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SIR JAMES FITZJAMES STEPHEN.

WE have always been taught that the work of Sir James Fitzjames Stephen was the foundation on which was built the codification of our criminal law, to which effect was given in the Criminal Code Act 1893; but we have not learnt much about the man who inspired the codification which contains so much of our criminal law down to the present time, and is now in force as the Crimes Act 1908.

Consequently, we are particularly indebted to the Selden Society for publishing a lecture by Dr. Leon Radzinowicz, who is the Director of the Department of Criminal Science and Fellow of Trinity College, Cambridge: "Sir James Fitzjames Stephen (1829-1894) and his Contribution to the Development of Criminal Law" (London: Bernard Quaritch).

This was a Selden Society lecture delivered in the Senate House of the University of London on July 30, 1957, during the eightieth annual meeting of the American Bar Association. While adding greatly to our knowledge of the life and work of Sir James Fitzjames Stephen, this lecture is of great interest in its exposition of the manner in which our codified criminal statute law came into being. The lecture which is beautifully printed, occupies forty-three pages of type; but the amazing research of the lecturer is indicated in the twenty-one pages in small type, which set out the sources of material which he consulted in preparation. We think this most interesting monograph should be included in all our Law Libraries for the benefit of student and practitioner alike.

I.

Fitzjames Stephen was born on March 3, 1829. His father, Sir James Stephen, was Under-Secretary of State for the Colonies, when he "literally ruled the colonial empire" for many years. His grandfather, James Stephen, was a Master in Chancery, and an influential member of Parliament who, in his day, joined hands with Wilberforce against the slave trade.

The lecturer comments:

> From these forbears James Fitzjames inherited a sturdy independence, a resolute energy, an urge to go his own way regardless of obstacles, a disposition to form opinions according to his tested standards of right and wrong, and an individualistic and searching mind; there was something of the expert wrestler in his intellectual tenacity. Early evidence for these robust qualities is extant in the diary which he kept as a boy, now preserved in the University Library, Cambridge. . . . In physical appearance he bore a strong resemblance to a cliff, and his mental makeup was no less craggy. He remained himself because he found no reason to change.
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> He was far from being a typical Etonian. 'Public schools,' Sir Courtenay Ilbert has remarked, 'are said to be useful in rubbing off angles': but 'Stephen's angles were not of the kind that rub off.' He took no interest in games; he found no stimulance in the syllabus; and he did not easily tolerate the bullying which was meted out to an 'up-town' boy. Accordingly, those schooldays were for him wasted and unhappy years. But he bore no grudge against the place; indeed he felt that public schools were a part of the national heritage; to be preserved at all costs, but to be reformed.

After a period at King's College, London, where he found life more congenial, he entered Trinity College, Cambridge, in 1847. Here again he followed his own bent:

> "He plunged at once into the intellectual life of Cambridge and enjoyed it to the full. His incessant search for truth impressed his contemporaries, and he was long remembered as one of the company of 'Apostles,' and in the Union debates was often the formitable opponent of William Harcourt, the future Liberal statesman and Home Secretary. He was regarded as belonging to the outspoken Johnsonian genus and his friends knew him as the 'British Lion.' Yet in terms of conventional academic progress he was a failure; he was twice disappointed in attempts to gain a scholarship at Trinity, and in the May term of 1851 he went out in the 'Poll,' in other words, without taking honours. 'Unteachable' was the judgment which he passed upon himself. And in 1856 he wrote, in an article supporting the Bill for the reform of the university, that Cambridge remained to him 'the very noblest place of education that ever deserved the gratitude of mankind . . . a seminary for all the simple manly virtues which have made England what it is . . . that quiet strength, the noble modesty, that frank courage, without which wisdom is cunning and knowledge vanity . . . .'

He was already acquainted with Sir Henry Maine, who was six years his senior, and then newly-appointed to the chair of Civil Law.

He entered the Inner Temple and was called to the Bar in January, 1854. He then read for a law degree in the University of London, and not only completed the course but also gained his only academic prize, a scholarship. He joined the Midland Circuit. He never became an eminent, or even a successful, barrister. The only two marks of distinction that fell to him during this period were the Recordership of Newark in 1859 and the taking of silk in 1868.

Fitzjames Stephen's interests were not confined to his work at the Bar. Dr. Radzinowicz continues:

> It is often said that the Bar is a jealous mistress demanding undivided allegiance: and from 1854 to 1869 Stephen was leading a double life. He who is best remembered as a historian of criminal law and writer of legal digests was earning a wide reputation not only as a voluminous journalist but as the main controversial publicist of his day. Starting with articles in the *Christian Observer* and the *Morning Chronicle*, he wrote his first two essays at the age of twenty-six, one on 'The relation of novels to life' and the other on the 'Characteristics of English criminal law,' both published in *Cambridge Essays*; and as time went on he found his taste for writing essays and leaders developing into a passion which threatened to absorb his energy and impair his health. During the next twenty years he became a regular con-

tributor to most of the leading literary and legal journals; but the two with which he was most closely associated were the *Pall Mall Gazette* and the *Saturday Review*. The former was a daily founded in 1865 and 'written by gentlemen for gentlemen'; the latter was a weekly paper, which first appeared in 1855 with the boldly proclaimed object of freeing 'thirty million people who are ruled despotically by *The Times*,' and whose influence can only be compared to that exercised by the *Edinburgh Review* during the first three decades following its foundation. . . .

It is known that during the four years between 1865 and 1869 his articles to the *Gazette* alone numbered over eight hundred and fifty, besides two hundred occasional notes and fifty items of correspondence. And we can gain an even better insight into Stephen's mind and the extraordinarily wide range of his intellectual interests thanks to the painstaking efforts of an American scholar who has identified about two hundred articles and notes of his which appeared in the *Saturday Review* in the period from 1855 to 1868. T. H. S. Escott, who was so intimately connected with the *Review*, thus assessed the role played by Stephen: 'As a journalist, Fitzjames Stephen did not only help to make the *Saturday Review*. He *was* the *Saturday Review*. His views of life set forth in casual conversation, if they could have been correctly reported, would have run naturally into *Saturday Review* articles. The most characteristic expressions of Cook's best contributors on ethical or serious social themes were the echoes of Stephen's mind, bodying themselves forth in articulate expression.'

But he never took himself seriously as a writer. "His dry, fluent prose reads more like spoken pronouncements," Dr. Radzinowicz says, "the economical, straightforward use of words gives his style the attraction of naturalness and simplicity. One enjoys the spontaneity and unpretentiousness of the text as one reads; but with deeper attention one perceives that this unstrained effect is the triumph of a rigid discipline of thought that had become second nature to the man, though it had in the process squeezed out all the warmth of colour in his utterances. His wit is always unlaboured, even startling, because it seems to slip out almost against his will when he is perhaps irritated beyond endurance; his epigrams and metaphors seem to materialize without his being aware of them, his only concern being with the feeling that has possessed him at the contemplation of some pleasing or unpleasing idea."

In 1868 Sir Henry Maine suggested that Fitzjames Stephen might be appointed legal member of the Governor-General's Council in India. India had for long captivated Stephen's imagination. When he was a boy, Macaulay's *Essays* had been his favourite book and he almost knew by heart those on Clive and Warren Hastings. The conquest of India fitted naturally into his conception of the destiny of the English race which, to quote his own words, "has girdled the world with its empire, which rules those who submit, and strikes down those who resist, with more than Roman force and Roman justice." The spread of the English legal system and of its mode of administration was to him not only an indispensable concomitant of the British rule but a principal means in its civilizing mission. To continue to quote from the lecture:

The foundation of Indian legislation had been laid by a 'work of true genius,' Macaulay's Penal Code, framed in 1835 and enacted in 1860. With the passing of the Codes of Civil Procedure and of Criminal Procedure in 1859 and 1861 respectively, the legal edifice was firmly established. Maine had carried the process another step forward: he had drafted the Indian Succession Act and introduced the Evidence and Contract Bills.

When Stephen took over in 1869, he proceeded to revise both these latter measures and incorporated them into the law of the land; he added new sections to the Penal Code; he recast the Criminal Procedure Act of 1861; he took a hand in expurgating and consolidating large portions of the Indian Statute Book; he helped to build up an inter-state law; he took a prominent part in the executive work of the Governor-General's Council; he devised a legal foundation for the administrative regulations of the Punjab; he even tried to disentangle the intricate web of Hindu wills and Brahman Somaj marriages. An imperial proconsul with a thirst for legislation had appeared on the scene and he drove along, constructing large *corpora* of laws in the course of two and a half years of prodigious activity. 'His capacity for the work of drafting,' commented Lord Bryce, 'was deemed not equal to his fondness for it. He did not shine either in fineness of discrimination or in delicacy of expression.' Such criticism was justified, but in no way does it invalidate the final judgment that Stephen was one of the greatest architects to bridge the gap between the Western World and India in the legal sphere. He played a large part in forging a bond between the two countries that has survived the bitter stresses from which a relationship based on conquest cannot help but suffer.

In 1872, when Fitzjames Stephen returned from India, Jeremy Bentham who was, in his own phrase, at the age of eighty-two still "codifying like any dragon," had long been advocating a movement which aimed at the total recasting of the law, including the common law, by reducing it to written form. He even advocated the obliteration of the existing law and a *de novo* erection of a "Complete Code," to cover the full extent of the legal and constitutional system, and to be grounded on the utilitarian tenets of his philosophical creed. He expressed his readiness not only to turn out such codes for home use, but also to take orders from the world at large; and this in addition to running a model prison for the Government. Lord Sidmouth and the Czar of Russia, the Congress of the United States, and several of the State governors were among the addressees of his reforming zeal.

In the United States he could point to the very remarkable work of codification accomplished by Edward Livingstone of the State of Louisiana—destined to serve later as an inspiration to Lord Macaulay. But he was bitterly disappointed with what had taken place in his own country: the series of statutes promoted by Peel and Lord Lansdowne had followed a line too much in keeping with a tradition going back to Bacon; they had chosen to digest and consolidate (allowing for a few amendments) only certain sections of the criminal law, already on the statute books but haphazardly scattered. As Dr. Radzinowicz says:

It was the indefatigable Brougham who seized the all but extinct torch of reform and resuscitated it with a fresh impetus: a commission was appointed in 1833, and another in 1837, and yet another in 1845. They were busy for almost fifteen years, those learned, industrious and well-paid men. Their thirteen reports surveyed the whole body of the criminal law, and were enlivened by many helpful comparative illustrations. A great number of proposals were advanced and a series of codifying Bills were passed. One of these Bills, that relating to the definition of crimes and punishments, was put before their Lordships by Brougham, but was withdrawn on an undertaking by Lord Lyndhurst that a further commission would be appointed to revise it. Brougham duly proffered the revised Bill a year later, only to be met with final rejection.

Seven years later it was the turn of Lord St. Leonards, then Lord Chancellor. He gave instructions for the preparation of a series of codifying measures, each relating to a particular province of the criminal law. One such draft dealing with offences against the person attained to an examination by a select committee, but before the work of revision could be completed a change in the government suspended the matter. However, the postponed revision was resumed in 1853; the Bill was amended, and sent to the Judges for their opinion by Lord Cranworth, the new Lord Chancellor: in spite of an unfavourable attitude of the judiciary, no less than seventeen new Bills were hopefully prepared in the next three years under his direction. The only outcome of these stupendous efforts, costing the nation a fortune, were the Criminal Consolidation Acts of 1861 relating to offences

against the person and offences against property; and they followed the principle favoured by Peel: the common law remained intact. The movement had spent itself. Even the scheme of assembling in an amended and digested form all statutory provisions on criminal matters and uniting them in one Criminal Code was derelict.

Shortly afterwards, in 1863, the dying flame was rekindled. Lord Westbury took the cause of the codifiers to heart and agreed to support their proposal to digest the case law. The theory of codification was taken up in Parliamentary speeches, leading periodicals, and newspapers, in tracts, and in the debates of learned societies. A Royal Commission appointed three years later reported in favour of the project, and with the approval of the Government it invited the members of the four Inns of Court to submit specimen digests of selected topics. But the brisk revival proved an illusion, and in 1871 a leader in *The Times* mourned the premature expiry of this fresh attempt at giving a new form to the laws of England.

At this critical juncture, in 1872, Stephen made his entry. In an emphatic article he used the weight of his enhanced reputation—he had just returned from India—in support of this task of reformation, the feasibility of which, according to him was so strikingly demonstrated not only by Edward Livingstone's codes but also by the impressive drafts of David Dudley Field which had found their way into several parts of the United States of America, and, last but not least, by what had been accomplished in India. Two years later, in rather curious circumstances, he was called upon to perform his first remedial operation on the criminal law of his country.

The immediate need, as it happened, was for a reduction in the scope of capital punishment appointed for murder, and codification was not explicitly mooted. John Bright, the Liberal politician, following up the Report of the Royal Commission on Capital Punishment of 1864, had enlisted the interest of Russell Gurney in the project, who in his turn had appealed to Stephen for help. Subsequently the Homicide Law Amendment Bill of 1874, in Stephen's draft, was referred to a Select Committee, with Stephen himself as the main witness defending it in the face of weighty criticisms from Chief Justice Cockburn, Baron Bramwell, and Mr. Justice Blackburn.

In our next issue, we shall consider the place of Fitzjames Stephen himself as he enters upon the work of codification as a private enterprise.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Auditor—Duty of Company's Auditor—Principles applicable in Considering Extent of Auditor's obligations to search for Irregularities. The duties of an auditor for a company must be determined by the contract and by no other test, for the relationship between an auditor and the company engaging him is solely a matter of contract. Where an auditor is appointed by resolution of the shareholders, and there is no express definition of the scope of his obligations, his duties are set out in s. 141 (1) of the Companies Act 1933 (now in extended form, s. 166 (1) of the Companies Act 1955). But that subsection does not specify the steps which an auditor must take to place himself in a position to report to the shareholders in the manner prescribed by the statute, and it does not specify the extent of his obligation to search for irregularities. The following are some of the principles applicable in considering that obligation: The primary purpose in the engagement of an auditor is to obtain a report to the shareholders on the accounts of the company, and the primary duty of the auditor is to make that report. In carrying out this primary duty, an auditor has to exercise reasonable care and skill in making inquiries and investigations, which may include investigations and reports upon the conduct of employees of the company. An auditor is never bound to exercise more than reasonable care and skill. What is reasonable care and skill in any particular case must depend upon the circumstances of that case. Where there is cause for suspicion, more care is necessary; but the test is still that of reasonable care and skill in the light of all the circumstances, including those circumstances which arouse suspicion. (Statements of Lindley L.J. in *Re London and General Bank (No. 2)* [1895] 2 Ch. 673, and of Lopes L.J. in *Re Kingston Cotton Mill Company (No. 2)* [1896] 2 Ch. 279; 288-289; *London Oil Storage* v. *Seear, Hasluck and Co.*, (reported in *Dicksee on Auditing*, 17th ed., pp. 632, 635); *Re City Equitable Fire Insurance Co. Ltd.* [1925] 1 Ch. 407; and *Fomento (Sterling Area), Ltd.* v. *Selsdon Fountain Pen Co. Ltd.* [1958] 1 All E.R. 11, 15, followed.) The obligation cast on an auditor by the statute is to make a report on accounts examined by him and on every balance-sheet laid before the company in general meeting during the tenure of office. While it may be good practice for an auditor, in the event of certain circumstances arising, to make some preliminary investigation at a time before the accounts are ready for a full audit, in the present case neither the statute nor the course of conduct between the company and the auditors required, as a matter of law, that the auditors, when conducting the audit for the year ended March 31, 1953, take any steps whatsoever in respect of the audit for the year ended March 31, 1954, until the books of the company were in a position for that audit and they had been called upon to embark upon it. *It was held* in the present case (an action for damages for alleged negligence in the performance by the defendants of their duties as auditors to the plaintiff company), that on the evidence indicated in the judgment, it was not established that there was such a departure from the standard of a reasonably competent and careful auditor as justified a finding of negligence against the defendants in respect of their conduct up to the date of the discovery of defalcations. The action accordingly failed. *Nelson Guarantee Corporation Limited* v. *Hodgson and Others* (S.C. Wellington. 1957. March 25. McCarthy J.)

EVIDENCE.

Admissibility—Letter written by Prospective Witness in Civil Action who had left New Zealand, but was said to be in Australia—Proof required that "all reasonable efforts to find him" have been made "without success"—Evidence Amendment Act 1945, s. 3 (1) (3). If a witness, who is not a "person interested" within the meaning of that term in s. 3 (3) of the Evidence Amendment Act 1945, is "beyond the seas and it is not reasonably practicable to secure his attendance" in terms of the proviso to s. 3 (1) of that statute, it must be shown that all "reasonable efforts to find him have been made without success" before any statement made by him may be admitted in evidence. *Wenlock* v. *Union Steam Ship Company of New Zealand Limited* (S.C. Wellington. 1958. March 6. Hutchison J.)

MAORIS AND MAORI LAND.

Confirmation—Licence to Occupy Maori Land an "alienation"—Such Licence, in the Absence of Confirmation, not tainted with Illegality—Maori Affairs Act 1953, s. 224 (1). The grant of a licence by a Maori in de facto but unconfirmed occupation of Maori land for the occupation of that land, which is an "alienation" within the meaning of that term as used in s. 224 (1) of the Maori Affairs Act 1953—the material passage of which reads: ". . . no alienation of Maori land by a Maori shall have any force or effect unless and until it has been confirmed by the Court"—is without validity in law, but is not tainted with illegality. *Sim* v. *McTavish.* (S.C. Palmerston North. 1958. April 1. Haslam J.)

Ngatiawa Development Scheme—Land purchased by Crown in Conjunction with Original Block of Maori Land—Crown not Trustee of Purchased Land in Favour of Maori Owners entitled to Original Block of Maori Land—Maori Land Act 1931, s. 522—Maori Land Amendment Act 1936, ss. 6 (2), 18 (2), 53. On an appeal against the judgment of Turner J. [1957] N.Z.L.R. 244, where the facts are fully set out. *Held*, by the Court of Appeal, for the reasons set out in several judgments, That, on a true interpretation of the relevant statutes, the area of 4,600 acres of land purchased in the name of the Crown between April, 1931, and October, 1933, as part of the Ngatiawa Development Scheme, was at all material times beneficially owned by the Crown, and the moneys expended on the purchase and development of those lands were not at any time charged or chargeable against the area of 726 acres of Maori land developed in conjunction with the purchased land; and the Crown did not at any stage become a trustee in favour of the Maori owners of any of the Maori lands. (*In re Tikitere Development Scheme* [1954]

N.Z.L.R. 738, overruled. *Aotea District Maori Land Board* v. *Commissioner of Taxes* [1927] N.Z.L.R. 817; [1927] G.L.R. 464, distinguished. Appeal from the judgment of Turner J. [1957] N.Z.L.R. 244, dismissed.) *Stewart* v. *Attorney-General.* (C.A. Wellington. 1958. March 31. Finlay J. Hutchison J. North J. Henry J. McCarthy J.)

MARRIAGE.

Persons within Prohibited Degrees of Affinity—Step-father and Step-daughter—Principles guiding Court in Exercising Discretion to make Order dispensing with Statutory Prohibition—Marriage Act 1955, s. 15 (1) (2), Second Schedule. Some of the principles which should guide the Court in the exercise of its discretion in determining, on an application made under s. 15 (2) of the Marriage Act 1955, whether consent to marry should be given or refused to persons within the prohibited degree of affinity (here applied to the case of a step-father and step-daughter) are, without attempting an exhaustive statement of the relative considerations, as follows: The Court must consider the realities of the technical relationship of step-father and step-daughter from the time that relationship first came into existence, to the date of the application: whether it is a relationship which is of the nature of guardian and ward; whether it is a relationship in which the technical step-father has in age and practical matters and aspect stood in something like a true father's position to his step-daughter, or whether it is more technical than real. Such consideration will aid in solving, or helping to solve, the question of whether the proposed marriage would be abhorrent to public opinion informed of the details. The Court must have regard to the realities of the situation which exists, for the purpose of determination of what course is most likely to serve the best interests of public morality as it is likely to have been expressed in public opinion. The Court must attempt to determine whether or not the wish to marry springs from any ulterior motive, such as the desire to acquire material gain, coming, for example, from some man of age and experience looking in the direction of a young and inexperienced girl possessed of wealth. A further consideration must be: What will be the consequences of the birth of children, which is a probable, if not inevitable result of marriage? Will it be likely to create difficulties or prejudice to existing families of children? Once the condition set out in s. 15 (2) has been satisfied, then each individual case falls to be finally decided on its own particular facts. (In *Re Woodcock* [1957] N.Z.L.R. 960, followed). *So held* by Shorland J., on an application by a step-father and step-daughter for an order, under s. 15 (2) of the Marriage Act 1955, in giving the Court's consent to their marriage and dispensing with the prohibition contained in the Second Schedule to that statute. *In re Hoskin and Pearson* (S.C. New Plymouth. 1958. May 2. Shorland J.)

NEGLIGENCE.

Tar-spraying Road—Nearby Properties damaged by Tar "Mist"—Negligence of Servant of Subcontractor—Subcontractor his General Employer responsible for His Negligence—Negligence of Foreman of Contractor Effective Cause of Damage suffered—Both Contractor and Subcontractor liable in Damages—Judgment against Both. On February 8, 1957, the first defendant, as the general contractor carrying out construction and sealing work on Kohimarama Road in the City of Auckland, engaged the second defendant to supply and to spray on to the road surface, the primer coat of tar in connection with sealing work. This tar-spraying operation was carried out by the employees of the second defendant but it was part of the whole works undertaken by the first defendant. While this tar-spraying work was being carried out a high northerly or north-easterly wind was blowing, with the result that a fine mist of the tar primer was blown from the roadway on to the houses of two of the plaintiffs. In consequence the exterior walls and roof of each of these houses were spattered with tar. Also, part of the house, the trellis, and letter box, and also the motor-car of the other plaintiffs were similarly damaged. At the request of the first defendant, the second defendant sent to this job its tanker, driven by its usual driver and laden with tar for the primer coat, heated to the appropriate temperature, and also supplied an experienced employee to operate the tar-spraying plant which formed part of the tanker's equipment. It was the responsibility of the first defendant to prepare the road surface for application of the tar primer coat and to give instructions as to what area was to be sprayed with tar and when the spraying operation was to commence. The tar was sprayed under pressure though a fine spray on to the roadway and its spread is controlled by the height at which the spray nozzle is held by the operator above the road surface. The operator of the spray plant testified that he had been engaged in spraying work for forty years. The tar-spraying operation is almost invariably accompanied by the escape of a fine spray of "mist" of tar. It is usual to place iron sheets against adjacent fences, gates, etc., in order to protect them from the escape of this tar "mist". On this occasion, a high wind was blowing across the roadway and towards the houses of the respective plaintiffs. The foreman for the first defendant, was present at that time and instructed the driver of the tanker and the spray-plant operator, both regularly employed by the the respective plaintiffs. The foreman for the first defendant was present at that time and instructed the driver of the tanker and the spray-plant operator, both regularly employed by the second defendant, to commence spraying the tar on to the road surface. The actual spraying was done by a regular employee of the second defendant. No proper or sufficient precautions were taken under the conditions prevailing to prevent the tar "mist" from escaping from the roadway on to the properties of the respective plaintiffs. As a consequence of such escape, the above-mentioned damage was done to the property of the respective plaintiffs. In an action by each of the plaintiffs against the first and second defendants on the ground of the negligence of them both, and alternatively, on the ground of nuisance. *Held*, 1. That the foreman of the first defendant was negligent and this negligence was an effective cause of the damage suffered by the plaintiffs. 2. That, on the facts, the tar-sprayer employed by the second defendant was negligent in proceeding with the spraying operation in the conditions then prevailing without ensuring that proper safeguards were taken to prevent the tar "mist" from being carried by the high cross-wind blowing towards the plaintiffs' properties. 3. That the first defendant did not have authority to control the manner in which the actual spraying was done; therefore, the responsibility for his negligence in so doing remained with the second defendant as his general or permanent employer. 4. That each plaintiff was entitled to succeed against both defendants on the cause of action based on negligence. (*Mersey Docks and Harbour Board* v. *Coggins and Griffiths Liverpool* [1947] A.C. 1; [1946] 2 All E.R. 345, followed.) *Williams* v. *T. K. Hay Construction Co. Ltd.* and *Acme Construction Co. Ltd. Wallace et Ux* v. *Same. Cameron* v. *Same.* (M.C. Auckland. 1958. February 19. Coates S.M.)

TENANCY.

Fixation of Fair Rent—Jurisdiction—Fair Rent fixed by Rents Officer after Order for Possession effective—Tenant no longer having "Lawful possession of the premises"—Assessment of Fair Rent made without Jurisdiction—Tenancy Act 1955, ss. 24, 41, 47 (2). The Rents Officer has no jurisdiction to make an assessment of the fair rent of premises after an absolute order for possession has become effective, whether or not a warrant for possession has been executed as, at that time, in terms of s. 47 (2) of the Tenancy Act 1955, the tenant no longer had "lawful possession of the premises." (*Moran* v. *Kirkwood Brothers Ltd.* [1947] N.Z.L.R. 213; [1947] G.L.R. 56, applied.) *Aliter*, If the tenant had been granted a suspension or postponement of the date of possession under s. 41 of the Tenancy Act 1955. *Bhika* v. *Cooper and Another.* (S.C. Wellington. 1958. April 24. Hutchison J.)

VENDOR AND PURCHASER.

Sale of Land—Memorandum in Writing—All Material Terms verbally agreed upon and later correctly expressed in Written Agreement—Agreement signed by Purchaser only—Receipt for Deposit identifying Property sold and Stating Same Deposit as acknowledged in Agreement—Receipt signed by Vendor's Authorized Agent—Receipt and Agreement read in Conjunction, sufficient "memorandum . . . in writing" to constitute Enforceable Contract—Contracts Enforcement Act 1956, s. 2 (2). In order that two documents may constitute a memorandum for the purposes of s. 2 (2) of the Contracts Enforcement Act 1956, it is indispensably necessary that there should be a document "signed by the party charged or by some other person lawfully authorized by him," which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied to some other document or transaction. Where any such reference can be spelt out of the document so signed, then parol evidence may be given to identity the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If, by this process, a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of s. 2 (2) of the Con-

tracts Enforcement Act 1956. (Statement of principle by Jenkins L.J. in *Timmins* v. *Morland Street Property Co. Ltd.* [1958] Ch. 110; [1957] 3 All E.R. 265, applied.) In the present case, a receipt for the deposit on a sale of land was signed by the vendor's authorized agent and a written agreement for sale and purchase, incorporating the terms of the sale verbally agreed uponby the parties, was signed by the purchaser only. It was held, for the reasons given in the judgment, That the receipt for the deposit could be read in conjunction with the agreement so as to constitute a sufficient memorandum for the purposes of s. 2 (2) of the Contracts Enforcement Act 1956; and the purchaser was entitled to an order for specific performance of the agreement constituted by the written agreement signed by the purchaser and the receipt for the deposit signed by the defendant's authorized agent. (Principles enunciated in *Timmins* v. *Morland* for the deposit on a sale of land was signed by the vendor's *Street Property Co. Ltd.* [1958] Ch. 110; [1957] 3 All E.R. 265, and in *Long* v. *Millar* (1879) 4 C.P.D. 450 (as exemplified in *Sheers* v. *Thimbleby & Son* (1897) 13 T.L.R. 451 and *Burgess* v. *Cox* [1951] 1 Ch. 383; [1950] 2 All E.R. 1212) applied. *Stokes* v. *Whicher* [1920] 1 Ch. 411, referred to.) *Saunderson* v. *Purchase*. (S.C. Hamilton. 1958. February 19. Finlay J.)

WILL.

Covenant not to revoke Will—Remarriage of Testator—Covenant not in Restraint of Marriage or Contrary to Public Policy—Covenant not extending to Cases where Revocation follows as Matter of Law—Wills Act 1837 (7 Will. 4 and 1 Vict., c. 26) s. 18. A covenant not to revoke a will is not an implied restraint of marriage, although a will is revoked by remarriage by operation of s. 18 of the Wills Act 1837, as remarriage is not a breach of the covenant not to revoke the will, the revocation arising as a matter of law and not by act of the party. Such a covenant is confined to acts of revocation performed as such for the purpose, and it does not extend to cases where revocation follows as a matter of law. (*In re Marsland, Lloyds Bank Ltd.* v. *Marsland* [1939] Ch. 820; [1939] 3 All E.R. 148, applied.) In August, 1953, a property owned by C.'s wife was registered as a joint family home in the joint name of herself and C. under the provisions of the Joint Family Home Act 1950. At the time of the registration, the parties agreed that in the event of the death of either of them, the survivor would leave the property by will to the five daughters of Mrs C. by a former marriage. Mrs C. died on December 6, 1953. Shortly after his wife's death, C. executed a deed of covenant, dated December 9, 1953, which recited the undertaking previously given by C. to his wife to leave the property to the latter's daughters by will, and in which C. covenanted with the five daughters irrevocably that he would leave the property upon his death to them as tenants-in-common in equal shares, and would forthwith execute a will giving effect to that covenant. On December 11, 1953, C. executed a will accordingly, and appointed two of the daughters executrices and trustees. On February 28, 1955, C. remarried, thus effecting the revocation by operation of law, by virtue of s. 18 of the Wills Act 1837, the will made on December 11, 1953. The daughters then registered a caveat against the title to the property forbidding the registration of any instrument. In an action, C. asked for a declaration that the deed of covenant was void as having been obtained by undue influence and as being contrary to public policy. He also asked for an order that the caveat be removed on the ground that the deed of covenant, if valid, did not create any interest in the land which would support a caveat. *Held*, 1. That, on the facts, the claim to set aside the deed, on the ground of undue influence and lack of independent advice, could not succeed. 2. That the covenant not to revoke the will was not void as being contrary to public policy. *Clausen* v. *Denson and Others*. (S.C. Palmerston North. 1958. February 14. McGregor J.)

WORKERS' COMPENSATION.

1. Accident arising out of and in the Course of the Employment—Brain Infarction—Effort not Causal Factor where Infarcation caused by Thrombosis—Association of Effort with Onset of Infarction due to Embolism—Indication of Effort playing Part in Accident—Workers' Compensation Act 1956, s. 3 (1). In the present state of medical knowledge, the Court cannot accept that the same criteria should be applied in respect of cerebral infarction as are applied in respect of cardiac infarction. If an infarction was caused by a thrombosis, effort was not a causal factor. If the infarction was due to an embolus, then, as an embolus may in remote cases be caused by effort, the association of effort with the onset of symptoms could be taken as an indication that effort in such a case played a part. Consequently, where the facts (as in the present case) show that the death of the worker was due to a cerebral thrombosis, not to an embolism, which led to the farction, it was held that effort played no part. *Semble*, That, since the decision in *Smith* v. *Wellington City Corporation* [1950] N.Z.L.R. 1026; [1949] G.L.R. 351, there has been a change in medical opinion: when that case was decided medical opinion accepted that thrombosis could be caused by subintimal haemorrhage and that subintimal haemorrhage, in its turn, could be caused by effort. Since that decision, medical authorities do not accept the theory of subintimal haemorrhage causing a thrombosis. *Ford* v. *Cotter* (Comp. Ct. Christchurch. 1957. March 3. Dalglish J.)

2. —— —— Tuberculosis—Worker in Institution under Control of Department of Health—Statutory Presumption—Application Where Evidence equally consistent with Two Explanations—Tuberculosis Act 1948, s. 23 (2)—Workers' Compensation Act 1956, s. 3 (1). Where evidence given to the Court is equally consistent with two explanations, the presumption created by s. 23 (2) of the Tuberculosis Act 1948 must apply; but it is always open to the Court, in considering the weight of the evidence to find against the statutory presumption, notwithstanding that there may be some evidence tending to support it. It is for the Court to decide whether the evidence against the statutory presumption is sufficiently compelling for it to displace the statutory presumption and outweigh that presumption and such evidence as may tend to support it. *Semble*, The obiter dictum in *Clements* v. *The Queen* [1953] N.Z.L.R. 857, 861, as to the reactivation of latent tubercle bacilli being a development of "contracting" of the tuberculosis, may require reconsideration if it directly arises in another case *Clarke* v. *Attorney-General* (Comp. Ct. Nelson. 1957. October 30. Wellington. 1957. December 16. 1958. March 26. Dalglish J.)

Hernia—Worker with Repaired Hernia suffered Twenty Years before Strain or Accident resulting in Clinical Hernia of Disabling Character—Onset immediately following Such Strain or Accident—Worker entitled to Compensation—Workers' Compensation Amendment Act 1943 s. 6 (1) (a)—(Workers' Compensation Act 1956, s. 18). In 1937, the plaintiff, when about fifteen years of age, had a left-sided hernia which was repaired at that time. The hernia recurred while he was in military camp in 1942 and was again repaired. On January 20, 1957, while the plaintiff was engaged at the defendant's farm stacking ensilage he was on top of the stack and reached forward to pull a load off the loader on to the stack. While so doing his fork slipped and he fell backwards into a hole in the stack wrenching his abdomen and feeling a severe pain which caused him to cry out. His employer was on the stack with him and was immediately aware that something had occurred. The plaintiff rested during the remainder of the morning, was driven back to the farmhouse after lunch, and did no more work that day or on the following day. By arrangement with his employer, as they were short-handed, he resumed work after the second day but did no heavy work. The pain continued as a nagging pain during this period, and it was made worse by any sort of effort which involved the stomach muscles. On February 20, while the plaintiff was having a bath, he had a severe bout of coughing and this caused the pain to be much more severe. The pain on this occasion caused him to place his hand over the site of the pain and he felt a lump. He reported to his doctor the next day, and the doctor confirmed that there was a hernia. This was a direct hernia which had occurred through the scar tissue having been stretched to allow the swelling to be noticeable. *Held* That, on the facts, the hernia was caused by the strain or accident on the ensilage stack, and it was a clinical hernia, the onset of which immediately followed that strain or accident; and, consequently that the case was within s. 6 of the Workers' Compensation Amendment Act 1943 (now s. 18 of the Workers' Compensation Act 1956), and the plaintiff was entitled to compensation. *Lawson* v. *Nowell*. (Comp. Ct. New Plymouth. 1957. December 19. Dalglish J.)

LAND VALUATION TRIBUNALS.

By J. F. NORTHEY, B.A., LL.M., DR. JUR. (Toronto).

(*Concluded from p. 75.*)

III. THE JURISDICTION AND PROCEDURE OF LAND VALUATION COMMITTEES. (*Continued*).

(*d*) *Appeals under the Estate and Gift Duties Act 1955 :* Where a valuation of land is made by the Valuer-General, in terms of the Estate and Gift Duties Act 1955, s. 75, for the purpose of determining the amount of gift or estate duty, an appeal in respect of the valuation may be taken to a Land Valuation Committee. The appeal is treated as if it were an objection to a valuation made under the Valuation of Land Act 1954. Where, however, the property is not land, s. 76 applies. Under that section a person dissatisfied with an assessment may appeal to the Supreme Court under s. 69 or raise objections to it in an action to recover the duty.[63]

(*e*) *Appeals under the Land Act 1948 :* Certain sections of the above Act confer appellate jurisdiction on Committees. Under s. 122, a lessee or licensee may acquire a fee simple and the Land Settlement Board determines in the first instance the value of the land and improvements. If the lessee or licensee is dissatisfied, he may require that the purchase price be determined by a Land Valuation Committee.[64]

Land Valuation Committees are also empowered to hear an appeal from the decision of the Board fixing the valuation of land for rental purposes.[65] Similar powers are conferred by ss. 139, 141, and 142 as to revaluations.[66]

But the provisions of Part X dealing with servicemen and the review of their obligations by the Land Settlement Board confer a right of appeal to the Court, and do not refer to Committees.[67]

The proceedings of the Committees are governed by the Act and Rules discussed above.

(*f*) *Objections to valuations under the Maori Affairs Act 1953 :* The Valuer-General is required by s. 244 to make a valuation of leasehold land in order to determine the compensation payable to a lessee. Objections made to that valuation[68] are disposed of as if they were objections lodged under the Valuation of Land Act 1951.[69]

Where rent is to be determined on review or renewal of a lease in terms of s. 346, the Valuer-General must make a valuation. Objections made to that valuation[70] are disposed of as if they were objections lodged under the Valuation of Land Act 1951.[71]

(*g*) *Objections to valuations under the Maori Reserved Land Act 1955 :* Under s. 30, the Valuer-General is required to make valuations for rental purposes. Objections made to those valuations are disposed of as if they were objections under the Valuation of Land Act 1951.[72]

Thus, in each case where a Land Valuation Committee has jurisdiction, it is necessary to look first to the statute conferring the jurisdiction to see what, if any, special rules govern the hearing and procedure of the Committee and then have regard to the general provisions contained in the Land Valuation Court Act 1948 and the Rules made thereunder.

IV. THE LAND VALUATION COURT.

The jurisdiction of the Court is even more varied than that of the Committees, because the Court has appellate jurisdiction in respect of any decision of a Committee[73] and, in addition, original jurisdiction in relation to :

(a) Certain claims for compensation under the Public Works Act 1928 ;[74]

(b) compensation for lands taken for settlement ;[75]

(c) compensation for improvements under the Maori Vested Lands Administration Act 1954 ;[76]

(d) review of servicemen's obligations under the Land Act 1948.[77]

The Court may also give directions to Committee.[78]

The procedure of the Court is governed by the statutes conferring jurisdiction on it and the Rules.[79] The Land Valuation Court Act and Rules give way to any specific provision made in another statute.

Where a Land Valuation Committee has made a decision, notice of its order is given to the parties.[80] If an appeal is not lodged, the order is sealed and becomes an order of the Court.[81] The period for lodging

[63] See E. C. Adams, *Law of Estate and Gift Duties in New Zealand*, 3rd ed., (1956), 284-9, 298-314.

[64] s. 122 (10). A further appeal lies to the Court ; s. 123 (2).

[65] ss. 131 and 132. A further appeal lies to the Court : s. 133 (2).

[66] A further appeal lies to the Court.

[67] ss. 157-159 as set out in the Land Amendment Act 1951, ss. 17-19. It is doubtful if Committees have jurisdiction, despite the provisions of the Land Valuation Court Act 1948, ss. 22 and 23. The contrast between the earlier sections of the Land Act which expressly refer to Committees, and the later sections which do not, suggests that only the Court has jurisdiction. This seems to have been accepted by the Court which itself heard the appeal under s. 159 in *In re McCloughin's Application* [1950] N.Z.L.R. 660.

[68] s. 245 (4). Presumably, the request for a valuation by the Valuer-General will be exceptional ; in most cases agreement will be reached between the parties.

[69] This provision, by inference, gives Committees jurisdiction.

[70] s. 348 (4). See f.n. 68, *supra*.

[71] see f.n. 69, *supra*.

[72] ss. 43 and 44. See f.n. 69, *supra*.

[73] See Land Valuation Court Act 1948 ; s. 26, Valuation of Land Act 1951, ss. 21 and 34, Land Act 1948 ; ss. 123, 133, Maori Affairs Act 1953 ; ss. 245 and 348 and Maori Reserved Land Act 1955, s. 44.

[74] See Land Valuation Court Act 1948, s. 22 (1).

[75] Land Settlement Promotion Act 1952, ss. 9-11, and Reg. 13 of the Rules ; see f.n. 56, *supra*. It should be noted that the decision of the Court as to the amount of compensation to be paid is final, but an appeal presumably lies to the Supreme Court on the question of right or title to compensation. In relation to the latter question, the Land Valuation Court has no special competence.

[76] ss. 10 and 39.

[77] See f.n. 67, *supra*.

[78] Land Valuation Court Act 1948, ss. 16 and 24.

[79] S.R. 1953:70.

[80] s. 25 (1) ; see also Regs. 39-45 of the Rules.

[81] s. 25 (2).

an appeal is fixed by s. 26.[82] The Court rehears the case, but it is for the appellant to discharge the onus of proof, i.e., to show that the decision of the Committee was wrong.[83]

A number of decisions of the Court has been reported and it is possible from these decisions to gain some insight into its procedure and the principles followed. The Court prefers that counsel exchange valuations before the hearing so as to shorten the time taken up in examination and cross-examination.[84] Evidence should be directed to establishing the value of the property as at the date of the transaction in question and evidence as to sales that have taken place since that date are available only to determine the value as at the date of the transaction.[85]

In relation to compensation under the Public Works Act, the Court of Appeal[86] placed a different construction on the provisions of the Act as to filing of claims from that given by the Land Valuation Court.[87] An owner cannot expect to receive compensation where the interference with his rights is trivial or is balanced by a benefit from the public works that have been carried out.[88]

The principles to be followed by the Valuer-General in assessing the value of land under the Valuation of Land Act 1951 are not stated in the Act, but it seems that he must attempt to arrive at the current market value.[89] That value will take account of any estate or interest created in or over the land, but will not take account of a statutory tenancy under the Tenancy Act 1955.[90] Under the Valuation of Land Act 1951,[91] the onus of proof lies on the objector. If he fails to discharge that onus, the value determined by the Valuer-General (and if adopted by a Land Valuation Committee the decision of that Committee) shall not be varied by the Court.[92]

[82] See also Reg. 47 as to extension of time. It is suggested that the period of fourteen days might be reduced to seven days in the cases of uncontested applications for consent under the Land Settlement Promotion Act 1952. At present, fourteen days must elapse before any order can be sealed.

[83] See *In re a Proposed Lease, Hood to Woolworths (N.Z.) Ltd.* [1949] N.Z.L.R. 297.

[84] *In re Dunedin City Corporation's Objections* [1956] N.Z.L.R. 466.

[85] *Poverty Bay Catchment Board* v. *Forge* [1956] N.Z.L.R. 811.

[86] *Barber* v. *Manawatu-Oroua River Board* [1953] N.Z.L.R. 1010.

[87] *Barber* v. *Manawatu-Oroua River Board* [1952] N.Z.L.R. 452; as to the compensation payable see *Barber* v. *Manawatu-Oroua River Board* [1954] N.Z.L.R. 391. See also *Poverty Bay Catchment Board* v. *Forge* [1956] N.Z.L.R. 811 as to payment of interest and *Lower Hutt City Corporation* v. *Dyke* [1954] N.Z.L.R. 166 as to the calculation of compensation (including a margin of profit) for land taken for an access road.

[88] *Candy* v. *Thames Valley Drainage Board* [1956] N.Z.L.R. 416.

[89] This is inferred from the definitions in s. 2, but "current market value" remains a somewhat vague notion as to which different opinions may be held. Where there is no market, other formulae may be adopted; *R.* v. *Buller County and Valuer-General* [1956] N.Z.L.R. 726, 729 (value of a coal mine). See also *Pomona Orchard Ltd.* v. *Minister of Works and Poverty Bay Catchment Board* [1958] N.Z.L.R. 88 as to the determination of compensation for injurious affection to an orchard.

[90] *Finlay* v. *Valuer-General* [1954] N.Z.L.R. 76. That decision relates to a valuation for the purposes of the Valuation of Land Act 1951 and would not govern valuations for other purposes, e.g., death and gift duties.

[91] s. 23.

[92] See *In re Wanganui City Valuations* [1955] N.Z.L.R. 495.

In applying Part II of the Land Settlement Promotion Act to leases, a number of interesting problems have arisen. Where the lease contains an option to purchase an application for consent may need to be made when the option is exercised.[93] When land subject to a "Glasgow" lease is put up for auction and is acquired by a person other than the lessee, the outgoing lessee is a person "interested in the hearing" within the meaning of the Land Valuation Court Act 1948, s. 23 (2).[94]

The meaning of "farm land" in the Land Settlement Promotion Act, s. 2, has been interpreted in a number of cases.[95] The basis of valuations of "farm land" and the compensation to be paid have also been discussed.[96]

There are certain conditions precedent to the taking of farm land for settlement.[97] The phrase "suitable or adaptable for settlement" has been examined by the Court.[98]

In an appeal concerning undue aggregation, the Court had occasion to examine the Land Valuation Court Act 1948, ss. 26 and 36. Section 26 provides that appeals shall be by way of rehearing and the Court's practice is to take the evidence again.[99] Although new evidence is admissible, only evidence related to the facts as at the date of the Committee's hearing will be accepted. In that case, the Crown was held to be bound by the submissions of the Crown Representative made to the Committee; his submissions could not be discredited on appeal. In determining whether there is undue aggregation, it is not only the land held by the purchaser that is relevant; public interest and the nature of the use to which the land is to be put may be overriding factors.[100]

The procedure adopted by the Land Valuation Court is not markedly different from that of the Supreme Court.[101] Where the Rules make no provision covering the issue before the Court, the Court has power to determine its own procedure,[102] but in fact there is little departure from Supreme Court procedure.

[93] *Re Woolworth's Lease* [1949] N.Z.L.R. 295, but see Land Settlement Promotion Act 1952, s. 23 (2) (q).

[94] *In re a Lease, Tauranga Borough to Commercial Bank of Australia, Ltd.* [1950] N.Z.L.R. 154.

[95] *In re a Proposed Sale, Smith to McPheat* [1950] N.Z.L.R. 734 (poultry farming); *In re a Sale, Exton to Grenville* [1951] N.Z.L.R. 636 (timber growing) and the cases cited there. See also *In re a Proposed Sale, Hunt to Nelson Pine Forest, Ltd.* [1957] N.Z.L.R. 451.

[96] *In re P. H. Saxton & Co., Ltd.* [1951] N.Z.L.R. 334 (uncertainty as to use of products of land); *In re Bowling* [1952] N.Z.L.R. 774 (sheep farming).

[97] Land Settlement Promotion Act 1952, s. 3.

[98] *In re a Proposed Sale, Wallace to Morton* [1952] N.Z.L.R. 324. The Committees and the Court can review the Minister's opinion as to suitability and adaptability.

[99] *In re a Sale, Hodder to Heays* [1954] N.Z.L.R. 1229, 1231. See s. 12, which enables the Court to receive as evidence material not admissible in a Court of law.

[100] *In re a Proposed Sale, Growcott to Asparagus, Ltd.* [1955] N.Z.L.R. 802. Cf. *In re a Proposed Sale, Maginness to Mundy* [1955] N.Z.L.R. 58 and *In re a Proposed Sale, Spencer to Smaill Bros.* [1956] N.Z.L.R. 243. See also certain decisions of Land Valuation Committees; *In re a Proposed Sale, P. to S.* (1953) 8 M.C.D. 52; *In re a Proposed Sale, McM. to T. & G. Ltd.* (1953) 8 M.C.D. 66; *In re a Proposed Sale, R. to C.* (1953) 8 M.C.D. 74; *In re a Proposed Sale, S. to M.* (1953) 8 M.C.D. 122 (all of which concern undue aggregation); *In re a Proposed Sale, G. to T.* (1954) 8 M.C.D. 237 (purchase on trust for children).

[101] Subject to the Land Valuation Court Act, s. 12 (1), the Evidence Act 1908 applies.

[102] s. 11 (2).

V. Conclusions.

It is now necessary to consider the relationship between the Land Valuation Court and Committees and the Supreme Court. The Court is a Court of Record,[103] but this does not exclude review by the Court. In fact, the Act expressly recognizes[104] that proceedings of the Court may be reviewed on the ground of lack of jurisdiction.[105] Although s. 27 (2) purports to protect proceedings of Committees from review by the Supreme Court, it is exceedingly doubtful if the section would be construed to do that.[106]

In *Manawatu-Oroua River Board* v. *Barber*,[107] the Courts were asked to quash the judgment of the Land Valuation Court[108] and to direct it to hear Barber's application for compensation in terms of the Public Works Act 1928. The Land Valuation Court had decided that it had no jurisdiction to hear his application because it was out of time. The provisions of s. 17 of the Act were raised against the plaintiff and the case turned on the meaning of the phrase " except on the ground of lack of jurisdiction," and the effect of privative clauses in general. It was noted[109] that the status of the Land Valuation Court was somewhat different from that of the Compensation Court under the Public Works Act. Both the Supreme Court and Court of Appeal considered the relevance of the " jurisdictional fact "[110]— in this case the time-limit prescribed by the Public Works Act, s. 45, for the commencement of proceedings. The reasoning of counsel in relation to this point was extremely close; the argument was also complete as far as can be judged from the report. It was held[111] that the provision in the Act as to a time limit was a " jurisdictional fact " reviewable by the Courts. The Courts placed a different construction on the section from that placed on it by the Land Valuation Court. Mandamus was issued addressed to the Land Valuation Court to hear and determine the claim. The Court of Appeal stated the relationship between the Land Valuation Court and the Supreme Court in these words:

> Mr Cleary contended that all questions as to what caused the damage are for the exclusive and final determination of the Land Valuation Court, and that this Court is bound to accept and act upon the findings of the Land Valuation Court on the matter. We cannot agree that this is so where the Land Valuation Court is dealing with matters of causation in relation only to the time for the commencement of proceedings; but we accept his contention that this Court will not disregard the Land Valuation Court's findings of fact unless clearly shown to be erroneous. As Fullagar J., said in *Blakeley's* case ((1950) 82 C.L.R. 54), " A doubt as to error is resolved in favour of the decision of the inferior tribunal " (*ibid.*, 93). It is however, the duty of the Supreme Court to examine these findings and to determine as best it can whether it finds them justified. The general position is succinctly stated in the judgment of this Court in *Stratford Borough* v. *Wilkinson* [1951] N.Z.L.R. 814; [1951] G.L.R. 345 as follows: " The principle that was laid down by Lord Esher, M.R., in *The Queen* v. *Income Tax Special Purposes Commissioners* ((1888), 21 Q.B.D. 313, 319) was stated by the Judicial Committee in *The King* v. *Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128) in the following words: ' if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior Court ' (*ibid.*, 158). We think that what was there said shows that, although in such a case the inferior tribunal may, at its peril, determine whether the facts necessary for its jurisdiction exist, the position nevertheless is that the existence or otherwise of such facts, if questioned, is ultimately a matter that is within the competence of the superior Court " (*ibid.*, 823: 349).[112]

Thus it is clear that the Land Valuation Court is subject to the supervisory control of the Supreme Court which will, by means of certiorari, prohibition, mandamus and presumably declaration, see that the Land Valuation Court keeps within its jurisdiction as defined by the Supreme Court.

The determination of land values is of primary importance as it is a question affecting most of the community. The ordinary Courts could perform this important function and in fact they still do so. For example, Magistrates' Courts and the Supreme Court are required to determine values for the purpose of rent fixation under the Tenancy Act 1955 and Assessment Courts continue to dispose of objections under the Rating Act 1925.[113] The Supreme Court has since 1955 the function of determining certain appeals in relation to estate, gift and stamp duties.[114] In cases such as these the Courts will of course act on the evidence submitted by the parties and the valuation of the Valuer-General is likely to be accepted. Essentially, the Courts are asked to judge the reliability of testimony, in this case testimony as to values, which is part of their normal functions. But it can hardly be doubted that there are advantages to be gained from having a Judge with wide experience in land valuation just as there are advantages to be gained from specialization within the three divisions of the High Court in England. An experienced Judge will be likely to reach a conclusion more rapidly and with less chance of error than one who lacks the specialized knowledge and experience. It is this sort of consideration that explains and justifies the existence of the Land Valuation Court. Not only does the Court tend to fix values on the same principles, but it also brings a high degree of experience to bear on the issues presented to it.

Similar considerations apply to Land Valuation Committees. They are part-time tribunals, but the quality of their work has been high. Uniformity can be secured by the issue of directions by the Court to the various Committees.[115]

The experiment—which can be said to have been made first in 1943[116] when the Land Sales Court and Committees were established—has been a success. Not only has it diverted a considerable volume of work from the ordinary Courts, but the decisions of the

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[103] s. 3.

[104] s. 17.

[105] s. 27 (2) provides that the proceedings of Land Valuation Committees may be reviewed only by the Court.

[106] Despite privative clauses of this kind, the Courts have continuously asserted their power to keep inferior tribunals within their jurisdiction. The most recent authority is perhaps *R.* v. *Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B. 574; [1957] 1 All E.R. 796.

[107] [1953] N.Z.L.R. 1010; see p. 135, *ante*.

[108] Reported in [1952] N.Z.L.R. 452.

[109] At p. 1033.

[110] See especially the contribution made by D. M. Gordon in (1944) *60 L.Q.R.* 250 to this topic; it was mentioned by the Court of Appeal at p. 1036.

[111] At p. 1015 per Fair J., and p. 1037 by the Court of Appeal.

[112] At p. 1037.

[113] See f.n. 7, *supra*.

[114] See Estate and Death Duties Act 1955, ss. 69 and 76. See f.n. 15 and p. 123, *ante*.

[115] See ss. 16 and 24.

[116] See the Servicemen's Settlement and Land Sales Act 1943.

tribunals have been accepted as fair by the parties.[117] The degree of public support or opposition to an institution is a reliable yardstick of its success.

One minor criticism must be made, however. The legislation relating to the jurisdiction of the Court and the Committees needs review. The method of conferring jurisdiction on the Court and Committees by a number of separate statutes tends to conceal the breadth of their jurisdiction. It also causes some ambiguity in that it is doubtful whether the Court or, in the first instance, Committees have jurisdiction.[118] A consolidation of the Land Valuation Court Act 1948 which included references to the other statutes conferring jurisdiction on the Court and Committees would meet this criticism.

[117] Many of the decisions of the Court hav been reported in the *Law Reports*; this is of great assistance to the legal profession.

[118] See, e.g., f.n. 40, *supra*.

ENTRY INTO POSSESSION OF PART OF MORTGAGED LAND.

By Puisne Mortgagee on Mortgagor's Default.

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

The judgment of Haslam J. in *Ruapekapeka Sawmill Co. Ltd.* v. *Yeatts and Yeatts* [1958] N.Z.L.R. 265 emphasizes once again the indefeasible nature of a registered estate or interest under the Land Transfer Act acquired without "fraud," which term means actual dishonesty of some sort. In this case, the estate or interest acquired was that of second mortgagee—the plaintiff, who by originating summons, on default having been made by the mortgagor, the first defendant, claimed possession of only part of the mortgaged premises—viz., the upper story of a dwellinghouse consisting of two stories—each story consisted of an independent flat. It was not contended, however, that the mortgagee was prevented from exercising his powers in respect of *part* only of its security without claiming possession of the residue of the mortgaged premises.

The mortgage incorporated the provisions of the Property Law Act 1952 and the Land Transfer Act 1952 "except in so far as the terms of the mortgage are expressly inconsistent therewith." Haslam J., pointed out that in the absence of words to the contrary a second mortgagee has the rights and powers conferred on mortgagees generally by the Land Transfer Act 1952.* In this mortgage, there was no express limitation of the powers implied by the Land Transfer Act.

Section 106 of the Land Transfer Act 1952 provides that upon default in payment of the principal sum, interest, annuity, or rent-charge secured by any mortgage, or of any part thereof, the mortgagee may enter into possession of the mortgaged land by receiving the rents and profits thereof or may bring an action for possession either before or after any sale of the land under the power of sale given or implied in the mortgage. Section 108 of the same Act confers on a mortgagee the like remedies for obtaining possession of mortgaged land as are given by law to a landlord against a tenant or tenant whose term has expired or whose rent is in arrear.

Section 108 is rather a remarkable provision, and there is but little authority on it. It is one of a group of sections intended to give to a mortgagee of land under the Land Transfer Act the same practical and effective rights and remedies, as a mortgagee of land under the "old system" enjoys. It would appear that these sections are intended to get over a technical difficulty which might otherwise arise due to the nature of a Land Transfer mortgage—that on its registration it operates not as a transfer of the estate or interest mortgaged, but as a charge thereon.

For the purposes of this case it was necessary to construe s. 108, and His Honour's construction will, one feels sure, be quoted in future text-books.

While the right to sue for possession on default was not disputed at the hearing, the question arose whether the second defendant fell within the category of persons referred to in s. 108 as "those claiming through or under" the mortgagor. The learned Judge said:

> The term "mortgagor" is defined in s. 2 of the Act as "the proprietor of any estate or interest charged with the mortgage." It accordingly embraces subsequent purchasers from the original mortgagor who have been duly registered on the title. As the words "those claiming through or under him" connote something outside the ambit of "mortgagor" as already defined, it seems a reasonable inference that persons in occupation by virtue of a lease, contract, or licence from the mortgagor should fall within that category. In my opinion, therefore, the mortgagee in the event of default may also sue such parties for possession.

The first and second defendants were divorced husband and wife respectively. The second mortgage in question (duly registered) was dated November 4, 1953, *but more than five years before* that date (i.e. on 30th June 1948) the two defendants had entered into a deed, cl. 5 of which, conferring certain rights on the second defendant, read as follows:

> 5. The said Annie Eleanor Kathleen Yeatts shall be entitled to the free use and occupation until her death or re-marriage of the top floor of the house property heretofore occupied as a matrimonial home at 6 Khyber Road, Seatoun Heights, Wellington, and the said Annie E.eanor Kathleen Yeatts shall be entitled to the free use and possession of the furniture and chattels now situated in the said house property until her death or re-marriage as aforesaid.

In His Honour's opinion, the site of the former matrimonial home of the two defendants at 6 Khyber Road was clearly identifiable by the title reference contained in the mortgage. His Honour's finding of fact was that the plaintiff mortgagee at the material time, the date of the registration of the mortgage, did not have actual or constructive notice of the second

* It has been held in Victoria that a second mortgagee may, subject to the rights of the first mortgagee, bring an action to recover possession of the land: *Croft* v. *Kennaugh* [1945] V.L.R. 40.

defendant's rights in the upper flat. That was an important finding of fact, for counsel for the second defendant expressly stated that his client made no allegation of fraud.

By *originating summons* the plaintiff, who as previously stated, was second mortgagee without fraud, claimed possession of the upper flat at 6 Khyber Road, the subject-matter of cl. 5 of the deed of June 30, 1948, cited above. The first defendant had made default under the second mortgage, and all necessary statutory notices had been served by the plaintiff on both defendants.

First, there had to be decided by the Court an important point of procedure. Was the procedure by way of originating summons available to the plaintiff for the purpose of evicting the second defendant? His Honour pointed out that R. 550 of the Code of Civil Procedure lists without a word of conjunction or the reverse, a series of forms of relief which may be sought on the summons, and concludes:

> the exercise of any powers, whether statutory or otherwise, vested in the mortgagee under and by virtue of such mortgage.

His Honour continued:

> The plaintiff purports to be exercising his powers under ss. 106 and 108 of the Land Transfer Act, 1952. The combined effect of these sections is to give a mortgagee the right to evict persons claiming through or under the mortgagor. Although the express reference in R. 550 to "delivery of possession by the mortgagor" without more, would seem by implication to exclude persons "claiming through or under" the mortgagor, the general nature of the concluding words above quoted, and the absence of any words calling for a more limited construction, suggest that this cheap and speedy remedy should be available in circumstances such as the present. Had there been any material conflict of fact, this procedure would in any event have been inappropriate.

It appears to the writer of this article that this same point of procedure was similarly decided by Callan J. in *Harris* v. *Camwell* [1947] N.Z.L.R. 498; [1947] G.L.R. 408, which is cited in several places in the fourth edition of *Garrow's Real Property in New Zealand*.

The next and real problem in *Ruapekapeka Sawmill Company Ltd.* v. *Yeatts and Yeatts* was: what was the exact nature of the rights conferred on the second defendant by the deed of June 30, 1948? It as common ground that it did not create the relationship of landlord and tenant; and that, therefore, the second defendant did not have the protection of s. 46 of the Tenancy Act 1955: *Hogenas* v. *Hatton* [1955] N.Z.L.R. 684.

Counsel for the second defendant appears to have submitted that, whatever the nature of his client's rights in the land (a life estate in the air-space occupied by the upper flat, or a mere licence, it could not be transformed into a *registrable* estate or interest; and that, therefore, the plaintiff, as mortgagee, could not claim the benefit of the indefeasible provisions of the Land Transfer Act 1952 (ss. 62 and 182); presumably it was also submitted that the mortgagee had *constructive* notice of his client's rights.

But His Honour rejected these contentions, holding that—

(1) the second defendant had an equitable life estate in the upper flat, determinable on her remarriage †;

(2) a certificate of title could be issued for the air-space occupied by the upper flat pursuant to ss. 91-95 of the Land Transfer Act 1952; and

(3) in the circumstances, the indefeasible provisions of the Land Transfer Act were applicable, and protected the plaintiff which, as we have seen, was the second registered mortgagee.

First, as His Honour pointed out, in the hierachy of interests, a life tenancy ranks above a licence. It has been repeatedly held with regard to wills that the words "use or occupation" confer a true life estate and not a mere right of residence.‡ And there is ancient authority for giving that phrase the same meaning in deeds as in wills: *R.* v. *Inhabitants of Eatington* (1791) 4 T.R. 177; 100 E.R. 959. His Honour continued:

> In recent years, the Courts have spelt out of the conduct of the spouses a licence to occupy the matrimonial home where the husband has left living in their former residence. Such cases are of little help in the present instance where the parties are in a different relationship, and their intentions have been embodied in a document.

Secondly, it had been contended by counsel for the second defendant that even if his client had a life interest, she was entitled to occupy certain air-space, and that a certificate of title could not be issued for a horizontally-severed portion of the freehold. His Honour thought differently, and could see no objection to the deposit of an adequate plan of survey under s. 137 of the Land Transfer Act 1952.

One may interpolate here that, in fact, certificates of title for air-space have been issued by the Land Transfer Office in New Zealand. In England, they will, under their system of State-guaranteed registration of title to land, issue a certificate of title, for example, even for a cellar

The cry, like a slogan, has recently gone forth: "Own your own flat!" And there is no doubt that unless we as a nation are prepared to dissipate our main inheritance—the matchless grass-lands—the inhabitants of our most populous cities will have to become more accustomed then heretofore to living in flats. There is, in theory, no objection to the occupier of a flat having a legal estate in fee simple therein; but, if the flats occupy more than one floor of a building, there are practical difficulties in the way. There must be some authority with sufficient financial stability to control those parts used in common by the various flat-dwellers—such as passageways, lifts, and gardens. The problem is being solved in Wellington by the incorporation of a company, in which the land will be vested and which will continue to exercise such general control: the ownership of shares in the company is linked up with the right to occupy a specified flat—such occupying shareholders will each have an equitable life estate in their respective flats, for there are provisions in the Articles as to the devolution of the shares on the death of each shareholder.

Thirdly, what applied in the circumstances as regards the rights of the second mortgagee (the plaintiff) was the principle of indefeasibility of title as outlined by the Privy Council in *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (1925) N.Z.P.C.C. 267.

The cardinal principle of the Land Transfer Act is that the register is everything; and that, except in cases of actual fraud on the part of the person dealing

† An estate by no means unknown to conveyancers: *Cheshire on Modern Real Property*, 5th ed. 375, *Norton on Deeds*, 1st ed. 343.

‡ See, for example, article by writer in (1956) 22 N.Z.L.J. 90.

with the registered proprietor, such person, upon the registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.

In conclusion, there is one dictum in the instant case, which, with all due respect, the writer of this article does not agree with.

His Honour suggested that, even if the second defendant had been entitled only to a bare right to reside in the property (i.e., something short of a life estate), she would have been entitled to protect her right by caveat against dealings. In support of this view, His Honour referred to the dictum of Salmond J. in *Wellington City Corporation* v. *Public Trustee* [1921] N.Z.L.R. 423, 424. But that case went to the Court of Appeal, which held that the Corporation had acquired an equitable easement, and, moreover, was entitled to the execution in its favour of a registrable easement. Therefore it was not necessary for the Court of Appeal to consider Salmond J.'s dictum. In *Staples and Co.* v. *Corby* (1900) 19 N.Z.L.R. 517, it was held that a restrictive covenantee had no right to lodge a caveat on an application to bring land under the Act, as his interest was not an interest in the land within the meaning of certain sections in the Land Transfer Act. At the same time, the Court of Appeal held that the doctrine of restrictive covenants (i.e. the rule in *Tulk* v. *Moxhay*, (1848) 2 Ph. 774; 47 E.R. 1345 did not apply to land under the Land Transfer Act, the practical difficulty of course being to give people contracting on the strength of the Register Book notice of the covenant.

The writer of this article sees no reason why the same principle should not apply to caveats against dealings with land subject to the Land Transfer Act. If Salmond J.'s dictum is correct, then he who has any sort of interest in land (whether a registrable one or not) can lodge a caveat and thus compel the registered proprietor to seek his consent to every dealing which he desires to register against his title. That would give the owner of such an interest a greater protection than equity ever gave it. When the Legislature desires such an effect, it makes express provision accordingly. Reference may be made to s. 126 of the Property Law Act 1952—authorizing the District Land Registrar to note restrictive covenants appurtenant to land against the title to the servient tenement: para (c) thereof provides that every such restriction notified on the appropriate folium of the Register Book shall be an " interest " within the meaning of s. 62 of the Land Transfer Act 1952.

To sum up, the main problem in *Ruapekapeka Sawmill Company Ltd.* v. *Yeats and Yeats* could be solved by applying the converse of the principle laid down by the High Court of Australia in *South-Eastern Drainage Board* v. *Savings Bank of Australia* (1940) 62 C.L.R. 603. The South-eastern Drainage Amendment Act 1900 of South Australia, provided that the amount of drainage construction costs apportioned to a landowner under that Act should be a first charge on the land of the landowner, and that such charge could be enforced by the Commissioner of Crown Lands, as if he were the mortgagee under the Real Property Act 1886 (which Act is the South Australian statute corresponding to our Land Transfer Act). In 1912, the registered proprietor executed a mortgage in favour of the Savings Bank of South Australia, and the mortgage was duly registered under the Torrens system. But, in 1908, a charge for drainage construction had attached to the land. In 1912, when the mortgage was registered there was no notice on the Register-book of the statutory charge. The Court held that, as the charge for drain construction costs did not depend for its efficacy on registration, *being in fact incapable of registration*, it was not possible to apply the principle of such cases as *Assets Co. Ltd.* v. *Mere Roihi* (1905) N.Z.P.C.C. 275, and so regard the statutory charge as being something intended to be brought into conformity with the general registration scheme.

As we all know, the *Assets Co. Ltd.* case is the leading one on indefeasibility of title under the Land Transfer Act; in the *South-Eastern Drainage Board* case that principle could not be applied; here, in the instant case, it can be applied for the interest sought to be displaced was capable of registration under the Land Transfer Act.

On April 29, the Court of Appeal refused the second defendant special leave to appeal against the judgment of Haslam J. considered above.

" **Fine Arts.**"—" What, then, is included in the expression, 'the fine arts' It was urged by counsel for the society that any medium of what he called 'pure art' as opposed to 'applied art' comes within the expression. Whether an art is also a fine art, he said, depended merely on the use to which it was put. I am unable to accept this view. It seems to me that fine art involves something more than this. What exactly it is I will not attempt to define, but this, at least, is necessary, I think, before an activity can be so classified. It must be an activity which makes an immediate impression on the mind or imagination, its perception, by whatever sense, arousing aesthetic satisfaction. Moreover, the person on whom that impression is to be made is the person perceiving the performance, not merely the performer. The fact that the performers get pleasure from their activity does not, of course, prevent an activity from being a fine art if otherwise it is one. Here, however, the main emphasis is on the pleasure derived by the performers. There is little, if any, evidence that people go to watch folk dancing like they undoubtedly go to see ballet dancing, or, if they do, that it is to see more than others partaking in a revival of traditional and recreational dances. Dancing does not become a 'fine art' merely because what is danced is a revival of that which was performed many hundreds of years ago and because the onlookers enjoy seeing others enjoying themselves. No doubt, there is also a considerable historical interest aroused, but that is, in my judgment, not enough. A pageant, or indeed a tattoo, of the times of Henry V has great historical interest and may be performed in such a way as to please the eye; but there is all the difference between that and a performance of Shakespeare's *Henry V*. The latter performance may well be an exposition of fine art, but certainly not the former "—Parker L.J. in *O'Sullivan* v. *English Folk Dance and Song Society* [1955] 2 All E.R. 845, 859.

TOWN AND COUNTRY PLANNING APPEALS.

Cunningham *v.* Masterton County.

Town and Country Planning Appeal Board. Masterton. 1957. October 10.

Scheme—Variation—Farm Property adjoining Proposed Stock Route Reserve—Objection to Reserve—Planning Map altered—Appeal allowed—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant was the owner of a farm property adjoining a proposed stock-route reserve defined on the plan for the respondent Council's proposed district scheme, and he lodged an objection under s. 23 to the proposed reserve.

This objection was heard by the respondent Council, and on May 3, 1957, the Council gave the following decision:

"That the objection be disallowed and that the district-planning map be altered to conform with the opinion hereinbefore expressed."

The appellant appealed against this decision. At the hearing the Board was informed that the parties had reached agreement.

By consent, the Board made the following order:

1. The appeal is allowed.

2. The Council's decision of May 3, 1957, is to be varied by deleting therefrom the words: "and that the district-planning map be altered to conform with the opinion hereinbefore expressed".

The Board allows the appellant the sum of seven guineas as costs.

Appeal allowed.

B. & B. Concrete Co. Ltd. *v.* Mount Wellington Borough.

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

Factory—Adjacent Area taken for Quarry—Land zoned "Residential"—Erection of Factory Detracting from Amenities of Neighbourhood—"Detrimental Work"—Town and Country Planning Act 1953, s. 38.

Appeal under s. 38 of the Town and Country Planning Act 1953, against the refusal of the council to permit the erection of a factory adjoining the Ellerslie-Howick Main Highway adjacent to Ellerslie Borough. The appellant wished to establish a factory for brick and pipe manufacturing.

The grounds for the appeal were that adjacent land was taken under the powers contained in the Public Works Act 1928 for a quarry, and quarrying is one of the uses to which Appendix B of the Fourth Schedule of the Town and Country Planning Regulations 1954 relates and as such comes within the same class of industry as brick and pipe manufacturing. The proposed factory would not have detracted from the amenities of the neighbourhood having regard to the use to which the adjoining land would have been put. The land was not suitable for residential purposes. The decision was a reversal of a previous decision made by the Council in February, 1954.

The Council refused to grant a permit on the grounds that the surrounding area was almost entirely residential. The appellant's land was to be zoned residential in the Council's undisclosed district scheme with a quarry zone superimposed. The Fourth Schedule of the Town and Country Planning Regulations 1954 was not being adopted by the Council as its Ordinances for the scheme. Owing to the special circumstances regarding natural deposits in the Borough, special provision was made in the scheme for quarries. The proposed factory would be a "detrimental work". Any land used for quarrying would be restored to normal conditions and made suitable for residential development. The land was suitable for residential purposes. The proposed factory would detract from the amenities of the neighbourhood likely to be provided or preserved by the Council's undisclosed district scheme. If the area were zoned for heavy industry in the Council's district scheme, owners of nearby land would have the right to object and appeal whereas if the application were approved these owners would be denied a right of appeal and would have no redress.

The judgment of the Board was delivered by

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

1. A great deal of the appellant's evidence was directed to establishing that this land was unsuitable in the main for residential use and should be more appropriately zoned as "industrial". That question does not fall for determination in these proceedings. When the Council's scheme is advertised under s. 22 the appellant will have a right of objection to the zoning, and if it does so object and its objection is disallowed then it will have a right of appeal to this Board.

2. The sole question to be decided in this case is whether or not the erection of a factory such as is proposed by the appellant will detract from the amenities of the neighbourhood likely to be provided or preserved by the Council's undisclosed district scheme.

3. If this area is ultimately to be zoned as "residential" and at this stage it cannot be said to be unlikely that it will be so zoned, then the erection of a factory for the carrying on of a heavy-industry business such as the appellant's will detract from the amenities of the neighbourhood.

No order as to costs.

Appeal dismissed.

A. H. and R. A. Coll *v.* One-Tree Hill Borough.

Town and Country Planning Appeal Board. Auckland. 1957. October 22.

Building—Area Zoned as "Residential B"—Application for Permit to build Shelter for Mobile Caravan—Requirements that Front Yards have Depth of Twenty Feet—"Building"—Structure "detrimental work" detracting from Amenities likely to be preserved under Proposed District Scheme—Town and Country Planning Regulations 1954 (S.R. 1954-141), Fourth Schedule.

Appeal by the owners of a house property, No. 37 Waiohua Road, One-Tree Hill, Auckland.

The first-named appellant was the owner of a mobile caravan (a converted motor bus) 30ft. in length. He applied to the respondent for a permit to erect shelter for this caravan, having the approximate dimensions of 33ft. by 10ft. by 8ft. 7in. The respondent Council refused its consent on the grounds that the proposed structure would detract from the amenities of the neighbourhood likely to be provided by or preserved under its undisclosed district scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). The appellant has already erected a structure on the front yard of the property which he claims is a "trellis" in which he houses the caravan.

Photographs produced indicated that this structure, although it has partly open sides and no roof is of a far more substantial nature than is generally found in trellis work. It could be aptly described as a large and substantial pergola.

In any case, whatever the most apt colloquial description of it may be, it is a "building" within the definition given in the respondent Council's Code of Ordinances which is similar to the definition given in the Fourth Schedule to the Town and Country Planning Regulations 1954, see Reg. 17 (2).

The respondent Council's Code of Ordinances provide in Ordinance 9 (a) (iii) (h) that in residential "B" zones in which type of zone the appellant's property is situate, the front yards must have a depth of at least 20ft.

A yard is defined in the Ordinance as "a part of a site which is required by this scheme to be unoccupied and unobstructed by buildings from the ground upwards, except as otherwise provided by this scheme" and "front yard" means a yard between the street line and a line parallel thereto and extending across the full width of the site.

Ordinance 13 (2) provides that "except as otherwise provided by this Ordinance no person shall erect any building on any front yard, rear yard and all such yards shall be left unoccupied and unobstructed from the ground level upwards".

It is clear that the structure erected by the appellants contravenes the Code of Ordinances and that it is a "detrimental work" within the meaning of s. 38 of the Act in that it detracts from the amenities likely to be provided or preserved by or under the respondent Council's undisclosed district scheme.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Ideal Laundry Ltd. *v.* Petone Borough.

Town and Country Planning Appeal Board. Wellington. 1957. July 19.

Petrol Pump — Removal and Re-installation — Land Zoned "Residential"—No Objections—Application granted subject to Conditions—Town and Country Planning Act 1953, s. 53.

Application to move a petrol pump from 6A Oriental Street, Petone, and to re-install this pump on a vacant section owned by the company adjoining their premises at 201 The Esplanade, Petone. The company's storage facilities in Oriental Street had become so dilapidated as to be unusable for their business and the present buildings were to be removed, and the section sold for housing. This use was permissible under the operative district scheme, as the property was zoned "residential."

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The Board hereby consents to the application, subject to compliance with the following conditions:

(a) That the approval of the Petone Borough Council relates only to the installation of a petrol pump and an underground tank for the storage of motor spirit.

(b) That the company's access way to the installation shall be by way of an entrance-way from the Esplanade with an exit on to Aurora Street.

(c) That the company comply with the Borough Engineer's requirements as to the installation of heavy motor vehicle footpath crossings at the Esplanade entrance and the Aurora Street exit.

Application granted.

Bowler *v.* Waikouaiti Borough.

Town and Country Planning Appeal Board. Dunedin. 1957. October 29.

Subdivision—Refusal of Consent on Ground that Land unsuitable for Subdivision—"Suitability" relating to Topographical Feature of Land, Its Situation, Suitability for Drainage, etc.—Land held to be Suitable for Subdivision—Municipal Corporation Act 1954, s. 351 (2) (a).

Appeal by the owner of a property at Waikouaiti being Lot 39 on Deposited Plan No. 6882 Hawkesbury Survey District, containing an area of 1 ro. 1.45 pp. It formed part of a subdivision made in 1950 comprising forty-nine sections, fronting on to Stewart Street in the Borough of Waikouaiti. These sections varied in area, but with few exceptions they consisted of about a quarter of an acre. The appellant wished to subdivide his property into two. The plan indicated that the front section would have an area of 20 pp. and the rear section an area of 29.48 pp., access being given to the rear section by a "leg in" strip 15ft. wide leaving the effective area of the rear section at 23.5 pp. The Council refused its consent on the sole ground that in its opinion the land was not suitable for subdivision. This refusal was made under s. 351 of the Municipal Corporation's Act 1954, subs. 2 (a).

The judgment of the Board was delivered by

REID S.M. (Chairman). At the hearing, the respondent's main contention was that this subdivision would tend to create undesirable housing conditions with the possibility of the creation of a "shanty town". The earlier correspondence between the parties indicated that the Council was opposed to "leg in" sections in general. The Council might have availed itself of the provisions of the Town and Country Planning Act 1953 (s. 38 (1) (c), and refused approval on the grounds that the proposed subdivision might detract from the amenities of the neighbourhood. It elected to rest on s. 351 of the Municipal Corporations Act and the only question calling for determination by the Board is whether or not the land is suitable for subdivision. The Borough does not appear to have any by-laws governing the size of residential sites within the Borough. The Board asked for production of the by-laws but was told that none could be found. It does appear, however, that in the past the Borough has approved of one eight of an acre sections for residential sites. The Borough did not produce any evidence on the suitability of the land as such. On the other hand, the appellant led the evidence of a registered surveyor who expressed the view that the land was quite suitable for subdivision, and that is the only real evidence on the question of suitability that was placed before the Board.

The Board is not prepared to define the phrase "suitability of land for subdivision" but it would appear that this question of suitability must relate more to the topographical feature of the land under consideration, its situation, its suitability for drainage, and so on. If the respondent Borough wishes to control the size of residential sites and to prohibit "leg in" sections, it can protect itself by framing appropriate by-laws. "Leg in" sections are a common feature in most towns in New Zealand and they cannot possibly be held undesirable per se.

The Board takes the view that the Borough has failed to discharge the onus laid on it of proving that this land as such is not suitable for subdivision, and the appeal is accordingly allowed.

No order as to costs.

Appeal allowed.

Giles *v.* Manukau County.

Town and Country Planning Appeal Board. Auckland. 1957 October 23.

Subdivision—Area Zoned as "Rural"—Amalgamation of Two Blocks farmed as One Dairying Unit—Application for Approval of Separation of House and Third of Acre—Scheme requiring Minimum of Five Acres—Lesser Area appropriate for Proposed Use—Subdivision approved—Town and Country Planning Act 1953, s. 42.

Appeal by the owners of a block of land containing 38 acres more or less part Allotment 33 of the Parish of Wairoa being Lot 2 on Deposited Plan No. 19210 being all the land comprised in Certificate of Title volume 580 folio 104.

The first-named appellant owned an adjoining block of 49 acres 2 roods more or less but the two blocks were farmed as one unit carrying 69 milking cows.

The appellants' homestead was on the latter block. The appellants purchased the 38-acre block to work in conjunction with the 49-acre block as the latter did not in itself constitute an economic unit.

On the 38-acre block there was a house which was of no use to the appellants, and they wished to subdivide this block by taking therefrom the house and approximately one third of an acre surrounding it, and selling it.

They applied to the Council for approval of this subdivision, but approval was refused because the subdivision would not be in conformity with the town-and-country-planning principles likely to be embodied in the Council's undisclosed district scheme.

Under that scheme the area in which this property was situated was zoned as "rural". It was common ground that the zoning was appropriate.

The judgment of the Board was delivered by

REID S.M. (Chairman). Under the Council's scheme the minimum area for subdivision in a rural zone is 5 acres.

Under its proposed code of ordinances the Council may permit the subdivision of land in a rural zone so as to produce an allotment of less than the minimum area prescribed if the applicant satisfies the Council either:

1. That the lesser area can be used as an independent economic farming unit or
2. That the lesser area or frontage is appropriate to the proposed use and that approval thereof is necessary to avoid injustice or irreparable loss.

The first of these conditions has no application to the circumstances of this appeal.

As to the second condition the Board is satisfied that on the limited information made available to the Council when approval of the subdivision was first sought it acted consistently and properly in refusing its approval.

At the hearing a great deal more information as to the appellants' financial circumstances was made available.

The Board does not propose to traverse the evidence. On that evidence it is satisfied that the lesser area is appropriate to the use proposed for it and that the appellants will be faced with irreparable loss if the proposed subdivision is not permitted. Accordingly the appeal is allowed. The Council is directed to approve the proposed subdivision.

No order as to costs.

Appeal allowed.

Vytals Products Ltd. *v.* Onehunga Borough.

Town and Country Planning Appeal Board. Auckland. 1957. April 6.

Factory—Proposed Use for Dehydrating Cattle Lungs—Area zoned as "Industrial C" Opposite Side of Street zoned "Industrial D"—Objection by Residents—No Evidence of Operations being Detrimental in Industrial C" Zone—Permit granted for Conditional Use of Factory—Conditions laid down—Town and Country Planning Act 1953, s. 38 (10)—Town and Country Planning Regulations 1954, Fourth Schedule, Appendix A.

Appeal, under s. 38 (10) of the Town and Country Planning Act 1953 against the refusal of the Onehunga Borough Council to permit the establishment and operation of a factory for the dehydration of lungs at No. 2 Edinburgh Street, Te Papapa. The industry of dehydrating cattle lungs comes within Appendix A of the Fourth Schedule to the Town and Country Planning Regulations 1954 and would therefore be a predominant use in an "industrial D" zone, although it might be established as a conditional use in an "industrial C" zone, if it were so modified as to preclude every element of noxiousness or danger.

The grounds for the appeal were that in the undisclosed district scheme, although the side of Edinburgh Street on which No. 2 was situated was zoned "industrial C", the opposite side was zoned "industrial D", so that the establishment of the appellant's factory could not add anything to the offensive conditions already existing; that the industry could be so conducted that it would cause no smell, noise, attract no flies or other vermin, and would in no way become the subject of complaint.

The Council refused to grant a permit on the grounds that the operation of the factories in the "industrial D" zone was not offensive or excessive for the nature of the trades carried on; that the boundaries of the "industrial D" zone were definitely fixed to prevent unauthorized extension thereof; and that the Council had taken into account objections from local residents to the granting of a permit.

The judgment of the Appeal Board was delivered by

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

1. The objections are all by residents and are based mainly on residential considerations from a domestic point of view and they would be appropriate if the area under consideration had been zoned as "residential", but the area is zoned as "industrial C". There is no evidence or submission that the company's operations would be detrimental to an "industrial C" zone.

2. That, under the Code of Ordinances, the council may in authorizing a "conditional use" impose special conditions "in the interests of the neighbours or the public in general".

The company intimated that it was prepared to accept and abide by the special conditions suggested by the respondent council, and none of the objectors challenged the appropriateness of those conditions or suggested any improvement or variation.

3. That, although the company's operations are classified as in effect a noxious trade or industry under Appendix A, those operations carried out under the special conditions suggested by the respondent council would not in fact be noxious or offensive nor would they detract from the amenities of an "industrial C" zone or interfere unduly with the interests of neighbours or the public in general.

The company is to be granted a permit for the "conditional use" of its premises subject to the following conditions:

1. Vytal Products Ltd. shall at all times and from time to time:

(a) Observe, carry out and perform the requirements of all Acts, regulations, by-laws, ordinances and other legal provisions in any way affecting the industry.

(b) Observe, carry out and perform the instructions of any medical officer of health, inspector of health, local body officer, or other person properly giving such instructions with due legal authority.

(c) Observe, carry out and perform all conditions, restrictions and prohibitions as to location, height, yards, position of buildings on sites, coverage, drainage, disposal of effluents and preservation of amenities as are stipulated in the Code of Ordinances relating to the zone in which the premises are situate.

(d) Establish the mincer unit to be used in the industry in a separate air-conditioned room to be constructed and maintained to the satisfaction at all times of the engineer of the Borough of Onehunga.

(e) All parts of the premises to be made and kept fly-proof to the satisfaction of the engineer.

(f) All exhaust gases from any dehydration ovens shall be passed through scrubbing plants constructed and maintained at all times to the satisfaction of the engineer.

(g) No alterations or additions shall be made to the premises or to any plant therein without the previous approval thereof by the engineer.

(h) Any grinding or bagging plant to be so operated as to prevent the emission of dust into the air to the satisfaction of the engineer.

(i) All organic matter to be either fully processed or removed from the premises within twenty-four (24) hours from the delivery thereof to such premises.

2. The Onehunga Borough Council may at any time wholly cancel this permit if all or any of these conditions are not duly observed, carried out and performed.

3. This permit shall not be transferable without the consent of the Onehunga Borough Council in writing first had and obtained.

No order as to costs.

Appeal allowed.

Chatties Stores Ltd. *v.* Waitemata County.

Town and Country Planning Appeal Board. Auckland. 1957. March 12.

Shops—Building—Area zoned as "Residential"—Permit refused on Ground of Likelihood of Proposed Shop detracting from Amenities of Neighbourhood—Existing Shop on Adjoining Site—Both Sites adjoining Main Highway—Expansion of Commercial Use in Locality contrary to Town-planning Principles—Town and Country Planning Act 1953, s. 38.

Appeal against the refusal of the Council to issue a building permit in respect of land adjoining the State Highway at Orewa, made under s. 38 (8) of the Town and Country Planning Act 1953. The appellant owned an existing shop on the State highway and proposed to erect new shops on an adjoining site.

The grounds for the appeal were that one of the new shops was required for the expansion of the appellant's business; that a permit for the erection of other commercial premises in the neighbourhood had been granted; that much of the land in the neighbourhood along the same road was already in use for commercial purposes; and that erection of the proposed buildings would not detract from any of the amenities of the neighbourhood.

The Council refused to issue a building permit on the grounds that the building proposed to be erected would detract from the amenities of the neighbourhood likely to be provided or preserved under the Council's undisclosed district scheme.

The judgment of the Board was delivered by

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

1. That the main road in question runs through Orewa and carries, particularly at holiday periods, a very substantial volume of both through traffic and local traffic. The parking of vehicles near existing shops in the summer months has caused bad traffic congestion. The Ministry of Works plans for the ultimate widening of this highway and to permit the erection of further business premises on the highway would tend to nullify its plan for providing better facilities for the flow of traffic.

2. That it is a recognized principle of town-planning practice that commercial buildings should wherever possible be concentrated in specific areas and it is a further recognized principle that commercial areas should not be sited on main highways.

3. That although there are at present some commercial buildings in use on this highway, to approve of the appellant company's proposal for further expansion of commercial use in this locality would be contrary to town-planning principles.

No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Fluoridation Note.—Edward Samson, F.D.S., R.C.S. (Eng.) in an article in the *British Dental Journal* (7/1/58) on "Fluoridation—The Last Word" pays a tribute to the work done by the New Zealand Committee of Inquiry on this subject which sat last year under the chairmanship of Judge Stilwell. He describes the report as "a penetrating, luminous, and voluminous document which adequately covers the entire field of this contentious subject", and he adds:

> Practising dentists have (according to rumour) little time for reading—perhaps little eyesight for it. Yet I would recommend this report as quite the best of all investigations into fluoridation. After all, it is just as well to be able to answer a few intelligent questions on a subject which will become increasingly controversial here, if not quite so feverish as in the U.S.A.
>
> Particularly interesting is the impartial way in which the Commission examined the evidence of fluoridation opponents which ranged from indicting it as "Mass Murder" to less emotional and more scientific criticism. Its conclusion is that "no harmful effects on health will follow fluoridation. . . ."

One is bound to comment, however, that the non-fluoridation die-hards remain singularly unconvinced that it is a caries-preventative, and will presumably remain unconvinced until they fill their last cavity.

A Gagged Bench.—The subject of dentistry reminds Scriblex of a short report in *The Times* (13/3/58) on the preliminary hearing in the Court of Appeal in *Kirk* v. *Colwyn*. Counsel for the appellant, Gilbert Beyfus Q.C., was informing the Court that his client was an anaesthetist, specializing in dental work, when the Master of the Rolls interrupted him and said: "I think, Mr Beyfus, that your client is known to me in that I have slid into unconsciousness under his care . . . Obviously I cannot deal with the case." Parker L.J. added that he went to the same dentist, and, although Sellers L.J. declared "I am free from any taint", it was decided that the appeal should be heard by a differently-constituted Court, presided over by Hodson L.J.

Ogres in Law.—A correspondent who keeps a close eye on the American scene appears fascinated, though somewhat dazed, by the following passage from *The Law of Libel and Slander in the State of New York* by Ernest P. Seelman. "And now there enters on the pages of the law, a most unwelcome visitor. Evil leers from its eyes, and wicked intent struts in its every step. Its aspect is indescribable. It cannot do right, if it would. It is predestined to do wrong. It is a giant ogre, attacking and blasting the fair fame of countless unborn thousands. Its tongue is sharper than a sword. Its breath more destructive than fire. It dwells in a land of bogs, morasses, quicksands, and pitfalls. To slay this ogre is the ambition, at some time of life, of every valorous Judge. He arms himself with the spear of metaphysics; the breast plate of reason; the shield of right; and mounts to the prancing steed of precedent; and, lance at rest, he rides full tilt at the giant monster, which grins and leers but does not flee from the onslaught. 'Aha, aha, it is slain', cries the triumphant victorious warrior. 'No longer will it live to plague the minds of future hapless Judges and juries, lawyers and litigants. Prostrate it lies, never to rise again'; and the brave Judge turns his steed and proudly canters off the field. But the shapeless, evil, wicked monster shivers, shakes itself, rolls over slowly, rises on its limbs, rubs its bruised part and finally stands erect, the same old ogre; no, not quite the same, a new protuberance now appears where the spear had struck, adding a new aspect to the terror it excites. It is the eternal, implacable foe of all who love the law; especially the law of libel. Its name is Malice."

A Solicitor's Duty.—In 1957, the New Zealand Medical Council wrote to one Maurice Lesser asking if he would recommend the engagement here of one Dr Alan Clark whom he knew had received some three years previously a prison sentence on a greyhound doping charge. In his reply, Lesser deliberately omitted any reference to the conviction or to Dr Clark's appearance before the British Medical Council. This led to the solicitor's own appearance before the disciplinary committee of the British Law Society, which decided the public was entitled to expect a solicitor to give a reference "with candour and honesty"; and imposed a fine of £250. The case draws attention to the duty of a solicitor to act with candour to the public, but the duty extends no less to his relations with the Court and with his fellow practitioners. Practitioners who find a peculiar pleasure in sheltering under half-truths rapidly forfeit any respect they might otherwise have from the Court. There can be no dereliction of duty to a client in conceding a fact or a proposition which is as inescapable as the Rock of Gibraltar.

From My Notebook—

(Barristers Division). "If I had known what was before me, what the awful uncertainty of success at the Bar really was, I don't think I should ever have dared to face it, and I certainly would advise no young man to embark in it, without ample means at his back to support the possibility of failure."—Sir Henry Hawkins (Baron Brampton) on his retirement.

"I may tell you, young man, if I had a son, I would sooner see him dead than going to the Bar."—Viscount Maugham's second sponsor to him on admission to Lincoln's Inn.

"Barristers, who generally know how to look after themselves, can escape all taxation for a whole year if they announce their retirement from the Bar: and authors should be allowed to do the same, choosing the year of their best-selling book."—Douglas Woodruff in *Walrus Talk*.

Tail Piece.—The 1958 Statute Law Revision Bill, the thirty-second of its kind to be passed in England since 1861, provides for the disappearance of a statute enjoining parsons not to cut down trees in the churchyard "undiscreetly." It was showing signs of senile decay when first listed in 1532.

NEW ZEALAND LAW SOCIETY.

Officers Elected.

The following officers were elected at the Annual Meeting of the New Zealand Law Society.

President: Mr A. B. Buxton.

Vice-Presidents: Mr D. Perry and Mr B. C. Haggitt.

Hon. Treasurer: Mr I. H. Macarthur.

Disciplinary Committee: Messrs J. B. Johnston, L. P. Leary Q.C., M. R. Grant, A. N. Haggitt, W. E. Leicester, A. C. Perry, F. C. Spratt, and Sir William Cunningham.

Management Committee of the Solicitors' Fidelity Guarantee Fund: Messrs D. Perry, E. T. E. Hogg, I. H. Macarthur, G. C. Phillips, and D. R. Richmond.

Conveyancing and Costs Committee: Messrs S. J. Castle, J. R. E. Bennett, E. T. E. Hogg, N. A. Morrison, G. C. Phillips, D. R. Richmond, and D. W. Virtue.

Finance Committee: Messrs D. Perry, E. T. E. Hogg, I. H. Macarthur, G. C. Phillips, D. R. Richmond, and A. T. Young.

Joint Audit Committee: Messrs F. B. Anyon, J. R. E. Bennett, and F. L. Parkin.

Judges' Library Committee: Mr H. R. C. Wild Q.C., and Mr I. H. Macarthur.

New Zealand Council of Law Reporting: Messrs A. T. Young, E. C. Champion, and J. P. Cook.

Legal Education Committee: Messrs I. H. Macarthur, A. C. Perry, K. Tanner, and N. Wilson.

Law Revision Committee: Sir Wilfrid Sim Q.C. and Mr H. J. Butler.

FIAT JUSTITIA RUAT COELUM.

By Advocatus Ruralis.

The rumour has gone round that the Justices of the Peace are passing to be replaced by additional Magistrates who will be given time to ponder. It might not be out of place to shed a tear and remember. We think we have written of the somewhat deaf octogenarian J.P. who was asked by his brother J.P. whether on the evidence he thought the driver was guilty. His reply was three years.

Advocatus is mixed up in a family business and a family estate.

Ruralis Estate is a landlord and Ruralis Limited is a commercial concern having heavy traffic vehicles on the road.

Some little time back one of the company's lorries had some bother. A farmer had spread out his sheep in a narrow hidden cutting, and when the 15-ton lorry finally came to a halt, twenty-two of the sheep had become mutton. The accident happened on a long hill and the sheep belonged to a member of the club to which Advocatus pays dues. The mess was cleared up, and in due course Advocatus was briefed to do his best for the driver. We saw about five witnesses who explained what happened to a loaded lorry when one set of brakes gave way going down hill; but we felt that we had little hope of making a Magistrate as confused as we were. Came the day—and we found that, as the Magistrate was overloaded, we were to appear before two J.P.'s Rather to our surprise, each of the J.P.'s was a company manager and at different times their companies had been tenants of Ruralis Estate.

This was a rub of the green we had never expected, so we turned on all our witnesses with the result that the Justices soon knew as little about braking troubles as Ruralis; and the driver was dismissed without a stain on his character (but the company took him off lorry driving). The farmer was somewhat peeved at the result, so we thought it injudicious to explain the rub of the green.

About the same time, our newest partner appeared before his own landlord and his client won hands down.

There are times when the Justices have our sympathy. Recently we were approached by a lady of our acquaintance who had had a collision at a corner and the Police suggested that she had acted wrongfully. As we had paddled i' the burn with her younger sister, we had some suspicion of her age so we asked if she had a medical certificate for driving. She didn't exactly snort but she demanded what we meant. We explained that our legislators, having read the 90th Psalm, more especially verse 10, had enacted that five years after becoming entitled to Universal Superannuation every driver had to have an annual doctor's certificate. She repeated the snort-like noise and said that she was born in 1891. We pointed out that, though Magistrates were mostly married men and would believe her on this point, insurance assessors were like the platoon leaders in the First World War—temporary officers but not necessarily gentlemen. We pointed out it was possible that without a medical certificate she had no insurance and reminded her of the old roundelay which started:

> *"Why should she with her big motor*
> *Run over us what was so poor;*
> *We will get a thousand quidlets—*
> *With any luck, a little more."*

She was silent for a while apparently to allow her memory to travel down the corridors of (nearly) seventy years of recorded time; then she rather took the wind out of our sails by saying, "Of course I was never in Flanders, but I don't remember that verse."

The upshot of our interview was that our client decided that she would like to go to Court and give evidence. In due course, the case came on before J.P.'s After the Police witnesses had done their worst, she went into the box and without a trace of nervousness described what really had happened. It did not sound like the same accident, but the verdict was "Not Guilty." We felt that she had thoroughly enjoyed herself, and after congratulating her we asked how she did it.

With a gleam in her eye, she explained that she knew the J.P.'s when they were children. The red-headed one used to bring the groceries, while the bald-headed one with glasses mowed the lawns every Saturday.

What other verdict was possible?