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FAMILY PROTECTION: SOME RECENT JUDGMENTS.

THIS is the last of the present selection of recent Family Protection judgments.

WIDOWERS.

In *In re Doidge (deceased)* (Nelson, M. No. 874), the learned Chief Justice had to consider a claim by the widower of Agnes Doidge, who died in July, 1957, at the age of seventy-two. She had married the plaintiff in 1950 when she was sixty-five and he was sixty-one. By her will, executed in 1952—that is about two years after her marriage—she gave all her property to her brother and made him her executor. He was the defendant in these proceedings. He was seventy-four years of age. Neither Mrs Doidge nor her husband had previously been married. Mr Doidge was the only person eligible to make a claim under the Family Protection Act 1955.

The only substantial asset in Mrs Doidge's estate was a piece of land situated at Brightwater and having a dwellinghouse erected thereon, valued at £2,065, but subject to a mortgage of £308. Mrs Doidge and her husband used this property as their matrimonial home, and the husband was still residing there. At the time of the hearing, he was almost seventy years of age. He asked that he be given a life interest in this property and in the furniture therein.

The plaintiff's annual income was as follows: Age benefit, £234; interest on money in Post Office Savings Bank, 17s. 2d.; income from his father's estate in which he had a life interest, approximately £70—a total of just over £300.

The defendant's only source of income was stated to be a war disability pension of £40 per calendar month or £480 per annum. He had a wife dependent on him. She was sixty-four years of age and in poor health. As His Honour observed, Mrs Doidge's husband and brother were both in very straitened circumstances and her estate was a very small one.

The plaintiff's marriage was of short duration—only seven years—and for some of those years his wife showed signs of mental and physical deterioration. For the last eighteen months of her life, she was in a mental institution and would have been sent there earlier but she preferred to live at home with her husband. There was a suggestion that her husband had neglected her; but this was definitely disproved by competent and independent evidence. The learned Chief Justice was satisfied he did all he could at his age and in his circumstances to assist and care for his wife. He clearly had a claim on her estate, though it could not be said that he did anything to assist her in acquiring it.

The defendant, on the other hand, did assist—especially during the years from 1933 to 1943—in the running of a farm at Rolleston then owned by Mrs Doidge and her two sisters. This property appeared to have been sold and the proceeds used in the purchase of the Brightwater property. On the deaths of her sisters, Mrs Doidge finally succeeded to the sole ownership of the Brightwater property and was the owner of it when she died. The defendant probably assisted Mrs Doidge in no small degree in acquiring that property. He claimed that he received no wages for his work, but was promised "by my sisters on their death" (the learned Chief Justice assumed, he meant on the death of the survivor of them) "if I were still alive then myself, whatever estate they had to leave and if I was not then living, then such estate would go to my two children".

His Honour said:

> Whether this promise would justify a claim under the Law Reform (Testamentary Promises) Act 1949 I need not consider, for the testatrix left the whole of her estate to the defendant; but it is a matter which I should take into account in considering the extent of the moral duty owed by the testatrix to her husband. I was at first reluctant to accept the suggestion of counsel for the plaintiff that the plaintiff should be given a life interest in the Brightwater property. The plaintiff and the defendant are about the same age; and to postpone the latter's interest till the death of the plaintiff might well deprive the defendant of the personal enjoyment of any part of his sister's estate. It was for that reason that I decided to reserve my judgment.

The learned Chief Justice came to the conclusion that he should accede to the plaintiff's request. He continued:

> I am influenced in that direction by two considerations. First, an immediate sale of the Brightwater property and division of the proceeds between husband and brother would deprive the husband of his home. There is apparently a dwellinghouse situated on the land belonging to his father's estate and in which he has a life interest; but that dwellinghouse and land are let: I am not told for what term. I must assume that the land could not be let without the dwelling and the termination of the tenancy, if it can be terminated, would deprive the plaintiff of about £70 a year. He does not appear to be physically capable of farming the land himself. So far as I can judge the matter, a sale of the Brightwater property would result in the plaintiff's having no home in which he could live. Secondly, I remind myself that the reward promised for work done by the defendant on his sisters' farm was a reward which it was contemplated might not be enjoyed by the defendant himself, but by his sons. He was, on his own statement, content with that. I think I shall do justice in the somewhat difficult and unusual circumstances of this case if I make an order that the gift of the whole estate to the

defendant be made subject to a life interest to the plaintiff in the Brightwater property and in the furniture contained therein.

The plaintiff must however accept responsibility for payment of interest accruing due under the mortgage during his life tenancy.

His Honour assumed that there would be no difficulty in renewing the mortgage when it fell due, and, if it must be renewed during the life tenancy, the plaintiff must bear the costs of renewal.

Orders were made accordingly.

In case there should be difficulty in renewing the mortgage, leave was reserved to either party to apply further to the Court in that respect. There was very little left in the estate that would not be subject to the life interest given to the plaintiff. Accordingly, no order as to costs was made.

In *In re Walker* (*deceased*) (Hamilton, G.R. 3847), the widower of the deceased sought further provision out of the deceased's estate. She is hereinafter referred to as " the testatrix ". She died at Hamilton on December 6, 1957, aged eighty-three years. She had been twice married and was survived by her second husband, the present plaintiff, aged eighty-two years, whom she had married in August, 1950, and also by six adult sons of her first marriage.

Bu her will dated November 12, 1956, the testatrix bequeathed, free of duty, a freehold section at Silverstream, valued at £275, to her eldest son, Robert Henry Roberts, and two freehold sections, also free of duty and at Silverstream, valued at £775, to her five other sons. Subject to the payment of debts, duty and expenses, the residue of the estate was divided equally into sevenths, between the plaintiff and the six sons.

The residue comprised the house property at Paeroa, with a capital value of £2,850, and personal property valued at approximately £7,268 8s. 2d.

The testatrix had also given to her sons in 1955 three other sections of a total value of £1,635.

The plaintiff's share under the will when duty, etc. was allowed for, was something in excess of £1,000. He had £102 cash in the bank, and his sons owed him £210. His health was good, but he had been retired for some years and his only source of income was an age benefit of £19 10s. per month. The trustee contemplated selling the house at Paeroa as it was thirty years old and contained three bedrooms. It was thus too large for the plaintiff's needs, and there was evidence which suggested that the upkeep of the house and garden was beyond his powers. The plaintiff would accordingly have to find other accommodation. He therefore filed this application under the Family Protect on Act seeking a life interest in the property at Hill Street, Paeroa, plus the use of the furniture and contents, in addition to his one-seventh share in the residue of the estate.

Mr Justice T. A. Gresson said :

When the testatrix and the plaintiff married in 1950, the latter had no proper home and virtually no assets. He has made no significant contribution towards the estate. The marriage was of only seven years' duration and appears to have been of doubtful success, the financial responsibility for the upkeep of the household resting heavily on the testatrix.

In the rather exceptional circumstances of this marriage, I am of opinion that the testatrix herself was in the best position to assess the extent of her moral duty and financial responsibility towards her husband; and, on a careful consideration of all the circumstances, I am not satisfied that there has been any failure by her in this respect. Having regard to the plaintiff's age and his financial standards when he married the testatrix, I am of opinion that, with the help of his own children, he will be able to support himself adequately on his age benefit, supplemented by the share of capital which the testatrix has bequeathed him.

The application was accordingly dismissed, but the plaintiff was allowed his costs out of the estate, fixed in the sum of thirty guineas, and disbursements. The costs of the remaindermen, also to be paid from the estate, were fixed at thirty guineas, and disbursements.

In *In re Chapelhow* (*deceased*) (Westport, M. 106), Haggitt J. considered a motion on behalf of Mrs Mavis Ann Brew, one of the executors and trustees of the deceased, for an order varying the provisions of an order made on March 7, 1950, under the Family Protection Act 1955. Under the order it was provided that the sum of £1 per week should be paid to the plaintiff, the husband of the deceased, for his life, commencing from the date of the order, the payments to be charged against the estate and to be payable first, out of income and, secondly, out of capital. The order went on to direct that, on the death of the plaintiff, the residue of the estate should be held by the trustees upon trust for Tom Chapelhow and Doris Isabel Bernadine Hodgson or the survivor of them, and applied for their maintenance and benefit, these two persons being children of the deceased.

At the time of the hearing of the present motion, the two children were aged forty-three and thirty-six, and it appeared from the affidavit of the applicant executrix, and from medical certificates attached to such affidavit, that both children were sub-normal; but, though they were unable to work, they could both attend to their own everyday needs. The children had lived with the applicant since the death of their mother, and each was in receipt of an invalidity benefit amounting to £4 10s. per week, this being their only source of income. Mrs Brew did not charge either child anything for her or his board and lodging, apparently being content to support the children to this extent out of her own resources.

Since the order of March 7, 1950, was made, the applicant, with the full concurrence of her co-executor and trustee, her brother, had had complete charge of the finances of the estate. Since the sale of a house property belonging to the estate, the only asset in the estate comprised moneys deposited in the Post Office Savings Bank. Following the sale, the amount of the deposit was some £650, but as at the date of the hearing this amount had decreased to £104 12s. 5d. and was the only asset remaining in the estate. Accounts which were presented showed that during the period since the order under the Family Protection Act was made, Mrs Brew had spent the sum of £103 13s. 6d. on the son, and the sum of £83 1s. on the daughter, the amounts so expended including in each case a sum of £51 for holidays. In addition, Mrs Brew had paid her brother and co-trustee the sum of £55 to reimburse him for expenses which he incurred in building a garage on the house property, a claim which, His Honour said, at the best, it was doubtful if it could have been enforced.

His Honour continued :

The applicant now moved, pursuant to leave reserved in the order, that such order be varied by increasing the provision thereunder for the two children. According to her affidavit, what she really seeks is that the annuity to the plaintiff be terminated forthwith, that the payments made by her on account of the children and to her brother should,

in effect, be approved, and that the balance of £104 12s. 5d. now remaining be applied for the benefit of the children to the exclusion of the plaintiff.

I have no hesitation in refusing the order sought. The plaintiff has flagrantly disregarded her duties as a trustee and has acted in disregard of the order of March 7, 1950. Her counsel contended that she is a person not versed in business affairs; but a disquieting feature is that it is alleged in an affidavit of the plaintiff, and is not denied, that the plaintiff has had difficulty in obtaining payment of the provision made for him under the order; that he had to consult his solicitors in 1956 and twice in 1958 to have the payments brought up to date, and that, in October, 1958, Mrs Brew informed his solicitors that there was no further money left in the estate. In addition, as at July 15, 1959, the payments due to the plaintiff, under the order, are in arrear to the amount of £74.

It is true that the plaintiff's financial position has improved somewhat since the making of the order, in that under the will of a woman who died in August, 1958, he was given a life interest in a house property situated at Greymouth, while, in addition, he was bequeathed a legacy of £100. According to the plaintiff's affidavit, he occupies portion of this property and lets the other part to a tenant at a rental of £1 10s. per week. He has, however, to pay the rates and insurance premiums totalling £34 19s. 11d., while he states in his affidavit that the dwelling is an old one, in a poor state of repair, and that he anticipates that he will be put to expense for repairs and maintenance. Apart from his annuity and what little surplus he may obtain from the rent after payment of the outgoings, his only source of income is a war pension of a sum of £22 15s. per month. It is clear that the plaintiff's position is little, if any, better than that of the two children for whose benefit, presumably, the present application is made; and it seems to me that, in inviting me to terminate the annuity granted under the order of March 7, 1950, and to substitute therefor the provision now suggested, I am being asked, in effect, to act on appeal against the order.

For the reasons set out above, the motion was dismissed. The plaintiff was allowed the sum of six guineas costs, together with disbursements, against the applicant, Mrs Brew. These costs were allowed against Mrs Brew personally and were not to be paid out of the estate.

His Honour said that the question of the breaches of trust committed by Mrs Brew, and acquiesced in by her co-trustee, of course, was a matter on which no direction or order could be made in the present proceedings; if the plaintiff wished to pursue the question of the breaches of trust further then he must do so in other proceedings.

Illegitimate Child.

In *In re Le Gros (deceased)*, (Wanganui, September 9, 1959), Mr Justice McCarthy had to consider a claim on behalf of an illegitimate child of the deceased, who died on July 6, 1957, intestate. His estate was being administered by the Public Trustee.

His Honour said there had been a commendable approach on the part of all parties, no doubt assisted by wise advice from their counsel, and it was agreed that the infant plaintiff satisfied the requirement of s. 2 (3) of the Family Protection Act 1955, and that no distinction could be made between the moral claims and urgency as between the two legitimate children and the plaintiff. It was not disputed by the mother of the legitimate children (she had remarried) or by counsel for those children, that the plaintiff should have a sum approximating one-third of the value of the estate. It was rather difficult to estimate that figure; and, in the circumstances, His Honour proposed to make an order in respect of the sum of £2,750. He said:

> It would obviously be unfair that any unexpended portion of this sum should pass to someone else in the event of the plaintiff dying under age. There is power conferred by the Family Protection Act 1955 to make a class order, but without considering whether that power embraces such a case as this, there are circumstances surrounding this case which in any event make it preferable to make an order in the same terms as was made by Gresson J. in *In re Bevan (deceased)* [1954] N.Z.L.R. 1108.

An order was made that the Public Trustee should appropriate, as soon as practicable, the sum of £2,750 for the benefit of the plaintiff to be contingent upon her attaining twenty-one years, and, in the event of her dying under that age, the balance then unexpended and held in trust should fall into the residue of the estate. Sections 40 and 41 of the Trustee Act 1956 should apply, free, however, of the limitation imposed by proviso (a) to s. 41. The Trustee should have power in his discretion to make payments under those sections without the prior approval of a Judge. Any payment which the Public Trustee might decide to make from the income or capital might be made to the guardian or any of the guardians of the plaintiff, and the receipt of such guardian or guardians should be a complete discharge.

If necessary application could be made to settle the terms of the order, which must contain a reservation enabling the Public Trustee to apply for further order, if such were necessary.

As regards costs, the Public Trustee was entitled to his costs out of the estate. The costs of the plaintiff and of counsel and solicitors for the legitimate children should be taxed and paid out of the estate. Agency fees should be included in the disbursements.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Land with Memorial Hall thereon Vested in Borough—Council's Powers to Regulate Admission to Hall including Power to prohibit Admission on Reasonable Grounds—Council's Powers administrative only—Council not required to act, in Respect of regulating Admission to Hall, in Judicial or Quasi-judicial Manner—Reserves and Domains Act 1953, s. 32—See Trust and Trustees (*infra*).

BANKRUPTCY.

Selected Tools of Trade, Furniture and Wearing Apparel—Right of Selection to be exercised promptly after Adjudication—Waiver of Right by Delay—Bankruptcy Act 1908, s. 121. A bankrupt who is allowed by the Official Assignee to make a selection, under s. 121 of the Bankruptcy Act 1908, of tools of trade, furniture, and household effects (including wearing apparel to the value of £100), acquires those assets by virtue of the Bankruptcy Act 1908. The right of selection arises "immediately upon adjudication", which means that the bankrupt must, with reasonable promptitude, after adjudication, exercise his right under the section, and he waives that right by not exercising it promptly. (*In re Fama* [1932] G.L.R. 282, and *In re J. J. McMahon* [1932] N.Z.L.R. 1082, followed.) *In re Douglas (A Bankrupt)*. (S.C. Auckland. 1959. August 19. T. A. Gresson J.)

COMPANY LAW.

Copy of Register of Members—Stranger, on Payment of Prescribed Fee, entitled thereto—Court not free to inquire into His Motives—Companies Act 155, s. 121 (3) (5). Where a stranger seeks to obtain a copy of a company's register of members, and is refused, the Court is not free to inquire into his motives; and there can ordinarily be no reason why an order under s. 121 (5) should be refused. (*Oakes* v. *Turquand and Harding* (1867) L.R. 2

H.L. 325; *Holland* v. *Dickson* (1888) 37 Ch.D. 669; *Mutter* v. *Eastern and Midlands Railway Co.* (1888) 38 Ch.D. 92, and *Davies* v. *Gas Light and Coke Co.* [1909] 1 Ch. 708, applied. *In re Kent Coalfields Syndicate Ltd.* [1898] 1 Q.B. 754 and *In re Balaghat Gold Mining Co. Ltd.* [1901] 2 K.B. 665, referred to.) *In re Wellington Trust Loan and Investment Co. Ltd.* (S.C. Wellington. 1959. July 17, 30. Cleary J.)

CRIMINAL LAW.

Appeal to Court of Appeal against Conviction and Sentence—Notice of Abandonment of Appeal Given—Later Second Notice of Appeal Given—Such Notice treated as Application for Leave to withdraw Notice of Abandonment—Application refused—Practice of Court of Criminal Appeal in England discussed—Criminal Appeal Act 1945, s. 3—Criminal Appeal Rules 1946, R. 44. Once an appeal under s. 3 of the Criminal Appeal Act 1945 has been dismissed, a second appeal will not lie; and it makes no difference whether the appeal has been dismissed on its merits or the dismissal has been consequent upon an abandonment of the appeal by the appellant himself. The only course open to an appellant who has given notice of abandonment is to withdraw it; and, if leave should be granted, his case is to be disposed of on his first notice of appeal. *Quaere*, Whether the Court of Appeal will follow the practice laid down by the Court of Criminal Appeal in England which allows notice of abandonment to be withdrawn only if something amounting to mistake or fraud is alleged, which, if established, would enable the Court to say that the notice of abandonment should be regarded as a nullity. (*R.* v. *Healey* (1956) 40 Cr. App. R. 4, and *R.* v. *Moore* (1957) 41 Cr. App. R. 179, referred to. *Sherlock* v. *Police* [1958] N.Z.L.R. 526, mentioned.) In the present case, the appellant's application for leave to appeal was treated as an application for leave to withdraw the notice of abandonment of the appellant's first notice of appeal, and, as no reason was shown why such leave should be given, the application was refused. *R.* v. *Pellikan.* (C.A. Wellington. 1959. September 14. Gresson P. North J. Cleary J.)

CROWN.

Third-Party Proceedings—Such Procedure available to Defendant claiming Contribution from Crown—Limitation Act 1950, ss. 14, 23 (1)—*See* LIMITATION OF ACTION (*infra*).

DESTITUTE PERSONS.

Maintenance—Agreement for Payment of Maintenance registered—All Provisions of Destitute Persons Act 1910 relating to Maintenance Orders applying to Such Agreement—Destitute Persons Act 1910, s. 47B. The effect of s. 47B of the Destitute Persons Act 1910 is that, where a written agreement for the payment of maintenance has been registered in the Magistrates' Court, the provisions of the statute relating to maintenance orders, including the power to vary, cancel, or suspend such an order apply to that agreement as from the date of its registration. (*Hudson* v. *Hudson* [1959] N.Z.L.R. 348, referred to. *Hyde* v. *Hyde* (1959) 9 M.C.D. 337, approved.) Fraudulent concealment of wife's means is a "change of circumstances" justifying remedial action under s. 39 of the Destitute Persons Act 1910. *Green* v. *Green.* (S.C. Auckland. 1959. August 27. T. A. Gresson J.)

Maintenance—Reasonable Cause for Wife's Refusal or Failure to live with Her Husband—"Reasonable Cause" less than "grave and weighty reasons" alone justifying Permanent Separation or forming Basis of Constructive Desertion—Magistrate's Discretion not fettered by Decisions relating to Conduct supporting Submissions of Constructive Desertion—Destitute Persons Act 1910, s. 17 (7). The "reasonable cause" upon which a Magistrate may hold that a wife is justified in failing to live with her husband may be less than the "grave and weighty reasons" which alone can justify permanent separation and may form the basis of constructive desertion. (*Fodie* v. *Fodie*, [1959] N.Z.L.R. 721, and *T.* v. *T.*, [1959] N.Z.L.R. 843, followed.) The discretion given to the Magistrate by s. 17 (7) of the Destitute Persons Act 1910 is one untrammelled by decisions which are directed to the definition of conduct which will support a submission of constructive desertion. It is not a discretion of which it is to be said that "seldom if ever" is it to be exercised unless grave and weighty cause is shown. (Statements of F. B. Adams J. in *Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, 1110, disagreed with.) *Rolfe* v. *Rolfe.* (S.C. New Plymouth. 1959. August 21 urner J.)

FAMILY PROTECTION.

Appeal to Court of Appeal—Substitution of Discretion of Court of Appeal for Discretion of Supreme Court—Limitation on Such Substitution—Costs—Unsuccessful Appeal by Applicant against Refusal of Relief—Rule to be followed—Family Protection Act 1955, ss. 4, 15. It is not to be readily assumed that the Court of Appeal will substitute its discretion for the discretion of the Supreme Court on an appeal on a Family Protection matter. It will not do so unless there be made out some reasonably plain ground upon which the order made in the Supreme Court should be varied. (*Rose* v. *Rose* [1922] N.Z.L.R. 809; [1922] G.L.R. 279, considered.) Even a widow who appeals against the refusal of an application in the Supreme Court must run the risk of costs being awarded against her in the Court of Appeal if her appeal be unsuccessful. The working rule should be: Is the case one where the taking of a second opinion was justified? *So held*, by the Court of Appeal, dismissing an appeal by the widow of the testator against the order made by Haslam J. on her application for further relief under the Family Protection Act 1955. In this case, where a son and daughter of a testator appeared as respondents on an appeal, and were separately represented, one set of costs was given to both respondents jointly. *In re Blyth (deceased), Blyth* v. *Blyth and Others.* (C.A. Wellington. 1959. September 14 Gresson P. North J. Cleary J.)

LIMITATION OF ACTION.

Third-party Claim for Contribution—Accrual of Right of Action wher Writ Served on Defendant—"Cause of Action"—Limitation Act 1950, s. 14. In claims for contribution by third parties, the "cause of action" mentioned in s. 14 of the Limitation Act 1950 accrues at the earliest upon the service of a writ of summons on the defendant. Where a sufficient notice of intention to claim contribution from the Crown is given by the defendant in accordance with s. 23 (1) of the Limitation Act 1950, and the Court is satisfied under R. 96A of the Code of Civil Procedure that the defendant has given the Crown a previous notice in writing containing reasonable particulars of the circumstances in which it was alleged that the liability of the Crown had arisen, the defendant is entitled to leave to issue a third-party notice for service on the Crown. *Flynn* v. *Strachan.* (S.C. Invercargill. 1959. August 24. Henry J.)

PRACTICE.

Appeals to Court of Appeal—Special Leave to Appeal from Supreme Court Judgment On Case Stated by Magistrate—Dominant Consideration for Court of Appeal—"General or public importance"—Summary Proceedings Act 1957, s. 144. Section 144 (3) of the Summary Proceedings Act 1957 provides that, where the Supreme Court refuses to grant leave to appeal to the Court of Appeal, the Court of Appeal may grant special leave to appeal "if in the opinion of that Court the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision". In the present case, the proposed appeal was from a judgment of the Supreme Court interpreting Reg. 11 of the Traffic Regulations 1956 (the right-hand rule). Leave to appeal was refused by the Supreme Court. On application to the Court of Appeal under s. 144 (3) of the Summary Proceedings Act 1957 for special leave to appeal. *Held*, 1. That the dominant consideration for the Court of Appeal on such an application is whether the case is of such "general or public importance" as to warrant the granting of leave. 2. That this was a proper case in which to grant leave, as Reg. 11 was one of considerable importance to all motor users of the highway, to all those who are called upon to police and regulate motor traffic, and to all those who are called upon to adjudicate. *Leveridge* v. *Kennedy.* (C.A. Wellington. 1959. August 26. Gresson P. Cleary J. Henry J.)

Parties—Foreign Corporation Suing in Corporate Name—Such Corporation competent to seek Declaratory Order or an Order under Charitable Trusts Act 1957—"Person"—Acts Interpretation Act 1924, s. 4—Declaratory Judgments Act 1908, s. 3—Charitable Trusts Act 1957, s. 60. Semble, The plaintiff, as a foreign corporation, could sue in its corporate name in the New Zealand Courts; it was a "person" by virtue of s. 4 of the Acts Interpretation Act 1924, and, as such, it could invoke s. 3 of the Declaratory Judgments Act 1908 or seek an order pursuant to s. 60 of the Charitable Trusts Act 1957. (To enable the Court to adjudicate completely upon the important question involved in the case, the Court ordered the names of four Jehovah's Witnesses resident in Mount Roskill Borough,

with their consent, to be added as plaintiffs.) *The Watch Tower Bible and Tract Society* v. *Mount Roskill Borough.* (S.C. Auckland. 1959. August 21. T. A. Gresson J.)

Third-party Procedure—Claim for Contribution against Crown—Court Satisfied that Defendant has given Crown Previous Written Notice containing Reasonable Particulars of Circumstances wherein Crown's Liability arose—Defendant Entitled to leave to issue Third-party Notice—Limitation Act 1950, ss. 14, 23 (1)—Code of Civil Procedure, R. 96A—See LIMITATION OF ACTION (*supra*).

PUBLIC RESERVES AND DOMAINS.

Land vested in Borough for Recreation Purposes and Memorial Hall erected thereon—Such Land held on Charitable Trust—Council's Powers Administrative Only—Power to Regulate Admission including Power to prohibit Admission on Reasonable Grounds—Refusal of Use of Hall for Public Bible Reading constituting Unjust Discrimination—Public Reserves and Domains Act 1953, s. 32 (1) (g)—See TRUST AND TRUSTEES (*infra*).

PUBLIC REVENUE.

Income Tax—"Allowances"—Air-fares paid by Employer in Connection with Trip to England of Employee and His Wife—Air-fares not "Allowances" as Employee could not have converted them into Money—Land and Income Tax Act 1954, s. 88 (b). The term "allowances" in the phrase "all salaries, wages or allowances (whether in cash or otherwise)" in para. (b) of s. 88 of the Land and Income Tax Act 1954 must be read ejusdem generis with "salaries" and "wages"; moreover, "allowances" are, in general, sums of money; and the words "(whether in cash or otherwise)" must be read so as to include within the term "allowances" only a provision for an employee which, if it is not in cash, is convertible into cash by him. (Dicta in *Tennant* v. *Smith* [1892] A.C. 150; *Cordy* v. *Gordon* [1925] 2 K.B. 276; *Machon* v. *McLoughlin* (1926) 11 T.C. 83; *Ede* v. *Wilson and Cornwall* [1945] 1 All E.R. 367, and *Edwards* v. *Commissioner of Taxes* [1925] G.L.R. 247, applied.) The Commissioner included in S.'s assessable income for the year ended March 31, 1954, a sum of £1,562 5s. 8d., which consisted of moneys paid by S.'s employer in connection with a trip to England by S. and his wife in 1953, being air-fares for two, £1,088, and travelling expenses in United Kingdom and Suva (£70), accommodation expenses in relation to the whole trip (£240) and general expenses (£163 5s. 8d.), all incurred by himself on the business of his employer. No personal expenses were included. On Case Stated under s. 30 of the Land and Income Tax Act 1954, a Magistrate held that, excluding the sum of £1,088 spent on the fares of S. and his wife, the balance of the moneys claimed by S. for expenses was properly claimed. He also held that there should be included in S.'s assessable income three-fourteenths of S.'s fare and the whole of his wife's fare, a total of £660 18s. 4d. On S.'s appeal from that determination, *Held*, 1. That the Magistrate had found on the facts, that the essential purpose of S.'s journey was two-fold: primarily, on leave or vacation on full pay, and, secondarily, while on leave to engage himself during part of the time on the business of his employer, the proportion of time spent on business and on leave being as 11 is to 3; and this finding on the facts could not be interfered with. 2. That the Commissioner should not have included in S.'s assessable income the payment by S.'s employer of the air-fares of S. and his wife as it was not an "allowance" within the meaning of that word in s. 88 (b) of the Land and Income Tax Act 1954, and as S. could not have sold the air passages or required his employer to pay him the corresponding sum of money. *Stagg* v. *Commissioner of Inland Revenue.* (S.C. Palmerston North. 1959. August 25. Hutchison A.C.J.)

TRANSPORT.

Offences—Driving Vehicle while intoxicated—Disqualification Following Conviction—"Special reasons"—Some Factors considered in Special Relation to Offence—Transport Act 1949, s. 41 (Transport Amendment Act 1958 (No. 2), s. 3 (2)). The period of three years' disqualification following conviction imposed by s. 41 of the Transport Act 1949 (as enacted by s. 3 (2) of the Transport Amendment Act (No. 2) 1958) is automatic, "unless for special reasons the Court thinks fit to order otherwise". Such reasons are special to the offence and not to the offender. The Court, in considering "special reasons" must have regard to the danger which has caused the Legislature to regard the offence of driving while intoxicated as so serious—namely, that drink impairs both the judgment and the mechanical ability to control a dangerous object—and to the protection of the public from the person who insists on driving when drunk. In this case, among the particular factors considered as reasons special to the offence as committed, in addition to the public interest, were the degree of intoxication, the distance travelled, and the fact that as the keys had been removed from the car, the vehicle had no motive power of its own other than the force of gravity. (*Profitt* v. *Police* [1957] N.Z.L.R. 468, referred to.) *Foti Wadi* v. *Police.* (S.C. Auckland. 1959. August 10,12. Hardie Boys J.)

TRUSTS AND TRUSTEES.

Borough receiving Subsidy for Erection of War Memorial Hall on Trust that Hall Available for Use of All Sections of Community—Refusal to allow Lawful Section of Community to use Hall—Breach of Terms of Trust. The defendant Borough held certain lands as a recreational reserve on which stood the Mount Roskill Memorial Hall. The erection of the Hall was financed by public subscriptions, a grant from the Borough, and a Government subsidy given upon the representation that the Hall was to be a war memorial commemorating those men from the district who lost their lives in the Second World War. It was a condition of the subsidy: "That the project be vested in the territorial local authority to ensure that the Memorial will always be available for the use of all sections of the community." It was made clear that the Hall was not of a purely symbolical nature, but was rather a memorial community centre. On March 8, 1956, by *Gazette* notice, the land in question was vested in the Borough, pursuant to the Land Act 1948 and the Reserves and Domains Act 1953, as a reserve for recreational purposes. On July 8, 1958, the plaintiff requested the use of the Hall for the purpose of a public Bible lecture on August 5. The Council resolved to decline the application, and the plaintiff was notified accordingly. The plaintiff sought a mandamus requiring the defendant Council to make the Memorial Hall available to it for the purpose of giving public Bible readings, and (or in the alternative) a writ of certiorari to quash the Council's resolution of August 5, 1958. It also sought a mandatory injunction giving it access to the Hall. Alternatively, the plaintiff asked for an order under s. 60 of the Charitable Trusts Act 1957, or an order declaring and defining its rights of access to the Hall, or both. *Held*, 1. That the Borough accepted the subsidy to finance the erection of the Memorial Hall on trust that the Memorial Community Centre would always be available for the use of all sections of the community; and the citizens of the Borough who were Jehovah's Witnesses comprised a lawful section of the community. In declining to allow the plaintiff the use of the Hall, the Council acted in breach of the wide terms of the trust. 2. That, on the basis that the plaintiff was a legally constituted religious body which had conducted itself lawfully for the past eighteen years, even if the action of the Council in refusing its permission to use the Memorial Hall constituted a denial of natural justice, there was nothing in the Reserves and Domains Act 1953 to require the Council to act in a judicial or quasi-judicial manner, and the powers contained in s. 32 were administrative powers only, so that the action of the Council in a purely administrative capacity could not be the subject of legal complaint as such, or remedied by prerogative writ. (*R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, and *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, and *New Zealand United Licensed Victuallers Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 167, followed.) 3. That, under the vesting order of the Minister of Lands, the land upon which the Memorial Hall was erected was vested in the Borough for recreation purposes, pursuant to the Reserves and Domains Act 1953, and in trust for that purpose, and the Council was not entitled to deal with it as though the Borough held the land as an absolute owner. It held the land on a charitable trust for a public purpose. (*Kaikoura County* v. *Boyd* [1949] N.Z.L.R. 233, followed.) 4. That the Council's power to regulate admission to the Memorial Hall conferred by s. 32 (1) (g) of the Reserves and Domains Act 1953, included the power to prohibit admission on reasonable grounds; and, in refusing the plaintiff permission to use the Memorial Hall for public Bible reading, the Council discriminated unjustly against it and infringed the spirit, if not the letter of the section. (*R.* v. *Rushbrooke* [1958] N.Z.L.R. 877, referred to.) 5. That, as the Council made its decision bona fide but on an imperfect appreciation of the extent of its obligations under the trust on which it held the Hall, it should be given the opportunity to reconsider the matter after the Court's definition of the nature of its trust. 6. That, in the circumstances, it was premature to consider the discretionary prerogative writs which the plaintiff sought, and a declaration should be made as to the legal rights of the parties under the Declaratory Judgments Act 1908, or pursuant to s. 60 of the Charitable Trusts Act 1957. (*Kaikoura County* v. *Boyd* [1949] N.Z.L.R. 233; [1949] G.L.R. 23, and *Hutton* v. *Hutton* [1916] 1 K.B. 642, applied.) *The Watch Tower Bible and Tract Society* v. *Mount Roskill Borough.* (S.C. Auckland. 1959. August 21. T. A. Gresson J.)

PROFESSOR A. L. GOODHART.

Welcomed by the Profession.

An interesting and unusually distinguished legal visitor to the Dominion during August was Professor A. L. Goodhart K.B.E., Q.C., a jurist of high international repute who is also Master of University College, Oxford, editor of the *Law Quarterly Review* and an authority on road safety. Professor Goodhart and Lady Goodhart came to New Zealand after attending the Australian Legal Convention at Perth and visiting State capitals in the Commonwealth.

A Notable Career.

Professor Arthur Lehman Goodhart Q.C., F.B.A., LL.M., LL.D., D.C.L., who is an Honorary Knight of the British Empire and has been Master of University College, Oxford, since 1951, is an American citizen, and was born in New York City sixty-eight years ago. He was educated first at Yale University, and later at Trinity College, Cambridge, where he was reading law when America entered the First World War. He served for two years in the United States Ordnance with the American Expeditionary Force and after the war returned to Cambridge in 1919 as a Lecturer in Law. Also in 1919 he acted as Counsel to the American Mission to Poland and in 1920 he was elected an Officier d'Academie de France. On his appointment as secretary to the Vice-Chancellor of Cambridge University, he assumed the editorship of the *Cambridge Law Journal*, which remained under his control until 1925.

The period 1928-29 he spent back in his homeland as Visiting Professor at Yale University.

Two years later, he accepted the Chair of Jurisprudence at Oxford University, which he occupied until his appointment as Master of University College in 1951. It was during this period that he followed up his editorial beginnings on the *Cambridge Law Journal* by taking over control of the *Law Quarterly Review* which he still edits. He was elected as an Honorary Bencher of Lincoln's Inn in 1938 and was also accepted as an Associate Fellow of Jonathan Edwards College, Yale University.

Throughout his distinguished career his interests and activities have developed notably along international lines, a trend that is evidenced by the executive positions he now holds. His offices include the chairmanship of the International Law Association, the vice-presidency of L'Institut International de Philosophie du Droit, and honorary membership of the American Academy of Arts and Sciences. He has also held the presidencies of the International Association of University Professors (1948) and the American Society (1951). Among his current enthusiasims is road safety and traffic control and he holds the office of president of the Pedestrians' Association for Road Safety.

For nearly two decades Professor Goodhart has identified himself intimately with the science and practice of the law in Great Britain, the breadth of his activities in this field being illustrated by active participation in the deliberations and policies of such important tribunals and committees as the Southern Price Regulation Committee (Chairman, 1940-1951), the Monopolies Commission, the Law Revision Committee, the Law Reform Committee, the Supreme Court Procedure Committee, the Company Law Revision Committee, the Alternative Remedies Committee, and the Law Reports Committee.

Among the adjuncts of his Mastership of University College is the post of Curator of the famous Bodleian Library at Oxford, and he has himself contributed largely to the literature of English and international law. His publications include: *Poland and the Minority Races* (1920), *Essays in Jurisprudence and the Common Law* (1931), *Precedent in English and Continental Law* (1934), *The Government of Great Britain* (1946), *English Contributions to the Philosophy of Law* (1949), *Five Jewish Lawyers of the Common Law* (1950), *English Law and the Moral Law* (1953), and legal articles and essays.

A Wellington Welcome.

On August 27 in Wellington, a reception was tendered him by the New Zealand and Wellington District Law Societies in association with representatives of the Faculty of Law in the University of New Zealand.

The President of the Wellington District Law Society, Mr C. H. Hain, in welcoming Professor Goodhart, said that the gathering comprised the members of the Council of the Wellington District Law Society, the President of the New Zealand Society, Wellington members of various New Zealand Law Society committees, representatives of the Law Faculty of Victoria University of Wellington, and Professor H. Gray from the University of Canterbury. He continued:

"We are indeed fortunate in having an opportunity of meeting in this way such an eminent international jurist as Dr Goodhart. We in Wellington are rather off the beaten track—even more so, in fact, than our Auckland brethren—and are seldom able to see and hear distinguished overseas lawyers. This is to be regretted, as most of us, whether conveyancing or common-law practitioners, tend to become immersed in the practical details of our work to the neglect of the theory and doctrine of law, the study of which is our life's work.

"To have the opportunity now of meeting such a distinguished lawyer as Dr Goodhart, and, we hope, to hear something from him, will act as a stimulus to us. No doubt Mr Justice Gresson had some such thoughts in his mind when, in giving to the New Zealand Law Journal an account of his visit to the recent Australian Legal Convention, he mentioned as among the eminent overseas visitors: "Dr A. L. Goodhart, K.B.E., Q.C., Master of University College, Oxford, and a tutor in law to those who can find time to read the *Law Quarterly Review* of which he is the editor'.

"I have been handed a list of our guest's honours, distinctions and attainments, I will not embarrass him by reading it to you, but you may take my word that it is exceedingly impressive.

"We welcome Dr Goodhart and Lady Goodhart to our city and hope that their brief stay will be most enjoyable."

The President of the New Zealand Law Society, Mr A. B. Buxton, said that the members of his Society, and particularly those of them who had had the good fortune to meet Dr Goodhart, joined in the welcome expressed by Mr Hain. "Though we all regret that more of us could not have this opportunity", he continued, "we are grateful that after an exacting tour of Australia you have felt able to undertake the additional thirteen hundred miles in the very limited time at your disposal.

"We commonly refer here to the English-speaking peoples as if our language was the tie between the United States and the Commonwealth, and the source of the finer thoughts and feelings that we respect and have in common. I am sure the real origin and foundation of the tie is the common law.

"You, sir, who were born, educated and received your legal training in the United States have been able to attain eminence as an English jurist and a Queen's Counsel. This affords an even more convincing proof than your predecessor of a hundred years ago, Mr J. D. Benjamin Q.C., who left the West Indies for the United States when he was four years of age. He had a notable career there as a lawyer and statesman. Yet he was able to go to England at fifty-five and become a Queen's Counsel. This could not have happened twice if both legal systems had not derived from the common law.

"But we do not welcome you here today merely as evidence of a theory. We all hope that your visit to New Zealand will give you as much pleasure as I can assure you it has given to all of us."

Professor Goodhart Replies.

Professor Goodhart in reply said: "I had a terrific shock when the President referred to road-safety regulations in Australia. I had no idea they had any! Incidentally, it is interesting to note that at the moment the fastest driver in the world is an Australian. If anything happens to him, at least fifteen drivers who were in Sydney last week could substitute for him. I am, however, very impressed with New Zealand as a law-abiding country. I have noticed quite a number of drivers stopping at the red lights! Certainly, I have driven chiefly with Judges and lawyers—but there seems to me to be a great sense of law and order in this country everywhere.

"I agree entirely with Mr Buxton's point about the common law, but many years ago, I decided not to speak on that subject again. I had a painful experience during the recent war, when the American Army came over to England in 1942 and camped in Gloucester. Some brilliant general in London had an idea that it would do the American army good if I went down and told them about the contribution the English common law had made to civilization. The American Army was feeling depressed. There were about a thousand troops in a large hangar, and I was duly introduced and told them about Magna Charta, Habeas Corpus, the Petition of Rights and the Bill of Rights, etc. When I finished the gloom did not appear to have vanished. They were then told that I would now be happy to answer any questions.

"A Southern sergeant got up and said they had been very interested in listening to me about 'Magna Charts' and 'Habus Corpse' and other things, 'but what me and my buddies would like to know is —what is the age of consent in this country?'

"To my everlasting disgrace, I did not know!

Personal Relationships.

"It gives me great pleasure to be here and to meet fellow-lawyers. The spirit that lawyers have is always the same in every country. For instance, when Dennis Maclean, who is perhaps known to some of you, was getting married in College Chapel—a young barrister—two of his best friends, solicitors, each sent him a wedding present—a divorce brief from each of them. Lawyers always stick together. It has been extremely interesting being over here. You have here the great advantage of not being too large a group. If you have a very large Bar, as they do in the United States, without the solidarity which one can get elsewhere, I think you miss a lot. In London we have the Inns of Court and the Law Society. How useful those organizations are in creating that spirit which makes life so pleasant for everyone.

"Last year the American Bar came over to England. This is a unified Bar as here, with barristers and solicitors. They were asked to dine at various Inns and a certain number came to Lincoln's Inn. It was a most enjoyable evening. As you know, the Benchers always drink the Loyal Toast sitting down. This dates from the 17th century when Charles II and his lady friend, Nell Gwynne, dined frequently at Lincoln's Inn. On one occasion they dined so well that no one could stand up—and thereafter the Loyal Toast at Lincoln's Inn has been drunk sitting down. However, on this occasion, we forgot to tell the Americans, and when the Queen's health was proposed, the Americans stood up and the Benchers remained seated. The Treasurer then rose and proposed the health of the President of the United States; the Benchers stood up and the Americans remained seated—which shows how dangerous it is to follow the traditions of another country.

"We, as a body, in the legal profession derive great happiness from this personal relationship, not only within our immediate country but within all the Commonwealth countries", said the speaker. "We understand each other. I hope that that understanding will continue and develop even more in the future. Travel between the various countries is so much easier now as far as time is concerned, although still extremely expensive.

"We had a most interesting trip by air over the North Pole. We flew to Denmark, over the Pole, stopped at Anchorage, a beautiful harbour and then on to Japan for 12 days; then to Hong Kong, Singapore and Perth—a most attractive journey.

International Scene.

"I think that the people in this country and in Australia do not realize that the whole international position has changed in the last ten years", Dr Goodhart said. "In Japan and Singapore, and all the Far Eastern countries, they are more interested and more affected by what you think and what you do than almost any other country in the world. They think of you as Pacific countries, but also as the two countries which represent Western thought and Western examples. Wherever one goes, one finds that these two countries are the ones that seem to create

tremendous interest and have this outstanding influence. Whether you like it or not, you are now in the centre of international affairs. At one time one tended to think of New Zealand and Australia as romantic countries, dramatic, far away, on the periphery of the civilized world—countries which were interesting but not particularly influential. Now all that is changed —they are no longer on the periphery, but at the centre of international affairs.

" The Pacific area is most important. You have an entirely new position, playing a role which I think is unique in almost all history for a country which is not numerically one of the largest. So it is tremendously important to see what you think and what you do. Also, as an example to these other countries, you do have an extremely interesting role to play.

" It has become in recent years the habit to talk of Great Britain and the Commonwealth—although I prefer to call it the Empire—as second-rate, with the Great Powers only Russia and the United States, and to say that the British Empire does not really count. That ", said Dr Goodhart, " is one of the most complete errors one can think of. Certainly if one looks towards the future, it is a self-evident error. At other times the British Empire has apparently collapsed and then come back again within a very short time. In the time of Charles II, the Dutch sailed up the Thames. It looked as though the British were finished. Within a hundred years the second great Empire was founded. Then, with the American Revolution, it looked again as if the whole power of Britain was coming to an end. That was a mistake. Professor Oman, lecturing, once said: ' George III was the greatest of the English Kings because he got rid of the American colonies while there was still time '. The result of that collapse, which looked so disastrous, was of course the new development, the new British Empire, with emphasis on Canada, new emphasis on Australia and New Zealand coming in against the violent protests of the Colonial Office, and further developments in India and Africa. Part of that has gone—India, Burma, Ceylon—and others only to a limited extent.

" Strange to say, relationship with India is closer than ever before. We still have the British Commonwealth, with Great Britain and the Dominions—Canada, Australia and New Zealand. They are potentially the leaders of the future—the new developing countries. True, Canada and Australia have greater physical assets than New Zealand, but here you have the tremendous asset of intellectual development—a unified people, a virile people, people with wonderful physical development. Your weather and your schools are excellent, and it is possible to discern ideas that belonged to the Athens of the past. New Zealand is thus able to contribute new ideas in many ways. There are fourteen New Zealanders on the staff at Oxford, and, I think, the same number at Cambridge. The Dominions are bound to play an ever-growing part in the world, and to talk of the British Commonwealth as being only second-class, is not only absurd today, but ridiculous as far as the future is concerned. This happens to be something that I feel very strongly about.

" Finally, may I say how delighted and grateful I am that I was invited to come over here, and how much we are enjoying our visit."

Equity of Redemption.—The right to redeem Lord Bramwell described in *Salt* v. *Marquess of Northampton* [1892] A.C. 1, 18, as " a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender, I suppose one may say by a debtor to a creditor, on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is now a legal right in the debtor. Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it." And Lord Macnaghten said in *Noakes & Co. Ltd.* v. *Rice* [1902] A.C. 24, 30, " Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent ir impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security."

Limits of Decree of Divorce.—In *Attorney-General for Alberta* v. *Cook* [1926] A.C. 444, 461, Lord Merrivale, delivering the opinion of the Privy Council said,; " In more modern times the decree of divorce *a mensa et thoro* was expressed in English, in a form which will be found in the text books . . . The material words are these: ' We do pronounce decree and declare that the said A.B. ought by law to be divorced and separated from bed board and mutual cohabitation with the said C.B. her husband until they shall be reconciled to each other; and we do by these presents divorce and separate them accordingly.' What is most strikingly apparent in the language of the decrees in question is the limited scope within which they purport to operate. The status of marriage remained. The decree lapsed if the parties were reconciled . . . it is difficult to find in the decree of divorce *a mensa et thoro* anything more in point of operative effect than a licence to the wife which protects her from suit in the Ecclesiastical Courts for restitution of conjugal rights."

RESTRAINTS ON ALIENATION OF PROPERTY.

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

I have received the following letter from valued correspondents :

> *Re Statutory Restrictions on Alienation.*
>
> We would now like to write you direct upon the subject of the clause from the will precedent given on page 867 of volume 2 of the *New Zealand Supplement to the Encyclopaedia of Forms and Precedents*. We recently had occasion to adapt that clause for use in a will we were preparing. The clause provides that, after the death of the son A, the income of the trust fund is to go to his widow, if any, during her lifetime and then follows this restriction :
>
> " *Subject* to the limitation that the estate interest or share given to such widow shall not during the life of such beneficiary be alienated or pass by bankruptcy. . . ."
>
> This restriction is drawn in reliance upon s. 24 of the Property Law Act 1908 (now s. 33 of the Property Law Act 1952). As we read the restriction, it does not seem to us to be good in law. As we read the relevant section of the Property Law Act, the restriction can be placed only on property given to the children or grandchildren of the testator. It would appear that the restriction cannot be attached to property given to the widow of a child of the testator.
>
> We realize that you did not write or edit the volume in which this occurs ; but, as you are the author of its supplement, we trust you will not mind our referring this point to you. We thank you in anticipation of any comment you may be prepared to make.

In the precedent from the *New Zealand Supplement to the Encyclopaedia of Forms and Precedents*, p. 867, referred to by the correspondents, the following words follow the extract :

> or be liable to be seized sold attached or taken in execution by process of law AND after the death of such widow if any to stand possessed of the said trust fund UPON TRUST for all or any of the children or child of my said son A who being male shall attain the age of twenty-one years or being female shall attain that age or marry under it and if more than one in equal shares AND in default of such children or child UPON TRUST for my son B absolutely.

The subject-matter of the trust is one of pure personalty :

> I GIVE the sum of £ to my trustees UPON TRUST to invest the same in or upon any securities authorized by law for the investment of trust funds and UPON FURTHER TRUST. . . .

It is quite true, as pointed out by my correspondents, that the restriction given by the late Mr Goodall (he having prepared the *New Zealand Supplement*) in this precedent is not wholly covered by s. 33 of the Property Law Act 1952. As they (my correspondents) read that section :

> the restriction can be placed only on property given to the children or grandchildren of the testator. It would appear that the restriction cannot be attached to property given to the widow of a child of the testator.

That is true : by subs. (2) of s. 33 the restriction is limited to the shares of children or grandchildren of the testator, or, in the case of a settlement, of the husband and wife, provided that for the purposes of that subsection a person shall be deemed to be the child or the grandchild, as the case may be, of a testator, notwithstanding that he is related to him only illegitimately. Although it appears from the wording of the precedent that Mr Goodall, in drafting this clause, had in mind s. 24 of the Property Law Act 1908 (the statutory predecessor of s. 33) what our correspondents say does not necessarily determine the point which they have put to me. It is possible to have certain restrictions under the general law (apart altogether from s. 33 of the Property Law Act 1952) : indeed subs. (3) of that section specifically provides that nothing in s. 33 shall prevent any lawful restraint on alienation of property from being imposed by will or settlement.

It is necessary, therefore, to consider the general law apart from s. 33 of the Property Law Act 1952 : in doing so I think that we should bear in mind two matters. First, this restriction on alienation is limited to a life interest : it does not affect the corpus or capital. Secondly, it does not affect realty but only pure personalty. Unfortunately, the question posed is not as easy to answer as I had at first imagined.

Garrow in his *Real Property in New Zealand** has the following to say as a part of the main text :—

> 2. *Forfeiture upon Bankruptcy or Attempted Alienation.* One may give property, real or personal, to or in trust for another upon condition that if he attempt to dispose of it, if he become bankrupt, or if any act or event shall occur which would cause his personal enjoyment to cease, the property shall go over. Then if the event happens, whether bankruptcy, or attempted alienation or otherwise, the property does not go to the trustees of the creditors, but goes over in the manner prescribed by the deed of grant or settlement. The interest of the grantee terminates upon the happening of the event, just as a life estate terminates upon the death of the life tenant.

Then *Garrow* gives several examples, all of which rather curiously are determinable life estates or interests, although the above-cited extract from the main part of the text is not limited to life estates or interests. However, in the instant case, we are dealing only with a life interest. One of the examples which *Garrow* states is permissible in a will reads as follows :

> Provided that if the said X. Y. shall become bankrupt or shall do or permit any act or thing whereby the income of the said moneys or any part thereof shall or may be alienated or encumbered, then the trusts hereinbefore contained for the payment of the income of the said moneys to the said X. Y. shall thenceforth cease and such income shall during the remainder of the life of the said X. Y. be paid to the person or persons for the time being next beneficially entitled in remainder expectant on the decease of the said X. Y.

It appears to me that the precedent from *Goodall* criticized by my correspondents purports to restrain alienation no more than this ; but in the precedent there is no gift over. *Garrow*, however, proceeds to point out that X. Y. could not have settled *his own property* upon himself in this way so as to avoid the results of his own bankruptcy. He cannot settle his own property upon himself until bankruptcy and then over. Indeed this appears to have been decided in New Zealand many years ago, before even the *New Zealand Law Reports* had been born. In *In re Robert Margrie* (1876) 2 N.Z. Jur. (N.S.) S.C. 121 (a decision of the late Mr Justice Williams), by a voluntary settlement D. H. M. vested certain lands in trustees, in trust in the first place for himself during life, but only until he should become bankrupt or insolvent, or alienate the land ; and after the determination of his estate, in trust for his wife for her life, and if under coverture, notwithstanding the coverture, for her sole and separate use without power of anticipation. It

* e.g. 4th ed., 111.

was held (i) that D. H. M. could not settle his own property so as to take under the settlement an interest defeasible on bankruptcy or on alienation and (ii) that the effect of the settlement was to give D. H. M. an absolute interest for his life, after which his wife would take a life interest in possession.

The footnote in *Garrow* continues as follows :

> If such a settlement is made, the Official Assignee in Bankruptcy will nevertheless take the property if the settlor becomes bankrupt. He can, however, settle his own property upon himself subject to a proviso for cesser of his interest if he should alienate it or charge it or if any other event should occur whereon he would, if absolutely entitled, be deprived of the enjoyment of it, and so that in such event it should go to some other person, e.g., if a creditor tried to take the property in execution : *In re Detmold* (1889) 40 Ch.D. 585. In such a case his settlement will be binding upon himself and if any of the circumstances mentioned occur, his interest will cease and will pass in the gift over. If he should become bankrupt while such a settlement is in existence, the property comprised in the settlement will be available for his creditors. If there is a surplus, it will not revert to the bankrupt, but the gift over will take effect (his interest having been forfeited by the bankruptcy) and the person next entitled under the settlement will take the property. Should he become bankrupt a second time, the property comprised in the gift over will not be available for the creditors in the second bankruptcy : *In re Johnson, Johnson* [1904] 1 K.B. 134.†

In re Detmold, cited by *Garrow* is, it appears, still regarded as authoritative in England, for it is cited in *Cheshire's Modern Real Property*, 8th ed. 160 ; and, so far as I am aware, there is no statutory provision in England corresponding to our s. 33 of the Property Law Act 1952. *Cheshire*, at p. 287, states that there may be a limitation of a determinable *life* interest, and adds that a *protective trust* is a common example of a determinable life interest. In such cases, the grantee takes an interest which may endure for life, or may determine sooner by the occurrence of the terminating event. It differs from a determinable fee in that it may be followed by a gift over to a third party which may validly take effect when the event occurs.

This leads us to the consideration of determinable *fees* : a highly technical topic. *Cheshire* deals with determinable fees at p. 286 :

> Determinable fees, however, disappeared from practical conveyancing (and gave way to shifting future estates operating under the Statute of Uses) when it was once decided that the fee simple in the case of a determinable limitation could not be made to pass to a stranger on the occurrence of the determining event. The common law has never allowed the fee to be limited after a fee simple. . . . Thus, at the present day (i.e. in England), if it is desired to make a fee simple pass from the grantee to some other person when a given event does or does not happen, the limitation will take the form of the grant of an *equitable* future estate. Despite several opinions to the contrary, it is established that the limitation of a determinable fee is still possible and effective. It is now further established, however, that such a limitation will confer a fee simple absolute, if the terminating event is one that may not happen within the period allowed by the rule against perpetuities.

In New Zealand, s. 14 of the Property Law Act 1952 provides that every limitation which at any time heretofore might have been made by way of shifting, springing, or executory use, may be made by direct conveyance without the intervention of uses.

Cheshire's opinion as to the effect of the perpetuity rule is shared by *Morris and Leach* in their admirable work, *The Rule against Perpetuities*, 204, 207, *et seq.*

† See also *Mackintosh* v. *Pogose* [1895] 1 Ch. 505, 511 and *Spratt's Law of Bankruptcy*, 123.

The rule against perpetuities is illustrated by *Hopper* v. *Liverpool Corporation* (1944) 86 Sol. Jo. 213, criticized in (1946) 62 *Law Quarterly Review* 222 and in the 1945 *Conveyancer's Year Book*, 203. In this case, there was a grant in 1805 to A, B, and C, and their heirs

> during such time as the said building called the Lyceum or any other building to be erected on the site thereof shall be used and enjoyed for the purposes of the said institution called the Lyceum.

This results in A, B, and C taking a fee simple absolute, for the possibility of reverter to the grantor is too remote.

In considering, however, the validity of restrictions against alienation of land there is another rule to be considered :

> A condition that is repugnant to the interest to which it is annexed is absolutely void. For instance, a condition attached to the grant of a fee simple that the grantee shall always let the land at a definite rent, or cultivate it in a certain manner, or be deprived of all power of sale, is void on the ground of its incompatibility with that complete freedom of enjoyment, disposition and management that the law attributes to the ownership of such an estate. It is not permissible to grant an interest and then to provide that the incidents which attached to it by law shall be excluded. (*Cheshire, op. cit.* 294, 295).

Chapman J. followed this principle in *Lucas* v. *Goldie* [1920] N.Z.L.R. 28 ; [1919] G.L.R. 418, where realty was devised to two grandchildren subject to the condition that it "shall not be disposed of either by way of mortgage or sale during the lifetime" of either of the grandchildren, excepting so far as one of the grandchildren could sell out his half interest to his brother. But, in the later case of *Kidd* v. *Davies* [1920] N.Z.L.R. 486 ; [1920] G.L.R. 289, Sim J. pointed out that the attention of Chapman J. in *Lucas* v. *Goldie* had not been drawn to (now) s. 33 of the Property Law Act 1952.

In *Rangimoeke* v. *Strachan* (1895) 14 N.Z.L.R. 477 (where Sir James Prendergast C.J. also discusses restrictions imposed by private grantors), it was held that the Crown had power to impose a restriction on alienation in a grant of land by way of compensation without any statutory authority in that respect. In New Zealand, such restrictions have been rare except in grants to Maoris, and all such Crown-grant restrictions in respect of Maori land were removed by the Native Land Act 1909 (see now s. 211 of the Maori Affairs Act 1953). Therefore, it may be that what the Crown may impose in the way of restrictions against alienation, on the creation of an estate in fee simple, cannot necessarily be imposed by the subject when alienating land, but this was doubted by Sir Robert Stout C.J. and Edwards J. in *In re the Native Land Court Act 1894* (1908) 28 N.Z.L.R. 646 ; 11 G.L.R. 263. The doubt appears well founded, for in New Zealand the validity of a Crown grant depends upon the statute under which it is issued.

A condition that the donee
shall not alienate at all, or
shall not alienate during a particular time, such as the life of a certain person, or during his own life, or
shall alienate only to one particular person, or to a small and diminishing class of persons, such as his brothers,
shall not adopt some particular mode of assurance such as a mortgage
is void.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Bledisloe Appeal.—The *Law Times* (28/8/59) notes an appeal arising out of the death last year of Viscount Bledisloe, the most agriculturally-minded of all our Governor-Generals and one who never lost his interest in and affection for New Zealand. "In view of the great esteem in which he was held, the townspeople of Lydney have decided to erect a memorial to him. As one of his chief interests in the town of Lydney was the local hospital, it is thought fitting that the memorial should take the form of an extension to the local hospital. The new wing will house a physiotherapy centre, which will serve a great need not only for the town of Lydney, but the whole Forest of Dean." The Treasurer of the Fund is Mr L. F. Swaite, of the Midland Bank, Lydney, Gloucestershire.

An Equality of Negligence.—An unusual case that illustrates an anomaly of the Contributory Negligence Acts is reported in the *Manchester Guardian* (17/7/1959) (now *The Guardian*). Two motor-cyclists collided and each brought an action against the other in the form of claim and counterclaim. Each was awarded by the trial Judge £4,000 damages, the one against the other, and had the liability been a personal one neither would have been any better off. The Judge observed, "Now, I suppose, the insurance companies have to pay"; and, in comment upon the case, the *Justice of the Peace Review* says: "This is probably an extreme case, but the way in which drivers are able to pass their personal responsibilities on to insurance companies has recently been criticized as tending to make drivers less careful than they should be and as contributing, therefore, to the increase of road accidents. It is not a simple problem and conflicting considerations are involved, but it does seem strange that two drivers, assuming that each was equally responsible for the accident, should each be able to secure £4,000 from insurance funds in this way to compensate him for injuries which he would never have received if he had driven with proper care".

No Public Harm.—In *Attorney-General* v. *Harris* [1959] 2 All E.R. 393, the Attorney-General (on the relation of the Manchester Corporation), endeavoured to injunct the defendants who had sold flowers from stalls near the entrance to a cemetery in Manchester on almost every Sunday since 1955. The stalls were about 7 ft. long, and projected between 2 ft. 6 in. and 3 ft. 6 in. from the railings of the cemetery into a footway between 15 and 16 ft. wide, used by only a few pedestrians, except on Mothering Sunday. The defendants, in trading in this manner, committed offences under the Manchester Police Regulation Act 1844, and in consequence they had been convicted and fined on many occasions; but they had nevertheless continued to trade. Notwithstanding that the Attorney-General had exercised his discretion in bringing the action and that the defendants had contravened the provisions of a statute, Salmon J. held that it was the duty of the Court in all relator actions to inquire whether the acts done by the defendants in truth injured the public. If they did, the fact that the injury was small would not, provided it was real, entitle the Court to withhold an injunction. Nor would it be germane that the public, though injured, might have received some compensating advantage from the defendants' acts. If, however, it was established that the public had in fact suffered no injury as a result of the defendants' acts, the Court might, in the exercise of its discretion, refuse an injunction. Undoubtedly it was only in the most exceptional circumstances that any statutory provision could be contravened without public injury. The circumstances of this case were, however, most exceptional. The acts done by the defendants did not, on the very special facts of the case, tend to injure the public; and, indeed, no member of the public had been in the slightest degree inconvenienced by the defendants. In all the circumstances, an injunction should not be granted, and, in the exercise of His Lordship's discretion, he refused the injunction, and gave judgment for the defendants.

A Jurist's Sayings.—Sir Edward Coke (1552-1634), the famous Judge and jurist, has been unfairly criticized by both Lord Macaulay and Lord Campbell, the former in particular calling him a "stupid serjeant, pedant, bigot, and brute". Incidentally, he was not made a serjeant until he went on the Bench. Coke who held office for twenty years as Chief Justice of the Common Pleas was a fine linguist, a man of wide learning and the author of many aphorisms that have retained their point through the centuries. Possibly, the best known to legal practitioners (and the Public Trustee) is "Corporations have no souls". Others with a modern touch are:

"The life of a man is much favoured in law, but the life of the law itself ought to be more favoured."

"Questions (are) like spirits which may be raised with much ease but vanquished with much difficulty."

Of death-bed wills he says: "Few men pinched with the messengers of death have a disposing memory."

"Trade and traffic is the life of every island."

Of Ranulph, Bishop of Durham: "He lived without love and died without pity, saving of those who thought it pity he lived so long."

"No man can carry the words of a positive law by Parliament in his head.'

"Three costly things do much impoverish the subjects of England, viz.: costly apparell, costly diet, and costly building."

"The golden and streight metwand of the law, and not the uncertain and crooked cord of discretion."

"Warranties are favoured in law, but estoppels are odious."

In Divorce.—The petitioner was explaining the trend of events. "You can imagine how I felt, Your Honour", he said, "when I came upon my wife in the arms of the co-respondent". "Of course", nodded the Judge. "And what did she say when you surprised her?" "That's what really hurt me", replied the husband. "She looked at me and she said, 'Well, here's old Big Mouth! Now *everyone* will know'."

A restraint that is partial, however, and which therefore does not substantially deprive the owner in fee of his power of alienation, is valid. Thus it has been held that a condition is valid which restrains the owner from alienating

to a specified person, or

to anyone except a particular class of persons,

provided however, that the class is not too restricted.

The above distinctions are well illustrated by the fairly recent case of *Re Brown* [1954] Ch. 39; [1953] 2 All E.R. 1342. By cl. 6 of his will the testator declared that if any of his sons

> shall execute any assurance . . . whereby the share of my business properties . . . hereinbefore devised or bequeathed to him would or might become vested in . . . any person or persons other than a brother or brothers of such son, then I direct that the share of such son in my business properties . . . shall be held by my trustees . . .

on certain discretionary trusts for the son and his wife and children. It was held that the class of permitted alienees was a diminishing class and constituted in substance, therefore, a general prohibition on alienation, and was accordingly void and not binding on the devisees.

Cheshire then proceeds to discuss the law as to the validity of conditions in restraint of marriage. These differ "according as the gift is of real or of personal property". This is because the rules governing personalty have come to us from the Roman law through the Ecclesiastical Courts and the Court of Chancery.

> A condition in total restraint of marriage is void, while one in partial restraint is good, provided that it is reasonable from the point of view of public policy. . . . But a partial restraint is not upheld unless there is a bequest over to another person in default of compliance with the condition. In the absence of such a bequest, the condition is treated as ineffectual on the ground that it has been merely imposed *in terrorem*, i.e. as an idle threat calculated to secure compliance by the donee. . . . The *in terrorem* doctrine, however, does not apply to realty, and it may be said that a condition in partial restraint of marriage attached to real estate is always good, and that one in total restraint *may* be good.

This difference, pointed out by *Cheshire*, may be illustrated by the recent case of *Leong* v. *Chyne* [1955] A.C. 648; [1955] 2 All E.R. 903, a gift by will of personalty to the widow of the testator's son provided she remained a widow of the son and led a chaste life. There was no gift over on the re-marriage of the widow or her failure to lead a chaste life. The widow remarried before distribution of the estate. It was held that there was no forfeiture, for, as the will contained no gift over, the proviso was ineffective to destroy the interests given. In an editorial note in the *Australian Conveyancer and Solicitors' Journal* (November, 1955), 120, we find the following pithy comment on this case, a decision of the Privy Council on an appeal from Malaya:

> This case relates to a bequest of personalty which was regarded as being *in terrorem*, and must be distinguished from the case of a devise of realty where a condition in partial restraint of marriage is effective to determine the estate without any new limitation to take effect on the forfeiture.

To sum up, any restraint on alienation of property which is valid and effective in England is equally so in New Zealand. But in New Zealand a restraint which may be invalid and ineffective in England may still be effective in New Zealand, if it passes muster under s. 33 of the Property Law Act 1952: an example of such a restraint is *Kidd* v. *Davies* [1920] N.Z.L.R. 486; [1920] G.L.R. 289, where the testator devised and bequeathed certain property to his son C. A. K. subject to a proviso that the property should not during the lifetime of the said son be sold or encumbered without the consent of the trustees, and then subject only to such conditions as they should impose. The residue of the estate was devised to the trustees upon trust to convert and to divide the proceeds in certain specified shares, one-fifth being bequeathed to C. A. K. The residuary clause was subject to a proviso that the respective shares of the testator's sons, C. A. K. and F. G. K., in the residuary trust funds should not during their respective lives be alienated or pass by bankruptcy or be liable to be seized, sold, attached or taken in execution by process of law. It was held that the condition against alienation in the devise to C. A. K., and the condition against alienation in the residuary clause were both within subs. (1) of s. 24 of the Property Law Act 1908 (now s. 33 of the Property Law Act 1952) and consequently were valid.

Another example which could be quoted is *Palmer* v. *Wright* [1929] N.Z.L.R. 53; [1929] G.L.R. 37, a gift of income by will to six children, "for and during their respective lives and so that they shall not nor shall any of them have power to anticipate the same".

The precedent from the *New Zealand Supplement*, cited by my correspondents is certainly not within s. 33 of the Property Law Act 1952, and it appears to me not to be valid under the general law: there is no gift over, if the particular limitation to the share should operate. If this is so, then the son's widow takes her life interest free of the purported limitation, and, if she goes bankrupt, her share will go to the Official Assignee.

Restricted Disposal of Patented Chattels.—"All that is affirmed is that the general doctrine of absolute freedom of disposal of chattels of an ordinary kind is, in the case of patented chattels, subject to the restriction that the person purchasing them, and in the knowledge of the conditions attached by the patentee, which knowledge is clearly brought home to himself at the time of sale, shall be bound by that knowledge and accept the situation of ownership subject to the limitations. These limitations are merely the respect paid and the effect given to those conditions of transfer of the patented article which the law, laid down by statute. gave the original patentee a power to impose." Per their Lordships of the Privy Council in *National Phonograph Co. of Australia Ltd.* v. *Menck*, [1911] A.C. 336, 349.

Reasonable Doubt.—"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of of that will suffice": *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372, 373, per Denning J. (as he then was).

TURN DOWN AN EMPTY GLASS.

By Advocatus Ruralis.

Our circle of acquaintances grows : We recently had a visit from an M.P. (not our own) whom we had known

"When all the world was young, lad,
And all the grass was green,
With every goose a swan, lad,
And every lass a queen."

For a while we talked of this and that—of Alice and of Maud, and did Jeanie with the light brown hair finally marry old Joe, who was always fairly well off. (She did.)

As we were not on the air, we quickly got down to the real object of his call. Believe it or not he had come to discuss death duties (see under Federated Farmers) and he wanted our opinion—free. This was almost too much for us, as we were much more used to listening to farmers—giving their opinion of death duties free. However, it takes a lot to stop us talking.

We explained that, in political circles, death duties were no longer a science having become merely a matter of expediency. As we remembered it, these duties were originally introduced to assist Mr Seddon's policy of bursting up large estates. We explained that, when we first became interested, a father could give five hundred pounds tax free to each of his daughters each year. Somewhere before the two-gong war, this was altered to a maximum of £1,000 worth of gifts per year free of gift duty. We have a record of one father who fifty-five years ago gave each daughter a house on marriage (£380, £490, £675). About thirty-five years ago the tax-free gift was reduced to an annual total of £500, which today would about pay for one of those fully-detached buildings that used to be built at the end of the brick path. This Act probably lowered the commercial morality of the community to its lowest point before the introduction of income tax for farmers.

In those earlier days, also, some statesman decided that it was for the good of the community if we were taught to save rather than to rely on a Welfare State which had not then arrived. To encourage this saving, money from life insurance within definite limits was deducted from the capital of the estate for death-duty purposes. The result was that an estate might be worth £20,000 plus £2,000 insurance ; but for death-duty computations £1,000 of insurance was tax-free.

Today, for the young man, life insurance is a right and proper thing ; but every insurance company knows that real life insurance is not taken out till the insured reaches fifty. We pointed out that a certain amount of lip service was rendered to life insurance by giving a small amount of assistance through income-tax deduction, but it would probably be better for a man over fifty to have no deduction for his income tax but to have his insurance up to twenty per cent. of his estate free of death duties.

If a man of fifty formed the opinion that his value on the hooks would be £50,000, and he wanted to save something over death duties for his widow then with a twenty-year expectation of life, he would normally think of life insurance.

Let us assume that he had the bright idea that an investment in Tasmania would bring money in more easily, and for his 10s. he received the sum of £10,000. Assuming that he died from the shock, leaving his widow a principal beneficiary then his estate would rise to £60,000, but his death duties would rise by £7,050 or seventy per cent.

If, however, he took out an insurance policy for £10,000 at fifty and died at seventy, what would his position be ? In twenty years he would pay approximately £9,100 in premiums and his executors would receive £12,880. He would at three per cent. have lost interest on the premiums over twenty years amounting to £3,125, in order that he could have the advantage of having the money immediately available for his executors. When Inland Revenue called on his executors, there would be a different story. With the widow as a beneficiary his duty on £50,000 was £19,950 ; but, at £60,000, the widow's exemption disappears so that at £62,280 (£50,000, plus insurance), death duties were £28,728 ; so that, to get £12,880 extra insurance, he would pay out premiums plus three per cent. on same £12,225 and extra death duty £8,778—a total of £21,000.

Our visitor was a disbeliever, and wanted to know why people insured.

We explained that, even outside members of Parliament, there were many people who really did not understand finance. Further, there were very few methods of keeping our savings out of the reach of our wives and daughters.

We pointed out that an exemption of life insurance up to twenty per cent. or twenty-five per cent. of the value of the estate would allow a man to die fairly comfortably without upsetting the economy of his business, but, with the present death rates, the lifetime of even the most prosperous private company is reduced from fifty years to thirty years. Very few private companies could pay for the deaths of the two principal shareholders if they died within five years of each other. The result is that a business, which has taken thirty years to build up, is handed over to the company mongers and the business may or may not stand the strain. It would pay a businessman to forgo his income-tax reduction for insurance premiums in order to save his business from ruin on his death.

In England, where they really understand finance, all insurance is separated from the estate until such time as death duties are paid. We suggested that perhaps this was a matter that the business community could pay someone to study. At the same time, they might study the Canadian attitude towards insurance.

TOWN AND COUNTRY PLANNING APPEALS.

Church Property Trustees *v.* Minister of Works.

Town and Country Planning Appeal Board. Christchurch. 1959. April 7.

Subdivision—County—Area zoned "Rural"—Land used in Two Blocks for Dairying for Town Supply—Proposed Self-contained Suburban Residential Unit with Community Amenities—Minister of Works requiring Prohibition of Subdivision as Detrimental to Public Interest and State Highway—Subdivision not prima facie detrimental to State Highway—Land having High Value for Food Production—Retention of Land for Rural Use in Public Interest—Town and Country Planning Act 1953, s. 38 (14).

Appeal by the owners of a property comprising 190 ac. 2 ro. 31.8 pp., having frontages on to the Main North Road and the Styx Mill Road. This property was in an area zoned under the Waimairi County Council's undisclosed district scheme as "rural". This land is at present leased in two blocks to two different lessees who are using it for dairying for town milk supply.

The appellants prepared a plan for the subdivision of this land into building sections. The proposed plan would in effect, if approved, lead to the creation of an almost self-contained suburban unit, as it would provide for some 565 building sections with provision for community amenities and a recreation reserve.

It appeared that this proposal, although not actually formally approved by the Chief Surveyor or the Waimairi County Council, at least was regarded by them in a favourable light, but in August, 1958, the Minister of Works, acting under s. 38 (14) of the Town and Country Planning Act 1953, required the Council to prohibit the subdivision on the grounds that urban development in this locality would be detrimental to the public interest and to the existing State Highway. In pursuance of this direction, the County Council had no other course open to it than to prohibit the subdivision and this appeal followed.

The judgment of the Board was delivered by

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

> The plan for subdivision, as such, appears to make provision for everything such a subdivision would require, but the question here is not whether the plan as such is suitable but whether the development of this block of land for urban use at the present time is contrary to town-and-country-planning principles.
>
> The Christchurch Regional Planning Scheme in the areas zoned for urban occupation makes provision for an increase in urban population of 89,000 within the next twenty years—that is to say, from 184,000 in 1956 to 273,000 in 1976. The authority has planned to provide sufficient land within the urban fence for this anticipated increase and in locations where services such as water, sewerage and transport could be economically supplied during the period of development. This proposed subdivision, if it is approved, would of course be developed gradually, but it would not be possible to connect it with a sewerage system for an estimated ten to fifteen years at least. The Board has held in other decisions, and is still of the view that urban development outside the perimeter of a city or borough should not be encouraged so long as there is vacant land suitable for urban use lying within the perimeter, and this particular case offends against that principle.

The most important factor in considering this appeal is in the view of the Board to be found by reference to the Second Schedule of the Act:

> "Control of subdivision including restraint upon unnecessary encroachment of urban development upon land of high actual or potential value for production of food."

This property is land having a high actual value for the production of food. Approximately eighty cows are being milked on it now for town supply and the evidence is that this carrying capacity could be increased up to a hundred-and-five cows, producing 84,600 gallons of milk per annum. Even if it were not used for dairying purposes the greater part of it is suitable for the production of all kinds of vegetables and for both tree and shrub fruits.

In those circumstances, the Board considers that retention of this land for rural use as long as possible is in the public interest. It considers therefore that the Minister of Works acted in the public interest in prohibiting this proposed subdivision and the appeal is disallowed.

Having disallowed the appeal on the grounds stated, the Board does not propose to comment on the third ground of the prohibition—that the proposed subdivision is detrimental to the State Highway other than to say that as the plan makes provision for a segregation strip with limited road access to the State Highway it does not prima facie appear to be detrimental to that highway.

Appeal dismissed.

Presbyterian Church Property Trustees *v.* Christchurch City Corporation.

Town and Country Planning Appeal Board. Christchurch. 1959. April 8.

Zoning—Area zoned as "Residential B"—Change of Use—Church Property Trustees desiring to use Brick Residence as Offices for Educational and Publication Purposes—Conditional Use permitted for "buildings for religious purposes"—Meaning—Buildings used for the general advancement and propagation of the tenets and views of any recognized religious order or sect"—Conditional Use of Building approved—Town and Country Planning Act 1953, s. 38A.

Appeal by the owners of a property situate at No. 236 Hereford Street, Christchurch, containing one rood more or less being s. 797 on the Public Map of the City of Christchurch. There was a substantial brick residence erected on the property. The appellants wished to use this property for religious and educational purposes and they applied to the Council under s. 38A of the Act for consent to a change of use. The Council refused to grant its consent and this appeal followed.

The property was in an area zoned as "residential B" under the Council's undisclosed district scheme. Under that scheme "conditional uses" in residential zones included:

"Churches and buildings used for religious purposes."

In making their application the appellants referred to a use as "offices" for various branches of the work of the Presbyterian Church. The respondent took the view that the proposed use of the premises constituted a commercial use rather than a use for religious purposes.

The judgment of the Board was delivered by

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

1. That the respondent is very properly and justifiably concerned to prevent so far as possible any encroachment of commercial use into residential area by the conversion of residential properties into offices and it acted consistently in refusing its consent to the application as filed. In that application the purposes to which the building was to be put were stated as follows: "Offices of the Presbyterian Social Service Association, Youth Office, Publicity Office and "Outlook" (a church publication) office". When the appeal came to be heard, however, the evidence indicated that the Social Service Association would not be housed in this building which it was proposed to be used only by:
   (a) The Department of Christian Education.
   (b) For the publication of but not the printing or setting up of the publication "Outlook".
   (c) The Publicity Department whose main function is the preparation of film scripts used for educational purposes within the Church organizations—principally in Sunday schools.
   (d) Meetings of various committees of the Church.
2. The respondent submitted that the words "buildings for religious purposes" must be construed as being in effect "ejusdem generis" with the word "churches" and read as applying only to buildings used solely for community worship or the propagation of the tenets of

some particular creed, sect or religious order. The Board considers that if that had been the intention then it could have been clearly expressed in other words, e.g. " other buildings used for public worship or religious services ".

3. Counsel have been diligent in their search for some authoritative interpretation or definition of the words " religious purposes " but the only one that could be deemed apposite is to be found in *Words and Phrases Judicially Interpreted*, 4th ed. 531, 532, where in the course of delivering judgment in the case of *Re Ward, Public Trustee* v. *Ward* [1941] Ch. 308, Clauson J. said: " In the absence of a context enabling the Court to place some extended meaning on the words ' religious purposes ' the phrase must be taken to mean ' purposes conducive to the advancement of religion '."

   The Board respectfully adopts that interpretation. It considers that the words " buildings used for religious purposes " in the context in which they here appear should be construed as meaning any building used for the general advancement and propagation of the tenets and views of any recognized religious order or sect.

4. Apart altogether from any question of interpretation the Board holds that the appeal must succeed because it is a condition precedent of any prohibition of a change of use made under s. 38A for the local authority concerned to establish that the proposed change of use will detract or be likely to detract from the amenities of the neighbourhood (see the concluding words of the section).

In cross-examination the Council's town-planning officer admitted that the use of this building for the purposes set out would *not* detract from the amenities of the neighbourhood.

The appeal is allowed. The appellant is entitled to use the building as a " conditional use " so long as that use is restricted to the purposes set out in para. 1 (*supra*), subparas. (a) (b), (c), and (d).

Appeal allowed.

Prosser *v.* Heathcote County.

Town and Country Planning Appeal Board. Christchurch. 1959. April 6.

Subdivision—County—Five-acre Minimum—Land used as Market Garden—Subdivision into Two Lots—Area fitted for Market Garden and Orchard use—Two Acres constituting Economic Market Garden Unit—Subdivision into Two-acre Lots not undesirable—Town and Country Planning Act 1953, s. 38.

Appeal by the owner of a property containing 4 ac. 1 ro. 22.6 pp., being Lot 5 on Deposit Plan 18313, part Rural Section 104, Block XVI Christchurch Survey District. This property was situated on the Horotane Valley Road on the western side of the northern or lower end of that road. The appellant carried on business as a market gardener, his activities being directed to the growing of tomatoes on a commercial basis.

He had prepared a plan for the subdivision of this property into two lots, one of 2 ac. 1 ro. 2.6 pp., having a leg-in entrance of a depth of 611 links. This plan was submitted to the Chief Surveyor in pursuance of s. 3 of the Land Subdivision in Counties Act 1946. The plan was submitted to the Council for its comments and the Council prohibited the subdivision under s. 38 of the Town and Country Planning Act 1953. The property in question was in an area shown in the Council's undisclosed district scheme as " rural ", and under that scheme the minimum rural area was fixed at five acres.

The judgment of the Board was delivered by

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

1. That the Horotane Valley, having regard to its situation and comparative freedom from frost and the nature of its soil, is eminently suited for market garden and orchard use and apart from some residential occupation it is used almost exclusively for this purpose.

2. Of the thirty-four holdings in the valley, six have an area of under one acre; nine have areas varying between one and three acres; nineteen of them are over three acres.

3. It is clear that two acres in this area with glasshouse or houses constitute an economic market-garden unit, at least in the lower, flatter portions of the valley where the appellant's property is situated. The appellant himself is using only approximately two acres or half of his property and from that he is making a good living from his tomato-growing activities. The balance of his land is lying idle and if the subdivision of his property could be approved, he intends to sell the 2 ac. 1 ro. at present lying idle.

4. Other market gardeners operating in the immediate neighbourhood of the appellant's property are apparently, from the evidence, making reasonable livings from areas of approximately two acres, and it appears that two acres is an appropriate area to be handled by one man, without the necessity of employing labour. It appears clear that two-acre lots in this particular part of Horotane Valley would constitute economic units. In this particular case the question falling for determination is that if the appeal be disallowed, a little over two acres of the appellant's property will continue to lie idle and unproductive, whereas if it is allowed there is at least a strong probability that it will be sold and obviously would be brought into production by a purchaser.

Although the Board considers that a five-acre minimum is in general terms a reasonable minimum area for subdivision in rural zoning, nevertheless in this particular case, having regard to the locality of the property and its nature, a subdivision into two-acre allotments cannot be deemed undesirable.

In the special circumstances of this case, the Board considers that two-acre lots in this immediate vicinity constitute economic lots and it would be unrealistic to endeavour to maintain a fixed five-acre minimum.

The appeal is allowed.

Appeal allowed.

Crispin *v.* Mt. Albert Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 7.

Zoning—Area zoned " Residential "—Objector Carrying on Watchmaking Business in His Residence—Business of Watchmaker to continue indefinitely as " Existing Use "—Town and Country Planning Act 1953, s. 36.

Appeal by the owner of a property being Lot 4 of Section 10 suburbs of Auckland D.P. No. 4837 of Allotments 158 and 159. This property was in an area zoned as " residential " under the respondent Council's proposed district scheme.

The appellant objected to this zoning claiming that his property should be zoned as " commercial ". This objection was disallowed and this appeal followed.

The judgment of the Board was delivered by

REID S.M. After hearing the submissions of the appellant, the evidence adduced by the respondent and the submissions of its counsel, the Board finds:

1. The appellant's property which is situate on the north-western corner of Sandringham Road and Grove Road is a residential property and is used as such by the appellant.

2. It is in an area zoned as " residential " and predominantly residential in character and occupancy though there is a small block of four shops on the opposite corner to the appellant's property zoned as " commercial A ".

   The residential zoning of the area is appropriate.

3. The appellant is a watchmaker by occupation and he carries on the business of repairing clocks and watches in one of the rooms in his residence.

   This is of course a commercial use.

4. The appellant appears to have made his objection under a misconception—namely, that unless his property was zoned as " commercial " he could be precluded from carrying on his business on the premises.

This, of course, is not the case. By virtue of the provisions of s. 36 of the Act the appellant can continue to carry on his present business as an " existing use " for as long as he wishes.

No case has been made out justifying a change of zoning and the appeal is disallowed.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Bledisloe Appeal.—The *Law Times* (28/8/59) notes an appeal arising out of the death last year of Viscount Bledisloe, the most agriculturally-minded of all our Governor-Generals and one who never lost his interest in and affection for New Zealand. "In view of the great esteem in which he was held, the townspeople of Lydney have decided to erect a memorial to him. As one of his chief interests in the town of Lydney was the local hospital, it is thought fitting that the memorial should take the form of an extension to the local hospital. The new wing will house a physiotherapy centre, which will serve a great need not only for the town of Lydney, but the whole Forest of Dean." The Treasurer of the Fund is Mr L. F. Swaite, of the Midland Bank, Lydney, Gloucestershire.

An Equality of Negligence.—An unusual case that illustrates an anomaly of the Contributory Negligence Acts is reported in the *Manchester Guardian* (17/7/1959) (now *The Guardian*). Two motor-cyclists collided and each brought an action against the other in the form of claim and counterclaim. Each was awarded by the trial Judge £4,000 damages, the one against the other, and had the liability been a personal one neither would have been any better off. The Judge observed, "Now, I suppose, the insurance companies have to pay"; and, in comment upon the case, the *Justice of the Peace Review* says: "This is probably an extreme case, but the way in which drivers are able to pass their personal responsibilities on to insurance companies has recently been criticized as tending to make drivers less careful than they should be and as contributing, therefore, to the increase of road accidents. It is not a simple problem and conflicting considerations are involved, but it does seem strange that two drivers, assuming that each was equally responsible for the accident, should each be able to secure £4,000 from insurance funds in this way to compensate him for injuries which he would never have received if he had driven with proper care".

No Public Harm.—In *Attorney-General* v. *Harris* [1959] 2 All E.R. 393, the Attorney-General (on the relation of the Manchester Corporation), endeavoured to injunct the defendants who had sold flowers from stalls near the entrance to a cemetery in Manchester on almost every Sunday since 1955. The stalls were about 7 ft. long, and projected between 2 ft. 6 in. and 3 ft. 6 in. from the railings of the cemetery into a footway between 15 and 16 ft. wide, used by only a few pedestrians, except on Mothering Sunday. The defendants, in trading in this manner, committed offences under the Manchester Police Regulation Act 1844, and in consequence they had been convicted and fined on many occasions; but they had nevertheless continued to trade. Notwithstanding that the Attorney-General had exercised his discretion in bringing the action and that the defendants had contravened the provisions of a statute, Salmon J. held that it was the duty of the Court in all relator actions to inquire whether the acts done by the defendants in truth injured the public. If they did, the fact that the injury was small would not, provided it was real, entitle the Court to withhold an injunction. Nor would it be germane that the public, though injured, might have received some compensating advantage from the defendants' acts. If, however, it was established that the public had in fact suffered no injury as a result of the defendants' acts, the Court might, in the exercise of its discretion, refuse an injunction. Undoubtedly it was only in the most exceptional circumstances that any statutory provision could be contravened without public injury. The circumstances of this case were, however, most exceptional. The acts done by the defendants did not, on the very special facts of the case, tend to injure the public; and, indeed, no member of the public had been in the slightest degree inconvenienced by the defendants. In all the circumstances, an injunction should not be granted, and, in the exercise of His Lordship's discretion, he refused the injunction, and gave judgment for the defendants.

A Jurist's Sayings.—Sir Edward Coke (1552-1634), the famous Judge and jurist, has been unfairly criticized by both Lord Macaulay and Lord Campbell, the former in particular calling him a "stupid serjeant, pedant, bigot, and brute". Incidentally, he was not made a serjeant until he went on the Bench. Coke who held office for twenty years as Chief Justice of the Common Pleas was a fine linguist, a man of wide learning and the author of many aphorisms that have retained their point through the centuries. Possibly, the best known to legal practitioners (and the Public Trustee) is "Corporations have no souls". Others with a modern touch are:

"The life of a man is much favoured in law, but the life of the law itself ought to be more favoured."

"Questions (are) like spirits which may be raised with much ease but vanquished with much difficulty."

Of death-bed wills he says: "Few men pinched with the messengers of death have a disposing memory."

"Trade and traffic is the life of every island."

Of Ranulph, Bishop of Durham: "He lived without love and died without pity, saving of those who thought it pity he lived so long."

"No man can carry the words of a positive law by Parliament in his head.'

"Three costly things do much impoverish the subjects of England, viz.: costly apparell, costly diet, and costly building."

"The golden and streight metwand of the law, and not the uncertain and crooked cord of discretion."

"Warranties are favoured in law, but estoppels are odious."

In Divorce.—The petitioner was explaining the trend of events. "You can imagine how I felt, Your Honour", he said, "when I came upon my wife in the arms of the co-respondent". "Of course", nodded the Judge. "And what did she say when you surprised her?" "That's what really hurt me", replied the husband. "She looked at me and she said, 'Well, here's old Big Mouth! Now *everyone* will know'."

CORRESPONDENCE.

Customary Hire Purchase Agreements.

The Editor,
NEW ZEALAND LAW JOURNAL,
Sir,

An article on p. 167 (*ante*) advocates the repeal of s. 57 of the Chattels Transfer Act.

I have expected some comment on this proposal but its absence indicates, I hope, that none of your readers has considered such a retrograde step anything but a remote possibility.

Repeal might force many traders to register, thereby adding to their burdens, necessitating larger registration staffs and possibly increasing the price of hired chattels—and all that merely to give an unnecessary and very limited protection to the public.

Contrary to a widespread but erroneous belief which may have prompted the article in question, and which I shall discuss later, the Chattels Transfer Act has never given any protection to the public in respect of hired chattels. Nor did s. 57 amend it in any way. In fact, it has no real place in that Act. What it did was to take away (in the case of customary hire-purchase agreements) such protection as was afforded by (*a*) s. 61 (c) of the Bankruptcy Act 1908 (order and disposition clause); (*b*) s. 27 (2) of the Sale of Goods Act 1908 and (c) the law of fixtures.

A few comments to show how limited such protection was.

As to (*a*), every chattel on the "customary" list is the subject of a notorious custom of hiring and would not therefore be caught by s. 61 (c) anyway. In fact today "notorious custom" could be proved in respect of all common merchandise, down almost to a shirt stud.

As to (*b*), s. 27 (2) was invariably got over by giving the hirer a right to return the chattel and *not*, as stated in the article, by a declaration in the agreement that the hirer could not pass title. Such a declaration is useless if the agreement binds the hirer to pay the whole price: see *Lee* v. *Butler* [1893] 2 Q.B. 318.

As to (c), there was no way of getting over the law of fixtures, but then comparatively few chattels are affixed.

None of these protections is sufficiently needed nowadays to justify loss of the benefits of s. 57. Hire purchase is so universal that there can surely be very few people who accept possession as proof of ownership.

Far from being repealed s. 57 should be extended to cover *all* vendors of "customary" chattels, not just dealers and manufacturers. There is no logic in the distinction, because the justification of the section is the "customary" or "notorious" nature of the chattel, not the vocation of the vendor.

In regard to fixtures, the section has been most beneficial to purchasers desiring to acquire chattels such as milking machines, stoves, and fixed engines. Here again, extension might be desirable to cover "customary" chattels affixed to other chattels, unless they form an integral part of such chattels.

I return to the erroneous belief above referred to as to the impact of the Chattels Transfer Act 1924 on hire-purchase agreements, which is mainly what prompts this letter. That belief is that the Act protects purchasers, mortgagees and others (by virtue of ss. 18 and 19) by rendering such agreements void and illegal if not registered. This view is accepted by two well-known text-books and in an obiter dictum in a Supreme Court judgment, and I have come across it frequently.

It is wrong, of course. Lack of registration (presumably) does render an unregistered hire-purchase agreement void or illegal, as it is (presumably) an "instrument", but that does not help a purchaser or mortgagee, because the voidness or illegality does not divest the vendor of his ownership, which is not derived from the agreement: *Bowmakers Ltd.* v. *Barnet Instruments* (1945) 172 L. T. 1 and *Eastern Distributors Ltd.* v. *Goldring* [1957] 2 All E.R. 525, 533.

In conclusion, I suggest that those catering for our large hire purchasing public have enough problems even with s. 57 to assist them.

Yours, etc.,

N. A. CAMPBELL.

AUCKLAND, August 24, 1959.

Sir,

A REPLY.

Referring to Mr Campbell's helpful letter, I regret that some loose phrasing of mine has quite justifiably led him to assume that I am guilty of the erroneous belief which he condemns. My views are quite the contrary, as appears from an earlier article (*ante*, 105-106). I there quoted the case which I think he has in mind and which has caused this confusion: *General Motors Acceptance Corporation* v. *Traders' Finance Corporation Ltd.* [1932] N.Z.L.R. 1. This was a decision of the Court of Appeal and, in my opinion, the point was not dealt with obiter, but was an essential ingredient of the decision.

However, this explanation does not alter my submission in the article that s. 57 should be repealed.

I listed the same three apparent benefits of s. 57 with which Mr Campbell deals. They are:

(*a*) "Order and disposition" negatived: I suggested that traders could soon establish "notorious custom". Mr Campbell goes further and thinks that "notorious custom" already exists for all common merchandise. The s. 57 provision on this point is thus not needed.

(*b*) Hire purchaser cannot pass title: I am pleased to accept Mr Campbell's correction that an option to return the chattel must be present, but my statement (which he accepts), that the form of agreement can cover this point, remains. The vendor needs only to adopt the *Helby* v. *Matthews* model [1895] A.C. 471. The s. 57 provision is thus not necessary for this aspect either.

(c) Fixtures: Mr Campbell is not greatly concerned with these, and we can dismiss them for the moment.

Now, if the above points exhaust the benefits of s. 57 (as I believe they do), what purpose does s. 57 serve Mr Campbell suggests that if the section were repealed dealers would need to register. My remarks may well have led him into saying this, but on his own argument if he relies on "notorious custom" and uses *Helby* v. *Matthews* agreements, he can protect his clients without s. 57. The presence or absence of s. 57 is therefore irrelevant. In my opinion, from the point of view of protection of the vendor, there is no difference in legal consequences between an unregistered, non-customary *Helby* v. *Matthews* hire-purchase agreement affecting a "notorious custom" chattel, on the one hand and a s. 57 customary hire-purchase agreement on the other; and all such transactions relating to "notorious custom" chattels can be brought under the first head irrespective of type of vendor, or the presence of s. 57.

Hence, subject to vendors being given time to get their agreements on to a *Helby* v. *Matthews* basis (if not already), s. 57, with its attendant amendments and schedules, could be safely repealed and we would revert to the common-law treatment which has been accepted in England all along.

The only value I can see in s. 57 is the statutory removal of certain chattels from the "order and disposition" section in bankruptcy; in effect, we are given a legislative list of "notorious custom" chattels. Mr Campbell ,an experienced commercial lawyer, is content to rely on notorious custo n for all chattels at present on hire purchase. Not all practitioners may care to run the risk, nor presumably would Mr Campbell if the chattel is of a new type, as e.g. T.V. sets will be. In the article I suggested that if s. 57 is repealed a vendor having doubts on the point could register his agreement. "Notorious custom" could soon become established and registration would be unnecessary. Another possibility is to still scrap the customary hire-purchase concept but amend the Bankruptcy Act to give power to declare by Order in Council that specified types of chattel do not fall into the "order and disposition" doctrine. This would cut the tangle of s. 57 with its special vendors and its confusions, and place the protection of the vendor in the Bankruptcy Act where it belongs.

For fixtures, in my opinion, the Chattels Transfer Act should be amended to allow a vendor of a hire-purchase chattel which has become a fixture to remove it in terms of his agreement if he has registered the agreement within twenty-one days of execution. It would thus operate as a bailment, and purchasers and mortgagees of the land could protect themselves by search.

I would be interested to learn whether Mr Campbell or any other practitioner has any views on the above.

Yours, etc.,

WELLINGTON, August 31, 1959 G. CAIN