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FAMILY PROTECTION: SOME RECENT CASES.

CASES under the Family Protection Act (1908 or 1952) do not, in general, provide suitable material for the Law Reports. Apart from the early cases which settled the principles on which applications by qualified relatives of the testator are to be considered, it is only now and then that a case of this kind presents any novel feature to justify its being placed on permanent record, because the award made by the Court, in its discretion, must always be considered in the light of the special facts supporting the application for further provision.

Notwithstanding the foregoing, it has been suggested to us that a periodical review of the unreported judgments, with particular notice of the quantum of the awards made therein respectively, would be of interest to the profession. We are happy to adopt this suggestion, and, in this place, to review some of the judgments, given during the present year, which are not otherwise considered to be reportable. In each case, any order as to costs has been omitted.

For purposes of convenience, the claims are grouped in relation to applications (*a*) by the widow, and (*b*) by children.

I.—Widows' Claims.

In *In re Westaway (deceased)* (Wanganui : February 8, 1956), the testator died at the age of seventy-eight, having been married to the plaintiff, then a widow of about forty-eight years, some fifteen years previously. The testator had twice before been married, and there was a family of each marriage, three daughters and a son of the first marriage, and a daughter of the second. The son predeceased the testator, leaving a son, and a grandson—namely, the grandson and great-grandson of the testator.

The testator left some legacies, including three of £100 each to three of the daughters, and some furniture to his widow. He left 10 per cent. of the residue to the widow, 18 per cent. to each of three daughters of the first marriage, 18 per cent. to the daughter of the second marriage, and 18 per cent. equally between the grandson and great-grandson.

The widow, who claimed further provision, had a substantial sum of cash in the bank, and unencumbered flats, bringing her in a weekly net income of £5 5s. a week, and she would later qualify for universal superannuation, or £7 5s. in all.

Mr Justice Turner, in an oral judgment, made an order that the widow should receive £3 10s. a week from the estate, to be reduced to £2 a week so long as she occupied rent free a flat owned by the estate. She would surrender part of the residue given to her, so as to leave her £150 (which was meant to balance the ensuing period during which she would not be able to receive universal superannuation). The widow's provision was charged against undivided one third of residue so long as the flats remained unsold, and thereafter on one divided third of the net residue or a minimum sum of £2,000 thereof, whichever is the greater, the balance of two-thirds being for relatively immediate distribution. The part of the residue surrendered by the widow would fall back into residue, and be distributable among the other beneficiaries pro rata in the same proportions as those in which they shared the residue.

* * *

In *In re Coad (deceased)* (Wellington : May 7, 1956), the testator left an estate of approximately £50,000. He left his wife a legacy of £5,000 and furniture, etc. (£411), and he devised his only child, a daughter, a two-house property valued at £2,750, bringing in an estimated annual net rent of £178. He gave £200 (to a sister), £10,825 (to another sister and members of her family, to one of whom he had given in his lifetime £1,411), £9,225 (to three strangers in blood, to two of whom he had given £1,888 in his lifetime), and £500 (to a charity).

There were claims by the widow and daughter respectively for further provision.

At the death of the testator, the widow, who was sixty-six years of age, acquired the family residence as a joint tenant. Its Government valuation was £3,575, but it required a large sum to be spent in repairs. Her assets were £800 (in stock) and £220 in the Post Office Savings Bank. She was entitled as the testator's widow to a superannuation benefit of £279 6s. per annum for her life. She was also entitled to receive universal superannuation. Medical testimony confirmed that her health had been adversely affected by the nursing of her husband in the last two or three years of her life.

Mr. Justice Gresson, in the course of his judgment, said :

> The testator's duty was merely to provide an adequate and proper maintenance for his wife during her lifetime, and did not extend to providing her with capital assets which she might give to others at her death. I think the issue narrows down to a consideration whether a testator can be said to have failed to discharge his moral obligations when he leaves his widow with an unencumbered house property worth £3,575 and the means of enjoying an income of £800 per annum. [With the legacy, she could purchase an annuity of £400 ; superannuation, £279 ; universal superannuation, £100 ; and interest on her capital assets.] Without attributing to her any blame for the disharmony of the married life (for that has not been established), it is nevertheless clear that there is an absence of those circumstances which in many cases increase a testator's

obligation towards his wife. This is not such a case as is often met with where a wife in the early years of the married life had to work hard and suffer privations, or where she has had the burden of bearing and rearing several children, or where she has assisted the testator in the acquisition of his fortune, or in other ways so conducted herself as to add to the obligations every husband owes to his wife. None of these circumstances is present in this case. Nevertheless, the plaintiff as the wife of a wealthy testator is entitled to be so provided for as to be able to maintain the same style of living and enjoy the same standard of comfort as she enjoyed in his lifetime.

After referring to dicta in *In re Allen*, *Allen* v. *Manchester*, [1922] N.Z.L.R. 218, 222; [1921] G.L.R. 613, 615; and *In re Hawke*, *Hawke* v. *Public Trustee*, [1935] N.Z.L.R. s. 157, 161 l. 20; [1935] G.L.R. 700, 702, the learned Judge said:

> The so-called "paramountcy" of a widow's claim, in my opinion, applies for the most part in those cases in which the widow's claim is in competition with that of other persons who also have a moral claim upon the testator, and where provision made for a widow will be at the expense of one or more of these other persons. No doubt her claim is superior to the claims of all others, but even so it is limited (as was said so long ago and has been endorsed by the highest authority) to such maintenance as will enable her, taken in conjunction with her own means, to live with comfort and without pecuniary anxiety in the state of life she was accustomed to in her husband's lifetime. This I think she can do.
>
> The [home] property . . . which has a value of £3,575 may prove an expensive home to maintain, but it is now her property absolutely and she could dispose of it and procure something more suitable. After giving the matter careful consideration, I am of the opinion that the widow has sufficient for maintenance and that the provision was as well proper and adequate from a moral standpoint. It is difficult to assess the measure of the moral obligation at any time, particularly is this so when as here the marriage was not a happy one; but, in my opinion, the applicant has not established a claim for further provision; and her summons is accordingly dismissed.

The daughter's claim, His Honour said, stood on a different footing. At the date of the testator's death she was thirty-six years old and the wife of a civil servant. There were three children of her marriage, two boys aged respectively thirteen and twelve years, and a girl nine years old. Her husband, aged thirty-nine, was in a very bad state of health; and, at the date of the testator's death, he was ill in bed with the prospect of becoming either a permanent invalid or of dying. Though his actual salary at the time was £16 per week, it was clear that his earning capacity was seriously diminished, and that possibly he would not be able to work any more. His doctor deposed to his having had a severe coronary occlusion, which had damaged some of the heart muscle irreparably. The husband died suddenly on February 24, 1956, shortly before the hearing. Because of her husband's breakdown in health, the testator's daughter had sought and obtained employment for three mornings in the week for which she received £2 8s. per week less tax. All she had, in addition to her personal clothing and some jewellery, was a little less than £100 in the Post Office Savings Bank, and a small motor-car. Her husband had a life insurance policy for £1,000, which, however, was assigned to a bank to secure an overdraft of approximately £400; there was a joint family home, the Government valuation of which was £3,185, but which was subject to a mortgage of £1,870; and a small amount of furniture. His Honour said:

> Though strictly speaking, in applications under the Family Protection Act, a parent's obligation to a daughter is to be measured as at the date of his death and to be judged in relation to her circumstances as they then are, nevertheless where there was (as here) the prospect of the permanent incapacity or early demise of her husband, and the latter has since come to pass, the Court may, in my opinion, when considering whether the provision made by the testator for her was adequate, take into account that she and her children have now been deprived of husband and father respectively. It is a happening which at the date of the testator's death was reasonably foreseeable.

The learned Judge concluded his judgment by saying:

> It is not necessary to cite authority for the proposition that a married daughter may be allowed provision from her father's estate where her husband's means and ability to support her are inadequate and the estate is a considerable one. At the date of the death of the testator, her husband was through ill-health not able to support her and the children. Now he is dead. The testator did make some provision—a specific devise of two houses of a capital value of £2,750 which will yield a net income of not much more than £3 per week. She will, of course, acquire the family home, but it is heavily mortgaged. I think she has been left by the will without provision as adequate as it was the testator's moral obligation to make "having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty." I think she should receive in addition to the provision made by the will a further £2,000. I adopt that figure as sufficient to enable her to discharge the mortgage on the family home. She will then have an unencumbered house, an income of something in excess of £3 per week from the houses devised to her, and, of course, whilst the children are young, she will receive 10s. a week in respect of each of them.

There was therefore an order that there be paid to the daughter out of the residue of the estate an amount of £2,000, to be treated in all respects as if it were a specific legacy included in the will.

* * *

In *In re Hall* (*deceased*) (Auckland: May 19, 1956), the widow of the testator sought an order for some provision out of his estate. They were married in 1950, she being then a widow with three sons and he a widower with four grown-up children. The marriage was not a happy one, and in 1952 both parties signed an agreement for separation, the document reciting only that unhappy differences had arisen between the parties and making no provision for payment of maintenance by the husband. The testator by his will left his estate to three of his children, informing the officer of the Public Trust Office who took his instructions that "Bertha [a daughter] has had her share" and "wife has assets of her own. I do not wish to leave her anything."

The estate was not expected to realize more than about £1,600 for the beneficiaries. The widow had a small house property in which she lived with her three adult sons. It was said to be worth about £1,600, subject to a mortgage of £650. She had an invalidity benefit of £16 4s. 2d. per month, she was fifty-seven years of age, and her health was not good. By reason of the provisions of s. 13 of the Family Protection Act 1955, Stanton J. said he must disregard the invalidity benefit and treat the widow as having no income in her own right. She, however, had the house which enabled her to make a home for her three sons, each of whom paid her £2 10s. a week.

Counsel for testator's children agreed in contending that the testator owed no moral duty to his widow, and that no provision should be made for her. Counsel for the three beneficiary children opposed any provision being made for the daughter, Bertha, other than the remission of a debt of £72, if it should be owing by her to the testator's estate. All counsel agreed that if any provision was to be made for the widow it should be by way of a lump sum, and not a periodical payment.

The learned Judge said that he could not presume that the separation was due to the fault of the plaintiff, nor

could he agree that she had no claim. On the other hand, the marriage lasted only for a very short period and the care of the testator in his later years devolved upon his children who now had some claim on his bounty. The daughter, who was disinherited, had shown that there was no considerable assistance given to her by the testator, but she had not a right to rank equally with her brothers and sister who were the nominated beneficiaries of the testator. It had not been suggested that His Honour should differentiate between these beneficiaries. In all the circumstances, he thought that the widow should have a legacy of £500 and Bertha should have a sum of £150, in addition to the remission of the sum of £72, if in fact it was found to be owing by her to the testator's estate. As the main asset of the estate was a house property which might be difficult to dispose of, owing to its being occupied by a tenant, the payment to the widow was to be made forthwith to the extent of the cash available, and the balance, together with the payment to Bertha was to be made within twelve months. The remaining provisions of the will are to stand.

* * *

In *In re Upton (deceased)* (Wellington : June 15, 1956), the widow sought further provision, as did the two sons of the testator by his first marriage and the two daughters of his marriage with the plaintiff widow. The testator left an estate of about £10,000, partly (£2,400) in Australia which he bequeathed to his brother. His New Zealand estate comprised a house property (£4,600), furniture (£412), cash (£2,562), motor-car (£200), a trailer, and some shares (£100) : £7,874, a total of £10,274. A legacy of £1,000 was left to a stranger in blood, Mrs F., to whom also he bequeathed the furniture and effects, including the motor-car. The residue was divisible amongst the six grandchildren of the testator, children of his two sons, if and when they attain the age of twenty-one. None of the claimants had, therefore, been left anything at all, and Gresson J. said, in his oral judgment, that he was required to consider, in each case, whether there was on the part of the testator a failure in the moral obligation he had towards each such claimant.

There was an estrangement between the testator and his wife during the last years of his life ; he left the house and took up residence with Mr and Mrs F. The plaintiff instituted a petition for dissolution of the marriage based on an allegation of desertion. It was undefended and a decree nisi was pronounced on March 16, 1955. The testator died on June 17, 1955. The will, with which this case was concerned was dated April 26, 1955. The decree nisi was never made absolute. The plaintiff was, therefore, his widow and entitled to apply under the Act. The testator made for her no provision at all. She was his wife since 1927 : they lived a normal married life together until about 1945 or a little later. She assisted him considerably in the conduct of his business. When he left, she continued to occupy the home. He paid her £20 a month until 1952, but, from September 1952, he paid the rates and insurance on the house only, and she took in boarders and, with some assistance from her two daughters, maintained herself. She said she did this on his representing that he was short of money. One daughter was married, and in a home of her own. The plaintiff claimed that, since 1945, her health had not been good, and that she could not continue to maintain herself by taking in boarders. Moreover, the house was not hers. She had been allowed to remain in occupation, pending the hearing of her application. She had £63 in the Post Office Savings Bank and furniture worth £150, and, except for her clothing, no other assets. In the absence of any proper medical testimony as to her state of health, the learned Judge was not prepared to regard her as a sick woman, though it might well be that to run even a small boarding establishment was beyond her.

His Honour said that it was indisputable that the testator had failed to made adequate provision for his widow's proper maintenance and support. What he had to determine was what provision should be ordered and the incidence of any order made. There must be an order in her favour. His Honour held, too, that there was a failure in moral obligation towards the testator's daughters. He disallowed the claims of the sons. In remedying the testator's failure, he said that he must do no more recasting of the will than was unavoidable. The following order was made :

1. Subject, to the provisions hereinafter contained, the income of the whole estate shall be paid to the plaintiff during her life and widowhood.

2. In any year in which the income shall be less than £312, recourse shall be had to the capital of the estate to bring the income up to £312, to the intent that the plaintiff shall enjoy a minimum annuity of £312 per annum.

3. The enjoyment of such income shall date from the date of the death of the testator, but payment shall be withheld until the plaintiff shall have vacated the house in Knight's Road.

4. No charge shall be made against the plaintiff in respect of her occupancy of the property [she was occupying] since the date of the death of the testator provided it is vacated by the plaintiff by August 1, 1956.

5. The furniture and effects except those in the residence of [Mr and Mrs F.] and except the motor-car are to be taken by the plaintiff absolutely.

6. The bequest of the Australian assets to the testator's brother is postponed to take effect only upon the death or remarriage of the plaintiff.

7. In any recourse to capital which, in any year, is made under the provision of this order, the amount so drawn from capital shall be charged primarily against the Australian assests bequeathed as aforesaid, and only when these are exhausted against the residue of the estate.

8. To each of the two daughters of the testator, there shall be paid a lump sum of £500, these two legacies being in substitution for and in extinction of the legacy of £1,000 to [Mrs F.].

9. These two legacies of £500 each are exonerated from the incidence of the order made in favour of the plaintiff, as, too, is the bequest to Mrs F. of the furniture and effects of the testator in the F. residence and the bequest of the motor-car.

10. The applications of the two sons are dismissed.

* * *

The widow applied for further provision in *In re Hunter (deceased)* (Wellington: June 28, 1956). The testator's estate, after payment of duties, was approximately £20,000, the expectant income about £800. The widow

was given an annuity of £416 tax free. She had considerable assets of her own, a valuable house property, mortgaged : but on the land, as well as the residence, there was a cottage capable of producing probably more than enough to meet interest on the mortgage. Mr Justice Gresson, in his oral judgment, said that these assets of her own had to be kept in view when considering whether there was a failure of moral obligation on the part of the testator. His Honour continued :

> It is true that her marriage to him was only in 1951 and the period of their married life together has been brief. Nevertheless, he was under an obligation to leave her adequately provided for. She is now seventy-four years of age. It is difficult to assess with exactitude what in any given circumstances is a testator's duty in the matter of quantum of annuity to his widow, but, in my view, what he has here provided and, himself, thought adequate when he made his will in 1952, is meagre. I do not think it is adequate, but, at the same time, I consider it fails to be adequate by very little. I propose to substitute for the annuity of £8 per week the sum of £10 per week on the same terms as that given by the will and dating from the date of death of the testator.

His Honour made an order substituting £10 for £8 as the annuity given to the widow, upon the same terms as appertained to the annuity given under the will and operating as from the date of death.

Application was also made on behalf of the daughters of the testator to modify the provisions of the will so as to permit them to enjoy the surplus income, anticipated in the lifetime of the widow. Such an order, His Honour said, could by made only on the basis that there had been a failure of moral obligation on the part of the testator towards his daughters. It was contended that there was failure only in a disposition preventing their earlier enjoyment of a share in his estate. The learned Judge did not think the provision made for them, though inconvenient, and one which might have been better not made, constituted such a failure of moral obligation as warranted intervention by the Court with an order to alter it. There would, therefore, be no order in that respect.

In our next issue, recent claims by children of the testator will be considered.

SUMMARY OF RECENT LAW.

DIVORCE AND MATRIMONIAL CAUSES.

Separation—Resumption of Cohabitation—Effect on Separation Order—In Circumstances of Case, Separation Order "in full force" —Divorce and Matrimonial Causes Act 1928, s. 10 (j)*—Destitute Persons Act 1910, s. 21 (1)—Destitute Persons Amendment Act 1953, s. 4 (1).* Section 21 (1) of the Destitute Persons Act 1910 (as enacted by s. 4 (1) of the Destitute Persons Amendment Act 1953) provides that a separation order ceases to have effect on resumption of cohabitation in two distinct and contrasting cases : (*a*) where a separation order was made before November 23, 1953, in respect of a husband and wife who "resume cohabitation" after that date ; and (*b*) where a separation order was in force on November 23, 1953, in respect of a husband and wife who "have so resumed cohabitation before that date". (*Sefton* v. *Sefton*, [1952] N.Z.L.R. 824 ; [1952] G.L.R. 473, referred to.) A separation order was made on June 23, 1949, but the parties later resumed cohabitation as man and wife. Such cohabitation continued until October 11, 1952, since when they had not again lived together. On a petition for divorce under s. 10 (*j*) of the Divorce and Matrimonial Causes Act 1928, upon the ground that the separation order was in full force and had been in full force for more than three years (i.e., from October 11, 1952), *Held*, That, as cohabitation had been resumed before November 23, 1953 (the date of the enactment of s. 21 (1) of the Destitute Persons Amendment Act 1953), the separation order was in full force on that date, but, as the parties were not "so cohabiting at that date", the separation order was not affected by the operation of s. 21 (1) (as enacted by s. 4 (1) of the Destitute Persons Amendment Act 1953), and it had not been cancelled by the Court. The petitioner was accordingly entitled to a decree. *Stilwell* v. *Stilwell*. (S.C. Palmerston North. June 28, 1956. Barrowclough C.J.)

EVIDENCE.

Sacerdotal Privilege in English Law. *221 Law Times*, 268.

HUSBAND AND WIFE.

Presumption of Death. *106 Law Journal*, 359.

Privilege and Attempts at Reconciliation. *100 Solicitors' Journal*, 390.

INNS AND INNKEEPERS.

Non-Liability of an Innkeeper for Damage. *106 Law Journal*, 341.

LAND TRANSFER—LEASE.

Indefeasibility of Title—Default by Lessee under Unregistered Lease—Purported Re-entry by Lessor—Lease given to Another Lessee—Such New Lease registered—No Fraud alleged or proved—Application by Original Lessee, still remaining in Possession, for Relief from Forfeiture—New Lessee's Title, as Lessee, indefeasible —Application for Relief accordingly not maintainable—Land Transfer Act 1952, ss. 62, 182—Property Law Act 1952, s. 120—Landlord and Tenant Act 1730 (4 Geo. 2, c. 28), s. 4. An application by an equitable lessee of land under the Land Transfer Act 1952, in possession of the demised land under an unregistered lease for relief from forfeiture for non-payment of rent cannot be entertained by the Court after the registration of a new lease of the same land to a third person, where there is no fraud alleged against the new lessee, as his title as lessee is indefeasible by virtue of ss. 62 and 182 of the Land Transfer Act 1952. (*Boyd* v. *Mayor, etc., of Wellington*, [1924] N.Z.L.R. 1174 ; [1924] G.L.R. 487, and *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co., Ltd.*, (1925) N.Z.P.C.C. 267, followed. *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542 ; [1945] G.L.R. 205, and *Webb* v. *Hooper*, [1953] N.Z.L.R. 111, referred to.) Section 4 of the Landlord and Tenant Act 1730 (4 Geo. 2, c. 28) does not authorize the Court to grant relief in equity in disregard of the provisions of the Land Transfer Act 1952 as to indefeasibility of title, or in a way which would involve a disregard of them. *Maori Trustee* v. *Kahuroa* (S.C. Gisborne. May 14, 1956. Cooke J.)

MASTER AND SERVANT.

Liability of Master—Liability to Third Person for Acts of Servant—Act authorized but not an Act in Discharge of Duty to Master—Lorry-driver permitted to stop for Refreshment during Long Journeys—Collision with Motor-cyclist while Lorry-driver walking across Road to reach Café. T., a lorry driver, was permitted by his employer to stop during long journeys to obtain refreshment. One morning, having drawn up the lorry on the side of a road, he proceeded to walk across the road to reach a café. While crossing the road, he was involved, partly through his own negligence, in a collision with the plaintiff, who was driving a motor-cycle. The plaintiff, who was injured in the accident, claimed damages against T.'s employer on the ground that, at the time of the accident, T. was acting in the course of his employment. *Held*, T.'s employer was not liable to the plaintiff for the consequences of T.'s negligence because, although T. was employed at the time of the accident and was permitted to obtain refreshment, yet the obtaining of refreshment was not something that he was employed to do and, therefore, he was not discharging his duty to his employer when the accident occurred. (*Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491, distinguished.) *Crook* v. *Derbyshire Stone, Ltd. and Another.* [1956] 2 All E.R. 447 (Derby Assizes.)

PRACTICE.

Judgment—Rehearing—Defendant in Prison on Date of Judgment by Default—Defendant, seeking Rehearing, alleging

LEGAL ANNOUNCEMENTS.

Continued from page i.

Qualified Solicitor aged 25 to 35 years required by well-known and old-established Taranaki firm with large conveyancing and estate practice. Prospects of partnership for a suitable applicant. Replies to :— "OPPORTUNITY,"
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Payment of Debt as claimed, and alleging Transaction amounted to Illegality precluding Plaintiff from obtaining Aid of Court—Refusal of Rehearing amounting to Miscarriage of Justice—Judgment set aside and Action set down for Rehearing—No Conditions imposed—Magistrates' Courts Rules 1948, r. 227. On March 1, 1949, judgment against O. for £174 4s. was given in favour of N., there being no appearance or representation of O. An ex parte order was made on February 22, 1956, granting to N. leave of the Court under s. 88 of the Magistrates' Courts Act 1947, to issue a judgment summons against O. The original summons and statement of claim was served on O. when he was on bail pending trial. On February 22, 1949, he was sentenced to twelve months' imprisonment. At the date of hearing, he was in prison. On an application for rehearing of the claim, O. alleged that he had paid £25 to N. in full settlement of the claim, and there was prima facie the appearance of corroboration on a letter-card. O. also alleged that the transaction on issue amounted to illegality of a nature precluding N. from obtaining the aid of the Court. *Held*, 1. That the refusal of a rehearing of the claim would amount to a miscarriage of justice, and the judgment should accordingly be set aside and the action set down for hearing on a date to be fixed. 2. That, in the circumstances as revealed, no order should be made directing the payment by O. of any part of the claim or of any costs as conditions of the making of the order for a rehearing. *Noble* v. *Over*. (Auckland. May 14, 1956. Grant S.M.)

DEATHS BY ACCIDENTS COMPENSATION: COMPROMISE OF ACTION.

The Court's Requirements before Approval.

In each of three recent cases, there was a motion for the Court's approval of a proposed compromise of the action. In each case, the action was brought under the Deaths by Accidents Compensation Act 1952. As infant dependants were interested, it was necessary to obtain the Court's approval of the proposed compromises.

The applications asked only for approval of the amounts at which the actions were to be settled, the appointment of the Public Trustee as trustee of the funds, and incidental matters. Questions as to the ultimate disposal of those funds were to be raised later and after the Public Trustee should have reported to the Court as to a suggested disposition of them.

In a written judgment covering all three applications, the learned Chief Justice said:

"When the Court's approval of such a compromise is sought, much more is required than a mere affidavit of the solicitor engaged in the action stating that he and counsel have thoroughly considered the matter and are of opinion that the proposed settlement is in the best interests of the infant dependants. However eminent and experienced the solicitor and counsel may be, and however helpful their opinion is in such matters, the Court is not justified in acting on their opinion alone. It must be furnished with such information as will enable it to satisfy itself as to the propriety of the proposed compromise. It is impossible to enumerate all the matters upon which information may be necessary. They will vary in different cases; but I think that in most cases the Court will look for information on matters such as the following.

"It is important that there should be evidence clearly establishing who were the deceased man's dependants. They are not limited to his wife and children. If he had parents living at his death who were not dependent on him, that fact should be stated. Such information as I have referred to will not ordinarily be within the personal knowledge of the solicitor, and will usually require to be included in an affidavit by the wife or other person knowing the facts.

"Evidence of the deceased's earnings immediately before the accident is only indirectly relevant. It is much more important to know how much of his earnings he was devoting to those who were dependent on him. Evidence as to whether or not his earnings were likely to increase or decrease would be relevant in so far as it might lead to a conclusion that with increased or decreased earnings more or less might be spent on his dependants.

"Where there are infant dependants, information should be furnished as to plans for their education. It is not to be assumed that children would cease to be dependent as soon as they reached an age at which they could lawfully leave school. If the deceased had shown an intention to give a particular child a University education, the cost of that education should be stated.

"I apprehend that no solicitor would advise settlement of such a case without making some such calculation of the damage as he would submit to the Court or jury if the action went to trial. He would estimate the monthly or annual benefits which the dependants could have expected to receive from the deceased, the period (commonly, the probable future working life of the deceased had he not met with a fatal accident) during which those benefits would have been received, and the present value at the appropriate rate of interest of those monthly or annual benefits. He would then discount that sum for the uncertainties and vicissitudes of life, and, if contributory negligence were a factor, he would discount it again according to the degree of contributory negligence likely to be established. It would obviously be of great help to the Court if a copy of those calculations were exhibited to the affidavit of the solicitor who advises the compromise; and I would hope that in future I shall be supplied with a copy of the calculations that are used in negotiating a settlement.

"Affidavits giving information on the points I have mentioned will not only assist the Court. They will serve as an authentic and reliable basis upon which the Public Trustee, or other person concerned, can found his recommendations as to the ultimate disposision of the fund and define the shares therein of the various dependants of the deceased. I repeat that the matters just enumerated are only some of the relevant matters upon which the Court should be informed. They are matters however upon which I have, not infrequently, been compelled to make enquiries: with consequent additional trouble and delay."

THE PREROGATIVE WRITS.

By the Rt. Hon. Lord Goddard, the Lord Chief Justice of England.*

(*Concluded from p. 201.*)

Habeas Corpus.

I want to talk for a few minutes about the writ of habeas corpus. A writ of habeas corpus, of course, is always extolled as one of the great protections to the liberty of the subject; and so it is. It is used, of course, on a variety of occasions. I am not going to talk to you about habeas corpus for the custody of infants or lunatics, because those are matters which very seldom come before the Court. The custody of an infant only comes before the Court if the parents are falling out and fighting who is to have custody of the child. It would be much better, I think, if all those could be sent to the Divorce Court. Still they have to come before us, but I am not going to talk about those. I am going to talk about habeas corpus as a remedy for false imprisonment or wrongful imprisonment.

The first thing to remember about habeas corpus is this: A writ of habeas corpus is not a writ of course; some ground for issuing it must be shown. The object of the writ is to bring the prisoner before the Court in order that the Court may determine, if they grant the writ, whether the man is wrongfully detained or not. The writ directs the gaoler or the person who has the custody, or is alleged to have the custody, to produce the body of the prisoner in Court. Having got him to Court then the Court decide whether he is to be released or whether he is to be remanded—to be "remanded" is the technical expression.

A writ of habeas corpus is a writ of right, but it is not a writ of course. The distinction between a writ of right and a writ of course is that, if it is a writ of course, the Court is bound to grant it, whenever it is applied for. There are few writs which are of course, except when the Attorney-General moves for them. A writ of right is a writ which the Court is bound to grant if any ground is shown for it, in other words, if there is, to use the technical and old expression, a "suggestion" which would be sound in law if it were supported. Therefore, to obtain a writ of habeas corpus, there must always be an affidavit or affidavits to show a prima facie ground, to show something to the Court which suggests that a prisoner is unlawfully detained.

Do not think that is merely a formality, because a writ of habeas corpus is not often used now. There are not many cases in which there is real serious argument in a habeas corpus except in extradition cases—and I will say a word about them later on. But we are quite constantly getting sent to us affidavits from prisoners who are in execution, that is those who are servng sentences, who are complaining that they are wrongfully detained. We had one the other day from a prisoner who was in Parkhurst serving, I think, a sentence of preventive detention, and he wanted a writ of habeas corpus because he said that he ought to have been discharged on an earlier day. He gave us the date of his conviction, and told us the sentence which had been passed upon him. The sentence was, I think, one of eight years' preventive detention, of which only six years had expired. He seemed to have come to the conclusion that, because the Prison Rules provide that a prisoner may have remission granted to him, he was therefore entitled to come to the Court and say: "I must have the remission granted to me". We refused a writ in that case, because on the face of the affidavit there was no ground on which to grant it. But if the writ shows a ground for granting the writ, then the Court is bound to grant it.

Until the beginning of the nineteenth century, if the affidavit showed a ground for granting the writ, the Court always granted it, and granted the writ straightaway; but about the year 1805—I think 1805 is the earliest which can be found in the books—the practice was started of proceeding by rule nisi for habeas corpus. I think a good deal of the confusion which has arisen about the law of habeas corpus—and there has been some confusion—was due to this change in practice.

The first recorded case in which the Courts granted a rule nisi, to be argued on the return as to whether it should be made absolute was in a case reported in *13 East* 195, and called the case of the *Hottentot Venus*. The report tells us that the Hottentot Venus was a lady of colour, as you might assume, of peculiar and apparently attractive form and shape. She had been shipped to this country from Hottentot land, wherever that may be, somewhere near the Cape of Good Hope. She was being shown in a show-ground or whatever it was; but the report hastens to add that there was no suggestion that she was not decently clothed.

Shortly afterwards in *Richard Blake's* case, (1814) 2 M. & S. 428, before Lord Ellenborough, counsel moved for a rule nisi for a habeas corpus.

I have never been able to find how the change came about, but the procedure under rule nisi, which has been abolished since the Administration of Justice Act 1933, was this: If you showed any cause at all for habeas corpus, mandamus, or certiorari, then the Court granted a rule nisi which called upon the other side to show why the rule should not be made absolute; and, in habeas corpus, the other side was being called upon to show cause, if the Court granted a rule nisi why the rule should not be made absolute to issue the writ. At the same time there was a rule of the Crown Office which provided that if the rule was made absolute, the Court could call for a return or could at once discharge the prisoner. I believe myself that the reason for introducing this practice—how it was introduced I do not know because the Crown Office Practice published in 1804 does not refer to it, but only refers to the issue of the writ—was probably that, once the writ was issued, the prisoner had got to be brought to Court. He had got to be brought to Westminster. In those days, when travel was difficult and communication difficult, it may be that the real reason for moving by rule nisi was that it avoided having to bring the prisoner up to the Court, because, if the Court decided, when the rule nisi was argued on whether a rule absolute should be made, that the rule should be discharged,

* An Address given in Gray's Inn Hall, reproduced by courtesy of *Graya*, the magazine of the Honourable Society of Gray's Inn, in which it first appeared.

then of course the prisoner did not have to be produced. If the Court decided that the rule should be made absolute then they could, as I say, under Crown Office rules, discharge the prisoner if they chose without calling for a return.

Trying to find out something about this, I discovered a case in 1853 called *Eggington's Case*, 2 E. & B. 717, 734, in which Lord Campbell said that he had dealt with these matters by means of a rule nisi in many cases as a matter of convenience. I think probably it was as a matter of convenience, but whether it was done by rule nisi or whether it was done by ordering a writ to issue, the same principles must apply.

I may say that since I have been Lord Chief Justice I have ordered the body to be produced, that is to say ordered the writ to issue ex parte, on at least three occasions. The first one was where a man, who had been an officer in the Forces in the War and who had been returned to the Z Reserve, complained that he had been taken from England to Germany, tried by court-martial, and sentenced. We held that under the Army Act, as it then was, there was no power to do it; and we ordered his immediate discharge. That of course led to an amendment in the Army Act. That is what always happens. If any of you gentlemen are patriotic enough to go to the House of Lords and satisfy them that you are not liable for something in the income-tax line, you will always find that the next Finance Act will make you liable! At any rate, that is what we did.

The second case was very much of the same description. Heartened by our decision in the first case, another officer who had been equally guilty—at any rate, he had been convicted—applied; but the only question there was whether he was subject to military law, and we held in that case that he was so subject and remanded him.

Then there was the case last summer in which the Polish seaman, who was on a ship in the Pool of London you may remember, moved for a writ of habeas corpus which we granted. The Thames Police intercepted his ship down river, took him off, and that was the end of that. As I say, I have on at least three—I think on four—occasions ordered the body to be produced.

Nowadays, instead of a rule nisi being applied for, the practice has been altered, and in the first instance you apply for leave to issue a summons or make an application by notice of motion asking for a writ of habeas corpus, and the matter is then argued.

Then you have got this curious position. I expect you have heard about it. Anybody who has either been refused a writ or who on the return to the writ has been remanded, that is to say sent back, can go from Court to Court and ask for his release. Whether the right was to go simply from Court to Court, that is to say from the King's Bench to Common Pleas, if the King's Bench refused, and from Common Pleas to the Exchequer, and also to the Lord Chancellor, as Lord Esher at any rate thought, or whether it was a right, as has since been held, to go to every Judge that you could find, pursue every Judge, is I think still to some extent a moot point. But there is no doubt of this, that if a man has moved for a writ of habeas corpus and has been refused, or if a writ of habeas corpus has been granted and on the return the Court has held the detention is valid, he is still able to ask any other Judge to release him. That is according to Chief Justice Wilmot, whose opinions on the subject of habeas corpus are of the very highest value. They are published. You will find at the Bar Library and probably in your Inns of Court Library a volume called *Opinions and Judgments by Chief Justice Wilmot.* That was his opinion that he put before the House of Lords when there was a habeas corpus Bill under consideration, and he maintained that the right to go from Court to Court was entirely the result of the Act of Charles II.

Perhaps in the privacy of this room, as Lord Kilmuir is one of your Benchers, I can tell you that for the first time for I do not know how many years—I am told forty years—a prisoner did seek to put this practice into force the other day. We had refused in the Divisional Court a writ of habeas corpus to a man who had been committed for extradition, and he, not quite knowing where to go, went to the Lord Chancellor, pursued the Lord Chancellor down to the House of Lords, and stopped him I think going away for a week-end; at any rate he did go to the Lord Chancellor. There is no doubt, although Sir Eardley Wilmot emphatically denied that until the Act of Charles II the Lord Chancellor had any powers to issue a writ of habeas corpus, that the right of the Lord Chancellor to issue a writ of habeas corpus did exist after that Act, because the Lord Chancellor was expressly mentioned therein.

There are some curious points about this, if you come to think about it. You can understand why, if the Courts refused on an ex parte application to issue the writ, he might go to another Court or to another Judge and move ex parte, either with or without fresh evidence. Perhaps I ought to interpose here and say that the return to a writ of habeas corpus is this. If the writ is issued it goes to the gaoler or the person who is detaining the prisoner, and the gaoler has to return on the back of the writ, and produce it in Court, the reasons for the detention, saying, for example, "I hold this man because he has been sentenced to six months' imprisonment on the 1st June, which is only three months ago"; or "I hold this man because he has been duly committed for trial", or as the case may be. That is on the return.

How is it that a man who had his case decided, we will say, by the King's Bench in the old days could go to the Common Pleas and argue exactly the same point over again? It is a very curious and highly technical reason. So far as a criminal cause or matter is concerned under s. 31 of the Judicature Act, once the Queen's Bench Division has pronounced judgment in a criminal cause or matter there is no appeal. Remember that. There is no appeal, but the applicant can still go, as the man did the other day, to another Court, if he can get one constituted, or to the Lord Chancellor or to another Judge—I am not sure that I would oblige him by constituting another Divisional Court, but, still, that is another matter—and ask for a writ.

It is a curious instance of the technical law of this country. I am dealing now, we will say, with a case in the reign of George III. Why was it that a person who could go from Court to Court was not met with the plea of *res judicata*? The case had been argued before a Court, but there was no plea of *res judicata.* The reason was this: the grant or refusal of a writ of habeas corpus was regarded merely as the grant or refusal of a warrant of the Court. Error was the only

method of appeal in the old days against the decision of one of the superior courts of common law, and error did not lie because in the order of the Court there was no "*ideo consideratum est*", which means "therefore it was considered and adjudged". As there was no "*ideo consideratum est*" in the order which was made, a writ of error would not lie. If a writ of error would not lie, the applicant was, if I may use a golfing expression, stymied; because there was no Court to which you could appeal from an order of the King's Bench in banc except by writ of error. A writ of error would never lie—Coke laid this down in the *City of London's Case*, 8 Co. Rep. 121 (b), 127 (b) —in the case of a prerogative writ. He says it is doubtful whether it would lie in the case of prohibition, but it never would lie in habeas corpus, certiorari, or mandamus. As you could not bring a writ of error you could not bring anything before a Court of Appeal, because, once the Court in banc had decided the case, there was an end of it. You could not appeal. If there was a discharge, the Crown could not appeal. If there was an order remanding the prisoner He could not appeal; but what he could do was to go back to another Judge and try to persuade him to let him out or grant a writ. You could not plead *res judicata*, because there was technically no judgment.

That is rather an interesting bit of old law, and you will find I am right—at least I hope you will find I am right—because it is all laid down in a case called *The King* v. *The Dean and Chapter of Dublin*, (1724) 1 Brown's Parliamentary Cases, 73, curiously enough, because in the days of, I think it was, George I, the Court of King's Bench in England claimed to exercise jurisdiction in error over courts in Ireland, as the Court of King's Bench in England used to exercise jurisdiction in error over the Court of Common Pleas.

Nowadays there is no appeal, because in the case of *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147, there was the decision once and for all that, if the imprisonment arises out of a criminal cause or matter, there is no appeal to the Court of Appeal. There is no appeal, but he could still go to another Court. It is very unlikely of course that, if the matter was argued before three Judges in the Divisional Court, quite apart from whether I am sitting there or not, another Judge would take a different line from the Divisional Court and meet me at lunch afterwards! (*Laughter.*)

These things happen sometimes. I had my lunch the other day with two who reversed me in the Court of Criminal Appeal, but I did not show malice. But there it is.

It is very curious, and I think it is about time that there should perhaps be some reconsideration of the law on this subject. It would be much more satisfactory, I believe, if we went back to the old practice, which certainly existed before 1805, of always issuing a writ instead of merely giving leave to move. It would be much better if a writ were issued, then a return would be made by the gaoler, and then the matter would be argued on the return. I hope that some day that may be done.

Mandamus.

Now the last matter about which I am going to talk to you is mandamus. I have left mandamus to the end because perhaps I have less to say about this than the others. In one sense, it is the highest writ of all.

One of the difficulties in certiorari which I forgot to emphasize is that certiorari and prohibition only lie to Courts. I think I did say something about this. They only lie to Courts or tribunals which have to act judicially. In these tribunals, which are set up under so many Acts of Parliament, which can deprive people of their property and so forth, the members must act judicially in such matters; and even Ministers can be restrained or have their orders brought up under certiorari or prohibition if they are presuming to deal with matters beyond those which the statute allows.

Mandamus is not concerned merely with Courts. Mandamus lies to individuals and to companies as well as to Courts, and naturally also to special tribunals. It lies to any one or any body who has a public duty to perform which appertains to his office. That is the great test of mandamus. As a rule it will not lie if there is some other specific legal remedy for enforcing the right; but it may lie, and the Court may grant it, if the specific remedy is less convenient, beneficial, or effectual than the writ would be. Before a person can apply for a writ of mandamus there must always have been, either express or implied, a request and a refusal to perform the duty alleged.

There is, you will find, if you look in the *White Book* (R.S.C. Ord. 53, r. 1) a rule concerned with the action of mandamus. The action of mandamus was introduced by the Common Law Procedure Act 1854, but it is very seldom used now. In fact I do not remember in all the years I have been in the profession any action of mandamus. † It is still possible to bring an action of mandamus, and you will find in the *White Book* when an action of mandamus will or will not lie. I do not propose to deal with it, as the action is practically obsolete because you can go nowadays, since the Judicature Act 1873 (now replaced by the Judicature Act 1925) and get a mandatory injunction, which is probably a more convenient remedy than an action of mandamus.

The first thing to remember about mandamus is that, unlike certiorari and prohibition, it is not a writ of right. Certiorari to quash is a writ of right for any person directly affected; if he can show a lack of jurisdiction, he is entitled as of right. If some person moves, as sometimes they do, to quash an order, and that person is not directly affected by it, then the Court can issue a writ of certiorari or not in its discretion. In mandamus, there is a discretion in the Court whether they will issue it or not; and if, when cause is shown against the writ, the right appears doubtful, the Court may grant it and leave the question to be argued on the return. The return, which is not now called for as a rule, unless the Court specially orders it, is generally that the order has been obeyed.

A common case is to Magistrates, to hear and determine according to law. The Magistrates dismiss an information alleging they have got no jurisdiction, or dismiss an information on wrong grounds. They say they have no jurisdiction to hear the case, or perhaps wrongly refuse to hear some evidence which was tendered to them. The writ will not tell the Justices how they are to determine the case. Nor will the Court issue a writ if they see that the matter

† Cf. R. 473 of the Code of Civil Procedure, and see *Dick and Sauer* v. *Attorney-General (No. 2)*, [1956] N.Z.L.R. 563.

is plainly within the discretion of the Justices. While I say that the writ will not tell the Justices how to decide the case, the Court will issue it to the Justices if they come to the conclusion that the Justices have refused to exercise judicially the discretion which they had got, and direct them to hear and determine according to law.

Another thing relating to the discretion of the Court with regard to mandamus is that they will not issue a writ of mandamus if they see it is futile, if no useful purpose can be achieved by it, although there is a right. For instance, they will not order a virtually defunct company—as used to be the case sometimes with railways; companies were formed, and then they could not go on because they had got no money— to do something when it is quite clear that they have not got any money with which to do it.

There is one very amusing case which appealed to me, as it comes from the West Country, in which the Court was asked by the Town Clerk of Axminster to order the Town Council to restore him to his office. The Court refused on the ground that they could see the corporation would remove him directly he was restored!

Then another case from the West Country very much appealed to me, because, before I was a Judge, I was Recorder of Plymouth. If any of you have a liking for legal law-Latin and will turn to Coke's Reports you will find there a wonderful case called *James Bagg's Case*, (1616) 11 Co. Rep. 936. What had happened was that in the Borough of Plymouth there was a very obstreperous chief burgess, as they were called in those days, a councillor nowadays, and chief burgesses were Justices as well. There was one who was continually making a frightful nuisance of himself, and insulting the mayor, and so they removed him from office; and he brought a mandamus to have him restored to his office. The return which the mayor made—there are ladies present, and so I am glad I can read it in Latin—was this: the reason we removed him from his office was because "Convertens posteriorem partem corporis sui more inhumano et incivili versus meipsum scurriliter contemptuose inciviliter et alta voce dixit haec anglicana verba sequentia, videlicet—come and kiss." (*Laughter.*)

I will tell you at once where you can find it in English. Take Volume IX of Holdsworth's *History of the English Law* and there at the end (p. 421) you will find that wonderful dialogue written as a skit by Mr Justice Hayes on Crogate's Case, which deals with the mysterious question I had to consider at the Courts the other day about the mysteries of the replication *de injuria*. Baron Surrebutter, a disguise for Baron Parke, meets in the Shades Mr Crogate, whose beasts had been driven off a common in Norfolk, and discusses why he lost the case. The Baron explains it to him. "Can you not understand," the Baron said, "that your plea of *de injuria* put everything in issue? You ought to have admitted certain things to be true which were clearly untrue. That is the beauty of it. Then you would have had a single issue to try." In the above dialogue on Crogate's Case, you will find the passage from Bagg's Case is quoted. The only difference is that Mr Justice Hayes made the mistake of attributing it to the Borough of Ipswich; it was not; it was the Borough of Plymouth.

I had the curiosity to refer to Coke's Reports in which this is reported, and you will find on page after page of law-Latin the whole of this case, setting out the affidavits and the returns. The words I have quoted are from the return which the mayor made. If you do not think that a very good reason for throwing a fellow out of his job I do not know what it is, but the Court order said that he should be restored. They said he might then be prosecuted for a misdemeanour; but there was no reason why he should not exercise the office of Justice of the Peace. Since then I have never had any respect for Chief Justice Coke at all!

Strict Liability.—I turn, then, to the first question which raises the familiar problem of strict liability, a phrase which I use to express liability without proof of negligence. Here is an age-long conflict of theories which is to be found in every system of law. "A man acts at his peril" says one theory. "A man is not liable unless he is to blame" answers the other. It will not surprise the students of English law or of anything English to find that between these theories, a middle way, a compromise, has been found. For it is beyond question that in respect of certain acts a man will be liable for the harmful consequences of those acts, be he ever so careful, yet in respect of other acts he will not be liable unless he has in some way fallen short of a prescribed standard of conduct. It avails not at all to argue that because in some respects a man acts at his peril, therefore in all respects he does so. There is not one principle only which is to be applied with rigid logic to all cases. To this result both the infinite complexity of human affairs and the historical development of the forms of action contribute.

The House has had the advantage not only of an exhaustive argument in which a large number of cases were cited and discussed and many authoritative textbooks and articles quoted, but also of careful and elaborate judgments in the Courts below, and I am left with the impression that it would be possible to find support in decision or *dictum* or learned opinion for almost any proposition that might be advanced. Yet I would venture to say that the law is that, subject to certain specific exceptions which I will indicate, a man is not in the absence of negligence liable in respect of things, whether they are called dangerous or not, which he has brought or collected or manufactured on his premises, unless such things escape from his premises and, so escaping, injure another, and, as I have already said, I would leave it open whether, even in the event of such escape, he is liable (still in the absence of negligence) for personal injury as distinguished from injury to some proprietary interest.—Lord Simonds in *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 All E.R. 471, 481.

INDEFEASIBILITY OF TITLE UNDER THE LAND TRANSFER ACT: A NEW ANGLE.

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

In Australia and New Zealand all law students learn, and all solicitors know, the general principles as to the indefeasibility of title conferred by registration under the Torrens system. The general rule is simple and easy to grasp and is perhaps best formulated in the words of their Lordships of the Privy Council in *Waimiha Sawmilling Co., Ltd.* v. *Waione Timber Co., Ltd.*, (1925) N.Z.P.C.C. 267.

The cardinal principle of our Land Transfer Act is that the Register is everything. Nothing can be registered the registration of which is not expressly authorized by statute, or by an enactment having the force of a statute or deriving its authority from statute law.

Everything which is registered gives, in the absence of fraud, an indefeasible title to the estate of interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.

Fraud means actual fraud, *dishonesty of some sort*, not what is called constructive or equitable fraud—an unfortunate expression, as pointed out by their Lordships of the Privy Council, and one very apt to mislead; but it is often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

Fraud means fraud of the person claiming under the instrument and not the fraud of the person alienating.

The principle is easy to grasp, but its application to a state of facts, as decided cases show, is not always so easy. In practice, there often occur borderline cases, on which much may be said on both sides, and which may bewilder both the student and the practitioner.

Cooke J. recently applied the principle to a novel set of facts. The facts involved a consideration of the equitable right of an equitable lessee of land under the Land Transfer Act, to relief from forfeiture for non-payment of rent, and the right of the equitable lessee to rely on s. 4 of the Landlord and Tenant Act 1730 (4 Geo. 2, c. 28).

Unfortunately, as in most Maori land cases, the facts were rather involved.

The following extract is taken from His Honour's judgment in *Maori Trustee and Cooper* v. *Kahuroa*, [1956] N.Z.L.R., 713, 714:

> " By a lease dated July 14, 1950, the Maori Trustee, the first-named plaintiff, leased to the defendant a piece of land in the Patutahi Survey District containing about 86 acres for a term of 21 years from August 1, 1949, at a rent of £43 3s. per annum, plus a commission of 5 per cent. on such rent. *The lease was never registered.* It provided for the payment of the rent, and commission half-yearly in advance. On July 20, 1950, the defendant paid the first two half-yearly instalments of rent and commission, but he had paid no further instalments by December 17, 1953. On or about that date, the Maori Trustee posted to the defendant a notice of his intention on or after January 30, 1954, to re-enter upon the lands and determine the defendant's estate or interest therein upon the ground of non-payment of rent. The defendant denies that he received this notice. On February 23, 1954, Mr Latta, an officer duly authorized by the Maori Trustee, entered upon the lands and read in a loud voice, and thereafter affixed to a tree on the land, a notice which was in the following terms:
>
> *Authority to Re-enter and Determine Lease.*
>
> THIS IS TO AUTHORIZE YOU on behalf of THE MAORI TRUSTEE as Agent for the Owners of the land hereinafter mentioned TO ENTER UPON AND RECOVER POSSESSION OF all that parcel of land situated in the COUNTY OF COOK of Part Lot 1B3 of Section 91 Block VII Patutahi Survey District containing an area of 86 acres 1 rood 3 perches more or less which said parcel of land was leased by Memorandum of Lease confirmed by the Maori Land Court at Gisborne on the 6th day of June, 1950, for a term of 21 years from the 1st day of August, 1949, in favour of RAYMOND (RENATA) KAHUROA of Muriwai, Agricultural Contractor, upon the terms and conditions set forth in the said Lease and thereby by such re-entry determine and put an end to the said Lease and the term of years thereby created UPON THE GROUNDS that rent and commission amounting to £158 11s. 7d. is unpaid and owing to the 1st day of August, 1953, in breach of the covenants of the said Lease, and that the right of re-entry has accrued to THE MAORI TRUSTEE by virtue of such default.
>
> DATED at GISBORNE this 9th day of February 1954.
>
> The notice was signed and sealed by the Maori Trustee by an authorized officer. The defendant denies that he ever saw this notice *and it is clear that he remained in actual occupation of the property.*"

(The italics in the above extract have been inserted by the writer.)

On August 9, 1955, the Maori Land Court, on the assumption that Kahuroa's unregistered lease had been validly determined by re-entry, confirmed a resolution of the assembled owners under Part XXIII of the Maori Affairs Act 1953, that the land be leased to one Cooper for 21 years " from this date ". The Maori Trustee executed the lease on September 18, 1955, *and it was duly registered on October 25, 1955.*

His Honour held that there was no evidence to show that Kahuroa became aware of the alleged forfeiture of his unregistered lease until some time after Easter, 1955.

Legal proceedings in the Supreme Court were commenced by the plaintiffs on January 21, 1956. Several amendments to the statement of claim were made during the course of the proceedings; but for the purposes of this article it will be sufficient to state that both plaintiffs, the Maori Trustee and Cooper, claimed possession of the land. The defendant Kahuroa (the equitable lessee) who had remained in possession up to the date of the proceedings filed a statement of defence and *also a motion for relief against forfeiture of his unregistered lease.*

Now, as the rent was in arrear, Kahuroa had no statutory rights under the Property Law Act 1952, ss. 117-119 of which provide for relief against forfeiture. Section 118 (7) provides that s. 118 shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent. As stated in *Garrow's Real Property in New Zealand*, 4th Ed., 620-622, the statute law applicable to New Zealand as to relief against forfeiture for non-payment of rent reserved in a lease is to be found in s. 4 of the Landlord and Tenant Act 1730. In equity, however, a landlord's power of re-entry for non-payment of rent is regarded simply as a security for the payment of the rent. A tenant in possession holding under an agreement for a lease is entitled to relief against forfeiture for non-payment of rent just as if he had his lease, the doctrine of *Walsh* v. *Lonsdale*, (1882) 21 Ch.D. 9, being applicable. Similarly, in the case of a tenant holding under an unregistered lease under the Land Transfer Act: *Harley* v. *Te Reneti Te Whauwhau*, (1913) 33 N.Z.L.R. 256; 16 G.L.R. 325.

In the course of his interesting judgment, Cooke J. said:

"The proviso for re-entry for non-payment of rent is regarded in equity as merely a security for the rent: *Howard* v. *Fanshawe*, [1895] 2 Ch. 581: and, although the matter is one of discretion, the general practice is that, on payment of the rent and any expenses to which the lessor has been put, the lessee is relieved: *20 Halsbury's Laws of England*, 2nd Ed., 274; *Newbolt* v. *Bingham*, (1895) 72 L.T. 852. The matter, however, fundamentally turns on equitable considerations, and, in appropriate circumstances, relief will be refused if there are equities against the tenant: *Anderson* v. *Yule*, (1907) 26 N.Z.L.R. 502; 9 G.L.R. 344; *Suttie* v. *Te Winitana Tupotahi*, (1914) 33 N.Z.L.R. 1216; sub nom. *Re Suttie's Lease*, 17 G.L.R. 110.

"In the present case, it is not disputed that there was a tender of the arrears of rent, while the defendant in his affidavit has offered to pay costs and expenses; and, notwithstanding the unfavourable matters I have already mentioned, I would, having regard to the description of the exercise of the jurisdiction given by Lord Esher M.R. in *Newbolt* v. *Bingham* (*supra*), by Stirling J. in *Howard* v. *Fanshawe* (*supra*, at pp. 587, 588) and by Cooper J. in *Harley* v. *Te Reneti Te Whauwhau*, (1913) 33 N.Z.L.R. 256, 262; 16 G.L.R. 325, 328, have been disposed to grant relief on appropriate terms if it *had not been for the execution and the registration under the Land Transfer Act 1952 of the new lease to Cooper.*

"The pleadings contain no allegation of fraud on the part of Cooper, and Mr Thorp admitted at the hearing that such a point was, therefore, not open to him. In my opinion, the position thus is that Cooper has the protection afforded to a registered proprietor by ss. 62 and 182 of the Land Transfer Act 1952. I do not think it is necessary to refer to the authorities culminating in *Boyd* v. *Mayor, etc., of Wellington*, [1924] N.Z.L.R. 1174; [1924] G.L.R. 487, and *Waimiha Sawmilling Co., Ltd.* v. *Waione Timber Co., Ltd.*, (1925) N.Z.P.C.C. 267, that were cited upon the question of indefeasibility of title under that Act: see also *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542; [1945] G.L.R. 205, and *Webb* v. *Hooper*, [1953] N.Z.L.R. 111."

(Again, the italics in the extract are the writer's.)

One way in which it was sought on behalf of the defendant, Kahuroa, to avoid the difficulty created in his way by the application of this principle of indefeasibility of title, was by reliance on s. 4 of the Landlord and Tenant Act 1730, as to which, see *Suttie's* case (*supra*). His Honour, however, did not think that that section could be regarded as authorizing the Court to grant relief in equity in disregard of, or in a way that would involve a disregard of, the provisions of the Land Transfer Act as to indefeasibility of title.

The Landlord and Tenant Act 1730 was passed in the reign of George the Second, and its preamble reads rather curiously:

> "For securing to lessors and land-owners their just rights and to prevent frauds frequently committed by tenants, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled" etc.

One wonders what the lessors and land-owners of those far off days would have thought of our own Tenancy Act! The right to relief from forfeiture for non-payment of rent is in equity a most ancient right, and it was usually granted, if the lessee paid adequate compensation to the lessor: *Howard* v. *Fanshawe*, [1895] 2 Ch. 581. The Landlord and Tenant Act 1730 fixed a period of six months after judgment for possession within which period the lessee must apply for relief against forfeiture for non-payment of rent. His right to relief is barred if he does not apply for relief within that period. Here, in the instant case, there had been no judgment for possession, nor had there been any effective re-entry by the lessor. It has been held in New South Wales (and I think that it would be similarly held in New Zealand) that the fact that a formal note of re-entry has been made on the Land Transfer Register does not prevent the lessee from applying to the Court subsequently for relief: *Brooker's Colours, Ltd.* v. *Sproules*, (1910) 10 N.S.W.S.R. 839, the ratio being that, as between the parties themselves, the Land Transfer Act does not prevent the enforcement of equities. In that case, however, there had been no subsequent registration in favour of a third person as there had been in the instant case, and therefore the two cases are clearly distinguishable.

As previously pointed out in this article, ss. 117-119 of the Property Law Act 1952 give a lessee a statutory right to apply for relief from forfeiture: in addition, there is the ancient right in equity for relief against non-payment of rent. It would therefore appear that, as regards land subject to the Land Transfer Act 1952, these statutory and equitable rights are subject to ss. 62 and 182 of the Land Transfer Act 1952, which, as pointed out by their Lordships of the Privy Council in the *Waimiha Sawmilling Co.* case (*supra*), are the two sections by which indefeasibility of title by registration under that Act is conferred.

But these are not the only provisions of the Property Law Act 1952 granting relief. Section 120 grants relief in circumstances in which Courts of equity would presumably have declined jurisdiction. Section 120 (3) reads:

> (3) Where—
>
> (*a*) By any lease to which this section applies the lessor has covenanted or agreed with the lessee that, subject

to the performance or fulfilment of certain covenants, conditions, or agreements by the lessee, the lessor will—

(i) On the expiry of the lease grant to the lessee a renewal of the lease or a new lease of the demised premises; or

(ii) Whether upon the expiry of the lease or at any time previous thereto assure to the lessee the lessor's reversion expectant on the lease; and

(*b*) The lessor has refused to grant that renewal or that new lease or to assure that reversion, as the case may be, on the ground that the lessee has failed to perform or fulfil the said covenants, conditions, and agreements, or any of them,—

the lessee may in any action (whether brought by the lessor or the lessee and whether brought before or after the commencement of this Act), or by proceeding otherwise instituted, apply to the Court for relief.

Now subs. (7) of this section specifically provides that the fact that the lessor may have granted any estate or interest in the demised land to any person other than the lessee, which estate or interest would be defeated or prejudicially affected by the grant of relief to the lessee, shall not affect the power of the Court under that section; but, in any such case, the Court may, if it thinks just, grant relief to the lessee and *cancel* or postpone any such estate or interest, and may if it thinks fit assess damages or compensation to be paid to that person in respect of the defeat of or prejudicial effect upon his estate or interest. This section forms part of Part VIII of the Property Law Act 1952, the heading to which is "Leases and Tenancies".

It is submitted that the provisions of ss. 62 and 182 of the Land Transfer Act 1952 (conferring indefeasibility of title) must be read subject to s. 120 of the Property Law Act 1952. Specific power is given to the Court to cancel any estate or interest; and that, it is considered, would include power to vacate the registration of a subsequent lease under the Land Transfer Act. But it is to be noted that, by s. 121, application for relief in accordance with s. 120 may be made at any time within three months after the refusal of the lessor to grant a renewal of the lease or to grant a new lease or to assure the reversion, has been first communicated to the lessee. As Stanton J. said in *Reporoa Stores, Ltd.* v. *Treloar*, [1956] N.Z.L.R. 359, 364:

> The crucial difference between the two groups of sections is that ss. 50 and 118 contain no time limit for the making of an application for relief whereas ss. 120 and 121 require the application to be made within three months from the communication of the lessor's intention to refuse to transfer the property to the lessee.

The moral of *Maori Trustee and Cooper v. Kahuroa* is this: If you claim under a registrable instrument under the Land Transfer Act, get it registered as soon as possible.

If the lease to Kahuroa had been registered in that case, the lease would have remained a legal lease (even if the lessor had in fact peaceably re-entered) until it had been determined by notice of re-entry on the Register Book pursuant to s. 121 of the Land Transfer Act 1952, and that would have involved additional procedure of which the lessee in all probability would have received notice: *Suttie* v. *Te Winitana Tupotahi* (1914) 33 N.Z.L.R. 1216; sub nom. *Re Suttie's Lease*, 17 G.L.R. 110, for it has always been the practice of the Land Transfer Department in New Zealand to examine applications for re-entry by lessors with great care, and to endeavour to give the lessees notice of the applications. The recent English case, *Gill* v. *Lewis*, [1956] 1 All E.R. 844, shows that in these circumstances a Court of Equity would assuredly have granted the lessee relief; relief, it is true, lies within the discretion of the Court, but it is only in most exceptional cases (*e.g.*, where the land is being used for an illegal or immoral purpose) that relief is refused where the lessee makes adequate restitution to the landlord.

"And" and "Or".—"I need not express any concluded opinion upon the question whether a complete solution of all difficulty may not here properly be found by reading the words of this ill-drawn clause '*and* so far as possible' as if they were '*or* so far as possible'. Farwell J. refers to this solution as a possibility, but he rejects it as inadmissible. He does not, however, allude to the difficulties which its adoption would remove. Now it must of course be agreed that this substitution of the disjunctive for the conjunctive is not lightly to be made even in the construction of a clause like this in a will where so much latitude in aid of intent is allowed. And if the views be correct which I have already expressed as to the permissible meaning of its words, as they stand, no resort to this solution is essential. But if these views are not tenable, and if the only proper construction of this clause as it stands is that adopted below, then I would hesitate long before I declared myself precluded in the cause of harmonious construction from here reading the word 'and' for the word 'or'. It is a substitution which in the case of a will has often been made by Courts of construction to remove contradiction or redundancy. In the present case it would eliminate both, and its effect in each direction would be as complete as it would be convincing." Lord Blanesburgh in *Inland Revenue Commissioners* v. *Raphael*, [1934] A.C. 96, 119:

Approbation and Reprobation.—The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights. It is the same right which he claims, but in larger degree. In *Mills* v. *Duckworth*, [1938] 1 All E.R. 318, a plaintiff who had been awarded damages for negligence had taken the judgment sum out of a larger sum paid into Court and had then appealed against the quantum of damages, and was met by a similar objection to his appeal. Greer L.J., in overruling the objection, pointedly said, at p. 321: "He (the plaintiff) said: 'I am not going to blow hot and cold. I am going to blow hotter.'" Here the applicant is not faced with a choice between alternative rights. He had exercised an undisputed right to compensation, and claims to have a right to more. One has not lost one's right to a second helping because one has taken the first.—Lord Atkin in *Lissenden* v. *C. A. C. Bosch, Ltd.*, [1940] 1 All E.R. 425, 436, 437.

TOWN AND COUNTRY PLANNING APPEALS.

Allison v. Piako County.

Town and Country Planning Appeal Board. Hamilton. 1955. September 6, 20.

Subdivision—Rural Land adjacent to Borough—Ribbon-development contary to Town-and-country-planning Principles—Town and Country Planning Act 1953, s. 38 (8).

Appeal by D. B. Allison, under s. 38 (8) of the Town and Country Planning Act 1953, against the decision of the Piako County Council refusing him permission to subdivide into six sections his property situated just outside the boundary of Te Aroha Borough to the north of the East Coast Main Trunk Railway, containing 13ac. 3ro. 24pp.

The grounds for appeal were that no district scheme was in force in respect of the area in which the land was situated, and that the proposed subdivision was not contrary to any proposed district scheme or the town-and-country-planning principles likely to be embodied in any undisclosed district scheme for the area.

The Council replied that the land was rural land, and that the proposed subdivision was contrary to the undisclosed district scheme for the area.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. The area within the Borough of Te Aroha suitable for development for residential purposes should be adequate to provide for the residential needs of that Borough for some years.

2. There is no evidence of any pressing or urgent demand for building sites outside the Borough.

3. The area in which the property is situated is predominantly rural in character, and the zoning of that area as "rural" is appropriate and in accordance with town-and-country-planning principles.

4. To approve of the proposed subdivision would be tantamount to approving ribbon development. It is a well-established town-and-country-planning principle that ribbon development is undesirable, uneconomic, and contrary to those principles. The appeal is disallowed. No order as to costs.

Appeal dismissed.

Holloway v. Hutt County.

Town and Country Planning Appeal Board. Wellington. 1955. September 7, 30.

Subdivision—Land in Rural Zone—Residential Sites—Proposed Extension of Existing Subdivision in Urban Area—Recreational Reserve under Consideration—Town and Country Planning Act 1953, s. 38—Town and Country Planning Regulations 1954, Reg. 17 (2), Third Schedule, para. 8 (1).

Appeal, under s. 38 of the Town and Country Planning Act 1953, against the decision of the Hutt County Council refusing the appellant permission to subdivide that part of his property in Stokes Valley lying within the rural zone.

The grounds for the appeal were that there was no operative district scheme over the land affected by the subdivision; that the land was suitable in all respects for residential sites; that the proposed subdivision was adjacent to the balance of the land which was within the residential area of the undisclosed scheme, and that it would not be economic or desirable to subdivide and sell this area alone; and that the proposed subdivision was so situated that it would not materially encroach on or prejudicially affect the rural area.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. The respondent Council's objection to the proposed scheme is two-fold:

(*a*) That it would constitute an encroachment of urban development into a rural zone.

(*b*) That it would interfere with the proposed recreation reserve.

2. Dealing, first, with the objection under para. 1 (*a*), *supra*, the Board is of the opinion that grounds for allowing the appeal under this heading might well exist. The proposed subdivision is in effect an extension of an already existing subdivision in Rawhiti Place and the land in it zoned as "Rural" is poor quality land some of it very steep covered with scrub and having little actual or potential value for productive purposes. The respondent Council acted consistently and properly in seeking to restrain the encroachment of urban land into rural areas until such time as the vacant residential land in the district is built on; but there was evidence of a keen demand for residential sites in this locality, and, as already stated, the proposed subdivision is a logical extension of an existing subdivision.

3. Dealing, secondly, with the objection under para. 1 (*b*), *supra*, the Board is of the opinion that here the respondent Council is on strong ground. Under the Town and Country Planning Regulations 1954, the Council is required (inter alia) "To provide, over the planning period, adequate space for the outdoor recreational needs of the various age groups, provision must be made in advance of subdivision": see Reg. 17 (2), and the Third Schedule to the Regulations, para. 8 (1).

The evidence is that the Stokes Valley area is badly off for recreational reserves and that it has not got the requisite area laid down as a minimum.

In this particular case, the position is somewhat complicated by the fact that on the proposed plan for the Council's undisclosed district scheme the proposed recreational reserve is incorrectly plotted; but that is a matter that can be very simply rectified.

4. The Board takes the view that the situation is one that might well lend itself to a solution by agreement between the parties concerned. If a solution can be reached whereby a recreational reserve with adequate access can be retained in this locality, then there would be no objection to the subdivision proceeding. This is, however, at present a matter for the parties themselves.

The Board disallows the appeal, but, in so acting, wishes to emphasize that it is mainly concerned as indicated to protect the recreational reserve. No order as to costs.

Appeal dismissed.

Vogal (N.Z.), Ltd. v. Hamilton City Corporation.

Town and Country Planning Appeal Board. Hamilton. 1955. September 5, 30.

Building—Factory for Light Industrial Purposes—Urban Area—Permit refused—Ample Provision for Industrial Areas in Contiguous County Districts—"Detrimental work"—Town and Country Planning Act 1953, s. 38 (1) (b)—Town and Country Planning Regulations 1954, Fourth Schedule.

Appeal, under s. 38 (8) of the Town and Country Planning Act 1953, against the decision of the Hamilton City Council, refusing to grant a building permit to the company to erect a new factory building for light industrial purposes at Norton Road, Hamilton.

The appellant's grounds for appeal were that no district scheme was in force in respect of the area in which the proposed new factory building was to be built, and that the proposed building would not be in contravention of any proposed district scheme or the town-and-country-planning principles likely to be embodied in any undisclosed district scheme for the area.

The Council replied that the proposed business of the appellant required the building to be sited either in an Industrial "C" zone (as described in the Fourth Schedule to the Town and Country Planning Regulations 1954) or a conditional use in an Industrial "D" zone (as so described), and that the proposed use of the land involved a "detrimental work" in that it involved a structure which would detract from the amenities of the neighbourhood and that it involved a change of use of land which would be likely to detract from those amenities.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). This appeal must be considered and determined under s. 38 (1) (*b*) of the Act. If the proposed factory would detract from the amenities of the neighbourhood likely to be provided or preserved by or under the Council's undisclosed district scheme, then the appeal must fail.

Nine owners of residential properties in this area (represented by Mr Bowden as counsel) exercised their right under s. 42 (2) of the Act to appear at the hearing to oppose the appeal, and some of them gave evidence. The Board does not propose to review the evidence.

After hearing that evidence and the submissions of counsel and having inspected the area under consideration, the Board finds:

1. That the zoning of the area as partly "General Commercial" and partly "General Residential" is appropriate, and in accord with town-and-country-planning principles.

2. That the respondent Council's undisclosed district scheme makes adequate provision for industrial areas in the City, and the evidence indicates that ample provision for industrial development will be made in county districts contiguous to the City.

3. That the establishment of any factory or manufacturing business in a residential area adjacent to existing residences, used as such, must be detrimental to the amenities of the neighbourhood.

4. That although the disallowance of the appeal may well impose some hardship on the appellant, the Board is not in determining appeals empowered to take hardship into account.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Collett and Fleming (Riverhead), Ltd. v. Waitemata County.

Town and Country Planning Appeal Board. 1955. September 2, 30.

Building—Site at Highways Junction—Rural Zone—Permit refused—Building likely to cause Traffic Hazard—Junctions or Intersections on Main Traffic Routes to be kept clear of Commercial Development—"Detrimental work"—"Conditional use"—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal, under s. 38 of the Town and Country Planning Act 1953, against the decision of the Waitemata County Council refusing a permit for the erection of a building on land situated at the junction of the Auckland-Hobsonville and Auckland-Albany Highways.

The grounds for the appeal were that the proposed new building was not a "detrimental work", as defined by s. 38 of the Act; that the building was for the sale of farm machinery, motor fuel, etc., and had the support of the farming community in the district; that the proposed site was the most advantageous one; and that the appellant company would suffer serious financial loss if the permit were not granted.

The Council replied that it had an "undisclosed district scheme" and had refused the permit on the ground that the proposed building would be a "detrimental work" within the provisions of s. 38 of the Act, that the area in which the appellant's land was situated would be a rural zone, and that the building would detract from the amenities of the neighbourhood. The Council added that it had made ample provision in other parts of the area for land for business purposes.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The appellant company applied to the respondent Council for the requisite building permit. This permit was refused upon the grounds that the proposed building would be a "detrimental work" within the meaning of s. 38 of the Town and Country Planning Act 1953.

It is against that refusal this appeal lies, and the question falls for determination under s. 38 (1) (*b*) of the Act, that is to say: will the proposed structure, if permitted, detract from the amenities of the neighbourhood likely to be provided or preserved by or under the respondent Council's undisclosed district scheme? Under that scheme the area in which the appellant company's land is situated is zoned as "Rural"; and the respondent Council submits that, under its scheme it has made adequate provision for urban development in three areas, viz., at (a) Kumeu, (b) Riverhead, and (c) Brigham's Creek. It is the view of the Council that a business of the type under consideration here should be located in an urban, not a rural, zone; but its main objection is that the siting of such a business at or adjacent to the junction of two main highways would create a traffic hazard, and accordingly detract from the amenities of the neighbourhood.

The Board does not propose to traverse the evidence submitted by the parties. After considering that evidence and the submissions of Counsel and having inspected the property under consideration and the locality in general, it finds:

1. That if the sole objection to the appellant's proposal had been that it proposed to establish its business in a "rural" as opposed to an "urban" area the appeal might have been given favourable consideration. The establishment of businesses of this nature in rural zones is recognized as a "conditional use" (see the Fourth Schedule to the Town and Country Planning Regulations 1954, under the heading "Rural Zones" "Conditional uses" (*g*)).

2. That the evidence clearly establishes that the appellant company's property is situated so close to the intersection of two main highways that to permit the establishment of such business premises as are proposed would tend to create a traffic hazard.

The two highways under consideration already carry a substantial volume of daily traffic, and that volume is likely to increase in the future. The National Roads Board strongly supports the respondent Council, and the evidence indicates that the Board is now engaged on re-designing this intersection to provide three traffic lanes and reduce traffic hazards. This will provide an amenity for the neighbourhood. It is in accordance with town-and-country-planning principles that junctions or intersections on main traffic routes should be kept clear of commercial development.

3. That it cannot be denied that to disallow the appeal will impose hardship on the appellant company, but the Board is not empowered to take hardship into consideration. It is almost inevitable that a decision based on town-and-country-planning-principles will inflict hardship on an appellant; but the appellant company might have minimized its hardship if it had made fuller inquiries as to the likelihood of a building permit being granted before it purchased the property.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Frederickson v. Hawke's Bay County.

Town and Country Planning Appeal Board. Napier. 1955. July 13, 18.

Zoning—Land adjacent to Borough Boundary—Zoned as Rural—Minimum Subdivision—Zoning proper—Town and Country Planning Act 1953, s. 26.

Appeal, under s. 26 of the Town and Country Planning Act 1953, against the decision of the Hawkes Bay County Council disallowing the appellant's objection against the zoning as rural of her land just outside the north-west boundary of Taradale Borough.

The County Council's district scheme provided for minimum subdivision of 5 ac. in the Rural Zones, with the proviso that the Council could consent to a subdivision of less than this minimum, but not in any case less than 2 ac., if the applicant satisfied the Council that such lesser area could be used as an independent economic farming unit or that such subdivision was necessary to avoid undue hardship. This was subject to the further proviso that any such subdivision would not lead to an uneconomic extension of public services or interference with the movement of traffic.

The area of the property in question was 1 acre; and the appellant submitted that any individual area of land already less than the minimum provided in the scheme should be exempted from the restrictions against subdivision and residential use.

The Council replied that the objective in this area was to proceed in orderly fashion, and that there was an understanding with the Taradale Borough that residential subdivision on the boundaries had to be halted in order to give effect to the Local Government Commission's findings when the Taradale Town District was raised to the status of a Borough.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. The zoning of this area as "rural" is appropriate. It is land having a high productive value, and, although there are a number of "non-conforming" residential properties in it, it is still predominantly rural in character.

2. That this area was originally zoned as "residential" but on the constitution of the Taradale Borough this zoning was changed to "rural" on the suggestion of the Local Government Commission and at the request of the Borough of Taradale, so as to restrict residential subdivision in the vicinity of the Borough until such time as the Borough itself was more closely settled.

The Board is of the opinion that this alteration in zoning was proper and in accordance with town-and-country-planning principles and that it should not be interfered with.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Slipshod Affidavits.—Comment from the Bench is frequently heard on the irrelevancies that creep into affidavits filed on applications of varying kinds against deceased estates. Scriblex suggests that cause for dissatisfaction may well arise from the adoption by some practitioners of what might be termed the "slice method". This consists in the handing to one party of the affidavit of another with a request that the client writes his (or, even worse, her) reply to the allegations made. Many of these are upon details that have rankled over the years, but are, nonetheless, trivial. The practitioner, upon receipt of a voluminous dossier which contains a fresh set of trivial details, proceeds to "slice up" the material into numbered paragraphs, and labels the entire concoction "reply". And so it goes on. But looseness in the matter of affidavits may prove expensive, as was found recently by an English solicitor, who, although acquitted on the charges of filing an affidavit which he knew or ought to have known was false and misleading and failing adequately to supervise his clerk who had prepared and filed the affidavit in his absence, was yet considered by the Queen's Bench Division to be not altogether free from blame, and was ordered to pay the costs of the application against him by the Disciplinary Committee: *Re A Solicitor's Clerk*, [1956] 2 All E.R. 242.

Legal Aid Schemes.—Writing in *The Spectator* (London) (8.6.1956) on the legal recession in England, Julian Leslie observes that there is very little litigation in the Chancery Division. "Chancery Judges are to be found grazing in Common Law pastures." The volume of writs issued in the Queen's Bench Division, he says, has enormously diminished over the last two years. In his view, the principal reason is that, far from encouraging litigation, the Legal Aid Scheme has imposed an unforeseen restraint.

> The man with a small claim in the County Court affords a good illustration. Before the days of Legal Aid, he could consult numerous solicitors, advice centres and charitable organizations who were prepared to assist for a small sum without inquiring too closely into the client's means. If he had to be milked, he was milked gently. Under the Legal Aid Scheme, however, he faces the meticulous scrutiny of the National Assistance Board; he has to make written declarations; he may be visited. If he is not scared off by such inquisitive preliminaries, there is a second shock to follow: he learns to his surprise that he is to contribute a considerable sum payable over a period towards the conduct of the case (it is little known that the "State-aided" petitioner in an undefended divorce is sometimes assessed at a higher sum than would have been demanded by a private solicitor). No wonder, therefore, that many prospective litigants refuse at such stiff jumps.

Criticism of the monetary implications to litigants involved in the Scheme, and the poor rewards to the Bar, has been made over the past few years by several members of the Bench in England. Scriblex is far from convinced that it has anything advantageous to offer the public of this Dominion in which it is rare to find any litigant with a meritorious claim or defence deprived, through lack of means, of adequate legal representation and services.

Solicitors' Note.—The *Solicitors' Journal* (26.5.1956) draws attention to the young lady singer who, interviewed on the wireless as to her experiences in the United States, observed that she was puzzled by a notice she often saw there "No Solicitors Allowed". "I thought it funny," she said, "because where I come from solicitors are an honoured profession." The *Journal* remarks that, while it was obviously shocking to her to hear for the first time that solicitors and pedlars share the same description, this knowledge is much more painful to solicitors when they bear in mind that this is one of those few cases in which the maxim "*ubi jus ibi remedium*" does not apply. On one occasion, when the charge was soliciting, counsel for the defence made some quip on the position of the late Arthur Donnelly as Crown Solicitor to which he retaliated, with his well-remembered laugh, that it was better to be a Crown Solicitor than to represent a "half-crown solicitor".

As You Choose.—The *All England Law Reports* have proved of inestimable value to the practitioner who has neither the space nor the means to keep up as part of his library a number of other Reports. It is unusual, however, to find this series providing, within a space of five pages or so, two conflicting decisions, each based upon substantial authority. The question in issue is whether a negligent driver who is ill-advised enough to injure a Police constable while on duty is liable to reimburse the constable's employer for wages paid during the time he is off duty as the result of the accident. Slade J., in *Metropolitan Police District Receiver* v. *Croydon Corporation*, [1956] 2 All E.R. 785 (on the principle of *Moule* v. *Garrett*, (1872) L.R. 7 Exch. 101, 104) says that he is liable; but Lynskey J. (on the principle of *Attorney-General for New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1955] 1 All E.R. 846) is equally emphatic that he is not liable: *Monmouthshire County Council* v. *Smith*, [1956] 2 All E.R. 800. Only a few days separate the two decisions, and an intending appellant may be prudent to consider the aphorism of the late Ambrose Bierce that "to appeal" means, in law, "to put the dice into the box for another throw".

Degrees of Guilt.—In *The Queen* v. *Turner*, in which the accused at the current sessions at Wellington elected trial by jury on a charge of using obscene language in a public place, the facts showed that a young constable who accosted him when he stumbled in the foyer of the Railway Station had not manifested throughout any marked show of tact. After a retirement of ten minutes, the jury returned with a verdict of "very not guilty". The accused was quickly discharged by Cooke J.: much quicker, no doubt, than if the jury had preferred grammar to indignation and said "not very guilty". The incident is reminiscent of the cartoon of a mixed jury hearing the case of a man charged with a breach of the matrimonial code in which the foreman is an Amazonianlike female who announces to the presiding Judge: "We find the defendant very, very guilty."

From My Notebook (Human Emotions Division).—"The whole tendency of human benevolence is to find some opportunity of helping someone at the public expense"—Viscount Kilmuir L.C. in a recent House of Lords debate on legal aid.

"Oh my dear, dear Dickens!" wrote Lord Jeffrey who was following each monthly issue of *Dombey and Son* with great interest, "what a No. 5 you have given us! I have so cried and sobbed over it last night and again this morning; and felt my heart purified by those tears."—Cockburn, *Life of Lord Jeffrey* (1852), Vol. II, pp. 406, 407.

MR A. M. ONGLEY.

Fifty Years In Practice.

On the evening of July 18, members of the Palmerston North Law Society gathered to do honour to Mr A. M. Ongley on his completion of fifty years' practice in the profession. Practitioners from Foxton, Levin, Pahiatua, and Feilding were also present at the dinner and were welcomed by the President, Mr J. A. McBride.

Apologies were received from Mr Justice McGregor and Mr A. W. Yortt S.M. both of whom referred to their close association with the guest of honour over the years gone by. Mr D. G. Sinclair S.M. and Mr A. A. Coleman represented the Magistracy, present and past. Dannevirke practitioners expressed their best wishes in a telegram of congratulation.

Following the loyal toast, Mr W. L. Fitzherbert proposed the toast of the guest of the evening. He said he felt sure that his two juniors in support, Mr J. Graham and Mr B. J. Jacobs, would, as "joint toast-feasors", joined with him in wishing Mr Ongley many future years of practice at the Bar.

Mr Fitzherbert said he had had first met "Joe" Ongley in 1907 when, after knocking him to the boundary for three successive balls, he had been clean bowled by a leg-break. From this he concluded Mr Ongley was a good tactician. From 1920 to 1930 Mr Ongley had been Mayor of Feilding, and indeed had always been active in the civic life of both the communities in which he had practised. On the sporting field he had represented Manawatu at both Rugby and Cricket, and at different times had been President of both the New Zealand Cricket Council and of the New Zealand Rugby, Union a record unique in New Zealand. Mr Fitzherbert said he could do little else but repeat the expression "Well done, thou good and faithful servant", and wish Mr Ongley and his family health and happiness in the years to come.

Mr John Graham spoke of the fifty years which had passed and took the gathering back to what he termed "the horse and buggy days". He first became acquainted with Mr Ongley when that gentleman commenced practice in Feilding, with the late Mr Kelly; but, when the Supreme Court came to Palmerston North, Mr Ongley followed. On the Rugby field, "Joe" had been an admirable halfback, and at the wicket had been a devastating bowler. Mr Ongley's undoubted success at the Bar was attributable not only to his ability, but also to his great industry and application. For this he was respected and admired by all who knew him. The fitting term applicable to the half century which had passed was that of the late Mr Justice Alpers, who had referred to his experiences at the Bar as "Cheerful Yesterdays". On behalf of the Feilding members, Mr Graham congratulated Mr Ongley and wished him every success in the future.

Mr B. J. Jacobs said he could now understand the position in which many Judges had found themselves in following previous expositions; and he himself could only use their avenue of escape, and say "I concur". His association with Mr Ongley began in Palmerston North where Mr Ongley had been in practice with the late Mr Gifford Moore.

Mr Jacobs drew a parallel between the approach to both sport and law adopted by the guest of honour. Mr Ongley had trained hard for his sport and so had he done in his work at the Bar. On the Rugby field, he had always kept the goal in mind and tackled hard. This he had done as successfully in the law. When setting his field at cricket he had always examined the pitch for blemishes, placed his team well, and attacked. This attitude was obvious in his approach to his cases in Court. Even at golf, his eye rarely strayed from the ball. He had always helped younger practitioners, and had been generous in charitable contributions. Mr Jacobs wished both Mr and Mrs Ongley a continuance of their life of service.

In reply, Mr Ongley remarked that it was pleasant to hear these many compliments, despite the fact that he had had to wait fifty years for them. In order to resolve any doubts, he placed in evidence at the dinner his first practising certificate dated July 18, 1906, and said that his first introduction to the law was in the Court Office at Hokitika in 1902. In 1904, with two years' experience of miners' rights and prohibition orders, he had moved to Palmerston North, where he took over the new Supreme Court office. He had qualified in 1906, and in that year entered practice with the late Mr Kelly at Feilding.

His principal observation of fifty years of practice was of the improved relationship between Bench and Bar. The friendly spirit which now existed between these two branches of the law, was, he considered, conducive to the proper administration of justice.

He thanked members of the profession who had gathered in his honour, and pointed out that, although he had worked hard, he had also played hard, enjoyed the fight, and made many friends. If he could go back those fifty years and choose his profession again, he would choose none other than that of the law.

Other speakers from the assembly then congratulated Mr Ongley, and the evening proceeded in pleasant informality.

Workers' Compensation Re-insurance.—"The general purpose of the legislation [the Workmen's Compensation Act 1925] was, beyond all doubt, to put upon the employer an obligation to pay to his workman or the workman's representatives compensation for the result of personal injuries incidental to his employment, for which no action for damages lay either at common law or for breach of statutory duty. In this sense it made the employer an insurer, and the insurance aspect is important for it helps to guide interpretation where the statutory language is open to doubt. The object of the legislation was essentially social, and it was no part of the purpose of Parliament to make the economic burden rest finally on the back of the individual employer. It was realized from the start that the risk would be re-insured, as in fact happened, and through the insurance premiums, as an item in the cost of production or of services rendered, the community at large of course has had to carry the ultimate burden of the social reform in the price of goods or services."—Scott L.J. (delivering the judgment of the Court of Appeal) in *Wilson* v. *Chatterton*, (1946) 39 B.W.C.C. 39, 44, 45.