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SUBDIVISIONS IN CITIES AND BOROUGHS: ILLEGALITY OF SALE-AND-PURCHASE AGREEMENT EXECUTED BEFORE DEPOSIT OF PLAN.

THE late Mr Justice Hay, in *Concrete Buildings of New Zealand Ltd.* v. *Swaysland* [1953] N.Z.L.R. 997, held that an agreement for the sale and purchase of land in a subdivision in a borough, executed before the deposit in the Land Transfer Office of the subdivisional plan, in breach of s. 332 of the Municipal Corporations Act 1933, is per se illegal, and no rights under it can accrue to either party.

This judgment, in so interpreting the section, has caused considerable worry to conveyancers and their clients; and the position of the legality of sales of lots in subdivisions has been aggravated by delays in the Land Transfer Office in the depositing of the relative deposited plans. Moreover, as s. 332 (1) (a) of the Municipal Corporations Act 1933 (now re-enacted as s. 350 (2) (a) of the Municipal Corporations Act 1954) applied also to leases, considerable difficulties confronted anyone engaged in the preparation of agreements for sale or for lease of part of the land in a city or borough comprised in one certificate of title if the required subdivisional plan had not been approved and formally deposited.

Now, by a majority, the Court of Appeal, in *Griffiths* v. *Ellis* (to be reported), a judgment delivered on July 7, has held that s. 332 (7) (or s. 351 (8) of the Act now in operation) prohibits a subdivision otherwise than in accordance with the approved plan and prohibits a subdividing (as by an agreement for sale and purchase of one or more of the lots in the subdivision) before the deposit of the subdivisional plan in the Lands Transfer Office, so that any subdividing is illegal if it is not done in accordance with the approved plan and after the plan has been deposited. It was also held that, from the moment of the execution of an agreement for sale and purchase in contravention of s. 332, no rights of action under it accrue to either party, and all the consequences of illegality attach to it.

It is clear that there must be early amendment of the statute. And there is much to be said for its rendering retrospectively legal the many agreements, which, almost as a matter of necessity, have been entered into in contravention of s. 332 or of the sections which have replaced it.

The crucial subsections of s. 351 were as follows:

> (1) For the purposes of this section any land in a borough shall be deemed to be subdivided if—
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> (a) Being land subject to the Land Transfer Act, 1915, and comprised in one certificate of title, the owner thereof, by way of sale or lease, or otherwise howsoever, disposes of any specified part thereof less than the whole, or advertises or offers for disposition any such part, or makes application to a District Land Registrar for the issue of a certificate of title for any part thereof

and

> (7) Every person who subdivides any land otherwise than in accordance with a plan of subdivision approved by the Council, or, in case of an appeal in accordance with a plan of subdivision approved by the Board under this section, and before such plan has been duly deposited under the Land Transfer Act 1915, or in the Deeds Register Office, commits an offence and is liable on summary conviction to a fine of one hundred pounds:
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> Provided that no person, being the owner of any land, shall be deemed to commit an offence against this subsection by reason merely of the fact that he makes application for the issue to him of a separate certificate of title for any part of such land.

(These have been re-enacted in the Municipal Corporations Act 1954 as s. 350 (2) (a) and s. 351 (8), respectively).

The case of *Griffiths* v. *Ellis* concerned the sale of two unimproved sections situated in the Borough of Te Awamutu. The appellant, who was the owner of a block of land comprised in two separate Certificates of Title, proposed to subdivide the area into some thirty-nine building sections. On July 31, 1950, a scheme-plan of the subdivision was approved by the Te Awamutu Borough Council, but subject to the construction by the appellant of new streets and a service lane shown on the plan in accordance with the Council's roading conditions, and subject to a further condition as to a footway and a reserve. There were some later modifications of these conditions, but they are not important. On October 15, 1951, the Council purported to pass a resolution by way of special order "to make, layout, and dedicate as public streets and as a service lane" the streets and service lane delineated on the plan. On November 19, 1951, the Council passed a further resolution purporting to confirm the special order. Pursuant to these resolutions, transfers by way of dedication of the respective streets and service lane were consented to by the Council and subsequently registered in the Land Transfer Office at Auckland on December 10, 1951.

After the Council's passing of the resolution by way of special order, the appellant and the respondent

executed a written document dated October 19, 1951, providing for the sale and purchase of Lots 23 and 24 of the subdivision. Each lot had a frontage to one of the new streets. Lot 24 also abutted on the service lane. The purchase price was £560 payable as to a deposit of £78 10s. on the signing of the agreement and as to the balance on December 1, 1951, or upon the deposit of the Land Transfer plan whichever date was the later. Payment of the deposit was acknowledged. The document contained the following provision:

> 13. The land hereby agreed to be sold is part of a subdivision by the Vendor and this agreement is subject to the survey plan of such subdivision being approved and deposited. The vendor will at his own cost and with all convenient despatch do and execute all acts and documents necessary to have the survey plan of the said subdivision deposited in the Land Transfer Office at Auckland and will forthwith commence and carry to completion the construction of the streets in the said subdivision in accordance with the scheme plan already approved by the Te Awamutu Borough Council. If for any reason whatever such survey plan should not be approved and deposited, then the Vendor will refund to the Purchaser the deposit paid hereunder and this agreement shall be null and void.

A plan of the subdivision in due form had been previously received by the District Land Registrar at Auckland on June 27, 1951, for examination. According to an endorsement, such plan was deposited on December 10, 1951. Settlement took place shortly after and the respondent, by presenting a memorandum of transfer at the Land Transfer Office, became the registered proprietor of Lots 23 and 24. The respondent alleged that the appellant had failed to complete the construction of the streets in the subdivision in accordance with cl. 13 of the agreement. The Borough Council accepted dedication of the streets, relying upon some undertaking by the appellant to complete the then incomplete road work. That road work was never completed.

In an action, the respondent claimed specific performance, or, alternatively, damages for breach of contract. The learned Judge, Shorland J., found that a breach of contract had been proved and awarded damages in the sum of £250.

The appellant appealed from that determination.

Several grounds were argued by counsel in support of the appeal. One of the defences advanced at the trial was that the agreement, having been entered into before the deposit of the plan in the Land Transfer Office, was illegal by virtue of the provisions of s. 332 (7) of the Municipal Corporations Act 1933, which, at all material times, was in force; and, accordingly, no action would lie for the alleged breach of its terms. This defence, which did not succeed in the Court below, was again put forward by counsel for the appellant.

As we have already seen, for the purposes of s. 332 of the Municipal Corporations Act 1933 (now s. 350 (2) of the Municipal Corporations Act 1954, land in a borough is deemed to be subdivided when certain acts are done by the owner; and, by subs. (7), it was made an offence punishable by fine to "subdivide" land otherwise than in accordance with certain provisions contained in that subsection.

The appellant, as we have seen, contended that the contract of October 19, 1951, could not be enforced for the reason that it was rendered illegal by the provisions of s. 332 (7) of the Municipal Corporations Act 1933.

On one point the members of the Court were in agreement—namely, as to the effect of illegality if it should be found that the sale-and-purchase agreement was an illegal one. In beginning his judgment, North J. said:

> A plea of illegality sounds ill from the lips of a person who brands himself to be a wrongdoer and then seeks to avoid an obligation solemnly entered into which has resulted in £250 reaching his pocket—for this the learned Judge found was the difference between the value of the land with the benefit of the proposed street and other amenities and in its present State.
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> It may well be that in these days when citizens are faced with complicated legislation, there is room in this field for the law reformer, at least in cases where a person has unwittingly involved himself in a contract prohibited by statute and has paid money to the other party. However that may be, in my opinion, the law is clear; the Legislature with a view to public policy may either expressly or by implication prohibit the doing of certain acts and when an act is thus made malum prohibitum, any contract to do it is illegal; and if there is any attempt to enforce such a contract the defendant, if his conscience permits him, may set up the illegality to which he was a party; for *in pari delicto potior est conditio defendentis*: *Taylor* v. *Chichester and Midhurst Railway Co.* (1867) L.R. 2 Ex. 356, 379.
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> If then this contract is of a class expressly or impliedly prohibited by the statute, it does not matter whether the parties or either of them meant to break the law or not. If a contract is deliberately made to do a prohibited act, that contract is unenforceable: *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, 283. In the present case, the respondent signed the agreement with the knowledge that the subdivision plan had not yet been deposited and he must be assumed to know the law. If then the law was not being observed, then it seems to me that he was *in pari delicto*: *George* v. *Greater Adelaide Land Development Co. Ltd.* (1929) 43 C.L.R. 91, 103.

But, after coming together in agreement on the foregoing statement of principle, their Honours parted, Finlay J. and Henry J. reaching the conclusion that the appeal should be allowed, and North J., for the reasons given in his judgment, being of the opinion that it should be dismissed.

It may be of interest to summarize the reasons on which their Honours of the majority decided that the agreement of October 19, 1951, was illegal ab initio and no rights of action under it accrued to either party.

In his judgment, Finlay J. said, on the issue of illegality, that it had to be conceded that if, by the agreement for sale and purchase of October 19, 1951, the appellant committed an offence under s. 332, then the respondent was inescapably party to that offence. The agreement disclosed all the facts necessary in those circumstances to constitute the offence; and the respondent must be assumed to know the law. His Honour said that he readily agreed with what North J. said on that topic in his judgment (*cit. supra*). He also agreed with him that, if the contract relied upon by the respondent was illegal, then the action could never have been sustained, and that the appeal must necessarily succeed.

His Honour then considered the relevant subsections of s. 322:

> The scheme of draftsmanship is simple enough. In subs. (1), the Legislature has defined when and in what circumstances land is to be deemed to be subdivided; and subs. (7) prescribes what is to constitute an offence by reference to what subs. (1) defines as the meaning of the word "subdivided." Subsection (7), in its final form, is inartistically worded; but, for present purposes, its particular characteristic is that it adopts the word "subdivided" as defined in subs. (1). It is unnecessary, in consequence, to make further reference to it beyond saying that, by the subsection, the Legislature

apparently intended to prohibit the disposition of subdivisional areas before a plan of a subdivision attained the character of a deposited plan, and to protract the prohibition of alienations thereafter otherwise than in accordance with the plan as deposited. I, however, express no concluded view as to that interpretation; for the subsection is, as I have said, inartistically drawn, and may well be the subject of future litigation. Meantime, the primary and crucial question for the purposes of this appeal is the interpretation of s. 332 (1) (a).

His Honour then considered what the Legislature meant by the words "disposes" and "disposition" in s. 332 (1) (a):

On their face, they are equivocal in that, while they clearly prohibit complete alienation, they may or may not comprehend a contract for future alienation. They are, in fact, equivocal in much the same way as the word "sale" in the cases to which Danckwertz J. alludes in *Milner* v. *Staffordshire Congregational Union* (*Inc.*) [1956] Ch. 275, 281; [1956] 1 All E.R. 494, 497. Indeed, the words "dispose" and "disposition" seem to me to exhibit equivocality of the same character as the word "sale."

If the word "disposes" stood alone the Court would, as a matter of principle, be required to attach to it a restricted meaning—this being a punitive provision—which would not draw within the ambit of prohibited acts and proceedings anything not clearly so prohibited, and I, for my part, would be glad to have been able to find refuge in that principle in this case for it offends one's sense of justice that one who so obviously was a principal offender as the appellant was should enjoy the fruits of his offending with impunity. Unfortunately, I do not feel able to act in this instance upon that principle. As I read the subs. (1) (a), the word "disposition" which appears in it has clearly to be given the same meaning as the verbal form of the word previously used. The substantive form relates to the words "advertises or offers." Even, therefore, if the word "disposes" relates to complete alienations, then the words "advertises or offers" relate to advertisements or offers designed to effect complete disposition. In other words, they express preliminary steps designed ultimately to culminate in complete alienation. In the meantime, until a contract is made they relate to a mere readiness to sell and can only be fairly interpreted as referable to readiness to sell upon any terms.

Unfortunately, I am, in any event, unable to shut my eyes to the fact that complete alienation was the designed and ultimate purpose of the agreement of October 19, 1951. It seems to me, therefore, that that agreement, at the moment of its execution, must have come within the ambit of s. 332 (1) (a), however restricted a meaning may be attached to the words "disposes" and "disposition." There was, of course, no question of any advertisement: nor was there any evidence whether the appellant made an offer to sell to the respondent or whether he accepted an offer to purchase made by the respondent. That, in the circumstances, seems to me immaterial. The agreement is the product of offer and acceptance and if the offer were made by the respondent then, by acceptance the appellant became identified with and in a very real sense party to the offer.

If that were not so then, His Honour continued, although the owner of a subdivision was restrained from offering subdivisional areas for sale, yet he could legally accept offers. This must involve an untenable proposition, for the whole purpose of the legislation would be defeated by a simple and transparent subterfuge and one readily capable of adoption by any vendor. His Honour added:

What I have said is based upon the hypothesis that the word "disposes" must be interpreted as relating to a complete alienation. But, in truth, having regard to the context in which the word is used, and to its association with the words "advertises or offers for disposition," I think that the word "disposes" was intended to extend to an agreement to sell. It is significant that advertising and offering are absolutely prohibited without any reference to terms or conditions. That forcibly suggests that disposition—in other words, selling—by any method is prohibited.

His Honour then considered the effect of the condition set out in cl. 13 of the sale-and-purchase agreement, and said:

On either construction, I regret that, with great respect, I cannot conceive that the incorporation of a condition—precedent or subsequent—can affect the illegal character of the agreement here in question. Whatever the character of the condition, the agreement of October 19, 1951 purported, on its execution, to be a binding contract involving mutual rights and obligations upon the parties to it. Under it, if it were valid, the appellant had, with some degree of immediacy—the words are "with all convenient dispatch"—to do constructional work and to perform other acts and execute necessary documents. The condition expressed—whatever its character—had no relation to this obligation of the appellant as vendor, so that if the condition expressed in cl. 13 of the agreement is a condition precedent, it was not a condition precedent to those immediate obligations of the appellant as vendor to which I have referred. In respect of those acts, the rescission effected by the condition would be nugatory; for, by its terms, the only result which was to follow the termination of the contract by non-fulfilment of the condition was that the deposit was to be repaid, whereupon the whole agreement was to be null and void.

It is with regret that I reach this conclusion, for I was impressed with Mr. Harding's suggestion that it was inconceivable that the legislation was intended to make illegal a contract which, by its terms, was designed to secure compliance with the legislation. However, mature reflection convinces me that s. 332 (1) (a) is wide enough to cover, and does cover, any contract designed to effect ultimate alienation; and that, as I have said, was the obvious purpose and design of this agreement. It was therefore, in my view, an illegal agreement and all the consequences of illegality attach to it.

Mr. Justice Henry's approach to the interpretation of s. 332 (7), the penal subsection, was, first, to consider s. 335 of the Municipal Corporations Act 1920, which declared that it was an offence to subdivide otherwise than in accordance with a plan approved by the appropriate Borough Council. This Act was consolidated and amended by the Municipal Corporations Act 1933, in which s. 335 was replaced and amended by s. 332. The re-enacted section introduced an element of time of, as well as manner of, subdivision. In the result, His Honour observed, s. 332 (7) contained two factors which purported to govern the right to subdivide. First, there was an implied prohibition (by reason that it was made an offence) against subdividing otherwise than in accordance with the approved plan; and, secondly, there was a similar prohibition against subdividing before the deposit of the plan. His Honour went on to say:

It is not possible to gather from the Act itself, or from any other matter brought to our notice, the reason for the introduction of the factor of time or what particular mischief it was intended to prohibit. Section 332 (7), which is reproduced hereunder, with the words added in 1933 in italics, reads as follows:

> Every person who subdivides any land otherwise than in accordance with a plan of subdivision approved by the Council, ... *and before such plan has been duly deposited under the Land Transfer Act 1915* . . . . commits an offence and is liable on summary conviction to a fine of one hundred pounds:

The use of the conjunction "and" in introducing the element of time into the offence, has resulted in a badly constructed clause which, on one view, might be said to require an owner of land to be in breach of both elements before any offence is committed. This may lead to anomalous and insensible results. The subsection quite clearly intends to prohibit a subdividing otherwise than in accordance with the approved plan—that is, as to the mode of subdivision; and it also shows an intention to prohibit a subdividing before the deposit of the plan—that is, as to the time of subdivision. It does not intend that a compliance with one only of these factors will render compliance with the other unnecessary. There is no point in so providing. The obvious intention is

that no subdividing is to be done *unless* in accordance with the approved plan *and until* the plan has been deposited. If the subsection will fairly yield to such a meaning as is consonant with that intention, then that construction should be adopted: *Caledonian Railway Co.* v. *North British Railway Co.* (1881) 6 App. Cas. 114, 122, *per* Lord Selborne. I think the subsection can fairly yield to such a meaning. It is elliptical in form and when the ellipsis is supplied the meaning is clear. A proper reading requires that after the word "and" the opening words of the subsection should be repeated. The subsection would then read:

> Every person who subdivides any land otherwise than in accordance with a plan of subdivision approved by the Council, ... and *every person who subdivides any land* before such plan has been duly deposited under the Land Transfer Act 1915, ... commits an offence and is liable on summary conviction to a fine of one hundred pounds:

So read, the subsection gives effect to a clear intention of the Legislature to prohibit subdividing before the deposit of the plan, as well as requiring that the subdivision shall be in accordance with the plan. This construction is, I think, in accordance with the provisions of s. 5 (j) of the Acts Interpretation Act 1924.

His Honour went on to say that s. 332 (1) (a), by using the word "deemed", had extended the meaning of "subdivide" to each of the following acts if done by an owner of land comprised in one certificate of title—namely, if he

(1) by way of sale or lease, or otherwise howsoever, disposed of any specified part less than the whole;

(2) advertised or offered for disposition any such part; and

(3) made application to a District Land Registrar for the ssue of a certificate of title for any such part.

The learned Judge then said:

> When the transaction of October 19, 1951, was entered into no plan of the subdivision had been deposited in the Land Transfer Office, so, if it is deemed (as above) to be a subdividing of appellant's land, there was a breach by him of the penal provisions of s. 332.

It was contended for the respondent that, upon its true construction, the transaction of sale provided for in the written agreement was subject to a condition precedent, and, accordingly, no obligation to sell could or would arise under the document unless and until the condition was fulfilled. This, it was argued, prevented the transaction from being a "disposal" under s. 332 (1) (a).

In answer to that contention, His Honour said:

> The words "dispose" and "disposition" are equivocal and their meaning depends upon the context in which they are used. They may mean, and be confined to, an actual transfer of an interest in land to some other person. An example of this may be found in *Astley* v. *Manchester, Sheffield & Lincolnshire Railway Co.* (1858) 2 De. G. & J. 453; 44 E.R. 1065. On the other hand, it was said in *Carter* v. *Carter* [1896] 1 Ch. 62, 67, that they are not technical words but ordinary English words of wide meaning, which, where not limited by the context, are sufficient to extend to all acts effectively creating a new interest in property whether legal or equitable.
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> In the context of s. 332, these words are not limited to an actual transfer or lease or other disposition of an interest in land to some other person. That is clear on three grounds: First, the section extends to advertising and offering for disposition, which clearly do not create any interest in any other person. Secondly, all species of disposition are included by the very wide terms used—namely, "by way of sale or lease, *or otherwise howsoever* disposes." Such words are effective in sweeping in all species of disposal: *Attorney-General* v. *Seccombe* [1911] 2 K.B. 688, 703, per Hamilton J. They would thus include an agreement to sell: *Milner* v. *Staffordshire Congregational Union (Inc.)* [1956] 1 Ch. 275; [1956] 1 All E.R. 494. And, thirdly, since this section speaks of disposition before the deposit of the plan it must be aimed at transactions entered into before then. If that were not so, the section would be largely nugatory since no disposition can be completed by registration under the Land Transfer Acts until after deposit of the plan.

Since all species of disposal and offers of disposal come within the words of s. 332 (1) (a), the learned Judge examined the transaction of October 19, 1951, to see whether or not it was such a disposal or an offer of disposal of the subdivided land. The document provided that the appellant agreed to sell at a price of £560, of which the sum of £78 10s. was to be paid as a deposit. Settlement and title were to follow either on December 1, 1951, or on the day of the deposit of the plan (whichever was the later). The document thus provided for a complete disposal of appellant's interest in the land unless its conditional nature in some way prevented it from ultimately having that effect.

In the Court below, it was held that this condition was a condition precedent which prevented the contract from coming into operation unless and until the condition was fulfilled. While not assenting to that proposition, His Honour did not find it necessary to express any opinion on it for the reason, whether that be so or not, he considered s. 332 (1) (a) was wide enough to include such a transaction. The Court is entitled to, and must, look fairly at the nature of the transaction. The appellant entered into a document whereby he expressly said he has "agreed to sell" this particular piece of land on terms fixed in the document. Even assuming this did not create an absolute and immediately binding obligation to sell, it, nevertheless, was a clear and unequivocal statement by the appellant that he would sell the property to the respondent. The only reservation made by the appellant was that the sale was subject to the approval and deposit of a certain plan; and, if such plan was not approved and deposited, the "agreement" shall be null and void. His Honour continued:

> But the appellant has bound himself that he will with all convenient despatch do all acts and execute all documents necessary to effectuate such approval and deposit of the plan. The appellant has thus, by this transaction, placed himself in such a position that he cannot, without defaulting under the obligation he has entered into, refuse to transfer to respondent the legal title to this piece of land except in the event of his failing, after due effort, to have the plan approved and deposited. That, I think, places the appellant in a dilemma.
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> If the written document was not binding as a contract owing to the legal effect of a condition precedent suspending its operation pending the determination of the fate of the condition, then at least there was an unequivocal statement by the appellant that "he agrees to sell" the land on the terms set out in the document. That is clearly an offer to sell on those terms. Moreover, it was an offer to sell which bound the appellant and from which he could not resile by any unilateral act of his and from which he would be released only if, without default on his part, the condition operated so as to make the transaction null and void.
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> It was, even if subject to a condition precedent, a clear and unequivocal statement of the terms upon which the appellant was willing to become legally bound in the future to dispose of the whole of his legal interest in the land. That it may never become a binding contract does not prevent it from being an offer binding him to sell on those terms, which offer remained in force as such at least during the time stated in the document, that is, until the condition came into operation.
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> On the other hand, if the condition was a condition subsequent, there was a binding contract to dispose of the appellant's interest in the land. Such contract was, however,

liable to be discharged by operation of the happening of the condition.

In either event, the transaction would infringe the statutory prohibition.

After considering the contention of counsel for the respondent that the transaction was not hit by s. 332, since it was, both as to completion and possession, made expressly subject to prior compliance with the provisions of s. 332, His Honour said :

The Legislature has, in my opinion, provided that it is an offence to subdivide *before* the deposit of the plan. If the transaction is a prohibited one, the offence is complete as soon as the act is done. The fact that neither settlement nor possession will take place till after deposit of the plan is not relevant to the issue. It is clear from subs. (7) as a whole that it is not concerned with the question of whether or not possession or title is postponed until after approval and deposit of the plan—it is concerned with the doing of certain acts by the owner before the deposit of the plan. If the acts or any of them are done before that time, the offence is complete. That, ultimately, the sale will be according to the approved and deposited plan, is not relevant to the issue of guilt.

Henry J. then referred to *George* v. *Greater Adelaide Land Development Co. Ltd.* (1929) 43 C.L.R. 91, in which the High Court of Australia held that the prescribed steps must be taken before any sale of the land could lawfully be made, and that it was not a compliance with the statute to make the sale subject to the requirements of the legislation being later carried out. That, His Honour thought, was precisely the position in the instant case. Section 332 prohibited "subdividing" *before* deposit of the plan, and a subdividing which took place before the deposit of the plan, but subject to a subsequent deposit of the plan, was not a compliance with the express provisions of the legislation.

If the transaction was entered into in contravention of the statute, as in His Honour's opinion it was, then the effect of such illegality required consideration. On this point, he expressed himself as follows :

The law applicable is that laid down by Scrutton L.J. in *In re Mahmoud and Ispahani* [1921] 2 K.B. 716, 728, where the following passage appears :

"I think the law is laid down in *Cope* v. *Rowlands* (1836) 2 M. & W. 149, 157, where Parke B., delivering the judgment of the Court, said :

'It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, *Bartlett* v. *Vinor* (1692) Carth. 251, 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract ?'

If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract."

Hay, J. in *Concrete Buildings of New Zealand Ltd.* v. *Swaysland* [1953] N.Z.L.R. 997, reached a similar conclusion, and held that, in respect of a contract in contravention of the section, no rights of action would accrue to either party upon the contract.

His Honour concluded by saying that the respondent was a party to a document which was entered into in contravention of the legislation. He entered into the transaction with full knowledge that the plan had not been deposited. He was assumed to know the law. He now sought to recover damages for a breach of one of the terms evidenced by and included in that document. If the Court lent its aid, it would be enforcing a right arising directly from an illegal transaction in respect of which the respondent was a party having full knowledge of all the facts which constituted the offence against the statute. Such an action would not lie.

The appellant therefore succeeded in his appeal on the ground that the defence of illegality was available to him as defendant in the action.

The appeal was accordingly allowed, but without costs.

* * *

In view of the judgment of the Court of Appeal in *Griffiths* v. *Ellis*, an early amendment of s. 315 (8) of the Municipal Corporations Act 1954 is called for. The profession is concerned at the consequences affecting some hundreds of sale-and-purchase agreements concerning parts of a subdivision in a city or borough some of which have been made subject to the condition that the vendor duly deposits the subdivisional plan. This condition has been held to be of no effect in its context in an illegal agreement—that is, one executed before the deposit of the subdivisional plan.

Section 351 (8) of the Municipal Corporations Act 1954 is, so far as is relevant, as follows :

(8). Every person commits an offence who subdivides any land otherwise than in accordance with a plan of subdivision approved by the Council or, in case of an appeal, in accordance with a plan of subdivision approved by the Town and Country Planning Appeal Board under this section, and before the plan of the subdivision has been duly deposited under the Land Transfer Act 1952 or any former Land Transfer Act or in the Deeds Register Office, and is liable to a fine not exceeding one hundred pounds :

It may well be that the simplest solution would be to delete from subs. (8) the words "and before the plan of the subdivision has been duly deposited under the Land Transfer Act 1952 or any former Land Transfer Act or in the Deeds Register Office." This would have the effect of restoring the law to substantially what it was under s. 335 of the Municipal Corporations Act 1920. It would also bring subdivisions in cities and boroughs into line with s. 3 (2) of the Land Subdivision in Counties Act 1946. Uniformity of requirements in these matters is highly desirable.

It is important that all advertisements, offers, and contracts should continue to be illegal unless and until the local body has approved the subdivision, otherwise it would be possible for an unscrupulous or over-optimistic land-owner to advertise a scheme of subdivision without obtaining the local body's consent, and to collect deposits and instalments of purchase money, such as was done in *Swaysland's* case.

As a result of the town and country planning legislation, the approval of the local body at the outset has become considerably more important than it was when the restrictions on subdivision were introduced in 1920.

An amendment, such as is suggested, should be made retrospective to the commencement of the Municipal Corporations Act 1954, save that nothing in the amendment should apply with respect of any deed, agreement,

or instrument which before the enactment of the amendment had been the subject of a judgment in any Court of Law.

There are other matters relative to the application of s. 351 (8) which also call for amendment: see the article by Mr. E. C. Adams, "Subdivisions of Land in a City, Borough, or Town District": (1954) 30 N.Z.L.J. 386. Among these is the exclusion from the ambit of the subsection of all types of leases, whether of buildings (or parts of buildings) or of land, for any term (including renewals under the lease) of not more than, say, fourteen years (as in s. 125 (9) of the Public Works Act 1928). This and other suggested exclusions are, at the moment, under consideration by a Departmental Committee, representative of all the interests involved. Its deliberations were postponed until the Court of Appeal gave its decision in *Griffiths* v. *Ellis*, and they will shortly be resumed. This, however, should not be allowed to delay the modification of s. 351 (8) outlined above, which is urgently required in view of the Court of Appeal's recent decision.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Investigation of Affairs of Companies. *108 Law Journal*, 244.

CONTRACT.

Consideration for the Supply of "Know-how." *108 Law Journal* 295.

COPYRIGHT.

Crown Copyright. *225 Law Times* 253.

CRIMINAL LAW.

Conviction founded on Error. *225 Law Times*, 191.

Human Automatism. *102 Solicitors' Journal*, 260.

DAMAGES.

Damages and Income Tax. *108 Law Journal*, 227.

DEATHS BY ACCIDENTS COMPENSATION.

Suicide as a Consequence of an Accident. *108 Law Journal* 293.

DIPLOMATIC IMMUNITY.

The Immunity of Diplomatic Agents. *108 Law Journal*, 243.

DIVORCE AND MATRIMONIAL CAUSES.

Seven Years' Separation—Petition—Amendment—Application for Leave to substitute Correct Date of Commencement of Living Apart—Respondent not prejudiced by Amendment—Leave to Amend given—Divorce and Matrimonial Causes Act 1928, s. 10 (jj). In her answer to a petition upon the ground of seven years' separation, the respondent denied that she and the petitioner had been living apart since October 16, 1950, as alleged in the petition, and said they had been living together until April 3, 1951. On a motion by the petitioner to amend his petition accordingly, the point taken was that, although the seven years referred to in s. 10 (jj) of the Divorce and Matrimonial Causes Act 1928, if computed from April 3, 1951, would not have expired when the petition was signed and filed, it had expired before the filing of the petitioner's motion to amend. *Held*, That the Court had jurisdiction to allow the amendment in a suit based on the ground set out in s. 10 (jj), as such amendment would not prejudice the respondent in any respect, and no good purpose would be served by requiring the petitioner to commence his proceedings anew. (*Thomas* v. *Thomas* [1955] N.Z.L.R. 216, applied. *Lapington* v. *Lapington* (1888) 14 P.D. 21, distinguished.) *Arnst* v. *Arnst* [1957] N.Z.L.R. 722, referred to.) *Grey* v. *Grey*. (S.C. Wellington. 1958. June 20. Hutchison J.)

EVIDENCE.

Children as Witnesses. *225 Law Times*, 251.

FACTORIES.

Registration as a Factory—Fireman injured or killed in Factory fire—Fireman attending Premises not in Its Character as a Factory—No Cause of Action at Suit of Deceased Fireman's Personal Representative Against Crown on Ground of Negligence of Inspector in granting Certificate of Registration of Premises as Factory—Factories Act 1946, s. 11. On the true construction of the Factories Act 1946 as a whole, there is no provision which can be regarded as enacted for the benefit or protection of a fireman who attends the premises, not in its character as a factory, but as a building in which an outbreak of fire has occurred. (*Merrington* v. *Ironbridge Metal Works* [1952] 2 All E.R. 1101, and *Hartley* v. *Mayoh & Co.* [1953] 2 All E.R. 525 and on appeal [1954] 1 All E.R. 375, distinguished.) Consequently, the personal representative of a deceased fireman cannot have any cause of action under the statute against the Crown on the ground of negligence even if it were proved that an Inspector of Factories negligently granted a certificate of registration under s. 11 of the premises as being suitable for the purposes of use as a factory when the ventilation system in the basement was not effective, and the sole exit from the basement was a staircase without any handrail or adequate lighting and having a right-angled bend therein, and the fireman while engaged in the basement in fighting a fire died from asphyxia from smoke and carbon monoxide gas. *Goodman* v. *New Plymouth Fire Board and Attorney-General.* (S.C. New Plymouth. 1958. June 9. Shorland J.)

FISHERIES.

Offences—Allowing Sawdust to Flow into or near Any Water—"Allow to flow"—"Near"—Freshwater Fisheries Regulations 1951 (S.R. 1951:15), Reg. 103. Regulation 103 of the Freshwater Fisheries Regulations 1951 is as follows: "103. No person shall cast or throw into any waters or allow to flow into or place near the bank or margin of any waters any sawdust or sawmill refuse, lime, sheep dip, flaxmill refuse, or any other matter or liquid noxious, poisonous, injurious, or harmful to fish." There is no offence under the Regulation if the acts or omissions, or both, of the person charged can fairly be said to have "allowed the sawdust to flow into the waters." The term "allow to flow" as used in Reg. 103 does not include the dumping of sawdust in a heap which is later denuded of its contents by an unusually high spate of water. The word "near" in the Regulation has reference to any area where it is likely that the deleterious matter will enter a river, stream, or waters. It is a question of fact whether the sawdust was placed "near" the waters. *Gorton Bros. Ltd.* v. *Otago Acclimatisation Society.* (S.C. Dunedin. 1958. June 23. Henry J.)

GAMING.

Offences—Advertisement as to Availability of Information with Respect to Lottery—Shop-sign describing Shopkeeper as "Lottery Agent"—Notification in Window "We Air Mail to Hobart", "We Post Weekly to Brisbane"—Shopkeeper holding Himself out as Person ready to give "Information or advice" on Lotteries generally and Offering Selection of Lotteries—Implied Invitation to Public to obtain Information as to Respective Merits of Such Lotteries—"Information or advice"—Gaming Act 1908, s. 63 (a). B. was the proprietor of a tobacconist's shop. In the window of his shop there were a number of notices relating to overseas lotteries. One card intimated "We Air Mail to Hobart", another "We Air Mail to Tasmania", and a third "We Post to Brisbane Every Week." There was also an illuminated flash sign in the window which read "Lottery Tickets Sold Here", and a notice in gold lettering on the window which read "Herbert's, Lottery Agent." In addition, on display in the window was the result of a Queensland State lottery known as the "Golden Casket" with a notification that the second prize ticket had been purchased in the appellant's shop. B. was convicted by a Magistrate on a charge of exhibiting an advertisement contrary to s. 63 (a) of the Gaming Act 1908. On appeal from that conviction, *Held*, 1. That B., by his notice that he was a

" lottery agent ", held himself out as a person ready to " give information or advice " on lotteries generally, and, in offering his prospective customers a selection between two overseas lotteries, one in Tasmania and the other in Queensland, he was impliedly inviting the public to obtain information, if not advice, from him as to the respective merits of these two lotteries or in respect of a lottery ; and that he thereby committed a breach of s. 63 (a) of the Gaming Act 1908. 2. That it was not necessary, in order that a person should be convicted of an offence against s. 63 (a) that the information or advice must be of a nature that would assist the person applying to win the event in which he is interested, as the words " information or advice " in the case of a lottery mean no more than the kind of information or advice which could be given in respect to such an event, such as supplying information as to the size and number of prizes available, the cost of the tickets, and like matters. Appeal from the judgment of Spence S.M. (1957) 9 M.C.D. 184, dismissed. *Brien* v. *Leyland.* (S.C. Auckland. 1958. June 13. North J.)

HIRE-PURCHASE AGREEMENTS.

Vendor of Motor-truck described in Agreement as " owner " and Purchaser as " conditional purchaser "—Purchase-price payable by Deposit and Instalments—Property in Truck not passing until Whole of Purchase-price paid—Such Agreement a " hire-purchase agreement "—and not a " credit sale agreement "—Relationship of Bailor and Bailee created—Hire-purchase and Credit Sales Stabilization Regulations (No. 2) 1955 (S.R. 1955/184) Reg. 2. By an agreement in writing dated April 13, 1956, the plaintiff, a company engaged within the meaning of the Chattels Transfer Act 1924 in the trade or business of selling and disposing of motor vehicles, agreed with the defendant as to a used motor-truck therein described. In that agreement, the plaintiff company was referred to as " the owner " and the defendant as " the conditional purchaser." In broad terms, the agreement was one in which the company agreed to sell and the defendant agreed to purchase the truck for £944 15s. upon terms that the purchase price was to be paid by a deposit and a number of instalments, it being provided that the property therein should not pass until the whole of the purchase money had been paid. The deposit was paid and received on the execution of the agreement, and it was provided that the balance, said to be £819 15s. inclusive of interest and other charges, was to be paid by instalments of £107 9s. 2d. per month over a period of eight months. It was common ground that no payments were made after the payment of the original deposit. Supporting its action on such alleged default, the plaintiff company repossessed the vehicle on or about March 7, 1957, and assessed its value upon repossession at £200. It charged £30 for the expenses incurred in repossessing the truck, and sued for a total balance owing of £649 15s. *Held*, That the contract in writing dated April 13, 1956, was a " hire-purchase agreement " as defined in Reg. 2 of the Hire-purchase and Credit Sales Stabilization Regulations (No. 2) 1955, as the relationship of conditional vendor and conditional purchaser created by that contract, until the last payment thereunder was made, was that of bailor and bailee of the truck respectively. (*Helby* v. *Matthews* [1895] A.C. 471 ; *Karflex* v. *Poole* [1933] 2 K.B. 251 ; and *Woods* v. *Latham* (1907) 27 N.Z.L.R. 50 ; 9 G.L.R. 650, applied. *South Australian Insurance Co. Ltd.* v. *Randell* (1869) L.R. 3 P.C. 101 ; 16 E.R. 755, referred to.) Observations on the distinction between a " hire-purchase agreement " and a " credit sale agreement," as respectively defined in s. 2 of the Regulations. *Motor Mart Limited* v. *Webb.* (S.C. Auckland. 1957. December 12. Turner J.)

INCOME TAX.

Dividend Stripping. *102 Solicitors' Journal*, 335.

Purchased Annuities : Income Tax Liability. *108 Law Journal*, 308.

INCORPORATED SOCIETY.

Trust Fund in Bank for Benevolent Purposes—Objects of Trust exhausted—Resulting Trust in Favour of Contributors in Proportions of Contributions—Fund to be so distributed, subject to any Grants received brought into Hotchpot. In February, 1939, the Auckland Car Club (Inc.) set up an account with the Auckland Savings Bank called " The Midget Drivers' Benevolent Fund ", which, on March 31, 1958, showed a credit of £391 3s., the last withdrawal having been made in August, 1949. The club was no longer associated with midget-car racing and was anxious to be relieved of its trusteeship and to distribute the fund to the persons legally entitled. On originating summons for determination of questions relating to the fund, *Held*, 1. That the benevolent fund was not a fund for charitable purposes, for the essential element of public benefit was lacking ; and Part IV of the Charitable Trusts Act 1957 had no application to the fund. (*In re Trusts of Hobourn Aero Components Ltd., Air Raid Distress Fund* [1946] 1 Ch. 86, 194, 208 ; [1945] 2 All E.R. 711 ; *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297, 306, 308 ; [1951] 1 All E.R. 31 ; *In re North Devon and West Somerset Relief Fund Trusts* [1953] 2 All E.R. 1032, 1034, followed.) 2. That the objects of the original fund were exhausted ; and there was a resulting trust of the proceeds of the fund in favour of the contributors to it in the proportions in which they contributed, but any grants already received by them must be brought into hotchpot. (*Auckland Car Club (Inc.)* v. *New Zealand Midget Racing Car Federation (Inc.) and Others.* (S.C. Auckland. 1958. May 13. T. A. Gresson J. M. 52-56.)

LANDLORD AND TENANT.

Maintenance of Amenities supplied to Flats from a Central Source. *225 Law Times*, 257.

MENTAL DEFECTIVES.

Offences—Ill-treatment of Mentally Defective Person—Negligence insufficient to constitute Offence—Guilty Knowledge Necessary Ingredient—No Vicarious Liability—Mental Health Act 1911, s. 126. On a charge of ill-treatment under s. 126 of the Mental Health Act 1911, negligence in the oversight, care, or control of a mentally defective person is not sufficient to constitute the offence, as guilty knowledge on the part of the defendant is a necessary ingredient. (*R.* v. *Burney* [1958] N.Z.L.R. 745, distinguished.) A person cannot be held responsible under s. 126 for the acts of ill-treatment by another in any vicarious way, but only if he were found to be a party thereto within s. 90 of the Crimes Act 1908. *The Queen* v. *Walker.* (C.A. Wellington. 1958. July 8. Gresson P., North J., Cleary J.)

NEGLIGENCE.

The Doctrine of Volenti Non Fit Injuria. *225 Law Times*, 201.

Employers' Liability and Causation. *108 Law Journal*, 310.

Fireman Killed in Factory Fire—No Duty owed by Crown to Fireman by Reason of Certificate of Registration of Premises as a Factory—Factories Act 1946, s. 11. An Inspector of Factories, when granting a certificate of registration of premises as being suitable for use as a factory, can reasonably anticipate that if there is a fire in the factory building registered as such, that a fireman will examine for himself the condition of means of ingress and egress, light, ventilation and other circumstances as they exist at the moment, in assessing the risks involved in any decision which he may make to enter the building. A reasonable assumption, reasonably held, that a fireman will look and determine for himself, removes the fireman from the category of persons who were so closely and directly affected by the Inspector's act in granting a certificate that he ought reasonably to have had a fireman attending a future outbreak of fire in contemplation as being affected by his act. Consequently no action in tort lies against the Crown in respect of the granting of a certificate of registration under s. 11. (*Donoghue* v. *Stevenson* [1932] A.C. 562 and *Denny* v. *Supplies Transport Co. Ltd.* (1950) 66 T.L.R. (Pt. I) 1108, distinguished. Statement of Lord Wright in *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85, 105, referred to.) *Goodman* v. *New Plymouth Fire Board and Attorney-General.* (S.C. New Plymouth. 1958. June 9. Shorland J.)

NUISANCE.

Trees—Roots from Trees in Neighbouring Property—Damage to Plaintiff's Garden—Injunction restraining Owner of Trees from permitting Roots to Encroach on Plaintiff's Property—Damages for Plaintiff's Cost of Removal of Roots, for Loss of Summer Season through Getting Roots out of Property, and for Loss of Previous Summer Season. Actual and material damage was caused on R.'s property, on which vegetables and flowers were grown, by elm roots coming through from the defendant's elm trees ; and it amounted to a nuisance. In an action claiming a mandatory injunction against the defendants to remove the elm trees or to restrain the defendants from permitting the roots of those trees to encroach on R.'s land, and damages. *Held*, 1. That the evidence did not go far enough to justify a mandatory injunction to remove the trees. (*Mandeno* v. *Brown* [1952] N.Z.L.R. 447 ; [1952] G.L.R. 342, distinguished. *Darroch* v. *Carroll* [1955] N.Z.L.R. 997, referred to.) 2. That

there should be an injunction against the defendants restraining them from permitting the roots to encroach on R.'s land, the details of what they should do to carry out that duty properly being matters for them. 3. That R. was entitled to damages, for the loss of a summer season (1959) through the process of getting the roots out of his land, the cost to R. of removing those roots, and for the loss of the summer season of the year 1958. *Roud* v. *Vincent and Another*. (S.C. Christchurch. 1958. June 9. Hutchison J.)

PRACTICE.

New Trial—New Trial ordered upon all Issues save that of Damages—New Trial Wholly Independent of First Trial—Decisions of Court or Jury's Answers to Issues in First Trial raising no Res Judicata or any Estoppel against Either Party, save on Issue of Damages. Where a new trial is ordered, the new trial is wholly independent of the first trial. Where a particular issue is excluded in the order granting the new trial, then, save on that issue, the decision of the Court or the jury's answers to issues in the first trial do not give rise to res judicata as to the issues to be determined in the new trial, or raise any estoppel against either party in relation to those issues. (*Gray* v. *Dalgety and Co. Ltd.* (1916) 21 C.L.R. 509, applied.) In the circumstances, the Court of Appeal ordered a new trial upon all questions save that of damages. 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. The motion was removed into the Court of Appeal. *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. May 1; June 6. Gresson P., North J. Cleary J.)

Trial—Application for Order for Trial before Judge with Jury—Nature of Discretion Exercisable—Principles affecting Appeal from Exercise of Such Discretion—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—Order for Trial with Jury—Judicature Amendment Act 1936, s. 3. The discretion which is required to be exercised under the proviso to s. 3 of the Judicature Amendment Act 1936 is not to be regarded as an absolute and uncontrolled discretion, but one which may be reviewed by a Court of Appeal, but nevertheless one which is not to be reversed merely because its members would themselves have exercised the discretion in a different way. Only if there has been a wrongful exercise of discretion, in that the Judge did not apply the right principle or give no weight, or not sufficient weight, to relevant considerations, should the Court of Appeal reverse the order of the Court below. Each case must be decided on its own circumstances. *So held* by the Court of Appeal affirming the judgment of Barrowclough C.J. 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.) *So held* by Barrowclough C.J., affirmed by the Court of Appeal. *Sulco Limited* v. *Talboys*. (S.C. Wanganui. 1958. May 16, 29. Barrowclough C.J. C.A. 1958. June 19, 20; July 4. Gresson P. North J. McCarthy J.)

PRINCIPAL AND AGENT.

Ratification of Agents' Act. *108 Law Journal*, 261.

THIRD-PARTY PROCEDURE.

Found to pay Third Party. *102 Solicitors' Journal*, 299.

TRANSPORT.

Licensing—Taxi-cab-service Licences—Offences—Driver causeing Taxicab to be drawn up on or adjacent to Fully-occupied Stand—"Adjacent to a stand"—Transport Licensing Regulations 1950 (S.R. 1950:28), Third Schedule, Condition 6 (1) (d). The meaning of the word "adjacent" as used in Condition 6 (1) (d) of the Third Schedule to the Transport Licensing Regulations 1956 is to be determined by having regard to the position of the taxicab in relation to the stand, and not by having regard to the intentions of the driver. (*Wellington City Corporation* v. *Lower Hutt Borough* (1904) N.Z.P.C.C. 354, applied.) Consequently, a taxicab, which is not only separated from the line of taxis on the stand by an intersecting street, but is also angle-parked so that it has no real association with the taxi-stand, is not drawn up "adjacent to a stand." *Claney* v. *Bland*. (S.C. Auckland. 1958. June 19. North J.)

Offences—Driving Motor Vehicle while Disqualified—Extension of Period of Disqualification—No Extension after Period Expired—"Extend the period of his disqualification"—Transport Act 1949, s. 31 (1) (10) (Transport Amendment Act 1955, s. 8 (1)). Subsection (1) of s. 31 of the Transport Act 1949, has no application to offences under subs. (10) of that section, the only power to disqualify in respect of them being the power conferred by subs. (10) itself. The words "Extend the period" in subs. (10) do not apply to a period of disqualification which has expired before the date of the sentence, and limit the power to impose a further disqualification to cases where the original disqualification is still in force. (*Commercial Agency Ltd.* v. *Adams* (1901) 19 N.Z.L.R. 578; 3 G.L.R. 227; *Brooke* v. *Clarke* (1818) 1 B. & Ald. 396; 106 E.R. 146, applied. *R.* v. *Board of Control, Ex parte Winterflood* [1938] 2 K.B. 366, referred to.) *Kinsman* v. *Brown* (S.C. Christchurch. 1958. June 30. F. B. Adams J.)

VENDOR AND PURCHASER.

The Drafting of Special Conditions of Sale. *225 Law Times*, 240.

WILL.

Construction—Annuity to Widow—Distribution of Trust Fund postponed until attainment of Majority by Youngest Child—Widow surviving that Event—Capital Vesting in Remainderman on Youngest Child reaching Age of Twenty-one Years—Annuity Charge only on Income of Trust Fund. Where, in terms of a will, distribution is postponed for a reason affecting a life interest and not for a reason personal to the donee, vesting of capital is not postponed to the death of the tenant for life even where the only gift is in the direction to pay. The contingency of surviving the tenant for life cannot be imported into the gift unless such an intention appears in the will. (*In re Jobson, Jobson* v. *Moody* (1890) 44 Ch.D. 154; *Hallifax* v. *Wilson* (1809) 16 Ves. 167; 33 E.R. 947; *In re Mitchell* [1919] V.L.R. 315, and *Public Trustee* v. *Perkis* [1926] G.L.R. 340, followed. *Brown* v. *Moody* [1936] A.C. 635; [1936] 2 All E.R. 1695, referred to.) In accordance with the testator's will, the trustees, upon the coming of age of his youngest son on June 11 1913, set aside a sum of £2,500, to provide an annuity of £100 to the widow, and thereafter distributed the residue of the estate amongst the children of the testator then living. From April 1, 1935, the income became insufficient to pay the annuity, and at the date of the widow's death the deficiency in income was £709 0s. 10d. The trustees sought the direction of the Court on the question whether that sum should be paid to the widow's executor and also as to the person entitled to the fund of £2 500 or the residue thereof. *Held* 1. That the annuity was a charge on the income only of the trust fund. (*Trustees Executors and Agency Co. Ltd.* v. *Dimock* (1892) 18 V.L.R. 729 followed.) 2. That the children's shares vested on the day fixed in the will—namely when the youngest child attained twenty-one years of age without interfering in any way with the widow's enjoyment of her annuity. (*In re Deighton's Settled Estates* (1876) 2 Ch.D. 783 distinguished.) Consequently arrears of the widow's annuity at her death were not claimable by her executor. *In re Amodeo (deceased) Dignan and Another* v. *Amodeo and Others*. (S.C. Auckland. 1957. November 1. T. A. Gresson J.)

APPEALS FROM MAGISTRATES: PRINCIPLES APPLICABLE.

By D. W. McMullin.

(*Concluded from p. 187.*)

Appeals by Way of Case Stated Under Summary Proceedings Act 1957.

Provision is made by s. 107 of the Summary Proceedings Act 1957, replacing s. 303 of the Justices of the Peace Act 1927, for an appeal by way of Case Stated on a point of law. This procedure is not commonly used by the defendants who consider themselves to be wrongly convicted, except where the only point at issue is a purely legal one. It is the only means, however, whereby an informant who considers that a defendant has been wrongly acquitted by a Magistrate or Justices may appeal to the Supreme Court from the dismissal of the information. If an informant does so appeal, he will have to show that the Magistrate or Justices made an error of law. If the informant's only quarrel with the Magistrate's decision is that it is against the weight of evidence then he can only successfully establish his case on appeal if he can show that the evidence was so compelling as to require a conviction. Only then can he make the Magistrate's failure to convict on the evidence a matter of law. If the evidence is so compelling as to require a conviction to be entered then the Magistrate's failure to convict becomes a matter of law. It is not sufficient for the informant to show that there was insufficient evidence to justify the Magistrate in arriving at this decision. He must show that there was no sufficient evidence to support the verdict. In other words if he attacks the Magistrate's findings of fact he must show that there was not only insufficient evidence, but he must go further and show that there was no legal evidence to support the finding.

In *McLeod* v. *Bardswell* [1931] G.L.R. 327, a Magistrate had dismissed an information for keeping a common gaming-house, holding that the evidence was not sufficient to convict, and gave reasons for his judgment. An appeal was lodged by the prosecutor against the Magistrate's decision, and the appellant claimed that in view of all the evidence before him the Magistrate was bound to have convicted.

MacGregor J. said that the Magistrate appeared to have directed his mind throughout to the true question before him—was or was not the evidence before him sufficient to convict the respondent on a charge of keeping a common gaming-house? The Magistrate had found that the evidence was not sufficient to convince his mind of the respondent's guilt and the learned Judge held that he could not say that the Magistrate was wrong in coming to that decision He then went on to point out that to succeed the appellant had to show that a question of law was raised because there was no evidence adduced in support of the conviction. He said:

> "As was said by Sir James Prendergast C.J. in *Nankivell* v. *O'Donnell* (1893) 13 N.Z.L.R. 60, 61, 62. 'In substance, the question is whether the sufficiency of the evidence adduced in support of an issue is a question of law. Certainly it is not; it is a question of law whether *any* evidence has been adduced upon which a Magistrate's finding could be based, but it is not a question of law that, such evidence as was adduced being all one way and tending to prove a fact, the Magistrate was bound to accept it as sufficient. I am of the opinion that the question stated is not one of law.' I respectfully agree with that statement of the law on the subject in this Dominion. In England, the law appears to be the same. Although the evidence is set forth in the case (as here), yet the Supreme Court does not put itself in the position of the Justices in deciding on its weight or sufficiency but accepts their findings upon facts within their jurisdiction as conclusive whatever may be the opinion of the Court itself as to the value of the findings: *Cornwall* v. *Sanders* 32 L.J.M.C. 6. As a rule questions of the present kind arise on Case Stated after a conviction. It is not common in New Zealand to find a Case Stated after an acquittal. In such a case, however, the rule is clearly laid down by Lord Alverstone C.J. in *Stokes* v. *Mitchison* [1902] 1 K.B. 857 as follows: 'I will only add that I think this case brings out in strong relief the distinction between a Case Stated after an acquittal and a Case Stated after a conviction. Where there has been an acquittal, it is incumbent upon the appellant to show, upon the facts stated, that there must have been a conviction' (*ibid.*, 864). In other words, before the present appellant can succeed, he must show that the Magistrate could not in law have come to the conclusion which he did upon the evidence before him. In my opinion, he has failed to establish this, and accordingly his appeal must fail" (*ibid.*, 328).

That the appellant in such a case must show that there was no legal evidence to justify the Magistrate's decision before he can succeed was demonstrated also in *Walker* v. *Crawshaw* [1924] N.Z.L.R. 93. This was a case of an appeal by a person who had been convicted of wilfully doing a grossly indecent act in a public place. Dismissing the appeal, Sim J. said:

> "On such an appeal the decision of the Magistrate can be disturbed only when it is clear that there was no legal evidence to justify the decision" (*ibid.*, 96).

These cases were followed by the present learned Chief Justice, Sir Harold Barrowclough, in *Commissioner of Inland Revenue* v. *H. R. Eccleston Ltd.* [1955] N.Z.L.R. 162 where an informant appealed against the dismissal of informations for wilfully furnishing false returns of income. The appeal was dismissed because the appellant had not shown that upon the facts stated there must have been a conviction.

Notwithstanding the heavy burden resting on them, the appellants in such cases do sometimes succeed. In 1947 the Court of Appeal in England did allow two appeals by informants against the dismissal of informations which had been laid under the Road Traffic Act. These cases were *Bracegirdle* v. *Oxley*; *Bracegirdle* v. *Cobley* [1947] 1 K.B. 349. In each case, the respondents had been charged with driving heavy motor-vehicles at a speed dangerous to the public. In *Oxley's* case a vehicle of six tons, carrying a load of eight tons, was driven for one mile at a speed varying between 40 to 44 miles per hour. The maximum speed allowed by law was 20 miles per hour and the strip of road covered included a number of hazards.

In *Cobley's* case, the facts were somewhat similar, though the vehicle loads and weights were a little different. In each case, however, the Justices dismissed the informations, holding that in spite of the speed limit, the speed, having regard to the type of road and situation of the test, was not dangerous and there was nothing to distinguish the case from one of ordinary speeding.

Goddard L.C.J., speaking of the power of an Appellate Court on such an appeal by the prosecutor by way of Case Stated said :

" In this Court we only sit to review the Magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived " (*ibid.*, 355).

He then said :

" Mr Parker . . . concedes that if Magistrates came to a decision to which no responsible bench of Magistrates applying their mind to proper considerations and giving themselves proper directions, could come, this Court can interfere because the position is exactly the same as if the Magistrates had come to a decision of fact without evidence to support it. Sometimes it has been said when speaking of a jury that a verdict in those circumstances is perverse, and I have no hesitation in applying that term to the decisions of Magistrates which are arrived at without evidence to support them " (*ibid.*, 355).

Continuing, he said :

" In my opinion, it is impossible to say whether if a reasonably-minded bench of Justices, having facts such as these before them, could come to a decision that no offences had been committed " (*ibid.*, 356).

The cases were accordingly remitted to the Justices with an intimation that the offences had been proved and a direction to convict.

Appeals Against Dismissal of Informations Pursuant to Section 42 of the Criminal Justice Act 1954.

This section confers jurisdiction on the Magistrates' Court to dismiss informations as a matter of discretion.

The section superseded s. 92 of the Justices of the Peace Act 1927 and is wider in its effect than the repealed section. There are a number of cases on record of appeals by informants to the Supreme Court against the dismissal by Justices of informations pursuant to the provisions of s. 92 of the Justices of the Peace Act 1927 and under comparable legislation in England. In *Hall* v. *Jordan* [1947] 1 All E.R. 826, Goddard L.C.J. said :

" It has been held over and over again—both under s. 116 of the Summary Jurisdiction Act 1879, which enabled Justices to dismiss cases if they were of opinion that they were trivial and so forth, and under the Probation of Offenders Act 1907—that a proceeding of this sort on the part of the Justices can be reviewed in this Court " (*ibid.*, 827).

In *Jones* v. *MacDonald* [1939] N.Z.L.R. 928, Reed J. on an appeal from the dismissal of an information under the Licensing Act 1908, said :

" Although the discretion of Justices vested in them under s. 92 of the Justices of the Peace Act 1927 should not be lightly interfered with, I am satisfied that in this case the discretion was wrongfully exercised and it is the duty of the Court to reverse it " (*ibid.*, 930).

In *Duddy* v. *Joyce* [1919] N.Z.L.R. 201, Chapman J. held that the Magistrate's decision was final unless it could be shown to be quite unreasonable. This decision has subsequently been considered as being too restrictive. So in *Cotter* v. *Gilmour* [1950] N.Z.L.R. 80, Stanton J. held that the exercise of a Magistrate's discretion under this section could be reviewed beyond the narrow limits suggested in *Duddy* v. *Joyce*.

In *Gunn* v. *Nicholls* [1949] N.Z.L.R. 56, Gresson J. declined to follow Chapman J. in *Duddy* v. *Joyce* and, finding that the action of the Magistrate in dismissing the information was not warranted, allowed the appeal.

The section was again considered judicially in *Young* v. *Davis* [1954] N.Z.L.R. 269, where Hay J. said :

" The trend of authority in the question of appeals from Magistrates against the exercise of their discretion under s. 92 of the Justices of the Peace Act 1927 appears to be in the direction that such exercise may be reviewed wherever it appears that there has been an improper use of the discretion."

It is submitted that while s. 42 of the Criminal Justice Act 1954 gives Justices a more unfettered discretion than the original s. 92, that discretion should nevertheless be subject to some measure of review by the Supreme Court of Appeal.

Appeals from the Decisions of Magistrates in Civil Cases.

This matter has already been canvassed in considering the principles to be applied in the hearing of general appeals under the Summary Proceedings Act 1957. It will not therefore be necessary to refer to it further.

Appeals from the Decisions of Magistrates on the Assessment of Damages.

The same principles are applicable here as are applicable to any Appellate Court which is hearing an appeal from an assessment of damages made by a Judge alone. An Appellate Court is reluctant to interfere with an award of damages unless there has been a misdirection of the law or the amount is manifestly too much or too little. In *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] A.C. 601, Viscount Simon, speaking of the principles to be observed by an Appellate Court in deciding whether it is justified in disturbing the finding of the Court of first instance said :

" The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or a jury the Appellate Court is not justified in substituting a figure of its own from that awarded below simply because it would have awarded a different figure if it had tried the case at first instance " (*ibid.*, 613).

In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, Lord Wright said :

" In effect the Court, before it interferes with an award of damages should be satisfied that the Court has acted on a wrong principle at law or has misapprehended the facts, or has for this and other reasons made a thoroughly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the Appellate Court is to interfere, whether on the ground of excess or insufficiency " (*ibid.*, 617).

In *Flint* v. *Lovell* [1935] 1 K.B. 354, Greer L.J. said :

" In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled " (*ibid.*, 360).

The principle established in these cases was applied in *Clarke* v. *E. R. Wright & Son* [1957] 3 All E.R. 486, where Lord Evershed M.R. said :

" Nevertheless, I repeat that nothing short of clear proof that there has been either some error of principle or some wholly erroneous estimate applied, will suffice and the onus on an appellant seeking to alter the quantum of damages is a very heavy one " (*ibid.*, 493).

EASEMENTS AND RESTRICTIVE STIPULATIONS: MODIFICATION AND EXTINGUISHMENT.

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

In a previous article, *ante* p. 170, I discussed the noting of restrictive covenants on the Land Transfer Register, as authorized by s. 126 of the Property Law Act 1952. That section, it is to be noted, also authorizes

> 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;

These words obviously refer to a release, variation, or modification by agreement of the parties concerned.

Section 126 of the Property Law Act 1952 does not provide for any particular form of release, variation or modification. As, however, the section does not authorize the registration of a restrictive covenant under the Land Transfer Act but merely its noting on the appropriate folium of the register book, it is apprehended that the release, variation, or modification should be couched in the form of a deed.

As the instrument of restrictive stipulation probably contains reciprocal covenants by the covenantee it would also be advisable to have the deed executed by the registered proprietor of the servient tenement. The release, variation, or modification obviously must be signed by the registered proprietor of the dominant tenement, and, it is respectively submitted, also by the registered proprietor of any lesser estate or interest therein—e.g., by a mortgagee.

The operative part of a deed of release could probably read as follows:

> A.B. (the registered proprietor of the dominant tenement) doth hereby release C.D. (the registered proprietor of the servient tenement) and the said land (the servient tenement) from the obligations of the hereinbefore recited restrictions as to user of the said land (the servient tenement).

It is also worthy of note that s. 126 of the Property Law Act 1952 does not apply to easements. In practice, a voluntary release or partial release of a registered Land Transfer easement is effected by a transfer of the easement from the registered proprietor of the dominant tenement (or, if it is an easement in gross from the registered proprietor of the easement) to the registered proprietor of the servient tenement, followed by a request from the latter to the District Land Registrar to note a merger or partial merger of the easement, or, to be more correct, to note an extinguishment or partial extinguishment of the easement by unity of seisin.* Unfortunately, there is no provision for the registration under the Land Transfer Act of a voluntary modification or variation of a registered easement or *profit a prendre*. Where the necessary parties have agreed to a modification or variation of a registered easement or profit their intention can be carried out only by extinguishing the easement or profit in the manner previously explained in this paragraph and registering a new easement or profit in lieu thereof. It is submitted that, as opportunity presents itself, the Land Transfer Act 1952 could, with advantage, be amended by making provision for the registration of a Memorandum of Variation or Modification of a registered easement or *profit a prendre*: c.f. Form I in the Second Schedule to the Land Transfer Act, 1952, (Memorandum of Variation of Covenants, Conditions, and Powers of Mortgage) and Form L, therein (memorandum of Extension or Variation of Lease). If covenants in a mortgage or lease may be varied, why not also covenants in an easement or profit?

Section 127 of the Property Law Act 1952 empowers the Supreme Court to modify or extinguish both easements and restrictive stipulations, but, be it noted, not *profit a prendre*. That section reads as follows:

> 127. (1) Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied—
>
> (a) That by reason of any change in the user of any land to which the easement or the benefit of the restriction is annexed, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement or restriction without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction, or would, unless modified, so impede any such user; or
>
> (b) That the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part; or
>
> (c) That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the restriction.
>
> (2) Where any proceedings by action or otherwise are instituted to enforce an easement or restriction, or to enforce any rights arising out of a breach of any restriction, any person against whom the proceedings are instituted may in those proceedings apply to the Court for an order under this section.
>
> (3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement or restriction and the nature and extent thereof, and whether the same is enforceable, and, if so, by whom.
>
> (4) Notice of any application made under this section shall, if the Court so directs, be given to the Council of the borough or county or to [the Town Council] of the town district in which the land is situated and to such other persons and in such manner, whether by advertisement or otherwise, as the Court, either generally or in a particular instance, may order.
>
> (5) An order under this section shall, when registered as in this section provided, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement, or interested in enforcing the restriction, and whether those persons are parties to the proceedings or have been served with notice or not.
>
> (6) This section applies to easements and restrictions existing at the commencement of this Act or coming into existence after its commencement.
>
> (7) In the case of land under the Land Transfer Act 1952 the District Land Registrar may of his own motion, and on

* For a precedent see (1951) 27 N.Z.L.J. 176.

the application of any person interested in the land shall, make all necessary amendments and entries in the register book for giving effect to the order in respect of all grants, certificates of title, and other instruments affected thereby and the duplicates thereof, if and when available.

(8) In the case of other land a memorandum of the order shall be endorsed on such of the instruments of title as the Court directs.

It appears clear that, under these provisions, the duties of the District Land Registrar are ministerial and that he cannot in the first instance require production of the outstanding duplicate certificate of title before noting the modification or extinguishment in the register book.

This section ought to prove very useful in the event of the subdivision of the dominant tenement. The District Land Registrar is often in doubt whether or not an easement is appurtenant to every part of the subdivision. It is a rule of law that the burden cannot be increased on the servient tenement, and the wording of the easement may not give one any clue as to the original intention of the parties. Again, to take a converse example, a drainage easement may subsist against Blackacre in favour of Whiteacre, together with the right of entry over the whole of the servient tenement. If a new title is issued for a part of the servient tenement (Blackacre) considerably distant from the actual drain itself, should such new title be made subject to the easement ? These are questions frequently arising in practice, which the Supreme Court will now have jurisdiction to solve.

The section may, in appropriate cases, be invoked as to ask for an extinguishment or modification of a restrictive provision whereby the applicant's predecessor in title restricted his own user. But query whether by virtue of the section, an easement (and *semble* a restrictive covenant) can be " modified " so as to enlarge it : *Richardson* v. *Manawatu Tyre Rebuilders Ltd.* [1955] N.Z.L.R. 541, per Turner J. at p. 542 : " . . . . and subs. (5) by directing that the Court's order shall be binding on persons entitled to the easement or interested in enforcing the restriction appears to contemplate that the order shall operate to restrict, not to enlarge, easements."

N.B.—The right of way in theabove casew as most unusual, inasmuch as it purported to be an *exclusive* grant. The above case shows that an applicant must bring himself within the very words of the section. As to this case, see also article in (1955) 31 N.Z.L.J. 220.

Re Parimax (S.A.) Pty. Ltd. [1956] S.R. (N.S.W.) 130, Mann J. at p. 131, said :

" Before considering the facts I should state that in my view an applicant must bring himself within the section before he would be entitled to an order. It is not for a respondent to prove a negative. Secondly, the benefit of a restrictive covenant is a benefit arising under a contract, and is a form of proprietary right. An order modifying a restriction is a serious inroad upon the proprietary right which is vested in the person who is entitled to enforce the restriction. An order, therefore, which is opposed by the person entitled to the benefit of the restriction should not, in my view, be made, unless the appellant established to the reasonable satisfaction of the Court that one or other of the conditions prescribed by the section is being fulfilled."

The restriction was against erecting any building or retaining wall on the applicant's land which in height exceeded a point fixed at sixteen feet below the curb level of Eastbourne road on the southwest corner of the applicant's land, which was considerably below the level of the street ; and what the applicant wished to do was to erect a garage on foundations of some sort which would enable the floor of the garage to be placed approximately level with the roadway. The order was refused on the ground that the modification proposed would substantially injure the covenantee inasmuch as the proposed building would (a) substantially reduce the amount of sunlight which would otherwise shine upon the building erected on his land, (b) reduce the amount of natural light which in any event his property has the benefit of, (c) block a pleasant view which his land at present enjoys and so reduce the value of his property.

In the recent English case, *Re Ghey and Galton's Application* [1957] 3 All E.R. 164, the owners of the servient tenement applied for the modification of restrictive covenants entered into in 1908 and 1945, prohibiting the use of any part of the premises otherwise than as a private dwellinghouse. The applicants desired permission to use the premises as a convalescent home. The Court declined so to modify the covenants, because the intention of the covenants was to preserve the locality as a residential area, and that locality (Eastbourne in England) had not ceased to be substantially residential. As Lord Evershed M.R. put it : " These were not covenants which had been bequeathed to the twentieth century by those who developed their land a hundred or more years ago when social conditions were wholly different from those which obtain to-day." This case was decided under s. 84 (1) of the Law of Property Act 1925 (Eng.) the wording of which is not identical with s. 127 of our Property Law Act 1952 ; but I think it is clear from this case and the New Zealand and Australian cases already cited that an applicant under s. 127 must prove, either that the restrictive covenant or easement has become obsolete, or that its continued user unmodified hinders to a real, sensible degree, the servient tenement being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the easement or the covenants. Moreover the dominant owner or covenantee has a *proprietary* right, and the Courts will not lightly expropriate that right, not even " to make possible an entirely estimable enterprise (e.g., conduct of a convalescent home) by an entirely estimable company."

Cruelty and Desertion.—" We are not trying a desertion case. We are trying a cruelty case, and the difference may be of importance in this respect, that it might, in a desertion case, be necessary to know precisely what the wife knew at the moment when she left home ; but it is conceded that in this charge of cruelty it is the whole course of conduct of the husband in this particular respect which we are entitled to take into account in its impact on the wife's mental health, and I repeat that we are concerned only with what, for short, is now called mental cruelty, and so called with the approval of the House of Lords."—Lord Merriman P., in *Crawford* v. *Crawford* [1956] P. 195, 199 ; [1955] 3 All E.R. 592, 594.

TOWN AND COUNTRY PLANNING APPEALS.

Ideal Laundry Limited *v.* Petone Borough.

Court of Appeal. Wellington. 1957. July 17.

District Scheme approved by Town Planning Board under Town-planning Act 1926—Such District Scheme governed by Town and Country Planning Act 1953—Scheme not Subject or Subordinate to Local By-laws—Provisions thereof to be construed as Statutory Regulations—Test of Reasonableness inapplicable—Provisions of Scheme not Ultra Vires by Reason of Its containing Discretionary Powers by Way of Relaxation of Its Positive Requirements—Enforcement of Scheme—Town and Country Planning Act 1953, ss. 18, 19 (2) (b), 22 (1), 33 (3), 35.

In accordance with the requirements of the Town-planning Act 1926, the Petone Borough Council prepared a scheme in terms of that Act. That scheme was finally approved by the Town Planning Board on July 8, 1953, when the scheme was complete and binding on the Borough and all others concerned.

The appellant company had for a very long time carried on the business of a laundry in the Petone Borough. For some years it had in contemplation the erection of a building on vacant land owned by it adjoining its existing premises and connected with them by a covered way.

The appellant's land was situate in an area prescribed by the town-planning scheme as a "general residential district". Before the scheme had been finally approved by the Town Planning Board, the company had exercised its right of objection. Its objection was disallowed.

As the appellant's land had thus become subject to the Borough's town-planning scheme, it applied on February 4, 1953, to the Borough Council for a permit allowing it to erect a substantial laundry building on the vacant land adjoining its then existing laundry premises. That application was refused in March, 1953, on the ground that the premises were situated in a general residential district, and that the use intended to be made of the proposed building would be a contravention of the town-planning scheme. Another application for a permit to erect the proposed building was made on October 7, 1953. That application was declined by the Council on December 4, 1953.

The Town and Country Planning Act 1953 was passed on November 26, 1953, but did not come into force until February 1, 1954. At the date, there was no current application by the appellant for a permit to erect any proposed premises. All its applications had, at that time, been finally and completely rejected.

In the Supreme Court, the appellant sought a declaration that the town-planning scheme at all material times in force in the Borough of Petone was invalid. It also sought the issue of a writ of mandamus requiring the Petone Borough Council to grant to it a permit for the erection of a proposed building and requiring the Borough Council to permit the use of the building for the purposes of the appellant's laundry business or for any purpose not forbidden by law. Alternatively, the appellant sought a declaration that it was entitled to erect the building proposed by it in accordance with the by-laws of the Borough, the town-planning scheme notwithstanding, and that the appellant was entitled to use the building for the purposes of its laundry business or for any other purpose not forbidden by law.

For the reasons given by him, Mr Justice Turner held that the town-planning scheme of the Borough was valid and that the appellant was not, in consequence, entitled to any of the relief sought.

On an appeal against that judgment,

Held, by the Court of Appeal, 1. That the Borough's town-planning scheme, having been finally approved by the Town Planning Board before the Town and Country Planning Act 1953 came into force, was operative under s. 19 (2) (*b*) of that Act, as a district scheme coming within and governed by that statute, and, in consequence, any allegations of invalidity in the scheme had to be determined in the light of the provisions of that Act.

2. That a district scheme under the Town and Country Planning Act 1953 is not subordinate to the local authority's by-laws, or subject to any qualification introduced by those by-laws, since a town-planning scheme, by virtue of ss. 19 (2) (*b*) and 33 (3), has the force and effect of a regulation made under that statute and it has such force even if some of its provisions are outside the ambit of the previous legislation; and, accordingly, it is not examinable by the Court for reasonableness.

Taylor v. *Brighton Borough Council* [1947] K.B. 736; [1947] 1 All E.R. 264, followed.

Carroll v. *Attorney-General* [1933] N.Z.L.R. 1461; [1933] G.L.R. 890 (adopted in *F. E. Jackson & Co. Ltd.* v. *Collector of Customs* [1939] N.Z.L.R. 682, 720; [1939] G.L.R. 229, 242) and *In re Fletcher (A Debtor), Ex parte Fletcher* v. *Official Receiver* [1956] 1 Ch. 28; [1955] 2 All E.R. 592, applied.

3. That the types of discretion conferred upon the local authority by a town-planning scheme, so long as the discretion is exercisable and exercised for the purpose of giving effect to the objects of the Town and Country Planning Act 1953 as defined in s. 18 of the Town-planning Act 1926 (or within the purview of the matters referred to in ss. 3 and 15 and the Schedule of the Town-planning Act 1926), are not ultra vires merely because the scheme contains discretionary powers by way of relaxation of the positive requirements of the scheme in particular cases, with or without conditions.

4. That s. 22 (1) of the Town Planning Act 1926 did not deal with the contents of a scheme but only with its enforcement; and the obligations of a local authority "to enforce the observance of the requirements of the scheme" referred to the scheme as it stands, so that those obligations are to be read subject to the discretionary powers which form part of the scheme as it was finally approved by the Town Planning Board.

Appeal dismissed

Gabites *v.* Upper Hutt Borough.

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

Re-zoning—Brick Building suitable for Industrial but not Residential Purposes—Land in Centre of High-density Housing Area—Detrimental Effect of Small Industrial "Spot Zones" on Adjoining Residential Properties—Town and Country Planning Act 1953, s. 26.

Appeal, under s. 26 of the Town and Country Planning Act 1953, against a decision by the Council to re-zone land in Tararua Street for residential purposes in its District Planning Scheme No. 2 (Varied). The land was originally zoned for "selected light industry".

The grounds for the appeal were as follows: Standing on the land was a valuable brick building which could be utilized for industrial but not residential purposes; adjacent to the area there were existing industrial establishments and the zoning of this land as "industrial" would be a natural extension of this industrial area. The land was in the centre of a large residential area from which labour could be obtained; and, if selected light industries only were permitted, there would be no interference with the enjoyment of adjoining owners, as in the opinion of the appellant further provision for selected light industry was required in Upper Hutt.

The land had been re-zoned "residential" by the Council on the grounds that the brick building could be adapted for residential use, and, as in fact there were no adjoining industrial establishments, this would become a separate industrial area. The land was therefore re-zoned "residential," because it was in the centre of a large residential area and ample provision had been made elsewhere for industry.

The judgment of the Board was delivered by

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

1. That the area in question is in the centre of a large and attractively-developed residential district, part of which has already been developed as a high density housing area.
2. That the establishment of small industrial "spot zones" in residential areas is contrary to town-and-country-planning principles.
3. That to permit the establishment of such "spot zones" would have a detrimental effect on the properties of adjoining residential owners and would detract from the amenities of the neighbourhood. No order as to costs.

Appeal dismissed.

Belcher *v.* Masterton County.

Town and Country Planning Appeal Board. Wellington. 1957. December 23.

Zoning—Area Zoned for "Public Use" with View to Aerodrome Expansion—Objection to Zoning disallowed—No Possibility of Land being required for Aerodrome Purposes—Direction that Area be Zoned as "Rural"—Costs allowed—Town and Country Planning Act 1953, s. 38 (1) (a).

Appeal by the owner of a property comprising 27 ac. 3 ro. 9.9 pp. being part Lot 21, Deposited Plan No. 9250, part Sections 44, 45 and 46 Manaia Block IV, Tiffin Survey District being all the land comprised in Certificate of Title, Volume 564, Folio 269 (Wellington Registry).

Under the Council's proposed district scheme (No. 1 Section) this land was coloured chrome yellow on the relative district planning maps and accordingly was zoned as being for "public use". This land was so designated because of the possibility of its being required for the future development and extension of the Hood Aerodrome, which adjoined the appellant's property

The appellant exercised her right of objection to the zoning but her objection was disallowed and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). At the hearing the counsel intimated that the Council had been advised by the Department of Civil Aviation that investigations carried out by that Department indicated that there was no probability of the appellant's land being required for the development or expansion of the Hood Aerodrome and accordingly the respondent Council did not oppose the appeal.

The appeal is allowed and the Board directs that the Council's district scheme (No. 1 Section) be altered by zoning the appellant's land as "rural".

The Board heard the submissions of counsel on the question of costs. It considers that though the Council acted properly and consistently in the first place in zoning this land for "public use" there are grounds for making some award of costs.

The Board allows the appellant the sum of seven guineas.

Appeal allowed.

In re Beattie.

Town and Country Planning Appeal Board. Napier. 1957. December 16.

Subdivision—Area Zoned as "Rural"—Subdivision into Two Lots, one with House to be sold—Smaller House to be built on Other Lot—Land unsuitable for Agricultural or Pastoral Use—Adequate Water Supply and Land suitable for Sewage Disposal—Exception from District Scheme allowed—Town and Country Planning Act 1953, s. 33 (2)—Town and Country Planning Regulations 1954 (S.R. 1954-141, 1956-147), Reg. 35.

Application under s. 33 (2) of the Act. The applicant was the owner of an area of 3 ro. 2 pp. situate at Bay View (near Napier) being part Te Pahou Block, part Lot 2, deposited Plan 9295 and she wishes to subdivide this land into two allotments of 2 ro. 10 pp. and 32 pp. respectively. If the subdivision was approved, she proposed to sell the larger lot on which was the house she occupied and build a house on the smaller lot.

Under the Council's operative district scheme, the area in which this property was situate was zoned as "rural" though it was so zoned not because of its actual or potential productiveness but because it was not considered suitable for residential development.

The Council refused to approve the proposed subdivision.

The judgment of the Board was delivered by

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

1. That the land in question being a shingle bed is quite unsuitable for any agricultural or pastoral use.
2. That a reasonably adequate water supply is available and that the land is suitable for sewage disposal by way of septic tank.
3. That the applicant has made out a case for the district scheme to remain without amendment while her application for exception is allowed.

The Board is satisfied:

1. That the applicant has complied in all respects with the provisions of Reg. 35 of the Town and Country Planning Regulations 1954 as amended by Reg. 18 of the 1956 Amendment.
2. That no objections have been received to the proposed subdivision.

The Board approves the subdivision of the applicant's land as hereinbefore described into two allotments comprising respectively 2 ro. 10 pp. and 32 pp.

Application granted.

Tattersfield Ltd. *v.* Christchurch City Corporation.

Town and Country Planning Appeal Board. Christchurch. 1957. October 31.

Building—Extensions—Area, when Building erected, zoned as "Light Industrial"—Area Transferred by County to City and Area then zoned as "residential"—Building of Size suggested a "detrimental work"—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal by the owner of a property situated at the corner of Bexley Road and Brooke Street, New Brighton, comprising 2 ac. 1 ro. 38.3 pp.

When this property was purchased it was in the Heathcote County and had been zoned as light industrial.

In October, 1950, the Heathcote County Council granted the appellant company a permit to erect a factory on the site to a value of £6,900. This factory was used for the manufacture of carpet underfelt. In 1953, the area in which the factory was situated was transferred to the Christchurch City Council. In 1954 that Council issued a building permit for a small amenities block.

On June 25, 1956, the Council resolved to zone the area under consideration as "proposed residential".

On May 30, 1957, the company applied for a permit to erect extensions (covering 10,000 square feet) to the existing factory for the purpose of manufacturing bedding, blinds and furniture. This application was refused by the Council on the grounds that under its undisclosed district scheme the area was zoned as "residential".

The judgment of the Board was delivered by

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

1. That the area under consideration is predominantly residential in character. It is not a high standard residential area but over recent years its residential occupancy has steadily increased and it would appear that although it is low-lying and has some disadvantages as a residential area it suits the residential needs of persons of modest means.
2. That whether or not this area is finally zoned as residential, the appellant company can continue to carry on in its present premises as an "existing use" the manufacture of carpet underfelt or similar work.
3. The appellant company's present factory has a total floor area of 5,300 square feet. It wishes to increase the floor space by the addition of a further 10,000 square feet and to manufacture a different type of goods.

   Counsel for the appellant submitted that its present case is analogous to *Amuri Motors Ltd.* v. *Christchurch City Corporation* (1956) Town and Country Planning Appeals, 28, but in that case what was involved was a comparatively small addition to a large building. Here, the converse is the case: a large addition to a small building is contemplated. It is also open to question whether the manufacturing of blinds and furniture is "similar" to the manufacture of carpet underfelt.
4. That, as it is probable that this area will continue to be zoned as residential, a factory building of the size suggested would be a "detrimental work" within the meaning of s. 38 (1) (b) in that it would detract from the amenities of the neighbourhood likely to be provided or preserved under the respondent council's undisclosed district scheme.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Reasonable Man.—It is refreshing as well as salutary to read now and again an iconoclastic exposition of the cherished beliefs of the legal profession, founded as many of them are upon the different conditions of a past generation. Such a treatise is *The Advocate's Devil* (Stevens & Sons Limited, 1958) by C. P. Harvey, Q.C., sometime Vinerian Scholar of Oxford University; and it is recommended to all who are not intolerant of unvarnished criticism. The lawyer, he says, by his training and experience is spellbound by the attitudes of the Reasonable Man. This insufferable creature, who stalks through every chapter of the law of torts and is not above meddling with contracts as well, has a way of life which is all his own. He never reads a newspaper while walking along the street or steps off a pavement without looking both ways; he makes regular tests of the tyre-pressures on his motor-car; he never leaves a letter unanswered for more than forty-eight hours; he always puts on goggles when working a lathe; before buying a railway ticket he reads the conditions of carriage contained in the company's handbills; he knows the difference between felony and misdemeanour; he is always on the look out for a loose stair rod in his house and for butt-rot in the elm trees in his garden; he does not forget to turn the gas off; he pays no attention to rumour or gossip; he has never been known to make a joke; and if he has not long ago been divorced by his wife it can only be because she is the Reasonable Woman—a character unknown to the law. . . . . It is not to be supposed, for instance, that the legal profession is responsible for the wording of s. 12 (6) of the Rent Restrictions Act, 1920 (Eng.), which provides that "where this Act has become applicable to any dwellinghouse . . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies," and might well have been composed by the wife of the Reasonable Man while bathing the baby.

Shockers.—The Bench does not escape scot-free in Mr. Harvey's chapter on Judges. ("He certainly fulfils his avowed purpose of giving the reader plenty to think about," says Lord Monckton of Brenchley, in his foreword). In my time at the Bar, the author comments, there have been some dreadfully bad judges. None was worse than Lord Hewart C.J. Here was a man marvellously quick-witted, with a superb command of the English language, with a vast knowledge of public affairs, and with a flair for advocacy which had brought him to the front rank in law and politics. He lacked only the one quality which should distinguish a judge: that of being judicial. He remained the perpetual advocate. The opening of a case had only to last for five minutes before one could feel—and sometimes actually see—which side he had taken; thereafter the other side had no chance. There is little scope for advocacy in conducting a case before such a judge. On one historic occasion, Serjeant Sullivan refused even to try and walked out of Court instead. Another real shocker was Mr Justice Darling. He would lie back in his chair staring at the ceiling with the back of his head cupped in his hands, paying scant attention to any argument but waiting until some footling little joke occurred to his mind. When this happened he would make the joke, the Court would echo for about thirty seconds with sycophantic laughter, and then the process would start over again. During the hearing before the Judicial Committee of *Hoystead* v. *Commissioner of Taxation*, Lord Darling (as he had by then become) interrupted the closely-woven argument of Clauson K.C., which he did not appear to have been following, with a quotation from *The Compleat Angler*. Lord Sumner was so cross that he threw the book he was looking at on to the floor.

Educational Hazards.—An unusual defence was offered in a case recently called before Mr Scully S.M. where judgment was sought for a liquidated amount, viz., arrears of payments under a hire-purchase agreement. The Court file disclosed a letter written by the defendant's mother who said:

> "My daughter is not liable for these payments as she is a minor aged 18. Moreover, they should not have made her sign the agreement. She cannot read as she was at school when this changed over from sight to sound."

It seems that even a victim of the play way method must file a notice of intention to defend. Judgment notwithstanding.

On Addressing Judges.—A marked degree of confusion as to the manner of addressing Judges, inside and outside the Courts, leads Scriblex to repeat what he wrote in this column some years ago. Any young practitioner who persists in Court in addressing a puisne Judge as "Your Worship" has only himself to blame if he conducts his argument without the usual background of affability. "Your Honour" is the approved method of address in the Supreme Court; but, unless it is varied with the impersonal "Sir," the speaker may occasionally become as embarrassing as the counsel mentioned in *Cheerful Yesterdays*, who, owing to a nervous affliction, broke into a smile of welcome whenever a member of the Bench spoke to him. Away from the Court, the puisne Judge is referred to as "Mr Justice Blank," whether he is present or not, and always when introductions are in progress; although on less formal occasions he is usually addressed as "Judge"—never, however, should he be addressed as "Judge" followed by his surname. In ordinary conversation, use of the word "Judge" is all that is required. "Are you feeling better, Judge?" This will be taken as a kindly inquiry into some recent indisposition, without there being implicit in it the suggestion, that, when he pronounced judgment in the last case you were in before him, he was slightly unhinged. Nor does the word "Judge" in such circumstances conjure up, except to avid readers of Wild West stories, the picture of a small-town lawyer with bits of straw sticking out of his ears.

MASTER AND SERVANT.

Presumption of Yearly Hiring Questioned.

In *Mestrovic* v. *Felt and Textiles of New Zealand Ltd.* (Wellington: June 26, 1958) which will not be reported, an action claiming damages for wrongful dismissal, the following obiter dicta of the learned Judge, McCarthy J., may be useful for future reference.

In the course of his judgment, His Honour said:

"The plaintiff claims that this is a yearly hiring. He relies upon the presumption referred to in *22 Halsbury's Laws of England*, 2nd ed., p. 144, para. 235:

'If a contract of hiring and service is a general hiring, that is to say, without limitation of time, there is a presumption that the hiring is for a year, whether the contract is oral or in writing. This presumption exists not only when the original contract was a general hiring, but also when, at the expiration of a contract for a definite period of service, the service is continued under a second contract which is indefinite as to time.

A contract may remain a hiring for a year, even though it be subject to a provision giving either party liberty to determine it at the end of a less period than a year.

The presumption of a yearly hiring is capable of rebuttal; it is not an inflexible rule and must be considered in connection with the circumstances of each case.'

"How far this presumption is applicable in modern times to employment in commercial undertakings is, I think, uncertain. It had its origin in the agricultural contracts of an earlier England where clearly there was necessity to provide a continuity of service from one season to the corresponding season in the following year. It has been applied in its development to a broad band of employment, but its modern scope was questioned in the Court of Appeal in *de Stempel* v. *Dunkels* [1938] 1 All E.R. 238. In that case, Greer L.J. said:

'I also think that it is no longer the rule applicable to all cases that an indefinite hiring is a hiring for a year only. In my judgment, Pollock C.B., was right when he said in *Fairman* v. *Oakford* (1860) 5 H. & N. 635, that there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. One of the circumstances which determines matters of this sort may be a custom proved with regard to the particular employment, but there may be other circumstances pointing in the same direction' (*ibid.*, 246).

and later

"The rule with regard to an indefinite hiring, being, in the absence of a special agreement to the contrary, a hiring for a year, arose out of the hiring of agricultural labourers, which usually took place at a particular time in each year. Undoubtedly, in the last case referred to, it was applied to the engagement of an engineer at £500 a year. I think that it ought not to have been so applied, as it is unreasonable to suppose that either the employer or the engineer contemplated, when they entered into their agreement, that the agreement should be determined other than by reasonable notice. Applying the rule as to implied contracts stated by Bowen L.J., in *The Moorcock* (1889) 14 P.D. 64, and that stated by Lord Esher in *Hamlyn and Co.* v. *Wood and Co.* [1891] 2 Q.B. 488, I think that there must be implied in the contract between the plaintiff and Otto Dunkels in the present case a term to the effect that the plaintiff's employment should be determined only by a reasonable notice, and that, accordingly, the defendant, who, by his constant and repeated efforts, which up to a point were unsuccessful, in the end induced Otto Dunkels to regard the position as so unsatisfactory that he was ready to get rid of the plaintiff at any price, and did so without sufficient notice' (*ibid.*, 247).

"On the other hand, Slesser L.J. after referring to the passage from *Halsbury* quoted above, said that there was no doubt in his mind that the law was correctly summarized in that passage, though the presumption was capable of rebuttal and was not an inflexible rule (*ibid.*, 252). The nature of the contract must be considered in connection with the circumstances of each case. Scott L.J. was content to record his agreement with the views of Greer L.J. (*ibid.*, 261). This judgment was delivered in December, 1937.

"On November 2, 1938, Lewis J. in *Cernon* v. *Findlay* [1938] 4 All E.R. 311, upheld the presumption in a case of a sales manager to a commercial organization, although the amount claimed by way of damages was one month's notice in accordance with a custom said to rule in that particular trade. The hiring, being a yearly one and to commence at a future date, the learned Judge went on to hold that the Statute of Frauds applied. In *Fisher* v. *W. B. Dick and Co. Ltd.* [1938] 4 All E.R. 467, in a judgment delivered on the twenty-first of the same month, Branson J. followed the view of Greer L.J. in *de Stempel* v. *Dunkels* and applied the test of implied term in a claim for wrongful dismissal brought by a salesman in the oil blending and vending trade. One day later—namely, on November 22—du Parcq L.J., sitting as a Judge of first instance in *Jackson* v. *Hayes Candy and Co. Ltd.* [1938] 4 All E.R. 587, after a consideration of *de Stempel* v. *Dunkels*, held that the presumption still ruled and should be applied.

"In the following year, the Court of Appeal, in *Adams* v. *Union Cinemas Ltd.* [1939] 3 All E.R. 136, had the subject-matter before it again in relation to an executive of a cinema-operating company. There, du Parcq L.J. clung to his view that the presumption does still operate. Atkinson L.J., on the other hand, expressed approval of the views of Greer L.J. in *de Stempel's* case. The President of the Court, MacKinnon L.J., did not express a clear view one way or the other.

"This apparent divergence of views is an interesting study, and one is tempted to a detailed examination of it; but I find that unnecessary in this case. It is sufficient to say that, in my opinion, the view expressed by Greer L.J. in *de Stempel* v. *Dunkels*, even though it goes further than was necessary for the decision in that particular case, is the one which attracts me most. The presumption of a yearly contract with its agricultural origin is unfitted to commercial contracts in New Zealand in the year 1958, and the true search, I think, should be for the presumed intention of the parties.

"As I say, the academic question does not arise; for, in my view, the facts clearly override any presumption which may exist in favour of a yearly hiring in the instant case."