LEGAL ANNOUNCEMENTS.

Continued from page i.

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SUMMARY OF RECENT LAW.

CONTROL OF PRICES.

Import Control—Sale of Imported Motor-car—Restrictions on Sale and Sale-Price—Purchaser entering into Restrictive Covenant with Dealers—Sale of Motor-car by Purchaser in Breach of Such Covenant—Making of Promise in Covenant not "valuable consideration" relating to Sale of Motor-car so as to increase Restricted Sale-price—Price of Car within Statutory Restrictions—Measure of Damages for Breach of Covenant—"Price"—Control of Prices Act, ss. 2 (1), 29—Import Control Regulations 1938 (S.R. 1938-161), Regs. 4, 11, 13. The purchaser of a North American motor-car from motor-dealers was required by the Control of Prices Act 1947 and the Regulations made thereunder, and in terms of Board of Trade "Conditions relating to Distribution", to enter into a restrictive covenant, in which he agreed not to sell or transfer, or otherwise dispose of, the motor-car within two years from the date of purchase, except to resell it to the dealers at the original sale-price, less depreciation at a fixed rate. The giving of the covenant was not a "valuable consideration" within the definition of the "price" in s. 2 (1) of the Control of Prices Act 1947, and was consequently no part of the "price". Moreover, the taking of the deed of covenant by the dealers was a compliance with an obligation imposed on them by authority; and the making by the buyer of the promise in the covenant was not a "consideration which in effect relates to the sale" of the car (within the definition of "price" in s. 2 (1), but was given pursuant to a legal obligation which was a prerequisite to any bargain between the dealers and the purchaser of the car, and which was not in effect part of such bargain. Consequently as the sale of the car, though accompanied by the taking of the covenant as part of the transaction, was not an offence under s. 29 of the Control of Prices Act 1947, the breach of the covenant gave rise to a cause of action at the suit of the dealers. The correct assessment of damages payable by the buyer of the motor-car, on a breach by him of the covenant, is the difference between the price of the car at which the dealers could have purchased it if it had been offered to them in accordance with the covenant, and the then market value of the car. *British Motor Trade Association* v. *Gilbert* [1951] 2 All E.R. 641, followed. *Rodocanachi Sons & Co.* v. *Milburn Brothers* (1886) 18 Q.B.D. 67, applied. *So held* by the Court of Appeal (Gresson and McGregor JJ., F. B. Adams J., dissenting), dismissing an appeal from the judgment of Barrowclough C.J. *Mouat* v. *Betts Motors Ltd.* (S.C. and C.A. March 8, 1957. Gresson J. F. B. Adams J. McGregor J.)

DIVORCE AND MATRIMONIAL CAUSES—JURISDICTION.

Defence—Duty of Court to Notice and Act upon Ground of Defence although not pleaded by Respondent—Withdrawal of answer disclosing Ground of Defence not permitted—Exception where Separation due to Wrongful Acts and Conduct of Petitioner—Divorce and Matrimonial Causes Act 1928, ss. 17, 18. The principle that in divorce proceedings the duty of the Court is to notice and act on a ground of defence, even though it is not pleaded by the respondent, is important in the public interest and admits of no exception.

Apart from, and in addition to the defences specifically mentioned in s. 17 of the Divorce and Matrimonial Causes Act 1928, the Court, on the hearing of any suit founded on alleged adultery, whether it is defended or undefended, is required of its own motion to notice or to investigate matters of defence, when those matters are either (i) not pleaded, or (ii) not espoused by the respondent at the trial, if they are such as would operate as a bar to the granting of a decree. This principle applies, for example, where a respondent does not appear at the trial and does not offer any evidence in support of the allegations raised in his answer. Thus, where the parties have compromised the suit upon terms binding the petitioner not to proceed, such as by a waiver of the benefit of a covenant or undertaking given by the other party, such waiver will not relieve the Court from the duty of noticing and applying the defence. *Statham* v. *Statham* [1929] P. 131, followed. *Rowley* v. *Rowley* (1866) L.R. 1 Sc. & Div. 63, applied. *Semble*, Section 18 of the Divorce and Matrimonial Causes Act 1928, provides that proof that the separation was due to the wrongful acts and conduct of the petitioner operates as a bar to the divorce; in such suits, the Court is neither entitled, nor required, to find the defence of wrongful acts and conduct made out unless it is shown that the respondent actively opposes the making of a decree. *Matthews* v. *Matthews and Another.* (S.C. Auckland. March 21, 1957. Shorland J.)

EVIDENCE.

Letters of Request—Examination of Witness in Relation to Matters pending before Foreign Tribunal—Witness not compellable to produce Document which He could not be compelled to produce in Supreme Court Action in New Zealand—Foreign Tribunals Act 1856 (19 & 20 Vict. c. 113) s. 5. A witness, when giving evidence in New Zealand under an order made pursuant to Letters of Request in relation to matters pending before a foreign tribunal, cannot be compelled to produce a document which he would not be compelled to produce in an action in the Supreme Court of New Zealand. (*Steele* v. *Savory* (1891) 8 T.L.R. 94 and *Barchard* v. *Macfarlane* [1891] 2 Q.B. 241, followed.) *Radio Corporation of America* v. *Rauland Corporation and Zenith Radio Corporation.* (S.C. Auckland. March 18, 1957. Shorland J.)

IMPOUNDING.

Stock found wandering at Night on Road—Dead Horse—Constable arranging for Owner's Employee to drag It to Side of Road—Section contemplating Seizure of Live Animal and holding It in Pound or under Restraint—Impounding Act 1955, s. 33 (1). A constable, on arriving at the scene of an accident caused by the driver of a motor-car striking a horse on a main highway, found a dead horse on the bitumen and arranged for an employee of the horse's owner to drag it to the side of the road, and told him he could do what he liked with it. The owner of the horse was charged under s. 33 (*1*) of the Impounding Act 1955 with being the owner of certain stock, to wit, one horse, found at night straying or wandering on the main highway. *Held*, dismissing the information, That the seizure of the stock contemplated by s. 33 (*1*) of the Impounding Act 1955 is taking possession of a live animal, and holding it in a pound or under restraint to prevent it from straying. *Semble*, Under s. 33 (*1*), it is not necessary to establish mens rea, but the requirements of the section must be strictly complied with before it can be successfully invoked against the owner of wandering stock. *Police* v. *Wilson.* (Patea. October 29, 1956. Yortt S.M.)

SHIPPING AND SEAMEN.

Desertion—Certificate of Master—Proof of Departure of Ship—Such Proof necessary before Master's Certificate admissible—"Departure of the ship from a port in New Zealand"—Shipping and Seamen Act 1952, s. 159. "The departure of the ship from a port in New Zealand", which must be proved before the certificate of the master can be admitted in evidence in terms of s. 159 of the Shipping and Seamen Act 1952 (formerly s. 133 (5) of the Shipping and Seamen Act 1908 as amended) is the departure which made it impossible or inconvenient for the master to produce to the Court the contract by which the deserter was bound and the entry in the log-book in which the deserter's name appeared. *Port Line Ltd.* v. *Martin.* (New Plymouth. November 26, 1956. Yortt S.M.)

TOWN AND COUNTRY PLANNING APPEALS.

Onslow Investments Ltd. *v.* Dunedin City Corporation.

Town and Country Planning Appeal Board. Dunedin. 1956. May 2, 18.

Subdivision of Two Brick Shops—Site affected by 1 ft. Building line Restriction—Shops covered by Common Pitch Roof—Land not suitable for Subdivision, Plan of Subdivision approved Subject to Conditions—Town and Country Planning Act 1953, s. 38.

Appeal under s. 351 of the Municipal Corporations Act 1954 against the decision of the Dunedin City Council refusing to approve a plan of subdivision of two double-brick shops on the corner of Sim Street and Highgate Street, Dunedin.

The Council's reasons for refusing to approve the subdivision were that the two shops were covered by a common pitch roof and that the site of one of the shops was affected by a 10-ft. building-line restriction which might make it impracticable for a new building to be erected on the site if the existing building ceased to exist.

The ground for appeal was that the land was suitable for subdivision, despite the two reasons to the contrary advanced by the Council.

On February 29, 1956, the appellant company submitted a plan of the proposed subdivision to the respondent Council for its approval under s. 351 of the Act.

This proposal, i.e. for the subdivision of this property, had previously been considered by the Council in a slightly different form, and approval had been refused.

This refusal was appealed against in earlier proceedings (see the Board's decision No. 42-55 dated February 22, 1956) and by agreement between counsel the Board has had regard to the evidence tendered at the hearing of that appeal in considering this present appeal.

The respondent Council gives as its grounds for refusal of approval that the land is not suitable for subdivision on two grounds:

(a) That the building-line restriction imposed on Sim Street by Order in Council published in the *New Zealand Gazette* of May 26, 1955, No. 36 at page 851 will reduce the useful area of Lot 1 to 0.8 perches when the restriction becomes effective.

(b) That the wall separating the two proposed lots does not comply with the Council's by-law relating to party walls. It is not a continuous double brick wall and it does not extend through the roof as a parapet.

The appellant made a fresh application to the Council, and, when this was in turn refused, lodged a further appeal on the same grounds as before.

The judgment of the Board was delivered by

REID S.M. (Chairman). Dealing, first, with the latter grounds of objection, the Board finds that the evidence establishes that the building was erected in 1926. The Council can offer no explanation as to why, when the building was first erected, a proper party wall complying with the by-law was not insisted upon. At that time the Council had power to modify the strict requirements of this by-law, but there is no record of any special application having been made for modification. It follows, therefore, that in the absence of any evidence to the contrary the Council must be deemed to have acquiesced in the building being erected in its present form, and its refusal of approval under this heading does not stand on strong ground.

The Council stands on much stronger ground in respect of its first reason for refusing to approve the proposed subdivision. The evidence is that under its undisclosed district scheme under the Town and Country Planning Act 1953 this area will probably be zoned as a "commercial" area.

In considering proposals such as the one under review here the Council is entitled, and must endeavour, to look well into the future.

When the building-line restriction in Sim Street becomes effective Lot 1 would, if the plan was approved, have an area of only 0.8 perches held under a separate title.

The Board is not prepared to hold that a subdivision into such small allotments as is contemplated here is desirable from a town-and-country-planning point of view and it agrees with the Council's view that the land is not suitable for subdivision.

The Board does, however, consider that the appellant company is entitled to some consideration.

As was suggested by counsel for the appellant company, it has considered the provisions of s. 351 (2) (*d*) of the Municipal Corporations Act 1954 and it is prepared to apply them.

The Board approves the plan of subdivision subject to the allotments being disposed of by way of lease only for a term or terms not exceeding 10 years from the date hereof and thereafter for such term or terms as may be prescribed by the Council.

No order as to costs.

Appeal allowed, subject to conditions.

Edward H. Pigeon Ltd. *v.* Manukau County.

Town and Country Planning Appeal Board. Auckland. 1955. September 1. 1956; February 22.

Erection of Additional Factory Building—Area in County zoned as "rural" but likely to be re-zoned as "residential"—Permit refused—Appellant complying with Conditions as to Approval imposed—Appeal allowed—Town and Country Planning Act 1953, ss. 38, 42 (3).

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Manukau County Council refusing to permit the firm to erect further extensions to its factory premises at Pakuranga.

The grounds for appeal were that the appellants' land was not suitable for housing, and that the inability to extend the firm's premises was causing it serious hardships.

The Council replied that questions of hardship could not lawfully be considered by the Appeal Board; that ample provision had been made for the general industrial requirements of the locality, and that the proposed building was a "detrimental work" as defined in s. 38 of the Act, in that it detracted from the amenities of the neighbourhood which were likely to be provided or preserved by the Manukau County Council's undisclosed district scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). The area in question is zoned as "rural" under the Council's undisclosed district scheme. The Board finds:

1. That the zoning of the area as "rural" is appropriate and in accordance with town-and-country-planning principles.

2. It is common ground that the appellant company's land is low-lying and wet in winter and unsuitable for housing.

3. That there is a strong probability that a considerable part of the surrounding higher ground at present zoned as "rural" will in the future be re-zoned as "residential" and utilized for residential purposes.

4. That had this appeal related to an application for the erection of a factory de novo on the appellant company's land it would in all probability have been disallowed, but it relates only to a proposed extension of an already existing industry.

5. That, although the existence of an industry such as that carried on by the appellant company can reasonably be held to be likely to detract from the amenities of a residential neighbourhood, nevertheless the evidence does establish that this particular industry by virtue of its situation does provide certain amenities for the building trade and the residents of the rapidly expanding residential areas of Pakuranga, Bucklands Beach, Eastern Beach, and Howick.

[At the conclusion of the hearing the Board reserved its decision but intimated to counsel that it was prepared to give favourable consideration to the appeal, but if it allowed the appeal it would invoke the provisions of s. 42 (3) of the Act and impose conditions designed to prevent as far as possible any interference with the proposed main highway between Howick and the City of Auckland and also with the aesthetic amenities of the neighbourhood.]

The conditions imposed by the decision are:

1. No timber to be stacked at any time on any part of the land within a distance of two chains from the frontage thereof on the Ellerslie-Howick Main Highway;

2. Within three years from April 30, 1956, those portions of the land extending to a depth of two chains from the frontage thereof on the Ellerslie-Howick Main Highway to be sown with average good quality lawn-grass seed

(*Concluded on p. 92.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"Respect the Burden."—The story is told of Napoleon one evening in Paris chiding a noble lady for refusing gangway to a heavily-laden porter in a hotel vestibule. Drawing her aside, he murmured, "Respect the burden, madame." The tale had a parallel on a rocky feature over-looking Cassino in Italy thirteen years ago. Negotiating the steep side of Trocchio (whose rugged summit looked down on the immediate objective of the New Zealand Division in association with the Indians and the British "Battle Axe Division"), Sir Howard Kippenberger, who used to practise at Rangiora, and whose death occurred in Wellington yesterday, respected the burden of a machine-gunner making the descent weighed down with the tripod of his weapon. He stepped aside to give the other fellow the easier going, and in doing so trod on the anti-personnel mine which crippled him grievously, and caused the years of unceasing pain and suffering that ended only with his death. A few years ago, when the story was told at a reunion, Sir Howard asked the narrator where he got his information. The answer was that the narrator was barely twenty yards away when the mishap occurred. The man who enjoyed the respect and esteem of ranker and brass in equal degree replied simply: "That's a story that need never be told."

Loss of Servant's Property.—In *Deyong* v. *Shenburn* [1946] K.B. 227, the plaintiff, who was playing the role of the Widow Twankey in the pantomime "Aladdin", had his overcoat, two shawls, and a pair of shoes stolen from the room which the theatre provided for rehearsals. His action failed upon the ground that a master has no duty of care to protect his worker's property. A similar decision has been given by the Court of Appeal (Hodson, Morris and Sellars L.JJ.) in *Edwards* v. *West Herts Group Hospital Management Committee* [1957] 1 All E.R. 541, in which a resident house physician at a hospital was required by the terms of his employment to live at a neighbouring hostel provided by the hospital management committee who employed him. He was required to leave the key of his bedroom in the lock. He received a salary of £425 a year, from which £125 was deducted in respect of board and lodging. On returning to his bedroom one night, he found that some articles of his personal clothing had been stolen, there being no indication whether the theft was by a person from inside or from outside the premises. He brought an action for damages against the Committee on the grounds either that they were in breach of a duty owed to him "that they, their servants, or agents would take reasonable care" of his bedroom, and of his clothes and personal effects, and of the key to the door, or that they were in breach of a term to the same effect implied in his contract of employment. The Court found that the Committee was not liable in damages because (i) neither as invitor towards invitee, nor as master towards servant, did the Committee owe the plaintiff a duty to take reasonable care of his personal effects in the hostel; (ii) although a boarding-house keeper owed a duty of care to all, the relationship between the Committee and the plaintiff was not that of a boarding-house keeper and guest; and (iii) in the circumstances, no such term as the plaintiff alleged should be implied in the contract for his employment. The point has been raised, however (*McCarthy* v. *Daily Mirror Newspapers Ltd.* [1949] 1 All E.R. 801), as to the effect of s. 43 of the Factories Act 1937 (U.K.) (s. 63 of our Factories Act 1946) which requires the provision and maintenance for employees of adequate and suitable accommodation for clothing not worn during working-hours. The Court of Appeal held that, in deciding whether accommodation is suitable, regard must be had to the risk of theft.

No Milkbar Cowboy, He.—Before the Court at Uxbridge, a youth denied any connection with a gang of lads, saying: "I don't associate with people in working clothes when I'm in Edwardian attire."—From the *Daily Herald* (London).

The Punishment of Blemishers.—In an (unfriendly) fight at Stepney in which one of the contestants received a severe cut on his head from a razor and the other (a cripple) had part of his left ear bitten off, the Recorder of London directed the jury (i) that, if they should find that reasonable people might have been intimidated or frightened by the conduct of the appellants, that would be sufficient in law, although there was no direct evidence of any one being put in terror, and (ii) that it was immaterial who started the fight, or who was to blame, and that the question of self-defence did not arise. The Court of Criminal Appeal (Lord Goddard L.C.J., Cassels and Hinchcliffe JJ.) upheld the Recorder on the first point, but held that, where a man merely defends himself and does not attack, there is not an affray, and, therefore, the question whether one of the appellants was merely defending himself should have been left to the jury. The Court quashed the convictions against both. The real interest of the case, however, lies in the course which the Court took at the end of its judgment. "We still have the power that we think should be exercised, a power to exercise what is called preventive justice. Both these appellants have shown themselves to be violent and aggressive and, as such, to be blemishers of the peace. We, as Her Majesty's Judges, are also Justices of the Peace for every county and we propose, therefore, to exercise the powers given by the Justice of the Peace Act 1361 (34 Edw. 3 c. 1), which have been confirmed by the well-known decisions in *Wise* v. *Dunning* [1902] 1 K.B. 167, and *Lansbury* v. *Riley* [1914] 3 K.B. 229. We order each of them to enter into a recognisance and to give a surety in the sum of £50, to keep the peace and be of good behaviour for twelve months, and, in default, to go to prison for six months."—*R.* v. *Sharp* [1957] 1 All E.R. 577.

Fast-moving Vehicle.—The following short extract from the evidence in an accident case enlivened a hearing before Henry J., in Dunedin.

Judge: Could you give us an estimate of the speed of the approaching vehicle

Witness: Yes, it was travelling towards me at the speed of a low-flying jet plane.

TOWN AND COUNTRY PLANNING APPEALS.

(*Continued from p. 90.*)

and the lawns laid down on the said land to be kept mown and adequately maintained at all times to the satisfaction of the local authority;

3. Before September 30, 1959, those portions of the land referred to in cls. (1) and (2) above to be planted with such ornamental shrubs or other low-growing trees not exceeding fifteen ft. in height as may be agreed upon between the owner and the local authority or, in default of such agreement, as may be settled by arbitration in the manner prescribed by the Arbitration Act 1908 and its amendments.
4. Before December 31, 1958, those portions of the land referred to in cls. (1) and (2) above to be drained with open drains to the satisfaction of the local authority.

The Board is now informed that the parties have agreed on the conditions to be imposed and have entered into a Deed of Covenant embodying those conditions and a Memorandum of Incumbrance. Certified copies of the Deed of Covenant and the Memorandum of Incumbrance are attached hereto and form part of this decision.

The appellant company having complied with the suggested conditions, the appeal is allowed.

Counsel for both parties have made written submissions on the question of costs. The Board has given these submissions full consideration but has decided to make no order as to costs.

Appeal allowed.

Amuri Motors Ltd. *v.* Christchurch City Corporation.

Town and Country Planning Appeal Board. Christchurch. 1956. February 9; April 26.

Garage Building Additions—Area in City Block predominantly Residential with only two Non-conforming Land-users—Permit refused for Reason Extension a "detrimental work"—Long-established Business in Permanently-constructed Building—Unreasonable to restrict Reasonable Extension of Business—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 Christchurch City Council refusing permission for the erection of additions to the firm's building in Durham Street, Christchurch.

The grounds for appeal were that the application should have been granted, having regard to the following:

(a) The proposed building was not a detrimental work in terms of s. 38 of the Act since it was in an area that was predominantly commercial in character and was unlikely to revert to a residential character.
(b) The company had carried on business on the same site since 1910 and its premises were substantial and modern in structure and had a very long expectancy of life.
(c) The present buildings were situated in a block which already included other commercial buildings.
(d) Permits had been granted in the area in question for the construction of commercial premises over recent years.

The Council replied that the proposed extensions constituted a "detrimental work" in terms of s. 38 of the Act; that the land covered by the application was situated in an area zoned for proposed land use—residential-apartment house—which covered predominant and conditional uses including public and semi-public uses; that the existing position in the area was predominantly cultural, educational, social and civic and further commercial encroachment would not conform to the proposed and predominant uses under the undisclosed scheme; that the block in which the appellant's property was situated was predominantly residential and contained only two non-conforming land users; that the present character and appearance of Armagh Street (on to which the site fronted) should be retained and that the area in the vicinity was essentially public in character and its use as such should be preserved.

The judgment of the Board was delivered by

REID S.M. (Chairman). (1) The appellant company has been established in business on this particular site for over 50 years. The life of the existing building used for showroom, office accommodation and workshops, is estimated to be 100 years.

(2) If the area in which the present building stands is ultimately zoned as "residential", the appellant company will still be entitled to carry on its business at least in its present premises, so that the probability is that the business will continue for a great many years. Garage premises are not a permitted use in a residential area unless as here the business was in existence prior to the coming into force of the Act, and if the application had related to the erection of a new building for a new business the appeal would in all probability have been dismissed. From the town-planning angle, this present business can be considered to detract from the amenities of a residential area, but the Board takes the view that an extension to the present buildings cannot materially increase that interference. It is the nature of the business rather than the building in which it is carried on that can be regarded as likely to detract from the amenities of the neighbourhood, but, as already stated, the appellant company can continue to carry on its business on its present site whatever the zoning may be, and, having regard to the estimated life of the existing building, the Board takes the view that it would be unreasonable to restrict the reasonable expansion of the company's business.

The appeal is allowed. The Board allows the appellant company costs on the appeal, fifteen guineas.

Appeal allowed.

Hall and Another *v.* Hastings Borough.

Town and Country Planning Appeal Board. Napier. 1956. June 5, 20.

Milk-bar and Mixed Business—Area zoned as "residential"—Proposed Building opposite Motor Camp—Isolated Shop in Residential Area detracting from Amenities therein—Shopping Area owned by One Person—Factor of Monopoly there not relevant—Building Permit refused—Town and Country Planning Act 1953, s. 38.

Appeal by A. J. and M. E. Hall under s. 38 of the Town and Country Planning Act 1953 against the decision of the Hastings Borough Council refusing to permit the erection of a shop for use as a milk-bar and mixed business, on a site fronting on Selwood Road, Hastings.

The grounds for appeal were that the erection of the business would be a considerable convenience to the residents of Hastings as the site was opposite one of the entrances to Windsor Park; that the carrying-out of the proposal would in no way be to the detriment of the district as such a business would be clean and quiet and would not be obnoxious in any way; and that other types of business are already carried on in the district so that the carrying-on of the proposal could not be said to mar an otherwise completely residential district.

The Council replied that it had a district scheme which was about to be publicly notified pursuant to s. 22 of the Act; that provision had been made in the scheme for a group of shops about 50 yards from the appellants' proposed business; that the appellants' site was immediately opposite the main motor-camp gates and that the proposed business would tend to create a traffic hazard.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the submissions of counsel and the evidence adduced, the Board finds:

1. That the zoning of the area in which the appellants' property is situated as "residential" would appear to be appropriate and in accordance with town-and-country-planning principles.
2. That in the area under consideration the Council has imposed a building-line restriction requiring all buildings to be set back 20 feet from the roadline. The appellants' proposed shop would not comply with this restriction.
3. That the erection of isolated shops in a residential area detracts from the amenities of such an area and should not be encouraged.
4. That part of the appellants' case was directed towards the submission that the area zoned as a shopping area is almost entirely in the ownership of one person and this, in effect, creates a monopoly which is undesirable in the public interest.

This is a factor which the Board cannot take into consideration; it is concerned only with the appropriateness of the land for the purpose for which it is zoned, not the incidence of ownership.

The appeal is disallowed. No order as to costs.

Appeal dismissed.