New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"
VOL. XXXV TUESDAY, NOVEMBER 3, 1959 No. 20

WILL: EFFECT OF ATTESTATION BY SOLICITOR LATER APPOINTED TRUSTEE.

IT will be remembered that Mr Justice Wynn-Parry held last year that a solicitor who attested a will, and, after the testator's death, was appointed a trustee of the testators's estate, was barred by s. 15 of the Wills Act 1837 from either receiving remuneration for his services as trustee under cl. 16 of the will or charging for his professional services under cl. 17 of the will.

This decision was the subject of an article in this place, *ante*, p. 65, where the relevant provisions of the will are set forth.

We hasten to inform our readers that Mr Justice Wynn-Parry's judgment has been reversed by a unanimous decision of the Court of Appeal (Lord Evershed M.R., Hodson and Romer L.JJ.) in *Re Royce's Will Trusts, Tildesley* v. *Tildesley* [1959] 3 All E.R. 278 (in the Part dated October 20).

Section 15 of the Wills Act 1837 is as follows.

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

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

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

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

The testator had provided by his will:

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

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

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

In the Court of Appeal, Lord Evershed M.R. stated the question at issue as follows:

> Mr Tildesley, the first defendant, is one of the two persons who attested the will: is he, therefore, disqualified, having now become, by virtue of the appointment, a trustee, from claiming a benefit under either one of, or both, cl. 16 and cl. 17 of the will? That is the problem which the learned Judge, Wynn-Parry J., felt to be difficult. There is also before us the second defendant, Mrs Minnie Elizabeth Beare.

She is one of the children of the sister of the testator mentioned in cl. 9, and, therefore, puts the argument on behalf of those who are interested* to resist the claim of the first defendant to enjoy the benefits conferred by cl. 16 or cl. 17; and on behalf of the second defendant a subsidiary point has been put forward, viz., that in the circumstances, as a matter of of construction of the clauses, the first defendant in any event cannot claim to receive benefits under both cl. 16 and cl. 17. The first question is: Having attested the will, can he now take any benefit at all under any of the provisions of the will? The argument which succeeded in the Court below is that he could not; and it is put on the broad lines that, having been an attesting witness, he cannot, within the terms of s. 15 of the Wills Act 1837, take any benefit at all under the will which he attested.

The Master of the Rolls came to a different conclusion from that reached in the Court below. He said he was at least comforted by the circumstance that the learned Judge had himself stated that he could well imagine that different minds might take different views. Putting it in its briefest form, it seemed to Lord Evershed that the argumont that counsel for the second defendant and the Attorney-General had put forward made the section read as though it said: "If any person shall attest the execution of a will he shall not thereafter take any benefit thereunder". That, he observed, would perhaps have been a simple way to express the intention had that been the view of the Legislature. But it was not the language of the section. The relevant terms are

> . . . If any person shall attest the execution of any will to whom . . . any beneficial . . . interest . . . shall be thereby given . . .,

then such beneficial interest shall be wholly null and void.

His Lordship continued:

> As a matter of English, it seems to me that the language which I have read points, on the face of it, to an inquiry at one date only, viz., the date when the will is being attested; and the question has then to be posed: At the time of the attestation is any beneficial interest given to the attesting witness under the instrument the execution of which he is going to attest? The phrase "any beneficial . . . interest . . . shall be thereby given" has, however, this possible equivocation in it, that, in strictness and according to general principle, you cannot (of course) speak of a "beneficial interest" being "given" by a will before the testator has died. For certain purposes, therefore, it may be arguable (though it does not, as I think, arise in this case, and I prefer, therefore, to express no view) that it would be relevant to look at the date when the will came into operation. But subject to that possibility, it seems to me, I confess, that the section is contemplating a point of time when somebody is attesting a will; and the question has to be asked: Is any beneficial interest given to him under the instrument which is in question?
>
> It will be noted that in the present case the right (if there be a right) to receive a benefit under the will does not arise by virtue of any expression used by the testator. When the execution of the will was attested, Mr Tildesley's name did not anywhere appear in it; and equally, of course, when the testator died, he was not a beneficiary under the will. It has happened that, by an event—an act—of persons other than the testator, which occurred after the testator's death, Mr Tildesley has been appointed a trustee—as anybody in the world might have been appointed trustee—to take the room of one named by the testator who had died or retired; and his interest under the will arises, therefore, from what might, I think, naturally, in other circumstances, be called, properly, a *novus actus interveniens;* and I for my part have come to the conclusion that it cannot be said, therefore, of this attesting witness that he was one, at any relevant date, to whom any beneficial interest was given by the will which he attested.

* By cl. 9 the testator gave one-tenth of his residuary estate on trust for such of the children of his sister as should be living at his death.

That view, to His Lordship's mind, is supported also by two other considerations. The first is one of the history of the section which he had read. The first relevant enactment was that of the Statute of Frauds, 1677, which is set out in *Burn's Ecclesiastical Law,* p. 94, together with considerable discussions about its effect on the part of Lord Mansfield and Lord Camden. He did not find it necessary to refer to what Lord Mansfield or Lord Camden stated; but it was perhaps appropriate to read s. 5 of the Statute of Frauds:

> All devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect.

The learned Master of the Rolls continued:

> It is, I think, clear that the effect of s. 5 of the Statute of Frauds was this, that, unless the devise or bequest was attested by three "credible" (i.e., not disqualified) witnesses, the whole instrument, or at the very least the whole devise or bequest, was entirely void; and a witness was held to be incompetent if he, under the will, took any interest whatever in the subject-matter of the devise or bequest. The result was that if a non-competent person did attest a will, and there were not three other competent ones who did, the whole instrument, or (as I have said) at least a very material part of it, was avoided altogether.
>
> The Wills Act 1752 was clearly intended somewhat to mitigate that effect. The Wills Act 1752, was (so far as is relevant for present purposes) exactly in the terms of s. 15 of the Act of 1837, save that in the latter there is a reference to the wife or husband of an attesting witness—a matter to which I shall come back later. But it was admitted by counsel for the second defendant (and, if I may say so, rightly so) that the object of these enactments was to protect a testator who was in extremis, or otherwise weak and not capable of exercising judgment, from being imposed on by someone who came and presented him with a will for execution under which the person in question was himself substantially interested; and if that is indeed the real object (as I think it is) of these enactments, then, to my mind, the object is not achieved if this section is construed so as to disqualify someone who, at the time he attested the execution of a will, had no interest whatever under the will as it stood and only became interested under it by some later event or act—what I have called a *novus actus interveniens:* e.g., if he should be the object of some appointment made by some person named in the will having a power to appoint; or (as in the present case) if he happened to be a person who was later appointed a trustee of the will by the then existing trustees.

The second consideration which, in His Lordship's judgment, supported the view he took was that which he had already anticipated, viz., the reference to "wife or husband". In his readings of the section he had omitted the references to wife and husband. He now read the relevant part of the section with the reference to "wife or husband" in it.

> . . . If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial . . . interest . . . shall be thereby given [then such beneficial interest] shall, so far only as concerns such person attesting . . . or the wife or husband of such person . . . be utterly null and void. . . .

If (following the argument of counsel for the second defendant and of counsel for the Attorney-General) the relevant words ought to be read as equivalent to "If any person shall attest the execution of a will who shall thereafter take any benefit", and you add in the reference to the husband and wife—"who or whose husband or wife shall thereafter take any benefit", then His Lordship said that he found it

extremely difficult to see how you can limit the wife or the husband, as the case may be, to an individual who happened to be the wife or the husband at the time the will was attested. If an interest subsequently taken as a result (as in this case) of a later appointment is sufficient to disqualify a trustee from his remuneration, then it would appear difficult to say that subsequent marriage to an attesting witness would not equally be a disqualification, since, at the time when the wife or husband took, she or he had acquired the character of being wife or husband of an attesting witness. But Mathew J. in 1881, decided to the contrary in *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311, 312. In that case, the marriage with the attesting witness occurred after the attestation but before the death of the testator; and Mathew J. said:

> I think the plaintiffs are entitled to judgment. The policy of the [Wills Act 1837] in depriving the attesting witness of any legacy given by the document of bequest, is not to allow wills to be proved by the evidence of persons benefited by them, and it makes void any devise to an attesting witness, or to his or her wife or husband. In the present case the plaintiff, at the time when the will was attested, took no benefit under it, but he subsequently married the devisee, and I am asked to hold that the result of this marriage is to destroy the validity of the devise.

The learned Master of the Rolls considered the reasoning of that decision was consistent, and consistent only with the view that in the *Royce* case the attesting witness was not disqualified by the fact that after attestation—indeed in this case after the death—he became interested by virtue of the appointment made of him as a trustee by Mrs Tildesley and Mr Claremont.

For those reasons, therefore, His Lordship concluded that Mr Tildesley was not, by virtue of s. 15 of the Wills Act 1837, excluded from taking benefits under cl. 16 and cl. 17 of the will, if he were otherwise, on their true construction, entitled to them.

On the second question, Lord Evershed said it would be observed that the remuneration which was given in cl. 16, consisting of a share in five per cent. of the income, was stated to be "by way of remuneration for their services". By cl. 17 the testator stated that Mr Claremont or any other executor or trustee

> who may be a solicitor shall be entitled to charge . . . for his services in the same manner as though not being an executor or trustee he had been employed . . . to render such services.

On behalf of the second defendant, it was said that this was really a duplication: that two legacies (for both operate in the nature of legacies) were given for one and the same thing, viz., services as a trustee; and although there was, or might be, a general rule in favour of cumulative gifts, if it appeared that two gifts were given to the same person in one will, it was said that that rule did not apply in the case of gifts in favour of an executor for a specific purpose.

The learned Master of the Rolls said:

> In my judgment, that consideration does not here apply. In the case to which counsel referred, *Wilson* v. *O'Leary* (1872) L.R. 7 Ch. 448, the rule against double gifts in favour of an executor was intimated, in passing, in the judgment as applicable to the case where the same amount was given to the same person for the same service. It is to be noted that here the amounts are quite different—in the one case a share of five per cent. of income; in the other (in effect) the right to charge profit costs. But the services to my mind are also not the same. The language perhaps might be improved; but cl. 16 relates to the general services of trustees as trustees—whether lay or professional: cl. 17 relates to professional services rendered by a solicitor in the course of his professional work. That is shown quite plainly by the very last words of the will—"as though not being an executor or trustee he had been employed by my executor or trustee to render such services".
>
> It was necessary for counsel to concede that, if he was right, notwithstanding the very clear and express language and the reference by name to Mr Claremont, Mr Claremont was equally disabled from taking under both clauses. Without saying more, I construe cl. 16 and cl. 17 as giving the right first to Mr Claremont and now to the first defendant (s. 15 of the Wills Act 1837, being out of the way) to enjoy the benefits under both cl. 16 and cl. 17. The result is that, for the reasons which I have attempted to state, in my judgment, the appeal should be allowed, and it should be declared accordingly that Mr Tildesley, the first defendant, is entitled, notwithstanding his attestation of the will, to the benefits which are conferred by cl. 16 and cl. 17.

The other members of the Court agreed with the judgment of the Master of the Rolls.

Romer L.J. added that the question, and the only question, for the Court was whether an attesting witness was disqualified from receiving a benefit which did not accrue to him—even as an expectancy—until long after the testator's death, the suggested disqualification deriving from s. 15 of the Wills Act 1837. He said:

> It is to be noted that neither at the date of the testator's will nor at the date of his death had the first defendant any beneficial interest in the estate which was recognizable at law or in equity; nor would he ever have received any beneficial interest at all but for the intervention of third parties—viz., those in whose hands lay the power of appointing new trustees. Take a gift of £1,000 to trustees, to invest and accumulate for ten years, and then to distribute at the trustees' discretion among the then employees of a particular company. A. attests the will, but is not in the employment of that company either at the date of the will or at the date of the testator's death. Subsequently to the testator's death he enters the company's employment, and is still in it at the end of the ten-years' period. On the argument of the second defendant, any benefit that he then receives under the exercise of the trustees' discretion is struck out by s. 15. I cannot believe that the section has such an effect. In the case supposed, it could not be said of A. at any relevant time that he was an attesting witness to whom a beneficial interest was given by the will. I cannot see how the contrary view would be material in any way to the policy underlying the Statute of Frauds and the two Wills Acts—which was, to ensure that a man's testamentary disposition really does truly and freely express his own wishes, uncoerced by outside influence.

His Lordship concluded his judgment by saying that counsel for the first defendant was right in saying that in the present case the second defendant was functus officio as an attesting witness long before it could be said of him in any sense that he was "interested" under the will. If that was right (and in His Lordship's judgment it was), s. 15 could not have any application to the case.

The general effect of the Court of Appeal's judgment, applying the reasoning of Mathew J. in *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311, 312 (where it was held that the marriage, after the attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise) is that s. 15 of the Wills Act 1837, on its true construction, renders void only those beneficial interests of which it could be predicated at the time when the will was attested (or possibly at the time of the testator's death) that they were thereby given to an attesting witness. Consequently, as it could not have been predicated at either such time that an attesting witness would be a beneficiary under cl. 16 or cl. 17 of the testator's will, he was not disqualified from benefiting under those clauses by his subsequent appointment as trustee.

SUMMARY OF RECENT LAW.

GOVERNMENT RAILWAYS.

Negligence—Collision with Railcar at Level-Crossing—Allegation against Railways Department's Failure to provide Warning Device at Level-Crossing and Failure to Direct Locomotive-drivers to Slow down when Approaching Level-Crossing, and Negligently constructing Level-Crossing, barred by Statute—Allegations against Locomotive-driver in Driving at Excessive Speed or Failing to Slow down and stop in Particular Circumstances—not so barred—Allegation of Negligence against Railways Department of Failure to keep Level-Crossing free of obstruction to Reasonable View of Approaching Rail Traffic by Road-Users, Question of Fact dependent on Evidence at Trial—Government Railways Act 1949, ss. 63, 64, 65. Section 63 of the Government Railways Act 1949 (as substituted by s. 5 of the Government Railways Amendment Act 1956)is a complete bar to an allegation that the Railways Department was negligent in failing to provide any or any adequate warning of the existence of a railway level-crossing which was not equipped with any notice or warning device. Section 65 of the Government Railways Act 1949 (as substituted by s. 23 of the Government Railways Amendment Act 1952) means that in normal circumstances drivers of locomotives are entitled to assume that the line is clear and locomotives and other rail vehicles are entitled to be driven at a speed which would be reasonable on the assumption that the railway line is clear; but, if a driver has, or should have, reason to believe that a collision is about to occur, such driver must take all steps reasonably possible to prevent the collision. Section 65 is a bar to an allegation that the Railways Department was negligent in failing to direct its drivers to slow down when approaching a railway level-crossing, as that allegation was a general one, which would apply in all circumstances. Section 65 is not, however a bar to separate allegations against the driver of a railcar of driving at a speed which was excessive in the circumstances, and of failing to slow down and stop the railcar when he saw or should have seen that a motor-car had stalled on the line. Those allegations are not barred by s. 65, for the reason that they are allegations in the particular circumstances existing at the time and place. An allegation against the Railways Department of negligent construction of a level-crossing is not maintainable. The Minister for Railways is fully empowered to construct level-crossings; and, if it is an ordinary railway-crossing which has been in existence for many years, it cannot be alleged that the Department was negligent in constructing a crossing with or on an upgrade, or that such a crossing constitutes a trap for motorists approaching at a slow speed. In an action against the Railways Department, alleging, inter alia, negligence in failing to keep clear obstructions to the reasonable view of approaching rail traffic by road users, what circumstances were causative of the accident must be a question of fact. It is a question of fact whether failure to clear or keep clear obstructions to the reasonable view of approaching rail traffic by road-users at a level-crossing, in any particular case amounts to failure to take reasonable precautions for the safety of road-users. The presence of growth obstructing the view of the driver of the road-vehicle may be relevant in regard to allegations of contributory negligence against such driver, and may well be relevant to the question of proper maintenance by the Department of railway property. The matter is one dependent on the evidence at the trial and the inferences to be drawn therefrom. Consequently, s. 64 of the Government Railways Act 1949 (as substituted by s. 6 of the Government Railways Amendment Act 1956) is not a bar to an allegation of failure to keep clear obstructions to the reasonable view of approaching traffic by road-users. (*Broad* v. *The King* (1915) N.Z.P.C.C. 658, and *Canning* v. *The King* [1924] N.Z.L.R. 118, referred to.) *Bird* v. *Hammond and Others.* (S.C. Napier. 1959. September 11. McGregor J.)

HEALTH.

Offences—Carrying on Undertaking so as to be Unnecessarily Offensive or Injurious to Health—Viticulturist in Borough using Noisy Instrument to Scare Birds—Principles to be applied—Health Act 1956, s. 29 (1). By-law—Borough—Offences—Wantonly disturbing Inhabitants by improperly starting Noisy Instrument—Viticulturist using Thunder Gun to scare Birds—Gun creating Noise, not "wantonly or maliciously" used—Mt. Wellington Borough By-law No. 243 (20). To succeed in proving an offence against s. 29 (1) of the Health Act 1956, the prosecution must show by positive evidence that the nuisance is offensive by way of being detrimental to public health within the locality. It must be established by evidence of complainants that noise complained of seriously interfered with the comfort physically of themselves and then families in the occupation of their homes according to the ordinary natures prevalent among reasonable people. (*Bloodworth* v. *Cormack* [1949] N.Z.L.R. 1058, and *Spencer* v. *Silva* [1942] S.A.S.R. 213, applied.) By-law 243 (20) of the Wellington Borough was as follows: "No person shall wantonly or maliciously disturb an inhabitant by improperly starting or setting in motion any fire-alarm, ringing any door bell, knocking at any door, blowing any trumpet or horn beating any drum or gong, using any other noisy instrument, or ringing any bell in any public place, or in any doorway abutting thereon." A viticulturist who was using a gun, which made loud reports equivalent to those made by a shot-gun at spaced intervals, to frighten birds away from his ripening grapes could not be convicted of a breach of the by-law, as he was not using the gun "wantonly or maliciously",—it was part and parcel of a legitimate undertaking, and, by virtue of that feature, he was not within the category of persons who disturb the peace of the locality in a malicious or wanton manner. *Mount Wellington Borough* v. *Laus.* (1959. July 1. Grant S.M. Auckland.)

Offences—Nuisance—Carrying on Manufacture of Paint so as to be Likely to be Injurious to Health and to be Unnecessarily Offensive, thereby causing or creating Nuisance—Complaints of Noise and Vibration caused by Paint-Manufacturing Company near Residential Area—Test of Nuisance—"Offensive"—Health Act 1956, s. 29 (1). The word "offensive", used in the term "unnecessarily offensive" in s. 29 (1) of the Health Act 1956, is to be interpreted in the light of the circumstances of any particular case, by having regard to the nature of the trade or business carried on in the locality in which it is situated and the manner in which it is carried on. (*Duke of Devonshire* v. *Brookshaw* (1899) 81 L.T. 83, and *Attorney-General* v. *Abraham and Williams Ltd.* [1949] N.Z.L.R. 461, applied.) Industrial noises and vibrations, for example, would be made pronounced in a country or quiet residential area than in ordinary city conditions or in an industrial area. The company carried on the business of paint manufacturers in premises erected with an area zoned as "Heavy Industrial", the boundary of that area being the boundary of the company's land. On the other side of the boundary was a zoned residential area. The owners of two residential properties distant from the company's premises 70 ft. and 85 ft. respectively were the real complainants on whose behalf the local authority laid information against the company under s. 29 (1) of the Health Act 1956. There was evidence of noise and vibrations which allegedly comprised the nuisance. *Held,* 1. That the issue in the informations was to be determined on a consideration of how reasonable persons living in a zoned residential area near the company's manufacturing premises would be affected in the ordinary use and pleasurable enjoyment of their homes, taking into account the locality in which the homes were situated. (*Attorney-General* v. *Abraham and Williams Ltd.* [1949] N.Z.L.R. 461, followed.) 2. That, on the evidence the noise complained of was of a minor nature, less than could be expected in such neighbourhood; it was not offensive and not injurious to health. 3. That the vibrations caused by the company were no more than would be normal in a suburban locality; and there was no proof that the vibrations complained of were either unnecessarily offensive or likely to be injurious to health. *Mount Wellington Borough* v. *Pacific Chemical and Mineral Development Co. Ltd.* (1959. August 28. Wily S.M. Otahuhu.)

PUBLIC REVENUE.

Gift Duty—Disclaimer of Devisee—Duty not payable on Disclaimer by Deceased's Executor of Devise to Deceased not accepted or rejected by Devisee in Lifetime—Estate and Gift Duties Act 1955, s. 43—See EXECUTORS AND ADMINISTRATORS (*ante,* 292).

Income Tax—Assets Method of Deducing Income—Taxpayer's Denial on Oath of Ownership and Existence of Asset claimed by Commissioner to have accumulated—Onus of Proof on Commissioner to prove Existence of Such Asset to displace Taxpayer's Denial—Land and Income Tax Act 1954, ss. 17, 32. The onus is on a taxpayer to show that the Commissioner of Inland Revenue's assessment of income tax is wrong. When, however, the Commissioner seeks to apply the "assets method" of calculating a taxpayer's income, he must in the final resort, undertake the burden of proving the existence of the asset which he claims the taxpayer has accumulated, if the taxpayer's denial on oath of the ownership and existence of any such asset is to be displaced. *Phillips* v. *Commissioner of Inland Revenue.* (S.C. Auckland. 1959. September 1. Shorland J.)

LEGAL ANNOUNCEMENTS.

Continued from p. i.

We have a vacancy for a qualified or near-qualified Clerk for a wide range of general work, including Common Law, to start in the New Year with salary according to qualifications and experience.

TOWLE & COOPER,
C.P.O. Box 142,
AUCKLAND.

FOR IMMEDIATE SALE. A general one-man practice in a South Island county town. Net earnings over £2,000 per annum. Modern house available for purchase. Apply to :—

No. 71,
c/o C.P.O. Box 472,
WELLINGTON.

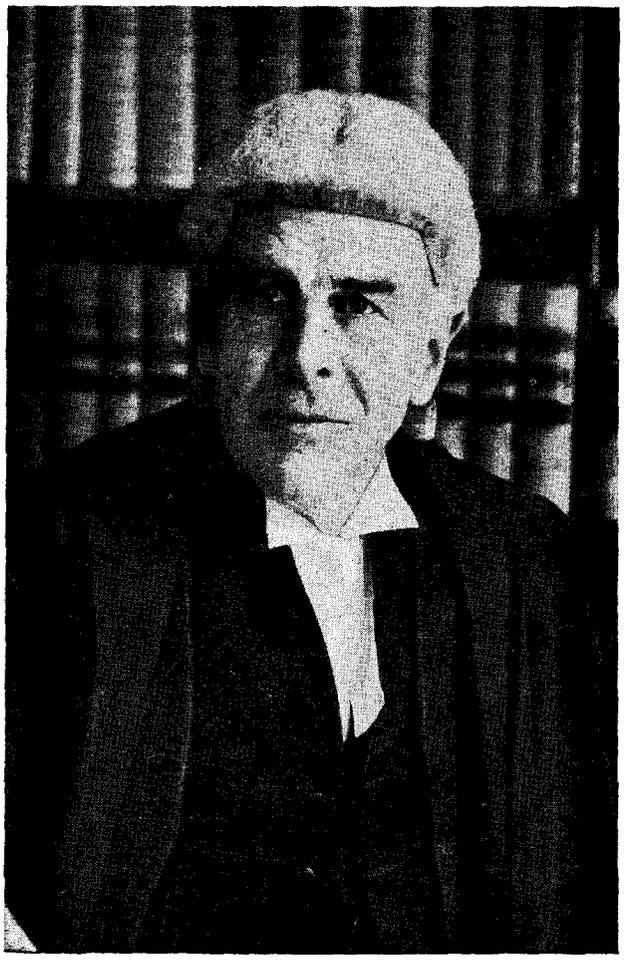
Meredith, Cleal & Co., Barristers and Solicitors, Auckland, wish to announce that they have taken into partnership, Mr DAVID STEWART MORRIS, LL.B. The firm will continue to practise under the name of MEREDITH, CLEAL & CO.

MR JUSTICE MACARTHUR.

It is of the utmost importance to the administration of justice that those who serve in a judicial capacity should enjoy the confidence not only of the legal profession but also of the general public. The packed Courtroom at the Supreme Courthouse, Wellington, on the occasion of the swearing-in of Mr Justice Macarthur was eloquent tribute to the esteem in which the new Judge is held by all sections of the community in Wellington.

Educated at Scots College, Wellington, where he was an outstanding pupil during the opening years of that institution, the new Judge proceeded thence to Victoria University College (as it then was), graduating LL.B. in 1930 and taking his LL.M. degree the following year. During his student days, he worked first as a clerk, then later as Associate to Sir David Smith, leaving the judicial atmosphere in 1930 for employment in Auckland until travelling overseas in 1934. Returning to New Zealand in 1935, he practised in Wellington on his own account thenceforth until 1940, when he joined the Army, serving both in New Zealand and overseas.

He is well remembered by many practitioners and former students as a part-time lecturer at Victoria University during that pre-war period, and his name is certainly familiar to many other erstwhile students as an external examiner during later years.



Earle Andrew, photo.

Mr Justice Macarthur.

Following war service, Mr Ian Macarthur (as he then was) joined the firm of Chapman, Tripp, & Co., in Wellington, and continued as a partner in that firm until his appointment: during these years he frequently appeared in the Courts in litigation covering many fields, and was associated with Mr G. G. G. Watson C.M.G., and Mr Justice Shorland (while the latter was at the Bar) on numerous occasions. Most recently, he has been engaged as counsel in a number of Commissions of Inquiry.

The new Judge thus brings to his judicial office a wealth of experience in the Courts, coupled with a manifest soundness of judgment which has been characterized by thoroughness and a demand for precision in all that he has undertaken. Ever courteous and patient, he has by his essential fairness in approach gained both the respect and affection of his colleagues at the Bar.

Notwithstanding the demands of a large practice, he has served the profession faithfully over a long period of years. Following some years as a member of the Council of the Wellington District Law Society, he was the President of that Society in 1956. At the time of his appointment he was treasurer of the New Zealand Law Society and a member of the Council of Legal Education.

Interests outside the law were not neglected; in student days, he was prominent in the sporting field, gaining University blues at hockey, rifle shooting, and tennis. The last-mentioned sport he has continued to play, and has acted for many years as a delegate to the Council of the New Zealand Law Tennis Association, of which body he was a member at one time of the Management Committee. He has also taken a prominent part in the affairs of the Royal Commonwealth Society.

As will be seen from this brief review of the new Judge's career, by far the greater part of his working life has been spent in Wellington. Nevertheless, the feelings of goodwill expressed at the ceremony of his swearing-in were indicative of the general satisfaction expressed throughout the country at his appointment. The profession generally joins in these expressions of congratulation and good wishes to Mr Justice Macarthur, and tenders also to his wife and three daughters its good wishes for their new life in Christchurch.

Swearing-In Ceremony.

Mr Justice Macarthur took the oaths of office and was sworn in at a ceremony in the Supreme Court, Wellington, on October 21. In the absence of the Chief Justice, Sir Harold Barrowclough, overseas, and also of the Acting Chief Justice, Sir Douglas Hutchison, Mr Justice McGregor presided, and had associated with him on the Bench Mr Justice Gresson P., Mr Justice North, Mr Justice Cleary, Mr Justice McCarthy, Mr Justice Haslam, Sir Robert Kennedy, Sir David Smith, Sir Arthur Fair, and Sir Joseph Stanton.

Also present were the Attorney-General, the Hon.

H. G. R. Mason Q.C., the Solicitor-General, Mr H. R. C. Wild Q.C., the President of the New Zealand Law Society, Mr A. B. Buxton, the President of the Wellington District Law Society, Mr C. H. Hain and a large gathering of the practitioners representing both the Inner and Outer Bars.

Mr Justice McGregor said he had been deputed to administer the required and after receiving the new Judge's Commission of Office, he called on Mr Justice Macarthur to take the Oath of Allegiance and the Judicial Oaths.

Judicial Welcome.

The oaths having been taken, Mr Justice McGregor said it was both his privilege and his pleasure to welcome Mr Justice Macarthur to the Bench, and in so doing he spoke not only for those present on the Bench that day but also for the Chief Justice, Sir Harold Barrowclough, and the Acting Chief Justice who was holding the fort in Christchurch, and on behalf of the other Judges of the Court.

"We are all delighted", he said, "to have you as our colleague, and we wish you both success and happiness in your term of office. You come to the Bench rich in experience, and with an almost unequalled education for the office.

"You had the good fortune, in what I might describe as your formative years, to serve for some years as Associate to Sir David Smith, and that period was followed by an association with Sir Joseph Stanton, both of whom are present on the Bench today. Since then, for a long period of years, you have been a member of a firm which might be described as the incubator of Judges, and from which I think at least seven members of the Bench have come, of whom five have been members of the Bench within the period of the last thirty years. I might say, therefore, that you have been cradled and nurtured in the Judiciary.

"It is propitious that you enter into this office on this particular day. I know that not only this day but every day you will follow the precepts of Nelson's historic signal, and I would add that you are fully entitled, when counsel appear before you on necessary occasions, to follow Nelson's example and place your telescope to your blind eye or turn a deaf ear to the blandishments of counsel unnamed.

"Mr Justice Macarthur, we all wish you every success in your new sphere."

The Attorney-General, the Hon. H. G. R. Mason, on behalf of the Government extended felicitations to the new Judge and wished him every happiness in his office.

Congratulations from the Bar.

The President of the New Zealand Law Society, Mr A. B. Buxton, said:

"For the past four years, His Honour Mr Justice Macarthur has been a member of the Council of the New Zealand Law Society, and at the time of his appointment he was not only the Treasurer of the Society but a member of our Legal Education Committee, one of our nominees on the Council of Legal Education of New Zealand University, and an almost one-man Committee on matters arising from transport licensing.

"We are grateful indeed for the services which His Honour has given to the Society, and any regret we may have that these have been terminated sooner than was expected was very much more than made up by the very great pleasure when we heard of his appointment to the Supreme Court Bench where the whole community will have advantage of his ability and very wide experience in practice at the Bar.

"We respectfully agree that not the least valuable parts of his experience will have been gained in the years which His Honour spent as an Associate, with its opportunities of seeing how cases should be conducted in this Court, and also the years he spent on active service with the Army in the last war, with the great insight these years gave into human nature. We are grateful for this opportunity of tendering congratulations to His Honour and our very warmest wishes for a happy and successful career on the Bench"

The President of the Wellington District Law Society, Mr C. H. Hain offered to His Honour, the new Judge, the warmest congratulations of his former colleagues, the members of the Wellington District Law Society, and on their behalf assured him that he took his place on the Bench with their best wishes, their goodwill, and their whole-hearted confidence that he would discharge the duties of his high office with great distinction.

"The announcement of His Honour's appointment", said Mr Hain, "has been received with profound satisfaction by all Wellington practitioners. His professional life was spent among us. We all know his ability and his outstanding personal qualities. He has served us faithfully and unreservedly for many years on the Council of our Society as its president and more recently as treasurer of the New Zealand Law Society. In the discharge of these offices, as well as in the pursuit of his professional duties he has amply displayed his fitness for the office he now assumes. Beyond that, however, he has gained the respect and affection of all his colleagues.

"On their behalf may I express the hope that he will be blessed with good health, that his judicial career may be long in years, as it will, we are confident, be fruitful in accomplishment."

His Honour's Reply.

Mr Justice Macarthur, in reply, said:

"Your Honours, Mr Attorney, Mr Buxton, Mr Hain, and gentlemen at the Bar. I should like first to express my appreciation to all the Judges for the warmth and welcome they have given to me during the past few days. I would then add that what has been said from the Bar gives me comfort and encouragement, for I shall now begin my new life in the law feeling that I do have the support and goodwill of my colleagues in my new profession. I thank you all."

His Honour began his judicial Duties in Christchurch on October 27.

TRANSPORT: DEMERIT POINTS.

A New Approach to Driver Control.

By DAVID B. HORSLEY.

INTRODUCTION.

On April 1, 1959, an official demerit points system for operators of motor-vehicles came into effect in the Province of Ontario, Canada. Similar systems were already in operation in the Provinces of Manitoba, New Brunswick, and Nova Scotia, and in a large number of the States of the United States, and have been accorded considerable publicity in recent years. (See the report *Driver Improvement: The Point System*, prepared by the Institute of Government, University of North Carolina, for a full discussion of existing systems.)

The system now drawn up for Ontario is the result of experience gained in recent years in the operation of an unofficial points system under the general powers of the Department of Transport in respect of the issue, suspension, and revocation of operators' licences under the Highway Traffic Act (Ontario).

From 1956 to 1959 the system was operated as an unpublicized administrative device for locating and dealing with habitual violators of traffic regulations. The Registrar of Motor-Vehicles maintained a record of all operators licensed under the Act, and the driving history of each operator was entered on his record. Relevant information was obtained from conviction notices sent in from the Courts, and from accident reports filed by investigating officers.

Points were assessed upon conviction for certain violations, an extra point being charged if the offence was connected with an accident. When a certain number of points had accumulated, administrative action in the form of an advisory letter or an interview was taken; and, in appropriate cases, the operator's licence might be suspended under the Minister's statutory power to withdraw licences for any cause he considered necessary. Mandatory suspension of licences was provided for under other provisions, and violations in respect of which action was mandatory took precedence over point system action.

The discretionary nature of the system meant that the administrator could change point values at will and there was insufficient publicity to elicit any degree of co-operation from motorists. A further difficulty arose from the inaccuracy of certain types of source documents.

In many instances, there would be no actual apprehension of the driver committing a violation; the law-enforcement officer would simply record the licence number of the vehicle involved and lay a charge against the owner of the vehicle rather than against the driver. If the charge was settled out of Court by payment of a fine, the offence was of necessity charged against the operating record of the owner; and it was possible for owners to be debited with violations at a time when they were not driving the car. Driver-owners who were actually guilty of a violation could likewise deny that they were driving, and driver improvement under these conditions was difficult to administer.

A recent amendment to the Highway Traffic Act now requires the police in every case to stop the vehicle and secure the name of the driver.

THE SYSTEM IN PRACTICE.

The effect of Ontario Regulations 285/58 is to place the points' system on a formal basis and to standardize some of the hitherto discretionary powers of the Department of Transport. A table of points has been drawn up that is intended to reflect the comparative seriousness of various traffic offences.* The principle underlying the compilation of the table was expressed recently by the Registrar of Motor-Vehicles for Ontario:

> Not all violations are assessed the same number of points. Experience has shown that there is good reason to assume that accidents and violations are correlated, i.e., drivers who have more than the average number of violations will also have more than the average number of accidents. The study of accident causes shows that certain violations are better predictors of accidents than others. A two-year study on this subject, by reference to actual case histories, has just been completed by the Research Institute of the University of North Carolina for the American Association of Motor-Vehicle Administrators. The points which will be assessed are based on the findings of the Research Institute as well as on a study of accident causes in Ontario. Thus a conviction of failing to remain at the scene of an accident will be assessed nine points whereas a conviction for speeding at less than 10 m.p.h. over the limit will only be assessed two points.

When a driver is convicted of one of the specified violations, the Department is notified and the appropriate number of points is charged against the driving record of the person convicted. It is interesting to note at this point a wide discretionary power vested in the Registrar of Motor-Vehicles: if a resident of Ontario is convicted in another Province of Canada or in one of the United States for an offence which, in the opinion of the Registrar, is in substance and effect equivalent to an offence for which points would be recorded upon conviction in Ontario, the Registrar may record the demerit points for the conviction in the same manner as if the conviction had been made in Ontario for the equivalent offence.

As points accumulate, several levels of action are contemplated, according to the number of the points on the record; but points are eliminated from the record after two years and are no longer taken into account.

When a driver has accumulated six points he may be sent a warning letter setting out his record, and advising that any further addition will result in more drastic action being taken against him. The letter is sent in the hope that it will influence the recipient to drive more carefully and lawfully.

When a driver has nine or more, but fewer than twelve points, on his record, he may be required to attend before an official of the Department to show cause why his licence should not be cancelled. Hearings are to be conducted before specially-trained personnel who will endeavour to find the cause of the bad driving record and will attempt to convince the driver that he is capable of better driving. In appropriate cases, a

* For full table, see below.

further driving test may be given, or a medical examination required, and the driver may be placed on probation, or, if reformation seems unlikely, his licence may be suspended.

Matters to be considered by the hearing officer are to include the age of the driver, his occupation, his need for a licence, the number of miles travelled annually, and other related circumstances.

An accumulation of twelve or more points results in automatic suspension for a period of three months. Under prior existing law, suspension was mandatory upon conviction for drunk driving, driving while ability was impaired and criminal negligence, and also in certain other conditions relating to proof of financial responsibility and ability to pay a judgment for damages resulting from an accident.

The new points system now adds the possibility of automatic suspension as a result of a number of minor violations tending to indicate in a driver disrespect for traffic laws and disregard for the safety of other persons on the highway.

The Aim of the System.

The expressed aim of the points system is to effect driver-improvement and a reduction in the number of accidents on the highway by providing a graduated series of deterrents backed by the ultimate sanction of suspension. Time alone will tell how successful the system is in operation, but experience from other jurisdictions has shown that much may be achieved by the education of drivers to a greater realization of their responsibilities.

In Nova Scotia, an official recently reported that "we have found that the points system is not enough by itself but it will have a good long range effect. . . . [Its] chief value . . . is that it makes every driver think twice". When allied to the more severe penalties of the Criminal Code there is every reason to believe that the system represents a step forward in the promotion of highway safety.

The recording of a fixed number of points in respect of violations without regard to the particular circumstances might suggest a lack of flexibility. A Court, in entering a conviction, can take account of mitigating factors by imposing a nominal or a severe penalty as the case may be. In recording demerit points no such latitude is permitted, but the according of a hearing before any suspending action is taken would seem a sufficient safeguard against possible injustice.

Right or Privilege.

The legal aspects of the points system have received little attention, and it is likely that very few issues of importance will arise. The only two cases recorded in America on the subject (*South Carolina State Highway Department* v. *Harbin* (1955) 226 S.C. 585; 86 S.E. 2d 466; *Sturgill* v. *Beard* (1957) 303 S.W. 2d 908) concerned points systems created by administrative regulation without express legislative authority, and the decision in each case turned on the constitutionality of the statutory authority relied upon. American jurisprudence has adopted the view that a licence to operate a motor-vehicle is a "privilege" and not a "property right", but the Federal Courts have since held that, regardless of this classification or terminology, the freedom to make use of one's property, in this instance a motor-vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a "liberty", which, under the Fourteenth Amendment, cannot be curtailed or denied by a State without due process of law: *Wall* v. *King* (1953) 206 F. 2d 878.

In England, it has been held that a cab-driver's licence issued under the London Cab Order was in the nature of a privilege and could be withdrawn by the Metropolitan Police Commissioner without any prior notice or hearing (*R.* v. *Metropolitan Police Commissioner, Ex parte Parker* [1953] 2 All E.R. 717), although in the particular case it appears that notice and a hearing had in fact been given. The power to grant a licence implies a power to revoke or suspend, and the question will generally be whether the statutory provisions have been complied with.

However, an interesting judgment has recently been handed down by the Supreme Court of Alberta affirming the "right" to drive, as distinct from mere privilege (*R. ex rel. Christofferson* v. *Minister of Highways*). Alberta has a modified driver-demerit system whereby drivers convicted of a violation or found negligent in an accident must send the Highways Department proof of financial responsibility before they are permitted to drive again. One Christofferson, an Alberta resident who held licences in both Alberta and Ontario, was convicted of impaired driving in an Ontario Court. This Ontario licence was suspended for three months and the Alberta Motor Vehicle Branch was duly notified. It, in turn, advised Christofferson that his Alberta licence was suspended for six months, and his insurance agents told him that his policies were being cancelled. The difficulties with the insurers were over one, and Christofferson advised the Alberta Government of his financial responsibility, but the Department refused to return his Alberta licence. The matter was taken to Court, and it was argued for the Department that the Vehicles and Highway Traffic Act defined the "right" to drive as a privilege by providing hat the Minister might cancel or suspend any licence for conduct or infractions of the provisions of the Act or on being satisfied that the holder was unfit or "for any other reason appearing to the Minister to be sufficient". It has been considered sufficient in Alberta that a bad accident record, indicating an accident-prone driver, could be cause for the Department to refuse or suspend a licence. Mr Justice Egbert found that it was the Minister's duty under the law to suspend the licence in this case, but that the suspension was not to be for any definite period—only for the period until the driver produced proof of financial responsibility. He continued:

> Since time immemorial, the Queen's subjects have been free to move along the Queen's highways provided only that they keep the Queen's peace. . . . I know of no legislation which has reduced the inviolable right to drive into a privilege to be granted or refused because of the uncontrolled whim of some petty bureaucrat. Because it is my duty to be technically competent to drive, my right to drive is not destroyed, although it may be taken from me or suspended if I fail in the performance of my duty.

It would appear that the learned Judge considered that specific provisions in the Act took precedence over general powers, and that any action based on conviction or accident outside the Province must be limited to that authorized by the Act—namely, suspension until proof of financial responsibility was filed. The implications of this judgment could be of general

application, since most points systems are based on the general discretionary power of the Minister to suspend licences when he thinks fit. It seems unlikely, however, that such general powers will be affected by the co-existence of a points system, provided that the Minister takes action under appropriate authority properly and clearly delegated by the Legislature.

Table of Points for Ontario Demerit Points Sys em.

Violation	Number of Demerit Points
Criminal negligence involving the use of motor-vehicle	12
Driving while intoxicated	12
Driving while ability to drive is impaired	12
Obtaining licence by misrepresentation	12
Failing to stop at scene of accident	9
Careless driving	5
Racing	5
Exceeding speed limit by 30 m.p.h. or more	5
Exceeding speed limit by more than 10 m.p.h. and less than 30 m.p.h.	3
Exceeding speed limit by 10 m.p.h. or under	2
Failing to yield right-of-way	3
Failing to obey a stop sign or signal-light	3
Failing to report an accident	3
Improper passing	2
Failing to share road	2
Improper right turn	2
Improper left turn	2
Failing to signal	2
Improper driving where highway divided into lanes	2
Driving to left of centre of highway when prohibited	2
Failing to stop for school bus	2
Unnecessary slow driving	2
Wrong way on one-way street	2
Following too closely	2
Improper passing of street car	2
Lack of caution meeting animals	2
Improper opening of vehicle door	2
Pedestrian cross-over violation	2

BANKRUPTCY: FRAUDULENT PREFERENCE.

By G. Cain.

It is common knowledge that one of the essential ingredients of the doctrine of fraudulent preference is that the debtor must prefer; prefer knowingly and voluntarily. Section 79 (1) of the Bankruptcy Act 1908 condemns payments made by the debtor

> . . . with a view to giving that creditor . . . a preference over the other creditors. . . .

The heresy raised in these notes is that the intentions of the debtor should be irrelevant and that the principle should rest upon whether an unfair preference has in fact taken place.

Two fairly recent cases show the difficulties the Court encounters in endeavouring to decide what the debtor's intentions are. In *Re T. W. Cutts (A Bankrupt), Ex parte Bognor Mutual Building Society* v. *Trustee in Bankruptcy* [1956] 2 All E.R. 537, a solicitor who had stolen money belonging to various clients generally (which matters were under investigation by the Law Society) had also failed to account to his principal client, the Building Society, for £3,300 (an incident not then known to the Law Society). He was negotiating with a solicitor-employee of his for the admission of the employee into partnership with him (or for sale of his practice to the employee if he were struck off the Roll by the Law Society). This employee was also a director of the Building Society and was aware of all the thefts. He had persuaded the solicitor to pay the Society the £3,300 stolen. The Society was unaware of the theft apart from any question of constructive notice of its director.

The payment was attacked as a fraudulent preference, and, by a majority decision, the Court of Appeal held that there had been a fraudulent preference.

Here, in all conscience, was a mixed bundle of motives. Did the bankrupt pay the money to avoid risk of discovery by the Law Society of his fraud on the Building Society? What weight was to be given to the knowledge of the employee and his desire to keep the scandal from the Society so that when he became a partner in the firm, or purchaser of it, his business relations with the Society could continue? Was the debtor under pressure of any sort, not indeed from the creditor concerned, but from this employee as a third party, and if so, was this pressure such as to remove from him his freedom of choice?

The bankrupt's own evidence that he did not intend a fraudulent preference was not accepted. The question of motive and intent was fully traversed and the dissenting judgment of Jenkins L.J. draws attention to the onus on the trustee in bankruptcy of proving not only the fact of payment and a resulting preference, but also the bankrupt's intent to prefer. At p. 545, he proceeds:

> He need not in order to discharge that onus prove the bankrupt's intent to prefer by direct evidence or by circumstantial evidence of which such intent is the only possible explanation. It is enough if he proves facts of which the intent to prefer is so much the most probable of the possible explanations that the Court can on the ordinary principles governing the trial of an issue of fact properly hold it to be the true explanation.

He observes (at p. 553) that a payment cannot constitute a fraudulent preference unless it is voluntary, but it does not follow that every voluntary payment which has the effect of giving the creditor paid a preference over the other creditors is a fraudulent preference. The question still remains: what was the view or intent?

His Lordship found on the facts there was no preference, and that the bankrupt may well have considered that he had no option but to pay the money to the Society. The other two members of the Court thought otherwise on the facts.

Thus can high judicial opinion differ on the application of the law to the facts. Not that this is anything new; but, if the rule were reduced to the Official Assignee's having to show the *fact* of preference without proof of intent, the area of uncertainty would be substantially diminished and, it is submitted, justice would be more fairly done.

Proof of intent is not always easy. Men are often

actuated by various reasons for acting as they do and they will often profess, or permit to be inferred, grounds which cloak their real reasons. Against the statement that the state of a man's mind is just as much a matter of fact as the state of his digestion, we can balance the old tag that the devil himself knoweth not the thoughts of a man. The problem is not made easier if the Court considers the debtor's own evidence as to his intentions should not be accepted. The Court can, apart from simply disbelieving him, evidently attribute to him a "constructive intention" and refuse to accept the reasons he gives for the payment.

Turning to a case nearer home (*Re Aston (A Bankrupt), Ex parte Official Assignee* [1956] N.Z.L.R. 703), Gresson J. had to consider whether a debtor who made deposits in his bank against his overdraft was giving the bank fraudulent preference. Various reasons for the deposits were advanced by the debtor, such as hope of further accommodation; a wish to protect the bank manager, who wanted the account down before he retired; that the manager had told him Head Office wanted all overdrafts down; that the bank might close his business if he did not make the reduction. As the Court, at p. 705, said:

> It is very difficult to form an opinion as to what was the real dominant or substantial motive of the debtor in making lodgments when, as here, there may have been several reasons operating.

A variety of reasons were thus deposed to and stood uncontradicted. It was not possible, the Court thought, to extract any one of them as the substantial, effective, dominant motive. The conclusion was that an intention to prefer the bank could not be collected from the variety of reasons advanced.

If we look at other provisions in the Bankruptcy Act which are designed to prevent the estate from diminution because of particular acts of the bankrupt, we do not find intent a noticeable feature of them.

The order and disposition section (s. 61 (c)) operates to sweep into the pool property the bankrupt does not own; if he had any option in the matter he would, one would think, normally prefer to have the true owner get back his own goods.

Section 75, which avoids certain voluntary settlements, operates irrespectively of proof of the settlor's intent. The *fact* of the settlement is enough.

Similarly, with s. 76 as to improvement of wife's property, and so on.

The *fact* is enough; intent to defraud may not be present; the husband may be solvent at the time; nevertheless, if bankruptcy occurs within two years, the wife must account to the pool. Similarly with marriage settlements caught by s. 78.

Then, an instrument by way of security securing past advances is void if executed within four months of adjudication. This provision, s. 79 (2), a subsection of the very section dealing with fraudulent preference, has no element of intent. The grantee under the instrument loses his rights irrespectively of any wish of the bankrupt to prefer him. In fact, we have the anomaly that a creditor who uses threats to obtain his debt may retain the money, because the debtor has not exercised free preference under s. 79 (1); but a creditor who insists on the lesser requirement of security for a past debt may have to forgo that security under s. 79 (2). Such appears to be a result of this inelegant New Zealand addendum to the United Kingdom fraudulent-preference section. Again, ss. 18 and 19 of the Chattels Transfer Act rendering unregistered instruments void against the Official Assignee have no element of "intent" on the part of the grantor. The grantee simply stands down in favour of the Official Assignee.

Thus, all these provisions designed to do justice among the general creditors of the bankrupt operate if in fact their respective requirements are met; and the Court is not asked to embark on the difficult inquiry of ascertaining what was in a man's mind and which motive out of several was the "dominant" motive.

Why could not the doctrine of fraudulent preference be put on the same basis? In fact one is inclined to ask why was it ever mounted on this unruly horse "intent". Is there some reason ex hypothesi which demands that intent be an ingredient? It is hard to see why. The use of the words *fraudulent* preference certainly suggests intent, but common-law fraud is not a necessary element in the doctrine.

The basic concepts of the bankruptcy legislation are, it is submitted, first, to free a man from debts he cannot meet; and, secondly, to distribute all property that he has, or should have, among his creditors upon an equitable basis. If, with bankruptcy imminent, he takes steps which result in one particular creditor getting paid in full while others must share in what is left, is not this second principle departed from? And this whether the debtor had a dominant intent to prefer or merely a subsidiary intent, or no intent at all.

If the bankrupt's estate is to be fairly distributed its contents should not be affected by artificial rules that the debtor's intentions must first be collected and then analyzed to see which motives are dominant and which are not. Surely the fund available is affected by the *fact* of one creditor getting paid in full. Why he was so paid is irrelevant. It is small comfort to the remaining creditors to learn that the lucky creditor can retain his total debt because the Official Assignee could not prove that the debtor's intent to prefer was his dominant motive but succeeded in showing it was a subsidiary one.

Then there is the well-established rule that fraudulent preference is not established if the payment was made under pressure from the creditor concerned. It is this rule which shows, it is submitted, how far away from justice s. 79 (1) leads us. There must be intent to prefer, and it follows that if the creditor, by virtue of his position, brings pressure to bear upon his debtor to get paid, there is no fraudulent preference because the debtor is not a free agent and has not made a free selection. This is inescapable if the voluntary, "uninfluenced" intent of the debtor is the test. But why should not the creditor's actions be open to examination? He has, by what could well amount in contract to undue influence, used his advantage to get payment of his debt in full while the other creditors suffer pro tanto.

It has been said that "the very circumstances which would render inadmissible a prisoner's confession render unassailable a debtor's payment": *Williams on Bankruptcy*, 17th ed., 357. Hence, the creditor can keep what he has obtained for himself by threats, but the prosecution cannot keep its confession. What an unusual situation that the law which seeks anxiously to preserve equality in distribution of funds insufficient

to meet all claimants, and which by the use of a doctrine such as relation back can reopen past transactions and by this and other means actually enlarge the fund at the expense of those who may well be entirely innocent parties, will shut its eyes to a flagrant exaction by one creditor of his debt in full and leave him to keep it because of the very fact that he did use pressure and therefore the debtor did not prefer him!

It may be objected that such a creditor may have to disgorge because of the operation of s. 82. This "good faith" section protects indeed bona fide payments (i.e. not those made in fraudulent preference, etc.) made to creditors if payment is made before adjudication and the creditor had no knowledge of the commission of an act of bankruptcy by the debtor. If the creditor had such knowledge, then, of course, he may be caught by the relation back doctrine and may have to suffer reopening of the transaction. But this section is not a satisfactory answer. There may be no proof or admission of knowledge in the creditor of any act of bankruptcy, although he may know well enough the set of the tide. Moreover, relation back extends for three months only, and then on conditions; fraudulent preference operates for six months without conditions.

It is submitted that s. 79 (1) should be amended by deleting the words:

> . . . with a view to giving that creditor a preference . . .

and substituting:

> . . . which has the effect of giving that creditor a preference. . . .

It is not suggested for a moment that this wording is ideal. Perhaps it would be better if it read:

> which has in the opinion of the Court the effect of giving that creditor an unfair or undue preference. . . .

The Court must plainly still be left with wide discretion. Many payments may have been made by the bankrupt before his adjudication in the ordinary course of business and need not fairly be disturbed. What is suggested, however, is that the difficulties in proof of intent should be removed and the point be decided upon whether, on the facts, one creditor has obtained an unfair advantage over others.

Further, the use of "fraudulent" in the marginal note and at the end of the subsection should be dropped. Under present law there need be no element of fraud in a preference which is avoided under the section. While we would thus be deprived of a convenient and long-standing expression, it has been rightly suggested that "voidable preference" is a more precise description of the doctrine (see e.g., *Williams, op. cit.*, 357).

Lastly, the doctrine does not apply to the Crown. All debtors who prefer the Crown are considered to be acting with perfect propriety. It is altogether right and proper that debtors should take all possible steps to see that the Crown, as the creditor nearest and dearest to them, should be paid first. Such a noble sentiment writ deep in the hearts of every citizen, etc., etc. will not be denied operation by applying to it the taint of fraudulent preference.

However, the progressive acceptance by the Crown of the principle of equality with its subjects, and the increasing tendency of the Crown in its various capacities to become a creditor of most of its subjects, render the rule obsolete. It seems more reasonable that the Crown should, in general, accept the same position as its subjects when competing with them for limited funds.

"Chattel."—"There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then [*sic., se.* "than"] by its own weight it is generally to be considered a mere chattel; see *Wiltshear* v. *Cottrell* (1853) 1 E. & B. 674; 118 E.R. 589 and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory* (1866) L.R. 3 Eq. 382. Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. . . . Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." Blackburn J., in *Holland* v. *Hodgson* (1872) L.R. 7 C.P. 328.

Retrospective Statute.—In *Re Athlumney, ex parte Wilson* [1898] 2 Q.B. 547, 551, Wright J. said: "Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretration, it ought to be construed as prospective only."

THE CHRISTCHURCH LAW LIBRARY.

The library adjoining the Supreme Court building at Christchurch was erected in 1896. Although a new Supreme Court building had been planned some years ago and its foundation stone laid in the presence of a distinguished gathering, the work was not proceeded with. As time went on, the general opinion hardened in favour of retaining and renovating the old structure. The interior of the library had been rearranged from time to time, but it had become overcrowded, and radical measures were needed to make the library function as an efficient instrument of legal research.

One obstacle to reform had been the fact that the President of the District Law Society held office for only one year, and the composition of the Council was determined by annual election. It was beyond the power of any individual to plan and bring about the very considerable changes required in the library. When it became apparent that long-term planning and dedicated work were needed, a permanent advisory Library Committee was set up by the Council, and worked over several years in planning the necessary reconstruction, and in anticipating and ameliorating, so far as possible, the gross disturbance which inevitably would occur to all those in Christchurch who served the law. The Committee worked upon the principle of reaching unanimity in all its recommendations, and upon a division of labour appropriate to the wishes and capabilities of its members.

The Department of Justice and the Ministry of Works provided the finance and the architectural and other services necessary. Plans were evolved in a series of meetings in the library between departmental officials and the Committee. The nature of the old stone building, with its hammer-beamed roof, the cost and difficulty of alterations, and the special requirements of a law library, imposed a heavy task upon the ingenuity of the architects and, later, upon the patience and skill of the craftsmen employed. But at last the plans were agreed upon by all concerned. One happy day the work was authorized. A few days later, on November 27, 1958, demolition of the interior was begun.

Although the work was anticipated and had been long hoped for, the coarse accompaniments of human labour came as a shock to many who, for most of their working lives, had been accustomed to the old library. Shock succeeded shock; but in a few days the point of no-return had been reached, and users of the library then underwent the painful experience of disturbance to habit—with the certain prospect of worse to follow.

One serious difficulty was to remove the 14,000 books and set them up in temporary quarters so that most of them would be reasonably available at all times. When demolition began, the physical drudgery of removing the books was lightened in its initial stages by the use of prison labour. and this had its amusing aspects. It was at times difficult for the uninformed observer to distinguish between the prisoners and the practitioners who were helping them, all in most dusty and frustrating conditions. But the ancient association between the profession and this class of citizen soon bore fruit in harmonious work. Indeed, old acquaintances were discovered, and perhaps, new clients. It was touching to note the interest shown by some unfortunates, in the apparatus of the law, which in the past had helped them, or had hindered them from helping themselves.

The Library Committee, strengthened by a number of young practitioners and law students, did most of the carrying of books from the library to the ambulatory of the Supreme Court building, where temporary accommodation had been improvised for about half the books, the remainder being disposable about the courtroom. The problem was to decide which books would be needed and which could be left in heaps for several months. The arrangements worked well, but it is worth remarking that there is no knowing what most unlikely book may be wanted by which most unlikely person. Research became quarrying; and explosive sounds could at times be heard.

The Committee was fortunate in having the help and encouragement of their resident Judge, who must have been often more than inconvenienced—he could at times be seen among heaps of unclassified books and errant rubble, searching for a missing volume or for some mislaid unbound part. *Fiat justitia ruat coelum*, was the order of his day!

As the work progressed, or failed to progress, unforeseen difficulties arose. Then the President of the Society would interpose his well-considered fiat, or the Librarian, most uncomplaining of men, would add the oil of his good nature to the vinegar of complaint. The book-laden caravan moved on.

Most of the voluntary work of removal, and later, when the library was remodelled, of replacement, was done on Saturday mornings, over a period of several months and it was amazing to see the extraordinary clothing worn by the profession at the weekend. However, this concours d'elegance agitated much dust, and after many man-hours had accumulated, time came for rest and refreshment. Time then for the older men to indulge in their traditional legal role of answering questions, as the discovery of books and documents produced requests for information. These occasions arose with delightful spontaneity, and were inspired by incongruous physical surroundings and by the strange juxtaposition of power-machines and old iron presses, books and bricks, plastics and antique metal ink-pots, fluorescent lighting equipment and incredible Victoriana. And all pervading dust! In, around, about and upon each and every person and thing, all day and every day! These occasions were also brought about by the pattern of order emerging from wreckage and chaos, a pattern stimulating to the legal mind.

If, in Samuel Butler's concept of life after death,

> We shall not argue saying "'Twas thus" or "Thus",
> Our argument's whole drift we shall forget;
> Who's right, who's wrong, 'twill be all one to us;
> We shall not even know that we have met.
> Yet meet we shall, and part, and meet again,
> Where dead men meet, on lips of living men.

then, a host of dead judges, magistrates, registrars and deputies, bailiffs, criers, lawyers, law clerks, and librarians must often have crowded upon the sad Stygian shore to share a revivifying draught from the legal cup, fragrant with the unique odour of old leather,

ancient paper, and immemorial dust.

For those fortunate enough to be present in the flesh, there came the transient interplay of ideas; boredom and delight; happy and less happy moments —then time to leave the companionable rubble and the harsh law, the litter and mess, the beautiful old folio and the garish rexine. Another good Saturday!

Although care was taken not to damage the volumes, there were times when hatred of books in heaps arose and overcame scruple. Out they had to go, and aroused no pity if they fell. The broken array became a rabble, disentitled to chivalrous usage. They had outgrown their confined habitat, and their inchoate numbers provoked their porters, those patient men who had endured them for so long.

In the ambulatory the books were professionally cleaned. Their return to the new shelves was physically less burdensome, but much time was consumed in sorting and arrangement.

The new library is now a pleasure to work in. A red carpet, blue-topped tables, light-coloured pinus shelves and a blue and rod staircase give colour; and generous warmth comes from a heating system laid under the carpet. New has been skilfully and artistically blended with old, and the beamed roof, the stained-glass northern window, and the new well-proportioned gallery create an atmosphere reminiscent of libraries in Oxford and Cambridge. Indeed, it may be said that this library is a monument to the work of the many who shared in its reconstruction. It is a fitting repository in New Zealand for the legal genius of the English-speaking people, and an inspiration to all who labour in it in the law.

A. C. Brassington.

MORTGAGE: MORTGAGEE SEEKING SALE THROUGH REGISTRAR.

Invalid Notice.

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

There is not much melodrama in the working life to a conveying counsel, but as one who has always liked drama with a sneaking regard for old-time melodrama (much more enjoyable than this wretched modern detective stuff) I have been intrigued with the melodrama implicit in *Jaffe* v. *Premier Motors Ltd.* (to be reported), the other party being the Registrar of the Supreme Court of New Zealand at Auckland.

The time is the last day of September and the scene is the Supreme Court at Auckland. On the day after the morrow the stage will be set for a Registrar's sale (the New Zealand procedure in lieu of the old foreclosure action by a mortgagee). The mortgagee has given a notice purporting to be issued under s. 92 of the Property Law Act 1952: the papers have been filed in the Supreme Court and accepted by the Registrar, and the necessary advertisements have been inserted in the newspapers.

The amount at stake is considerable, the mortgage securing the sum of £27,618 odd. The mortgagor seeks an injunction restraining the sale against the mortgagee and also, of course, against the Registrar of the Supreme Court.

The next day, Mr Justice Shorland observes:

> The sale is fixed for tomorrow afternoon, and it is important that this matter be decided without delay.

There must have been a breathless hush in the Supreme Court that last day of last September when, after hearing argument on the injunction proceedings, His Honour reserved his decision for one day.

The case is interesting for another reason, for it is very rare for an advertisement announcing a Registrar's sale to be followed by injunction proceedings; but there was no other remedy open to the mortgagor, if, as he alleged, the mortgagee had failed to give a valid notice under s. 92 of the Property Law Act 1952: the mortgagee, of course, had served a notice of default on the mortgagor, but the mortgagor's counsel had submitted it was invalid. We all know how serious the consequences may be to a mortgagor if the mortgagee exercises his power of sale, and the Legislature must have had that in mind when it passed s. 3 of the Property Law Amendment Act 1939, which is now s. 92 of the Property Law Act 1952.

In the fourth edition of *Garrow's Law of Real Property in New Zealand*, 4th ed. 499, I inserted the following note:

> The effect of s. 92 of the Property Law Act 1952, is to alter the law as stated in *McDuff* v. *Rea* [1937] N.Z.L.R. 922; [1937] G.L.R. 593—namely, that where such default in payment of interest had been made as entitled the mortgagee to exercise his remedies, subsequent tender of arrears did not purge the default: *Supplement No. 1 to Ball on Mortgages*, p. 12.

In *McDuff* v. *Rea*, the mortgagor covenanted to repay the principal sum under a memorandum of mortgage on August 29, 1925, and the mortgagee agreed not to call it in before May 29, 1930, unless default was made in payment of interest on the appointed days. In the event of such a default continuing for fourteen days the mortgagee had power to sell the mortgaged property. The mortgage ran on after May 29, 1930, and, on application being made in 1937 for relief under the Mortgagors and Lessees Rehabilitation Act 1936, it was ordered that the mortgage be extended to February 28, 1942, and that the mortgagor pay the mortgagee weekly sums of 30s. in respect of interest as from February 28, 1937, to be applied as directed by the order. On June 7, 1937, a cheque for five weekly instalments calculated from May 2, 1937, was tendered to the mortgagee's solicitors but it was declined on the ground that the mortgagee intended to exercise her power of sale.

Sir Michael Myers C.J. held that, inasmuch as the weekly payments due on May 9 and 16 were not tendered until June 7, default in payment had con-

tinued for more than fourteen days, and consequently the rights and powers of the mortgagee had accrued: that she was not bound to accept any subsequent tender of arrears; and that, in the circumstances, she was entitled to exercise the power of sale and incidental powers contained or implied in the mortgage.

As Shorland J. points out, s. 92 of the Property Law Act 1952 in effect provides that no power to sell land conferred by any mortgage shall become exercisable, and no moneys secured by any mortgage of land shall become payable by reason of any default in payment of any moneys secured, or in the performance of any covenant expressed or implied in the mortgage, unless or until the mortgagee serves on the owner of land a notice specifying the default complained of, the date on which the power will become exercisable or the moneys will become payable, and requiring the owner to remedy the default, and the owner fails to remedy the default before the date so specified. It may be pointed out here that the date to be specified in the notice shall not be earlier than one month from the service of the notice nor earlier than the date on which the power would have become exercisable if the section had not been passed.

Now, what was the form of the notice which the mortgagee had served on the mortgagor, now desperately interested in preventing a forced sale of his property the day after the morrow? The crucial provision in the Memorandum of Mortgage was cl. 5 which contained a provision to the effect that, if the mortgagor made default in any matters, then the principal sum would at the option of the mortgagee become immediately payable without notice. The notice given in this case correctly specified in its recitals certain breaches of covenant. It also recited so much of cl. 5 of the mortgage as purported to provide that upon the happening of defaults as were recited, the principal moneys secured became due and payable; and, finally, it called upon the plaintiff "to remedy the said defaults by making payment to the mortgagee of £27,745 odd, being all the interest and principal plus rates owing, or which could be owing under the mortgage".

But, His Honour pointed out, upon the construction which he had given to s. 92 of the Property Law Act 1952 and cl. 5 of the mortgage, the principal sums secured by the mortgage were not payable unless the mortgagor failed to remedy the breaches of covenant within the time fixed by the notice. It followed that the mortgagor was not bound by law to pay the principal sum in order to remedy the defaults complained of. In the result, the notice given was one which not merely required the mortgagor to remedy the defaults, but also required him to repay the principal as well.

The point which His Honour had to consider was whether or not a notice which required the mortgagor not merely to remedy the default but also to pay the principal sum, complied with s. 92.

In support of his submission that the notice was valid, counsel for the mortgagee cited the Privy Council case *Campbell* v. *Commercial Banking Company of Sydney* (1879) 40 L.T. 137; but His Honour did not think that the notice in the instant case fell within the principle of that case. His Honour accordingly held that the mortgagee was not entitled to exercise his power of sale then, and that the mortgagor was entitled to an injunction restraining the sale. In the course of his judgment, the learned Judge said:

> One of the objects of s. 92 is to ameliorate the effect of a provision in the mortgage which makes the principal sum payable if there is default in other matters. Its purpose in this respect is to require that a mortgagor will be notified in writing of any breaches of covenant, which would, but for s. 92, make the principal sum payable, and be given a period of time within which to remedy these breaches, and thus receive the opportunity of escaping the calling up of the principal sum. If in a case such as the present, in which the very purpose of s. 92 is to ensure that a mortgagor will have an opportunity of escaping the calling up of the principal sum and that he will receive a notice that will give him that opportunity, a notice which demands payment of the principal sum denies the mortgagor the very privilege the section was intended to give, such a notice is not merely a notice which demands an excessive sum, it is a notice which defeats the very purpose for which the section requires it to be given.

And so the curtain fell; the first act of the drama was over: what next?

Family Protection.—In *Bosch* v. *Perpetual Trustee Company Limited* [1938] A.C. 463, Lord Romer, in the course of delivering the judgment of their Lordships, said at pp. 478-9: "Their Lordships agree that in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father. This no doubt is what the learned judge meant by a just, but not a loving, husband or father. As was truly said by Salmond J. in *In re Allen (Deceased), Allen* v. *Manchester* [1922] N.Z.L.R. 218, 220; 'The Act is . . . designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances." In *Dillon* v. *Public Trustee* [1941] N.Z.L.R. 557, 560, Viscount Simon L.C., in the course of delivering the judgment of their Lordships, said: "What the statute does is to confer on the Court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorises the Court to interpose and carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Pyramid Case.—Although it has lurked like some Juggernaut behind the legal consciousness of the Dominion, some of the salient features of the Pyramid mower hearing would seem worthy of record in this column, although whether Christchurch practitioners will count among its more avid readers is more open to question. A hearing that lasted 151 days, extended over seven-and-a-half months, and was nearly four times as long as the previous longest New Zealand case, must qualify for a record among civil cases heard anywhere in a British Court. A million words of evidence, sixty witnesses, and counsels' addresses for almost forty-three days is certainly impressive. The plaintiff, Pyramid Machines Ltd., alleging breach of contract to develop, manufacture, and deliver mowers, claimed £55,623 against W. H. Price & Son Ltd., a Christchurch engineering firm, which claimed the failure of the hydraulically-driven agricultural mower to operate properly and sought by way of counter-claim £51,608 for the cost of producing the mowers and for losses incurred. The length of the case is said to exceed by a third that of the civil hearing of the celebrated Tichborne trial; and, although the criminal trial arising out of the claim of the Wagga Wagga butcher lasted for 188 days, Pyramid enthusiasts point out that the evidence in the Christchurch case (2,769 foolscap pages) and a number of exhibits (430 or so) far exceeded the Tichborne evidence. No doubt in future the Pyramid hearing will be quoted as a classic example of counsels' under-estimation, since their confident expectation was that it would last no more than two or three weeks. When His Honour (F. B. Adams J.) said at the end of the addresses: "I shall, of course, take time to consider my judgment", this announcement came as no shock to those whose hopes for an oral decision had monthly become fainter. It is a matter of interest to the many who have become serially engrossed in the case that submissions of counsel have been confined solely to liability, and the question of damages may well have to be argued at some future date.

Damages Note.—"At present the signs are that the next election will be fought on how much reduction in taxation will be offered. Surely New Zealanders have a soul that cannot be valued in cash, specially cash of a diminishing value."—Dr O. C. Mazengarb Q.C., summing up the main ideas that emerged from papers read to and discussed by the two-day convention in Wellington of the Constitutional Society.

The Personal Touch.—In *The Queen* v. *Kinzett*, counsel for the accused (N. R. Taylor), in seeking to test the recollection of a barman called as a Crown witness, asked him if he remembered the conditions in his bar on a particular date last September. The witness claimed that he did. "Do you remember me being there" inquired counsel. The Associate said that she had not fully heard the question. "Do you remember me being there" repeated the Judge (McCarthy J.) for his Associate's benefit. "No, I can't say that I do recall your Honour being there", replied the witness, amidst laughter. This exchange reminds Scriblex of a story told by Sir Travers Humphreys in his *Criminal Days* of a case before Sir Peter Edlin Q.C., when acting as Assistant Judge at the Middlesex Sessions. A certain counsel who had a habit of identifying himself with his client was defending a person charged with assisting in the conduct of a disorderly house. The defence was that the accused was a mere servant who was unaware of the improper character of the premises. His speech took this form: "Gentlemen, surely we can all put ourselves in the position of my client. We all know what happens in such a case. We go to the house with the woman of our choice, or maybe we rely upon the keeper of the house to supply what is desired; we ring the bell, the door is answered by a servant; what is it to him that you or I are upon an immoral errand; we merely leave our hats and coats with him, or perhaps the more experienced of us do not even trust him to that extent. It has happened to every one of us over and over again, etc., etc.". By this time half of the jury were highly indignant and the other half grinning with delight. It is said that Edlin interrupted with the observation: "Mr Blank, may I suggest that you should reserve the recital of your further experiences at this establishment until you come to write your reminiscences".

Picture of a Lawyer.—"Motion pictures and theatrical performances have portrayed the lawyer in a guise the real attorney would have difficulty in recognizing. He is pictured as a handsome, dynamic, swaggering hero, who defies gangsters and orders judges to perform his every command. His secretary is always desperately in love with him, and all the successful businessmen of the metropolis stand in line and vie with each other to offer him munificent retainers, which he scorns. This romantic conception is rarely, if ever, justified by the facts. The truth is that the real lawyer is hardly a picture worth describing. He is doing nothing worth watching or recording. He is just busy working." Cutler, *Successful Trial Tactics* (New York).

From My Notebook:

In British legal history, the only known case of a Court committing the jury to prison for acting in defiance of its instructions is that of the trial in 1670 of William Penn and William Mead charged with conspiring to procure an unlawful assembly in Gracechurch Street, London, after Penn discovered that the Quakers' meeting house had been locked against him. The determination of one of the members of the jury was such that he sat on, deprived of food and drink, until they returned a verdict of "Not Guilty". (This is the first of a series of famous trials selected by Lord Birkett for the B.B.C.).

"One point, however, which should be stressed, and which is not always sufficiently appreciated by inexperienced psychiatrists, is that paedophiliacs—men who are prone to molest boys—should not in any circumstances be allowed to continue in work involving contact with children or youths. Thus, if a paedophiliac schoolmaster is put on probation, a change of occupation should be insisted on as a condition."—Dr W. L. Neustatter, M.D., B.Sc., M.R.C.P., Physician in Psychological Medicine at the Royal Northern Hospital, London, writing on "The Homosexual Offender".

TOWN AND COUNTRY PLANNING APPEALS.

Arthur *v.* New Plymouth City Corporation.

Town and Country Planning Appeal Board. New Plymouth. 1959. March 20.

Zoning—Objection—Jurisdiction—Area Zoned as "Industrial A"—Property with Dwellinghouse thereon—Application for Authority to use Land as Garage, Service Station, and Warehouse—Approval given Subject to Conditions—Appeal against Conditions—"Panel-rolling" alleged as not being equivalent to "Panel-beating"—Question raised on Appeal not put to Respondent—Scheme still in Undisclosed Stage—Jurisdiction declined—Town and Country Planning Act 1953, s. 23.

Appeal by the owner of a property situate in Devon Street West, in the City of New Plymouth, containing 1 ro. 1.6 pp. more or less, being Section 221 on the public map of the Town of New Plymouth.

This property was in an area zoned under the respondent Council's undisclosed district scheme as "industrial A". There was a large dwellinghouse erected on the property and the appellant sought authority to use the land as (1) a garage and service station, and (2) a warehouse.

The Council granted the permission sought in the following terms:

"That in reply to his letter asking for permission to utilize the land he has recently purchased at the corner of *Devon* and *Weymouth* Streets as a site for a workshop garage-service station and-or warehouse Mr J. Arthur be informed that approval is given subject to the undermentioned conditions:

(a) The above approval is given as to use only;

(b) If it is intended to alter, re-construct or add to the existing building situated on the site for either or both of the above uses the applicant must first obtain the approval of the Council and comply with the Council's Building By-laws and the Code of Ordinances as to coverage before a permit will be issued.

(c) If it is intended to erect new premises on the site then the applicant will be required to submit a site plan showing the relationship between the site area and the situation of the proposed building(s) before final consent will be given;

(d) The applicant will also be required to obtain the approval of the Motor Spirits Licensing Authority for the installation of any petrol pump intended to be erected on the land;

(e) The applicant is warned that in no circumstances will the Council permit panel-beating to be carried out on the site either as a major or ancillary use."

The judgment of the Board was delivered by

REID S.M. (Chairman). Commercial garages and warehouses are predominant uses in an "industrial A" zone and prima facie the appellant was granted what he had applied for. He wishes, however, to utilize part of the premises for "panel-beating" and in essence his appeal is directed to the warning given by para. (e) of the conditions set out above and is in effect an application to have the zoning of his area altered from "industrial A" to "industrial C" as panel-beating is only permitted in "industrial C" zones.

As the Board has indicated in many previous decisions, it will not alter zoning of any land under an undisclosed district scheme at the request of any one individual because to do so might well prejudice the rights of other owners of land in the area to object under s. 23 when the scheme is publicly notified.

In his opening address, counsel for the appellant, intimated that he proposed to call evidence directed to establishing that a modern process known as "panel-rolling" is a totally different process from "panel-beating", and that he would ask the Board to give a decision or an expression of opinion on this question. The Standard Code of Ordinances contains no reference to "panel-rolling" though "panel-beating works" are referred to in Appendix B (Fourth Schedule—Town and Country Planning Regulations 1954, p. 56).

Counsel for the respondent submitted that this was the first occasion upon which the appellant, or anyone on his behalf, had made any mention of "panel-rolling" as distinct from "panel-beating"; the question of whether or not there is any distinction between the two had never been put to the Council for consideration.

The Board does not consider it has jurisdiction to give a decision which might be tantamount to an amendment to the Standard Code of Ordinances, at least while a scheme is still at the undisclosed stage, but that, even if it had jurisdiction, it would not give a decision or express an opinion on a question which had at no time been put to or considered by the Council.

The appeal is disallowed.

The Board orders that the appellant pay the Council costs in the sum of six guineas.

Appeal dismissed.

St. Luke's Church Trust Board and Mount Albert Baptist Church *v.* Mount Albert Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 5.

Church Buildings—Churches and Buildings erected for Religious Purposes—"Predominant Use" in Residential Zones—Ordinance Amended—Town and Country Planning Act 1953, s. 26.

The facts sufficiently appear from the judgment.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Town and Country Planning Appeal Board by consent doth hereby order:

(A) That the decisions of the respondent disallowing objections by the appellants on December 15, 1958, be and the same are hereby reversed and that Churches and other buildings erected and used only for religious purposes be and they are hereby designated a predominant use in residential zones provision for which is made in Ordinance (9) of the Code of Ordinances which forms part of the respondent's proposed district scheme under the said Act.

(B) That Clause (1) (which relates to "Residential Zones") of Ordinance (9) of the said Code of Ordinances be and the same is hereby amended in respect of the following matters and to the extent indicated hereunder—namely:

(1) By inserting in subcl. (i) thereof (which specifies the "predominant uses" in residential zones) after paragraph (c) thereof the following additional paragraph:

"(c) (i) Churches and buildings erected and used only for religious purposes."

(2) By omitting from subcl. (ii) thereof (which specifies the "conditional uses" in residential zones) paragraph (a) thereof—namely, "Churches and buildings erected and used only for religious purposes".

(3) By adding to the heading of subcl. (iii) thereof—namely, "Bulk and Location Requirements for Predominant Uses" the words "except Churches and buildings used only for religious purposes".

(4) By adding a new subcl (iv) thereto as follows:

"(iv) *Bulk and location Requirements for Churches and Buildings erected and used only for Religious purposes as a Predominant Use.*

(a) *Building Height*

Height restrictions (in relation to site boundaries).

No part of any building shall exceed a height equal to 10 feet plus the shortest horizontal distance between that part of the building and the nearest site boundary PROVIDED THAT "height" for the purposes of the foregoing height restriction shall be measured from the mean ground level of such of the external walls (or parts thereof) as are situated less than 20 feet from the respective boundary.

(b) *Yards*

Front yards—a depth of at least 25 feet
Rear yards —a depth of at least 20 feet
Side yards —a depth of at least 10 feet

(c) *Site Coverage*

The coverage shall be not greater than 40% of the site.

(d) *Density*

Minimum frontage—60 feet.
Minimum area —40 perches."

Appeal allowed.