Salmon L. J. went on to distinguish *Alderslade* v. *Hendon Laundry Ltd.* [1945] 1 K.B. 189 on the ground that in the instant case the ordinary man would not expect in the course of normal dealings, to find such a clause, and would indeed be surprised to discover it. "To my mind," he ruled "if the defendants were seeking to exclude their responsibility for a fire caused by their own negligence they ought to have done so in plainer language than used here."

Where the words are clear, however, as in *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport* [1972] 3 W.L.R. 1003, even the defendants' own negligence may be covered by the exception clause which in this case included the words "all claims and demands" fortified by the word "whatsoever". The words here were ruled to show clearly that the trader would indemnify the carrier against all claims without exception.

In *Eastman Chemical International* v. *N.M.T. Trading Ltd. & Eagle Transport Ltd.* [1972] 2 Lloyd's Rep. 25 the divisional court in holding that the destruction of the subject matter of a contract brought the contract to an end and consequently any condition therein failed with it, applied *Harbutt's Plasticine* v. *Wayne Tank & Pump Co.* [1970] 1 Q.B. 447.

The New Zealand Court of Appeal in *Hawkes Bay Aero Club Inc.* v. *McLeod* [1972] N.Z.L.R. 289, considered and reaffirmed its own decision in *Producer Meats Ltd.* v. *Thomas Borthwick and Sons (Australasia) Ltd.* [1964] N.Z.L.R. 700 and stated that the principles of law governing exception clauses in contracts were contained in the *Producer Meats* decision (supra) and the court felt no need to expand on those principles.

R. P. Wolff.

CRIMINAL LAW

Crimes—defence of insanity

Certain dicta in the English case *R.* v. *Clarke* [1972] 1 All E.R. 219 are significant in the construction of the test for insanity in New Zealand. The learned judge held that the defence of insanity applies to accused persons who, by reason of a disease of the mind, are deprived of their power of reasoning. The defence does not apply and has never applied, he said, to those who retain the power of reasoning but who in moments of confusion or absentmindedness fail to use their powers to the full.

Crimes—theft by person required to account

Mead v. *The Queen* [1972] N.Z.L.R. 255 concerned the interpretation of s. 222 Crimes Act 1961. It was argued, on behalf of the appellant, first, that a bank credit can neither be stolen nor converted for it is not an inanimate thing but rather a right, and, secondly, that since the appellant had delivered the cheque for which he was required to account to his bank manager for deposit in the joint account of the company in which he was a partner, and *then* drawn a cheque on that account for his own purposes, that should not be construed as fraudulently converting to his own use or fraudulently failing to account for a part

of the original cheque. Thus, it was argued for the appellant that once the cheque for which he was responsible had been paid by him into the firm's account as directed, s. 222 should have no application.

Citing *R.* v. *Bruges* (1906) 9 G.L.R. "as authority, the Court of Appeal dismissed this argument, relying to some extent on the fact that the money concerned was readily identifiable, there being "but a few dollars" in the firm's account apart from the cheque which the appellant had just paid in. His actions were, therefore, construed as fraudulent conversion of a part of the proceeds of the cheque for which he was required to account, and hence as theft.

Crimes—trial of indictments

The decision in *Ryan* v. *The Queen* [1972] N.Z.L.R. 736 turned on the questions of the admissibility of evidence not heard in open court by a witness, but given by way of deposition. It was held, on appeal, that an accused person has a fundamental right to have the evidence against him given in court, and there to be the subject of cross-examination. Moreover, if the accused is asked by the Crown to forego this right, he should only be asked to do so on the basis of correct information. Since the information in this case viz. that the complainant, a seaman, was not in New Zealand at the time of hearing, was wrong, although given in good faith, it was held that the conviction entered against the appellant should be quashed, and a new trial should be held at which the complainant would appear in person.

Criminal Offences—Police Offences Act 1927

In *O'Connor* v. *Police* [1972] N.Z.L.R. 379, Richmond J. held that "disorderly behaviour" did not necessarily have to be such as was calculated to provoke a breach of the peace, but did have to be something more than just fitting the dictionary definition of "disorderly". That the behaviour in question (the words "officious bastard", or as the appellant claimed, "officious bar steward") happened to annoy a single police officer, of whose presence the appellant had no reason to be aware, was held insufficient to satisfy the objective test of whether, having regard to time, place and circumstances, it was of a kind likely to cause serious annoyance to some person or persons present.

Undoubtedly, had the proposed Springbok Tour taken place in 1973, test cases on disorderly behaviour would have multiplied. In England, the notion of "insulting behaviour" was tested in an Apartheid-sport case, *Brutus* v. *Cozens* [1972] 3 W.L.R. 521. The House of Lords turned its attention to the difficult general question of how far freedom of speech and behaviour must be limited in the general public interest. It was held (per Lord Reid) that

> . . . vigorous and, it may be, distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting.

The other lords concurred in this and held that the reaction of the spectators was not necessarily relevant in determining whether or not the behaviour was insulting.

How far Lord Reid's "commonsense" test could (or would) be applied in New Zealand in defining "disorderly behaviour" is another matter.

Criminal offences—Transport Act 1962

The question of random investigations by officers was raised with respect to "breathalyser" tests for drunken driving in two recent cases, *Police* v. *Anderson* [1972] N.Z.L.R. 233 and *Ministry of Transport* v. *von Hartitzch* [1972] N.Z.L.R. 928, where the notion of a traffic officer having to have "good cause to suspect" that an offence had been committed was discussed. It was held, first, that the question of whether the traffic officer did have "good cause" was a question of fact, and, secondly, that the "good cause to suspect" which led the officer to administer the breath test does not have to be proved by the prosecution as an ingredient of the charge; proof beyond a reasonable doubt of this factor is therefore not required. In *von Hartitzch's* case it was held that "good cause to suspect" means no more than "a reasonable ground of suspicion upon which a reasonable man would act". It is not necessary that evidence of an actual driving fault be adduced in order to establish that the officer had "good cause".

Police powers—search

The impact of the Court of Appeal's decision in *Macfarlane* v. *Sharp* [1972] N.Z.L.R. 838 is bound to be extensive in the controversial fields of police powers, the right to privacy, the acquisition of evidence, and criminal procedure. In this case, the Court upheld its own decision in *Barnett and Grant* v. *Campbell* (1902) 21 N.Z.L.R. 484: the seizure of the documents which were in question was ruled unlawful, because the search warrant was issued in respect of other items, and the appellant was not arrested at the time of the seizure. Here, the law in New Zealand seems to differ from the English decisions in, for example, *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 2 Q.B. 299. Perhaps the difference may be explained by the fact that search warrants are generally easier to obtain in New Zealand than in England. The Court of Appeal, however, upheld White J.'s ruling at first instance that the proper remedy in a case of unlawful seizure was damages, and ruled that the appellant was not entitled to have the documents returned nor a writ of prohibition against criminal proceedings in which those documents would be presented as evidence.

In deciding this issue, the Court made it clear that the documents "unlawfully" seized might still be used in evidence in court (subject to the usual rules of unfairness etc.), and White J.'s dictum that "The principle to be applied as to the admissibility of the evidence, is whether it is relevant to the matters in issue, . . . not how the evidence was obtained," was apparently upheld.

J. J. Waldron

EQUITY

Implied trust

The far-reaching nature of implied trusts arising by operation of law was recently illustrated by decisions of the New Zealand and