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THE JUDICIAL COMMITTEE: SITTINGS IN NEW ZEALAND.

FIFTY-FIVE years ago when he was impelled, with the Chief Justice, Sir Robert Stout, and others, to protest against an unwarranted attack by the Judicial Committee of the Privy Council on the New Zealand Court of Appeal, that eminent Judge, Sir Joshua Williams, while deploring their Lordships' suggestion that the Court of Appeal had been subservient to the Executive Council, could still say with dignity and conviction :

> " That the decisions of this Court should continue to be subject to review by a higher Court is of the utmost importance. The knowledge that a decision can be reviewed is good alike for Judges and litigants." ((1903) N.Z.P.C.C. 756.)

The significance of that observation, made in the Court of Appeal about the Court of Appeal, was emphasized twenty-seven years later when the Third Dominion Legal Conference in Auckland made the following affirmation of policy :

> " That this Conference, representative of the whole of the profession in New Zealand, resolves that the retention of the final right of appeal to His Majesty in Council is in the best interests of the Dominion of New Zealand and of the administration of justice therein." (6 NEW ZEALAND LAW JOURNAL, 102.)

That the profession's view of the supreme appellate jurisdiction of the Judicial Committee in exercise of the judicial prerogative of the Crown now delegated to the Committee, is unchanged, is not open to question ; and, for that reason, it must have been with lively interest, if not keen anticipation, that Judiciary and Bar alike read the statement by the Solicitor-General, Mr H. R. C. Wild Q.C., on his return from an appearance before their Lordships' Board in London on an appeal from New Zealand in which New Zealand counsel appeared for both litigants, that " arrangements may be made in the future for the Judicial Committee of the Privy Council to sit in Australia and New Zealand ".

The proposition is not a novel one. More than thirty years ago Sir John Simon, as he then was, made what is thought to be the first public suggestion of an ambulatory or peripatetic Judicial Committee visiting the Dominions in much the same way as a Judge going on circuit. It may be that little has been done in the interim to implement the proposal, but the idea has by no means died aborning. At the Commonwealth and Empire Law Conference in 1955, Mr Justice Gresson revived it in a notable speech in Westminster Hall, in which he said :

> " May I offer a suggestion : it is that their Lordships of the Judicial Committee of the Privy Council might sometimes come to us to hear appeals. We continue a faithful customer as, too, does our sister Australia, and I think I speak for both of us in saying we should welcome such visits. . . ."

And then, again, last year, when Lord Morton of Henryton, a member of the Board of the Judicial Committee, visited New Zealand in August, the question was raised on more than one occasion. His Lordship did not hesitate to confess that the notion of a peripatetic Judicial Committee appealed to him, and he undertook to discuss the matter with his colleagues on the Board when he returned to London (33 NEW ZEALAND LAW JOURNAL, 270).

It is impossible not to judge favourably of the principle of hearings on the spot in the Dominions which still recognize the jurisdiction of the Judicial Committee. It would bring all the Queen's Courts to people at present unable to contemplate the enterprise or cost of going to those Courts, and it is difficult to understand how the resulting expense could equal that now entailed by all parties to a final appeal in combination.

In the wider sense, such a reform would preserve not only the substance of a unified British system of law, but also its ancient heritage. The growth of independence within the framework of the British family of nations makes it increasingly necessary to strengthen the historic links which bind the constitutional elements of that Commonwealth.

A study of the history and development of the right of subjects, in the last resort, to appeal to the Sovereign, reveals a principle of growth and development, even in modern times. After the passing of the Judicial Committee Act 1833, Queen Victoria was the Queen of Great Britain (comprehensively including England, Scotland, Ireland, and Wales only) and the Colonial territories. Her present Majesty, in virtue of the Royal Prerogative, "the Source and Fountain of Justice", is the Head of the Commonwealth, but she is also Queen of each separate Dominion, including our own. For any Dominion which so desires, and always in respect of a Colonial territory, she exercises her prerogative of justice, through the Judicial Committee, for the benefit of her subjects.

The ease and swiftness of modern travel communications can be expected to ensure that always there will be available the very best judicial talent, a requirement indispensable to the retention of the complete confidence of litigants. The Royal Family has multiplied the public esteem and respect in which it is held by breaking through the traditional barriers of distance and isolation. It must follow that the measure of respect the Judicial Committee enjoys will be increased if it ceases to be the remote tribunal it had to be by reason of the exigencies of travel in the past century.

Finally, there is nothing in the Judicial Committee Act (3 and 4 Will 4 c. 41) 1833, under which the supreme appellate jurisdiction was re-established in its present form, to prohibit its members from sitting as the final appellate Court elsewhere than in the capital of the Commonwealth and dispensing justice to the humblest of Her Majesty's subjects on the other side of the world.

A technical difficulty may be raised, but it is easily disposed of. It is true that the opinion of the Judicial Committee, advising Her Majesty to allow or dismiss an appeal from a Dominion or Colony, takes the form of an Order in Council and becomes part of the records of the Parliament at Westminster. But every Order in Council made by Her Majesty's Privy Council (not the Judicial Committee) in relation to matters affecting the United Kingdom and a Dominion, or by the Executive Council of any Dominion or Colony, is similarly dealt with in relation to that Dominion or Colony: cf. the Privy Council Appeals Rules 1910, and their successors (*Sim's Supreme Court Practice*, 9th ed., 681 et seq.), which were re-gazetted in the *New Zealand Gazette*.

As we have seen, there is no statutory difficulty to prevent a sitting of the Judicial Committee away from Downing Street. So, too, there is no technical difficulty in holding a Privy Council out of the United Kingdom. This is shown by the fact that Her Majesty held a Privy Council at Government House, Wellington, early in January, 1954. How, then, can any technical or other difficulty arise from the sitting of the Judicial Committee of the Privy Council in any Dominion or Colony to hear appeals from its highest Courts, or from its opinion being expressed abroad or in London?

Coupled with the question of a peripatetic Judicial Committee is the matter of a more liberal scheme of appointment as Privy Councillors of Dominion Judges who hold or have held high judicial office. This extension of the personnel of the Judicial Committee would facilitate its sittings outside of London. There is statutory authority for such appointments, and, in the past, New Zealand Judges have assisted at various times, in London, in the work of the Board. Sir Robert Stout C.J. was a member of the Judicial Committee when it heard two Indian appeals. In 1914, one of New Zealand's distinguished Judges, Sir Joshua Williams, went to London to sit permanently as a member of the Committee, and did so until the time of his death twelve months later. Sir Michael Myers C.J., too, sat as one of the Board in hearing a Canadian appeal. Australians and Canadians holding high judicial office have frequently sat as members of it.

Now, however, some twenty years and more have passed since any New Zealand Judge sat at their Lordships' Board. The growing stature of the Dominions as independent nations and the high standing of their own appellate Courts, as exemplified by the High Court of Australia and our own new separate Court of Appeal, point to the wisdom of drawing on the experience of Commonwealth Judges, who are Privy Councillors, for this highest Commonwealth Court. As the Solicitor-General observed, the special experience of Dominion Judges would surely be of assistance to their Lordships in appropriate cases, as undoubtedly the experience of sitting with the Judicial Committee would be of great value to Dominion Judges, and, through them, to their Courts at home. And, by the appointment of more Judges from the Dominions as Privy Councillors, a peripatetic Judicial Committee would be greatly assisted in making fixtures outside of London.

It is important to remember that the Judicial Committee is not an English Court considering, or perhaps overruling, decisions of the Courts of Dominions recognizing its jurisdiction. It is, in personnel, and, in fact, constitutionally, a Commonwealth Court, comprising all Privy Councillors who hold or have held high judicial office in the Queen's realms, including at the present time the Chief Justice of New Zealand; and as such, it is important for its future and for the plenitude of the administration of the Queen's justice that its permanent members should periodically forsake the august precincts of Downing Street and go to hear appeals to it in the Dominions which willingly accept its appellate jurisdiction whenever work is there for it to do.

The Solicitor-General has raised our hopes. And any representation made by our Government to bring about sittings in this Dominion of the Judicial Committee to hear appeals from our Court of Appeal will have the fullest support and encouragement of the Judiciary and the Bar of this country.

SUMMARY OF RECENT LAW.

DIVORCE AND MATRIMONIAL CAUSES.

Practice—Discovery—Party's Denial on Oath of Adultery—Other Party not entitled to claim Discovery in Respect thereto—Divorce and Matrimonial Causes Act 1928, Practice—Slip Rule—Order perfected—Circumstances in which Court may amend—Cod of Civil Procedure, R. 426 D. Section 47 of the Divorce and Matrimonial Causes Act 1928 cannot be invoked to claim discovery in respect of charges of adultery where the party has already denied on affidavit the adultery charged. *Redfern* v. *Redfern* [1891] P. 139 and *Schoolcraft* v. *Schoolcraft and Ruhmoor* (1891) 65 L.T. 794 followed.) Rule 426 D of the Code of Civil Procedure enables the Court to amend an order which has been drawn upon only (a) where there had been an accidental slip in the order as drawn up; or (b actually decided. (*MacCarthy* v. *Agard* [1933] 2 K.B. 417 referred to.) An order for discovery, made on notice of motion by the respondent which asked for an order in the usual terms. As drawn up and perfected, it did not include the words of exception "save as to his alleged adultery." Such an order cannot ne amended or discharged by the Court which made it. But the petitioner may, nevertheless, make all or any claims to privilege from production of documents to which he may be entitled by law. *Prevost* v. *Prevost.* (S.C. Auckland. 1958. July 3. Shorland J.)

Seven Years' Separation—Wrongful Conduct of Petitioner subsequent to Separation—Such Wrongful Conduct not, of Itself, operating as Bar to Petition—"Wrongful act or conduct" confined to Conduct to which Separation due—Divorce and Matrimonial Causes Act 1928, ss. 10 (jj), 18. Wrongful conduct of the petitioner which, under s. 18 of the Divorce and Matrimonial Causes Act 1928, would operate as a defence must be wrongful conduct to which the separation was due. Once the state of living apart has commenced subsequent to wrongful conduct of either party which turns the separation into desertion will not of itself operate as a bar within the meaning of the words of the section. The respondent wife was confined in a mental hospital from March 1945, to September 1948. On her release, the petitioner would not receive her back in the matrimonial home, and thereafter they had lived separate and apart. On a petition under s. 10 (jj) of the Divorce and Matrimonial Causes Act 1928, *Held*, 1. That the action of the petitioner in refusing, on his wife's release from the mental hospital, to have her back was not, in the circumstances of the case, "wrongful conduct" within the meaning of s. 18 of the Divorce and Matrimonial Causes Act 1928, as his attitude was a justifiable one. 2. That, when the separation took place in September 1948, the state of living apart was broken, and that, as the husband's attitude at the time of the separation was justifiable, it did not cease later to be so. *G.* v. *G.* (S.C. Hamilton. 1958. June 19. Turner J.)

DOMAIN BOARD.

Powers of Board—Tenancies granted to Individuals and Erection of Holiday Cottages thereon—No Power conferred on Board to grant Tenancies—Tenancies arising by Implication from Actions of Board and Its Caretakers—Power not acquired by Estoppel—Acts done in Excess of Statutory Powers—Crown Entitled to Possession of Areas whereon Cottages erected—Reserves and Domains Act 1953, s. 27 (3) (c). A Domain Board is the creature of statute (the Reserves and Domains Act 1953) and constituted for a special purpose, and acts done by a Domain Board or its agents without the prescribed formalities, or for objects foreign to those for which it was formed are ultra vires. No power has been conferred by the Reserves and Domains Act 1953, or by any other statute, on a Domain Board to grant tenancies to individuals for private purposes inimical to the enjoyment of a Domain for public recreation; and neither the Minister of Lands nor the Domain Board can give themselves such power by estoppel. (*Minister of Agriculture and Fisheries* v. *Matthews* [1950] 1 K.B. 148; [1949] 2 All E.R. 724; and *Howell* v. *Falmouth Boat Construction Co. Ltd.* [1950] 2 K.B. 16; [1950] 1 All E.R. 538.) Where a Domain Board was at all material times expressly precluded by statute from dealing with the domain in respect of which it was appointed, the actions of that Board and its successive caretakers in purporting to grant tenancies, and the actions of the occupiers in erecting baches, were throughout illegal in the sense that they were done, if not in the face of an express prohibition, then at least in manifest excess of the powers conferred by the relevant legislation. The Crown was accordingly entitled to orders for possession against the occupiers of Domain land purported to be let to them. On an appeal to the Supreme Court under s. 71 of the Magistrates' Courts Act 1947, every ground which could not be met by evidence, and which the evidence shows could have been raised in the Magistrates' Court, may be raised on appeal. (*Parker* v. *Dobson* (1914) 33 N.Z.L.R. 1313; 17 G.L.R. 9, followed.) *The Queen* v. *Rushbrooke and Others.* (S.C.) Auckland 1958. July 10. T. A. Gresson J.)

INSURANCE.

Insurance of Flats. *108 Law Journal*, 228.

INSURANCE.

Non-disclosure of Previous Convictions. *102 Solicitors' Journal*, 280.

LAW PRACTITIONERS.

Taxation of Costs. *108 Law Journal*, 291.

LICENSING.

Offences—Supplying Liquor after Hours—Barman employed under Award—Barman engaged under Terms of Award providing for His Boarding and Lodging at Hotel wherein He is employed—Such Barman, when not engaged in Contract of Service, a "lodger" and entitled to Lodger's Privileges—Licensing Act 1908 ss. 191, 205 (2) (Licensing Amendment Act 1951, s. 4). A barman who is employed at an hotel and lives there in terms of a contract of service under an award is, when not engaged in his contract of service, a "lodger" within the meaning of s. 191 of the Licensing Act 1908, and is entitled to the privileges conferred on lodgers by s. 205 (2) of the statute, (as added by s. 4 of the Licensing Amendment Act 1957). (*MacDonald* v. *Graham* [1944] N.Z.L.R. 21, followed.) *Hopper* v. *Cahill* [1925] G.L.R. 380, distinguished.) *Police* v. *Rohe* (M.C. Auckland. 1958. June 20; 27. Astley S.M.)

POLICE.

Police Force Promotion Board—Examinations—Tests conducted by Senior Officers—Senior Officers not taking Part in Board's Deliberations on Reports of Tests—No Delegation by Board of Its Powers—Police Force Act 1946, s. 25 B—(Police Force Amendment Act 1954, s. 6). In an action arising out of certain recommendations for promotion in which the members of the Police Force Promotion Board were the defendants, the plaintiff sought certain declarations. The first of these declarations, as amended, was made by consent. The second cause of action was, in effect, that from April 30 to May 3, 1957, and from August 20 to August 23, 1957, courses were held at the Police Training School, Trentham, for senior sergeants and senior detectives who had qualified for promotion to higher rank, At those courses the members of the Police Force Promotion Board other than two of its members, examined or tested the senior sergeants and senior detectives on the basis of relative performances under competitive conditions; and the results were taken into account by the Board in making its recommendations. It was alleged that, in holding the examinations or tests and in taking the results into account as abovementioned, the defendants acted beyond any powers conferred on them by law; and the recommendations were accordingly invalid. There were about fifty senior sergeants and senior detectives qualified by examination for promotion to commissioned rank. They were stationed all over New Zealand. To one or other of the two courses referred to in the statement of claim all these senior sergeants and senior detectives were invited. The circular letter to each of them signed by the Deputy Controller-General, was couched in the form of an invitation; but it would appear to those receiving the invitations that failure to attend the course would prejudice their chance of promotion and accordingly that attendance could not be regarded as optional. The tests included a written paper, group discussions with each man in turn leading the discussion, and practical demonstrations all relative to police situations. There was a discussion on "The Job of the Inspector"; and there was a personal interview with every man by members of the Police Force Promotion Board along with other senior officers. There were always one or more senior officers present at the tests, including from time to time members of the Board. *Held*, 1. That there is nothing in s. 28 B of the Police Force Act 1947 (as enacted by s. 6 of the Police Force Amendment Act 1954) to prevent the Promotion Board from taking active steps to obtain material on which to consider matters relating to promotion set out in

Reg. 108 of the Police Force Regulations 1950; and those steps may extend to organizing and conducting such tests as were held; and that the actual conducting of the tests need not be by the Board itself or even by individual members of the Board. 2. That the Promotion Board in terms of s. 25 B (6) must, in its final deliberation on recommendations, act collectively; but there is nothing in s. 25 B to prevent the Board considering a report by one of its members on a test which he has conducted or which he has observed. 3. That there was no delegation of powers on the part of the Board as the deliberation on the matters relating to promotion was not entrusted to others. (*Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636, applied. *Vine* v. *National Dock Labour Board* [1957] A.C. 488 referred to.) *Devlin* v. *Barnett and Others*. (S.C. Wellington. 1958. June 10. Hutchison J.)

TRANSPORT.

Transport Licensing—Available Route—Deviation from Customary Road Route necessary for Delivery of Goods in Railway—Degree of Deviation sufficient to take Operator off "available route," Question of Fact—Transport Licensing Regulations 1950 (S.R. 1950/28), Reg. 29 (2)—Transport Licensing Regulations 1950 Amendment No. 10 (S.R. 1955/188) Reg. 2. The fact that a deviation from the customary road route is necessary in order to deliver to the railway does not necessarily exempt a goods service operator from the limitation on his licence fixed by Reg. 29 (2) of the Transport Licensing Regulations 1950 (as amended). An "available route" within the meaning of that Regulation is one which is, in fact, open and usable; and there is no economic element or implication in the word "available." (*Hanna* v. *Garland* [1954] N.Z.L.R. 945 and *Gordon* v. *Coldicutt* [1956] N.Z.L.R. 839, followed.) Therefore, the question whether the degree of deviation is such as to take the operator off the "available route" for the carriage of goods which includes at least thirty miles of open Government railway is one which is to be determined by the facts of each case. Although the distance involved may be the same in each case, the direction of travel may, in extreme cases, be a factor which, with other relevant considerations, the Court may take into account in deciding whether or not a particular route is an "available route." In the present case, a deviation to the railway station of one mile to the east of the corner at which the customary road route changed direction to the west was held to form part of an "available route," so that Reg. 29 (2) applies, and the goods should have been carried only so far as was necessary to permit of their carriage by rail—namely, to the railway station. (*Hanna* v. *Garland* [1954] N.Z.L.R. followed. *Gordon* v. *Coldicutt* [1956] N.Z.L.R. 837, distinguished.) *Quaere*, Whether, for example, a five-mile deviation to make a junction with the railway or a two-mile deviation over a nearly impassable roadway might well preclude the conclusion that these were part of an "available route." *Tuakau Transport Limited* v. *Donovan*. (S.C. Auckland. 1958. April 14; June 27. T. A. Gresson J.)

VENDOR AND PURCHASER.

Lots in Subdivision—Agreement for Sale and Purchase executed before Subdivisional Plan deposited—Agreement illegal—No Rights of Action accruing to Either Party—Effect of Condition in Agreement—Irrelevancy of Fact that Sale would ultimately be in accordance with Approved and Deposited Plan—"Disposes"—"Disposition"—Municipal Corporations Act 1933, s. 332 (1) (a), (7). G., who was the owner of a block of land under the Land Transfer Act 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 new streets and a service lane shown on the plan being constructed by G. in accordance with the Council's roading conditions, and subject to a further condition as to a footway and a reserve. On October 15, 1951, the Council purported to pass a resolution by way of special order "to make, lay out, 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 that 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 they were subsequently registered in the Land Transfer Office at Auckland. The Council certified that the requirements of s. 125 of the Public Works Act 1928 had been satisfied in respect of such streets, but in fact the roading had not been completed. On October 19, 1951, after the passing of the resolution by way of special order, G. and E. executed a written document providing for the sale and purchase of two unimproved lots of the subdivision. Each lot had a frontage to one of the new streets, and one of them 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. Such plan was deposited on December 10, 1951. Settlement took place shortly after; and E., by presenting a memorandum of transfer at the Land Transfer Office, became the registered proprietor of the two lots. E. then alleged that G. had failed to complete the construction of the streets in the subdivision in accordance with cl. 13 of the agreement. In an action, E. claimed specific performance, or, alternatively, damages for breach of contract. Shorland J. held that the agreement of October 19, 1951, did not contravene s. 332 of the Municipal Corporations Act 1933, since it was so drawn that all the provisions of the agreement which related to the sale were subject to a condition so as to impose no obligation upon the purchaser until the deposit of the subdivisional plan in the Land Transfer Office; that it was the agreement itself, and not performance of it, which was expressed to be subject to the condition; and, further, that the agreement was not, and could not be, a "disposition" of the land until and unless the condition upon which the very agreement itself depended was fulfilled. In His Honour's view a conditional agreement, so long as the condition precedent remained unfulfilled, could not constitute an offer for "disposition" of land as distinct from a conditional offer; and he held that, as no breach of s. 332 (7) of the Municipal Corporations Act 1933 had been proved, the agreement was enforceable, and that a breach of it had been proved. E. was awarded damages in the sum of £250. From that judgment, G. appealed. *Held* by the Court of Appeal, Finlay and Henry JJ., (North J. dissenting) That the appeal should be allowed as the agreement for sale and purchase was in contravention of s. 332, and the appellant, as the defendant in the action, had the defence of illegality available to him. For the reasons: Per Finlay and Henry JJ. 1. That s. 332 (1) (a) of the Municipal Corporations Act 1933 was wide enough to cover, and did cover, any contract designed to effect ultimate alienation; and that, consequently, it extended to an agreement to sell. 2. That, in respect of a contract in contravention of s. 332, no rights of action accrue to either party upon the contract. Per Finlay J. 1. That complete alienation was the designed and ultimate purpose of the agreement for sale and purchase of October 19, 1951; that the parties to it offended against s. 332, as it was the produce of offer and acceptance, and, if the offer were made by the respondent purchaser, then, by acceptance, the appellant vendor became identified with, and in a very real sense, party to that offer; and, at the moment of execution, all the consequences of illegality attached to it. 2. That the incorporation of a condition, precedent or subsequent, did not affect the illegal character of the agreement, as, whatever the character of the condition in cl. 13, the agreement purported, on its execution, to be a binding contract involving mutual rights and obligations on the parties to it. Per Henry J. 1. That s. 332 (7) prohibited a subdivision otherwise than in accordance with the approved plan, that is, as to the mode of subdivision; and it also prohibited a subdividing before the deposit of the plan in the Land Transfer Office, that is, as to the time of subdivision: so that no subdividing could be done legally unless in accordance with the approved plan and until the plan had been deposited. 2. That the agreement for sale and purchase provided for a complete disposal of the appellant's legal interest in the land; that, if the sale was subject to a condition precedent, it was 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; and that, if the

(*Continued on p. 229*).

MR J. N. WILSON, Q.C.

Call to Inner Bar at Auckland.

Mr. John Nigel Wilson was called to the Inner Bar at a largely attended function in the Supreme Court at Auckland on June 16. Mr Justice Turner presided on the Bench and had associated with him, in his welcome to the new Queen's Counsel, Mr Justice Shorland and Mr Justice T. A. Gresson. At the Inner Bar itself, to add their congratulations and felicitations to Mr Wilson, were the Attorney-General, the Hon. H. G. R. Mason Q.C., Mr H. P. Richmond Q.C., Mr. L. P. Leary Q.C., and Mr A. L. Tompkins Q.C. of Hamilton, who had himself been called only a week previously. Sir Vincent Meredith Q.C. was absent through indisposition.

The body of the Court was practically filled by the representative attendance of metropolitan and provincial practitioners, and Mr Wilson's family and non-professional friends occupied the gallery.

Mr Wilson, having, at the request of Mr Justice Turner, read the Order in Council granting his Commission as a Queen's Counsel, presented the document to His Honour, who then invited him to read and sign the traditional declaration. This having been done and the signature witnessed, His Honour called upon Mr Wilson to take his place within the Bar.

After the customary obeisance to the Bench and the exchange of courtesies between the new silk and the Inner and Outer Bars, Mr Justice Turner expressed the pleasure of himself and his brothers at sitting together that afternoon on the occasion of Mr Wilson's call to the Inner Bar.

" It must be a matter of satisfaction to yourself to see how large a number of your fellow-practitioners have set aside their own engagements to attend in Court and to be present at your call," said His Honour, addressing Mr Wilson. " Indeed, it is a demonstration of the affection and regard in which you are held by your professional brothers. Two of the Queen's Counsel senior to yourself practising in the city of Auckland are present in Court to welcome you ; and the learned Attorney-General has come from Wellington and Mr Tompkins from Hamilton to join in the congratulations which I now tender to you.

" Not every person who is ambitious for the distinction attains the dignity of the patent of Queen's Counsel. There are, of course, many who for personal reasons never ask for it ; but, among those who do, the distinction is by no means automatic. Ability, industry, application, judgment, resolution, and courage in adversity—all these qualities are necessary ; but added to all these, above all, are generosity and integrity.

" All present are pleased to honour you by acknowledging these qualities in yourself, and Bench and Bar join in congratulating you on your call.

" The profession will, I am sure, be pleased to see that the learned Attorney-General has made time to attend at the Court as the Leader of the New Zealand Bar, to make his bow on this occasion. This gesture, which no doubt was made at some personal inconvenience, has helped to dignify the occasion, and to make the signal honour which is conferred this day upon you.

" We all join in wishing you distinguished success in your career as one of Her Majesty's Counsel learned in the law, and many years of good health in which to enjoy it."

SUMMARY OF RECENT LAW.

(*Concluded from p. 228*).

condition was a condition subsequent, there was a binding contract to dispose of that interest : so that, in either event, the transaction infringed the prohibition contained in s. 332 (7). 3. That, if any of the acts prohibited by s. 332 (7) is done by the vendor before the deposit of the plan, the offence is complete ; and that the fact that, ultimately, the sale will be in accordance with the approved and deposited plan, is not relevant to the issue of guilt. (*George* v. *Greater Alelaide Land Development Co. Ltd.* (1929) 43 C.L.R. 91, applied. *Taylor* v. *Chichester and Midhurst Railway Company* (1870) L.R. 4 H.L.C. 428 and *R.* v *R. W. Proffitt Limited* [1954] 2 Q.B. 35, distinguished. *Concrete Buildings of New Zealand Ltd.* v. *Swaysland* [1953] N.Z.L.R. 997, referred to.) Appeal from the judgment of Shorland J., allowed. *Griffiths* v. *Ellis*. (S.C. Hamilton. 1956. May 1, 22. Shorland J. C.A. Wellington. 1957. April 8, 9 ; September 18. 1958. July 7. Finlay J. North J. Henry J.)

WILL.

Accumulation of Income—Restriction of Accumulation—Cutting-down of Period so as to fit Testator's Intention—Disposal of Released Income at End of Appropriate Accumulation Period—Accumulations Act 1800 (39 and 40 Geo. 3, s. 98). In order to determine which of the periods of accumulation is applicable under the Accumulations Act 1800 (the Thellusson Act), the Court must look for the one period which will fit the case before it, i.e., not the period which would best effectuate the intention, but the one which actually fits the intention as declared by the testator. (*In re Errington, Errington-Turbutt* v. *Errington* (1897) 76 L.T. 616, followed.) The only permitted period of accumulation which fitted the present case (in which there was no question of the infringement of the rule against remoteness of vesting) was the period of twenty-one years from the death of the testator ; and the directions for accumulation were valid and effectual for that period, but ceased to be valid and effectual after the expiration of that period. Where, under a will, vested interests are not intended to take effect in possession until the happening of a future event (e.g., the death of the survivor of the testator's widow and sister), and the testator has not merely directed that certain annuities should be paid until then but has said that there should be no division of the fund until that event happened, the Thellusson Act does not accelerate the possession of those interests. In this case, the direction for accumulation related to the income of a trust fund which was, for all practical purposes, the same as the testator's residuary estate. The income released as a result of the accumulation being stopped by the statute was accordingly not disposed of by the will. (Dictum of Lord Maugham L.C. in *Berry* v. *Green* [1938] A.C. 575, 581-582, followed. *Weatherall* v. *Thornburgh* (1878) 8 Ch.D. 261, applied. *Saunders* v. *Vautier* (1841) 4 Beav. 115 ; 41 E.R. 482, distinguished.) Where a will contains both a direction to add surplus income to the corpus of a fund and a direction to resort to the corpus to make an annuity up to a certain amount if the income in any year is insufficient, are siduary legatee whose interest is postponed in possession cannot claim that a share of surplus income be paid to him as it arises, merely because his interest is indefeasably vested. It is immaterial that, having regard to the size of the estate, it may be extremely unlikely that resort will ever have to be made to the corpus to make up the annuity. There was accordingly an intestacy as to so much of the income as was, by the Thellusson Act, released from the testator's direction to accumulate. (Statement by Sir Owen Dixon C.J. in *Thomas* v. *Perpetual Trustee Co. Ltd.* (1955) 93 C.L.R. 537, 544, followed.) *In re Griffin (deceased), Dooly and Another* v. *Griffin and Others.* (S.C. Wellington. 1958. May 9. Barrowclough C.J.)

THE LATE SIR ROBERT STOUT, CHIEF JUSTICE.

Unveiling of Portrait.

A notable addition to the portrait gallery of the Wellington Supreme Court was unveiled before a representative gathering of the Judiciary and the Bar on July 23. It was an oil painting by the Australian painter, William Dargie, of Sir Robert Stout, Chief Justice for twenty-seven years and a notable figure in the political and educational development of the Dominion for more than half a century.

The portrait was the gift of the Stout family and was unveiled by Sir Robert Stout's eldest son, Dr Robert Stout, who had associated with him at the ceremony his sister Mrs. T. M. Holmden, of Auckland, and his brother Mr T. D. M. Stout, of Wellington, as well as representatives of succeeding generations.

The Chief Justice, Sir Harold Barrowclough, presided on the Bench and was accompanied by Mr. Justice Gresson P., Mr Justice Cleary, Mr Justice Hutchison, Mr Justice McCarthy, and three former members of the Judiciary, Sir David Smith, Sir Robert Kennedy, and Sir Arthur Fair. Sir Arthur Tyndall President of the Court of Arbitration and Judge Stilwell and members of the Magistracy were also present.

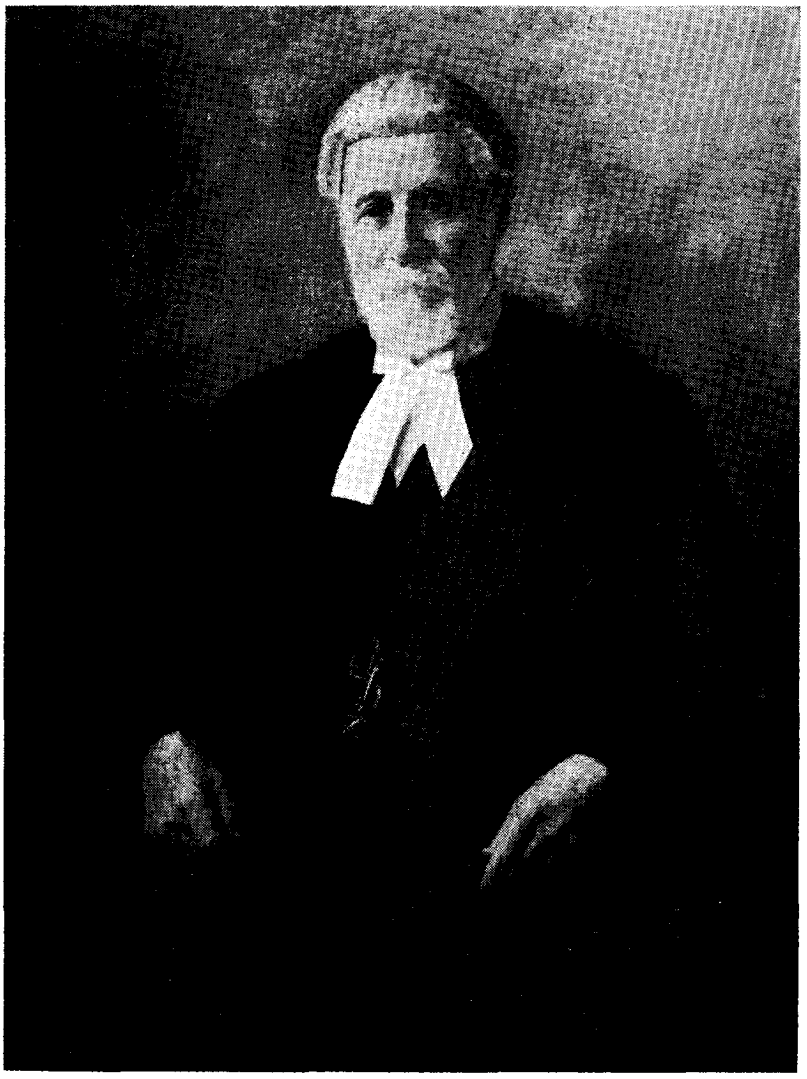
A representative gathering of the Bar, which included a former Solicitor-General, Mr H. E. Evans Q.C., the President of the New Zealand Law Society, Mr A. B. Buxton and a past president, Sir William Cunningham, was led by the Attorney-General, the Hon. H. G. R. Mason Q.C.

The Chief Justice.

Paying tribute to his distinguished predecessor, the Chief Justice said they had met together that afternoon to witness the unveiling of a portrait which he had long wished to see hanging in its rightful place in that Courtroom. That many others had had the same wish was evidenced by the very large attendance of members of the Bench and Bar and of others in the legal profession. He was, he said, shortly to have the pleasure of asking Dr. Robert Stout to unveil the portrait of his bery distinguished father, the late Sir Robert Stout, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Member of Her Majesty's Privy Council, Doctor of Civil Law, Doctor of Laws of Oxford, and Chief Justice of New Zealand for twenty-seven years.

"Sir Robert," the Chief Justice continued, "was the fourth of our Chief Justices and he held office for a longer term than any other—before or since. The first of them, Martin, was Chief Justice for fifteen years. He was followed by Arney for seventeen years, Prendergast for twenty-four years and then by Stout for twenty-seven years. In view of the provisions of the Supreme Court Judges Act of 1903 it seems in the highest degree improbable that that record term of office will ever be exceeded. We now have in this Courtroom the portraits of all the former Chief Justices save the first two, and I still hope that it may be possible, some day, to complete the gallery.

There had long been, elsewhere in Wellington, he said a portrait of Sir Robert, but he had always felt that it was something of a reproach to them that a portrait of him was not to be found there in that Courtroom in which he so long presided and which, more than any other place, ought to contain a reminder of his distinguished judicial career. That reproach was now about to be removed and they were greatly indebted to the members of Sir Robert's family for having presented a picture which, as they would presently see, was an extremely good likeness and a great tribute to the skill of the artist who created it. It was commissioned more than twenty years after Sir Robert's death and had perforce to be painted from photographs; but he was sure that those who knew the subject of it would agree



William Dargie, Pnxt.

The Rt. Hon. Sir Robert Stout, Chief Justice, 1899-1926.

that it had almost brought him to life again and that they would be delighted with the result.

"Sir Robert came to this country at the age of eighteen", said the Chief Justice. "He qualified both as a schoolmaster and a surveyor. He came from the Shetland Isles, and was quick to see and to grasp the great opportunities that this young Colony presented. At once he showed that he was marked for greatness. He early adopted the legal profession as his own and he immediately proved himself to be an outstanding advocate, particularly at nisi prius work. His forensic success was as phenomenal as it was meteoric. But his interests were not confined to the law alone. He was interested in mankind: and the law was but one field in which humanity could be served. It was characteristic of him that he should wish to serve in every field in which his undoubted gifts could be used. He espoused the cause of education and was for twenty years Chancellor of the University of New Zealand. He rendered valuable service as a member of the Otago Land Board. He entered Parliament and was a member for many years. He was Attorney-General in the Ministries of Grey and Vogel. He held the portfolio of Education and for two brief periods was Premier of New Zealand. He became Chief Justice in 1899.

"But this recital of some of the distinguished offices which he held is by no means a complete description of the man. He had a tremendous capacity for work. He was a great fighter and a real crusader in his zeal for the 'cause that lacks assistance and the wrong that needs resistance'. It was inevitable that this crusading spirit should bring him into conflict, before he went on to the Bench, with those who held different views. He had his critics and at times they were severe critics. He would not have wished it otherwise. But his severest critics always respected him and admired his singleness of purpose and his deep interest in the welfare of his fellow men. Everyone remembered his innate kindliness and the unassailable sincerity of his convictions and beliefs.

"I should like to say to the members of his family who are present at this ceremony how proud and gratified we are to have here in these Courts of Justice a permanent reminder of the outstanding qualities of such a man", concluded the Chief Justice. "It is accordingly with very great pleasure that I now ask Dr Robert Stout to unveil this portrait of a very distinguished Judge and a great servant of this Dominion in many other fields as well as in the field of law."

Dr Robert Stout then unveiled the portrait.

The Attorney-General.

The Attorney-General, the Hon. H. G. R. Mason Q.C., said: "Your Honour has referred to some of the many fields in which the late Sir Robert Stout manifested those outstanding qualities that gave him such eminence. I would recall that his long life in New Zealand covered a period of our history when circumstances were very different from those of today. It went back to the time when the means of travel were few, and great exertions and long hours were called for when today there is utmost ease in making the same journeys. They were the formative years of our country, when there was everything to be done, and resources were few. In such an epoch there was called for men of rugged stature. Our country was fortunate that such men were not lacking.

"Your Honour has referred to some of the fields of activity of the late Sir Robert Stout, some of the fields in which he was notable. I must resist the temptation to elaborate upon that point; but, in reference to the field of education in this city, I may be forgiven for recalling that it is to him more than any other that we owe Victoria University College (now, the Victoria University of Wellington), and that he may properly be called its founder.

"My personal knowledge of Sir Robert Stout as Chief Justice was most limited. I had hardly any at all, but that little was enough to leave indelibly with me the impression of his inexhaustible patience, and his unfailing courtesy, - and his very great humanity."

The New Zealand Law Society.

Mr A. B. Buxton, on behalf of the New Zealand Law Society thanked His Honour for permission to hang the portrait in the Courtroom over which Sir Robert Stout so long presided, and also thanked the members of the family who had commissioned and presented to the Society so memorable a portrait.

"We respectfully agree with Your Honour", he said, "that this is in every way the proper home for such a portrait, but we appreciate that others who are not members of our society may well think that a portrait by such an outstanding artist of such a notable New Zealand figure as Sir Robert Stout should have been hung in the National Gallery. Knowing this, as we do, and the connection that the members of his family have always had with our gallery, we are grateful indeed for the kindness and thoughtfulness that has inspired this gift.

"Some of our members received at Sir Robert Stout's hands as Chancellor of the University their diplomas; some of us were admitted by him as Chief Justice to this profession, and some of us have appeared before him in this and other Courts in New Zealand. To all those he is still a channel of learning and experience and knowledge, but for all of us his wisdom is preserved in our *Reports*.

"We again assure the members of his family that his portrait will be cherished and safeguarded by the society, not only for the pleasure it will give, but as a reminder of their debt of gratitude to one of the staunchest upholders of the ideals and obligations of their profession, and a reminder of the gratitude they owe to his family for their generosity in making this presentation.

"Sir Robert Stout seemed to us to have been always Chief Justice of New Zealand; and we are apt to forget, as your Honour has reminded us, that he had a very leading practice at the Bar. He was, in fact, a member of the Wellington District Law Society for the four years 1896 to 1899, and for this reason the President of the Wellington District Law Society has asked that the members of the Wellington Society be expressly joined in our thanks to Sir Robert's family for this addition to the portraits of its most illustrious members.

Mr Trevor Holmden, speaking for the family of Sir Robert Stout, said they were very happy and proud

to present the portrait to the New Zealand Law Society, and they wished to thank their Honours for the permission granted to have it hung in the Court-room.

"The family", he said, "are very appreciative of the kind remarks made by the Chief Justice, by the Honourable the Attorney-General and by Mr Buxton. Your Honour has referred to the innate kindness of the late Sir Robert Stout, and may I mention an episode that happened in this Courtroom, I think, many, many years ago. I had just been admitted, and I was directed to appear before the Court of Appeal and move for a rule nisi to be made absolute. In fear and trembling I appeared before the august body, and I said that I moved that the decree nisi be made absolute. A very learned Judge snorted at me and said: "I don't know counsel, but this is not a Divorce Court". Sir Robert Stout very kindly leaned across and suggested that nothing further be said; and he then spoke to me and said: "I don't know your name, counsel, but the papers are all in order, and the rule nisi will be made absolute".

DRAINAGE EASEMENT CERTIFICATES.

Conveyancing Precedent.

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

As a general rule, a *legal* easement against a Land Transfer title can be created only by the registration of a memorandum of transfer against the servient title: *McKenzie* v. *Waimumu Queen Gold Dredging Co.* (1901) 21 N.Z.L.R. 231, *Gray* v. *Urquhart* (1910) 30 N.Z.L.R. 303; 13 G.L.R. 406.

If, however, the easement is one created by another statute it will prevail against the Land Transfer title and will be binding on all registered proprietors of the servient tenement: *Barber* v. *Mayor, etc., of Petone* (1908) 28 N.Z.L.R. 609; 11 G.L.R. 148, *Hawke's Bay River Board* v. *Thompson* [1916] N.Z.L.R. 1198; [1917] G.L.R. 14. An example of an easement prevailing against a Land Transfer title is the grant of a mining privilege by the Warden under the Mining Act 1926. If the special statute creating the easement makes provision for the registration of the easement under the Land Transfer Act, then registration under the Land Transfer Act may or may not be necessary for the continuance of such easement: that would probably depend on the particular wording of the special statute. However, when the special statute does provide for its registration under the Land Transfer Act the better practice appears to be to register it, if registration is practicable.

A somewhat novel departure from normal Land Transfer procedure is the registration of *certificates* as to easements under special statutory authority. Two examples are certificates as to drainage easements under the Municipal Corporations Act 1954, and certificates as to pipe-line, right of way, party-wall, and underground electric cable easements, pursuant to s. 25 of the Housing Act 1955 (as amended by s. 3 of the Housing Amendment Act 1956).

The Municipal Corporations Act 1954 recognizes two kinds of drains: (a) public drains, and (b) private drains.

Public drains are *vested* in the Corporation and include drains actually controlled for more than twenty years: ss. 215 and 216 of the Municipal Corporations Act 1954.

The terms "public drains" and "private drains" do not appear to be defined in the Act. Private drains are not vested in the Corporation and they may be divided into two classes: (1) *common* private drains, and (2) private drains, which are not common.

The statutory provisions, hereinafter set out, as to registration of drainage certificates apply to *common* private drains only.

The Borough Council may repair public drains; but, as pointed out by F. B. Adams, J. in *Petone Borough* v. *Daubney* [1954] N.Z.L.R. 305, 328, "there is no similar express power, enabling the Council in general terms to repair private drains." By s. 228 (1) of the Municipal Corporations Act 1954 a Council by resolution may declare any common private drain to be a public drain. Although a public drain under the Municipal Corporations Act 1954 is *vested* in the Corporation, that apparently does not vest the technical estate in fee simple in it, so as to enable it to apply by transmission for a title to the space occupied by the drain, although it is undoubted that the Corporation has true proprietary rights thereto and not merely an easement: *Kingdon* v. *Hutt River Board* (1905) 25 N.Z.L.R. 145, *Attorney-General* v. *Leighton* [1955] N.Z.L.R. 750.

It is obvious, therefore, that where a memorial of a private drain has been entered on the Land Transfer Register and the Council has converted it into a public drain by the passing of the necessary resolution, the certificate of title does not show the true position. It is for this reason that the Land Transfer Department will often note the resolution on its records in order that searchers will not be misled.

It does not follow that, because a drain is laid through private property, it is not a public drain: *Wellington and Manawatu Railway Co.* v. *Mayor, etc., of Wellington* (1895) 14 N.Z.L.R. 472. It is, for example, the opinion of many New Zealand lawyers that a natural watercourse may be a public drain for the purposes of the Municipal Corporations Act 1954.

For the difference between public and private drains, see the judgment of Gresson J. in *Connolly* v. *Palmerston North City Corporation* [1954] N.Z.L.R. 1006. A public drain is a drain which is in the general interest of the city or borough, as opposed to one for the particular benefit of an individual or of one household. The distinction is between a drain laid in connection with a particular property or even a drain laid to be used in common by two or more properties for the benefit of the particular household or households for whom it is installed, and, on the other hand, a drain laid to meet the needs of a group or collection of houses and to enable that settlement to be connected up to the general drainage system of the city. In that case, the Court held that the drain was a public drain because "it is in contemplation that the new drains will become

attached to one of the Corporation's sewers and become integrated into the city's drainage system. It has been constructed, and by the Corporation, with that object in view." Therefore, it appears that the question whether a drain is a public or private drain is a question of fact.

(1) Section 227 of the Municipal Corporations Act 1954 reads as follows:

"227. Where any private drain existing on the fifteenth day of December, nineteen hundred and thirteen (being the date of the passing of the Municial Corporations Amendment Act 1913), or constructed after that date, and whether before or after the commencement of this Act, with the consent of the owners of all the lands affected passes through or serves separately owned premises there shall be attached to each and all of the lands served by such private drain the following rights—namely:

"(a) A right to the free and uninterrupted use of that private drain; and

"(b) A right for the occupiers or any of them to enter upon all lands served by that drain, or through which it passes, for the purpose of relaying or effecting necessary repairs to the drain; and

"(c) A right to contribution from the owners or occupiers of other lands so served by the drain towards the cost of executing, providing, and doing all or any of the things required in respect of such drain by this Act or any by-law; and

"(d) A right to contribution from the owners or occupiers of such other lands towards the cost of all necessary repairs to the drain—

and those rights, upon a certificate being furnished by the Town Clerk that any of the lands is actually served by that drain, shall be registered by the District Land Registrar against the titles (whether under the Land Transfer Act 1952 or not) to all the other lands so served by the drain, and also, in the case of the right to free and uninterrupted use of the drain and the right to enter upon land to effect necessary relaying or repairs, against the titles (whether under the Land Transfer Act 1952 or not) to the lands through which the drain passes."

N.B.—The words "with the consent of the owners of all the land" apply only to drains constructed after December 15, 1913: see s. 227 of Municipal Corporations Act 1954.

The principal requisite is that the tenements must be "separately owned." (N.B.—The definition of "owner" in s. 2: ". . . the person for the time being entitled to receive the rack rent thereof, or who would be so entitled if the same were let to a tenant at a rack rent:") also the position of the drain must be defined with sufficient accuracy for Land Transfer purposes.

The effect of the above section appears to be to create easements appurtenant to the separately-owned premises that private drains pass through to serve.

With regard to the following precedent it is understood that the local authorities, before issuing such a certificate, require the consent of all owners of the various lands affected.

As to pipe-line certificates under the Housing Act 1955: s. 26 provides that the Corporation may issue a pipe-line certificate in any case where a pipe-line which serves several parcels of land has been constructed on land required by the Crown for State housing purposes and one of the parcels of land is thereafter sold. The section specifies the form of the certificate; and provides that, while the certificate is registered against the titles to the land, the owners for the time being of the several parcels of land specified in the certificate are to have the right to use the pipe-line and to enter on the land and do all work necessary to keep the pipe-line in repair. There is to be a right of contribution between the owners of the land served by the pipe-line towards the cost of keeping it in repair. Where it is not practicable to show the true course of any pipe-line its position shall be indicated as closely as possible on the certificate.

CONVEYANCING PRECEDENT.

DRAINAGE CERTIFICATE BY TOWN CLERK.

IN THE MATTER of Section 227 of the MUNICIPAL CORPORATIONS ACT 1954.

THE MUNICIPAL CORPORATIONS ACT 1954.

To The District Land Registrar
Wellington

I The Town Clerk to the City of
DO HEREBY CERTIFY that the common drain shown on the plan drawn hereon passes through or serves the separate premises described in the Schedule hereto and that such lands are affected by the rights of drainage conferred or imposed by Section 227 of the Municipal Corporations Act, 1954 in respect of common private drains.

DATED at this day of 1958.

SCHEDULE HEREINBEFORE REFERRED TO.

Insert official descriptions of various Lands here.

1. . . . . .

2. . . . . .

3. . . . . .

TOWN CLERK.

Fly as "Foreign Body."—"The respondents, who are wholesale suppliers of milk, were brought in under s. 83 (3) of the Food and Drugs Act, 1938, because a bottle of milk which they had supplied to the retailer—who in turn supplied it to a purchaser just as he got it—had in it a fly. House-flies are carriers of disease, and people do not like having flies in their milk. If a fly is found in milk, proceedings can be taken under the Food and Drugs Act, and the only question in this case is whether proceedings should have been taken under s. 3 or s. 9. Section 4 of the Act shows, among other things, that food may not be of the nature or quality demanded if it contains some foreign body, and this milk had got, not only a foreign, but a dead foreign, body in it, a fly. In *J. Miller Ltd.* v. *Battersea Borough Council,* we pointed out that a shot in a pheasant was not a foreign body which rendered the pheasant unfit for human consumption. Unless the pheasant had been poached and had its neck wrung, the purchaser would assume that it was shot, and it would be absurd to say that a shot in a game bird made it unfit. That was a prosecution under s. 9. We pointed out that under s. 3 the presence of a foreign body could make food not of the nature and quzlity demanded, and if the justices had had the advantage of seeing *J. Miller Ltd.* v. *Battersea Borough Council,* no doubt they would have decided differently. They had a large number of cases cited to them which, so far as I can see, had nothing whatever to do with the case before them, and they were asked to consider questions whether the respondents acted fraudulently, but that had nothing to do with fhe case. This case must go back to the Justices with an intimation that the offence was proved."—Lord Goddard C.J. in *Newton* v. *West Vale Creamery Company Limited* (1956) 120 J.P. 318.

THE LATE MR H. D. C. ADAMS.

Parliamentary Law Draftsman.

On July 3, 1958, the death occurred at Wellington of Howard Dartrey Charles Adams, C.M.G., LL.B., the Parliamentary Law Draftsman.

In paying a tribute to him, the Prime Minister, the Right Hon. Mr W. Nash, said: "His brilliant ability as law draftsman was matched only by his gentlemanly modesty and integrity. . . . I know that all present and past members of Parliament, and in particular all present and past Cabinet Ministers, will agree with me when I say that few men, in the Legislature or out of it, have contributed more to good government in New Zealand than did Mr Adams in the twenty years he has been in charge of the Law Drafting Office".

The Attorney-General, the Hon. H. G. R. Mason, said: "It can confidently be said that largely through his work our statutes stand comparison with any in the world as a monument of excellent draftsmanship".

The deputy-leader of the Opposition, the Hon. J. R. Marshall, who was Attorney-General in the previous Government, referred to his "clear, precise, and accurate draftsmanship", and said: "He was an able lawyer whose sound judgment and profound knowledge was much relied upon by Ministers of the Crown and departmental officers".

During the past fifty years, New Zealand has been fortunate in having at the head of the Law Drafting Office three great draftsmen in succession. They were Sir John Salmond, James Christie, and Dartrey Adams, all men of strong personality and exceptional ability whose influence on our legislative drafting has been profound and lasting. It is due to them that there has been built up what the Dean of the Harvard Law School (Dr Erwin Griswold) has called "a tradition of careful and effective draftsmanship", to such an extent that, in Dr Griswold's words, "New Zealand leads the world in law draftsmanship".* A large part of the credit for that achievement is due to Dartrey Adams. His drafting had a clarity and simplicity that few men could attain, and he was responsible for many great improvements in the style of the statute book.

* "*The Dominion*", July 17, 1951.

Earle Andrew, photo.

The Late Mr H. D. C. Adams.

Dartrey Adams was born in 1897 at Napier. He was educated in Wellington at the Roseneath School, Wellington College, and Victoria University. He won junior and senior Education Board scholarships, and in his fourth year at Wellington College became dux of the school and won a University National scholarship. He graduated LL.B. in 1918 and was admitted as a barrister and solicitor in the same year.

His first seven months in a law office were spent with Messrs Luke and Kennedy, and then he was employed for four years by Messrs Chapman, Skerrett, Tripp, and Blair, on the common-law side. He left that firm in 1922 to enter into partnership with Mr W. Tudhope, of Hamilton, and practised there as a member of the firm of Tudhope and Adams for more than six years. In 1929, he returned to Wellington and joined the legal division of the Public Trust Office. In 1930, he was appointed to the Law Drafting Office as an assistant-law draftsman. After being seconded to the Crown Law Office as a Crown Solicitor in 1934, he returned to the Law Drafting Office in 1935 as first assistant law draftsman. In 1938, he was appointed law draftsman when Mr James Christie retired from that office and became counsel to the Law Drafting Office. As law draftsman he then became a member of the Law Revision Committee.

In 1947, he led the New Zealand delegation to a Commonwealth conference in London on British nationality and citizenship, which resulted in legislation in the following year. In the same year he was awarded the C.M.G.

Two years ago, he was entrusted by the Government with the tremendous task of editing the new Reprint of Statutes. Before he died, he had set the pattern for the whole work and had just completed the final revision of Volume I, which has been published since. It is a monument to his high standard of meticulous care and accuracy.

He was intensely interested in the theatre. For many years he worked as a member of the committee

of the Wellington Repertory Society, and took parts in a number of plays. He also loved Rugby. Having represented Wellington College and Victoria University, he remained a keen supporter of the University Rugby Club.

During his twenty years as law draftsman he drafted much legislation of major importance, particularly in the fields of finance and taxation, industrial legislation, and company law, and was responsible for major policy measures.

In his office he was a leader and a friend to his staff. He had a remarkable capacity for mastering a complicated problem, discarding the inessential elements, arriving quickly at the heart of the matter, and then finding the solution and expressing it clearly and with precision. His quick wit was a delight to all who knew him. But with all his brilliance, he was modest to the point of shyness. He will be remembered with admiration for his intellect, skill, and sound grasp of legal principles, with respect for his personality and strong convictions, and, best of all, with affection.

FURNISS v. FITCHETT.

A Footnote.

Although not all the Lords who heard the appeal in *Donoghue* v. *Stevenson* expressly agreed with what was said by Lord Atkin and Lord Macmillan in that case, the statements of the latter have given rise to a number of interesting attempts to extend the boundaries of the law of negligence. Denning L.J.'s dissenting judgment in *Chandler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164 is perhaps the most striking recent unsuccessful attempt to establish that the categories of negligence are never closed, and indeed there is a good deal of authority to justify the view that Denning L.J.'s position was unfounded. But it is much more difficult to comment on cases where there is no particularly relevant earlier authority either way, and into this class of case fall the decision of Barrowclough C.J. in *Furniss* v. *Fitchett* [1958] N.Z.L.R. 396, in which a doctor was held liable in negligence for making a true statement of his patient's medical condition, and the decision of the Supreme Court of Canada in *Guay* v. *Sun Publishing Co.* [1953] 4 D.L.R. 577, where a newspaper was held not liable in negligence for making an untrue statement that the plaintiff's husband and children had been killed in a car accident. In both cases, whatever principle can be extracted from *Donoghue* v. *Stevenson* was relied on ; and it is interesting to contemplate why the results in each case should be different.

The facts of *Furniss* v. *Fitchett*, and the judgment of the learned Chief Justice, have already been editorially canvassed in earlier pages of this JOURNAL (*ante*, p. 65), but what appears on a first reading to be the ratio decidendi of the judgment is worth restating : that a doctor who knows that his patient's health is likely to be injured if he communicates to her his opinion of her mental condition has a duty at common law to take reasonable care to ensure that no expression of his opinion on such a matter should come to her knowledge : [1958] N.Z.L.R. 396, especially at 404.

It should be emphasized at this point that the fact that it might be a breach of professional ethics on a doctor's part to communicate his opinion of his patient's condition to a third person was not the " breach of duty " which lay at the foundation of Dr Fitchett's liability in negligence : he was negligent because his opinion had come to his patient's knowledge : or, in other words more in accord with the actual terms of the judgment, he had communicated his opinion to a third party in such a way that he could be held to have reasonably foreseen that his opinion would come to his patient's knowledge and cause the patient injury.

It is true that, if liability in negligence can be stated in terms—that a man is liable if he invades another person's bodily health, which invasion he ought reasonably to have foreseen, and has taken no reasonable steps to avoid—there can be no doubt that Dr Fitchett was rightly held to be negligent. He ought reasonably to have foreseen the possibility of injury to his patient, and did not take the obvious step of keeping quiet about her condition. But it surely cannot be argued that, simply because a doctor knows that knowledge of his patient's condition will hurt his patient, he is under a legal duty to hide the truth from his patient. It has never been suggested that the law should erect a barrier between a doctor's patient and reality, to breach which the doctor may be exposed to tortious liability. The question is, is there in fact a duty of care on a doctor's part in such circumstances ? Does the injury arise in circumstances which impel the doctor to use reasonable care to prevent it ?

It might be considered extraordinary that a patient suffering, for example, from syphilis, should be able to recover in negligence for injury to his health which he suffered as a result of his doctor telling him what was wrong with him. To state an example somewhat nearer home, it might be considered even more extraordinary that a solicitor should be liable in negligence to a client involved in what is, to the client, vital pending litigation, who suffers severe mental shock when the solicitor advises him that his case is hopeless. Yet on one view of *Furniss* v. *Fitchett* this might appear to be what has been decided. Whenever a professional man is consulted by a client, he may not give his client true advice if he ought reasonably to forsee that his client might suffer injury on hearing such advice.

Indeed, it is almost fantastic to maintain that Dr Fitchett would have been liable if, in ordinary circumstances, he had told Mrs Furniss to her face what he considered her mental condition to be. It is suggested however, that the decision of the learned Chief Justice does not, and was never intended to, go as far as this. It is implicit, rather than expressed, in the judgment that Dr Fitchett's liability lay, not only in the fact of communication, but in the manner of communication. It is easy to envisage the possibility that, when a patient is to be told about the state of his health, it is

sometimes necessary to " break the news gently " to him in certain circumstances. In certain cases a doctor may, in view of his patient's general condition, feel it incumbent upon him to advise his patient as tactfully as possible, and use every possible endeavour to avoid causing unnecessary shock. If a doctor knows that his patient has an extremely serious heart condition, for example, and is not likely to live long, he is hardly acting in the most responsible way if he tells his patient in a particularly brutal manner that he will be dead at the end of six weeks. It is suggested that what *Furniss* v. *Fitchett* decides is that, in such a case, a doctor owes his patient a positive duty not to be tactless or brutal if the reasonably foreseeable consequence of such brutality or tactlessness is further injury to the patient's health. It is a duty to be tactful, rather than a duty to conceal harsh truths.

If this view is correct, therefore, the true explanation of *Furniss* v. *Fitchett* is that Dr Fitchett would not have been liable in negligence had he directly and tactfully told Mrs Furniss of her mental condition. Nor, it is submitted, would he have been liable in negligence if, having so told her, he had told anyone else. The truth at that stage, so to speak, have lost its sting. But Dr Fitchett was liable in negligence because he acquainted a third person of information relating to Mrs Furniss's health, when he knew that such information would injure Mrs Furniss, and when, as a reasonable man, he should have foreseen that the information would be exploded like a bombshell into Mrs Furniss's attention in cross-examination in judicial separation proceedings. He was liable, not because he was bound to see that Mrs Furniss did not suffer in health as a result of learning his opinion of her condition, but because he did not take reasonable steps to ensure that she was injured as little as possible in the circumstances.

It is, with respect, unfortunate that the learned Chief Justice should have phrased parts of his decision in a manner which might lead one to believe that a wider interpretation of it might be possible. Although he expressly limited his remarks to the circumstances of the case, he found

> " that the defendant doctor was aware that the opinion which he expressed in the certificate of May 21, 1956, would, if it should come to the knowledge of his patient, be likely to injure her in her health. I find also that in the circumstances in which he issued that certificate—handing it to the patient's husband to be given to his solicitor, knowing that husband and wife were then estranged, and without marking it as confidential or otherwise restricting its use—he ought reasonably to have foreseen that the certificate or its contents would be likely to come to the knowledge of his patient. I conclude, therefore, that, in the circumstances to which I have referred, the doctor owed to his patient at common law a duty to take a reasonable care to ensure that no expression of his opinion as to her mental condition should come to her knowledge " : [1958] N.Z.L.R. 396, 404.

It may perhaps be suggested, with the greatest respect, that some of the difficulties referred to above might be avoided were it clear that the fault lay, not in the fact that Mrs Furniss was told of her condition, but in the way in which she was told.

Whether such an extension of Lord Atkin's statement in *Donoghue* v. *Stevenson* is desirable or not is largely a matter of opinion, but some may find it also unfortunate that the learned Chief Justice should have regarded *Nocton* v. *Ashburton* [1914] A.C. 932 as " in line with, though not direct authority for," the decision he reached : [1958] N.Z.L.R. 396, 404 ; especially since *Nocton* v. *Ashburton* concerned, not a negligent statement of the truth, but a negligent *mis*-statement of the truth.

In this respect it is somewhat odd that a defendant should be liable if he negligently tells the truth, however awkward the truth may be, while a defendant who negligently does not tell the truth is not liable for resulting personal injury : this, however, is the result of a comparison of *Furniss* v. *Fitchett* with *Guay* v. *Sun Publishing Co.* [1953] 4 D.L.R. 577.

In the latter case a daily newspaper in British Columbia published a false news item which stated that the plaintiff's husband and three children had been killed in a motor accident in another province of Canada. The newspaper did not check on the authenticity of this information, and was unable to say from whom it had received it. The plaintiff read the news item, and suffered nervous shock and impairment in health. The trial Court allowed her claim for damages for negligence, but was reversed by the British Columbia Court of Appeal, whose judgment the Supreme Court of Canada declined to disturb. The general view of the majority was that there could be no liability for an innocent mis-statement unless there were a contractual duty, or a fiduciary relationship such as that in *Nocton* v. *Ashburton* [1914] A.C. 932, and that the matter before the Court did not fall within either these or other exceptions which it is not necessary to mention here. As Locke J. said ([1953] 4 D.L.R. 577, 604), after an extensive review of the authorities on this point :

> " This was the state of the law when the judgment of Lord Atkin in *Donoghue* v. *Stevenson* was written and, unless he had changed his mind about the matter after he wrote his judgment in *Shapiro* v. *La Morta* (1923) 40 L.T.R. 201, this was also his view of the law. I do not think that the passage from his judgment in *Donoghue* v. *Stevenson* was intended by him to declare the law as to the liability for negligent mis-statements or to have any application to such liability. It is inconceivable, in my opinion, that if Lord Atkin and the Law Lords who agree with him in *Donoghue* v. *Stevenson* had intended to declare a principle of law inconsistent with what had been decided by the House of Lords in *Derry* v. *Peek* (1889) 14 App. Cas. 337 and *Nocton* v. *Ashburton* and by the Court of Appeal in *Le Lievre* v. *Gould* [1893] 1 Q.B. 491, they would not have said so in plain terms."

If it is clear that there can be no recovery in tort for injury due to negligent but innocent falsehoods, a fortiori, one would think, there can be no recovery for injury due to negligent truths. It is true, of course, that there was in fact a contractual relationship in *Furniss* v. *Fitchett*, but any question which might have arisen out of it was apparently abandoned and not considered of any relevance in the judgment : see [1958] N.Z.L.R. 396, 399-401.

Be this as it may, it would now appear that *Donoghue* v. *Stevenson* has been extended for the first time to cover liability in negligence for telling the truth, and that a doctor is liable to his patient in tort if his patient suffers harm by finding out what the doctor considers his medical condition to be in a manner which the doctor should have foreseen would cause him harm. On the other hand, it may be possible to regard *Furniss* v. *Fitchett* as laying down a general rule that a doctor is an insurer against any injury resulting to his patient as a result of finding out what the doctor thinks is wrong with him. If this is the position, it may be suggested that the categories of negligence should be closed at once to avoid any such further expansion.

B. D. INGLIS.

TOWN AND COUNTRY PLANNING APPEALS.

G. B. Piesse Construction Co. Ltd. *v.* Cook County.

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

Subdivision—Group-Housing Scheme—Land, zoned as "rural". in County bordering on City Area—Definite Break between City and Proposed Housing Subdivision in County created by "Green Belt"—Undeveloped Land and Full Development of Subdivided Land in City Area providing for More than double of present City Population—Proposed Subdivision not immediately Suitable for Residential Purposes—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal by a company owning a property comprising 6 ac. 3 ro. 37 pp. being Part Lot 1 on Deposited Plan No. 1131 part Matawhero B or 5 Block and Block 11 Turanganui Survey District. This property fronted on to the Main Gisborne-Wairoa highway on the south side. It was in an area zoned as "rural" under the Council's undisclosed district scheme.

The appellant company carried on the business of erecting dwellinghouses and in particular directs its activities to group-housing schemes under the administration of the State Advances Corporation. It had the opportunity of acquiring the land under consideration for development as a group-housing scheme and before completing the purchase, the managing director stated in evidence that he made verbal inquiries of the assistant engineer to the Council as to the Council's requirements for subdivision. He was told of the Council's requirements in relation to roading, size of sections etc., and he took that as being an assurance the the proposed subdivision would be approved by the Council.

The property was inspected by the State Advances Corporation and approved by it as suitable for a group-housing scheme.

Without any further reference to the Council, the appellant company purchased the land and prepared a subdivisional plan subdividing it into 26 allotments, 23 having areas of 32 pp. and the remaining three areas of 38 pp., 35.3 pp. and 44 pp. respectively, access being provided partly by frontages on to the Gisborne-Wairoa Main Highway and a side road (Parker's Lane) and partly by an access "frying pan" road debouching on to the Main Highway. Pursuant to s. 3 of the Land Subdivision in Counties Act 1946 this scheme plan was submitted to the chief surveyor and by him, pursuant to s. 3 (4) of that Act, to the Council. The plan was considered by the Council and on July 17, 1957, it certified the plan to be a detrimental work pursuant to s. 38 (1) (c) of the Town and Country Planning Act 1953 and accordingly prohibited. This appeal followed.

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 in preparing its district scheme the Council is working in conjunction with the Gisborne City Council particularly with reference to housing development in the city and in the county where it borders on the city, with the object of providing for the orderly development of residential occupancy.
2. That both authorities are agreed that the golf links, aerodrome, showgrounds, the Makaraka Domain and the cemetery form a "green belt" making a definite break between the built-up areas of the city and the rural environs lying to the west, and that further subdivisions should be confined to the city fringes adjoining existing built-up areas and to a portion of the Kaiti district to the east of the city.

   The Board is in accord with that view.
3. That the company's land is outside the "green belt" area referred to above.
4. That the undeveloped land within the city boundaries and the full development of existing subdivided land in the environs should provide for more than double the present population.
5. That although the land under consideration does not have any actual or high-potential value for agriculture or pastoral purposes, it is not at present suitable for residential subdivision. In coming to that conclusion, the Board has given weight to the following factors:
   (a) That to approve the subdivision would be tantamount to approving the creation of a residential pocket in a predominantly rural area.
   (b) That the development of such residential pockets along main highways should be avoided.
   (c) That there is no adequate water supply available. Although the city main passes the property water from that source would not be available for some time because a substantial portion of the city area is not as yet reticulated and further areas are served with only small diameter mains.

   Obviously, these areas must take priority.
   (d) That there is no sewerage system available and there is unlikely to be any such system available for a long time. The actual nature of the soil as such might lend itself to sewerage disposal on a small scale but the Board accepts the evidence of the officer from the Department of Health to the effect that septic tank drainage from twenty-six houses would make the soil very polluted and in five or six years, nuisances may arise. It was suggested for the appellant that the installation on the dissolvenators would solve this problem, but on the evidence available to it, the Board cannot hold that this method would be satisfactory in a closely-occupied residential pocket of twenty-six houses.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Aley *v.* Manukau County.

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

Lock-up Shops—Refusal of Permit on Ground of Unsuitability of Site owing to Non-Availability of Drainage and Sewage—Provision for Same not Impossible or Impracticable—Approval subject to making Adequate Provision for Drainage of Surface and Storm Water and Installation of Septic Tank for Sewage—Town and Country Planning Act 1953, s. 38 (10).

Appeal, under s. 38 (10) of the Town and Country Planning Act 1953, against the refusal of the council to approve a proposal for the erection of two lock-up shops in Pah Road, Manurewa.

The appellant's grounds for the appeal were that the land was suitable for the purpose of erecting shops; that the proposed shops would serve a rapidly developing area and would be excellently situated for their purpose; that adjoining land had been subdivided and built on without any objections on the grounds of drainage as septic tanks had been installed and the same could be done on this land; and that the closest shopping area was a mile distant.

The grounds for the council's refusal were that the land was not suitable for the erection of lock-up shops; that the contour of the appellant's land was very different from that of the land adjoining which was used for residential purposes and was less suitable for drainage; that the shops would be a physical obstacle to any work likely to be constructed in accordance with the town-and-country-planning principles likely to be embodied in the Council's undisclosed district scheme; and that the shops would also detract from the amenities of the neighbourhood likely to be provided or preserved by the undisclosed scheme.

The judgment of the Board was delivered by

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

1. That the erection of two shops on the proposed site would not, per se detract from the amenities of the neighbourhood. The locality is a suitable one from all points of view other than the drainage problem.

2. That the provision of adequate drainage and sewage disposal is not impossible or impracticable. It may not be a feasible economic proposition but that is not a matter on which the Board is competent to venture any opinion.

3. The appeal is allowed subject to the following conditions:
   (a) That the building is suitably designed and sited for use as two shops for grocery and dairy-milk bar business respectively.
   (b) That adequate provision is made for drainage of surface and storm water and for the disposal of sewage by means of septic-tank installation.

No order as to costs.

Appeal allowed.

R. & W. Hellaby, Ltd. *v.* Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1956. November 30.

Setting-back of Building—Narrow Side Road—Owners of Buildings and Two Other Owners Sole Users thereof—Erection of Proposed Building approved, Subject to Conditions—Town and Country Planning Act 1953, s. 38 (8).

Appeal under s. 38 (8) of the Town and Country Planning Act 1953 against the Council's refusal to permit the erection of a large storage building in Bell Avenue, a cul-de-sac in an Industrial D Zone, unless the building was set back twelve feet from the road boundary.

Grounds for the appeal were that the appellants and two other companies were the sole users of the road, were likely to remain so, and that future traffic was unlikely to increase. They already supplied parking-space nearby, and, being a company of national importance, required all available land for future expansion.

The Council's refusal to approve unconditionally the erection of the building was made under s. 38 (2) of the Act on the grounds that it would detract from the amenities of the area; that setting back is required to provide now or in the future for off-street parking; and because it intended widening the road, constructing footpaths and kerbs on the appellant's side of the road.

The judgment of the Board was delivered by

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

1. That Bell Avenue is a minor side road running roughly east and west from the Great South Road; it is 66ft. wide, 16½ chains in length, and has no access at its western terminus where it abuts on to the North Island Main Trunk railway line.

   It has a narrow carriageway with unformed verges on either side, though evidence was given of the respondent council's intention to widen the carriageway and provide kerbing and channelling on the north side.

   For approximately half its length from the Great South Road, the land on either side is owned by the appellant company. Kempthorne Prosser and Company's fertilizer works front on to the remaining portion on the south, and the Union Soap and Candle Company's works and property front on to the remaining portion on the north.
2. The traffic using this road is almost entirely confined to the vehicles of Kempthorne Prosser and Company and the Union Soap and Candle Company, their employees, and those doing business with them.

   The appellant company uses it only for a limited amount of cross traffic and for cars of employees entering and leaving a car park at the eastern end.
3. That, although in its reply the respondent council contended that there was a possibility in the future of Bell Avenue becoming an important access road to reclaimed mud flats in Manukau Harbour, evidence at the hearing indicated that it will always be a blind road because the Railway Department plans to erect marshalling yards adjoining the western end of the road as now consituted.
4. That there appears little likelihood of the usage of the land abutting on to this road changing in character nor of there being any substantial increase in the volume of traffic using it.
5. Whilst affirming its view that a setting back of buildings from the road frontage is in general sound town planning practice, the Board considers that in this particular case the nature of Bell Avenue itself and the incidence of the ownership and the usage of the land abutting on it are special circumstances to which consideration should be given.

   The appeal is allowed subject to the conditions: (*a*) That the proposed building to which it relates is erected in conformity with the plan submitted at the hearing, and (*b*) That at no time and in no circumstances are vehicles to be loaded or unloaded through the wall adjoining the road boundary.

The Board emphasizes that this decision must not be regarded as establishing a precedent or as creating any right for the appellant company or any other body corporate or individual to erect any further building on Bell Avenue up to the road boundary line.

No order as to costs.

Appeal allowed.

In re Kirkham's Application.

Town and Country Planning Appeal Board. Wellington. 1956. November 23, 30.

Subdivision—Small Section with Two Houses owned by Trustee of Deceased Estate—Area zoned as "rural"—Subdivision to carry out Provisions of Deceased's Will—Form of Order made—Town and Country Planning Act 1953, s. 33.

Application by W. T. & C. H. Kirkham made under s. 33 of the Town and Country Planning Act 1953, for consent to the subdivision of their property at Eskdale in the Hawke's Bay County, situated in the Rural Zone of th Hawke's Bay County operative district scheme.

The property in question was just under an acre in extent, and two houses were built on it. The applicants were trustees in the estate of Walter Isaac Hartley Kirkham, deceased, and the property was owned by the estate. It was proposed that one of the houses would be transferred to two elderly spinster daughters of the deceased and that the other house would be sold and the proceeds divided among the members of the family in accordance with the will of the deceased. The applicants stated that the Hawke's Bay County Council supported the application.

The order made by the Appeal Board was as follows:

UPON READING the application filed herein by the above-named William Thomas Kirkham and Charles Harrison Kirkham (the trustees under the will and in the estate of Isaac Hartley Kirkham, deceased) and the affidavits filed in support thereof AND being satisfied that the provisions of s. 33 of the Act and of Regulation 35 of the Town and Country Planning Regulations 1954 have been duly complied with THE TOWN AND COUNTRY PLANNING APPEAL BOARD hereby APPROVES OF AND CONSENTS TO the subdivision by the appellants into two lots of 1 rood 27.44 perches and 2 roods 5.66 perches respectively of part of Block 4 Eskdale containing 3 roods 33 perches more or less being Lot 1 on Deposited Plan 7561 being part of the land comprised in Certificate of Title Volume 72 Folio 147 Hawke's Bay Registry.

Gear Meat Co. Ltd. *v.* Petone Borough.

Town and Country Planning Appeal Board. Wellington. 1956. November 30.

Zoning—Unimproved Area in Borough—Zoned as Proposed Reserve in Operative District Scheme—Owner's Objection formerly dismissed—Change of Circumstances—New Area added to Borough—Decision reviewed—Zoning changed to "general industrial"—Town and Country Planning Act 1953, s. 26 (3).

Application under s. 26 (3) of the Town and Country Planning Act 1953. The appellant company is the owner (inter alia) of an unimproved area of land of 11 acres in Hautonga Street, Petone. The respondent Council now has an operative district scheme known as the Borough of Petone Town Planning Scheme No. 1. Under that scheme, this block of land was zoned as a proposed reserve and a small proportion as a proposed street. In the earlier stages, before this plan became operative, the appellant company twice objected under the 1926 Act to the proposed zoning, but these objections were dismissed by the then Town Planning Board. Since then the circumstances had changed in that the area of Gear Island, formerly within the boundaries of the Lower Hutt City, is now within the jurisdictional boundaries of the Petone Borough Council. This is a large area, and part of it will be more than adequate for reserves for sports and general recreational purposes within the boundaries of Petone.

The judgment of the Board was delivered by

REID S.M. (Chairman). The respondent Council has by resolution given its unqualified support to this application. In those circumstances, the Board has no hesitation in exercising its power to review the decision of the Town Planning Board. It directs that the Borough of Petone's Town Planning Scheme No. 1 be amended by cancelling the zoning of this 11 acres as a proposed reserve, and rezoning it as a "general industrial" area.

Application granted.

(*Concluded on p. 240.*)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Propriety of Whipping.—"Corporal punishment brutalizes the prisoner and executioner alike. It breeds hatred and bitterness, uproots personal dignity, and frustrates any attempt at social readjustment. At the same time it arouses among fellow prisoners a community of interests against the prison regime and a sympathy with its victims." This extract from the views expressed in *Grunhut on Penal Reform* in 1948 is afforded a prominent place in the dissenting judgment of Smith J. in *R.* v. *Taylor and O'Meally* [1958] V.R. 285. The facts, as stated, are that the applicants, John Henry Taylor and William John O'Meally, were each charged with having on March 29, 1957, escaped from Pentridge Gaol and pleaded guilty. They were further charged with wounding Robert Henry Davis, a warder at the gaol, with intent to do him grievous bodily harm. This charge, to which they pleaded not guilty, related to the shooting of the warder by Taylor at close range on the day of, and in furtherance of, their escape. On the latter charge they were tried before Hudson J., and a jury of twelve men and on August 27, 1957, they were both found guilty. On October 31, 1957, each of the applicants was sentenced to four years' imprisonment on the first charge and six years on the second. Taylor was already, in respect of earlier offences, serving sentences aggregating about thirteen-and-a-half years, of which he had served about three years, and in his case, Hudson J., directed that one year of the sentence of four years and two years of the six should be served concurrently with sentences he was already serving. O'Meally was presently serving a term of imprisonment for the full term of his life without any remission and without the benefit of the regulations relating to the remission of sentences, which sentence was imposed on him in 1952 when he was convicted of murder and sentenced to death and the sentence commuted. In O'Meally's case, Hudson J., directed that the whole of the two terms of four and six years should be served concurrently with the existing life sentence. His Honour declined to fix any minimum term in the case of either of the applicants. In addition to the imprisonment ordered, each of the applicants was, on the charge of wounding with intent to do grievous bodily harm, sentenced to be once privately whipped with the cat-o'-nine-tails and the number of strokes was fixed at twelve. It was decided by the Full Court of Victoria that, in order to hold that "the commission of the offence was attended with or accompanied by cruelty or great personal violence" so as to entitle the Court to direct an offender to be whipped pursuant to s. 510 (2) of the Crimes Act 1928 (now s. 477 (2) of the Crimes Act 1957), it is not necessary to find circumstances showing violence in addition to those inherent in the crime itself. The Court further decided that to shoot and wound another with a gun at close range constitutes "cruelty or great personal violence" within the meaning of the section. Lowe and Gavan Duffy JJ. held that the fact that the trial Judge gave no directions as to the manner in which the sentence of whipping was to be carried out did not render the sentence improper: and they differed from the view of Smith J. that the case was not one in which whippings should have been ordered.

Postscript.—What was described in these columns (*ante*, p. 191) as "the case of the closeted lady" (*Sayers* v. *Harlow Urban District Council* [1958] 2 All E.R. 342) has been the subject of comment by the witty "Richard Roe" in the *Solicitors' Journal* (June 28, 1958). "It is not surprising", he says, "that the learned Judges of the Court of Appeal, who awarded the plaintiff damages for the injury which she sustained in reconnoitring the possibilities of a means of escape, but nevertheless found her partly to blame, should not have made any specific pronouncement on what would have been her proper legal course to pursue judged by the standard of the reasonable man or woman in the Clapham lavatory. All books of etiquette are silent on this important and embarrassing subject nor, strangely enough, is much practical help to be gleaned from the escape stories which have lately burst out so plentifully all over literature and the cinematograph. Tunnelling in the manner of the Count of Monte Cristo is not a practical solution. . . . Theoretically there was open to her the traditional resort of marooned persons to put a message in a bottle and commit it (if of moderate size) to the waters, but nothing guaranteed a timely reply. A distress rocket (had she happened to have one about her among the multifarous objects which women carry) would almost certainly have attracted immediate attention if fired through the window. Perhaps this episode will encourage some enterprising manufacturer to produce a set of miniature lipstick-sized rockets neatly fitting into a lady's handbag and suitable for use in such an emergency".

From My Notebook (All-Over Division).—The Full Court of Victoria on June 9 dismissed the appeal of the Australian Government against an award of £19,625 arising from an accident when an employee of the power house at Yallourn, during the course of his work, picked up a radio-active capsule from the floor and carried it about in his pocket for several days. He received severe burns to his right leg which was subsequently amputated and he had been unable to work since. Liability was admitted. . . .

"Experience is tending to show that no country, however tightly insulated by an Iron Curtain from world opinion, can afford indefinitely to ignore objections which go to the root of accepted principles of justice and international law." Sir Hartley Shawcross, in an address to the International Commission of Jurists at The Hague.

"Some Russians drink a great deal at parties; some don't drink at all. The custom whereby guests were practically compelled to drink toast after toast, long after their capacity to enjoy them was exhausted, has lapsed to an extent, partly because so many Moslems, who don't drink, come to Moscow on official missions these days. The Russians first became accustomed to visitors who do not drink when Mr Nehru arrived. He demanded tomato juice or orange juice during the toasting, got it, and Moscow has never been quite the same since." John Gunther in *Inside Russia Today*.

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 238.*)

Christensen *v.* Kairanga County.

Town and Country Planning Appeal Board. Palmerston North. 1957. July 19.

Building Permit—Area zoned as "residential"—Application to erect Shed for Storage of Timber and Building Materials—Industrial Use—Area predominantly Residential—Application refused—Town and Country Planning Act 1953, s. 38 (8).

Appeal by the owner of a property situated in Monrad Street, which lay approximately a quarter of a mile away from the south-western boundary of Palmerston North City. This area was zoned "residential" in the undisclosed district scheme for Kairanga County.

When the appellant applied to the Council for a building permit to erect a shed on the back portion of his property, he stated that the building was to be used for the storage of timber and materials used in his business as a builder. However, the reasons given in the appeal for the erection of the shed were that the sections in this area were unsuitable for housing development and that there was a lack of demand for residential sections. The appellant, therefore, wanted the zoning of the land changed from "residential" to either "commercial" or "light industrial" in order to allow his father to lease the building to a firm of implement makers for storage, repair, assembly and servicing of farm machinery. This use was an industrial one and was not permitted even as a conditional use in a "residential" zone.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The Monrad Street area is predominantly residential in character; it is a short street half a mile in length and there are already thirty-seven dwelling houses in the street. In the past three years six building permits have been issued for the erection of houses in this area to a total value of £13,700. Within the same period building permits have been issued for additions to already existing houses to a value of £1,820.

2. The Monrad Street area is closely adjacent to the southern boundary of Palmerston North City. The Palmerston North City Council and the respondent Council have a joint planning committee for interrelating the planning of the land in the county adjacent to the city and the adjacent city land. In the plans that have already been prepared in furtherance of the respondent Council's scheme that Council has zoned the Monrad Street area as "residential." It is closelya djacent to a rapidly developing residential area in the Palmerston North City. The Monrad Street area is predominantly residential in character and it is reasonable to anticipate that before long it will to all intents and purposes be part of a large residential area in the city of Palmerston North.

The erection of the building proposed by the appellant to be used for the purpose indicated, which is an industrial one, would clearly detract from the amenities of a residential neighbourhood. It is in the opinion of the Board quite clear that this area is likely to be preserved as "residential" under the respondent Council's district scheme and the appeal is therefore disallowed. No order as to costs.

Appeal dismissed.

De Menech *v.* Lower Hutt City Corporation.

Town and Country Planning Appeal Board. Wellington. 1957. March 15; April 12.

Subdivision—Condition imposed by Local Authority—Filling-in of Low-lying Area to permit Sewer Connection and Protect Land from Erosion and Inundation—Adequate Provision to be mads—Municipal Corporations Act 1954, s. 351.

Appeal, under s. 351 of the Municipal Corporations Act 1954, against a condition imposed by the Lower Hutt City Council in its approval of a proposed subdivision. The land was situated on the corner of High Street and Maltby Road and contained twelve ac. 35.6 pp., which were to be subdivided into sixty-one allotments.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). Part of the land (allotments 1 to 28) is low-lying and at present subject to the possibility of flooding from the Hutt River. After protracted discussions between the appellant's advisers and the respondent Council's officers the latter in November, 1956, resolved to approve the subdivision subject to certain conditions being complied with.

Only one of these conditions is affected by this appeal, viz.:

Condition (b) "Certain low-lying areas are to be filled to the satisfaction of the city engineer so as to permit satisfactory sewer connections and general filling to be carried out to a level to the satisfaction of the city engineer to protect the land from erosion and inundation".

The Council supplied the appellant with specifications of the estimated cost of providing the required filling—that estimate being in excess of £16,000. The appellant has appealed on the grounds that this condition is unreasonable and is unjustified in fact and in law.

The condition as set out embodies two separate conditions, the authority for their imposition flowing from different sources.

By s. 351 (2) of the Municipal Corporations Act 1954, the council may refuse to approve the plan if in its opinion the land is not suitable for subdivision or, in the case of any allotment, adequate provision has not been made, or is not practicable, for drainage or the disposal of sewage.

By s. 351 (3) the Council, in considering whether any land is suitable for subdivision, "shall take into consideration any danger that may exist of the land being eroded or inundated by the sea or by a river or lake"—and, if it is of opinion that the danger is such as to render the land unfit for subdivision for building purposes, it may refuse to approve the plan or, before approving the plan, require the owner to make such provision for the protection of the land from erosion or inundation as the Council thinks fit.

Dealing first with the provisions of s. 351 (2).

As counsel for the appellant correctly submitted, if the council seeks to impose conditions in regard to the disposal of sewage and storm water, then regard must be had to the Lower Hutt City Empowering and Rates Consolidation Act 1941, s. 5 (1) and to subs. (5) of s. 125 of the Public Works Act 1928, as amended by s. 24 of the Public Works Amendment Act 1948.

It is not proposed to traverse the submissions on this point. The Board agrees that the power given by those sections to require construction of drains does not include a power to *require* the land to be raised. But, however the condition under consideration is worded, the substance of it is that the Council is of opinion that the land in its present state is not suitable for drainage and the disposal of sewage. With this opinion the Board is in accord. The appellant contends that:

(a) Storm water can be successfully drained into the Hutt River;

(b) That the disposal of sewage can be met by the installation of pumps.

In the opinion of the Board the weight of evidence is against both contentions.

Dealing, secondly, with the provisions of s. 351 (3) of the Municipal Corporations Act 1954, it is clearly established by the evidence that the land at present is in danger of inundation by flood waters from the Hutt River. This is, in fact, tacitly admitted by counsel for the appellant when he submitted that the appeal should be allowed subject to a condition that the appellant should not sell or build upon allotments Nos. 1 to 28 until certain river protection works contemplated by the Hutt River Board have been completed to the point where they protect the property from flooding by the Hutt River.

This was estimated in evidence to be in about five years' time.

The appellant submitted no practical alternative proposal for the protection of this land from inundation.

After careful consideration of the evidence adduced and the submissions of counsel, the Board:

Pursuant to s. 42 (3) of the Town and Country Planning Act 1953, varies the decision of the respondent Council in relation to the appellant's application by deleting condition B as hereinbefore set out and substituting the following conditions:

B (1) That adequate provision is made for the disposal of sewage and storm water by gravity flow drains.

B (2) That adequate provision is made for the protection of the land from inundation by flood waters from the Hutt River.

No order as to costs.

Appeal allowed in part.