New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"
VOL. XXXV TUESDAY, OCTOBER 20, 1959 No. 19

INCOME TAX: SOLICITOR'S RESPONSIBILITY IN MAKING OUT CLIENT'S RETURNS.

SOLICITORS who make out income-tax returns for their clients must be very careful that they do not infringe penal sections of the Land and Income Tax Act 1954. They can do this unwittingly by accepting from the client the figures he supplies them regarding his income and allowable expenditure for the tax year in question. Unless reasonable and provable care is exercised in compiling and completing the return, the practitioner may be found to have negligently made a false return. Carelessness is no defence.

To be more specific: A solicitor who is instructed to prepare tax returns for a client may be guilty of an offence under s. 149 (b) of the Land and Income Tax Act 1923, or under s. 228 (1) (b) of the Land and Income Tax Act 1954, if he negligently makes any false return, or gives any false information, or misleads or attempts to mislead the Commissioner or any other officer in relation to any matter or thing affecting his client's liability to taxation.

This was recently the subject-matter of a judgment by Mr D. G. Sinclair S.M. (to be reported, *Commissioner of Inland Revenue* v. *P.*), which is well worth the careful consideration of every practitioner.

The Commissioner of Inland Revenue brought nine charges against the defendant solicitor: that, in each of the nine years in question, he did negligently make a false return under the Land and Income Tax Acts in relation to the income derived by his client, a sheep-farmer, a matter affecting the liability of the sheep-farmer to taxation.

The relevant statutory provisions were s. 149 (b) of the Land and Income Tax Act 1923 and s. 228 (1) (b) of the Land and Income Tax Act 1954.

Section 149 (b) of the Land and Income Tax Act 1923 was as follows:

> (b) Every person who wilfully or negligently makes any false return, or gives any false information, or misleads or attempts to mislead the Commissioner in relation to any matter or thing affecting his own or any other person's liability of taxation.

Section 228 (1) (b) of the current income-tax legislation reads:

> (b) Every person commits an offence against this Act who wilfully or negligently makes any false return, or gives any false information or misleads or attempts to mislead the Commissioner or any other officer in relation to any matter or thing affecting his own or any other person's liability to taxation.

For the prosecution, evidence was given by an inspector of the Inland Revenue Department and the taxpayer; no evidence was given by or for the defendant solicitor.

The Inspector employed by the Inland Revenue Department gave evidence that, after an investigation of the sheepfarmer's farming transactions, he reassessed the taxpayer's income for the years in question. As there were insufficient records available to him to do a complete assessment on the original bank pass-book or income basis, he used the assets accretion method. The statement of income thus assessed together with the taxpayer's returns, was produced, showing a discrepancy between the income returned and income assessed for each year. The discrepancies were both ways—a discrepancy in some years, and a surplus in others. All were incorrect. Over the period of nine years, the total discrepancy was not gross. In each year, sales ascertained were greater than the sales returned. For the years when there was an over-statement of income returned, it was found that certain expenses were underclaimed.

For the prosecution, evidence was also given by the taxpayer who said that he had been carrying on business on his own account since 1945; and, since he had been in business, his returns of income had been made by his solicitor, the defendant, who signed them as solicitor for the taxpayer and forwarded them to the Inland Revenue Department. He also said that at the end of each financial year he used to take in to the defendant "everything he had". This included all the receipts and statements together with books of farming accounting, except his bank pass-book and "a few things he missed out". Occasionally he bought and sold stock, as he expressed it, "privately" and "forgot" to inform the defendant of such sales. At one period, he was absent from his farm for some months through illness and his papers became jumbled up.

He originally went to the defendant for assistance in the preparation of his returns. The solicitor told him what information was required of him. He was given a book designed for the recording of farm transactions. Three such books were used by the farmer and his son but only one was available to the Inspector. The other two, he explained, were destroyed by fire during one of his bouts of illness. The learned

Magistrate said he had no reason to doubt his explanation. While he was absent from the farm, his son acted under power of attorney and kept the farm books. The defendant prepared the returns of income in the presence of one or the other of them. His fee for this service was £1 11s. 6d.

Counsel for the prosecution referred to the case of *Commissioner of Taxes* v. *B.* & *B.* (1949) 7 M.C.D. 82. In this case the explanation given by the defendant was that the returns were falsely made through ignorance or carelessness.

In the present case, the prosecution alleged carelessness, which, as was stated by the learned Magistrate, Mr S. L. Paterson, in the case referred to, at p. 86, is no defence to the charges. He continued:

> Negligence, as used in the Land and Income Tax Act 1923, is just as much a state of mind as intention or wilfulness. It connotes the mental state of indifference with respect to his conduct and its consequences. Thus, a person who sends in a false return, knowing that he has not kept proper records from which a correct return might be made up . . . is guilty of the offence of negligently making a false return, not because he intends or desires to send in a false return, but because he is careless and indifferent whether the return is false or not.

Relying on this authority, it was submitted for the prosecution that there was an obligation on the person making the return to use due care, and that such obligation was greater when such person was professionally engaged to make a taxpayer's returns; and, further, that there was an obligation on the part of the defendant to ensure that proper books of account were being kept and that full records were made available to him, from which he could make correct returns. The defendant should, among other things, have examined the taxpayer's bank pass-books and all monthly statements from stock firms, and then reconciled the accounts sales and the bank statements.

For the defendant, it was submitted that the defendant did not "make" the returns. The return was deemed for all purposes to have been made by the taxpayer as provided in s. 16 of the Land and Income Tax Act 1954, which reads:

> 16. A return purporting to be made by or on behalf of any person shall for all purposes be deemed to have been made by that person or by his authority, as the case may be, unless the contrary is proved.

It was further submitted that, even if the defendant did make the returns, there was no negligence on his part, because he relied on the word of his client that all information was supplied.

Concerning the first submission, the learned Magistrate said that the evidence showed that the returns did purport to have been made by the defendant on behalf of the taxpayer, and were made by the taxpayer's authority. The purpose of this section was to attach liability to the taxpayer in cases where he employed an agent or other person to make the return for him. It did not absolve from liability the person making the return. Section 228 of the Act provides that every person commits an offence against the Act who negligently makes any false return or gives any false information in relation to any matter or thing affecting any other person's liability to taxation.

Concerning the second submission, the learned Magistrate said that it was of importance, as in *Commissioner of Taxes* v. *B.* & *B.* to ascertain the state of mind of the defendant in so far as it related to his attitude in carrying out his instructions. The onus was on the prosecution to establish a mental state of indifference with respect to his conduct and its consequences.

The whole question for determination was this: Did the defendant know, or should he have known, when making any of the returns, that proper records had not been kept by his client

On the evidence before him, the learned Magistrate was not satisfied that that onus was discharged. The defendant was instructed to prepare returns of income and, when originally instructed, advised his client to keep all relevant particulars of income and expenditure in a particular type of book suitable for the purpose. This was done. From a careful perusal of the book produced, it appeared that a good deal of care was taken in its preparation. It included records of sales and purchases of stock, stock on hand, wages paid, and general farm expenses from 1949 to 1954. It was clear that the returns for the relevant years were prepared from the information contained in this book—with the exception of sales of wool.

There was evidence, however, that particulars of sales of wool were supplied to the defendant in some other manner. They generally coincided with the sales ascertained by the inspector. The most serious discrepancy in this respect was brought about by an omission, in two years, of moneys received from the Wool Retention Account. Such receipts were, however, included in the return for subsequent years. These two items might have been among those "odd things missed out".

From a study of the documentary evidence and particularly the testimony of the taxpayer (who, it is to be remembered was a witness for the prosecution), it appeared to the learned Magistrate that the defendant had carried out his instructions according to the information supplied to him. Such records and information had the appearance of completeness, and there was a lack of evidence to establish that the defendant had reason to suspect otherwise. He was not employed to prepare a book of accounts, or to make an audit of his client's accounts.

As the evidence of the prosecution fell short of satisfying the learned Magistrate that the defendant made the return "in a mental state of indifference in respect to the taxpayer's conduct and its consequences", the charges were dismissed.

From the foregoing, it is clear that a determination whether or not a solicitor was negligent in preparing his client's tax returns must always be a decision on the facts or on inferences from the facts before the Court.

Practitioners should remember that, while s. 16 of the Land and Income Tax Act 1954 attaches liability to the taxpayer himself where he employs a solicitor or agent to make his return for him, the solicitor is not absolved from liability under s. 228 (1) (b) for negligently making a false return or giving false information to the Commissioner in relation to anything affecting the client's liability to taxpayer.

The solicitor, for his own protection, must be vigilant in acquiring from his client full and exact information regarding his returnable income. While the onus is on the Commissioner to establish a mental state of indifference with respect to the information supplied by the client taxpayer, the question for the Court must always be: Did the solicitor know, or should he have known, when he was making up his client's returns, that proper records had not been kept by his client, or, it may be added, had the solicitor taken care to ascertain that the figures supplied to him were exact and complete?

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Minister of Health—Power to replace Hospital Board by Commission—Minister after obtaining Report from Committee of Inquiry and on Recommendation of Hospitals Advisory Council, appointing Commission to act in Place of Hospital Board—No Obligation on Minister to adduce Evidence He was "Satisfied"—Notice of Minister appointing Commission Prima Facie Evidence He was "satisfied" there had been Grave Dereliction of Duty on Board's Part—Power conferred on Minister Administrative only—Minister having Regard to Considerations of Policy appearing to Him to be relevant in deciding whether Board had made Such Default, under No Duty to act Judicially when Exercising Power to replace Board by Commission—"Satisfied"—Hospitals Act 1957, s. 84—Acts Interpretation Act, s. 24—Evidence Act 1908, s. 46. The Minister of Health, after obtaining a report from a committee of inquiry appointed by him under s. 13 of the Hospitals Act 1957, and on the unanimous recommendation of the Hospitals Advisory Council, which had considered the report of the committee, exercised the power conferred on him by s. 84 of that Act, and, by notice dated November 13, 1958, published in *1958 New Zealand Gazette*, 1657, appointed a Commission of three persons with power to act in place of the Board. The notice provided that the Commission should have and might exercise, to the exclusion of the Board, all the powers and functions of the Board. In an action by the Hospital Board and its Chairman against the Attorney-General (sued in respect of the Minister of Health), the following relief was claimed: (*a*) a declaration that the appointment and proceedings of the Committee of Inquiry were invalid; (*b*) a declaration that the appointment of the Commission to act in place of the Board was invalid; and, in the alternative; (*c*) a writ of certiorari to quash the appointment of the Commission. In the Supreme Court, F. B. Adams J. dismissed the action. The plaintiffs appealed. *Held*, per totam curiam. 1. That, whether a body is under a duty to act judicially depends on the construction of the material statutory provisions, and on the circumstances relating to the exercise by it of its jurisdiction, with no presumption one way or the other. The existence of a lis is not essential. (*New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, and *N.Z. United Licensed Victuallers Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 167, followed.) 2. That there was no obligation on the Minister to adduce evidence at the hearing that he was, in fact, "satisfied" within the meaning of that term as used in the proviso to s. 84 (1) of the Hospitals Act 1957. (*Point of Ayr Collieries* v. *Lloyd-George* [1943] 2 All E.R. 546, and *Carltona Ltd.* v. *Commissioner of Works* [1943] 2 All E.R. 560, followed.) 3. That, by reason of s. 24 of the Acts Interpretation Act 1924 and s. 46 of the Evidence Act 1908, the Minister's notice in terms of s. 84 (1) appointing the Commission was in itself to be taken as prima facie evidence that the Minister was satisfied. *Held also*, by the Court of Appeal (Gresson P. and Cleary J., North J. dissenting). That the appeal should be dismissed. *Bull r Hospital Board and Another* v. *Attorney-General and Others.* (S.C. Westport. 1959. April 13. F. B. Adams J.) (C.A. Wellington. 1959. September 14. Gresson P. North J. Cleary J.

ANIMALS.

Calves Straying on Highway—Collision with Motor-car causing Damage—No Duty of Care towards Road-users on Part of Owner of Stock to prevent them Straying on Highway—Particular Animal with Some Peculiarity rendering it Dangerous, excepted—No Statutory modification of Common-law Principle—Police Offences Act 1927, s. 4 (1) (i)—Impounding Act 1955, s. 33. There is no duty of care on the owner or occupier of land towards highway users to prevent stock, being domestic animals, depasturing on the land from straying on the highway. (*Brackenborough* v. *Spalding Urban District Council* [1942] A.C. 310; [1942] 1 All E.R. 34, and *Searle* v. *Wallbank* [1947] A.C. 341; [1947] 1 All E.R. 12, followed.) The only exception to the general rule is when it is shown that the individual animal in question is known to have some peculiar propensity or some special peculiarity which renders it dangerous when on the highway. Something that is common to any particular group of animals, such as young calves, cannot be said to be peculiar or special. (*Brock* v. *Richards* [1951] 1 K.B. 529; [1951] 1 All E.R. 261, followed.) There is nothing in s. 4 (1) (i) of the Police Offences Act 1927 or in s. 33 of the Impounding Act 1955 which abrogates or modifies the common-law rule or gives an individual right of action for a breach of those statutory provisions. *Simeon* v. *Avery.* S.C. Palmerston North. 1959. September 8. Hutchison A.C.J.)

COMPANY LAW.

Articles—Reduction of Capital—Special Resolution by Entry in Minute Book reducing Capital—Article authorizing Same ultra vires and void—Companies Act 1955, s. 75. The company adopted Table A of the Second Schedule of the Companies Act 1933, but subject to the conditions and modifications therein mentioned. By art. 2, it was expressly provided that art. 38 of Table A should not apply to the company. Article 38 of Table A is in the following terms: "The company may by special resolution reduce its share capital and any capital redemption reserve fund in any manner and with, and subject to, any incident authorized, and consent required, by law". The following article of the company's articles of association was substituted for art. 38: "8. THE Directors may from time to time with the sanction of the Company to be given by a special resolution passed either under the provisions of Section 125 of 'The Companies Act 1933' or by entry in the Company's Minute Book in manner provided by Section 300 of 'The Companies Act 1933' reduce the capital of the Company in any manner for the time being authorized by law and may subdivide or consolidate its shares or any of them." The company by entry in its minute book, in accordance with s. 362 of the Companies Act 1955, passed the following special resolution: "That the capital of the Company now consisting of £5,000 divided into 5,000 ordinary shares of £1 each be reduced to £2,000 divided into 5,000 ordinary shares of 8s. each credited as fully paid by repaying to the shareholders of the ordinary shares the sum of 12s. per share, being capital which is in excess of the wants of the Company." On motion for an order confirming the special resolution for the reduction of capital, *Held*, That the effect of art. 2 of the Company's articles of association was to take away from the company in general meeting the power to reduce its capital by special resolution, which it would have had by virtue of s. 75 of the Companies Act 1955 and art. 38 of Table A in the Companies Act 1933. Article 8 purported to substitute a power vested in the directors with the sanction of a special resolution of the company. 2. That, by virtue of s. 75 of the Companies Act 1955, art. 8 was ultra vires and void, and consequently the company was not one which was "authorized by its articles" to reduce its capital. The application for an order confirming the special resolution was dismissed. *In re Blakey Ltd.* (S.C. Auckland. 1959. September 11. Turner J.)

CONTRACT.

Contract for Sale of Land—Consent of Court required—No Consent obtained—Contract declared by Legislature to have No Effect—Moneys paid in Purported Pursuance of Its Terms paid for Consideration which has failed—Such Moneys recoverable. Where the Legislature has decreed that a contract shall have no effect, moneys paid in purported pursuance of its terms have been paid for a consideration which has failed and such moneys are ipso facto recoverable. (*Leys* v. *Money* [1957] N.Z.L.R. 156, discussed and distinguished on the facts.) The combined effect of subss. (1) (a), (4), and (5) of s. 25 of the Land Settlement Promotion Act 1952, in regard to a transaction entered into subject to the consent of the Land Valuation Court, is that, under subs. (5), the transaction is of no effect unless and until the Court consents to it and until any conditions it may impose are complied with; and, under subs. (4), if no timeous application is made for consent, it remains ineffectual and becomes unlawful as well. The rights of the parties have to be determined at the expiration of one month after the date of the transaction—the point of time at which the illegality arose. The express provision that the transaction is "subject to the Land Settlement Promotion Act 1952" appearing in a contract of sale for which consent of the Court is in fact required, is equivalent to saying that the agreement is "subject to the consent of the Court"; and express and explicit words are not necessary in the contract of sale if that intention is sufficiently conveyed. (*Leys* v. *Money* [1957] N.Z.L.R. 156, referred to.) The express terms of subs. (4) of s. 25 to the effect that a transaction—that is to say, the "contract or agreement which by virtue of s. 23 constitutes the transaction—entered into in contravention of the Act "shall be deemed to be unlawful and shall have no effect", are plain and unambiguous, and prohibit the Court from attributing any effect whatever to the transaction from the moment when the illegality arose (including such effects as might otherwise have ensued from its declared unlawfulness). (Judgment of Stanton J. in *Miles* v. *Watson* [1953] N.Z.L.R. 954, followed.) The contrary view expressed by the Court of Appeal in *Watson*

v. *Miles* [1953] N.Z.L.R. 958, was by way of obiter dictum only, as that Court had no intention either to bind the parties or to establish a binding precedent. Section 25 (4) cannot operate retrospectively so as to render tortious any acts previously done with consent in intended pursuance of the transaction); but, subject to any such necessary exemption, no one may rely on the contract by way of attack or of defence, for any purpose that would give it effect in law. Subject as aforesaid, on any question as to money had and received (as by way of deposit) or on questions as to possession of lands (as in *Watson* v. *Miles* [1953] N.Z.L.R. 954), or on any question that may arise as to the civil rights of the parties, the Court is similarly bound to proceed exactly as if the contract had never been entered into. The result will, in most cases, be a simple *restitutio in integrum*, by means of which the parties are brought back, as nearly as the circumstances permit, to the positions they formerly occupied. *Semble*, 1. Similar phraseology to that in s. 25 (4) ("shall not have any effect") occurs in s. 25 (5), in which there is no mention of unlawfulness. Those words in s. 25 (5) of the subsections necessarily mean what they mean in s. 25 (4), and both subsections may apply to a single transaction, and may even do so simultaneously. 2. The words "no person" in s. 24 (3) cannot be confined to third parties; and to allow a vendor to retain a deposit would be tantamount to allow him to receive a valuable consideration, and would conflict with the manifest intention. 3. Section 25 (4) was framed in such a way as to exclude the operation of the rules relating to unlawful contracts, and their arbitrary consequences. In the present case, the sole effective cause of the supervening illegality was the failure to apply for the Court's consent, and, under the contract between the parties, the responsibility for that lay on the vendors. *Hayes and Another* v. *Sutherland and Another*. (S.C. Greymouth. 1959 August 31. F. B. Adams J.)

Unjust Enrichment—Contract entered into by Tenant Without Owner's Authority for Erection of Fence—Such Fence an Improvement to Property—Owner of Property liable on Quasi-contract for Payment of Cost of Fence. The first defendant, M., was the owner of a house property in Palmerston North. It was divided into two flats—the front flat being occupied by his mother, Mrs K., and his half-brother, the second defendant, I., also a son of Mrs K. The other flat was let to a tenant. In December, 1957, during the absence of Mrs K., I. instructed the plaintiff company to erect a fence on one of the boundaries of the property to give more privacy to the back-yard. The fence was duly erected, but not paid for. On these proceedings being brought, I. admitted liability by filing confession of claim, but Morris denied liability. *Held*, That, while M. was not liable in contract for the cost of the fence, but, as he was unjustly enriched or received unjust benefit by its erection, he was liable for payment to the company which erected it. *Brooks Wharf and Bull Wharf Ltd.* v. *Goodman Bros.* [1937] 1 K.B. 534, 545; [1936] 3 All E.R. 696, 707, applied. *H. E. Townshend Ltd.* v. *Morris and Irwin*. (1959. May 22. D. G. Sinclair S.M. Palmerston North.)

EXECUTORS AND ADMINISTRATORS.

Powers—Disclaimer of Devise to Deceased Devisee—Deceased, during Lifetime, not Accepting or Rejecting Devise—Executor, on Devisee's Death, Succeeding to Deceased's Right to disclaim—Disclaimer effective without Formality of Deed—Oral Refusal operating as Disclaimer. The executor of a deceased devisee may disclaim the devise to the deceased if during his lifetime the deceased did not accept or reject the devise, as, on the deceased's death, his executor succeeded to the deceased's right to disclaim which the deceased had before his death. (*Townson* v. *Tickell* (1819) 3 B. & Ald. 31; 106 E.R. 575, followed. *Attorney-General* v. *Brackenbury* (1863) 1 H. & C. 782; 158 E.R. 1099, distinguished.) In order to make the disclaimer effective, it is not necessary for the disclaiming party to execute a deed; it is enough if the devisee simply refuses to do anything by way of acceptance. If he unequivocally refuses, he must be taken as disclaiming, and such refusal is sufficient to operate as a disclaimer of real estate. (*Bingham* v. *Lord Clanmorris* (1828) 2 Moll. 253, and *In re Clout and Frewer's Contract* [1924] 2 Ch. 230, followed.) A., who died on March 7, 1957, by his will gave his residence to his daughter Mrs P. and the residue of his estate (subject to the payment of debts, death duties, etc.) to Mrs P. and his son R. in equal shares. On March 23, 1957, Mrs P. died and probate of her will was granted on May 3, 1957, to H., one of her execut During these intervening sixteen days, she had not done any act accepting or disclaiming the devise of the residence in A.'s will, and, at the time of her death, probate of A.'s will had not been granted. By her own will, she gave her whole estate to her executors for his daughter, Mrs McL. If both wills had been given their full undivided effect, they would have resulted in Mrs McL. receiving from A.'s estate £13,887, while R. A. would have received £3,879. Mrs McL., considering this distribution as an injustice, wrote to the solicitors for A.'s estate saying it was her intention to make over half of her interest in A.'s residence to R. A. In a telephone conversation with the solicitors for A.'s estate, H. and they agreed that the specific devise of the residence should be disclaimed. Ultimately, a deed of disclaimer was drawn up and executed. The Commissioner of Inland Revenue, regarding the transaction evidenced by the deed of disclaimer as a gift, assessed Mrs McL. with £194 5d. gift duty. Mrs McL. objected to that assessment. On a Case Stated by the Commissioner, pursuant to s. 69 of the Estate and Gift Duties Act 1955. *Held*, 1. That, during the sixteen days by which Mrs P. survived A., Mrs P. did nothing to disclaim the devise to her of the residential property; but, during that period, she was competent to disclaim it, and to do so when still retaining and accepting her interest in the residue under A.'s will into which, by virtue of her disclaimer, the residential property would fall. (*In re Loom, Fulford* v. *Reversionary Interest Society Ltd.* [1910] 2 Ch. 230, followed.) 2. That, on Mrs P.'s death, her executor succeeded to her power to accept or disclaim the gift of realty under A.'s will; that this power vested in H. upon the grant of probate to him; that, until the date of the telephone conversation with the solicitors for A.'s estate, H. had done nothing to accept or reject the devise; and, that by the telephone conversation, he, as executor, unequivocally disclaimed the gift, and the disclaimer was not retracted before the deed was executed. 3. That the deed did no more than confirm and place on record, as between Mrs P.'s executor and her daughter, the disclaimer which was already operative, and, as between them, the deed operated as a release of the executor, inter alia, for his acts in disclaiming the devise, and that, notwithstanding the effective oral disclaimer, the parties recorded the matter by a deed which would constitute permanent evidence of their actions, and, by the deed, the beneficiaries would release their trustees in bot estates, and the executor of Mrs P.'s will would release A.'s executor. 4. That the deed did not operate as an acceptance and an assignment: there were no operative words of assignment, and what was done by the deed was not sufficient to alter the transaction from a disclaimer to an acceptance coupled with an assignment. 5. That, accordingly; the deed and the transaction hereby evidenced did not constitute a gift; and the Commissioner was wrong in assessing gift duty in respect of the transaction. *McLaren* v. *Commissioner of Inland Revenue*. (S.C. Auckland. 1959. September 11. Turner J.)

TRANSPORT.

Offences—Overtaking at Bends—Overtaken Car partly on Roadway and partly on Cycle-track—Such Car "within the area of roadway"—Overtaking Vehicle "passing" within area of roadway on which the middle lines are marked"—Offence Committed—Traffic Regulations 1956 (S.R. 1956/217), Reg. 8 (1). The purpose of Reg. 8 (1) of the Traffic Regulations 1956 is to prohibit overtaking at bends where the length of visibility immediately ahead is restricted, and where, if overtaking were allowed to take place, the overtaking car might interfere with oncoming traffic approaching in the other direction. In this case, the overtaken car was partly on a cycle track but was partly on the roadway (i.e., the roadway in the narrow sense of the distance between the right-hand edge of the cycle track and the roadway to the right thereof), and the driver of the overtaking car did his overtaking movement within the length of the longitudinal line marking the centre of the road. On appeal from a conviction of the appellant on a charge under Reg. 8 (1) of the Traffic Regulations 1956, with being the driver of a motor-vehicle on a road when approaching a bend where the controlling authority had marked longitudinal middle lines along the middle or near middle of the roadway in the manner specified in the First Schedule to the Traffic Regulations 1956 he did before reaching the further end of the continuous line nearest to his left of the road pass a vehicle proceeding in the same direction within the area of road on which the middle lines were marked as aforesaid. *Held*, 1. That, as the overtaken vehicle was partly at least on the roadway, it was a vehicle using the road in the narrow sense, so that it was "within the area of roadway" within the meaning of that phrase in Reg. 8 (1) of the Traffic Regulations 1956, and consequently, the offence as charged was committed. 2. That, alternatively, in Reg. 8 (1); the words "within the area of roadway" qualify the words "pass or attempt to pass", and, as the overtaking vehicle was "passing" he was passing "within the area of roadway in which the middle lines are marked" in terms of Reg. 8 (1). *Wakeman* v. *Herbert*. (S.C. Napier. 1959. August 31. McGregor J.)

THE LATE MR JUSTICE HAGGITT.

Tributes to His Work and Worth.

The profession throughout the Dominion on October 7 learned with deep sorrow of the untimely death in Wellington of Mr Justice Haggitt, whose appointment to the Supreme Court Bench had lasted less than six months. His period of judicial duties had been shorter than that of any Judge of our Supreme Court in the 117 years since the appointment of the first member of the Judiciary in this country, Sir William Martin, in 1842.

Mr Justice Haggitt was appointed a temporary Judge on April 9, 1959, and commenced his judicial duties in Christchurch on April 27. By the Judicature Amendment Act 1959, which was passed by the House of Representatives on September 30, seven days before his death, his appointment was made permanent as from April 9. His death on October 7 followed a period of several weeks' illness.

In both Auckland, where the late Judge spent the greater part of his career at the Bar, and Christchurch, where he was resident Judge from the time of his appointment, warm tributes to the learning, personality and devotion to duty of Mr Justice Haggitt were paid at special gatherings by both Bench and Bar.

Gathering in Auckland.

Mr Justice Turner presided at the sitting of the Supreme Court in Auckland on October 12 at which the late Judge's notable contributions to the law were recognized. With him on the Bench were Mr Justice Shorland, Mr Justice T. A. Gresson, Mr Justice Hardie Boys, and two former members of the Judiciary, Sir George Finlay and Sir Joseph Stanton. Included in the large assemblage of members of the Bar in the Auckland and surrounding districts were four Queen's Counsel,, Messrs H. P. Richmond, L. P. Leary, Sir Vincent Meredith, and Mr Nigel Wilson.

The Judges' Tribute.

Mr Justice Turner, addressing the assembled Bar, said :

"We meet in this Court this morning to mourn the death of Bryan Cecil Haggitt, so recently a colleague at the Bar of you who are present and so short a time ago appointed one of our brothers on this Bench. It is indeed less than six months since most of us here today assembled in this very Courtroom to hear him take his oath of office.

"Though called to the Bench from practice at the Auckland Bar, our brother Haggitt was a Christchurch Judge ; and it is fitting that the tribute of the Judiciary should have been officially paid to his memory in Christchurch on Friday last by Mr Justice F. B. Adams, the senior Judge resident in that city. But, notwithstanding this, it has been thought appropriate that members of the legal profession in Auckland, where the late Judge practised in his most fruitful years, should have this opportunity of finally expressing their regard for him. The warmth of the affection which his memory inspires among you all is amply demonstrated by the numbers who have laid their ordinary business aside to be here this morning.

"The Auckland Judges whom you see here on the Bench, with two of their elder brethren, are not alone in the tributes which, through me, they now pay to the memory of their late colleague. A cablegram has come from overseas from the Chief Justice, Sir Harold Barrowclough, asking particularly that he may be associated with what will fall from my lips this morning. Mr Justice Henry in Dunedin has written asking to be allowed to join with us in what is said.

"I have had a sad letter from Mr Justice North, perhaps, of all, the closest to the late Judge, for Haggitt succeeded him as the common-law partner in his firm when he took silk. The Acting Chief Justice, Mr Justice Hutchison, and with him all the Wellington Judges, has asked to join us in affectionate remembrance of him who has passed from among us, and in extending their brotherly sympathy to his widow and son. And last, our brother Adams, though he has himself already given expression to his thoughts at Christchurch, has sent a message that he will be remembering us when we meet in this room today."

"Haggitt the Judge."

"It is not for us on the Bench, Mr President, to call to memory Haggitt the advocate, with whom most of us on the Bench actually practised ; or Haggitt, the Law Society's servant and office-bearer, of whom nonetheless my brothers and I saw and remember much to be extolled. Of these aspects of his life you will perhaps say something when I have done.

"It will be fitting, however, for me to speak of Haggitt the Judge ; for, though short, his judicial career was not uneventful, and it already showed rich promise of great things to come. It is transparently clear that, by his death, the Bench of this country has suffered great loss. We were all delighted to welcome him among us on his so-recent appointment. We knew that his qualities would make him a success on the Bench, and none doubted that he would handle the Christchurch work with distinction. It is common knowledge that he did so, and that he had already secured the complete confidence of the profession and of the public in Canterbury. And he liked being a Judge and was happy in every aspect of his work : how could it be otherwise when he was at once making such a success of it ?

"The few judgments of his which have so far been reported demonstrate the industry and the independence of mind which must be acknowledged to be two of his essential characteristics : but he will perhaps be remembered by those who had the happiness of practising before him, most of all for the urbanity and courtesy which were always a very part of himself, and for that singular grace which distinguished the dignity with which he met every occasion, great or small. That graceful air which adorned all that Haggitt said or did will long be remembered by all of us.

"One of the Wellington Judges has written me a letter in which he has spoken of Haggitt's last days. We would all have expected that he would have

exhibited the same courage that was ever one of his outstanding characteristics; and we are told that, faced with the onset of a mortal disorder, he refused to accept defeat, and maintained a uniform and steadfast demeanour to the end. And his wife's courage matched his own.

"Now he has gone. He has passed from among us and these precincts will see Bryan Cecil Haggitt no more. Another may succeed him, but none will quite fill his place. We on the Bench will ever remember with the warmest affection him, our youngest brother, who was taken from us so soon, and the brief happy days which he spent among us as our colleague. To his widow and son we extend our fraternal sympathy in the great loss that is theirs."

Auckland Bar's Tribute.

The President of the Auckland District Law Society, Mr D. L. Bone, addressed their Honours. He said that the members of the Auckland District Law Society were grateful for the opportunity afforded to pay tribute to the late Mr Justice Haggitt. The President of the New Zealand Law Society (Mr A. B. Buxton) had asked that the New Zealand Society be associated with the Auckland Society on this occasion, as had also the Wellington District Law Society, the Canterbury District Law Society, and the Hamilton District Law Society.

Mr Bone continued:

"Our words of warm congratulation and expressions of sincere goodwill so recently tendered to the late Judge still linger in this very Court. His untimely passing on the threshold of what promised to be many years of distinguished service to his fellow-men in his judicial office is a loss the Judiciary, the legal profession, and the community can ill afford to suffer.

"It was our privilege and our pleasure to have His Honour for many years as one of our colleagues and brethren. His learning in the law, his diligence and ability in his work, his qualities, his character, and his integrity gained our highest esteem and respect, and rapidly earned for him a foremost place among us. His work ranged the whole diverse legal field. Disregard for himself in the interests of his client marked his work, as did the thoroughness of the preparation of his cases, and the fairness of their presentation.

"His appointment to the Supreme Court Bench was most fitting, and was received with the fullest approbation and utmost confidence of the whole of the legal profession.

"We number him among those who have given outstanding service to the legal profession. Despite the calls of a busy and demanding legal life, he found the time to serve with generosity and ability his fellow practitioners; not only did he give many years of service as a member of the Council of the New Zealand Law Society and as a member of the Councils of both the Wanganui and our own Law Societies, but he also guided with ability, as President, the affairs of both the Wanganui Society and our own, and filled with distinction the office of Vice-President of the New Zealand Law Society.

"Above all, we were privileged that he was our friend, so our sense of personal loss is indeed great.

"More eloquent than any words of mine, more eloquent than our presence here, is the silent tribute now paid by each of us to a friend, a man who in the highest sense we honoured, and one who it was our privilege to know.

"And so we pay our sincere tribute to the late Mr Justice Haggitt.

"To his widow and his son we express and extend our deepest sympathy, with the hope that this gathering and the tributes here paid may in some degree help to sustain them in their sad loss."

Ceremony in Christchurch.

In Christchurch the Judiciary's tribute to their late colleague was paid by Mr Justice F. B. Adams, and the president of the Canterbury District Law Society, Mr E. B. E. Taylor, spoke on behalf of the large gathering of practitioners, associated with whom were Judge Archer, of the Land Valuation Court, the Mayor of Christchurch, Mr G. Manning, and members of the Magistrates' Court Bench.

The Chief Justice, Sir Harold Barrowclough, and other members of the Judiciary, and the councils of the Wanganui, Auckland and New Zealand Law Societies sent messages requesting to be associated with the tribute.

"The occasion was a sad one", said Mr Justice Adams, "as the late Judge had been not only in the prime of life but on the threshold of his judicial career. It was only on April 27 last that he had first assumed judicial duties, facing courageously and efficiently the immediate task of opening and conducting a criminal and civil session of the Court".

Devotion to Duties.

His Honour said he had been impressed by the late Judge's charming personality and his devotion to his duties, and the high standards he set himself in their performance. In Mr Justice Haggitt, Christchurch had acquired a Judge whose qualities eminently fitted him for his task.

"Although the work of the Court was heavily in arrears when the late Judge arrived in Christchurch, he was never overburdened or oppressed, but worked vigorously, efficiently and happily, and he was able to meet with abounding cheerfulness all the demands made upon him", said His Honour.

Mr Taylor, speaking on behalf of the Bar, said that Mr Justice Haggitt's appointment had been welcomed by the profession because it meant that long-needed relief was coming to the Court.

"In the three short months that he presided over his Court in this building he showed that he was going to fill his new position with modesty, consideration and ability", Mr Taylor said.

"The profession is convinced that if he had been spared to carry out his duties he would have become one of our New Zealand Judges who would have been remembered for his ability and his contribution to the legal history of New Zealand."

In his short time in Christchurch, Mr Justice Haggitt had proved that he had the qualities that made a great Judge. "The law has lost a worthy servant", said Mr Taylor.

"OWN YOUR OWN FLAT."

Some Conveyancing Aspects.

By G. CAIN, LL.M.

These notes will be of little value to those practitioners who have become specialists in this work, but may be of some interest to others. Mr E. C. Adams has a valuable article in (1958) 34 N.Z.L.J. 268, and reference to it by the reader will be helpful.

The subject is in its infancy in this country and experience may well lead us to veer in other directions, but it is hoped to sketch some aspects that could be given some thought.

We can assert with some confidence that there are two broadly-defined and different methods possible of giving effect to the "own your own flat" principle: (a) the "stratum" or "air space" method, and (b) the company share-block method.

I.

STRATUM OR AIR-SPACE METHOD.

Here a title is granted for the air space the flat occupies. This appears at first blush to be the ideal method; the flat owner owns his flat by having a Land Transfer title to it, just as if he were an ordinary house owner. There is no doubt that the Land Transfer Act is sufficiently accommodating to admit of the issue of a title to a block of air space.

There are, however, two practical difficulties attendant on this method.

First, the easement problem; difficult but not insuperable. Take a flat, say, on the fourth floor of the building. Its position in air space must be fixed by survey based on a datum ground level, to continue constant despite surface change.

Next, the flat owner must be given some rights in the ground beneath him; and, immediately, we encounter the question whether he is to have an aliquot share in the land in common with other flat owners, or, as seems to be adopted in Victoria, a company in which he is a shareholder is formed to own the ground and service the building. Similar questions arise in respect of those parts of the building which are to be used in common, such as stairways, lifts and their wells, access from street, corridors, possible access to roof, and so on. The use of the management company simplifies these matters, but we must not confuse the pure administrative company here in view and the share-block company which forms the second method. Next are the easements; for drainage, water, party walls, treatment of floors and ceilings, and so on. It seems that in New Zealand there is no escape from creating these specifically so as to affect and benefit each flat. This means specification of the course of pipelines and similar detail, and a substantial amount of conveyancing on a rather intricate basis is thus involved. It might be possible to evolve some modification of normal easement requirement if a company is formed to own the land surface, common areas and pipe channels and so forth, but it still seems unavoidable to have to provide substantial diagram and easement detail, as stratum space and "common" space would be in different ownership.

The easement question has been handled by statute in Victoria on a very general basis and without necessity to specify the easements. This method cuts across the New Zealand preference for disclosure by the register of all interests.

The second objection to the stratum-title principle really springs from the innate conservatism of lenders. Mortgagees are reluctant to be the guinea pig in pioneering a new scheme. While adequate investments are offering on an orthodox basis, there is no point in courting trouble by lending on the security of the block of air contained in a concrete shell. But the mortgagee's objection can go deeper than this. The mortgagee of land and orthodox building has rights which are dominant over those of his mortgagor; if default is made, the mortgagee may take possession and exercise his other powers at his own discretion, untrammelled by any legal necessity to consider or consult others. The position is hardly parallel if he is a mortgagee, say, of a block of air space seventy feet above the ground. While he may legally secure to himself all access and service rights which his mortgagor has, he is nevertheless exposed to some uncertain dangers. Without, it is hoped, appearing to be looking for difficulties which may never arise, a few aspects can be mentioned.

FIRE INSURANCE.

Mortgagees invariably insist on the right to elect, if a building on the mortgaged land is destroyed by fire, whether to apply the fire-loss money in reinstatement, or reduction or repayment of the mortgage. A mortgagee of air space cannot have this option; whatever is done with fire-loss money must be a decision binding on all air-space owners or their derivatives. The mortgagee of flat No. 18 cannot elect repayment if owners or mortgagees of other flats want reinstatement. If the owner of flat No. 18 could refinance his mortgage the matter would be settled, but the present mortgagee's option is thus dependent on this circumstance. The mortgagee, instead of having his option, is dependent on the wish of the majority of air-space owners.

DESTRUCTION BY FIRE.

Apart from the above aspect, what is the position if the building is completely destroyed by fire, or rendered uninhabitable or unsafe because of fire damage. Fire insurance will provide the bulk of the money required to reinstate but not necessarily all of it. The mortgagor is likely to be left to find part of what is required, for 100 per cent. insurance is not usual. He may not be able to do so. In a single unit house proposition, his equity in the land will often carry him through, but he has not clear-cut surface ownership with an air-space title. He will own the surface in common with others or have merely shares in the company. If the mortgagor cannot provide the deficiency in respect of his flat, his mortgagee may have to on a security-protection basis. This sort of possibility is distasteful to mortgagees. Moreover,

if the majority decision is to reinstate, perhaps half-a-dozen dissentients will not or cannot provide their respective deficiencies between their proportion cost and fire-loss money.

If a company is the administering authority, it may be able to borrow the deficiency or the individual air-space mortgagees may find it, but the situation is obviously fraught with difficulties. The air-space owners may possibly be able to effect insurance on a replacement basis which should remove this "deficiency" problem, but even then the insurer may be disinclined to pay because of some policy breach and involve every air-space owner and mortgagee in that decision. House mortgagees at present are prepared to accept the risk of the insurer declining to pay because of policy breach by the mortgagor (although many prominent mortgagees have a special contract with the insurer whereby the insurer agrees not to plead policy breach by the mortgagor), but with the air-space principle, the mortgagee is accepting the risk of many owners other than his own mortgagor committing policy breaches, e.g., in an extreme case, even arson itself. Over these persons the mortgagee has no contract or remedy except perhaps a common-law action for damages. To counter this, the insurer may be prepared to issue a special type of policy, the terms of which the mortgagee would need to consider carefully.

Security Protection.

In the course of administration of his mortgage, the mortgagee has to accept the possibility of paying rates, insurance premiums, rent, and so on, and even taking physical steps such as erecting concrete walls, all in protection of his security, the mortgagor being unable or unwilling to perform his covenants. The extent of this contingent liability on the mortgagee of air space is much wider. He may be exposed to contribution to general maintenance of the common areas and the roof and exterior, even though the particular flat he is interested in is not directly affected. If, for instance, the majority owners decide to resurface the exterior walls with more satisfactory plaster, and a company is the means they have adopted to enforce majority decisions, a levy on air-space owners may be necessary. If a new lift is wanted, a similar levy may be made. In default of payment, there must be some right reserved to the company to take punitive action; the mortgagee may have to pay up to avoid worse evils. The majority may choose to embark on some project, such as beautification of grounds, with which the mortgagee may have little sympathy, but to which he may be obliged to contribute.

General.

More questions like this could occur, and in summary the grave objection from the mortgagee's point of view is the loss of the paramount position he has in a house unit, and his subordination to the will of the majority of stratum owners over whom he has no control.

Before we leave this aspect it should be made clear that the above difficulties may not arise if the type of building is simpler than the big multi-storey block of flats we have in view. If the building can be so constructed as to subdivide the flats vertically instead of horizontally (or instead of vertically and horizontally) both the easement and title position is simplified. For instance, six flats may be incorporated in a two-story building, each flat occupying two stories and divided from its fellow by vertical party walls. There is little difficulty about party walls and the services of water and access can often quite well, as a matter of construction, be handled on an individual basis, each flat being self-contained as regards these aspects. No easements would thus be necessary beyond the party-wall rights. Access, too, could be handled simply even where e.g. one ramp is used to give approach to all flats. This really is the English "terrace system", and while it may be a depressing feature of some landscapes, there is scope for it here on a scattered basis. A further advantage is that mortgagees will be more willing to lend on each unit; the presence of a party wall is a trivial factor alongside the multi-story difficulties mentioned above. In the terrace system, we thus can have individual units, individual titles and individual mortgages. No company is necessary. If promoters have modest blocks of flats like this in view, both the above difficulties, and those dealt with below, are not present.

II.

Company Share-Block Method.

We now turn to the second method, which is briefly the promotion of a company which owns or acquires the land and building, and whose shareholders, by virtue of holding particular blocks of shares, are entitled to indefinite occupation of the flat referable to that share-block. The company can raise mortgage finance in the ordinary way by charging the land and, subject to what is said a little later, the mortgagee has his normal rights. There are different ways of handling the capitalization of the company but the most logical way, in my opinion, is:

Assume cost of land and building at £100,000; 20 flats; each shareholder takes up 5,000 shares; shareholder A may be able to pay his £5,000 in cash; B can find only £3,000; C £4,000, and so on. The promoters locate the shareholders and find that shareholders' cash totals, say, £60,000; the company then borrows the balance of £40,000 on long-term mortgage. Each shareholder takes 5,000 shares paid up to the extent of his cash contribution. The balance due from him is called up in sympathy with the company's repayments due under the mortgage. In effect, the mortgage is raised having reference to the individual requirements of the shareholders; their unpaid share capital is gradually paid up and debenture capital is thus replaced by paid-up capital. Each shareholder obtains an occupation contract entitling him to indefinite occupation of his flat subject to his meeting his unpaid capital as above, and the general service charges levied on all shareholders. There are, of course, variations on this theme but they all follow the general pattern. This method has been adopted in numerous instances in New Zealand, and we can say it is established in favour here in preference to the stratum method (which as far as I am aware has not been used at all here).

The teething troubles in getting a company going are considerable; temporary finance usually has to be arranged with the permanent mortgagee taking over when the building is finished. Prospective shareholders also usually prefer to buy a flat (i.e., their shares) after they have seen what it looks like as a finished job, rather than off the drawing board. But these are not legal questions.

THE MORTGAGEE.

At first sight his position is unassailable. He has mortgage of the land (with probably collateral debenture) and his remedies for recovery of his debt on default appear entirely normal. It is to be hoped they are, but there are one or two clouds on the horizon. The occupation contracts held by the shareholders are not usually leases, although they may be. The mortgagee lends with full knowledge of the existence of these contracts. Assume that in our 20-flat proposition three shareholders default in payment of their charges. The company is, of course, liable directly to the mortgagee and must either pay the deficiency out of reserves for the purpose or make a levy on the other seventeen. The company can also evict the defaulters, sell their shares, etc. So long as the company moves promptly, no difficulties are likely. The financial seventeen will not want the incidents prolonged. Someone else must be installed who will meet his obligations.

Now we can go one stage further and whisper of a depression (a purely hypothetical possibility !). Say half the shareholders are defaulters ; the other half have difficulty enough meeting their own charges, let alone those of the defaulters. The company may evict the defaulters but may find no takers for their shares. The company defaults, the mortgagee calls up, and payment is not made. The market may be depressed and prospects of selling a block of twenty flats may be slight. However, he decides to proceed with a sale under conduct of the Registrar rather than enter into possession for an indefinite period. At the auction, we will assume for the moment that he is the only bidder, and he buys at his estimate. What are his rights against the occupants ?

The ten defaulters may not have vacated. He must at least evict them. He can appoint a receiver who could use the company's powers to evict the defaulters. The situation, however, is rather odd for a mortgagee who has become purchaser to have to use the body of the defaulting company, inspired by the soul of his receiver, to evict the defaulters. (A receiver has a soul ; it generally being agreed that it is his principal who has not.) Alternatively, he probably has a common-law action against the defaulters as trespassers, for their rights to remain as against the mortgagor have been lost.

But the position is more perplexing when we consider whether the mortgagee is bound to recognize the non-defaulting occupants.

If the occupation contracts were straight leases, then, even if they had not been formally consented to by the mortgagee, they would probably be binding on him. The mortgagee will have lent knowingly to a company which was proposing to enter into the leases and in practice the text of the leases would normally have to be acceptable to the mortgagee. However, the occupation contract more commonly takes the form of a licence and falls short of being a lease (shades of *Errington* v. *Errington and Woods* [1952] 1 K.B. 290 ; [1952] 1 All E.R. 149. Mr Adams, in his article earlier referred to, thinks the occupation contracts could be leases although in the shape of licences, and the occupant thus has a caveatable interest. The mortgagee will still be quite aware of the set-up before he lends, and is likely again to have approved the text. Here then we have an unregistered interest apparently binding in equity on the mortgagee purchaser who buys with notice. The rights appear to survive the mortgagee's purchase of the fee simple.

Can the mortgagee cover himself against this by his contract ? What is the effect of a covenant by the company that, upon its default, the mortgagee may remove its shareholders from possession of their flats whether they are in default or not in the performance of their occupation contracts ? Presumably the company can so bind its shareholders, and leave the non-defaulting shareholders with an action for breach of contract against the company if their rights are prejudiced. This is likely to be a rather empty right of action. Moreover, the naked assertion in advance, of the paramount rights of the mortgagee, may well deter intending shareholders from entering the scheme, but this method at least has the merit of letting everyone know where he stands.

Now it may well be that the mortgagee is content to permit the non-defaulters to remain and to get himself paid out of the revenue he may receive from them and from any newcomers he can introduce on, we would expect, a simple letting basis. In that event, examination of the rights of the non-defaulters is unnecessary. But the mortgagee may be able to locate a purchaser from himself, or one who will buy at the Registrar's sale at a figure satisfactory to the mortgagee and who wishes to purchase the building vacant, without the complications of these occupation contracts. It will then be vital to establish whether rights under the contracts survive the exercise of power of sale. For the reason that the mortgagee has notice of them they may bind him, but is a bona fide purchaser for value bound ? In the absence of special provision in the mortgage, the question seems to depend entirely on notice. The interests are not registered, but the Courts have of recent years shown an increasing tendency to protect unregistered interests if the party to be bound had actual or constructive notice of them (see the cases collected by Mr Adams at para. 491 of his *Land Transfer Act*). We seem to be swinging steadily back to the equitable doctrines of notice and to be abandoning the simple Land Transfer principle that the Register is everything. It is true that hardship may be caused by rigid application of the Land Transfer principle but it is a matter of grave doubt that rectification of these individual hardships should continue to be countenanced at the expense of the registered interest under the Act. The balance of justice may well lay on the maintenance of the principle of inviolability of the Register. There is some merit in ruling that persons who erect rights in themselves, which they do not or cannot register under the Act, should not be enabled to seek the assistance of the Court in establishing their claims against registered proprietors, fraud alone excepted. Our principle of a simple Land Transfer Register is being steadily undermined by the attribution of notice to proprietors of registered interests. Our purpose at the moment, however, is to endeavour to ascertain whether a purchaser for value of a block of flats is bound to honour the occupation contracts of non-defaulting occupiers. Is he put on inquiry merely because the building does comprise flats and some notoriety has been attained by the " own your own flat " publicity ? Then there is the common-law rule that a purchaser who has notice of a tenancy has notice of the tenant's rights and can take only subject to them. These occupation contracts come perilously close to a tenancy.

No purchaser of the building would buy without some inquiry as to existing tenancies and rents, and it would be hard to see how he would avoid learning of the occupation contracts. The vendor may conceal their nature and represent the occupiers as pure tenants, but under the advancing importance of notice the purchaser should probably inquire himself of the occupiers or not do so at his peril. Some relief might come from *Harris* v. *Fitzmaurice* [1956] N.Z.L.R. 975, where the purchaser was aware of a tenancy but was told it was a weekly one. When, after purchase, he found it was a longish unregistered lease, the lessee failed against the purchaser. In the flat proposition, however, these occupation contracts are usually scheduled in the articles of association of the company; search at the Companies Office would immediately disclose the constitution of the company. The Court may thus have to answer the question whether, if A, by paramount title, sells B's land to C, is C bound by rights in derivatives of B which C might ascertain by special search of B's constitution? Perhaps the answer may be founded on the principle of the covenant running with the land; if the occupation contracts run with the land, they will bind purchasers with notice. A new principle in variation of *Tulk* v. *Moxhay* (1848) 1 H. & Tw. 105; 47 E.R. 1345 may arise. The Land Transfer Act may be assailed from a new quarter.

All we can safely say, at this early stage of the history of flat propositions in this country, is that there is some prospect of the purchaser being held to be so bound; and, if he wants the building vacant as a condition of his purchase, he should require his vendor to clear it before buying; otherwise his purchase may be subject to these contracts, and he may be able to recover from the occupiers only the charges for which they are liable under their contracts, and not possession or a market rent.

The position is further involved when we consider what happens if, for instance, the occupier has already repaid such part of the debenture capital as was raised on his behalf (or he may at the outset have paid cash for his contract). His shares are fully paid. Exactly what is the position of a mortgagor company whose principal asset has passed to a purchaser in exercise of power of sale by the mortgagee? Prima facie, the mortgagee's action separates the mortgagor from its interest in the land and all rights of its shareholders will fall to the ground (or rather away from the ground) too. We have, however, the complication of the overlay of constructive notice, certainly on the mortgagee and perhaps on the purchaser. One obvious course for the mortgagee is to have the company wound up; he would have an unsatisfied debt which would support a petition. This would appear to leave the shareholders with claims only against the company for breach of their occupation contracts, and they can prove for that loss. Naturally if the company cannot pay the mortgagee it cannot meet such claims.

This shows that the shareholders' rights are precarious. Although they may have paid cash for their shares or have a substantial equity in their share block, they are at risk of complete loss if the mortgagee liquidates the company before he sells. Does the doctrine of notice preclude the mortgagee from taking this step? There seems no reason why it should. He is entitled to his money back, and to save their position the shareholders would have to pay him off and refinance elsewhere if they could.

It seems that the purchaser from the mortgagee could not dispose of the company by winding up because he has no ground for his petition. He is not a creditor of the company. He may, however, be able to instigate his vendor, the mortgagee, into doing so.

There may be room for legislation conferring on the "financial" shareholder some form of relief against the exercise by the mortgagee or his purchaser of his paramount rights (lessened as they may be with the attribution of notice). By ss. 50 and 118 of the Property Law Act 1952, the Legislature recognizes that lessees and purchasers in possession are entitled to the exercise of the discretion of the Court against the lessor or vendor who enforces his strict legal rights. Something similar seems justified for the shareholders (perhaps even against the company where they are in default) but at any rate against the mortgagee or his purchaser. What is given to the shareholder, however, derogates pro tanto from the rights of the mortgagee. Mortgagees may very well pass over such propositions if, as well as normal investment risks, they may be exposed to annoying Court applications from shareholders of their mortgagor.

Finally, we could have a brief look at the shareholder's position apart from default of the company, where the mortgagee has security over the land and building.

The shareholder has his block of shares and his occupation contract. Let us assume he wishes to sell for some reason; he may find his proximity to his neighbours too close, or he may die and his estate wishes to sell. What he has for sale is the shares and the contract. He may have paid £5,000 or more for these pieces of paper: he wants cash. Most people who are seeking to buy living accommodation cannot find the whole price in cash; they will raise a mortgage. All they will have, however, to raise a mortgage on will be the shares and the contract.

It is elementary that company shares are a weak form of security because on liquidation the claim of creditors must first be met before the mortgagee can receive anything. The position can be covered to some extent by taking some form of management control if possible, but that could not be done in this type of company as the shareholder has a minority interest only. The type of mortgagee who is accustomed to lend on land and bricks and mortar (or, to bring it up to date, on concrete, steel and glass) will not care to finance a purchaser of a block of shares; the purchaser will be obliged to endeavour to raise the money privately perhaps from relatives, or from a lender who is not in ordinary first mortgage business. Interest rate and other terms of such loans may be severe. These restrictions on the purchaser will not only tend to keep the sale price of the flat rights down; they may have the more serious effect of making sale almost impossible except at gift prices to speculators.

Similar considerations arise if, for instance, the original or a later shareholder himself wishes to raise money on his "equity" irrespective of any question of sale.

If the memorandum of association of the company is so drawn it might be possible to authorize the

company to make loans to its shareholders on the security of its shares, although s. 62 of the Companies Act is the difficulty. Even if a loan is made in breach of this section, the lender's security is good (*Victor Battery Co. Ltd.* v. *Curry's Ltd.* [1946] Ch. 242; [1946] 1 All E.R. 519), but the prospect of prosecution of the directors for breach is dampening. It may be possible for a further company to be formed on an investment basis to handle such finance; the flat company may indeed come to see the necessity for this and for contribution of capital to it if its members are unsuccessful in raising outside finance. That capital, however, may have to come principally from the flat-company shareholders themselves.

As this is a discussion from the conveyancing aspect, there is no attempt to forecast how the Court will view some of these problems; the intention is merely to point to their existence so that they can be borne in mind when advising client shareholders or mortgagees. No doubt other aspects will occur to practitioners, and it would be helpful to all if discussion is promoted in these columns.

Perhaps we can summarize what has been said by repeating there are two possible methods of handling the "own your own flat" principle where resort to the simpler "terrace" system is not possible:

(a) the stratum or air-space title method, which can give individual Land Transfer titles to each flat occupied but which is not in use because of:
  (i) difficulty re creation of easements;
  (ii) probable reluctance of mortgagees to finance individual flats:

(b) the company "share block" method which has been adopted so far. Aspects in this method are:
From the point of view of the shareholder:
  (i) problem of isolation of the non-defaulting shareholder from consequences of default of other shareholders;
  (ii) difficulty likely in sale of or mortgage of his shares.

From the point of view of the mortgagee:
uncertainty as to the extent to which he or his purchaser is affected by notice of occupation contracts especially of "financial" shareholders.

The mortgagee should insist on clarification in the mortgage of his rights against all shareholders, and he can probably disregard the shareholders if he liquidates the company before he realizes.

REGISTRATION OF MAINTENANCE AGREEMENTS.

The decision of Haslam J. in *Hudson* v. *Hudson* [1959] N.Z.L.R. 348 is the first Supreme Court decision to be reported on the effect of s. 47B of the Destitute Persons Act 1910. Section 47B, it will be remembered, was enacted in 1955 by s. 4 of the Destitute Persons Amendment Act of that year, and provided for the registration of maintenance agreements in the Magistrates' Court. The material parts of the section are as follows:

> (1) Where any agreement between a husband and his wife has been entered into in writing . . . and the agreement provides for the periodical payment by either party of sums of money towards the maintenance of the other party or of any child to whom Part III or Part IV of this Act is applicable, either party may register the agreement in the prescribed manner in the office of a Magistrate's Court.
>
> (2) Where any agreement or copy thereof is registered under subsection one of this section, the provisions of the agreement relating to maintenance shall, while it continues in force, have the same force and effect as if the agreement were a maintenance order under this Act on the date of the registration, and the provisions of this Act shall apply accordingly, with the necessary modifications.
>
> (3) Where any Magistrate is satisfied that any registered agreement was not in force on the date of the registration of the agreement or copy under this section, he may make an order cancelling the registration.

Two difficulties in the operation of the section immediately come to mind. First, since the maintenance agreement becomes, so to speak, a Magistrate's order only from the date of its registration, it would seem to follow that there is jurisdiction to vary the amount payable under s. 39 of the Act only if the circumstances of the parties have changed *after* the date of registration. For example, the parties may enter into a maintenance agreement on the basis that the wife is unable to work. Later the wife may find that she is able to work, and does so. She then registers the agreement. On the face of the section, it is not open to the husband to apply to vary the amounts payable on the ground that the wife now has an income of her own.

Secondly, not every agreement for periodical payments of maintenance stands unvaried by the parties throughout the period of its existence. There must be many cases in which the husband has agreed in writing to pay the wife, say, £6 per week by way of maintenance, but has later found that, owing to circumstances beyond his control, £3 per week is all he can reasonably pay. The wife may have agreed to accept the latter amount. It is not every estranged husband and wife who put such an arrangement in writing, and no doubt very few spouses in such circumstances instruct their solicitors to draw up a formal variation of the prior agreement.

Suppose, however, that the wife wishes to take advantage of the procedure made available by the Destitute Persons Act by registering the written agreement. Is the "order" under the Act which the agreement is deemed to become to be regarded as an order to pay £6 per week, or an order to pay £3 per week—or, since the subsequent agreement to pay the lesser sum is not an "agreement entered into in writing", can the prior written agreement be registered at all, since it does not now embody the present existing bargain between the parties?

It may be that these questions might not arise in a very acute form in cases where all the wife has done is not to insist on her husband paying her the full amount of the instalments due. However, in a case where the parties have expressly agreed that the periodical payments are to be reduced the difficulties in these questions take on solid reality.

It was a situation involving the questions mentioned above which fell for Haslam J.'s decision in *Hudson* v. *Hudson*, and the effect of the judgment in that case is that the figure mentioned in the written agreement is the figure which must be regarded as forming the basis of the order which the agreement is deemed by the section to become regardless of any agreement between the parties to the contrary. This result is perhaps surprising, especially in view of the fact that it was expressly conceded by counsel that the parties had in fact entered into an agreement that a reduced amount should be paid and accepted, and that if the registered agreement were to take effect at all, it should take effect only in respect of that reduced amount.[1]

The circumstances which gave rise to the decision in *Hudson* v. *Hudson* were these:

> The parties entered into a written separation agreement, providing for payments of maintenance to the wife at the rate of £5 per week. The wife later went out to work, and the maintenance provision was varied by an oral agreement between the parties to £3 10s. per week. The wife subsequently advised the husband that the latter sum was insufficient for her needs, and registered the written agreement in the Magistrates' Court pursuant to s. 47B. She then issued an information for arrears on the basis of £5 per week, and the husband filed a complaint for the cancellation of the registration. The Magistrate before whom the information and complaint were heard stated a case to the Supreme Court so that it might be determined whether the agreement was validly registered, and if it was, what its effect was.

The real questions at issue were, therefore: was there an agreement "entered into in writing" between the parties within the meaning of s. 47B (1) which could be registered, and, if there were such an agreement, was that agreement "in force" at the time of registration within the meaning of s. 47B (3)?

There would seem to be perfectly simple answers to these questions. First, it might be suggested (as counsel for the husband did, in fact, suggest) that the only agreement between the parties as to maintenance was that the husband should pay the wife £3 10s. per week. That was the only subsisting bargain between them. The "agreement in writing" was admitted to have been replaced by an oral agreement to pay maintenance at the above rate. Therefore the document which the wife had registered did not contain the agreement which had actually been reached and which was actually enforceable between the parties. The agreement under which the husband was admittedly bound to pay £3 10s. per week was not an "agreement entered into in writing", and therefore there was no agreement which could be registered under s. 47B.

This argument is based on a line of well-known authority on the effect of s. 4 of the Statute of Frauds on oral variations of written agreements,[2] and it is submitted that it is perfectly clear that an agreement to pay by way of maintenance an amount different from that payable under a prior agreement between the parties amounts to an entirely new agreement, and not merely a variation of the prior agreement, the latter remaining in force subject to the variation.[3]

Secondly, what has been said above really answers the second question at issue: was the written agreement "in force" at the time of registration? Plainly it was not. The only maintenance agreement in force was the agreement to pay £3 10s. and that was an oral agreement. Any suggestion that a written agreement to pay maintenance, regardless of the amount, was "in force" within the meaning of s. 47B is clearly unsound, because a written "agreement" to pay some amount other than that actually agreed upon by the parties is not an "agreement" as contemplated by the section.

It is thus difficult to resist the conclusion that the agreement in *Hudson* v. *Hudson* either should not have been registered at all on the ground that it was not the "agreement" subsisting between the parties at the time, or should have been cancelled, on the ground that it was not an agreement "in force" at the time of registration. Either view is fatal to the enforcement of the written "agreement".

It is now necessary to examine the judgment in *Hudson* v. *Hudson* [1959] N.Z.L.R. 348. The learned Judge reached the conclusion, first, that the oral "variation" of the written agreement did not affect the obligation imposed by the latter to pay £5 per week.

> In my opinion, he said: the verbal [sic] variation referred to in the Case Stated did no more than reduce the husband's liability to his wife to the extent that he complied with the agreement. At any time the wife was entitled to repudiate the arrangement which was made without consideration, and bound her only so long as she accepted the lesser sum in full satisfaction of the weekly amount of £5 as provided in the agreement. I am unable, on the material before me, to find any basis for promissory estoppel creating a permanent change in the legal relations of the parties. . . .
>
> The informal variation did not affect the continued validity of the maintenance provision. The latter was suspended only so long as the husband observed the arrangement by paying the reduced amount. Even then, the wife could terminate this concession by giving him notice of her intention to revert to the original figure. She did so by registering the agreement without qualification, and by giving the formal notice to her husband through the Registrar. Before so doing, she had given her husband warning that £3 10s. per week was insufficient for her needs (*ibid.*, 351).

Three observations must be made about this passage. First, it is perhaps unfortunate that it relates to matters which were neither argued nor adverted to by counsel.[4] No doubt if the experienced counsel who appeared for the wife had considered it necessary to raise the issues discussed in the above passage, he would have done

---

[1] The argument in *Hudson* v. *Hudson* is not reported, but through the courtesy of counsel engaged in that case the writer has been supplied with full notes of the submissions made on each side.

[2] *Goss* v. *Nugent* (1833) 5 B. & Ad. 58; *Marshall* v. *Lynn* (1840) 6 M. & W. 109; *Williams* v. *Moss Empires Ltd.* [1915] 3 K.B. 242, 246, 247, per Shearman J. (Div. Ct.); *Morris* v. *Baron* [1918] A.C. 1.

[3] It is true that it can be loosely said that an agreement to pay a lesser amount is a "variation" of an agreement to pay maintenance, but it is submitted that such reasoning is inapposite in regard to agreements to which s. 47B applies. Under s. 47B a maintenance agreement becomes a maintenance order: but there is no such thing as an "order to pay maintenance" without reference to the amount ordered to be paid. The term "maintenance" describes the purpose of the payment, and the purpose for which the moneys paid are to be applied. Accordingly, an agreement to pay £5 per week is an agreement to pay £5 per week, not an agreement to pay maintenance, and an agreement to reduce the amount payable to £3 10s. per week is not a "variation" of the original agreement, but a new agreement in lieu of the original agreement. Accordingly, on this reasoning, any difficulties which may be created by the effect the decision of the House of Lords in *Morris* v. *Baron* (*supra*) may be said to have had on *Williams* v. *Moss Empires Ltd.* (*supra*) are avoided. See, on this topic generally, Williams, *The Statute of Frauds, Section* 4 (1932), 178-187.

[4] See *ante*, note 1.

so. In any event, it may be suggested that he had perfectly sufficient reasons for not doing so, because the issues raised above were really entirely irrelevant: as we have already seen it was expressly stated by counsel to be common ground between the parties that the wife and the husband had expressly agreed that the amount of maintenance payable was to be £3 10s. per week and no more. This being the position, it was scarcely open to the wife to say that her husband was liable to pay her £5 per week, and it was therefore, with respect, even less open to the learned Judge to find that the husband was liable to pay the higher amount.

Secondly, assuming that there was such an agreement, it is impossible to see how the wife, by her unilateral acts of advising the husband that £3 10s. per week was too little and registering the separation agreement, could have altered the position so as to reinstate the prior agreement. If there was, in fact, an agreement between the parties that £3 10s. per week was all that was to be paid, it can hardly be suggested that the amount payable could be varied except by further mutual agreement.

Thirdly, even if there was not such an agreement, and Haslam J. was right in holding that the wife had the right to oblige her husband to revert to payments of £5 per week by giving him notice[5] that the prior arrangement was at an end, the position was that, in fact, she did not give him notice, and he did not receive notice, until after the written agreement had been registered. How, then, can it possibly be said that the written agreement contained a statement of the true legal position between the parties if the arrangement to pay £3 10s. per week could not have expired until after the registration of the written agreement

It is suggested that these points really dispose of the questions whether the written agreement was registrable in the first place and whether its registration should have been cancelled. It is therefore submitted that a written maintenance agreement cannot be registered if it does not embody the subsisting bargain between the parties.

If, however, *Hudson* v. *Hudson* was rightly decided, and correctly states the effect of s. 47B, the result is hardly to be described as either fair or just. As we have seen, the reason for the reduction of the amounts payable under the agreement was that the wife had commenced working. By registering the agreement, she therefore did two things: she effectively fixed the rate of maintenance she should receive at the original figure, regardless of the fact that her circumstances had materially changed for the better. Secondly, she effectively avoided an agreement she had willingly entered into to accept a reduced amount of maintenance.

The section, as it stands, affords the husband no relief by way of variation, because he is (presumably) unable to show any change of circumstances since the date of registration.

It is difficult to believe that the Legislature intended to bring about such a result. It may be that an appropriate amendment to the section is called for, and it may also be that one method of avoiding the difficulties encountered in *Hudson* v. *Hudson* is to make it clear that all a party is doing by registering a maintenance agreement is avoiding the necessity of applying for a formal order: there is no reason, it is suggested, why the circumstances of the parties at the date of registration should not be open to examination with a view to making such adjustment in the amount payable under the agreement as may be just.

B. D. INGLIS.

[5] Haslam J. indicates, as we have seen, that mere "notice" is sufficient. It seems, however, that the notice must at least be "reasonable notice": *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1954] 1 W.L.R. 862 (C.A.).

Malum prohibitum and malum in se.—"A distinction may therefore be drawn between the sort of situation where a crime is to be regarded as an offence wherever it is committed and the sort of statutory offence which is created only in relation to a particular place. Murders are offences against the moral law in the broad sense wherever they are committed. But if a statute provides that something may not be done in a public house, it is an offence only if it is committed in a public house. No one would treat it as an offence everywhere and say that the Court assumes jurisdiction over it only if it is committed in a public house. In the same way, if a statute provides that something shall be an offence if done in the County of Middlesex, it is an offence only in the County of Middlesex and not an offence if committed anywhere else: again it is not a question of assuming jurisdiction only if it is done in Middlesex; it is a case of the statute that creates the offence making it an offence only within limits. Where limits are imposed as to place or in some other form, the limits prescribe the nature of the offence. Broadly speaking one can, therefore, distinguish between offences which as I say are offences against the moral law, and to be regarded as wrong wherever they are committed, and offences which are merely breaches of regulations that are made for the better order or government of a particular place such as a public house, or a particular area such as the County of Middlesex, or a particular country such as England." Devlin J. in *R.* v. *Martin* [1956] 2 Q.B. 272, 286.

"Signing" a Document.—"It is established, in my judgment, as a general proposition that at common law a person sufficiently 'signs' a document if it is signed in his name and with his authority by somebody else; and in such case the agent's signature is treated as being that of his principal. That this is so was recognized by Blackburn J., in *R.* v. *Kent Justices* (1873) L.R. 8 Q.B. 305; by Lord Esher in *R.* v. *Cowper* (1890) 24 Q.B.D. 533, and by the Divisional Court in *France* v. *Dutton* (1891) 2 Q.B. 208. The definition of 'signature' in *Stroud's Judicial Dictionary* is also in conformity with the principle. On the other hand if, by some rule of law, or by statute, a document has to be personally signed the duty of signing cannot be delegated to a third person (*cf. In re Prince Blucher* [1931] 2 Ch. 70); and the same result would follow if two parties agree that any document which one of them may serve upon the other under and by virtue of their contract is to bear his personal signature." Romer L.J. in *London County Council* v. *Agricultural Food Products Ltd.* [1955] 2 Q.B. 218, 223.

EASEMENTS AND RESTRICTIVE STIPULATIONS.

Modification by Order of the Supreme Court.

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

At p. 235, *ante*, I furnished precedents leading up to the obtaining of an order of the Supreme Court modifying an easement, under s. 127 of the Property Law Act 1952.

Having obtained from the Court such an order, the next thing to be done is to procure its registration. The title to the land, in the great majority of cases, will be found to be registered under the Land Transfer Act 1952.

Subsection (7) of s. 127 of the Property Law Act 1952 provides that, in the case of land under the Land Transfer Act 1952, the District Land Registrar may of his own motion, and on the application of any person interested in the land shall, make all necessary amendments and entries in the register-book for giving effect to the order in respect of all grants, certificates of title, and other instruments affected thereby and the duplicates thereof, if and when available.

It will be remembered that, in *In re Lewis* [1959] N.Z.L.R. 1040, the Court ordered the locus of the right of way to be changed: the right of way ran up the middle of the servient tenement, and the Court altered it by changing it from that position to one along the western boundary of the servient tenement.

The Land Transfer register must show from day to day the true picture of the legal title, and the Registrar has inherent jurisdiction to prevent his records from becoming uncertain: *Mahoney* v. *Hosken* (1912) 14 C.L.R. 389. And s. 167 of the Land Transfer Act 1952 authorizes the District Land Registrar on any application, *inter alia*, for registration of any instrument affecting *part* only of land comprised in any certificate of title to require the deposit in the Land Registry Office of a plan of the land or subdivision or part thereof. Fortunately, in *In re Lewis*, (*supra*,) the original position of the right of way was shown on an old deposited plan, and that of the proposed right of way on a new subdivisional plan which had recently been deposited. Therefore it was an easy matter to draft and to register the order of the Supreme Court altering the locus of the right of way. The memorial on the certificate of title for the servient tenement reads as follows:

> Order of Court 436738 modifying the Rights of Way created by Transfers 238714, 253850 and 352904 over the part of Lot 3 plan 11366 (coloured yellow on plan hereon) by substituting the part of said Lot 3 (14.69 pp), coloured blue (and marked "Right of Way") on plan 18967 in place of the part of said Lot 3 coloured yellow on plan 11366 (and on the plan hereon).

I add hereto a copy of the order of the Court, modifying the right of way. This will complete the Precedent on p. 237, *ante*.

PRECEDENT.

Modification of a Right of Way by the Supreme Court under s. 127 of the Property Law Act 1952.

No. 3.
Order of Court.
No. M. 78/59.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY
IN THE MATTER of an application by
CHARLES LEWIS

TUESDAY, the 23rd day of June, 1959.

Before the Honourable Sir James Douglas Hutchison, Acting Chief Justice of New Zealand.

UPON READING the Notice of Motion for Order under Section 127 of the Property Law Act 1952 and the Affidavit of Charles Lewis filed in support thereof, and the Affidavit of Charles Lewis as to service and advertising AND UPON HEARING the evidence in support of the application AND UPON HEARING Mr RELLING of Counsel for the applicant AND Mr POPE of Counsel for Leonard Fernley Cunningham, Ian Munro McKay and Betty Joan McKay and Francis George Austin Healy, this Court HEREBY ORDERS that the rights of way created by Transfers 238714, 253850 and 352904 over Lot 3 deposited plan number 11366 BE MODIFIED BY substituting that piece of land having an area of 14.69 perches and coloured blue on a plan deposited in the Land Transfer Office, Wellington, under number 18967 in place of that piece of land coloured yellow on deposited plan number 11366 as the portion of the said Lot 3 over which such rights shall subsist.

By the Court.

Deputy Registrar.

Desertion and Adultery.—"It would be deplorable if desertion by one party were thought to be an excuse for the other party to go and commit adultery. It may explain the adultery, but it does not excuse it. During the war it often happened that, when the husband was serving abroad, his wife at home committed adultery; and in the pension cases it was always held that the wife's adultery was not caused by the separation at all, but was due to her own personality and conduct. So it seems to me in these cases when there is desertion and nothing more, and then the wife commits adultery, her adultery is due, not to the desertion, but to her own weakness of character; 9r, as, no doubt, she would prefer to put it, because she fell in love with another man. That is the case here. A year after the desertion she fell in love with another man and she committed adultery with him. The adultery is due to her own weakness of character and not to the desertion. . . . [Counsel for the wife] argued that in this case there was something more than desertion, but it is significant that in the pleadings it was never alleged that the husband's conduct had conduced to the adultery. That does not prevent the Court from considering it; it may have to do so; but, nevertheless, if the wife does not allege it, it does go to show that there is nothing in the contention. This wife was not left destitute. After her husband deserted her, she was living at home with her parents and going out to work and earning her living in the same way as she had done before the marriage. She said in evidence that she did not take proceedings in the Magistrates' Court against her husband for desertion because she did not want money. She was earning enough as she was. In those circumstances, it seems to me to be plain that his conduct did not conduce to her adultery." Denning L.J. in *Richards* v. *Richards* [1952] P. 307, 310.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

What Makes an Advocate.—A month or so ago, Sir Sydney Littlewood, addressing the Local Government Legal Society on the subject of "Advocacy", observed that there was no such thing as a born advocate; he was made by a careful study of his own faults and of other people's methods. This would scarcely seem to apply to Edward Carson, once described by Sir John Simon as the most devastating cross-examiner he had ever heard. Carson held the view that for a cross-examination to be successful it is best to ask at least one "very leading question"; and he developed this technique (for which he later became famous) by asking only a few pertinent questions and then sitting down. "It was a very brilliant technique which was to pay off handsomely over and over again, but so unlike the usual prolix style of advocacy in vogue in Ireland in those days that at first it tended to have a perplexing effect. Indeed it was not until he arrived in London and tried it out in the English Courts that it came to be fully appreciated." A sample of this technique is provided by H. Montgomery Hyde M.P. in the *Sunday Times* when dealing with the libel action brought against Lord Gladstone, the son of the Liberal statesman, for having described the plaintiff as a liar and a coward, because he had said that Lord Gladstone's father, while appearing to be high-principled in public, was a hypocrite who led an immoral life. Carson listened in to the ten-hour cross-examination of the plaintiff by Norman Birkett, then a young barrister, who brought about a resounding victory for his client, the jury adding a rider to the effect that the evidence they had heard completely vindicated the high moral character of W. E. Gladstone. Mr Hyde comments: "While pleased with the result, which he considered eminently just, Carson remarked to another onlooker in Court that Mr Birkett's cross-examination had been too long. According to Carson he should have asked the plaintiff three questions only.

"Have you a mother?" (Yes.)

"Do you love her?" (Yes.)

"Would you have said the same things about your mother that you said about Mr Gladstone?"

This was Carson's method. Whether it would have produced the same result in this case is a matter of opinion. But it does provide a characteristic illustration of Carson's peculiar style of advocacy, which he practised for upwards of half a century with conspicuous success.

Assessment of Damages.—An interesting addition to cases in the accident field is provided by *Scott* v. *Musial* [1959] 3 All E.R. 193. The headnote reads that, in a motor accident for which the defendant was wholly responsible, the plaintiff suffered very severe injuries and at a trial by Judge and jury was awarded by the jury £18,000 damages. The defendant appealed as to damages, referring to comparable awards in cases tried by Judges alone and contending that from them a standard emerged which this award exceeded; he relied particularly on *Waldon* v. *The War Office* [1956] 1 All E.R. 108, as showing a maximum comparable figure (£17,000). It was held by the Court of Appeal (Morris, Ormerod, and Wilmer L.JJ.) that an award of a jury which does not conform to a pattern or level of awards of damages by Judges in cases tried by Judges alone is not thereby shown necessarily to be wrong, for the views of juries may form a valuable corrective to the views of Judges, and juries may not know of, and are not bound by, any level that Judges have thought to be appropriate, and the Court would not interfere with the jury's award in this case because, applying the settled test (stated by Lord Wright in *Mechanical & General Inventions Co. Ltd. & Lehwess* v. *Austin and Austin Motor Co. Ltd.* [1935] All E.R. Rep. 22, 37, and *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (*No. 2*) [1942] 1 All E.R. 657, 664), the award was not out of all proportion to the circumstances of the case. The Australian approach to the assessment of damages by Judges ((1958) 32 A.L.J. 19) has been summarized as follows: "The proper amount of money to be awarded as fair and reasonable compensation for, inter alia, pain and suffering, must depend on the views current in the community shown by the general run of verdicts then current. It is for this reason that many consider that the jury is the proper tribunal to assess general damages. For Judges to attempt to work out the proper amount by mathematical calculations based on the size of verdicts given at some earlier period is likely to lead to error, because the view of the community may have changed in the meantime. Before the introduction of the Welfare State it was for each citizen to provide his own security against unemployment, ill-health, and other misfortunes. If what he provided was inadequate, then his relatives faced misery, if not disaster. Therefore, the possession of a lump sum of money was of great importance and a fair equivalent for a great deal of pain and suffering. Today, however, such a sum has not the same security value. It is thought that the award should be considerably higher than the statistical equivalent of a sum deemed appropriate twenty years ago. The fall in the purchasing power of the pound with drastic inflation suggests that awards four or five times those of pre-war are fair and just considering present-day conditions, at least in the eyes of present-day jurors."

Tailpiece.—One of our younger Judges (who has evinced more than a passing interest in the etiquette to be observed by those who appear before him) was himself confronted the other day with an unusual problem. Seated in a small courtroom with a window just behind him, he was startled when this suddenly opened and a workman engaged on the building surveyed the scene and announced in a loud, clear voice: "I can see you are all busy. I'll be back later". Before His Honour could make the appropriate fixture, the workman had disappeared, presumably to discuss with his workmates the workings of our judicial system.

TOWN AND COUNTRY PLANNING APPEALS.

Sharp and Others *v.* Mount Roskill Borough and Others.

Town and Country Planning Appeal Board. Auckland. 1959. May 12.

Building Permit—Area zoned "Commercial B1"—Picture Theatre to be built on Vacant Land—Objection by Ratepayers to Grant of Permit rejected—Appeal on Ground of Change of Use—Building Permit properly given before Operation of Legislation affecting Change of Use—No Jurisdiction to hear Appeal—Town and Country Planning Act 1953, s. 38A (3).

Appeal purporting to be brought under s. 38A (1) of the Town and Country Planning Act 1953. It was filed by ten owners or occupiers of land within the Borough of Mount Roskill and it related to the issue by the first respondent of a building permit for the erection of a picture theatre by the second and third respondents on a property situate in Mount Albert Road.

Under the Council's undisclosed district scheme this land was zoned as "commercial B1" and a picture theatre was a "predominant use" in such a zone. In February, 1957, the second respondent sought approval of its proposal to erect a picture theatre. The first respondent though not under any statutory obligation so to do caused a circular letter to be forwarded to residents in the vicinity seeking their views on the proposal. In response to that circular letter twelve replies were received, eight approving and four objecting.

The Council met to consider these approvals and objections and on April 16, 1957, resolved that approval be granted to the erection of the theatre. That approval was conveyed to the applicants by a letter dated April 29, 1957, in the following terms: 'Your application for permission to erect a picture theatre on a site in Mount Albert Road was considered by the Council at its meeting on the 16th April and I have much pleasure in advising you that the Council approved your application."

No further action was taken until October 10, 1958, when an application was received from the second and third respondents for the requisite building permit. After some discussion regarding provision for parking-space agreement was reached.

On October 28, 1958, a petition objecting to the erection of a picture theatre was received from a number of ratepayers and the Council agreed to receive a deputation on November 4, 1958. This was done, the deputation was heard but after hearing the deputation and considering its representations the Council resolved that the necessary building permit be granted.

This appeal was then filed as an appeal under s. 38A (3) against what was claimed to be a change of use. When the appeal came to hearing counsel made submissions on the question whether or not the Board had jurisdiction to hear the appeal and after hearing argument on this issue the Board reserved its decision and agreed to rule on this preliminary question.

The judgment of the Board was delivered by

REID S.M. (Chairman). Having considered the submissions made, the Board finds:

That in order to establish a right of appeal, the appellants must bring themselves within s. 38A of the Act but on the agreed facts the Board must hold that no consent for a change of use was ever applied for by the second and third respondents or purported to be granted by the first respondent. Counsel for the appellant argued that the issue of a building permit was in effect a consent to a change of use and that the audience granted on November 4, 1958, to the petitioning ratepayers was a "hearing of objections". Neither submission is tenable. The issue of the building permit was an administrative act and related back to the approval given on April 29, 1957, for the erection of the picture theatre.

Section 38A came into force on November 1, 1957—the date of the coming into force of the Town and Country Planning Amendment Act 1957. As at that date the "character" of the land under consideration was "vacant land zoned as 'commercial B1' upon which authority to erect a picture theatre had been duly and properly given", the issue of a building permit on November 4, 1958, could not change the character the land already possessed.

The Council's action in receiving the deputation was no more than an act of courtesy. The petitioners had no legal right of audience and they certainly had no statutory right of objection to a change of use. As has already been stated the land is zoned as "commercial B1"—a picture theatre is a "predominant use" in such a zone and if there ever had been any change of use that event took place in April, 1957.

The Board holds that the appellants have no right of appeal and it declines jurisdiction.

Jurisdiction declined.

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

Town and Country Planning Appeal Board. Auckland. 1959. May 12.

Building Permit—Area zoned "Rural A"—Permit sought for Erection of Workshop, Offices, and Store—Machinery Workshops Conditional Use only in Zone—Detrimental work in Open Area between Large Urban Development Areas—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal under s. 38 of the Town and Country Planning Act 1953. The appellant was the owner of a property situate on the Great South Road near Papatoetoe containing 10 ac. 3 ro. 24 pp. more or less being Lot 2 on Deposited Plan No. 38966.

He applied to the Council for a permit to erect a workshop, offices, and store on this land. The Council, though under no obligation so to do, advertised the nature of the application, intimating that it was prepared to receive and consider objections to the proposal. Various objections were received and on October 28, 1958, the Council at a duly constituted meeting sat to hear the objectors and the appellant and on October 29, 1958, resolved to decline the application. 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:

1. The land in question is in an area zoned as "rural A" under the Council's undisclosed district scheme and "machinery workshops" are a conditional use only in such a zone.
2. In declining the application the Council did so under s. 38 (2) of the Act being of the opinion that the proposed structures will detract from the amenities of the neighbourhood which are likely to be provided or preserved by or under the Council's undisclosed district scheme and are therefore a "detrimental work" as defined by s. 38 (1) (b) of the Act.
3. The Board does not propose to review the considerable volume of evidence tendered by the interested parties. It proposes to refer only to the evidence given by the Director of Planning for the Auckland Regional Authority.

   The Mangere-Papatoetoe-Otara block of urban development lying to the north of the area where the company's land is situated when fully developed will contain a population of more than 80,000.

   The Manurewa-Takanini-Papakura urban development area lying to the south of the land under consideration will have a population of 50,000 to 60,000.

   It is proposed under both the regional planning scheme and the district planning scheme that the area between Papatoetoe and Manurewa should be kept as an open area making a physical break between these two extensive areas of urban development. The ultimate intention is that a large scale regional park for recreation and open-space purposes will be provided in this area.

The Board holds that these concepts are in complete accord with town-and-country-planning principles and it considers that the area between Papatoetoe and Manurewa should be preserved as an open space, an object that can only be attained by preserving it as a strictly rural zone. Any industrial development in this area would detract from the amenities of such an area and therefore the company's buildings would constitute structures that would detract from the amenities of the neighbourhood which are likely to be provided or preserved by or under the Council's undisclosed district scheme.

The appeal is disallowed.

Appeal dismissed.