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SOLICITOR'S PRIVILEGE AS TO DISCLOSURE: STATUTORY RECOGNITION AND SPECIAL MODIFICATION.

THE Inland Revenue Amendment Act 1958 is to be welcomed as it clarifies the position of a legal practitioner who is called upon by the Commissioner of Inland Revenue to disclose matters relating to the affairs of a client which are under investigation by the Inland Revenue Department.

The position of a solicitor, when a client's affairs were being investigated by an officer of the Inland Revenue Department, and when he was asked to disclose information about a client's transactions or to produce papers or books recording them, used to be, in the then state of the law, a difficult, if not an ambiguous, one If he refused to give that information, he might be liable to prosecution under s. 16 of the Inland Revenue Department Act 1952, or, earlier, under s. 163 of the Land and Income Tax Act 1923 or its re-enactment by s. 12 of the Finance Act (No. 2) 1948. If he gave any such information to the Commissioner or his representative without his client's waiving his privilege in its regard, he might have to face an action for damages at the suit of the client, for it is well established that a solicitor owes to his client a duty to refrain from communicating to others information obtained by the solicitor from the client, and a breach of this duty gives rise to a right of action by the client: *Taylor* v. *Blacklow* (1836) 3 Bing (N.C.) 235; 132 E.R. 401.

The foregoing is supported by the relevant legislation and by the consideration given to that legislation by the Court of Appeal in 1954.

Section 163 of the Land and Income Tax Act 1923, as re-enacted by s. 12 of the Finance Act (No. 2) 1948, provided as follows:

> 163. (1) Every person, whether a taxpayer or not (including any officer employed in or in connection with any Department or by any public authority) shall, if required by the Commissioner or by any officer authorized by him in that behalf, furnish in writing any information or produce any books or documents which the Commissioner or any such officer considers necessary or relevant for any purpose relating to the administration or enforcement of this Act or any other Act imposing taxes or duties recoverable by the Commissioner, and which may be in the knowledge, possession, or control of that person.
>
> (2) Without limiting the foregoing provisions of this section it is hereby declared that the information in writing which may be required under this section shall include lists of shareholders of companies, with the amount of capital contributed by and dividends paid to each shareholder, copies of balance-sheets and of profit and loss and other accounts, and statements of assets and liabilities.

That section was repealed and was replaced by s. 16 of the Inland Revenue Department Act 1952, which, in part, provided:

> 16. (1) The Commissioner may, for the purpose of obtaining any information with respect to the liability of any person for any tax or duty under any of the Inland Revenue Acts or any other information required for the purposes of the administration or enforcement of any of those Acts, by notice in writing, require any person to attend and give evidence before him or before any officer of the Department authorized by him in that behalf, and to produce all books and documents in the custody or under the control of that person which contain or which the Commissioner or the authorized officer considers likely to contain any such information.
>
> (2) The Commissioner may require any such evidence to be given on oath and either orally or in writing, and for that purpose he or the officer authorized as aforesaid may administer an oath.

The common-law principle of legal professional privilege is of ancient origin. It is expressed in *12 Halsbury's Laws of England*, 3rd ed. p. 39, et seq., as follows:

> 56. As litigation can only be properly conducted by professional lawyers it is necessary that a litigant should be able to have recourse to them in circumstances which enable him to place unrestricted confidence in the lawyer whom he consults and that the communications which he makes to that lawyer should be kept secret. Hence communications made to and from a legal adviser for the purpose of obtaining legal advice and assistance are protected from disclosure in the course of legal proceedings, both during discovery and at the trial. This privilege is quite separate from the defence of privilege which may be raised in an action of defamation in respect of words spoken or written between legal advisers and client. Any other communications as are reasonably necessary in order that the legal advice may be safely and sufficiently obtained are also protected, but in the case of communications to or from a non-professional agent or third party, such as a person who witnessed some event, the privilege only arises if litigation is threatened or contemplated. . . .
>
> 57. The privilege is confined to the legal profession. . .
>
> To be protected the communication must be made to or by the legal adviser in that capacity and while the relationship of client and legal adviser subsists. . . .
>
> Communications to and from a legal adviser are privileged even though litigation is not pending or contemplated. . . .
>
> In three special cases the protection does not apply: (1) when the communications are made for some fraudulent or illegal purpose; or (2) when the client waives the privilege and permits disclosure; or (3) when the communications are made for the purpose of being repeated to the other

party, such as an instruction to settle a claim for a special sum.

59. Any communications, verbal or written, passing between a party or his predecessors in title and on their solicitors or other legal professional advisers are privileged from production, provided they are confidential, and spoken or written to or by the legal adviser in his professional capacity and for the purpose of getting or giving legal advice or assistance, but not otherwise. A document coming into existence under these conditions is privileged even though it is not in fact communicated. The fact that a letter within the privilege contains statements of facts as to matters publici juris does not take it out of the privilege.

Bills of costs tendered by a solicitor, relating to litigation, actual or in contemplation, are also privileged, so far as they do not extend to (1) what took place in the presence of the opposite party; (2) communications with the opposite party; (3) matters of fact which are publici juris.

69. Where the privilege exists it may be waived by the client (whose privilege it is and who can restrain the solicitor from disclosure), but not by the solicitor or other legal adviser. . . . Until the client has waived the privilege, it is the duty of the solicitor to claim it. The death of the client does not put an end to the privilege which can be claimed by his successor in title.

Although, however, a report prepared in contemplation of litigation may be privileged from production by the defendant in the litigation for whom it was prepared, yet the report will not be privileged in a subsequent action for libel in respect of passages in the report brought by the same plaintiff against the person who prepared it.

These statements of the common-law principle, which also appear in *Cordery on Solicitors*, 4th ed., 289 et seq., are supported by a wealth of authority of which the following judgments are typical:

The general principle and its reason are clearly and concisely stated in the judgments of the House of Lords in *Bullivant* v. *Attorney-General for Victoria* [1901] A.C. 196, where Lord Halsbury said:

I think the broad propositions may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no Court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding. Those are the two principles, and of course it would be possible to make both propositions absurd, as is very often the case with all propositions, by taking extreme cases on either side. If you are to say, "I will not say what these communications are because until you have actually proved me guilty of a crime they may be privileged as confidential", the result would be that they could never be produced at all, because until the whole thing is over you cannot have the proof of guilt. On the other hand, if it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing which he is so endeavouring to inquire into may have been illegal or not, the privilege in all cases disappears at once. The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out, but there must be some definite charge of something which displaces the privilege (*ibid.*, 200, 201).

Lord Lindley said:

The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone—it remains (*ibid.*, 206).

In *Minter* v. *Priest* [1930] A.C. 558, Lord Atkin said:

If a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give him professional advice, communications made for the purpose of indicating the advice required will be protected. And included in such communications will be those made on occasions such as the present where the parties go to a solicitor for the purpose of seeing whether he will either himself advance or procure some third person to advance a sum of money to carry out the purchase of real property. Such business is professional business, and communications made for its purpose appear to me to be covered by the protection, whether the solicitor eventually accedes to the request or not (*ibid.*, 614).

(That is a matter in which trust account matters are involved.)

In *Commissioner of Inland Revenue* v. *West-Walker* [1954] N.Z.L.R. 191, a Case Stated by a Magistrate for the opinion of the Supreme Court and removed into the Court of Appeal, followed the charging of the defendant solicitor with an offence under s. 149 of the Land and Income Tax Act 1923 with a breach of s. 163 (cit. supra) in that, having been required by the Commissioner to furnish any information and to produce any books correspondence or documents in his knowledge possession or control relating to the income, financial position, financial transactions, or trust account, and, in particular information relating to transactions in property of a named person, who had been a client of the solicitor charged, the solicitor had failed or refused to give such information in writing or to produce such books or documents to the Commissioner of Taxes or to an officer authorized by the Commissioner of Taxes in that behalf as required by the Commissioner's notice.

The contest between the parties centred on the question whether or not the language of s. 163, when applied to a solicitor, showed a sufficiently clear expression of legislative intention to override the common-law privilege and obligation not to disclose, in the course of legal proceedings, or, when legal proceedings might be contemplated, information given to a solicitor by a client and communications by the client for the purpose of obtaining assistance or advice. If the section did not, then it was to be presumed that Parliament did not intend to extinguish an ordinary rule of law of great antiquity which existed for the public benefit.

After Fair J., who delivered the first judgment, had discussed the nature and extent of the solicitor's privilege and had said that it was established that it was definitely in the public interest that it should be maintained, he said that express words in a statute are necessary to nullify a privilege of this type. He continued, at p. 209:

It would seem most improbable that a specific privilege of this kind was intended to be overridden or withdrawn by a section in such wide general terms. If such special privileges, and special protection was intended to be withdrawn, the ordinary course would be specifically to refer to them, as was held in *Newcastle* v. *Morris* (1870) L.R. 4 H.L. 661. The general principles governing the interpretation of this type of provision have been stated by Viscount Simon in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014; [1940] 3 All E.R. 549, where he says: "Where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result" (*ibid.*, 1022; 554). . . .

I have not overlooked that this privilege is primarily that of the client, and that, on the interpretation that I think is

correct, it may be argued that it would exempt him from making such disclosure. That may well be so. It does not directly arise here except to the extent of supporting an argument that, if he is not exempted, then the solicitor should not be. It does seem to me that almost all, if not all, the reasons that I consider apply to confer exemption on his solicitor apply to him: and that he, too, is entitled to the protection to the same extent on the same grounds.

These considerations satisfy me that the defendant was entitled to decline to show matters covered by this common-law privilege to the Inspector whom the Commissioner authorized to obtain such information.

In the course of his judgment, Gresson J., at p. 213, said, after considering s. 163 and the relevant authorities:

I am of opinion, therefore, that the Commissioner of Taxes must exercise the powers given by the section subject to the common-law privilege protecting communications with solicitors, which has been established in order that legal advice may be safely and effectively obtained. I do not think that the statutory provision overrides the common-law rule. . . .

It follows that, in my opinion, the answer to the question propounded by the case should be that the defendant in his capacity as a solicitor, is privileged and excused in law from furnishing the information and producing the books and documents sought by the Commissioner to the extent that the privilege operates. It is not incumbent upon this Court even to attempt to define the scope and limits of the privilege.

Hay J., at p. 217, said:

The argument for the defendant is, in my opinion, placed on a much more substantial basis in counsel's secondary submission, to the effect that s. 163 applies to solicitors who are comprehended in the term "every person", but subject to the limitation that there continues to exist their common-law privilege and obligation not to disclose written or oral communications passing directly or indirectly between client and solicitor in his professional capacity, and in the legitimate course of professional employment. In my view, that submission is well founded. The principle is well established that a general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter, and the application of that principle is well illustrated by the *Duke of Newcastle* case (1870) L.R. 4 H.L. 661, the reasoning of which appears to me to be as fully applicable to privilege from disclosure of information given by clients to solicitors as it is to the privilege of Parliament therein dealt with. . . .

It was submitted that here there could be no privilege on the part of the client himself, as he would be bound by the words of the statute to disclose the information it was designed to elicit, and it necessarily followed that there could be no privilege on the part of the solicitor. It is true that the solicitor's privilege can be no greater than the client's right, and that, in a case where the client cannot refuse discovery, the solicitor cannot claim privilege: see *Cordery on Solicitors*, 4th ed., 298; but it by no means follows that the client's right for present purposes is limited to the extent of the discovery he is bound to make in terms of s. 163. Nor is there, in my opinion, any valid reason for distinguishing the present case from the *Duke of Newcastle* case (1870) L.R. 4 H.L. 661, when it is realized that the privilege in question is one applying to the client as well as to the solicitor. . . .

It is difficult to see how the preservation of the privilege attaching to confidential communications between a solicitor and his client can, to any substantial extent, stultify the purposes of s. 163, having regard to the fact that the wide terms of the section can compel information from quarters where no question of privilege can arise. The limits within which the privilege can be deemed to operate are greatly narrowed by the sweeping language of the section.

Nor do I accept the contention advanced by the Solicitor-General that the privilege in question is one applicable only to legal proceedings, and is no more than a rule of evidence. The whole weight of authority is opposed to that view, as is demonstrated by Fair J., in his judgment, and there is no doubt in my mind that the privilege applies as well to administrative inquiries authorized by s. 163 as to legal proceedings. Moreover, the privilege has its origin, not in the contractual obligations arising out of the relationship of solicitor and client, but in the principle of public policy that the confidential communications between a solicitor and his client shall not be subject to production.

In the course of his judgment, North J. said:

For myself, then, I am not prepared to accept the view that this ancient privilege, so vital both to the administration of justice and to the public interest, has been taken away by a "side wind", for to so hold would mean that the Commissioner could require a solicitor who had been consulted by a client on an income-tax matter to disclose admissions made to him by his client in the course of obtaining legal advice. There are, I think, to adopt the words of Viscount Simon in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014; [1940] 3 All E.R. 549 "adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles" (*ibid.*, 1022; 554).

It follows from the judgment of the Court of Appeal in *West-Walker's* case that their Honours were not able, as the statutory provisions then stood, to hold that the Legislature had abrogated the common-law principle by the language it had used. A statutory modification of the principle was required before the Commissioner could, for his purposes, overcome it. In that situation, the Court was not called upon to determine the scope and limits of the privilege.

The matter then became the subject of discussions between the Commissioner and representatives of the New Zealand Law Society.

No practitioner wants to do anything to help a tax-evader. It is doubtful, too, if the privilege, which is the client's, would extend to a successful claim for privilege if the Commissioner has reason to believe the client, whose affairs he is investigating, is deliberately evading legitimate taxation under the cloak of the privilege. Furthermore, if the client, whose affairs are being investigated, has nothing to hide in his transactions or communications with his solicitor, it is helpful to him that the Commissioner should see that such is the position.

The Commissioner, too, is not concerned with the "communications" between the solicitor in his professional capacity and his client for the purpose of getting legal advice. But he is concerned with the client's financial transactions simpliciter; and an examination of his dealings, as shown in his solicitor's trust account, will sufficiently disclose their nature and significance.

As the result of the discussions, the Inland Revenue Department Amendment Act 1958 was passed on September 9.

The purpose of this Act is to define the circumstances in which information, books, and documents in the possession of a barrister or solicitor, and relating to the affairs of his client, are privileged from disclosure to the Commissioner of Inland Revenue.

Any information, book, or document is privileged from disclosure if—

(a) It is a confidential communication passing between a legal practitioner in his professional capacity and his client; and

(b) It is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and

(c) It is not made or brought into existence for the purpose of committing or furthering the commission of an illegal or wrongful act.

So far, the new Act states the common-law principle, as applied to the purposes of the income-tax legislation.

The privilege is then limited in respect of taxation matters: it does not extend to any information or book or document consisting of or relating to the receipts, payments, income, expenditure, or financial transactions of any specified person, if it is prepared or kept in connection with a solicitor's trust account. If a barrister or solicitor refuses to disclose any information or book or document on the ground that it is privileged, either he or the Commissioner of Inland Revenue may apply to a Magistrate for an order determining whether the claim of privilege is valid.

The Act seems admirably to fulfil its purpose. The scope and extent of the privilege at common law, as stated in the new s. 16A of the Inland Revenue Act 1952 (as enacted by s. 2 of the new Act), is succinctly and accurately stated. If this is, as it may be, the first time in a statute the privilege has been stated, the long history of this common-law doctrine has culminated in its receiving accurate statutory recognition. This is expressed as follows:

> 16A. (1) Subject to subsection two of this section, any information or book or document shall, for the purposes of sections thirteen to sixteen of this Act, be privileged from disclosure if:
>
> (a) It is a confidential communication, whether oral or written, passing between a legal practitioner in his professional capacity and his client, whether made directly or indirectly through an agent of either; and
>
> (b) It is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
>
> (c) It is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

Then comes the modification of the principle:

> (2) Where the information or book or document consists wholly or partly of, or relates wholly or partly to, the receipts payments, income, expenditure, or financial transactions of a specified person (whether the legal practitioner, his client, or any other person), it shall not be privileged from disclosure if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by the legal practitioner in connection with a trust account of the legal practitioner within the meaning of section seventy of the Law Practitioners Act 1955.

The new modification of the privilege in respect of trust-account transactions, set out in subs. (2), will not trouble the practitioner. He, in common with all right-minded citizens, agrees with what McCarthy J. said in *Maxwell* v. *Commissioner of Inland Revenue* (Wellington, September 23, 1958, as yet unreported):

> It must be accepted that the wilful making of false returns amounts to a deliberate evasion of one's duties as a citizen, while at the same time advantage is being taken of the rights of citizenship. Through such action added burdens are thrown on those members of the community who with integrity face their proper obligations, obligations which at no time are light. This class of offence is usually born of greed and should be seen in that light.

Sympathy is wasted on any person who deliberately evades tax or on his partial loss of protection in order to bring him to a just accounting. The Commissioner's new-given authority to investigate the financial transactions of such a person passing through a solicitor's trust account will be accepted as right and proper.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Automatism—Automatism as Defence—Onus of Proof—Where Automatism of Type Consistent with Sanity—Where Automatism attributable to Abnormal Condition of Mind capable of Designation as "disease of the mind"—Proper Direction when Automatism shown to be "disease of mind"—Apart from Issue of Insanity, Onus of Proof on Crown, when Defence of Automatism raised, to Establish Guilt—Onus on Accused to Establish Insanity as negativing Intent—Crimes Act 1908, s. 43 (2)—Mental Health Act 1911. s. 31. Evidence—Evidence of Accomplice—Such Evidence not wholly Exculpatory—Warning to Jury as to acting on it without Corroboration—Unsworn Statement by Accomplice to Police—Direction that Such Statement not Evidence of Truth of Matters therein, except Parts thereof admitted to be Correct. In cases in which intent is an essential ingredient, where the plea of automatism (i.e. that the accused's lack of consciousness negatived intent) is put forward as a defence and a proper foundation has been laid for it, and the automatism is of a type consistent with sanity, there is no reason why, should the defence be successful, the accused should not receive an ordinary acquittal. But if the automatism, or action without consciousness of so acting, is shown in evidence to be attributable to an abnormal condition of the mind capable of being designated as a disease of the mind, the Judge should submit to the jury the question whether, if there is to be an acquittal, the verdict should not be expressed, in terms of s. 31 of the *Mental Health Act 1911*, as an acquittal on account of insanity. (*Hill* v. *Baxter* [1958] 1 Q.B. 277, referred to.) If, there being no evidence of insanity, a plea of automatism is advanced by an accused as showing want of intent, the onus on him is no more than to provide sufficient evidence upon which a finding of automatism could be based. Once that is done, there comes into operation the overall onus which remains throughout the trial upon the Crown to prove the guilt of the accused, the only exceptions being insanity and offences where the onus of proof is specially dealt with by statute. (*Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462, followed.) If there be evidence of insanity as negativing intent (i.e. that disease of the mind made a sane intent impossible) the accused must establish it. If he shows that because of "some disease of the mind" within the meaning of s. 43 (2) of the Crimes Act 1908 (in which the M'Naghten Rules are given statutory recognition) he did not know the nature and quality of the act he was doing, that is sufficient. But, apart from an issue of insanity, the onus of proving all facts necessary to establish guilt remains on the Crown. (*R.* v. *Kemp* [1956] 3 All E.R. 249; 39 Cr. App. R. 27, and *R.* v. *Charlson* (1955) 36 Cr. App. R. 37; [1955] 1 All E.R. 859, mentioned.) *So held*, by the Court of Appeal per totam curiam. *Per Gresson P.* The question whether the state of mind of the accused calls for an acquittal on the grounds of insanity or merely because the necessary intent was lacking depends on the totality of the evidence. Automatism or lack of conscious volition must be put to the jury if it has been advanced as negativing intent; and the jury should be told that it must consider whether, upon the evidence, it is satisfied that the Crown has discharged its onus of proof and that, if in doubt, it may be its duty to acquit the accused. *Per North J.* It is the duty of the trial Judge, in a proper case, to instruct the jury what constitutes a "disease of the mind" within the meaning of s. 43 (2) of the Crimes Act 1908, and then it is for the jury to say whether the accused was suffering from a disease of the mind. (*R.* v *Charlson* (1955) 36 Cr. App. R. 37; [1955] 1 All E.R. 859, criticized. *R.* v. *Porter* (1933) 55 C.L.R. 189, referred to.) *Per Cleary J.* That, when it appears from the evidence that a disease of the mind is relied upon as the foundation for a plea that the accused was not responsible for or even conscious of his acts, the course of the trial is determined by s. 31 of the Mental Hospitals Act 1911, and not by any form of words used by the defence. *Quaere*, per Gresson P., whether the phrase "disease of the mind" includes all forms of mental derangement or aberration, including an absence of consciousness or volition at the crucial time (commonly called "automatism") which may be due to a variety of causes and may be transient, or whether it is to be limited to "disease of the mind" in a much stricter sense. C. was indicted on six counts under the Crimes Act 1908. H., an accomplice, gave evidence. There was a defence of automatism, and medical evidence was given concerning epileptic fits to which C. was subject. Certain questions were put to the jury, which found

C. a party to some of the offences charged, and negatived the defence of automatism. On the direction of the Judge, a verdict of guilty was then returned. The trial Judge directed the jury that it would be a valid defence entitling the accused to an acquittal if he had acted without conscious volition, and that the onus of proving the state of automatism rested on the defence. C. appealed on the grounds that the learned trial Judge had misdirected the jury in four matters: (a) failure to give the usual warning to the jury regarding the evidence of an accomplice; (b) failure to direct the jury regarding the probative content of certain evidence given by H.; (c) failure to direct as to the nature of the defence raised as to automatism; (d) misdirection that the onus of proving the state of automatism rested on the accused. The Court of Appeal held that the first two grounds of appeal were established, quashed the conviction, ordered a new trial, and later gave reasons for that judgment, including reference to the defence of automatism. *Held*, per totam curiam, 1. That, as to the first ground of appeal, the evidence of H. though to some extent exculpatory, was not wholly so, and the jury should have been given the usual warning against acting on it without corroboration; and that s. 4 (1) of the Criminal Appeal Act 1945 was not applicable. 2. That, as to the second ground of appeal, the jury should have been directed that an earlier written unsworn statement by H. was not evidence as to the truth of the matters contained therein, except as to those passages which H. admitted to be correct. 3. That, in respect of the remaining grounds of appeal, it was not necessary, since the conviction had been quashed on other grounds, to make a concluded finding as to the adequacy of the direction regarding automatism, but the Court thought it right to examine the submissions made on the subject of automatism for the assistance of the Judge presiding at the new trial. Observations regarding the meaning of the words "disease of the mind" in s. 31 of the Mental Health 1911, and the circumstances in which the defence founded on s. 43 (2) of the Crimes Act 1908, can be raised. *The Queen* v. *Cottle*. (C.A. Wellington. 1958. April 24, 25; July 31. Gresson P. North J. Cleary J.)

DESTITUTE PERSONS.

Maintenance—Separation—Principles on which Discretion should be exercised in Making or Refusing Separation Order on Ground of Failure to maintain—Nature and Extent of Such Discretion—"Reasonable cause"—"If he thinks fit, having regard to all the circumstances of the case"—Destitute Persons Act 1910, s. 17 (1), (6), (7), 18 (4). It is implied in s. 17 (6) of the Destitute Persons Act 1910 that a wife, who is with "reasonable cause" insisting on living apart from her husband, may have a right to be maintained by him, and that a wife's right to be maintained is, in general, conditional upon the performance by her of the duty of cohabitation. Section 17 (6) confers an arbitrary discretion, which should be exercised in such a way as not to amount to a marked departure from the standard that "grave and weighty" grounds must be shown in order to entitle a wife to refuse cohabitation. In the absence of clear statutory provision to the contrary, the rule to be applied in determining whether, in different forms of proceedings, a spouse is justified in living separate and apart is that the conduct must be "so grave and weighty a matter" as to justify one spouse or the other withdrawing from cohabitation; and the rule is precisely the same when a husband is resisting an allegation of wilful neglect to maintain. (*Jones* v. *Jones* (1941) 165 L.T. 398; *Holborn* v. *Holborn* [1947] 1 All E.R. 32; and *Chilton* v. *Chilton* [1952] P. 196; [1952] 1 All E.R. 1322, followed. *Hill* v. *Hill* [1954] 1 All E.R. 491, referred to.) The opinion of the Magistrate or Judge, under s. 17 (7) should normally be directed to a proper determination on legal grounds of the question whether there is "reasonable cause" for the refusal or failure of a wife to live with her husband, that is to say, such cause as will be sufficient in law to justify the refusal or failure to cohabit. A husband does not "fail" to provide maintenance unless he is under a duty to do so, and s. 17 (7) is a statutory recognition of the common-law principle that, in general, a wife's right to be maintained is conditional on the performance by her of the duty of cohabitation, and, where she has no legal justification for ending the cohabitation she has no right to be maintained unless and until she acts in such a way as to restore her right. (*Chilton* v. *Chilton* [1952] P. 196; [1952] 1 All E.R. 1322, and *Beus* v. *Beus* [1950] N.Z.L.R. 298; [1950] G.L.R. 298, applied.) Before a separation order can be made under s. 18, proof of one or more of the grounds set forth in s. 17 (7) is necessary. Section 18 (4) does not confer on the Court an arbitrary discretion, but calls for an opinion based on proper legal grounds. Whether there was "reasonable cause" during the interval between the separation and the making of the separation order, for the husband's failure to provide adequate maintenance for his wife (as in the present case), it does not matter that the husband's failure to maintain his wife may have been "wilful", as he was under no obligation to provide maintenance. Even if a wife succeeds in showing that she had reasonable cause for non-cohabitation, a bona fide belief to the contrary on the husband's part would amount to a "reasonable cause" for his withholding maintenance from her pending the litigation of the dispute. Section 18 (1), by using the words "if he thinks fit, having regard to all the circumstances of the case", confers a discretion on the Court, and separation orders ought not to be made unless there is some reasonable necessity for them, as the making of such orders is a very, serious matter, involving far-reaching and possibly unjust consequences. The primary question should always be whether a separation order is necessary for the wife's protection. (*Judd* v. *Judd* [1933] N.Z.L.R. 1029, *Rogers* v. *Rogers* [1937] N.Z.L.R. 436; [1937] G.L.R. 245, and *Towns* v. *Towns* [1957] N.Z.L.R. 947, referred to.) *Bulman* v. *Bulman*. (S.C. Christchurch. 1957. November 21. F. B. Adams J.)

Separation—Maintenance—Principles on which Discretion should be exercised in Making or Refusing Maintenance and Separation Order on Ground of Failure to Maintain—Nature and Extent of Such Discretion—"Reasonable cause"—"If he thinks fit, having regard to all the circumstances of the case"—Destitute Persons Act 1910, s. 17 (1) (7), 18 (4). A husband, having been told by his wife to leave the matrimonial home, did so, and thereafter paid her nothing by way of maintenance. She sought maintenance and separation orders on the ground of persistent cruelty and wilful failure to maintain. On appeal from a decision of a Magistrate granting the orders, *Held*, 1. That, on the facts, the wife had not established persistent cruelty or any failure to maintain, wilful or otherwise, during cohabitation. 2. That a husband does not "fail" to provide maintenance unless he is under a duty to do so; that the wife, having told the husband to leave the matrimonial home without legal justification, the husband was under no duty to maintain her; because, in general, a wife's right to be maintained is conditional on the performance by her of the duty of cohabitation; and that, therefore, the husband's failure in fact to provide her with maintenance after he had left the home was not a ground for the making of maintenance or separation orders. 3. That, as there was no evidence that the husband was willing and ready to support his wife if she lived with him, s. 17 (7) of the Destitute Persons Act 1910 had no application. *Semble*, 1. In the absence of clear statutory provision to the contrary, the rule to be applied in determining whether, in different forms of proceedings, a spouse is justified in living separate and apart is that the conduct must be "so grave and weighty a matter" as to justify one spouse or the other withdrawing from cohabitation; and the rule is precisely the same when a husband is resisting an allegation of wilful failure to maintain his wife under s. 18 (4) of the Destitute Persons Act 1910. (*Jones* v. *Jones* (1941) 165 L.T. 398; *Holborn* v. *Holborn* [1947] 1 All E.R. 32; and *Chilton* v. *Chilton* [1952] P. 196; [1952] 1 All E.R. 1322, followed. *Hill* v. *Hill* [1954] 1 All E.R. 491, referred to.) 2. Section 17 (7) is a statutory recognition of the common-law principle that, in general, the wife's right to be maintained is conditional on the performance by her of the duty of cohabitation, and, where she has no legal justification for ending the cohabitation, she has no right to be maintained, but she has her locus poenitentiae, and, if acting reasonably and in good faith, she can at any time terminate her desertion and restore to herself her marital rights including the right to be maintained. (*Chilton* v. *Chilton* [1952] P. 196; [1952] 1 All E.R. 1322, and *Beus* v. *Beus* [1950] N.Z.L.R. 298; [1950] G.L.R. 131, applied.) 3. It is settled law that s. 17 (7) confers an arbitrary discretion in the exercise of which the authorities governing the right of a wife to live apart may be disregarded, but the usual rule that "grave and weighty grounds" must be shown in order to entitle a wife to refuse cohabitation provides the standard which the Court should bear in mind in considering the application of s. 17 (7). 4. Section 18 (1), by using the words "if he thinks fit, having regard to all the circumstances of the case", confers a discretion on the Court; and separation orders ought not to be made unless there is some reasonable necessity for them, as the making of such orders is a very serious matter, involving far-reaching and possibly unjust consequences. The primary question should always be whether a separation order is necessary for the wife's protection. (*Judd* v. *Judd* [1933] N.Z.L.R. 1029; *Rogers* v. *Rogers* [1937] N.Z.L.R. 436; [1937] G.L.R. 245, and *Towns* v. *Towns* [1957] N.Z.L.R. 947, referred to.) 5. Section 18 (4) does not confer on the Court an arbitrary discretion, but calls for an opinion based on proper

legal grounds. Where there was " reasonable cause ", during the interval between the separation and the hearing of the separation proceedings, for the husband's failure to provide adequate maintenance for his wife (as in the present case), it does not matter that the husband's failure to maintain his wife may have been " wilful ", as he was under no obligation to provide maintenance. *Bulman* v. *Bulman*. (S.C. Christchurch. 1957. November 21. F. B. Adams J.)

HIRE-PURCHASE AGREEMENT.

Customary Hire-purchase Agreement—Uncle becoming Conditional Purchaser of Motor-car and taking Delivery of Same—With Consent of Vendor, Car registered in Name of Nephew, a Minor—Agreement not Cloak concealing Real Transaction—Chattels Transfer Act 1924, s. 57. One W. entered into a customary hire-purchase agreement with F. company to purchase a motor-car. The person interested in acquiring the car was C., and, because he was a minor, F. company was unwilling to allow the transaction to be completed in C.'s name, but it did not object to C. being registered as the owner of the car and the registration papers showed a transfer from F. company to C. on the day on which the customary hire-purchase agreement was executed. On the same day, F. company assigned the benefits of the agreement to I. Later, C. purported to sell the car to A., who in turn resold it to J. who entered into a customary hire-purchase agreement with A. A. assigned the benefits of that hire-purchase agreement to S. J. purported to sell the car to C. B., with notice of the fact that she held it under hire-purchase agreement. C. B. paid S. the balance owing by J. While the car was still in possession of C. B., I., in pursuance of the first hire-purchase agreement, seized the car. On an appeal against the judgment of a Magistrate who awarded damages to C. B. against J. for alleged wrongful conversion, *Held*, That there was no ground for concluding that the original hire-purchase agreement with W. was a cloak concealing the real transaction, and so invalid under s. 57 of the Chattels Transfer Act 1924, as W. became the conditional purchaser and took delivery of the car, and, by arrangement between the three parties to that transaction, the car was registered in C.'s name, but the legal title to the car remained at all times with F. company which assigned its rights to I. (*Nelson Guarantee Corporation* v. *Farrell* [1955] N.Z.L.R. 405, and *Cash Order Purchases Ltd.* v. *Brady* [1952] N.Z.L.R. 898, referred to.) *Semble*, If the claim had been made against J., who innocently purported to sell the car to which she had no title, J. could have claimed an indemnity from A., who likewise purported to sell her a car it did not own. (*Industrial Supplies Ltd.* v. *Car Buyers and Sellers Ltd.*) (S.C. Auckland (No. 387£57). 1958. August 25. North J.)

LANDLORD AND TENANT.

Leased premises not subject to Tenancy Act 1955—Month's Notice to Quit given on Ground of Non-payment of Rent—Lessor re-entering before Notice to Quit expired—Notice affirmation of Subsistence of Lease for at least One Calendar Month—Lease determinable only by Re-entry—Purported Re-entry ineffective to determine Lease—Lessor's acceptance of Offer of All Arrears and Expenses of Re-entry, and Consent to Transfer of Lease to suitable Tenant, while Lease subsistent, amounting to Waiver of Right to determine Lease in Reliance on Original Cause of Forfeiture. A notice to quit premises not protected by the Tenancy Act 1955, on the ground of failure to pay rent, served on the lessees on March 24, 1958, required vacant possession " after the expiration of one calendar month from the receipt by you of this notice ". The lease contained an express proviso for re-entry or forfeiture by the lessor on, inter alia, non-payment of rent, and no provision whereby it could be terminated by notice to quit. On March 25, the solicitor for a club was authorized in writing by the lessor's solicitor to re-enter upon the premises as the lessor's agent and to take possession of the same. He duly re-entered and took steps to prevent the lessees returning to the premises, on which he left a formal notice of re-entry. On March 28, one of the lessees was adjudged bankrupt. The lessor authorized the club's solicitor to arrange for a locksmith to change the existing locks. Notwithstanding this the other lessee endeavoured to return to the premises. On April 1, the club's solicitor informed the Official Assignee that the club had leased the premises as from that date, and asked for the keys, which were handed to him and he had the lock on the outside door changed. On the same date, the club occupied the premises as arranged with the lessor's solicitor, and continued to occupy them, and the lessor promised to give it a lease. On April 17, the Official Assignee's solicitors gave notice to the lessor that the Official Assignee was able and willing to pay the arrears of rent and any expenses of the re-entry, and asked that he be put back into the position of lessee jointly with the non-bankrupt lessee. On April 30, the lessor's solicitors replied that the lessor was willing to " consent to a transfer of the existing lease " to a responsible tenant provided the arrears of rent were paid to date together with the expenses of re-entry. On May 1, the Official Assignee's solicitor accepted that position, and replied that the letter " obviated the need for an application to the Court for relief against forfeiture ". On May 15, the lessor's solicitors purported to withdraw the lessor's consent to the transfer of the lease to the Official Assignee and the non-bankrupt lessee, which the lessor had previously given. On an application by the Official Assignee for a declaration that the lease, in relation to the bankrupt's interest therein, was an asset in his bankrupt estate; that the lessor had not re-entered or forfeited the lease, and, alternatively, an order granting relief against such forfeiture, *Held*, 1. That the notice to quit affirmed the subsistence of the lease for at least one further calendar month, or until validly determined, and that, by reason of its terms, the lessees were entitled to retain possession until the expiration of the period stated. 2. That this particular tenancy could not be determined by notice to quit or demand for possession, but only by re-entry: and the notice to quit could not be construed as an unequivocal determination of the lease or as equivalent to re-entry or the commencement of an action for possession. (*Town* v. *Stephens* (1899) 17 N.Z.L.R. 828 and *Moore* v. *Ullcoats Mining Co. Ltd.* [1908] 1 Ch. 575, followed.) 3. That the notice to quit precluded the lessor from exercising any right of re-entry for any antecedent non-payment of rent, and, in particular, from exercising that right, during the month referred to in the notice to quit; and that, accordingly, the purported re-entry was ineffective to determine the lease. 4. That the lessor's acceptance of the Official Assignee's offer of all arrears and the expenses of re-entering, and her consent to the transfer of the balance of the lessee's term to a suitable tenant at a time when the lease still subsisted, amounting to a waiver of her right to determine the lease at a subsequent date in reliance upon the original cause of forfeiture. (*Matthews* v. *Smallwood* [1910] 1 Ch. 777, followed. *Loewenthal* v. *Vanhoute* [1947] 1 All E.R. 116; *Marche* v. *Christodoulakis* (1948) 64 T.L.R. 466; *Creery* v. *Summersell & Flowerdew & Co. Ltd.* [1949] 1 Ch. 751, and *Gregory* v. *Wilson* (1852) 9 Hare 683, 68 E.R. 687, applied.) 5. That, consequently, the lessor had not re-entered or forfeited the lease, and the interest therein of the bankrupt lessee was an asset in his estate in bankruptcy. *Re Register* (*A Bankrupt*), *Ex parte Official Assignee*. (S.C. Auckland. 1958. July 31. T. A. Gresson J.)

LICENSING.

Offences—Search Warrant—Jurisdiction—Justice's Judicial Duty, before issuing Search Warrant, to be satisfied on Sworn Facts of Reasonable Grounds to believe Liquor being sold unlawfully—Informant's Belief inconclusive to found Jurisdiction to issue Search Warrant—Licensing Act 1908, s. 228. A Justice of the Peace, in determining under s. 228 of the Licensing Act 1908 whether or not there is reasonable ground for belief that liquor is sold, or exposed, or kept for sale at the place mentioned, is charged with a judicial duty upon which he must exercise his own judgment. The grounds or facts upon which the informant's suspicion arises must be sworn to, and it is on these sworn facts that the Justice, in the exercise of his judicial function, must be satisfied that there is reasonable ground to believe that liquor is being sold unlawfully. The belief of the informant is not conclusive and is of secondary significance only, as it is the Justice himself, and not the informant, who must be so satisfied. (*Bowden* v. *Box* [1916] G.L.R. 443, followed. *Bridgeman* v. *McAllister* (1898) 8 Q.L.J. 151, applied.) *Mitchell* v. *New Plymouth Club* (*Incorporated*). (S.C. New Plymouth. 1958. July 29; August 18. T. A. Gresson J.)

LOCAL AUTHORITIES.

Negligence—Obstruction on Roadway—Duty of Local Authority in Respect of Preventing obstruction becoming Danger to Public. A local authority has a duty to take reasonable steps to prevent an obstruction on its roads becoming a danger to the public, and to give the public due warning of its existence by night and day. The duty to take care is not a duty to light the obstruction, even though lighting in such a case is no doubt the obvious and simplest method of precaution during hours of darkness: other steps may be equally effective. (*Fisher*

v. *Ruislip and Northwood Urban District Council and Middlesex County Council* [1945] K.B. 584; [1945] 2 All E.R. 458, followed.) *J. R. Day Limited* v. *Dunedin City Corporation* (*Barclay, Third Party*). (Dunedin. 1958. May 27, 30; June 10, Willis S.M.)

MAGISTRATES' COURT. (M.C.)

Practice—Appeal to Supreme Court—Application for Order for Re-hearing of Whole of Evidence—Magistrate's Notes reasonably full and accurate—Affidavit attacking Magistrate's Notes inadmissible—Magistrates' Courts Act 1947, s. 76. Under s. 76 of the Magistrates' Courts Act 1947, the Supreme Court on an appeal, has a discretion, to be sparingly used, to re-hear the whole or any part of the evidence, but it is not permissible to admit an affidavit by some person present at the Magistrates' Court hearing purporting to depose what a witness said, in substitution for a seemingly full and correct note by the Magistrate of the evidence of that witness. (*Hodson* v. *Edwards* (1910) 12 G.L.R. 476, followed.) *Belcher* v. *Woodward.* (S.C. Auckland. 1958. August 13. Shorland J.)

PUBLIC REVENUE.

Death Duties—Life-Insurance Policy assigned by Insured during Lifetime for Adequate Consideration—Not Policy Kept up by Insured "for benefit of a beneficiary"—Nature of Transaction to be looked at to ascertain if entered into for "fully adequate consideration for money or money's worth"—Settlement by Deed for Infant Son with Provision for weekly Payment to Former Wife during Her Lifetime—Liability for Such Monthly Payment not "debt owing by the deceased at his death", as Consideration therefor given by Wife and Settlement in Favour of Son Substantial Benefit arising from Deed—Death Duties Act 1931, ss. 5 (1) (f), 9 (1), 38 (1). If a person disposes of a life-insurance policy on his life during his lifetime for adequate consideration in money or money's worth, that policy is not a policy "kept up by him for the benefit of a beneficiary" within the meaning of s. 5 (1) (f) of the Death Duties Act 1921. In ascertaining whether an agreement has been entered into for a "fully adequate consideration in money or money's worth" with recourse to the meaning of the definition of "gift" in s. 38 (1) of the Death Duties Act 1921, the proper approach is to look at the nature of the transaction and consider whether what was given was a fair equivalent for what was received. (*Attorney-General* v. *Sandwich* [1922] 2 K.B. 500, applied. *Public Trustee* v. *Commissioner of Stamp Duties* (1912) 31 N.Z.L.R. 1116, and *Commissioner of Stamp Duties* v. *Pearce* [1924] G.L.R. 338, approved.) *So held,* by the Court of Appeal, affirming the judgment of Stanton J. [1957] N.Z.L.R. 1197, on this point. On June 12, 1931, the deceased entered into a separation agreement with his wife, which contained, inter alia, a covenant to pay his wife £50 a month during their joint lives, and a provision that he should maintain an insurance policy on his life for £5,000, which was then transferred to his wife. On August 15, 1935, a decree nisi was granted to the deceased. On February 17, 1936, the provisions of the separation agreement were varied by deed, in which it was agreed that the maintenance payments agreed upon should continue for the life of the former wife, but, if she remarried, the monthly amount should be reduced to £25; and, further, it was agreed that the former wife should transfer the insurance policy to trustees to be held in trust for her and the child of the marriage, and for the deceased if he should survive her and the child died under the age of twenty-one (which he would attain in 1940). On May 15, 1936, the decree nisi was made absolute. The deceased died on March 30, 1951. The wife had remarried. She and the child of the marriage survived the deceased. The proceeds of the policy of insurance, payable on the deceased's death, amounted to £7,440 4s. The Commissioner of Inland Revenue included in the value of the deceased's estate for death-duty purposes the proceeds of the life-insurance policy. He also refused to treat the liability of the deceased to pay maintenance to his former wife as a debt owing by the deceased. It was held by Stanton J. that the Commissioner wrongly included the sum of £7,440 4s. representing the proceeds of the policy; and that an allowance should be made in respect of the liability of the deceased at his death to pay £25 to his former wife during her life, such allowance to be calculated on an actuarial basis. On an appeal by the Commissioner from the whole of that judgment, *Held,* by the Court of Appeal, 1. That the Commissioner wrongly included in the final balance of the deceased's dutiable estate the sum of £7,440 4s., representing the proceeds of the insurance policy; and that no portion of that amount should be included, as the separation agreement entered into on June 12, 1931, bore every evidence of being a bona fide arrangement, was supported by a valuable consideration, and there was no ground for holding that anything was left for gift or for natural love or affection. (*Finch* v. *Commissioner of Stamp Duties* [1927] N.Z.L.R. 810, aff. on app. (1929) N.Z.P.C.C. 600, followed.) 2. That the deed of February 17, 1936, could not be regarded merely as a variation of the separation agreement of June 12, 1931. 3. That no allowance should be made in respect of the liability of the deceased at his death to pay, pursuant to the deed of February 17, 1936, £25 per month to his former wife during her lifetime, for such liability was not a "debt owing by the deceased at his death" for the purposes of s. 9 (1) of the Death Duties Act 1921, because the substantial benefit arising under that deed was the settlement in favour of the deceased's infant son, and, therefore the debt—namely, the £25 per month—was not "incurred" wholly for the deceased's own use and benefit, the full consideration moving from the wife included the insurance policy, and the husband was not free to dispose of the policy as he pleased, free from the control or interference of others. (*Attorney-General* v. *Duke of Richmond* [1909] A.C. 466, applied.) *Quaere,* whether the words "wholly for his own use and benefit in s. 9 (2) (a) apply to the debt or to the consideration; but, semble, the construction most beneficial to the subject should be adopted. Appeal allowed in part. Judgment of Stanton J. [1957] N.Z.L.R. 1197, varied. *Commissioner of Inland Revenue* v. *New Zealand Insurance Co. Ltd.* (C.A. Wellington. 1958. August 14. Gresson P. North J. Hutchison J.)

PUBLIC WORKS.

Compensation for Land Taken—Farm Land containing High Deposit of Metal—Method of Valuing such Land—Finance Act No. 3 1944, s. 29 (1)—Statutes Amendment Act 1939, s. 64. Farm land was taken under the Public Works Act 1928 by the County for a metal pit. On a claim for compensation for the loss of farm metal, the claimant alleged he was entitled to the value of the land as farm land, plus the value of the metal that would be extracted therefrom. The respondent County contended that it was liable only for the value of the land as farm land, plus something additional for the substantial metal deposits it contained. *Held,* that the proper approach to the question was to estimate the value of the land as farm land containing a high deposit of metal in a district where metal was in limited supply; and that the land as such had a potential value above that of ordinary farm land, and should be valued accordingly. (*South Eastern Railway Company* v. *London County Council* [1915] 2 Ch. 252 and *Marshall* v. *Minister of Works* [1950] N.Z.L.R. 339; [1950] G.L.R. 20, applied *Pointe Gourde Quarrying & Transport Company Limited* v. *Sub-Intendent of Crown Lands* (*Trinidad*) [1947] A.C. 565, distinguished.) *Wills* v. *Eltham County.* (Taranaki Ld. Val. Cttee, Stratford. 1958. June 26; July 16. Yortt S.M.)

SOCIAL SECURITY.

Special Tribunal—Evidence—Inquiry into Allegation of Grave Misconduct—Notice by Minister of Health to Respondent reciting Convictions for Breach of Social Security Act 1938—Tribunal's Inquiry not confined to Investigation of Those Charges—Evidence of Respondent's Performance of Duties under Contract Admissible—Social Security Act 1938, s. 84—Commissions of Inquiry Act 1908, s. 2. Under s. 84 (2) of the Social Security Act 1938 the Minister of Health, if he has reason to believe that a contracting party under s. 84 (1) has been guilty of any grave misconduct in the performance of the duties required of him under the contract, may refer that matter for investigation by a special tribunal. The expression in s. 84 (2), "guilty of any grave misconduct in the performance of the contract", includes all acts or omissions in relation thereto whether or not they disclose offences against the Social Security Act 1938. The Minister of Health, in his notice to the respondent summoning him to appear before a special tribunal to investigate a charge of misconduct, stated that the respondent had been convicted of twenty-two charges of unlawfully obtaining payment for the Social Security Fund. *Held,* 1. That the mention in the Minister's notice of the twenty-two convictions was not the reference for inquiry to the Tribunal, but was a voluntary statement by the Minister of his grounds for believing that there has been misconduct. 2. That any evidence as to the performance by the respondent of his duties under the contract referred to was, therefore, admissible, and the hearing should proceed on that basis. (Statement of Kennedy J. in *In re Royal Commission on Licensing* [1945] N.Z.L.R. 665, 684, applied.) *Re Foster.* (Special Tribunal. Auckland. 1958. July 17. Astley S.M., President.)

THE EASEMENT OF NATURAL RIGHT OF SUPPORT.

The Problem of the Missing Excavator.

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

Swiftly (if not silently) the bulldozer does its work with the efficiency expected of the machine in this great machine age of ours. But one may well wonder whether the law has moved in harmony to meet the changes in the landscape which the bulldozer so rapidly achieves: in a few hours hills may be levelled and hilly sections excavated, enabling houses and other buildings to be built thereon; but, in improving for building purposes, the section excavated, the gentle bulldozer may well do untold damage to the adjoining sections. When a client complains that the owner of the section lower than his has excavated with the aid of the bulldozer a building site and your client is alarmed lest the house already built on his, the higher section, should be imperilled, what can one do to assist the client? It is too late to get a *quia timet* injunction, (if such a remedy were ever available), for the bulldozer has well and truly done its work. Must one simply wait for the next move to come from the Almighty?

Every owner of land has *ex jure natura*, as an incident of his ownership, the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land *naturally* affords to his land. This natural right to support does not entitle the owner of land to insist upon the adjoining land of his neighbour remaining in its natural state; but it is a right to have the benefit of support, which is infringed as soon as, *and not until*, damage is sustained in consequence of the withdrawal of that support: *12 Halsbury's Laws of England*, 3rd ed., 603, 604.

Where land has been built upon, it is entitled only to such degree of support as would have sufficed if it had not been burdened with buildings; but to that extent the natural right continues, and affords a right of action against a person so excavating adjacent and subjacent soil so as to let down the land with buildings on it, provided the excavation would have caused subsidence in the same manner had no buildings been erected. In such a case the measure of damages includes the injury to the buildings themselves: *Stroud's Law of Easements*, p. 211; *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.* [1947] Ch. 427; [1947] 1 All E.R. 218, per Somervell L.J.

The recently-reported case of *Bustin* v. *Petley* (1957) 9 M.C.D. 153 is of more than passing interest, as it deals with the problem of the missing excavator,* and Mr J. S. Hanna S.M. had to decide which of two New Zealand leading cases applied to the rather unusual facts of the case. First, it will be observed that the action for damages was brought not by the owner of the upper section, but by the owner of the lower section, which more than twenty-five years previously had been excavated, presumably for the purpose of building a house thereon.

The plaintiff was the owner and occupier of a property which she purchased in 1930 and had since occupied. It was bounded at the back by the defendant's section, which was on higher ground than the plaintiff's.

When the plaintiff bought her section, there already existed a perpendicular concrete retaining wall, some 11ft. in height at one end and tapering down to 5ft. at the other, erected substantially upon the boundary-line dividing her property from the defendant's. *There had been an excavation along that boundary on the plaintiff's side*, and the concrete wall had been built against the face of clay and rotten clay left by such excavation. Most of the wall had been concreted against the face. The wall had been built for more than twenty-five years.

The defendant had acquired her property in 1946. No filling had since been brought on that property, and she was wholly unaware that there was any filling on her property.

On July 3, 1955, following heavy rain, the retaining wall collapsed. It had broken in various places, and there was a substantial subsidence of soil and rubbish into the back-yard of the plaintiff, who launched an action against the defendant, claiming damages resulting from the collapse of the retaining wall.

In the course of his judgment, the learned Magistrate said:

> What the plaintiff contends is that the filling behind the wall caused the wall to collapse. I feel quite unable to accept that as proved. The impression the evidence makes upon my mind is that the collapse of the wall was due to the inherent defects of the wall itself, age, and natural decay, and pressure from the adjacent soil in wet weather. The evidence fails to satisfy me that the land behind the retaining wall, that is on the defendant's side of it, was in other than its natural condition, not having been built up behind the wall by any appreciable or substantial accumulation of soil capable of exercising any destructive pressure upon such wall. I am satisfied that the perpendicular face between her section and the plaintiff's had been created by the cutting down or excavation of the plaintiff's section, and not by any artificial raising of the defendant's section in any substantial way. The evidence does not satisfy me that the collapse of the wall, and the results which followed from it, were due to lateral pressure and slipping of material artificially accumulated by the defendant's predecessor behind the retaining wall for the purpose of levelling the section.

The learned Magistrate went on to point out that the plaintiff's counsel had placed great reliance on *Knight* v. *Bolton* [1924] N.Z.L.R. 806, on app., 1043; [1924] G.L.R. 322, on app., 602. That was a decision of the Court of Appeal which decided that an occupier of land is liable to an action by a private person damaged by a nuisance existing in or coming from the land, if, being a successor in title, he took the land with an artificial nuisance upon it.

The learned Magistrate went to some pains to ascertain exactly what the facts were in *Knight* v. *Bolton*, and came to the conclusion that the most comprehensive statement of the facts of that case are to be found in the judgment of Herdman J. However, that judgment is too long to cite here *in extenso*. Suffice it to say that both titles were acquired independently from or through a previous owner in whom both sections were originally vested; and, as in *Bustin* v. *Petley*, the defendant's land was on a higher level

* Thirty-four years ago, Sir Robert Stout C.J. pointed out the need for remedial legislation: *Bolton* v. *Knight* [1924] N.Z.L.R. 1043, 1044.

than that of the plaintiff, there being a perpendicular face several feet in height between the two properties. On the boundary between the two properties there had been erected a wooden retaining wall; and, on the plaintiff's side of the retaining wall and a few inches therefrom, there was a brick wall considerably lower than the wooden wall. The defendant's land immediately in contact with the wooden retaining wall *was not a natural formation* but consisted of an artificial accumulation of soil placed there by the defendant's predecessor in title. The weight of this artificial accumulation of soil pressing against the wooden retaining wall forced the wall forward against the adjoining brick wall, with the result that the brick wall was fractured and displaced and there was danger of further damage. The defendant had had ample warning of the mischief complained of; for, about five years previously, the plaintiff had called his attention to the fact that one of the posts of the retaining wall had given away and fallen forward until it touched and cracked the plaintiff's brick wall. The defendant then took steps to prevent any further subsidence, but the steps taken were ins fficient. In 1923, the plaintiff wrote to the defendant drawing his attention to the fact that the retaining wall had broken the plaintiff's brick wall and pointing out the dangerous condition of affairs. The defendant wrote in reply declining any responsibility and saying he would not do anything. It was held by the Court of Appeal (distinguishing *Byrne* v. *Judd* (1908) 27 N.Z.L.R. 1106; 11 G.L.R. 45) that the defendant was liable for the *nuisance* and that the plaintiff was entitled to an injunction and to damages. One material fact which appears to emerge from the facts as rejected by Herdman J. is that for some distance from along the line which separated the two adjoining properties *no excavation or very little excavation* was necessary to enable building operations to be carried out on the plaintiff's land.

In *Bustin* v. *Petley*, the learned Magistrate ended his judgment thus:

> Now if these, indeed, be the facts of *Bolton* v. *Knight*, then it is at once plain that this case is very different from that case.
>
> For my own part, I incline to the view that the facts of this case approximate the facts of *Byrne* v. *Judd*, and that it is the defendant in the present action, who has a right of action, not of course, against the plaintiff, but against the person who, by excavating on his own land, has caused a subsidence of the defendant's land.
>
> In the result, the present action fails and there will be judgment for the defendant to whom the plaintiff is ordered to pay costs of Court, solicitor's fee (£20), and witnesses' expenses as fixed by the Registrar.

To get a clear idea of the essential difference between *Knight* v. *Bolton* and *Byrne* v. *Judd*, one cannot do better than turn to the judgment of Salmond J. (the Judge of first instance) in the former case [1924] N.Z.L.R. 806, 810; [1924] G.L.R. 322, 324:

> "In the New Zealand case of *Byrne* v. *Judd* (27 N.Z.L.R. 1106; 11 G.L.R. 45) it was held by the Court of Appeal that when a piece of land has been cut down or excavated so as to withdraw the lateral support afforded by it to the adjoining land of another owner, and a subsidence of the adjoining land subsequently results, the person solely responsible for the subsidence is the person who originally interfered with the right of support, and that a subsequent owner or occupier of the excavated land is under no liability for the subsidence, and is under no obligation to prevent it by erecting a retaining-wall or other substituted support, or even to keep in repair any such wall that may have been constructed by his predecessor in title. This decision, however, is not in point in the present case. In *Byrne* v. *Judd* the plaintiff said to the defendant, "It is your duty to hold up my section so as to 'prevent if from slipping into yours'. In the present case the plaintiff says to the defendant, "It is your duty to hold up your own section so as to prevent it from slipping into mine'. In both cases the defendant replies that he is under no such duty, because the danger is due to an alteration of the natural conditions effected not by himself but by a predecessor in title. In *Byrne* v. *Judd* it was held that this was a good plea. In the present case, for the reasons which I have already indicated, I think that it is a bad one. A duty to prevent a subsidence of one's neighbour's land is one thing; a duty to prevent the falling into one's neighbour's land of an artificial accumulation of soil upon one's own land is a different thing. The existence of the former duty is negatived by *Byrne* v. *Judd*, the existence of the latter duty is affirmed by the general law of nuisance."

When, therefore, a retaining wall between a higher and lower tenement collapses and the question arises as to what person is liable to repair the damage, the answer to the question will depend to a great extent on the facts. If the substantial cause is an artificial accumulation of soil on the higher tenement (thus constituting a nuisance), the present occupier and owner is liable whether or not he created the nuisance. But, when the real cause is an excavation on the lower tenement, then only the original excavator is liable: the problem then is to find him. Where the ownership of the lower tenement has changed in the meantime, the owner of that tenement is not liable; and, as between the two tenements, the damage must stand put, as in *Bustin* v. *Petley*.

Wife as Witness.—In *Director of Public Prosecutions* v. *Blady* [1912] 2 K.B. 89, the defendant was charged upon the information of his wife with knowingly living wholly or in part on the earnings of prostitution. Pickford J., after stating that as a general rule a wife was not a competent witness against her husband said at p. 90: "There were exceptions, but they were confined to cases in which the offence itself concerned the liberty, health or person of his wife. . . . In the present case the offence does not necessarily involve anything of the kind. It does not necessarily involve a wife in any way. The offence is living on the earnings of prostitution, it may be of a wife or anyone else, and therefore it does not concern the person, or the liberty, or the health of a wife. . . . If the wife were so called as a witness, it might appear that she had been coerced into prostitution, or it might not. In either case the offence would be proved. In other words injury to to the person or health of the wife is no part of the offence charged." Avory J. said at p. 91: "To the general rule of law that in the case of husband and wife one is not a competent witness against the other on a criminal charge there is, so far as I know, only one exception at common law—namely, that either is a competent witness on any charge which affects his or her liberty or person. The cases cited to us by Mr Humphreys in support of his argument are cases in which the liberty or person of the wife has been affected by force or fraud. In my opinion the charge in the present case under the Vagrancy Act 1898 [U.K.] is not a charge affecting the liberty or person of the wife either by force or fraud. The offence is equally constituted whether the wife is or is not a consenting party. It is no part of the offence to show that her liberty or her person was affected either by force or fraud."

PAGES FROM THE PAST.

IX. Two Forgotten Judges: Sidney Stephen and Daniel Wakefield JJ.

II. Daniel Wakefield J.

By R. Jones.

Mr Justice Daniel Wakefield's contribution to the history of the Judiciary was necessarily circumscribed by the brevity of his tenure of office. Barely a month after the second anniversary of his appointment as an acting Judge, ill-health compelled him to resign his Commission. Only one other Judge of the Supreme Court, Sir Patrick Aloysius Buckley, enjoyed a shorter encumbency than Wakefield. Buckley was appointed in December, 1895, and died six months later. Wakefield was invited to accept an acting Judgeship in October, 1855, on the removal of Mr Justice Sidney Stephen to Auckland to relieve the Chief Justice, Sir William Martin, and his resignation was forwarded to the Executive Council in November, 1857. Although his retirement was not officially recognized until January 5, 1858, three days before his death, his work on the Bench had ended several months before. His last illness was a long one, and the arrears of business in the Southern District were proving an embarrassment to profession and public alike.

Wakefield might well have had lively cause to resent the peculiar attention that was devoted to him by Mr Justice H. S. Chapman in his early days in the Colony. Chapman could find no good in him whatever. The temptation to expand Pope's epigrammatic contrast between the wisest and meanest of men, one fears, was often too strong for Chapman the diarist and letter-writer, whatever more impartial qualities were possessed by Chapman the Judge. It is true that Wakefield cut no heroic figure in the primitive sphere of early colonial life, either as a politician or as a Judge, and there may be disenchantment from the juridical viewpoint today at finding him, in that world, neither better nor worse than the general run of his fellows. But that can hardly be recognized as a valid reason for treating him almost as a criminal, as Chapman was pleased to do. There may have been truth, but not the whole balanced truth of historical judgment, in a great many of the critical Judge's assessments. In fact, it is not easy to avoid the conviction that Chapman J., at least in his private capacity, was liable to be carried away by either loyalty or prejudice, with the result that he too often lacked a sense of proportion and fell short of equity in judgment.

Arrival In New Zealand.

Daniel Wakefield was born in London in 1798, one of five brothers, the most significant of whom, in terms of New Zealand at least, was Edward Gibbon. He entered Lincoln's Inn on the recommendation of his uncle, Daniel Wakefield K.C. in 1827 and, on being called to the Bar in London, practised in a desultory fashion for a number of years. There is no record of his ever enjoying any substantial practice in the Old Country, but he was without question a man of the world, a frequenter of the clubs, full of gaiety and good humour, and with a certain courtly gallantry—n short, rather too much of the soldier of fortune to be an aver-devout worshipper at the altar of the Common Law.

It could be assumed that his work at the Bar made only limited claims on his energy, since it can be taken for granted that no man in assured practice would abandon actual or potential professional prospects at the English Bar for the uncertainties of a Colonial career. That, of course, in reality proves nothing. What could be more to the point is that in 1843 a rollicking sporting journal of the day, "*Bell's Life in London*", announced that a certain Daniel Wakefield had been posted as a defaulter at Newmarket in the sum of £4,000; that in 1844 a "Mr Bowler" was among the passengers from Tilbury to Wellington; and that later, on arrival in this country, "Mr Bowler" turned out to be Mr Daniel Wakefield.

Whatever Wakefield's reasons for coming to New Zealand may have been, it was no new decision to emigrate that he made in 1844. Earlier he had been intimately associated with Edward Wakefield, another of his uncles, in plans for the colonization of South Australia. As one of the architects of the Charter of the South Australian Association, it had from the outset been his intention to sail with the first settlers for the new Colony. But, when his formal application to the Colonial Office for a Judgeship in South Australia was declined, his interest in the new settlement suddenly diminished. After the first colonists had left for South Australia, he could still be found in his chambers, pursuing his unspectacular professional way which, if it achieved nothing else, kept his name out of the accepted law reports of his day.

On his arrival in New Zealand, Mr Wakefield practised in both Wellington and Nelson; but here again his interests were less forensic than general. Averse to the considerable labour of establishing himself at a Bar where opportunities were far from generous, he found local politics more congenial, and it was while dabbling on the fringe of his brother's affairs in Wellington that he came under the critical notice of Mr Justice Henry Samuel Chapman, who at that time was the only puisne Judge in the Colony.

There are for most of us conjunctions of time and circumstance that stamp admiration and prejudice alike with a seal of certitude beyond argument, and with Chapman at this time the accent was strongly on prejudice. There was not lacking in the late forties evidence that Chapman J. was beginning to repent his coming to New Zealand, and such disillusionment as he felt he was wont to express in stern judgments of men and affairs as he saw them. In a letter to his father in England in 1847, he seemed to set the mean for his estimate of one who, within a decade, was to step into the shoes he was even then more than half willing to discard.

> "Wakefield's brother Daniel and others of his toadies go about the Beach in their sneaking way", he wrote (*Chapman Letters*).

Daniel Wakefield had not yet found an official niche in the administration, but when his appointment as Crown Solicitor and Public Prosecutor was announced, together with that of Henry Petre as Provincial Treasurer, Chapman's reaction was one of immediate disapprobation.

> "No appointments could be worse", he said in a letter home. "It now needs only a bad Provincial Secretary for the Executive Council really to distinguish itself with a collective folly."

In December, 1847, a Charter was signed dividing the Colony into two provinces—New Ulster and New Munster—and, when this was proclaimed in March of the following year, the system of government vested in a Governor, who was responsible only to the Crown, was abolished. Each province was now to have a Lieutenant-Governor under the Governor-in-Chief, who was also Governor of each province, and an Executive Council and Legislative Council. Thus a variety of administrative posts, for which there was keen competition, were created. Wakefield, as Crown Solicitor, set his heart on the Attorney-Generalship of New Munster, and his prospects of securing the appointment were generally conceded. Chapman viewed the prospect with alarm and expressed himself accordingly in a letter to his father:

> "This Dan is in every respect a bad fellow . . . destitute of principle, mendacious and slanderous. . . . His knowledge of the law, if he ever had any, has grown rusty from non-use."

Later, with the position of Attorney-General still in the lap of the gods, Chapman returned to the attack. In another letter he deplored the fact that the appointment of Wakefield seemed likely, and presented a catalogue of errors and shortcomings which he canvassed as ample grounds for a different choice. Wakefield, he recalled, had become separated from his wife in circumstances highly discreditable to himself; he had been posted as a defaulter in respect of gambling transactions at Newmarket in England; and he had arrived in New Zealand under the assumed name of "Bowler" to escape those obligations (*Chapman Letters*, July 10, 1848).

And, of course, to lend verisimilitude to his uncompromising view, Chapman at this time contrived to become possessed of a copy of *Bell's Life in London*, which chronicled the details of the £4,000 in respect of which Wakefield was alleged to have been in default at the time of his adoption of his temporary alias.

Political Beginnings.

Already the chief executive offices of the New Munster Provincial Legislative Council had been filled, with Edward John Eyre as Lieutenant-Governor, Henry William Petre as Treasurer, and Alfred Domett as Colonial Secretary; but the Governor-in-Chief, Sir George Grey, was bidding his time in the matter of the appointment of an Attorney-General. Finally, on December 21, 1848, he invited Wakefield to accept the office. Chapman was more than ever chagrined, and even John Robert Godley, the Resident Agent of the Canterbury Association in Christchurch, which was included in the boundaries of New Munster, expressed some dismay. He thought Wakefield "most incompetent", notwithstanding that to date the new Attorney-General as Crown Solicitor had had negligible opportunities of showing his mettle either as lawyer or politician.

Godley found it difficult to justify the appointment of Wakefield, and two years later it must still have been exercising his mind, for, in 1850, he wrote to his father in England emphasizing that Sir George Grey had been fully aware of the circumstances of his new Attorney-General's arrival in New Zealand under a false name, and had refused to view them as a bar to office.

Godley's opinion on this matter is confirmed by Grey's explanation of the appointment to his Lieutenant-Governor in New Munster, Mr Eyre. Writing to Eyre, Grey mentioned the commonly-accepted stories of Wakefield's introduction to the Colony, and added:

> "To make such a reason as this the ground for lasting exclusion from the Public Service would be to raise up implacable enemies to the Government, who, feeling themselves marked men, could never become reconciled to it." (*New Zealand Archives.*)

A disagreement with Sir George Grey over the land regulations, a topic on which his colleague, Mr Justice Stephen, also crossed swords with the Governor, led to Wakefield's resignation from the post of Attorney-General in 1853, and he retired temporarily from the public scene. In the interim, Mr Justice H. S. Chapman had crossed the Tasman to take up his duties as Colonial Secretary in Tasmania, and the Judiciary, which in 1850 had been increased to three by the premature appointment of Mr Justice Stephen to Otago, was now reduced once again to a Chief Justice, Sir William Martin, resident in Auckland, and Mr Justice Stephen, who had succeeded Chapman J. at Wellington.

When ill-health in 1855 caused the absence from the Colony of the Chief Justice, a withdrawal that eventually proved permanent, Stephen J. removed to the Northern District as Acting Chief Justice, and the Government was faced with the necessity for a new appointment. As Sir William Martin was thought to be only on sick leave, an acting Judge was all that should be required, and Wakefield was invited to accept office on that basis in October, 1855.

Canterbury Courts.

Among the early records of the Christchurch Supreme Court are references to both Stephen J. and Wakefield J. When the first prisoner in Canterbury was tried on November 6, 1852, at Lyttelton by Stephen J. on charges of theft of blankets, flour, and tea from a warehouse, Mr Attorney-General Wakefield appeared for the Crown. In spite of the failure of his witnesses to appear, the accused was acquitted, and the jury commented "on the imperfect manner in which the evidence was got up in this case".

Stephen's next case, with Wakefield again prosecuting, concerned the theft of clothes valued at £21 from an employer. His Honour remarked that temptation had been provided by the carelessness of the master and the goodness of his wife, and proceeded forthwith to impose a sentence of seven years' transportation. On the following day Wakefield reappeared in Court with a new indictment against the province's first prisoner—theft of a watch—and this time he secured a conviction and a penalty of seven years' transportation.

It was two years before the Canterbury Supreme Court sat again. Stephen J. arrived at Lyttelton to

find the Crown unprepared to proceed with two indictments and "the Court was adjourned until tomorrow" (November 28, 1854). When the prisoners were arraigned, one was found not guilty and "discharged with an admonition" and the other had to have a Bench Warrant issued for his arrest. He had skipped his bail, and, apparently, had taken all his witnesses with him. A week later His Honour gave effect to a jury's recommendation to mercy on account of the "youth and ignorance" of a seventeen-year-old charged with attempted rape by sentencing the prisoner to two years' imprisonment with hard labour.

Among Stephen J.'s more interesting cases at this time was the trial of the notorious freebooter James MacKenzie, whose spectacular memory is preserved in the MacKenzie Country, over which he held sway for years as an almost legendary figure. MacKenzie was charged with stealing a thousand sheep. In the dock, the prisoner "on being several times required to plead, continued mute, whereupon the jury was called upon to try 'whether he stood mute of malice or not'". On His Honour's charge the jury found for malice, and when MacKenzie, on further arraignment, persisted in holding his peace, the Judge directed that a plea of "Not Guilty" should be entered for him. But the infamous Highlander had already pleaded guilty before a Magistrate, and he was eventually convicted and sentenced to five years' imprisonment, "during which time he is to be kept at hard labour on the roads".

Stephen J. presided over twenty-one civil matters, most of them the administration of the estates of intestates, at which it was then customary for counsel to appear, and he seems to have held about a dozen criminal sittings.

Wakefield J. also sat at Lyttelton before the first sessions in Christchurch in 1857. On July 1, 1856, he presided where he had previously been prosecutor, and the Crown was represented at the Bar by Mr H. B. Gresson who, in the following year, was to fill the vacancy caused by Wakefield's resignation.

The indictment against one of the prisoners is of interest:

> "In the Province of Canterbury in the Southern District of New Zealand.
>
> The Jurors of our Lady the Queen upon their oath present that John Ritchie on the 20th day of February in the year of our Lord One thousand eight hundred and fifty six, one gun and one gun case, of the goods and chattels of one Arthur Douglas Browne, feloniously did steal take and carry away against the peace of our Lady the Queen."

For this the punishment was two years' gaol with hard labour.

The following is an extract from the Court minute book, of July 2, 1856:

> "The Grand Jury went to inspect the gaol at Lyttelton and on their return into Court made two prosecutions, viz.; One as to the gaol and one as to the sittings of the Court.
>
> D. Wakefield, Judge."

It fell to the lot of Wakefield J. to hold the first sitting of the Supreme Court in Christchurch in 1857, the year in which he resigned. His prosecutor was again Mr H. B. Gresson, who, at the time of that inaugural session of the Court in the Town Hall, was the only practising barrister in the City of Christchurch. Canterbury's first barrister, Henry Sewell, Premier of the Colony for three weeks in the previous year, had by now completely forsaken the Bar for politics, and was a member of the Executive Council in the Stafford Ministry. Later he held the office of Attorney-General from 1861 to 1865.

Health Deteriorates.

Wakefield J., who was now fifty-nine, had been handicapped for more than a year by indifferent health which developed a serious form in 1857, and incapacitated him completely in the latter months of the year. The business of the Court in his district was steadily increasing but more and more of his fixtures had to be postponed. For several months there were no sittings of the Court at all, and with Mr Justice Stephen in Auckland in no better plight, the stream of judicial administration in the Colony boasted only a very sluggish flow. Representations made to the Government by the profession and by the Wellington Chamber of Commerce protested at the heavy accumulation of arrears of work, but no new appointment was made to the Bench until December, 1857, when Wakefield J.'s resignation had already been in the hands of the Governor for a month. To make matters worse, Stephen J. in Auckland was also finding it impossible through illness to keep his appointments in Court.

When seventeen years later he came to retire from the Supreme Court Bench in Canterbury, Mr Justice H. B. Gresson referred to the urgency of the situation at the time he accepted appointment:

> "When invited, in December, 1857, by the then Colonial Secretary, to become acting Judge, my first impulse was to decline, chiefly from a sense of my own insufficiency. There were only two Judges then for the whole Colony, and both were in very delicate health. Consequently, there was a large arrear of business, both civil and criminal, and great inconvenience was being experienced throughout the country. In these circumstances, I felt, on reflection, that the more manly course for me to pursue was to accept the position offered": (1876) 2 N.Z. Jur. Jo. (N.S.) iv.

Both Stephen and Wakefield JJ. died in the month following Mr Justice Gresson's acceptance of a seat on the Bench, and it was to be two months before the new Chief Justice, Mr George Alfred Arney, assumed office in terms of his warrant under Royal Sign Manual, dated September 2, 1857, and furnished a reinforcement for Mr Justice Gresson. A third Judge, Mr Justice Alexander James Johnston, was appointed in November, 1858, and six years later the Judiciary comprised a Chief Justice and four puisne Judges, the enlarged personnel being achieved by the appointment of Mr Justice Richmond in 1862, and the reappointment of Mr Justice H. S. Chapman, after his Transtasman interlude, in 1864.

There can hardly fail to be lively divergence of opinion concerning some of the circumstances surrounding the lives of these early occupants of the Supreme Court Bench. The question of the merits of their appointment may be an idle one, or insoluble if reasonable, but this chronicle can probably best be concluded with another extract from the valedictory

remarks of Mr Justice H. B. Gresson in Christchurch in 1875:

"We all know that, in a new country, the greatest difficulty with which its rulers have to contend is to find men qualified, even in a moderate degree, for the posts which must be filled, and therefore the standard of qualification is necessarily much lower than in England. The difficulties with which a Judge of the Supreme Court in New Zealand had to contend in those days were much greater than those of the Judges at Westminster": (1876) 2 N.Z. Jur. Jo. (N.S.) iv.

FESTINA LENTE.

By Advocatus Ruralis.

"I haven't time to sign my will
I'm running just a trifle late."
At least he saved his lawyer's bill.
And that was paid by his estate.

Advocatus has recently been on a dangerous expedition—a motor trip to that area which for the sake of anonymity we shall refer to as Eagle's Harbour. We should explain that we were first allowed to drive a motor-car some few years before the First or Two-Gong War. In those days what few lorries there were had solid tyres, while chains were carried by cars as a matter of necessity. Travelling for eighty miles from Lancaster to Senlac through the province of Eagle's Harbour we had a choice of three roads—all of which had fords and mud-tracks.

In recent years, in order to brisk the Railway Department up, the good Government has seen fit to spend £2,000,000 on the Route Nationale in this area, so as to allow private enterprise to give a road passenger service which apparently cannot be given by the railway.

One of the results of this road improvement is that local inhabitants, indigenous or exotic, use the Route Nationale as a speed track, and to anyone about to motor there the accident figures are startling.

Being committed to the trip, we first examined our will and found rather to our surprise that it was executed thirty-three years ago. (Well, when was yours executed?) We then brought our obituary notice up to date. After this we wandered round to get advice from our local traffic cops who advised going by plane. We suggested flying the Panama flag to show that we were strictly neutral but the cops thought: (1) the inhabitants would offer to race us for it; or (2) they'd just pinch it.

Came the day, and we set off. Our car, according to Junior when we were not supposed to be listening, is capable of 80 knots but Advocatus likes to keep down to 48 m.p.h. This was all right till we crossed the border into Eagle's Harbour. Then we ran into a convoy of road-service buses. They came up to at least their legal limit on the flat and filled all the road on the hill, so that it took ten miles to pass three of them. We found that by keeping up to 48 m.p.h. we gradually left them behind so perhaps they are unduly maligned.

Still travelling northward we found that our sober pace was not enough. We picked up a hitch-hiker who explained to us that the speed laws were administered rather like the liquor laws on the West Coast. From time to time we had to pull over to the bank to let Malcomb Campbell through, and on any bend of the road we had to prepare to withstand a charge from some local middle of the road Coeur de Lion or Don Quixote.

As we neared Senlac the pace increased—the really dangerous spots were carried ventre a terre, rather like trench spots marked "Beware Snipers." And then, about three miles from Senlac, in a nice sunny spot we saw our first Road Cop. He was sitting in the middle of a straight stretch and was visible for at least half a mile. This was the only period during our stay that the cars really slowed down.

We proceeded through the town of Senlac arriving at a hostelry in the city of Scinde where we off-saddled. At dinner, a commercial traveller assured us that he usually made the trip from Wellington in four hours. As this was a distance of 207 miles, we asked if that included stops.

In the next day or two we travelled round the area admiring its beauties, avoiding its traffic, and trying to get the hang of the local rules. We travelled north for about fifteen miles and found to our surprise that a local bus which looked old enough to vote was breathing down our neck. Out of curiosity we pushed ahead to rid ourselves of it. We found however that if we dropped below 55 m.p.h. the bus was again threatening our back seat.

We let it pass and followed behind. There must have been a Cop's Convention somewhere, for during our stay we saw only that one cop south of Senlac.

Before coming home, we studied the map and decided to travel east about. We were surprised to find tarred roads most of the way and good scenery, with no speedsters. The second half of the trip caused a certain amount of nostalgia for it took us around these places where we camped in 1912 when C.M.T. had its beginnings. Eheu fugaces!

We feel sure that the Minister in charge of road-killings would be glad of our conclusions. In the before-mentioned Two-Gong War, if a unit or army was not doing its stuff nobody bothered to blame the Sergeant-Major. They promoted the officer-in-charge to command the still-vexed Bermuthes or Gibraltar or somewhere; and somebody nice and hard took over and developed the necessary discipline.

We all like speeding, but there are more deaths from speeding than drunken driving.

With the accident statistics available, it should be easy to see if any district is falling behind the other districts. Publication of this and a good shake up each month of the worst district, followed if necessary by an offer to the senior officer of a job in the local equivalent of the Celebes might well bring down the death-rate.

Of course, we might be the speeding motorist ourselves; but it is better to appear in Court on a speeding charge than as chief witness at an inquest.

TOWN AND COUNTRY PLANNING APPEALS.

Johnson *v.* Dannevirke Borough.

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

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

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

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

The council supported the application, subject to certain conditions.

The judgment of the Board was delivered by

REID S.M. (Chairman).

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

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

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

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

Order accordingly.

Carpenter *v.* Waitemata County.

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

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

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

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

The judgment of the Board was delivered by

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

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

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

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

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

The appeal is allowed. No order as to costs.

Appeal allowed.

Willis *v.* Hutt County.

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

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

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

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

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

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

(*Concluded on p. 288.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"**A Most Improper Book.**—David Langdon, familiar to *Punch* readers, illustrates the amusing 78-page *Strictly Legal* (*A Textbook*) by Fenton Bresler (Allan Wingate, 1958). From his chapter on "How to get away with blackmail" comes the following:

> "The law is equally understanding of the hazards and economic difficulties with which property dealers have to contend. There is always an element of risk inherent in any human undertaking and a speculator may go to a great deal of expense buying land, building on it, letting it out to tenants—and then find that he has hardly covered his basic costs. The cheapest and most effective way that he can make his land productive is simply to write to the person living next-door telling him that he proposes erecting a monstrosity of modern architecture such as will make his hair go white and cause his children to grow up mentally retarded. To use Lord Wright's words, 'the other man may then think it worth while to pay, rather than have the amenities of his house destroyed by an eyesore': *Thorne* v. *Motor Trade Association* [1937] A.C. p. 820. No illegality is committed, a reasonable profit is netted; and the total outlay is the price of the empty site plus a threepenny stamp. The law, as will have been seen, is a great respecter of enterprise."

The reader eager to learn is told how to commit the perfect murder and the perfect theft, how to be a successful landlord and a successful salesman, how to go bankrupt, to earn the wages of sin and to split your personality; but the most timely, if not the most amusing chapter for P.A.Y.E. enthusiasts is "How to minimize your tax" in which the author quotes the much-debated observation of Lord Tomlin in *Duke of Westminster* v. *Commissioner of Inland Revenue* (1935) 19 T.C. 490, 520:

> "Every man is entitled, if he can, to order his affairs so that tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

Byrne *v.* Boadle Again.—Say what you like about muemonics: they do last. Scriblex can still remember, over a span of forty years, *Byrne* v. *Boadle, barrel of flour,* and the underlying principle of *res ipsa loquitur.* This sad story of the defloured gentleman brought low by a barrel of flour carelessly dropped from the upper window of a miller's establishment has a recent counterpart in the fate which befell a pedestrian in a narrow Blackburn street. He claimed that he had been hit on the head by a brick and knocked senseless during a course of operations to enlarge the windows of premises he was passing: *Walsh* v. *Holst & Co. Ltd.* [1958] 1 W.L.R. 800. At the Manchester Assizes, Gorman J. found in his favour; but the Court of Appeal held by a majority that the defendants were not liable to the plaintiff even on the basis that his injuries were attributable to the brick and on the assumption that the brick had fallen from the building. At the time, only one person was working at the face of the building and his evidence to the effect that no bricks fell from where he was working was accepted. It was therefore assumed by the Court that the brick had somehow become dislodged from some other insecure place on the building. Sellers L.J. said that the more he heard of the case the more difficult he found it to accept the probability that the plaintiff was hit on the head by a brick from the building in question, including the scaffolding erected in front. His injuries his Lordships thought, were equally consistent with his having fallen on his head on the pavement. Morris L.J., dissenting, considered that unless someone in the building threw the brick, and this was not suggested, then it fell because it had not been made properly secure.

Masonic Slander.—Freemasons will be interested in a recent action for slander heard by Mr Justice Diplock in the Queen's Bench Division. Both plaintiff and defendant were members of the Masonic craft. The case for the former was that at the annual general meeting of the lodge of instruction, of which he was preceptor, the defendant had, during consideration of an item on the agenda "to elect a preceptor for the ensuing year", used words which meant and were understood to mean that the plaintiff was not a fit and proper person to be preceptor of a Masonic Lodge of instruction and that he was not a fit and proper person to join a Masonic Lodge. Special damage was not alleged, but the plaintiff alleged that he had been injured in his credit and reputation and in his office. The Court held that, in an action for slander by words alleged to have been spoken of a plaintiff touching his office, where the office was an office of honour not of profit and no special damage was alleged, it was necessary, in order to show that the words were "calculated to disparage the plaintiff in [his] office" within s. 2 of the Defamation Act 1952, to establish, in accordance with decisions before that Act, that the words imputed to the plaintiff some want of integrity or corrupt or dishonest conduct in the discharge of his office. It is thought that frequent actions of this kind may, in the long run, disturb the harmony of the lodge: *Robinson* v. *Ward* (June 16, 1958).

University Entrance.—From overseas comes the story of a member of a cricket team from the Royal Navy scheduled to play an Oxford College. When the match was over, the team was entertained in the city and he became detached from his hosts and fellow-players. On arrival back at the College where he was to spend the night, he found the gate locked and a porter either deaf or asleep. Not lacking in resource, he threw stones at an upper window of a room which chanced to be that of the Provost. The sailor asked the Provost when he opened the window if he could say how one got into the College. "Certainly," replied the Provost, "by examination only," and shut the window.

Tailpiece.—"Old lawyers never die. They just lose their appeal."

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 286*).

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. In compiling the plan under consideration the respondent Council appears to have made adequate provision for the residential needs for the population estimated to be residing in the district during the planning period. The present estimated population is 4,000. This is estimated to rise to 5,600 in five years and to 7,400 in ten years and 11,000 by the end of the planning period in 1976. The programme for development proposes that the area zoned as " residential " should be developed first until a reasonable population density is reached.

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

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

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

No order as to costs.

Appeal dismissed.

Marlborough County *v.* Minister of Lands.

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

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

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

The property under consideration comprises a total area of Section 54 in the Omaka District.

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

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

The County appealed against the Minister's decision.

The judgment a the Appeal Board was delivered by

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

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

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

Appeal dismissed.

McGregor *v.* Havelock North Borough.

Town and Country Planning Appeal Board. Napier. 1958. March 27.

Building Permit—Residence—Area zoned as " Commercial "—Such Zoning to be regarded as Appropriate to Future needs of Expanding Population—Erection of Residence a " detrimental work "—Town and Country Planning Act 1953, s. 38 (1) (c).

The appellant was the owner of a property fronting Joll Road in the Borough of Havelock North comprising 36.6 pp. more or less being Lot 10 on Deposited Plan 6947 being all the land comprised in Certificate of Title Volume 114 Folio 298 (Hawke's Bay Registry).

He applied to the respondent Council for a building permit for the erection of a residence on this property but a permit was refused on the grounds that the land in question was in an area zoned as " commercial " under the Council's proposed district scheme, and the erection of a residence would contravene that scheme.

The appellant appealed against that decision.

Judgment of the Board was delivered by

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

1. That the Havelock North Borough is rapidly expanding and is predominantly residential in character.

   Further substantial residential expansion can be reasonably anticipated in the near future.

2. That there appears to be little present demand for commercial sites in the Borough but the general rule is that commercial expansion follows residential expansion, it does not move with it or in anticipation of it.

3. That although the present commercial needs of the Borough appear in the main to be met by existing commercial premises the respondent council in preparing its scheme must endeavour to look well into the future and the commercial zoning in Joll Road including the appellant's property must be regarded as appropriate to the future needs of an expanding population.

4. That residential development is taking place to the south and east of this area and the commercial needs of residents in that area can best be met by commercial development of the zone under consideration. To permit the erection now of a residence in that zone would be a detrimental work. The appeal is disallowed.

No order as to costs.

Appeal disallowed.