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INCOME TAX: TRUSTEES AND BENEFICIARIES.

SECTION 102 of the Land and Income Tax Act 1923 (s. 155 of the Land and Income Tax Act 1954) deals with the assessment of beneficiaries' income in the hands of trustees. The parts of this section which are the subject of present consideration are as follow:

> 102. With respect to income derived by a trustee the following provisions shall apply:
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> (a) If and so far as the income of the trustee is also income derived by a beneficiary entitled in possession to the receipt thereof under the trust during the same income year, the trustee shall in respect thereof be deemed to be the agent of that beneficiary, and shall be assessable and liable for income tax thereon accordingly, and all the provisions of this Act as to agents shall, so far as applicable, apply accordingly . . . .
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> (b) If and so far as the income of the trustee is not also income derived by any beneficiary as aforesaid, the trustee shall be assessable and liable for income tax on that income in the same manner as if he were beneficially entitled thereto, save that the rate of tax shall be calculated by reference to that income alone, and that the trustee shall be entitled to a deduction by way of special exemption of two hundred pounds, and shall not be entitled to any further deduction by way of special exemption. . . . .

The recent judgment of Turner J. in *Marshall* v. *Commissioner of Inland Revenue* (to be reported) is a decision of great interest and importance to taxation authorities, trustees, accountants, and taxpayers. The effect of the judgment is to raise an entirely new concept of the basis of liability to tax of persons deriving income through a trustee or trustees.

The practice of the Inland Revenue Department has always been to treat s. 102 of the Land and Income Tax Act 1923 (s. 155 of the Land and Income Tax Act 1954) as the code for the assessment of all estate and other income derived through a trustee, the only question being whether the trustee was to be assessed as an agent under s. 102 (a) or whether he was to be assessed (virtually as a principal) under s. 102 (b).

His Honour has held, in effect, that s. 102 is a purely enabling and machinery section, and that the Commissioner is free, if he prefers to do so, to by-pass the section entirely and assess the beneficiary directly, even where the beneficiary was not entitled to the receipt of the income in possession during the income year.

The question arose on a Case Stated by the Commissioner of Inland Revenue pursuant to the provisions of s. 35 of the Land and Income Tax Act 1923 (s. 42 of the Land and Income Tax Act 1954). The first three appellants were the executors and trustees of the will of one Marshall, deceased, and the fourth was his widow, who during her widowhood enjoyed the income from the residue of his estate.

The testator died on January 28, 1949. By his will (so far as the terms are relevant) he directed that the income from the residue of his estate, the principal asset in which was a farm, should be paid to his widow during her widowhood, and, upon her death or remarriage, income and capital alike should vest absolutely in children. The widow remarried on February 17, 1951. Up till that date she was entitled to the income; after it she ceased so to be entitled.

During the life of the testator, he had (with the consent of the Commissioner) furnished his returns of income for years commencing on October 1 and ending on September 30, each of which was for the purposes of the Act deemed to be a return of income for the year ended on the last preceding March 31, pursuant to s. 4 of the Finance Act (No. 2) 1937 (s. 8 of the 1954 Act). The trustees continued this practice after the death of the testator. They furnished to the Commissioner after the testator's death a return of income for the broken period October 1, 1948, to January 28, 1949, and, in due course, a further return for the broken period January 28, 1949, to September 30, 1949. Thereafter, they returned income for balance-years ending on September 30 of each year. Each of these was deemed for the purposes of the Act to be a return up to the last preceding March 31.

The return of the trustees for the balance-year ended September 30, 1950 (deemed for the purposes of the Act to be a return for the income year ended March 31, 1950) showed a net profit for the farming business carried on by them of £3,507 17s. 5d. When some trifling items of miscellaneous income were added, the net trust income was returned at £3,509 6s. 11d. Applying the provisions of s. 102 (a), the trustees showed the whole as income derived by the widow to the receipt of which she was entitled in possession in the same income year. The effect was that the income was treated for tax purposes as part of her income for the income year ended March 31, 1950, and there was no "trustees' income" remaining to be assessed under s. 102 (b) in respect of that income year.

As has been mentioned, the widow remarried and disentitled herself to income from the date of her remarriage, February 17, 1951. The trustees caused an account of income to be taken as at that date. On February 17, 1951 the sheep on the farm had been shorn, but the wool was not yet sold. It was said in the course of argument that, in adjusting accounts between the widow and the remaindermen, several courses were open to the accountants.

Mr. Justice Turner observed that it could have been argued possibly that, as the wool clip constituted the principal item of revenue, it should in some way have been notionally distributed over the year on a day-to-day basis, instead of allowing it to be a matter of pure accident whether it was to be credited in toto to the widow or to the remaindermen; but this course, if it was open as a matter of accountancy, was rejected by the accountant-advisers of the two sets of beneficiaries, since it was recalled that on the death of the testator (which it will be remembered took place at the same time of the year) the course had been adopted of crediting the proceeds of the shorn wool wholly to the period in which it had been shorn.

It seemed to both accountants to follow, as a matter of justice, that the practice which had been adopted when the widow began to receive her income should be followed likewise at the end of her period of enjoyment. (As to the reasonableness of this course, reference may be made to *In re R. B. Denniston* [1928] N.Z.L.R. 760). This was done; and, in the statement of account agreed upon, the shorn wool, the value of which was of course not exactly determined until actual realization, was credited to the widow.

This settlement, of course, did not take place until long afterwards; but the fact was that at the date of her remarriage the widow was entitled to certain income. The amount in money of this income was subsequently agreed upon by all interested parties as including actual proceeds of the wool shorn but as yet unrealized as at the date of her remarriage on February 17, 1951.

In due course, the trustees made their return of income for the year in which the remarriage had taken place, up to September 30, 1951, following their accustomed practice. In compiling this return, they were able to show exactly the amount realized on the wool to which reference has been made, since it had been sold on September 18, 1951. It realized £4,247 0s. 5d. When forwarding their returns of income for the balance-year ended September 30, 1951, the trustees did not include this sum of £4,247 0s. 5d. as income derived by the widow to the receipt of which she was entitled in possession "during the same income year," but treated it as "trustees' income" returnable under s. 102 (b) (now s. 155 (b)). The total income derived by the trustees in that balance-year and ultimately payable to the widow was £11,455 13s. 7d.

There could be no doubt, His Honour said, but that £7,208—odd was returnable under s. 102 (a) as income derived by the widow during the income year, to the receipt of which she was entitled in possession in the same year: but, while this was admittedly unavoidable, the trustees contended that they were justified in treating the £4,247 0s. 5d. (the proceeds of the wool shorn but unrealized on February 17, 1951 but realized on September 18, 1951) as "trustees' income," with the consequence that the total income became assessable for tax in two separate sums of £4,247, and £7,208, instead of being assessable in one sum of £11,457.

The Court was told that the difference in the tax payable was something like £1,000.

In the Case Stated, the Court was asked two questions which were as follow:

> (1) Whether the said amount of £4,247 0s. 5d. was income derived by the said widow "as a beneficiary" of the deceased's estate "entitled in possession to the receipt thereof under the trusts" of the will of the deceased during the income year ended on March 31, 1951; and
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> (2) Whether the respondent properly included the said amount of £4,247 0s. 5d. in calculating the assessable income derived by the widow during the income year ended on March 31, 1951, subject to her being credited with the tax which the income derived by the trustees and assessed to them "under section 102 a of the said Act attracted."

Counsel for the appellant, Mr. R. E. Tripe, made two submissions. His first was that the income could not be taxed in the hands of the trustees under s. 102 (a), since, on a proper reading of the statute, it could not be said that the income year in which the beneficiary became entitled to its receipt in possession was the same as that in which the trustees were deemed to have derived the income. His second submission was that when the widow became entitled to the receipt in possession of the income, she was no longer a beneficiary; and that for this reason also s. 102 (a) could not be invoked.

Mr Tripe's submission was that the words of s. 102 (a) make it necessary, as a pre-requisite to the application of the subsection, that the widow should not only have been entitled in possession to the receipt of the income in the relevant income year but that she should have so become entitled to it *as a beneficiary*; and he submitted that she was not a beneficiary at the date when she became entitled in possession to its receipt. The learned Judge said:

> The wool was shorn and became income in the hands of the trustees at some time before February 17, 1951. It was not realized until September 18, 1951, and I agree with Mr Tripe that until this last date it had not become income to the receipt of which the widow was entitled in possession. Before September 18, 1951, she was entitled to the net proceeds of the wool *when realized*; but she could not have sued for its amount, since until realization and final ascertainment of the expenses involved, the amount to which she was entitled could not be determined. So far I am prepared to accept the argument, which seems adequately supported by *Dalrymple* v. *Commissioner of Taxes* [1934] N.Z.L.R. 366*n*, 368*n*; *Doody* v. *Commissioner of Taxes* [1941] N.Z.L.R. 452, 457; [1941] G.L.R. 218, 221; and *Public Trustee* v. *Commissioner of Inland Revenue* [1957] N.Z.L.R. 535, 537.

Counsel went on to submit that when the widow at last became entitled to the receipt in possession of the income, she was not then a beneficiary: he submitted that she was a creditor. His Honour rejected that submission. He said:

> Though the widow, by remarrying, disentitled herself to the continued enjoyment of the income as from the date of her remarriage, in my opinion she remained a beneficiary in respect of all income due or accruing to her, but unpaid at the date of her marriage.

In dealing with the appellant's first submission based upon the meaning of the words "income year," His Honour said:

> It must follow from the words of s. 102 (a) that the Commissioner may assess trustees as agents for their beneficiary only in cases in which the income which the trustees have derived is income to whose receipt that beneficiary is entitled in possession *in the same income year* as that in which the trustees have derived it. It becomes immediately necessary to decide exactly what is meant by the words "income year." These words are defined by the statute as meaning, in respect of any person, the year in which any income is derived by him; and "year" is defined as "a year commencing on the first day of April and ending on the thirty-first day of March . . . ."

His Honour went on to say that the judgments in the Court of Appeal, in *Marshall* v. *Commissioner of Taxes* [1942] N.Z.L.R. 265; [1942] G.L.R. 184 of Sir Michael Myers C.J. (*ibid.*, 275; 187), of Kennedy J. (*ibid.*, 277; 191), and of Callan J. (*ibid.*, 279; 192), made it abund-

antly clear that (to use the words of Callan J.) " every income year . . . mentioned in the principal Act and its amendments is a year commencing on the first day of April and ending on the thirty-first day of March " (*ibid.*, 279 ; 193).

In the present case, the trustees " derived " the income at the time of the shearing of the wool : *In re Angas* [1906] S.A.L.R. 140 : *In re Hemi Matenga*, [1942] G.L.R. 72, 85, per Smith J. : *Hassell* v. *Perpetual Executors and Agency Co. (W. A.) Ltd.* (1952) 86 C.L.R. 513, 522. This was some time before February 17, 1951. It was within the balance-year of the trustees ended September 30, 1951. By s. 4 of the Finance Act (No. 2) 1937 (now s. 8 of the 1954 Act) income derived during this balance-year must for the purposes of the Act be deemed to have been derived by the trustees during the income year ended March 31, 1951.

His Honour said the question to be asked then was : Did the widow become entitled to the receipt in possession of this income during her income year ended March 31, 1951 ?

After citing the judgment of Hosking J. in *Dalrymple* v. *Commissioner of Taxes* [1934] N.Z.L.R. 366*n*, 368*n* and that of Smith J. in *Doody* v. *Commissioner of Taxes* [1941] N.Z.L.R. 452, 457, l. 15 ; [1941] N.Z.L.R. 218, 219, which was adopted and followed again recently by the learned Chief Justice, Sir Harold Barrowclough, in *Public Trustee* v. *Commissioner of Inland Revenue* [1957] N.Z.L.R. 535, 537, l. 11, His Honour continued :

> Since then, it is apparent that the widow did not become entitled to the receipt in possession of the income until the wool had been sold and its net proceeds ascertained, it follows that this did not happen in the income year ended March 31, 1951, for the wool was not sold until September 18, 1951. The income derived by the trustees was therefore not income to which the provisions of s. 102 (a) applied. It was therefore income to which the provisions of s. 102 (b) applied, and accordingly I accept Mr Tripe's submission that it was assessable for tax in the hands of the trustees in accordance with the provisions of that paragraph. It was competent for the Commissioner, in other words, to assess under s. 102 (b). It remains (as will be seen) to discuss the question whether the Commissioner was bound to assess under that paragraph, or whether, some other section being alternatively applicable, he could elect to assess under such other provision.
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> Question 1 must accordingly be answered " No," for the income was not income to whose receipt the appellant was entitled in possession during the relevant income year.

This, in the view of the learned Judge, left unanswered the question whether the widow was not personally assessable for tax as having " derived " the income at the same time as the trustees derived it, even though, as His Honour had held, she was not entitled immediately to its receipt. He continued :

> In order to become liable for tax under s. 72 of the 1923 Act (in the 1954 Act s. 77) it is not, of course, necessary that a person should be entitled to the immediate possession of income—it is sufficient simply that the beneficiary " derives " the income. In most of the cases where income becomes assessable in the hands of trustees under s. 102 (b), it will not be assessable in the hands of anyone else as having derived it at the relevant time—e.g. in the case of income directed to be accumulated in a class fund. Such income, though derived by trustees, is not derived by any particular beneficiary. There may, however, be cases where, though a beneficiary is not presently entitled to the receipt of the fund, yet that beneficiary has nevertheless " derived " the income, since the fund has become indefeasibly vested, though not presently enjoyable. An example of such a case will be found in the case (before the passing of the Land and Income Tax Amendment Act 1941) of an infant beneficiary whose share in income, though vested, still remained unapplied in the hands of his trustee : *Doody* v. *Commissioner of Taxes* [1941] N.Z.L.R. 452 ; [1941] G.L.R. 218.

By s. 72 (2) of the 1923 Act (s. 77 (2) in the 1954 Act), it is provided that :

> Subject to the provisions of this Act [income tax] shall be payable by every person on all income derived by him during the year preceding the year in and for which the tax is payable.

By virtue of this section, therefore, a taxpayer who has derived income is liable to be assessed for income tax upon that income. In His Honour's opinion, he remains liable so to be assessed, notwithstanding that the same income is liable to assessment in the hands of trustees under the provisions of s. 102 (b), subject, however, to this very important qualification, that the income cannot be cumulatively taxed under both sections : *Luttrell* v. *Commissioner of Taxes* [1949] N.Z.L.R. 823 ; [1949] G.L.R. 469. Then, His Honour said :

> This view seems to be in accordance with the language of s. 102 itself, for para. (d), which I have not so far quoted, reads :
>
> > (d) Nothing in this section shall be so construed as to exempt a beneficiary from any income tax which would be payable by him had he derived the income to which he is entitled under the trust directly instead of through a trustee :
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> It seems to me that the effect of this paragraph is to preserve, in proper cases, the liability for assessment of a beneficiary who himself " derives " the income which is simultaneously derived by his trustees, and that, as Kennedy J. concluded in his judgment in *Luttrell's* case, " this is the language of a saving clause . . . ." (*ibid*, 845 ; 476.)

Mr. Justice Turner accordingly rejected the appellants submission that s. 102 is a code containing all the law applicable to the assessment of income derived through trustees ; and he preferred to regard it as a convenient means whereby tax may be collected by assessing trustees if the Commissioner does not prefer instead, in cases where it is possible to take this course, to assess the beneficiary directly as a person having derived the income.

His Honour went on to consider whether, in the present case the widow derived the income represented by the shorn wool at the time when the trustees derived it ; and he said :

> I think it must follow from the words of Smith J. in *Doody* v. *Commissioner of Taxes* [1941] N.Z.L.R. 452 ; [1941] G.L.R. 218, which he had quoted above, that the appellant did derive this income at the same time as the trustees derived it—i.e., when the wool was shorn—notwithstanding that she was not immediately entitled to the receipt of its proceeds.
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> On the facts before me, I must have regard to the plain terms of s. 92 (in the 1923 Act, s. 90) :
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> > For the purposes of this Act every person shall be deemed to have derived income though it has not been actually paid to or received by him, or already become due or receivable, but has been credited in account, or reinvested, or accumulated or capitalized, or carried to any reserve, sinking, or insurance fund, or otherwise dealt with in interest or on his behalf.
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> Having regard to this provision, I am constrained to conclude that the income represented by the shorn wool was dealt with in the interests and on behalf of this beneficiary when the wool itself, to the proceeds of whose realization he was indefeasibly entitled, was taken from the sheep and placed in store in preparation for being sold in pursuance of the trusts of the will. The appellant, then, derived the income as and when the trustees did so. She must accordingly be liable to be assessed for it directly, if the Commissioner elected so to assess her, or under s. 102 (b) if he chose to use that provision. He has not assessed under s. 102 (b), and is therefore in my opinion free to assess the widow direct.

Question 1 was answered " No " ; Question 2 was answered " Yes " ; the respondent properly included the amount of £4,247 0s. 5d. in calculating the assessable income derived by the widow."

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Appeal—Appeal from Conviction—Death of Appellant while Appeal pending—Abatement of Appeal—Personal Representatives of Deceased Appellant claiming Interest may be added as Appellants—Conviction not abated—Summary Proceedings Act 1957, s. 115. Where an appellant, who lodged a general appeal under the Summary Proceedings Act 1957, against his conviction, died before the appeal could come on for hearing, the appeal abates unless the personal representatives of the deceased appellant have an interest and ask to be added as appellants. The abatement does not extend to the original conviction. (*Beauchamp* v. *Johnston* (1903) 22 N.Z.L.R. 923; 5 G.L.R. 328, not followed. *Hodgson* v. *Lakeman* [1943] K.B. 15 (explained in *R.* v. *Rowe* [1955] 1 Q.B. 573, 575; [1955] 2 All E.R. 234, 235), applied.) *Walker* v. *Rusbatch.* (S.C. Napier. 1959. March 18. Hutchison J.)

Motor-vehicles—Transport Offences—Accident arising from Use of Motor-vehicle—Driver of Motor-vehicle alleging Shortness of Interval elapsing between Accident and Death of Injured Person—Duty "to render all practicable assistance to injured person"—Duty arising, if Death not already occurred—No Defence to show, ex post facto, Death was inevitable and Consciousness already lost—Transport Act 1949, s. 47 (1). The expression "all practicable assistance to the injured person" in s. 47 (1) of the Transport Act 1949, is wide enough to include assistance to persons who are so injured that it may be difficult or impossible to say, either at the relevant time or subsequently, whether or not death had already occurred. In other words, the duty, being one to be performed at the time and on the spot, and requires the motorist to give all such assistance, within his power, as appears to be necessary or desirable on the objective facts of the case as they present themselves to him then and there. The duty depends on the circumstances existing at the relevant time and place; and, if those circumstances call for any assistance that may possibly prevent death or alleviate pain and suffering, the motorist must render such assistance. There is no duty if death has already occurred; but, apart from that one qualification, the duty arises; and it cannot be evaded by showing *ex post facto* that death was inevitable and consciousness was already irretrievably lost. (*R.* v. *Bowden* [1938] N.Z.L.R. 247; [1938] G.L.R. 156, and *R.* v. *Tait* [1939] N.Z.L.R. 543; [1939] G.L.R. 387 referred to.) *Swift* v. *Pine* (S.C. Christchurch. 1959. April 8. F. B. Adams J.)

CONTRACT.

Construction—Sale of Goods—Purchaser of Second-hand Jeep signing Agreement containing Clause Acknowledging Purchase of Jeep, as inspected, in Reliance on Purchaser's Judgment and not on any Representation by Vendor, and that it was purchased Free of Warranty—Jeep represented as "reconditioned" throughout—Such Representation not Fundamental Term of Contract so as to disentitle Vendor to rely on Exempting Clause—"Reconditioned". On October 26, 1956, H., along with G., a motor-mechanic, called at the premises of the company, a motor-car dealer, to inspect a jeep which H. was interested in buying. F., director of the company, in the course of the discussion, in answer to a question from the mechanic, said that the vehicle had been completely reconditioned. After a day or two's consideration, H. decided to buy the vehicle, and on October 30, a sale was made. H. then signed an agreement form which evidenced the purchase at the price of £400 payable in cash. The printed form of agreement contained a paragraph: "I acknowledge I have inspected the above vehicle myself and buy it as inspected, relying on my own judgment and not on any representations made by you or by anyone on your behalf in respect thereof and I purchase it free of warranty. I understand there is no guarantee by you of the correctness of mileage." The form was also signed as a receipt on behalf of the company and a duplicate of it was received by H. Subsequently, the jeep performed unsatisfactorily and work was done to it to the extent of £147 11s. 6d. H. brought an action in the Magistrates' Court claiming that sum, with £50 for damages, arising from loss of the use of the vehicle while the repairs were being carried out. He claimed, first that it was a condition of the contract that the jeep had been reconditioned, and that there was a breach of that condition; and secondly, that there were breaches of conditions implied by s. 16 of the Sale of Goods Act 1908, and he pleaded that he elected to treat all such conditions as warranties. On appeal from the Magistrate's judgment for the company, *Held*, 1. That the representation that the vehicle had been "reconditioned throughout" was not a "fundamental term" of the contract (within the meaning of *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 2 All E.R. 668 and *Smeaton Hanscomb and Co. Ltd.* v. *Sassoon I. Setty, Son, and Co.* [1953] 2 All E.R. 1471) so as to disentitle the company to rely on the exempting clause; because, on the assumption that the representation was contractual, the article delivered was not something different in kind from what was contracted for. 2. That the sale was not a sale by description, and, as s. 16 (b) of the Sale of Goods Act 1908 did not apply, no condition, as distinct from a warranty that the article was of merchantable quality, was implied; and, as H. had elected to treat any implied condition as a warranty, he could not claim to treat it otherwise than as a warranty; and, as a warranty, it was excluded by the exempting clause. (*Wallis Sons and Wells* v. *Pratt and Haynes* [1910] 2 K.B. 1003, applied.) *Harper* v. *South Island Holdings Ltd.* (S.C. Christchurch. 1959. March 6. Hutchison J.)

LAW PRACTITIONERS

Solicitor—Sale of Land—Solicitor acting for Vendor and Purchaser—Alleged Representation of Solicitor to Purchaser that Consent of Land Valuation Court to Transaction had been given—No Consent sought or obtained—Solicitor's Representation made in Course of His Employment by Purchaser on being asked by Purchaser True Position of Transaction—Statement not Clothed with Ostensible or Other Authority as being Statement made on Vendor's Behalf—Land Settlement Promotion Act 1952, s. 25 (4). A solicitor acted for both the vendor (since deceased) and the purchaser in relation to a sale of land. It was alleged by the purchaser that the solicitor had made a specific representation to him that the consent of the Land Valuation Court to the transaction had been obtained and that the written contract was valid and binding. In fact, no consent had been sought or obtained. The purchaser claimed, inter alia, from the vendor's executor damages founded on the alleged fraud of the vendor by reason of her solicitor's alleged representation that the consent had been granted. *Held*, 1. That although, as a matter of practice, a vendor's solicitor attends to all matters relative to the consent of the Land Valuation Court, the solicitor in the present case was not the agent of the vendor for the purpose of making the representations alleged, because, though the solicitor transacted all the vendor's business, he also acted for the purchaser and was paid by the purchaser for his services. 2. That it could not be found on the proved facts that the solicitor had made any statement which was clothed with ostensible or other authority as being a statement made by him on the part of the vendor; and that he was not authorized, either expressly or impliedly, to make any such representation, or that he had made it, on behalf of the vendor. (*Lloyd* v. *Grace Smith and Co.* [1912] A.C. 716, and *Barwick* v. *English Joint Stock Bank* (1867) L.R. 2 Ex. 259, applied.) *Uxbridge Permanent Benefit Building Society* v. *Pickard* [1939] 2 K.B. 248; [1939] 2 All E.R. 344, referred to.) 3. That, if any such statement were made by the solicitor, it was made in the course of his employment by the purchaser who wanted to know what was the true position of the dealing. The judgment is reported on this point only. *Molloy* v. *Millow.* (S.C. Invercargill. 1959. March 12. Henry J.)

OCCUPIER'S LIABILITY.

Employee of Tenant injured when making Use of Means of Access in Landlord's Occupation and Control—Such Employee, in Relation to Landlord, a Licensee—Employee's Knowledge of Danger. An employee of a tenant who makes use of the means of access which are in the occupation and control of the landlord, is, in relation to the landlord, a licensee. (*Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74, applied. *Jacobs* v. *London County Council* [1950] A.C. 361; [1950] 1 All E.R. 737, distinguished.) *So held* by the Court of Appeal (Gresson P. and Cleary J., North J. dissenting). The plaintiff, P., was an employee of a firm which occupied part of the first and second floors of a building as tenant of the owner of the building, which also occupied part of it. When he was leaving the building he fell and was injured when he stepped on a rubber mat which lay upon a temporary wooden step situated at the entrance to the building and jutting out on the highway. In an action against the landlord company, the jury found inter alia, that the step and mat rendered dangerous that portion of the highway outside the entrance to the defendant's building; that the step and mat constituted an unusual danger of which

LEGAL ANNOUNCEMENTS.

Continued from p. i.

CHARLES C. MUNRO, LL.B., wishes to announce that he has been joined in partnership as from the first day of April 1959 by ERNEST N. BROUGH, LL.B., who has been associated with the firm for the past twelve months. The practice, previously carried on under the name of MASON & MUNRO, will, as from the above date, be continued by Mr Munro and Mr Brough under the name and style of MASON, MUNRO & BROUGH, at 23 Bowen Street, WAIUKU.

the defendant knew or ought to have known; and that the step and mat constituted a danger of which the defendant knew. They also found that P. was not negligent in a manner causing or contributing to the accident in failing to exercise proper care for his own safety while leaving the building, but was negligent in failing to keep a proper look-out. They awarded him damages, less a reduction of five per cent. as his share of responsibility for the accident. The trial Judge entered judgment for P. The owner of the building appealed. *Held, Per totam curiam*, 1. That there was no evidence to justify the jury's finding of a concealed danger, because P.'s knowledge that the mat could be dangerous showed that, if he had exercised reasonable care for his own safety, the mat would not have been a trap for him; and that therefore P., as a licensee, could not succeed on the basis of occupier's liability. 2. That the defendant was not liable in nuisance, as P.'s accident did not arise out of any user of the highway. (*Jacobs* v. *London County Council* [1950] A.C. 361; [1950] 1 All E.R. 737, applied.) *Held*, by the majority of the Court of Appeal, Gresson P. and Cleary J. that the appeal should be allowed for the reasons: 1. That P. was a licensee, but, even if he was an invitee, the degree of his knowledge and appreciation of the dangerous or potentially dangerous condition of the step and mat disentitled him to recover damages. (*London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737; [1951] 2 All E.R. 1, applied. *Smith* v. *Austin Lifts Ltd.* [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81, distinguished.) 2. That P. was not entitled to recover on the ground of negligence simpliciter, since the case was not one of operations being carried out on the premises or of any act of commission by the defendant; but one in which there was a defective condition of the entrance to the building (*Perkowski* v. *Wellington City Corporation* [1959] N.Z.L.R. 1, followed.) Per North J., dissenting, That the appeal should be dismissed for the reasons: 1. That, since the "common interest" which distinguishes invitees from licensees need not be direct, the landlord of a large commercial building has a common interest in seeing that the employees of his tenant reach with safety their place of business; and, consequently, the employee of the tenant is *quoad* the owner of the premises, an invitee. (*Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, aff. on app. (1867) L.R. 2 C.P. 311, followed. *Mersey Docks and Harbour Board* v. *Procter* [1923] A.C. 253, applied.) 2. That the test of a plaintiff's knowledge, or full appreciation, of the danger is, in some respects at least, a subjective test applicable to the particular man; and that it could not be said that the Court was justified—having regard to the course of the trial and the way in which it was presented to the Judge—in saying that P. had full knowledge and appreciation of the risk he ran when he was injured. (*London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737; [1951] 2 All E.R. 1, distinguished. *Smith* v. *Austin Lifts Ltd.* [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81, referred to.) 3. That contributory negligence on the part of an invitee is not a bar to his claim since the passing of the Contributory Negligence Act 1947. Appeal from the judgment of Haslam J. allowed. *Percival* v. *Hope Gibbons Ltd.* (C.A. Wellington. 1958. October 24, 25. 1959. March 20. Gresson P. North J. Cleary J.)

PUBLIC REVENUE.

Income Tax—Assessment—Profit from the Sale of Land—Property bought for Residence—Subsequent Sale of Sections—Property bought with Intention of Selling Part of It—Such Property not necessarily acquired "for the purpose of selling or otherwise disposing of it at a profit"—Land and Income Tax Act 1923, s. 79 (1) (c). A person who acquires property, having at the time an intention of selling part of it, does not necessarily acquire it "for the purpose of selling or otherwise disposing of that part of it within the meaning of s. 79 (1) (c) of the Land and Income Tax Act 1923 (before its amendment and re-enactment by s. 10 of the Land and Income Tax Act 1951). (*Bedford Investments Ltd.* v. *Commissioner of Inland Revenue* [1955] N.Z.L.R. 978 and *Plimmer* v. *Commissioner of Inland Revenue* [1958] N.Z.L.R. 147, referred to.) In an appropriate case, the proper approach to a consideration of the question whether a property has been "acquired for the purpose of selling or otherwise disposing of it at a profit" within the meaning of those words in s. 79 (1) (c) is to inquire as to the taxpayer's state of mind at the time when he purchased the property in relation to sections which, in fact, were later sold. The onus of proving that the taxpayer did not acquire the property or any part of it "for the purpose of selling or otherwise disposing of it at a profit" is on the objecting taxpayer. *Davis* v. *Commissioner of Inland Revenue*. (S.C. Wellington. 1959. March 25. Hutchison J.)

Income Tax—Trustees' Income and Beneficiary's Income—Operation of Special Provisions with Respect to Trustees—Power of Commissioner of Inland Revenue to elect to treat Income derived by Trustees of Deceased Estate as Trustee's Income or to include Such Income in calculating Assessable Income derived from all sources by the Beneficiary—Land and Income Tax Act 1923, s. 102—Land and Income Tax Act 1954, s. 155. Under the trusts of the will of her deceased husband, the widow was entitled to the income from the residue of his estate, of which the principal asset was a farm, until her death or remarriage. She remarried on February 17, 1951, up to which date she was entitled to the income. The deceased (and after his death, his trustees) made returns of income for years commencing on October 1 and ending on September 30, each of which was deemed to be a return for the year ending on th last preceding March 31. On February 17, 1951, when the widow remarried, the sheep on the farm had been shorn, but the wool was not sold. The wool was sold on September 18, 1951. It realized £4,247 0s. 5d. In due course, the trustees made their return of income up to September 30, 1951. They did not include the amount of the proceeds of the wool, under s. 102 (a) of the Land and Income Tax Act 1923, as income derived by the widow to the receipt of which she was entitled in possession "during the same income year," but treated it as "trustees income" returnable under 102 (b) of that statute. The Commissioner of Inland Revenue, in calculating the assessable income derived by the widow during the income year ended on March 31, 1951, included therein the amount of £4,247 0s. 5d., subject to her being credited with the tax on the income derived by the trustees and assessed to them. On a Case Stated by the Commissioner of Inland Revenue under s. 35 of the Land and Income Tax Act 1923, *Held*, 1. That, as the words "income year" in s. 102 (a) of the Land and Income Tax Act 1923 refer to a year commencing on April 1 and ending on March 31, and as the trustees "derived" the income at the time of the shearing of the wool, some time before February 17, 1951, within their balance-year ended September 30, 1951, this income for the purposes of the Act, must be deemed to have been derived by the trustees during the income year ended on March 31, 1951. (*Marshall* v. *Commissioner of Taxes* [1942] N.Z.L.R. 265; [1942] G.L.R. 184, followed.) 2. That the widow did not become entitled to the receipt in possession of the income until the wool was sold and its net profits ascertained on September 18, 1951. Therefore, the income was not "income derived by a beneficiary entitled in possession to the receipt thereof," under the trusts of the deceased's will, during the income year ended March 31, 1951. (*Dalrymple* v. *Commissioner of Taxes* [1934] N.Z.L.R. 366*n* and *Doody* v. *Commissioner of Taxes* [1941] N.Z.L.R. 452; [1941] G.L.R. 218, followed.) 3. That, accordingly, the income derived by the trustees was not income to which the provisions of s. 102 (a) applied; and, by virtue of s. 102 (b) it was assessable for tax as income in the hands of the trustees. 4. That, by virtue of s. 72 (2), a taxpayer who has derived income is liable to be assessed for income tax on that income, and he remains liable to be so assessed notwithstanding that the same income is liable to assessment in the hands of trustees under the provisions of s. 102 (b), subject, however, to the qualification that the income cannot be cumulatively taxed under both sections. 5. That, having regard to the terms of s. 90, the income represented by the shorn wool was "dealt with in the interest [and] on behalf of" the widow, when the wool itself, to the proceeds of the realization of which she was indefeasibly entitled, was taken from the sheep and placed in store in preparation for sale in pursuance of the trusts of the will; and that she "derived" the income as and when the trustees did so. (*Luttrell* v. *Commissioner of Taxes* [1949] N.Z.L.R. 823; [1949] G.L.R. 469, applied.) 6. That the widow was liable to be assessed for the income directly, if the Commissioner elected so to assess her, or under s. 102 (b) if he chose to use that provision; and, as he had not assessed the income under s. 102 (b) he was free to assess the widow direct. Consequently, the Commissioner properly included the amount of the income, £4,247 0s. 5d., in calculating the income derived by the widow during the income year ended on March 31, 1951. *Marshall and Others* v. *Commissioner of Inland Revenue*. (S.C. Wellington. 1959. March 25. Turner J.)

Note. Sections 72 (2), 90, and 102 of the Land and Income Tax Act 1923 are now s. 77 (2), 92, and 155 of the Land and Income Tax Act 1954, respectively. Section 4 of the Finance Act (No. 2) 1937 is now s. 8 of the Land and Income Tax Act 1954.

(*Concluded on p. 112.*)

CAPITALIZATION OF FAMILY BENEFIT.

Guide to Practitioners.

The Family Benefits (Home Ownership) Act 1958 was enacted to give a statutory basis for the carrying out of the Government's scheme for capitalization of family benefit. It has been followed by Regulations of the same name, recently gazetted as S. R. 1959/37.

This article deals briefly with the Act and Regulations as far as they affect the profession. The principle of the scheme is to enable certain beneficiaries who are entitled to the family benefit under the Social Security Act to draw in advance and in one sum the future payments in respect of the child (or children) and to use the money for an "approved" purpose.

Beneficiary.—This is defined in the Act (s. 2) as the person to whom the family benefit is payable, being a parent of the child. The definition thus excludes persons *in loco parentis* to the child who are drawing the family benefit, e.g. guardians. Adopting parents will qualify as parents. The beneficiary in most cases will be the mother, and it is thus she who will make the election whether or not to apply to capitalize.

Child.—The child in respect of whom capitalization is sought must have attained the age of one year and not have attained the age of sixteen years. Capitalization may be sought in respect of one or more children of the beneficiary in order to provide the required sum.

Certificate of Eligibility.—Eligibility to capitalize will be decided by the Social Security Commission, and if the Commission is satisfied that approval should be given (as distinct from the later approval of the specific proposition for which the applicant requires the money), it will issue a Certificate of Eligibility. This certificate has a currency of twelve months, after which renewal must be sought if wanted. The family benefit ceases to be payable as from the date specified in the certificate.

Maoris.—Where a Maori who is being assisted with loan finance by the Maori Affairs Department applies to capitalize, she will still have her eligibility established by the Social Security Commission; but the Maori Affairs Department will receive the application and, if eligibility is established, attend to completion of the matter from there on.

Purpose of advance.—The purposes for which an advance may be approved are set out in Reg. 5 and are briefly:

(a) The acquisition of land and erection on it of a dwelling to be used as a home for the family.

(b) Acquisition of land with a new dwelling thereon, not previously occupied, for use as a family home.

(c) Erection of a dwelling for use as a family home on land already owned by the beneficiary or by her and her spouse.

(d) Alterations and additions to an existing dwelling similarly owned, to provide for the needs of the family.

(e) The discharge or partial discharge of encumbrances existing at January 1, 1959 on a family home owned on that date by the beneficiary.

(f) The payment or part payment of purchase money under a registered agreement for sale or under registered lease or licence under which the beneficiary is purchasing the fee simple of land, the dwelling on which is being used as a family home.

(g) The discharge or partial discharge of any other debt owing at January 1, 1959, incurred in respect of the acquisition of land, erection of a dwelling or making alterations to a dwelling provided in each case the dwelling is the family home.

Application for advance.—The beneficiary is to apply to her local social security office or agent to have her eligibility established. If she is married, the Commission may require her husband to join in the application. Her application for an advance on her specific proposition is to be made to the local office of the State Advances Corporation. She can seek to have her eligibility established without having a specific proposition in view. If, for example, she is proposing to erect a house it may assist her if she can first verify that she will be permitted to capitalize. She can then locate a section, builder, etc., and then submit her application for an advance, with plans and specifications, for approval If the proposition is approved she is then offered an advance of the approved capitalized sum by the Corporation.

Amount of advance.—This must be not less than £200 (s. 3), nor exceed £1,000. The table to the Regulations shows what advance may be granted depending on the number of four-weekly pay periods for which the benefit is capitalized.

Land.—Freehold and leasehold interests in land are admitted by the Act, but if leasehold, the lease must give reasonable protection for the lessee's improvements. Her solicitor will be asked to verify this before forwarding his usual certificate. The land must be either (a) in the sole name of the beneficiary, or (b) settled as a joint family home.

Charge.—The advance will be secured by a charge signed by the beneficiary and registered against the land. The Regulations set out the form of charge, which is in short form with usual covenants implied. It is payable on demand. If the advance is used to repay or reduce an existing mortgage it ranks in priority order on the title at the same point as the repaid or reduced mortgage. Authority for this is contained in s. 7 of the Act. For instance, if there is a first mortgage of £1,500, a second of £500 and a third of £200, and the advance is used to repay the second mortgage, it can be registered following release of the second mortgage and will obtain priority over the third mortgage automatically. The charge will specify in a schedule what ranking it is to take. If the second mortgage is being reduced by, say, a £300 advance, there would have to be registered a memorandum of reduction of the second mortgage, following which the charge is to be registered. The £200 remaining owing on the second mortgage thus will have priority over the charge. There is no interference with existing priorities;

the charge will merely take the place, pro tanto, of the encumbrance repaid or reduced.

Repayment of charge.—Normally, the advance is automatically cleared when the child whose benefit has been capitalized reaches the age of sixteen provided the property has continued to be used as a home for the child. If, however, circumstances arise whereby the benefit, if it had not been capitalized, would cease to be payable or the house ceases to be used as a home for the family (e.g. it is sold or let), repayment of the advance will be required. If the child dies within one year of the date of capitalization, the advance remains as a charge on the property until repayment is required. If the child dies more than one year after the date of capitalization and repayment has not for some reason been earlier demanded, repayment will not be required. To cover all these circumstances, the charge is formally made payable on demand. Reg. 10 deals with this aspect. The charge is taken in the name of the State Advances Corporation of New Zealand, except in the case of a Maori being assisted by the Maori Affairs Department.

The charge will be registered in duplicate in the ordinary way, but is exempt from stamp duty and registration fees. The duplicate certificate of title or lease will require to be produced to the District Land Registrar.

Interest.—Interest is payable in terms of Reg. 12 if demanded.

Life Insurance.—There is built into the prescribed table, which shows the amount of the advance available having regard to the age of the child, a life insurance premium which repays the advance if the child dies after one year from the date of advance. Hence, if an advance is made in respect of a child aged three years and it dies at the age of five years, the balance of the advance is written off. The first year from the advance, however, is not covered in this way and if the child dies at the age of three-and-a-half years the balance becomes due.

Administration of the scheme.—On receipt of the application, the Social Security Department will decide the eligibility of the applicant. If the application is approved, a Certificate of Eligibility will be issued showing the capitalized value of the benefit up to which an advance may be made if the housing proposition is accepted. When the applicant has a specific housing proposition she should apply to the State Advances Corporation for an advance. Her Certificate of Eligibility should accompany this application. If the Corporation has no office near the town in which the applicant lives, she can lodge the application for advance at the nearest social security office. The State Advances Corporation will then examine the specific proposition, and if an advance is approved, the Corporation will make a formal offer to the applicant. On acceptance of this offer the Corporation will then issue instructions to the solicitors nominated by the applicant to act for her (if approved by the Corporation) to prepare and register the charge. The solicitors will furnish their certificate in the usual way and payment of the advance will be made to them by the Corporation. The chief differences between this type of advance and ordinary loans of the Corporation are:

(i) The land is to be owned by the applicant or must be settled as a joint family home immediately that is possible.

(ii) If the land is held under lease or licence, verification that the lessee's improvements are protected is expected of the solicitor.

(iii) The solicitor will be expected to ensure that the advance is applied to the approved purpose.

(iv) Careful attention will have to be paid to registration of the charge to give it the ranking required in terms of the instructions.

(v) The whole advance will be paid in one sum upon receipt of a satisfactory solicitor's certificate.

(vi) In certain circumstances (chiefly where a private mortgagee is financing the beneficiary), the solicitor will be asked to verify that the finance is available and supply brief particulars of the mortgage.

(vii) If any mortgage on the property is overdue, or due for repayment shortly, the solicitor will be asked to verify that satisfactory renewal arrangements have been made.

Where the purpose of the advance is to erect a dwelling, the beneficiary will usually require payment of the advance before any mortgage money becomes available. Most mortgagees require the mortgagor's contribution to be made first; the advance is regarded as the mortgagor's contribution and will accordingly be made available on the taking of the charge. If, however, it is proposed to settle the property as a joint family home, as this cannot be done until the dwelling is finished and occupied, the husband and wife will be required to undertake to settle the property immediately they can do so. The spouses' undertaking to do this will be embodied in the order for payment of the advance at the foot of the solicitor's certificate. The solicitors will be asked to follow up completion of the joint family home application immediately that becomes possible. In the meantime, however, the charge may be taken from the present registered proprietor, e.g. husband or wife, and registered in its ranking order. If the spouses do not carry out their undertaking, the solicitors are asked to advise the Corporation promptly. Repayment of the advance may then be demanded.

Arbitrator's Jurisdiction.—"Their Lordships . . . think it would be contrary to principle to hold an award bad because the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms excluded on the face of the award. It is true that in inferior Courts the maxim '*Omnia praesumuntur rite esse acta*' does not apply to give jurisdiction, as was laid down by the Court of Queen's Bench in *R.* v. *All Saints, Southampton (Inhabitants)* (1828) 7 B. & C. 785; 108 E.R. 916, and by Willes J., in *London Corporation* v. *Cox* (1867) L.R. 2 H.L. 239. That rule is applicable to the award of an arbitrator where no jurisdiction is shown to make the award, but where, as in the present case, there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction, it has no application. In such a case the award can only be impeached by showing that the arbitrator did in fact exceed his jurisdiction."—Lord Davey in *Falkingham* v. *Victorian Railways Commission* [1900] A.C. 452, 463.

THE CHATTELS TRANSFER ACT.

Oddities and Oddments

By G. CAIN.

(*Concluded from p. 89.*)

SECTION 26.

Section 26 says that nothing in the last three sections (s. 23, inventory of chattels; s. 24, instrument void if grantor not owner of chattels; and s. 25, defeasance) is to render an instrument void in respect of:

(a) stock, wool, and crops;

(b) fixtures, plant, or trade machinery substituted for any of like nature described in the instrument;

(c) tractors, engines, machines, vehicles, implements and farming plant of every description described in such instrument and used upon or in connection with any land or premises specified in the instrument.

The last-mentioned (c) was added by an amendment to the Act in 1931 which also added a proviso to s. 24 to the effect that, if an instrument over chattels is expressed to be given as security for a loan to be expended in the purchase of chattels, the grantor is deemed to have acquired the chattels at the same time as he signs the instrument.

The exception of (a)—stock, wool, and crops—was necessary because special provisions follow as to these items. Obviously, if s. 28 is to make special provision as to how stock are to be described, the general s. 23, relating to all types of chattels, must be excluded. The exception (b), substituting fixtures, plant, and trade machinery, is, however, an independent provision standing proprio vigore. It is a code (although a very abbreviated and not too happily expressed or placed one) relating to these items, just as s. 28 and s. 29 form a code for stock and after acquired stock.

It is (c), however, that is the puzzle, and I fear I must allege again faulty drafting. There is no element in the subsection of substitution; simply a declaration that the last three sections shall not render an instrument void which affects chattels of the named type which are *described in the instrument.* Now if e.g., a tractor is described in the instrument (which expression, we must surely take it, means described in terms of the Act) what is the purpose of saying that s. 23 does not apply to it? Section 23 says the instrument must describe the chattels it affects; s. 26 (c) says, e.g., that tractors described in the instrument need not be described in the instrument. I have read that theologians consider that the only limitation on God's creative powers is that He is not able to bring about a situation wherein X can be non-X at the same moment; existence and non-existence of the same thing cannot exist at the same time. Our old friend, the Chattels Transfer Act, however, is impeded by no such inhibitions.

Moving to s. 24, which says that an instrument is void, etc., in respect of chattels which the grantor acquires after execution of the instrument, we are told by s. 26 (c) that this does not apply, e.g. to a tractor described in the instrument. So that for some reason, and not necessarily or logically connected with the proviso to this section added by the same 1931 amendment (as outlined above), a grantor can charge now a tractor he proposes to purchase in ten years' time, even though the loan money is not to be applied in its purchase, so long as it can be described in the instrument. Obvious comments are: the two sections overlap; the condition necessary in the proviso is not made necessary in s. 26 (c); next, why out of all chattels are tractors and other s. 26 (c) chattels in such an unusual position? And if the future purchase of a chattel is in view it may be difficult to describe it in the instrument in the first place in such a manner as will adequately identify it, unless we are to assume that "described in such instrument" in s. 26 (c) does not require such a description as that description necessary under s. 23 to save the instrument from the Official Assignee.

The last section declared inapplicable is s. 25. As I have suggested that this section should be repealed, I can only agree with s. 26 (c) here, but would make its application general to all chattels.

There is another oddity about this s. 26 (c). It deals with tractors, engines, machines, vehicles, implements, and farming plant of every description. Are the earlier words to be construed *ejusdem generis* with "farming plant"? Tractors are usually farming plant but, in these days of earthmoving equipment, not necessarily so. The other words are quite equivocal and need not refer to farming plant at all. This question has practical importance. If a grantor in respect of a tractor is using the tractor as farming plant, i.e. is farming with it, the instrument covers, it seems, by virtue of s. 26 (c) a future substituted tractor so long as it can now be described in the instrument. But an earthmoving contractor could not do so. On the other hand, if the word "engines", for instance, means engines in general and not those which form part of farming plant, grantors of any occupation can charge such future engines as they can now describe. Also there is an unpleasant generality about the expression "farming plant". There will surely arise doubtful items which may or may not be farming plant; the farmer's wife's deepfreeze unit; and so on. Then again s. 26 (b) and (c) appear to stand separately, but, although not qualified or cross-referenced to each other, are not mutually exclusive. The chattels in question may fall within the fixtures, plant or trade machinery of (b) if there some doubt about whether they fall into (c).

In fact there are so many difficulties with this section that the more prudent course to adopt when a farmer or any other type of grantor in respect of whom s. 26 (b) can clearly apply wishes the co-operation of the grantee in disposing of an item of plant for the purpose of acquiring another, is for the grantee to ask for a further security over the new item as a condition of releasing the old one.

Successive Securities.

The principle of s. 34 is clear enough: a succession of instruments cannot be given, say, every twenty days and so avoid the necessity for registration. But the section raises some practical difficulties.

First, it is not uncommon for an instrument by way of security to be executed before the loan money is forthcoming from the lender and this may not happen until more than twenty-one days after the date of execution. If the instrument has not been registered in anticipation of receipt of the loan money, it is too late to register it when the money is advanced. If a new instrument is executed, does it become a successive security? The practical view is that it does not because s. 34 operates only if the later instrument "is given as a security for the same debt as is secured by the prior instrument". The prior instrument in our example secures no money because none has been advanced; it is therefore a nullity and can be ignored. If this view is not acceptable the only other course is to apply for extension of time for the filing of the first instrument; registration of the second will not help the grantee, as it would be void under s. 34. What if the first instrument above is merely re-executed at a later date, its date changed and the affidavit of due execution resworn? There seems no objection to this, for the money is not advanced and the grantor can legitimately re-execute the instrument on the date he gets the money, or a few days earlier in anticipation of its receipt. This view may be arguable because s. 8 requires an instrument to be registered within twenty-one days of its execution, but I suggest a gloss is permissible on these words by adding that where an instrument secures nothing, a later instrument taken to secure the earlier intended debt is not a successive instrument. The ideal course is naturally to register the first instrument within the twenty-one days; if for some reason the loan falls through it can be lapsed or satisfied by the lender.

A second difficulty is this. A written agreement to execute an instrument is itself an instrument. This follows from the definition of "instrument" (item f) and see *Ball on Chattels Transfer*, 15. Now it frequently happens that a borrower will make written application to a lender offering security over chattels and the lender replies with an offer of a loan in which this security is stipulated; the borrower may in that offer be asked to accept formally the offer, and does so. Quite plainly this correspondence constitutes an instrument as defined. It therefore requires registration within twenty-one days. But it is not in registrable form and is obviously intended to be followed by a formal instrument which will be registered. Is this formal instrument then a successive security? I can only submit that this question should be answered similarly to my first point; that as the loan money is not advanced at date of the correspondence, the contract thus created can therefore be disregarded for registration purposes; the formal instrument duly taken and registered is sufficient protection to the grantee. Indeed practitioners who hesitate to agree to this suggested treatment of the first type of case may waver when faced with the paralysis of conveyancing in respect of stock-security lending if this correspondence, being a registrable instrument, must be registered, failing which the formal security is avoided. The point is an interesting one and calls for clarification before the Official Assignee is successful in raising it against a lender.

Hire-purchase Agreements.

The exact position of these under the Act is puzzling. Perhaps a few general principles should be mentioned first.

(1) Customary hire-purchase agreements (s. 57) are not "instruments".

(2) There two broad types of hire-purchase agreement at common law: the *Lee* v. *Butler** agreement where the purchaser is bound to purchase although title to the goods may not pass to him until he has paid the purchase price in full, and the *Helby* v. *Matthews*† type where the hirer has an option to purchase or return the goods at any or some point of time. Although the distinction between the two types is less important here than in England because of our s. 57, there is some residual effect still operating here, Because in the *Lee* v. *Butler* type the hirer has agreed to purchase the goods he could at common law pass title to the goods in fraud of the seller, and to avoid this in England the *Helby* v. *Matthews* or "option" agreement is used. In New Zealand s. 57, dealing with customary hire-purchase agreements, applies to both types and s. 57 (5) deprives the hirer of any ability to confer title on a third party.

What however is the position of a "non-customary" hire-purchase agreement? First, is such a hire-purchase agreement an "instrument" under the Act? In England, registration is not necessary because the hirer is not the owner of the goods and the licence to seize merely empowers the owner to retake possession of his own goods: *3 Halsbury's Laws of England*, 3rd ed., 265. Our definition of "instrument" in s. 2 is, however, wider than the corresponding English definition. *Garrow's Law of Personal Property*, 3rd ed., 97 accepts without discussion that hire-purchase agreements (other than customary agreements) are bailments which should be registered. Mr Ball, on the other hand, considers they are not bailments and would not require registration unless they cloak a loan transaction (*Law of Chattels Transfer*, xxiv, 23, 46), although registration is desirable to avoid any question of 'order and disposition' on bankruptcy of the hirer. However, the case on which this statement was founded, *Booth Macdonald* v. *Official Assignee of Hallmond, (No 1)* (1913) 33 N.Z.L.R. 110; 16 G.L.R. 103, does not seem to go so far, as the Court appears merely to have decided that the particular hire-purchase agreement before it was not a bailment, and we since have if I may respectfully say so, the careful judgment of Turner J. in *Motor Mart* v. *Webb*, [1958] N.Z.L.R., 773 where he held that the element of bailment could co-exist with either a *Lee* v. *Butler* or a *Helby* v. *Matthews* type of hire-purchase agreement.

The result seems to be, then, that the "non-customary" hire-purchase agreement is a bailment and is therefore an "instrument" under the Act and registration is indicated. What then are the penalties of failure to register it? Section 18 (1) can have no application, for the hirer is not the owner of the chattels. Subs. (2) of this section, however, mentions bailments and says that chattels in a registered bailment are not deemed in the order and disposition of the grantee on his bankruptcy. If, however, the question is not bankruptcy but sale or attempted sale by the hirer, we are left to consider s. 19 which

* [1893] 2 Q.B. 318
† [1895] A.C. 471

says that an unregistered instrument is void against the bona fide purchaser. In *General Motors Acceptance Corporation* v. *Traders Finance Corporation Ltd.*, [1932] N.Z.L.R. 1; [1931] G.L.R. 513 the Court of Appeal held that unregistered hire-purchase agreements were void against bona fide purchasers because of this section, but, as pointed out by Mr Evans Scott in (1933) 9 N.Z.L.J. 40, the decision cannot be supported on this ground, because the vendor did not rely on an unregistered instrument to prove his title —he had that title antecedently and the failure to register the agreements was irrelevant; if the hirer was in a position to pass title it was because he was a buyer in possession under a *Lee* v. *Butler* agreement and his wrongful disposition was nevertheless good against the vendor under s. 27 (2) of the Sale of Goods Act 1908. If, on the other hand, the agreement had been a *Helby* v. *Matthews* one and the hirer was not acting as a mercantile agent, he could not pass a title.

The ability of the buyer in possession to pass title under s. 27 (2) of the Sale of Goods Act is, however, subject to the rights of the vendor if embodied in an instrument registered under the Chattels Transfer Act.

The position appears, then, to be that registration of a hire-purchase agreement of the *Lee* v. *Butler* type (not being a customary agreement) gives protection to the vendor:

(a) against loss of the chattels in order and disposition of hirer on his bankruptcy (s. 18 (2))

(b) against unauthorized disposition to bona fide purchaser by hirer as a buyer in possession (s. 27 (2)) Sale of Goods Act.

But, if the agreement is the *Helby* v. *Matthews* type, the hirer cannot pass title as he has not "agreed to buy" the goods, so that s. 27 (2) of Sale of Goods Act does not operate and failure to register the instrument is material only on bankruptcy of the hirer.

Section 19 has no application.

If the instrument is a "customary" hire-purchase agreement under s. 57 the order and disposition clause does not apply (subs. (4)) nor can the hirer pass a title (subs. (5)) despite the generality of s. 27 (2) of the Sale of Goods Act 1908, the proviso to which should be read as regarding as a registered instrument, an instrument under s. 57.

Gifts and the Act.

It is elementary that, if a donor who has made a complete gift of a chattel remains in possession of it, the donee's property in the chattel is liable to be defeated under ss. 18 and 19. *Garrow's Personal Property*, 3rd ed., 132, goes further and says:

> If a gift is made by an instrument registrable under the Chattels Transfer Act 1924, and the instrument is duly registered, the property passes without delivery.

Now there are three essentials for a valid gift which is not made by deed—expression of intention of donor, delivery, and assent of the donee. The last-named can usually be presumed, and most litigation as to gifts hinges on the nature of the expression of intention, and the method of delivery. If the gift of a chattel is made by deed, delivery is not necessary: *18 Halsbury's Laws of England*, 3rd ed., 382.

As Professor I. D. Campbell points out to his Property Law classes, the above statement in *Garrow* appears to be incorrect. No authority is quoted for it, and it is not supportable in general principle. If the gift is evidenced by a deed, delivery is not necessary, and if possession is remaining in the donor, registration under the Act is desirable to protect the donee, as we have said. But registration gives no special validity to the gift; validity depends on the factors mentioned above. If, for instance, the instrument effecting the gift were not drawn in the form of a deed and delivery were not made, registration under the Chattels Transfer Act could not cure the defect.

The statement in *Garrow* appears to be based on a misapprehension of the effect and purpose of the Act. The Act declares void against certain persons unregistered instruments given by owners of chattels who remain in possession of them. It in no sense confers any title to those chattels. It does not say that upon registration of an instrument which is insufficient to pass title to chattels, title shall nevertheless be thereupon passed. To say this would be to claim for the Act the indefeasibility principle of the Land Transfer Act where, for instance, in the unsatisfactory Court of Appeal decision in *Boyd* v. *Mayor, etc., of Wellington* [1924] N.Z.L.R. 1174 registration of an invalid instrument was held to confer a good title. There is nothing like this in the Chattels Transfer Act; there the reward for registration is protection against certain eventualities and not the giving of special sanctity to an imperfect gift.

Affidavit of Due Execution.

This requirement is imported from the English legislation. An affidavit does fix with certainty the date of execution by the grantor of an instrument, and this certainly is necessary because registration should be effected within twenty-one days. Should, however, the date given in the instrument suffice without necessity for an affidavit?

The requirement of an affidavit limits the possibility of false dating, but many other important dates have to be decided by evidence which falls short of an affidavit in virtue. Whatever the justification may be, however, for the grantor's execution to be so verified, there appears to be only nuisance value in asking that the grantee's execution, upon repayment, should also be verified. Nothing depends on the satisfaction being registered within twenty-one days of execution or on the exact date the satisfaction was signed: nothing that is not susceptible of proof in the ordinary way without affidavit. The requirement is unnecessary and should be dropped from the Act. The same remarks apply to the affidavit of renewal.

A simpler procedure would be to file within the five-year period a certificate from the lender or his agent (e.g. solicitor) to the effect that the instrument is still current.

The use of the affidavit in a conveyancing transaction (as a chattel loan is) is archaic and inconvenient.

ESTOPPEL AS SEEN FROM TWO UNUSUAL ANGLES.

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

The two recent cases considered in this article examine the question of estoppel from rather unusual angles. They are not covered by the rather controversial case of the *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130, [1956] 1 All E.R. 256, and by the comments flowing therefrom in an ever-increasing volume.

A. EXECUTION OF DOCUMENT AFTER REPRESENTATION THAT IT WOULD NOT BE FULLY ENFORCED.

City and Westminster Properties (1934) *Ltd.* v. *Mudd* [1958] 2 All E.R. 733 was not the usual type of estoppel case where it is pleaded that a representation has been made *after* contractual relations existed between the parties to the effect that one party to the contract would not rely on his rights. It concerned a lease of business premises, the draft of which had contained a covenant by the lessee as follows :

> To use the demised premises as and for showrooms, workrooms and offices only and not use exercise or carry on or permit or suffer to be used exercised or carried on in or upon the said premises or any part thereof the trades or businesses of (then followed a long list of prohibited trades and businesses) and not to permit or suffer the demised premises or any part thereof to be used as a place for lodging dwelling or sleeping.

There was the usual proviso for re-entry by the landlords upon breach of any of the leese's covenants.

At the time, when the draft leases were being considered by the respective solicitors for the landlord and the lessee, the lessee objected to the words restricting the user as a place for lodging, dwelling, or sleeping. It appears that the lessee carried on the business of an antique dealer on the premises, and his solicitors informed the landlord's solicitors that their client lived entirely alone, and that he had pointed out to them that unless he resided at the premises he could not obtain any burglary insurance of his very valuable stock of antiques. The landlord's solicitors wrote that they could not agree to the exclusion of these words, as they feared that user for residential purposes would bring the premises within the Rent Restrictions Acts. Desultory correspondence followed, but eventually the lease was executed with the following words omitted :

> and not to permit or suffer the demised premises or any part thereof to be used as a place for lodging dwelling or sleeping.

In May, 1956, the landlord's managing-director having visited the premises and having learned that the lessee was living there, wrote giving the lessee notice to quit. The landlord issued a writ claiming forfeiture on the ground of breach inasmuch as the lessee was residing on the premises. This alleged breach of covenant the lessee denied ; but he admitted that he was sleeping there and always had done so in order to guard the valuable stock of his business which he did not insure. Alternatively, the lessee alleged that the landlord had waived the covenant, or, alternatively, *was estopped from relying on it.* The lessee also counterclaimed for rectification of the lease by the addition of the following words to the covenant as to users : " provided that nothing herein shall prohibit the said Dixon Horace Mudd from personally residing in the demised premises." The lessee also claimed relief against forfeiture.

As to the question of the construction of the covenant, the Court held that it was not permissible for it to look into the past history of the matter or to rely on the fact that the lessee had been living on the premises to the landlord's knowledge ; nor could the fact be called in aid that express words of prohibition as to residence had appeared in the draft but were not in the lease as executed, none of these matters being surrounding circumstances which could be called in aid to construe the language used. But the Court held that *the nature* of the property was a matter to be taken into consideration, and the fact that these particular premises were not suitable for a dwelling-house, taken with the fact of a covenant to use them for showrooms, workrooms, and offices only, clearly showed that the defendant was in breach of covenant in using the premises for residential purpose.

The Court also refused to grant rectification of the lease. In this connection, Harman J. said :

> The tenant sought to have inserted a proviso expressly allowing him to reside on the premises. Now, according to his evidence, which I accept on this point, this was the very request which he made to Mr Jones on the telephone in December, 1947, and which Mr Jones categorically refused, being under the impression that this would be a breach of the covenants of the head-lease. The tenant argued that both sides did in fact intend that the defendant should be allowed to reside ; but even if that be so, there was clearly no common intention to insert such a provision in the lease, for the very clear reason that the landlords wished to avoid the mischief of the Rent Restrictions Acts. The plea of rectification therefore fails.

It may be mentioned that Jones was at the date of the lease the then property manager of the landlord, but, at the time of the hearing of the case he had left the employment of the landlord company.

The lessee also relied on the doctrine of what the learned Judge called " promissory estoppel." Harman J. said :

> There remains the so-called question of estoppel. This, in my judgment, is a misnomer and the present case does not raise the controversial issue of the *Central London Property Trust Ltd.* v. *High Trees House Ltd.* This is not a case of a representation made after contractual relations existed between the parties to the effect that one party to the contract would not rely on its rights.

According to the defendant's evidence, just before the lease was issued he telephoned to Jones and told him that he would not sign the lease with a clause about not sleeping on the premises. He added that he asked Jones to have a clause inserted stating expressly that he could sleep there, but Jones replied that this was impossible because it was against the terms of the head-lease. This was in fact untrue, but Harman J. found that it was clear that Jones believed his own statement. According to the defendant, Jones added that the plaintiffs would make no objection to his continuing to reside there if he would sign the lease. Jones, who at the date of the Court proceedings had left the employment of the plaintiffs and was only called at an adjourned hearing, stated that he had no recollection of this conversation. He admitted in cross-examination that the plaintiffs must have known that the defendant was living on

the premises, and said that the plaintiffs' object was to avoid the mischief of the Rent Restrictions Acts. He added that on paper his attitude was "business premises only," but he was less emphatic when dealing with the defendant personally.

Continuing his judgment on the issue of promissory estoppel, Harman J. said:

> If the defendant's evidence is to be accepted, as I hold it is, it is a case of a promise made to him before the execution of the lease that, if he would execute it in the form put before him, the landlords would not seek to enforce against him personally the covenant about using the property as a shop only. The tenant says that it was on reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted on by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile.

In his Lordship's opinion, the plea that this was a mere licence retractable at the landlords' will did not bear examination. The promise was that so long as the defendant personally was the tenant, so long would the landlords forbear to exercise the rights which they would have as to residence if he signed the lease. He did sign the lease on this promise, and was therefore entitled to rely on it so long as he was personally in occupation of the shop. And so the defence of estoppel succeeded, and the action was dismissed. Harmen J. added:

> I may add that if I had been of a different opinion, I should certainly have allowed the defendant relief against forfeiture under the Law of Property Act; but that of course would have been on the footing that he ceased to reside or sleep on the premises, which would have been a different result.

B. Lease by Estoppel with Reference to the Doctrine of Ultra Vires.

In *Rhyl Urban District Council* v. *Rhyl Amusements Ltd.* [1959] 1 All E.R. 257 (also a decision of Harman J.) by virtue of a local Act the Rhyl Urban District Council in 1932 leased premises to Rhyl Amusements, Ltd. The consent of the Minister, which was required for a lease under s. 177 of the Public Health Act 1875, was not obtained. The defendants continued in occupation of the premises and paid rent regularly each year in accordance with the terms of the lease. On October 28, 1955, the Council served notice under s. 25 of the Landlord and Tenant Act 1954 to terminate the defendant's tenancy on May 1, 1956, stating that an application for a new lease would be opposed. In the present action, which was begun by writ issued on September 13, 1956, the Council claimed declarations that the lease was void and that the notice served on October 28, 1955, under s. 25 of the Landlord and Tenant Act 1954 was valid. The defendants claimed for damages for the Council's failure to obtain the necessary consent to the lease of 1932, and to meet this claim the Council pleaded the Limitation Act 1939 (which our Limitation Act 1950 follows substantially).

The Court held that the only power of letting which the plaintiffs had at the time of the lease of 1932 was that contained in the Public Health Act 1875, s. 177, of which provides:

> Any local authority may, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same.

By 1932, the Local Government Board had been superseded by the Ministry of Health. Harman J. said:

> If, therefore the consent of that body was not obtained the lease was, in my opinion, ultra vires and void.

The question of consent or no consent was one of fact. After examining the evidence on this point, His Lordship said:

> Nevertheless, I am of opinion that the plaintiffs have sufficiently proved that no consent was applied for, still less given, to the grant of the lease of 1932, which was, therefore, in my judgment not merely voidable but void.

It may not be out of place here to observe that, in New Zealand, if a lease requiring a statutory consent is registered under the Land Transfer Act without such consent, the lessee nevertheless obtains an indefeasible title by virtue of the State-guarantee: *Boyd* v. *Mayor etc., of Wellington* [1924] N.Z.L.R. 1174; G.L.R. 489. As it is the practice in New Zealand for long-term leases to be registered, such a case as *Rhyl Urban District Council* v. *Rhyl Amusements Ltd.* would in New Zealand in all probability take a different course by reason of the indefeasibility provisions of the Land Transfer Act.

Now it must be mentioned here that before the issue of the 1932 lease the same lessee had held the premises under a lease dated 1921. In 1932, there were negotiations for a new lease, as a result of which, by a deed of surrender made on June 23, 1932, the defendants surrendered to the plaintiffs all the property comprised in the lease of 1921, such term to merge in the reversion. This deed, after reciting the lease of 1921, further recited:

> And whereas the company has agreed with the council for the surrender to the council of the said premises described in the schedule hereto for the unexpired residue of the said term to enable the council to grant to the company a new lease of the said premises.

And the habendum to the deed of surrender was in the following form:

> To hold unto the council and their successors for all the unexpired residue of the said term to the intent that the said term may merge and be extinguished in the freehold and inheritance of the said premises. And to the further intent that the council may forthwith grant to the company a new lease of the surrendered premises.

It was argued by the defendants and so pleaded that the landlords were *estopped* from denying the validity of the lease of 1932. The plea was based on the fact that the relations of the parties had been regulated by it ever since 1932, and that in that year the defendants changes their position by surrendering the lease of 1921 on a *promise* to grant the new lease.

His Lordship continued:

> The representation so acted on must have been that the plaintiffs had power to grant a valid new lease. If the plaintiffs were private people this would have been a strong plea, but in my judgment a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires: see *Minister of Agriculture and Fisheries* v. *Hulkin*, an unreported case alluded to by Cassels J., in *Minister of Agriculture and Fisheries* v. *Matthews* [1950] 1 K.B. 148; [1949] 2 All E.R. 724.

Harman J. then cited a long extract from the last-mentioned case, such extract ending thus:

> The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel. That point, I think, can be shortly disposed of.

His Lordship commented that that seemed to him good sense as it was good law.

However, it was ingeniously argued that the instant case was not one of the Council's having no power, but that it had the power if it obtained the necessary consent and that the doctrine of ultra vires did not apply except where no power existed, so that the Council might be estopped from denying that it had obtained the consent.. Of this argument, Harman J. said :

> If this be not, as I suspect, a quibble, a like answer could be made that it would destroy the necessity of ever obtaining consent, if a statutory body omitting to obtain it could thereafter be held estopped.

As previously stated by me in this article, the defendants claimed damages for the Council's failure to obtain the necessary consent to the lease of 1932, and to meet this claim the council pleaded the Limitation Act 1939, which our Limitation Act 1950 substantially follows. The Court held that the council's failure to obtain the consent of the Minister to the lease was not a continuing default and therefore the lessee's claim for damages was barred by the Limitation Act 1939, which applied notwithstanding that the prescribed limitation period under the Limitation Act 1623, would have expired in 1938. The point raised was that the wrong statute had been pleaded. It was submitted that as time would have run by 1938 under the Act of James 1, that Act should have been pleaded and not the 1938 one.

In answer to that submission Harman J. referred to the decision of Lord Greene M.R. in *Pegler* v. *Great Western Railway Co.* [1947] 1 All E.R. 559, and stated that the decision in that case involved a finding that time had run before the coming into force of the Act of 1939, which was nevertheless held to be rightly pleaded. Apart from the question of pleading the substantive provision was s. 33 (a) of the Limitation Act, 1939 (U.K.) is similar to s. 34 (a) of our own Limitation Act 1950, which reads :

> Nothing in this Act shall :
>
> (a) Enable any action to be brought which was barred before the commencement of this Act by an enactment repealed or amended by this Act or ceasing to have effect by virtue of this Act, except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Act.

Hence the lessee's claim for damages was thrown out on the ground that the claim had been made too late. In short, the lessee lost the battle all the way along the line, but it was a legal battle bristling with technicalities. On the merits one cannot but regret that the plea of estoppel did not prevail.

LEGAL LITERATURE.

The Concise Law of Trusts, Wills, and Administration in New Zealand. By PHILIP NEVILL, LL.B., Lecturer in Trusts, Wills, and Administration at the University of Otago. Third Edition, 1959. Wellington : Butterworth & Co. (Aust.) Ltd., Wellington, N.Z. Pp. 291 and Index. Price 47s. 6d., post free.

The happy combination of a sold-out second edition and considerable changes in the relevant statute law have led to the issue of a revised edition of this handy guide. It remains to be seen whether Mr Nevill's product will continue the precedent it has established of requiring biennial reprinting in order to keep up with the demand.

Cases such as *Re Goldschmidt* [1957] 1 All E.R. 513, and statutes such as the Simultaneous Deaths Act 1958, of later vintage than the previous edition, are noted. Otherwise the bulk of the text remains unaltered, as is pointed out in the Preface.

In format the present edition follows the style of its predecessor, being handy in size and set in a good readable type face. The review copy has come from the press without the curious left-hand shadow-line that somehow blemished many letters of the second edition copy, and this, with the use of a wide body, has led to a pleasing " finish " in the edition.

M. B.

Land Valuation Law in New Zealand. By J. P. MCVEAGH, LL.M. Second Edition, 1959. Wellington : Butterworth & Co. (Aust.) Ltd. : Wellington, N.Z. Pp. 307 and Index. Price 52s. 6d., post free.

Since the first edition in 1952, the Companies Act, Health Act, Housing Act, Impounding Act, Land Agents Act, Municipal Corporations Act, Town and Country Planning Act, Tenancy Act, to name but a few, have been revised, and a general conspectus such as the present must be brought up to date in order to fulfil its purpose of presenting to valuers and agents, and to the interested man in the street, the main outlines of the law with which he must be acquainted if he is to deal in real property as a financial proposition.

Although Mr McVeagh has written primarily for the New Zealand Institute of Valuers, and covers much that is elementary to the lawyer, his work is a useful reminder of the straightforward principles so easily overlooked in the stress of dealings, and is a useful commencing point for the occasional opinion on New Zealand rating, valuation, or building contract matters.

M. B.

Partner-Executor.—" My Lords, in point of fact the testator appointed as one of his executors one of his partners, Mr. Henry Vyse. I apprehend it to have been perfectly clear that the testator could not, by appointing one of his partners as his executor, annul that partnership contract which he had deliberately entered into. I cannot admit that it was necessary for the person so appointed executor to disclaim the executorship in order to save his contract. In the view, at least, of a Court of Equity, I apprehend that the contract remained in full vigour, even though there might, from the peculiar position of the executor as a surviving partner, be reasons for watching narrowly the course which he would take with the regard to the fulfilment of the contract." This comment by Lord Cairns L.C. in *Vyse* v. *Foster* (1874) L.R. 7, H.L. 318, was cited with approval by Lord Shaw of Dunfermline in delivering the judgment of the Privy Council in *Hordern* v. *Hordern* [1910] A.C. 465, 475, where a similar question arose owing to the appointment by one member of a partnership of the other member as his executor. Lord Shaw said ; " It is no doubt true that the conflict between duty and interest may arise, but it is also true that that conflict is brought about entirely by the action of the late Mr. Anthony Hordern, who appointed Mr. Samuel Hordern his executor in the full knowledge that he would have to exercise on survivance the rights, and come under the obligations, stipulated in regard to the surviving partner by the articles of association. The idea that, in consequence of that possible conflict, Mr. Samuel Hordern's duty was to decline the trust reposed in him by his brother is out of the question."

TOWN AND COUNTRY PLANNING APPEALS.

Tamahere Stores Ltd. *v.* Waikato County.

Town and Country Planning Appeal Board. Hamilton. 1959. March 16.

Building Permit—Garage and Service Station as Addition to Store—Area zoned "Rural"—Such Building likely to detract from Amenities of Neighbourhood—Town and Country Planning Act 1953, s. 38 (1)—Jurisdiction—Undisclosed District Scheme—Council passing Resolution for Authority to Prepare District Scheme—Scheme then in Course of Preparation—Later, on Same Day, Application for Building Permit declined—Resolution indicating Its Effect to zone Applicant's Land as "Rural"—Jurisdiction to decline Grant of Permit—Town and Country Planning Act 1933, s. 2 (1)—Town and Country Planning Amendment Act 1957, s. 2 (2).

Appeal by the owner of a property situated on the Hamilton-Rotorua State Highway being Lot 4 D.P. 53853 of Part allotment 1 Tamahere Parish Block VIII Hamilton Survey District. There was a building comprising a combined store and house erected on the property and a shed being used as a commercial garage.

The appellant company applied for a building permit for the erection of a garage and service station as an addition to the store building. This permit was refused under s. 38 of the Act on the grounds that the proposed building would constitute a "detrimental work" within the meaning of that section. This appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. That the property under consideration is in area zoned as "rural" under the Council's undisclosed district scheme and under the proposed Code of Ordinances a commercial garage is not permitted as a predominant use or a conditional use in a rural zone.

2. It is a recognized town-and-country-planning principle that commercial development of properties fronting on to a main arterial traffic route is to be avoided wherever possible. Such development where it is needed in the public interest should be sited in compact areas on secondary roads.

3. That on 1957 figures the Hamilton-Rotorua State Highway carries a daily average of 3,750 vehicles. This is a high density and any additional commercial or industrial development along this route should be avoided.

4. The appellant is already carrying on the business of a commercial garage in a shed on the property and it can continue to carry on that business as an "existing use" but to permit the erection of a new garage of substantial structure would only tend to perpetuate a non-conforming use.

5. There is a fully equipped service station within 400 yards of the property, a repair garage a short distance away and a fully equipped commercial garage and service station two and a half miles away at Hillcrest. Evidence was given that the appellant company's mechanic was kept fully occupied and there was a steady demand for his services but the fact that any commercial enterprise is receiving a measure of public support is not in itself an argument for disregarding town-planning principles.

Counsel for the appellant submitted that the Council had no jurisdiction to decline the application, because at the time it did so it did not have an "undisclosed district scheme" within the definition laid down in s. 2 (1) of the Act as (amended by s. 2 (2) of the Town and Country Planning Act 1957).

On November 8, 1955, the Council resolved "that application be made pursuant to s. 20 of the Town and Country Planning Act 1953 for authority to prepare the District Scheme in 7 sections" in the following order of priority: (1) Hamilton; (2) Waikato County rural area, etc.

That resolution, coupled with evidence that a scheme for the Waikato County rural area has been in course of preparation since February, 1957, satisfies the first requirement of the statutory definition in that there is "part of a district scheme in course of preparation pursuant to a resolution of the Council on that behalf." On August 19, 1958, the Council resolved as follows: "That the land shown on the schedule hereto be zoned as rural under the Town and Country Planning Act 1953." SCHEDULE—Lot 4 D.P. 53853 of part Allotment 1 Tamahere Parish Block XIII Hamilton Survey District."

On the same day, by a subsequent resolution, the appellant's application was declined.

Counsel's submission is that as the first resolution of August 19, 1958, is ineffective in that it does not follow the exact wording of s. 2 and purport to "adopt" that part of its scheme which is or might be affected by the "detrimental work" there was no jurisdiction to pass the second resolution declining the application.

The Board considers that the first resolution is couched in sufficiently clear terms to indicate that the effect of it, when carried, was to zone the appellant's land as "rural." It is the effect of the resolution that must be looked at, not the precise wording of it.

As therefore the appellant's land was zoned as "rural" under the Council's undisclosed scheme when it resolved to decline the application the requirements of s. 2 had been satisfied and the Council was entitled under s. 38 to refuse its consent to the erection of this garage as being likely to detract from the amenities of the neighbourhood likely to be provided or preserved under its undisclosed district scheme.

Appeal dismissed.

Rutherford *v.* Howick Borough.

Town and Country Planning Appeal Board. Auckland. 1958. November 27.

District Scheme—Objection—Property in Area zoned "Residential" and predominantly Residential in Character—Opposite Corner zoned "Commercial B"—Adequate Provision made in District Scheme for Foreseeable Local Shopping Needs—Creation of Small Commercial "Spot" Zone on Objector's Land Contrary to town-and-country-planning Principles—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953.

The appellant was the owner of a property in the Borough of Howick situate at the corner of the Panmure-Howick Main Highway (Ridge Road) and Nelson Street being Lot 2 on Deposited Plan No. 33470 of Allotment 70 Village of Howick containing 1 ro 2.52 pp. This property was an area zoned under the respondent Borough's proposed district scheme, as publicly notified, as "residential". The appellant lodged an objection to this zoning, claiming that her property should be zoned "commercial C" or alternatively "commercial B".

Her objection was disallowed. This appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The appellant's property is in an area zoned as "residential" and predominantly residential in character. The land lying to the east and south is extensively built on, and land on the opposite of Ridge Road to the west and north-west is being rapidly developed for residential use.

2. On the opposite corner of Ridge Road and Nelson Street, the respondent's plan makes provision for a "commercial B zone". There is a commercial garage already erected on the corner, and the area zoned as "commercial" provides sufficient land for several small local shops if and when a local shopping centre is needed in the locality. If the area so zoned should prove insufficient for local shopping needs, the position could be met by extending the existing zone east along Nelson Street.

3. Local shopping centres should wherever possible be sited on side streets and not on intersections with main traffic roads, such as Ridge Road and, in particular, should be so sited as not to straddle a street to avoid the crossing and re-crossing of the street by the shopping public.

The Board considers that the Borough's proposed district scheme makes adequate provision in the area already zoned as "commercial B" for the foreseeable local shopping needs of this locality for sometime to come and to permit the erection of a small commercial "spot zone" on the opposite side of Nelson Street would be contrary to town-and-country-planning principles.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

A Cup of Tea.—"It is unlikely that civil servants, with a great legendary reputation as char-consumers, are more absorbent than the rest of us," says Ivor Brown in his *Words of Our Time* (Jonathan Cape, 1958). "My own observation of the building trade at work is that its operatives—sometimes a courtesy title—are more frequently stopping for a 'cuppa' than any other brand of contemporary toiler." There is this much to be said, however, for civil servants—that like the Lyttelton ferry their movements are timed with exactitude. Anyone endeavouring to communicate with a member of some Government Department between 10 a.m. and 10.15 a.m. must inevitably accept the constant ringing of an unanswered telephone bell. Not that the civil servant is unique, although these habits in the law are attended with greater delicacy. "If you are about to embark upon a new topic, Mr Blank," observes the presiding Judge, "it might be opportune for the Court to take a short break." In Palmerston North, Nelson, and other small centres, the vigilance of the Registrar or his lesser lights is extended to visiting counsel who find considerable solace in that "cup that cheers." The metropolitan centres would do well to emulate this type of consideration towards their bewigged barristers, whether homegrown or from a distance. One of the friends of Scriblex reports the effects of the tea-break in a local law office. The male staff was engrossed in a game of cards, the female divided its quarter-hour between knitting, the morning paper, *Life* magazine, and a brightly-covered book that seemed to have transported the receptionist into another sphere altogether. He peeked at it while waiting for a few grains of attention. It was *The World of Susie Wong*.

Container and Net Fluid Measures.—The recent judgment of McCarthy J. in *Robins* v. *Coster* will drive another nail into the coffin of the container method of selling draught beer to which the licensed trade has considered itself fully entitled under the exempting Weights and Measures Regulations until the Price Tribunal made its post-Budget order. A contributor with passing interest in this topic has referred Scriblex to the judgment of Owen J. delivering that of the Full Court of New South Wales in *Ex parte Brown, Re McGregor*, (1952) 52 S.R. (N.S.W.) 134, 136:

"Those who framed the English Act of 1878 and its counterpart in this State lived in a day when the measuring out by a publican of spirituous liquor, such as whisky, by the fluid ounce was unthinkable, and when such niggling measures were regarded as being appropriate only to commodities dealt with by apothecaries."

If there is any substance in the threat of a number of hotel proprietors that they will under existing conditions close down their premises and turn them into offices, then the time may come when, in order to have a late-afternoon appetiser, we may be forced to nip over to the nearest chemist's store.

The Difficulty of Names.—A feature of accident litigation in these times is the number of plaintiffs of foreign extraction who find their way into the Courts. The valiant attempts of a trial judge recently to master an almost unpronouncable Polish name reminded Scriblex that when Sir John Mitford (who has resigned the office of Attorney-General to be elected Speaker of the House of Commons) became, as Lord Rosedale, in 1802 the new Lord Chancellor of Ireland he found great difficulty with Irish names, much to the delight of the junior Bar. His biographer tells us that one of the barristers was named Geoghegan and the Chancellor made valiant efforts to acquire the right pronunciation. On his return to Dublin from a visit to England, he remarked genially: "I have at last succeeded in mastering the spelling of your name, but I cannot remember how you pronounce it." The man had meantime changed his name to O'Neill and thought the Chancellor knew it, so he answered: "My name is pronounced *O'neel*." Lord Redesdale said nothing at the time, but that evening he remarked to some friends: "The way the Irish pronounce their names is really extraordinary. There is a man in my Court who spells his name *GEOGHEGAN* and he actually pronounces it *O'neel!*"

The Rule in Shelley's Case.—"In 1894, F. E. Smith, later Lord Birkenhead, obtained a first-class grade at Oxford when he took the Honours School of Jurisprudence examination, but the next year when he took the B.C.L. examination he gave the wrong answer to a question on the Rule in *Shelley's Case*, with the result that he received only a second-class grade. He vowed that, 'When I am Lord Chancellor, I shall abolish that rule'—and exactly thirty years later he did just that."—Chief Justice Arthur Vanderbilt of New Jersey.

Dooleyisms.—*Appeal*—An appeal, Hinnissy, is where ye ask wan coort to show its contempt f'r another coort.

De Minimis Curat Lex—"Niver steal a dure-mat," said Mr Dooley. "If ye do, ye'll be investigated, hanged, an' maybe rayformed. Steal a bank, me boy, steal a bank."

Expert Testimony—Thank th' Lord, whin the case is all over, the jury'll pitch th' tistimony out iv th' window an' consider three questions: Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we wint to supper?

Presumptions—In England a man is presoomed to be innocent till he's proved guilty, an' they take it f'r granted he's guilty. In this counthry a man is presoomed to be guilty ontil he's proved guilty, an' afther that he's presoomed to be innocent.

Tail-piece.—"Well," said the Conciliator to the young and puzzled husband, "take my case, for instance. I arranged with my wife at an early stage of our marriage that she would make all the small decisions and I would make all the big ones. She decides where we will live and what we will wear and how we spend our money. I decide whether or not we should bomb Russia."

CORRESPONDENCE.

Re "The Truth—the Whole Truth."

Sir,

May I impose on your kindness to ask that you *audi alteram partem* of a recent article (*ante*, 62) written by Advocatus Ruralis *quorum pars magna fuit*. Only the exercise of this privilege may I be justified in applying the tactics of *similia similibus curantur*. I am referring to the events to which *Advocatus* adverts—namely, the payment of his witnesses' expenses and allowances.

Before doing so, I would point out to *Advocatus* that the witnesses' room which he describes as a "junk room" is a large room, laid with new superior quality linoleum, has comfortable padded chairs for a dozen persons or more, a gas-heater, and fluorescent lighting. The room itself was repainted in tasteful pastel shades a year ago. The "junk" referred to are the new tables recently made for the use of counsel, who have the privilege of appearing before that august body, the Court of Appeal—*Advocatus* refers to it as "the luxury-class hotel".

Advocatus's frank admission that some solicitors do not read what they sign brings to mind the purpose of R. 403 of the Code of Civil Procedure and its painful repercussions on counsel or solicitors who sign documents flippantly. However, his *lapsus memoriae* was offset by the speed at which he negotiated the seventy miles to the Supreme Court.

The Witnesses' and Interpreters' Fees Regulations 1954 are not *arcona imperii* and therefore I shall explain the £2 7s. paid to *Advocatus*. I did not apply the practice of *fronti nulla fides* in determining that *Advocatus* was really lame and therefore should be entitled to first-class rail fares, as provided for within the ambit of reg. 6 (a)—infirm persons; I immediately decided that *Advocatus* would be paid *pleno jure* first-class rail fares, but being a fellow townsman of *Advocatus*, I knew that the rail cars which travelled to our town were only second-class, so that the travelling expenses *bene merenti* were the same *non bene merenti*. My payments to *Advocatus* may have been *suaviter in modo fortiter in re* but alas, *ita lex scripta!* I preferred to adopt the principles in the saying *bis dat qui cito dat*. Much as I would have liked to have included the 3s. parking-meter fees (no doubt included in the £21,000 profits made by the W.C.C.) and the cost of a cigar and a glass of wine (*de gustibus non est disputandum*) I could only plead, *volo, non valeo*.

Advocatus may not have been paid *quantum meruit* but since, as a result of the trial, "the rabbit escaped", he must have been paid for the evidence he gave *quantum valeat*.

Yours, etc.,

ROBERT.

SUMMARY OF RECENT LAW.

(*Concluded from p. 101.*)

Land and Income Tax—Appeal to Supreme Court—Rehearing of All Evidence given before Magistrate allowed only if Some Good Cause Shown—Land and Income Tax Act 1954, ss. 35, 39 (2). Some good cause must be shown to entitle a party to a rehearing of all the evidence under s. 39 (2) of the Land and Income Tax Act 1954, on an appeal from the determination of the Magistrates' Court pursuant to s. 34. The mere fact that the Magistrate's judgment turned on credibility is not of itself sufficient in the great majority of cases. (*N.* v. *Commissioner of Inland Revenue* [1958] N.Z.L.R. 122, distinguished.) *Semble*, The Court may at any time reverse its order refusing the rehearing of the whole of the evidence should it become apparent during the hearing of the appeal that the interests of justice so require. *Commissioner of Inland Revenue* v. *Sisson*. (S.C. Wellington. 1959. March 18. McCarthy J.)

TENANCY.

Possession—Property—Premises to be demolished and reconstructed and to be occupied by Landlord—Part of Reconstructed Property surplus to Landlord's Requirements to be let—Standard of Substantiality of Landlord's Requirements applicable when considering whether Landlord "reasonably required" Property for its Own Occupation—Corporate Body as Landlord—Financial Loss to It as "hardship"—Hardship to Employees as "other persons"—Tenancy Act 1955, ss. 36 (e) (p), 37 (1). Property is "reasonably required by the landlord . . . for his own occupation," in terms of s. 36 (e) of the Tenancy Act 1955, even though part of it is to be let as being surplus to his requirements. The question whether or not the landlord requires the premises for his own occupation is to be dealt with on a commonsense and practical basis, applying the standard of substantiality. (*Jackson* v. *Huljich* [1955] N.Z.L.R. 1057, *J. R. McKenzie Ltd.* v. *Gianoutsos and Booleris* [1957] N.Z.L.R. 309 (as to some of the matters to be considered), referred to). Section 24 (1) (m) of the Tenancy Act 1948 does not restrict the scope of s. 36 (e) by rendering it inapplicable simply because demolition or reconstruction is contemplated; and it is only when the landlord requires the premises for demolition or reconstruction with a view to letting or selling them or making some use of them other than his own occupation that s. 36 (e) is not available to him, and he had to invoke s. 36 (p). (*McKenna* v. *Porter Motors Ltd.* [1955] N.Z.L.R. 832, explained). The hardship to the landlord, a corporate body seeking possession of part of its premises let as shops, was that the part occupied by it was, through growth of business, inadequate for its purposes. The premises were congested, which impaired the efficiency of the staff, the ventilation was poor, and the facilities for customers were inadequate. *Held*, 1. That those matters caused the corporation financial loss, if for no other reason, proper value would not be received for the working time of the staff, and this constituted "hardship to the landlord within the meaning of s. 37 (1) of the Tenancy Act 1955. *Quaere*, whether anything which does not affect a corporation financially can constitute hardship for the purposes of s. 37 (1). 2. That, in any event, there was hardship to the landlord's employees, who were "other persons," within the meaning of s. 37 (1). *National Bank of New Zealand Limited* v. *Choo Ming and others*. (S.C. Wellington. 1959. March 23. Hutchison J.)

WORKERS' COMPENSATION.

Assessment of Compensation—Worker aged Fifteen Years entitled to Compensation calculated on Quasi-schedule Basis—Court's Discretion to award Compensation on Loss-of-earnings Basis—Matters for Court's Consideration—Workers' Compensation Act 1956, s. 17 (7). In a case where the worker is entitled to receive compensation on a quasi-schedule basis, before the Court can exercise its discretion under s. 17 (7) of the Workers' Compensation Act 1956, to award compensation on the basis of loss of wages, it is necessary first to decide what compensation would be likely to be awarded to the worker under the other provisions of the Act if the quasi-schedule basis is not applied, and to consider the nature of the injury in relation to the nature of his former usual employment and his probable future circumstances. Where the worker is under twenty-one years of age, regard must be had to the provisions of s. 16. On April 2, 1957, the plaintiff, who was then fifteen years of age, was working in the bush for the defendant company. He was receiving a wage of 5s. an hour, and, during the few months he was so working, his average weekly earnings amounted to £12 10s. He met with an accident which affected his right leg. He received compensation for some weeks during which he was temporarily totally disabled. He was left with a permanent partial disability equal to five per cent. of total incapacity, on a quasi-schedule basis. The plaintiff was unable to resume work in the bush, and he worked at sash-and-door making, where his average earnings were £8 16s. 4d., but, in two or three years' time, his average weekly earnings would be £16 10s. The Court was asked to exercise its discretion under s. 17 (2) of the Workers' Compensation Act 1956 and award compensation on the basis of loss of earnings. *Held*, 1. That, if the plaintiff had continued to work in the bush, his average weekly earnings at the age of twenty-one years would probably be £18 a week, while at the time, his earnings in his sash-and-door making work would probably be £16 a week; so that the loss of earnings on which compensation would be calculated would be £1 10s. a week, and compensetion on a loss of earnings basis would be 80 per cent of that amount, or £1 4s. a week, and that must be compared with 9s. 5d. per week on a quasi-schedule basis. 2. That the amount of compensation payable to the plaintiff on a quasi-schedule basis would not, in terms of s. 17 (7) (a), "be inadequate because of the circumstances of the worker." 3. That, consequently, the provisions of s. 17 (7) could not be applied, and compensation must be calculated on a quasi-schedule basis, i.e., the basis of five per cent of total incapacity. *Lumsden* v. *Express Timber Co. Ltd.* (Comp. Ct. Dunedin. 1959. April 3. Dalglish J.)