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# DAMAGES: CONSIDERATION OF TAX LIABILITY ON LOST EARNINGS.

THE recent judgment of the House of Lords in *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796, has caused considerable interest among the advisers of those who are frequently called upon to pay damages as the result of a judgment in an action for personal injuries, when the damages are awarded for loss of past or prospective earnings. Briefly, their Lordships held that, in assessing damages for personal injuries, account should be taken of tax liability which would have been incurred on earnings which the injured person would have earned but for the accident; but, in *Union Steam Ship Co. of New Zealand, Ltd.* v. *Ramstad*, [1950] N.Z.L.R. 716; [1950] G.L.R. 311, our Court of Appeal has held that social security tax on wages should be left out of account in the assessment of special and general damages for loss of earnings, not only in an action brought by a servant against his master, but also in actions brought by servants against other persons.

It is not our purpose here to consider whether *Gourley's* case should, or should not, be followed or applied in this country. At the time of writing, the judgment in *Ramstad's* case is binding on all our New Zealand Courts. It is almost certain, however, that the question involved in it will shortly come before the Court of Appeal for re-consideration; and, accordingly, we must content ourselves with merely stating the ratio of each judgment.

In *Ramstad's* case, special damages for loss of earnings were awarded to the plaintiff; and counsel for the defendant company submitted that this amount should be assessed less 1s. 6d. in the pound for social security charge, which would have been levied if the money had been actually earned. The learned Chief Justice, Sir Humphrey O'Leary, held that the social security charge should not be deducted by the employer from the damages awarded against him in respect of loss of earnings arising in an action for damages for negligence arising out of personal injuries. The Court of Appeal, in affirming that judgment, followed the decision of the English Court of Appeal in *Billingham* v. *Hughes*, [1949] 1 All E.R. 684, where it was held that in the assessment of damages for loss of earnings the liability for income-tax should be disregarded. It is interesting to note that Tucker L.J. (as he then was) with whom Singleton L.J. concurred, based his judgment on the principle that the damages recoverable were the amount required to effect *restitutio in integrum*, and to establish accordingly the full amount of the wages. He observed that questions of the plaintiff's legitimate liability to the Revenue authorities were matters which did not concern the defendants; and the Court of Appeal did not divert from the reasoning of Atkinson J. in *Jordan* v. *Limmer and Trinidad Lake Asphalt Co., Ltd.*, [1946] K.B. 356; [1946] 1 All E.R. 527, and of du Parcq J. (as he then was) in *Fairholme* v. *Firth and Brown, Ltd.*, (1933) 49 T.L.R. 470—namely, that any liability for tax was *res inter alios acta*. The Court of Appeal in *Ramstad's* case considered that the state of the authorities was such that it was beyond any real doubt that the true view of the matter, in the many cases to which it referred, was that the liability for tax was *res inter alios*; and it held that both in the class of case in which liability for tax is thrown on the recipient of the income and in the class of case where the primary liability for tax is put on the employer, such liability should be left out of account in assessing both general and special damages. Their Honours observed that in each of the two classes of case the fundamental basis for the view that questions of tax should be ignored is the fact that it is only when the gross earnings have either actually or notionally become the income of the employee that they attract the tax. In the first class of cases they have actually become his, and he alone becomes liable for the payment of the tax. In the second class of case, they have become notionally his, and it is out of them that the social security charge is payable by the employer. Their Honours, in their judgment delivered by Cooke J., at p. 731, said:

> Whether, as in the first class of case, the gross earnings have actually become the income of the employee, or, as in the second class of case, they have notionally become his income, the liability that descends on them for tax is a matter that is foreign to the assessment of damages for the past or future loss of those earnings. That view as to the second class of case appears to us to be strongly supported by what was said by the Privy Council in *Forbes* v. *Attorney-General for Manitoba*, [1937] A.C. 260, 269, 270; [1937] 1 All E.R. 249, 253, 254.

In *British Transport Commission* v. *Gourley* the facts were that the respondent was a passenger in a train from Liverpool to London, which became derailed at Weedon, Northamptonshire. As a result of this accident, which was caused by the negligence of the appellant's servants or agents, the respondent suffered severe personal injuries. At the time of the accident the respondent was aged sixty-five, and was physically fit and young for his age. He was an eminent civil engineer who specialized in water schemes, and was senior partner in a firm of civil engineers. From the date of the accident until some time in 1952,

the respondent was disabled by his injuries from taking any effective part in his business; and, though he returned to work during 1952, his earning capacity, and consequently his income, was much reduced. Pearce J. awarded him £47,720 as damages, made up of £9,000 for pain and suffering, £1,000 for out-of-pocket expenses, £15,220 for actual loss of earnings before the end of 1953, and £22,500 for estimated future loss of earnings. The sum of £37,720 in respect of loss of earnings was awarded on the basis that the incidence of income-tax and surtax was not taken into account. On the basis that liability to tax had to be taken into account, Pearce J. made an alternative award of £6,695, made up of £4,945 for actual loss of earnings before the end of 1953, and £1,750 for estimated future loss of earnings.

The sole question before the House of Lords was whether liability to tax should be taken into account in assessing that part of the damages attributable to actual or prospective loss of earnings.

Their Lordships (Earl Jowitt, Lord Goddard, Lord Reid, Lord Radcliffe, Lord Tucker, and Lord Somervell of Harrow, with Lord Keith of Avonholm dissenting) held that liability to income-tax was not so remote that it should be disregarded in assessing damages for loss of earnings, though the estimate of tax liability need not be elaborate; and, consequently, the damages to which the respondent was entitled were such as would compensate him for the loss of taxed earnings, which were the measure of his real loss, and accordingly £6,695 was the proper sum to be awarded as damages. Their Lordships overruled *Billingham* v. *Hughes* (*supra*).

In his speech, Earl Jowitt, after considering the various authorities cited to their Lordships, said that it would be fallacious, in his Lordship's view, to consider the problem as though a benefit were conferred on the wrongdoer by allowing him to abate the damages for which he would otherwise have been liable. The question was rather: for what damages was he liable? He was liable for such damages, as, by reason of his wrongdoing, the plaintiff had sustained. He could not think that the risk of confusion arising if the tax position be taken into consideration should make their Lordships hesitate to apply the rule of law if they could ascertain what that rule is; nor should they be deterred from applying that rule by the consistent or inveterate practice of the Courts in not taking the tax position into consideration in those cases in which the Courts were invited to do so. His Lordship went on to say:

> I agree with Lord Sorn [in *M'Daid* v. *Clyde Navigation Trustees*, [1946] S.C. (Ct. of Sess.) 462] in thinking that to ignore the tax element at the present day would be to act in a manner which is out of touch with reality. Nor can I regard the tax element as so remote that it should be disregarded in assessing damages. The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called on to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income. Indeed, save for the fact that in many cases—though by no means in all cases—the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence.

Counsel for the appellant, in the course of his argument, put the case of two men each enjoying a salary of £2,500 a year, the one as a servant of an international body being exempted from all tax on his salary, the other having to pay income-tax and surtax in the ordinary way. He pointed out that, if each of these men met with an accident and each was deprived of a year's salary, for which he succeeded in recovering damages, it would be quite unreal to treat them as though they were in receipt of the same income; for, in the absence of special and unusual circumstances, the one whose salary was tax free would enjoy an income almost double the income of his fellow who had to pay taxes. Lord Jowitt agreed with that contention. He said:

> I see no reason why in this case we should depart from the dominant rule, or why the respondent should not have his damages assessed on the basis of what he has really lost; and I consider that, in determining what he has really lost, the Judge ought to have considered the tax liability of the respondent.

His Lordship, in concluding his judgment, said:

> It would, I think, be unfortunate if, as the result of our decision, the fixation of damages in a running-down case were to involve an elaborate assessment of tax liability. It will, no doubt, become necessary for the tribunal assessing damages to form an estimate of what the tax would have been if the money had been earned, but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury and for the pain and suffering endured.
>
> In the present case, the Judge has made an elaborate and detailed survey of the position and has fixed two sums; and it was agreed between the parties that we should award as damages one or other of these sums. We were, therefore, in no way concerned to consider the precise method which the trial Judge employed in arriving at these figures. In my opinion, in these circumstances we should substitute the sum of £6,695 for the sum of £37,720.

In his speech, Lord Goddard L.C.J. (with whom Lord Radcliffe and Lord Somervell agreed) after referring to *Billingham* v. *Hughes* (*supra*) said that it was conceded by the appellant that the case before their Lordships was indistinguishable from *Billingham* v. *Hughes*, so the question was whether or not that case was rightly decided. The parties agreed that, under the present law, no part of the sum awarded as damages was subject to income-tax or surtax, and the appeal proceeded on that footing.

It is curious that His Lordship, in remarking how little authority there was on this subject, said there did not seem to be any decision in the appellate Courts of the other Commonwealth countries on the matter. It is clear that counsel had not drawn the attention of their Lordships to *Ramstad's* case with its references to decisions in Canada and in Australia.

Continuing his speech, Lord Goddard said:

> The basic principle, so far as loss of earnings and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position so far as can be done by an award of money as he would have been had the accident not happened, and I will endeavour to apply this in the first place to the special damage claimed in respect of the loss of earnings. Hitherto the decisions, other than that of Lord Sorn in *M'Daid* v. *Clyde Navigation Trustees* [*supra*] have treated the incidence of tax on a man's earnings as *res inter alios acta*. This expression in this context is, I think, misleading. A plaintiff may seek to increase, or a defendant to diminish, damages by items which are held to be too remote. The mere fact that the item arises as between plaintiff and a third party would not seem to be the test. In a wrongful dismissal or personal injuries action, the fact that a plaintiff has obtained remunerative employment with a third party is normally relevant, though it would fall within the words *res inter alios acta*.
>
> The question is whether taxation is, or is not, too remote to be taken into account. A plaintiff claims loss of earnings because he has been prevented from fulfilling a contract of service or earning wages, or, if a professional man, earning fees from clients or, if a trader, from dealing with customers.

Tax is imposed by law ; the State exacts a certain proportion of income which varies with the amount of the taxable income. There is a standard rate of income tax, but there are allowances, and no one pays the standard rate on each pound of his income. Surtax is graded according to the amount of income. The taxpayer must pay and, in my opinion, it cannot make any difference whether he receives the gross income and pays his tax later, as he does if assessed under Sch. D.*, or whether it is deducted before he receives it, as is the case with tax under Sch. E.† or P.A.Y.E. In either case, to say that a taxpayer has the benefit of his full income is, in my opinion, to be out of touch with reality, to use the word of *Lord Sorn* in *M'Daid* v. *Clyde Navigation Trustees* [*supra*]. As he said, with income tax at 10*s.* in the £ (*to say nothing of surtax*) to award a person damages without regard to tax would be like giving him just double the amount of his loss. The simplest case to take, no doubt, is that of a person assessed under Sch. E. A certain salary is attached to the office, but that which he will receive is, at the present rate of taxation, the salary less a very substantial percentage which is deducted for tax before payment.

If, therefore, he is disabled by an accident from earning his salary, I cannot see on what principle of justice the defendants should be called on to pay him more than he would have received if he had remained able to carry out his duties. A taxpayer assessed under Sch. D.* can, no doubt, make provision for payment as he pleases. It may be that from time to time he has to sell capital to enable him to pay his tax is he has spent his income before the tax becomes due, but I cannot see any principle on which the amount he is to receive as damages should depend on whether he is assessed under one Schedule or another. Though the tax is not payable till a year after the income is earned, the liability, which is common to all except those who, by reason of the smallness of their income are exempt altogether, always remains and must be discharged. Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation, and this is as true with regard to special damage as it is with general damage.

Before concluding his speech, Lord Goddard said that the principles he had set out would be applicable in wrongful dismissal actions, in which the Court has to calculate for loss of earnings which would have been subject to tax had they been earned.

Lord Reid urged that this was a case where it was proper to consider the question on its merits as one of principle. In the course of a lengthy speech, he said :

The general principle on which damages are assessed is not in doubt. A successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has suffered, and will probably suffer, as a result of the wong done to him for which the defendant is responsible. It is sometimes said that he is entitled to *restitutio in integrum*, but I do not think that that is a very accurate or helpful way of stating his right. He cannot in any real sense be restored, even financially, to his position before the accident. If he had not been injured he would have had the prospect of earning a continuing income, it may be for many years, but there can be no certainty as to what would have happened. In many cases, the amount of that income may be doubtful, even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss.

Lord Reid went on to say that the general principle is subject to one qualification. A loss which the plaintiff has suffered, or will suffer, or a compensatory gain which has come, or will come, to him, following on the accident may be of a kind which the law regards as too remote to be taken into account. In His Lordship's judgment, the real question in the case before their Lordships' House was whether the plaintiff's liability to pay taxes is something which the law must regard as too remote when determining or estimating what he has lost as a result of the accident. The defendant is only bound to pay damages based on an assessment of the plaintiff's actual and prospective loss taking into account all those factors which are not in law too remote. Lord Reid, on p. 808, proceeded :

It has sometimes been said that tax liability should not be taken into account because it is *res inter alios*. That appears to me to be a wrong approach. Let me take the case of a professional man who is injured so that he can no longer earn an income. Before his accident he earned fees and he paid rent and rates for his office, the salaries of clerks, the expenses of running a car and other outgoings, and he would have continued to do so if he had not been injured. Apart from one matter to which I shall refer later, I cannot see why these expenses are any less *res inter alios* than his payments of income tax in respect of his net earnings. Indeed, he could not avoid liability to pay tax, but he might have been able to diminish his outgoings if he had chosen to spend more time and effort himself on his work, or in travelling in the course of his work. Yet no one would suggest that it is improper to take into account expenditure genuinely and reasonably incurred, or that the plaintiff's damages should be assessed on the fees which he would have continued to receive without regard to the outgoings which he would have continued to incur.

In *Billingham* v. *Hughes*, [1949] 1 K.B. 643 ; [1949] 1 All E.R. 684, the leading authority on which the respondent relies, I think that this fact was not fully appreciated. For example, it was said that the doctor in that case was entitled to restitutio vis-à-vis his patients, i.e., to receive his fees in full, but it cannot have been intended that his outgoings should be disregarded in assessing damages. And it was also said that a man's income is his own to do what he likes with it, and that the defendant has no concern with what happens to his income. But that argument goes much too far. The gross fees which the doctor receives are his own to do what he likes with them. He is not bound to spend them in paying his rent or rates or other outgoings, any more than he is bound to spend them in paying his taxes. But, if he does not meet any of these obligations either out of his fees or from some other source, he will ultimately be made bankrupt. The defendant has no more concern with whether or how he pays his rent than with whether or how he pays his taxes. What the defendant is concerned with is how much the plaintiff has lost.

In a case where the wrongdoer is the plaintiff's employer, it has sometimes been said that he would have had to continue to pay the plaintiff's full wages or salary if there had been no accident or wrongful dismissal, so why should he take advantage of his own wrong to diminish his liability. That argument has lost some of its force since the introduction of the system of P.A.Y.E., but it would be strange if the introduction of a new method of collecting tax altered the legal position and, in any event, the argument would remain for surtax. The real answer is, I think, that before the wrong the employer was paying for the plaintiff's services, whereas now he is paying the plaintiff's loss, and he will have to pay someone else to perform the services. And this argument also, if valid, would go too far, for it would seem to involve the proposition that, if a dismissed employee gets other work, the employer ought not to be able to take advantage of that.

Lord Tucker said that, having heard the point argued three times—twice in their Lordships' House and once in the Court of Appeal—he was persuaded that the decision in *Billingham* v. *Hughes* (*supra*), to which he was a party in the Court of Appeal, was erroneous. His Lordship agreed that the phrase *res inter alios acta* did not assist in the solution of the problem, but the difficulty was, he felt, in deciding what items of expenditure which follow the earning of profits are to be taken into consideration and which are to be ignored. He

* See Income Tax Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10) s. 122.
† *Ibid.*, s. 156.

thought that the true answer was that expenditure which, though not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt is relevant to the ascertainment of the loss suffered by the party injured.

Lord Keith of Avonholm, as we have said, dissented. He was unable, with some regret, knowing the views of their Lordships, to change the opinion he expressed in *Blackwood* v. *Andre*, [1947] S.C. (Ct. Sess.) 333 (which was referred to in *Ramstad's* case in the judgment of our Court of Appeal: [1950] N.Z.L.R. 716, 728, 729). Lord Keith said that he felt great difficulty in the view that the incidence of taxation on an injured taxpayer should be any concern of the wrongdoer and should be used to minimize an award of damages in his favour. To many, he said, it may seem somewhat hard that the more tax a man has paid before he meets with an accident the less damages relatively will he recover from the person who has injured him. Two men, each earning £2,000 a year, are injured in the same accident and are totally disabled for life. A has income from investments of £5,000 a year, or a wife with income of that amount. B is a single man with no independent income. It would be no answer for the wrongdoer to say, A has got a wealthy wife, or a large independent income, and, therefore, he does not need, and ought not to recover, any damages except for pain and suffering, loss of amenities, and out-of-pocket expenses. The law would say the wealthy wife and the independent income are not his concern. But, by taking net income after payment of tax as the measure of damages, the wrongdoer achieves by a back door precisely what is refused to him by the direct entrance. In such an event, B will receive full compensation for loss of his earning capacity of £2,000 a year so far as Judge or jury with the limitations of human foresight and possibilities of human error can assess it, A will receive insignificant and, some may think, derisive damages for loss of exactly the same income. His Lordship did not ignore the fact that B may need the damages more than A, and the difference may seem to introduce a measure of equity as between A and B, to the advantage of the wrongdoer; but the law has not yet reached the stage of assessing damages for a legal wrong on the basis of need. His Lordship continued:

> The whole issue in this case boils down to the question whether a man is to be compensated for loss of wage-earning capacity on the basis of gross earnings, or net earnings after deduction of tax. The first alternative provides a simple rule which has been adopted for generations and creates the minimum of trouble. The second alternative must, I think, give rise to serious difficulties and complications. Nor is the matter confined to British income tax. It was conceded in argument and is, I think, inevitable that, under the second alternative, if a foreigner is injured in this country, the Courts will have to pay regard to the incidence of his foreign income tax, if any. It is a strange turn of fortune's wheel that the intricacies and accidents of fiscal legislation should have its repercussions in the assessment of damages in the civil Courts.
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> Nor does the matter end there. A man may be content to earn a large income with a high rate of tax, with a view to prospective benefits or advantages. He may propose to make payments under covenants to relatives and others, with consequent taxation reliefs, or to maintain and possibly increase insurance premiums on life and endowment policies, or be content to enjoy the minimal benefits of earning a large salary under a system of high taxation with a view to enjoying in retirement a better pension. To take account of his existing tax position at the date of the accident will make no allowance for these contingencies. They may be very real intentions, the opportunity of realising which may depend on a man's maintaining his earning capacity. It may be said they can be taken account of by Judge or jury. If so, new and difficult factors will be introduced into the computation of damages which would be unnecessary if damages were assessed on the basis of gross earnings.
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> There is, I think, a deceptive simplicity in looking at the matter from the point of view of loss of earnings down to the date of trial. It is, of course, obvious that, if the injured man had been able to work, he would have paid tax on his earnings, and it is attractive to say that his damages for ascertained loss of earnings should be calculated on net earnings after deduction of tax. But, if an award of damages for loss of earnings is not subject to tax, to deduct tax before assessing damages seems to me singularly like exercising taxing powers in an indirect way. It must be remembered also that income tax is an annual tax imposed by the will of Parliament. To fix damages on an estimate of future taxation is impossible, and to assess them de futuro on the basis of existing taxation savours of legislation by the Judiciary. Further, to fix them on the basis of existing taxation without any knowledge of what the future commitments and obligations and personal status of the injured person will be, or would have been, seems to me to be unreal. On all counts the safe and simple rule, in my opinion, is to exclude the element of taxation from the assessment of damages. If there is a case for thinking that assessing damages on a basis of gross earnings in actions for personal injuries, or for wrongful dismissal, enables the individual to escape his fair contribution to the national revenue, the position, in my opinion, should be rectified by legislation.

There we must, in the meantime, leave the matter. It may well be that the question may have to be settled by legislation, as Lord Keith suggested.

As a footnote, we may add that the Commissioner of Inland Revenue in New Zealand has not assessed, and does not assess, for the purposes of social security charge or income-tax, special or general damages awarded in actions based on negligence claiming damages for personal injuries. This is so, even when such damages comprise or include an award for loss of past or future earnings. In that regard, the Commissioner has treated such damages as being a refund or reimbursement of the capital loss to the plaintiff of his ability to earn income.

# SUMMARY OF RECENT LAW.

## AGED AND INFIRM PERSONS.

*Mental Hospital Patient—Appointment, as Manager of Patient's Estate, of Person Other than Public Trustee—Onus on Applicant to show Proposed Appointee more Suitable than Retention of Control by Public Trustee—Aged and Infirm Persons Protection Act 1912, s. 27—Mental Health Act 1911, s. 93—Practice—Order—Review of Order—Order made in Chambers for Court—Whether Permissible to move to review Such Order—Code of Civil Procedure, R. 426A.* There is jurisdiction to make an order under the Aged and Infirm Persons Act 1912, pursuant to s. 27 thereof, even though the person in respect of whom the protection order is sought has become a "patient" within the meaning of the Mental Health Act 1911. The onus is on the applicant for a protection order, who asks for the appointment, as manager of the estate of a mental patient, of someone other than the Public Trustee to show that the person proposed is a more suitable appointee, (*In re R.*, [1942] N.Z.L.R. 531; [1942] G.L.R. 341, and *In re G.*, [1948] N.Z.L.R. 189; [1948] G.L.R. 89, followed.) *Quaere.* Whether under R. 426A of the Code of Civil Procedure it is permissible to move to vary an order, which, though made in Chambers, was necessarily a Court order. *In re N. C.* (*An Infirm Person*). (S.C. Palmerston North. December 14, 1955. Gresson J.)

## CHARITY.

*Cy-près Doctrine—Gift of Residue—Particular Charitable Purpose—Surplus after satisfying Prescribed Purpose—Direction of Scheme.* By her will the testatrix gave her real and personal

## LEGAL ANNOUNCEMENTS.

*Continued from page i.*

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*Continued on page v.*

property on trust for sale, and subject to a life interest, gave specific and pecuniary legacies including a legacy of £400 for a "stained glass window to be inserted in [R.] church". She directed that the remainder of her property "be sold and the proceeds taken for the continuation of the seating of the church" at R. After the seating in the church had been completed, so that it could not be extended further without impairing the beauty of the church, there would be a surplus of the residuary estate. On the question whether such surplus should be applied cy-près or devolved as on intestacy, *Held*, the will showed an intention that the whole of the residue should be applied to a particular charitable purpose, viz., the provision of seating in the church, and as the gift of residue was a gift of more than was required for that purpose, the surplus would be applied cy-près. (*Re King*, [1923] 1 Ch. 243, and *Re Royce*, [1940] 2 All E.R. 291, followed. *Re Connolly*, (1914) 110 L.T. 688, and *Re Stanford*, [1924] 1 Ch. 73, distinguished). *Re Raine (deceased), Walton* v. *Attorney-General and Another*. [1956] 1 All E.R. 355 (Ch. D.)

## CONTRACT.

*Evidence—Action for Specific Payments due under Simple Contract—Initial Onus of Proof on Plaintiff discharged upon Proof of Contract—Plea of Payment and Proof of Facts in Support, open to Defendant—Such Defence against Deceased Estate to be examined with Care and even Suspicion.* In an action for specific payments due under a simple contract, the plaintiff has discharged the initial onus of proof lying upon him when he has proved the contract under which the defendant is liable to pay. A plea of payment and proof of facts supporting such plea is thereupon a defence open to the defendant. (*Tamara Te Angiangi* v. *Treadwell*, [1926] N.Z.L.R. 693; [1926] G.L.R. 453, and *Heintzman* v. *Young*, (1923) 54 Ont. L.R. 13 (approved in *Follis* v. *Albemarle Township*, [1941] 1 D.L.R. 178, 186) followed. *Caldwell* v. *Cobbledick*, [1912] S.A.S.R. 40, referred to. *Nelson* v. *Campbell*, [1928] V.L.R. 364, not followed.) Where such a defence is put forward against the estate of a deceased person by the surviving party, while it may not be necessary for the defendant's evidence to be corroborated, nevertheless his evidence must be examined with care and even suspicion. (*Begg* v. *Watt*, [1925] G.L.R. 95, applied.) *Mawson* v. *Public Trustee*. (S.C. Wellington. December 9, 1955. Turner J.)

## CRIMINAL LAW.

*Borstal Training—Sentence of Maximum Period of Borstal Detention—After Subsequent Offence, Such Sentence extended by One Year's Borstal Training—Such Extension Valid—Criminal Justice Act 1954, ss. 2 (3), 29 (4).* The power of extension of the maximum term of borstal training, given to the Court by s. 29 (4) of the Criminal Justice Act 1954, is a power to extend, for a period not exceeding one year, as the Court thinks fit, a previous sentence of detention in a borstal institution imposed before the passing of the statute (which, by virtue of s. 2 (3) is deemed for the purposes of the statute to be equivalent to a sentence of borstal training). Consequently, the Court had jurisdiction to extend a maximum sentence of detention in a Borstal institution (imposed before the passing of the Criminal Justice Act 1954) by a sentence of a term of one year's borstal training in respect of an offence committed after the passing of that Act. *In re Myers*. (S.C. Wellington. November 30, 1955. McGregor J.)

## DEATHS BY ACCIDENTS COMPENSATION.

*Damages—Infant Child of Deceased—Re-marriage of Widow—Financial Position of Deceased and Child's Stepfather similar—Whether Child's Dependency ceased on Mother's Re-marriage.* On January 15, 1951, the deceased was killed during the course of his employment with the defendants who admitted their liability for negligence. At the date of his death the deceased had an infant daughter aged four months. On September 17, 1951, the plaintiff, the widow of the deceased, re-married. Her second husband was in a financial position similar to that of the deceased (he earned £8 10s. weekly) and treated his stepchild with kindness and generosity. In an action for damages under the Fatal Accidents Acts, 1846 to 1908, on behalf of the plaintiff and the child, the child was awarded damages (£36) in respect only of the period between her father's death and her mother's re-marriage on the ground that the dependency of the child ceased wholly on the plaintiff's re-marriage. On appeal, *Held*, (i) if the defendants were to escape liability for damages to the child in respect of any period after the wife's re-marriage the burden was on them to show that in all reasonable probability the child could not thereafter suffer damage as result of her father's death, and, (ii) the defendants had not discharged this burden because the moral obligation of a stepfather to provide for the child was not the financial equivalent of the legal obligation of a father so to provide and because of other possibilities, such as an increase of the family and consequent financial claims on the stepfather of his own children; accordingly the damages awarded in respect of the child would be increased from £36 to £200. (*Peacock* v. *Amusement Equipment Co., Ltd.*, [1954] 2 All E.R. 689, considered.) Appeal allowed. *Mead* v. *Clarke Chapman & Co., Ltd.* [1956] 1 All E.R. 44 (C.A.)

## WORKERS' COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

*Murder—Death by "accident"—Causal Connection between Employment and Worker's Death to be established—If risk of Murderous Assault reasonably incidental to Particular Employment, Accident to be treated as having arisen "out of" the Employment—"In the course of" the Employment—Workers' Compensation Act 1922, s. 3.* Death by murder is death by "accident" within the meaning of the Workers' Compensation Act 1922, (*Trim Joint District School* v. *Kelly*, [1914] A.C. 667, 7 B.W.C.C. 274, followed.) To establish that the worker's death arose "out of" the worker's employment, there must be seen to be some causal connection between the employment and the worker's death. In deciding whether the murder arose "out of" the employment, regard is to be had to the question whether there was some special risk of murderous assault arising from the employment. If what occurred might be looked on reasonably as a risk incidental to the particular employment, then the accident should be treated as having arisen "out of" the employment, but not otherwise. (*Mitchinson* v. *Day Bros.*, [1931] 1 K.B. 603; 6 B.W.C.C. 190, followed. *Johnstone* v. *Johnstone*, (1910) 13 G.L.R. 305, and *Smith* v. *New Zealand Express Co., Ltd.*, (1914) 16 G.L.R. 602, applied. *Ruth* v. *Union Steam Ship Co., Ltd.*, [1953] N.Z.L.R. 218, and *Nisbet* v. *Rayne and Burn*, [1910] 2 K.B. 689; 3 B.W.C.C. 507, referred to.) For a worker to be "in the course of his employment" it is not necessary that he should be under a particular duty to do the thing which he is doing at the time of the accident, nor is it necessary that he should be actively working at the time of the accident. The decision is each case must depend on the particular circumstances surrounding the employment, and regard must be had to the terms of the employment and to its incidents. (*Davidson & Co.* v. *Officer*, [1918] A.C. 304; 10 B.W.C.C. 673, and *St. Helen's Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59; 16 B.W.C.C. 230, followed.) *Public Trustee* v. *Henderson and Pollard, Ltd.* (Comp. Ct. Rotorua. October 19, 1955. Dalglish J.)

*Temporary Suspension of Employment—Worker, while employed as Rigger, after dropping Two One-pound Notes, leaving Roof of Building where He was working and going on to Roof of Lower Building to search for Them—Worker falling through Such Roof and killed—Worker going on Lower Roof for His Own Purposes unconnected with His Employment—Employer not liable for Compensation—Workers' Compensation Act 1922, s. 3.* At the time of his death, the deceased worker was employed by the defendant company, as a rigger. On April 7, 1954, at about 6 p.m. the deceased worker, who was on the roof of the main building, on which the defendant company was carrying on a contract, was dismantling scaffolding and preparing it for lowering from the roof. The main building was a high building behind which, on the south side, there were lower buildings roofed with fibrolite or asbestos sheeting. The deceased dropped two £1 notes. The breeze carried them over the parapet of the roof of the main building on to the roof of the lower buildings. The deceased descended a fire escape down the side of the main building, and, from a platform some distance down that fire escape, he obtained access to the roof of the lower buildings. He fell through that roof on to the floor of a store beneath. As a result of the injuries suffered in this fall, the worker died. In an action by the deceased's widow for compensation under the Workers' Compensation Act 1922, *Held*, That it was not part of the deceased worker's employment to go on to the roof of the lower buildings to search for his lost money, and he went there entirely for his own purposes unconnected with his employment; so that at the time of his accident, he had temporarily suspended his employment while he pursued some excursus of his own, and, consequently, the accident did not "arise out of and in the course of" his employment. (*Lancashire and Yorkshire Railway* v. *Highley*, [1917] A.C. 352, 10 B.W.C.C. 241, followed. *McLaughlan* v. *Anderson*, [1911] S.C. (Ct. Sess.) 529; 4 B.W.C.C. 376, and *Strong* v. *John Wright and Co.*, [1922] S.C. (Ct. Sess.) 515; 15 B.W.C.C. 307, distinguished.) *Swan* v. *William Cable, Ltd.* (Comp. Ct. Wellington. October 4, 1955. Dalglish J.)

# THE LATE HON. E. P. HAY.

**Tributes to His Worth and Service.**

The late Hon. E. P. Hay, who died on December 31, was a Judge of the Supreme Court from January, 1949, until his regretted retirement, owing to ill health, in February of last year.

On January 30, before the commencement of the year's Sittings, the Wellington Supreme Court was filled to capacity by members of the profession, which was a tribute in itself to the qualities and worth of a much-loved Judge.

On the Bench were The Chief Justice, Sir Harold Barrowclough, Mr. Justice Hutchison, Mr. Justice Cooke and Mr. Justice McGregor, and with them were the Hon. Sir David Smith, Hon. Sir Robert Kennedy, and Hon. Sir Arthur Fair. Also attending were the Judge of the Compensation Court, Judge Dalglish; and the Judges of the Court of Arbitration, Sir Arthur Tyndall and Judge Stilwell. All the Wellington Magistrates were also present in Court.

His Worship the Mayor of Wellington, Mr. R. L. Macalister, who for many years was a partner of the late Judge, attended in his official capacity. The late Judge's widow and members of his family were present.

### The Judiciary's Tribute.

His Honour the Chief Justice, addressing those present, said:

"Before the Court enters upon its normal business, I wish to make reference to the passing of one who, for six years, sat upon this Bench and whose absence from it now we all deeply deplore. The Hon. Ernst Peterson Hay was appointed as a Judge of this Court in January, 1949, and for six years he served the cause of Justice most faithfully and well. We were all greatly distressed when a year ago the state of his health compelled him, unwillingly, to retire from the office he had so nobly and honourably held. It was with a deep sense of disaster and of real personal loss that we learned of his death.

"I see before me a very full representation of the Bar and of the legal profession of this Dominion. Your attendance in such strength is a silent but eloquent tribute to the memory of the man who was so great an ornament to our profession; and I know that some of you will presently speak, on behalf of you all, of the high regard in which the late Judge was held. It is my sad privilege to express, if I can, the sentiments of my brethren now on the Bench, and of those who have retired from it. I am supported here by all the Wellington Judges, except two, who are now away on circuit duties. Both of them have asked me to say how much they regret their inability to be present, and how sincerely they would concur in any tribute that may be paid to-day to our former colleague and great friend. I am supported also by the presence with us on the Bench of three former Judges of this Court; and I have a letter from another retired Judge whose illness prevents his attendance here in person.

"But I know I speak for all the Judges and for all those who have sat here before my time and are now retired. On their behalf, and for myself, I wish to say that our late brother has left behind him a record of judicial service of which we all are proud. He was indeed a man learned in the law, but he was also a man knowledgeable of human nature—of its nobilities and its weaknesses. He was a fair and kindly man, loath to discern the dishonesties that are so often suspected and alleged by less tolerant people, and ever ready to recognize merit and honesty of purpose in litigants and their witnesses. In no cause that was tried before him did any party have reason to complain that his version of the matter did not receive just and fair and benevolent consideration. In short, we have lost a great Judge and a good Judge, and little more than that need be said in praise of any member of the Judiciary.

"But there is much more that can be said, and which I must say, and say with gratitude and warm appreciation. In his relations with his colleagues, our late brother was a very Bayard of courtesy, kindliness, and consideration, a man *sans peur et sans reproche*. His constant anxiety was to ensure that he took upon his shoulders a fair share of the burden of judicial work, and it was with the greatest difficulty, especially during the last few months before his retirement and when he was already a very sick man, that we could dissuade him from doing his full share, and much more than his full share, of the work that had to be done. Nothing was too much trouble for him. Nothing could surpass the readiness with which he subordinated his own convenience to that of the Bench as a whole. We have lost not only a great Judge but a great friend—a most helpful and considerate friend.

"There is one further tribute which I have been asked to pay, and which I very gladly pay, to the judicial work of Ernst Peterson Hay. I have already referred to the cordiality of his relations with his brother Judges. He was equally cordial, equally helpful and kindly, in his relations with the staff of this Court and of the Courts which he visited on circuit. The Registrars and Deputy-Registrars of those Courts have asked me to express their deep appreciation, and the appreciation of their staffs, of the great help and the many kindnesses which he so readily accorded to them.

"In speaking of our own grief and sense of loss, we do not forget the deeper grief and greater sense of loss that must be felt by those who were nearest and dearest to him. To his widow and to the members of his family we extend our sincerest sympathy. I trust that it may afford them some measure of consolation that they have been here to-day and have heard in what high regard the late Judge was held by those who were associated with him throughout his long and distinguished career, both as a practising member of the profession and as one of Her Majesty's Judges of this Court."

### The Attorney-General.

The Attorney-General, the Hon. J. R. Marshall, was the next speaker. He said:

"I would like to speak of the late Mr Justice Hay not only as a lawyer, but particularly as a citizen. My learned friends, Mr Cleary and Mr Hogg, will speak more particularly of his contributions to the profession.

## LEGAL ANNOUNCEMENTS.

*Concluded from page iv.*

H. W. Dowling, C. E. Weston Wacher, and A. K. Monagan who have hitherto carried on practice as Barristers and Solicitors under the firm name of Dowling, Wacher and Co., Browning Street, Napier, wish to announce that as from the 1st April, 1956, they have been joined in partnership by Brian Grossman, LL.M. The practice will continue to be carried on at the same address and under the former name of DOWLING, WACHER AND CO.

Consequent upon the recent retirement of Mr C. M. Rout, the practice formerly carried on at Nelson under the style of GLASGOW, ROUT & CHEEK will be continued, as from the first day of April, 1956, by the remaining partners, Messrs J. Glasgow and W. J. Glasgow, under the style of GLASGOW & SON.

We have a vacancy for a young man (qualified or unqualified). Special opportunities for investigation and preparation of Supreme Court actions (mainly industrial accidents); lower Court prosecution work, and miscellaneous common law. Position provides varied experience. Liberal salary to suitable applicant.
STRANG, SANDFORD & MCMULLIN,
Solicitors, HAMILTON.

RICHMOND & RICHMOND,
BARRISTERS AND SOLICITORS,
WELLINGTON.
As from Monday, the 19th March, 1956, our offices will be on the 4th Floor, Dolphin Building, 296 Lambton Quay (next to the New Commercial Hotel). Our telephone number remains the same, 42-182 (2 lines), but our Post Office Box Number will be 2694.
RICHMOND & RICHMOND.

The Solicitor-General has asked me if I would associate him in my remarks, as he is absent from Wellington today.

" The late Mr Justice Hay was born in Central Otago and brought up in the Scottish tradition. In his case, as in many others, that was a significant and influential circumstance, and his life and character showed the best that that background can give. It is a belief of that tradition that success is the reward of hard work. From the commencement of his career in the Public Service until its end on the Supreme Court Bench, Mr Justice Hay was a hard worker in the best sense of that word. In the law that means the concentration of the mind in the application of legal rules to human behaviour, and it requires considerable intellectual capacity. It requires great patience and perseverance, the ability to think clearly and to judge honestly. It means laborious days and nights, and its reward is the success that this profession of ours can give. The late Mr Justice Hay earned his success that way.

" Another belief of the Scottish tradition is that a man has a duty not only to succeed but to serve, and the late Mr Justice Hay had a profound sense of responsibility for the welfare of his fellow-men and he sought to discharge that responsibility in many ways. He was Mayor of Lower Hutt, the city in which he lived. He was President of the Wellington Rotary Club. He was a President of the British and Foreign Bible Society. He was President of the Wellington District Law Society. He was one of the Property Trustees of the Presbyterian Church, and he served the Church in many other capacities. These are just a few of the many ways in which he sought to serve the community in which he lived.

" The Scottish tradition in which he was nurtured demands also qualities of moral integrity; qualities which are perhaps easier to admire in others than to attain. I am sure that we all felt we could admire those qualities in Mr Justice Hay; for himself, he would be the last to claim such qualities. He was kindly in his understanding of human weaknesses. He was impatient of imposters. He was without prejudice in administering the law, always ready to temper justice with mercy where mercy would be truer justice.

" Mr Justice Hay in his earlier days was a friend of my father's, and when I first came to Wellington as a student he was the first member of the profession whom I met. I was sent to see him to be guided by his advice; and I think it is perhaps one of the things that many men would like to have said of them : that he was the kind of man that a father would send his son to for advice and for guidance.

" I would like to associate myself and the profession in the profound sympathy that we all feel to Mrs Hay and the members of his family."

### The New Zealand Law Society.

The President of the New Zealand Law Society, Mr T. P. Cleary, said:

" The members of the profession throughout New Zealand wish to associate themselves with the tributes paid to the memory of the late Judge. The news of his death clouded and saddened the New Year for practitioners, for he held a very special place in their esteem and respect, and, one can truly say, in their affection. This was gained at first in his many years of practice amongst them in this city, and was widened and strengthened in the few brief years he served on the Bench.

" We take some comfort in the belief that he knew and prized the high place of honour he held in the regard of his former colleagues. Upon his elevation to the Bench, his fellow-practitioners met in very large numbers to wish him well, and all who were present will recall that there was a demonstration which plainly showed the depth and sincerity of their feelings of loyalty and regard towards the new Judge. It was this tribute from his colleagues that he valued more than any rewards of office in civil or professional life. To adopt his own apt reference, what he prized most was ' not the wreath, nor the statue ; nor the welcome of the city ; but the strict verdict of his equals '.

" Mr Hay was in public practice for over thirty years. As time went on, he served his brethren in increasing measure in Law Society affairs. In the New Zealand Law Society, he was for very many years a member, and for a long time chairman, of the management committee of the Guarantee Fund. He was for several years a member of the Standing Committee of that Society. At the time of his appointment to the Bench, he was also serving on the Conveyancing Committee and the Disciplinary Committee. Work on all those committees carried responsibility and anxiety; but Mr Hay gave freely of his time and talents, and he discharged a great volume of work with conscientious fidelity.

" But it was not merely because of this long and valuable service to his brethren in the law that he was held in such high esteem by them. Nor was it merely because of his self-sacrificing public service, nor even because of the outstanding qualities he had already displayed as a Judge before his tenure of office was cut short. What did gain him such a high place in ' the ' verdict of his equals ', was the character of the man, which was based on his own exacting standards of conduct and high code of honour, and which shone through all he did whether in practice or in public affairs or on the Bench. He who was always considerate and thoughtful towards others was his own most severe taskmaster. It was characteristic of him that, with the onset of illness, he struggled against any relaxation of those judicial duties in which he had never spared himself. When retirement from the Bench became inevitable, he fought valiantly to regain at least a measure of his former health and strength. That this was denied him may well have been due to the way he had spent himself over the years in the service of others.

" We commemorate today a practitioner whose unaffected sincerity made him the friend of all ; a Judge of distinction and of humanity ; but, above all, a man of complete integrity. *Integer vitae scelerisque purus.*

" Mr Hay's partner of nearly thirty years, Mr O. C. Mazengarb, is unable to be present today, but wishes to be associated with all that is said in honour of his late friend.

" We have watched, with sympathy and with admiration, the way Mrs Hay bore the trying time of her husband's lengthy illness. To her, and to all the members of the family, we extend our respectful condolences."

### The Wellington Law Society.

The President of the Wellington District Law Society, Mr E. T. E. Hogg, said :

" Members of the profession in Wellington are grateful for the opportunity afforded them of taking part in this public reference to the death of the late Mr Justice Hay. They are grateful because, as is well known to you all,

he spent the greater part of his life here, and he entertained at all times our highest respect and our deepest affection.

"On behalf of the Wellington District Law Society, I desire to associate myself respectfully with the tributes which have been paid by His Honour the Chief Justice, by the Attorney-General, and by the President of the New Zealand Law Society. At the risk, however, of some degree of repetition, there is something, some little, that I wish to add.

"Ernst Peterson Hay, after serving for seventeen years in the Public Trust Office, where he attained the position of Office Solicitor, went into private practice in Wellington where he remained until his elevation to the Bench in 1949. In the course of his practice, he attained a wide reputation for ability, integrity, and, above all, for humanity; and his elevation to the Bench was received with the highest approbation by both the legal profession and the public. The qualities which I have referred to stood him in good stead in his all too short period on the Bench. As the Attorney-General has said, he showed himself there patient but firm, kindly and charitable in his understanding of human nature, impatient with imposters, but able to temper justice with mercy; but with all, of clear and sound judgment. As you yourself have said, Sir, his resignation from the position of a Judge of this Honourable Court was indeed a severe loss to us all.

"Were this all that might be said of him it were much, but, before Mr Hay had gone on the Bench, he had earned a position in the community which was far beyond the ambit of the legal profession. His whole life was governed by a strong sense of responsibility to the community, and by the highest ideals in the conduct of his private life and towards his participation in public affairs. He took the fullest part in affairs that might be expected of a worthy citizen. As the Attorney-General has said, in the Church he loved, he held the highest office. During the War he took his full part in those duties which were available to him, being a chairman of one of the Armed Forces Appeal Boards, and chairman of the E.P.S. organization in Lower Hutt.

"During the course of a busy life, he never felt himself unable to take part in a community effort which he considered to be of value. As was to be expected of such a man, he had a long and meritorious service in local body affairs. In a period when Lower Hutt was in a state of transition from a small town to a city, services such as his were of inestimable value, and it was inevitable that, after some years of service on the Council, he became Mayor of his city, which office he held from 1944 to 1947. The whole district owes much to his balanced judgment and far-sightedness. It is fitting, therefore, that as far as Lower Hutt is concerned, that when a mural to the new War Memorial Library is completed, his features and his robes will be delineated and will be recognized by citizens of his city as depicting Justice and all that it stands for.

"Within the domestic circle of the Law Society he also played his part, serving on the Council of the Wellington District Society, and, in 1933, becoming its President. As a member of the New Zealand Law Society, and particularly on its Disciplinary Committee, he gave invaluable service.

"Mr Hay is widely mourned. I can do no better than to say of him in the words used by the Minister of his own Church, 'He was a good man, a wise Judge, and a leader among the people'.

"I join the Wellington District Law Society in offering to his widow and family our deepest sympathy."

# STAMP DUTIES: TRANSFERS FROM TRUSTEES TO BENEFICIARIES.

## Transfer from Liquidator to Shareholders of Company of Assets.

By E. C. Adams, I.S.O., LL.M.

### Introductory.

It is somewhere recorded in *Hansard* that the late Sir John Salmond once observed that questions arising out of stamp duty were some of the most difficult and complicated on which he was asked to advise during his term of office as Solicitor-General. No part of the Stamp Duties Acts has caused more controversy and litigation than s. 81 (*d*) of the Act of 1923 (now s. 69 (*d*) of the Stamp Duties Act 1954) and cognate provisions of the earlier Acts. This particular provision has recently been considered by the Supreme Court and the Court of Appeal in *Shaw Savill and Albion Co., Ltd.* v. *Commissioner of Inland Revenue*, [1956] N.Z.L.R. 211.

I shall deal with this case, which is of great interest and importance to the conveyancer, under two headings: (*a*) As it was dealt with in the Supreme Court; (*b*) As it was dealt with in the Court of Appeal.

### I. Supreme Court.

The relevant statutory provision reads as follows:

> The following conveyances shall be exempt from conveyance duty:— . . . .
>
> (*d*) A conveyance by a trustee, executor, or administrator to a beneficiary, devisee, legatee, appointee under a power of appointment, or successor on an intestacy, of property to which such beneficiary, devisee, legatee, appointee, or successor is entitled under the trust, will, or intestacy, to the extent to which he is entitled.

This difficult provision is very minutely, and, it is respectfully submitted, accurately analyzed by F. B. Adams J., in the Court of first instance.

Counsel for the tax-payer submitted that, as a *bare legal* title was being conveyed, and that, as duty had to be assessed on the value of the interest conveyed, no *ad valorem* duty was payable, but this particular argument was rejected. It is difficult to see how it could

have been accepted by the Court. In England, conveyances in which no beneficial interest passes in the property conveyed or transferred, are expressly exempt from *ad valorem* duty. But there is no similar exemption under our law. In New Zealand, a transfer is exempt from *ad valorem* stamp duty to the extent of any property which is liable to gift duty; but if no gift duty is payable, the transfer is liable to *ad valorem* conveyance duty on the value of the property conveyed, unless it can be brought within one of the statutory exemptions. Even if gift duty is payable a transfer may be liable to *ad valorem* stamp duty in respect of any property or consideration in respect of which gift duty is not payable. For example, a transfer of property to the trustees of an ante-nuptial marriage settlement being exempt from gift duty is liable to *ad valorem* stamp duty, although no beneficial interst may pass to the transferee.

The main argument on behalf of the tax-payer was that the transfer was by a company and/or the liquidator as *trustee* to the sole shareholder of the assets of the company *in specie*, and that the transferee was accordingly entitled under a trust to the entire beneficial interest. Counsel for the Crown on the other hand submitted that the relationship between the parties to the transfer was not that of trustee and beneficiary under a trust within the meaning of the relevant statutory provision. The Crown therefore sought to introduce what appears to the writer to be a narrow construction: the taxpayer contended for a much wider application of the relevant exemption. During the course of the argument, counsel for the Crown made rather a startling submission. He contended that s. 81 (*d*) is applicable only to *express* trusts, and that constructive trusts cannot come within its meaning. But His Honour rejected this submission. He said:

> The subsection does not speak of "express" trusts, and the process of adding words to a statute is always dangerous. In the present instance, as will appear below, I think there is a limitation which must be implied into the subsection by reference to its purpose and context; but subject to that limitation, I am of opinion that a constructive trust, like any other trust, is within the meaning. Subject to that limitation, if A has become the legal owner of property in any circumstances which, quite apart from any express trust, render him in equity a bare trustee of that property for B, I can see no reason why the subsection should not apply to the conveyance which A is bound to make.

It may be apposite to point out here that it has been held in England that satisfaction of a dividend or a reduction of capital by transfer of assets *in specie* is liable to *ad valorem* conveyance duty. This was so held in *Associated British Engineering, Ltd.* v. *Inland Revenue Commissioners*, [1941] 1 K.B. 15, and *Wigan Coal and Iron Co., Ltd.* v. *Inland Revenue Commissioners*, [1945] 1 All E.R. 392. These two cases are referred to and discussed by His Honour, and it is interesting to read the following comment on them by a very recent authority, *Munroe's Stamp Duties*, 4 (*a*):

> It should be noted that the Judge in each of these two cases used language which suggested that if he had thought the dividend resolution or the order confirming the reduction had created a trust in favour of the shareholders he might have reached a different conclusion.

But it has not been the practice in England to charge *ad valorem* stamp duty on the transfer of assets *in specie* by the liquidator for a company to shareholders in satisfaction of their rights in a winding-up.

The question whether or not there is a *trust* within the meaning of the exemption must always be to some extent a question of fact. The exemption has to be read in its context and with reference to the general purpose of the statute to exact duty upon conveyances on *sale*. His Honour thought that there was much to be said in favour of counsel for the Crown's suggestion that the exemption applied only to "voluntary conveyances" and to conveyances which are deemed voluntary to a partial extent.

"Voluntary conveyance", for the purposes of the Act, means a conveyance of property otherwise than for valuable consideration. As previously pointed out by His Honour, the words of the exemption "to the extent to which he is entitled" show that a conveyance or transfer may be partly within and partly outside the exemption, some consideration being given in respect of which duty is assessable. His Honour emphasized that it cannot have been intended that a transfer which is in reality a conveyance on sale should be exempted from *ad valorem* duty merely because the transaction is carried out in such a way that there ultimately arises a situation in which the legal owner of the property has become a bare trustee for the other party. The duty cannot be evaded "by paying your money first, and executing your deed afterwards": per Channell J., in *Garnett* v. *Inland Revenue Commissioners*, (1899) 81 L.T. 633, 638. But where is the dividing-line to be drawn?

> The test that seems to emerge ... appears to be whether there is a completely independent transaction, that is to say, whether the ultimate conveyance in pursuance of a "trust" is sufficiently severed from any prior transaction for value, or from any consideration given, to be regarded as an independent transaction.

There was no doubt that the transferee at some stage gave value for the transfer, and that the transfer was in no sense a gift. But in His Honour's opinion the consideration so given was *too remotely* related to the situation which arose when the sole shareholder demanded the transfer from the liquidator. He said:

> I think that the proper view is that the property then already belonged to the appellant beneficially, and that a simple trust arose, not from any prior transaction for value, but from circumstances which, for present purposes, were independent and severable.

The crucial facts in this case were that in the year 1947 Inglis Buildings, Ltd., was incorporated as a private company. The object clause of the memorandum of association included a specific power "to distribute among the members in specie any property of the company". Later in the same year, Shaw Savill & Albion Co., Ltd., purchased all the shares, and all but three of the shares thereupon became and continued to be, to the date of the transfer to be assessed for stamp duty, registered in that company's name, the remaining three being registered in the name of its nominees.

By special resolution passed in December, 1951, the company went into voluntary liquidation and a liquidator was appointed. All the debts of the company having been discharged, the Shaw Savill Company requested the liquidator to transfer the property to it. The value of the assets transferred was ascertained by special valuation made under s. 74 of the Stamp Duties Act 1923 (now s. 60 of the Stamp Duties Act 1954) to be £42,000; and, in purported pursuance of s. 79 (*a*) of the 1923 Act (now s. 66 (*a*) of the present Act), the Department assessed the duty at £462.

It is a matter of interest to the conveyancer to observe how the transfer was worded. It correctly recited all

the relevant facts : the winding-up ; the appointment of the liquidator; that the Shaw Savill Company held 12,497 of the shares in the company ; that the remaining three shares were held by named persons in trust for that company ; that all the debts of the company had been discharged ; and that that company, being entitled beneficially to all the shares, had requested the liquidator to transfer the property to it in lieu of selling it. The transfer purported to be by the company by direction of the liquidator, the liquidator confirming the transfer.

The tranfer was clearly a conveyance as defined in the Stamp Duties Act 1923, where it was defined as follows :

> " Conveyance," " transfer," or " assignment " means the transfer of any property from one person to another, whether by the owner of that property or by any other person in the exercise of a power of sale, power of appointment, or otherwise howsoever.

The facts of this case were strikingly similar to those in *Drapery and General Importing Co. of New Zealand, Ltd.* v. *Minister of Stamp Duties*, [1925] G.L.R. 58. That case, however, was decided on the previous law. In the instant case, the Crown submitted that the principle of that case no longer applied to the 1923 statute, which as to the relevant exemption is the same as the present (1954) Act. The wording of the relevant exemptions in the two cases was different ; but all cases decided since the 1923 Act came into force seem to point in one direction ; that is, that the 1923 Act did not in practical effect alter the law as regards the exemption from *ad valorem* duty of transfers in favour of beneficiaries under trusts.

In *Drapery and General Importing Co. of New Zealand, Ltd.* v. *Minister of Stamp Duties, supra*, the liquidator of a company, all the shares in which had become vested in that company (generally called the " D.I.C."), conveyed and assigned certain freehold and leasehold lands to the D.I.C. in pursuance of an arrangement whereby the D.I.C. undertook to pay the debts owing by the company in liquidation. The Full Court held that the conveyance and assignment were conveyances on sale, but only to the extent of the consideration involved in the undertaking for the payment of the debts, *ad valorem* duty being payable accordingly only on that consideration. The Crown submitted in that case that *ad valorem* duty was payable on the value of the properties transferred ; but the Court held that, as to the difference between the value of the debts and the value of the properties, the documents were exempted from such duty by the exemption then prevailing.

The recent case, *Shaw Savill and Albion Co., Ltd.* v. *Commissioner of Inland Revenue, supra*, shows that the principle of the *D.I.C.* case still applies to the present legislation, as suggested by the writer of this article in his text-book on *The Law of Stamp Duties in New Zealand*, 2nd Ed., 96.

It is useful, therefore, to make a brief examination of the authorities applied by the Full Court in that case.

*Macleod* v. *Commissioners of Inland Revenue*, (1885) 12 R. (Ct. of Sess.), 1045, was concerned with the distribution of the assets of a partnership. The plaintiff and one Wilson were partners in a trading concern and dissolved partnership. Wilson continued the business and handed over to the plaintiff a heritable security for £8,000 and cash to make up one-half of the partnership capital. The Inland Revenue Commissioners assessed the assignment of the security as a conveyance on sale ; but on appeal the assessment was set aside on the ground that the transfer was not a sale but a partition or division. In New Zealand, however, there is a special section dealing with partitions of *land* only (s. 102 of the 1923 Act and s. 91 of the 1954 Act) and therefore *Macleod's* case may not apply to our present law in New Zealand.

Very much in point in the *D.I.C.* case was *McIlraith* v. *Commissioner of Stamps*, (1906) 25 N.Z.L.R. 949; 8 G.L.R. 554. In that case a testator devised certain lands to trustees, upon trust to sell and to stand possessed of the proceeds, upon trust for his son absolutely, subject to a rent-charge to the testator's widow, and also subject to certain other charges upon contingencies which did not arise. The son arranged with the widow to release the rent-charge, giving her another security, and, having elected to take the land itself in lieu of the proceeds, requested the trustees to transfer the land to him, which they did. The Court held that the transfer was not liable to *ad valorem* duty, because the son took the land as a devisee under the will, the transfer being made bona fide by way of completion of his title. *Thompson* v. *Commissioner of Stamp Duties*, [1926] N.Z.L.R. 872 ; [1926] G.L.R. 447, 580 (decided under the 1923 Act), is really based on the principle of *McIlraith's* case. In *Thompson's* case, the residuary estate was held in trust for two sons : one son bought the other out, and it was held that *ad valorem* duty was payable only with respect to the consideration moving from the purchasing son to the vendor one, plus one-half of the legacies and debts which the vendor was responsible for.

But, it is submitted, the most relevant case applied by the Full Court in the *D.I.C.* case was *Morrison* v. *Commissioner of Stamps*, (1907) 26 N.Z.L.R. 1009 ; 9 G.L.R. 414, 621 (which was distinguished by the Court of Appeal in *Thompson's* case, (*supra*) ). In that case, there was an imperative trust for sale and conversion, and, subject to certain legacies and annuities, the residue was given to testator's four sons. Two of the sons, having become entitled to the residue, requested the trustees to convey the real estate then subject to a mortgage to the trustees to secure the legacies and charges and this was done. The Government value of the land was £74,383, and the legacies and charges amounted to about £50,000. The Commissioner assessed the duty as on a conveyance on sale for £74,383. The Court of Appeal held that the conveyance was a conveyance on sale but the stamp duty was payable only on £50,000. The Court further held (and this was the really important part of the judgment) that, if at the date of the deed the legacies and other moneys had been paid and the annuities provided for, so that the proceeds of the land, if sold, would have belonged to the transferees absolutely, they would have been entitled to demand a conveyance from the trustees which would have been free from *ad valorem* duty. Again there emerges the principle of *McIlraith's* case (*supra*), and the application of *McIlraith's* case by Sir Charles Skerrett C.J. in *Thompson's* case, [1926] N.Z.L.R. 872, 876 ; [1926] G.L.R. 447, 449, is worthy of the closest attention :

> It is, in my opinion, quite clear that the two residuary devisees were entitled, with the consent of the creditors of the estate and all the legatees under the will (all being of age), to elect, before the exercise by the trustees of the power of sale, to take the land itself and all the other assets of the estate *in specie*. This right would subsist even if the will had created a trust for sale and conversion instead of merely giving to the trustees, as it does, a power of sale.

## II. The Court of Appeal.

It is pointed out by Shorland J., in the course of his judgment in the Court of Appeal, that the Crown conceded (and in His Honour's opinion, rightly conceded) that the word "trust" in the exempting subsection could not be confined to an express trust, but extended to a constructive trust. His Honour added :

> The word of the subsection being "trust", I think that it must be so construed, and it cannot be construed as "express trust" or some particular form of trust.

The members of the Court of Appeal unanimously held that the appeal by the Crown should be dismissed ; but the Australian case, *Archibald Howie* v. *Commissioner of Stamp Duties*, (1948) 77 C.L.R. 143, appears to have given the members of the Court much anxious thought : apparently it was greatly relied on by the Crown. In that case, the company, having the necessary power, resolved to reduce its capital by distributing *in specie* among its members, at book values, certain shares held by it in other companies. The question was whether the transfers were dutiable : (*a*) as conveyances without consideration in money or money's worth, or (*b*) as conveyances upon a bona fide consideration in money or money's worth of less than the unencumbered value, or (*c*) as conveyances upon a consideration in money or money's worth of not less than the unencumbered value. The last, which, as Hutchison J. points out, was the one contended for by the tax-paying company, was held to be the true basis.

Hutchison J. expresses surprise that the Crown in the *Shaw Savill* case should have relied on this Australian case for its assessment of duty on the value of the property, for, if the principle of that case applied, the duty should be levied on the amount of the consideration value, which would be the amount of the capital of the company, i.e., on £12,500, which would have made the duty payable, £137 10s. 0d. Whereas, as previously pointed out in this article, the Crown had assessed duty on the value of the property (£42,000) at £462. His Honour is not quite sure that it could have not been successfully argued that the transfer was liable to a duty of £137 10s. 0d.; for, although obviously enough there is a difference between the position of a company *in liquidation and that of a company carrying on* business, at the same time, it might be difficult to see why the view of the High Court of Australia, if that were to prevail, should not be applicable after liquidation as well as before liquidation. However, His Honour concluded his judgment thus :

> The view that I have expressed of the effect of the *Archibald Howie* case is one that has impressed itself on me in my consideration of this case. It was not put forward in the argument and may therefore be entirely ill-founded. Even if it were well-founded, an application of it could affect the case to a small extent only. My brethren being of the opinion that the appeal *fails altogether*, my proper course, I think, is not to consider dissenting from that simply because, on my view, it was arguable, though not argued, that a small amount of ad valorem duty was payable.
>
> I therefore agree that the appeal be dismissed with the consequences as to costs proposed by Stanton J.

In the course of a short judgment, which quickly gets to the kernel of the matter, Stanton J. said :

> I was at first inclined to think that it was difficult to rebut the logic of the judgment of the High Court of Australia, particularly the judgment of Dixon J. in *Archibald Howie Pty., Ltd.* v. *Commissioner of Stamp Duties*, (1948) 77 C.L.R. 143, and that such a transaction as the present one was a "conveyance on sale.". On consideration, however, I have come to the conclusion that, so far as the High Court relied on the original purchase price of the shares as constituting consideration for the subsequent transfer of assets, that consideration is too remotely connected with the later transfer to allow it to be regarded as the consideration for that transfer ; and that, so far as the High Court found a consideration in the subsequent transaction itself, the same reasoning and results did not apply in the case of a transfer made in the course of liquidation and in the circumstances here present. I agree, therefore, with the conclusions of the trial Judge and of Shorland J. on this ground and have nothing to add to what they have said.

Shorland J., after a minute examination of the above-cited Australian case and the English cases of *Wigan Coal & Iron Co., Ltd.* v. *Inland Revenue Commissioners*, [1945] 1 All E.R. 392, and *Associated British Engineering, Ltd.* v. *Inland Revenue Commissioners*, [1941] 1 K.B. 15 ; and, after expressing the opinion that, if the Shaw Savill Company gave valuable consideration for the transfer, it could not be exempted under s. 81 (*d*), said :

> In my view, the respondent [i.e., the transferee] in the present case became entitled to have the memorandum of transfer executed in its favour for no reason other than that it had become the beneficial owner of the land in question. No doubt the respondent gave value for its shares, but the rights represented by its shares did not confer beneficial ownership (or any legal right thereto) in land of which the company (a legal entity distinct from its shareholders) held both the legal estate and (until the passing of the resolution for voluntary liquidation) the full beneficial ownership.

His Honour goes on to point out that, when the liabilities of the company had been discharged, its assets then stood charged pursuant to s. 243 of the Companies Act 1933 with the statutory duty of being distributed among its members. Finally, as the memorandum of association provided for distribution among the members, of property of the company *in specie*, the members being then entitled to call for distribution *in specie* in lieu of proceeds on realization, did so ; with the result *that from that moment* the company and the liquidator were bound to convey the legal estate which was all that remained vested in the company. Now this is really the *ratio decidendi* of the decision of the Full Court in the *D.I.C.* case (*supra*), which, as we have previously noticed in this article and which is pointed out by Hutchison J. in the *Shaw Savill* case, was arrived at by a consideration of the trustee-beneficiary cases set out in that judgment.

It is indeed refreshing to find the Court of Appeal supporting these long established trustee-beneficiary cases. This is all to the good : alterations in stamp law (as in other taxation branches) should not be inferred. The principle of *stare decisis* should, it is submitted, be applied wherever possible to precedents which have stood unchallenged for a long period of time. It is important that the solicitor should be in the position of being able to advise his clients with a certain amount of confidence on the taxation effect of their contemplated business dealings. What the Court of Appeal has decided in the *Shaw Savill* case, and in earlier cases decided since 1923, is that, although the relevant exemption in the 1923 Act (now the 1954 Act) is differently worded than the corresponding exemption in the earlier Acts (on which most of the trustee-beneficiary cases were decided), in effect there has been no alteration to the law.

Shorland J. proceeds as follows :

> In my view, once the respondent had required distribution in specie, the beneficial ownership which had been taken out of the company by virtue of the operation of s. 243 of the Companies Act 1933 was to be found in the respondent, and the company, holding as it did the bare legal estate, the relationship of cestui que trust and trustee arose between the respondent and the company. It was urged that the relationship between the company and the respondent which arose by

virtue of the operation of s. 243 was no more than that of debtor and creditor; but, in my view, this submission fails to notice that, before the giving of the transfer, the respondent had become more than a creditor—it had become beneficial owner of property of which the company retained the bare legal estate.

The various judgments recognize the clear distinction between a case of either a reduction of capital or the issue of a bonus distribution in which cases the company continues in operation, and the case of a distribution consequent on winding-up : the *D.I.C.* and *Shaw Savill* cases are examples of the latter.

In *6 Halsbury's Laws of England*, 3rd Ed., 681 (*i*), the relevant English stamp duty law and practice is summed up thus :

(*i*) Where there is an agreement to distribute surplus assets in specie, the company is a trustee thereof for the shareholders (*Re Strathblaine Estates, Ltd.*, [1948] Ch. 228; [1948] 1 All E.R. 162). *Ad valorem* stamp duty is not in practice charged on such distributions where they correspond with the rights of shareholders to surplus assets; but it is charged on distributions in specie whilst the company is a going concern (see p. 406, *ante*, and *Associated British Engineering, Ltd.* v. *Inland Revenue Commissioners*, [1941] 1 K.B. 15; [1940] 4 All E.R. 278), the company being in the latter case not a trustee but a debtor in respect of the assets to be distributed (see note (*d*), p. 599, *ante*).

In England, on a distribution of assets to shareholders, when the company is not in liquidation but is continuing its operations, the transfers or conveyances are treated as voluntary conveyances; and *ad valorem* duty is accordingly charged on the value of the assets transferred. It is submitted that the consensus of judicial opinion expressed in the *Shaw Savill* case shows that in New Zealand such transfers or conveyances should be assessed as conveyances on sale, the duty, however, being based not on the value of the property transferred but on the amount of share capital involved, that being the true consideration for the transfer. Thus, if the transfer in the *Shaw Savill* case had been as the result of a reduction of capital, the duty would have been £137 10s. 0d. and not £462, which latter figure would be correct, if the English method of assessing as a voluntary conveyance were adopted. Of course the *Shaw Savill* case is not a direct authority on that point, which will doubtless be authoritatively decided in New Zealand sooner or later.

The *D.I.C.* case also shows that, if, on a liquidation, the shareholder before getting a transfer from the liquidator pays or covenants to pay the company's debts, *ad valorem* conveyance duty is payable on the amount of the debts although that consideration may, of course, be apportionable pursuant to s. 54 of the Stamp Duties Act 1954.

Not infrequently it happens that a practitioner when presenting for stamping a transfer to beneficiaries under a will or settlement unexpectedly receives an assessment of *ad valorem* conveyance duty when he had contemplated payment of duty of 15s. only, as a deed not otherwise chargeable.

In such circumstances, the practitioner should very carefully consider the principle of the cases cited in this article ; and, if he has any doubts as to the correctness of the assessment, he should within twenty-one days of the assessment appeal to the Commissioner of Inland Revenue. (It is necessary to forward a reference fee of 5s., and it is always preferable to refer to the cases relied on by the appellant.) It is not usually known by practising solicitors that all such appeals receive the most careful consideration in a judicial manner, whether or not they are eventually taken to the Courts.

From the *Shaw Savill* and *D.I.C.* cases there also emerge principles of company law and practice, and of gift duty law, of great moment to the conveyancer.

Although there is no express power in the Companies Act requiring a liquidator to convert the assets of the company into money, in ordinary cases this is invariably done. But, where the memorandum of association or the articles of association, empower the company to distribute the whole or a part of its assets among its members *in specie*, that the power can be exercised by the liquidator at the request of the members ; and the members can call upon the liquidator to distribute *in specie* the assets representing the surplus after due provision has been made for the payment of all the debts and liabilities and expenses, and for the adjustment of the rights of the contributors. The moral is always to include these powers in the memorandum or the articles.

The principle of gift-duty law which emerges is that the distribution of assets of a company among its members, either by way of bonus or reduction of capital or by the liquidator on the liquidation of the company, is not liable to gift duty.

# UNIVERSITY EXAMINATIONS.

## Companies Act and Annual Examinations.

The University has lately considered the teaching problems involved by the method under which the Companies Act 1955 is going into force. After discussions with the Council of Legal Education and the Education Committee in Accountancy, the University has agreed that many students and teachers will prefer, as a matter of practice, to study the new Act which will come into force (even though possibly amended) just after they have completed their examinations. Other students have already begun work on the 1933 Act, knowing that the 1955 Act is not in force this year.

Agreement has therefore been reached that an examiner who may ask a question affected by the Companies Act will give full credit for the answer received whether that answer is made in terms of the 1933 Act or the 1955 Act.

Should an examiner set a question which must be answered in the light of one of those Acts only, he will set with it an alternative question which may be answered in the light of the other Act.

Students and teachers therefore may work with confidence provided the whole of their work relates consistently to either the 1933 Act or the 1955 Act.

# TOWN AND COUNTRY PLANNING APPEALS.

## Cassidy and Others *v.* Manukau County and Minister of Lands.

Town and Country Planning Appeal Board. Auckland. 1955. April 21.

*Town and Country planning Scheme—Meaning of "undisclosed district scheme"—Application of Town-planning Principles—Each Appeal considered in Light of its Own Facts and Circumstances—Remedies open to Unsuccessful Appellant—Appeal Board not empowered to consider Questions of Hardship—Refusal of Minister to approve Scheme Plan—Whether Appeal to Appeal Board lies—"Town-planning principles"—Town and Country Planning Act 1953, s. 38—Town and Country Planning Regulations 1954 (S.R. 1954/141), Fourth Schedule, cl. 10 (2).*

The term "undisclosed district scheme" as defined in s. 38 (1) of the Town and Country Planning Act 1953, means the scheme which a local authority is required under the statute to prepare, but, if none has been prepared, the scheme which will come into existence when that requirement has been fulfilled.

*Wong* v. *Northcote Borough*, [1952] N.Z.L.R. 417, applied.

In preparing its district scheme, the local authority must have regard to the views of the Regional Authority. If, therefore, the Regional Authority zones land as "rural" and the local authority also zones it, and that zoning is in accord with town-and-country-planning principles, there is at this stage the likelihood of those principles being embodied in the Council's undisclosed district scheme.

Each particular appeal under s. 38 must be considered and decided in the light of the facts and circumstances surrounding it. An unsuccessful appellant still has rights under ss. 23-26 and 38 (9), (10) of the statute. The Town-planning Appeal Board cannot consider questions of hardship. Provision is made in cl. 10 (2) of the Fourth Schedule to the Town and Country Planning Regulations 1954, for a local authority in certain circumstances to consider undue hardship, but this does not come into force until there is in existence a district scheme that has become operative.

The refusal of the Minister to approve a scheme plan under s. 4 of the Land Subdivision in Counties Act 1946 is an administrative act.

*Quaere*, Whether an appeal from such refusal to the Town Planning Appeal Board lies.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). Put shortly, the appellants contend that there cannot be "an undisclosed scheme" until such time as the scheme prepared by a local authority in accordance with the statutory duty imposed on it by the Act has passed out of its embryo stages and is a scheme in being ready for, but lacking, public notification, and that the local authority cannot invoke s. 38 until that stage is reached. This contention is on all fours with the submissions made by counsel for the plaintiff in *Wong* v. *Northcote Borough*, [1952] N.Z.L.R. 417. That case is authority for the proposition, that, under s. 34 of The Town-planning Act 1926, the word "scheme" as it is used in s. 34 (1) is "the scheme which the local authority is under obligation to prepare or has resolved to prepare—a concrete scheme if one has been prepared, but, if none has been prepared, the scheme which will come into existence when the obligation is performed or the resolution implemented; and the phrase covers the period of time from the date when the obligation is imposed or the resolution is passed down to the final approval of a scheme".

As part of his answer to appellant's submissions Mr Smytheman relies, inter alia, on *Wong's* case.

It is clear that *Wong's* case is an accepted authority—see the judgment of Hutchison J. in the *Attorney-General* v. *Prince*, [1953] N.Z.L.R. 540, and the observations of Fair J. in *City Improvements, Ltd.* v. *Lower Hutt City Corporation*, [1954] N.Z.L.R. 493, 497—and, if it is apposite to apply it to s. 38 of the Town and Country Planning Act 1953, then it is binding on the Board.

It follows, therefore, that the Board must examine and compare the relative provisions of s. 34 of the Town-planning Act 1926 and s. 38 of the Town and Country Planning Act 1953. Section 34 speaks of "any local authority . . . under an obligation to prepare a town-planning scheme . . .". Section 38 defines an "undisclosed district scheme" as ". . . . any district scheme . . . which is required under this Act to be prepared".

The words "under an obligation to prepare" and "required to be prepared" are *in pari materia*. Similarly, in s. 34, occur the words "in contravention of town-planning principles" while s. 38 speaks of "any subdivision of land . . . not in conformity with . . . town and country planning principles *likely* to be embodied . . .". Again, the words "in contravention of" and "not in conformity with" are *in pari materia*. It was suggested that s. 38 is more restrictive and should be more narrowly applied than s. 34. The Board takes the view that s. 38 is wider in scope than s. 34. The new definition of "detrimental work" gives local authorities wider powers than they had under s. 34, and the introduction of the word "likely" further widens the scope of their powers. Under the former Act, a local authority could refuse its consent to the erection of any building or the carrying out of any work if it appeared that such erection or work would be "in contravention of town-planning principles".

The Town-planning Act 1926 contains no reference to "subdivisions of land" as does the Town and Country Planning Act 1953, and, under the latter, a local authority can, inter alia, refuse its consent to any subdivision not in conformity with ". . . town and country planning principles *likely* to be embodied . . .".

The language of s. 38 of the Town and Country Planning Act 1953 gives a local authority wider, not more restricted, powers than did s. 34 of the Town Planning Act 1926.

The word "likely" is synonymous with the words "in all probability" or "probably", and these words are if anything of wider import than the words "appear to", and give the local authority more elastic powers.

The Board rules that the respondent Council had jurisdiction to refuse its consent to these subdivisions, and that this Board has jurisdiction to hear and determine appeals.

The Board holds that the decision in *Wong's* case, [1952] N.Z.L.R. 417, is binding on it, and, applying that decision mutatis mutandis to s. 38 of the Town and Country Planning Act 1953, it takes the view that an "undisclosed district scheme" is the scheme which a local authority is required under the Act to prepare, and if none has been prepared the scheme which will come into existence when that requirement has been fulfilled.

The Board now takes the view that the Legislature itself determined what might be called the starting point by enacting s. 1 (2) of the Act, which decrees that the Act should come into force on February 1, 1954.

Mr Wheaton, as part of his submissions, contended that there is still a great difference of opinion as to what town-planning principles are and that this Board is not entitled to conjecture as to what is meant by town-planning principles; but, as Mr Smytheman points out, under s. 2 (1) of the Act, the Board is expressly charged with the duty of determining differences of opinion over principles of town and country planning or likelihood in relation to the inclusion of any provision in a scheme. By virtue of s. 3 of the Act regional planning schemes "shall be designed as a guide to Councils engaged in the preparation of district schemes", and, by s. 4, every local authority is required to adhere to the provisions of any regional planning scheme that is operative in its district.

In the particular cases under consideration, there is not an operative regional scheme in existence but there is in existence a properly constituted Regional Planning Authority; and, as appears from the evidence of Mr Jones, that authority is actively engaged in the preparation of a regional planning scheme. That scheme envisages the zoning of the area in which all the lands under consideration here are situate as "rural". His evidence—and that must be taken as indicative of the present views of the Regional Planning Authority—is

that each of these subdivisional schemes is not in conformity with recognized town-planning principles, and that they constitute an encroachment of urban development on land having an actual or potential productive value.

Now, in preparing its district scheme, the local authority cannot disregard the views of the Regional Authority; on the contrary it is under a statutory obligation to have regard to them. If, therefore, the Regional Authority zones this land as "rural" and the local authority also zones it and that zoning is in accord with town and country planning principles, can it be said at this stage that there is no *likelihood* of those principles being embodied in the Council's undisclosed district scheme? The Board considers there is every likelihood of their being so embodied.

In *Wong's* case, [1952] N.Z.L.R. 417, 422, F. B. Adams J. makes reference to the necessity of the Court being guided by expert evidence. In that case, expert evidence was adduced and was uncontradicted. In these present cases the position is the same.

It was not disputed that the Act encroaches on the rights of the subjects and should be construed strictly; but, as Turner J. stated in *Ideal Laundry, Ltd.* v. *Petone Borough*, [1955] N.Z.L.R. 186, 188, l. 6, ". . . the Town and Country Planning Act, 1953, is a code in itself containing the whole of the law applicable to the formulation, approval, and operative effect of town-planning schemes" and there is nothing in that Act to preclude either this Board from hearing and determining appeals, or the local authority from refusing its consent to the plans under consideration here, provided always that it acts in good faith.

As Mr Smytheman points out, decisions under s. 38 are not final. The powers given to local authorities by that section are designed to afford protection to a local authority's embryo scheme whilst it is in the process of formulation. If there were no such protection, there might well be in any local authority's district a riot of speculative subdivision that could stultify any proposed town and country planning scheme.

An appellant's right of appeal under s. 38 is not as was suggested an empty right. The Board is not prepared to indulge in speculation as to the circumstances under which an appeal is likely to succeed. Each particular appeal must be considered and decided in the light of the facts and circumstances surrounding it.

Furthermore, the dismissal of an appeal under s. 38 is not a final determination. An unsuccessful appellant still has rights under ss. 23-26 and s. 38 (9) and (10) of the Act.

In some of the appeals under consideration, the hardship caused to the appellant was advanced as one of the matters to be considered by the Board. The Board has been unable to find in the Act or the Regulations any provision by virtue of which it can consider questions of hardship.

In the standard form of code of ordinance in the Fourth Schedule to the Town and Country Planning Regulations, 1954 (S.R. 1954/141) under the heading "Subdivisional Standards and Building Sites", cl. 10 (2) does make provision for a Council in certain circumstances to consider undue hardship, but it would seem that this would not become operative until there is a district scheme in existence that has become operative.

Of necessity, every refusal of consent by a local authority must occasion hardship of some sort or another to an unsuccessful applicant; it can be a matter of degree only. As F. B. Adams J. said in *Wong's* case, [1952] N.Z.L.R. 417, 423, a decision based solely on the principles of town-planning "is a bitter pill to swallow"; but, as the Legislature has not empowered the Board to take hardship into consideration it cannot of its own volition import it.

Finally the Board refers to the submissions made on behalf of the Minister of Lands. In this connection the Board finds: (1) That, under s. 4 of the Land Subdivision in Counties Act 1946, it is mandatory on the Minister to refuse approval of a scheme plan once the local authority has certified under para. (*h*) that it has prohibited the subdivision. The Minister's refusal is an administrative act, and it is open to question whether any appeal to this Board lies; but, if it does, then where the Board allows an appeal against a local authority, and a concurrent appeal has been filed against the Minister, the latter appeal will be allowed but without prejudice to the Minister's rights under ss. 3 and 5 of the Act.

## Cassidy and Others *v.* Manukau County and Minister of Lands (No. 2).

Town and Country Planning Appeal Board. Auckland. 1955. April 21.

*Subdivision—Residential Sites in Area zoned as "rural"—Ribbon Development—Contrary to Town-and-Country-planning Principles—Minimum Areas allowable in Rural Zone—Restriction to Five-acre Lots in Conformity with Such Principles—Town and Country Planning Act 1953, s. 38 (1).*

These five appeals arose out of decisions of the Manukau County Council refusing to approve scheme plans for the close subdivision for urban purposes of property owned by each of the appellants. Each appeal was also against a decision of the Minister of Lands who, pursuant to s. 4 of the Land Subdivision in Counties Act 1946, as amended by s. 8 of the Land Subdivision in Counties Amendment Act 1953, had refused his approval to the subdivisional scheme plans.

The appellants severally and variously pleaded that their lands were ideally suited for residential purposes; that they were well drained and well serviced with water, electricity, formed and surfaced roads and public transport, and that the Manukau County Council would not be involved in the provision of any further public services, or extension of them that was not in the economic interests of the region or locality of any public service, or cause existing or proposed public services to be uneconomically used. One appellant pleaded also that other smallholding subdivisions had been approved in the past, and there was still an unsatisfied demand; and another pleaded injurious affection and financial loss.

In each case the Council refused its consent under s. 38 (1) (c) of the Town and Country Planning Act 1953, on the grounds that each proposed subdivision was not in accordance with the town-and-country-planning principles likely to be embodied in the Council's "undisclosed district scheme".

The Board considered that the Minister's refusal was an administrative act, and that it was questionable whether any appeal lay against him.

In each case,

*Held*, 1. The Council had refused to consent to the subdivision upon the grounds that it was not in conformity with the town-and-country-planning principles likely to be embodied in the Council's undisclosed district scheme for the area.

2. The property for which subdivision was proposed lay within the area zoned as "rural" under the County Council's undisclosed district scheme.

3. That to allow subdivisions into residential sites in an area zoned as "rural" would not be in conformity with the town-and-country-planning principles likely to be embodied in the Council's undisclosed district scheme, and would be "a detrimental work" within the meaning of the Act.

In one appeal, the appellant's occupation was poultry farming on a 12-acre property, and he wished to subdivide approximately one half of it into residential sites fronting on to Hill Road, Manurewa. The property was about half a mile from the boundary of the Borough of Manurewa.

*Held*, That the proposed subdivision was in the nature of what was known as "ribbon development"; and such development was not in conformity with town-and-country-planning principles.

In another appeal, the property had a total area of 70 ac. 3 ro. and 34 pp. and was being used as a dairy farm within the area zoned as rural under the Council's undisclosed district scheme.

As part of its undisclosed district scheme, the Council had decided that 5-acre lots were the minimum areas that should be allowed in a rural zone.

*Held*, That such decision was in conformity with town-and-country-planning principles.

*All appeals dismissed.*

No order was made as to costs.

In connection with these appeals, the Board gave a general decision on the legal submissions made during the hearing and that general decision was deemed to be part of these decisions and was to be read in conjunction therewith. (For a copy of this general decision see the preceding case.)

(*Continued on p. 64.*)

# IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

**Sir Ralph Grey.**—The recent visit of Her Majesty the Queen to Nigeria has resulted in the conferment of a Knighthood (K.C.V.O.) on Mr. Ralph Grey, C.M.G., a former member of the New Zealand Bar. A product of Scots College, and Wellington College, and Auckland University, he will be remembered as one of the last of the male Judges' Associates, another being Kenneth Kirkcaldie whose widow he married when his friend was killed in air action over France in 1940. In view of the fact that Sir Ralph Grey joined the Colonial Service much later than is customary with cadets, his achievement at the comparatively early age of forty-six is a remarkable one. Responsibility for the success of the trip of the Queen and the Duke of Edinburgh was in a large measure due to his foresight and organization both in London and Nigeria. This arduous and worrying task was delegated to him solely. Its happy issue has added an important chapter to the history of Africa.

**A Touch of Colour.**—Counsel recently returned from an appearance before the Privy Council reports a conversation in which a member of the Judicial Board said to him that, while the Board did not always agree with the submissions of barristers from New Zealand, its members were rarely at a loss to hear what they said. This reminded Scriblex of an occasion when Sergeant Sullivan was appearing before the Court of Appeal and read the shorthand notes with such histrionic ability that Lord Sankey, a member of the Court, was prompted to remark: "It is such a relief to hear a note as though it was a record of something that took place. These fellows mumble through the whole of the evidence as though it was the same thing whether the witness said that he had his dinner or he had said he butchered the baby and stewed it and ate it. A little life is good for us."

**Note on Capital Punishment.**—The outcome of the free vote of the British Government on the controversial issue of capital pubishment has shocked the die-hard deterrent school, but even in England the movement for abolition has had a long history. Even the first number of *Punch*, issued on July 17, 1841, "at the irresistibly comic charge of threepence" contained a strong leader urging the abolition of capital punishment. (Its editor, Mark Lemon, was then employed at thirty shillings a week which eventually rose to the unprecedented sum of £1,500 a year.) It is interesting to note that Sir Ernest Gowers, the Chairman of the Royal Commission that went fully into the subject, has lately said in an article that he started the inquiry with no very strong convictions. He had been inclined to favour capital punishment, and disposed to think of abolitionists as rather sentimental people. He had ended, however, after some four years' study of the facts, as a firmly convinced abolitionist.

**The Parker-Hulme Case.**—Whether or not it is desirable to have periodic Press reference to the corrective training of the prisoners in the Parker-Hulme case, the fact remains that the case itself is unique and will inevitably fill a niche in the criminological records of the British Commonwealth. So far as Scriblex is aware, the first attempt to reduce "what may well prove the most shocking crime of the century" into any such records is made by Rupert Furneaux in his "Famous Criminal Cases No. 2" (Allen Wingate, London, 1955). The trial occupies a chapter in this study of a number of recent *causes célèbres*. The author gives, within a short compass, a good practical account of the surrounding circumstances and the conduct of the trial. He concludes his study thus: "Complete egotists, they were insane only in the sense that their ideas were those of animals rather than of human beings. Their law was the law of the jungle and like wild animals they must be caged until they have shown themselves capable of living together with other human beings. One day, perhaps, they may have a second try at life." This conclusion may well accord with the popular and uninformed view, but deeper psychological insight is required if we are ever to get to the roots of this extraordinary case.

**Briefing the Boys.**—There was no surer method by which a witness could incur the wrath of a former Chief Justice, Sir Michael Myers, than for him, when giving evidence as a bookmaker, ticket-seller, hairdresser or the like, to refer to his "clients". It is a fair inference, therefore, that Myers C.J. would have taken no less exception to that portion of the "Boss of Britain's Underworld", the banned autobiographical dossier of Billy Hill in which that literary socialite refers to his habit of "briefing" the boys of his gang on two or three "jobs" at the one time "in case anything went wrong with the first one we chose". In fairness to him it must be conceded, however, that his knowledge of Court atmosphere was not inconsiderable as he spent an aggregate of seventeen years in order to attain, or retain, the title he has given to his book. His picture of hard labour in 1933 will cause a shudder to pass through our penal refermers. "In those days," he writes, "you did not get a bed to sleep for the first fourteen days of your hard—you slept on a bare board. You got a tin for drinking purposes, another tin for washing and you had a china jerry for toilet. There were no such things then as looking out of a window even. For the first three months you did not even get as much as one book to read."

**Relicts.**—Here is a decrepit note about the obituary notice that describes some deserving widow as the "relict" of her deceased husband. This is not surprising since, upon the authority of a writer in *Country Life*, "relict" is what is left of "derelict", and he quotes the following text from a wall monument:

> Here lies the dust of Mrs Packington
> Who was a wife and widowe Rare
> Examplar in each life,
> A derelict of six and twenty years.

Asked once to choose her epitaph, Dorothy Parker replied: "Excuse my dust"; and "dust" is an instance, writes Ivor Brown, of a word beautified by its associations. Assigned to doom, occurring in sepulchral passages, voicing the poignancies of the withered hope and the fallen leaf, linked with the way of all flesh and the fading of the flower, dust, so often on the lips of the lords of language, has been impelled, he says, to raise itself to a higher power.

# TOWN AND COUNTRY PLANNING APPEALS.

## Keegan *v.* Makara County.

Town and Country Planning Appeal Board. Wellington. 1955. February 3.

*Subdivision in County—Proposed Subdivision of Farm into House and Shop Sites—Area zoned as "rural" in Council's Undisclosed District Scheme—Refusal of Permission by Council—Area predominantly Rural in Character—Refusal upheld—Town and Country Planning Act 1953, s. 38.*

This was an appeal against the decision of the Makara County Council under s. 38 of the Town and Country Planning Act 1953, refusing the appellant permission to subdivide 3½ ac. of his farm on South Makara Road into fourteen house-sites and one shop-site.

The appellant's grounds for appeal were that the allotments were in close proximity to the City of Wellington; were well sited for drainage and could be readily reticulated for power; that there was water available from a stream passing through the property; that there was a keen demand for housing sections in the vicinity; that another housing subdivision in the immediate vicinity was approved by the Council two years previously.

The appellant claimed that this area should be zoned as residential and should be excluded from the area to be zoned as rural in the zoning scheme for the Makara district.

The Council replied that the proposed subdivision was "a detrimental work" under s. 38, as it was in an area which the Council intended to zone as "rural" under its undisclosed District Scheme.

In replying to the appellant's grounds of appeal, the Council stated that there was not a keen demand for housing sections in the vicinity; that the allotments were not in close proximity to the city, the only access being over 3 miles of narrow, winding, unsealed road; that there was no public provision for drainage or sewage disposal, water supply, or power, and that provision for these services to this isolated area would involve unjustified expense; that the stream mentioned passed through other heavily-stocked farm lands; and that the other subdivision referred to was one of eleven sections approved by the Council in 1950, only two of which have been built on.

*Held*, by the Appeal Board, 1. That the question for determination was whether or not the land in question should be zoned as residential and excluded from the area to be zoned as rural under the Council's undisclosed District Scheme.

2. That at present this area was predominantly rural in character and should not be zoned as residential.

*Appeal dismissed.*

## Marshall *v.* Makara County.
## Titahi Investments, Ltd. *v.* Makara County.

Town and Country Planning Appeal Board. Wellington. 1955. February 8.

*Shops in Housing Area—Proposed Shops in Areas to be zoned as Residential in Undisclosed District Scheme—Adequate Provision for Shops already made to meet Foreseeable Future Needs of Locality—"Detrimental work"—Town and Country Planning Act 1953, s. 38.*

Each of these appeals under the Town and Country Planning Act 1953 was against a decision of the Makara County Council refusing permission for the erection of shops in the rapidly developing housing area of Titahi Bay. Although the two sites were about quarter of a mile apart, their relationship to the planned shopping zones in the area was similar. The arguments of the appellants and the Council, both on the facts and on planning principles, in each case were similar.

The grounds for the Council's refusal were that the erection of shops on the properties in question would be a "detrimental work" under s. 38 of the Act, as they were in areas which the Council intended to zone as residential under its undisclosed district scheme.

The appellants claimed that each site was in the natural centre for shopping in the locality; that the sites were close to existing shops; and that the convenience of the residents of the locality would best be served by the erection of shops on the properties.

The Council denied these claims and said that other areas had already been selected and were in use as shopping centres; that the areas so zoned would permit of the erection of the necessary additional shops for the service of the locality; and that the zoning of the properties of the appellants as residential was in accordance with the best town-planning principles for the locality.

*Held*, That each of the appellants' properties was within a short distance of a main shopping area, and, in addition, in the Marshall case, that the property was immediately opposite a local shopping centre of five shops. The undisclosed district scheme provided for two main shopping areas and four local shopping centres, so disposed as to be not more than half a mile from each other; and in the opinion of the Board adequate provision had been made to meet the foreseeable future needs of the locality.

*Both appeals dismissed.*

## Mackay *v.* Stratford Borough.

Town and Country Planning Appeal Board. Stratford. 1955. March 31.

*Shop in Business Area—Refusal of Permission to build Such Shop—Undisclosed District Scheme providing for Street across Section on which Shop proposed to be built—Alternative Route proposed by Owner—Appeal Board not called upon to express Opinion on Tentative Plan as to Proposed Street or to determine whether Refusal justified—Order made, at Appellant's Request, that Respondent take Section under Public Works Act 1928—No Order as to Costs—Town and Country Planning Act 1953, ss. 22, 38.*

This appeal arose out of a decision of the Stratford Borough Council under s. 38 of the Town and Country Planning Act 1953 refusing him permission to build a shop in the central business area of the town, on the grounds that it would be a "detrimental work".

The appellant's property had frontage on to Broadway, the main shopping and business street, to the west of which lies Miranda Street. The Council advised that its undisclosed district scheme made provision for direct access between these two streets, and on an alignment across the section bought by the appellant.

It was common ground to both parties that the area should be zoned for commercial purposes and also that direct access from Broadway to Miranda Street was a necessary and desirable part of any Town Planning Scheme.

A considerable volume of evidence was led by the appellant in seeking to establish that alternative access from Broadway to Miranda Street could be readily obtained without using his particular section for that purpose. Expert evidence was called and suggested plans put forward.

*Held*, 1. That the Appeal Board was not at present called upon to decide on the merits or demerits of the plan put forward by the appellant or the tentative plan prepared by the Council's Town Planning Adviser; and it was not within the scope of the Board in these proceedings to express any opinion on any of these proposals.

2. That, in due course, the Council, to comply with the Act, must give public notice of its proposals so that any individual or local body affected by the proposal may object thereto (see s. 22 *ff.*); and that, for the Board at that stage to express any opinions on those plans might well prejudice the rights of other people to object when the appropriate time arrived.

3. That all the Board was called upon at that juncture to decide was whether the Council's action in refusing a building permit to the appellant was in the circumstances of the case justified; and the Board was of the opinion that such refusal was justified.

*Appeal dismissed.*

4. (On an application by both parties for costs:) That, at all material times the appellant was well aware of the general purpose for which the respondent required the land in question, and there were no grounds for departing from the general practice of disallowing costs to an unsuccessful appellant; that the appellant had been put to considerable expense in presenting his appeal, and the Board did not propose to add to that burden by allowing costs against him; and that no order as to costs would be made.

NOTE: At the conclusion of the hearing, the Board intimated that it would withhold its decision to enable the appellant and his advisers to consider whether he would make an application under s. 47 (3) for an order requiring the respondent to take the land in question under the Public Works Act 1928. The appellant made the application, and the Board made the order accordingly.