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THE RULE OF LAW: THE AIMS OF THE INTERNATIONAL COMMISSION OF JURISTS.

IN a preface to an article in the *Bulletin of the International Commission of Jurists* (No. 3), we are told that international politics of today are the politics of the smile, of the well-filled cocktail- and vodka-glass, of mutual friendship visits. There is an exchange of culture, there is even perhaps, here and there, superficially, an exchange of points of view on doctrine.

The International Commission of Jurists hails all this with great satisfaction. The smile makes life warmer and brighter and the exchange of ideas can only bring enrichment. But the smile and friendliness demand alertness of mind and keenness of eye. They demand a deep self-knowledge and a deep knowledge of others.

The Commission is fearful for the legal values of our civilization. In spite of the smile and the vodka-glass, we may never forget that, behind the facade, the political reality in the Soviet bloc is incompatible with our convictions of justice and freedom.

The consequences of the system of the dictatorship of the proletariat go further than the field of politics. Hans Kelsen recently pointed out these consequences in *The Communist Theory of Law* (London: Stevens & Sons, Ltd.; New York: Frederick Praeger Inc., 1955), p. 127, where he says:

> If science is considered to be an instrument of politics, then it is a punishable crime to advocate the wrong theory; and then a theory is wrong if it is a deviation from the orthodox doctrine, the orthodox doctrine being the one established by the political party in power.

The political system of the Soviet countries brings into focus for the free jurist the fact that there remain irreconcilable contrasts which cannot be glossed over. This renders the defence of the fundamental principles of justice a task in which all lawyers of the free world can, and should, participate.

An intensification of this feeling for justice and reality was seen at the Athens Congress of Jurists at Athens from June 13 to 20, 1955, with jurists from forty-eight countries in attendance, when, after a full and free discussion of the fundamental concepts of freedom, the Congress in a Plenary Session recalled and reaffirmed solemnly the fundamental principles of the Rule of Law in the *Act of Athens*, which is as follows:

ACT OF ATHENS.

We free jurists from forty-eight countries, assembled in Athens at the invitation of the International Commission of Jurists, being devoted to the Rule of Law which springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.

Being concerned by the disregard of the Rule of Law in various parts of the world, and being convinced that the maintenance of the fundamental principles of justice is essential to a lasting peace throughout the world.

Do solemnly Declare that:

1. The State is subject to the Law.

2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.

3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges.

4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.

And we call upon all judges and lawyers to observe these principles and

Request the International Commission of Jurists to dedicate itself to the universal acceptance of these principles and expose and denounce all violations of the Rule of Law.

Done at Athens this 18th day of June, 1955.

I.

The Commission (of which Sir Hartley Shawcross, Q.C., President of the Bar Council, is a member) meets at least once every three years, at which time it defines its general policy and programme of activities. Whenever the Commission is not in session, the authority and powers of the Commission are exercised by an Executive Committee, elected from the Members of the Commission, which meets at least three times a year. At present the Executive Committee consists of the President, Dudley B. Bonsal (New York); the Vice-President, A. J. M. Van Dal (The Hague); Theo Friedenau (Berlin, W. Germany); Axel Henrik Munktell (Upsala, Sweden); and Edouard Zellweger (Zurich, Switzerland). Serving as an alternate to Mr Bonsal is Mr James L. McDonnell, Member of the New York Bar and American Counsellor of Law with the London office of the firm of Breed, Abbot & Morgan of New York.

The practical work for the realization of the aims and objectives of the Commission is the responsibility of the Secretary-General who is empowered within the general policy laid down by the Executive Committee to take such action as may be necessary to this end.

Since April, 1956, the Secretary-General is Mr Norman S. Marsh, Fellow of University College, Oxford, who assumed this office upon the election of Mr A. J. M. Van Dal to the Vice-Presidency of the Commission. Mr Marsh, after studying law at Oxford, practised at the English Bar until World War II in which he served with the army and the Control Commission for Germany, having charge of United Nations property in the British Zone. After the war he returned to Oxford to teach law, and has made a special study of international and comparative law. He has been given leave of absence by his College to take over his present post.

The Secretary-General is assisted in the daily conduct of the affairs of the Commission by the Administrative Secretary, Edward S. Kozera, former Lecturer in Government at Columbia University, by Horst Rockmann, Werner Schulz, and Karel Vasak, legal assistants, and by a secretarial staff.

The foregoing gives some indication of the world-wide support the Commission has received from individuals and groups of lawyers. The Commission encourages the formation of national groups of jurists, which pursue the same objectives as the Commission and which are regularly constituted according to the laws of their respective countries. Although independent of the Commission these national groups co-operate with it on the basis of mutuality of purpose and interests.

The purposes and methods of action of the International Commission of Jurists are set out in Articles 4–6 of the Statute of the Commission which read as follows :

Aims and Objectives

Art. 4. The Commission is dedicated to the support and advancement of those principles of justice which constitute the basis of the Rule of Law. The Commission conceives that the establishment and enforcement of a legal system which denies the fundamental rights of the individual violates the Rule of Law.

The Commission will uphold the best traditions and the highest ideals of the administration of justice and the supremacy of law and, by mobilizing the jurists of the world in support of the Rule of Law, will, *inter alia*, advance and fortify the independence of the judiciary and the legal profession and promote fair trial for all persons accused of crime.

The Commission will foster understanding of and respect for the Rule of Law and give aid and encouragement to those peoples to whom the Rule of Law is denied.

Methods of Action

Art. 5. The aims and objectives of the Commission are carried out through the publication of printed matter, including bulletins and periodicals; the organization of private lectures, public meetings and congresses; the preparation and transmission of suitable radio and television broadcasts, and generally by any other type of activity appropriate to achieve the objectives of the Commission.

Art. 6. The Commission further proposes to co-operate with national and international legal organizations and groups engaged in activities consistent with the aims, objectives and procedures defined in the present Statute.

The bringing together by the Commission, last year, of one hundred and fifty leading jurists from forty-eight countries at Athens " to consider what minimum safeguards are necessary to ensure the use of the Rule of Law and the protection of individuals against arbitrary action of the State " has led to a great expansion in the scope and scale of the Commission's activities and responsibilities. In view of these developments it seems desirable to have some knowledge of the organization, past achievements, present work, and future activities of the Commission.

In an appendix to the *Report of the International Congress of Jurists* at Athens, which has now been published,[1] some contemporary reactions of the world press have been printed, the Commission draws attention to a detailed examination in the *Revue de Droit International, de Sciences Diplomatiques et Politiques* (1956, Janvier-Mars, No. 1, 34e année) by Professor Jean Graven, a Judge of the Cour de Cassation of Geneva, and Vice-President of the International Association of Penal Law. At the Congress he played an important role in its deliberations as chairman of the Committee on Criminal Law.[2]

In drawing up a balance-sheet of the achievements of the Congress, Professor Graven writes :

> Among the great professional international organizations the Commission . . . is a meeting-place, a natural centre of life and action. It has, indeed, adopted as its aim and slogan " the defence of fundamental legal principles, a task of all jurists ", and it does in fact represent a real " Jurists International " consisting of lawyers—both academic and in practice—of all schools and all countries. These lawyers are resolved to pool their knowledge and experience in order to strengthen and to propagate their legal ideals without preconceptions of system or school of thought, regardless of the origin, location or political importance of the countries from which these ideals draw their support.

The Commission has received many appreciative letters regarding the Congress but what has been even more valuable is the spirit of constructive criticism which has inspired them. The theme of most of these letters is remarkably consistent. In the first place, there is a general desire to know more about the organization, finances, and methods of work of the Commission. Secondly, there is a repeated insistence that the Commission should envisage its task not merely in negative terms, necessary as it has been and continues to be to point out the shortcomings of legal systems in totalitarian-ruled countries. In this context it is relevant to quote from a speech by Mr Van Dal, Vice-President of the Commission, at a dinner attended by leading members of the English legal profession in London on March 9, 1956. Mr Van Dal said :

> If we want to preserve the most precious legal values of our tradition, we have to realize what they are. We have to present a constructive legal concept of freedom, adapted to forms of the modern State, a conception around which we can unite the freedom minded lawyers.

In the same sense, was a letter of the Secretary-General to *The Times* which was printed in its issue of March 23, 1956, in which he spoke of

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[1] The English version is in process of distribution and is available on request; the French and German translations will shortly be available.

[2] Prof. Graven's paper on the rights of the accused is summarized at pp. 67-70 of the Congress Report (English edition). A limited number of copies of his full speech under the title " Les Droits de l'Accusé dans le Procès pénal " is available in French. It may be obtained by writing to the International Commission of Jurists, 47 Buitenhof, The Hague, Netherlands.

the special responsibility of the legal profession in all countries where liberty of opinion is respected and government is subject to the Rule of Law to realize the full implication of these principles and offering them to the communist and indeed to all totalitarian ruled countries as the only feasible framework of freedom.

The third theme which has been continuously emphasized by the friends of the Commission, and indeed is forced to its attention by the ever-widening scope of its contacts, is that its work cannot be confined to those areas of the world in which in recent years human rights and principles of justice have been most flagrantly violated. We have recently been warned by an English Lord of Appeal against too easily categorizing our democratic civilizations as the "free world".[3] The economic and social development of all States, whether authoritarian or democratic in their governmental structure, requires an increasing measure of collectively organized power in the hands of the community. To control this power and to ensure that it is truly used for the benefit of the individuals who in the last resort make up a State, is the special responsibility of lawyers. In no sphere, as many have pointed out, is this responsibility more important than in those countries which have recently obtained or are about to obtain their independence, and it is encouraging to note the interest which the work of the Commission has evoked in such countries as, to name but a few, India, Burma, Malaya, and the territories of Africa.

[3] Lord Radcliffe, "Law and the Democratic State", presidential address to the Holdsworth Club, University of Birmingham, published by the Holdsworth Club of the University of Birmingham, 1950.

For instance Mr Justice Bose, of the Supreme Court of India, gave a broadcast in 1954 over All-India Radio, which is here singularly appropriate. It was delivered in English and in translation beamed to China and the Far East. Mr Justice Bose pointed out that what is understood by the Rule of Law is not merely a list of individual freedoms, which in any event all governments to a greater or lesser extent must restrict; nor does it consist in the formal independence of the judiciary, in the legal controls imposed on the Executive, or even in the constitutional responsibility of the government to Parliament and the electorate. In the last resort, Mr Justice Bose argued, it is "an intangible something broad-based on the goodwill of the people". This appeal beyond the sphere of legal forms and safeguards to basic political and ethical ideals emphasizes a fourth theme which has inspired discussion of the objectives of the Commission since Athens. It is necessary for the Commission to offer to the world legal community something more than is already provided by well-established international organizations of lawyers. Other organizations fulfil a valuable task as an international expression of the solidarity of a professional group and of common interest in an intellectual study: the compelling attraction of the Commission is, or ought to be, its concern with human values of which the lawyer is the especial custodian in the interests of the wider world community.

In our next issue, we shall consider the Commission's concept of the Rule of Law as a convenient term to summarize a combination of legal ideals and practical experience; and we shall also try to give some idea of the Commission's general activities.

SUMMARY OF RECENT LAW.

BIRTHDAY HONOURS.

Knight Bachelor: His Honour R. O. Sinclair, Vice-president, East African Court of Appeal, Barrister and Solicitor of the Supreme Court of New Zealand. Sir Ronald was formerly in practice in Auckland.

CHOSE IN ACTION.

Legal Chose in Action—Assignable in Equity—Absence of Consideration—Assignment effective if Complete and Perfect—Gift—Payment with Statement of Intention of Its being Loan during Donor's Lifetime and Gift on His Death—Intention not implemented by Will—Gift incomplete. A legal chose in action may be effectively assigned in equity, even when there is no valuable consideration for it, provided the assignment is complete and perfect; and no formal words are necessary so long as the meaning is plain. Notice in writing is not required. (*Gray* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 23; [1938] G.L.R. 634, distinguished.) *Holt* v. *Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1; [1942] 1 All E.R. 404, and *In re McArdle*, [1951] Ch. 669; [1951] 1 All E.R. 905, referred to.) Where a person intends that a payment of money should be treated as a loan during his lifetime and that it should become a gift on his death, and he does not implement that intention in his will, the gift is incomplete and his intention fails. *Pulley v. Public Trustee.* (S.C. Wellington. June 14, 1956. Barrowclough C.J.)

CONTRACT.

Frustration, Some Further Thoughts on, *106 Law Journal*, 406.

CONVEYANCING.

Trust Holdings in Private Companies. *100 Solicitors' Journal*, 427.

CRIMINAL LAW.

Crimes and Punishment (Mr Justice Barry). *30 Australian Law Journal*, 125.

Criminal Punishment. *221 Law Times*, 322.

Drunkenness and Criminal Responsibility. *30 Australian Law Journal*, 3.

Wife's Evidence on Criminal Charge. *100 Solicitors' Journal*, 426.

DAMAGES.

The Ambiguity of Remoteness. *106 Law Journal*, 371.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Deserting Spouse's Belief in Resumption of Cohabitation at Some Indefinite Future Date—No Answer to Charge of Desertion—Ending of Desertion incumbent on Deserting Spouse—Deserted Spouse entitled to rely on Presumption that Intention to desert still continuing—Divorce and Matrimonial Causes Act 1928, s. 10 (b). There may be desertion notwithstanding the fact that the forsaking spouse hopes, believes, or intends that cohabitation will be resumed at some future date. Such an intention or desire is no answer to a charge of desertion where one spouse has abandoned the other with the intention that the abandonment should continue for some indefinite time. It is not incumbent on a deserted spouse to show that he or she was at all times during the relevant period ready and willing to receive back the deserting spouse. It is for the deserting spouse to bring the desertion to an end; and, until the deserting spouse does so, the other spouse is entitled to rely on the presumption that his or her intention to desert was still continuing. (*Sifton* v. *Sifton*, [1939] P. 221; [1939] 1 All E.R. 109, and *Church* v. *Church*, [1952] P. 313; [1952] 2 All E.R. 441, followed.) A public servant in the course of his official duties, was transferred to Hokitika, his wife remaining in the family home at Wellington. He went to Hokitika in January, 1951, and, in December of that year, obtained a flat as a home. His wife visited him there on January 23, 1952, and left on January 31, 1952, returning to the family home where she remained during his term of service at Hokitika (where he retired in May, 1955) and had lived there since. On a petition for divorce by the husband alleging desertion without just cause commencing on or about January 31, 1952, *Held*, That, on the facts, there was desertion by the wife in January, 1952, the respondent then forsaking the petitioner for an indefinite time, and until he might choose to repair the broken bond by resuming cohabitation in Wellington. *W.* v. *W.* (S.C. Christchurch. July 20, 1956. F. B. Adams J.)

EVIDENCE.

Confessions and Improperly Obtained Evidence. *30 Australian Law Journal*, 68.

Crown Privilege. *221 Law Times*, 308.

Inspection—Inspection by the Judge—Allegation of Unsafe System of Work—No rebutting Evidence—Judge taking into Consideration Own Opinion formed on Inspection—While cleaning the tucking blades of a rotary press with a swab held in his hand, a workman was injured. He brought an action for damages for negligence against his employers, claiming that they had failed to provide a safe system of work, and at the trial he called witnesses who gave evidence that the use of a swab held in the hand was dangerous. His witnesses were cross-examined, but no rebutting evidence was called by the employers. At the invitation of the parties, the Judge of first instance inspected the press and saw a demonstration by the workman showing how it was cleaned. The Judge in his judgment reviewed the evidence of the workman's witnesses and held that any adult man using reasonable care would find no difficulty in cleaning the blades and that the workman's injury was due to his own carelessness. The workman appealed on the ground that the Judge had substituted his own opinion formed on his view for the evidence of the workman's witnesses. *Held*, That on an issue, not calling for technical evidence, such as whether in a simple case something was dangerous, a Judge was entitled to take into consideration his own impression formed on a view of the subject-matter, which constituted part of the evidence in the same way as an exhibit or demonstration in Court (dictum of Denning L.J. in *Goold* v. *Evans & Co.*, [1951] 2 T.L.R. 1189, 1191, adopted); in the present case the Judge had not relied on his own opinion to the exclusion of other evidence and had not given undue weight to the impression which he had formed on the view and his decision would be upheld. (*London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135, and *Cole* v. *United Dairies (London), Ltd.*, [1940] 4 All E.R. 318, distinguished; dictum of Lord Alverstone C.J. in *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135, 138, criticized as too wide.) *Buckingham* v. *Daily News, Ltd.*, [1956] 2 All E.R. 904. (C.A.)

EXECUTORS AND ADMINISTRATORS.

Application of Assets: I. Paying Debts and Expenses. *106 Law Journal*, 390.

Application of Assets: II. Payment of Legacies, *106 Law Journal*, 405.

LAW PRACTITIONERS.

The Barrister: Remuneration and Responsibility. *221 Law Times*, 323.

Retirement Benefits for the Self-Employed. *100 Solicitors' Journal*, 442.

MARRIED WOMEN'S PROPERTY.

Question of Title—Ordinary Principles of Law and Equity applicable without being Over-technical or Over-rigid—Land purchased in Joint Names of Spouses—Wife contributing Cash above Mortgage for Erection of House—Husband orally abandoning His Interest to Wife, followed by Her Exclusive Possession and Meeting All Expenditure—Husband standing by and allowing Same to be made—Equitable Estoppel by Acquiescence, giving Wife Right to call on Husband to transfer His Interest to Her—Wife entitled to Whole Beneficial Ownership—Married Women's Property Act 1952, s. 19. Where the property, subject to an application by one of the spouses under s. 19 of the Married Women's Property Act 1952 for an order determining the title to the property, is realty and is unsold, ownership can and should be decided upon an application of the ordinary principles of law and equity, subject to the qualification that the Court is not bound to be over-technical or too rigid in the application of such principles. Section 19 does not enable the Court to determine the respective interests of the spouses merely upon what in the circumstances is fair and just, but it may, provided there is a proper observance of legal principles, disregard niceties and make an authoritative declaration as to the respective beneficial interests of the parties in a property (or in the identifiable proceeds of the sale of property) when the title is (or was) in the name of the one or the other or in both their names. (*Barrow* v. *Barrow*, [1946] N.Z.L.R. 438, referred to.) The husband and wife purchased land with a view to building thereon a matrimonial home. Each contributed half the purchase price. They took title as joint tenants. The cost of the house was met by a mortgage and with cash almost entirely contributed by the wife. There was an oral abandonment of the property to the wife by the husband, who said she could have it and in her name. Later, he deserted her, and, since December, 1951, she had paid all the outgoings. On an application by the wife, under s. 19 of the Married Women's Property Act 1952, for an order determining the title to the property, she asserting a right to the whole of the beneficial ownership thereof, *Held*, 1. That there was an oral abandonment by the husband to his wife of his interest in the property resulting in an unconditional gift of the land to the wife, and this was followed by the wife's exclusive possession, and expenditure on the land pursuant to the gift and in the belief that she was the owner of the land, the husband standing by and allowing such expenditure to be made. 2. That a supervening equity in favour of the wife arose from the expenditure of money by her on the faith of the husband's abandonment to her of his interest in the property; and, although the gift was a verbal one only, it gave the wife a right in equity to call upon the husband to complete the imperfect gift, and she was entitled to the whole beneficial ownership of the property. (*Dillwyn* v. *Llewelyn*, (1862) 4 DeG. F. & J. 517; 45 E.R. 1285; *Hughes* v. *Metropolitan Railway*, [1877] 2 App. Cas. 439, and *Central London Property Trust Ltd.* v. *Hightrees House Ltd.*, [1947] K.B. 130, followed. *Gregory* v. *Mighell*, [1811] 18 Ves. 328; 34 E.R. 341, referred to.) *Thomas* v. *Thomas*. (S.C. Wellington. July 26, 1956. Gresson J.)

NEGLIGENCE.

Action for Breach of Statutory Duty. *106 Law Journal*, 387.

PRACTICE.

Judgment—Reciprocal Enforcement of Foreign Judgment—Action in personam—Judgment Debtor served in New Zealand with Writ and Subsequent Judgment by High Court of Justice in England—Judgment Debtor taking No Part in Proceedings or Submitting to Jurisdiction of High Court—Judgment, having no Extra-territorial Validity, not registrable in Supreme Court—Reciprocal Enforcement of Judgments Act 1934, ss. 4, 6 (3). Where the Reciprocal Enforcement of Judgments Act 1934 (N.Z.) refers to "jurisdiction" both in s. 6 (1) (*b*) and in s. 6 (3), the reference is to jurisdiction so as to confer extra-territorial validity on the foreign judgment, and not jurisdiction to hear and determine the matter. A judgment given by the High Court of Justice in England in an action in personam cannot be registered in the Supreme Court of New Zealand if the judgment debtor (here a company registered in New Zealand, which, at no time, had any office or place of business in England), on being served with the writ, did not take any part in the proceedings in the High Court or submit to its jurisdiction, or agree in respect of the subject-matter of the proceedings to submit to the judgment of that Court, as none of the conditions set out in s. 6 (3) is present to enable the High Court to assume an extra-territorial validity to its judgment. (*Sirdar Gurdyal Singh* v. *The Rajah of Faridkote*, [1894] A.C. 670, followed. *In re Dulles' Settlement (No. 2): Dulles* v. *Vidler*, [1951] 1 Ch. 842, distinguished. *Wallace* v. *Bastings*, (1899) 18 N.Z.L.R. 639, applied.) *Sharps Commercials Limited* v. *Gas Turbines Limited*. (S.C. Wellington. July 27, 1956. McGregor J.)

PUBLIC REVENUE—INCOME TAX.

Purchase of Trading Stock—Livestock bought at Public Auction as Part of Farm as Going Concern—Stock not sold in Ordinary Course of Business—Commissioner apportioning Sale Value of Stock at less than Amount likely to be realized at Local Stock-sale—Amount of Such Apportionment "the market price"—Stock not sold at "less than the market price . . . on the day of the sale"—Land and Income Tax Amendment Act 1926, s. 5—Land and Income Tax Amendment Act 1949, s. 9 (1). Section 9 of the Land and Income Tax Amendment Act 1949 covers the disposal of trading stock other than its sale in the ordinary course of business, and does not deal with ordinary trading transactions. The term "the market price", as used in s. 9 (1) must be construed with reference to all the surrounding facts, and from those it must be determined (i) what is the market to which the sale or disposition is referable, and (ii) what is the price in such market. This is largely, if not entirely, a question of fact. (*Charrington & Co., Ltd.* v. *Wooder*, [1914] A.C. 71, and *Earl of Ellesmere* v. *Inland Revenue Commissioners*, [1918] 2 K.B. 735, followed.) On September 24, 1952, the mortgagee of a farm, who also had securities over the live and dead stock, sold the same through the Registrar of the Supreme Court under his powers of sale by public auction as a going concern for £21,000. The taxpayer was the highest bidder, and became the purchaser. There was no separate price for the livestock. A week before the sale, the livestock was valued by stock auctioneers at £6,471. In his income-tax return in respect of the income derived by him during the year ended March 31, 1953, in which the sale was held, the taxpayer returned the cost of the stock to him as £6,471. Pursuant to s. 5 of the Land and Income Tax Amendment Act 1926, the price of the stock acquired

by the taxpayer was determined by the Commissioner of Inland Revenue as being £4,711 14s. 7d. This sum was determined by apportioning the total price realized at the auction sale for the farm land, plant, and stock sold as a going concern in proportion to the Government valuation of the land, the market value of the plant, and the market value of the stock if it had been sold separately by auction in the local saleyards. On Case Stated, a Magistrate upheld the taxpayer's contention that he was entitled to return the cost of the stock at £6,471. The Commissioner appealed. *Held*, 1. That the market upon which the sale took place was a public auction properly conducted at which the livestock was sold as part of a farm as a going concern, and was a "market" within the meaning of s. 9 for disposing of trading stock, either livestock or otherwise; and the livestock was so realized at the best price available. 2. That, on the day of the sale, the mortgagee-vendor's livestock could not be sold by him as a separate item, and it was then, *qua* him, not available for separate sale; its market was limited to a market as part of a farm as a going concern, and, as such, on that market, it was not shown that it did not fetch the market price on the day of the sale. 3. That, accordingly, as the livestock was not sold for a consideration "less than the market price or the true value thereof on the day of the sale", s. 9 did not apply; and the taxpayer was not entitled to enter the figure of £6,471 in his return of income. *Commissioner of Inland Revenue* v. *Edge*. (S.C. Christchurch. July 26, 1956. Henry J.)

Revenue Fraud at Common Law. *106 Law Journal*, 387.

TENANCY.

Sale of Business as Going Concern—Apportionment of Purchase Price—Vendors agreeing to apply for Landlord's Consent to Transfer Lease—Transfer of Tenancy an Incident on the Occasion of the Sale—Real Nature of Transaction to be looked at—Tenancy Act 1948, s. 19 (5)—"As a condition of the . . . transfer of the Tenancy"—Tenancy Act 1955, s. 32 (2). An agreement provided for the sale and purchase for £5,900 of the milk-bar property therein described, being "all the plant fittings stock and business of the vendors including only £300 worth of stock". The purchase price was stated as being apportioned as follows: "Goodwill, £1,600; Plant and fittings, £4,000; and Stock, £300." A clause in the agreement provided that the vendors would forthwith apply to the landlord of the premises to transfer the lease to the purchaser. Default was made in payments under the bill of sale given by the purchaser over the plant and fittings. In an action by the vendors to recover from him the amount owing to secure the balance of the purchase-money the defendant purchaser relied, *inter alia*, on the defence of illegality—namely, that the plaintiffs by stipulating for or demanding or accepting for themselves, as a condition of the transfer of the lease of the said premises to the defendant, payment for chattels (the plant and fittings) a sum in excess of the fair selling value, acted contrary to the provisions of s. 19 of the Tenancy Act 1948, and that such agreement was thereby rendered null and void and of no effect. Section 19 (5) of the Tenancy Act 1948 (s. 32 (2) of the Tenancy Act 1955) provided that every person committed an offence who "stipulates for or demands or accepts . . . as a condition of the transfer of the tenancy . . . payment for the furniture or fixtures, or other effects of the premises, or for any other chattels, of any sum in excess of the fair value thereof." *Held*, 1. That there was no evidence that the plaintiffs stipulated for or demanded any sum paid in excess of the selling price of the plant and fittings. 2. That there was no evidence that such excess sum came into the transaction as "a condition of the transfer of [the] tenancy", as those words were used in s. 19 (5) of the Tenancy Act 1948 (s. 32 (2) of the Tenancy Act 1955), as the transfer of the tenancy was an incident on the occasion of the same, but no more. 3. That, on the evidence, the plaintiffs made an apportionment of the purchase price at the request of the solicitor who prepared the agreement, and none of the parties knew the reason for his request. 4. That there was no acceptance of payment, because the only sum paid before the transfer of the tenancy was £2,000, which was on account of the purchase price generally, and it was not appropriated to the plant or chattels. *Semble*, That it is not lawful to charge excessive sums for chattels under the guise of a contract of sale of a going concern, as the Court can look at the real nature of the transaction and can receive extrinsic evidence in appropriate cases to prove that an excessive sum is "stipulated for or demanded, or accepted as a condition of the grant or transfer of the tenancy"; but, unless and until those elements can be proved, there is no offence. *Thomas et Ux.* v. *Lee*. (S.C. Timaru. April 26, 1956. Henry J.)

TRANSPORT.

Transport Licensing—Available Route—Meaning of "available"—"At least of thirty miles of open Government railway"—Continuous Stretch of Railway at least Thirty Miles in Length—Transport Licensing Regulations 1950 (S.R. 1950/28, 1951/129), Reg. 29 (2) (a). The word "available" in the expression "an available route" in Reg. 29 (2) (*a*) of the Transport Licensing Regulations 1950 (as amended by Reg. 3 of Amendment No. 3) is limited by its context to meaning "capable of being used" from the customary route along which carriage of goods by road is permitted. The phrase "at least thirty miles of open Government railway" in Reg. 29 (2) (*a*) envisages a continuous stretch of railway extending at least thirty miles in length, and does not include an aggregate of two or more separated stretches of railway. (*Hanna* v. *Garland*, [1954] N.Z.L.R. 945, referred to.) *Gordon* v. *Coldicutt*. (S.C. Auckland. August 21, 1956. Shorland J.)

TRUSTS AND TRUSTEES.

Variation of Trust—Court's Inherent Jurisdiction—Statutory Enlargement thereof—Variation to be for Benefit of Whole Trust, and not of One Beneficiary only—Statutes Amendment Act 1936, s. 81—Administration Act 1952, s. 33. The inherent jurisdiction of the Court to modify or vary trusts extends to cases in which the Court (i) effects changes in the nature of an infant's property, or (ii) allows trustees of settled property to enter into some business transaction which was not authorized by the settlement (the salvage cases), or (iii) allows maintenance out of income directed to be accumulated, or (iv) approves a compromise on behalf of infants and possible afterborn beneficiaries; a compromise in this connection meaning an agreement relating to disputed rights. (*Chapman* v. *Chapman*, [1954] A.C. 429; [1954] 1 All E.R. 798, followed.) The object of s. 81 of the Statutes Amendment Act 1936 is to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view, to authorize specific dealings with the property which the Court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the Court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction. (*In re Downshire Settled Estates, Marquess of Downshire* v. *Royal Bank of Scotland*; *In re Chapman's Settlement Trusts, Chapman* v. *Chapman*; *In re Blackwell's Settlement Trusts, Blackwell* v. *Blackwell*, [1953] Ch. 218; [1953] 1 All E.R. 103, followed.) Whether an application is made under s. 33 of the Administration Act 1952 or under s. 81 of the Statutes Amendment Act 1936, the transaction which it is sought to have approved must be for the benefit of the whole trust and not of one beneficiary only. (*In re Craven's Estate, Lloyds Bank* v. *Cockburn*, [1937] 1 Ch. 423; [1937] 3 All E.R. 33, followed.) *In re Gray (deceased)*. (S.C. (In Chambers). Wanganui. July 18, 1956. Gresson J.)

WILL.

Bequests of Shares in a Private Company. *221 Law Times*, 337.

Construction—Devises and Bequests—Gift of "all my furniture (except carpets) and effects in my dwelling"—Gift confined to Contents actually in the Dwelling—"Effects" including Cash Register in the Dwelling, Contents of Garage excluded. By a codicil to his will, the testator, apart from confirming the will, provided as follows: "I GIVE AND BEQUEATH to EILEEN HILLGROVE free of all duties all my furniture (except carpets) and effects in my dwelling at 902 Avonside Drive, Christchurch." At the time of his death, the testator lived at the address mentioned. There was a detached garage, which contained a motor-car, lawnmower, garden boots, garden hose, sundry tools and a pair of steps, all being usually kept there. There was a cash register in the house. The will did not give the donee any right to enjoy the dwelling itself. On originating summons to determine which of the named articles (if any) passed under the codicil, *Held*, That the gift in the codicil was confined to the contents actually in the dwelling: (1) the furniture (except carpets) in the building in which the testator actually dwelt; and (2) the effects (localized by the testator as being those "*in* the dwelling") which included the cash register. (*MacPhail* v. *Phillips*, [1904] 1 I.R. 155, referred to.) *In re Smith (deceased)*, *Hillgrove* v. *Smith*. (S.C. Christchurch. July 26, 1956. Henry J.)

Felonious Acts and Rights of Succession. *100 Solicitors' Journal*, 482.

THE MEANING OF "POUND".

In Respect of Obligations to be Discharged Abroad.

By E. J. HAUGHEY, M.A., LL.M., B.Com.

The recent decision of the Privy Council in *National Mutual Life Association of Australasia, Ltd.* v. *Attorney-General*, [1956] N.Z.L.R. 422 ([1956] A.C. 369 ; [1956] 1 All E.R. 721), should be of interest, not only to the profession, but also to investors and all those concerned with matters of finance. In this case, the question in dispute between the parties concerned the nature and extent of the obligations of the New Zealand Government in respect of five parcels of New Zealand 5½ per cent. inscribed stock and one parcel of four bearer debentures, all of which matured on February 1, 1951 ; and the aggregate nominal or face value of which was £526,500.

The history of these securities was as follows. In September, 1925, the Secretary of the Treasury entered into negotiations with a Melbourne firm of stockbrokers with a view to borrowing on behalf of the Government money from investors either in Australia or England ; but no prospectus was ever issued in respect of this loan. As a result of these negotiations, the National Mutual Life Association (which carries on an extensive life insurance business in New Zealand, but has its head office at Melbourne) agreed through the brokers to subscribe various sums in consideration of the issue to it of inscribed stock, bearing interest at 5½ per cent. per annum, payable half yearly on February 1 and August 1, and maturing on February 1, 1951. Apart from the sum of £100,000 which the Association had available in Wellington at the time, all these moneys were received from it by the Bank of New Zealand at Melbourne to the credit of the Public Account, and, by the direction of the Treasury, were remitted to that Bank at Wellington. The stockbrokers were paid commission by the Government at the rate of 10s. per cent., and out of this commission they paid the cost of remitting the money to New Zealand, so that the full amount thereof was provided for the Government at Wellington.

It was, however, an express stipulation of the contractual arrangements entered into between the parties that the moneys secured by all such stock (including the £100,000 raised in Wellington) should be payable as to interest and repayable as to principal at Melbourne "free of exchange" ; and this provision was expressly incorporated in respect of the stock in the Inscription Register of the New Zealand Government and endorsed on the certificates of title issued in respect thereof. Four of the five parcels of stock mentioned above represented the balance of this stock held by the Association at the maturity date thereof.

The fifth parcel of stock, which was purchased by the Association in 1942, represented portion of a larger parcel of stock which had originally been subscribed for in 1925 by other investors on terms similar to those set out above in respect of the stock originally subscribed for by the Association itself. In particular, those terms originally included the stipulation that the moneys secured by the stock should be payable as to interest and repayable as to principal at Melbourne "free of exchange" ; and a provision to this effect was likewise incorporated in the relevant entry in the Inscription Register.

The debentures which were purchased by the Association in the open market in 1942 were issued by the Government in 1927 pursuant to s. 3 of the New Zealand Inscribed Stock Act 1917 in exchange for certain inscribed stock which had also been issued on terms similar to those set out above. The bearer of each such debenture was entitled, on the presentation and surrender thereof at the Melbourne office of the Bank of New Zealand to receive from the Government on February 1, 1951, "five hundred pounds sterling", and during the currency of the debenture to be paid at such office of the bank interest on the principal sum thereby secured at 5½ per cent. per annum by half-yearly instalments on February 1 and August 1 on the presentation and surrender of the relevant coupons attached thereto. It is to be noted that the expression "free of exchange" did not appear in the debentures.

At the time when all the foregoing securities were issued, New Zealand currency was at parity with Australian currency ; and, although both currencies were subsequently devalued in terms of English currency and there was for a period some divergence between them, the two currencies had again been at parity with each other for many years before August 20, 1948, when New Zealand currency was restored to parity with English currency with the result £N.Z.100 became worth £A.124. Thereafter, the Government continued to pay to the Association at Melbourne interest at the rate specified in the securities on the nominal amount thereof expressed in terms of Australian currency, and, likewise, on the maturity date, repaid to the Association at Melbourne the nominal amount of the principal in Australian currency. The Association, however, claimed that the Government's obligations under the securities were measurable in the money of account of New Zealand, and brought an action claiming the alleged short payments of principal and interest arising from the difference in value between the two currencies which occurred after August 20, 1948.

It was held by the Full Court of the Supreme Court (Fair, Hay and North JJ., Gresson and Stanton JJ. dissenting) that such obligations were measurable, not in the money of account of New Zealand, but in that of Australia ; and that the Crown had fully discharged its obligations both as to principal and interest by paying to the Association the nominal amounts thereof in Australian currency in Melbourne. Against this decision the Association appealed to the Privy Council ; but the majority judgment of the Supreme Court was upheld by the Board, and the appeal was dismissed.

I.

Before the judgments which were delivered in the *National Mutual* case are discussed, it is desirable to refer in some detail to the principal cases which, in recent years, have moulded the development of this

important branch of the law. These cases reveal a remarkable diversity of judicial opinion. In not one of them (they have all gone to appeal, and in some instances there have been two appeals) have all the Judges who heard the case in its various stages been unanimous in their decisions, and, even where the same conclusions have been reached, there are a number of occasions where they have been based on differing reasons.

The first of these cases to which it is necessary to refer is *Broken Hill Proprietary Co., Ltd.* v. *Latham*, [1933] Ch. 373. The facts in this case were as follows. In October, 1920, an Australian company, incorporated in Victoria and also having a registered office in London, issued mortgage debentures secured by a trust deed. By each of the debentures, the company covenanted to pay the principal moneys on October 1, 1940, or such earlier date as they should become payable in accordance with the conditions endorsed thereon, and in the meantime to pay interest thereon at 7 per cent. per annum in accordance with the coupons annexed thereto. Under the conditions, both principal and interest were payable in either Australia or London, at the holder's option. In accordance with a supplemental trust deed dated September 1, 1921, an additional register of debentures was established in London, and the company had power to make provision for, inter alia, transfer of registration from one register to the other. At the date of the last drawing of debentures for redemption before the commencement of the proceedings (namely, October 7, 1931) over 6,000 debentures were outstanding, of which 137 were on the London register.

It was held by Maugham J. that the payment to debenture-holders electing to be paid in London, both as to principal and as to interest, should be in sterling, without deduction on account of the exchange value of the pound in Australia.

This judgment was reversed by the Court of Appeal (Lawrence and Romer L.JJ., Lord Hanworth M.R. dissenting), it being held (i) that on the true construction of the debentures and of the annexed coupons there was no implied stipulation that, in the event of a debenture-holder exercising his option to be paid in London, the company could be required to pay the principal moneys and interest thereby secured in sterling and not in Australian currency; and (ii) that, therefore, the appeal must be allowed, and, in lieu of the declaration made by Maugham J., there must be a declaration that the sums payable by the company in London in redemption of, and for the interest on, the debentures in question ought in all cases to be paid in Australian currency converted into sterling at the rate of exchange current in London on the due date for payment thereof.

The majority decision of the Court of Appeal in the *Broken Hill* case was, however, expressly overruled by the House of Lords in *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122.

The *Adelaide* company was an English company incorporated under the Companies Acts, 1869 to 1909, as a company limited by shares and having its registered office in London and a branch office in Adelaide, where it carried on its business of supplying electric light. The capital of the company included certain 5 per cent. A cumulative preference shares (A shares) and certain 6½ per cent. C cumulative preference shares (C shares). On June 1, 1925, and thenceforward, the Prudential company was and remained registered in England as the holder of A shares which had been registered in England in 1919. In 1924 and 1928 the same company was registered as the holder of C shares which had been offered for subscription concurrently in England and Australia.

In 1921, by special resolutions duly passed and confirmed, the whole conduct and control of the *Adelaide* company's business, except formalities required by statute to be observed in England, were transferred to Australia; and it was provided that all dividends should be declared at general meetings to be held in Australasia and should be paid in and from Adelaide or elsewhere in Australasia, and that all preference dividends declared by the board of directors should be declared at meetings to be held in Australasia and should be paid in and from Adelaide or elsewhere in Australasia, and that no part of the profits of the company should be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there.

In 1929, the A and C shares were converted respectively into A stock and C stock.

On and after March 1, 1931, the *Adelaide* company paid dividends on the stock by delivering to the stockholders warrants payable at the Bank of Adelaide, South Australia.

The *Prudential* company claimed a declaration that they and all other holders of A stock and C stock registered in the *Adelaide* company's register in England were entitled to be paid their dividends in sterling in England in English legal tender for the full nominal amount thereof and not subject to deduction for Australian exchange, and to an order for payment accordingly less the amount already received in respect of the dividends.

It was held by the House of Lords (reversing orders made by Farwell J. and by the Court of Appeal which had been based on that Court's decision in the *Broken Hill* case) that, inasmuch as the dividends were by agreement between the parties to be paid in Australia, the *Adelaide* company had discharged its obligations by paying in Australian currency that which was in Australia legal tender for the nominal amount of the dividend warrants.

In *Auckland City Corporation* v. *Alliance Assurance Co., Ltd.*, [1937] N.Z.L.R. 142 ([1937] A.C. 587) the Judicial Committee discussed and applied the *Adelaide* case. The respondents were the holders of a number of debenture bonds in denominations of £100, dated 1920, and the interest coupons outstanding under them which were issued by the Auckland City Corporation under the Local Bodies Loans Act 1913, and s. 26 of the Appropriation Act 1915, in payment for the purchase by the Corporation from a private undertaking of the city's tramway system. The debentures and the interest thereon, at the rate of 5¼ per cent. per annum, were payable at the holder's option either in Auckland or London. The currency of New Zealand having become depreciated, the respondents exercised their option to be paid in London, and, having been there offered payment of the equivalent in sterling of

the nominal amount in New Zealand currency, they claimed a declaration that they were entitled to be paid in sterling—in the currency of England—both as to principal and interest, without any deduction for exchange.

It was held by the Privy Council, affirming the decision of the Court of Appeal (Ostler, Blair, and Kennedy JJ., Reed A.C.J. dissenting) ([1936] N.Z.L.R. 413) that there being a common unit of account, the pound, in England and New Zealand, the mode of performance of the contract must be governed by the law of the place of performance and accordingly the debt must be discharged by payment in the currency of the place of payment. Provided, therefore, that the bearer exercised his option to be paid in London, the interest coupons were payable in English currency without any allowance for exchange, as also were the debentures when they fell due.

Shortly after the decision in the *Auckland* case another currency case from New Zealand came before the Privy Council—that of *De Bueger* v. *J. Ballantyne and Co., Ltd.*, [1938] N.Z.L.R. 142 ([1938] A.C. 452). In this case, by an agreement made in England in 1932 between the respondents, a company incorporated in New Zealand, and the appellant then resident in England, the appellant agreed to proceed to New Zealand to be there employed by the respondents as a tailor cutter for a period of three years at a salary of " seven hundred pounds sterling " a year. At the date of the agreement the value of the New Zealand pound was at about ten per cent. discount as compared with the English pound, and later during the appellant's period of service the discrepancy rose to twenty-four or twenty-five per cent. The appellant, having claimed to be entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current at the time of each payment, the respondents refused to pay the £700 a year otherwise than in New Zealand currency.

In the Supreme Court ([1935] N.Z.L.R. 1043) Northcroft J. decided in favour of the appellant as plaintiff, holding in effect that the question was purely one of the construction of this particular contract and that the use of the word " sterling " therein could not be regarded as a mere habit of speech not meaning anything more than legal tender. In this contract he thought that the word must be construed as signifying English currency in contrast with the currency of other countries and in particular with that of Australia or New Zealand.

This decision was reversed by a majority in the Court of Appeal ([1936] N.Z.L.R. 511). Reed A.C.J., who dissented, held that in the absence of the word " sterling " the salary would have been payable in New Zealand currency, because it was the currency of the place of performance. But the use of the word " sterling ", which was not common form in a contract of service, in a commercial contract drawn and executed in London, must, in his opinion, be taken to express " the intentions of the parties as to the currency in which the remuneration should be paid ". He, therefore, held that " sterling " here meant British currency, being in constant use in that sense.

Ostler J., as also did Kennedy J., with whose judgment Blair J. agreed, took the opposite view. Ostler J. held that as in August, 1932, the New Zealand pound was only at a discount of ten per cent., and was not depreciated to twenty-five per cent. until January, 1933, the appellant was not likely to have exchange questions in his mind, and if he had, should have insisted on less ambiguous language than the word " sterling " which, he said, was used both in England and New Zealand as meaning the currency which had then taken the place of gold as legal tender. He would have come to a different conclusion if the New Zealand pound had been a different unit of account when the contract was made, but held that it followed from *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (*supra*) that the English and New Zealand pound were the same; and hence that payment in New Zealand currency was a sufficient performance, since in New Zealand the word " sterling ", at least until the Reserve Bank of New Zealand Act 1933, meant nothing more than paper money which had taken the place since August, 1914, of the sovereign as legal tender.

Kennedy J. also emphasized as the ground of his decision that " the English pound or the pound sterling, as the unit of account, is not only identical with the English pound used in England for so many years, but it is also one and the same as the New Zealand pound ". " The pound in New Zealand is," he held, " the same unit of account as the pound in England, not merely a unit of account with the same name." Hence he concluded that " the obligation to be discharged by payment in New Zealand is expressed in a money of account common to New Zealand and to England, and will be discharged by tender of that which is legal tender at the place of performance "; and that the word " sterling " added nothing.

This decision of the Court of Appeal was in turn reversed by the Privy Council. Their Lordships held that " sterling " meant British sterling; and that " sterling " was added in the agreement to define what means of discharge—what currency—was being stipulated, and was an express term excluding the prima facie rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. Having regard to the place where, and the parties between whom, the agreement was made, the appellant was entitled under it to be paid his salary of £700 a year in English currency or its equivalent in New Zealand currency at the relevant rates of exchange. If " sterling " had not been inserted, the salary would have been payable in New Zealand currency, being that of the place of payment in accordance with the principles laid down in the *Adelaide* case.

[In our next issue, the later currency cases, from 1948 to 1952, will be considered.—Ed.]

THE NEW COMPANIES ACT 1955.

Private Companies.

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

SIZE OF NEW ACT.

The Companies Act 1955 is in itself a massive tome. In the *Handbook* issued by Messrs Butterworth & Co. (Australia), Ltd. (preparatory to the publication of a new edition of *Morison*) the Act together with the Index thereto occupies 361 pages of fairly close type. The Act, as issued by the Government Printer, consists of 408 pages: the Schedules alone take up eighty pages of very small type. The amount of detail in several of the Schedules is almost staggering: for example, Table A (Regulations for Management of a Company Limited by Shares) takes up twenty-three pages, whilst the much-debated and greatly-detailed Eighth Schedule (Provisions as to Balance Sheet and Profit and Loss Account) take up ten pages. Yet I venture the very confident opinion that there is very much material in the Companies Act 1955 which the average busy solicitor will never need to consider. Few solicitors will ever have to worry very much about the provisions affecting:

(a) A company limited by guarantee. (The Incorporated Societies Act 1908 has rendered guarantee companies almost unnecessary in New Zealand.)

(b) An unlimited company. (Who in New Zealand to-day would ever contemplate the registration of a company not having any limit to the liability of its members?)

(c) Companies not formed under the Act authorized to register under the Act (Part X).

(d) Winding up of unregistered companies (Part XI).

(e) Overseas Companies (Part XII) except perhaps a few Wellington solicitors acting for overseas companies. (Section 7 (2) of the Act provides that all matters relating to any overseas company shall be recorded in the office of the District Registrar at Wellington, and shall at all times be retained in that office.)

And then the Eighth Schedule, containing many new provisions (some very far-reaching) as to accounts, balance sheet, and profit-and-loss account, will interest and affect the practising accountant more than the solicitor, although no doubt when the new Act comes into force solicitors may often have to advise clients as to the nature and operation of these new and more stringent provisions. It was suggested by some person that the special provisions affecting *mining* companies, (as defined in s. 424) could conveniently be dispensed with, especially as the gold-mining industry in New Zealand at the present time is in a moribund state. However, it was not practicable to carry out that suggestion, for a change in the economic condition of New Zealand or some other event might very well lead to a revival of that once very important industry, and the legislation has to be on hand to meet such a contingency. Yet, beyond knowing that he must not include *mining* purposes (as defined in s. 424) in his memoranda of association, the average solicitor in New Zealand at present is very little concerned about Part XIV of the Companies Act 1955.

MATTERS OF IMPORTANCE TO SOLICITORS.

On the other hand, there are other parts of the Companies Act 1955 which the solicitor will have to have at his fingertips: the provisions of the Act, as to private companies, the registration of charges, and the incorporation of companies, are examples of these parts. The new Act does not contain very much new material as to the registration of private companies: every private company on and after January 1, 1957, will have to have a secretary.

EVERY COMPANY TO HAVE A SECRETARY.

Section 181 requires every company (private or public) to have a secretary, and s. 355 provides that no private company shall:

(a) Have as secretary a person who is the sole director of the company:

(b) Have as secretary a corporation, the sole director of which is the sole director of the company:

(c) Have as sole director of the company a corporation, the sole director of which is secretary to the company.

There was a certain amount of opposition to these special provisions as made applicable to private companies. It was pointed out that in New Zealand many companies are virtually one-man companies, often consisting entirely of a married man who holds every share except one, the other nominal shareholder often being his wife. However, in such a case, the authorities could see no objection to the husband being sole director and to the company appointing the wife as secretary.

PRIVATE COMPANIES MAY DISPENSE WITH AUDITORS.

Again, many have often thought that it was unnecessary for a small one-man company to employ an auditor: in fact, although at present under the Companies Act 1933 every company big or small, private or public, is required by law to have an auditor, it is well-known that many private companies have in fact no auditor: I suppose because the company does not consider that the expense incurred in having one is justified. The new Act will regularize this undoubtedly irregular practice.

Section 163 of the Companies Act 1955 is the general provision requiring every company to have an auditor:

> Every company shall at each general meeting appoint an auditor or auditors to hold office from the conclusion of that, until the conclusion of the next, annual general meeting.

This general provision is modified by s. 354 (3) which reads as follows:

> (3) Section one hundred and sixty-three of this Act shall not apply to a private company (not being a subsidiary of a company that is not a private company) in respect of any annual general meeting if at or before that meeting all the members of the company having the right to vote on that resolution pass a unanimous resolution that no auditor be appointed at that meeting. Every such resolution shall expire at the commencement of the next annual general meeting after the meeting to which it relates. Where a resolution under this subsection is passed—

(*a*) Section one hundred and forty-seven of this Act shall apply to the resolution:

(*b*) The Registrar may at any time before the next annual general meeting, if he thinks fit, on the application or with the consent of any member or creditor of the company, or of his own motion, appoint an auditor or auditors to hold office until the conclusion of the next annual general meeting.

(*c*) Every balance sheet of the company prepared while the company has no auditor shall include a statement that the accounts have not been audited; and subsection six of section one hundred and fifty-three of this Act shall apply in every case of failure to comply with this paragraph.

Statutory Safeguards when Private Company has No Auditor.

It will be observed that, although the Legislature has sanctioned the dispensing of an auditor by a private company (with certain exceptions), it has at the same time provided safeguards against the abuse of this power. The Registrar may at any time before the next annual general meeting, if he thinks fit, on the application or with the consent of any member or creditor of the company, or of his own motion, appoint an auditor or auditors to hold office until the conclusion of the next annual general meeting. Also, it is specifically provided that every balance sheet of the company prepared while the company has no auditor shall include a statement to that effect. No doubt many solicitors will be asked to advise their clients as to these new let-out provisions for private companies.

Maximum Membership of a Private Company Increased.

Every solicitor knows that a private company must consist of not less than two members and not more than twenty-five. A slight modification of this rule was introduced by the Companies Act 1933. Section 292 (2) of that Act provides that where two or more persons hold one or more shares in a company jointly they shall for the purposes of Part VIII of the Act (that being the part specifically dealing with private companies) be treated as a single member. When the Companies Bill 1952 was under consideration strong representations were made to permit a much larger maximum number than twenty-five: these representations were only partly successful, the consensus of opinion being that, if an association of more than this number desired the protection and benefit of registration under the Companies Act, the members should seek registration as a *public* company, and assume the wider obligations of a public company, to wit, full disclosure to the public of its affairs, such as the filing in the Companies Office of its annual balance sheet and profit and loss account.

Section 359 (1) of the Companies Act 1955 (following s. 297 of the Companies Act 1933) provides that, if a private company enters the name of any person in its register of members (whether upon the registration of a transfer or transmission of shares, or upon the allotment of any shares, or otherwise) so as to increase the number of the members of the company beyond twenty-five, the company and every officer of the company who knowingly and wilfully authorizes or permits the entry shall be liable to a fine not exceeding £50, and a further fine not exceeding £5 for every day during which the number of members continues in excess of twenty-five.

Subsection (2) expresses the limit to which the Legislature was prepared to go to in amelioration of the above prohibition: as from January 1, 1957, in computing the number of the members of a private company for the purposes of the preceding prohibition, no account is to be taken of persons who are in the full time employment of the company, and have been in such employment for at least two years, or of persons who, having been formerly in the full time employment of the company for at least two years, were, while in that employment, and have continued after the termination of that employment to be members of the company. *But in no case must the total number of the members of the company at any time exceed fifty.*

As a safeguard against the abuse of this concession the Legislature has provided that where the number of the members of a private company exceeds twenty-five, the company must send with the annual return a certificate signed by both a director and the secretary, to the effect that the excess of the number of members of the company over twenty-five consists wholly of persons who are employees or former employees who are so qualified under the preceding provisions. The certificate to be given reads:

Further Certificate to be Given by a Director and the Secretary of a Private Company if the Number of Members of the Company Exceeds Twenty-five.

We certify that the excess of the number of members of the company over twenty-five consists wholly of persons who—

(*a*) Are in the full time employment of the company, and have been in such employment for at least two years; or

(*b*) Having been formerly in the full time employment of the company for at least two years, were while in that employment, and have continued after the termination of that employment to be, members of the company.

Signed: , Director.

Signed: , Secretary.

Special Provisions as to Labour Shares.

Whilst on the topic of shares in a private company owned by employees or former employees thereof, the provisions above set out must not be confused with the provisions of s. 67 authorizing a company (private or public), unless expressly prohibited from so doing by its memorandum, to issue special shares called *labour* shares, *to persons for the time being employed in the service of the company.* If the holder of any *labour* shares ceases to be employed in the service of the company (whether by reason of death or otherwise) he shall be deemed to have surrendered his shares. It is specifically provided in s. 67 (7) that nothing in s. 359 (cited in the previous paragraph of this article) shall apply with respect to *labour* shares issued pursuant to s. 67.

The result is that, in calculating the number of permissible members of a private company, no account may be taken of the holders of *labour* shares: they stand on a special footing of their own. When the Company Law Revision Committee was considering s. 59 of the Companies Act 1933 (the statutory predecessor to s. 67 of the 1955 Act) it made inquiries as to the number of companies in New Zealand which have availed themselves of the opportunity to create *labour* shares, and ascertained that very few companies in New Zealand have ever issued *labour* shares. It remains to be seen how many private companies in New

Zealand will issue ordinary (as distinguished from *labour*) shares to employees and former employees by virtue of the authority conferred by s. 359 (2).

Passing of Resolutions by Private Companies by Entries in Minute.

Section 300 of the Companies Act 1933 has proved a great convenience in practice. It provides that anything that may be done by a company registered under Part II of the Act (containing the provisions relating to the registration of *public* companies) by resolution, special resolution, or extraordinary resolution passed at a meeting of the company may, subject to any special provisions in that behalf in the articles of the company, be done by a private company in the same manner or by resolution passed, *without a meeting or any previous notice being required*, by means of an entry in its minute book signed by at least three-fourths of the members, holding in the aggregate at least three-fourths in nominal value of the shares of the company.

Section 300 was amended by ss. 11 and 12 of the Statutes Amendment Act 1939, which consist of certain machinery provisions dovetailing s. 300 into the winding-up provisions of companies.

It was always the general opinion of the legal profession and the Companies Office that a private company could invoke the provisions of s. 300 in increasing its capital. The writer, therefore, read with considerable astonishment not unmixed with dismay, the case of *Roach* v. *Roach (1931) Ltd.*, [1953] N.Z.L.R. 1006, where counsel for the plaintiff had submitted that a private company could not take the short cut provided by s. 300, when it desired to increase its capital. Had such a submission prevailed, it would have upset existing practice and probably necessitated the passing of clarifying legislation.

In the Supreme Court, Hutchison J., in an oral judgment, held that a private company could increase its capital by entry in its minute book, provided, of course, the other statutory requirements were present. The case, however, went to the Court of Appeal, and a perusal of the judgment as reported in [1955] N.Z.L.R. 946, shows what an able argument the appellant's counsel submitted. However, the appeal was dismissed, Cooke J. delivering the judgment of the Court, and dealing fully with all points raised.

There is no doubt that the above handy rule of practice, as sanctioned by the Court of Appeal in *Roach's* case, will continue to apply under the Companies Act 1955, but the procedural provisions enabling private companies to avail themselves of entries in minute books have been somewhat improved.

Under the 1955 Act, the three-fourths majority required will be linked up, not with the number of members of the company and the nominal value of their shares, but with the members having the right to vote on the particular resolution, holding in the aggregate at least three-fourths in nominal value of the shares giving that right. And s. 362 (2) is new; it provides that it shall not be necessary for a private company to hold an annual general meeting, if everything required to be done at that meeting by resolution, special resolution, or extraordinary resolution (including the adoption or approval of every balance sheet or other document required to be laid before the meeting) is within the time prescribed for the holding of the meeting done by means of an entry in its minute book in accordance with the section.

Issue of Redeemable Preference Shares by Private Companies.

The first provision in New Zealand law enabling a company to issue redeemable preference shares was s. 57 of the Companies Act 1933, which is still in force.

Section 57 gives a company power to issue redeemable shares, if it is so authorized by its articles. As pointed out, however, in *Morison's Company Law in New Zealand*, 2nd Ed., 313, a private company has no power to issue redeemable preference shares, as s. 57 is expressly declared not to apply to a private company: Companies Act 1933, s. 293 and Seventh Schedule.

As from January 1, 1957, however, a private company will have power to issue redeemable preference shares. The relevant provision will be s. 66 of the Companies Act 1955, and there is nothing in that Act stating that that section will not apply to a private company. For the first time, there is expressed the provision (which previously has probably been implied) that the redemption of preference shares under s. 66 shall not be taken as reducing the amount of the company's authorized share capital.

Other changes with reference to the issue of redeemable preference shares will be pointed out in a future article.

Balance Sheets and Profit-and-Loss Accounts of a Private Company.

As is the position under the present statutory law, a private company will not be required to attach to its annual return to be filed in the office of the Registrar of Companies, a balance sheet, a profit-and-loss account, group accounts or auditor's report: Companies Act 1955, Ninth Schedule. A private company, however, will have to send to the Registrar with the Annual Return a certificate signed *both* by a director *and* by the secretary of the company that the company has not since the date of the last return (or in the case of a first return, since the date of the incorporation of the company) issued any prospectus.

Loans by a Private Company to its Directors.

By virtue of para. (*c*) of the proviso to s. 56 (1) of the Companies Act 1933, there is nothing illegal in a company's making loans to persons, *other than directors*, *bona fide* in the employment of the company with a view to enabling those persons to purchase fully-paid shares in the company to be held by themselves by way of beneficial ownership. The corresponding proviso, however, to s. 62 of the Companies Act 1955 (which will replace s. 56 of the Companies Act 1933) reads as follows:

> Provided that nothing in this section shall be taken to prohibit—
>
> (*c*) The giving by a company of financial assistance, by means of a loan, guarantee, or the provision of security, to persons who are *bona fide* in the employment of the company and (*except in the case of a private company*) are not directors of the company, with a view to enabling those persons to purchase

(*Concluded on p. 256.*)

DIVORCE: SERVICE OF PETITION.

Need for Corroborative Evidence.

In a judgment delivered on July 27, His Honour the Chief Justice drew attention to the desirability of corroborative evidence of the service of a petition in undefended divorce suits where there is no appearance and no address for service. The text of the judgment (*Bolton* v. *Bolton*) is as follows:

" This is an undefended suit for divorce on the ground that the petitioner and the respondent are parties to a written agreement for separation that has been in full force and effect for not less than three years. There was no appearance on behalf of the respondent, and no address for service had been filed. I was not altogether satisfied with the proof of service of the petition and notice attached thereto; and I think it desirable that I should say why I thought the proof to be unsatisfactory.

"The respondent was not personally known to the process server, and he identified the person served by her likeness to a photograph, which was attached to the affidavit of service, and which, at the hearing, the petitioner said was a recent photograph of his wife. The process server also swore that the woman, on whom he served the papers, admitted that she was the respondent named in the petition. There was no evidence other than that of the petitioner identifying the photograph as a likeness of the petitioner's wife.

" It is frequently the practice, when the respondent is not personally known to the process server, that the person served is sought to be identified by means of a photograph, or by the production of an acknowledgment of service purporting to be signed in the handwriting of the respondent. I have no desire to question or disapprove of that practice; and, when the photograph or handwriting is identified at the hearing, not only by the petitioner, but also by a corroborating witness, the Court will not ordinarily have the least difficulty in being satisfied that it was the respondent upon whom the papers were served.

" The matter is not quite so free from difficulty when the only evidence, that the photograph or handwriting is that of the respondent, is the uncorroborated evidence of the petitioner.

" A final decree of divorce alters the status of the parties, and corroboration of the evidence of the grounds of divorce is invariably demanded. In undefended suits, where there is no appearance and no address for service, convincing proof of service is as important as is convincing proof of the ground of divorce itself; and, if the evidence of service is readily capable of corroboration, I think it is desirable that such corroborative evidence should be tendered.

" In most cases, the corroborating witness, who is necessarily called, will be able to confirm the petitioner's evidence that the photograph produced is a recent photograph of the petitioner's spouse and a good likeness. It will not so frequently be the case that he can corroborate the petitioner's evidence that the signature, in an acknowledgment of service, is that of the respondent. In such a case, at all events when the signature is distinctive, the corroboration may be supplied by a comparison of that signature with the signature appearing on the written agreement for separation, where that is in evidence.

" In almost all cases where the petitioner's evidence is a necessary link in the chain of proof of service, some corroboration of his evidence will be readily obtainable. I am not called upon to set out the various forms of corroborative evidence which may be led. An obvious foundation for corroboration would be laid if the process server were instructed, before serving the papers, to inquire of the person about to be served the date and place of his marriage, the full christian names of the petitioner, the maiden name of the wife, names, ages and places of birth of children, the addresses at which the parties lived, or any of a dozen other incidents in the domestic history which no one but the respondent would be likely to know. A paragraph in the affidavit of service recording the results of such an inquiry would ordinarily provide all the corroboration that the Court would require, and would not cause any unnecessary expense or inconvenience.

" I am not to be understood as asserting any rule of law, that corroboration such as I have been discussing is an absolute and essential requirement. I am aware that in England, under the Matrimonial Causes Rules 1950, a procedure is prescribed which seems to be less rigorous than that which I recommend, and that the Committee on Procedure in Matrimonial Causes thought that it was unlikely that a person would sign an acknowledgment if he or she was not the person named in the petition: see *Rayden on Divorce*, 6th Ed., 271, 272, 422. In New Zealand, we have no such Rule as the English RR. 7 and 9. Under our Rules, the petition shall not be tried unless, in the case I am contemplating, the Court is satisfied that the respondent has been served. Bearing in mind that a final decree of divorce alters the status of the parties, that carelessness in serving documents is unfortunately not unknown, and that, now and then, there may appear in the Divorce Court a petitioner not scrupulously careful of what he says, I have always felt that the Court should exercise the greatest vigilance in satisfying itself that service has in fact been effected on the person who is in fact the respondent. Accordingly, when the petitioner's evidence is a vital link in the chain of identification, I shall always look for corroboration of that part of his evidence, as I am bound to look for corroboration of the evidence establishing the grounds of divorce. I shall expect such evidence to be tendered if it is reasonably procurable, and I think it will usually be quite readily procurable. If it is not reasonably procurable, I shall have to consider the circumstances and decide each case on its merits.

" In view of what I have just said, I ought to add that I have no reason to doubt, in the least degree, the present petitioner's honesty. It is simply that undefended suits come before me with such rapidity, and in such numbers, that I find it necessary to guide myself by a rule that must apply to all.

" After an adjournment, further evidence was given which satisfied me that the respondent in this cause was duly served. There will, therefore, be a decree nisi which may be moved absolute after the expiration of three calendar months."

TOWN AND COUNTRY PLANNING APPEALS.

Clive Progressive Association v. Hawkes Bay County.

Town and Country Planning Appeal Board. Napier. 1955. July 15, 18.

Proposed District Scheme—Objection thereto—Land in County contiguous to Township zoned as "rural"—Unsatisfied Demand for Residential Sites—Part Area to be re-zoned as "residential"—Town and Country Planning Act 1953, s. 26.

Appeal, under s. 26 of the Town and Country Planning Act 1953, against the disallowance by the Hawkes Bay County Council of its objection to the proposed district scheme, and its request that notice be taken of the original county plan "which is more progressive and takes into consideration needs and problems peculiar to us and which would allow Clive to expand under expert local knowledge."

The Council in its reply to the appeal said that the reason for altering the first zoning was to compact residential expansion thus preventing ribbon development (in this case on a State Highway), and aiming for a lower capital cost in providing further services in the future.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. There was at present a substantial unsatisfied demand for residential sites in this locality.

2. Although within the area zoned as residential there was at present sufficient vacant land to provide for the foreseeable residential needs of Clive for some time, much of it was not available for that purpose having regard in part to the nature of its present occupancy and ownership and also in part to the fact that some of it is very low-lying and would, if it were to be utilized for residential purposes, involve substantial drainage problems.

3. There were good grounds for supporting the appellant's view that increasing commercial development in the surrounding district would increase the demand for residential sites in Clive.

The Board allowed the appeal in part: i.e., That of the land contiguous to the area zoned as residential the following area now zoned as rural is to be re-zoned as residential: "That block of land bounded as follows: commencing from the point at which the southern boundary of Miss Davidson's property joins the Hastings-Napier State Highway thence in a south-easterly direction along that boundary to Muddy Creek thence in a north-easterly direction along Muddy Creek to Tucker's Lane thence in a north-westerly direction along Tucker's Lane to its junction with the aforesaid State Highway and thence in a south-westerly direction along such State Highway to the commencing point (excluding therefrom such portions as are already zoned as 'residential' in the proposed district scheme.)"

No order as to costs.

Appeal in part allowed.

Mackersey v. Hawkes Bay County.

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

Zoning—Land zoned as "rural"—Suitability for Light Industrial Installations—Permits for Same already issued—Adequate Provision in District Scheme for Industrial Areas—Part economically usable for Industrial Purposes to be re-zoned—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 an objection to the proposed zoning as "rural" of a piece of land owned by him at Kaiapo Road, Hastings.

The grounds for appeal were that the land was situated in an area in which already existed many light industrial installations; that the land is more suited to industrial than to rural use; that the area has been regarded as industrial, and permits for industrial buildings had been issued; and that insufficient area had been set aside by the Council for light industrial purposes.

The Council replied that "it considers that it has made ample provision for industrial development in its plan" and that "it is not in favour of additional sites at present, especially in close proximity to a Main Highway which is expected to carry the bulk of the through Napier-Wellington traffic."

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. The zoning of the area as a whole as rural was appropriate, although the use of land in the immediate vicinity of the appellant's property for rural purposes was slight, the area as a whole was land of high fertility, and should as far as possible be retained for primary production.

2. The respondent's proposed district scheme made adequate provision for industrial areas in the locality within the immediately foreseeable future.

3. The appellant's property was being used solely for residential and industrial purposes and its use for such purposes was likely to be permanent: it was unlikely to revert to rural use. The vacant portions of it could be more economically and appropriately used for industrial purposes.

The Board allowed the appeal in part: i.e., that of the appellant's property that portion of it comprising 3 ro. 14.3 pp. being Lots 12, 13 and 14 on D.P. 3266 Hawke's Bay Registry should be zoned as "light industrial". No order as to costs.

Appeal in part allowed.

Hastings Borough, Hastings Chamber of Commerce, and Greater Hastings (Inc.) v. Hawkes Bay County.

Town and Country Planning Appeal Board. Napier. 1955. July 12; August 3.

Proposed District Scheme—Objections thereto—Land in County contiguous to Borough zoned as "rural" and "light industrial"—Desired Change to "residential" and "heavy industrial"—Rapid Extension of Borough—Sufficient Undeveloped Area in Borough for Residential, Commercial, and Industrial Expansion—Area zoned as "light industrial" to be re-zoned as "heavy industrial"—Borough's Intention to petition for Incorporation of Rural Areas in Borough—Appropriate Course to pursue—Town and Country Planning Act 1953, s. 26.

Appeals, under s. 26 of the Town and Country Planning Act 1953, against the disallowance by the Hawkes Bay County Council of the appellants' objections to the following four matters under the proposed district scheme. The three appeals were heard together, and dealt with in Part I of the Appeal Board Decision. In effect the Hastings Chamber of Commerce and Greater Hastings (Inc.) supported and endorsed the case of the Hastings Borough. The County Council's reply is shown in each case.

1. *The Rural Zoning in the Area North-east of Collinge Rd.:* The Borough Council desired an area of about 198 ac. to be zoned as residential. The County Council, in its rejection, stated that "it has agreed that there is a case to the extension of the residential area in the vicinity of Collinge Road and has an understanding with the Hastings Borough Council that this will receive prior consideration after the plan has been fully established." It did not agree to any alteration at present.

2. *The Rural Zoning of the Area lying between Williams St. and Richmond Rd.:* The Borough Council desired that most of this area be re-zoned as residential, and that portion containing 25 ac. lying to the west of Tomoana Road, be re-zoned as heavy industrial. The County Council, in its reply, stated that it did not agree that a further area of rich agricultural land should be removed from production.

3. *The Light Industrial Zoning of the Land lying between Williams St. and Coventry Rd.:* The Borough Council desired that this area be re-zoned as heavy industrial, but the County Council considered that it had made ample provision for industrial development in its plan.

4. *The Lack of an Extension of St. Aubyn St. southwards to join up with the Havelock Rd. and the Lack of Widening of Havelock Rd.:* The County Council replied that, at the time of the hearing of objections, it had been unable to decide on the best method of dealing with the Havelock-Hastings Road problem. The position was still unchanged.

In addition the Hastings Chamber of Commerce appealed in respect of two other matters, as set out in Part II of the Appeal Board Decision.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman): PART I. *Main Objections:*

1. Three of the appeals relate to three blocks of land in the County but contiguous to the Borough of Hastings on its North Eastern Boundary:

(*a*) An area North-east of Collinge Rd. containing approximately 198 ac. at present zoned as "rural".

This is known as the "Ellison Block". The appellants seek to have this block re-zoned as "residential".

(*b*) An area of 181 ac. bounded by Williams St., Tomoana Rd., Richmond Rd., and Pakowhai Rd. This is known as the "Richmond Block", at present zoned as "rural".

The appellants seek to have 156 ac. of this block zoned as "residential" and 25 ac. fronting on to Tomoana Road zoned as "heavy industrial".

(*c*) An area of 43 ac. bounded by Williams St., the Railway Line, Coventry St., and Tomoana Rd., at present zoned as "light industrial". The appellants seek to have this area re-zoned as "heavy industrial".

2. The fourth common ground of appeal relates to the omission from the proposed district scheme of provision for the extension of St. Aubyn St. on a diagonal line to join up with the Hastings-Havelock Rd. about 15 chs. outside the Borough Boundary, and for the widening of the latter road.

A considerable volume of evidence was led, but the Board does not propose to traverse that evidence in detail. After hearing the evidence adduced and the submissions of the parties and having inspected all areas under consideration, the Board finds:

1. That the rapid expansion of the Borough of Hastings over the past nine years indicates that further substantial expansion both residential and industrial can be expected to take place in the future.

2. That the area at present undeveloped within the Borough is approximately 400 ac. including residential, commercial, and industrial areas, but of this approximately 220 ac. only are suitable for residential subdivision.

3. That it is reasonable to assume that within five years or less more land close to, or contiguous to, the Borough of Hastings will be needed for residential purposes.

4. That the proposed district scheme makes adequate provision in the Omahu Rd. area for the foreseeable future industrial development needs. This area is light shingle land having no great present or potential primary productive value.

5. That the "Ellison Block" (para. 1 (*a*), *supra*) and the "Richmond Block" (para. 1 (*b*), *supra*) comprise land of high fertility having a high primary productive value. Their retention as rural for as long as possible is essential to the general economic needs of the district.

6. That the evidence disclosed that the Borough Council has under consideration the question of petitioning the Local Government Commission for the incorporation of the above-described rural areas in the Borough. It is the opinion of this Board that that is the appropriate course for the appellants to pursue.

If those lands or part thereof were incorporated in the Borough then their development as residential areas could be planned by stages outward from the present boundary. A Borough Council is better equipped and has better facilities to so develop land for urban occupancy and to control such development than is a County Council. If these lands were zoned as residential now, it would almost inevitably follow that their development as residential areas would be spasmodic and haphazard with isolated or semi-isolated residential pockets dotted about in rural land with a consequential diminution of primary production.

The Board disallows the appeals in so far as they relate to the areas described in para. 1 (*a*) and (*b*), *supra*, i.e., the "Ellison Block" and the "Richmond Block".

7. With regard to the area of 43 ac. referred to in para. 1 (*c*), *supra*, the Board is of the opinion that as this land, at present zoned as light industrial, is contiguous to an area already zoned for noxious industry; and, having regard to its proximity to the railway and the main sewer, the request that it be re-zoned as "heavy industrial" is reasonable.

The Board allows the appeals in regard to this particular area which is to be re-zoned as "heavy industrial".

St. Aubyn Street Extension:

Very little evidence was adduced in support of this part of the appeals though the Board is prepared to accept as correct the submission that the Hastings-Havelock main road carries a substantial volume of traffic, particularly so when seasonal goods are being transported, and that it is reasonable to assume that in the future this traffic is likely to increase in volume.

The proposed new road was recommended by a sub-committee set up by the two local bodies in 1949 to investigate and report on this question.

The Board agrees with the contention of the respondent Council that a road such as is suggested would be a short-term palliative and wrong in principle, and that the correct solution when the necessity arises is to provide for a road parallel to the present highway.

The Board disallows the appeal on this question.

Part II.

In addition to the questions hereinbefore dealt with the Hastings Chamber of Commerce also appealed in respect of two other matters of objection which the respondent Council had disallowed. They are as follows:

1. *That an Area of 25 acres at Paki Paki shown as "rural" should be zoned as "light industrial".*

This land is of light quality having a pumice subsoil. There is an adequate supply of water. Part of the land is used for industry at present as some other parts were used for many years in the past. On the other hand, the evidence for the respondent Council is that at present the drainage is totally inadequate and cannot be improved until the outfall of the Karamu Stream is improved.

The proposal is also open to the objection that there would be an undue loss of time to workers travelling to and from their work. As was said by Mr Fish in his evidence: "where it is practicable to do so, trade and residence should be planned together in order to secure a regular labour force within such a distance that will obviate the necessity of any material travelling." The Board agrees with that submission: it is in accord with sound town-and-country-planning principles.

Furthermore the Board, as already stated, takes the view that the proposed scheme makes adequate provision for the development of industry in the Omahu Road area.

This appeal is disallowed.

2. *That Provision be made for the Subdivision into Quarter-acre Sections of Land which adjoins the Borough Perimeter, at present zoned as "rural."*

No evidence was led in support of this proposal other than a general broad submission that it would assist in the inevitable development of Hastings.

To endorse such a proposal as this would be contrary to town-planning principles, and not in accordance with the planned and orderly internal and outward development that should be the objective of those interested in the expansion of Hastings.

This appeal is disallowed. No order as to costs.

Appeals allowed in part.

West Lynn Farms, Ltd. *v.* Waitemata County.

Town and Country Planning Appeal Board. Auckland. 1956. January 24; February 7.

Subdivision—Land in County near Borough—Area zoned as "rural"—Large Area in County zoned as "residential"—Such Area sufficient for foreseeable Residential Needs for Many Years—Town and Country Planning Act 1953, s. 38.

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Waitemata County refusing permission to the appellant company to subdivide its property at Henderson Valley-Forrest Hill Road, about three-quarters of a mile south-west of the Henderson Borough.

The grounds for appeal were that the property was serviced by good roads, water, and electric power, and direct transport with Auckland city and suburbs; that the land was high and had ideal views; that the nature of the soil was such that it presented no difficulty regarding drainage, and was suitable for drainage with septic tanks; that there were other subdivisions and homes already erected beyond the appellant's property; that the subdivision would not detract from the amenities of the neighbourhood; that there was a demand for such sections, and that the Waitemata County had no operative district under the Town and Country Planning Act 1953.

The Council replied that it had an undisclosed district scheme, and that the proposed subdivision would not be in conformity with the town-and-country-planning principles likely to be embodied in the undisclosed district scheme.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. That the property in question, with the exception of Lots 1 to 14, is an area to be zoned as "rural" under the Council's undisclosed district scheme, and that zoning was appropriate.

2. That under the undisclosed district scheme the Council proposed to zone an area of approximately 5,000 acres for urban development.

3. That, under the scheme, ample provision will be made for the foreseeable residential needs of this area for many years.

4. That to approve of the subdivision for urban purposes of small areas of "rural" land lying outside the proposed residential area would be to contravene town-and-country-planning principles and impede the orderly development of the area zoned as "residential." The appeal was disallowed. No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Silver Jubilee.—With a recent issue of this Journal, its Editor completed twenty-five years' continuous service in that capacity. This is an unusually long time in legal journalism, and is not often exceeded in general newspaper work. In the quarter-century, Scriblex understands that he has written every one of the 500-odd leading articles which have appeared, and has personally attended to the page make-up of every issue. His expositions on changing law have proved of inestimable value to readers of the Journal, which has provided over the period a service unexcelled by any other weekly or fortnightly legal magazine in the Empire.

Licensing Note.—A feature of the new Licensing Court, opened last month in Bourke Street, Melbourne, is its witnesses' room, with its carpet, leather-padded seats, and occasional tables fitted with trays. Its opening, convivial in the traditional sense of the word, included Judge Fraser, counsel, Crown Law Officers, Police, hotel architects, and hotel-keepers. Included in the gathering was the Director of the Victorian Local Option Alliance (the Rev. C. R. McCue) who was overheard to remark: "I'll really have to go soon. I just can't stand here drinking tea after tea after tea."

Misleading Case.—In *1956 Criminal Law Review*, 415, there is reference to a case in which the defendant was charged with displaying on a tray of fillets of catfish a label which was calculated to mislead, inasmuch as it bore the words "Mock Halibut Fillets", contrary to s. 6 of the Food and Drugs Act 1955. The facts were agreed by the parties, namely, that skinned and filleted catfish—a fish for obvious reasons never sold under its own name—was sold from a tray bearing the label "Mock Halibut Fillets" at a price slightly more than half the price of halibut fillets. A blackboard outside the shop, setting out the various types of fish for sale, also included "Mock Halibut Fillets". For the prosecution, it was contended that the label should not have contained the word "Halibut". The defence contended that no customer would be misled having regard to the word "Mock" appearing on the label, coupled with the price, and drew an analogy with "Mock Turtle Soup". It was held that, applying the test laid down by Wrottesley J. in *Concentrated Foods Ltd.* v. *Champ*, [1944] K.B. 342, the label was not calculated to mislead any ordinary person; and there was no case to answer.

Reasonable Doubt.—"I have never yet heard any Court give a real definition of what is a reasonable doubt, and it would be very much better if summings-up did not use that expression", says Lord Goddard L.C.J. in *R.* v. *Summers*, [1952] 1 All E.R. 1059. "Whenever a Court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to say what is a reasonable doubt, to say to a jury: 'You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed'. The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one". The case is now applied by F. B. Adams J. in *Watkins* v. *Watkins* [1956] N.Z.L.R. 754, 756, to an adultery situation:

> This passage seems to be accepted as authoritative in England (*Archbold's Criminal Pleading, Evidence, and Practice*, 33rd Ed., 200): and the word "satisfied" used therein is the same word as is used in s. 17 (1) (c) of the Divorce and Matrimonial Causes Act 1928 in regard to divorce on the ground of adultery, and with more general scope in s. 14. There seems to be no distinction between this statutory requirement and the requirement of the criminal law as laid down in *R.* v. *Summers*: and, even if one regards the reference in that case to "feeling sure" as adding something to the word "satisfied"—on this point see *R.* v. *Hepworth*, [1955] 2 All E.R. 918—no one will doubt that, in a case of adultery, the tribunal must be "satisfied" to the point of "feeling sure".

There are a number of cases following *R.* v. *Summers* which indicate that the decision has given rise to uncertainty; and, in *R.* v. *Hepworth* (*supra*), the L.C.J. manifests a tendency to place reliance on both formulas despite the apparent conflict between them: "One would be on safe ground if one said in a criminal case to a jury: 'You must be satisfied beyond reasonable doubt'," he observes in one passage of his judgment; and then continues: "One could also say—'You, the jury, must be completely satisfied'—or better still—'You must be sure of the prisoner's guilt'." Incidentally, the Court of Criminal Appeal held in *Hepworth's* case that, in a receiving case, to "be satisfied" was not enough; and it is hard to reconcile, at least in criminal cases, the "be sure" formula with the view of the House of Lords in *Woolmington's* case, [1935] A.C. 462, that "juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt".

Licensees and Invitees.—An up-to-date practitioner, mindful of the recent recommendation of the Law Reform Committee in England, that the distinction between invitee and licensee should be abolished, on being called upon to advise a client on this thorny subject, told him that the law regarding invitees and licensees was in a process of change and might well be the subject of early legislation. "Don't tell me that," said the client, "I always thought that Parliament was pretty chary about altering the liquor laws."

The Young (automotive) Heart.—A precocious child with habits even beyond the contemplation of Hilaire Belloc in his *Cautionary Tales* is described in a recent issue of the *Daily Express*. He converted a beer lorry and drove it for a short distance; crashed a car and a van after driving the latter for 1½ miles down a main road; careered at a fast speed with a horse and milk cart borrowed without consent, and finally, but without success, attempted to convert a motor-bus. His age, seven; his obsession, motor-vehicles. As s. 50 of the Children and Young Persons Act 1933, provides that "it shall be conclusively presumed that no child under the age of eight years can be guilty of any offence," the lovable little fellow could not be charged; but the boy's father was bound over in the sum of £100 for his son's future good behaviour.

THE NEW COMPANIES ACT 1955.

(*Concluded from p. 251.*)

> or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

The result is that on or after January 1, 1956, it will be permissible for a private company to give financial assistance to its *bona fide* employees (whether or not they are directors) for the purpose of enabling them to purchase or subscribe for fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

Section 190 of the Companies Act 1955 (which is new) prohibits a company from making loans to its directors, but that section does not apply to private companies : see the Ninth Schedule to that Act.

RIGHTS OF MEMBERS OF PRIVATE COMPANIES TO RECEIVE COPIES OF BALANCE SHEETS AND AUDITORS' REPORTS.

These rights will be extended to the last five balance sheets and to the one about to be presented : Companies Act 1933, s. 363. Under the 1933 Act, the right is restricted to the *last* balance sheet.

THEIR LORDSHIPS CONSIDER.

BY COLONUS.

Statute of Limitation.—" The policy of the law with respect to these statutes [sc. of limitations] is unquestionably this ; possession is always regarded by the law as *prima facie* title, and it is so regarded with a view to public benefit. It is not with a view to the benefit of the individuals who may be in possession or out of possession, who may have title or who may not have title, but it is with a view to public benefit, because it is the public policy that possession should remain undisturbed." Lord Redesdale in *Cholmondeley* v. *Clinton*, (1821) 4 Bligh 1, 75 ; 4 E.R. 721, 747.

Ratifying Joint Contract.—" The suggestion is that where A deposits a sum of money with his bank in the names of A and B payable to A or B, if B comes to the bank with the deposit receipt he has no right to demand the money from the bank or to sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B's, or possibly that A had acted with B's actual authority. For the contract, it is said, is between the bank and A alone. My Lords, to say this is to ignore the vital difference between a contract purporting to be made by A with the bank to pay A or B and a contract purporting to be made by A and B with the bank to pay A or B. In both cases of course payment to B would discharge the bank whether the bank contracted with A alone or with A and B. But the question is whether in the case put B has any rights against the bank if payment to him is refused. I have myself no doubt that in such a case B can sue the bank. The contract on the face of it purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract. If A has actual authority from B to make such a contract, B is a party to the contract ab initio. If he has not actual authority then subject to the ordinary principles of ratification B can ratify the contract purporting to have been made on his behalf and his ratification relates back to the original formation of the contract. If no events had happened to preclude B from ratifying, then on compliance with the contract conditions, including notice and production of the deposit receipt, B would have the right to demand from the bank so much of the money as was due on the deposit account." Lord Atkin in *McEvoy* v. *Belfast Banking Co., Ltd.*, [1935] A.C. 24, 43.

Statute : Conveyancing Practice in Interpretation.—" I do conceive that the law has frequently been decided even in the construction of Acts of Parliament upon what has been the general understanding of lawyers as to the true construction of these Acts of Parliament ; and I will instance such a case under the law of jointure. This House determined in the case of *Drury* v. *Drury* [*Earl of Buckinghamshire* v. *Drury*, (1762) 3 Bro. Parl. Cas. 492] that a rent-charge settled on an infant was within the statute (27 H. 8, c. 10, s. 6) of jointure a good bar of dower, not because such was the literal interpretation of the statute, but because such had been the constant practice of conveyancers and others touching the subject, and it was expressly upon that ground that the decision at that time went ; and I do conceive that it is of the utmost importance that the House should use its judgment by such a criterion whenever the case occurs, for otherwise all property must be in hazard. It is more especially so with regard to settlements, which are ordinarily prepared by those persons who employ their minds in the construction of deeds, and what persons of that description consider to be the law thus acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject, and more particularly it must have reference to that construction which ought to be put upon settlements by persons of that description. How are you to understand the intent of parties in a settlement which really and truly is as much, I may say, the view of the person who prepared it has upon the subject, as the view of the parties ; for the parties to a certain degree are ignorant of the words that are used, unless they are advised by the persons they may consult ; and therefore the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and whenever that has prevailed for a great length of time without impeachment in a court of justice, I take it it ought to be considered as a true exposition of the law." Lord Redesdale in *Smith* v. *Earl of Jersey*, (1821) 3 Bligh 290, 460 ; 4 E.R. 610, 668.