by the grantees or their successors as derogating from the grants, such by-laws no doubt would be held to be binding upon the owners of the dominant tenements, as they would be on the public generally, so long as they were not unreasonable, upon the authority of *Attorney-General* v. *Hodgson*.[32]

A right of action also would lie in the owners of the dominant tenements in the event of disturbance of this easement by the servient owners or by strangers.[33] Most of the authorities dealing with disturbance of incorporeal rights, notably *Fitzgerald* v. *Firbank*[34] and *Nicholls* v. *Ely Sugar Beet Factory*[35] relate to interference with profits à prendre in respect of which it is clearly established that an action in the nature of trespass, not requiring proof of specific damage, is appropriate. However, despite the observations of Lord Wright, M.R. in the latter case,[36] citing Sir Frederick Pollock,[37] it would appear to be well settled[38] that the disturbance of an easement of this nature would be actionable rather in nuisance, requiring proof of specific damage, and of course, proof of the plaintiff's title to the incorporeal right.[39]

In England, where the right to use communal gardens and garden squares vested in owners and occupiers of adjoining properties is a common feature of urban development, the decision has greater significance and application than in Australia, but it would appear that local courts would have no difficulty or hesitation in adopting *Re Ellenborough Park* as authority in any case where a similar express grant of easement is in issue. The registration of an easement of this nature under the Real Property Act or corresponding State Acts, as appurtenant to land under the Act, similarly would appear to present no difficulty.

The definition of the law and establishment of principle in this case, whilst it should not encourage landowners generally "to subject their land to new and strange burdens",[40] should nevertheless pave the way for the creation of such new and at present unrecognised servitudes and easements, as may be required by future social and economic circumstances.

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OBJECTIONABLE LITERATURE

TRANSPORT PUBLISHING COMPANY LTD. (AND OTHERS) v. *LITERATURE BOARD OF REVIEW*

During 1953-55 new legislation was enacted in five States to widen the control over undesirable publications.[1] Much of this legislation was in common form, particularly in the widening of the meaning of "obscene" as a term of art. The greatest advance, however, took place in Queensland and Tasmania where Boards of Review were established with the express duty to prevent the distribution of "objectionable" literature. This meant also that a new term of art "objectionable" was created by statute, though its content was expressed in the same language as that found for the wider version of "obscene".

Now the establishment of Boards of Review has on the face of it relieved

[32] (1922) 2 Ch. 429.

[33] As to rights of way, these being the nearest example to the easement in the present case, *Thorpe* v. *Brumfitt* (1873) L.R. 8 Ch. App. 650.

[34] (1897) 2 Ch. 96.

[35] (1931) 2 Ch. 84; (1936) Ch. 343.

[36] *Id.* at 349, 353.

[37] Pollock, *Law of Torts* (13 ed. 1929) 391 (see now 15 ed. 1951) 283; *Harrop* v. *Hirst* (1868) L.R. 4 Ex. 43.

[38] 33 Halsbury (2 ed.) para. 13; *Paine* v. *St. Neots Gas Co.* (1939) 3 All E.R. 813, *per* Luxmoore, L.J. at 823.

[39] *Paine* v. *St. Neots Gas Co.* (1939) 3 All E.R. 813.

[40] Radcliffe, *Real Property Law* (2 ed. 1938) 146.

[1] A short summary may be found in (1956) 2 *Sydney L.R.* 134.

the courts of the duty of acting as *custos morum*. Yet under the Queensland statute, the section allowing appeals from the Board's decision was so expressed as to allow the court to undertake a complete re-examination of the publication including as an issue in the appeal the question whether it was objectionable according to the statute.[2] From this it followed that further appeal was possible, namely to the High Court. The present case,[3] therefore, gives the first opportunity to see how the judges interpret the new legislation,[4] particularly since the High Court decision was by a three to two majority.

The facts were simple. The appellants had published monthly in Sydney certain periodicals, with varying titles, all concerned with "romance" and all consisting of pictures accompanied by words. The Literature Board of Review had prohibited the distribution in Queensland of these periodicals in their entirety (including future parts) on the grounds that they were "objectionable".[5] No reasons were given for the Board's decision, but at the trial before the Full Court and the High Court, the objectionable feature was taken to lie in the portrayal of passionate embraces and in the suggestion given by the publications that happiness in the estate of marriage was in some way proportionate to the *corpus* or *quantum* of such embracing. No picture by itself portrayed anything indecent or obscene nor was illicit intercourse mentioned. It was held by Dixon, C.J., Kitto, J., and Taylor, J. (McTiernan and Webb, JJ. dissenting) that the publications were not objectionable according to the statutory definition, reversing the Full Court of Queensland, (Macrossan, C.J., Mansfield, S.P.J., Hanger, J. dissenting). The High Court was also divided on a point of evidence, namely the admissibility of "expert" opinion to determine what would be the effect of such publications on groups of persons, such as "psychopaths". The majority held that it would be essential to show the existence of categories of persons forming "a subject of special study or knowledge" and to allow from qualified persons evidence confined to matters within such special study or knowledge. It is proposed here to deal with three points, (a) the assistance afforded by the decision in defining the ambit of "objectionable"; (b) the admissibility of expert evidence; and (c) the desira-

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[2] Objectionable Literature Act of 1954, 3 Eliz. 2, No. 2, s.11. "The court or judge before whom such an order to review is returnable shall determine as an issue in the appeal the matter of whether or not the literature in question or some part thereof is objectionable under and within the meaning of this Act and, in respect of that determination shall not be bound by the opinion of the Board."

[3] *Transport Publishing Co. Ltd. (and others)* v. *Literature Board of Review* (as yet unreported from the High Court), (1955) Q.S.R. 466.

[4] An application for special leave to appeal to the High Court was refused in another case which started long before the present case but in which the Full Court gave judgment three days later. See Preliminary Note to (1955) Q.S.R. This latter case (*Literature Board of Review* v. *Invincible Press* (1955) Q.S.R. 525) is of interest as being concerned with crime, cruelty and violence, though much of the judgments therein is relevant to the present case. See esp. pp. 540-44 (*per* Stanley, J.).

[5] "Objectionable"—in relation to literature or any part of any literature, regard being had to the nature thereof, the persons, classes of persons and age groups to or amongst whom that literature is or is intended to be or is likely to be distributed and the tendency of that literature or part to deprave or corrupt any such persons (notwithstanding that persons in other classes or age groups may not be similarly affected thereby) objectionable for that it:

(i) Unduly emphasises matters of sex, horror, crime, cruelty, or violence; or
(ii) Is blasphemous, indecent, obscene, or likely to be injurious to morality; or
(iii) Is likely to encourage depravity, public disorder or any indictable offence; or
(iv) Is otherwise calculated to injure the citizens of this State.

This definition, though merely a variant of those found in the other State Acts, is open to criticism in that it contains an inversion and in that the word "objectionable" occurs in the definition itself. Since the draughtsman was in the definition section bound to the form "Board", "Literature", "Objectionable", etc., it was both nonsense grammatically and incorrect in meaning to say "objectionable for that". The novelty lies in the use of the word "objectionable" as a term of art, yet in the section as drafted it has both a "legal content" (*viz.* all after "for that") and a "statutory meaning" (*viz.* the *whole* definition). Thus, since the Board of Review must concern itself with the whole definition before it can class literature as "objectionable", only the statutory meaning is important and on this showing the "nature", "persons" and "tendency" are not mere preliminary matters. Indeed, they should properly come after the "legal content".

bility of retaining appeals from Boards of Review other than on points of jurisdiction and natural justice. The vagaries of individual opinion to be found in dealing with points (a) and (b), which reflect opinions on the publications themselves as facts rather than on abstract points of law, would seem to give support to point (c).

(a) *The ambit of "objectionable".*

The definitions in the Acts are in much the same terms[6] involving the following propositions.

1. Before banning literature regard must be had to those who will probably be its readers and to its tendency to affect them for evil.

2. Persons, whether in the mass or in classes or age groups may be affected for evil by the visual perception of matters of sex, horror, crime, cruelty or violence.

3. Literature cannot be classed as objectionable unless it can be shown both that it has undesirable qualities and that these qualities will tend to deprave or corrupt the probable readers.[7]

For the purpose of the present case the undesirable quality was said to have been an undue emphasis on matters of sex though some attention was given in the High Court to making a distinction between "unduly emphasises matters of sex" and "is indecent, obscene".[8]

In the Full Court, Mansfield, S.P.J. defined sex as "the distinction between male and female" comprehending "not only physical differences but their psychological differences in conventional behaviour", this being "its ordinary meaning". "If", he continued, "a publication deals almost entirely with the distinction between male and female as defined above to the exclusion of other matters of interest and entertainment it could, I think, be held not only to emphasise such distinction but to emphasise it to an undue degree".[9] Hanger, J., on the other hand, found the publications to be outside the statute, reaching this conclusion by holding that they had no tendency to deprave or corrupt.

In the High Court the majority clearly did not feel that the words "unduly emphasises matters of sex" should cover so wide an ambit and held that the publications were not within heads (i)-(iii) of the "legal content" of objectionable. It is extremely interesting to compare the opposing views of the majority and the minority on the simple matter of their own reactions to the publications. Thus the majority said:

> In the present case it happened that owing to the course the argument took in this Court we did not turn to the actual publications in question until we had listened to a discussion on the Act, the judgments of the Supreme Court and on parts of the evidence. . . . When we did turn to the publications their actual character proved quite unexpected and produced almost a sense of contrast.

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[6] There are, of course, many minor differences of wording, e.g., "tendency to deprave or corrupt" as opposed to "tendency to corrupt" merely. Yet it may be feared lest such petty differences which bring with them *ejusdem generis*, *expressio unius* and similar rules, may not lead to a greater need for restricting appeals from Boards of Review. Thus, since the Tasmanian Act says "portrays, describes or suggests acts of a criminal nature" and the Queensland Act says "encourage . . . any indictable offence" counsel may well be found arguing that the portrayal of, e.g. lesbianism, "rape" on a wife or offences by children under eight could not be prohibited. Indeed, in cases of bigamy or incest the court might entertain the farce of hearing learned argument on the matrimonial status of the characters in the publication before reaching a conclusion. Again, if the *ejusdem generis* rule were to be rejected in para. (iv) of the Queensland definition (*supra* n.5) then certainty would vanish. (On this point see (1955) Q.S.R. 488. But *cf. id.* 477 *ad fin.* with 496).

[7] This double requirement is not clearly set out in Queensland, s.5 (*supra*, n.5). *Cf.* N.S.W., s.3(3)C and Tasmania, s.10, which has a third requirement that the distribution of the publication would have an immoral or mischievous effect. However, the position in Queensland is quite clear. See (1955) Q.S.R. 486-87.

[8] "'unduly emphasises' includes emphasis on conduct short of obscenity or indecency such as embracing or kissing; otherwise the phrase would, I think, be redundant as what is obscene or indecent is also expressly included in the definition" (*per* Webb, J.).

[9] (1955) Q.S.R. 487. See also Macrossan, C.J. at *id.* 478.

On the other hand, McTiernan, J. said:

> If there were nothing before the Court but the publications themselves, I would reach the same conclusion as to their tendency to deprave and corrupt young people who are so unstable as to favour them as literature or who acquire the habit of reading them. Some, of course, are less evil than others. But I think that it is correct to say of all of the publications that they are calculated to stimulate the sensual passions of teenagers and adolescents and to inculcate brutish standards of conduct and to debase courtship and marriage.

The result, then, is that the phrase "matters of sex" has not received the normal (or, in the light of earlier cases, the extended) meaning sought for it by the majority of the Queensland Full Court. Naturally the outcome of this decision is that this interpretation of the phrase will be binding in all States, this being one of the risks that States must take when borrowing legislation.

(b) *Admissibility of opinion evidence.*

A feature of the present case was the evidence of a number of psychiatrists who testified either in person or by affidavits that the publications would or would not have a tendency to deprave or corrupt.[10] All three judges in the Full Court of Queensland were prepared to allow the admission of such evidence but in the High Court the majority, while not prepared to reject it entirely, sought to restrict its admission to special cases. This is indeed an area of the law in which the eccentricities of opinion evidence could be expected to abound, and it is submitted that there is only a small difference between allowing evidence concerning a tendency to deprave or corrupt a group or class of persons and refusing to allow it if the tenderer claims that the publications have no tendency to deprave or corrupt any persons or any groups or classes of persons. Yet the latter, of course, goes towards determining the issue and usurps the function of the court.[11] Due to the wide drafting of the Act, a class of subnormal persons is adequate for the definition, and it is only necessary to show a likelihood that the publications will reach this class, not that they have actually done so. Indeed, Webb, J. felt that "classes of persons" and "age groups" had narrow meanings:

> Just as I cannot see how "classes of persons" in the definition of objectionable could refer to other than persons mentally, psychologically or sexually abnormal, so I am unable to see what "age groups" other than adolescents are within the definition.[12]

Hence it may be easy for the court to find that there are those qualified to give expert evidence as to the behaviour of a select class of persons and to the tendency of the literature to deprave or corrupt that class. In the present case, much of the evidence allowed before the Full Court was concerned with unstable and psychopathic female adolescents, many of whom had been committed to homes for sexual offences. Obviously if publications are to be banned from a State as the result of the reactions of a relatively unrepresentative class of persons, then the court will be not competent to decide without hearing evidence. Yet even here there may be further room for doubt as to the meaning of

[10] See (1955) Q.S.R. 502-511.

[11] *Cf.* (1955) Q.S.R. 491.

[12] It is submitted that this is to view the definition too narrowly. The Act requires the Board to take notice of the distribution of literature among classes of persons or age groups. This must be determined in fact and in a particular case it could easily be shown that the literature was only distributed or likely to be distributed among adults, or among research students, or among a working class; for example, literature put out by an exclusive and expensive book club, collections of undoubtedly objectionable matter made up for study and a journal circulating among the employees of a large firm. Surely an absence of class-consciousness does not mean that persons can only be normal or abnormal? Earlier the learned judge had said, ". . . I am unable to see what classes of persons other than those possessing abnormal characteristics, mental, psychological or sexual, could be intended; no other discrimen suggests itself to me".

"deprave" and "corrupt" about which further expert evidence could be allowed. Despite the obvious contradiction involved in the corruption of the already corrupted, can it be said that a psychiatrist would be incompetent to say that on certain classes of subnormal persons publications of the present kind might have the effect of relieving mental stress and of permitting the eventual control of inhibitions or of character? Indeed, the view that the majority of the High Court took of the publications, pointing out as they did that the theme was the triumph of virtue and the eventual happy conclusion of courtship, seems itself to involve the premise that such a theme, if it cannot actively do good, at least cannot do harm according to the statute.

Opinion evidence, therefore, would seem a dangerous innovation in this class of case. Rather it might be suggested that, since this is primarily a matter of human behaviour, the courts might be prepared to make more use of the doctrine of judicial notice, which is equivalent to saying that the judge's own experiences of life are no less certain a test than the conflicting evidence of psychiatrists, among whose opinions it will be the judge himself who has to make a choice.[13]

(c) *Should appeals be retained?*

It has been common enough in the last twenty years to see the establishment of Boards and Commissions from whose decisions no appeal to the ordinary courts has been allowed. This is today no longer treated as being an automatic diminution of individual freedom nor indeed as a sign of lack of confidence in the courts. Rather are such tribunals seen as specialist bodies, competent to the point of finality, but within a set area only. In this way, if we may make the analogy, the Crown through the Parliaments grants a revocable *peculium* to these small tribunals and through the courts watches over their use of it, whereas the Crown's justice in the courts is a *patrimonium* which cannot be taken away. It is submitted therefore that all the advantages found in delegation elsewhere would apply in the present situation. For a close reading of the judgments, revealing the doubt as to the admissibility of evidence shows that in the long run the judges were compelled to take their own personal view of the publications and to decide on this basis. It is indeed surprising, as was indicated by Hanger, J., that, since the order to review the Queensland Board's order was returnable before a single judge or the Full Court, "a single judge (may) set aside the decision of a specially constituted Board of five."[14] Further if we assume the Board to have been unanimous, the result of the whole litigation was that the opinion of three judges became effective though only they and one other thought the publications not objectionable whereas nine others thought the contrary. And this not on abstract matters of law but simply on the impression made by the publications themselves. A still further point, though perhaps one of more complexity, is that since Queensland and Tasmania have such specially-constituted Boards, the members of which are, presumably, fully employed in the supervision of literature, it must follow that energetic activities on the part of these Boards can determine a publication's fate throughout Australia, except in Western Australia. Indeed any publisher having a nation-wide market would be well advised to go to the High Court in every case since his market will depend upon the decision.

Thus, in the absence of a Federal Board of Review—a most improbable institution—it is a most fitting paradox that one should suggest that the most efficient machinery for the suppression of unwanted literature should be kept

[13] "Ordinary human nature, that of people at large, is not a subject of proof by evidence whether supposedly expert or not." (*per* Dixon, C.J., Taylor, Kitto, JJ. See also (1955) Q.S.R. 491. "It is for the judges of this Court to evaluate these opinions and to accept what we consider to be in accordance with human behaviour as known to us", *per* Mansfield, S.P.J. See also *id.* 480-81. *Cf.* Objectionable Publications Act, 1954 (Tas.), No. 80, s.9(9), which releases proceedings before the Board from the strict rules of evidence.

[14] (1955) Q.S.R. 497.

in its proper place, though the paradox is easily resolved by the reflection that, in spite of six State Acts that speak with the same voice, the things which are good or bad in Queensland may not be automatically accepted, even via the High Court, as good or bad in any other State.

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