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THE STATUS OF BARRISTERS.

FROM the earliest days of the profession in this country, practitioners have fulfilled the dual capacity of barristers and solicitors. Now, however, apart from Queen's Counsel, there is a growing number of practitioners who have elected to practise as barristers only. This brings into being a new status, not yet clearly defined.

Consequently, there is material for careful thought on the part of the profession as a whole in the necessarily brief but significant observations of the learned Chief Justice, the Rt. Hon. Sir Harold Barrowclough,—which appear on another page—on the subject of the briefing of counsel, which distinguished the function on March 25 in the Supreme Court in Wellington, when Mr Reginald Hardie Boys was admitted to the Inner Bar.

Readers will recall the paper, " Professional Ethics ", delivered by Sir Wilfrid Sim Q.C., at the Dominion Legal Conference at Christchurch last year, and the discussion which followed it: (1957) 33 N.Z.L.J. 107 et seq. It will be remembered that much of the discussion centred on the status and conduct of those who practise as barristers only, but do not take silk. As Sir Wilfrid said, " the members of such tend to increase, and features of the situation are that the practitioner attains the status of a barrister simpliciter with the advantages that flow from such a status." (He was not referring to anyone who openly practises as a barrister *and* solicitor). Later on, Sir Wilfrid said that the question of the status of those who practise as barristers only, without taking silk, " is an evolving one, the future of which is in the hands of the profession." He added, in the course of the discussion:

> The whole matter will call for sifting as time goes on, and those barristers who practise solely as barristers would be well advised to consider their position, and formulate some rules by their own co-operative efforts.

The plea of the learned Chief Justice for a more general systematic recognition of experience and specialization in barristerial work—including the work of those practising as barristers and solicitors—takes the matter a step further and opens up a topic of first importance to the profession at large. His Honour said that the function at which he was presiding was not appropriate to a considered elaboration of the theme of the specialized character of work at the Bar, but a promise was implicit in his suggestion that he might " seek some other opportunity of developing " the notion.

As the learned Chief Justice observed " it may be that there should be some association, within the Law Society, of men who are engaged solely or principally as barristers, and that they should draw up some rules for their guidance and conduct." In this, His Honour and Sir Wilfrid Sim Q.C. appear to be in close agreement.

In Canada, the Bar Association represents the amalgamated profession, as does the New Zealand Law Society. The Association, we are informed, has a sub-committee of barristers to watch the interests of those who choose to practise only as barristers.

At present, as we know, those who are practising alone as barristers uphold the ethics and specialized rules of the Bar in England, where the two branches of the profession practise within strictly defined limits.

At the end of his distinguished career, Sir Patrick Hastings, in *Cases in Court* (Heinemann), in speaking of the English Bar, said:

> No statute controls its activities; it knows no master but itself; it knows no rules except those handed down by centuries of tradition.

There seems to be no occasion or necessity in this country to depart from the well-established practice and usages of the English Bar to which the Bar in New Zealand has always closely adhered.

It may be that the best interests of the profession generally would be served if the New Zealand Law Society could see its way to invite District Councils or individual practitioners to express their views whether the time has come for a formulation of rules of practice which will recognize the status of the barrister practising as such, and will guide him in his everyday work vis-a-vis the remainder of the profession. Practice as a barrister has its privileges, but it has its obligations, too.

As His Honour sought to emphasize, " the time is arriving, if it has not already arrived " when cognizance should be taken of this aspect of practice,

> and those whose other duties allow them to appear rarely in the Courts might be well advised to brief those who have greater experience as advocates and who have shown that they have a special aptitude for that kind of work.

Even if definite conclusions cannot be immediately achieved, reasoned consideration at this juncture should at least pave the way for eventual agreement between the profession generally and the barristers practising as such in defining their respective functions.

SUMMARY OF RECENT LAW.

CONVEYANCING.

Technical and Ungrammatical Language, *102 Solicitors' Journal*, 80.

HUSBAND AND WIFE.

Artificial Insemination : Status and Property Rights, *225 Law Times*, 69.

Title to property—Jurisdiction—Title Deeds of Land held by Husband as Trustee—Retention of Deeds by Wife—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17 (Married Women's Property Act 1952, s. 19). In 1950 the husband purchased freehold property on behalf of a partnership in which the husband and his brother were the partners. The property was conveyed into the name of the husband. A large part of the purchase price was borrowed from a bank on the security of title deeds which were deposited with the bank, and the rest of the purchase money was provided by the partnership. In 1954 the beneficial interest in the property subject to the bank's lien was transferred to a limited company by declaration of trust by the husband and his brother and in 1956 after the loan had been discharged the bank delivered the deeds to the husband, who had throughout retained the legal estate. The husband placed the deeds in the strong-room at his matrimonial home. In 1957, after some matrimonial troubles, the husband left home but did not take the deeds with him. The company desired to produce the deeds to its auditors, but the wife refused to give up possession of them and they were retained by her solicitors as her agents. The husband having applied to the Court under the Married Women's Property Act 1882, s. 17, for an order for delivery of the deeds, the wife contended that the Court had not jurisdiction in this matter under that provision. *Held*, The Court had jurisdiction, because the title deeds were themselves property within s. 17 and there was a dispute as to their possession between the husband and the wife; in the circumstances the wife would be ordered to deliver up the deeds to the husband. *Re Knight's Question.* [1958] 1 All E.R. 812, Ch.D.

LANDLORD AND TENANT.

" Fair wear and tear excepted," *108 Law Journal*, 67.

PRACTICE.

Compromise of Action—Jurisdiction—Terms of Settlement Embodied in Agreement—Agreement stipulating for Judgment—Failure of One Party to consent to Judgment—Court's Discretionary Power to make agreement an Order of Court—Order having effect of Judgment enforcing Its Terms. Where an agreement to compromise an action stipulates for a judgment, and one of the parties fails to consent when the judgment is actually sought by the other of them, the Court may, in its discretion, make the agreement an order of Court. When that order is made, it has the force and effect, as regards the enforcement of its terms, of a judgment or order stating those terms. (*Smythe* v. *Smythe* (1887) Q.B.D. 544 and *Dillon* v. *McDonald* (1902) 21 N.Z.L.R. 375, applied.) The terms of a settlement of an action, and intituled in the action, contained the following final clause: " 12. Judgment by consent to be entered if above arrangement not carried out." A motion for judgment for the plaintiff based on the compromise was supported by an affidavit exhibiting a copy of the compromise, and stating the plaintiff's readiness, and the failure of the defendants, to perform it. Attached to the motion a memorandum, on a separate piece of paper, was a signed admission by the defendant's solicitor that the terms of the settlement had not been complied with by the defendants. The defendants opposed the motion. *Held*, 1. That, on the construction of cl. 12 of the terms of settlement, judgment by consent was to be entered in terms of the compromise; and this was equivalent to the stipulation commonly inserted in compromise agreements in England to the effect that the compromise may be made a rule or order of the Court or that a Judge's order may be obtained 2. That the undertakings embodied in the compromise agreement were not to be treated as admissions of fact that the plaintiff was entitled to the relief sought; and, in effect, the Court was asked to decree performance of the somewhat elaborate provisions of the compromise agreement. (*Shalfoon* v. *Potts* [1948] N.Z.L.R. 1214, followed.) 3. That the Court, in its discretion, had power to make the agreement an order of Court, but for the reasons given in the judgment, such discretion should not be exercised in the plaintiff's favour. *Burfitt* v. *Johansen and Others* (Supreme Court. Auckland. 1953. September 21; November 27. F. B. Adams J.)

——*Plaintiff proceeding with Claim after Payment made by Defendant in Terms of Compromise—Such Proceeding Vexatious and Abuse of Procedure of Court.* The Supreme Court has an inherent jurisdiction to prevent, as both vexatious and an abuse of the procedure of the Court, a party from proceeding on a claim after a compromise thereof has been duly performed by the opposing party. (*Burfitt* v. *Johansen, supra*, distinguished. *Scully* v. *Lord Dundonald* (1878) 8 Ch.D. 658, referred to.) Before the hearing of an action claiming damages for enticement, the defendant, while denying liability, agreed to pay an amount in full settlement of the plaintiff's claim and costs, and actually paid that amount to the plaintiff's solicitors (see *Kontvanis* v. *O'Brien* [1957] N.Z.L.R. 890). Since that judgment, the plaintiff issued an order for discovery of documents, a notice to admit documents, and a motion for leave to administer interrogatories. *Held*, 1. That there should be an order for the determination, before the trial of the action, and in a summary way, of the question whether the alleged compromise and the payment made to the plaintiff thereunder amounted to a valid and binding settlement of the claims made by the plaintiff in the action. 2. That there should be a further order staying all proceedings in the action until after the determination of that question, with liberty to the plaintiff to apply at any time for the removal of the stay if the defendant is guilty of undue delay in procuring the determination of that question by the Court. (*Eden* v. *Naish* (1878) 7 Ch.D. 781, *Henderson* v. *Underwriting and Agency Association* (1891) 65 L.T. 616, and *Guy* v. *Walker* (1892) 8 T.L.R. 314, applied.) *Kontvanis* v. *O'Brien*. (S.C. Christchurch. 1957. December 20. F. B. Adams J.)

Tenancy—Possession—Tenant-in-Common letting Persons other than Co-owner into Possession as His Tenants—Tenancy so created a " Separate tenancy "—No Jurisdiction to eject Tenant except on Statutory Grounds—Tenancy Act 1948, ss. 2, 24—(Tenancy Act 1955, ss. 2, 36.) A tenant-in-common is entitled to possession, though not, as against a co-owner, to sole possession; and his rights include the right to let other persons into possession as his tenants. If, however, the other co-owners do not concur therein, such tenancies will confer no rights as against them, and the tenants thereunder may be obliged to share possession with such co-owners or their tenants. A tenancy created by one tenant-in-common, particularly by one who purports to be the sole owner, is a separate tenancy although the other tenant-in-common may be entitled to share the occupation of the premises. Even if the tenant is the tenant of only one co-owner, he is still a tenant, and the Court has no jurisdiction to make an order for his ejectment except on one or more of the statutory grounds contained in, and subject to the other provisions of the Tenancy Act, 1955. (*Barton* v. *Fincham* [1921] 2 K.B. 291 and *Middleton* v. *Baldock* [1950] 1 K.B. 657, applied. *Thorne* v. *Smith* [1947] 1 K.B. 307, referred to.) *Durfitt* v. *Johansen and Others.* (S.C. Auckland. 1953. September 21; November 27. F. B. Adams J.)

Third-party Procedure—Defendant seeking Leave to issue Third-party Notice—Leave not granted as of Right—Exercise o Discretion—Plaintiff unfairly hampered or delayed in Trial or prejudiced in Matter of Expense, if Leave given—Leave refused—Code of Civil Procedure, R. 95. A party who brings himself within R. 95 of the Code of Civil Procedure is not entitled as of right to an order for leave to issue a third-party notice, the matter being one of discretion. Where the giving of leave would unfairly hamper the plaintiff or delay him in the trial of his action, or prejudice him in the matter of expense, leave should not be given. (*Wye Valley Railway Co.* v. *Hawes* (1880) 16 Ch. D. 489, applied.) *Allan* v. *Westfield Freezing Company Limited and Others.* (S.C. Auckland. 1958. February 20. Shorland J.)

PUBLIC BODIES LEASES.

Renewable Lease—Rent for Renewal Term to be fixed by " two indifferent persons "—Lease in which Crown the Lessee—Crown appointing as Its Arbitrator a Valuer employed in the Valuation Department—Such Person not an " indifferent peraon "—Public Bodies Leases Act 1908, First Schedule, cl. 4. In a lease granted in 1936, under the authority of s. 5 (e) of the Public Bodies Leases Act 1908, by the Wellington Harbour Board as lessor to His Majesty the King as lessee, there was given to the lessee successive rights of renewal at a rental to be determined in terms of the First Schedule to that statute, cl. 4 of which provided that the valuation which was to be made by " two indifferent persons as arbitrators one of whom shall be appointed

by the lessor and the other by the lessee." On the expiry of the original term of the lease, the lessee (the Crown) appointed as its arbitrator an officer of the Valuation Department. The lessor asked the Court to determine whether the Crown as lessee was entitled to appoint as its arbitrator a person who was a Civil Servant—namely, a Valuation Department valuer employed by the Crown. *Held*, That, in such a matter as this, a valuer employed in the Valuation Department was not an "indifferent person" within the meaning of that term in cl. 4 of the First Schedule to the Public Bodies Leases Act 1908. (*In re Skene's Award* (1904) 24 N.Z.L.R. 591, distinguished.) *Wellington Harbour Board* v. *Attorney-General*. (S.C. Wellington. 1958. March 11. Barrowclough C.J.)

SALE OF GOODS.

Sale of Goods—Implied Condition Reasonable Fitness for Purpose for which Goods required—Frock fitted on Buyer by Seller's Servant—After Purchase, Buyer finding, on Delivery, Zip Fastener defective—Buyer's Right to repudiate Contract—Sale of Goods Act 1908, s. 16 (a). M. was fitted with a frock on the seller's business premises. M. had nothing to do with the fastening or unfastening of the zip fastener on the back of the frock before it was wrapped and delivered to her, when she found the zip fastener defective. She claimed a refund of the purchase price, but this was refused. In an action claiming the amount of the purchase money from the seller. *Held*, 1. That, on the facts, the frock was of a description supplied in the course of the seller's business, and in purchasing the frock and impliedly making known to the seller the purpose for which it was required, M. relied on the seller's skill and judgment as to the condition and effective working of the zip fastener. 2. That, in pursuance of s. 16 (a) of the Sale of Goods Act 1908, there was imported into the contract between the parties an implied condition that the frock, and specifically the zip fastener which formed an essential part of it, were reasonably fit for the purpose for which M. required them. 3. That M. was entitled to reject the frock for breach of the implied condition, and to a return of the price she had paid for it. (*Taylor* v. *Combined Buyers Ltd.* [1924] N.Z.L.R. 627.) *Maxwell* v. *Nova Models Limited* (Wellington. 1957. September 20. Carson S.M.)

Non-acceptance of Goods, *108 Law Journal*, 68.

SETTLEMENT.

How Not to Determine a Settlement, *108 Law Journal*, 52.

TRUSTS AND TRUSTEES.

Trustee—Costs—Amount to be allowed—R.S.C., Ord. 65, r. 27 (29). (Code of Civil Procedure, R. 574). On April 23, 1956, an originating summons was taken out by trustees to obtain directions enabling them to invest trust moneys in a wider range of investments than was authorized by the trust instrument. On June 4, 1956, the summons came before the Judge in chambers and after about an hour's hearing it was adjourned *sine die*. On October 29, 1956, the summons was restored and heard in chambers for about twelve minutes, when it was adjourned on a question being raised by the Judge as to his jurisdiction. In November, 1956, an opinion of counsel was taken, and on May 13, 1957, the summons came on for further hearing which lasted ten minutes and an order was made, including an order for costs in the form prescribed, i.e., directing taxation of the trustees' "costs and expenses of and incident to this action". At the last hearing, counsel previously instructed on behalf of the trustees did not appear for them, and different counsel was instructed and appeared. The bill of costs included the following fees to counsel all of which had been paid by the trustees—£16 5s. in respect of the hearing on June 4, 1956, £11 in respect of the hearing on October 29, 1956, £11 for the opinion given in November, 1956, and £16 5s. in respect of the final hearing. The taxing master taxed these fees down respectively to £11, £5 10s., £5 10s. and £5 10s., acting under R.S.C., Ord. 65, r. 27 (29), which provided that no costs should be allowed, save as against the party who incurred the same, which appeared to the taxing master to have been incurred or increased by payment of special fees to counsel. *Held*, The only difference between a person paying his own counsel and solicitor and trustees paying theirs was that trustees were under a duty to use their judgment so as to avoid unnecessary expense; these fees were expenses of the trust properly incurred by the trustees and ought to be allowed on taxation in full, so that the trustees should be reimbursed from the trust fund. *Re Grimthorpe's (Baron) Will Trusts* [1958] 1 All E.R. 765 Ch.D.

WILL.

Construction—Will executed before Passing of Estate and Gift Duties Act 1955—Death of Testatrix after its Passing—Bequest to W. "subject to and charged with the payment by him of all amounts payable by way of succession duty thereon"—Direction to Trustee to pay "all death duties payable in respect of my dutiable estate (except the succession duty payable on the aforesaid bequest)" [to W.]—Whole of Estate Duty included in Such Phrase and payable Out of Residuary Estate—Death Duties Act 1921, ss. 2, 4, 15, 17, 31 (2)—Estate and Gift Duties Act 1955, ss. 3, 4, 32 (1) 34 (1) (2), 89 (7). Will—Testamentary Capacity—Testatrix lacking Testamentary Capacity from Passing of Estate and Gift Duties Act 1955 (after Execution of Her Will) until her Death—No Presumption that She knew of Alteration of Law made by that Statute—Wills Act 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24. The testatrix left a will made on June 8, 1951. By cl. 3 she gave a farm property, stock, and plant to W. "subject to and charged with the payment of all amounts payable by way of succession duty thereon." By cl. 4, she gave the residue to her trustee, to pay, inter alia, "all death duties payable in respectof my dutiable estate (except the succession duty payable on the aforesaid bequest [to W.] and to stand possessed of the residue for my sister." At the date of the making of the will, the Death Duties Act 1921, which imposed estate and succession duty, was in force. That statute was repealed by the Estate and Gift Duties Act 1955, which did not impose succession duty and which came into force on July 21, 1955. The testatrix died on October 21, 1955. From about the month of December 1952 until her death, the testatrix lacked testamentary capacity. On originating summons to determine whether W. the devisee and legatee of the farm property, was liable to bear any portion of the estate duty levied on the testator's assets by virtue of the Estate and Gift Duties Act 1955. *Held*, 1. That, on the true construction of the will, the "succession duty" referred to in cl. 3 was the succession duty imposed by virtue of s. 15 of the Death Duties Act 1931, and the gifts to W. were subject to the payment by him of that duty on the value of his succession, and, by cl. 4 all estate and succession duties (other than the succession duty on W.'s succession) were directed to be paid out of the residuary estate; and that those provisions were specific directions in accordance with s. 31 (2) of the Death Duties Act 1921. 2. That the whole of the estate duty payable came within the ambit of the phrase "all death duties payable in respect of my dutiable estate" in cl. 4 of the will; and that provision was a clear direction to pay the whole of the estate duty out of the residuary estate, the gift to W. being exempted from the exigencies of such duty. (*In re Holmes, Beetham* v. *Holmes* (1912) 32 N.Z.L.R. 577; G.L.R. 226, applied.) 3. That, in view of the fact that the testatrix lacked testamentary capacity from October, 1952, until the date of her death, she could not be presumed, at any time from the passing of the Estate and Gift Duties Act 1955, until her death, to have known of the alteration of the law made by that statute. (*Hasluck* v. *Pedley* (1874) 19 L.R. Eq. 271, applied.) That the clear intention of the testatrix, reading the will as at the of the will, was that the residuary estate should bear all death date duties, whatever the quantum thereof might be, other than any succession duty (again irrespective of the quantum thereof) which might be payable on W.'s succession, and the context in the will did not require that the words "death duties" in cl. 4 should not be deemed to be reference to estate duty under the Estate and Gift Duties Act 1955. (*In re Cunningham, Official Assignee* v. *Cunningham* [1955] N.Z.L.R. 657; [1935] G.L.R. 552, *Wheeler* v. *Thomas* (1861) 4 L.T. 173, and *In re Bridger, Brompton Hospital for Consumption* v. *Lewis* [1894] 1 Ch. 297, applied.) 5. That, accordingly, W. was not liable to bear any portion of the estate duty levied upon the assets of the testatrix. *In re Holden (Deceased), McIntosh* v. *Weddell* (S.C. 1958. February 12. McGregor J. Wellington.)

In Defence of The Jury System.—Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in the jury box. When it wants a library catalogued, or the solar system discovered, on any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around. The same thing was done, if I remember right, by the Founder of Christianity.—G.K. Chesterton, in essay "The Twelve Men," in *Tremendous Trifles*.

A DIRECTOR OF PUBLIC PROSECUTIONS.

By the Hon. H. G. R. MASON Q.C., Attorney-General for New Zealand.

From time to time the suggestion has been made in New Zealand that the office of Director of Public Prosecutions should be established. The most recent reference to it was at the 1957 Dominion Legal Conference at Christchurch, when the then Attorney-General raised the question whether there should be in New Zealand an officer of State having the functions of the Director of Public Prosecutions in England: (1957) 33 N.Z.L.J. 105. The matter has since been considered officially and the conclusion has been reached that, for the present, there is no real need for such an office; but that the proposal may merit review later. Practitioners will be interested in the reasons for that decision.

A short account of the origin of the Director's office in England and a brief description of his powers and duties is necessary to relate the matter to New Zealand conditions.

The point is made by Stephens in his *History of the Criminal Law* (1883) Vol. I, p. 493, that while, in most countries, the duty of investigating crime and bringing offenders to trial has long been in the hands of public officers, in England the prosecution of offences was left entirely to private persons or public officers acting in their capacity of private persons. From the earliest times it was considered not only the right but also the duty of the English private citizen to preserve the peace and to bring malefactors to justice. Not until 1829, and then only in the face of very strong opposition, was an organized police force inaugurated in London. Even then the police were given no special powers and, to this day, a policeman has no greater right than a private citizen to obtain statements or secure the attendance of witnesses. But once the Metropolitan Police had survived the storm of hostility and ridicule with which they were greeted, powers were given boroughs and counties to establish police forces and the natural result was that more and more prosecutions were undertaken by the police.

Before 1879, cases of special difficulty or importance were reported by the police to the Home Office which either gave advice as to the action to be taken or instructed the Treasury Solicitor to prosecute. But, in 1879, the office of Director of Public Prosecutions was established by the Prosecution of Offences Act, its function being to institute and prosecute criminal proceedings and advise the police and others concerned in prosecutions. Undoubtedly a principal reason for the new office was the need to have one responsible official to supervise the increasing number of prosecutions instituted by the growing number of police forces by then established.

In practice, the first Director did not undertake prosecutions, but merely acted as adviser to the Treasury Solicitor. In 1908, however, a separate Department of Public Prosecutions was established. Although the right of private prosecution was expressly reserved, the development of the office of the Director really dates from that year.

The Director's duties and functions are now set out in the Prosecution of Offences Regulations 1946 (S.R.O. 1946/1467) which, for present purposes, may be summarized as follows:

(1) It is his duty to institute and carry on criminal proceedings in any case,

(a) where the offence is punishable with death;

(b) referred to him by a Government Department;

(c) appearing to him to be of importance or difficulty.

(2) It is his duty to give advice on application or on his own initiative to Departments, clerks to Justices, Chief Officers of Police and others in criminal cases of importance or difficulty.

(3) The police must report to him alleged offences:

(a) under the statutes relating to incest, official secrets, forgery and coinage offences,

(b) of sedition, conspiracies to pervert the course of justice, public mischief, libel of judicial officers, bribery of or by public officials, and fraudulent conversion by public officials and trustees;

(c) of manslaughter, attempted murder, and sexual cases;

(d) of obscene or indecent libels;

(e) under the Extradition and Fugitive Offenders Acts.

(4) The police must report to him cases in which a prosecution has been withdrawn or not proceeded with in reasonable time.

Referring in turn to each of the foregoing four paragraphs the following comments are made in relation to the law and practice in New Zealand:

(1) It is now the established practice for a Crown Solicitor to conduct murder cases at all stages. Except in straightforward cases, in which the police may be instructed to prosecute, it is the regular practice of all Government Departments in all criminal and "quasi-criminal" cases to seek the advice of the Crown Law Office, which itself institutes a prosecution or instructs a district Crown Solicitor.

The inclusion of "other cases of importance and difficulty" in the category of those which in England must be prosecuted by the Director of Public Prosecutions, appears to reflect the need in England to have one official responsible for supervising and advising on prosecutions. That need must result largely from the fact that in England there is not one but a large number of independent police forces. There are, in fact, no fewer than 128 of them, and the need for co-ordination in the interests of uniformity is obvious. In New Zealand on the other hand, with one centrally-controlled police force, the same need for independent supervision does not exist. Nevertheless the fact is that it is usual for the police to consult Crown Solicitors in all cases of importance or difficulty.

(2) The matters in respect of which the Director gives advice to Departments and to the police in England are also generally the subject of advice by Crown Solicitors here.

(3) To a large extent the prosecution of the classes of offences which must be reported to the Director in England requires the prior leave of the Attorney-General or a Court in New Zealand. The Attorney-General's fiat is, indeed, required in New Zealand for some prosecutions in respect of which there is no duty to report in England. Moreover, in practice the police generally consult with Crown Solicitors or the Crown Law Office in cases of difficulty.

(4) The requirement that the police must report cases of withdrawal or failure to proceed with prosecutions no doubt reflects the fact that private prosecutions were once the general rule and are still not uncommon in England. It is a guard against interference with the course of justice, but there is no need for it in New Zealand where private prosecutions are almost unknown.

Whenever the appointment of a Director of Public Prosecutions in New Zealand has been suggested the reason advanced usually is that there should be a safeguard against citizens being wrongly put upon trial. (Cf. the addresses to the 1957 Legal Conference —(1957) 33 N.Z.L.J. 105, 131.) But there has been no real call from the profession or elsewhere for the establishment of the office, and instances of unjustified prosecutions or failure to prosecute are very rare. Generally speaking, qualified and experienced advice from solicitors holding the Crown Warrant is applied as a matter of course to all important cases, and is always available in other cases of an unusual character. Liaison between the police and Crown solicitors has been fairly close and is officially encouraged.

At the present stage it is thought that the appointment of a Director of Public Prosecutions is not warranted in New Zealand, but the question will be reviewed from time to time.

A NEW QUEEN'S COUNSEL.

Admission of Mr R. Hardie Boys.

On March 25, in the Supreme Court, there was a large attendance of Wellington practitioners to witness the admission to the Inner Bar of Mr Reginald Hardie Boys.

The Chief Justice, the Rt. Hon. Sir Harold Barrowclough, presided. With him on the Bench were Mr Justice Hutchison, Mr Justice McCarthy, and Mr Justice Haslam.

The Attorney-General, the Hon H. G. R. Mason Q.C., the Solicitor-General, Mr H. R. C. Wild Q.C., and the President of the New Zealand Law Society, Mr A. B. Buxton, were among those present.

After Mr Hardie Boys had made the required declaration, had taken his seat, and given the usual bows to Bench and Bar, His Honour the Chief Justice said :

" Mr Hardie Boys : Now that you have taken your seat as one of Her Majesty's Counsel I should like to take the opportunity of congratulating you on the distinction you have achieved and of wishing you every success in your future career as an advocate in the new rank in which you will hereafter practise. In saying this, I am expressing also the sentiments of those of my brethren who are with me on the Bench. It is clear from the large and representative attendance of your fellow-members of the profession that you have earned also the congratulations of the Bar—and I trust also of those who practise mainly as solicitors. I hope that from the latter briefs will presently be delivered in such numbers as will give you no cause ever to regret your decision to take silk.

" It is always a pleasure to me to call to the Inner Bar a barrister who is qualified for that advancement in rank. Indeed, I would go further and say that I am very anxious to encourage any barrister, whether he be a silk or a stuff gownsman, who is prepared to devote all his energies to the art of advocacy—provided, of course, that he has an aptitude for that work.

THE BRIEFING OF COUNSEL.

" In this Dominion, except in the case of Queen's Counsel, the professions of the barrister and of the solicitor are combined and I make no criticism of that. But work at the Bar is specialized work and is done best by a barrister who is constantly engaged upon it, and who is not interrupted by the many demands that are made upon a practising solicitor. I think the time is arriving, if it has not already arrived, when solicitors who are qualified as barristers, but whose other duties allow them to appear but rarely in the Courts, might be well advised to brief those who have greater experience as advocates and who have shown that they have a special aptitude for that kind of work. Queen's Counsel can expect such briefs ; but I am thinking of the Junior Bar—and not simply of those juniors who practise as barristers alone. I am thinking also of those who are members of a firm but engaged principally on Court work and opinion work.

" As to the latter, there are difficulties in the way of giving them briefs from a rival firm ; but, in the past, those difficulties have not proved to be insuperable, and I do not believe them to be insuperable. It may be that there should be some association, within the Law Society, of men who are engaged solely or principally as barristers, and that they should draw up some rules for their own guidance and conduct.

" That is but a suggestion. The present is not the occasion for further elaboration of what I have in mind, and I may seek some other opportunity of developing it. In the meantime, I welcome the new silk and wish him every success in his future career at the Inner Bar.

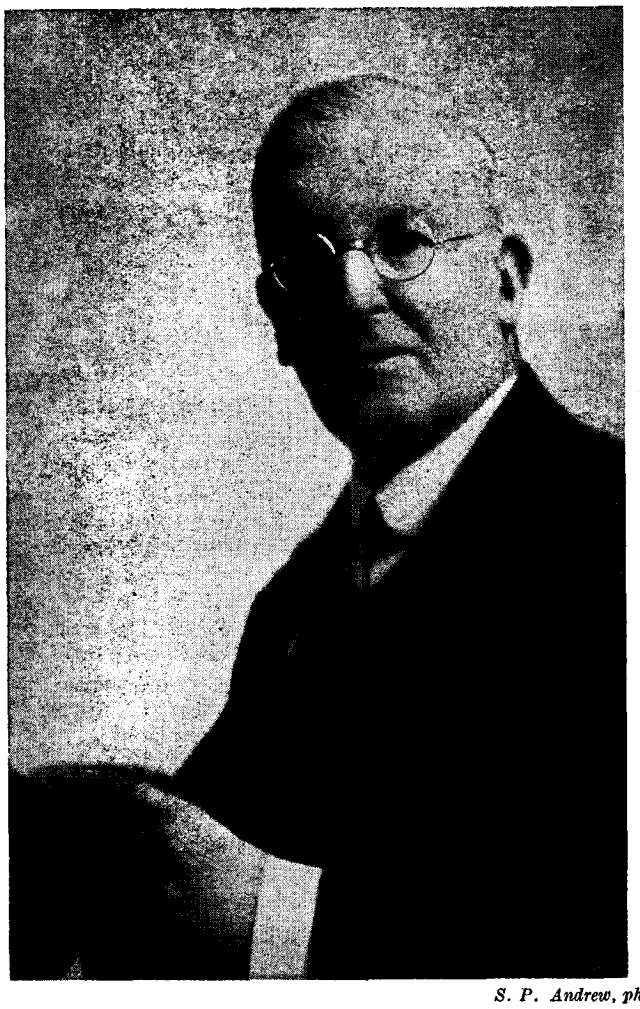
When the ceremony had concluded Mr Hardie Boys Q.C., accompanied by other members of the profession, visited the Court of Appeal, which was then in session, and made his bows to that Court.

LEGAL PORTRAITS.

VII. Mr Heinrich Ferdinand Von Haast (1864-1953).

After the death of H. F. von Haast on January 4, 1953, the NEW ZEALAND LAW JOURNAL published a full account of his active and varied career.* He took a wider view of the proper functions of a lawyer than is usually held. His Manuscripts, together with records of the life and work of his father, Sir Julius von Haast, the eminent scientist who did so much for his adopted country, have been deposited in the Turnbull Library, and they disclose much of the life and thought of an unusually able and interesting man.

After graduating M.A. and LL.B. at Canterbury College, von Haast was articled to Frederick Wilding, of the Christchurch firm of Wilding and Lewis, and then became associate to Charles Dudley Robert Ward, a Judge of the District Court, who acted as a temporary Judge of the Supreme Court during the absence of Johnston J. Associates in those days were paid £2 per week and travelling expenses. They fetched books and ran errands, but the Judge relied on his own notes. There were no typewriters. An associate would be paid by the profession for copies of judgments and evidence, but would be lucky if he made an extra £50 a year. "We had an easy life of it sixty years ago compared with the present highly efficient lady associates."



S. P. Andrew, photo.

Mr H. F. Von Haast.

According to von Haast Ward was unattractive, about 61, a tall gaunt, man . . . with a tip-tilted nose set in the middle of a fierce face, reddish hair, then mostly greyed. He was cynical, concise, and critical, wasted no time, and gave himself no extra labour that he could avoid. If he could give an oral judgment, he did so."

There was an incident at the opening of the Supreme Court Sessions at Hokitika which must have caused considerable hilarity. Ward spoke sharply to old Mr K., the Registrar, who was handling the box containing the cards with the names of the jury panel, and he was so upset that he dropped the box and the cards were spilled on the floor. The Registrar, more disturbed than ever, bent down to retrieve them, whereupon the Judge shouted at him, "Don't grovel." The Deputy Registrar sprang to his assistance, order was restored and the selection of the jury proceeded.

How different a man may be in his private and public capacities especially if he should be a Judge cursed with a nervous temperament! I have known men—perhaps not very experienced men—who were liable to sleep badly the night before they had to conduct a case in the presence of Denniston J. Yet von Haast was his associate for five years. He says: "A more kindly and considerate man never existed. On the day he took his seat upon the Bench—March 12, 1889—he admitted me to the Bar. He was then 42, I was 25, and there began a long and happy companionship and friendship . . . Denniston possessed the qualities of a good Judge—bar one. He had sound knowledge of the law, a quick and analytical mind, a mastery of accounts, an instinct for doing equity, the power of literary and lucid expression in his written judgments and a deep humility . . . But, so far as his own peace of mind and health was concerned, he had not the temperament for a Judge. He was too emotional, too highly-strung, too tender-hearted, too hesitant in making up his mind on difficult points of law to pursue with serenity the even tenor of his way, as the ideal Judge should."

Alexander James Johnston, whom Denniston succeeded, is described by von Haast as "a short, stout pompous man upon whom dropsy had laid its mark. He was a friend of my father's and used sometimes to come to our house to sing; but owing to his absence on circuit could not join the Glee Club that my father had arranged to meet in each other's houses in turn. But he liked the compliment of being asked. He is described as a sound Judge and an industrious one. Having at times a large number of Banco cases to deal with, he would sit all day hearing argument, examine at night the authorities cited, and next morning was ready with his decisions."

For over sixty years von Haast was a writer, and indeed it appeared at one time that he had forsaken

* Vol. 29, p. 8.

law for journalism. In 1897 he visited England for the Jubilee of Queen Victoria, and remained there for six years working for a syndicate representing Australian and New Zealand newspapers. It was during this period that he was called to the Bar at Lincoln's Inn. He was in Westminster Abbey as a newspaper correspondent at the Coronation of King Edward VII and duly reported it for New Zealand newspapers in a series of articles. In his later years he wrote many articles for THE NEW ZEALAND LAW JOURNAL. He was Editor of *The New Zealand Law Reports* from 1933 to 1948. He was the last of the original members of the New Zealand Round Table Group. He was deeply interested in the constitution and development of the British Commonwealth of Nations, and many of the quarterly articles on New Zealand affairs in *The Round Table* came from his pen. It was, however, when he was over seventy, that he began his greatest piece of literary work *The Life and Times of Sir Julius von Haast*. It entailed an immense amount of research, much of it heavy work among newspaper files in the basement of the General Assembly Library. It extends to over 1,100 pages and occupied over ten years in writing. It was truly a magnificent memorial from a son to his father. The University of New Zealand, with which Heinrich von Haast had been so long and honourably associated, in recognition of the writing of this work, conferred on him the Degree of Doctor of Literature.

But he had a lighter side. He had a great gift for the writing of humorous verse and especially the kind in which lawyers delight in their hours of ease, such as his " Lawyer's Bride," with its refrain :

Be tenant of my heart for life
Oh maiden fair and chaste,
And let my arm encircle
Your voluntary waste.

No one could be a more genial, jovial companion on a holiday. At Christmas, 1918, the late Harry van Asch and I went to the Hermitage, Mount Cook. Opposite us in the coach was von Haast. Arrived at the hotel, there was a good deal of joking and confusion about these two men with the foreign names—which was von Haast and which van Asch ? Next morning von Haast produced these verses :

VAN ASCH AND VON HAAST.

Score van—tage all

Loquitur : Though our names are so foreign
We're both Britons true.

van Asch : van Asch, that is I
von Haast, that is you.

von Haast : Pray do not confuse us
Or you'll make a hash ;
Now I am von Haast
And he is van Asch.

van Asch : Look out for the young one
Who's cutting a dash,
Don't think he's von Haast
He's not, he's van Asch.

von Haast : Don't flirt with the wrong one,
We'll both look aghast,
The giddy one's van Asch
The sober von Haast.

van Asch : Give von Haast a cigar
And his teeth he will gnash,
It's I am the smoker
In my pipe is *van Ash.*

von Haast : If you're wanting subscriptions,
It's he has the cash
The poor man is von Haast
The rich is van Asch.

Both : Now we hope you've discovered
The difference at last
Between me, H. van Asch,
And me, H. von Haast.

" This doggerel " von Haast has recorded : " So stuck in Hunter's mind that thirty years later, when presiding at a meeting of the Wellington Shakespeare Society, and introducing me as about to give an address on ' Shakespeare as Playwright,' he repeated them correctly. He then brought the house down by continuing, looking at me ' Mr van Asch . . . ' A roar of laughter cut him short before he could add ' will now give his address '."

The outbreak of the First World War in 1914 was a heavy blow to von Haast. Before it began, Germans were well liked by New Zealanders ; they were good colonists and some of them were people of learning and culture. War changed all that and liking turned to suspicion. Von Haast's position was very unhappy. His father had been naturalized and made New Zealand his home ; his mother was English and the daughter of Edward Dobson, one of the Canterbury " Pilgrims " ; he himself was born in New Zealand and all his sympathies were with Britain. He had, in fact, cherished hopes of a political career, had been President of the Reform Association, and the Prime Minister, Mr Massey, had promised that he would be the Government's candidate in the first Wellington electorate which should fall vacant. In 1918, A. L. Herdman, who had been Attorney-General and Minister of Justice, went to the Supreme Court Bench. Von Haast was passed over and J. P. Luke chosen as the candidate. Of course Mr Massey knew best. Von Haast put a good face on the matter and gave active assistance to Mr Luke. But he was bitterly disappointed, finished his connection with politics, and from then on devoted the time he could spare for public matters more largely to the affairs of the University, of which he became Pro-Chancellor.

In some ways, von Haast was strangely naive ; a man with a closer approach to reality would have seen that the outbreak of war with Germany meant for him the abandonment of all hopes of becoming Attorney-General and Minister of Justice. This incident was in fact but a minor casualty amongst the real tragedies of war.

—W. J. HUNTER.

REFORM OF PUBLIC WORKS ACT PROCEDURES.

By J. R. POWELL M.A., LL.B.

By s. 3 of the Public Works Amendment Act 1952 provision was made for the automatic lapsing of a notice of intention to take land after the expiration of one year from the publication of the notice in the *Gazette*. Provision was also made for extending the effect of notices.

These provisions whilst, adding further to the confused jumble of Public Works Act procedures and tending to extend rather than diminish the problem, do at least highlight the fact that inconvenient, costly, and cumbrous though the present methods may be to those forced to work through them, they also, and to a greater degree, inconvenience persons affected by them. One feels that they echo : " If it were done when 'tis done then 'twere well it were done quickly."

One can understand that in the early Colonial days and also when the Deeds Registration system was in its heyday that the requirement of giving wide and frequent publicity to proposed takings was most necessary. Also it could be argued that when communications were poor and when the only publication of notices in some cases was their posting to some notice board or door, the period of forty days for objections to be lodged was a very reasonable one. No doubt also the *New Zealand Gazette* was an official publication received by all persons of importance.

All that is now changed. Above all, the Land Transfer Office now provides its excellent and nearly comprehensive registration system. The Public Works Act procedures, however, have not changed. While it is not suggested that the first Biblical period of forty days elapsed within the living memory of the original legislators it may explain the lack of co-ordination with the Land Transfer Act. Not until s. 30 of the Finance Act 1945 was the description of land as a lot on a D.P. or as the whole of a deposited plan sufficient to dispense with the requirement of special plans. This particular provision after being widened in s. 15 of the Public Works Amendment Act 1948 is now comprised in s. 18 of the Public Works Amendment Act 1952. Special provision was also made by s. 19 of the latter Act for the issue of certificates of title to lands held for public works.

Let us first of all analyze what is needed. Broadly land is taken under two systems under the Public Works Act.

(1) Compulsory dealings.

(2) Dealings by consent.

Compulsory dealings may also be divided into cases where :

(*a*) procedure for objecting—all usual cases

(*b*) no objections permitted—as under the present Act, land required for defence purposes or railways.

Let us deal, first, in detail with the system of compulsory dealings. It is essential that, after plans have been drawn up (in those cases where there is no Land Transfer description which would suffice), notice of the proclamation document be served on persons having registered interest in the land affected and that a period be allowed for objection. The forty days now provided seem inordinate in comparison with the fourteen days and over provided for Supreme Court procedures. As a result the time taken to complete the action is unduly lengthened at no gain to a possible objector who objects if he objects at all, soon after receiving notice. It has to be remembered also that the system of using a notice of intention is often used in the case of roads being reformed where there are a large number of owners involved who, although not likely to object, can be dealt with more quickly by this method than by obtaining the considerable number of consents required. At present the procedure under s. 22 of the Public Works Act requires :

(*a*) Gazetting and publication twice in a local newspaper of the notice of intention to take the lands after forty days.

(*b*) Service of notice on owners, occupiers and persons having an interest in the land.

(*c*) Consideration of objections by the Minister or local authority.

(*d*) Minister recommends the Governor-General to issue a Proclamation or Local Authority prepares Memorial signed by two of its members together with statutory declaration by the Chairman, Mayor or other Chief Executive Officer.

(*e*) The Governor-General then issues a proclamation taking the land. This proclamation is then published once in a local newspaper and afterwards registered.

Let us suggest that after objections, if any, have been disposed of then the proclamation document could be forwarded with an affidavit as to service to the Ministry of Works or other appropriate department for confirmation by the officer empowered to sign proclamations. It is not envisaged that signature by, nor reference to the Minister should be necessary in normal cases. As to which cases should require the Minister's signature administrative decisions would no doubt determine. In no case should it be necessary to obtain the Governor-General's signature, nor would the pointless gazettings and advertisements be required. As an example of how similar procedures have already been applied consider s. 9 of the Public Works Act 1928 which originally provided that : " Every contract for the execution of Government works shall be entered into in the name of His Majesty and may be executed by the Governor-General on his behalf." By 1935, apparently, however, this provision had so caused Governors-General to be afflicted with writer's cramp that s. 13 of the Public Works Amendment Act 1935 was enacted and this provided that contracts could be signed by the Governor-General or by the Minister or by someone authorized by the Minister. No doubt an increasing number of contracts continued to be made and s. 13 of the Public Works Amendment Act 1948 widened the provisions enabling the Minister to appoint persons to sign contracts on his behalf to make them prevail " notwithstanding anything to the contrary in any other Act."

Where local authorities are concerned and the consents of registered proprietors are endorsed on the document it should be possible for the authority to forward its documents to the District Land Registrar for registration without need to refer to a Government department. In such cases, of course, the District Land

Registrar would have to be satisfied that all was in order before registration but this is no more than is required for any transfer of land. Provision might also be made for the endorsement of consents where available and for service of notice of the proclamation document where consents are not available. The procedures could also cover the stopping (ss. 148-151 Public Works Act 1928) or closing (s. 29 Public Works Amendment Act 1948) of roads, the setting aside of Crown Land (s. 25 Public Works Act) or Reserves and other like cases.

Section 17 of the Public Works Amendment Act 1948 provides the Minister and Local authorities with a very simple and useful means of protecting agreements made by them respecting land. The Certificates may be signed by an authorized person on behalf of the Minister or executed by the local authority as if a deed. The certificate may be registered against the whole title if the part affected is not accurately defined and registration affects with notice all persons having an interest in the land in the title. This procedure provides a useful illustration of the simple way in which consent proclamations could be executed and registered.

In the case of a road situated in a county where it is stopped under s. 148-151 the stopped road vests in the corporation of the county but where the road is closed under s. 29 of the Public Works Amendment Act 1948 then it vests when closed in Her Majesty. No doubt this difficulty could be resolved by ownership being determined according to whether action was instituted by the Crown or the local authority. Where the closed or stopped road is vested in adjoining owners in exchange for land taken for a road, provision is made at present under s. 29 of the Public Works Amendment Act, 1948 for the bringing down of encumbrances on to the titles for the stopped road. There is no such provision under ss. 150 and 151 of the Public Works Act and it is inconvenient. There seems to be no reason why such provision should not be made.

When land has been acquired for a public work and is later not required, the Governor-General may by an Order-in-Council, publicly notified and gazetted, cause the land to be sold under certain conditions (s. 35 of Public Works Act, 1928 as amended by s. 4 of the Public Works Amendment Act 1954). The Minister may instead by a notice in the *Gazette* declare the land to be Crown land and deal with it accordingly. When land is held for a certain public work (other than road, street, access way or service lane) then a local authority may by complying with s. 20 of the Public Works Amendment Act, 1952, change the purpose for which the land is held. These provisions for changing the purpose follow generally those of s. 22 of the Public Works Act for the taking of land. The necessity for so restricting the Crown and local authorities by these provisions seems questionable. If land is no longer required for a public work then why should not an appropriate certificate on a warrant effecting sale be sufficient without cause for issuing an Order in Council. Similarly the declaration of land held for a public work as Crown land could be effected by a document registered in the Land Transfer Office. Publication in the *Gazette* is scarcely notice to the man in the street and registration in the Land Transfer Office is sufficient and effective notice to persons dealing with the land. If it is essential to show the purpose for which land is held (and no private owner is so restricted) then a certificate could be registered to show any change.

Summary of Advantages of Suggested Changes.

First, in the case of a compulsory taking, two preliminary notices and one final notice in the local newspaper and two notices in the *Gazette* would be eliminated.

Secondly, neither the Governor-General nor the Minister would be required to sign the document. At present the necessity for these signatures requires the compiling of quarto sheets (for the Minister) and Minister as Recommendation Sheets (for the Governor-General) in order to inform the signatories but in practice (and rightly so) they rely on officers of the Department.

Thirdly, the delay in the lodging of objections would be reduced. This would assist particularly in the case of reformation of roads where many owners are affected and the compulsory provisions are used in order to eliminate the necessity for obtaining execution of a great number of consents.

Fourthly, difficulties occasioned by minor mistakes made either in the notice of intention or in the gazetted proclamation could be rectified prior to registration without the need for revoking proclamations. This is a considerable attraction when perhaps 50 or more pieces of land are being dealt with.

Fifthly, a considerable saving in time and labour among the legal staff of the district and head offices of the Ministry of Works could be made.

Sixthly, a number of anomalies should be eliminated and the different procedures assimilated to one another ; some procedures could be eliminated.

"**Riot.**"—"Now it is true that affrays are usually classed along with unlawful assemblies, riots and routs as offences against the public peace, but in this appeal we have to deal only with an affray. The word 'riot' is a term of art, and, contrary to popular belief, a riot may involve no noise or disturbance of the neighbours, though there must be some force or violence. For instance, if three persons enter a shop and forcibly or by threats steal goods therein, technically they are guilty not only of larceny or robbery but also of riot: see *London & Lancashire Fire Insurance Co. Ltd.* v. *Bolands Ltd.* [1924] A.C. 836. It may be that the fifth element referred to in *Field's* case [1907] 2 K.B. 853 may require reconsideration at some future time, for if disturbances such as necessitated the passing of the Public Order Act 1936, should occur again or if there were a repetition of the Trafalgar Square riots which took place towards the end of the last century when most of the club windows in Pall Mall were smashed by an angry mob, it would seem superfluous if someone had to go into the witness box and say that he or some passers-by felt, or appeared, afraid or apprehensive. We need give no final decision on this point so far as riots are concerned, but, in our opinion, there was in the present case evidence on which the jury could find that the appellants were guilty of an affray and on that matter the recorder's direction was right"—Lord Goddard C.J. in *R.* v. *Sharp, R.* v. *Johnson* [1957] 1 Q.B. 552, 560 ; [1957] 0 All E.R. 577, 579.

LAND TRANSFER: DEALINGS WITH UNREGISTERED ESTATES OR INTERESTS.

De Luxe Confectionery Ltd. *v.* Waddington.

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

A valued correspondent has drawn my attention to the fact that in *Goodall's Conveyancing in New Zealand*, 2nd ed., there is no precedent for an assignment of an unregistered deed of lease or agreement to lease of land subject to the Land Transfer Act. It is true that in Wellington short-term leases of land under the Land Transfer Act are frequently drawn in the form of deeds or agreements to lease, and they are dealt with by deeds under the general law; if the lessee, for example, desires to transfer his equitable lease, he does so by a deed of assignment, as in the following precedent. It was held early in the history of the Torrens system that equitable estates and interests could be dealt with under the general law: e.g. *Tietyens* v. *Cox* (1916) 17 S.R. (N.S.W.) 48.

The careful analysis as to the legal position involved by each member of the Court of Appeal (Gresson, McGregor, and Shorland JJ.) in *De Luxe Confectionery Ltd.* v. *Waddington* [1958] N.Z.L.R. 272 is of great interest to the conveyancer, and appears to show that the Wellington practice as stated in the preceding paragraph stands on a firm foundation. (In all probability a similar practice prevails in other parts of New Zealand, especially in the larger centres.) I propose therefore to examine that case rather closely from the viewpoint of the conveyancer.

The facts were that by an *agreement* to lease, dated May 20, 1952, A agreed to lease to B certain premises for a period from May 17, 1952, to December 18, 1956, i.e. for a term slightly exceeding four-and-a-half years. The agreement contained provisions usual in agreements of lease. There was a provision requiring that the lessee should not assign, underlet, or part with the possession of the premises or any part thereof without first obtaining the written consent of the lessor; the consent was not to be arbitrarily withheld in the case of a respectable and solvent assignee or subtenant not carrying on or intending to carry on a business or trade in competition with the other tenants of the lessor in the building. But there were as well what Gresson J. described as "somewhat unusual terms". (These terms, however, were similar to terms often used in practice in Wellington in leases to small private companies, e.g., the precedent submitted by the writer of this article in (1956) 32 N.Z.L.J. 198.)

The agreement for lease provided that the lessee should, if assigning, underletting, or parting with possession to a company, procure a deed of covenant executed either by the controlling shareholder of the company or, if no one shareholder should have a controlling interest, then by all the shareholders of the company. Such deed was to prohibit the covenantor from any disposition of shares without the consent in writing of the lessor if such disposition should alter the effective control by the covenantor over the company; the previous consent in writing of A, the lessor, had to be obtained to any disposition of shares by the covenantor over the affairs of the company; to allowing any person to become a director; to permitting any person to enter into physical occupation of the premises other than a bona fide employee; and to the conduct of any business other than the type of business previously carried on by the lessee, B. There was a further term that the provisions of any such deed of covenant were to be deemed included in and become part of the lease and that any breach by the covenantor should be a breach of the lessee's covenants under the lease and should entitle the lessor, A, to exercise his rights and powers and remedies thereunder without prejudice to his right of action against the covenantor personally for breach of covenant. It was stipulated that the lessor A should not unreasonably or arbitrarily withhold his consent provided he should have first been satisfied that his position as lessor would not be adversely affected in any way and that the person or persons proposed to be granted the controlling interest or directorate in the company or physical occupation of the demised premises were Europeans, respectable, solvent and responsible. It was provided, too, that when such consent was granted the lessee should be bound to obtain a deed of covenant from the assignee containing similar terms. Finally, there was a provision that the obligations imposed on the covenantor should be joint and several, if more than one.

By a short *deed* of assignment dated May 7, 1954, B, the lessee, assigned to De Luxe Confectionery Ltd.

> all that the said premises to hold the same unto the assignee for the residue yet to come and unexpired of the said term of years created by the said recited lease.

The company, the assignee, covenanted to pay the rent and perform all the covenants of the lease and to indemnify the assignor, B. A, the lessor, consented to the assignment "without prejudice to my rights, powers, and remedies under the said agreement of lease".

The deed of covenant itself was made between C and D (both main shareholders in the company) as covenantors, the company, and A, the lessor. After appropriate recitals, the deed went on to provide that in consideration of A, the lessor, "consenting to the assignment of lease to the company and to the transfer of the shares in the company to C and D (the covenantors)", they, the covenantors, covenanted that they would not dispose of their shares to reduce their joint holding below fifty-one per cent. of the share capital without the consent of A, the lessor, which consent was not to be unreasonably or arbitrarily withheld in the case of a solvent responsible European proposed transferee; that they would not part with the occupation of the premises without A's (the lessor's) consent (otherwise than to a bona fide manager); and that they would not conduct any type of business other than that hitherto carried on by C and D (the covenantors) in the premises.

The deed provided further that, although, as between the company and C and D (the covenantors), the latter might be only sureties, nevertheless as between A (the lessor) and C and D (the covenantors) they should be principal debtors. The only other covenant on the

part of C and D (other than for payment of costs) was a covenant to indemnify B, the transferor. The company covenanted with A (the lessor) that any breach of the terms of the deed by C and D (the covenantors) should constitute default by the company as lessee under the lease.

The above review of the relevant facts really constitutes a very good lesson in modern conveyancing.

The case was one under the Tenancy Act 1955. Upon the expiration of the term of the agreement to lease, A, the lessor, claimed possession of the premises, relying on s. 14 of that Act, which provides that Part IV of the Tenancy Act 1955 and ss. 45, 46, and 47 of the Act shall not apply to the premises in respect of that tenancy after the expiration of six months from the date of the transfer of the tenancy, unless, before the date of the transfer,

(a) The landlord has consented in writing to the continued application of those provisions; or

(b) The Court has ordered that those provisions shall continue to apply.

Counsel for the lessee company submitted that s 14 (1) of the Tenancy Act 1955 did not apply where there was privity of contract between landlord and assignee, and that, in substance, the deed of covenant placed the company in the position of an original tenant. Consequently, there was great argument whether there was privity of contract as well as privity of estate between A, the lessor, and the company, the assignee or transferee of the agreement to lease. But the Court did not decide this interesting academic point: Gresson J. even doubted whether there was privity of estate between A and the company, for A held the legal estate in fee simple whereas the company at the most held as equitable lessee.

However, it was held by the Court of Appeal that the assignment to the company of B's interest was not done in such a way or attended by such circumstances as to bring into existence a new or different tenancy, and that A, the lessor, was accordingly entitled to possession. In short, the final provision of the deed of assignment was quite incompatible with any new tenancy, as pointed out by Gresson J. (at p. 280).

But perhaps the most interesting feature of *De Luxe Confectionery Ltd.* v. *Waddington* [1958] N.Z.L.R. 272 was the effect of the Land Transfer Act on the form of the instruments involved in the case. It was common ground that the land was subject to the Land Transfer Act. Section 115 of the Land Transfer Act 1952, was therefore applicable, and so far as it is relevant that section reads as follows:

> 115 (1) When any land under this Act is intended to be leased or demised . . . for any term of not less than three years, the proprietor shall execute a *memorandum of lease* in Form K in the Second Schedule to this Act. . . .
>
> (2) A memorandum of lease executed in the said Form K may be registered notwithstanding that the term thereof is less than three years, but no lease or agreement for lease for a less period than three years shall be void by reason only that no such memorandum has been executed or registered.

Subsection (2) did not apply because the term of the tenancy, as we have seen, was not for a less period than three years.

As the instrument evidencing the tenancy (an agreement to lease) was not in the statutory form, it could not be registered; and so it was not effectual and could not in itself be made effectual to pass the legal estate. What in the circumstances did apply to the agreement to lease between A, as lessor, and B, as lessee, was the doctrine of *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9.

As Gresson J., at p. 279, said:

> It was an agreement for a lease of which equity would have decreed specific performance, and for all practical purposes the parties were in the same position as if the lease had given a legal estate.

McGregor J., at pp. 281 and 282, explains this aspect at greater length:

> But it has been held on numerous occasions that an unregistered memorandum of lease or agreement to lease of land under the Land Transfer Act is valid in equity and creates an equitable estate.

Then His Honour cites the well-known New Zealand cases, *Dufaur* v. *Kenealy* (1909) 28 N.Z.L.R. 269; *Mayor of Timaru* v. *Hoare* (1898) 16 N.Z.L.R. 582; *Harley* v. *Te Heneti Te Whauwhau* (1914) 33 N.Z.L.R. 256; 16 G.L.R. 325, and *Rewiri* v. *Eivers* [1917] N.Z.L.R. 479; and, after stating that once possession has been given to the tenant under an agreement to lease, the latter is in the same position in most respects as if a lease had been granted, and after citing a passage from the judgment of Sir George Jessel M.R. in *Walsh* v. *Lonsdale* (1882) 2 Ch.D. 9, concludes as follows:

> It seems to me, therefore, in the present case that the original tenant, having taken possession, had an equitable estate in the land, and this equitable estate was assigned to the appellant (i.e. the company) who took possession under the assignment.

The same view as to the application of the doctrine of *Walsh* v. *Lonsdale* to land subject to the Land Transfer Act was adopted by the late Professor Garrow in his book on *Real Property in New Zealand*: see, for example, 4th ed., 550 and 551.

Now the assignment of the agreement of lease from B to the company was in the form of a *deed*. Section 44 of the Property Law Act 1952, provides that a deed according to the form in the Second Schedule to that Act, or to the effect thereof, shall be effectual to pass any *land* and the possession thereof.

"Land" is defined in s. 2 as including *all* estates and interests, whether freehold or chattel, in real property. (It is provided in s. 3 (3) of that Act that the provisions of that Act which are specified in the First Schedule to that Act do not apply to land or instruments under the Land Transfer Act 1952.

On looking up that First Schedule we find that one of the provisions specified as not applying to "Land Transfer Land" is s. 44, "Form of Conveyance". Obviously s. 44 of the Property Law Act 1952 could not apply to *instruments* under the Land Transfer Act, for a Land Transfer instrument has to be in the form prescribed by the Land Transfer Act.

With the exception of cases covered by s. 210 of the Land Transfer Act and its statutory predecessor (providing for registration of deeds bearing date before or within six months after, the *compulsorily* bringing of land by the Registrar under the Land Transfer Act), it has never been possible to register under the Land Transfer Act a conveyance in the "old system" form. Form always has been, and still is, an essential feature of the Land Transfer or Torrens system.

On again looking up s. 2 of the Property Law Act 1952, we find that "Land under the Land Transfer Act 1952" or any equivalent expression, means estates or interests *registered* under the Land Transfer Act.

The agreement for lease from A to B was not registered under the Land Transfer Act and indeed could not have been registered under that Act, but it could have been protected by caveat. Therefore the deed of assignment from B to the company had the effect attributed to it by s. 44. It constituted a *legal* assignment of the equitable estate vested in B. To adopt the reasoning of Edwards J. in *Dufaur* v. *Kennedy* (1909) 28 N.Z.L.R. 269, 295, the transfer from B to the company was a deed, and, although unregistered, it was effectual as a deed to pass whatever rights B had under it to the company.

PRECEDENT.

Deed of Assignment of a Short-Term Lease of land under the Land Transfer Act.

THIS DEED made the.....day of.....One thousand nine hundred and fifty-eight BETWEEN A.B. of Wellington, Grocer (hereinafter called "the Assignor") of the one part AND C.D. of Wellington, Grocer (hereinafter called "the Assignee") of the other part WHEREAS the Assignor is the Lessee named and described in a certain Deed of Lease bearing date the.....day of.....1954, and made between..... .....Limited therein described as Lessor and the Assignor as Lessee.....AND WHEREAS the parties hereto have agreed for the assignment of the said Lease by the Assignor to the Assignee NOW THIS DEED WITNESSETH that in consideration of the sum of (insert here consideration) paid the Assignor by the Assignee (the receipt whereof is hereby acknowledged) the Assignor DOTH HEREBY ASSIGN unto the Assignee ALL THAT the premises described in and demised by the said Lease TO HOLD the same unto the Assignee for the residue yet to come and unexpired of the term comprised in and created by the said Lease SUBJECT nevertheless to the payment of the rent thereby reserved and the observance and performance of the covenants and conditions therein set out AND the Assignee DOTH HEREBY COVENANT with the Assignor that he the Assignee will henceforth pay the rent at the time and in the manner provided by the said Lease and will henceforth observe and perform all and singular the covenant conditions and provisions therein contained or implied and on the part of the Assignor thereunder to be observed and performed and will indemnify the Assignor and his estate from and against all claims demands costs actions and proceedings whatsoever arising through default being made in the payments of such future rent or in the observance and performance henceforth of such covenants conditions and provisions respectively.

IN WITNESS whereof these presents have been executed the day and year first hereinbefore written.

SIGNED by the said A.B.)
in the presence of:)
E.F.
Solicitor
Wellington.

SIGNED by the said C.D.)
in the presence of:)
G.H.
Solicitor
Wellington.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Joint Tortfeasors.—"I would add that there may have been yet another route by which the respondents might have achieved success. Counsel for the respondents submitted that his clients could have sustained an action in tort against the appellant, apart altogether from the provisions of the Law Reform (Married Women and Tortfeasors) Act 1935 [U.K.], notwithstanding the well-known decision of Lord Kenyon C.J. in *Merryweather* v. *Nixan* (1799) 8 Term Rep. 186. He referred to *Adamson* v. *Jarvis* (1827) 4 Bing. 66; *Pearson* v. *Skelton* (1836) 1 M. & W. 504, and *Palmer* v. *Wick & Pulteneytown Steam Shipping Co.* [1894] A.C. 318, and to observations of Lord Coleridge J. in *W. H. Smith & Son* v. *Clinton & Harris* (1908) 99 L.T. 840. In the first of these cases Best C.J. said, in regard to the rule laid down in *Merryweather* v. *Nixan*: '. . . from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act'. This saying was approved by Lord Herschell L.C. and other members of this House in the third of the cases just mentioned. Counsel for the respondents submitted that his clients, though joint tortfeasors with the appellant in the eyes of the law, were only liable vicariously for the wrongful act of their servant, and were not debarred at common law from bringing an action for damages against him. My Lords, this is an interesting point, which may some day fall for decision by this House, but I express no opinion on it, as it has not been considered in the Courts below and I am of opinion that the respondents are entitled to succeed on other grounds"—Lord Morton of Henryton in *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] 1 All E.R. 125, 138.

The Changing Law.—In the *Romford* case (*supra*), Lord Radcliffe said, at p. 180, 142: "Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act 1930 [U.K.], if it did not exist before it? My Lords, I do not know, because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as if it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity. If such actions are now to be the usual practice, I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionized by the growth of all forms of insurance. No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from

(*Concluded on p. 112.*)

TOWN AND COUNTRY PLANNING APPEALS.

Johnson *v.* Dannevirke Borough.

Town and Country Planning Appeal Board. Wellington. 1957. April 8.

Building—Accommodation for Storage of Carrying Vehicles, Equipment, and Superphosphate—Area zoned as "Special Residential"—Consent to Building Permit to Applicant Personally—Storage of Bulk Superphosphate not permitted—Town and Country Planning Act 1953, s. 33 (1).

Application under s. 33 (1) of the Town and Country Planning Act 1953 for consent to erect accommodation for the storage of vehicles, equipment, and superphosphate on land that had a right-of-way frontage on to High Street, Dannevirke, and which was zoned "special residential" in the district planning scheme.

The appellant's grounds for the application were based on the fact that before the commencement of the district planning scheme, the land and adjoining property had been used for the storage of vehicles and goods, and a building permit was issued in October, 1948, but lapsed due to expiry of time. It was also stated that no further inconvenience would be caused to the adjoining owners if the application were allowed.

The council supported the application, subject to certain conditions.

The judgment of the Board was delivered by

REID S.M. (Chairman).

1. The Dannevirke Borough Council supported the application, subject to certain conditions hereinafter set out.
2. The requirements of Reg. 35 of the Town and Country Planning Regulations 1954 (as amended by Reg. 18 of the Town and Country Planning Regulations Amendment No. 1) have been complied with.
3. No objections to the said application have been received by the Dannevirke Borough Council.

Consent is given to a building permit being issued by the Dannevirke Borough Council to the applicant for the erection on Lot 3, Deposited Plan 3898, suburban section 57 Dannevirke, of accommodation for the storage of vehicles, equipment, and superphosphate to be used by the applicant in connection with the transport business being carried on by her, subject to the following conditions:

(a) That this consent is given to the applicant personally, and shall not enure for the benefit of her successor or successors in occupancy or title.

(b) That the storage of superphosphate in bulk is not permitted.

Order accordingly.

Carpenter *v.* Waitemata County.

Town and Country Planning Appeal Board. Auckland. 1957. May 20.

Subdivision—"Rural" Area—Land farmed for Town Milk Supply—Owner residing Elsewhere—Subdivision to allow House on Property to be sold—Balance of Farm an Economic Unit—District Scheme not detrimentally affected—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal by the owner of a property situated at Trig Road, Whenuapai, comprising fifty-six ac., two ro., 16.3 pp. This property had been owned and farmed by the appellant since 1932. There was a dwellinghouse in the south-eastern corner of the property which was occupied by the appellant until 1953 when it became too small to accommodate his growing family. He then purchased a larger house about half a mile away, where he now resided. The house on the property had been let to tenants. The present tenant wished to buy the house and the appellant was anxious to sell.

He accordingly had a subdivisional plan prepared cutting off 1 ro. 19 pp. surrounding the house, and applied to the respondent Council for its consent to the proposed subdivision. That consent was refused on the grounds that the proposed subdivision would be a "detrimental work" within the meaning of s. 38 (1) (c) of the Act in that it would not be in conformity with the town-and-country-planning principles likely to be embodied in the respondent council's undisclosed district scheme. He appealed.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds:

1. That although the appellant describes himself as a farmer, his main occupation is that of manager of a bus company and for years past he has farmed the property as a "side-line". The presumption is that it was not farmed to its full productive capacity. The appellant's nineteen-year-old son has now taken over the property and proposes to use it as a dairy-farm, milking for town supply. The evidence establishes that, so utilized, the property would be an economic unit, that the cutting off of the 1 ro. 19 pp. surrounding the house would not affect its productivity, and that if in future it became necessary so to do, another house could be erected on the property without affecting that productivity.

2. That the main object of zoning land as "rural" is to restrain the unnecessary encroachment of urban development upon land of high actual or potential value for production of food and to restrain "spot" or "ribbon" residential development in predominantly rural areas.

3. That although technically the appellant's proposed subdivision is a residential one, it is not "a subdivision for residential purposes" as those words are broadly understood. If it is approved there will be no loss of production nor will there be any demand on the local authority to supply amenities, for the evidence establishes that main water and electricity are available, and that the respondent council has no sewerage scheme in operation.

4. That the respondent council acted properly and consistently in refusing its approval as the proposed subdivision is not strictly in conformity with its undisclosed district scheme, but, in the particular circumstances of this case, the appellant's proposal will not detrimentally affect the operation of that scheme or the principles sought to be maintained thereby.

The appeal is allowed. No order as to costs.

Appeal allowed

Willis *v.* Hutt County.

Town and Country Planning Appeal Board. Wellington. 1957. July 31.

Zoning—Area zoned as "rural"—Claim that land should be zoned as "residential"—Applicant not residing on property or attempting to farm it—No special Residential Development near Applicant's Property—Land not suitable for Subdivision for Residential Use—Town and Country Planning Act 1953, s. 30.

Appeal by the owner of a property containing approximately forty ac. being Lots 4, 5, and 6 and part Lot 3 on deposited plan No. 16710. This property is in an area that had been zoned as rural under the Paraparaumu-Raumati (Hutt County) extra-urban planning scheme No. 1.

When this scheme was publicly advertised, the appellant objected to this zoning, claiming that the land should be zoned as "residential". The Council heard the objection and disallowed it. Against that decision, this appeal was lodged.

The appellant purchased Lots 3, 4, and 5 in 1953, the transfer being registered on January 20, 1956. When the transfer was lodged the requisite declaration under s. 24 of the Land Settlement Promotion Act 1953—was made by the appellant. In that declaration the appellant declared that he intended to reside personally on the land and personally to farm it exclusively for his own use and benefit. He purchased Lot 6 in 1956, the transfer being registered on August 17, 1956. In connection with this purchase the appellant made a statutory declaration which was filed in the Land Valuation Court and therein he stated that he was acquiring a property to increase the size and productivity of his holding, that holding being too small to run economically.

In his appeal and in his evidence the appellant claimed that he bought the land for the purpose of development and ultimately for subdivision. The fact was that the appellant had never resided on the property nor attempted to farm it, and the grazing has been let to a neighbouring farmer. He claimed that because this land is not by itself an economic farming unit it is only suitable for residential use.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. In compiling the plan under consideration the respondent Council appears to have made adequate provision for the residential needs for the population estimated to be residing in the district during the planning period. The present estimated population is 4,000. This

is estimated to rise to 5,600 in five years and to 7,400 in ten years and 11,000 by the end of the planning period in 1976. The programme for development proposes that the area zoned as "residential" should be developed first until a reasonable population density is reached.

2. On the evidence the area already zoned for residential purposes can reasonably be expected to accommodate a population of 16,900 to 18,700 persons. There is no substantial residential development anywhere near the appellant's property, which is in the midst of a predominantly rural area. To grant the appellant's appeal would be to approve the creation of a small pocket of urban development in a rural zone. This pocket would not be serviced with any of the amenities appropriate to a residential area, and it would appear to be a reasonable assumption that it will not be required for residential purposes for some years to come.

The appellant himself, in evidence, admitted that it would be five to seven years before this area is ripe for subdivision, and that it would be at least five years before he would begin to subdivide it, even if his appeal were allowed.

The appellant appears to have overlooked the provisions of s. 30 of the Act which require every district scheme to be reviewed when it has been operative for five years. The Board is of the opinion that this land is not at present suitable for subdivision for residential use and the appeal is disallowed.

No order as to costs.

Appeal dismissed.

Marlborough County *v.* Minister of Lands.

Town and Country Planning Appeal Board. Blenheim. 1957. September 12.

Subdivision—Plan providing for Setting-back of a Road Frontage to One Section—Minister approving Plan subject to Widening of Road facing that Section and to Provision of Building-line Restriction and not requiring Owner to dedicate Whole Frontage—No Considerable Traffic likely—Minister's Conditions upheld—Land Subdivision in Counties Act 1946, *ss.* 3 (7), 3A.

Appeal under s. 3 (7) of the Land Subdivision in Counties Act 1946. The owner of the land concerned appeals pursuant to s. 3A of the Act (as inserted by s. 7. 7 of the Land Subdivision in Counties Act 1953).

The property under consideration comprises a total area of 5 ac. 3 ro. 15.5 p., being Lot 45 on Deposited Plan 110 being Section 54 in the Omaka District.

The owner submitted a plan for subdivision of this land into two lots, one containing 1 ro. 22 p., the other containing 5 ac. 1 ro. 29.5 p., 4 p. being allowed for dedication for road-widening purposes. The relevant plan was submitted to the Minister for approval under s. 3. The Minister submitted the plan to the County Council for its comments pursuant to s. 3 (4). The plan provided for the setting back of a road frontage facing Lot 1.

The property concerned fronts on to Roseneath Lane which is a public road 40 links in width. The Council considered that the whole of the frontage should be set back as a residential section had been cut out. The Minister was not prepared to give effect to this suggestion holding that the position could be met by widening the road in front of the Lot being cut out line of the road, over the whole frontage.

The County appealed against the Minister's decision.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The Council did not prohibit the subdivision under s. 38 of the Town and Country Planning Act 1953. The evidence indicated that under the Council's undisclosed district scheme the land in question is an area zoned as "rural". The land to the south of Roseneath Lane is zoned as "residential". Roseneath Lane itself is a blind road. This subdivision is a typical "father and son" transaction. The land is not being subdivided for the purposes of sale as residential lands and the Council take no exception to the actual subdivision itself.

The only question calling for determination here is whether it is reasonable to require the owner to dedicate the whole frontage at present. There was little evidence to support the Council's contention that Roseneath Lane is likely to carry a substantial volume of traffic. It would seem that in the main the only traffic using this road would be traffic going to and from the owner's property. He is a commercial grower of tomatoes and it would appear that there would not be any considerable traffic to and from his property.

The Board is of the opinion that the Minister's contention should be upheld, provided that provision is made for the widening of the road in front of Lot 1, and by imposing a building line restriction 33 ft. from the middle line of Roseneath Land over the whole frontage. It is possible that some time in the future this land might be subdivided for further residential use, but the evidence does not suggest that that is likely to occur for some considerable time. The position can be safe guarded by the imposition of the building line restriction No order as to costs.

Appeal dismissed.

Allison *v.* Piako County.

Land Valuation Court. Hamilton. 1957. September 18, 19; October 8. ARCHER J.

Compensation—Subdivision—Claim for Loss arising out of Refusal of Consent to Proposed Subdivision in Area oned "rural"—Subdivision resulting in "ribbon development"—Decision on That Issue by Town and Country Planning Appeal Board Final and Conclusive—Compensation Court's Decision on Claim for Compensation following Such Refusal—Onus on Claimant to show that Proposed Change in Use of Land from "rural" to "residential" would not be contrary to Economic Interests of Particular Locality—Town and Country Planning Act 1953, *ss.* 38 (2), 42 (3), 44 (6) (b), (*ii*), (*iii*).

Appeal by the Piako County against a decision of the No. 2 Waikato Land Valuation Committee dated June 17, 1957, by which the Committee awarded £750 as compansation to the respondent Allison for loss arising out of the refusal of consent to a proposed subdivision of land.

It was held by the Land Valuation Court as follows:

The effect of the words "notwithstanding anything in subsection five of this section", in s. 44 (6) of the Town and Country Planning Act 1953, is to save certain claims which have been barred by subs. (5), but not to restrict the application of subs. (6) to those claims.

Under s. 44 (6) (*b*) (iii), the Court is required to consider only the effects of the particular proposed subdivision. The claimant is required only to show that the proposed change of use of the land concerned in his application for consent would not cause a demand for an uneconomic extension of public services.

Under s. 44 (6) (*b*) (iii) wider considerations are involved, as it is a recognition of the undesirability of permitting what is known as "ribbon development" along highways in, or extending into, rual areas, and where such development is held to be contrary to the economic interests of the locality.

The owner of a property in Piako County proposed to subdivide it into five building sections, reserving a strip to give access to the rear lands for later subdivision. The area was zobed as "rural" in the County's undisclosed district scheme. Under s. 38 (2) of the Town and Country Planning Act 1953, the County refused consent to the subdivision and an appeal from that refusal was dismissed by the Town and Country Planning Appeal Board.

The owner of the property then claimed £1,000 from the County as compensation for "all loss" arising out of the refusal of consent to the proposed subdivision. A Land Valuation Committee awarded him £750.

From that decision, the County appealed, but it did not dispute that a claim for compensation may be for loss resulting from the refusal of consent to a subdivision of land.

Held, 1. That the issues arising out of s. 44 (6) (*b*) (iii) of the Town and Country Planning Act 1953, whether the proposed subdivision would amount to a "ribbon development" area and whether it should be prohibited on that account had been conclusively determined against the claimant by the Town and Country Planning Appeal Board; but, while that decision by the Board, within its proper authority, is, under s. 42 (3) final and conclusive, the responsibility of deciding whether or not a claim for compensation can succeed is that of the Land Valuation Court.

2. That the claimant had not discharged the onus of showing, under s. 44 (6) (*b*) (iii) that the proposed change in the use of part of his land from "rural" to "residential" would not cause a condition of ribbon development, which would be contrary to the economic interests of the particular locality.

3. That the decision of the Land Valuation Committee was wrong in law, and the appeal should be allowed and the Committee's order discharged.

Appeal allowed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Reduced Sentences.—*The Justice of the Peace Journal* in its issue of February 15 draws attention to two cases of recent reduced sentences. In the Court of Criminal Appeal on February 3 there were two instances of noteworthy reduction of sentence. In *R.* v. *Palmer*, a sentence of ten years' preventive detention, passed for bigamy, was altered to one of twelve months' imprisonment. The appellant was said to have a very bad character and eight convictions for serious offences. The Lord Chief Justice said the bigamy was not particularly aggravated, and his other offences had nothing to do with bigamy. The appellant was not a professional bigamist. His wife had suffered no hardship, because she had gone off with another man, and the second woman was willing to stand by him. The second case, *R.* v. *Smith*, was one of manslaughter, and the sentence was reduced from seven years to eighteen months. The Lord Chief Justice said that the Judge who had tried the case had written to the Court and told them that he had further considered the matter and thought that the sentence was too much. Having related the facts of the case the Lord Chief Justice said the appellant, a man of excellent character, had not intended in the least to kill the woman when he gripped her by the throat after an argument, and it was mere bad luck that this happened.

Divorce Evidence.—In *Corke* v. *Corke and Cooke* [1958] 1 All E.R. 224, in which the husband appealed against the dismissal by the Commissioner of his petition alleging adultery by his wife with the co-respondent, and the particular point of importance was whether certain evidence adduced by the wife was admissible. The husband and an inquiry agent kept watch on night at the house where the wife was living and the co-respondent was a lodger. They heard conversation in the co-respondent's bedroom; the wife, hearing a noise, came downstairs and confronted the husband and the inquiry agent, who accused her of adultery, which she denied. Shortly after they had gone, she and the co-respondent went to a telephone box, and she asked her doctor to come and examine her and the co-respondent to prove that sexual intercourse had not taken place. He refused to come saying that his evidence would be valueless. Hodson and Sellars L.JJ. held that the evidence was inadmissible since statements by a party to an alleged act of adultery, made afterwards to third persons and tending to show that adultery had not been committed, were of no probative value. In the course of his judgment Hodson L.J. said: "This offence could be proved by admissions tending to show that it had been committed but cannot be disproved by statements of the person charged afterwards made to third persons tending to show that it had not been committed. It appears from the authorities that the rule is justified by the risk of fabrication".

Driving Penalties.—In the House of Lords in February, Lord Chesham in answer to a question said that the average fines imposed by Magistrates' Courts in England and Wales for the offence of careless driving during the periods of six months beginning on October 1, 1954, 1955 and 1956, respectively, were £4s. 1d., £4 4s. 4d. and £5 8s. 10d. For dangerous driving the average fines for the same periods were £10 17s. 1d., £11 9s. 7d. and £13 9s. 10d., respectively. For driving or being in charge of a vehicle while under the influence of drink or a drug the average fines for these periods were £17 7s. 1d., £18 16s. 4d. and £21 12s. 10d., respectively. Expressed as percentages of the maximum fines which could be imposed during these periods on first conviction for these offences, these average fines were 20, 21 and 15 per cent. for careless driving: 22, 23 and 15 per cent. for dangerous driving, and 35, 38 and 24 per cent. for driving or being in charge of a vehicle while under the influence of drink or a drug. The maximum fines which could be imposed on first conviction for these offences had been doubled by provisions of the Road Traffic Act 1956, which had come into force on November 1 of that year, and in relating average fines to maximum fines during the period of six months beginning on October 1, 1956, allowance had been made for the fact that the higher maximum fines had been in operation for only five out of the six months.

Burke and Hare.—"Mr Burke's integument being cut up into sortable parcels to suit buyers' tastes and exposed for sale by private bargain, my grandfather, who was then but a young man, invested in a modest shilling's worth. Wealthier purchasers bought larger lots—I have heard that the late Professor Chiene had a tobacco pouch made of this unique material. Personally, despite my predilection for crime, I prefer india-rubber. My grandfather kept his portion coffined in a wooden snuff-box; it was shrouded in a yellow scrap of paper, bearing in his autograph the contemporary inscription: 'Piece of Skin tan'd from the Body of Burke the Murderer'. Thus in my blameless childhood did I first hear the horrid story of Burke and Hare. . . . In due course of nature I succeeded to my grandfather's snuff-box and its incongruous contents; and in the fulness of time it was my fortune to edit *Burke and Hare* in the series *Notable British Trials*. Finally, in my friend Mr James Bridie's most excellent play, *The Anatomist*, I have had the pleasure to see the protagonists of that old dreadful drama revived for my entertainment in their habit as they lived.—William Roughead, *Knaves' Looking Glass* (Cassell) (1936).

Driving Test.—In his forthcoming *Inside Russia Today*, John Gunther (whose next project is "Inside Australia") says: "Very few Americans in Moscow have ever passed the Soviet driving test. Among other things, you have to be approved by a panel of physicians, including an eye doctor, a cardiologist, a back specialist, and one who tests reflexes in the soles of your feet. You have to work out traffic problems with model cars on something that looks like a parchesi board, and prove that you can take apart and mount an engine." The last test would be somewhat hard on lawyers whose qualifications in this respect fall short of those of the late Mr Justice Blair.

Tail Piece.—"My wife", said a Maori defendant, charged a few weeks ago with fishing without a licence, "was pregnant and wanted some eels to eat. I set an eel's trap. The eels wanted some trout. So I caught the trout and gave it to the eels—but only for bait!".

THEIR LORDSHIPS CONSIDER.

(*Concluded from p. 108.*)

one point to another, but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place."

Arbitration and Limitation.—In *Board of Trade* v. *Cayzer, Irvine and Co. Ltd.* [1927] A.C. 610, 615, Viscount Cave L.C. said: "My Lords, it appears to me that the decision given in *Scott* v. *Avery* (1856) 5 H.L.C. 811 disposes of the present appeal. Under the statute of James, which applies to this case, time runs from the cause of action; and it seems to me to follow beyond question that under the clause which we are considering, and having regard to the case cited, time runs not from the date of the loss of the steamship but only from the making of the award. If this be so, then the arbitrator, however willing he may have been to give effect to all legal defences, could not properly have found that time had run against the claimants. It is argued that on this view of the law claimants under a document containing an arbitration clause in the *Scott* v. *Avery* form might delay their proceedings indefinitely, and a claim might be made ten or twenty years after the damage had arisen. This may be so, but, if so, it is a feature which results from the form of contract which the parties have chosen to adopt; and it may be noted that it is at any time open to either party to expedite a decision of the matter by himself instituting proceedings for arbitration."

Intent in Statutory Crime.—In *Technical Books Ltd.* v. *Collector of Customs* [1957] N.Z.L.R. 490, 494, McGregor J. quoted the words of Sir Richard Couch in a case some sixty years earlier: "*The absence of mens rea really consists in an honest and reasonable belief, entertained by the accused, of the existence of facts which, if true, could make the act charged against him innocent*": Bank of New South Wales *v.* Piper [1897] A.C. 383, 389. In the original case, the Bank had charged the plaintiff, Piper, with having sold and disposed of sheep and cattle mortgaged by the plaintiff to them, without the statutory written consent. The Attorney-General later declined to proceed in the matter. There arose the question whether the Bank had laid the charge without reasonable or probable cause, in which event it was guilty of malicious prosecution. The jury found a verdict for the plaintiff for £1,000—a large sum in those days. Reviewing the matter, their Lordships said: "It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be mens rea on the part of the accused, and that he may avoid conviction by shewing that such mens rea did not exist. That is a proposition that their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases where the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

"*Permit*" *and* "*Cause*".—"To 'cause', the user involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To 'permit' is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However, the word also includes cases in which permission is merely inferred. If the other person is given the control of the vehicle, permission may be inferred if the vehicle is left at the other person's disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used. In order to prove permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be, or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section"—Lord Wright in *Houston* v. *Buchanan* [1940] 2 All E.R. 179, 187.

Condonation.—As was said by Viscount Simon L.C. in *Henderson* v. *Henderson* [1944] A.C. 49, 52; [1944] 1 All E.R. 44, 45: "The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect."

Good Sense in Law.—Speaking of the rule that "if a will, traced to the possession of the deceased, and last seen there, is not forthcoming at his death, it is presumed to have been destroyed by himself, and that presumption must have effect unless there is sufficient evidence to repeal it," in *Welch* v. *Phillips* (1836) 1 Moo. P.C.C. 299, 302; 12 E.R. 828, 829, Lord Wensleydale, then Baron Parke, said: "It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable that the deceased himself has purposely destroyed it."