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CRIMINAL LAW: CERTIORARI.

IN a recent judgment of some importance, *McCarthy* v. *Grant* (to be reported), Mr Justice T. A. Gresson observed that the temptation to undermine the protection which the prerogative writs of mandamus, certiorari, and prohibition afford to the liberty of the subject by legislation, is manifested year by year; and, in his view, it is as important to the citizen of today as it was in the past that the "train of authority" which Sir Edward Coke C.J. started in 1614, and which has the strong and outspoken support of Sir John Holt C.J., Lord Mansfield, Lord Kenyon C.J., and Lord Goddard L.C.J., should be maintained in its full vigour: *Re Gilmore's Application* [1957] 1 All E.R. 796, 801. The ancient writ is grounded, he added, not upon the variable content of contemporary legislation, but on the firm foundation of the common law.

The learned Judge said that it has too readily been assumed in New Zealand in the past that certiorari was not available where a conviction in a lower Court has resulted from a disregard of the principles of natural justice in the course of the hearing which led to the conviction.

His Honour also observed that justice must not only be done, but must manifestly be seen to be done, *R.* v. *Bodmin Justices, Ex parte McEwan* [1947] K.B. 321, 325; [1947] 1 All E.R. 109, 111; and, if a breach of that principle warrants an order for, certiorari to remove a conviction for the purposes of quashing it, then, a fortiori, the writ should issue where there has been a manifest injustice.

There is nothing in the Summary Proceedings Act 1957, to take away by express words the inherent jurisdiction of the Supreme Court to issue a writ of certiorari and to quash the conviction in such circumstances.

Consequently—and the learned Judge so held—certiorari is the appropriate remedy where there has been a conviction after a miscarriage of justice during the hearing of the information, even though there may be a right of appeal from such conviction. And, where the error is contrary to the general laws of the land or so vicious (in the legal sense) as to violate some fundamental principle of justice, certiorari will lie.

The facts of the case before His Honour were as follow:

A collision took place between a car driven by McCarthy, and one driven by Wylie. Wylie did not stop and McCarthy, who was very angry, gave chase and eventually overtook him. A fight then ensued in which McCarthy appeared to have been the aggressor. As a result of these incidents, proceedings were taken against both parties in the Magistrates' Court at Auckland.

McCarthy attended the Court in a dual capacity: to defend a charge of assault, and to give evidence on subpoena against Wylie on the charge of negligent driving, but later reduced to one of careless driving. The Magistrate ruled that the trials should proceed separately. Both Wylie and McCarthy pleaded not guilty. The hearing of the charge against Wylie was then begun and McCarthy, pursuant to his subpoena, was called to give evidence for the prosecution. He duly described the circumstances of the impact between the two cars and the chase northwards along the motorway; and he was in the process of recounting the details of his fight with Wylie when the Magistrate interposed and, reversing his earlier ruling, said "We will hear both these cases together", thus interjecting plaintiff's trial into that which, up to that point, had been proceeding separately. McCarthy who was on subpoena, thereupon became in effect a compulsory witness against himself and was examined not by his own counsel, but by the prosecutor, and by the Magistrate himself. He was then cross-examined at length by Wylie's counsel who would have had no right to be heard, and still less to question the plaintiff, had the latter been tried separately. McCarthy was then cross-examined, instead of being examined, by his own counsel. At a later stage, a constable was called by the prosecution and at the conclusion of his evidence-in-chief he produced signed statements obtained from both Wylie and McCarthy. Wylie's statement would, have been inadmissible against McCarthy had the latter been tried separately.

Wylie was convicted of driving without due care and attention, and also of failing to stop. On the first charge, he was fined £5, and his licence was suspended for one month and endorsed for three years. On the second charge, he was fined £5. McCarthy in turn was convicted of assault and was sentenced to one month's imprisonment.

Both parties appealed against conviction and sentence, and by consent these appeals stood adjourned, McCarthy meanwhile remaining on bail.

McCarthy (hereinafter termed "the plaintiff") applied for the issue of a writ of certiorari directing the Magistrate to send the proceedings into the Supreme Court for examination and for an order quashing the

conviction, upon the grounds that the plaintiff's trial should not have been heard contemporaneously with Wylie's trial to the plaintiff's prejudice, and that the plaintiff was improperly called by the police as a witness against himself and was examined by the Court and cross-examined by Wylie's counsel, contrary to the provisions of the Summary Proceedings Act 1957, and the principles of natural justice; and that there was thus a miscarriage of justice.

His Honour began his judgment by saying that it was a fundamental principle of our criminal law that no accused person was compelled to give evidence and thus expose himself while under oath to cross-examination by the prosecution or to questions from the Court: Evidence Amendment Act 1952, s. 2; *R.* v. *Male and Cooper* (1893) 17 Cox C.C. 689, 690, per Cave J.; Summary Proceedings Act 1957, ss. 163, 166; Crimes Act 1908, ss. 422, 423. It was a hearing and not an inquisition which must be conducted. Moreover, as was well known, no adverse comment was allowed upon the fact that an accused refrained from giving evidence: Summary Proceedings Act 1957, ss. 67 (5), 166. The plaintiff was entitled, if he so elected, to give no evidence in relation to the charge of assault against him, but, owing to the unfortunate course of events at the hearing below, he was denied any opportunity of exercising his election in this respect, and while in the witness box, under subpoena, suddenly found himself on trial and thus obliged to answer questions from the prosecutor and the Court and, to add insult to injury, from counsel for his "opponent", Wylie. On these grounds, His Honour was satisfied that the plaintiff's conviction could not be upheld. He continued:

> Section 67 of the Summary Proceedings Act 1957 provides that if the accused pleads not guilty the hearing *shall* be conducted in a prescribed way, and the Court *shall* first hear the informant and such evidence as he may adduce, and *shall then* hear the accused and such evidence as he may adduce. The accused has a right to hear the case that is made against him before he decides whether or not to call evidence on his own behalf, and in practice it is not uncommon for an accused to decide *at this stage* to refrain from either giving or calling evidence, or in some cases to change his plea to one of guilty in the light of the evidence which he has heard. It is clear that the provisions of s. 67 of the Summary Proceedings Act 1957 were not observed in regard to the plaintiff's trial below, and in this case there has been "an essential departure from well-established rules of criminal procedure" amounting to a denial of justice: *R.* v. *Neal* (1949) 33 Cr. App. R. 189, 193, per Lord Goddard L.C.J.

The remaining point of difficulty was procedural; but, it was, in His Honour's view, one of some importance. He continued:

> This is not an appeal on which this Court may direct a rehearing in the Magistrates' Court (Summary Proceedings Act 1957, s. 131), or in its discretion rehear the evidence itself, (s. 119), but a motion for certiorari and to quash the conviction. It is the inherent and original, and not the appellate jurisdiction of this Court, which the plaintiff invokes. As was stated in *R.* v. *Gillyard* (1848) 12 Q.B. 527; 116 E.R. 965, the case therefore "involves the jurisdiction of this Court [the King's Bench] as a Court of control over all inferior Courts, and the Court has authority to correct all irregularities in the proceedings of inferior tribunals. In quashing a conviction in appropriate circumstances, it is exercising the most salutary jurisdiction which this Court can exercise" (*ibid.*, 530; 966).
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> In the well known passage in *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer* [1924] N.Z.L.R. 689; [1924] G.L.R. 139 Salmond J. stated:
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> > "The controlling jurisdiction of the Supreme Court over other Courts by way of prohibition, certiorari, or otherwise, is inherited from the Court of King's Bench in England, by virtue of the Supreme Court Act 1860, which provides that the Supreme Court of New Zealand shall have jurisdiction in all cases whatsoever as fully as Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster, and each of such Courts have or hath in England at the time of the passing of this Act. Of the Court of King's Bench, Blackstone says: 'The jurisdiction of this Court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here or prohibit their progress below.' In England the question as to what Courts are inferior Courts thus subject to the supervisory or controlling authority of the King's Bench, is one of some complexity to be determined by historical considerations relative to the particular Court under consideration . . . In New Zealand I do not think that similar difficulties arise. The only Court on which the Legislature has conferred the controlling jurisdiction of the King's Bench is the Supreme Court. By virtue of the exclusive possession of this jurisdiction all other Courts whatever, with the exception of the Court of Appeal, are prima facie inferior Courts subject to the exercise of that jurisdiction If any Court claims exemption the claim must be based on some express statutory provision to that effect" (*ibid.*, 706; 149).

Counsel for the Crown submitted that the application for a writ of certiorari was misconceived, and that the appropriate procedure was by way of motion to quash; *Duncan* v. *Graham* [1941] N.Z.L.R. 535, 555; [1941] G.L.R. 316, 324, per Sir Michael Myers C.J.; *R.* v. *Montgomerie* (1885) N.Z.L.R. 3 S.C. 140, 143; *R.* v. *Rix* [1931] N.Z.L.R. 984; *Re West* [1934] N.Z.L.R. 893; *R.* v. *Swinton* [1946] N.Z.L.R. 43; [1946] G.L.R. 44. Section 74 of the Justices of the Peace Act 1927, provided for the keeping of a criminal record book, and, by subs. (3):

> The conviction shall afterwards when it becomes necessary. be drawn up by the Justices in the form No. 10 or No. 11 in the First Schedule hereto, and they shall cause the same to be lodged with the Registrar of the Supreme Court to be filed by him.

If this subsection had been brought forward in the Summary Proceedings Act 1957, His Honour said it would be difficult to reject the Crown's contention. In its absence, however, the immediate problem was to bring the conviction which was entered in the lower Court up into the Supreme Court for examination, and certiorari was, in the view of the learned Judge the appropriate remedy, *R.* v. *Beetham* (1872) Mac. 1095, 1097.

An examination of *R.* v. *Fulton* (1870) 1 N.Z.C.A. 390, 392; *R.* v. *Beetham* (1872) Mac. 1095; and *R.* v. *Brooke* (1873) 1 N.Z. Jur., 104, shows that certiorari in New Zealand was, by reason of the Justices of the Peace Act 1866, ss. 22 and 45, held superfluous; but the learned Judge pointed out that this was a very different matter from holding that the writ would not lie, and, in his view, it had been too readily assumed in the past that the writ was unavailable in circumstances such as in the case before him. In *1 Johnston's New Zealand Justice of the Peace*, 91 (1870), the learned author stated:

> Now it may be a question whether in New Zealand, where by virtue of the Justices of the Peace Act 1866, ss. 22 and 45, convictions and orders are to be drawn up formally when required and lodged with the Registrar of the Supreme Court to be filed by him, there is any necessity for the writ of certiorari. If the conviction or order is already filed in the Court the writ would be useless; and if not, the Magistrates on application would probably draw up and lodge the document which they would be bound to do, subject to mandamus and attachment, and so the proceedings would be actually in the Court; and could be brought before it either on production by the Registrar, or on affidavit by the party. *But there seems to be no doubt*

that a certiorari might issue to the convicting Magistrate to bring up the proceedings before they were lodged in the Supreme Court, even although the other course might be open also . . . At all events, the principles illustrated in England by the right to the use of the writ of certiorari are fully applicable in the colony . . . and by the rule of Court, Reg. Gen. May, 1859, Rule 10, it is expressly provided that the practice of the superior Courts in England with regard to the writ of certiorari and proceedings thereon may be followed as far as they can be, consistently with the other rules of the Court and the laws of the Colony."

His Honour said his conclusion was reinforced in some measure by the wording of s. 204 of the Summary Proceedings Act 1957, which, in the case of indictable offences triable summarily, omitted any reference to certiorari, which was previously taken away expressly by s. 260 of the Justices of the Peace Act 1927, now repealed, and by s. 110 of the new Act, which carried with it the clear implication that a writ of certiorari might still lie in certain cases. It should also not be overlooked that under s. 204 of the new Act, a conviction, process or proceeding might be quashed by reason of a defect, omission, or irregularity in form alone, if the Court was satisfied that there had been a miscarriage of justice. He continued:

Furthermore, this "salutary jurisdiction", by way of certiorari, affording as it does stout protection for the liberty of the subject, can only be taken away by express negative words: *R.* v. *Cashionbury Hundred Justices* (1823) 3 Dow and Ry. (K.B.) 35; *R.* v. *Jukes* (1800) 8 Term. Rep. 542; 101 E.R. 1536; *R.* v. *Plowright* (1686) 3 Mod. Rep. 94; 87 E.R. 60; *R.* v. *Moreley* (1760) 2 Burr. 1040; 97 E.R. 696.

It is interesting to observe that, in 1760, Lord Mansfield and the King's Bench regarded this as "a point settled," and one may respectfully agree with Lord Kenyon C.J. in the *Jukes* case (1800) 8 Term. Rep. 542; 101 E.R. 1536 that "certiorari being a beneficial writ for the subject could not be taken away without express words; and he thought it much to be lamented in a variety of cases that it was taken away at all" (*ibid.*, 545; 1538). "I find it very well settled", said Denning L.J. in *Re Gilmore's Application* [1957] 1 All E.R. 796, "that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words" (*ibid.*, 801).

I therefore reject the contention that subss. (3) and (4) of s. 71 of the Summary Proceedings Act 1957, which appear to me to be evidentiary only, render certiorari unavailable, unnecessary or inappropriate: see s. 13 of the Magistrates' Courts Act 1947, which does not prevent the issue of certiorari where the civil jurisdiction of the Magistrates' Court is involved: *Healey* v. *Rauhina* [1958] N.Z.L.R. 945; *Black* v. *Black* [1951] N.Z.L.R. 723; [1951] G.L.R. 395.

In this regard, it should be observed that, by certiorari, the record, which includes all relevant documents at common law, and not merely the certified entry of conviction, is brought up to this Court for examination: *1 Chitty on Criminal Law*, 394 (1826), and *Short and Mellor, Crown Practice*, 2nd ed., 509, 510; and this Court has power to order an inferior tribunal to complete or correct an imperfect record: *Re Gilmore's Application* [1957] 1 All E.R. 796, 801; *R.* v. *Northumberland Compensation Tribunal* [1952] 1 K.B. 338, 346 et seq; [1952] 1 All E.R. 122 127, et seq., per Denning L.J.; *Davies* v. *Price* [1958] 1 All E.R. 671, 678. It may even be that in exceptional circumstances the superior Court may request information from the learned Magistrate on affidavit, *Duncan* v. *Graham* [1941] N.Z.L.R. 535, 555; [1941] G.L.R. 316, 324, and *New Zealand Sheep Farmers' Agency Ltd.* v. *Mosley and Hill* [1932] N.Z.L.R 949, 964; [1932] G.L.R. 589, 596.

Counsel for the Crown, moreover (quite rightly, in His Honour's view), in the interests of justice, disclaimed any reliance upon any procedural objection to the form of these proceedings; and, for the purposes of that case only, conceded that the conviction and record of what had transpired in the Court below were in any event before this Court in connection with the adjourned appeals and could thus, in the particular circumstances, be examined. Furthermore, both counsel declared to the Court that there was no dispute as to the facts set out in the affidavit by the plaintiff's solicitor, filed in support of the motion for certiorari. His Honour observed:

There seems little doubt that this affidavit can be regarded by this Court: *R.* v. *James Bolton* (1841) 1. QB. 66; 113 E.R. 1054, per Lord Denman C.J.; *R.* v. *Wandsworth Justices, Ex parte Read* [1942] 1 K.B. 281, at 283; [1942] 1 All E.R. 56, 57, per Viscount Caldecote C.J. In these circumstances, I am satisfied that the denial of justice which the plaintiff suffered here is apparent on the face of the record now before this Court. The plaintiff was clearly entitled to a separate trial, and, in my view, it was quite irregular in law for the learned Magistrate, doubtless under the pressure of the usual heavy list of traffic offences, to embark as he did on a joint trial without the plaintiff's consent, and the result was a mistrial amounting to a miscarriage of justice, *Munday* v. *Gill* (1930) 44 C.L.R. 38, 89; *Russell* v. *Bates* (1927) 40 C.L.R. 209, 214.

His Honour acknowledged that, where proceedings were regular upon their face, and the inferior Court had jurisdiction, the superior Court would not grant an order of certiorari on the ground that the Court below had misconceived a point of law (*R.* v. *Minister of Health, Ex parte Glamorgan County Mental Hospital* [1939] 1 K.B. 232, 246; [1938] 4 All E.R. 32, 36 per Greer L.J.), or had wrongly admitted or excluded evidence, (*R.* v. *Murphy* [1921] 2 I.R. 190, 226), or, where certiorari had been taken away by statute, in a case where a conviction had been entered without any evidence, (*R.* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128; *In re Collett* (1897) 15 N.Z.L.R. 425). Nor might a wrong conclusion of fact be examined by certiorari, (*R.* v. *Nat Bell Liquors Ltd.*; *R.* v. *James Bolton* (1841) 1 Q.B. 66; 10 L.J. (N.S.) 49).

He added:

Certiorari nevertheless is not a remedy which can be granted only where an inferior tribunal has acted without or in excess of its jurisdiction, (*R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1951] 1 K.B. 711; [1952] 1 All E.R. 122), and in the present case there has been "a complete disregard by an inferior tribunal of the laws of natural justice" and the appropriate course is to remedy that mistake by making an order of certiorari to quash the conviction; *R.* v. *Wandsworth Justices Ex parte Read* [1942] 1 K.B. 281, 284; [1942] 1 All E.R. 56, 58; *Paley on Summary Convictions*, 10th ed., 368; *11 Halsbury's Laws of Engiand*, 3rd ed., p. 145, para. 272.

On the objection by the Crown that the plaintiff had filed an appeal against his conviction, His Honour said:

The fact that the plaintiff has also exercised his right of appeal—which I was informed from the Bar was primarily designed to secure his release from custody—should, in the circumstances of this case, not debar him from his remedy by way of certiorari; *In re Foley* v. *Wallace, Ex parte Wallace* (1897) 15 N.Z.L.R. 501; *G. E. Davis & Co. Ltd.* v. *McLeod* [1949] N.Z.L.R. 145; *R.* v. *North, Ex parte Oakey* [1927] 1 K.B. 491; [1926] 43 T.L.R. 60. There is no reason why a person who has been wrongly convicted should assist the prosecution to go to some other tribunal at which the irregularity may be avoided, and he may prefer to apply for an order of certiorari, *R.* v. *Wandsworth Justices, Ex parte Read* [1942] 1 K.B. 281, 284; [1942] 1 All E.R. 56, 58.

However improbable or unattractive a defence may be, the accused is entitled to have it considered impartially, and to be tried in accordance with well-established rules. It is not for every irregularity in the course of a hearing that a certiorari would be granted. The same rule as in the case where bias on the part of a Justice adjudicating is alleged applies—namely, there must be a real likelihood—not certainty—of prejudice; *R.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller* [1956] 1 Q.B. 36, 41; [1955] 3 All E.R. 300, 303.

His Honour said that the rule that no one was to be condemned, punished, or deprived of his property in any judicial proceedings unless he had had an oppor-

tunity of being heard—*audi alteram partem*—was an ancient principle of the common law and anything done contrary to that principle was contrary to natural justice. He continued:

> It is a rule of universal application founded upon the plainest principles of justice: *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180; 143 E.R. 414. It is not desirable to force such laws into any Procrustean bed, but the language of the rule is not as important as the spirit which quickens it: *General Council of Medical Education and Registration* v. *Spackman* [1943] A.C. 627, 644; [1943] 2 All E.R. 337, 344; *Healey* v. *Rauhina* [1958] N.Z.L.R. 945, 952, per Hutchison J., approving McCarthy J. in *In re Glennie and Rountree* (Unreported: Wanganui, December 20th, 1957). I can see little distinction, if any, between failing, in breach of the maxim, to hear an accused at all, and granting a hearing which, either because of bias—which did not arise in the present case—or because of its fundamental irregularity, involves a denial of natural justice. I entertain no doubt that in the plaintiff's case both the letter and the spirit of the rule were violated.
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> Where the error involved is " contrary to the general laws of the land ", or " so vicious—in the legal sense—as to violate some fundamental principle of justice ", then certiorari or prohibition will lie: *Ex parte Smyth* (1835) 3 Ad. & E. 719, 724; 111 E.R. 587, 589 per Littledale J.; *Martin* v. *MacKonnochie* (1877) 3 Q.B.D. 730-739, per Lush J.; (1879) 4 Q.B.D., 697, 732, per Thesiger L.J., and (1881) 6 App. Cas., 424, 440, 460; *Woodley* v. *Woodley and Meldrum* [1928] N.Z.L.R. 465, 472; [1928] G.L.R. 405, 408.

The learned Judge did not overlook the provisions of s. 4 of the Inferior Courts Procedure Act 1909; but, in his view, that Act, as its title showed, provided for the validity of the judicial proceedings of inferior Courts, notwithstanding technical or formal errors. Here the error made was in substance, resulting in a miscarriage of justice. Moreover, ss. 7, 8, and 9 of the Inferior Courts Procedure Act 1909, clearly contemplated that a writ of certiorari would still lie in appropriate circumstances. He concluded:

> Where an information is framed in the alternative against one accused, he may apply for an amendment if embarrassed in his defence; and the informant must elect between the alternatives charged and proceed thereon: Summary Proceedings Act 1957, s. 16. A fortiori, an accused should not be embarrassed in his defence by a simultaneous trial with another accused on a different charge.

His Honour then observed:

> If contrary to my view, certiorari can be said to be ousted by any section of the Summary Proceedings Act 1957, or otherwise, it would still be open to this Court, on motion, to quash for irregularity if satisfied there had been a miscarriage of justice. Any failure to observe the prescribed rules of criminal procedure may " imply " a want of jurisdiction, and the conviction may be quashed on this ground. It was the non-fulfilment of this condition, i.e. a fundamental procedural defect, involving a denial of natural justice, which appears to me to have been the ratio decidendi in *Duncan* v. *Graham* [1941] N.Z.L.R. 535, 551, 552 and 556; [1941] G.L.R. 316, 322, 323, 324, per Sir Michael Myers C.J. It may be argued, therefore, that in denying the accused a hearing according to law, the learned Magistrate exceeded the authority given him by the statute, under which he was empowered to hear the charge, (s. 67, Summary Proceedings Act 1957) but I do not rest my decision on this ground.

Finally, the learned Judge said that the issue of the writ might be discretionary, but there was nothing in the circumstances of the case before him which would justify the Court in refusing relief by way of certiorari to the party aggrieved; *R.* v. *Stafford Justices* [1940] 2 K.B. 33, 44, per Sir Wilfred Greene M.R.

His Honour ended his judgment by saying:

> There can be little doubt that had the trial been properly conducted the plaintiff would have been convicted of what appears to have been a most unjustifiable assault. One may regret, with Wills J. in *R.* v. *Wells* (1895) 20 Cox C.C. 671, 673, that a person should escape the consequences of his wrongdoing. But there is something very much more important than this, and that is that a basic principle of our criminal law should not be neglected or lost sight of. The preservation of this principle is of more importance than the result of this particular case.

There was accordingly an order for certiorari, and the plaintiff's conviction was quashed.

In His Honour's words, the case was but a recent, and, perhaps because of the plaintiff's co-existent right of appeal, a relatively minor, instance of the value of this ancient writ. That writ was grounded not upon the variable content of contemporary legislation, but on the firm foundation of the common law.

SUMMARY OF RECENT LAW.

DESTITUTE PERSONS.

Maintenance—Reasonable Cause for Wife's Refusal to resume Cohabitation—Husband Discharged Mental Patient—Wife's Nervous Strain caused by Fear for Herself and Children—Present " reasonable cause "—Destitute Persons Act 1910, s. 17 (7). —Separation—Husband's Honest Belief that Wife's Refusal to live with Him unjustified—Withholding of Maintenance not " without reasonable cause "—Destitute Persons Act 1910, s. 18 (4). The withholding by a husband of maintenance to a wife who declines to live with him is not " without reasonable cause " within the words of s. 18 (4) of the Destitute Persons Act 1910, when he honestly and reasonably believes that her refusal to live with him is unjustified. (*Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, referred to.) " Reasonable cause " for the purposes of s. 17 (7) of the Destitute Persons Act 1910, is not limited to cases where the husband is to blame. (*Murray* v. *Smith* [1927] N.Z.L.R. 513, followed. *Johnstone* v. *Johnstone* [1937] G.L.R. 511, referred to.) In this case, it was held that while there were no grounds for a separation order, the wife was at the time of the hearing, entitled to an order for maintenance, as she had reasonable cause for declining to live with her husband, not because of the husband's mental illness and the consequent separation for five years while he was in a mental hospital, but because of the nervous strain caused to her as a result of her husband's mental illness. *Semble*, Whether the wife's reasonable cause for declining to live with her husband would continue to be the position depended on what happened in the future. The husband might, or might not, be able to establish, by medical reports and otherwise, that any fear on her part was groundless. The known facts of his mental illness and her nervous strain on that account operated as prima facie evidence for her, so that the burden of proof on the question of reasonable cause for living apart would not, in such a case, be shifted to the husband. *T.* v. *T.* (S.C. Wellington. 1959. May 14. Hutchison J.)

MENTAL HEALTH.

Committee—Order appointing Committee—Court's power to include Provision for Remuneration of Solicitor-member of Committee—Mental Health Act 1911, s. 115—Judicature Act 1908, s. 17. The Court in making an order appointing a committee of a mental patient under s. 115 of the Mental Health Act 1900, can, in the exercise of its inherent jurisdiction, properly make an order for the remuneration of a solicitor member of the committee. *In re A (A Mental Patient).* (S.C. Christchurch. 1959. May 18. Haggitt J.)

Jurisdiction—Order Authorizing Sale of Realty owned by Patient and Purchase of Residential Property to provide Family Home—Court's Power to make Order preserving Nature and Devolution of Acquired Property—" Property "—Mental Health Act 1911, s. 119c. (Mental Health Amendment Act 1957, s. 16). The word " property ", as used in s. 119c of the Mental Health Act 1911 (as enacted by s. 16 of the Mental

LEGAL ANNOUNCEMENTS.

Continued from p. i.

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Health Amendment Act 1957), and the section generally should, having regard to the social nature of this legislation, be given a large and liberal construction. According to the true intent, meaning, and spirit of the legislation, the power conferred on the Court by s. 119c extends to acquired property, and so authorizes an order, in respect of realty purchased with the assets of a patient's estate, that the patient, his executors, administrators, next-of-kin, devisees, legatees and assignees, shall have the same interest in the purchased property as he or they would have had in the land sold, and that such property be deemed to be of the same nature as the land sold. *In re M (A Mental Patient).* (S.C. Wellington. 1959. May 26. McCarthy J.)

MAORIS AND MAORI LAND.

Maori Vested Lands—Special Valuation to ascertain Value of Lessee's Improvements—Function of Land Valuation Court—Status of Valuer-General as Party—Maori Vested Lands Administration Act 1954, s. 12. The Land Valuation Court has a limited function under the Maori Vested Lands Administration Act 1954, as it is concerned only with the special valuation as such made by the Valuer-General under s. 12 of the statute. It has not to award or assess compensation or to consider whether the amount found to be the value of improvements is adequate, or more or less than adequate, as compensation to the lessee in his vacating the demised property. There is no material difference in the principles to be applied to the making of a valuation under Maori Vested Lands Administration Act 1954, from the principles applicable to a valuation of land under the Valuation of Lands Act 1951. The Valuer-General should have the full status of a party to the proceedings on appeal from the decision of a Land Valuation Committee whenever his special valuation under the Maori Vested Lands Administration Act 1954, is called in question. Observations on the proper method of assessing the value of the improvements. *In re Wright's Objection.* (L.V. Ct. Wellington. 1959. April 21. Archer J.)

Will—Construction—Will written in English—Trust for Sale—Statutory Restrictions on Sale of Maori Land imposed Subsequently to Testator's Death not affecting Operation of Equitable Doctrine of Conversion—Interests of Remaindermen vesting at Testator's Death, subject to Possibility of Diminution or Partial Divesting on Birth of Further Children—Operation of Accruer Clause in Will—Maori Affairs Act 1953, s. 456. Testatrix, a Maori, died in 1917. By her will, written in English, she gave all her property to her trustee upon trust for sale, with power of postponement, and after payment of debts and expenses to stand possessed of the residue IN TRUST as to one equal half part or share thereof to invest the same in one or more of the modes authorised for the investment of trust funds in New Zealand and to pay the income to arise from and out of such investments to my son Hori Turu of Oaonui during his life and after his death to pay and apply the same equally for and towards the maintenance education and benefit of all the children of the said Hori Turu until the youngest of such children shall attain the age of twenty-one years and then in trust as to both capital and income to divide the same equally between all the children of the said Hori Turu AND as to the other equal half part of share thereof to invest the same in one or more of the modes authorised for the investment of trust funds in New Zealand and to pay the income thereof to my granddaughter Tapuikura of Oaonui during her life and after her death to pay and apply the same equally for and towards the maintenance education and benefit of all the children of the said Tapuikura until the youngest of such children shall attain the age of twenty-one years AND then in trust as to both capital and income to divide the same equally between all the children of the said Tapuikura AND I direct that if either of them the said Hori Turu or Tapuikura shall die leaving no children him or her surviving who shall attain the age of twenty-one years then the whole of my said residuary estate shall go and be applied and divided as hereinbefore provided as to the half thereof to and among the children of the other of them. By orders of the Maori Land Court two pieces of freehold farm-land were vested in the Public Trustee upon the trusts of the will. The lands were still held unsold. Both life tenants survived the testatrix. One of them, Tapuikura, has since died, but the other, Hori Turu, was still living. Tapuikura had had only two children. One died before the testatrix. The other survived the testatrix but died before Tapuikura, leaving a child who survived Tapuikura. Hori Turu had had three children of whom two had died. On originating summons for interpretation of the will, *Held*, 1. That a Maori testator using English words is deemed to mean what an Englishman would mean; and accordingly the term "children" in the will did not include grandchildren, notwithstanding Maori custom. (*Love* v. *Ihaka Te Rou* (1890) 8 N.Z.L.R. 198, 217, followed.) 2. That, by virtue of the trust for sale, the land notionally became personalty at the testatrix's death. The statutory restrictions upon sales of Maori land imposed subsequently to the death of the testatrix did not cancel or affect the operation of the equitable doctrine of conversion. Consequently, the interests of beneficiaries dying before distribution devolved as personalty. 3. That the notional conversion into personalty was not affected by the statutory provisions (now contained in s. 456 of the Maori Affairs Act 1953) which caused the proceeds of the sale of some Maori Land to retain the notional character of land; and s. 456 did not apply to the proceeds of the sale of the land in this estate. 4. That the interests of the remaindermen (children of Hori Turu and Tapuikura) became vested at the death of testatrix, subject, however, to the possibility of diminution or partial divesting to admit any further children who should be born. (*Price* v. *St. Hill* (1914) 33 N.Z.L.R. 1096; 16 G.L.R. 613, followed.) 5. That, at the death of Tapuikura, the accruer clause in the will operated to divest her deceased son of his interest in the half the income which had been payable to Tapuikura for life. 6. That the accruer clause should not be construed literally so as to terminate Hori Turu's life interest upon the death of Tapuikura, but should be construed in accordance with the general intention appearing from a consideration of the will as a whole. If necessary, punctuation marks may be supplied, for there can be no greater difficulty in supplying and adding punctuation marks than there is in supplying and adding words. Consequently, as from the death of Tapuikura, the income from the whole estate was payable to Hori Turu for life. 7. That, even if Hori Turu should "die leaving no children him surviving who shall attain the age of twenty-one years", the accruer clause could not operate to divest the interests of his children, as once the clause took effect in respect of one half share (as occurred upon the death of Tapuikura) it ceased to be capable of any further effect. *In re Hinerangi (deceased), Public Trustee* v. *Hori Turu and Others.* (S.C. New Plymouth. 1959. April 20. Shorland J.)

POLICE OFFENCES.

Conversion of Motor-vehicle—Person lawfully in Possession making Unauthorized Use of Motor-vehicle—Such Person Guilty of Offence—"Without colour of right"—"Unlawfully"—Police Offences Act 1927, s. 32. A person who is in lawful possession of such vehicle but makes an unauthorized use of it is guilty of the offence of taking or conversion created by s. 32 of the Police Offences Act 1927, as enacted by s. 4 of the Police Offences Amendment Act 1956. The words "without colour of right" in the section are wide enough to include all acts of taking or converting which, in a general sense, may be said to be unlawful. (*Police* v. *Brandon* (1934) 29 M.C.R. 83, approved. *Police* v. *Synott* (1951) 7 M.C.D. 314, overruled). *Murphy* v. *Gregory.* (S.C. Timaru. 1959. May 18. Henry J.)

TENANCY.

Possession—Suitable Alternative Accommodation—Part of Building with Frontage to Busy Shopping Street let to Tenant as Shop—Landlord intending to Demolish Part of demised Premises—Landlord reasonably requiring Demised Premises for Demolition or Reconstruction—Tenant offered Alternative Accommodation in Another Street in Completed Part of New Building—Arcade between Streets under Construction to be completed Nine Months from Tenant's Vacating Shop—Tenant offered Such Alternative Accommodation Rent free pending Completion of Arcade and for Half Rent for Subsequent Two Years—Requirements of Statute met by Alternative Accommodation offered to Tenant—"Suitable"—"Available"—Tenancy Act 1955, ss. 36 (e), (p), (r), 38 (2) (4). F., a dealer in radios and electrical equipment, had been in occupation as tenant of part of the building in W. Street owned by the Dominion Life Assurance Company (herein termed "the landlord"). The part comprised in the tenancy was a shop and premises on the ground floor, an office above the rear portion of the shop with access therefrom, and the basement premises immediately under the shop. On July 18, 1956, F.'s tenancy was determined by the landlord by notice to quit, but F. refused to deliver up possession. On June 10, 1957, the company having been the landlord of F.'s premises during the two preceding years, gave written notice to F. that it intended to apply for an order for possession of the demised premises after the expiration of one year from the date of service of such notice. The landlord proposed to demolish a substantial portion of the total area let to F., and to use it partly in the construction of an arcade giving access from W. Street to its new building

being erected in V. Street, and partly for conversion or incorporation into reconstructed or altered shops and offices, some of which it intended to let to tenants other than F. The landlord claimed possession on the ground that F.'s premises were reasonably required by it for its own occupation. Alternatively, it claimed that suitable alternative accommodation would be available to F. in the new building in V. Street when the order for possession sought took effect, and it offered to provide such suitable accommodation. In the Supreme Court, F. alleged that, if an order for possession of F.'s premises were made, hardship would be caused to F., its shareholders, employees, and customers, and to the general public. The arcade giving access from W. Street to V. Street would not be available until at least January 1, 1960, or for at least nine months from any date on which F. might vacate the W. Street shop. The landlord offered to allow F. to have the alternative accommodation, the V. Street shop, free of rent for the nine months during which the arcade would be under construction and thereafter for two years at half the rent which the company proposed to charge for the premises. McCarthy J. made an order for possession on April 1, 1959, upon the conditions appearing therein. On appeal from that determination, *Held* by the Court of Appeal, per totam curiam, 1. that the landlord had not brought itself within s. 36 (e) of the Tenancy Act 1955, since it had not shown that it required the tenant's premises "for its own occupation". (*McKenna* v. *Porter Motors Ltd.* [1956] N.Z.L.R. 845, and *Kerry* v. *Hughes* [1957] N.Z.L.R. 850, followed). 2. That the landlord had established that the premises were reasonably required by it for demolition or reconstruction in terms of s. 36 (p), with the consequence that it could obtain possession if it provided suitable alternative accommodation for the tenant. (*Morris* v. *English, Scottish and Australian Bank* (1957) 97 C.L.R. 624, followed). *Held* by the Court of Appeal (Gresson P. and North J., Cleary J. dissenting), That, the alternative accommodation offered to the tenant met the requirements of the statute, for the reasons, *Per Gresson P.* That the "suitability" of the alternative accommodation offered was essentially a question of fact to be determined by the tribunal of fact in a common sense way taking a broad view of all the circumstances; that no sufficient ground had been shown for overruling the decision of the trial Judge which had been arrived at after hearing a great deal of evidence; that, though for a period the suitability of the premises offered would be much diminished pending completion of building operations, the charging of no rent for that period and of only half rent for a subsequent two years counterbalanced such adverse effect as the change would have; and that where premises are being demolished in order to be rebuilt a tenant should be co-operative. (*Scrace* v. *Windust* [1955] 2 All E.R. 105, referred to). *Per North J.* 1. That while in the terms of s. 38 (2), suitable alternative accommodation must be available "when the order takes effect", the offered accommodation is deemed, by s. 38 (4), to be suitable unless the tenant can satisfy the Court that the premises are inadequate for his needs, or are of an unreasonably low standard, or are for any special reason unsuitable for the tenant; and the tenant had not proved any such special reason. (Breadth of statements of Cooke J. in *Goodman* v. *Furniture Fashions Ltd.* [1953] N.Z.L.R. 547 548, ll. 20-36, and *Majestic Theatre (Wellington) Ltd.* v. *New Zealand Jewellers Ltd.* [1953] N.Z.L.R. 589, 590, ll. 43-50, questioned). 2. That any situational disadvantages in the alternative accommodation offered to the appellant was only of a very temporary nature; and that, approaching the matter in a reasonable and realistic way, the tenant is not immune from temporary inconveniences which are an inevitable consequence whenever an old building is demolished and replaced by a new building, particularly when, as here, the landlord is prepared to go to great lengths to cushion the temporary disadvantages of the new premises. (*Scrace* v. *Windust* [1955] 2 All E.R. 105, referred to). *Per Cleary J*, dissenting, 1. That, as the three reasons given in s. 38 (4) do not preclude a tenant from objecting to the alternative accommodation on grounds of locality or situation, the tenant of a shop in a retail shopping area is at least entitled to alternative premises also situate in an area which can reasonably be called a retail shopping area. (*Goodman* v. *Furniture Fashions Ltd.* [1955] N.Z.L.R. 547, *Majestic Theatre (Wellington) Ltd.* v. *New Zealand Jewellers Ltd.* [1953] N.Z.L.R. 589, and *McKenzies (Invercargill) Ltd.* v. *Lewis* [1954] N.Z.L.R. 591, referred to). 2. That availability and suitability must be determined at one and the same time; and that the premises offered to the tenant, situate partly in a street which was not (and would not for some time be) a retail shopping street and partly in an uncompleted arcade which would not for nine months provide access from a main shopping street, could not be deemed, in the terms of s. 38 (2), "suitable alternative accommodation available for the tenant when the order takes effect"; and that the Court could not regard present unsuitability as offset by some form of compensation. (*Singh* v. *Malayan Theatres Ltd.* [1953] A.C. 632, applied). Appeal from the judgment of McCarthy J. dismissed. *Fear's Radios and Cycle Co. Ltd.* v. *Dominion Life Assurance Office of New Zealand Ltd.* (C.A. Wellington. May 18. Gresson P. North J. Cleary J.)

PUBLIC REVENUE.

Income Tax—Costs on Case Stated in Magistrates' Court—Exercise of Discretion—Guiding Principles—Percentage Method of Awarding Costs deprecated—Land and Income Tax Act 1954, s. 33. To give effect to the provisions of s. 33 of the Land and Income Tax 1954, a Magistrate should, in the exercise of his discretion, award in each case such costs as it deems just having regard to all of the circumstances of that particular While this method may lead to variations in the amounts of costs awarded in particular cases, it is preferable to the percentage method (the awarding of costs computed on a percentage of the additional tax becoming payable as the result of the Court's decision on a Case Stated) which may lead to unjust results. A case stated in the Magistrates' Court under the Land and Income Tax Act 1954 is analogous to an originating application, and in fixing costs, the Magistrate should be guided by the scale of costs relative thereto. *Semble*, The Magistrates' Courts scale should not be invariably followed where the circumstances justify some increase, and, having regard to the time and effort required, a substantial fee should be awarded for preparation for trial. *E.* v. *Commissioner of Inland Revenue.* (1959. February 26. Coates S.M. Auckland.)

SALE OF GOODS.

Sale of Secondhand Jeep—Sale not by Description—No Condition, as Distinct from Warranty, that Jeep of Merchantable Quality—Purchaser, electing to treat Any Implied Condition as Warranty—Exclusion, As Warranty, from Exempting Clause is Sale Agreement—Sale of Goods Act 1908, s. 16 (b). See CONTRACT (*ante*, p. 100). *Harper.* v. *South Island Holdings Ltd.* (S.C. Christchurch. 1959. March 6. Hutchison J.)

TRANSPORT.

Offences—Negligent Driving—Plea of Autrefois Acquit—Previous Charge of Negligent Driving Causing Death dismissed "without prejudice"—Same Charge or Cognate Charge maintainable after Such Dismissal—Crimes Act 1908, s. 403 (1)—Transport Act 1949, s. 39 (1). The words "if all proper amendments had been made that might there have been made" in s. 403 (1) of the Crimes Act 1908, apply only to formal amendments to the charge as laid, and not to an amendment substituting another offence. If such an amendment has been made, the procedure set out in s. 43 of the Summary Proceedings Act 1957 must be followed and the defendant asked how he pleaded to the substituted charge. Where no amendment has been made, and the information was dismissed "without prejudice," the same charge may be laid again, or any other cognate charge can be laid. Consequently, a plea of autrefois acquit failed, where after a charge of negligent driving causing death under s. 39 (1) of the Transport Act 1949 was dismissed "without prejudice", a new charge under the same section of negligent driving causing bodily injury arising out of the same circumstances. *Police* v. *Bascand.* (1958. July 4. Izard S.M. Christchurch.)

Suspension of Driving Licence—Motor-Cyclist driving his Motor-cycle during Period of Suspension—Defence that he was Unaware of Suspension imposed in His Absence—Such Defence not sustainable—Transport Act 1949, s. 31 (1) (a). On October 23, 1958, at Palmerston North, the defendant was convicted of the offence of failing to keep his motor-cycle as near as practicable to the side of the roadway on his left, and his driving licence was suspended for three months. On October 31, 1958, a registered letter notifying his conviction and suspension of licence was received at his home, but did not come to his attention until he returned home in the evening. Later, he was charged with driving his motor-cycle at Christchurch on October 31 while disqualified. *Held*, That, under s. 31 (1) (a) of the Transport Act 1949 a driver's licence is in jeopardy when he is charged with any driving offence (other than a first or second offence of speeding), and it was the defendant's responsibility to apprise himself of the decision given in Palmerston North when his licence was suspended; and, accordingly, the defence that he did not know of the conviction when he drove his motor-cycle on October 31 could not be sustained. (*Dryden* v. *Jackson* [1954] N.Z.L.R. 455, followed.) *Police* v. *McCobb.* (1959. March 25. Izard S.M. Christchurch.)

WORKERS' COMPENSATION.

Accident arising out of or in the Course of Employment—Accident to Worker travelling to or from Work—Authorized Means of Transport—Express and Implied Authority—Principles applicable—Workers' Compensation Act 1956, s. 5 (b). Where an accident happens to a worker while he is travelling to or from his work, it is sufficient to satisfy the term " authorized ", as used in s. 5 (b) of the Workers' Compensation Act 1956, in the expression " the employer has expressly or impliedly authorized " the worker's means of transport while he is travelling to or from his work, if the evidence shows that the employer gave his considered and unequivocal approval to the use of the means of transport in question. Such approval may be given either expressly or by implication. If express authorization is given, there is no occasion to inquire as to the employer's reasons for giving that authority, or as to the benefit, if any, which may accrue to the employer as the result thereof. Implied authority cannot be established from evidence of knowledge coupled with tacit consent or with the absence of objection on the part of the employer. (*Gollan* v. *Westfield Freezing Co. Ltd.* [1945] N.Z.L.R. 103; [1945] G.L.R. 111, *Harison* v. *The Queen* [1952] N.Z.L.R. 545, *Clunies-Ross* v. *Attorney-General* [1954] N.Z.L.R. 1158, and *Hassett* v. *Bridgeman (No. 2)* [1948] N.Z.L.R. 1220; [1948] G.L.R. 511, referred to.) In the present case, the plaintiff did not have to rely on implied authority. The authorization of the use of his motor-cycle to take him to and from work was given expressly after discussion between him and the employer's agent. It was not a case in which it was immaterial to the employer how the plaintiff got to his work, and the plaintiff's engagement was dependent on his being able to make special travel arrangements. It was in reply to the employer's agent's questioning the plaintiff on the subject that the plaintiff indicated that he proposed to travel by motor-cycle, and the agent gave his approval to that method of travel with the words, " That is all right ". *Rigden* v. *N.Z. Breweries Ltd.* (Comp. Ct. Auckland. 1958. April 30. Archer J.)

Accident arising out of and in the Course of the Employment—Intracranial Aneurysm resulting from Rupture of Cerebral Aneurysm—Medical Evidence conflicting on Question whether Death due to Effort—Claim for Compensation decided—Balance of Probabilities—Workers' Compensation Act 1956, s. 3 (1). Where the medical evidence established that the worker's death was due to the rupture of an aneurysm in a cerebral artery, but the medical evidence was in conflict on the question whether a causal relationship to effort had been established, the Court held that the case fell to be decided on the balance of probabilities. (*McHerron* v. *Hansford and Mills Construction Co. Ltd.* [1932] N.Z.L.R. 1222; [1932] G.L.R. 465, referred to.) Observations on latest medical authorities on question of activity and trauma in relation to intra-cranial aneurysm. *Murphy* v. *Taupo Totara Timber Co. Ltd.* (Comp. Ct. Hamilton. 1959. April 30. Dalglish J.)

THE COURT OF APPEAL.

The Profession's Tribute.

The profession were delighted to learn that in the recent Birthday Honours Her Majesty had been pleased to confer the honour of Knighthood on Mr Justice North and Mr Justice Cleary, members of the Court of Appeal.

The President of the Court was created a Knight Commander of the British Empire in last year's New Year Honours.

The announcement of the bestowal of the honour of Knight Bachelor on the members of the Court was welcomed not only because of the personal and judicial merits of the recipients. It was considered right and proper that our highest Court should be recognized in the same way as the High Court of Australia, and for the same reasons. Lawyers know that the knighting of our Judges adds nothing to their stature in the legal world. But it is proper that there should be evidence of public recognition of the fact that our Court of Appeal is the most important unit in the community, and that the public should have a continuous reminder of its importance.

Consequently, as Her Majesty, who is the fountain of justice, has provided recognition of that importance, her loyal subjects will not be slow in accepting her gracious lead.

On the first sitting day after the Birthday Honours were announced, June 15, the Bar attended before the Court of Appeal to congratulate their Honours.

Among those present were the Attorney-General, the Hon. H. G. R. Mason Q.C.; the Solicitor-General, Mr H. R. C. Wild Q.C., and the President of the New Zealand Law Society, Mr A. B. Buxton.

Addressing their Honours, Mr Buxton said :

" The members of the Bar have assembled to express to your Honours the very great pleasure of every member of the New Zealand Society on learning that Her Majesty had been pleased to confer the honour of Knighthood on the members of this Court who had not yet been so honoured.

" Since the constitution of this Court, so long sought by the Society, we have had the great satisfaction of knowing that our submissions were justified, and that in the administration of justice the Court has achieved all and more than we expected and claimed for it.

" As members of the legal profession, we are delighted, and as Her Majesty's subjects in New Zealand, we are justifiably proud and grateful that Her Majesty has so graciously recognized our Court of Appeal as of equality with the very much older appellate Courts of the larger Commonwealth countries.

" We therefore, your Honours, take this opportunity of expressing what we feel and of tendering with respect our sincere congratulations and best wishes to those members of the Court whom Her Majesty has honoured.

In reply, the President said :

" I thank you, and through you the Law Society, for this expression of their gratification at the honour that has been done to this newly-constituted Court of Appeal in the awards which Her Majesty the Queen has been graciously pleased to make.

" As an appellate tribunal, it is still in its infancy, taking its first faltering steps; but we shall tread more firmly as the months pass, and as we gain in experience. We are very conscious of the honour done us, and shall use every endeavour to deserve the confidence and regard of the profession and the community."

IMPERFECT CHARITABLE TRUSTS.

Two Recent Judgments of the Privy Council.

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

Every New Zealand lawyer should know what is and what is not, in general, a charitable trust in the eyes of the law, although in particular cases of difficulty, the problem has puzzled even the House of Lords and the Privy Council. In the taxation field, charities are often expressed in the fiscal statute concerned to be exempt from a particular tax: e.g. Stamp Duties Act 1954, Estate and Gift Duties Act 1955, and the Land and Income Tax Act 1954.

The Privy Council has held that, unless there is something in the taxing Act itself to the contrary, charitable purposes are confined to purposes which in the eyes of the law are charitable, and often what the law would not regard as charitable would unhesitatingly be considered as highly charitable by the man on the Clapham Bus or on the Wellington-Lower Hutt train, and, vice versa, the ordinary reasonable John Citizen would be amazed to learn of some of the queer trusts created by eccentrics which have passed the test of a legal charity.

This general rule, that, in a taxation statute, an exemption in favour of a charity means a charity not in the popular but in the legal sense, was laid down by the Privy Council in *Chesterman* v. *Federal Commissioner of Taxation* [1926] A.C. 128. Then, apart from taxation benefits we all know, I think that a charitable trust will not be declared by the Courts void on the ground of uncertainty, and, so far as the rule against perpetuities is concerned, it usually enjoys almost a charmed life: *Morice* v. *Bishop of Durham* (1804) 9 Ves. 399; (1805) 10 Ves. 522; *Oppenheim* v. *Tobacco Securities Co. Ltd.* [1951] A.C. 297, 309, per Lord Normand.

In determining whether an intended gift or trust is charitable or not, the starting point must always be the Charitable Gifts Act 1601 (the Statute of Elizabeth, 43 Eliz., c. 4). In its preamble, the following are referred to as "charitable and godly uses":

(1) Relief of the aged, impotent, and poor people.

(2) Maintenance of sick and maimed soldiers and mariners.

(3) Maintenance of schools of learning, free schools, and scholars of universities.

(4) Repair of bridges, highways, harbours, churches.*

(5) Education and preferment of orphans, maintenance of houses of correction, marriages of poor maids, support of young tradesmen, handicraft men, and persons decayed; redemption of prisoners, relief of poor inhabitants as to certain taxes.

("Relief of poor inhabitants as to certain taxes" reads somewhat quaintly: apparently even in the reign of the first Elizabeth there were too many taxes.)

These and other purposes analogous to them are the purposes now recognized as charitable.† Such purposes must be of a public nature (except those in relief of poverty) and must be intended to benefit the public or some portion of the public, not some individual person or persons: this last requisite has been frequently emphasized by the Courts during the last decade, and is again emphasized in the two recent judgments of the Privy Council to be considered in this article.

Charity, in its legal sense, comprises four principal divisions:

(1) Trusts for the relief of poverty.

(2) Trusts for the advancement of education.

(3) Trusts for the advancement of religion.

(4) Trusts for other purposes beneficial to the community, not falling under headings (1), (2), or (3) above.

That was the division adopted by Lord Macnaghten in *Income Tax Special Commissioners* v. *Pemsel* [1891] A.C. 531, 583, and it has since been universally adopted, for example, by our own Court of Appeal in *In re Bruce, Simpson* v. *Bruce* [1918] N.Z.L.R. 16; G.L.R. 26, where it was held that a trust for "the purposes of afforestation or the making of domains or national parks in New Zealand" was a valid charitable trust.

The first Privy Council case considered in this article deals with trusts under the heading for the advancement of education. The second case deals with trusts under the third heading for the advancement of religion.

I.

The first case, *Davies* v. *Perpetual Trustee Co. Ltd.* [1959] 2 All E.R. 128 was an appeal from the Full Court of the Supreme Court of New South Wales, and concerned a will which had been made in 1894, the testator dying on January 21, 1897: the last of the life tenants (who from my experience are usually a long-lived race) did not die until April 19, 1957.

The parties were in agreement that the particular devise concerned was invalid unless it could be upheld as being charitable. The devise was an ultimate one and followed on certain life interests and read as follows:

> I give and devise Block Seventy B upon which stands Ultimo House to the Presbyterians, the Descendants of those settled in the Colony hailing from or born in the North of Ireland, to be held in trust for the purpose of establishing a College for the Education and Tuition of their Youth in the Standards of the Westminster Divines‡ as taught in the Holy Scriptures.

One may reasonably hazard a guess that the testator himself hailed from, or was born in, the North of Ireland, and also that the Westminster Divines had sound religious principles as taught in the Scriptures.

* Mr Justice Shorland has recently held that a block of land owned by the Auckland Harbour Board is not held on a charitable trust: *Auckland Harbour Board* v. *Commissioner of Inland Revenue* [1959] N.Z.L.R. 204.

† These are to be regarded as instances, and not as the only objects of charity: *Re Foveaux* [1895] 2 Ch. 501, 504.

‡ A Puritan assembly which, sitting at Westminster from August, 1643 to February, 1649, formulated a Presbyterian system of Church Government in England, but all its work was suspended at the Restoration.

The judgment of their Lordships was delivered by Lord Morton of Henryton who pointed out that the object of the testator's bounty was *prima facie* a charitable object within the well-known classification in *Income Tax Special Purposes Commissioners* v. *Pemsel* [1891] A.C. 531, being concerned both with education and with the advancement of a particular religious faith, but then, quoting from *Cerge* v. *Somerville* [1924] A.C. 496, he observed that it was now well-established that an element of *public benefit* must be present even in such gifts, if they are to stand in the privileged position of a charitable gift. The inhabitants of a parish or town or any particular class of such inhabitants, may, for instance, be the object of such a gift, but private individuals or a fluctuating body of private individuals, cannot. No question of the relief of poverty arose in the present case: trusts for the relief of poverty are in an anomalous position, inasmuch as they may be valid even if the element of *public benefit* is absent therefrom.

Quoting extensively from the fairly recent House of Lords case, *Oppenheim* v. *Tobacco Securities Ltd.* [1951] A.C. 297; [1951] 1 All E.R. 31, Lord Morton of Henryton emphasized that a group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes: per Lord Simonds in *Oppenheim* v. *Tobacco Securities Ltd*, (*supra.*). As Lord Normand said in the *Oppenheim* case:

> The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined.

Proceeding, Lord Morton of Henryton said that the principles laid down must be applied to the facts of each particular case, and their Lordships had not found it easy to decide on which side of the line fell the trust which the testator desired to establish. They assumed that the College to be established was intended to provide a general education and not only to give education in the standards of the Westminster Divines. Even so, they were unable to hold that the objects of the trust were either the community or a section of the community. They clearly were not "the community", for the testator had been at pains to impose particular and somewhat capricious qualifications upon the persons who were to benefit from the education. Nor could those persons, in their Lordships' opinion, be a "section of the community" in the sense which those words had been interpreted in the authorities. Delivering the judgment of their Lordships ([1959] 2 All E.R. 128), Lord Morton of Henryton said:

> They are certain Presbyterians who can establish a particular descent. Moreover the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator has in mind. It cannot be said that boys whose Presbyterian ancestors (living on January 21, 1897), trace their descent from emigrants from Northern Island are in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors (living as aforesaid) are descended from emigrants from e.g. England or Scotland. In their Lordships' opinion the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than "a fluctuating body of private individuals" and the gift must fail because the element of public benefit is lacking. This being so they need not consider further the argument as to uncertainty already mentioned. Counsel for the respondent relied strongly on the case of *In re Tree, Idle* v. *Hastings Corporation* [1945] Ch. 325; [1945] 2 All E.R. 65. That case is, however, distinguishable from the present on the ground that the element of poverty was present, but their Lordships doubt if the decision could have been justified had that element been absent (*ibid.*, 133).

And so their Lordships held that the devise of Block 70B, as hereinbefore set out, was not a charitable trust. The costs of all parties to the appeal to the Privy Council, as between solicitor and client were ordered to be paid out of the funds representing the proceeds of sale of Block 70B: these funds amounted to £53,000. The moral is: if you desire to create a valid charitable trust, make sure that there is present the element of *public benefit*§: be broad rather than narrow in your selection of beneficiaries, and do not be capricious or seem to be capricious in your choice of the objects of your bounty.

Before concluding this article on *Davies* v. *Perpetual Trustee Co.*, I desire to observe that I am rather surprised that their Lordships of the Privy Council have by implication disagreed with one of the grounds of the decision in *In re Tree, Idle* v. *Hastings Corporation* [1945] Ch. 325; [1945] 2 All E.R. 65, but that only tends to show how very careful the draftsman must be, when his client is desirous of forming a valid charitable trust, to see that what his client seeks to create is in law a charitable trust. In that case, a testator gave a share of his residuary estate to trustees on trust to invest it and apply the income from time to time for the assistance of persons living in Hastings in or before 1880, or their descendants, who desired to emigrate to the British Dominions, the amount of assistance to be limited to £50 for each individual, and £150 for each family so assisted, the object being to improve their condition in life and the upholding of the Empire. Evershed J. (as he then was) held for two reasons that a valid charitable trust had been created, the reasons being: (1) the purpose asserted in the will being that of assisting persons financially, by a limited amount, to emigrate and improve their condition in life thereby, the true intention of the testator was to confine the class of persons which could benefit to poor persons; (2) the class capable of benefiting was defined by the testator by reference to a section of the community as a whole, distinguished from the rest of the community by a characteristic which did not involve the notion of selection by the testator, at any stage in the devolution, of individuals as individuals. The gift had, therefore, the necessary public character in the opinion of the learned Judge.

In elaborating his reasons for the second ground of his decision in *In re Tree*, Evershed J. went to great pains to distinguish the English Court of Appeal case, *Re Compton, Powell* v. *Compton* [1945] Ch. 123; [1945] 1 All E.R. 198, which had been decided only a few months previously. In *Compton's* case there were three points at issue: (1) whether a trust for the education of the descendants in perpetuity of three named individuals (the Compton, Powell and Montagu children), irrespective of their means, was a valid charitable trust; (2) if not, whether the present trust was a valid charitable trust by reason of the fact that the kind of education which was required was such as "to fit the children to be servants of God serving the nation"; (3) whether the decisions upholding gifts to

§ The converse does not apply: a trust for the benefit of the public is not necessarily charitable: *Re Compton* [1945] 1 All E.R. 198, 201.

(*Continued on p. 192.*)

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The annual meeting of the Council of the New Zealand Law Society was held at the office of the Society, Wellington, on Friday, April 24.

Societies Represented: Auckland, Messrs, D. L. Bone. S. W. W. Tong, J. N. Wilson, Q.C. and C. P. Richmond; Canterbury, Messrs. E. B. E. Taylor and W. K. L. Dougall; Gisborne, Mr. W. C. Kohn (proxy); Hamilton, Mr. J. R. Fitzgerald; Hawkes Bay, Mr. W. A. McLeod; Marlborough, Mr. F. W. Horton; Nelson, Mr. J. H. Reaney; Otago, Messrs. W. Lang and J. P. Cook; Southland, Mr. J. G. Grieve; Taranaki, Mr. J. H. Sheat; Wanganui, Mr. C. N. Armstrong; and Wellington, Messrs. W. R. Birks, C. H. Hain, and H. R. C. Wild, Q.C.

The President (Mr A B Buxton) occupied the chair, and the Treasurer (Mr. I. H. Macarthur) was also present.

An apology was received from Mr. A. M. Jamieson.

The President extended a welcome to Messrs. C. P. Richmond, E. B. E. Taylor, J. R. Fitzgerald, W. A. McLeod, J. P. Cook and to Mr. J. C. Kohn, who was acting as proxy for Mr. J. D. Kindlor and Mr. A. R. Cooper, acting as proxy for Mr. H. R. C. Wild Q.C.

After the luncheon adjournment, Mr. Wild was able to attend the meeting, and Mr. Cooper withdrew. The President welcomed Mr. Wild to his first meeting of the New Zealand Council. The President also welcomed Mr. A. E. J. Anderson, who was attending a New Zealand meeting for the first time since commencing his duties.

SIR WILLIAM CUNNINGHAM.—The Council recorded its deep regret at the death of Sir William Cunningham. Before the meeting a tribute had been paid in Court, at which the Council had attended, when the Presidents of both the New Zealand and Wellington Societies had addressed the Court.

It was resolved that the Council record its appreciation of the great services Sir William Cunningham had given to the Society and the country during his life and their sympathy for Lady Cunningham and his family.

MR. JUSTICE HAGGITT.—The President reported that Mr. B. C. Haggitt had been sworn in by the Chief Justice in Auckland, as a member of the Supreme Court Bench. It was resolved that the Council send to His Honour the congratulations of the Society, their best wishes for a happy tenure of his office and their thanks for his services to the Society as delegate of Wanganui and Auckland, and as Vice-President of the Society.

MR. L. E. PEPPIATT, PRESIDENT OF THE LAW SOCIETY.—The President mentioned the recent visit made by Mr. and Mrs. Peppiatt to New Zealand and expressed thanks and appreciation of the efforts made by members of the Auckland, Hamilton, Dunedin and Wellington Societies, who had given up their holiday and free time during the Easter vacation to look after Mr. and Mrs. Peppiatt. A letter of appreciation had been received from Mr. Peppiatt.

LORD SOMERVELL OF HARROW AND DR. GOODHART, MASTER OF UNIVERSITY COLLEGE, OXFORD.—The President mentioned the forthcoming visits to New Zealand of Lord Somervell of Harrow (in August) and Dr. Goodhart (in June or July). It was resolved that the Society give every assistance to Lord Somervell and Dr. Goodhart to make their visits to New Zealand pleasant and arrange transport and entertainment as desired; but that the question of expense of entertainment be left to each district which they visit, reserving the right for any individual district if anything particular arises by way of expense, to refer to the Society. Details of the itineraries to be made available to districts as soon as known.

ELECTION OF OFFICERS.—

President: Mr. A. B. Buxton, the only nominee, was duly elected and thanked the Council.

Vice-Presidents: It was resolved that Mr. D. Perry be re-elected as a Vice-President, and to grant Mr. Perry leave of absence during his visit overseas. The President read a letter of resignation from Mr. B. C. Haggitt, who had been appointed to the Supreme Court Bench. The resignation was accepted with regret. It was resolved to elect Mr. J. H. Sheat, Tarakani, as a Vice-President. The President, in welcoming Mr. Sheat, mentioned his long service on the Council, and the value to the Society of having a Vice-President outside Wellington.

Hon. Treasurer: Mr. I. H. Macarthur was re-elected.

Disciplinary Committee: It was resolved that Mr. E. D. Blundell be appointed to fill the vacancy caused by the death of Sir William Cunningham. Messrs. J. B. Johnston, L. P. Leary, Q.C., M. R. Grant, A. N. Haggit, W. E. Leicester, A. C. Perry, and F. C. Spratt were re-elected.

Management Committee of the Solicitors' Fidelity Guarantee Fund: Messrs. D. Perry, E. T. E. Hogg, G. C. Phillips, I. H. Macarthur, and D. R. Richmond were re-appointed members of this Committee.

Conveyancing and Costs Committee: The President read letters of resignation from Messrs. S. J. Castle and G. C. Phillips. The Council recorded its sincere thanks to Messrs. Castle and Phillips for their services on this Committee and its regrets at their resignations. It was resolved that Messrs. J. R. E. Bennett, E. T. E. Hogg, N. A. Morrison, D. R. Richmond, and D. W. Virtue be elected as members of the Conveyancing and Costs Committee, and that they be notified that three shall be a quorum of the Committee.

Finance Committee: Messrs. D. Perry, E. T. E. Hogg, I. H. Macarthur, G. C. Phillips, D. R. Richmond and A. T. Young were re-appointed.

Joint Audit Committee: Messrs. F. B. Anyon, J. R. E. Bennett and F. L. Parkin were re-appointed.

Judges' Library Committee: Messrs. H. R. C. Wild, Q.C., and I. H. Macarthur were re-appointed.

New Zealand Council of Law Reporting: Mr. J. P. Cook of Dunedin, was re-appointed for a further term of four years, expiring on the first Monday in March, 1963.

Legal Education Committee: Messrs. I. H. Macarthur, A. C. Perry, K. Tanner and J. N. Wilson, Q.C., were re-appointed.

Law Revision Committee: Sir Wilfred Sim, Q.C., and Mr. H. J. Butler were re-appointed representatives of the Society on the Law Revision Committee.

On the motion of the President, the annual report was formally adopted and on the motoin of the Treasurer the accounts and balance sheet for the year ended December 31, 1958, were formally adopted.

TRANSPORT ACT.—Mr. Macarthur reported as follows:

"The Commissioner of Transport informs me that consideration is at present being given to a number of suggestions that have been made, by various authorities and organisations, for amendments to the Transport Act. There has not been any conference of Transport Licensing Authorities, the possibility of which was mentioned by the Commissioner over a year ago; and I gain the impression that it is not likely that any such conference will now be held."

I reminded the Commissioner of the reforms already suggested by the Society (see Item No. 8, Minutes 23/8/57) and he said that he would see that those matters were again considered. I recommend, however, that a letter be sent to the Commissioner stating that the Society holds the strong view that the suggested reforms (particularly that relating to subpoenas) are desirable."

Mr. Macarthur added that the Commissioner thought it unlikely that any amendment would come down for the current sessions.

It was resolved to thank Mr. Macarthur for his report and to ask him to keep in touch with the Commissioner of Transport and to endeavour to have the Society's proposed amendments included in the new draft.

TRANSPORT AMENDMENT ACT, No. 2, 1958.—The following letter from the Hawkes Bay District Law Society was considered:

4th December 1958.

"Dear Madam,

re Transport Amendment Act No. 2.

The attached letter received by a practitioner has been considered by my Council and it was resolved that the letter should be forwarded for the consideration of the New Zealand Law Society.

My Council expresses its whole-hearted agreement with the views expressed therein. On the order principle of minimum penalties, my Council has expressed a clear view against such penalties.

I should therefore be pleased if this matter could be placed in the agenda for the next N.Z. Law Society meeting."

Enclosure:

" Dear Sir,

re Transport Amendment Act, No. 2.

The minimum period of application for reinstatement of driving licence following a conviction for driving while intoxicated is now one year instead of six months. This provision applies to offences committed both before and after the passing of the Transport Amendment Act. Penalties are intended to be deterrent. It is against principle to alter the reinstatement period from six months to one year in respect of offences committed prior to the passing of this Act. The reinstatement of a driving licence is wrapped up in the penalty, and the new Act really legislates retrospectively in regard to this particular point. This is wrong. Moreover, it means that for persons convicted before the passing of the new Act who received the minimum disqualification of one year, there is no right of remission at all, because they cannot apply in under one year from date of conviction.

It will be recalled that originally the earlier restoration of driving licences was done by the exercise of Royal clemency through the Under-Secretary of Justice in Wellington, and it was only after some years that this power was given to Magistrates under the Transport Act. It could no doubt be arranged that in regard to persons convicted before the passing of this Act and whose period of disqualification was one year, clemency could be extended to restore licences earlier in cases where such remission would ordinarily have been earned. Such action would recognise the principle involved. The proposal contained in this paragraph is, of course, made because it would for practical purposes be too late to remedy the situation by the time that Parliament meets next year. Persons who had been convicted before the passing of the Transport Act No. 2 would nearly enough have served the full period of disqualification before any amendment could be enacted by Partiament."

Mr. McLeod stated that this question had now become one of academic interest, and in view of Mr. Macarthur's report as to the proposed amendments to the Act, it was resolved that no further action was required.

PROSECUTIONS FOR TRAFFIC OFFENCES.—Mr. Birks reported that before this matter could be discussed with the Departmental officers concerned, it had been decided to make a survey as to the extent to which the practice obtains in places other than Auckland. He advised that the matter had not yet been discussed with the Commissioners of Transport and Police and asked that it be deferred. It was resolved that the matter be deferred until the next meeting and that Mr. Birks and Mr. Macarthur be thanked for the work they had already done in the matter.

CONVEYANCING CHARGES—ATTENDANCE SCALE.—This matter was still awaiting action from the Costs and Conveyancing Committee, and it was resolved to ask the Costs and Conveyancing Committee to furnish the Council with a complete report on the matter.

SCALE OF INCREASE OF CAPITAL.—This matter had been referred to the Costs and Conveyancing Committee to bring out a scale on the lines suggested by Auckland, for consideration by the Council. It was resolved to ask the Costs and Conveyancing Committee to expedite their report for consideration.

MOTOR REGISTRATION CERTIFICATES.—Representations had been made to the Minister of Transport on this matter, and an acknowledgement had been received. The President said that this matter had previously come before the Law Revision Committee without reference to the Society, and that the Licensed Motor Vehicle Dealers' Act had perhaps been considered as a solution to the situation. It was resolved that a letter be sent to the Minister saying that the Society had now been able to consider the Motor Vehicle Dealers' Act, that it does not seem to the Society to solve the difficulties, and that the Society presses again that consideration be given to the proposed Bill.

SUPERANNUATION BENEFITS FOR SELF-EMPLOYED.—The President advised that Mr. Hurley, who had been pursuing this matter on behalf of the Society, had informed him that the Noble-Lowndes Organisation had agreed to have their report printed, and it would be sent to all districts.

The superannuation scheme adopted by the English Law Society was mentioned, and the question raised whether the Society should circulate particulars of this shceme and bring before the Minister the taxation benefits therein.

It was resolved to thank Mr. Hurley for the work he had done, and that immediately a report of the English scheme is received, it be circulated to all District Societies.

PAYMENTS WITHOUT PROBATE.—The President reported that, following on representations to the Minister and discussions with the Deputy Commissioner of Inland Revenue, who advised that the scheme had been opposed by the Public Trustee, a letter had been sent to the Public Trustee, and the following reply had been received:

9th December, 1958.

" Dear Sir,

Payments Without Probate.

I regret the delay in replying to your letter dated 8th October.

There seems to have been some misunderstanding in regard to the attitude of the Public Trustee to an increase in the amounts of money which may be paid without probate or administration. Until your letter was received the Public Trustee was not aware that any general proposals had been before the Law Revision Committee and has, therefore, not made any representations to that Committee. The Public Trustee did have some correspondence with Treasury in 1956 and, as a matter of interest, copy of memorandum 1st May, 1956, and an extract from an earlier memorandum 7th February, 1956, which is referred to therein, are enclosed.

I suppose there could be difficulties if there were several persons equally entitled and there were several assets to which the limit of £500 could be applied. In most cases no doubt there would be one person entitled and only one or perhaps two assets to be dealt with. In that event a limit of £500 seems to be reasonable.

The suggestion in the last paragraph of your letter that a new statute might be introduced to deal with all such payments is I think a good one. If a committee were set up to draft legislation for consideration by interested parties, I would be glad to make one of the Public Trust Office solicitors available to assist if that were desired.

Yours faithfully."

The question arose whether or not the Minister should be approached with a view to amending the Acts, of which there were over 20. Mr. Hain said that the co-operation of the Public Trust Head Office would be invaluable and the Wellington Council would be prepared to appoint a sub-committee to look at the whole problem and, if necessary, suggest drafting a new statute.

It was resolved that this matter be referred to the Wellington District Law Society, to bring down a report for the next meeting.

ADOPTION REGULATIONS.—Mr. Birks reported that he had taken up the matter of the draft Regulations with the Justice Department, and suggested certain amendments along the lines discussed at the last meeting. He elaborated on these amendments and explained that the Society's part in the framing of these Regulations was completed and that they were now the responsibility of the Justice Department.

The Council recorded its thanks to Mr. Birks for his action in the matter.

FILING FEES ON REGISTRATION CHARGES.—The following letter from the President to the Registrar of Companies was read:

5th February, 1959.

" Dear Sir,

Re: Filing Fees on Registration of Charges—Section 102.

The Gisborne District Law Society has referred to the Council the fee charged by the Registrar at Gisborne on the filing of particulars of a charge registered under other Acts. In the majority of cases the particulars will, no doubt, be of a Memerandum of Mortgage given or taken over by a company in respect of which a registration fee of £2 1s. 0d. will already have bene paid by the company to the District Land Registrar concerned. The Gisborne Law Society understood from the District Registrar at Gisborne, that the charges of £1 where the amount exceeds £200, as it almost invariably would, was pursuant to a ruling issued by you.

The Council considered that it appeared doubtful whether the fee of £1 on the registration of particulars of a charge

registered elsewhere was justified by Section 102 and by Part III of the first schedule to the Act.

The first schedule does not specify any fee for filing particulars of a mortgage registered under any other Act, but does not provide a fee of 10s. or £1 (according to the amount of the charge) for registering the instrument *creating or evidencing any charge required to be registered thereunder.* Section 102 provides that a copy of the instrument by which the charge is created or evidenced shall be delivered to the Registrar for registration in manner required by the Act, and then follows the proviso which says that if the instrument by which the charge is created or evidenced is registered under any Act other than Companies Act, it shall be sufficient if particulars of the instrument sufficient to identify it are delivered to the Registrar for registration. Where, as is almost always the case, the particulars are of a Land Transfer mortgage, the document creating or evidencing the charge is the mortgage itself on which the registration fee has already been paid. It seemed to the Council that Section 102 and the schedule emphasized the registration of the document creating or evidencing the charge which would not include the particulars delivered to the Registrar of Companies. It seemed to them that this should properly be charged under the schedule heading 'For registering any document required by this Act to be delivered, sent or forwarded to the Registrar and not otherwise charged,' for which the fee is 5s.

If you think this interpretation of the Section and Schedule is not justified by their wording the Council asks that you reconsider whether the schedule could not be amended to specify a fee of 5s. for filing particulars. Under the present practice applied at Gisborne and possibly elsewhere in New Zealand, a debenture securing a very large sum can be registered for £1, but the Land Transfer mortgage for quite a small sum would carry a fee of £2 1s. 0d. in the Land Transfer Office, a further fee of £1 in the Companies Office, plus 5s. fee if a certificate of registration is taken out. In many cases, of course, the mortgage is merely collateral security for the debenture."

The following letter has been received in reply:

20th February, 1959.

"Dear Sir,

Registration Fees on Registration of Charges: Section 102, Companies Act, 1955.

I have considered the Gisborne Law Society's submissions on the question of the fees payable in connection with particulars filed in compliance with the proviso to Section 102 of the Companies Act 1955, but am unable to agree with them. The District Land Registrar, Gisborne, obtained a ruling from this office in August, 1957, and is charging fees in accordance with that ruling. All Companies Offices in New Zealand observe this scale of charges.

The proviso to Section 102 (1) states that—'if the instrument by which the charge is created or evidenced is registered under any Act other than this Act it shall be sufficient compliance with the requirements of this subsection if..... particulars of the instrument sufficient to identify it and such other particulars if any as may be prescribed are delivered to the Registrar for registration.'

Halsbury's Laws of England (2nd Edition, Vol. 31, Sec. 605) states—'A proviso excepts out of a previous section or out of the earlier part of the section which contains it, something which but for it would have been in the enacting part.' In the present case the proviso excepts the filing of the certified copy of the instrument and allows particulars of the instrument to be filed in lieu thereof. The proviso therefore constitutes a variation of form not of substance.

Section III of the First Schedule of the Act is quite unequivocal in its statement of the fees payable:

'For registering under Part IV of this Act the instument *creating* or *evidencing* any charge required to be registered thereunder	
Where the amount of the charge does not exceed £200	£0 10 0
Where the amount exceeds £200 or is not specified	£1 0 0'

The position is the same in the case of the proviso to Section 104 of the Companies Act, 1955.

As regards the argument that a registration fee usually under the Land Transfer Act has already been paid on the document concerned, I must point out that registration under that Act confers certain benefits on the mortgagee and cannot therefore be regarded as entitling the Company mortgagee to escape payment of a statutory fee under the Companies Act. Apart from the fact that there is a statutory duty to register, registration also confers certain advantages under the Companies Act. I do not consider that there is a good case for a reduction in the fees in this instance but the Gisborne Law Society could no doubt, through your Society, make a case to put before the Law Revision Committee for consideration.

In regard to the last sentence of your letter in cases where the mortgage concerned is collateral with a debenture previously registered, the particulars (or true copy) attracts a registration fee of 5s. only as provided in the Schedule of fees.

I trust what I have set out above will be of assistance to the Society in considering this matter and regret that I cannot assist them either by agreeing to their interpretation of the proviso or by putting the Schedule of Fees up for amendment.

Yours faithfully."

It was resolved that the report be received and that no further action be taken in this matter.

JURY NOTICES:—The President reported that the Districts had been asked for their views on this matter, the subject having been raised originally by the Auckland District Law Society.

The following views were received:

(a) *Hamilton*:

"At its February Meeting my Council considered the above item and resolved that it approved of the practice of the filing of a Praecipe setting a Jury case down for hearing before a Jury and the serving of a copy upon the other side within the normal setting down time as being sufficient notice for a Jury trial—thus dispensing with the requirement of filing and serving any Jury notices.

(b) *Nelson*:

"This Society supports the views expressed in the memorandum of the 23rd February".

(c) *Canterbury*:

"My Council . . . is of opinion that the inclusion of notice to the effect that a Jury is required in a Praecipe setting down would suffice not only for setting down the action subsequently to the first sitting, but indeed for the first setting down. It would, of course, be necessary to porvide that service of the Praecipe setting down be obligatory".

The views of Wanganui District Law Society were also expressed at the meeting by Mr Armstrong, setting out some arguments against the views expressed by Auckland. Mr Wilson said that none of the difficulties mentioned by Mr Armstrong would survive the abolition of the special jury notice and the sub-stitution of the filing of the Praecipe setting down.

It was resolved that the Standing Committee take up with the Rules Committee the suggestion that the jury notice which is now required in order to obtain trial by jury should be abolished and that it should be sufficient that a Praecipe setting down before a jury be filed and that a copy of the Praecipe be served on the other side not later than the last day for setting down.

DIVORCE AND MATRIMONIAL CAUSES ACT 1928:—The President reported that the following letter had been sent to the Minister of Justice:

11th December, 1958.

"Sir,

Re: Divorce and Matrimonial Causes Act 1928, Sections 10 (jj) and 18

At its meeting on 28th November the Council considered a submission by the Wellington District Law Society that an amendment be sought to Section 18 of the Act to allow the Judge a discretion in granting a decree on the grounds specified in Section 10 (jj) in cases in which the respondent opposes the making of the decree and the Court is satisfied that the separation was due to the wrongful act of the petitioner.

Section 10 (jj) contains the additional ground for divorce introduced in 1953—namely, "that the petitioner and the respondent are living apart and are unlikely to be reconciled and have been living apart for not less than seven years".

Section 18 provides:—

"In every case where the ground in which relief is sought is one of those grounds specified in paragraphs (h), (i), (j and (jj) of section ten of this Act and the petitioner has

proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made, but if upon the hearing of a petition praying for relief on the grounds specified in paragraph (i), or paragraph (j), or paragraph (jj) aforesaid the respondent opposes the making of a decree and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition."

The subsections (h), (i), (j) refer respectively to the grounds of failure for three years to comply with a decree for restitution, an agreement for separation in full force for not less than three years and a decree of judicial separation an order for separation made by a Magistrate or a competent Court in force for not less than three years, Section 18 was made to refer to Section (jj) in 1953 when the new ground was included in the Act and since that date has been the subject of considerable judicial comment.

In his judgment in a case heard in Wellington, *Howell* v. *Howell*, on the 25th August 1958, North J., in his written judgment says:

"Before parting with the case, however, I think I may with propriety again draw attention to the present unsatisfactory state of the law. When in 1953 it was thought right to introduce as a separate ground for divorce that the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years, I doubt whether it was sufficiently recognized that the Court was left with no discretion to grant the petition if the respondent filed an answer and proved to the satisfaction of the Court that the 'living apart' was due to the wrongful act or conduct of the petitioner. The very fact that Section 18 still speaks of 'the separation' seems to indicate that this may be so, for these words are really inappropriate to describe a parting which has occurred otherwise than by consent."

His Honour then refers to the observations of Kennedy J., in *Keast* v. *Keast* [1934] N.Z.L.R. 316, who stated that he was authorized by the other Judges who had sat with him in an earlier case to say that the words 'the separation' in s. 18 did not include wilful desertion which is a termination of cohabitation by the unilateral act of one party. On the contrary, the words 'the separation' in the context in which they occur in s. 18 of the Act, refer to a cessation of conjugal cohabitation by mutual consent of the parties.

In *Wadsworth* v. *Wadsworth* [1955] N.Z.L.R. 993, Turner J., felt obliged to give the words a wider meaning now that they were required to apply not only to true separations but also to the new ground of divorce.

In *Towns* v. *Towns* [1957] N.Z.L.R. 947, at page 950, Adams J., after quoting with approval the remarks of Gresson J., in *Crewes* v. *Crewes* [1954] N.Z.L.R. 1116, says:

"The same learned Judge expressed himself to the effect that the enactment of Section 10 (jj) was a legislative recognition of the principle that it is not conducive to the public interest that man and woman should remain bound together in permanence by the bonds of a marriage which has irremediably failed. The learned Judge mentioned, of course, the equally important legislative recognition in Section 18 of the principle that there may be cases in which a petitioner has been guilty of such grave matrimonial misconduct that in the public interest a decree should be refused. One may observe quite consistently with his remarks, with which I respectfully and wholeheartedly agree, that the competition between those principles might well be left to the arbitrium of the Court in the exercise of the discretion and that it ought not to lie in the arbitrium of the respondent to the suit to determine which of the two principles should govern the particular case, and to prevent the Court from granting a decree even though the Court be convinced, as I am in this case, that in the circumstances the first principle is the dominant one that any misconduct which has been proved is insufficient to justify the refusal of a decree."

In this case the learned Judge granted a short adjournment to enable counsel to discuss with their clients the possibility of the respondent withdrawing her opposition on security for maintenance being provided. In *Wadsworth* v. *Wadsworth* [1955] N.Z.L.R. 993, Turner J., adopted a similar procedure when the respondent's opposition arose from religious conviction. In both cases the adjournment did not lead to the withdrawal of the answer and a decree was refused.

In *Kurtich* v. *Kurtich* [1957] N.Z.L.R. 128, Archer J., reviewed the decisions on s. 18 both before and after the introduction of s. 10 (jj) as a ground for divorce.

The Wellington District Law Society had referred the question of an amendment to the Secretary of the Law Revision Committee, who replied:

"The following representations to the Minister as a result of previous decisions and in particular *Kurtich* v. *Kurtich*, this matter was considered by the Law Revision Committee earlier this year (1958). It was pointed out that the present law with its absolute bar to the wrongful conduct of the petitioner was enacted by Parliament in 1953 after the Statutes Revision Committee had heard a great deal of evidence from interested organisations. There are, indeed, grounds for thinking that if the absolute bar had not been introduced, divorce on the grounds of seven years' separation might not have commended itself to Parliament at all."

"In the circumstances the Law Revision Committee decided not to recommend any change in the existing law and suggested that if an alteration was sought, Parliament should be approached directly. This being so, I do not think the Committee could usefully be asked to reconsider the question at this stage."

Five years have now elapsed since the section was considered by the Statutes Revision Committee at the time of the enactment and as the judicial comments show, there have been many cases in which the Court would have been prepared to grant a decree if it had been allowed any discretion. The experience of the members of the Society has been that in the great majority of cases brought under s. 10 (jj), the parties have lived apart from each other following differences and that in such cases, the husband almost invariably leaves the matrimonial home. When a petition is filed by the husband at least seven years later and the respondent wife says that she did not agree to the husband going, it is almost impossible for the husband to obtain a decree under the section without the acquiescence of the wife. It is also very difficult to get reliable evidence of what actually did happen when the marriage broke up after this lapse of time. In many cases the divorce means little to the petitioner and is brought merely to give a legal name to illegitimate children of a later association. In many cases, for example *Wadsworth* v. *Wadsworth*, the Court suggested to the respondent that she might reflect whether the case did not affect the lives of others beside herself to such a degree that she might be influenced to reconsider her attitude.

As an application to the Law Revision Committee appeared to be useless the Council resolved to submit to you its request that further consideration be given to an amendment of s. 18 allowing discretion to the Court in petitions on the ground contained in s. 10 (jj)."

This letter had been acknowledged only by the Minister. It was resolved that this matter be stood over pending further reply from the Minister.

COMMISSION ON GOVERNMENT AND LOCAL BODIES LOAN:— The following letter from the Auckland District Law Society was discussed:

"At a recent Annual General Meeting of Members of this Society, the following resolution was passed:

'That this meeting considers that there is nothing improper in a solicitor receiving a payment by way of commission from the Government or from a local body where the solicitor makes application on behalf of a client for debentures or stock so long as the solicitor discloses to the client that he, the solicitor will be receiving such a commission.'"

Hawkes Bay supported Auckland's resolution, but Mr McLeod drew attention to his own personal view, which was that practitioners should not augment their income by any fees other than legal fees.

The Auckland view was that there was nothing improper in a solicitor accepting brokerage under the circumstances mentioned in their resolution provided that the client was aware of it.

Mr Birks spoke in support of Wellington's opposition to the acceptance of commission on local body loans by solicitors.

It was resolved that Ruling No. 42 be cancelled and the following substituted:

"There is nothing improper in a solicitor receiving commission from the Government or from a local body where the solicitor makes application on behalf of a client for debentures or stock so long as the solicitor discloses to the client that he, the solicitor, will be receiving such a commission, and the client agrees."

EMPLOYEES' INDEMNITY BILL AMENDMENT :—The President advised that the proposed amendment had not yet been considered by the Law Revision Committee, but that all reports received by the Society were being handed on to the Justice Department at the request of the Secretary for Justice. It was resolved that any representations on the subject be forwarded in triplicate to the Secretary of the Society, one copy to be handed to our representatives on the Law Revision Committee, one for the Justice Department and the third for the Council's records.

COMMISSION ON LIFE INSURANCE PREMIUMS :—The above matter was also connected with a matter raised by the Wanganui District Law Society as follows :

" The following is a copy of a letter received from one of our practitioners. Would you please refer this letter to the appropriate committee so that they may give a ruling on this matter.

' A question has arisen relative to the N.Z. Law Society's ruling No. 39 given in September, 1945, in the following circumstances :

Recently we arranged several advances by the State Advances Corporation in each case the advance being protected by a life policy upon the single premium basis, the premium being added to the advance under the mortgage. On completion of one of the matters we were somewhat surprised to find that the Life Insurance Company concerned sent to us a cheque apparently upon a commission basis. We advised the Insurance Office that this cheque could not be accepted and they expressed surprise and said that their Company both in Wanganui and in other centres had, for some time, paid a similar commission to solicitors who were putting business in their Company's way.

We should be glad to have your comment upon this matter and also if you think it advisable to obtain an expression of opinion from the New Zealand Council.' "

Wanganui pointed out that their Society did not consider that the matter came within the New Zealand Law Society's Ruling No. 39, as the solicitor concerned did not at any time act as agent for the Life Insurance Company.

Mr Birks submitted that the basic principle behind the old ruling still obtains. He said that a solicitor would tend to lose his independence ; if some Life Insurance Companies paid commission, and not others, it might be suggested that the solicitor was influenced in his recommendation by the fact that he would receive commission on the policy so effected. It was pointed out that the solicitor did nothing on arranging the policy but merely inserted a name in the application. It was resolved that the Council is of opinion that it is improper for a solicitor to receive a commission from an insurance Company whose name has been inserted in an application for a loan supported by a mortgage redemption policy.

INTERNATIONAL BAR ASSOCIATION :—The following report on the Cologne Conference was received from Mr R. L. Ronaldson :

25th February, 1959.

" As a delegate of the Society I attended with the Honourable Mr Justice McGregor the Seventh Conference of the International Bar Association held in Cologne between the 21st and 25th July last.

Unfortunately, immediately following the opening session of the Conference at which he replied to the address of welcome, Mr Justice McGregor became very unwell and was unable to take any further part in the Conference at all.

It was fortunate that Mr J. R. E. Bennett was present at the Conference and he delayed his return to England to enable him to attend throughout.

I am enclosing herewith the minutes of the general meetings of the Council with covering memorandum from the Secterary General. I also enclose a list of the conferees and a resumé of the Conference.

I have expected before now to have received the complete bound report of the Conference which is now on the press in Germany and as soon as it comes to hand I shall forward it to you.

In view of the resumé enclosed and the complete record of the Conference that should arrive shortly, there seems little that I can add.

There was a most generous welcome extended to all the conferees, their wives and friends. The meetings at which the remits and papers were read and discussed were always well attended and it is quite clear that those members of the Bar most closely associated with the Association are enthusiastic and earnest and they are making a real contribution in matters of private international law and allied subjects as well as fostering goodwill amongst members of the profession in various parts of the world.

There were many American members of the Bar at the Conference but it was pleasing to note that there seemed no effort on their part to take more than their fair share of the administration and control of the Association. There were many instances of American appreciation of contributions and suggestions made by members of the English Bar and Law Society as well as from other countries, and the Chairman, on re-election, sincerely expressed the hope that a member of the English Bar or a member of the Law Society should occupy the Chair after the next Conference.

The Secretary of the English Law Society, Sir Thomas Lund, was helpful at all times. I understand that he has written to you advising you that Mr Peppiatt, the President of the Society, hopes to be in Australia next month and could if invited come to New Zealand. No doubt the Council will consider the value of such a visit."

It was resolved that the Secretary be authorized to pay the membership dues of the International Bar Association, amounting to 150 dollars.

INTER-UNIVERSITY MOOT :—Mr Macarthur read a letter from the N.Z. Law Students' Association regarding the expenses of University students in relation to the Easter moot.

It was resolved that the Society pay to the N.Z. Law Students' Association the maximum of £75 for the 1958 year in respect of the Inter-University moots, subject to the Treasurer being satisfied that the expenses were properly incurred.

The next meeting of the Council will be held on Friday, July 31, 1959.

Safe System of Work.—In the case of *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180, 191 ; [1952] 2 All E.R. 1110, 1114, Lord Oaksey in his speech said ; " In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts." Lord Reid said : " The question then is whether it is the duty of the appellants to instruct their servants what precautions they ought to take and to take reasonable steps to see that those instructions are carried out. On that matter the appellants say that their men are skilled men who are well aware of the dangers involved and as well able as the appellants to devise and take any necessary precautions. That may be so, but in my opinion it is not a sufficient answer." (p. 193 ; 1117).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

An Employee's Misconduct.—In *Laws* v. *London Chronicle* (*Indicator Newspapers*) *Ltd.* [1959] 2 All E.R. 285, concerned the behaviour of an employee of the defendant company, who had been engaged by the company as advertisement representative some three weeks previously, in following the advertisement manager of the company, her immediate superior, out of the room of the managing-director after an embarrassing interview between the advertisement manager and the director, despite the latter's saying said to her "Stay where you are". She left the room out of loyalty to her immediate superior, who had asked her to follow him, and because the situation was embarrassing and unpleasant. She was dismissed summarily for misconduct. It appeared that the chairman and managing-director had asked an expert to advise him and the company on business efficiency, and he ordered the advertising staff of the paper—the manager and two persons under him, including the plaintiff—to attend to hear the expert's observations. An unfortunate scene broke out between the chairman and the manager. It was suggested that the latter was drunk, and the chairman requested that someone should supply the manager with the calming effects of black coffee. According to Lord Evershed M.R., the manager "obviously behaved badly and announced at some stage that he would have no more of it and would go, 'taking the staff with him'"—namely, the two persons aforesaid, whom he invited to accompany him out of the room. Notwithstanding the chairman's order to stay, they followed the manager out of the room. Counsel for the defendants urged that the dismissal was not wrongful and that there was nothing that a self-respecting employer could do but dismiss the plaintiff summarily, for here was an order which had been disobeyed. The Master of the Rolls disagreed with the view and held that, since a contract of service was but an example of contracts in general, the general law of contract was applicable. If summary dismissal was claimed to be justifiable, the question must be whether the conduct complained of was such as to show that the servant disregarded the essential conditions of the contract of service. It was, no doubt, generally true that wilful disobedience of an order would justify summary dismissal, since such disobedience showed a deliberate disregard of a condition essential to the contract of service and, unless the servant obeyed the proper orders of the master, the relation was struck at fundamentally. But the statement of the law in *Halsbury* also said: "There is no fixed rule of law defining the degree of misconduct which will justify dismissal". The judgment of the Court below awarding the plaintiff £45 damages was upheld by the Court of Appeal.

The Value of Reports.—"Let not the same thing happen to the common law", said Lord Denning, in referring to the multitude of workers' compensation cases, "lest we be crushed under the weight of our own reports". This statement is accepted with reservation by the *Law Journal* (London) (Vol. 109, p. 258) which stresses the difficulty of the problem of adequate reporting. "Few people", it says, "probably, would quarrel with the statement that under a system of precedent the basic legal reason for reporting a case is that it establishes, extends, or modifies a principle of law. In our generation new law is made, however, by statute, and the interpretation of statutes accounts for many reported cases". In its view, the classic rule is too narrow today. There exists a demand for the report of cases based upon what practitioners need to assist them, so much so that distinguished practitioners have advocated the desirability of reporting every case. "The approach of Judges to problems arising at the present day explains to practitioners the application of old principles in new conditions; it may be a valued guide, even though new law is not created. The reporting of cases illustrating this application of established principles is essential to the existence of a sufficient degree of certainty to enable clients to be advised, and litigation to be brought, settled, or fought on the real issues. That is the main purpose that reports serve, not solely that the decisions reported make or modify legal principles. It is the proper and useful function of reports to satisfy the need for guidance, avoiding excess so far as is possible." Newspapers like *The Times* with a well-qualified law editor serve the profession and the public alike with its reports of cases and judgments when the Courts are sitting. The recent innovation of some of the metropolitan papers in New Zealand of syndicating every few days the precis of some recent Supreme Court or Court of Appeal judgment has been well received as a timely and useful addition to Press service, and it has the further advantage of keeping everyone up-to-date with decisions that the limitation of space may in certain instances render unsuitable for inclusion in our official Reports.

Adjournment Note.—The *Justices of the Peace Review* relates that a restaurant-keeper who applied for a publican's licence anticipates a saving of no less than £295 as the result of an adjournment that was not of his seeking but was unavoidable. His application was adjourned on a question of conditions and then granted, monopoly value being fixed at £300. For the purpose of confirmation, the matter had to stand over for twenty-one days, by which time the Chancellor of the Exchequer had introduced his Budget proposals in the House of Commons. Now the restaurant-keeper looks like paying only £5 as the result of the change in the law. On occasions, Courts see value in continued adjournments. Scriblex recalls a case involving the construction and materials of several jerry-built houses. Neither counsel seemed ever to be in a position to proceed with the hearing. A well-felt apology for the making of the sixteenth application for an adjournment was met with an interruption from the Magistrate (Mr Riddell S.M.). "There is no need to pursue the matter", he said, "an adjournment will be granted"; and, he added with a smile, "I shall continue to grant adjournments in this case, whenever requested, and at the expense of the Court".

Tailpiece (for ageing lawyers).—The advantage of being bald is that when you are expecting company all you have to do is to straighten your tie.

IMPERFECT CHARITABLE TRUSTS.

(*Continued from p. 185.*)

the poor kindred of a testator as good charitable trusts ought to be extended by way of analogy to cover a trust for the purposes of education of an equally limited class. It was held :

(1) That a gift for the education of descendants of named persons introduced into their qualification a purely personal element and such gift was, therefore, to be regarded as a family trust and not as one for the benefit of a community.

(2) That the direction as to the kind of education to be provided was as such not sufficient to make the gift a charitable one.

(3) That the rule that gifts for the relief of poverty of members of a specified family were charitable was good law, though anomalous, and such anomaly ought not to be extended to the case of an educational trust without a poverty qualification.

The second recent judgment of the Privy Council, *Leahy* v. *Attorney-General for New South Wales* [1959] 2 All E.R. 300, is much lengthier than the Privy Council case previously discussed in this article : it deals with more topics. The two main topics (both very difficult) dealt with are :

(1) The true application and extent of a New South Wales statutory provision similar to one in Australia and to our New Zealand s. 2 of the Trustee Amendment Act 1935 (now represented by s. 82 of the Trustee Act 1956, where, however, the wording has been altered).

(2) Gifts to unincorporated bodies, when they are valid and when they are not as tending to a perpetuity.

(*To be concluded.*)

CORRESPONDENCE.

Unanimity in the Court of Appeal.

Sir,

In his article " Dangerous Premises : Court of Appeal Decisions " (*ante* p. 117), Mr R. B. Cooke states that in the first fifteen months of its work the reconstituted Court of Appeal of New Zealand disposed of ninety-three cases, civil and criminal (including appeals against sentence only) and in every case the result reached was unanimous. This, your contributor suggests, is a remarkable, if not unique, record.

A significant number of these cases were criminal appeals either against sentence, or conviction, or both. There is surely nothing remarkable in the fact that the result reached by the Court was unanimous in all such cases.

The New Zealand Court of Appeal has almost invariably adopted the practice (for reasons which are readily apparent) of delivering a single judgment in criminal appeals under the Criminal Appeal Act 1945. The Court of Criminal Appeal in England for many years has done likewise. It would be wrong to assume that in all such appeals there was complete unanimity among the members of either Court as to the proper decision.

Mr Cooke's comments would, I suggest, have been more realistic had they been based only on appeals in civil cases.

C/o CROWN LAW OFFICE
WELLINGTON C. 1.

I am, etc.,
G. S. ORR.

Chattels Transfer Affidavits.

Sir,

I heartily agree with the comments of Mr Cain (in his Article in the Journal, *ante*, p. 106) that the affidavit of due execution is an unnecessary nuisance.

However, if an affidavit *is* insisted upon by the Act, surely it need not be in such a clumsy verbose and repetitive form as the one prescribed in the Schedule. For years I have used a shorter and simpler form.

The Court Officials at first objected, but I argued that s. 5 required " an affidavit in the form numbered 1 or *to the like effect*," and that my form covered all the points included in the prescribed form.

To their credit, I think, they accepted my form, albeit with some reluctance, and I have used it in all Chattels Registrations since.

My form of affidavit is as follows :

I JOHN SMITH of Dunedin Clerk make oath and say as follows :

1. THE document annexed hereto and marked " A " is a true and full copy of an Instrument under the above Act as duly executed by William Steele on the 16th day of December 1957 in my sight and presence at Dunedin and witnessed by me in my proper handwriting.

2. THE said William Steele resides at 28 Brown Street, Dunedin, and is a Welder.

3. I am a Clerk and reside at Wingatui.

I am, etc.,
WARRINGTON TAYLOR.

" **Discovery** " **in American Courts.**—" Recent cases in this country—I have in mind one decided by the Court of Appeal a year or two ago, *Board* v. *Thomas Hedley & Co. Ltd.* [1951] 2 All E.R. 431—have shown that one may sometimes obtain discovery of documents not because they are relevant in the case itself, but because they may fairly lead to a line of inquiry which would disclose relevant material. It is plain that that principle has been carried very much further in the United States of America than it has been carried in this country. It is not restricted merely to obtaining disclosure of documents from the other party to the suit. It is plain that there is a procedure, what might be called a pre-trial procedure, in the Courts of the United States, which allows interrogation not merely of the parties to the suit but also of persons who may be witnesses in the suit or whom it may be thought may be witnesses in the suit to require them to answer questions and produce documents. It seems to me to be plain enough that those questions would not necessarily be restricted to matters which were relevant in the suit or to produce necessarily what was admissible evidence, but might be used to lead to a train of inquiry which may of itself lead to relevant material. It is plain that that pre-trial procedure, the obtaining of depositions from witnesses with a view to discovery, is what the Federal Court at Illinois is at present engaed on, and accordingly the applicants, the Rauland Corporation, applied to the Court for process, which under English law they could not possibly get, to obtain discovery, in effect, from witnesses in this country, from the English Electric Co., the Marconi Co. and a number of directors of those companies. In accordance with the ordinary American procedure, they were allowed to obtain that."—Devlin J. in *Radio Corporation of America* v. *Rauland Corporation* [1956] 1 All E.R. 549, 550.