New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"
VOL. XXXV TUESDAY, MARCH 24, 1959 No. 5

WILL: EFFECT OF ATTESTATION BY SOLICITOR-TRUSTEE.

SECTION 15 of the Wills Act 1837, is as follows:

> If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will.

That section was substituted for the corresponding section, s. 1 of the Wills Act 1752. In the Wills Act 1752, however, there was no reference to the husband or wife of an attesting witness, and, to that extent, the earlier section is extended. The Act of 1752 effected a vital change in the policy of the law because, under what might be called "the new law" dating from 1752, the will is to stand, but the gift is to fail.

It is generally well known that a solicitor appointed a trustee with the right to charge professional costs should, in his own interest, refrain from witnessing the will, since a clause empowering a solicitor-trustee to charge his profit costs confers a beneficial interest within the meaning of s. 15 of the Wills Act 1837: *Re Barber, Burgess* v. *Vinnicome* (1886) 31 Ch. D. 665 and *Re Pooley* (1888) 40 Ch. D. 1, both of which were applied by Chapman J. in *In re Mollett* (1907) 27 N.Z.L.R. 68, 70; and *In re Brown*[1918] W.N. 118, in which Eve J. held that the amount which a solicitor-trustee would receive under a charging clause in a will is a legacy which in the event of a deficiency of assets must abate rateably with other legacies. In *Stamp Duties Commissioner (N.S.W.)* v. *Pearse* [1954] A.C. 91; [1954] 1 All E.R. 19, their Lordships of the Judicial Committee approved *In Re Brown* and *Re Pooley*, and also *Re Thorley, Thorley* v. *Massam* [1891] 2 Ch. 613.

That, however, was not directly the question before Wynn-Parry J. in *In Re Royce's Will Trusts, Tildesley* v. *Tildesley* [1958] 3 All E.R. 586. The first defendant who was a solicitor, had been an attesting witness to the testator's will which was made on April 20, 1933. The testator died on April 22, 1933, without having revoked or altered his will. On the death, in 1934, of one of the two trustees named in the will, the first defendant was appointed by the surviving trustee to be a trustee of the will.

The testator had provided by his will:

> "16. I declare that if and so long as my trustees are retaining any part of the trust fund and receiving and applying the income it shall be lawful for them to pay to themselves out of such income before dividing the same such a sum as shall equal five per cent. thereof to be equally divided between them by way of remuneration for their services.
>
> "17. I declare that Albert William Claremont or any person who may for the time being be an executor or a trustee of my will who may be a solicitor shall be entitled to charge and shall be paid out of my estate for his services in the same manner as though not being an executor or trustee he had been employed by my executors or trustees to render such services."

On originating summons, the Court was asked to determine the following question:

Whether having regard to the fact that the first defendant was an attesting witness to the testator's will, he was entitled as a trustee of the will: (a) to receive remuneration for his services under cl. 16 of the will; or (b) to charge professional remuneration as a solicitor against the testator's estate under cl. 17 of the will?

Wynn-Parry J. said that the question was not an easy one and there was no direct authority regarding it. He continued:

> The real question which emerges can be put in this way. It has been held, and the proposition is beyond dispute, that the provision that a solicitor is to be entitled to charge, is a legacy. If a person is named in the will as executor and is a solicitor and the will contains a charging clause, then at all material times he is a member of a class of persons who have the right to make professional charges. However, if he only enters that class after the death of the testator, but he attested the will, is he within the mischief of s. 15? That appears to me to be a difficult question to answer.

His Lordship first referred to *Re Pooley* (1888), 40 Ch. D. 1 which was a decision of the Court of Appeal. A testatrix appointed two named persons, the second of whom was a solicitor, as executors and trustees of her will and declared that any trustee who should be a solicitor should be entitled to make professional charges. The named solicitor was one of the attesting witnesses and it was held by the Court of Appeal, affirming the decision of Stirling J., that the solicitor was not entitled to any profit costs for business done by him in relation to the estate. The basis of the decision was that the right to make professional charges could only be claimed under the will and was a beneficial interest under it, from claiming which the solicitor, as an attesting witness, was precluded by s. 15 of the Wills Act 1837. That was not exactly the case before

His Lordship because in that case the solicitor in question was named as an executor and trustee in the will, whereas the first defendant became a trustee only by appointment after the death of the testator. But it is to be observed that the claim to make professional charges could only have been made under the will.

Counsel for the first defendant relied strongly on *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311, which lays down the proposition that under s. 15 of the Wills Act 1837, s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise. Mathew J., in a short judgment said :

> I think the plaintiffs are entitled to judgment. The policy of the Wills Act 1837, in depriving the attesting witness of any legacy given by the document of bequest, is not to allow wills to be proved by the evidence of persons benefited by them, and it makes void any devise to an attesting witness, or to his or her wife or husband. In the present case the plaintiff, at the time when the will was attested, took no benefit under it, but he subsequently married the devisee, and I am asked to hold that the result of this marriage is to destroy the validity of the devise. But there is no such provision in any part of the Act; the only section which could be referred to is s. 24, by which every will is to take effect as if it had been executed immediately before the death of the testator (*ibid.*, 312).

Counsel for the second defendant submitted that from this case no general principle could be deduced, and that only the very limited principle could be deduced from it that it dealt only with the point of time when the position of husband or wife was to be ascertained.

Counsel for the first defendant, against that, drew the Court's attention to the argument of counsel for the defendant in that case, who is reported as having said :

> Section 14 of the Act, enacting that if any person who shall attest the execution of a will shall, at the time of the execution or at any time afterwards, be incompetent to prove the execution, such will shall not on that account be invalid —contemplates that the witness may become incompetent after the execution of the will and before the death of the testator . To uphold the present devise would enable an attesting witness who took a devise under the will to secure himself by antedating it. (*ibid.*, 312).

Wynn-Parry J. said that he must take the words of the judgment and extract from them what counsel for the second defendant submitted : that it is directed simply to considering when a person is to be considered as being wife or husband for the purposes of s. 15 of the Wills Act 1837.

His Lordship continued :

> My attention was drawn to a passage from the judgment of the Privy Council, delivered by Lord Cohen, in *Stamp Duties Commissioner* (*N.S.W.*) v. *Pearse*, [1945] A.C. 91; [1954] 1 All E.R. 19. Lord Cohen said :
>
> "Their Lordships agree with the majority in the High Court that the decisions to which Williams J., refers, and, in particular, the decisions in *Re Thorley, Thorley* v. *Massam* [1891] 2 Ch. 613 and *Re Brown* [1918] W.N. 118 lead inevitably to the conclusion that such a provision as cl. 13 [charging clause] confers a gift on the executor and enables him to take out of the assets of the testator something which the law would not otherwise allow." (*ibid.*, 113; 28)
>
> It is perfectly true that the appointment of the first defendant as a trustee has the result of enabling him to take out of the assets of the testator something which the law would not otherwise allow because there is in the will a charging clause. Against that there is to be borne in mind that it is with the proving of a will that, primarily at any rate, s. 15 of the Wills Act 1837 is concerned. There then remains the short, but still difficult, question of the language of s. 15. Has one who attests the will—although he is not in the class which has any beneficial interest either when the will is attested or when the will comes to be proved—any right, if he afterwards enters a class defined by the will, to take the benefits which the benefits of the will seek to confer on that class ? I find this a difficult question and I can well imagine that different minds might well take different views, but giving the matter the best consideration I can, I come to the conclusion that the only safe view to adopt is that if a man attests a will he should not in any way be enabled to take any benefit under that will—not even if he only enters a class intended to benefit by the will after the will has been proved. There is a good deal to be said for the argument which counsel for the first defendant put forward, but it would necessarily in many cases lead to uncertainty and it might in certain cases lead to collusion.

For those reasons, therefore, His Lordship came to the conclusion that he should declare that the first defendant was not entitled either to receive remuneration for his services under cl. 16, or to charge for professional remuneration under cl. 17.

The late Professor Garrow used to impress on his students the danger of the loss which was in store if any of them should witness a will in which there was a provision authorizing him, though a trustee, to charge professional costs against the prospective estate. In the light of *In Re Royce's Will Trusts*, the warning today must be taken a step further.

SUMMARY OF RECENT LAW.

DETINUE.

Postal Packet—Rival Claimants for Postal Packet—Interpleader Summons issued promptly by Postmaster-General to have Rival Claims determined by Court—Postmaster-General always ready and willing to hand Postal Packet to Lawful Owner—No Cause of Action in Detinue maintainable by Successful Claimant against Postmaster-General—Code of Civil Procedure, R. 482. In s. 140 (1) of the Post and Telegraph Act 1928—which is as follows : No claim or demand against His Majesty or the Postmaster-General shall arise by reason of any default, delay, omission, or loss in relation to any postal packet posted or received under this Division of this Act—the word " omission " includes a negligent omission, and a claim in respect of loss arising from negligent omission would lie in tort. Similarly, the word " default " connotes a wrongful act of the breach of some duty. (*In re Bayley-Worthington and Cohen's Contract* [1909] 1 Ch. 648). J., as unpaid seller, who had sent by post parcels of periodicals addressed to McC., claimed an interest in the goods by cable to the Post and Telegraph Department on November 30, 1956. The parcels were received at the Chief Post Office in Wellington in the months of December 1956 and January 1957. As a result of the receipt by the postal authorities of the rival claims of J. and McC. to the parcels, the Postmaster-General, on January 31, 1957, issued an interpleader summons under R. 482 of the Code of Civil Procedure, calling on the rival claimants to the parcels to appear and to obtain an adjudication in respect of their claims. The effect of the judgment delivered on July 12, 1957, was that J., in the circumstances, had no right of stoppage in transitu under s. 45 of the Sale of Goods Act 1908 in respect of goods sent to the buyer in a postal packet, and that McC. was entitled to delivery : [1957] N.Z.L.R. 829. McC. now brought an action for damages against the Postmaster-General and the second defendant, who at the material times held the position of Chief Postmaster at Wellington, for unlawful detention of the goods. *Held*, 1. That the plaintiff's claim was a claim in detinue, but there was no refusal to deliver the goods as the defendants were always ready and willing to hand the goods to the lawful owner, and promptly took the proper course to have the claims of the rival claimants determined by the Court ; and that the defendants

were entitled to reasonable time to inquire into the right of the claimants. (*Clayton* v. *Le Roy* [1911] 2 K.B. 1031, followed. *Lucas* v. *London Dock Co.* (1832) 4 B. & Ad. 378; 110 E.R. 498, distinguished.) 2. That no action could be brought by the plaintiff for wrongful detention of the goods, and the action should be struck out. 3. That, in any event, s. 140 of the Post and Telegraph Act 1928 was a complete bar to the plaintiff's claim against the Postmaster-General, which was based on a "default, delay, omission or loss in relation to a postal packet"; and that s. 141 (1) of that statute, was a bar to the claim against the Chief Postmaster at Wellington as the act of detention was not his, and he could not be rendered liable for the act of the Postmaster-General who instituted the interpleader proceedings, and who, by virtue of s. 3 of the statute, has the general administration of the Department. *E. E. McCurdy Ltd. (In Liqdn.)* v. *Postmaster-General and Another.* (S.C. Wellington. 1958. December 11. McGregor J.)

ESTOPPEL.

Issue Estoppel—Principle defined—Collision between Motor-vehicles—Both Drivers held to be Negligent and Their Respective Shares of Responsibility for Accident assessed—Subsequent Recovery by Owner of Motor-car from Plaintiff in Earlier Action of Total Cost of Repairs—Later Action by Plaintiff in First Action Total Cost of Repairs—Later Action by Plaintiff in First Action claiming Recovery from Defendant in First Action of Full Amount of Judgment given in Action by Car-owner—Each Party Estopped from asserting His Share of Responsibility for Accident as being Other than as Previously Determined—Law Reform Act 1936, s. 17 (2)—Contributory Negligence Act 1947, s. 3 (1). Issue estoppel is a form of estoppel which arises from the fact that a particular issue, arising in later proceedings, has already been determined by the judgment of a Court of competent jurisdiction binding on the parties to the later proceedings. The principle is not limited to the prior determination of a particular issue, but it extends to every point of fact which was put in issue and which was in substance the ratio of, and was fundamental to, the decision of the Court in the former proceedings, and the legal quality of the fact must be taken as finally and conclusively established. (*Outram* v. *Morewood* (1803) 3 East. 346; 102 E.R. 630 approved in *Jones* v. *Lewis* [1919] 1 K.B. 328, and *Hoysted* v. *Federal Commissioner of Taxation* [1926] A.C. 155, followed.) Thus, where the shares of responsibility for a collision between motor-vehicles, have been put in issue as between the opposing drivers, and have been determined by a Court of competent jurisdiction in a proceeding to which they (or their respective principals) were both parties, that determination is a final determination of that particular issue; and each driver in any subsequent action between them is bound by that determination as to the assessment of their respective shares of responsibility for the collision or its consequences, or both, and each party is estopped from contending to the contrary in subsequent proceedings between them. (*Marginson* v. *Blackburn Borough Council* [1939] 2 K.B. 426; [1939] 1 All E.R. 273, *Jackson* v. *Goldsmith* (1950) 81 C.L.R. 446, not followed. *Bell* v. *Holmes* [1956] 3 All E.R. 449, referred to.) A collision occurred between C.'s motor-car, which was being driven by D. C. obtained judgment against D. in the Magistrates' Court for the amount of repairs to C.'s car less 25 per cent. on account of C.'s contributory negligence. On appeal, the Magistrate's judgment was upheld by the Supreme Court. W., as owner of the motor-car driven by D., obtained judgment against C. for the total cost of repairs to W.'s car. C., in a subsequent action, clamined to recover from D., pursuant to s. 17 of the Law Reform Act 1936, 75 per cent. of the total amount of the judgment recovered by W. from C. Before the trial of the action, there was argued the question of law whether or not D. was estopped from denying that the amount of contribution pursuant to s. 17 of the Law Reform Act 1936, for which he was liable to C. in respect of the judgment obtained by W. against C., was 75 per cent. *Held*, 1. That, as between C. and D., a Court of competent jurisdiction had determined (and the appropriate appellate Court had affirmed) that the cause of the collision between the two vehicles, and, therefore, of the damage occasioned to each of the motor-vehicles involved, was negligence on the part of both C. and D., and that, in determining the extent to which the damages recoverable by C. should be reduced under s. 3 of the Contributory Negligence Act 1947, by reason of C.'s own negligence, that Court had also determined between the parties (and the appellate Court had affirmed) that C.'s share in the responsibility for the two vehicles was 25 per cent., and that of D. was 75 per cent., when measured by the criteria embraced by the words "just and equitable having regard to the extent of" the particular party's "share in the responsibility for the damage" appearing in s. 3 (1) of the Contributory Negligence Act 1947. 2. That, as the language of s. 17 (2) of the Law Reform Act 1936 was, for the purposes of this case identical in all material respects with s. 3 (1) of the Contributory Negligence Act 1947, and the assessment made of the parties' respective shares in the responsibility for the collision under the latter statute was such an assessment of all the relevant criteria under s. 17 (2) of the Law Reform Act 1936 as fixed 75 per cent. of the total as the contribution which C. should receive from D. in respect of the plaintiff's liability to W. pursuant to s. 17 of the Law Reform Act 1956. 3. That, consequently, issue estoppel arose as what was in substance the same issue as arose under s. 17 of the Law Reform Act 1936 between C. and D. had already been put in issue between them, litigated, and determined by a Court of competent jurisdiction, and each was estopped from asserting in the present action that his share of responsibility for the collision was otherwise than was previously determined. (*Priest* v. *Mowat* (*No. 2*) [1937] N.Z.L.R. 789; [1937] G.L.R. 450, and *National Insurance Co. of New Zealand Ltd.* v. *Geddes* [1936] N.Z.L.R. 1004; [1936] G.L.R. 716, distinguished.) *Clyne* v. *Yardley.* (S.C. Hamilton. 1958. December 18. Shorland J.)

LIMITATION OF ACTION.

Actions in Respect of Bodily Injury—Application for Leave to bring Action out of Time—Material Witness for Intended Defendant unavailable—Time of Trial, when Prejudice to Intended Defendant arises, to be considered—Medical Examination of Intending Plaintiff, as to Attributability of Injuries to Relevant Accident, not possible until Time of Notice of Intention to bring Delayed Action—Defendant, on both Grounds, "materially prejudiced in his defence by delay"—Limitation Act 1950, s. 4 (7). Where on an application, under s. 4 (7) of the Limitation Act 1950, for leave to bring an action out of time, the intended defendant raises the question of a missing witness, the time of the trial is when the prejudice if any, to the intended defendant in his defence must arise. Consequently, the respective times at which the position is to be compared are (a) the time at which the action could reasonably have been expected to be heard if it had been launched just before the end of the limitation period, and (b) the time at which it could reasonably be expected to be heard if it had been launched at the time when the application for leave was filed. (*Meadows* v. *Lower Hutt City Corporation* [1955] N.Z.L.R. 863 applied. *Wm. Cable Ltd.* v. *Trainor* [1957] N.Z.L.R. 377 referred to.) The cause of action accrued on January 29, 1956. On July 16, 1958, the intending plaintiff's counsel first indicated to the intended defendant that it was proposed to proceed with a claim on her behalf. Late in August 1958, the application for leave was served on the intended defendant. On October 17, a material witness for the defendant went missing in circumstances in which he must be presumed to be dead. *Held*, 1. That, if the intending plaintiff had launched her action by January 29 1958, (when the limitation period expired), it could reasonably have been expected to be heard before October 17, the date when the witness went missing, while, if she had launched her action at July 16 only, the probabilities were that it could not reasonably have been expected to be heard before October 17; and that the intended defendant was materially prejudiced in his defence by the delay. 2. That attributability to the accident of the condition of the intending plaintiff was an important issue, and the intended defendant was unable to have the plaintiff medically examined until late in August 1958, after he had been made aware of the proposed action, in respect of the injuries she attributed to the accident of January 29, 1956; and that the intending plaintiff had not satisfied the Court that the defendant was not thereby materially prejudiced in his defence by the delay. *Sparrow* v. *Grimmer.* (S.C. Christchurch. 1958. December 12. Hutchison J.)

MENTAL DEFECTIVES.

Reception Order—No Jurisdiction, on Application for Order of Discharge of Mental Patient on Ground of Illegal Detention, to review Reception Order or Matters relative to Its Making—Mental Health Act 1911, s. 86. The Supreme Court, on an application pursuant to s. 86 (3) of the Mental Health Act 1911, for an order that a mental patient be discharged upon the ground that he is "illegally detained as a mentally defective person" within the meaning of that subsection, has no power to review a reception order or matters before its making, as the mental patient's detention is prima facie lawful and the Superintendent of the institution is detaining the patient, and is bound to detain him, under the authority of an order which has been made by a competent authority having the requisite jurisdic-

tion, and which, until set aside in other proceedings must, unless there is at least a defect on the face of the order, be accepted as valid. (*Kinch* v. *Walcott* [1929] A.C. 452, followed.) The question to be determined at the hearing of an application under s. 86 (3) is the then present state of mind of the patient, and whether that state of mind does not require his detention as a mentally defective person, either for his own good or in the public interest, and, if it appears to the satisfaction of the Judge that the patient is not at that time mentally defective the Judge must make an order directing a discharge. *Semble*, where there are defects in procedural matters before the making of a reception order, proceedings by way of certiorari may lie to set aside or quash the order, or, on an application for a writ of habeas corpus, the Court in its inherent jurisdiction has power to go behind the reception order. *In re C.* (*A Mental Patient*). (S.C. Wellington. 1959. February 24. McGregor J.)

NEGLIGENCE.

Joint Tort-feasors—Tort-feasor without Blame other than Vicariously—Right to be indemnified by Other Tort-feasor responsible for Damage—Law Reform Act 1936, s. 17 (1) (a) (c), 2. R. was not in a condition to drive his motor-car home, so O'N., with R.'s acquiescence, agreed to drive it, taking A. and two others whom R. had promised to drive home. Another car, driven by T., accompanied the first car in order to return O'N. to his home after he had taken R. home. A collision occurred between the two cars. It was not disputed that O'N. had negligently stopped on the highway and that this was a cause of the damage to T.'s car. In an action in the Magistrates' Court against R. and O'N., T. obtained judgment against R. for a proportion of the damage suffered by T.'s car. R. sought relief against O'N. by way of indemnity, but it was held that R. was not bound to indemnify O'N. in any sum. R. appealed and asked that the judgment for the amount recovered against him should be amended by entering judgment also against O'N., and that R., as between him and O'N., be adjudged entitled to recover the full amount of that judgment by way of indemnity. The Magistrate's finding that R. was vicariously responsible for O'N.'s act was not disputed. *Held*, 1. That R. not only retained possession of his car, he also necessarily retained the right and power to control the manner in which O'N. drove it; but the mere act of stopping (which was the cause of the collision) because R. intimated he was going to be sick was not an instruction or direction by R., and it did not bring about any reasonable necessity for the car to be stopped or parked negligently. 2. That the sole responsibility for the damage was O'N.'s act in stopping and parking the car in a negligent manner; and that R.'s pending illness, although the reason for stopping, was not an act of happening which entered into the "responsibility for the damage," as that expression is used in s. 17 (2) of the Law Reform Act 1936. 3. That, as there was no responsibility for the accident attributable to R., other than his vicarious responsibility for O'N.'s acts or omissions, O'N. should completely indemnify R. (*Lister* v. *Romford Ice Co. Ltd.* [1957] A.C. 555; [1957] 1 All E.R. 125, followed. *Harvey* v. *R. G. O'Dell Ltd.* [1958] 1 All E.R. 657 and *Semtex* v. *Gladstone* [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206, applied.) The appeal was allowed, and the Magistrate's judgment was amended by setting aside the judgment for costs given in favour of O'N., and a further judgment was to be entered to the effect that R. recover from O'N. contribution in respect of the whole amount of the judgment and costs awarded T. against R. *Richardson* v. *O'Neill and Others*. (S.C. Invercargill. 1959. February 20. Henry J.)

Farm Tractor with Internal Combustion Engine—Tractor used to cut Fire-break through Dry Scrub, Spark from Exhaust causing Scrub Fire—Fire spreading to Neighbour's Land and causing Damage—No Lack of Skill or Care in Management of Tractor—Use of Tractor without Spark-arrester not Negligent. The appellants and the respondent were adjoining landowners. In February, 1956, when drought conditions prevailed in the district, the respondent was cutting a fire-break some eight to ten yards in width, through a dry area of manuka scrub on his property. The break was being cut by the use of a tractor with a vertical exhaust, driven under the supervision of the respondent. A fire began on the property and was first noticed about 150 yds. away from the tractor, but at a spot which the tractor had earlier passed at a distance of some five yards. The fire commenced in dry scrub, and, despite immediate efforts of the respondent to check it, it almost immediately spread. The fire swept into the adjoining property of the appellants and caused considerable damage to pasture, fencing, trees, and cut timber. The damages suffered by the appellants were assessed by the lower Court at £570 12s. 9d. In the Magistrates' Court, judgment was given for the respondent. The primary cause of action alleged by the appellants was based on negligence on the part of the respondent in three particulars: (a) negligent and unskilful management of the tractor so that it emitted sparks; (b) that the tractor was so negligently constructed as to allow sparks to escape; and (c) that in the extremely dry conditions prevailing, it was negligence on the respondent's part to use the tractor. In the alternative, and irrespective of negligence, it was contended that the respondent was liable under the principle of absolute liability for the escape of fire, in that he intentionally brought on his land a tractor, which was a machine producing internal combustion by means of the ignition spark, and the combustion so produced caused the emission from the exhaust of sparks or carbon particles which ignited the surrounding scrub. *Held*, 1. That, considered in the light of the surrounding circumstances, and accepting the generally hazardous conditions prevailing, it was not negligent to use a tractor in the operation of cutting a fire-break through dry scrub; and there was no evidence that the driver of the tractor was negligent or unskilful in his management of the tractor, or that lack of skill or care in the management or driving of the tractor caused it to emit sparks and so originate the fire. 2. That, accepting the dangerous conditions existing in the district and the necessity for the exercise of a high degree of care, it was not foreseeable that the use of an ordinary properly-equipped tractor could be a source of danger, and that reasonable care and precautions did not require that a farmer should refrain from the use of a tractor to cut a fire-break through scrub, or that any tractor used should be equipped with a spark arrester. 3. That, alternatively and irrespective of negligence, the owner of the tractor was not liable under the principle of *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265; aff. on app. (1868) L.R. 3 H.L. 330, because without any default or negligence on his part, he was using the tractor in the particular circumstances existing for the cutting of a fire-break, and this was an ordinary or natural use of the land, or, in other words, was an accepted incident of some ordinary purpose to which land is reasonably applied by the occupier. (*Richards* v. *Lothian* [1913] A.C. 263, followed. *Pett* v. *Sims Paving and Road Construction Co. Ltd.* [1928] V.L.R. 247 and *Tolmer* v. *Darling* [1943] S.A.S.R. 81, applied *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265; aff. on app. (1868) L.R. 3 H.L. 330 and *Powell* v. *Fall* (1880) 5 Q.B.D. 597, distinguished.) *MacKenzie and Another* v. *Sloss* (*Waipara County, Third Party*). (S.C. Christchurch. 1959. February 10. McGregor J.)

NUISANCE.

Absolute Liability for Fire—Tractor used to cut Fire-break through Dry Scrub on Farm without Negligence—Spark from Exhaust causing Fire and Damaging neighbouring Property—Such Use Ordinary or Natural Use of Land excluding Absolute Liability.—See NEGLIGENCE (*ante*). *Mackenzie and Another* v. *Sloss* (*Waipara County, Third Party*). (S.C. Christchurch. 1959. February 10. McGregor J.)

POST AND TELEGRAPH.

Postal Packet—Postal Packet detained by Postmaster-General pending result of Interpleader Proceedings begun by Him to ascertain Lawful Owner—No Claim in Detinue maintainable against Him "by reason of any default, delay, omission or loss in relation to a postal packet"—"Default"—"Omission"—Post and Telegraph Act 1928, s. 140. See DETINUE (*ante*). *E. E. McCurdy Ltd.* (*In Liquidation*) v. *Postmaster-General and Another*. (S.C. Wellington. 1958. December 11. McGregor J.)

RATES AND RATING.

Systems of Rating—County Town—Differential Rating—General Rate levied on Rateable Property within County Town—Such Rate Expendable in providing Roads and Footpaths in County Town—Such Rate contrasted with Special Improvement and General Development Rate—Counties Act 1956, ss. 422, 423. The provision of roads and footpaths for a County Town is a duty which a County Council can discharge out of the income from its general rates levied pursuant to s. 423 of the Counties Act 1956. Such provision is distinct from a "public work" (such as a library) for which a separate improvement and development rate is levied in pursuance of s. 422, which makes an alternative method of rating available to the Council: a special rate levied so that moneys can be borrowed against that rate which continues until all the work has been completed and all borrowed moneys repaid. *McLeod et Ux* v. *Waitemata County*. (S.C. Auckland. 1958. December 18. Hardie Boys J.)

RELIGION AND THE LAW.

By IVOR L. M. RICHARDSON, LL.B. (N.Z.), LL.M., S.J.D. (Mich.).

Through the centuries, countless wars have been fought over religious questions. Religious freedom or the right to worship according to the dictates of conscience was one of the most vital issues involving governments and their citizens even before the rise of Christianity. Religious toleration is one hallmark of a democratic state.

Our laws, no less than the laws of other countries, have been immeasurably influenced through the centuries, not only by the moral ideals of religious thought, but also by current attitudes to religion and the desirability or otherwise of extending toleration to religious minorities. Religious freedom has permeated deep into the laws.

Freedom of religion refers to far more than the mere right to attend a church of one's own choosing. It also embraces the right to practise one's religious beliefs in daily life, in the family, and in the community.

Where claims to religious freedom by one individual or sect impinge on the activities and rights of other members of society (as they frequently do), the well-being of society as a whole may be considered paramount. In short, freedom does not mean licence. Restrictions on the individual citizen's right to govern his activities solely according to the dictates of his conscience have long been imposed by our laws.

But, these points can best be understood if we examine the immediate impact of the principle of religious freedom on our laws from the standpoint of the individual himself, the family and the group.

INDIVIDUAL.

(1) *Religious Tests.*

Until early in the nineteenth century, English law barred members of some religious denominations such as Roman Catholics, Jews, and Unitarians from many public offices.[1] At the present time, apart from the requirement that the ruling Sovereign must join in communion with the Church of England,[2] a religious test is not imposed by New Zealand law as a qualification for public office. It is not even necessary for office-holders to subscribe to Christianity or to have a belief in a Supreme Being.

(2) *Competency of Witnesses.*

We are inclined to accept without question the right of an agnostic or atheist to give evidence in any Court. But this privilege is a comparatively recent development. It was a rule of the common law that persons of no religious belief were incompetent as witnesses, the rationale being that they were incapable of acknowledging the obligation of an oath.[3] This position was not remedied in the United Kingdom until the enactment of s. 1 of the Oaths Act 1888 (51 and 52 Vict. c. 46).

Nowadays, s. 4 of the Oaths and Declarations Act 1957 expressly provides that everyone is entitled as of right to make his solemn affirmation instead of taking an oath. This, of course, covers not only the person who has no religious belief, but also anyone for whom the taking of an oath is contrary to his religious belief.

(3) *Respect for Conscientious Scruples.*

There are several areas where the laws make some allowances for religious scruples.

During the Second World War provision was made not only for those persons who while unwilling to fight actively were prepared to undertake humanitarian work at the battle front, but also for others who for reasons of conscience believed it to be wrong to take any part in warfare.[4]

Again, our laws expressly recognize the ritualistic kosher killing of stock intended for consumption by orthodox Jews. In prescribing methods of slaughtering stock at abbatoirs and slaughterhouses, regulations under the Meat Act 1939 (Slaughter of Stock Regulations 1951, (S.R. 1951/178), Reg. 7) expressly provide for the slaughter of stock by certain Jewish methods.

Another instance and one of more general application is the right already noted to make an affirmation instead of taking an oath wherever an oath is normally required.

On the other hand, it is not a defence to a criminal charge to assert that the act in question is one permitted by the accused's religion. The classic example of this was the conviction in the United States on charges of bigamy of several prominent leaders of the Church of Jesus Christ of Latter-Day Saints, commonly known as Mormons, despite the defence argument that polygamy was permitted by their religion.[5] Another instance was the refusal of the English rulers in India to countenance the custom of Hindu law requiring a widow to be burnt on her husband's funeral pyre.[6]

It is a little more difficult to decide if a person is entitled to refuse necessary medical treatment of himself because of religious objection. Clearly, society has an interest in the health and continued life of every citizen as it evinces in s. 193 of the Crimes Act 1908 by treating attempted suicide as a crime. But it appears that refusal to submit to medical treatment, no matter how necessary, would not amount to attempted suicide. This is not because there is a distinction between active and passive behaviour—an expert swimmer who fell into a river and who refused to try to avoid drowning would be just as guilty of attempted suicide as someone who deliberately jumped in. The reason is that to be convicted of attempted

[1] See generally *Dicey's Law and Opinion in England* (1905) 342-343, *13 Halsbury's Laws of England*, 3rd ed., 520 et seq.

[2] Bill of Rights (1688) (1 Will. and Mar. sess. 2 c. 2); Act of Settlement (1700) (12 and 13 Will. 3 c. 2).

[3] *Atorney-General* v. *Bradlaugh* (1885) 14 Q.B.D. 667; *Nash* v. *Ali Khan* (1892) 8 T.L.R. 444. And see *15 Halsbury's Laws of England*, 3rd ed. 437n.

[4] National Service Emergency Regulations 1940 (S.R. 1940/117) Regs. 21 & 28A. See, too, Military Training Act 1949 ss. 28 et seq.

[5] *Mormon Church* v. *U.S.* (1889) 136 U.S. 1; *Reynolds* v. *U.S.* 98 (1878); U.S. 145.

[6] *Pollock's Essays in Jurisprudence and Ethics* (1882) 168-169.

suicide the accused must have intended committing suicide. In our example, the intention is not to commit suicide but merely to refuse medical treatment.

There are, however, some statutory provisions which limit an individual's right to refuse medical treatment on religious grounds. Under ss. 7 and 16 of the Tuberculosis Act 1920, a Medical Officer of Health may require persons suffering from tuberculosis to undergo treatment. Likewise, the Health Act 1956 provides wide powers enabling the Medical Officer of Health to deal with infections and notifiable diseases. Venereal diseases are dealt with separately, and s. 88 of the Health Act 1956 specifically requires every person who has reason to believe he is suffering from venereal disease to undergo treatment.

These provisions are clearly aimed at the spread of infection. There is, however, a further provision imposed, not simply on this ground, but in the general interests of society as a whole. Under s. 126 of the Health Act 1956, a Magistrates' Court may order the committal to hospital of any aged, infirm, incurable or destitute person found to be living in insanitary conditions or without proper care and attention. An Inspector of Health or constable may enforce the order despite the objection of the person in respect of whom it is made (s. 126 (3)), and it would appear to follow from the section that an order could be made on the ground that the person was " without proper care and attention " if he refused to undergo necessary medical treatment.

(4) *Blasphemous Libel.*

In the interests of society, limitations are imposed on the rights of individuals to attack other beliefs. Thus, s. 150 of the Crimes Act 1908 makes publication of blasphemous libel a crime. It should be added that it is not an offence to express in good faith and in decent language, or to attempt to establish by arguments used in good faith and conveyed in decent language, any opinion on any religious subject (s. 150 (3)).

The interesting point is that blasphemy apparently applies only to attacks on Christianity.[7] This is due, of course, to historical reasons, being based on the ancient duty of the State to protect Christianity. Nevertheless, there is at the present time an apparent discrimination on this score against Judaism and other non-Christian religions and one which is hardly in keeping with our ideals of religious toleration.

(5) *Restrictions on Sunday Trading.*

Under s. 18 of the Police Offences Act 1927 and the Shops and Offices Act 1955, Part I, restrictions are placed on Sunday trading. These laws require the observance of the first day of the week as a holiday to the extent of prohibiting or limiting to a large degree the carrying on of ordinary work, the cessation of public amusements and the closing of shops and hotel bars on that day.

It is difficult to state with assurance the theoretical basis for these laws. Whatever it is, the laws weigh more heavily on members of religious groups, such as Jews and Seventh-Day Adventists who observe another day in the week as their day of worship. This is so, whether the theoretical justification for the laws is the religious one of observing Sunday as a day of rest or the general principle that it is in the best interests of society to have a regular day a week for rest and recreation.

The answer to any complaint of discrimination in the operation of these laws is, of course, that it is in the interests of order and good government that all citizens should, so far as possible, observe the same day of rest and Sunday happens to suit the majority of the people.

FAMILY.

(1) *Marriage.*

Marriage has both a secular and a religious significance. As a result, it possesses some unique characteristics, even at the present day. And in earlier times views on the divine nature of the marriage contract permeated the laws to a much greater degree than is now the case.

At common law, in order for a marriage to be valid for all purposes, it had to be solemnized before a priest in holy orders.[8] In early nineteenth-century England, Roman Catholics, Presbyterians, and atheists alike had to submit to the same marriage ceremony as Anglicans —all marriages had to be performed by Anglican priests in accordance with the rites of the Church of England.[9] This was monstrously unjust and the position was remedied by the passage of the Marriage Act 1836 (6 and 7 Will. IV c. 85).

New Zealand law provides for both religious and civil ceremonies.[10] As a result, a marriage solemnized in accordance with the rites of any recognized religious denomination is just as valid as a ceremony performed by the Registrar.

But no additional legal significance is attached to the religious marriage ceremony. Indeed, under s. 56 of the Marriage Act 1955, it is an offence to deny or impugn the validity of a marriage recognized by law or to allege that the issue of a lawful marriage are illegitimate or born out of wedlock.

Likewise, capacity to marry and formalities of marriage are determined by the general law and do not depend on the religious affiliation of the parties. No notice is taken of the attitude of any particular religion to marriages in New Zealand of New Zealanders within the prohibited degrees. Thus, on the one hand, a marriage within the legally prohibited degrees is void, even though a Papal dispensation is obtained.[11] On the other hand, even if a dispensation is required by the laws of the Roman Catholic Church for the marriage of the parties (e.g. first cousins), the absence of such a dispensation does not invalidate the marriage as the parties are not within the legally prohibited degrees.

Again, English law does not recognize a disability to marry imposed by a religious doctrine.[12] Thus,

[7] See the definition of " blasphemy " in *10 Halsbury's Laws of England*, 3rd ed., 661. See, too, *Re Bowman, Secular Society Ltd.* v. *Bowman* [1915] 2 Ch. 447, at 469, per Warrington L.J.; and *Pollock* (*op. cit.*) at pp. 172-175.

[8] *R.* v. *Millis* (1844) 1 O. Cl. & Fin. 534; *Beamish* v. *Beamish* (1861) 9 H.L. Cas. 274.

[9] The only exceptions were when both parties to the marriage were Quakers or Jews, in which case they could be married by their own officers according to their own usages. See *Nathan* v. *Woolf* (1899) 15 T.L.R. 250.

[10] The Marriage Act 1955 provides for the solemnization of marriages by an officiating minister (s. 31 and s. 10) or a Registrar (s. 33) and special provision is made for the marriage of Quakers (s. 32).

[11] *Peal* v. *Peal* [1931] P. 97 (nephew and aunt).

[12] *Chetti* v. *Chetti* [1909] P. 67.

no legal impediments would be placed upon the marriages of monks and nuns.

The essence of the matter is that the validity of a marriage depends upon the law of the country governing the point rather than the religion of the parties.[13] In this respect, our law takes no account of a special ability or disability of a personal character imposed by rules of a religious group to which either or both of the parties belong.

(2) *Treatment of Family.*

By and large, an individual is entitled to indulge masochistic inclinations. But he cannot force his family to adopt the same standards as he sets for himself.

Thus, it is no defence to a charge of cruelty, whether it be physical or mental cruelty, to proffer the excuse that the accused's actions simply accorded with his religious beliefs. It is true that, by s. 38 of the Infants Act 1908, a parent may administer punishment to a child under his control. But the punishment must be reasonable in all the circumstances and furthermore ss. 28 and 31 of the Infants Act 1908 provide for punishment of persons wilfully ill-treating or neglecting children in their charge. The criminal laws of assault also apply here in the usual way.

Again, s. 167 of the Crimes Act 1908 lays down that it is the duty of the head of the family to provide necessaries of life for children under sixteen years of age. Likewise, criminal responsibility attaches to a person who fails in his duty to provide persons in his charge with the necessaries of life if death ensues or the life of the other is endangered or his health permanently injured (s. 166).

"Necessaries" certainly include medical treatment, and it is no defence to a charge to reply on the accused's religious objections to medical treatment. It is submitted, however, that these provisions would not cover the position where a husband on religious grounds refuses consent to a therapeutic abortion on his wife, although it is known that his wife must die if the operation is not performed. The reason is that the decision involves the life of the unborn child and it is not just the wife's life which is at stake.

There are further limitations on freedom to practise religious beliefs of this kind. Apart from the provisions of the Tuberculosis Act and the Health Act referred to earlier, there is provision for the medical examination at public schools of school children,[14] and criminal proceedings may be taken against a parent or guardian who, despite notification that the child is suffering from a serious disease or serious bodily defect, neglects to obtain suitable medical or surgical treatment.[15]

While there is no express power to force a parent to arrange for treatment, the Courts do, of course, have power to deprive a parent of custody and to hand over the child to the care of the State.[16]

[13] Where a foreign law is the proper law governing the marriage our law will apply the foreign law and not New Zealand law in order to determine the validity of the marriage—see generally *7 Halsbury's Laws of England* 3rd ed. 91 et seq.

[14] Education Act 1914 s. 134; Health Act 1956 s. 125.

[15] Education Act 1914 s. 135. See too Health Act 1956 s. 90 which imposes a duty on a person in charge of a child under sixteen years suffering from venereal disease to have the child treated by a registered medical practitioner.

[16] Infants Act 1908 s. 6 and s. 31; Child Welfare Act 1925 s. 13 and s. 31.

It need scarcely be stated that euthanasia is not excusable on religious grounds.

(3) *Divorce.*

It has already been pointed out that the law does not attach any particular significance to the religious aspects and religious incidentals of the marriage ceremony. This principle applies in the same way in the field of divorce.

In the first place, a promise made by one party at the time of marriage to abide by the divorce laws of a particular religious denomination or simply never to apply for a divorce is not binding in law. It is treated as an agreement which is revocable at any time by the promisor.

Secondly, a representation made at the time of marriage by one party that he would always remain a member of, or alternatively never join a particular religious denomination, is not binding and if the promise is broken, the other party is not entitled ipso facto to a decree of nullity. This is so, even though a ground for nullity is that the marriage was induced by duress, mistake or fraud (s. 10 B of the Divorce and Matrimonial Causes Act 1928). The reason is that the essential element of a valid marriage in this respect is a free consent [17] and here there would, in fact, be a free consent even though one party might have misrepresented or concealed facts which, if known to the other, might have prevented the marriage.

(4) *Religious Education of Children.*

Over the years, dozens of cases have come before the Courts involving the religious education of children. There are three basic situations in which such disputes arise: (i) in divorce or separation proceedings between the parents; (ii) where one parent is dead and that parent's relatives or representatives quarrel over the religious instruction of the child with the surviving parent; (iii) where both parents are dead and the dispute is between rival sets of relatives or personal representatives.

It is not proposed to make an exhaustive analysis of the cases. This is partly for considerations of space and partly because the principles applicable to the various circumstances have been clearly settled. In short, in most cases, the difficulty is not so much in deciding the principle involved so much as in applying that principle to the particular circumstances.

The general principles applying in cases of this kind may be briefly stated as follows:

(i) The paramount consideration is the welfare of the child and all others are subject to this overriding principle.[18] (ii) The father of a child, prima facie, has a right to have the child brought up in his own religion[19] and this right continues until the child attains his majority.[20]

(iii) An agreement by which the father has attempted to divest himself of that right is unenforceable and the father is free to change his mind at any time.[21]

[17] *Latey on Divorce* 13th ed. 17.

[18] Guardianship of Infants Act 1908 s. 2. *Ward* v. *Laverty* [1925] A.C. 101 108.

[19] *In re Agar-Ellis* (1878) 10 Ch.D. 49; *In re Thomson* (1911) 30 N.Z.L.R. 168; *In re Corbett* [1936] G.L.R. 676.

[20] *In re Agar-Ellis* (1883) 24 Ch.D. 317 326.

[21] *Andrews* v. *Salt* (1873) L.R. 8 Ch. 622; *In re Levin* [1891] 2 Ch. 299.

(iv) That right continues after the father's death,[22] and if he has left no directions on the subject it will be presumed he wished to have the child educated in his own religion even if this is contrary to the views of the mother.[23]

(v) The father may lose that right (a) by his immoral conduct;[24] (b) by the expression of opinions which have an immoral or irreligious tendency;[25] (c) by waiver or abdication of the right through allowing his children to be brought up in another religion for a considerable period.[26]

While it seems clear that these principles are deeply embedded in our law, it is perhaps unfortunate that in this area of family law, the principles and rules have not followed the general trend towards giving both parents equal rights and obligations. In other areas of domestic relations such as custody and maintenance[27] the tendency has been to raise the rights and duties of the mother on to a plane with the father's.

But, even if we accept the justification for the second principle stated above, it is suggested that the third and fourth principles exemplify an unnecessary solicitude for the father's supposed religious feelings. So far as the third principle is concerned, it is hard to understand why the father should not be bound by his contracts. After all, the infant's position is protected by the first principle which makes the welfare of the child the paramount and overriding consideration. So far as the fourth principle is concerned, at least where the deceased father has left no directions as to religious training, it is submitted that the Court shows scant respect for the mother's religious feelings in preferring the father's presumed feelings to her express views; particularly so where it grants custody of the child to the mother and then directs that the child be brought up in the father's religion.

However, it would seem that the principles listed above are deeply engrained in the law and that statutory provision will have to be made if it is desired to give mothers and fathers equal rights regarding the religious education of their children.

[22] *Hawksworth* v. *Hawksworth* (1871) 6 Ch. App. 539; *In re Austin* (1865) 34 L.J. Ch. 499.

[23] *Re Newberry* (1866) 1 Ch. 263; *Hawksworth* v. *Hawksworth* (*supra*); *In re McSweeney, Fogarty* v. *Prouting* [1943] G.L.R. 239.

[24] *Shelley* v. *Westbrooke* (1817) Jac. 266.

[25] *Thomas* v. *Roberts* (1850) 3 De G. and Sm. 758; *In re Besant* (1879) 11 Ch.D. 508.

[26] *In re Newton* (1896) 1 Ch. 740; *Ward* v. *Laverty* (*supra*); *In re McSweeney Fogarty* v. *Prouting* (*supra*).

[27] See generally *Birks's Legal Relationship of Parent and Child* (1952) 122 et seq. and *ibid.* 105 et seq.

In cases involving the religious education of children, the Courts are not concerned with the soundness of the religious beliefs of the parents[28]—the Courts will respect the father's wishes whether he is "a Christian, a Jew, a Parsee, a Mohammedan or a Buddhist".[29] But while they will not distinguish between conflicting positive religions, it appears that the Courts will normally favour any religion as against atheism or agnosticism.[30]

So far, we have been examining the rights of parents to have their child brought up in their religion. Parents are, however, under no corresponding duty to provide religious education for their children.[31] On the other hand, guardians are still under an obligation to give their wards a moral and religious education.[32]

Problems of religious education may also arise on an adoption. Here again, parental rights are fully respected.[33] A natural parent, under s. 7 (4) of the Adoption Act 1955, may impose conditions with respect to the religious denomination or practice of the applicants for adoption or as to the religious denomination in which they propose to bring up the child and before making an interim or final order the Court must be satisfied that these conditions are being complied with (s. 11).

If the conditions were breached after an interim order only had been made, that would, it is submitted, be a ground, under s. 12, for revocation of the interim order or for objection to the final order. If the breach occurred after the final order was made then it may be argued, in terms of s. 20 (3) of the Adoption Act 1955, that, in some circumstances, the Court would have power to discharge the adoption order on the ground that the adoption had been procured by reason of mistake as to a material fact or in consequence of a material misrepresentation to the Court or to any person concerned. It is doubtful, however, if there would be any effective remedy in such a case, particularly if the breach occurred some years after the date of the adoption order.

(*To be concluded*).

[28] But cf. *Thomas* v. *Roberts* (1850) 3 De G. and Sm. 758.

[29] *In re Besant* (1879) 11 Ch.D. 508 520 per James L.J.

[30] See the cases cited in notes 24 and 25 (*supra*) and see, too, *In re McSweeney Fogarty* v. *Prouting* note 23.

[31] *Simpson on the Law of Infants*, 3rd ed., 1909, 157-158.

[32] *Ibid.*, 220.

[33] Note, too, the duty of a Child Welfare Officer to observe the instructions of a parent of a child committed to his care as to the child's religious education: Child Welfare Act 1925, s. 14.

"**Quasi-judicial.**"—"I would like, in the first place, to associate myself with the critical observations made by Lord Greene M.R., on the expression 'quasi-judicial' in *Coplans* v. *King* [1947] 2 All E.R. 393. It is not to be found in the statements made in this House and normally cited on this topic. I will not set them out, but I have in mind the Earl of Selborn L.C.'s opinion in *Spackman* v. *Plumstead Board of Works* (1885) 10 App. Cas. 229, 240; Lord Loreburn L.C.'s opinion in *Board of Education* v. *Rice* [1911] A.C. 179, 182; and that of Viscount Haldane L.C., in *Local Government Board* v. *Arlidge* [1915] A.C. 120, 132. The phrase 'quasi-judicial' suggests that there is a well-marked category of activities to which certain judicial requirements attach. An examination of the cases shows, I think, that this is not so. The Court has to consider whether a Minister, tribunal or board has to act 'judicially' in some respects and has failed to do so. The respect in which he has to observe judicial procedure will depend on the statutory or other provisions under which the matter arises."—Lord Somervell of Harrow in *Vine National Dock Labour Board* [1957] A.C. 488, 510; [1956] 3 All E.R. 939, 950.

DEATH DUTY AND GIFT DUTY.

Liability of Home Under Joint Family Homes Act and of Proceeds of Its Sale.

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

I. Liability to Death Duty.

In the recent case of *Milne* v. *Commissioner of Inland Revenue* (to be reported), Haslam J. discusses and applies a rather obscure provision of the Estate and Gift Duties Act 1955, and, for the first time, he construes certain sections of that novel but very popular Act, the Joint Family Homes Act 1950 and its amendments, and explains and applies the modern doctrine of equity with regard to disputes between the spouses as to the beneficial ownership of the matrimonial home, although in this case there never was any dispute between the spouses themselves, the dispute being, as to the quantum of death duty, between the executors of the deceased wife and the Commissioner of Inland Revenue.

In 1936, the deceased and her intended husband purchased a house property on the mutual understanding that they were entering into a joint venture, but shortly after their marriage the legal land transfer title (for a stated reason which satisfied His Honour) was put into the name of the wife alone, subject to a mortgage raised to finance the deal. The husband reduced the principal by payments totalling £300 and paid £750 for alterations. The deceased with her own moneys repaid the balance of £1,900, and the mortgage was discharged on May 15, 1946. In 1951, the husband spent a further £1,028 on alterations to the house. The total contributions of the husband were thus £2,078 and of the deceased £1,900. The husband paid all outgoings, including all interest on the mortgage while it was current. As His Honour observed: "The parties thus almost achieved equality in their capital payments."

On October 29, 1955, the deceased completed an application in the prescribed form to register the matrimonial home under the Joint Family Homes Act 1950 and its amendments. At that time the Joint Family Homes Amendment Act 1955 had just come into force, removing any limitation on the value of property which might be registered as a joint family home. The value of the property was £7,000. On November 10, 1955, the Joint Family Home Certificate was duly issued and registered.

In assessing the deceased's (i.e., the wife's) estate for death duty the Commissioner of Inland Revenue concluded there was a *presumption* of advancement or gift by the husband to the deceased in respect of any contributions made by him to the residential property. In holding that this *presumption* of advancement applied to the circumstances of the case, the Commissioner was following well-established principles of equity, exemplified for example in the recent House of Lords case *Shephard* v. *Cartwright* [1955] A.C. 431; [1954] 3 All E.R. 649. There is a presumption of a gift from husband to wife where a husband transfers or causes to be transferred property to his wife. In *Moate* v. *Moate* [1948] 2 All E.R. 486, the presumption of intended gift was applied to a purchase by an intending husband in the name of an intended wife—the parties at that time being engaged to be married. But the point to be noted is that it is only a *presumption* which may be rebutted by admissible evidence. As His Honour observed in the course of his judgment:

> In considering the relevant material, I must first examine the evidence on the conduct and declarations of the parties before or contemporaneous with the transaction itself: *Shephard* v. *Cartwright* [1955] A.C. 431; [1954] 3 All E.R. 649. Subsequent acts and declarations by a party are admissible as evidence only against the party who made them, and not in his favour: *Snell's Principles of Equity*, 24th ed. 153. Oral evidence of a party is admissible to prove his intention at the time of the transaction: *Knight* v. *Biss* [1954] N.Z.L.R. 55.

Accordingly, the Commissioner made the alternative contention that the husband's contributions to the purchase, maintenance, and improvement of the matrimonial home were referable to the husband's desire to improve the home for himself and his family. No doubt that, in making this alternative contention, the Commissioner had in mind the ruling of the Privy Council in the New Zealand case, *Finch* v. *Commissioner of Stamp Duties* (1929) N.Z.P.C.C. 600; In that case the husband and wife were living together in a house owned by the wife, and the husband had spent a sum amounting to £1,982 in alterations and repairs to that house. On this sum, the Commissioner of Stamp Duties had claimed gift duty. But it seemed quite plain to their Lordships on the facts found in that case, that the payments made by the husband were not referable to any intention of the husband of making a gift to or improving the value of the estate of the wife, but were referable to the desire of the husband to improve the home in which he was living and in which his children were being brought up, and accordingly did not constitute either the intention of or in fact a gift to the wife, but comprised merely a provision made by him for his own enjoyment and benefit and for the proper maintenance of his home and his children.

Accordingly, in the instant case the Commissioner of Inland Revenue contended that the deceased wife, by settling the matrimonial home as a joint family home, had vested it in herself and her husband jointly so that the beneficial interest passed to the husband on her death, and accordingly he claimed that he was entitled to bring the sum of £4,000 into the final balance of the wife's estate, pursuant to s. 5 (1) (e) of the Estate and Gift Duties Act 1955. How was the sum of £4,000 arrived at? Well, the house was worth £7,000 at the material date, and under s. 16 of the Joint Family Homes Act 1950, as enacted by s. 4 of the Joint Family Homes Amendment Act 1952, and as amended by s. 6 of the Joint Family Homes Amendment Act 1955, there is a maximum exemption from estate duty of £3,000 in respect of a joint family home registered under the Act.

It is interesting to observe that the Commissioner of Inland Revenue disclaimed intention to invoke any

of the other provisions of s. 5 (1) of the Estate and Gift Duties Act 1955, and conceded that, if, at the outset, the husband had an equitable half-interest as claimed, he (the Commissioner) was concerned only with the other half share for duty purposes.

Paragraph (i) of s. 5 (1) of the Estate and Gift Duties Act 1955 sometimes worries practitioners as regards joint family homes registered under the Joint Family Homes Act 1950. That provision brings into the death duty net:

> Any property vested in the deceased and any other person jointly and situated in New Zealand at the death of the deceased, to the extent to which he had power up to the time of his death to dispose of his beneficial interest therein, if that interest passes or accrues by survivorship to any person on the death of the deceased.

The words to be noted in this para. (i) are "*to the extent to which he had power up to the time of his death to dispose of his beneficial interest therein.*" Paragraph (i) catches beneficial joint tenancies to which the deceased did not contribute, as well as those to which he did contribute, and was enacted to abrogate the ruling of the Court of Appeal in *In re Todd, In re Going, Public Trustee* v. *Commissioner of Stamp Duties,* [1951] N.Z.L.R. 144; [1950] G.L.R. 481.

In my book, *Death and Gift Duties,* 3rd ed. 333, I showed by an example that the Commissioner did not invoke para. (i) in respect of a joint family home registered under the Joint Family Homes Act 1950, the reason apparently being that neither spouse can of his or her own volition deal with his or her beneficial half-share in the home. As Haslam J. observed, the joint tenancy created by registration under the Joint Family Homes Act is a "special form of joint tenancy created by the legislation."

The executor of the estate of the deceased wife was dissatisfied with the assessment of the Commissioner and requested a case to be stated under s. 69 of the Estate and Gift Duties Act 1955. By agreement, the narrative of fact, as summarized in the Case Stated, was supplemented by oral evidence.* The appellant claimed that the husband had acquired an equitable half share or interest in the property before the issue of the Joint Family Home Certificate, and therefore that, in computing the final balance of the estate, only £500 should be included in respect of the matrimonial home, such sum being the value of the deceased's alleged half share therein—namely, £3,500 *less* the joint family home exemption of £3,000.

In recent years, especially in England, there has been a spate of what His Honour terms the matrimonial cases. He said:

> While the scant evidence in some of the matrimonial cases has necessitated decisions being reached on the basis of "Palm-tree justice", the Courts have been careful not to disturb legal or equitable rights: *Barrow* v. *Barrow* [1946] N.Z.L.R. 438, *Masters* v. *Masters* [1954] N.Z.L.R. 82. . . . The matrimonial cases therefore restate principles of general application. After considering the evidence of the appellant (i.e. the husband), whom I saw and heard as a witness, I find that the presumption of advancement has been rebutted. I accept his testimony as completely reliable in essential matters. Whether or not he had to meet the presumption by a marked preponderance of evidence, or by some lower degree of proof, I think that he has succeeded in so doing with the result that until registration of the property as a joint family home the deceased held it on trust for herself and the appellant (her husband) equally.

His Honour then turned to para. (e) of s. 5 (1) of the Estate and Gift Duties Act 1955, relied on by the Commissioner for his assessment. The material passage of s. 5 (1) (e) reads:

> Any property which the deceased has at any time . . . caused to be transferred or vested in himself and any other person jointly, so that the beneficial interest therein passes or accrues by survivorship to any person on the death of the deceased.

His Honour remarked on the dearth of authority in New Zealand and in other countries where similar legislation prevails. An examination of the leading text-books appears to confirm this. There are, for example, very few cases mentioned in *Green on Death Duties,* 4th ed., on the corresponding provision in the United Kingdom. At p. 131, the learned author says:

> Under the present head the basis of liability is that the property was provided or purchased wholly or *pro tanto,* by the deceased. It is a further condition of liability that there shall be *some* benefit by survivorship on his death, but the extent of such benefit is not in point. If the beneficial interest in *some part* of the property passes or accrues, the whole, or so much as the deceased provided or purchased, is in strictness taxable.

His Honour said:

> The object of the paragraph was to make assessable for death-duty purposes any property alienated by the deceased into the joint names of himself and any other person, in such a way that on the death of the deceased the beneficial interest passed to that other person. The section is directed at beneficial interests. For the Commissioner, it was submitted that the registration of the property as a joint family home necessarily meant that the deceased caused it to be transferred to or vested in herself and the appellant jointly, and that, in consequence, the beneficial interest therein passed or accrued by survivorship to the appellant (i.e., the husband) on the death of the deceased. I think, however, that for para. (e) of the subsection to apply, the transfer or vesting must of itself cause the beneficial interest to pass or accrue by survivorship. In this case, as a result of my findings of fact, the only beneficial interest which in my view could possibly pass or accrue by survivorship in 1955 was the equitable half share of the deceased in the property. The appellant at that date already was entitled to the other beneficial half interest, of which he was not deprived by registration of the property as a joint family home.

His Honour had then to turn to s. 16 of the Joint Family Homes Act 1950, as enacted by s. 4 of the Joint Family Homes Amendment Act 1952, and as amended by s. 6 of the Joint Family Homes Amendment Act 1955. That now reads as follows:

> Where any joint tenant of any joint family home dies during the lifetime of the other joint tenant and, except for this section, the value of the joint family home or of any interest therein would form part of the dutiable estate of the deceased joint tenant for the purposes of the Death Duties Act 1921, that value shall be deemed not to form part of that dutiable estate unless it exceeds three thousand pounds in which case it shall be deemed not to form part of that dutiable estate to the extent of three thousand pounds.

This paragraph expressly covers both total ownership on the part of the deceased, and also any "interest" therein owned by the deceased at the date of death. His Honour thought that in the instant case the wife had vested in the husband the rights of a joint tenant under the Joint Family Homes Act 1950 in respect only of her half beneficial interest in the property, and no more. There is nothing elsewhere in the Joint Family Homes Act 1950 which affects that conclusion. His Honour turned to s. 7 (1) (b) of the 1950 Act as showing the effect of registration. This paragraph is as follows:

---

* There was a similar agreement in *Robertson* v. *Commissioner of Inland Revenue* (to be reported).

(b) Subject to the provisions of this Act, the husband and wife on whom the land is settled shall become the legal and beneficial owners of the land as joint tenants subject to all mortages, charges, encumbrances, estates, and interests then affecting the land; and, if the husband and wife are not already registered as proprietors of the land as joint tenants, the land shall thereupon vest in them as joint tenants without transfer or conveyance, but subject to all mortgages, charges, encumbrances, estates, and interests then affecting it.

His Honour thought that this paragraph contemplated the preservation of equitable estates and interests affecting the land at the date of registration. In the present case, as from the date of the purchase, the wife and the husband had equal equitable interests in respect of the property. If they had already been registered as joint tenants thereof, registration would have done no more than make them joint tenants "subject to the provisions of" the Joint Family Homes Act. In either event the parties became joint tenants "subject to the provisions" of the Act and henceforth held the property in the special form of joint tenancy created by the legislation.

Accordingly His Honour held that the Commissioner, in computing the final balance of the wife's estate, was entitled to include in respect of the joint family home not the full sum of £4,000 as claimed by him but only the sum of £500. One half of the capital value of the home was £3,500, and the taxpayer was entitled to an exemption in respect thereof of the full sum of £3,000, as provided by the provisions of the Joint Family Homes Act as herein explained.

II.—Liability to Gift Duty.

The Joint Family Homes Act 1950 is:

An Act to Provide for Joint Family Homes and for Exemptions from Gift Duty, Death Duty, and Stamp Duty in respect thereof.

Exemptions from gift duty are set out in s. 15 of the Joint Family Homes Act 1950. Broadly speaking, the principles relating to gifts arising from the creation, or the cancellation of, or the sale of property forming part of a joint family home are that a settlement of land as a joint family home or any re-vesting of the land on the cancellation of a Joint Family Home Certificate is not deemed to be a gift; but any disposition of the proceeds of sale or other disposition of the property registered as a joint family home is deemed to be a gift to the extent to which the husband or wife, as the case may be, receives and retains any amount in excess of the amount to which that person would have been entitled if the property had not been settled as a joint family home.

We all know, I think, that no gift duty is payable on the creation or cancellation of a joint family home under the Act. But do we always remember that gift duty may be payable on the proceeds of the sale or other disposition of a "joint family home" unless the *status quo ante* is restored in respect of the moneys thereupon arising? I think that the spouses themselves, unless they have quarrelled, think that each is entitled to an equal share of those moneys whether or not their beneficial shares were equal at the date of the registration of the joint family home certificate. (We have seen that in *Milne's* case (*supra*) the shares of the spouses were equal at that date, but that is not the normal case. In most cases, the husband alone is the settlor: in some the wife is). And I do not think that land agents all realise the implications of the liability to gift duty, and that the statement in an agreement for sale and purchase by husband and wife as purchasers that they are to own equally or jointly is not of itself registration under the Joint Family Homes Act 1950, the procedure prescribed thereunder not being capable of being short-circuited.

Let us take the following example which may readily happen in practice.

The matrimonial home is solely, both legally and beneficially, owned by the husband alone. The wife gets to hear of the benefits of registration under the Joint Family Homes Act, and the husband consents to apply for registration thereunder. The home is duly registered under the Act. The parties subsequently decide to sell the home and with the proceeds thereof to purchase another one. The home is sold and the proceeds banked in the joint names of the husband and wife.

This will constitute a gift by the husband to the wife of one-half the proceeds of the sale, and, in due course, when the District Commissioner of Stamp Duties gets to hear of the transaction, an assessment of gift duty will be issued by him. Perhaps, however, on the sale the proceeds thereof are correctly banked to the credit of the husband settlor alone. But the parties may eventually go to a land agent and purchase another house and unaware of the dangers thereof the agent preparing the agreement may show the spouses as purchasing equally or jointly: this attempt at short-circuiting the Joint Family Homes Act will also involve the parties in a claim for gift duty.

It appears to the writer of this article that this feature of joint family home law constitutes a trap for the unwary, and is perhaps not so well-known as it ought to be.

Objects of Judicature Act.—"One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned."—Lord Esher M.R. in *Byrne* v. *Diplock* (1889) 22 Q.B.D. 657, 666.

TOWN AND COUNTRY PLANNING APPEALS.

Ashburton Borough *v.* Minister of Works.

Town and Country Planning Appeal Board. Ashburton. 1958. November 3.

Zoning—Railway Reserve zoned as Parking Space for Off-street Parking—Reserve leased by Railways Department to Commercial Firms having Railway Siding Access to Railway Yards—Present Use of Value to Commercial Undertakings—Proposed Zoning Premature—Town and Country Planning Act 1953, ss. 21, 26 (2A).

Appeal by the Ashburton Borough, whose proposed district scheme, as publicly notified, zoned a Railway reserve owned by the Railways Department on the west side of the South Island Main Trunk Railway line extending from North to South for four blocks from Havelock St. to Kermode St., as parking space for off-street parking. The land in question was leased by the Railways Department to various commercial firms with premises on West St.; and two of these firms, as well as three other firms, had railway-siding access across West St., connecting their business premises with the Railway yards.

The judgment of the Board was delivered by

REID S.M. (Chairman). The proposal to zone this area for off-street parking is premature. As it is used at present, it is of considerable value to the commercial undertakings which at present have the use of it, and that present use should not be disturbed. It may well be that when the Borough Council's scheme comes up for its first five-yearly revision, the situation may have changed and it may be necessary to make some provision for off-street car parking in this locality.

Appeal dismissed.

Ashby Bros. Ltd. *v.* Waimairi County.

Town and Country Planning Appeal Board. Christchurch. 1958. September 1.

Shingle Pit—Application for Permit to establish Pit on Sixty Acres of Land—Area zoned as "Rural"—Area not economic Farm Unit in Itself—Isolated Pocket of Rural Land—Potential Value for Food Production—Retention for Such Purpose in Public Interest—Town and Country Planning Act 1953, s. 38.

Appeal by a company carrying on business as suppliers of gravel, road metal, etc., and operating a shingle pit at Wairakei Road. This pit had an estimated life of approximately ten to twelve years and the company, looking to the future had been endeavouring to find another site for its operations to which it could transfer its plant when the present pit was exhausted. The company obtained an option over an area of land off Waimakariri Road comprising some sixty acres, and it applied to the Council for permission to establish a shingle pit on this property.

This application was declined under s. 38 of the Act on the grounds:

1. The land was in an area which under the Council's undisclosed district scheme is zoned as "rural" and the company's industry could only be a conditional use thereon.

2. This type of industry could not comply with the conditions relating to conditional uses in rural zones as set out in the Council's proposed Code of Ordinances.

3. That it would not be in the public interest for the Council to consent to this land use. In its reply to the appeal, the Council claimed that the establishment of a shingle pit would detract from the amenities of the neighbourhood likely to be provided or preserved under its undisclosed district scheme and also that the establishment of a shingle pit would be a detrimental work as the land was farming land.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. On the evidence this 60 ac. of land is not an economic farm unit in itself, it is light land and without irrigation it would be restricted to use as grazing land, though it could be made to produce crops of any kind by using irrigation, though this would probably be a costly matter.

There is evidence that under good husbandry it would be capable of carrying the equivalent of three ewes per acre.

There was no evidence to support the claim that the establishment of a shingle pit on this site would detract from the amenities of the neighbourhood. It is an isolated pocket of rural land adjoining an area zoned for industrial use and an area of old river bed controlled by the Catchment Board having no actual or potential productive value.

It is a well-established town-and-country-planning principle that encroachment for urban or industrial use on rural lands capable of being used for productive purposes is to be avoided wherever and whenever possible. Although the property under consideration here may not have, at the present time, a high productive value for farming purposes, nevertheless it has a potential value and that potentiality should be maintained for as long as possible.

The Board is aware from evidence given in other appeals that there has already been a substantial encroachment of urban residential development in the Waimairi County into land having an actual or potential value for food production and it considers the retention of such land for that purpose is of the greatest importance in the public interest.

Appeal disallowed.

Caldwell *v.* Rotorua County.

Town and Country Planning Appeal Board. Rotorua. 1958. September 24.

Zoning—Property zoned "Rural"—Objection by Property-owners in Area requiring Zoning as "Residential"—Other Nearby Residential Subdivisions in Locality approved before Commencement of Current Statute—Adequate Provision made for County's Foreseeable Urban Population Needs—Town and Country Planning Act 1953, s. 23.

Appeal by the owner of a property situate on Sunset Road in the County of Rotorua being Lot 2 on Deposited Plan 36010 being part Kaitao Rotohokahoka 2 of Block IX Horohoro Survey District, and by his wife. They were the joint owners of a property on the opposite side of Sunset Road being part Kiatao Rotohokahoka 3C 2 B Block IV Horohoro Survey District the two properties having a combined area of 24 ac. 1 ro. 16 pp. These properties were zoned as "Rural" under the Respondent Council's proposed district scheme.

The appellants lodged an objection under s. 23 of the Act against the zoning of their land claiming that it should be zoned as "residential A."

The Council disallowed the objection and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. It was contended for the appellants that as there are other residential subdivisions in this locality some of which have been built on to a certain extent, the granting of this appeal would enable the appellants to subdivide their properties for residential use and that such subdivision would be a logical addition to or extension of an existing residential use but these other subdivisions were approved before the Town and Country Planning Act, 1953 came into force and could not have been prohibited by the Council. They are examples of sporadic urban development in a rural area—a type of development which is contrary to town and country planning principles.

2. The Council's scheme makes adequate provision in the areas zoned as "residential" for the foreseeable urban population needs of the County for many years to come.

3. Evidence was submitted, as part of the appellant's case, that there is in and around Rotorua an unsatisfied demand for low-priced sections for residential purposes, but such a demand is in no way peculiar to Rotorua; sporadic urban development in rural areas is not the answer to that problem.

The Board does not propose to embark on an examination of the economic difficulties confronting would be home-owners.

The Board takes the view that, although this land may ultimately be used for residential purposes its subdivision for that purpose at present is premature.

Appeal dismissed.

Evans *v.* Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1958. July 4.

Building Permit—Workshop Additions—Workshop adjoining Dwelling—"Back Yard" Business detracting from Amenities of Residential Area—Town and Country Planning Act 1953, s. 38 (8).

Appeal by husband and wife, the joint owners of a freehold property situated at No. 7 Harding Avenue, Panmure, upon which was erected a house property and certain outhouses used as a workshop.

This workshop had an area of 464 square feet and woodworking machinery was installed therein. For some time the appellant carried on the business of manufacturing step ladders, and fire screens as a spare time occupation, but some twelve months ago he decided to carry on this work as a full-time business. He found himself with insufficient work room and storage space so he started to make extensions to the building without first obtaining the requisite building permit. He was prosecuted for building without a permit and convicted. He then applied to the respondent Council for a permit for the erection of additions to his workshop to cover an additional 480 square feet. This permit was refused. The property was in an area zoned as "residential" under the Council's undisclosed district scheme and under the provisions of the Code of Ordinances adopted by the Council the maximum area permissible for outbuildings in a residential zone was 400 square feet.

The appellant appealed under s. 38 (8) of the Act against the refusal of the building permit.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The purpose of restricting the floor space area of outbuildings in a residential area is to prevent such buildings from being used for business or industrial purposes. It is a recognized town-planning principle that "back yard" businesses or industries do detract from the amenities of a residential area.

2. The appellant can continue to carry on his business as a non-conforming use but the Council acted properly and consistently in refusing a permit for additions to the building with a consequential increase of a non-conforming use.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Lockwood Buildings Ltd. *v.* Rotorua County.

Town and Country Planning Appeal Board. Rotorua. 1958. September 24.

Building Permit—Factory—Area zoned "Residential"—Extension a continuing "non-conforming use"—Proposed Extension unlikely to detract from Amenities of Neighbourhood—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal by the owner of a property situate in Russell Road in the County of Rotorua containing 1ac. 2ro. 29.6pp., being Lot 2 on Deposited Plan No. S2311 of Koutu 1B No. 2 situated in Block XVI Rotorua Survey District.

In 1953 the company was granted a permit for the erection of a factory on this land, and, subsequently, two permits for additions to the factory were granted, so that it comprised an area of approximately 12,000 square feet. The company carried on business as manufacturers of precut houses.

On June 9, 1958, the appellant company applied to the Council for a building permit to erect an extension to its existing factory. The Council refused the application on the grounds that the factory was in an area zoned as "Residential" under the Council's proposed district scheme. That decision was deemed to have been given under s. 38 (1) (b) of the Town and Country Planning Act 1953.

The appellant company appealed against that decision.

The judgment of the Board was delivered by

REID S.M. (Chairman); 1. Although the appellant company's property is in an area zoned as "Residential", it can carry on its present business as a "non-conforming use" for so long as it so desires. Its existing buildings are of a substantial nature and can be expected to have a long life.

2. Although the land immediately surrounding it is mainly residential in character, there is a joinery factory owned and operated by the S. & S. Joinery Co. Ltd., adjoining the appellant's property; and there is an area opposite to it on the North side of Russell Road zoned as "Industrial".

In the immediate locality, there are twelve established industries (including two sawmills with a large output) and the area can be reasonably described as one of mixed "Industrial", "Commercial", and "Residential" use.

The only question calling for determination is whether or not the proposed addition to the appellant company's premises is likely to detract from the amenities of the neighbourhood to be provided or preserved by the Council's proposed district scheme.

The Board is of the opinion that there will be no detraction from the amenities if the permit sought is granted.

The Board directs that a building permit is to be issued to the appellant for additions to its existing factory, such additions not to exceed a total area of 4,000 square feet.

Appeal allowed.

Anthony Shearer Ltd. *v.* Waimairi County.

Town and Country Planning Appeal Board. Christchurch. 1958. November 3.

Building Permit—Combined Office-Showroom and Store—Area zoned "Residential"—Detraction from Amenities of Neighbourhood—Railway Line as Line of Demarcation in Planning—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal by the owner of a property containing 3ro, 34.6 pp., situated between the Main Christchurch-Picton Railway line and the Main North Road, immediately to the west of the Styx overhead bridge, against a decision of the Council refusing a permit for the erection of a commercial building thereon.

The appellant carried on the business of a builderrs' merchant, and its premises were situated near Chaneys corner. It wished to move its business from that site, and, with that object in view, it purchased the land under consideration. An agent acting for the appellant company, made inquiries about this property, and was informed that, in about the middle of 1956, the then owner had been refused approval to a plan for the subdivision of this land into residential sites on the grounds that under the Council's undisclosed district scheme, this area was zoned as "light industrial". This agent claimed that he made inquiries at the offices of the Council, and was informed that this area was zoned as light industrial.

There was a conflict of evidence as to what actually was said on that occasion, but it was clear that in November, 1956, long before the appellant purchased the land, zoning in this area had been changed from light industrial to residential. That was its zoning at the sime of the appeal

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The area in which the property is situated is predominantly residential in character. It is extensively built on, and a new subdivision to the south-west of the appellant's property is now being roaded and opened up for residential use.

2. The appellant's proposal is to erect a combined office-showroom and store, having a ground coverage of 4,500 square feet. The Board considers that, whether the appellant's undertaking is an industrial one or commercial, the erection of a building of that size in a predominantly-residential area in close proximity to already existing residences, would detract from the amenities of the neighbourhood.

3. It was suggested on behalf of the appellant, that as the land lying to the north of the railway-line is zoned as industrial, there would not be any particular detraction from the amenities of the neighbourhood if its land was so zoned. A railway line, with the usual reserve strips on each side, while it is not a natural boundary, frequently provides an obvious and convenient line of demarcation in planning the zoning of localities in the vicinity. That is the position in this case. As has been held in previous decisions, the Board will not alter the zoning of land under an undisclosed district scheme, because to do so might prejudice the rights of adjoining owners to object under s. 23 when the scheme is publicly notified.

Appeal dismissed.

Dilworth Old Boys Association (Incorporated) *v.* One Tree Hill Borough.

Town and Country Planning Appeal Board. Auckland. 1958. September 1.

Zoning—Objection to Zoning—Structural Alterations to Dwelling for Its Use as a Clubroom—Area zoned as "Residential B"—Use as Club "Conditional use"—Objection disallowed—Town and Country Planning Act 1953, s. 00.

Appeal by the occupier of a property comprizing (a) all that parcel of land containing 33.4pp. more or less situate in the Borough of One Tree Hill being part Allotment 13 of Section 11 Suburbs of Auckland and (b) all that parcel of land containing 11.3pp. being Allotment 19A on Deposited Plan No. 11464 being part of the allotment 13 and known as No. 75 Great South Road Auckland. The property was owned by the Dilworth Trust Board which owned a substantial area of land in this vicinity dominated by the Dilworth School and the grounds appurtenant thereto. The property under consideration was a residence to which the appellant wished to make certain structural alterations so as to use it as a clubroom for its members.

It first applied to the Council for a building permit to make the requisite alterations. This was refused.

The property was in an area zoned as "residential B" under the Council's undisclosed district scheme. When this scheme was publicly notified the appellant lodged an objection under s. 3 of the Act against the zoning of this property as "residential B" and requested that it be rezoned as "commercial B" so as to permit of the appellant establishing clubrooms as of right.

The objection was heard by the Council and disallowed. This appeal followed:

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The property in question is in an area that has been zoned as "residential" since 1941. This area is predominantly residential in character and the zoning is appropriate.

2. To allow the appeal would lead to the creation of a "spot" commercial zone in a predominantly residential area and be contrary to town-and-country-planning principles.

3. The use of this property as club rooms would be a "conditional use" under the Code of Ordinances proposed for the Council's undisclosed district scheme that is to say a use that is permitted subject to the consent of the Council and to such conditions as the Council may see fit to impose.

This appeal is directed only to the disallowance of an objection to the zoning, and, as such, it is disallowed.

Had the appellant appealed against the refusal of a building permit to alter the building and use it as clubrooms, the Board would have been disposed to allow the appeal subject to the right of the respondent Council to impose reasonable conditions.

Appeal dismissed.

Joseph Mahon L'd. *v.* One Tree Hill Borough.

Town and Country Planning Appeal Board. Auckland. 1958. September 1.

Zoning—Appropriateness of Zoning—Textile Manufacturers' Building Area zoned as "Commercial B"—Appellant granted "Conditional use" of Premises under Bond—Application for zoning as "Industrial B"—Effect to create "Spot" Industrial Zone in Predominantly Residential Area—Application refused—Town and Country Planning Act 1953, s. 23.

Appeal by the owner of a property situate at No. 270 Manukau Road, Epsom, Auckland, containing 1ro. and 25pp. more or less, being Lot 1 on Deposited Plan No. 30783 and part of Allotment 18 of s. 11 of the suburbs of Auckland. It is an area which under the Council's undisclosed district scheme is zoned as "commercial B".

The company acquired this property in 1935 and, after various negotiations with the Council, it carried out extensive alterations and repairs to the existing building and was granted a "conditional use" of the premises under a bond setting out certain conditions for the purpose of carrying on the business of the manufacture and production of textiles, fabrics and various types of clothing. This type of business is a predominant use only in an industrial zone.

When the Council's undisclosed scheme was publicly notified pursuant to s. 22 of the Act, the company lodged an objection under s. 23 to the zoning of its property as "commercial B" and requested that the zoning be altered to "industrial B".

The Council heard the objection and disallowed it. This appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The property is in an area that has been zoned for commercial use since 1941, the purpose of this zoning being to provide an area for development for shopping purposes in a predominantly residential locality.

2. This area fronts on to Manukau Road which constitutes the western boundary of the One Tree Hill Borough; on the opposite of Manukau Road is a large residential area zoned as such by the Auckland City Council. With the exception of this small commercial zone all the adjacent land in the One Tree Hill Borough is predominantly "residential" in character and is zoned as "residential B".

3. The Board is satisfied that the company's operations do not constitute a nuisance—there is no noise, smoke, or fumes and the buildings are appropriately designed so that there is very little if any detraction from the amenities of the neighbourhood but, if the property were to be rezoned as "industrial B", than the company or any successor in title could as of right use the property for any of the purposes laid down as predominant uses in industrial zones.

4. The Council's undisclosed scheme makes adequate provision for industrial use in the area zoned for that purpose at the southern end of the Borough. To allow this appeal would mean the erection of a "spot" industrial zone in a predominantly residential area and be contrary to town-and-country-planning principles.

5. So long as the company complies with the conditions laid down by the bond into which it has entered, it can continue to carry on its present operations as a "conditional use" without let or hindrance.

Appeal dismissed.

Bell *v.* Auckland City Corporation.

Town and Country Planning Appeal Board. Auckland. 1958. February 19.

Building Permit—Softgoods Warehouse—Area Zoned as "Residential B"—Erection of Warehouse detracting from Amenities of Neighbourhood—Likelihood of Proposed Motorway passing through Property—Building likely to be Physical Obstacle to Work constructed in Accordance with Town-and-country-planning Principles—Town and Country Planning Act 1953, s. 38 (1) (a), (d).

The appellant was the owner of a property known as No. 2 Clovernook Road, Newmarket, being Lot 23, D.P. 3639 of allotment 21 in Section 6, Suburbs of Auckland. The land had an area of 35.1 perches with frontage of 73 feet to Clovernook Road, Newmarket, and a depth of 132 feet. It was situated on the southern side of Clovernook Road, approximately 120 feet from the intersection of that street with Broadway, Newmarket.

The appellant applied to the respondent Council for a permit for the erection of a soft-goods warehouse on this land. This permit was refused on the grounds that the property was zoned in the Council's Undisclosed District Scheme as Residential "B" and a commercial building of the type sought by the appellant would detract from the amenities of the neighbourhood. As a further ground for refusing the permit sought the Council claimed that the proposed building would be a physical obstacle to a public work—namely, a motorway likely to be constructed in the area in accordance with the town-and-country planning principles likely to be embodied in the undisclosed district scheme.

The judgment of the Board was delivered by

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

1. That Clovernook Road is predominantly residential in character and the erection of a warehouse in that street would detract from the amenities of the neighbourhood.
2. That on the evidence it is quite clear that there is more than a likelihood of the proposed new motorway proceeding from Ellerslie to Newton passing through the appellant's property. Any building erected on that property would therefore be a physical obstacle to the work likely to be constructed in the area in accordance with the town-and-country-planning principles likely to be embodied in the respondent's undisclosed district scheme.

The appeal is disallowed.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Uses of Adoption.—In 1957, an unreported case heard in camera by the Court of Appeal in England made an adoption order of an illegitimate child in favour of its mother. It would seem that some eighty-seven or more orders of the same character have since been made. However, recently a Judge who heard one of these applications pointed out that the welfare officer had said that the mother was anxious to remove the stigma of illegitimacy from the child and that no other reason or advantage to be gained from the proposed adoption had been advanced either by the mother herself or the welfare officer. In those circumstances, he refused to make the order on the ground that the Act was not designed or intended to be used simply for the purpose of removing the stigma of illegitimacy, and that if the order was granted in this case it would no doubt soon become common form and illegitimacy would automatically be abolished in England. On appeal in *In re D. (an Infant)*, *The Times*, November 29). Lord Denning said he was unable to agree with this reasoning, and he drew attention to the advantages which would result to the infant from the making of the order in favour of the mother, particularly from a property point of view. He considered that although the making of the order must depend upon whether the mother was a suitable person to be given the order, whether the home was suitable, and all the circumstances, there was certainly no bar against it being made simply because the child was illegitimate. Ormerod L.J. pointed out that the registration of a child in the adopted children's register was received for all purposes as if it were an entry in the register of births, so that if application had to be made for a child to go to school or any other place where an entry was necessary, that entry in the adopted children register could be used.

Judicial Politeness.—"I wish to make it clear that I concur in, and share the responsibility for, the judgment which has just been delivered, except with regard to two points on which I have the misfortune to differ from my brethren. I need hardly say that only with some hesitation and diffidence do I venture to express a conflicting view, especially as my view is also in conflict with that of the learned trial Judge." Willmer L.J. in *In re United Railways of the Havana and Regla Warehouses Ltd.* [1959] 1 All E.R. 214, 246.

Recognition of Foreign Divorces.—The case of *Mountbatten (Marquess of Milford Haven)* v. *Mountbatten (Marchioness of Milford Haven)* [1959] 1 All E.R. 99 is interesting, not merely because of the social renown of the petitioner, but because of the length of time taken and the wealth of authority submitted at the hearing before the Judge (Davies J.). It is interesting also because it seems that, if the respondent had been ordinarily resident in New York for three years at the commencement of any suit there, and had she not deliberately left her residence in New York and obtained a certificate of one day's residence in Mexico in order to give jurisdiction to the Courts of that country, the English Courts would have recognized any New York decree as a proper dissolution of the marriage. The headnote read that the husband and wife were married in 1950 in the United States of America. The husband, and thus the wife also, were at all times domiciled in England. They lived in New York. In 1952, they separated, the husband returned to England and the wife remained in New York. In 1952, the wife started proceedings in New York for divorce or separation. On May 21, 1954, the wife filed a petition for divorce in the State of Chihuahua in Mexico on the ground of incompatibility of temperament. The wife attended the hearing, the husband was represented and submitted to the jurisdiction, admitting the petition; the wife produced a certificate of her residential qualification for the purpose of the proceedings and was actually present in Mexico within the jurisdiction of the Court for some twenty-four hours. In Mexican law jurisdiction was based on two grounds, either of which would be sufficient, viz., residence of the wife (which meant her actual presence at the time of granting the qualification certificate), and submission of the parties to the jurisdiction. The decree was pronounced on May 22, 1954, and became final twenty-four hours after it was pronounced. Such decrees were recognized according to the law of New York. On a petition by the husband for a declaration that the Mexican decree validly dissolved the marriage, it was held that, in English law, domicil was the foundation of jurisdiction in divorce; and, the domicil of the parties being English, the Court would not recognize the Mexican decree, for it was not based on such residence as would have supported jurisdiction under s. 18 of the Matrimonial Causes Act 1950, if the residence had been in England, and the fact that the decree was recognized in New York did not compel or permit the English Court to recognize the decree. In the result, the Court in England has expressly rejected the theory of a dual test for recognition of a foreign decree in divorce, such theory being that such a decree is entitled to recognition if it is valid either by the law of the domicil or by the law of the place where the wife is concurrently entitled to proceed.

Traffic Story.—The story is not new but it was quoted by a legal speaker at a recent luncheon and it has at least the same merit as a traffic warning. A motorist was one hundred yards from an open level railway crossing and was doing 50 m.p.h. At the same time a train was approaching at 60 m.p.h. and its distance from the crossing was 375 feet. The problem raised—"Did the motorist get across?" and the solution: "Yes, the motorist got a cross all right. His widow paid for it out of the insurance moneys."

Tailpiece.—During the last sessions of our Court of Appeal, counsel described an up-to-the-minute authority cited by him as being "hot from the oven." "I did not know," observed Cleary J. "that our brethren in England worked under such torrid conditions."

SUNSET AND EVENING STAR.

By Advocatus Ruralis.

Advocatus knew of three brothers (the Agricola Brothers) all of whom have entered that bourne from which no traveller returns, and all of whom twenty years ago were struggling to keep the mortgagee from the door.

On the division of their father's estate each of these brothers became the possessor of approximately 2,300 acres carrying some 3,200 sheep. During the 1930 slump period, with the help of the Mortgagors' Relief Committee, each of them had been able to retain his land, and by about 1945 they were advised that it would be wise to do something about reducing their mortgages as death would surely come, even to farmers. About this time prices started to go up. Agricola Primus consulted his solicitors, and, between them, they formulated a five-year plan which, with a minimum expenditure of income, helped to place his estate in a care-free position.

In 1951, the farmer's annus mirabilis, he used his extra money to put his house finally in order and pay his solicitor.

Agricola Secundus was of a different type. He had two daughters, one of whom married a well-to-do farmer and the other a solicitor. The difference in outlook between a farmer and a solicitor is that a solicitor knows: (1) that he is not immortal; and (2) that, though he may know something of his own business, he really knows nothing about farming.

Some ten years ago, Agricola Secundus raised the question of death duties with his lawyer son-in-law, who advised him to see his own solicitor, as he (the son-in-law) was in an invidious position. Secundus realized that this would cost money, so he used his 1951 goldmine to take a trip to England, to buy a new car and another one for his wife, and left his mortgage as it was. He indulged in a considerable amount of aerial topdressing and then died, just after the latest death duties had been imposed while prices were still at their peak. He had prepared his own will, leaving a substantial gift to his widow with the remainder to the children. When the executor, a corporation sole who had not previously been consulted, took over, it found an ailing widow, who was not fit to carry on and who did not want to live on the farm. The farmer son-in-law had his own property and the solicitor son-in-law had no intention of becoming a farmer. After various family conferences, it was decided to sell the property which meant for income-tax purposes it was possibly better to raise the value of the stock at the date of death so as to set off the income tax payable against the final balance of the estate. A valuation of the land and the stock had been obtained. The land valuation had apparently been arrived at by simply adding twenty-five per cent. to the existing valuation. Before the estate accounts could be passed by the Stamp Office, a severe drop occurred in the price of sheep, and this, combined with the fact that only farmers (who were no longer good risks) could buy farms, reduced the selling value of farms and the value of second-hand plant and machinery. Death-duty values for taxation purposes were however taken at the date of death. This left the trustees with the following nice little set of figures.

Book Value	*Death Duty Value*	*Realization Value*
	£	£
Sheep, 3,150	10,941	7,630
Cattle, at £5 and £2 10s., £1,215	5,614	4,314
Implements, £1,199	3,725	2,973
Land, £17,084	22,783	19,000
Car, furniture, etc.	2,000	Nil
Insurance, £3,170	3,170	3,170
	48,233	38,087
Less income tax	7,000	
	£41,233	

Therefore, out of the recovery of £38,087, Agricola's executors had to find death duties, £15,739, income tax, £7,000, valuation fees, land-agents' fees, stock-agents' fees, and executors' fees, £2,000, a total of £24,739, leaving his estate balance at £13,348, of which by his will he had given £4,000 to his widow. She bought a house for £3,250, leaving herself with a sum of £750 for possible hospitalization, painting the house, etc. The balance of £9,348 was invested at five per cent. with the result that, in spite of her ill-health, she had not enough left to employ help in the house, even if she could get it.

Some six months later, Agricola Tertius died. His stock numbers and land area were almost exactly the same as his brother's, but the cold draught having come, his final valuation (see realization values) was £40,000 instead of £48,000. Having sons to take over, he did not have to find income tax, so his final amount to be found for taxation did not include income tax, and his death duties were £15,000. This left the final value of the estate at £25,000, or £11,000 more than that of the widow.

To return to Agricola Primus, he had followed his solicitor's advice and made dispositions during his lifetime, with the result that there was no moaning at the Bar when he put out to sea.

Control of Damages.—"The damages for any breach of warranty are always limited to the natural and probable consequences. The point then becomes one of remoteness of damage; or, if it is thought better to put it in Latin, the expressions novus actus interveniens and volenti non fit injuria are ready to hand. There is also the rule that an aggrieved party must act reasonably and try to minimize his damage. A master who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic because he had not cared to risk damage to his paintwork."—Devlin J. in *Compania Naviera Maropan S. A.* v. *Bowaters Lloyd Pulp & Paper Mills Ltd.* [1954] 3 All E.R. 563, 568.