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OUR PROFESSIONAL TRADITIONS.

IN the experience of most of us there is a shadowy interval between the things we have been taught and the things we have observed, a region of events not old enough to be accounted for in the readings of youth and not recent enough to be fresh in memory. It has been in an endeavour to bridge this unfilled gap in the chronicles of the profession in New Zealand that the series, "Pages from the Past", has been included in the JOURNAL.

We, of the profession of the law in this Dominion, have traditions of our own, but unfortunately we have not had an historian to make them come alive. Because of this, "Pages from the Past" (which are the fruit of considerable research) will be persevered with. As Lord Buckmaster once said: "Knit, as we should, law with history, and it becomes life, life in movement advancing from a continuous past to a continuous future".

Because the traditions of the New Zealand Bar are worthy of a closer acquaintance, especially when the happenings in its earliest years are part of our professional heritage, an attempt has been made to recall persons and matters that have had a bearing on the development in New Zealand of the administration of the law. In this issue, is included an important instalment, which, proceeding beyond the limits of mere anecdote, touches upon a consideration of the highest import—the independence of the Judiciary—and recalls for us the notable part played by one of our early Judges, H. B. Gresson J., in forcibly maintaining in this country that integral part of its constitutional inheritance. On this subject, Sir William Holdsworth in "His Majesty's Judges", (1932) *173 Law Times* 336, at pp. 336-377, has the following to say:

"The Judges hold an office to which is annexed the function of guarding the supremacy of the law. It is because they are the holders of an office to which the guardianship of this fundamental constitutional principle is entrusted, that the Judiciary forms one of the three great divisions into which the power of the State is divided. The Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers. It is quite beside the mark to say that modern legislation often bestows undivided executive, legislative and judicial powers on the same person or body of persons. The separation of powers in the British Constitution has never been complete. But some of the powers in the Constitution were, and still are, so separated that their holders have autonomous powers, that is, powers which they can exercise independently, subject only to the law enacted or unenacted. The Judges have powers of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded as a separate and independent part of the Constitution. It is true that this view of the law was contested by the Stuart kings; but the result of the Great Rebellion and the Revolution was to affirm it."

Against that background, we give consideration on another page in this issue to Mr Justice H. B. Gresson's stand in maintaining the principle of judicial independence. As we recall him, memory brings back words which seem to be his exact epitome, and which we may be permitted to repeat:

> Justum et tenacem propositi virum
> Non civium ardor prava jubentium
> Non vultus instantis tyranni
> Mente quatit solida.

JOINT FAMILY HOMES: THE POSITION AFTER DIVORCE.

AN important judgment on the construction of the Joint Family Homes Act 1950 was recently delivered by Shorland J. in *Henson* v. *Henson* (to be reported).

A former husband applied for an order under s. 11 of the Joint Family Homes Act 1950 cancelling the registration as a joint family home in the name of himself and his former wife of a dwellinghouse property; or alternatively, for an order directing the sale of the property and apportioning the proceeds between the parties, upon the grounds that a decree absolute divorcing the husband from the wife had been granted. The application raised for consideration the effect of divorce upon the registration in the names of the spouses of their former matrimonial home as a joint family home under the statute.

In two judgments, *Sutherland* v. *Sutherland* [1955] N.Z.L.R. 689 and *Shotton* v. *Shotton* [1956] N.Z.L.R.

159 the Court was concerned with applications in respect of joint family homes following the separation of the spouses; but, as His Honour pointed out in *Henson's* case, there is no reported decision dealing with an application made by one of the spouses under s. 11 of the Joint Family Homes Act 1950 following divorce.

I. The Construction of the Statute.

Section 11 of the Joint Family Homes Act 1950 as enacted by s. 11 of the Joint Family Homes Amendment Act 1951, is as follows:

> 11. Where any decree or order is made by a Court, Judge, or Magistrate of competent jurisdiction for divorce, nullity of marriage, judicial separation, separation, maintenance, or guardianship, and the decree or order relates to a husband and wife who are joint owners of a joint family home or to the maintenance or guardianship of the children of the marriage of the husband and wife, then, at the same or any subsequent time:
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> (a) The Supreme Court or any Judge thereof may make such order as the Court or Judge thinks fit for the possession of the joint family home, or for the cancellation of the registration of the Joint Family Home Certificate, or for the sale or lease of the joint family home and the disposal of any moneys received in consequence of the sale or lease thereof:
>
> (b) If no order under this section has been made in respect of the joint family home by the Supreme Court or any Judge thereof, a Magistrate's Court may make such order as the Magistrate's Court thinks fit for the possession of the joint family home.

On considering this section, His Honour said:

> The section is explicit in its provisions as to when, and in what circumstances, the jurisdiction conferred arises. It is likewise explicit in its provisions as to the extent of the jurisdiction conferred, but it is singularly silent as to the principles upon which the jurisdiction conferred is to be exercised. It is clear from the provisions of the Act and the definition of a "joint family home" contained in s. 2 that the registration of a dwellinghouse property as a joint family home, in the names (as it must be) of a husband and wife, is a settlement upon them in their respective characters of husband and wife of property to be held by them as joint tenants (of a special nature) in respect of which each has equal rights in connection with ownership and possession.

The difficult question which, His Honour thought, arose in respect of s. 11 was whether, on the true construction of the Act, the termination of cohabitation destroys a fundamental condition of the settlement involved in registration of the matrimonial home as a joint family home, with the result that the jurisdiction conferred is intended to enable the Court to terminate the settlement and restore the family home to the original settlor, except to the extent that questions of welfare of children, maintenance, and matters arising from divorce, nullity, or separation dictate to the contrary; or whether the settlement having once been made is irrevocable except to the extent that considerations arising from divorce, nullity, separation, or maintenance, or guardianship of children dictate otherwise. His Honour added:

> In other words, is s. 11 analogous to s. 37 of the Divorce and Matrimonial Causes Act 1928, and intended to provide for variation of a joint family home settlement only to an extent analogous to the variation of an ante-nuptial or post-nuptial settlement envisaged by s. 37 of the Divorce and Matrimonial Causes Act 192 , or is it a provision intended to render the continuance of a joint family home settlement substantially conditional upon continued cohabitation of the joint owners? The question can be answered only by an examination of the Act as a whole.

Up to s. 7 (2), His Honour said, the provisions restated the normal rights of common-law joint tenants. Thereafter, the section introduced modifications of the common-law estate in joint tenancy, by prohibiting any dealing by one joint owner with his or her undivided interest or estate in the land while the other was living, and further protected the estate of each joint owner from the normal consequences of bankruptcy and onslaughts from creditors.

Section 8 contains machinery enabling the Registrar to cancel registration of the joint family home under the Act (either as to the whole or part of the land), where both husband and wife or the survivor of them applies, where both have died, where husband and wife or the survivor sell or otherwise cease to own the property, where the certificate has been issued under mistake, where the Court so orders under ss. 11 and 14 or where neither husband nor wife resides in the property, or where it has ceased to be used exclusively or principally as a home for the husband and wife or either of them (together with the members of their, his, or her household).

His Honour continued:

> Leaving aside ss. 11 and 14 of the Act, s. 7 clearly contemplates that the property may remain registered as a joint family home jointly owned by husband and wife so long as one of them continues to occupy it as his or her principal home and continues to use it exclusively or principally as a home.

Section 14 contains provision to enable the Official Assignee and creditors in certain circumstances to have limited recourse to the property.

The remaining sections, except for the all-important ss. 10 and 11, next to be dealt with, did not appear to His Honour to bear upon the question under discussion.

Before turning to ss. 10 and 11, His Honour said that the sections so far considered clearly recognized that registration of a joint family home and the estate and interest and rights of both husband and wife in and to the property may continue so long as one of them resided in and used the property exclusively or principally as his or her principal home.

Section 10 of the Joint Family Homes Act 1950 is as follows:

> (1) In any question between the husband and wife as to any matter affecting a joint family home either party may apply by summons or otherwise in a summary way to any Judge of the Supreme Court, or, if the value of the property in dispute is within the limits of the jurisdiction of an inferior Court, to that Court; and, subject to this Act, the Judge or Court hearing any such application may make such order with respect to the joint family home, and as to the costs of and consequent upon the application, as the Judge or Court thinks fit, or may direct the application to stand over from time to time, and any inquiry touching the matter in question to be made in such manner, as the Judge or Court thinks fit; and may, if either party so requires, hear the application in a private room.
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> (2) Nothing in this section shall prevent any appeal against any such order.

As to s. 10, His Honour said:

> Section 10 is derived from s. 23 of the Married Women's Property Act 1908 (now s. 19 of the Married Women's Property Act 1952). Except for verbal alterations designed to substitute "any matter affecting a joint family home" as the subject of the matter in dispute for "the title to or possession of property", the material words of s. 10 are identical with the words of s. 23 of the Married Women's Property Act 1908.
>
> That the jurisdiction conferred by s. 10 extends to ordering a sale of the property is clear from the terms of s. 7 (2) (d) (iii). It is pertinent to state in this respect that husband and wife are joint tenants holding not the common-law estate in joint tenancy, but the special estate created by the Act.

The power to order a sale and distribution of proceeds to the tenants in their respective shares has long been given by the law in respect of common-law joint tenancy to enable disputes between joint tenants so be resolved. As to the extent and limits of the jurisdiction conferred by s. 10, the operative words are that "the Judge or Court . . . may make such order with respect to the joint family home . . . as the Court or Judge thinks fit . . .". Except for words of description of the subject-matter, the operative words are identical with the operative words of s. 23 of the Married Women's Property Act 1908, which words read "The Judge or the Court may make such order with respect to the property in dispute . . . as he or it thinks fit. . . .

The purpose of s. 10 is, I think, neither more nor less than to give the same jurisdiction to settle disputes between husband and wife affecting a joint family home as exists under s. 23 of the Married Women's Property Act 1908 for the settlement of disputes between husband and wife as to the title to, or possession of property.

As His Honour said, s. 23 of the Married Women's Property Act 1908 (now s. 19 of the Married Women's Property Act 1952) has received well-established judicial interpretation, and, in his opinion, the Legislature must be presumed, in adopting for s. 10 of the Joint Family Homes Act 1950 the identical language of s. 23, to have intended that it should be construed in accordance with established judicial construction. In *Barrow* v. *Barrow* [1946] N.Z.L.R. 438, the Court of Appeal held that s. 23 gave no power in respect of property owned by husband and wife as joint tenants to order distribution of the proceeds of realization otherwise than in accordance with their legal or equitable rights, or, as Cooke J. put the point in *Masters* v. *Masters* [1945] N.Z.L.R. 82:

The question of title or ownership cannot be determined otherwise than in accordance with legal or equitable rights of the parties and that the Court has no discretion to interfere with these rights on the ground of fairness or justice.

After examining the judgment of the Court of Appeal in *Barrow* v. *Barrow*, His Honour said he was forced to the conclusion that s. 10 of the Joint Family Homes Act 1950 must be construed as subject to the same limitation as had been applied by well-established judicial decision to the identical words in s. 23 of the Married Women's Property Act 1908 before the enactment of the Joint Family Homes Act 1950. In the result, for the reasons stated in *Barrow* v. *Barrow* [1946] N.Z.L.R. 438, 444 l. 49; 445 l. 15, His Honour was of the opinion that, while s. 10 did enable the Court to order sale in solution of a dispute, it did not empower the Court to order distribution of the proceeds otherwise than in accordance with the legal or equitable rights of the parties, and did not give the Court a discretion to interfere with those rights on the grounds of fairness or justice. His Honour stated his reasons for this conclusion at some length, because, he said, he was conscious of the fact that he might, with respect, be differing somewhat from the view as to the construction of s. 10 expressed obiter by Turner J. in *Sutherland* v. *Sutherland* [1955] N.Z.L.R. 689.

His Honour went on to say:

Section 11 becomes operative upon the happening of specified events, each of which necessarily involves a termination of cohabitation and a situation in which the equal rights of the spouses in connection with ownership and possession of the joint family home can no longer be mutually exercised. The section clearly contemplates that divorce, decree of nullity, judicial or summary separation have or may have effect upon the joint family home settlement, but in so far as it has no application to a separation under deed, or written or oral agreement, or to desertion, it can scarcely contemplate that it is the fact of termination of cohabitation which raises the question of modification of the respective rights of the party. Indeed, the fact that the section applies if there is no more than an order for guardianship of children or an order for their maintenance, points to considerations other than termination of cohabitation as raising the desirability for modification of the rights of the parties.

Finally, it is significant that while s. 3 requires that both spouses must be living in the home when the application for registration under the Act as a joint family home is made, s. 8 (1) (e) enables the Registrar to apply for cancellation of the registration of the joint family-home certificate only where *neither* the husband nor wife resides in the property, or when it has ceased to be used exclusively or principally as a home for either of them.

His Honour said he was forced to the conclusion that s. 11 contemplates that a need for modification of rights may arise from divorce, nullity, judicial or summary separation, or from the making of an order for maintenance or for guardianship of children, from considerations inherent in any one of such happenings other than the termination of cohabitation.

Two features, the learned Judge added, will be common to all of the specified happenings—namely, (a) that the mutual exercise of equal rights to possession and ownership is no longer practicable; and (b) that a right in one spouse to receive maintenance and support from the other while freed of the duty of cohabitation will (in most cases) have arisen.

II. The Principles Applicable.

His Honour defined the purpose of the Joint Family Homes Act 1950, as follows:

The purpose of the Act is no doubt to enable one or both spouses after marriage to settle upon themselves as joint tenants, with right of survivorship or jus accrescendi, a family home protected from attacks from creditors and the unilateral act of either party to the end that the family shall be secure in its home, and the survivor of the parents secure in inheritance of the whole.

Marriage is the foundation of the purpose envisaged by the Act; but surely it is the rights and obligations as to maintenance and support in respect of parents and their children which arise from marriage, and not the preservation of the formal status which s. 11 has in contemplation. A decree of dissolution or even of nullity does not per se remove the rights and obligations in respect of family maintenance and support which have arisen from the marriage.

The learned Judge went on to say that if the measures provided for in s. 11 were intended to proceed upon the basis of destruction of the formal marriage tie, and not upon the basis of the effect that specified happenings had had upon family maintenance and support, then he would not expect to find judicial and summary separations and orders for maintenance and for guardianship of children included (as they were) in the list of conditions giving rise to the powers contained, nor would he expect to find powers which go far beyond those powers which would suffice to restore the property to the settlor. He continued:

In my opinion, the prima facie construction of s. 11, read in the full context of the Act, suggests that its purpose is related rather to considerations inherent in the rights and obligations as to family maintenance which have arisen upon termination of cohabitation than to termination of cohabitation itself. The act of effecting registration of property as a joint family home under the Act effects a settlement of property upon husband and wife in their respective characters of husband and wife, under which both have rights and under which their children, so long as they remain at home, have some rights.

The settlement may not technically constitute a post-nuptial settlement, but it is at least analogous thereto.

In the final result, His Honour was of opinion that s. 11 of the Joint Family Homes Act 1950 was in purpose and effect analogous to s. 37 of the Divorce and Matri-

monial Causes Act 1928, and that principles similar to those governing the exercise of the power contained in s. 37 of the Divorce and Matrimonial Causes Act 1928 should govern the exercise of the power contained in s. 11 of the Joint Family Homes Act 1950.

The learned Judge added that the general principles evolved by judicial decisions in respect of the former were collected and succinctly stated in *Rayden on Divorce*, 6th ed., 593, in particular, in para. 50. Later on, His Honour said:

> With very great respect, I find myself unable, in the circumstances of the present case, to adopt the approach suggested in *Sutherland* v. *Sutherland* [1955] N.Z.L.R. 689 for the reasons:
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> (1) It appears to me to give insufficient weight to the principle of irrevocability of gift once made—a principle well established in our law.
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> (2) Proceeding as it does substantially upon the basis of respective contribution made, its application would tend to treat a settlor whose matrimonial misconduct alone was responsible for the break-up of the marriage and who had emerged with heavy obligations to the other spouse in respect of maintenance and support, in much the same manner as it would an innocent settlor who emerged from a broken marriage with no further obligations in respect of maintenance and support.
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> Finding as I do that the basis from which the approach to the exercise of the power contained in s. 11 must proceed is that there has been a settlement on husband and wife which has resulted in each acquiring equal undivided legal title, and that the statute contemplates that the settlement and respective titles enure so long as one of them uses the property exclusively or principally for his or her principal home, I am forced to the conclusion, for reasons already stated, that the proper approach to the exercise of the power contained in s. 11 of the Act is to apply principles which are in line with and similar to the principles governing the exercise of the power contained in s. 37 of the Divorce and Matrimonial Causes Act 1928. . . .

His Honour then considered the influence which consideration of the relative contributions made by the respective parties had on the cases. This, he said, was by no means a dominant influence. It was but one of many factors of influence which operated no further than was necessary to achieve the end of making proper provision for the injured spouse and the children of the marriage, and ever subject to the prima facie rule that the settlement should not be interfered with further than was necessary for that purpose. It was a factor which must be considered along with, inter alia, the respective incomes of husband and wife and their respective pecuniary prospects.

In our next issue, we shall show the application of the foregoing principles to the position of husband and wife, the joint owners of a matrimonial home registered under the Joint Family Homes Act 1950, upon a divorce on the ground of separation.

SUMMARY OF RECENT LAW.

ESTOPPEL.

Res Judicata—Motion for Judgment—Court of Appeal deciding in Plaintiff's Favour Issue of Occupation and Control of Stairway on which Plaintiff injured—Court of Appeal, in Another Appeal in Respect of Other Issues in Same Action ordering New Trial on All Issues except Damages—Plaintiff contending Defendant, on New Trial, Estopped by Judgments of Court of Appeal from denying Occupation and Control of Stairway—If Both Branches of Motion for Judgment dealt with at One Hearing by Court of Appeal, Only Decision Order for New Trial—Decisions of Court of Appeal not giving Rise to any Res Judicata or Estoppel as to any Issue except Damages. In her statement of claim, the plaintiff alleged negligence against the defendant. The jury found that the defendant was guilty of negligence causing an accident to the plaintiff and awarded damages. The defendant moved for judgment upon the ground, inter alia, that it had not been established that the stairway upon which the accident happened was under the occupation or control of the defendant, alternatively, for an order that the verdict be set aside and a new trial be had. Cooke J. entered judgment for the defendant upon that ground, and forbore to deal with the other matters comprehended in the motion. The plaintiff appealed. The Court of Appeal allowed the appeal and remitted the action to the Supreme Court for determination of the questions raised in the defendant's motion other than the question raised in the stated ground: [1955] N.Z.L.R. 1097. Thereafter, those questions were argued before Cooke J., who dismissed the defendant's motion for judgment or judgment of nonsuit, or, alternatively, for an order that the verdict of the jury at the trial be set aside and that a new trial be had between the parties. The defendant appealed against the judgment. The Court of Appeal allowed the appeal, and ordered a new trial upon all questions save that of damages: [1958] N.Z.L.R. 409. Before the new trial, the plaintiff sought an order amending the pleadings upon the basis that the defendant was estopped by the judgment or judgments of the Court of Appeal from denying that at all material times she was in occupation and control of the stairway upon which the accident to the plaintiff occurred, or, alternatively, that there be an order directing that this question be argued before trial. *Held*, by the Court of Appeal, 1. That if both branches of the defendant's motion had been dealt with at the one hearing in the Court of Appeal, there would have been only one decision of the Court and that would have been an order for a new trial, and that the circumstance that the argument before the Court was heard in two stages did not alter the position. (*Lyons* v. *Nicholls* (No. 2) [1958] N.Z.L.R. 460, followed.) 2. That, accordingly, the decisions of the Court of Appeal did not give rise to any res judicata as to the issues save that of damages, or raise any estoppel against either party save on that issue. (*Gray* v. *Dalgety and Co. Ltd.* (1916) 21 C.L.R. 509, referred to.) *Lyons* v. *Nicholls* (No. 3). (C.A. Wellington. 1958. June 6. Gresson P. North J. Cleary J.)

PRACTICE.

Trial—Jury—Finding on Issue of Perjury decisive of Action—Grave Imputation made against Plaintiff's Character—Unless Strong Countervailing Considerations, Action "more conveniently tried before a Judge with a jury"—Likelihood of Tender of Technical Evidence, not beyond Ready Comprehension of Common Jury, not a Countervailing Consideration—Judicature Amendment Act 1936, s. 3. Neither the circumstance that personal character is involved in the action nor the circumstance that the action involves pure questions of fact is necessarily conclusive that the action "can be more conveniently tried before a Judge with a jury", within the meaning of those words in the proviso to s. 3 of the Judicature Amendment Act 1936. Where the finding on an issue of perjury will decide a case, and a very grave imputation is made against the defendant's character, then, unless there are strong countervailing considerations, the action is one which could be "more conveniently" tried by a jury. It is not such a countervailing consideration that there is to be tendered technical evidence which does not appear to be likely to be beyond the ready comprehension of a common jury. (*Brett* v. *Cox* (1899) 18 N.Z.L.R. 694; 1 G.L.R. 281, distinguished.) *Sulco Ltd.* v. *Talboys*. (S.C. Wanganui. 1958. May 16, 29. Barrowclough C.J.)

PROBATE AND ADMINISTRATION.

Insolvent Estate—Garnishee Summons creating charge on debt due to Estate of Deceased—Garnisher entitled, as against Administrator, to Such Charge—Bankruptcy Act 1908, s. 80—Administration Act 1952, s. 71. Section 80 of the Bankruptcy Act 1908 has no application to an administration under Part IV of the Administration Act 1952. Consequently, as the administrator under Part IV of the Administration Act 1952 takes subject to any charges or equities, the charge which is created on a debt owing to the estate of the deceased by a garnishee summons belongs to the garnisher, who, in effect, is a secured creditor. (*Hasluck* v. *Clark* [1899] 1 Q.B. 699, and *In re Ben Green Advertising Co. Ltd. (In Liquidation), Ex parte E. F. Jones Ltd.* [1932] N.Z.L.R. 1511; sub nom. *Jones Ltd.* v. *Ben Green Advertising Co. Ltd.* [1932] G.L.R. 285, applied.) *Drew* v. *Official Assignee*. (S.C. Wellington. 1958. May 20; June 3. Haslam J.)

PAGES FROM THE PAST.

VII.—Quamdiu Se Bene Gesserit—Mr Justice H. B. Gresson's Stand for Judicial Independence.

By R. JONES.

"It is, we think, beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the Constitution of the country. They stand equally between the Crown and the Executive and the subjects. They have to discharge the gravest and most important duties. It has for over two centuries been considered essential that their security and independence should be maintained inviolate. . . . In this matter our country has set an example to the world, and we believe that the respect felt by the people for an English Judge has been partly due to his unique position."

It was in the above terms that in December, 1931, a Memorandum to the Prime Minister of Britain, Mr Ramsay MacDonald, by the Judges of His Majesty's Supreme Court of Judicature reaffirmed the independence of the Judiciary which was ensured by the Act of Settlement. The position in New Zealand can be no less plainly stated. The Constitution Act provided, with a directness equal to that of the Act of Settlement, for the creation here of that judicial independence and detachment that are the prime elements of the firm foundations upon which the modern structure of British law rests.

In an age when little is sacrosanct, it is comforting to reflect that no matter how many public institutions may have degenerated to the point where they are regarded with brisk impatience, if not open contempt, the Judiciary still commands the respect and confidence of all classes. The Justice-seat has survived unscathed in a period of change that has claimed a host of casualties. The detachment and eminence of the office are not merely the crowning glory of a forensic career; the scratch-wig means something more than just competence and impartiality. The Judge is a being apart, consecrated to a high calling in an office that must always be outside and beyond the influence of the political forum, and any attempt to whittle away that peculiar independence must mean the beginning of the end of the strength, dignity and usefulness of the Judicature.

But it is not enough to pay lip service to the principle of the independence of the Judiciary. There must be an ever-present realization of the necessity of preserving unimpaired the independence of a Judge as one who, though appointed and paid by the Government of the day, has a very special status, altogether independent of the Crown, and the Ministers of the Crown for the time being. Constant vigilance is called for, since it is so easy to forget that herein lies the source and safeguard of liberty. It is especially important in these days when the activities of the Executive are so considerable and the powers delegated by the Executive are so extensive.

The personal detachment with which the Judge properly and deliberately hedges himself about is one of the safeguards of the administration of justice. How much more important is it, therefore, that such an attitude of mind and conduct should be reinforced with a rigid recognition by political authority of the need for the strictest preservation of judicial dignity and independence? If the Judge is prepared, as he must be, to turn his back on all sectional, business or professional relationships in the pursuit of unquestionable impartiality, he is anticipating no more than his right when he requires unconditional freedom from political interference, Executive or Ministerial, in the special circumstances of his public life.

There was a time in New Zealand when such independence, in the view of the Judges, as well as of many members of the Bar and the general public, was in danger of being undermined. Eighty-four years ago decisions taken by the Government in a fit of perversity blasphemed against the rules of independence, whether by accident or design, in such a way that Her Majesty's Judges were impelled to the strongest forms of protest. Almost overnight the composition of the Judiciary was completely changed by three resignations, including that of the Chief Justice, and in one case at least the Government's policy was deplored in the most unequivocal terms.

The trouble arose from a curiously irrelevant recommendation in the report of a Joint Parliamentary Committee set up to inquire into a charge of partiality levelled in Dunedin by District Judge Charles Dudley Robert Ward against Mr Justice Henry Samuel Chapman.

A libel action, *Macassey* v. *Bell*, was pending in the Supreme Court and Judge Ward, acting gratuitously, was advising Mr W. K. Turton, counsel for the defendant. Mr Justice Chapman, on an application on behalf of the plaintiff Macassey, made an order ex parte to allow the plaintiff to inspect, not only telegrams between the parties to the action and relating to the action, but also telegrams which had passed between Mr Turton and Judge Ward in reference thereto. Judge Ward "became imbued with suspicion" that Chapman J., in making the order, had acted partially on account of his private friendship with Macassey and his relationship to Macassey's then partner (Mr Justice Chapman's son, later His Honour, Sir Frederick Revans Chapman).

Apparently Chapman J. had made similar orders for production in other cases in Dunedin without any objections having been raised, but the practice in other centres at the time was to make such orders only after hearing both parties. Actually in *Macassey* v. *Bell* no action was taken by the plaintiff on the order, which was eventually rescinded by the Judge.

Judge Ward, however, like Rachel, refused to be comforted, and raised the matter in a formal charge of partiality which he referred to the Premier, Mr Julius Vogel. The upshot of it was that the Government took so serious a view of the allegation that a Joint Committee of both Houses of the Assembly was appointed to hold an inquiry.

The Committee was G. M. O'Rorke (later Sir Maurice, Speaker of the House of Representatives), William Fox

(four times Premier), M. Richmond (Nelson), Harry A. Atkinson (five times Premier), John Sheehan (later Minister of Justice), A. de B. Brandon (a Wellington barrister), T. B. Gillies (who was later appointed to the Bench), J. L. Gillies (Dunedin), John Studholme (Kaiapoi), and N. Y. A. Wales (Dunedin).

The Committee decided that the charges against Chapman J. were not substantiated and were made without due consideration of their importance as affecting the character of a high judicial officer.

It also reported that, while the propriety of the practice of issuing such orders ex parte may have been open to grave question, the Committee was not of the opinion that Chapman J. had acted partially in the matter, or that there were any grounds for impeaching the conduct or questioning the integrity and impartiality of Chapman J. in the discharge of his judicial duties.

It was in Paragraph III of the report that the Committee produced its classic irrelevancy:

> "While it may not be strictly within the order of reference, yet the Committee cannot refrain from suggesting to the Government the desirability of making arrangements for the periodical shifting of Supreme Court and District Court Judges to different circuits."

Parliament received the report and passed it for publication, and the Government interpreted reception of the report as a mandate to give full and immediate effect to Paragraph III. Though the Committee had perhaps not been conscious of what it was doing, its suggestion assailed the sacred principle of the independence of the Judges, and it was inevitable that there should be repercussions.

The Chief Justice, Sir George Arney, with seventeen years' service behind him, Mr Justice Henry Samuel Chapman, with a total of twenty years in office, and Mr Justice Henry Barnes Gresson, who was in his eighteenth year as a Judge, all intimated to the Colonial Secretary that they desired to retire on March 31, 1875. Considering that the Judiciary at the time consisted of a Chief Justice and four puisne Judges, it is hardly surprising to find the *Evening Post* late in 1874 commenting that "the fountains of justice are at present in a very disturbed state". There were only oblique references to what was generally regarded as the root cause of the simultaneous resignations—the recommendations of the Ward-Chapman Joint Parliamentary Committee—but the situation was widely blamed on the Minister of Justice (Mr C. C. (afterwards Sir Charles) Bowen), who, the *Evening Post* declared, "is irresponsible in that he is not a member of either branch of the Legislature".

"It would be difficult to conceive a more thorough change than that about to take place in the Judicial Bench" said the *Evening Post* on November 20. "Whether it will be for the better is in the lap of the gods", the paper continued, "but the Colony may be well satisfied if the new Judges to be appointed serve it as well as the old ones have done, and as well maintain the reputation of the Bench for impartiality, legal knowledge, dignity and judicial ability".

The Press seemed to have its own explanations for the resignations. Of the Chief Justice the *Evening Post* said: "Sir George Arney intends to avail himself of the retiring pension provided by Parliament during last session".

Somewhat more space was devoted to Mr Justice Chapman. In August, after the appearance of the Ward-Chapman report, the *Evening Post* said: "Mr Justice Chapman, if he is a wise man or is inclined to be guided by the advice of judicious friends, will retire from active life. It is scarcely probable that he would submit to being moved to another district, and after the late occurrences it is impossible that he can continue to sit on the Bench in Otago with any pleasure to himself or, we may add, with advantage to the public".

Although he was triumphantly acquitted of the partiality charged against him by Judge Ward, Chapman J. did not take long to make up his mind on the subject of the future and his intention to retire was reported by the *Post* in the following terms:

"In Dunedin Mr Justice Chapman is stated to have at length consented to retire, but only after exacting a pledge from the Government that he shall not be succeeded by his bete noire, Judge Charles Dudley Robert Ward."

Mr Justice Gresson, as far as the *Evening Post* was concerned, "has elected to retire on his pension in preference to being transferred to some other judicial district than Canterbury".

On the face of things, it all appeared to be very simple—three Judges were retiring and would require to be replaced. But behind the scenes there was deep concern of a kind that would have been the better, in the interests of both the Judiciary and the public, if it had been brought out into the open. For reasons which no doubt seemed adequate to themselves, and which they probably considered to be of no interest to anyone else, Sir George Arney and Mr Justice Chapman refrained from any public comment on the proposed redistribution of the Judiciary and its possible effect on their decisions to resign. It was left to Mr Justice Gresson to flush the fox and acquaint the public with what could only be regarded as a meaningless, unnecessary, and unconstitutional procedure—a policy which, if condoned or encouraged, could not fail to strike at the very roots of the principle of the independence of Judges. The Bench as a whole was agreed that it would be a restriction of its independence if Parliament or the Minister of Justice had the power to move Judges from place to place, but it was left to Mr Justice Gresson to make it plain to both the Government and the country that such a proposal was intolerable as well as wrong.

This he did, first in his letter of resignation to the Colonial Secretary (the Hon. Daniel Pollen) and finally at his valedictory appearance on the Bench in Christchurch on March 31, 1875.

Sir George Arney had discussions with the Colonial Secretary on the subject but was prepared to accept his translation from Auckland to Wellington "if I should continue to hold office after March next".

Mr Justice Chapman on the other hand avoided all reference to the re-arrangement of districts in his correspondence with the Colonial Secretary, and contented himself with resigning, and emphasizing that despite a broken term of office he had fulfilled all the conditions relative to the granting of a pension.

The text of the various letters of resignation provides some intriguing analogies which make their reproduction of interest.

Sir George Arney addressed the Colonial Secretary as follows:

"If I recollect rightly that which passed at our last interview at Wellington, you desired to hear from me further before the Government would resolve finally upon the redistribution of the business of the Supreme Court.

"At all events I have the honour to inform you that, if I should continue to hold office after March next, I shall be prepared to remove to Wellington in good time to conveniently be prepared for and to hold the sitting of the Court at Wellington in the first week in April."

That was in December, 1874.

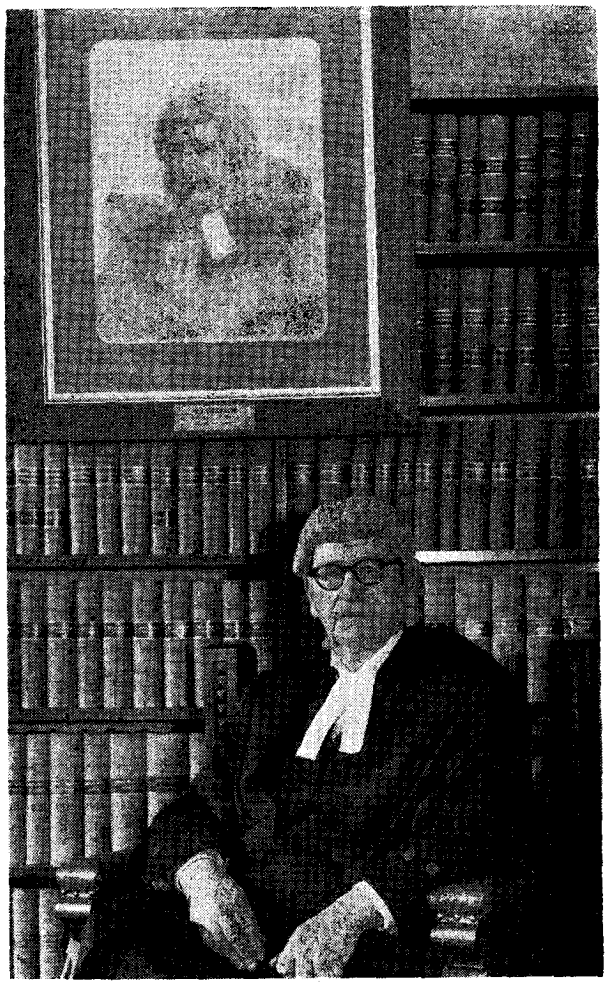
The Chief Justice, however, did not take up his duties in Wellington.

On February 20, 1875, he again wrote stating that he was desirous of retiring, his formal communication concluding with the words:

"Upon receiving, therefore, the notification that the exigencies of the Public Service do not require my tenure of the Office of Chief Justice after the 31st of March next, I shall be prepared to tender my resignation to His Excellency the Governor."

On March 27 he sent a formal resignation to the Governor, and three days later the Executive Council advised the Governor to accept it and to approve the appointment in his stead of Mr James Prendergast.

The *Evening Post*, which had described the retiring Chief Justice as an "upright and able Judge who has well maintained the dignity of his high position", said of his successor: "His legal attainments are beyond question and he will probably make an excellent Judge".



Portrait of Mr Justice H. B. Gresson in the Christchurch Law Library, with Mr Justice K. M. Gresson, his grandson.

Mr Justice Chapman, who in the spring of 1874, had informed the Government and the Colonial Secretary verbally of his intention to retire in March, 1875, had to be asked to put his decision "in official form" as the date of his retirement drew near, and this he did on February 22, 1875. His Honour advanced no reason for his resignation, but gave an assurance that he had fulfilled all the conditions required by the Supreme Court Judges Act 1874

"to entitle me to a retired allowance of half my present salary. I am within a few months of seventy-two and have already served more than the prescribed period".

(To qualify for a half-pay pension a Judge had to be over sixty years of age and have over fifteen and under twenty-five years' service.)

In the meantime, Mr Justice Gresson had been directed to remove from Canterbury to the Nelson district; and, while Mr Justice Alexander James Johnston was communicating with the Government about his transfer to Christchurch, Mr Justice Gresson was penning a letter of resignation which left no one in any doubt as to his views regarding the irregular and unconstitutional character of the policy which was even then being put into operation. His letter, direct and to the point, demonstrated, probably more than his arduous and much more than competent tenure of office, the courage, singleness of purpose, and consuming sincerity that distinguished his occupancy of the Bench.

It is probably not easy for the Bar, or even the Judiciary, in this day and generation to assess to the full what is owed to the early architects of the present-day edifice of law and its interpretation—the detachment and independence that are the accepted essentials of procedure in 1958—but the young and not so young adventurers of the mid-twentieth century who may feel tempted to profess only a meagre indebtedness to the compact and dignified conventions of their immediate ancestors should pause to reflect whether, after all, they are not standing on their shoulders. In the law as elsewhere, many outward signs persist today, long after the things they signified have become obsolete, but there is still virtue in remembering.

Recollections of the people of the earliest days of this country are full of wandering anecdotes, fathered now on one authority and now on another, whose place and time of origin are undiscoverable, but in the case of Mr Justice Gresson it is revealing and informative at this stage to recall an incident neither extravagant nor apocryphal. Gresson J. was the guest of the Chief Justice at dinner in Welington after a sitting of the Court of Appeal.

Sir George Arney (contemplating his guest across the table): Gresson, you are the most extraordinary Irishman I ever saw.

Gresson J.: And why would you think that ?

Sir George: Because you are sober, hard-working, contented and moderately economical, and you don't blow your own trumpet.

It is in the light of that candid contemporary opinion that the following statement of principle by Gresson J. in his letter of resignation to the Colonial Secretary should be read:

"I regret that I cannot accept the judicial district of Nelson, and I shall be prepared to resign my office on the tenth of March next.

"Shortly after my appointment to the judicial office, upon the passing of the Supreme Court Judges Act 1858, by which the Judges of the Supreme Court were made to hold office during good conduct instead of during pleasure, as theretofore, at the instance of the then Attorney-General (Mr F. Whitaker) I resigned my Commission in order that I might receive a Commission to hold office during good conduct. I need scarcely remind you that since the change so made in the tenure of office of the Judges, the Legislature, by a further enactment, has manifested its determination to place them as nearly as possible in the same position of independence as the English Judges, making them removable only by Her Majesty upon the address of both Houses of the Legislature. I venture to think, therefore, that if the wish of the Legislature to which you refer has been rightly interpreted, its present action is not only of a retrograde character, placing the Judges of the Supreme Court as it does at the mercy of the Minister for the time being, but is at variance with the legislation of the Colony for the past sixteen years. I cannot help thinking also that the time for the change is particularly inopportune, when from the circumstances of a charge of partiality having been recently made against one of the Judges, the proposed change will naturally be attributed by the public to the result of the Inquiry, and thus a foul and most unjust imputation will be made to attach to the Judges.

"As in other circumstances I should probably have retained my office a few years longer, it having been my desire to continue my work as long as I could discharge my duties efficiently, I regret being compelled to tender my resignation, but I have no alternative."

And so the die was cast. On March 25, 1875, Mr Justice Gresson forwarded to the Governor his formal resignation, and with it his Commission as a Supreme Court Judge. His Excellency accepted them.

Gresson J., it is true, had become wedded to the Canterbury district, and could only view the prospect of removal to Nelson with dismay. He had been at pains to identify himself "with the people and their aims", and about ten years before had acquired a country property at Woodend. But his whole history as a Judge discounts any suggestion that such considerations weighed more heavily with him than the principle on which he had staked his judicial future.

When his momentous decision had to be taken he had barely twenty years' residence in the country. Born in County Meath, Ireland, in 1809, he graduated B.A. at Trinity College, Dublin, and was called to the Irish Bar in Trinity Term 1833. After a London interlude and eight years as an equity barrister at the Chancery Bar in Dublin, he decided to emigrate and sailed from London in 1854 with his wife, his two daughters and his son in the ship "Nelson" (688 tons). He was forty-five years of age when after a four-months' voyage he arrived at Lyttelton and took the Bridle Track over the Port Hills to Christchurch. The family's complete household possessions, with the exception of a silver tea and coffee service presented to him on his departure by the Irish Bar (which in its wooden case was washed ashore), were lost when a small vessel foundered on the Sumner Bar, and the future Judge faced life in an entirely strange sphere from a position which the present generation would describe as "behind scratch". He was even without his valedictory testimonial signed by at least a score of Irish Q.C.'s, half a dozen Doctors of Law, and the rank and file of a Bar at which, in spite of the keen competition, he had already secured more than a nominal footing.

With no insurance (his heavy goods were covered only to Lyttelton), his library of law books lying deep beneath the sands of the bar off the beach where his grandsons were later to bring their children and grandchildren to play, Henry Barnes Gresson began life afresh, living first in Madras Street where the rain poured into the kitchen and the children slept in the loft, and later in Manchester Street and at Halswell.

With the population of Christchurch only 710 (forty-six fewer than in Lyttelton) and only 5,347 souls in the whole of the Canterbury Provincial District, he was appointed Crown Prosecutor. By the time Mr Gresson became Gresson J. in December, 1857, Christchurch could still boast only 1,000 inhabitants, and it was to be another forty years before it attained its first 50,000.

Mr Justice Gresson was one of the first Fellows of Christ's College, being "nominated, constituted and appointed" in the Deed of Foundation, and he was one of those who chose the site of the present College. He was also intimately associated with the movement for the erection of the Christchurch Cathedral, having at a meeting in 1858 moved the motion which marked the decision to build in Cathedral Square.

As it was barely three years after his arrival in the Colony that he was invited to accept a judgeship, Mr Gresson forsook the Bar with not a little diffidence. Eighteen years later, on his retirement, he confessed to a lively sense of his personal inadequacy at the time, but he explained that he was swayed in his decision by the fact that there were only two Judges then in office, the Acting-Chief Justice, Mr Sidney Stephen, and Mr Justice Daniel Wakefield, both of whom were in delicate health, and with a large accumulation of arrears of work, both criminal and civil. Indeed, both Judges died within a week of each other in the month following the gazetting of Mr Gresson's Commission. Since it was not until March 1, 1858, that the new Chief Justice, Sir George Arney, was appointed, Gresson J. carried out his judicial duties in splendid isolation for nearly two months as the only Judge in the Colony. Even after Sir George Arney took office, it was eight months before another puisne Judge (Mr Justice Johnston) was appointed.

But perhaps the greatest problem at that time was the existence of a single superior Court exercising jurisdiction both at law and in equity, a sole tribunal of general jurisdiction. The system had many advant-

ages, but in those days the Judges had received their training and experience in only one of the two jurisdictions. In Mr Justice Gresson's case it was equity. The law had to be administered in the new Colony as one organic whole, and, while generally speaking the Bench succeeded fairly well in doing so, the Judges found the task a difficult one. Gresson J. found the lack of ready references and authorities a sore handicap, as did all the Judges, and he had good reason in the early years of his office to rail at the malign fate that buried his personal library beneath the sands of the Sumner bar on his arrival in New Zealand. This loss, in conjunction with a purely Chancery Bar training, greatly complicated a tour of duty that could be only imperfectly described by the term " strenuous ".

Then there were the discomforts and hazards of travel. Mr Justice Gresson at first had the whole of the South Island to cover. His first circuit took him from Wellington to Nelson, and thence overland to Lyttelton—a mere 230 miles on horseback, led by a Maori guide. With business in Canterbury concluded, the Judge then set off, in the saddle again, for Dunedin to preside over the March session of the Court there. In the face of such rigours of travel and change of scene, it would be idle to suggest that anyone of the calibre of Gresson J. could have been constrained by personal convenience rather than principle to take a firm stand in the matter of the 1874 redistribution policy.

In 1862, when Mr Christopher William Richmond took Nelson off his hands, Mr Justice Gresson's Commission was made permanent, and two years later, with the reappointment of Mr Justice Chapman, the strength of the Judiciary was brought up to the five Judges who were involved in the Government's programme of interference.

On March 31, 1875, in Auckland, Christchurch and Dunedin special references were made to the three retirements that became effective on that date.

In Auckland, the Chief Justice, Sir George Arney, replied to the " kind feeling and approbation " conveyed to him on behalf of the northern Bar by the Attorney-General (Mr F. Whitaker), and admitted that he felt he was not withdrawing from office " too early ". But of reference to the then relations between Bench and Government there was none, nor did His Honour in even the most indirect fashion couple his resignation with the Government's policy.

Similarly in Dunedin, where Mr Justice Chapman met a large gathering of members of the Otago Bar, His Honour, in reply to the encomiums of Mr George Cook, forbore to make any mention of the question of judicial independence and the recent threat to it.

But in Christchurch there was a different story. Mr T. S. Duncan (Crown Prosecutor) expressed the profound regret of the Canterbury Bar at the retirement of Mr Justice Gresson, and His Honour in reply did not hesitate to discuss a topic which he considered to be of the gravest importance to the law and to the community at large.

After acknowledging that next to the approval of his own conscience he valued nothing more than the testimony of those among whom he had administered the duties of his office, and thanking the Bar for its kind wishes, he said :

" It only remains for me, before I take leave of you, to explain the events that have caused me to retire somewhat sooner than I had intended. You are aware that the Joint Committee of both Houses of Assembly on the Ward-Chapman Inquiry appended to their report a recommendation that the Supreme and District Court Judges should change their circuits occasionally. I supposed at the time, as did many others, that it was merely intended to invite the Judges to exchange circuits, in conformity with the practice of the Judges in the United Kingdom. Such an exchange has often been talked of, and to it the only possible objection could be that it might be attended with some slight additional cost to the country. But the General Government interpreted the suggestion to mean that the Judges should be requested to change their judicial districts at intervals, and remove from time to time from one point of the Colony to another.

" I venture to doubt that this could have been the meaning of the Committee, or the intention of the Legislature, because it would have implied an imputation against the Judges, and because it would have been at variance with the course of legislation over the last sixteen years, culminating in the statute which secured the independence of the Supreme Court Judges, by making them removable only by Her Majesty upon the address of both Houses of the Legislature. But what becomes of the independence of the Judges if they may be ordered by the Minister of the day, as often as he pleases, to remove to whatever part of the Colony he pleases ? It is obvious that such a power is open to gross abuse, and that if these be the terms under which they hold office, the Judges are not better off than when their Commissions were only during pleasure, a form which was wisely altered by the Legislature to a good-conduct tenure so long ago as 1858.

" In conformity with what the Government supposed to be the policy of the Legislature, I received a letter from the Colonial Secretary informing me that this judicial district had been assigned to Mr Justice Johnston, and inviting me to remove to Nelson. This I did not feel called upon to do in the circumstances which appear to me to convey an imputation against the impartiality of the Judges. If the Legislature had by statute expressed its intention that the Judges should reside at the seat of Government, I should unhesitatingly have accepted a change which might fairly be assumed to be for the public interest and not inconsistent with the independence of the Judges, although in my opinion, the Colony is not sufficiently advanced for such a movement. But viewing the matter as I do, no alternative remained for me but to retire."

It was a valiant and opportune undertaking upon which His Honour had embarked, and it is for those who have followed after him to assess the value and significance of his revolt.

In case it should be thought that Mr Justice Gresson was a voice crying in the wilderness, it is appropriate to conclude this chronicle of events by quoting two others of His Honour's colleagues on the question which he regarded as of the greatest moment.

Mr Justice Richmond, who drew Otago in the reshuffle, replied to the invitation to transfer there with a request for eighteen months' leave of absence on

half-pay, the money to be paid to him in London by the New Zealand Agent-General there. The Otago climate, he advised, would be inimical to his current state of health. His letter to the Colonial Secretary ended on the following note :

> " My request for leave of absence has been necessitated by the suddenly-taken resolution of the Government."

The leave of absence was granted and was subsequently extended to two years.

Mr Justice Johnston, having persuaded the Government that the statutory £200 removal allowance for Judges was insufficient for his translation from Wellington to Christchurch (he finally received over £300), accepted the Canterbury district, but concluded his letter of acceptance as follows :

> " I deem it my duty to say that I assent to the proposal on the footing of your representation that the Legislature has expressed its approval of the propriety of the proposed changes, and that the Government deems them necessary for the exigencies of the Public Service, without my admitting there is any proved necessity for them, or that the currently-reported scheme is the most convenient one for the alleged purposes, or that it is constitutional in principle, or that the time has been opportunely chosen for introducing it."

The real significance of the stand taken by Mr Justice Gresson eighty-four years ago may be said to reside in the extent to which the independence of the Judges has long since been determined. Today a Judge removes from one district to another only at the request of the Chief Justice whose responsibility it is to supervise and organize throughout New Zealand the sittings of the Supreme Court. The importance of such an arrangement cannot be overrated and Bench, Bar and public alike may well be conscious of a deep sense of obligation to one who was prepared to insist upon the principle no matter what the cost.

LAND TRANSFER: RESTRICTIVE COVENANTS.

Noting on Register.

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

Sections 126 and 127 of the Property Law Act 1952 have now been in force in New Zealand for five-and-a-half years, and perhaps the time is now meet to review the position and explain briefly the new law which was introduced by those sections.

Section 126 deals with the noting on the Land Transfer Register of restrictive stipulations as to the user of any land " subject to the Land Transfer Act ; what we in New Zealand usually refer to as " restrictive covenants ". Section 127 authorizes the Supreme Court to modify or extinguish easements and " restrictive stipulations ".

Similar, or almost similar, provisions have been in force for many years in one or two States of the Commonwealth of Australia and, if New Zealand counsel is asked to advise on ss. 126 and 127 of the Property Law Act, a perusal of relevant Australian cases and text-books will greatly assist. Two text-books which I have consulted are *Baalman's Commentary on the Torrens System in New South Wales*, and *Baalman and Wells's Practice of the Land Titles Office*, 3rd ed. (1952).

Section 126 of the Property Law Act 1952 reads as follows :

> 126. Where a restriction arising under covenant or otherwise as to the user of any land under the Land Transfer Act 1952 the benefit of which is intended to be annexed to other land is contained in an instrument coming into operation after the commencement of this Act—
>
> (a) The District Land Registrar shall have power to enter in the appropriate folium of the register book relating to the land subject to the burden of the restriction a notification of the restriction, and a notification of any instrument purporting to affect the operation of the restriction of which a notification has been so entered, and when the restriction is released, varied, or modified to cancel or alter the notification thereof :
>
> (b) A notification in the register book of any such restriction shall not give the restriction any greater operation than it has under the instrument creating it :
>
> (c) Every such restriction notified on the appropriate folium of the register book shall be an interest within the meaning of section sixty-two of the Land Transfer Act 1952.

The marginal note to the section (*Registration* of restrictions of user of land) is rather misleading. " The entry of a notification on a certificate of title does not amount to a registration " (*Baalman and Wells op. cit.*, p. 62).* But a restriction so noted becomes an " interest " within the meaning of s. 62 of the Land Transfer Act 1952. That section is the one in which is enshrined the principle of indefeasibility of title. In the absence of fraud the estate of a registered proprietor is (with certain statutory exceptions) paramount but subject to such encumbrances, liens, estates, or *interests* as may be notified on the folium of the register. Therefore, the estate of a registered proprietor of land under the Land Transfer Act is now subject to any covenant or other agreement restricting the use of the land, the existence of which is noted against the appropriate folium of the register book ; but note particularly that by virtue of para. (b) *such notification does not give the restriction any greater operation than it had under the instruments creating it.* In his *Commentary on the Torrens System in New South Wales*, 96, Baalman states :

> The entry is made only because there is no other way of giving notice (for what it may be worth) to assigns of the covenantor. It does not carry the element of conclusiveness of a registered estate or interest. . . . The rights and liabilities of the parties will continue to be determined by the general law ; and, if for any reason peculiar to the law affecting covenants, the restriction ceases to bind the land, the proprietor can have the notification cancelled.

Further on, in his *Commentary*, at p. 196, the learned author, after pointing out that a demand for noting

* In New South Wales the practice of noting restrictive covenants first received statutory approval by the conveyancing (Amendment) Act 1930, s. 88 (3) (a)—although it had been in force for many years before that date.

restrictive covenants against titles arose in the early part of this century, and has developed in intensity with the succeeding years, is rather critical of the practice of noting restrictive covenants against Torrens titles in New South Wales. At p. 197, he states:

> The general impact of restrictive covenants upon the Torrens system still requires much judicial enlightenment. A branch of the law which rests so heavily on the doctrine of notice cannot be grafted on to a tree which repudiates that doctrine without impairing the general health of the tree.

The practice of noting restrictive covenants against land-transfer titles has this advantage: it does enable one to obtain protection of a right against the land of another which the common law would not recognize as a legal easement. It is not beyond the wit of a conveyancer to embody such a right in the form of a restrictive covenant. Of course, such a right could always have been protected by the rather roundabout method of a Memorandum of Encumbrance (Form D, Second Schedule to the Land Transfer Act 1952). A suitable precedent of such an encumbrance will be found in (1950) 26 N.Z.L.J. 171.

In order that a restrictive covenant may be noted against a land-transfer title, the covenant should clearly indicate

(*a*) the land to which the benefit of the restriction is appurtenant, and that land may of may not be subject to the Land Transfer Act;

(*b*) the land which is subject to the burden of the restriction, and that land (the servient tenement) must be subject to the Land Transfer Act.

If the servient tenement is not subject to the Land Transfer Act, then the instrument could be registered under the Deeds Registration Act 1908, or, presumably, if title is held under the Mining Act 1926, the instrument could be registered under that Act; it would not matter if the covenant was not appurtenant to any land but merely a covenant in gross. But, if the servient tenement is under the Land Transfer Act, the covenant must be appurtenant to other land; covenants in gross (e.g. the brewer's covenant as in *Staples and Co.* v. *Corby* (1900) 19 N.Z.L.R. 517; 2 G.L.R. 398) could not be noted against the Land Transfer Register.

Restrictive covenants in memoranda of leases and mortgages have never been objected to in New Zealand; indeed, so far as leases are concerned, their inclusion is impliedly authorized by the Fourth Schedule to the Land Transfer Act 1952, "Covenants implied in Instruments". (The words, "That the lessee will not use the said premises as a shop", imply, etc. the words "will not carry on offensive trades" imply, etc.; the words "will not cut timber" imply, etc.) It appears clear, however, that a purchaser relying on the register book would not be affected by a restrictive covenant in a lease the term of which had expired, or the previous determination of which had been noted against the register book pursuant to s. 121 of the Land Transfer Act 1952 (notification of re-entry by lessor): *Gallagher* v. *Thomson and Allen* [1928] G.L.R. 373, which is consistent with *Brown* v. *Wellington and Manawatu Railway Co. Ltd.* (1898) 17 N.Z.L.R. 471, 1 G.L.R. 14.† It is not the practice in New South Wales to enter on the register a notification of a covenant contained in a registered lease or mortgage. In New Zealand, the only covenants in a lease which are noted on the register are fencing covenants and those conferring "a right for or covenant by the lessee to purchase the land": s. 7 of the Fencing Act 1908 and s. 118 of the Land Transfer Act 1952. And (as in New South Wales) it is not the practice in New Zealand to note on the register covenants contained in a registered mortgage.

Section 126 of the Property Law Act 1952 does not authorize the noting of positive covenants on the Land Transfer Register: a positive covenant may be protected by the registration of a memorandum of encumbrance in Form D in the Second Schedule to the Land Transfer Act 1952, but a memorandum of encumbrance may constitute an inconvenient blot on a title and that procedure is not to be recommended. It may be pointed out, however, that a covenant which is positive in form may really be negative in substance: for example, a covenant to keep a square open as a pleasure ground: *Garrow's Real Property in New Zealand*, 4th ed., 235. Similarly, a covenant for the benefit of the dominant tenement, not to erect upon the servient tenement a building of a value less than a stated minimum is a true negative covenant‡ *Collins* v. *Castle* (1887) 37 Ch.D. 243. But a covenant to erect on land a house of a value not less than a stated minimum would be a positive covenant. A covenant by the servient owner that every building on the servient tenement shall be used only as a private dwellinghouse, motor-garage, or other building belonging thereto and that so much of the land as shall remain unbuilt upon shall be used only as the yard, garden or grounds of such dwellinghouse and premises would be permissible negative covenant: *Burns* v. *Dilworth Trust Board* [1925] N.Z.L.R. 488; [1925] G.L.R. 287. A covenant not to carry on a certain business on the servient tenement is permissible: *Newton Abbey Co-op.* v. *Williamson and Treadgold Ltd.* [1952] 1 All E.R. 279.

It is submitted, however, that the District Land Registrar should not object to the inclusion of positive covenants which are merely ancillary to restrictive covenants. An example of such an instrument is Precedent No. 4 hereunder which was passed by the Registrar-General of Land.§

† see, also, *Bualman's Commentary on the Torrens system in New South Wales*, p. 97.

‡ A covenant by the "purchaser" for himself, his heirs, executors, administrators and assigns, with the "vendor" her heirs executors and administrators, that the purchaser, etc., shall not erect or permit "to be erected upon the said land any main building of less value than £300": *Dabbs* v. *Seaman* (1925) 36 C.L.R. 538, 544, 545.

§ As to positive covenants in restrictive covenants (in this case they were contained in a building scheme) Upjohn J. in *Halsall* v. *Brizell* [1957] 1 Ch. 169; [1957] 1 All E.R. 371, 376, made the following useful observations: "First, in so far as the deed of 1851 purports to make the successors of the original contracting parties liable to pay calls, is it valid and enforceable at all? I think that this much is plain: that the defendants could not be sued on the covenants contained in the deed for at least three reasons. First, a positive covenant in the terms of the seventh covenant does not run with the land. Secondly, these particular provisions with regard to the payment of calls plainly infringed the rules against perpetuities. Of course, these parties are not parties to the contract. Finally, it is conceded that the provisions for distraining on failure to pay is not valid. A right to distrain can only be annexed to a rent charge which this certainly is not. But it is conceded that it is ancient law that a man cannot take a benefit under a deed without subscribing to the obligations thereunder. . . . It is laid down in Co. Litt. 230 b that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it. If the defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations thereunder. But, of course, they do desire to take the benefit of this deed".

It is thought that perhaps the following examples taken from the Law Reports published in Australia will prove of interest.

In *Jacobs* v. *Greig* [1956] V.L.R. 597, a contract of sale contained the following condition:

"The land is sold subject to the following restrictive covenant: no building shall be erected on any lot sold other than one detached private dwellinghouse or one detached building not exceeding two storeys in height comprising two substantial maisonettes or two residential flats, one above the other, and any such building shall not be erected of any material other than brick or stone with a tiled or slate roof. A covenant giving effect to this condition shall be inserted in the transfer to the purchaser in such form as the vendor shall think necessary and shall run with the land.

"It was held that the covenant did not allow the erection of a building, the vertical construction of which was not substantially wholly of brick or stone, and in particular, did not allow the construction of a black veneer building."

Per Sholl J. at p. 604: "It is a matter of construing the covenant according to common sense in the light of current usage and custom".

In *In re Bishop and Lynch's Contract* [1957] V.L.R. 179, the servient tenement was Lot 202 on plan of subdivision No. 7162, and it appeared that each lot had become subject to a restrictive covenant for the benefit of the other lots contained in the said subdivision to the effect that the original purchaser of such lot "his heirs executors administrators and transferees will not at any time hereafter erect upon the said lot hereby transferred any buildings other than a private dwelling with a slate or tile roof and will not erect more than one such dwelling upon the said lot hereby transferred and that such dwelling with the outbuildings thereof shall cost not less than £500". At first only one dwelling intended for one family only was erected on the servient tenement. Subsequently alterations and additions were made to that dwelling with the result that the house became fully equipped for two residences each separate from the other. It was held that these alterations and additions did not constitute a breach of the covenant. Per Herring C.J. at p. 181: "There is I think a real distinction to be drawn between the erection of a building and the alteration of a building".

N.B.—The above case must be carefully distinguished from *In re Marshall and Scott's Contract* [1938] V.L.R. 98, where the restrictive covenant provided that there should not be built on the land, "any building save one dwellinghouse". It was held that the building on the land of a villa containing two self-contained flats, each structurally complete and separated by a wall that prevented access from one to the other constituted a breach of the covenant. It appears that in construing these restrictive covenants the words thereof should be given their meaning in common vernacular use, and not regarded as terms of art to be given some special meaning.

It is hoped that the following precedents may be of some assistance to practitioners.

For Precedent No. 1 I am much indebted to Mr P. W. Kirby of New Plymouth. The servient tenement had been excavated leaving the dominant tenement several feet in the air, to which access could be gained only by means of a ramp. It will be observed that the instrument makes provision for relinquishment of an existing right of way to enable the old right of way to be built over. The restrictive covenant is for the purpose of preserving light for the windows of the building on the dominant tenement; the covenant is tied to a height above mean sea level. This is a height easily determined by survey and has the advantage that it remains fixed and cannot be altered by any alterations of the surface of the land either by excavations or filling in. In this age when "bulldozing" of the soil has become quite common the District Land Registrar will probably insist on some such permanent fixing. If the land is situated in a municipality which has an official datum level, the District Land Registrar will probably suggest that that datum level should be adopted as in Precedent No. 2 hereunder.

It appears to the writer that when one's client sells a part of his land and gives instructions that he does not want the purchaser to block out his view, the reservation in the transfer of subdivision may be effected either by an easement of light and air complying with s. 124 of the Property Law Act 1952, or by a restrictive covenant by the purchaser. In Precedent No. 2 hereunder an easement of light and air is granted, but the vendor's instructions that he must be permitted to allow his retaining wall to encroach on to the lot sold are carried out by a restrictive covenant.

Precedent No. 3 hereunder is to supply an omission in the transfer as to restrictive covenant by the purchaser. It will be noticed that it is couched in the form of a deed, which appears to be the correct form to use, when the restrictive covenant is created in an instrument other than one provided for in the Land Transfer Act itself and noting on the Land Transfer Register is desired pursuant to s. 126 (a) of the Property Law Act 1952.

Precedent No. 4 hereunder is designed to deal with this situation. In the course of erection of a very substantial and expensive building it is discovered that the builder has inadvertently encroached a few inches on to the adjoining land. The unfortunate owner of the building could by the appropriate Court proceedings obtain a vesting order vesting in him the strip of land so encroached upon: s. 5 of the Property Law Amendment Act 1957. But neither party desires to alter the legal title to the two parcels of land involved. The owner of the adjoining land is willing to allow the new building to continue to encroach on to his land, provided that, if such building is at any time demolished or destroyed, any building erected in substitution therefor does not so encroach.

In my next article I shall endeavour to deal with the cancellation, release, variation or modification of a restrictive covenant which has been noted against the Land Transfer Register.

PRECEDENT NO. 1.—MEMORANDUM OF TRANSFER OF GRANT OF EASEMENT TO USE A RAMP AND A RESTRICTIVE COVENANT TO PRESERVE LIGHT FOR THE WINDOWS OF A BUILDING.

WHEREAS THE.....SOCIETY LIMITED a duly incorporated society under the Industrial and Provident Societies Act having its registered office at.....(hereinafter with its successors and assigns called "the Grantor") is registered as the proprietor of an estate of freehold in fee simple subject, however, to such encumbrances, liens, and interests as are notified by memorandum underwritten or endorsed hereon, in that

piece of land situated in the Survey District of.....FIRST, containing [*Set out here area*] be the same a little more or less being the Section Numbered.....on the Public Map of the Town of.....and being all the land in Certificate of Title Volume.....Folio.....(.....Registry) subject to the Right-of-Way created by Transfer No.....SECONDLY containing [*Set out here area*] more or less being part of the Section Numbered .....on the Public Map aforesaid and being all the land in Certificate of Title Volume.....folio.....(.....Registry) Subject to the Right-of-Way created by the said Transfer No.....and to an agreement as to Fencing contained in Transfer No.....and THIRDLY containing [*Set out here area*] more or less being part of the Sections Numbered.....,.....and..... on the Public Map aforesaid more particularly delineated by part land on Deposited Plans Numbers.....and.....and being all the land in icate of Title Volume.....folio..... (..... Registry) Subject to the conditions contained in By-laws..... to.....inclusive of the By-laws of the Corporation of the Borough of.....and Subject to the Right-of-Way created by Transfer No.....(hereinafter called "the land first above described") AND WHEREAS.....LIMITED duly incorporated under the Companies Act having its registered office at.....(hereinafter with its successors and assigns called "the Grantee") is registered as proprietor of an estate of freehold in fee simple as aforesaid containing [*Set out here area*] more or less being the Section numbered.....on the Public Map of the Town of .....TOGETHER with the Rights-of-Way created by Memorandum of Transfer registered No.....over parts of the lands comprised in Certificate of Title Volume.....folio.....and Volume.....folios.....and.....and being all the land comprised and described in Certificate of Title Volume.....folio..... (.....Registry) limited as to parcels (hereinafter called "the land secondly above described") AND WHEREAS it has been mutually agreed by and between the parties hereto that the Grantee shall transfer release and surrender to the Grantor all the right title and interest of the Grantee in and over the lands first above described created by the said Transfer registered No.....upon the Grantor granting to the Grantee the alternative rights over the lands first above described as hereinafter provided NOW THIS MEMORANDUM WITNESSES that in pursuance sf the said agreement and in consideration of the grant of easement hereinafter contained the Grantee DOES HEREBY TRANSFER RELEASE AND SURRENDER to the Grantor as registered proprietor of the land first above described all the Grantee's right title estate or interest in and over the lands first above described created by the said Memorandum of Transfer Registered No. .....to the intent that the easement thereby created shall merge and be wholly extinguished in the fee simple of the lands first above described AND in further pursuance of the said agreement and in consideration of the foregoing transfer release and surrender the Grantor DOES HEREBY TRANSFER AND GRANT unto the Grantee its successors and assigns the registered proprietors or proprietor for the time being of the land secondly above described or any part thereof full and free right liberty and licence for them and each of them their and each of their servants visitors tenants and licensees and all persons having bona fide and lawful business with them or any of them their or any of their successors executors administrators or assigns and their or any of their servants visitors tenants and licensees in common with all other persons having the like right at all times hereafter by day as well as by night with or without horses carts or other vehicles of any description for all purposes connected with the use and enjoyment of the land secondly above described for whatever purpose such land may lawfully be used and enjoyed to go pass and repass over and along that portion of the land first above described coloured yellow on plan deposited in the Land Transfer Office at.....as No. .....TO HOLD the said rights hereby granted unto the Grantee its successors and assigns as aforesaid forever as and in the nature of an easement appurtenant to the land secondly above described and every part thereof PROVIDED ALWAYS and it is hereby agreed and declared by and between the parties hereto that so long as the Grantor shall provide and maintain and the Grantor does hereby covenant with the Grantee to so provide and maintain a ramp over portion of the land coloured yellow on the said Plan No.....leading from the.....Street frontage such ramp having a length of 164 links and a uniform width of 15.15 links and at the.....Street frontage being on the same level as.....Street and rising on an even grade to a height of 64.67 feet above mean sea level at the end thereof 164 links from.....Street and a level floor at the said height of 64.67 feet above mean sea level over the whole of the remainder of that portion of the said land coloured yellow such floor and ramp to be made and constructed of reinforced concrete of sufficient strength to carry not less than nine-ton vehicles fully laden and having proper and sufficient guard rails on all sides then the rights of way hereby granted shall be exercisable by use of the said ramp and floor and not otherwise and the Grantor shall be at liberty to erect upon the surface of the said right-of-way up to the height of the said floor or ramp as the case may be a building for the exclusive use of the Grantor AND IT IS HEREBY AGREED AND DECLARED that if any dispute or difference shall arise between the parties hereto as to the strength condition or sufficiency of the said floor ramp or guard rail such dispute shall be referred and settled by the arbitration of two arbitrators both of whom shall be architects or structural engineers or their umpire and otherwise in accordance with the provisions of the Arbitration Act 1908 and its amendments or any Act passed in substitution therefor AND PROVIDED ALWAYS that if at any time the Grantor shall fail to keep the said floor and ramp in the same proper and serviceable order and condition the Grantee or its agents or workmen shall be at liberty to enter upon the land first above described and at its or their sole option either to repair the said ramp and floor or to remove from the said portion of the said land coloured yellow the said ramp and floor and buildings or other obstructions without being liable for any damage done in the course of such removal and the cost of such repair or removal as the case may be shall constitute a liquidated debt due by the Grantor to the Grantee and be recoverable at law accordingly AND PROVIDED FURTHER THAT IF THE Grantee shall exercise its option to remove from the said land coloured yellow the said ramp and floor and all buildings or other obstructions the rights-of-way hereby granted shall thereafter be exercisable over the surface of the said portion of the said land coloured yellow without any obstruction AND IT IS HEREBY AGREED and declared that if at any time the Grantor shall sell or otherwise dispose of its interest in the land first above described it will procure from the purchaser or transferee thereof a deed of covenant whereby such purchaser or transferee shall covenant with the Grantee to observe and perform all the covenants and obligations on the part of the grantor herein contained and so on with each succeeding sale or transfer of the said land first above described such Deed of Covenant to be prepared by the Grantee's Solicitors at the cost in all things of the Grantor or other person primarily liable to procure the same AND IT IS HEREBY FURTHER MUTUALLY AGREED by and between the parties hereto that neither party hereto will use the said floor and ramp in such a way that it shall restrict the free and reasonable use thereof by the other party and its licensees and each party hereto will use its best endeavours to expedite the loading and unloading of vehicles using the said floor and ramp by its licence or authority so that the same may at all times be kept as free and clear from vehicles and other obstructions as is or shall be reasonably possible and the Grantor DOES HEREBY COVENANT with the Grantee that the Grantor will not at any time hereafter make place or erect any building or part of any building or other obstruction on or in the space over that portion of the land first above described coloured red on the plan drawn hereon between the heights of 64.67 feet and 76.6 feet above mean sea level such covenant to be in the nature of a restrictive covenant as to the user of the land first above described annexed in perpetuity to and for the benefit of the land secondly above described.

IN WITNESS whereof these presents have been executed this 10th day of October One thousand nine hundred and fifty-eight (1958).

THE COMMON SEAL of THE..... SOCIETY LIMITED was hereunto affixed pursuant to a resolution of the Board of Directors in the presence of:

A. B. } Directors
C. D. }

E. F., Secretary

THE COMMON SEAL of..... LIMITED was hereunto affixed in the presence of:

G. H. } Directors
I. J. }

K. L., Secretary

N.B. *Diagram of the ramp and platform and of the dominant and servient tenement and the consent of the municipality endorsed on the instrument.*

PRECEDENT No. 2: MEMORANDUM OF TRANSFER OF GRANT OF EASEMENT OF LIGHT AND AIR TOGETHER WITH A RESTRICTIVE COVENANT TO MAINTAIN AN ENCROACHMENT ON SERVIENT TENEMENT.

I. A. B. of Wellington, Agent (hereinafter called "the Vendor") being registered as the proprietor of an estate of freehold in fee simple subject however, to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in that piece of land situated in the City of Wellington containing [*Set out here area*] be the same a little more or less being part of Section.....District and being Lot 1 on Deposited Plan.....and being part of the land comprised and described in Certificate of Title Volume..... Folio.....Registry SUBJECT to Fencing Agreement in Transfer.....IN CONSIDERATION of the sum of TWO THOUSAND POUNDS (£2,000.0.0) paid to me by C. D. of Wellington, Accountant (hereinafter called "the Purchaser") (the receipt of which sum is hereby acknowledged) do hereby transfer to the said C. D. all my estate and interest in the said piece of land Reserving nevertheless to me the Vendor and my heirs executors administrators and assigns as in the nature of an easement for the benefit of the residue of land in said Certificate of Title Volume.....Folio.....the perpetual right or privilege to the free and unobstructed and uninterrupted access of light and air perpendicularly from the sky downwards to the height of 24 feet from the present ground level as existing at that point on the said land hereby transferred where the northern boundary thereof is contiguous to.....Street which said height is equivalent to 658.25 feet from the City datum level AND reserving to me the Vendor and my heirs executors administrators and assigns in the nature of a restrictive covenant for the benefit of the residue of the land in said Certificate of Title Volume.....Folio.....the right to keep and retain the concrete retaining wall on the strip of land approximately 3 inches in width running along the Southern boundary of the said land hereby transferred PROVIDED ALWAYS and the purchaser his heirs executors administrators and assigns doth hereby covenant with the vendor that the vendor shall not be called upon to erect or repair maintain or contribute towards the cost of erection or repair of any dividing or boundary fence between the land hereby transferred and any land adjoining thereto the property of or occupied by the vendor but this covenant shall not enure to the benefit of any purchaser or other occupier of any such adjoining land.

IN WITNESS whereof this Memorandum has been executed this 8th day of December, One thousand nine hundred and fifty-eight.

SIGNED on the day above named by the said A. B. in the presence of:

E. F.
Solicitor,
Wellington.

SIGNED on the day above named by the C. D. in the presence of:

G. H.
Solicitor,
Wellington.

PRECEDENT No. 3: RESTRICTIVE COVENANTS INADVERTENTLY OMITTED FROM TRANSFER BY WAY OF SUBDIVISION.

THIS DEED made.....day of....., 1958 BETWEEN A. B. of Wanganui in New Zealand Builder (hereinafter called "the Grantor") of the one part AND C. D. of Wanganui aforesaid Accountant (hereinafter called "the Grantee") WHEREAS by Agreement in writing made the.....day of....., 1958 the Grantee agreed to sell to the Grantor all that piece of land containing [*set out here area of servient tenement*] be the same a little more or less being Lot No.....on Deposited Plan No.....and part.....Town Sections Nos.....and.....and being now the whole of the land in Certificate of Title Volume .....Folio.....Wellington Registry (hereinafter called "the Servient Tenement") reserving nevertheless to himself and the owner or owners for the time being of all those pieces of land containing [*Set out here area of dominant tenement*] be the same a little more or less being Lots.....,.....and.....on said Deposited Plan No.....and part.....Town Section Nos. .....and.....and being the residue of the land comprised in Certificate of Title Volume.....Folio.....Wellington Registry (hereinafter called "the dominant tenement") the rights concerning buildings and trees as hereinafter appear AND WHEREAS by mistake of the parties a transfer to the Grantor of the servient tenement has been duly registered without expressly making such reservations NOW THEREFORE in pursuance of such agreement the Grantor for himself his heirs, executors administrators and assigns and the Owner or owners for the time being of the servient tenement DOTH HEREBY GRANT unto the Grantee his heirs executors administrators and assigns and the owner or owners for the time being of the dominant tenement the right to require him or them to refrain from erecting or maintaining on the servient tenement any building or erection within twenty feet from the back boundary thereof as shown on the diagram endorsed hereon nor in any case to a greater height than two storeys from the present ground level* of the.....Street frontage of the servient tenement and to refrain from cutting or killing the trees at present growing upon or adjacent to the said back boundary of the servient tenement AND THE GRANTOR doth hereby covenant not to do permit or allow such erecting maintaining cutting or killing AND for the consideration aforesaid DOTH HEREBY COVENANT to allow the Grantee to cut or trim such trees and for such purpose to enter with workmen and servants upon the servient tenement.

IN WITNESS WHEREOF etc.

* *In all probability the District Land Registrar will require this to be tied up to a datum level, if practicable.*

PRECEDENT No. 4: DEED AS TO RESTRICTION OF USER OF LAND. NEW BUILDING SLIGHTLY OVERLAPPING TITLE BOUNDARIES.

THIS DEED made the.....day of.....1958 BETWEEN A. B. of the City of Wellington, Manufacturer (hereinafter with his successors in title and assigns called "the Grantor") of the one part AND.....LIMITED a duly incorporated company having its registered office at Wellington (hereinafter with its successors in title and assigns called "the Grantee") of the other part WHEREAS the grantee is seized of an estate by virtue of a Deferred Payment Licence in the land described in the First Schedule hereunder written and WHEREAS the grantor is seised of an estate by virtue of a Deferred Payment Licence in the land described in the Second Schedule hereunder written AND WHEREAS the grantee has erected a building on the land described in the said First Schedule AND WHEREAS the said building encroaches on to the land described in the said Second Schedule AND WHEREAS the said building and encroachment is shown on the plan endorsed hereon the said encroachment being of a uniform width of five-eighths of an inch AND WHEREAS the said encroachment was unintentional as the parties hereto do hereby freely admit AND WHEREAS the grantor is willing to permit the said building to continue to encroach on his land as aforesaid in consideration of the grantee entering into the covenants and conditions hereinafter set out and has agreed to restrict his own use of that part of his land as so encroached upon as hereinafter set out NOW THEREFORE in consideration of the premises THIS DEED witnesseth as follows:

1. The grantor doth hereby covenant with the grantee that whilst the said building encroaches upon his the grantor's land as aforesaid he will not use the land so encroached upon (hereinafter called the servient tenement) in any way or manner so as to interfere with the continued use and enjoyment of the said building by the grantee its tenants, servants, contractors or customers and will not do or cause or permit or suffer to be done any act or thing whereby the stability or safety of the said building or of any part thereof is endangered, threatened, damaged, destroyed or injuriously affected, to the intent that the benefit of the foregoing covenants shall be appurtenant to the land described in the said First Schedule.

2. For the consideration aforesaid the grantee doth hereby covenant with the grantor that he will not cause permit or suffer the said building to get into a dangerous state of disrepair but will keep the same in good order and repair (fair wear and tear and inevitable accident or Act of God excepted), and will not cause permit or suffer the said building to become a nuisance to the grantor or a source of danger to any building which may at any time be erected on the land described in the Second Schedule.

3. It is hereby declared by the parties hereto that the phrase "said building" as used in these presents is restricted to the building at present erected on the dominant tenement and encroaching on to the servient tenement as aforesaid and does not include and shall not extend to any building erected in substitution therefor.

4. It is hereby declared by the parties hereto that in the event of the said building being damaged by fire, flood, lightning

(*Concluded on p. 176.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Chartered Clubs.—A conference of chartered clubs has recently discussed the anomalous position in regard to "off-sales" rights. Power was given to the Licensing Control Commission (Licensing Amendment Act 1948, s. 75) from time to time, in its discretion, to grant new charters with the provision if it thought fit, to authorize the sale of liquor for consumption only on the premises of the club. Chartered clubs before 1948 appear for the most part to have the right to sell liquor to their members for consumption off the premises. Some of the clubs that obtained charters shortly after 1948 received such a right, but the Commission's view has seemingly changed as to the wisdom of conferring a privilege that is not in reality one of the amenities to be expected by a member of a chartered club. After an investigation into the position, the Commission indicated its intention to refuse "off-sales" rights to Returned Servicemen's Clubs that sought a charter. The large membership of such clubs and of Workingmen's Clubs remove the force of Nicholas Bentley's lines, "Liberty and Licence":

> "Blessed all the rich
> Who can afford the clubs,
> Where they go on drinking
> When the poor have left the pubs."

Whether they do or not is a controversial topic. In its report presented to Parliament for the year ended March 31, 1958, the Commission says:

> "It is a matter for regret that upon police reports it has had to authorize prosecutions against eight clubs during the year. Convictions have been recorded in six cases and in other cases prosecutions are not yet disposed of."

It again recommends an amendment of the law so that a charter can be suspended for a period not exceeding three months for convictions for breaches of the licensing laws or serious breaches of the conditions on which the charter is granted. Statutory recognition of this recommendation would do much to discourage many chartered clubs, the drinking habits of which are chameleon-like, taking colour from their surroundings and the deep-seated traditions of a past era.

Taxhunters Note.—In *Wright* v. *Boyes* (*Inspector of Taxes*) [1958] 1 All E.R. 864 a huntsman engaged by the Master of the Hunt, and under the Master's orders, was responsible for the feeding of the hounds, management of the pack and the kennels, and "finding foxes and getting the hounds on to them." At the time of his appointment, which was made orally, nothing was said about Christmas gifts, but it was found to be a widespread and long-standing custom for gifts of cash to be made to the huntsman at Christmas time, normally at the meet on Boxing Day. The gifts were entirely voluntary and were made by followers of the hunt and others interested in it. Many givers were influenced by personal regard for the huntsman, but it was found that that personal regard had its origin in the way the huntsman performed his duties as huntsman. The huntsman was assessed with income tax under Schedule E, in respect of the gifts of cash and, on appeal, the Special Commissioners of Income Tax held that the gifts (other than those received from persons not connected with the hunt) accrued to the taxpayer by virtue of his employment and were taxable. The Court held, applying *Moorhouse* v. *Dooland* [1955] 1 All E.R. 93 that the gifts found by the Special Commissioners to be taxable were in law taxable since they came to the huntsman by virtue of his employment as huntsman and were not mere presents or testimonials. No doubt, such gifts if made in New Zealand would have been caught as gratuities or tips under s. 88 of our 1954 Act. This particular huntsman, home from the hill, must have pondered whether the foxes he found were the only ones who had the hounds on to them.

The Personal Approach.—"Scriblex" is always receptive to a new story of Lord Birkenhead in those undergraduate days he shared with C. B. Fry and our own Sir Harold Johnston. This is one mentioned by John Senter, Q.C. in a short biographical sketch in *Graya*, the magazine issued for circulation among members of Gray's Inn. John Simon (afterwards Simon L.C.) and F. E. Smith (as Birkenhead then was) had been playing football somewhere in the Midlands. F. E. Smith left the railway carriage at one of the stations on the way back to Oxford to buy the evening papers. While he was away, a man came into the carriage and took the seat. Simon said, "I am sorry, sir, but this seat is taken." The man paid no attention. Smith came back and Simon said to him, "I told this gentleman this was your seat." The man paid no attention. F. E. Smith stood looking down on him, and then said, "I don't wish to be in any way personal, sir, but, thank God I haven't got hairs growing out of the end of my nose." The man got up, and without a word, left the carriage. Smith resumed his seat and said to Simon, "I have always tried to impress on you the importance of adjusting your oratory to your audience."

Female Logic.—According to the *Newcastle Journal* (20/3/58), the Stipendiary Magistrate at Middlesbrough is reported to have said to a motor-car owner: "One can use a wife for many purposes, but not for driving a car." To this there can be added the recent evidence concerning a woman defendant, held responsible for an accident, who exclaimed in a fury to the other driver: "If you are a married man, you would know that I am surely entitled, if I give a signal, to change my mind."

On a recent Health Department prosecution.—

> An epicure dining at Crewe,
> Found quite a large mouse in his stew.
> Said the waiter, "Don't shout,
> And wave it about
> Or the rest will be wanting one, too!"
>
> Anon.

Tailpiece.—The Managing-Director was beaming. "The result of this case has exceeded our wildest expectations," he said. "My fellow directors and I think: how can we ever thank you?" "Ever since the Phoenicians invented money," replied counsel, "there has only been one answer to that question."

LAND TRANSFER: RESTRICTIVE COVENANTS.

(*Concluded from p. 174.*)

storm, tempest, or otherwise but not to such an extent that it cannot be substantially repaired, then the grantee will with all reasonable dispatch and diligence repair the said building and restore it to a state of safety and efficiency, and in the case of any dispute arising under this clause the same shall be referred to arbitration under the Arbitration Act 1908.

5. In the event of the demolition or destruction of the said building or in the event of it being damaged by fire, flood, lightning storm tempest or otherwise to such an extent that it cannot be substantially repaired and restored to a state of safety and efficiency then the foregoing restrictions as to user of the servient tenement shall cease and determine and the grantee whenever called upon by the grantor will execute a release thereof, and for the purposes aforesaid the grantee for itself, successors in title and assigns doth hereby appoint the grantor his successors in title and assigns its or their attorney to execute for it or for them in its or their name a release of the foregoing restrictions as to user of the servient tenement and a request to the District Land Registrar to cancel the said restrictions as to user on the appropriate folium of the Register Book, and in the case of any dispute arising under this clause the same shall be referred to arbitration under the Arbitration Act 1908.

6. The costs of execution, stamping and registration of these presents shall be borne by the grantee.

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO DOMINANT TENEMENT.

[*Insert official description of grantee's land.*]

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

[*Insert official description of grantor's land.*]

IN WITNESS whereof the parties hereto have executed these presents the day and year first before written.

SIGNED by the said A. B.)
in the presence of:)

C. D.
Solicitor,
Wellington.

THE COMMON SEAL of.....)
LIMITED was hereunto affixed in)
the presence of:)

.....Director

.....Director

THEIR LORDSHIPS CONSIDER.

"*Social Welfare.*"—The expression "social welfare" is very wide and very vague. As Lord Tucker said in *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572, 613; [1955] 1 All E.R. 525, 547, in considering the phrase "the promotion of social well being": "This is an extremely vague phrase which may have different meanings to different minds, and may include things considered by some, but not by others, to be advantageous. It would appear to cover many of the activities of the so-called 'welfare state', and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable. I find it impossible to construe these trusts, as the Court of Appeal have done, in such a way as to restrict the operation of this language to promoting or inculcating . . . 'those standards of secular conduct or behaviour expected of a good neighbour and a good citizen'."

Estoppel.—The principle applicable is to be found in the words of Lord Tomlin in the case of *Greenwood* v. *Martin's Bank Ltd.* [1933] A.C. 51: "The essential factors giving rise to an estoppel are I think:

(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3) Detriment to such person as a consequence of the act or omission." His Lordship continued, "Mere silence cannot amount to a representation, but where there is a duty to disclose deliberate silence may become significant and amount to a representation." This was a case where a husband, knowing his wife was forging cheques to draw on his bank account, kept silent, and was held not entitled to recover from the Bank" (*ibid.*, 57).

Voluntary Statement by Accused.—It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."—Lord Sumner in *Ibrahim* v. *R.* [1914] A.C. 599, 609.

Conspiracy Abroad.—In the same case His Lordship referred as follows to *R.* v. *Kohn* (1864) 4 F. & F. 68; 176 E.R. 470, a case in which a ship's carpenter, a foreigner, had been charged with conspiracy and scuttling. "The Court of Criminal Appeal interpreted this case as authority for the following four propositions: (i) That an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (ii) That to conspire to scuttle out of the jurisdiction is not indictable; (iii) To conspire to scuttle whether the ship should be within or without the jurisdiction is indictable as the ship might be scuttled in an English port or within English territorial waters; (iv) That to conspire to injure persons within by doing an act out of the jurisdiction is indictable. I agree as to (i) and (iii) but I do not think it is an authority for (ii) and (iv)." Stephen J., referring to this case in the seventh edition of *Roscoe's Criminal Evidence* at p. 244, expressed a view similar to that which I have indicated above as to what was actually decided, but added 'but on principle it ought to be criminal.' In his *History of the Criminal Law of England*, vol. II, at pp. 13 and 14, dealing with the question of conspiracies in England to commit crimes abroad (other than murder), he regards the law as unsettled, and expresses the view that it is the duty of the legislature to remove all doubt by putting such conspiracies, subject to certain possible exceptions, on the same footing as crimes committed in England.": [1957] A.C. 602, 631; [1957] 1 All E.R. 411, 419.