby attract publicity"[30].

Those remarks, together with the learned judge's opinion that the defendant's refusal to hand over the pamphlets and his passive resistance to arrest could also be inferred as offensive conduct, supports the view that his Honour was prepared to consider any behaviour in the whole incident which conveyed to passers-by the object of the defendant's activities[31]. It should be mentioned that the learned judge did not have in mind any question of *mens rea;* his reference to the defendant's objects can be seen as merely emphasizing that what was relevant was not the conduct in isolation, but the *impression* which it conveyed to the passer-by. And in his Honour's judgment, the ordinary citizen could not reasonably have avoided the impression that the defendant was encouraging people to defy the law. He regarded that as offensive to a reasonable man. It seems, therefore, that the defendant's subsequent conduct when approached by the police was considered to have contributed to that impression.

As has been demonstrated, the proper application of s.7 is not an easy matter for the courts to consider. Perhaps it is because, as was said by Napier J. (as he then was) in *Barrington* v. *Austin*[32],

> "In all these cases[33] it is a question of fact and opinion whether the conduct complained of amounts to a 'nuisance'."[34]

It is not denied that some might take issue with the majority's assessment of the defendant's conduct. Yet one must be careful of the grounds on which the criticism is advanced; for there are two major steps in the reasoning of *all* the learned judges: what was the relevant conduct to be considered (material fact); was that conduct offensive (opinion)? It is submitted that the approach of the majority to the first stage is a proper one, though its conclusions on the second stage might more easily be disputed. It is, perhaps, a difficult thing to say how many people these days would be offended by being invited to encourage defiance of the National Service Act. Even if such an invitation brought a reaction from passers-by, would it "wound the feelings, arouse anger or disgust or outrage in the mind of a reasonable

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28. Inciting to or urging the commission of an offence against Cth. law.
29. Presumably, in affecting the eventual decision.
30. [1969] S.A.S.R. 310, at 316, see also similar remarks by Zelling A.J., [1969] S.A.S.R. 296, at 309.
31. [1969] S.A.S.R. 310, at 316.
32. [1939] S.A.S.R. 130.
33. Various forms of nuisance, including offensive and disorderly behaviour; Police Act, 1936-51, Pt. VIII, s.75.
34. At 132.

man"[35]? In other words, to adopt the comments of Kerr J. in *Ball* v. *McIntyre*[36],

> "behaviour to be offensive behaviour must be calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from or non-acceptance of his views."

(ii) *Disorderly Behaviour*

The question of disorderly behaviour seems to have depended largely on what conclusions the learned judges reached as to the application of s.75 to council by-laws in general, and the validity of the particular by-law.

The words of Napier J. (as he then was) in *Barrington* v. *Austin* (above), adopted by the Full Court in *Rice* v. *Hudson*[37] and approved by the New Zealand Court of Appeal in *Melser* v. *Police*,[38] were generally taken as the definition of disorderly behaviour:

> "I have no doubt that these words 'disorderly behaviour' refer to any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in or in the vicinity of the street or public place."[39]

Zelling A.J. held that there were three elements in the defendant's behaviour which could be regarded as "disorderly":

(1) The pamphlet incited people to break the law;

(2) The defendant refused to hand over the bundle of pamphlets, necessitating the use of force by a police officer to try to obtain possession of them[40].

(3) The defendant, when arrested, fell limp to the pavement and had to be carried to the police wagon.

In his Honour's judgment all three were calculated "in greater or less degree to lead to breaches of public order"[41] and could therefore amount to disorderly behaviour within the meaning of s.7. That the third element was purely a passive resistance to arrest was not any defence, since he had held that the arrest was lawful, and the defendant therefore not entitled to resist his arrest[42].

Of the three reasons enumerated by Zelling A.J., Mitchell J. could find no element of disorder in the last two. The arrest was not lawful in her opinion[43], and the defendant was therefore entitled to resist arrest, which was the object

35. Per O'Bryan J. in *Worcester* v. *Smith* [1951] V.L.R. 316, 318. See also *Re Marland* [1963] 1 D.C.R.(N.S.W.) 224; *Inglis* v. *Fish* [1961] V.R. 607, 611 (Pape J.).
36. 9 F.L.R. 237, at 242, commenting on the above definition of O'Bryan J.
37. [1940] S.A.S.R. 290.
38. [1967] N.Z.L.R. 437.
39. [1939] S.A.S.R. 130, 132.
40. See below.
41. [1969] S.A.S.R. 296, at 309.
42. See above.
43. See above.

of his going limp. And the police had no right to attempt to take possession of the pamphlets. This point does not receive much attention in any of the judgments. The magistrate's findings specify[44] that the arresting officer did not form the intention to arrest until *after* the defendant refused to give his name and address. The attempt to take possession of the pamphlets occurred *before* that. Police officers have statutory authority to search, examine and take certain particulars from persons *in custody*[45] but there was little authority recognizing the power of police officers to do the same *before* arrest. Wright J. in *R.* v. *Lushington; ex parte Otto*[46] said:

> "In this Country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidence of crime, and which have come into the possession of the constables without wrong on their part."

With regard to *this* offence, the question still remains whether the officers attempted to take possession of the pamphlets, "without wrong on their part." It might be concluded that the answer lies in the view the learned judges took of the validity of the impugned by-law and the power of arrest in that situation. The majority in the Full Court agreed with Zelling A.J. that the by-law was valid and the arrest lawful. It is inherent in their judgments that they considered the initial attempts by the police to take possession of the pamphlets as quite within their powers. It might therefore be inferred (though their Honours did not expressly deal with the point) that, where a person is found committing an offence, a police officer may confiscate things in the possession of the offender, for use in court as evidence of the offence—and that is so, whether the offender is arrested or not. Mitchell J., took a contrary view of the validity of the by-law and the arrest, and therefore, could not have considered the circumstances as being open to the operation of such a principle.

Her Honour had more difficulty with the first reason given by Zelling A.J. In the result, she concluded that there was nothing in the defendant's conduct which was disorderly, unless it was disorderly to hand out that particular pamphlet; and she did not think that liability under a Commonwealth Statute was any criterion of disorderly behaviour. In arriving at that conclusion, Her Honour, with respect, did not counter, exactly, Zelling A.J.'s reasoning. His Honour's attention was not directed towards the defendant's liability under a Commonwealth Statute but towards the possibility that the defendant's conduct, in handing out pamphlets inciting defiance of the law, might reasonably lead to a "breach of public order". Chamberlain J. took the view that the incident as a whole might "properly be regarded as disorderly."

The differences of approach between the majority of the Full Court and Mitchell J. (who based her opinion initially on the approach adopted by Zelling A.J.) should be noted. Mitchell J. (and Zelling A.J.) regarded each element in the incident as pertaining *either* to offensive or disorderly behaviour, but not to both. The majority looked at the incident as a whole

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44. See para. 5, [1969] S.A.S.R. 296, at 300.
45. S.81, Police Offences Act.
46. [1894] 1 Q.B. 420, 423.

in order to gauge the impressions of offensiveness and disorderliness it might reasonably have conveyed to the public. Thus, elements which constituted a picture of offensiveness could also go to the question of disorderliness; the learned judges did not seek to divide the total picture into component parts and judge of the offensiveness or disorderliness of each part.

By this approach, the majority reached the stage where an opinion of the ordinary and reasonable man's reaction was required. If, especially in relation to the offensiveness of the defendant's conduct, they erred in that final stage, it was not, it is submitted, the result of an imperfect or unjust approach, but rather of the natural conservatism of the law.

*Jonathan Wells**

BLACKLEY v. DEVONDALE CREAM (VIC.) PTY. LTD.

ARBITRATION AND SECTION 109

The *Metal Trades* case[1] held that a Commonwealth award could regulate the minimum rate of wages to be paid by an employer to all his employees whether or not they were members of the disputing union, although there was no direct control over persons not involved in the dispute. In *Blackley* v. *Devondale Cream (Vic.) Pty. Ltd.*[2] the High Court considered whether such a provision was inconsistent with a State law obliging an employer to pay a higher rate. Devondale Cream employed Macdonald to do work covered by a classification in the Transport Workers Award, which laid down a minimum rate of wages to be paid to all employees whether or not they were members of the Transport Workers Union, the only union bound by the award. The company was a named party to the award, but Macdonald was not a Transport Workers Union member. The determination of the Frozen Goods Board, a Victorian statutory body, prescribed a higher rate of wages to be paid to Macdonald than that specified in the Arbitration Commission award. It was alleged that the company had failed to pay Macdonald the appropriate rates, in breach of the Labour and Industry Act 1958.

The company's contention that the rate fixed by the Frozen Goods Board was inoperative under section 109 of the Constitution for inconsistency with the federal award had been upheld at first instance, and by the Industrial Appeals Courts of Victoria. The appeal to the High Court against this decision was dismissed by a majority.

It was argued for the appellant that the State could give Macdonald rights against his employer since that subject was outside the field covered by the award. Barwick C.J. could not accept such a contention as " . . . it attempts to dissociate in an inadmissible way the right of an employee to recover a

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1. (1935) 54 C.L.R. 387.
2. (1967) 117 C.L.R. 253.

wage from the obligation of the employer to pay it"[3]. The award placed an obligation on the employer to pay a stated wage, which was enforceable both civilly and criminally. "Properly understood" the award stated that the specified wage was the only one which by law the employer was obliged to pay.

The rationale for such a provision in an award is to protect members from unfair competition by employees who will work for less than the award rate. A State law which required an employer to pay a higher wage to a non-union employee would not seem to be opposed to this. However, in *Clyde Engineering* v. *Cowburn*[4], Isaacs J. stated that "[a] State law is inconsistent, and is therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute". This dictum weighed heavily with Menzies J. and he had no difficulty in holding that the award intended to lay down complete and uniform rates of wages to be paid to all transport workers. His Honour agreed with Barwick C.J. that the emphasis should properly be placed on the employer's obligation to pay the wage, since this was the area common to the award and the State law. Since the award intended that the obligation it imposed on the employer should be the only one, it was of no moment whether Macdonald had an enforceable right to these wages under the award.

McTiernan J. concurred in the reasons given by Barwick C.J., and Taylor J. delivered a judgment to similar effect, stating that although some employees were not bound by the award, their wages could be indirectly affected. It was not then open to State law to modify in any way the determination of the Arbitration Commission.

Kitto J. dissented. Since both laws were susceptible of obedience at the same time, they were only inconsistent if the federal law provided a complete answer to the very question to which the State law offered its own answer. "What then, was the question, or subject, with which the State law here relevant purported to deal"[5]? His Honour defined the subject matter of the State determination as the lowest wage which employees in the industry should be entitled as against the minimum rates of wages which members of the union were entitled to receive from the employers for their own services, and also to have the employers pay the non-unionists for theirs.

Dicta by Latham C.J. and Dixon J. in the *Metal Trades* case were cited in support of the proposition that an award could only affect the legal relations of the actual disputants[6]. An award may have an indirect effect on third parties by controlling the behaviour of one of the disputants in relation to them, but it cannot confer enforceable rights and obligations on persons outside the dispute. Since the federal award did not give any rights to non-union employees, this area was wide open to control by State laws which were capable of being simultaneously observed. The federal award dealt with the relationships between union members and employers; the State law covered mutual rights and obligations of non-union employees and the employers. The

3. *Ibid.*, 258.
4. (1926) 37 C.L.R. 466, 499.
5. 117 C.L.R. 253, 263.
6. 117 C.L.R. 253, 265-6.

two laws dealt with different subjects and since both could be complied with by paying the higher rate fixed by the State authority, there was no inconsistency. While the majority emphasized that the obligation on the employer to pay the wage was the element common to both laws and therefore the only relevant consideration, Kitto J. showed that the only duties imposed by the award and State law arose in different contexts in the course of legislation upon two entirely different subject matters.

The possibility of obedience to both laws as a decisive test of inconsistency was rejected in *Cowburn's* case. The absence of a direct contradiction between two laws does not preclude inconsistency, even if it is possible to place them in different "fields". An award dealing with relations between an employer and one group of employees, and a State law dealing with the same employer and another group of employees are not *a priori* mutually exclusive. It is incorrect in this case to assert that the laws are unrelated, for both deal with the subject of minimum wages to be paid to non-unionist employees. In other words, the content of the duty must be considered independently of the relationships involved—for the purposes of s.109 it does not matter where the correlative rights lie.

In *Ex parte McLean*[7], Dixon J. stated that when both laws mean to state what shall be the law upon a specific matter "it probably would be of no importance whether each legislature was directing its attention to the same general topic, or had dealt with the same act or omission in the process of legislating upon two entirely different subjects". To much the same effect Latham C.J. held in *Colvin* v. *Bradley Brothers*[8] that "[t]he application of s.109 does not depend upon any assignment of legislation to specific categories which are to be assumed on an *a priori* basis to be mutually exclusive . . . If the Commonwealth law is valid it prevails over any State law which is inconsistent with it, even though . . . the Commonwealth Parliament could not have enacted [it] in all its parts". In the light of these cases, "inconsistent" cannot be given the limited meaning which Kitto J. ascribes to it.

At this point, it becomes clear that the real matter in dispute is not the respective rights and duties of the employers and employees, but the criteria for ascertaining inconsistency under s.109. Kitto J. was only prepared to apply a very limited test—in both laws the duty imposed on the employer must arise in the same context. The majority, however, was prepared to hold that any upsetting of the scheme of a Commonwealth award was inconsistent with it. Some of the obscurities in the judgment of the Chief Justice become clearer when it is speculated that this was the inarticulate basis of his decision. The assertion that, properly understood, the award enacted that the sum so to be paid was the only sum which by law the employer was obliged to pay, is really dependent on this basic premise. Similarly, His Honour's opinion that this was a case of direct inconsistency because "[o]bedience to the one, the award, is disobedience to the other, the determination" is not very convincing. Inconsistency was only produced because of the implied norm in the Conciliation and Arbitration Act that any interference with the scheme of an award would be inconsistent with it. It was, therefore, a case of indirect inconsistency.

7. (1930) 43 C.L.R. 472.
8. (1943) 68 C.L.R. 151.

Whether or not the implication of this norm was justified is another matter, but the decision of the majority was probably more in accord with the rules developed in earlier cases.

The implications of the decision on the future of State industrial control are serious. The Arbitration Commission can now exercise an effectively exclusive control over any industry which falls even partially within its jurisdiction.

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