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DEFAMATION: DIRECTION WHERE JUSTIFICATION AND FAIR COMMENT PLEADED.

III.

THE judgment in *Truth (N.Z.) Ltd.* v. *Avery* is important in that it contains the first judicial interpretation of s. 8 of the Defamation Act 1954 (or of its counterpart in s. 6 of the Defamation Act 1952, the United Kingdom Act from which it was taken). This judicial interpretation of the section is opportune in that there has been a difference of opinion among the text-book writers as to the scope and effect of the section. Thus, in *Gatley on Libel and Slander*, 4th ed., the learned editor in his Preface, at pp. xi-xii, says :

> One other of the clauses which were rejected during the Committee stage in the Commons needs to be mentioned—namely, Clause 5, which dealt with the defence of fair comment. This clause, which was designed to give effect to a recommendation of the Porter Committee ran as follows :
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> " In an action for libel or slander in respect of words consisting partly of statements of fact and partly of comment, the defence of fair comment shall not fail by reason only that the truth of every statement of fact is not proved if—
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> (a) the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining statements ; and
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> (b) the comment is fair in relation to the statements proved to be true."
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> This clause of the Bill was rejected during the Committee stage in the Commons. At the Report stage (the decision of the House of Lords in the case of *Kemsley* v. *Foot* having now been given) a new and different clause dealing with the defence of fair comment was introduced, being proposed by Mr Harold Lever, M.P., and seconded by Mr Michael Foot, M.P., one of the defendants in the action brought by Lord Kemsley. After a short and unsatisfactory debate, the new clause was carried and incorporated in the Bill before the House. It now forms s. 6 of the Act of 1952. A glance at the structure and the language of s. 6 suffices to show that the alteration in the law of fair comment effected by the Act is something other than that which was recommended by the Lord Chancellor's Committee and contemplated in the Bill as originally introduced. The interpretation of the law as it stands will naturally be for the courts to determine. Our business here is merely to direct attention to the terms of the statute and to the significance of the change.

In the same work, at p. 345, it is said :

> This section of the new Act appears to assume that in cases which invite the defence of fair comment on a matter of public interest the gist of the defamation lies, or may lie, in the adverse comment, and so appears to limit the obligation to prove facts (" shall not fail by reason only that the truth of every allegation of fact is not proved ") to proof of such of the facts alleged or referred to in the words complained of as warrant the defamatory comment made. It is not difficult however, to imagine a case in which the defamatory comment is mild by compariron (let us suppose) with some elements of a series of defamatory allegations of fact in the words complained of. On a literal interpretation of the section it might seem that a defendant in such a case who proved sufficient facts in the series to warrant the defamatory comment (leaving other defamatory statements of fact unproved) would satisfy the requirements of section 6 without being under an obligation to prove the truth of this residue of defamatory statements of fact.

And, in a footnote, the learned editor says :

> Until the Courts decide otherwise, it is safe in such cases to add a plea of justification.

In the twelfth edition of *Salmond on Torts*, the learned editor, in a footnote, changed the view expressed in the eleventh edition, p. 473, on the point involved. The passage in the twelfth edition, p. 374, reads :

> The comment must not mis-state facts : no comment can be fair which is built upon facts which are invented or misstated. So when in a review of a play the defendant stated falsely that it contained an incident of adultery, his plea of fair comment failed. Originally it was necessary to show that every statement of fact in the words complained of (however minor or unimportant) was true. But now the Defamation Act, 1952, s. 6, provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

In a footnote it is stated, in relation to s. 8 of our Act :

> This amendment of the law affords greater protection to the defendant than was proposed by the Porter Committee.

In *Street on Torts*, 347, the learned author's view is expressed as follows :

> But the section [s. 6 of the United Kingdom Act : s. 8 of our Act] appears to enact that if that which the defendant proves true is an adequate basis for the comment, he has in his plea of fair comment alone a complete defence to the tort although those facts not proved true would add materially to the injury to his reputation.

On the other hand, a different view is expressed in *Clerk and Lindsell on Torts*, and in *Winfield on Torts*, and this view our Court of Appeal has now adopted.

It was contended in the Court of Appeal for the appellant that the learned Chief Justice was incorrect in directing the jury that the defence of fair comment related only to fair comment, and in not directing them that it was a defence alternative to justification, and it would, if established, constitute a complete defence to the allegation of libel; and in not directing them that that defence would not fail by reason only that the truth of every allegation of fact was not proved if the expression of opinion was fair comment, having regard to such of the facts alleged or referred to in the words complained of as were provided. In support of that contention, it was argued that s. 8 is a statutory provision wholly replacing, so far as the necessity for proving facts is concerned, the common-law rule which formerly governed a plea of fair comment, and that, in the form in which it was enacted, all that is required of a defendant is to prove sufficient of the stated facts to justify the expressions of opinion.

The Court of Appeal rejected those contentions, and expressed their view on the true meaning of s. 8. Their Honours said:

> This section, together with its companion section (s. 7) was enacted to meet the difficulties in this branch of the law which had been pointed out by the Committee set up in England by the Lord Chancellor, under the Chairmanship of Lord Porter; but so far, it would seem that the meaning and effect of s. 8 (or of its counterpart in the United Kingdom statute) has not been the subject of judicial interpretation.

Therefore, it fell to the Court of Appeal to decide for the first time what the section really means. The judgment proceeded:

> The defence of justification is concerned with establishing the truth of the statements complained of, whether they be allegations of fact which it is intended to prove to be true, or, as is sometimes said, correct. The defence of fair comment is, of its nature, concerned with comment only: "the defence of fair comment is concerned with expressions of opinion as distinguished from assertions of fact": (*20 Halsbury's Laws of England*, 2nd ed. 488); and its purpose is to protect the comment, not on the ground that it is true in the sense of being correct, but on the ground that even though untrue it should nevertheless be protected as an honest expression of opinion on a matter of public interest. If it is desired to assert the truth of the comment there must be a plea of justification; and, conversely, it is not permissible, under a plea of fair comment, there being no plea of justification, to assert the truth of the comment as distinct from the truth of the facts on which it is based: *Digby* v. *Financial News* [1907] 1 K.B. 502, 509, per Collins M.R.; *Burton* v. *Board* [1929] 1 K.B. 301, 305.
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> It is true that a defendant pleading fair comment is not only entitled but is bound to prove the facts on which the comment is based, and in this respect there is a similarity between the two defences, but he does so not as an end in itself (as where the plea is justification) but as a foundation for, and a necessary step towards, establishing the plea of fair comment: as Viscount Finlay said in *Sutherland* v. *Stopes* (supra) at p. 62:
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> > The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment.

and as Scrutton L.J. said in *Burton* v. *Board* (supra) at p. 306:

> And in alleging the facts on which he relies he is asserting that these are facts; that he will prove them—not that he will justify them—and ask the jury to say that the comments are fair.

Their Honours then repeated that, before the passing of the Defamation Act 1954, a defendant who failed to prove each and every fact upon which the comment was based failed in his defence of fair comment: *Gooch* v. *N.Z. Financial Times* (*No. 2*) [1933] N.Z.L.R. 257; *Kemsley* v. *Foot* [1952] A.C. 345, 358. The result was that he was liable to the plaintiff for any defamatory imputation contained in the comment because he had failed to gain protection for the comment by establishing the necessary foundation of fact. But, if the unproved allegation of fact was itself defamatory of the plaintiff, he was liable to the plaintiff in respect of that also; and the basis of his liability was that there remained an unjustified defamatory statement of fact. They continued:

> That in our opinion, is necessarily so, because the defence of fair comment, of its nature, protects only the comment, although to succeed it is required to be comment on facts truly stated. Since the passing of the Defamation Act 1954, the plea of fair comment "shall not fail by reason only that the truth of every allegation of fact is not proved", thus modifying the rigour of the rule exemplified by *Gooch* v. *N.Z. Financial Times* (*No. 2*) (supra). This falls much short of saying that a defence of fair comment shall be an answer to a claim in respect of words consisting both of allegations of fact and expression of opinion if sufficient facts are established to warrant the comment.
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> A defence of fair comment still protects only the comment, or, as s. 8 calls it, "the expression of opinion." It does not, since 1954, any more than it did before 1954, of itself confer immunity in respect of any unproved allegation of fact defamatory of the plaintiff. To obtain such immunity a defendant must, we think, since 1954 as before, justify the allegation of fact under a plea of justification, but since 1954, subject to s. 7 of the Defamation Act.
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> This conclusion enables ss. 7 and 8 of the Defamation Act 1954 to be read harmoniously together, and avoids the result that s. 8—intended, as we think, only to relax the severity of the rule that a plaintiff must prove each and every fact upon which his comment is based—has instead greatly enlarged the nature of the plea of fair comment and converted it into a defence which, instead of giving protection to matters of comment only, would confer immunity in respect of defamatory allegations of fact.
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> The foregoing is the view which has commended itself to the editor of the last edition of *Clerk and Lindsell on Torts*, 11th ed., 797 in the passage which reads:
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> > If there was any defamatory "sting" in the facts stated in the alleged defamatory matter, presumably they remain actionable unless they are justified.

So far as their Honours could see, none of the textbook writers—with the possible exception of *Gatley*—had so far attempted to support the construction contended for by the appellant's counsel in *Avery's* case.

For the reasons given by their Honours, they agreed with the warning given by the editor of *Gatley on Libel and Slander*, 4th ed., 436, when he said that, until the Courts decide otherwise, where the defendant is under any obligation to prove the truth of sufficient facts to warrant the defamatory comment, leaving other defamatory statements of fact unproved, it is safer to add a plea of justification.

To summarize their Honours' interpretation of s. 8:

A defence of fair comment still protects expressions of opinion only. The section does not of itself, any more than as was the case at common law, confer immunity in respect of an unproved allegation of fact defamatory of the plaintiff. To obtain such immunity, a defendant must (as before the enactment of s. 8) justify the allegation of fact under a plea of justification, but now subject to s. 7 of the Defamation Act 1954.

SUMMARY OF RECENT LAW.

CONTROL OF PRICES.

Import Control—Sale of Imported Motor-car—Customs Restrictions on Sale and Sale-price—Price Tribunal's Special Approval of Maximum Retail Selling Price—Purchaser entering into Restrictive Covenant with Dealers—Sale of Motor-car by Purchaser in Breach of Such Covenant—Covenant not Part of "price" so as to increase Restricted Sale-price—Measure of Damages for Breach of Covenant—"Price"—Control of Prices Act 1947, ss. 2 (1), 15, 16, 29 (1)—Customs Act 1913, s. 46. On the sale of a motor-car, the dealer took from the buyer the sum of £1,207 and a special covenant which provided inter alia that, in considerarion of the dealer agreeing to sell the car to the covenantor and to make present delivery thereof and for the further consideration of one shilling, it was agreed between the parties that the covenantor would not re-sell the car within two years without first offering it back to the dealer at the original price of £1,207 less depreciation. The licence under which the car was imported into New Zealand by the dealer's suppliers was subject to a condition imposed by the Board of Trade pursuant to regulations made under the Customs Act 1913, whereby each dealer was to require a purchaser to sign a covenant. In an action by the dealer for damages for breach of the covenant the buyer contended that the covenant was illegal because it was a valuable consideration relating to the sale of the car, and therefore part of the "price" within the meaning of s. 2 (1) of the Control of Prices Act, 1947; whereas the Price Tribunal had fixed the maximum price for such a sale at £1,207. *Held*, 1. That the special covenant was, in a sense, valuable consideration—just as any collateral contract is consideration for the making of a main contract—but it did not relate to the sale. It is of the essence of a sale that the property in the goods should be transferred from the seller to the buyer: and a valuable consideration only relates to the sale if it is given as the inducement—or as one of the inducements—for the transfer of the property. In this case the sale and entire inducement for the transfer was the cash sum of £1,207. The special covenant was not given for the property but for something different. It was given for the privilege of being allowed to buy a new car. 2. That, even if the "price" did include the covenant there was no illegality. The Director of Price Control must be presumed to have been aware of the conditions imposed by the Board of Trade, and his letter fixing the price must be read as if there was added to it the words "It is understood, of course, that in selling at this price the dealers will be exacting a special covenant as required by the Board of Trade conditions." 3. That the special covenant was somewhat different in its terms from that required by the Board of Trade conditions: but the differences were not so substantial as to effect the matter. 4. That, as to the quantum of damages, under the Board of Trade conditions the dealer could have resold the car at a profit of £50 only. but it did not lie in the buyer's mouth to say this. That was a matter peculiar to the dealer which was no concern of his. The dealer was entitled to go into the market and buy a similar car at the market price. The market price of this car in that market was £1,700. At any rate the buyer could hardly deny that that was its market price, since that was the sum for which he sold it; and the damages should be the difference between that market price of £1,700 and the contract price of £1,157. (*Williams Brothers* v. *E. T. Agius Ltd.* [1914] A.C. 510; and *British Motor Trade Association* v. *Gilbert* [1951] 2 All E.R. 641; [1951] 2 T.L.R. 514, referred to.) Appeal from the judgment of the majority of the Court of Appeal, *Mouat* v. *Betts Motors Ltd.* [1957] N.Z.L.R. 380, dismissed. *Mouat* v. *Betts Motors Ltd.* (Judicial Committee. 1958. October 20. Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow, Lord Denning.)

Christmas Message to the Profession

From the ATTORNEY-GENERAL.

I gratefully accept this opportunity afforded me by the NEW ZEALAND LAW JOURNAL *to wish all members of the legal profession a Happy Christmas and New Year.*

The past year has been a notable one. The inauguration of a separate Court of Appeal was a landmark in the legal history of our country, and we have now come to the end of the first year of its acceptance. I believe there will be general agreement that our experience already warrants the high hopes we had of improvement in the administration of justice through the institution of the new Court. Delays and congestion of business were fundamental reasons for seeking an alteration, and already it would appear that in this respect the change has been successful. There are, of course, other features in relation to which the new arrangement, it is hoped, will prove more convenient than the old.

During the year, also, effect has been given to a very substantial amount of work arising from the deliberations of the Law Revision Committee.

The period allowed to members for their Christmas vacation has varied from time to time. Though greater than when I first entered upon the profession of the law, it is not too much for that recuperation which the close of one year of hard work requires before entering upon another. A happy vacation period is an essential need for so hard-worked a profession as is that of the law.

H. G. R. MASON.

Attorney-General's Office,
Wellington.

DEATHS BY ACCIDENTS COMPENSATION.

Dependency—Persons having Right to Damages even though no Dependent on Deceased before His Death—Court's Right to designate Dependents with Legitimate Claims to be included—Class-fund Order giving Discretion to provide for Their Needs as Circumstances require—Deaths by Accidents Compensation Act 1952, ss. 7 (1) (b), 8. A person may have a right to damages under s. 7 (1) (b) of the Deaths by Accidents Compensation Act 1952, even though he or she was not dependent upon the deceased before his death; a reasonable expectation of enjoying some actual pecuniary benefit in the future being a sufficient foundation for a claim. A plaintiff is obliged by s. 8 to give particulars of the person or persons for whose benefit the action is brought; and, if any of the dependents of the deceased is not named, the Judge may interest himself in the matter in order to ensure that dependants with legitimate claims, are not excluded. In proper circumstances, the Judge may take that course at a later stage of the proceedings; as, for instance, when the apportionment of the damages is under consideration. (*Adelaide Chemical and Fertilizer Co.* v. *Carlyle* (1940) 64 C.L.R. 514, followed. *Avery* v. *London and North Eastern Railway Co.* [1937] 2 K.B. 515; [1937] 2 All. E.R. 777, distinguished.) In the present case, the action was brought for the benefit of the widow and three sons, aged 14 years, 12 years and 8 years respectively. There were two older sons aged 21 years and 20 years respectively, each of whom, at the deceased's death, was self-supporting. An order was made directing the balance of the amount of damages to be held by the Public Trustee as a class-fund, for the benefit of the widow and the five sons, so that the Public Trustee might, in his discretion, provide for the needs of the two eldest sons as circum-

stance may require, thus doing for them from time to time what (if anything) their father may have been expected to do if he had survived. (*O'Connor* v. *Attorney-General* [1955] N.Z.L.R. 148, applied.) *Batt* v. *Hydro Coal Mines Limited*. (S.C. Greymouth. 1958. October 23. F. B. Adams J.)

DEFAMATION.

Defence of Justification and Fair Comment—Proper Direction to Jury—Statutory Relaxation of Common-law Rule as to Fair Comment—Interpretation—Defamation Act 1954, ss. 7, 8. It is a fundamental rule that every party to a trial has a legal and constitutional right to have the case which he has made, either in pursuit or defence, fairly submitted to the jury. (*Bray* v. *Ford* [1896] A.C. 44, followed.) In a libel suit in respect of the whole of a newspaper article consisting partly of statements of fact and partly of comment, if the defendant raises two defences—first that the whole of the article was true in substance and in fact, and secondly an alternative plea of fair comment expressed in the conventional language of the "rolled-up" plea—the proper direction to the jury is that they should first consider the defence of justification in all its aspects and that that defence applies to the comments as well as the statements of fact. Where the plaintiff has not sought particulars with the object of limiting the evidence which could be led at the trial in support of the defence of justification, the jury are entitled, in reaching their decision on that defence, to consider the whole of the evidence given at the trial. (*Hewson* v. *Cleeve* [1904] 2 I.R. 536, followed.) In such a case, if the jury came to consider the defence of fair comment, the position is not the same because the form of the "rolled-up" plea ties the defendant down to the statements of fact contained in the article and to no others. (*Aga Khan* v. *Times Publishing Co.* [1924] 1 K.B. 675, followed.) Since the enactment of s. 8 of the Defamation Act 1954, a defence of fair comment still protect, only expressions of opinion. It does not since 1954, any more than it did before 1954, of itself confer immunity in respect of an unproved allegation of fact defamatory of the plaintiff. To obtain such immunity a defendant must, since 1954 as before, justify the allegation of fact under a plea of justification, but since 1954 subject to s. 7 of the Defamation Act. (*Queen* v. *Carden* (1879) 5 Q.B.D. 1, 8; *Burton* v. *Board* [1929] 1 K.B. 301, 305; *Gooch* v. *N.Z. Financial Times (No. 2)* [1933] N.Z.L.R. 257; [1933] G.L.R. 308; *Kemsley* v. *Foot* [1952] A.C. 345, 358; [1952] 1 All E.R. 501, 506, referred to.) *Truth (N.Z.) Limited* v. *Avery*. (C.A. Wellington. 1958. October 21; November 19. Gresson P. North J. Cleary J.)

DIVORCE AND MATRIMONIAL CAUSES.

Jurisdiction—Domicile of Wife Petitioner—Requirement as to Animus Manendi to be fulfilled when Petition filed—Animus Manendi not required during Whole of Three-year Period—"Living"—"Living there for three years at least"—Effect of Temporary Absence Overseas—Divorce and Matrimonial Causes Act 1928, ss. 10, 12 (4). Where s. 12 (4) of the Divorce and Matrimonial Causes Act 1928 is relied on by a petitioner, the requirements of that subsection must be fulfilled when the petition is filed in order to comply with the requirement as to domicile imposed by s. 10, so that the necessary jurisdiction should then exist. (*Thomas* v. *Thomas* [1955] N.Z.L.R. 216, distinguished.) While the animus manendi, for which s. 12 (4) stipulates and which would constitute a New Zealand domicile in the case of an unmarried woman, must be present when the proceedings are commenced, it is not required to have been in existence throughout the three-year period. The continuity of the three-year period is not broken by a short period of absence from New Zealand during which the animus revertendi is always present. Where no such intent exists, the successive periods of residence in New Zealand, separated by an intervening period overseas, cannot be added, at any rate when the intervening period of absence is substantial and does not have the characteristics of a temporary absence. (*Boorman* v. *Boorman* [1958] N.Z.L.R. 354, referred to.) Where the statutory time is qualified by the words "at least" (as in the phrase "living there for three years at least" in s. 12 (4)), both the commencing and concluding days must be excluded from the computation of the three-year period, so that a clear period of three years of living in New Zealand is necessary. But, as the term "living" means something less than living in New Zealand with the animus manendi necessary for the acquisition of a domicile, all that the statute requires is that the petitioner shall actually have lived her life in New Zealand for the three-year period. If, in addition, the animus manendi exists at the time of the filing of her petition, the requirement of ss. 10 and 12 (4) have been satisfied. Even if the petitioner has entered New Zealand without any intent at all and her stay expands itself to three years, and, at some point of time during that period, she decides to remain living in New Zealand for the rest of her life, her period of "living" goes back to, and includes, her earliest days in New Zealand. *Rowley* v. *Rowley*. (S.C. Christchurch. 1958. September 25. F. B. Adams J.)

TENANCY.

Possession—Business Premises—Owner requiring Possession must require Premises for His Own Physical Occupation, and not for Occupation by Tenants—Premises required for Demolition or Reconstruction of Part thereof—Suitable Alternative Accommodation—Tenant not to Expect Business to be unscathed by move to New Accommodation—Benefit to Public of New Building a "relevant matter"—Tenancy Act 1955, ss. 36 (e) (p), 37 (1). In order to justify the making of an order for possession on the ground set out in s. 36 (e) of the Tenancy Act 1955 (i.e., that the landlord reasonably requires the premises for his own occupation), he must prove that he requires the premises for his own physical occupation, or for the physical occupation of his servants, agent, or other form of alter ego. Thus, an order for possession cannot be made where a substantial proportion of the area in the tenant's occupation and of which possession is sought is intended for letting to other tenants after reconstruction of the premises, as the occupation of a tenant cannot be said to be the occupation of the landlord. (*J. R. McKenzie Ltd.* v. *Gianoutsos and Booleris* [1957] N.Z.L.R. 309 and *McKenna* v. *Porter Motors Ltd.* [1956] N.Z.L.R. 845, followed.) *Semble*, In a limited class of cases, benefit to the public at large can be taken into account either under the words "or any other person" or as another "relevant matter" in s. 37 (1), and, where the benefit is one which clearly in point of fact affects citizens generally, the matter is not restricted to a benefit or detriment which can be shown to affect a definitely ascertainable class in the community. F., a dealer in radios and electrical equipment, had been in occupation as tenant of part of the company's building in W. Street, such part being a shop and premises on the ground floor, an office above the rear portion of the shop with access therefrom, and the basement premises immediately under the shop. On July 18, 1956, F.'s tenancy was determined by the company by notice to quit, but F. refused to deliver up possession. On June 10, 1957, the company having been the landlord of F.'s premises during the two preceding years, gave written notice to F. that it intended to apply for an order for possession of the demised premises after the expiration of one year from the date of service of such notice. The company proposed to demolish a substantial portion of the total area let to F., and to use them partly in the construction of an arcade giving access from W. Street to its new building being erected in V. Street, and partly for conversion or incorporation into reconstructed or altered shops and offices, some of which it intended to let to tenants other than F. The company claimed possession on the ground that F.'s premises were reasonably required by it for its own occupation. Alternatively, it claimed that suitable alternative accommodation would be available to F. in the new building in V. Street when the order for possession sought took effect, and it offered to provide such suitable accommodation. F. alleged that, if an order for possession of F.'s premises were made hardship would be caused to F., its shareholders, employees, and customers, and to the general public. *Held*, 1. That the premises let to F. were not required by the company for its own occupation, within the meaning of s. 36 (e) of the Tenancy Act 1955. 2. That the premises let to F. were reasonably required by the company for demolition or reconstruction on the premises within the meaning of s. 36 (p) of the Tenancy Act 1955. (*McKenna* v. *Porter Motors Ltd.* [1956] N.Z.L.R. 845, followed.) 3. That suitable alternative accommodation, within the meaning of s. 37 (1) of the Tenancy Act 1955, would be available when the order for possession was to take effect, as the tenant could not expect his business to remain unscathed in a move to the alternative accommodation offered; and this is particularly so when the move is necessitated by changes which time and the growing needs of a community render desirable. (Dictum of Cooke J., in *Goodman* v. *Furniture Fashions Ltd.* [1955] N.Z.L.R. 547, applied.) 4. That this was not a case where the Court should exercise the discretion conferred by s. 37 (1) to refuse an order for possession. *Dominion Life Assurance Office of New Zealand Ltd.* v. *Fear's Radio and Cycle Co. Ltd.* (S.C. Wellington. 1958. October 10. McCarthy J.)

CONTRACT SUBJECT TO FINANCE.

By J. C. PARCELL.

The editorial in NEW ZEALAND LAW JOURNAL (*ante*, p. 241) discusses with clarity the decisions of Mr Justice Cleary in *Barber* v. *Crickett* [1958] N.Z.L.R. 1057, and Mr Justice Stanton in *Carmody* v. *Irvine* (Auckland, February 2, 1954, unreported) with ample reference to the authorities therein cited and the lines of reasoning whereby the Judges reached their decisions.

The subject is an extremely important one, as a surprisingly high percentage of sale-agreements are made subject to some sort of reservations as to the availability of finance and to conditions as to the consent of overriding authorities. This comparatively modern trend in business finds the law of contract in a difficult position, as its accepted principles have to be applied to circumstances which do not appear to have been within contemplation when the principles were formulated. I am not sure that this difficulty is as great as it seems to be, and with the utmost respect I beg leave to doubt the decisions arrived at by our learned Judges. With a full realization that in all likelihood they are quite right and I am quite wrong, I would like to put forward an argument which I think will account for all the prior authorities on the basis of a fundamental principle of the law of contract, which, in effect, would have caused *Barber* v. *Crickett* and *Carmody* v. *Irvine* to be decided the other way.

The first point I would make is that, in all the cited cases, it is assumed that there was a contract; but it seems to me that in every case the inquiry should have started with a question whether there was in law a binding contract at all. Was there an offer and was there an acceptance of an offer; always bearing in mind that a conditional acceptance is no acceptance? For, so long as the acceptance is conditional, the offer is not accepted and may be withdrawn. On the other hand, if the offer is not withdrawn, the conditional acceptance may be replaced by an unconditional acceptance, whereupon a legal contract will come into being. It is accordingly distinctly arguable that when dealing with a condition, the first requirement is to decide whether the condition is a condition attached to the acceptance.

Now, *Fry on Specific Performance*, 6th ed. 175, 461, refers only to the case of a stipulation or condition *in a contract*. Given a valid contract the purchaser thereunder may waive a condition which is for his own benefit. Incidentally that is not always right either: see *Inland Revenue Commissioner* v. *Morris* [1958] N.Z.L.R. 1126, but it is sound enough so far as the present argument goes. Here the basic assumption is that there is in existence a legal contract.

Gibson v. *Bain* [1925] G.L.R. 407 was a case where Mr Justice Sim construed the document as a contract wherein the purchaser covenanted to apply for a Government loan. This was quite a reasonable interpretation. A covenant to apply for a Government loan was a covenant to do a clearly-defined and well understood act which entailed no special difficulty.

Accordingly, the Judge held that, if the purchaser had failed to apply, she would have been liable for breach of her contract. But the Judge did not say any more. On the other hand, as the benefit of the covenant fell to the purchaser, the Judge held she could waive it if she liked and complete her purchase for cash.

New Zealand Shipping Company Ltd. v. *Societe des Ateliers et Chantiers de France* [1919] A.C. 1, was a case on the old question of when the word "void" is to be construed as meaning voidable at the option of the party entitled to enforce. Again it assumes that there is in existence a valid contract which can be brought to an end. It is open to the parties to stipulate that, in certain circumstances, the contract shall be void; and, if they make the stipulation in adequate language, then the contract is, in law, void upon the happening of the stipulated event. If, however, the language does not go far enough, it may well turn out that the contract was voidable only. It is just a matter of construction of the particular contract. One principle seems to be that where the only issue is that of time, it takes very powerful language to void the contract altogether.

Suttor v. *Gundowda Pty. Ltd.* (1950) 81 C.L.R. 418, was a case of a contract subject to consent of an overriding authority. In principle, I would think that, if the *power to contract* is subject to the consent of an overriding authority known or deemed to be known to both parties, it does not matter whether a condition to that effect is included in the document or not. The Court would construe the document as containing a covenant by both parties that all proper steps would be taken to procure the consent, and, if the consent were not forthcoming after all proper endeavours, then the contract would be frustrated. In any event, *Suttor's* case went off on the old question of "void or voidable"; and it will be noted that the issue was really about a time stipulation in an admitted contract. The question of default, as discussed in the judgment, arises only because the Court construed the admitted contract as impliedly containing a covenant that both parties would use all proper endeavours to obtain the necessary consent.

Brauer & Co. (Great Britain) Ltd. v. *James Clark (Brush Materials) Ltd.* [1952] 2 All E.R. 497, again is a case of the construction of a contract wherein fulfilment of the promise was conditional upon the consent of an overriding authority; and Lord Denning therein construed the contract as if it contained a covenant by both parties to take all reasonable steps. *In re Sandwell Perth Colliery Co., Field* v. *The Company* [1929] 1 Ch. 277, is in the same category.

I respectfully submit that where the power to contract is subject to an overriding authority, it is clear that the contract does not fail through lack of capacity to contract, but that the parties may contract and the Court will construe the contract as containing a covenant by both parties to do all acts reasonably necessary to obtain consent. If such reasonable acts fail to obtain consent, then the contract is at an end. Stipulations as to time in ordinary circumstances will not be construed as of the essence of the contract.

But, in my contention, nothing of this has anything to do with the formation of the contract itself, and the stipulation imposed by the parties themselves. There must be an offer, and there must be an unqualified acceptance, and with all due respect, I think *Barber* v. *Crickett* and *Carmody* v. *Jones* both break down in this analysis. It is one thing for parties to agree to some term in a contract, but another thing altogether for one to say I agree, if so and so . . . . That is not an acceptance and it forms no contract.

When a contract purports to be made subject to finance, I would submit it is not a contract at all. The offer by the vendor is there, but the purchaser's acceptance is conditional only. The practical aspect of the matter makes this quite clear. If you asked such a vendor if he had sold his house he would unquestionably say " I don't know. I have signed an agreement, but the purchaser may not be able to find the money. He has till Wednesday next to find out." Likewise, if the purchaser were asked whether he had bought a house, his reply would be equally indefinite. If A offers his house for sale at £3,000 and B says he will take it provided he can raise the money, there just simply is no offer of acceptance. In contract, there is no such thing as a conditional acceptance. The crux of the situation is that the purchaser does not accept the offer made by the vendor, but merely expresses an intention to accept at a future date, provided events in the meantime take a certain course. Such an expression of intention is normally not binding at law.

The alternative view entails the construing of the document as if it were an absolute contract containing a covenant by the purchaser that he will take all reasonable steps to obtain the necessary finance. This, with respect, is what I conceive to be the construction adopted by our Judges. With all due respect, I submit that this is obviously not what the parties intended; and the assimilation with the cases of overriding authorities is not warranted. But, assuming such a covenant can be implied, how could it have any meaning? In the overriding authorities cases, it is at all times perfectly clear what the parties have to do. In the special contingency cases (rain on Coronation Day, etc.) it is perfectly clear what is the contingency. But what on earth reasonable endeavours to obtain finance amount to and whether the reasonableness is to be applied to the endeavours or the results or both of them, is, I submit, beyond the powers of humans to foretell. If it does not have a definite meaning when the contract is entered into, subsequent events can have no bearing. Is the purchaser to go to every bank, every insurance company, every lending institution? No matter what he does, there will always be dozens of inquiries he could have made. Who is going to decide whether the financial deal he is offered is reasonable—the Judge?

On the other hand, as Mr Justice Cleary points out, the effect of uncertainty of this nature may well be that the covenant is meaningless, and the contract stands absolute. Such a result would be completely at variance with the expressed intention of the parties: *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543.

The whole fact of the matter is that when a purchaser buys subject to finance, all he does is to say, " I will buy your property if I can raise the money." In a hard business world, vendors have got to be content with that; but, in my submission, it is no contract.

Testamentary Evidence.—In *Cooper* v. *Bockett* (1845) 4 Moo. P.C.C. 419; 13 E.R. 365, a proceeding for proof in solemn form, the will of the deceased, a retired army captain, was in his own handwriting. It was admittedly signed by him and the signatures by two servants appeared as those of " Witnesses to the said will ". There was, however, no regular attestation clause. One witness was uncertain whether the deceased signed before or after the witnesses, but the other was certain that he signed after both witnesses. The Judge of the Prerogative Court nevertheless pronounced for the will and the Privy Council affirmed his decision. Knight-Bruce V.-C., for the Board, said: " But certainly it is not to be forgotten that fraud is out of the question; that Captain Cooper certainly intended the instrument to be his will; intended it to be effectual as his will; that he knew, or believed, his own signature to the paper to be essential, or advisable, and desirable at least; that he knew, or believed, the signature of two subscribing witnesses to be also essential, or advisable, and desirable at least; that the purpose for which, and the object with which, he summoned these two servants to his room, and caused them to sign their names, was merely to substantiate the instrument as his will; that if they have not attested it effectually, their presence—their signature—and the whole transaction, was idle and useless, and the intended testator's design and wishes, have been absolutely and irremediably frustrated. It is the duty of a Court of Justice not to allow undue weight to these considerations. It seems equally its duty not wholly to lose sight of them " (*ibid.*, 438; 372.) He added: " The improbable, however, is not always the untrue, and their Lordships have thought it right next to inquire, whether it may reasonably be supposed as not unlikely, that the exact particulars and course of the transaction may not have been accurately remembered by the witness; they think that it may. They cannot avoid observing his station in society, his probable habits of life, his probable degree of education and knowledge; they cannot but be aware how very difficult it is for any man, of whatever rank or class (not gifted with uncommon faculties of mind) to remember with precision and clearness the exact particulars and order of a set of circumstances, not involving his own feelings or interests, at a distance of some months from their occurrence; where no memorandum has been made, and where the circumstances are not of a kind or description, with which his own studies or habits of life have rendered him conversant or familiar (*ibid.*, 438; 322).

COMPENSATION FOR LAND TAKEN UNDER PUBLIC WORKS ACT 1928: DECISION OF THE JUDICIAL COMMITTEE.

By MALCOLM BUIST, LL.M.

The recently-available opinion of their Lordships of the Judicial Committee of the Privy Council, in *In re Whareroa 2E Block, Maori Trustee* v. *Ministry of Works*, delivered by Lord Keith of Avonholm, concerns the application of s. 29 (1) (b) of the Finance Act)No. 3) 1944—which reads :

> The value of land [to be paid as compensation upon its compulsory taking by the Minister of Works] shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize—

to land the value of which is capable of substantial increase by subdivision. This question is now of more importance than heretofore, by reason of the recent statutory relaxation of the conditions of approval of aubdivisions. It is now possible to contract *in anticipation of* due official approval of a proposed subdivision, in most instances ; and the effect of this fact on their Lordship's decision may yet have to be tested.

In brief, the Maori Trustee (as successor to the Maori Land Board) was handling a proposed subdivision of some 242 acres, out of which the Minister of Works took a tract of about 91 acres as from September 15, 1952 (the " specified date "). Due compensation was sought by the Trustee, under the abovementioned section, and he argued that the development potentiality of the 91 acres must be added to or included in the value placed upon that tract for purposes of compensation as though the subdivision had proceeded. The Minister of Works contended, however, that since there had not been an actual subdivision this was not a correct appraisal of the actual value at the specified date, in terms of the statute, and he was supported by the Judicial Committee which, in general, upheld the views expressed by the Court of Appeal: [1957] N.Z.L.R. 284.

THE FOUNDATIONS OF COMPENSATION.

The conclusion of their Lordships appears to follow chiefly from their comment, " *It is fundamental that the land must be valued in its state at the time of the taking,*" and one might venture to say that this sentence is at the heart of the matter. It was as though they were saying, " The legislation envisages a sale of this land in its condition on the specified date. You are not instructed by the statute to make a speculative valuation. There is not to be compensation for inchoate proposals : payment is restricted to achievements."

The brief canon italicized above was applied by the Judicial Committee to the situation on the " specified date " in the present case as follows :—

1. The consent of the Minister of Maori Affairs had yet to be given to any sale of the land in question by the Maori Trustee under s. 8 (9) (2) of the Maori Purposes Act 1943.

2. The plan of subdivision could not yet be carried into execution without the consent of the Minister of Maori Affairs or delegated authority as required by the Land Subdivision in Counties Act 1946.

3. There were in fact no subdivided lots as shown on the plan, no roads, fences, accesses, drainage, or other facilities.

It seems, in effect, that the learned tribunal, when asked to increase the compensation by the value of the subdivision, asked, " What subdivision ? " for none had been *established.* " The crucial and deciding factor, in their Lordships' view, is a subdivision in fact which has been lawfully carried out."

BYPATHS.

Departures from the statutory canon by the claim of the appellant Trustee may be shown by looking at certain difficulties created through the use of the terms " potential " and " hypothetical."

" *Potential* " : Their Lordships pointed out that there were, as had frequently been observed, cases where land had a potentiality which might be realizable in the foreseeable future, and if so would give the land an added value over and above its value for the uses made of it at the time of the taking. After pointing out that on the face of the matter a willing vendor of six houses could hardly be expected to sell them in a single lot to one purchaser for less than he could realize by selling them separately to six purchasers, their Lordships stressed the difference made to the " potential " subdivision, in the present case, by the want of " a subdivision in fact which has been lawfully carried out "—*vide* the three defects itemized above. In *St. John's College Trust Board* v. *Auckland Education Board* [1945] N.Z.L.R. 507, the third defect had not been given due weight : there were in fact no subdivisions and,

> to give the claimant compensation on the basis that there were [actual subdivisions] would be to give him compensation for unrealized possibilities as if they were realized possibilities.

In other words, the " potential " value must not infringe the fundamental rule that the land must be valued in its state at the time of the taking.

" *Hypothetical* " : In expressing disagreement with the *St. John's College* case, their Lordships first approved the manner in which Kitts and Taylor JJ., in *Turner* v. *Minister of Public Instruction* (1956) 95 C.L.T. 245, had dealt with a similar problem under s. 124 of the Public Works Act 1912 (N.S.W.)., and then summarized the matter themselves by concluding, " If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision, he would not be expected to pay more for it than any other purchaser buying for the same purpose."

The opposed questions in *Turner's* case were set out as whether the compensation for the resumption of the land was to be determined—

1. By reference to a hypothetical sale of the land at a price equivalent to the net amount which the owner might have expected to realize on subdividing it and

selling it in subdivisions, less only an allowance for the risk of realization.

2. By reference to a hypothetical sale *in cumulo* to a purchaser buying with a view to subdividing and selling in subdivision and prepared to pay for the land no more than such a sum as would return to him out of the transaction an appropriate allowance for the risk of the venture and a profit for himself.

It is respectfully submitted that Gresson J., in the Court of Appeal, set out the substance of the alternatives, in a passage ([1957] N.Z.L.R. 284, 289) approved almost *in toto* by the Judicial Committee. First he commented that a purchaser would take into account that the land was *capable* of subdivision. (It is noteworthy that his Honour thus narrowed the "potential" factor down to its proper sphere.) Then he set out the limits of the "hypothetical" factor in the following passage: "In estimating what price a purchaser would be willing to pay, recourse may be had to an examination of the estimated gross yield from a subdivision as yet notional only, and the estimated deductions that a purchaser would have to take into account; but that is the extent to which a *notional* subdivision can be regarded." The word "notional" has been italicized, because that is the element of hypothesis. If, before the "specified date," there has been "a subdivision in fact which has been lawfully carried out," then there is no need for hypotheses of value in relation to potentiality. In the absence of such subdivision, any "hypothetical" value is restrained by the fundamental rule that the land must be valued in its state at the time of the taking.

CROSS-ROADS.

But, as indicated early in this article, it must be remembered that *valid* contracts with prospective purchasers may have been entered into, under the new legislation relating to subdivisions. The Maori Trustee's circumstances lacked the aid of this legislation, and he further lacked Ministerial consent. If however, a private landowner were today to seek compensation upon the taking of land all or part of which he had disposed of, or had been in full readiness to dispose of, by anticipatory contracts, now within the law, before "the necessary legal consents" referred to in their Lordships' revised version of the directions laid down in the *Maori Trustee* case, then, it is submitted, the fundamental rule set out by the Judicial Committee would require that the compensation be allowed on a full subdivisional basis.

PARTY-WALL RIGHTS: GRANT INCLUDING RIGHTS OF SUPPORT.

Conveyancing Precedent.

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

EXPLANATORY NOTE.

I have yet to meet the conveyancer who relishes the task of preparing for his client a grant of party-wall rights. Unfortunately these grants will become more common in New Zealand as our principal cities become more populous.

Precedents will be found in *Goodall's Conveyancing in New Zealand*, 2nd ed., 253-259. A valued correspondent has written to point out that, in his opinion, cl. 7 of the precedent on p. 256 (dealing with the apportionment of the costs as between the parties themselves) is not too clear. In particular, he refers to the portion,

> "the cost of the erection of the said walls . . . per square foot shall be deemed to be the total cost thereof divided by the total area of the said walls . . . ."

The wording of that clause is certainly a little clumsy, but I think that its meaning is clear. However, cl. 5 of the precedent (infra) is neater in its wording, and the precedent has the added advantage of containing easements of support, the drafting of which is also a troublesome matter to the conveyancer, however experienced he may be.

If the easements were created in an instrument separate from the transfer of the fee simple, it, being a mutual grant would be treated for stamp-duty purposes as having a twofold operation; it would be assessed not as one grant but as two, and the stamp duty assessed would probably be 22s. or 30s. But, as they are embodied in a transfer of the fee simple, the only stamp duty payable will be ad valorem conveyance duty, based on the amount of the consideration passing from the transferee to the transferor. Similarly, no extra registration fees will be payable because of the existence of the easements: *Adams's, Land Transfer Act*, 447, 448.

For permission to use the following precedent, I am much indebted to Mr. R. J. Loughnan, of Christchurch.

Memorandum of Transfer on Subdivision creating Easements and reserving Party-wall and Rigdts of Support.

PRECEDENT.

A. B. and C. D. both of Christchurch, (hereinafter called "the Vendors") being registered as proprietors of an estate in fee simple in all that parcel of land situated in the City of Christchurch containing [*set out area*] be the same a little more or less being [*set out here official description of land*] and being the whole of the land comprised in Certificate of Title Volume — Folio ....

IN PURSUANCE of an agreement bearing date the .....day of .....1958 made between the Vendors of the one part and the X.Y. COMPANY LIMITEDa Company duly incorporated and having its registered office at Christchurch (hereinafter referred to as the "Purchaser") of the other part AND in consideration of the sum of.....this day paid by the Purchaser to the Vendors etc.

DO HEREBY TRANSFER to the Purchaser ALL THAT parcel of land containing [*set out here area of part to be transferred*] be the same a little more or less being that portion of the above described land shown as Lot 9 on Deposited Plan .....

RESERVING to the Vendors and other the owner or owners registered as the proprietors of Lots 8 and 10 on the said Deposited Plan :

(a) In respect of the strip of land lying along the Southern boundary of the said Lot 9 and coloured yellow.

(b) In respect of the strip of land lying along the Northern boundary of the said Lot 9 and coloured blue.

the rights and easement of support hereinafter more particularly described and

RESERVING ALSO to the Vendors, and other the owner or owners registered as the proprietors of Lot 10 on the sai Deposited Plan the rights of way and passage hereinafter more particularly described affecting the Easternmost portion of the said Lot 9 edged in blue.

AND in further pursuance of the said Agreement the Vendors do HEREBY GRANT to the Purchaser and other the owner and owners registered as the proprietors of the said Lot 9

(c) In respect of the strip of land lying along the Northern boundry of the said Lot 100 coloured blue and

(d) In respect of the strip of land lying along the Southern boundary of the said Lot 8 coloured yellow

the rights and easements of support hereinafter more particularly described.

AND in further pursuance of the agreement the Vendors HEREBY GRANT to the purchaser and other the owner and owners registered as the proprietors of the said Lot 9 the rights of way and passage hereinafter more particularly described affecting the Easternmost portions of Lots 2, 4, 6, & 8 edged in yellow on the said Plan AND the Easternmost portions of Lots 3, 5 & 7 edged in blue on the said plan.

AND these presents further witness and it is hereby DECLARED AND AGREED by and between the parties hereto as follows namely :—

1. THAT the rights and easements of support in respect of the several strips of land more particularly above described affect the walls at present standing upon the Northern and Southern boundaries of the said Lot 9 which are in the positions respectively shown on the said Deposit Plan No. ..... and whose dimensions as to thickness and height are more particularly shown on the Plan deposited as No. ..... are such that each of the said walls shall be deemed to be a party wall supporting the buildings on both sides of the strip of land on which it stands to the intent that the said rights and easements so reserved and so granted shall be forever appurtenant to and be used and enjoyed together with and shall run with and against the respective lands above described but subject to the respective liabilities hereinafter appearing.

2. THAT subject to due and reasonable arrangement having been made with the tenant or tenants for the time being of the areas immediately adjoining the several boundaries between the said respective lands either party shall be entitled on giving to the other not less than six calendar months' notice in writing of his intention so to do to pull down the now existing walls so shown on the said deposited Plan or either of them and any other part of any building or buildings necessarily involved or required to be pulled down and to proceed with all reasonable expedition to build a suitable party wall as for ordinary suitable and proper buildings and on the said boundary-lines or either of them between the said properties and along such length thereof as may reasonably be required for any building either of both of such parties may be erecting or contemplating erecting.

3. The party building such new party wall shall take all reasonable care to interfere as little as shall be reasonably possible with the comfort and convenience of the occupier or occupiers of the premises adjoining and shall during such building operations shore up or cause to be shored up in a proper and workmanlike manner and also make good any damage done to any part of the adjoining premises affected by such demolition and building operations.

4. The position and dimensions of every new party wall shall be such that the centre-line thereof shall coincide with the true line of the boundary between the said properties as such boundary-line is indicated in green on said deposited Plan No. ..... and each such new wall shall be deemed to be a party wall.

5. The said wall or walls shall in the first instance be paid for by the party or respective parties erecting the same and the other party before making use thereof as a party wall shall pay to the party so erecting the said wall or walls a sum of money equal to one-half of the cost of the erection of the said walls and foundations ; but in the event of his using a portion only of such wall as a party wall he will pay only such a sum as bears the same ratio to the half cost of the said wall as the superficial ares of the portion so used by him bears to the super f icial area of the whole wall.

6. The maintenance and repair of any such party wall whether original or erected in substitution therefor shall be borne by and be done at the joint expense of the parties hereto unless it can be shown that any repairs or reinstatement have or has been rendered necessary by the act or default of either of the parties hereto alone in which event the party responsible or in default shall bear the whole cost thereof PROVIDED ALWAYS that save as hereinbefore appearing the cost of maintenance and repair of the said wall or walls shall be shared by the said parties in the same proportion in which they respectively from time to time contributed to the cost of the wall or walls.

7. In the event of any dispute arising as to what constitutes a suitable or sufficient wall or as to the apportionment of the cost of the erection or maintenance of the walls mentioned in the last preceding paragraphs the matter shall be referred to the arbitration of an architect to be mutually agreed upon and failing agreement to the then President for the time being of the New Zealand Institute of Architects or an Architect recommended by him.

AND LASTLY these presents further witness that it is hereby DECLARED AND AGREED by and between the parties hereto that the rights of way and passage hereinafter referred to shall entitle the holders of them and the person or persons registered as the proprietors of the several dominant tenements enjoying them their and each of their servants, tenants, guests, visitors, licensees and invitees in common with all others having the like rights at all times by day or by night with or without horses carts and vehicles of every description laden or unladen to pass and repass over such portions of each or all of the servient tenements above described subject to such conditions and restrictions as the Christchurch City Council or other Local Authority having power to do so may see fit to impose.

IN WITNESS etc.

Certiorari following Plea of Guilty.—" Another ground for refusing certiorari in this case is that I know of no case where a plea of guilty has been entered and certiorari has been granted. No one can suggest that the Magistrate did anything wrong. She has filed an affidavit explaining exactly what happened. She was not asked to construe these regulations. As competent counsel was before her and entered a plea of guilty for his client, she naturally proceeded to record a conviction and consider what penalty should be imposed. In my opinion, it would be quite wrong to issue certiorari after that has been done, and also in my view the Court has no power to order certiorari in this case. Certiorari is always, it should be remembered, a discretionary remedy. Although, in the history of that writ, the Courts were inclined at one time rather to depart from the fact of its being a discretionary remedy, in *Rex* v. *Stafford Justices* [1940] 2 K.B. 33, to which [counsel for the applicant] referred, the Court of Appeal was, if I may say so, on the right lines in getting certiorari back to a matter of discretion. It may very often be that the facts are such that the discretion can be exercised in only one way, that is to say, it would not be a judicial exercise of discretion if one decided the other way. In this case the whole difficulty was caused by the deliberate entering of a plea of guilty on the part of the applicant."—Lord Goddard C.J. in *Regina* v. *Campbell, Ex parte Nomikos* [1956] 1 W.L.R. 622, 627 ; [1956] 2 All E.R. 280, 283.

LAWYER IN SARAWAK.

By K. H. DIGBY.

I. UNDER THE RAJAHS.

While Sarawak was ruled by the Brookes, lawyers were not held in high esteem there. It was said that the second Rajah, Sir Charles Brooke, who died in 1917, refused to allow any barrister or solicitor to enter the country, which may be one of the reasons why Sarawak Oilfields Ltd., an offshoot of the Anglo-Dutch combine, made such a good bargain when it obtained its concession at Miri.

The third Rajah, Sir Charles Vyner Brooke, who is still living in England, was not so hostile to the profession, but no member of it entered his service until 1928. Following a legal row, in the course of which representations were made to the authorities at Home, qualified persons were in that year appointed to be Chief Justice and Legal Adviser respectively. For a short time there was even a qualified Assistant Legal Adviser as well.

The lot of these intruders was no bench of roses. The official language of the Courts was Malay, and all Magistrates, whether European or Native, were expected to try their cases in that language. The use of Sea Dayak was allowed when that was the mother tongue of both parties. These rules could not be applied to the new Chief Justice, who, of course, had not been taught either language, but many of the Lower Courts kept their records in Romanized Malay, and some in the Arabic script called Jawi. This tended to increase the difficulties of the highest appellate and revisionary tribunal, which was the Supreme Court constituted by the Chief Justice sitting alone.

All the Magistrates, including the Residents, were laymen. The Residents' Courts were the highest Courts of first instance, with unlimited jurisdiction in criminal and civil matters, and in most cases they were in practice the last resource of the pertinacious appellant as well. Below the Residents' Courts there were three tiers of Courts with limited jurisdiction, the most important of which was the District Court, presided over by the District Officer, which was the backbone of the judicial system of the country.

All these Magistrates' Courts administered a very rough and ready justice. There is a good deal to be said for refraining from imposing on primitive peoples British conceptions of law and procedure. There is also a good deal to be said for attempting to give such primitive peoples the benefits of British legal experience. Pre-war Sarawak, however, fell between the two. Lay Magistrates, with a sincere desire to do right between man and man, were irritated, hampered and intimidated by being expected to administer laws, which they had not read, according to rules the value of which they entirely failed to appreciate.

It is not intended to suggest that the Magistrates were slaves to orthodox procedure. As a very junior administrative officer in 1934, still damp from my call to the English Bar, I accompanied my first District Officer into Court in order to learn how the job should be done. In the first case that I attended a prison warder was charged with negligently allowing two convicts to escape. A Chinese eye-witness of the incident was called into the witness-box, and, after the usual preliminaries, his examination, conducted by the Magistrate, went on like this: "Where were you?" "Among the trees." "What were you doing there?" "Cutting firewood." "Have you a licence?" "No." "Then you are fined ten dollars."

Magistrates of that sort were common and they were not to be despised. They knew nothing of the rules of evidence and very little of substantive law, but they spoke the language fluently, were on friendly and familiar terms with the people committed to their charge; were, on the whole, liked and trusted; and were not inclined to put up with any interference from an unnecessary Chief Justice with whom they had nothing in common at all.

Very harsh things were said in the backwoods, and more than one Magistrate protested in writing when his decision was reversed by the Supreme Court. On one occasion a Resident asked me to scrutinize and advise him on the validity of his objections before he dispatched them.

The law was as unsophisticated as the Courts. Sarawak was an independent protected State, recognized as autonomous in so far as its internal affairs were concerned. All power lay with the Rajah. (As late as 1940 there occurred a case of the Rajah reversing a decision of the Supreme Court.) Not all the Rajah's words were law but any of them might be.

The second Rajah had legislated by means of succinct "Orders" published in the *Government Gazette*. One of the most famous of these was in these terms: "I hereby order that in future all wooden shophouses in Kuching shall be built of brick". Everyone knew what he meant by that and indeed few of his edicts lacked clarity. As no lawyers were allowed in the Courts there was nobody to twist them out of shape.

Matters were much worse when the Rajah considered, or was persuaded, that a statute of some other country might serve as a suitable model. When this happened the statute was lifted bodily out of its natural environment and roughly set down in Sarawak with little or no attempt at adaptation. This, for instance, was the fate of the English Fugitive Offenders Acts, but fortunately excursions of that kind were rare so that the statute book was not very cluttered up with that sort of nonsense.

Occasionally, on the same principle, regulations were made, or bodies or commissions set up, on the model of those in other territories, without any attempt to copy the parent legislation from which they sprang. In later days this practice led, and is probably still leading, to considerable difficulties.

Even after the advent of the Legal Adviser the path of the reformer was perilous. Departments took his title literally and held themselves free to accept or reject his advice. They drafted the legislation which they wanted themselves, sometimes seeking professional assistance and sometimes not. One result was that law and administrative instructions often became hopelessly entangled. For instance, the Land Officer who failed to use the proper-coloured ink when drawing his documents was liable to imprisonment under the

general penalty clause of the Land Settlement Order.

In any event the Legal Adviser had enough to do without lecturing the Government Departments on law. His gazetted titles were "Legal Adviser, Registrar of the Supreme Court and Official Assignee", but, by virtue of the provisions of various laws, he was also Registrar of Companies, Registrar of Deeds, Registrar of Business Names, Registrar of Trade Marks, Registrar of Letters Patent, Bankruptcy Officer, Probate Officer, and Public Prosecutor. After September, 1939, he added Custodian of Enemy Property to the catalogue, and later still he was appointed to be a Government Director of the Sarawak Electricity Company, which was in form a limited company but in fact a partnership between the Sarawak Government and a firm of engineers in Singapore.

Furthermore, as there were still no lawyers in private practice in Sarawak, the Legal Adviser's work was not wholly confined within the boundaries of his official duties. Strictly speaking, he was employed only to advise the Government, but he was frequently expected to advise Magistrates, and on occasions he was asked to advise private litigants, although, of course, in the last case such advice was gratuitous. It happened more than once in a complicated civil case that the plaintiff came in on one day, the defendant on the next, and the Magistrate during the actual hearing, all to seek advice on law or procedure.

If a dispute arose between a Government Department or official, on the one hand, and a private person, on the other, it was clearly the Legal Adviser's duty, to his calling if not to his employer, to put both sides of the case before the executive and to do his utmost to see that justice was done. This naturally would not apply where the aggrieved person had the means and the facilities for obtaining advice in Singapore or elsewhere, but such cases were very rare.

Even before the advent of the Legal Adviser, Sarawak statutes had gradually been taking a more formal shape. With the arrival of a professional draftsman this process was accelerated. Statutes were still called "Orders", but they were given a long and a short title, an interpretation section, and, where necessary, repealing provisions. It became the practice to use and adapt models from other territories. But the demand of the powerful administrative (and therefore magisterial) branch of the service for simplicity still prevailed over legal predilictions, with the result that a good many of the "models" reached the statute book in such truncated form as to be nearly unrecognizable, hopelessly vague, and patently ambiguous.

Occasionally the Secretariat would forget about the new conventions and publish in the *Gazette* a short "notification", signed by the Rajah and framed in the old style. As there was no reason why the Rajah should not legislate in any way he chose these lapses from good taste had in law the same force and effect as the more formal "Orders". They invariably roused reasonable protests from the Chief Justice and the Legal Adviser, the only effect of which was to confirm the prevalent view that lawyers were fussy pedants, always prepared to sacrifice substance for form.

The laws which the Courts administered, more or less, comprised the "Orders" which have been described, English law where this could be suitably invoked to fill up the gaps, the by-laws of the Municipal Boards of the three municipalities, Kuching, Miri and Sibu, and "Local Orders" made by the Residents, under some unidentifiable power which knew no statutory parent, for the good government of their Divisions. (Sarawak, a country about the size of England and Wales in area, was split up into five administrative Divisions each under a Resident.)

It was continuously emphasized, indeed it might almost be said to be a cardinal principle of "Brooke rule", that law was to be regarded as a guide or signpost and not as a mandate. A written law was thought to be helpful to the Courts and to assist them to do justice. Ordinarily they were required to give effect to it, but Magistrates were expected to use their common sense and dispense with any provision which might work injustice, or be otherwise inappropriate, in a particular case. Hard cases were prevented from making bad law by being taken outside the law and dealt with on their merits.

This qualification did not, however, apply to Native customary law, which was treated as being rigid in the extreme. The Courts had to take judicial notice of such customary law, and to accord it an importance second only to the Rajah's "Orders". Its administration was primarily the responsibility of Native chiefs and headmen, but all Courts had to have cognizance of it, and a disappointed litigant in a Native Court could easily take his case by way of appeal to the hierarchy of ordinary Courts. In 1939, Native Courts were for the first time regulated by statute under which no less than six successive rights of appeal were given, as far as a specially-constituted Supreme Court, with no obstacle to get over other than the filing of successive petitions and the payment of successive fees.

Most of the Magistrates, European as well as Native, were more familiar with the rules of Native customary law than they were with legislation. The substance of some of these customary laws will be dealt with in my next article.

II. Native Customary Law.

I shall continue to write in the past tense because I left Sarawak at the end of 1951 and have no first-hand knowledge of the changes which have been made since then. I have little doubt that most of the matters which I shall describe to-day remain as they were before my departure.

Many different races and sub-races were deemed to be indigenous to Sarawak. Expert opinion varied as to the exact number because some saw distinctions between certain communities where others alleged that no distinctions existed. The law noticed at least twelve separate native peoples. Of these the most numerous and influential were the Malays and the Sea Dayaks. The latter formed the largest race in Sarawak, the Chinese taking second place and the Malays third.

The law did not recognize the Chinese as "natives," however many generations of the family had been born in Sarawak, and so their ancient legal customs, interesting though they were, have no place in this article.

The customary laws of the native races all had a certain resemblance to each other although there were some important differences, particularly between the Malays (and perhaps the Melanaus), on the one hand, and the rest on the other. It is not intended to make any attempt to cover the whole field (few men, indeed,

would be qualified to do so), but a brief description of some of the customs of the Malays and the Sea Dayaks may serve to give an indication of those of the others.

It is dangerous to generalize about races, but it does seem that the English system of requiring a witness to swear to an intention to speak the truth does not come naturally to an Asian. His idea of an oath is to swear to the existence of certain facts. (Perhaps this concept is not unlike that of the " compurgators " in medieval England.) A Chinese does not kill a chicken in order to bind his conscience, but as conclusive proof that his contentions are true. It seems that in his view the oath should follow evidence instead of preceding it.

In Sarawak this was particularly true of the Malays, who were, of course, Mohammedans by religion. An oath in the mosque was often conclusive proof of the matters in issue. The bulk of their customary law concerned the relations between the sexes from one aspect or another. If a man was accused of fornication his oath in the mosque that he was innocent was conclusive unless the girl in the case was pregnant. In all cases in which pregnancy occurred the woman's oath in the mosque that a particular man was responsible for her condition was also conclusive. For the better achievement of certainty, and the protection of religion, Malay customary law wisely refused to allow both parties in the same suit to swear to the truth of their conflicting contentions.

In common with other races the Malays had a partiality for fixed sentences. The potential transgressor liked to know what it was going to cost. Accordingly every offence in the Undang-Undang, or Malay Code, had a price tag on it. The price for incest, which amongst the Malays covered an extremely wide range of personal relationships, was two years' imprisonment for the man (the woman being left to her shame).

Before the war many humane European officers attempted to obtain some mitigation of this harsh rule but the Malay chiefs were adamant. After the war a new and more advanced generation of chiefs strongly favoured amendment, but the Government felt itself inhibited from this course by the promise, made when the country was ceded to the Crown in 1946, that no change would be made in native law or custom. Consequently the practice grew up of reducing the automatic two-year sentence by the regular exercise of the prerogative of mercy vested in the Governor. Thus politics made an ass of the law.

Among the Malays, and, I think, all the other native races, both sexes were punishable by fine for adultery. Malay women were forbidden to remarry for three months after divorce, or the death of a husband, so that there might be as little doubt as possible about the paternity of any children they might thereafter bear. A Malay man was entitled to any number of concurrent wives up to four provided he could maintain them all. Malay girls were entitled to marry after attaining the age of fifteen, or after first menstruation, or after having a dream of sexual relations, whichever event should first happen. It was an offence for a man to whistle at night under a house containing an unmarried girl, or for a man to enter a house other than his own while there was no adult male therein. All these matters, and many others of a similar kind, were covered by the written code of Malay customary law. In some cases a proportion of the fine inflicted was payable to the opposite party, the remainder going to the Government, or, after the post-war administrative reforms, to the " native treasuries."

Even in incest cases the woman's oath was conclusive of the accused's guilt if she was pregnant, and the Malays attached great importance to this rule. European Magistrates preferred to decide such cases on the evidence available. In 1937 a respected mosque official was accused of this offence by his niece. The trial took the whole of one weary day. After heart-searching consideration the Court, consisting of a European District Officer and a Malay Magistrate, convicted the accused in the face of his heated denials, and passed the only legal sentence. Thereupon the man's male relatives went down in a body to Kuching, the capital, to complain, not that the verdict was erroneous, nor that there had not been a fair and proper trial, but that the woman had merely taken the oath usually tendered to witnesses and had not been required to swear in the mosque to the truth of her allegations.

The Resident ordered that this omission should be cured forthwith. Accordingly arrangements were made for the woman to go to the mosque where she duly took the requisite oath. Everybody was then content, except, perhaps, her disappointed uncle.

The Malays could obtain a divorce for due cause, or, if there was no due cause, merely by asking for it and paying the fixed fine. This applied to both sexes, and, I think, to all the other native races in Sarawak as well. The only obstacle in the way of a frolicsome Malay spouse, apart from finding the cash when no matrimonial offence could be proved, was that section of the Undang-Undang entitled " China Buta " (Blind Chinese). This provided that a man and a woman might divorce and re-marry twice, but they could not re-marry after a third divorce until the woman had undergone a platonic union with a third party, the " blind Chinese," whom she must marry and divorce in due form, before she was free to run back again to her thrice discarded husband.

The regulation of sexual relations was also one of the subjects with which Sea Dayak customary law was concerned. Their code was, however, not quite so preoccupied with this class of case as was the Undang-Undang. Another difference was that Dayak fines were not invariably assessed in terms of money. An unlucky defendant might be ordered to pay a pig or a parang (curved native sword) or some other personal chattel, but generally these would be awarded to his aggrieved opponent as compensation for the wrong. Pigs were not paid into the Treasury.

The Dayaks had two especially interesting methods of settling disputes amongst themselves, cock-fighting and diving. The former is still a legal sport in Sarawak, and a long time ago its popularity was occasionally invoked by a desperate Court.

In 1936 a Dayak boy was drowned while bathing with bigger boys. An inquest was held and a verdict of " accidental death " returned. But the Dayaks placed greater reliance on dreams than they did on Coroners, and after the inquest the father of the dead boy reported that he had dreamed that he saw his son held under water by one of the other bathers. His manner, when announcing this to the Resident, was so strained and anguished that it seemed that a refusal to bring justice into line with his dream might lead to grave consequences.

The Resident was in a dilemma. "This is the result of you people," he said to me. "In the old days, before you lawyers came to this country, I would have ordered a cock-fight and seen that this man had a phoney cock planted on him. Now anything may happen." Fortunately for us lawyers nothing did.

The Resident was right in thinking that cock-fighting could no longer fill the roll of arbitrator, but the Courts occasionally permitted "diving" as long as Brooke Rule lasted. It was resorted to only at the request of both parties and after the Court had been driven to the conclusion that it was impossible to sift the truth from a mass of conflicting exaggerated and mendacious testimony.

This trial by ordeal was conducted as follows. Each side appointed a champion and a pole-holder and provided a pole. The pole-holders walked into the river until they came to a sufficiently deep place. The champions followed them, grasped their respective poles, which were held upright in the water with their ends resting on the bottom of the stream, and submerged themselves. The man who stayed under longest won the case for his patron.

The record was said to be six minutes, but generally one champion reappeared after staying down just long enough to save his face. He knew his side was in the wrong on the merits of the dispute, and did not see why he should suffer discomfort when he was bound to be defeated anyway. The losing side usually complained that the opposition pole-holder had cheated by pushing his man's head under when it had begun to come up.

As far as I know the last occasion on which diving was officially resorted to in Sarawak was in 1943 when the Japanese used this method in attempting to find the murderers of Gilbert Arundell, one of Sarawak's pre-war Residents, but that is a story which will have to wait another time.

From time to time in this article reference has been made to "codes", but it should be explained that the bulk of native customary law in Sarawak was not reduced to writing. The Malays, with their Undang-Undang, were an exception to the general rule.

The mass of the Sea Dayaks were concentrated in the Second and Third Divisions. The Third Division Dayaks had their written code which was as rigid as that of the Malays. The customs of the Second Division Dayaks differed in some respects from those in force in the Third Division, and had in part been put into typescript by a succession of administrative officers. This typescript was regarded only as a guide while the printed code of the Third Division was mandatory.

Well-meaning District Officers often attempted to keep a written record of the customary laws of other native races as well. But there were, of course, strong arguments against any attempt at codification. The Brookes, as was mentioned in an earlier article, upheld and accorded great respect to such law, and on cession this tradition was maintained. Codification, however, inevitably produces rigidity, which is the very characteristic that primitive law must avoid unless the administrative objective is to establish an anthropological Whipsnade.

Furthermore none of the codes or pseudo-codes had any statutory backing. Occasionally attempts were made to give them such authority, but all these broke on the horns of this cruel dilemma. If the parent law purported to render the code flexible their would be a loud complaint from conservative native opinion that ancient rights were being destroyed; but if, on the other hand, the law made amendment difficult, progress would be slowed to tortoise pace.

The importance of customary law in the life of the people, coupled with the existence of rigid codes which were technically unknown to the law, became one of the major headaches of the Legal Adviser when the session of Sarawak to the Crown in 1946 brought the rule of law into greater prominence than it had ever enjoyed under the Brookes.

"Retail Shop."—"Nor so I agree with the view that has prevailed as to the effect of the words 'of a similar character.' For myself I am unable to state what are physical features the existence of which is essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows; but I am equally familiar with retail shops where no such features exist. In my opinion it is not possible to say that the words 'of a similar character,' even if they include, are limited to, physical features of the premises. Tjey must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now, if we com pare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein Moreover, once you include repair work in the words 'retail trade or business,' it can be truthfully said that there is a similarity between the tyvz of business carried on in this building and the type of business carried on in a retail shop." Viscount Dunedin in *Turpin* v. *Middlesborough Assessment Committee & Bailey* [1931] A.C. 451, 473.

Pleadings and Particulars.—"My Lords, I think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial Judge, that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents—I cannot tell, since the evidence is incomplete—but I am certain that we should do worse justice to the appellants, since, in my view, they were entitled to conduct the case and confine their evidence in reliance on the further and better particulars of para. 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues, and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant, and how much irrelevant, to those issues. Proper use of them shortens the hearing and reduces costs. But, if an appellate Court is to treat reliance on them as pedantry or mere formalism, I do not see what part they have to play in our trial system."—Lord Radcliffe in *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218, 241; [1955] 3 All E.R. 865, 871.

TOWN AND COUNTRY PLANNING APPEALS.

Austin *v.* Manukau County.

Town and Country Planning Appeal Board. Auckland. 1958. August 12.

Building Permit—Residence and Glasshouses—Area Zoned as "Residential"—Market gardening Purposes—Conditional Use—No retailing of Produce or Execution of Signs or Advertisements without Consent—Town and Country Planning Act 1953, s. 38.

Appeal by the owner of a property containing 2 ro. 38.4 pp., being Lot 10 on Deposited Plan 44724 being part Fairburns old Land Claim 269A. He applied to the Council for a permit for the erection on the property of a residence and three glasshouses each 30ft. by 100ft.

The property is in an area zoned as "residential" under the Council's undisclosed district scheme and lies within the Pakuranga County Town.

There was no dispute as to the appropriateness of the zoning.

The Council refused to grant a permit and in its reply to the appeal it claimed that this refusal was on the grounds that the glasshouses would constitute a "detrimental work" in that they would detract from the amenities of the neighbourhood likely to be provided or preserved by the Council's undisclosed district scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The appellant's property comprises a peninsula jutting out into the Tamaki River having access by a narrow strip of land (33.5 links) to the Old Bridge or Panmure-Howick State highway. It is virtually surrounded by Mangrove swamp and the nearest house is five to six chains away.

2. The property by reason of its situation and physical characteristics including adequate drainage is admirably suited for the purpose for which the appellant wishes to put it, viz., the growing of tomatoes for the wholesale market.

3. The Council has not yet adopted a Code of Ordinances but under Reg. 17 (2) Town and Country Planning Regulations 1954, it must in preparing its Code follow generally the form set out in the Fourth Schedule to the Regulations so that in considering the appeal the Board must look to the Fourth Schedule for guidance.

Under that schedule (page 38 of the Regulations) under the heading "Residential A Zones Predominant Uses" appears (para. 2) "Farming including . . . market gardens and nursery gardens".

It cannot be argued that the growing of tomatoes for human consumption is not "market gardening".

It follows therefore that if the Code in the Regulations is to apply then the appellant is entitled as of right to use his land for that purpose. See the definition of "Predominant use" (p. 34 of the Regulations).

Evidence was given that in its Code of Ordinances the Council intends to provide that "market and nursery gardens" are to be "conditional" not "predominant" uses in residential areas so that there is at least a likelihood of such a provision being embodied in the Council's scheme when it becomes operative.

4. The Board proposes to allow the appeal. The only question is whether it should under the provisions of s. 42 (3) impose any conditions.

The appellant's property fronts on to the Panmure-Howick Main Highway, a road which carries a very substantial volume of traffic.

In the evidence for the Council a great deal of emphasis was laid on the contention that the erection of glasshouses on the appellant's property might lead in the future to the retail sale of produce from the glasshouses themselves or from a wayside shop or stall and in that event a traffic hazard would be created by cars stopping at or going into and out of the appellant's property.

The appellant stated that he had no intention of doing any retail selling and the Board accepts that but he cannot bind any successors in title.

The Board thinks it proper therefore to impose some conditions.

The appeal is allowed subject to the following conditions:

1. No produce is to be retailed from anywhere on the property.

2. No signs or advertisements are to be erected on the property without the prior consent of the respondent Council.

Appeal allowed on conditions.

Auckland Transport Board *v.* One Tree Hill Borough.

Town and Country Planning Appeal Board. Auckland. 1958. August 12.

Zoning—Objection—Building used for Storage and Warehousing Purposes—Area zoned "Residential"—Objection asking Change of Particular Property to "Industrial C"—Building formerly used as Tram Barn and "non-conforming Use" permitted—Land not suitable for Industrial or Commercial Development—Zoning appropriate—Town and Country Planning Act 1953, s. 38.

Appeal under s. 26 of the Town and Country Planning Act 1953. It relates to a property of two ac. 1.6 pp. situate at the corner of Manukau Road and Green Lane owned by the appellant Board on which is erected the Epsom tram barn.

Under the Council's proposed district scheme this property is zoned as "residential". When this scheme was publicly advertised pursuant to s. 22, the Transport Board gave notice of objection under s. 23 to the proposed zoning claiming that its land shoud be zoned as "Industrial C". The objection was heard by a committee of the Council on February 19, 1958, and the Council on May 28, 1958, disallowed the objection. This appeal followed.

In its appeal, the appellant Board prayed that the zoning should be altered from "residential" to "industrial C" but at the hearing the case as presented for the appellant conceded that an "industrial C" zoning might not be appropriate and asked for the creation of a special industrial area limited to such forms of light industry as might be appropriate.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The tram barn was erected in 1902 and used as such until 1956 when electric trams went out of use. Since 1956 it has been used for storage and warehousing purposes.

2. The Borough Council's first town plan was adopted in September, 1941, and under that plan the property under consideration was in an area zoned for commercial purposes but about 1948 that zoning was changed to "residential B" and it has remained so zoned.

It follows therefore that its use as a tram barn was a "non-conforming" use permitted as being a public utility.

Its present use for storage and warehousing although non-conforming is an "existing use" within the meaning of s. 36 and can be continued so long as the building remains usable.

The Board wishes to sell the property and if zoned as "industrial" it would command a far higher price than if zoned as "residential".

3. Counsel for the Board conceded that any hardship that might be occasioned to that Board if the zoning was not altered was not a factor that could be taken into consideration by the Appeal Board in determining the appeal and he sought to establish that the zoning as "residential" is inappropriate.

4. The property is on the western boundary of the One Tree Hill Borough. The western side of Manukau Road is in the City of Auckland. It was claimed by the appellant that it is in the centre of an industrial and commercial area. That is true if viewed within a very narrow perimeter. Nearby in Manukau Road there is a small industrial undertaking and a small commercial area but if a wider view is taken of the locality it is clear that it is predominantly residential in character except for the open spaces of the Auckland Trotting Club's Course, the A. & P. Association's grounds and the Green Lane and adjacent hospital grounds.

In determining the character of the locality, regard must be given not only to that part of it that is within the boundaries of the One Tree Hill Borough but also to the large residential area in Auckland City to the west of Manukau Road.

(*Concluded on p. 368.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

More Variety in Debt Collection.—Mindful of the Indian gentleman who sought to get away from the stereotyped demand for payment within seven days (see this column, *ante,* 319), a country correspondent has drawn attention to a local reply just received: "Dear Sir, Just a few lines to let you know that I can not pay you just yet as my wife is going into the home very soon so you can see that I want to get the things for the baby as I don't want to have our first born to be short of clothes or any thing so if you don't believe me come out and see her for your self.' The firm has replied, and it would seem with every justification, that since their client's high quality meat for which they are asking payment has undoubtedly contributed towards the debtor's joy he must pay up or explain his predicament to the Magistrate (to his utmost damned astonishment !).

The Delicate Touch.—In his *Reminiscences,* Sir Henry Hawkins, later Baron Brampton (1817-1907), says that Mr Justice Graham "was a man unconscious of humour yet humorous, and was not aware of the extreme civility which he exhibited to everybody and upon all occasions, especially to the prisoner." In granting a postponement in a trial for murder, he thus addressed the prisoner: "'Prisoner, I am extremely sorry to have to detain you in prison, but common humanity requires that I should not let you be tried in the absence of an important witness for the prosecution, although at the same time I can quite appreciate your desire to have your case speedily disposed of: one does not like a thing of this sort hanging over one's head. But now, for the sake of argument, prisoner, suppose I were to try you today in the absence of that material witness, and yet, contrary to expectations, they were to find you guilty. What then ? Why, in the absence of that material witness, I should have to sentence you to be hanged on Monday next ? That would be a painful ordeal for both of us. But now let us take the other alternative, and let us suppose that if your trial had not been put off, and the material witness, when called, could prove something in your favour—this sometimes happens—and that that something induced the jury to acquit you, what a sad thing that would be ! It would not signify to you, because you would have been hanged, and would be dead.' Here His Lordship paused for a considerable time, unable to suppress his emotion, but, having recovered himself, continued—'But you must consider what my feelings would be when I thought I had hanged an innocent man ! ' At the next assizes the man was brought up, the material witness appeared, the prisoner was found guilty, *and* hanged.

Bouncing the Glass.—A hearing before the Price Tribunal on an application to increase the price of draught beer has unearthed a piece of rural folklore deserving of a wider audience. Credit for the discovery must be attributed to the *Rotorua Star,* whose staff reporter announces that the bar of the Tokoroa Hotel has a tile floor and for some years it has been the custom for skilful patrons to practice bouncing empty eight and a half ounce beer glasses on the tiles. If a glass is dropped with the bottom square on to the floor it will bounce high enough to be caught again in the hand. Unfortunately the slightest error in calculation usually has disastrous results. Less experienced—and slightly unsteady—drinkers, fascinated by the dexterity of the experts, have had only indifferent success and the toll of broken glasses has been expensive. "Nowadays, therefore," the reporter adds, "the practice is openly frowned on by the hotel management and only the most accomplished glass bouncers venture to try their skill. The rate of breakages has shown a corresponding decline."

On Price Order No. 1745 (Draught Beer).—

Oh, many a peer of England brews
Livelier liquor than the Muse,
And malt does more than Milton can
To justify God's ways to man.

A. E. Housman: A Shropshire Lad.

James Boswell.—"At the end of July 1766 he was admitted to the Faculty of Advocates and soon began to practise. His first important job was to defend a sheep-stealer named John Reid. This he did with so much zeal that he aroused antagonism in certain quarters which, for the sake of his career, he should have propitiated. With an imposing array of legal notabilities against him, including the Lord Advocate and the Solicitor-General, he and a lawyer named Andrew Crosbie made such eloquent appeals that the jury returned a verdict of 'Not Proven' and Reid was set free, a result that irritated the law lords. Such acts of disinterestedness were typical of Boswell, whose nature compelled him to extremes which often harmed himself and sometimes benefited others. Reid however ended on the gallows some years later, owing to his habit of mistaking other people's sheep for his own. Again Boswell defended him and supplied personal sympathy when the law was obdurate."—Hesketh Fearson: *Johnson and Boswell* (Heinemann, 1958).

A Moment of Forgetfulness.—In his biography of Abraham Lincoln, Carl Sandburg cites the following story: "At the first council of war, after the President became the supreme commander-in-chief of the army, in place of McClellan, the General did not attend, and excused himself next day by saying that he had forgotten the appointment. 'Ah now,' remarked Lincoln, 'I recollect once being engaged in a case for rape, and the counsel for the defence asked the woman why, if as she said, the rape was committed on a Sunday, she did not tell her husband till the following Wednesday And when the woman answered, she did not happen to recollect it—the case was dismissed at once.'"

Tailpiece.—A correspondent to the *Law Times* (London) in dealing with the slovenly use of words in law reporting cites an example given by the late Sir Frederick Pollock in his "Essays on the Law" in regard to "such" in commercial documents. "The plaintiff's yellow dog, being, as was alleged by the plaintiff, muzzled, bit a dynamite cartridge belonging to the defendant. Such cartridge exploded, and after such explosion it was not found possible to reconstruct either such dog or such muzzle."

TOWN AND COUNTRY PLANNING.

(*Concluded from p. 368.*)

5. It was contended in support of the appeal that the land is unsuitable for residential development and evidence was led to show that the Housing Construction Division did not regard it as suitable for development by the State by way of medium density flats. This view was based only on economic factors.

It was also contended that the erection of flats whether of medium or high density standards would create a dangerous traffic hazard having regard to the fact that the property is at the corner of two important traffic routes in that women and children would have to cross Manukau Road to get to the shopping centre, to schools and to public transport into Auckland. Manukau Road is a main arterial road which already carries a heavy volume of traffic and that traffic can reasonably be expected to increase substantially in the future.

Having given full and careful consideration to these contentions the Board takes the view that flats could well be erected on this property and that appropriate siting and some internal roading plus the provision of a pedestrian crossing on the Manukau Road could minimize any unusual traffic hazard. There must always be some traffic hazard on any arterial road passing through closely built up City areas. The most that can be done is to seek to minimize that hazard by appropriate control.

6. The Board is not as a rule prepared to approve of the creation of "spots" of industrial zones in predominantly residential areas. There may be exceptional cases when by reason of physical characteristics and situation land cannot be put to any other use but that is not so in this case. The land under consideration here is not suitable for industrial or commercial development and there is a substantial volume of informed evidence to support the view that its appropriate zoning is "residential".

The Borough's proposed district scheme appears to make adequate provision for industrial use in the area zoned for that purpose in the southern portion of the Borough. The area so zoned is close to the residential area and so is not remote from potential labour sources.

The Board holds that the Transport Board has failed to establish that the present zoning is not appropriate viewed against the back-ground of the scheme as a whole and not in accord with town-and-country-planning principles.

It agrees with the submission of counsel for the Borough and the Auckland City Council that its decision must be based on principle not on expediency.

Appeal dismissed.

Howe *v.* Mount Roskill Borough.

Town and Country Planning Appeal Board. Auckland. 1958. August 20.

Building Permit—Factory Building—Area zoned as "Residential"—Appropriateness of Zoning—Substantial Opposition likely from Adjoining Owners if Zoning be altered, subject to Right of Objection when Scheme publicly notified—Town and Country Planning Act 1953, s. 38.

Appeal by the owner of a property comprizing 2 ac. 2 ro. 4.3 pp. more or less being Lot 9 on Deposited Plan No. 1-34094 situate at 27 Dornwell Road in the Borough of Mout Roskill. This land was a rear section legal access being by way of an adjoining section owned by the appellant fronting on to Dornwell Road. The appellant resided on this adjoining section. She applied to the Council for a building permit on the grounds that the property was in an area zoned as "residential" under the Council's undisclosed district scheme. This appeal has followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The property in question is in an area zoned as "residential" and the land adjacent to it on all sides is zoned as "residential," with the exception of a small part on the western side which is in an area zoned as "industrial".

2. The appeal as presented and argued is in substance an appeal against the appropriateness of the zoning.

As has been stated in previous decisions the Board will not as a rule adjudicate on the appropriateness of zoning under an undisclosed district scheme as to do so might well prejudice the rights of other owners or occupiers to object under s. 23 of the Act when the scheme is publicly notified.

3. In this case the Council's scheme has advanced to the point where it is about to be submitted to the Minister and adjoining local bodies for comment pursuant to s. 21 (5).

It follows therefore that public notification under s. 22 can be anticipated in the near future.

4. The evidence showed that a previous Council had intended to include this property in an industrial area but following on representations from householders and others in the vicinity it decided to retain the zoning as "residential". This indicates that there would be substantial opposition from adjoining owners and occupiers to a change of zoning to "industrial".

In those circumstances, the Board is not prepared to alter the zoning and the appeal is disallowed.

This decision will not preclude the appellant from exercising her right of objection under s. 23 when the scheme is publicly notified should she desire to do so.

Appeal dismissed.

J. H. Dryden (Holdings) Ltd. *v.* Manukau County.

Town and Country Planning Appeal Board. Auckland. 1958. August 12.

Subdivision—Residential Purposes—Area Zoned as "Rural"—Adequate Provision made in District Scheme for Urban Development—Undue Encroachment of Urban Development in Rural Areas to be avoided—Town and Country Planning Act 1953, s. 38.

Appeal by the owner of a property containing 10 acs. 3 ro. 24 pp. more or less being Lot 2 on Deposited Plan No. 38966 being part of Clendon's Grant in Block XI of the Otahuhu Survey District.

The appellant had prepared a plan for the subdivision of this land into 34 lots for residential purposes and applied to the Minister of Lands pursuant to the provisions of the Land Subdivision in Counties Act 1946 for approval of the scheme plan.

This plan was referred to the Council which certified under s. 3 (4) of the Land Subdivision in Counties Act 1946 that it had prohibited the subdivision under s. 38 of the Town and Country Planning Act 1953. This appeal has followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The appellant company's property is in an area zoned as "rural" under the Council's undisclosed district scheme. The actual land itself as such is suitable for residential use and the scheme plan provides an appropriate form of subdivision for such use.

2. The Board has in previous decisions relating to proposed subdivisions for residential purposes in the Manukau County expressed the view that the Council's undisclosed district scheme appears to make adequate provisions for urban development within the county for the next 20 years.

The Board adheres to that view.

3. The appellant's property which is situate on the State highway is approximately 1½ mile to the south of the urban area envisaged for the urban development of Papatoetoe and if this subdivision were approved it would create a pocket of urban development in a predominantly rural area. This would be contrary to town-and-country-planning principles.

4. The issue to be determined here is not whether the appellant's land is physically suitable for residential development but whether its development for that purpose will conflict with the town-and-country-planning principles likely to be embodied in the Council's undisclosed district scheme. The basic principle to be considered is that undue encroachment of urban development in rural areas is to be avoided whenever possible.

Applying that principle the Board holds that there is every likelihood of the area in which the appellant's land is situate continuing to be zoned as rural.

Appeal dismissed.