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TRADE PRACTICES ACT 1958: INTERPRETATION OF TERMS.

IN our last issue (*ante*, p. 337), we considered that part of the first judgment of the Trade Practices Appeal Authority, Judge Dalglish, in *Re Wellington Fencing Materials Association*, which relates to the onus of proof that an agreement or arrangement is contrary to the public interest

Other parts of the judgment of the Appeal Authority interpreting several provisions of the Trade Practices Act 1958 are also of permanent value to those whose professional duty includes appearances before the Commission.

On the evidence before it, in the view of Judge Dalglish, the Commission was entitled to find as facts that the members of the Association had entrusted to their executive the formulation of a pricing plan and that the executive devised the plan and notified the members of it, and to draw the inferences that there was a general understanding among the members that the plan would be followed and that there was no substantial deviation in the observance of that plan.

"AGREEMENT OR ARRANGEMENT"

The question then was whether the facts disclosed "an agreement or arrangement". In His Honour's view they did. He said:

> The phrase "agreement or arrangement", which appears in paras. (c) and (d) and in quite a number of other paragraphs in s. 19 (2) must be considered as including something more than an agreement made between two persons. The addition of the word "arrangement" is clearly intended to convey something more than would be conveyed by the term "agreement". It may be suggested, perhaps, that the word "arrangement" is intended merely to include an understanding between two or more persons intended to be observed by the parties thereto, but not intended to create obligations enforceable by legal proceedings. In my view, the term "arrangement" is intended to include much more than this. Reference was made by counsel to a discussion on the meaning of the term "arrangement" appearing in *Robertson* v. *Commissioner of Inland Revenue* [1959] N.Z.L.R. 492. In that case, the judgment of the Privy Council in *Newton* v. *Commissioner of Taxation of the Commonwealth of Australia* [1958] A.C. 450; [1958] 2 All E.R. 759 is referred to. The word "arrangement" as discussed in the last-mentioned case appeared in the phrase "every contract, agreement, or arrangement . . . entered into, orally or in writing". The Privy Council in that case said:
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> > "Their Lordships are of opinion that the word 'arrangement' is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law."
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> In the context in which the word "arrangement" appears in paras. (b) and (c) of s. 19 (2) of our Act, I consider that it includes something more than an understanding arrived at between two or more persons, binding those persons as between themselves to a common course of action. It would include also an understanding arrived at between individual traders and a third party, for example a trade association, under which traders are bound to follow a common course of action although no rights by one trader against another may arise from the arrangement and although the obligation to follow the common course of action may not be legally enforceable.
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> The word "arrangement" also contemplates something which is "arranged" by an organization and which the members of the organization are bound to observe.
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> From s. 12 of the Act it is clear that an agreement or arrangement need not be in writing.

The learned Judge went on to say that in the present case there was no specific agreement between the members of the Association, but the whole course of their conduct showed that they left it to the executive to take certain steps and that each member accepted that all the members would observe the recommendation of the executive. There was here a common intention that a certain course of action should be followed by each and every member of the Association. The whole transaction amounted to an understanding between the traders who were members of the Association that they would follow a common course of action; and, although the obligations stemming from the transaction were not enforceable at law as between the traders or even by the Association against any individual trader failing to observe the terms of the understanding, there was therefore an "arrangement" within the meaning of s. 19 (2) (b) and (c).

It was suggested by Mr I. L. McKay that if the recommendation of the Association in the present case was to be regarded as an agreement or arrangement then s. 11 (4) of the Act was meaningless. His Honour did not agree. He said that s. 11 (4) did not arise for consideration in these proceedings, but he was satisfied that there might be other circumstances to which it could apply.

In the result, the learned Judge agreed with the Commission's finding that there was an "agreement or arrangement" in the present case, and that such agreement or arrangement fell within the categories described in paras. (b) and (c) of s. 19 (2).

"CONTRARY TO THE PUBLIC INTEREST."

The appellant's counsel's second main submission was that the recommendation made in the circular was not contrary to the public interest. This called for a

consideration of the provisions of s. 20 (b) and (d) (set out, *ante*, p. 337).

The Commission took the view that the tests provided in the separate paragraphs in s. 20 were independent of one another, and it came to the conclusion that it was not concerned to inquire whether the agreement or arrangement had the effect of increasing unreasonably the price of wire netting. Neither the Commissioner nor counsel assisting the Commission claimed that the prices were unreasonably increased.

The Commission said that it need not concern itself in this particular case with the purpose of the agreement or arrangement nor about the price levels fixed. The Commission took the view that whether or not private price-fixing was in the public interest depended neither upon the purpose of the prices fixed, nor upon the reasonableness of the prices fixed. The Commission did not therefore consider that it was necessary to go into the question of price in any detail.

The Commission stated the question that it was obliged to answer in this case as being :

> " Whether in terms of s. 20 (d) of the Act the agreement or arrangement which the Commission has found to exist is contrary to the public interest because it prevents or unreasonably reduces or limits competition in the sale or purchase of wire netting.

In considering this question the Commission expressed the view that, apart from the specific provisions of s. 20 (d), a general interpretation of the Act indicated that one basic intention of the legislation was to stimulate free competition and to restrain trade practices which tended to prevent competition. While agreeing that the goodwill and good sense of participants in a price-fixing scheme might limit the bias inherent in such arrangements, the Commission considered that the public interest could not rely upon this nor could public authority constantly re-examine prices privately established to ascertain whether or not, under the changing private decisions and the changing conditions of the market, they were kept continuously fair.

The Commission took the view that, where Government authority did not control prices, competition in prices was almost always needed as a continuing safeguard for the interests of all, and that evidence that at a particular time a price was not unreasonable would not be sufficient to remove the over-riding presumption that this safeguard was necessary.

The Commission found that the agreement or arrangement between the members of the Association resulted in competition for the sale of wire netting being virtually eliminated among members of the Association ; thus, the Commission said " in terms of the Act, competition was unreasonably limited or reduced ". The Commission commented that it was said that other merchants with wire netting to sell were not members of the Association and were therefore free to sell at any price they wished. As to this, the Commission expressed the opinion that that fact had " no bearing on the legality of the agreement or arrangement " which was the subject of the present inquiry.

The Commission therefore decided to make the orders appealed against in the present case.

The appellant's counsel submitted that the Commission was wrong in regarding price as irrelevant and that the Commission was in error in regarding any kind of price fixing as contrary to the basic intention of the legislation. He submitted that the Commission had given no consideration at all to the effect of the word " unreasonably " in para. (d) of s. 20. In his submission, the term " unreasonably " in para. (d) of s. 20 called for interpretation in this context ; and, from the point of view of the public interest, para. (d) could not apply unless the limitation of competition was such as to cause a substantial detriment to the public. He suggested that para. (d) was aimed at zoning schemes or schemes of ring-price tendering rather than mere pricing procedure, which, in his submission, was intended to be dealt with under para. (b). On this point, the learned Judge said :

> The only direct provision in the Act as to what is contrary to the public interest is contained in s. 20. I am of opinion that, when the Commission has to consider whether or not any particular trade practice is contrary to the public interest under s. 20, it may apply each of the tests in the section separately.
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> A trade practice may therefore be deemed to be " contrary to the public interest " if only one of those tests is satisfied. The separate paras. (b) and (d) with which we are concerned in the present case are clearly expressed as being in the alternative ; they are not in any sense cumulative.
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> When consideration is given to the general scheme of the Act, to the list of trade practices set out in s. 19 (2) (which are subject to registration and in respect of which the Commission may make an order directing their discontinuance), and to the provisions of s. 20, it is clear that one of the main objects of the Act is to secure and maintain free and open competition. In my view, para. (d) of s. 20 is directed to all fields of competition. An agreement or arrangement between traders as to prices which shall be charged or as to margins by which the cost of goods shall be increased on their resale definitely restricts competition in the field of prices. Competition in other fields such as services may still continue, and that competition may be keen. Nevertheless, any agreement which restricts competition in the field of prices deprives the public of the benefits which they might derive from a lowering of prices when conditions would tend to make prices competitive.

It seemed to the learned Judge to be quite proper, and in accordance with the Act, for the Commission to approach the consideration of any particular case on the basis that any trade practice which prevents or unreasonably reduces or limits competition in the production, manufacture, supply, transportation, sale, or purchase of goods is contrary to the public interest and should be made the subject of an order under s. 19 (1), unless some good reason is shown why such order should not be made.

In his view, the fact that, at the time of the inquiry by the Commission, the price of goods may not be unreasonably increased by a particular trade practice which amounts to a restriction on competition in the field of prices does not automatically mean that the trade practice is not contrary to the public interest. Conditions may change from time to time ; and, indeed, in the present case, while the current effect of the trade practice in question might be to tend to keep the price of wire netting down (during a period of shortage of supplies), it was quite clear that the immediate effect of the arrangement when it was made was to increase the mark-up, following the termination of price-fixing under the Control of Prices Act 1947 (at a time when it was anticipated that there would be no shortage of supplies).

Differences In United Kingdom Legislation.

The learned Judge then referred to the differences in the corresponding Restrictive Trade Practices Act 1956 (U.K.). On this topic he said :

> Because of the different plan of the United Kingdom Act, not a great deal of assistance can be gained from a consideration of cases under that Act on the subject of private price stabilization agreements. Nevertheless, it would

seem that the Restrictive Practices Court [which includes two Judges of the High Court of Judicature and a Judge from the Court of Session] holds the view that in general quite apart from any presumption embodied in the United Kingdom Act, the public is worse off where such an agreement operates than where there is a free market. In *Re Scottish Master Bakers' Agreement* [1959] 3 All E.R. 98, 109, the Court, per Lord Cameron, said:

> "We reaffirm the view already expressed by this Court in *Re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118, 189; [1959] 1 All E.R. 299, 317 that, as a general rule, price stabilization as an alternative to a free market is not a benefit to the consuming public. Stabilization does not appear to us to be necessarily a virtue. Indeed, it may prevent or retard the introduction of progressive methods in industry and thus operate positively against the interest of the consumer."

In *Re Yarn Spinners' Agreement* (*supra*), the Court, per Devlin J., had this to say:

> "What we have to consider is whether price stabilization as an alternative to a free market is a benefit to the purchasing public in the circumstances of this particular case. We cannot think that as a general rule it is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest. There may be particular cases where price stabilization confers a peculiar benefit sufficiently great to outweigh the loss of a free market, but this is not one of them. We cannot find that, in the circumstances of this case, stabilizing the price of yarn confers any benefit on the purchasing public that is not outweighed by the loss of the chance of reductions in price that might be secured under free competition.'

It will be seen that in these two cases the Court referred to two different types of benefit which the public might lose if there is a private price-stabilization scheme. In the *Scottish Master Bakers'* case it was the possibility of the introduction of progressive methods in industry and in the *Yarn Spinners'* case it was the chance of reductions in price.

In the present case, the Appeal Authority was concerned with an agreement or arrangement relating to prices to be charged. The learned Judge considered that it undoubtedly restricted competition as to prices between the parties affected thereby, as it fixed a particular margin which is to be included in the prices. It did not make the margin a maximum below which any party is at liberty to go. There was therefore no possibility, while the agreement or arrangement is in force, that competition can lead to a reduction in price to the public by a reduction in the margin laid down. It followed that the agreement or arrangement therefore denied to the public the chance of a reduction of price that might be secured under free competition.

While at the present moment, by reason of shortage of supplies of wire netting, it may be unlikely that free competition would lead to a reduction in price, the Commission, in the view of the learned Judge, is entitled to consider the matter on a broad basis and have regard to the likely effect of the agreement or arrangement in the foreseeable future, bearing in mind what happened in the past when no shortage of supply was imminent. He continued:

> Section 20 makes it clear that not every trade practice restricting competition is to be deemed contrary to the public interest. It is
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> "only if, in the opinion of the Commission, the effect of the practice is or would be . . . to prevent or unreasonably reduce or limit competition"
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> that the Commission may regard the practice as contrary to the public interest and make an order under s. 19 (1).
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> The Commission, therefore, has to consider whether competition is prevented or unreasonably reduced or limited.
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> In the present case, it is clear that there are traders in wire netting who are not members of the Association. Therefore it cannot be said that the agreement or arrangement "prevents" competition. But the Commission does not appear to have considered the extent to which competition is in fact reduced or limited by the agreement or arrangement which it has found to exist, or to have considered whether that reduction or limitation of competition is "unreasonable".
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> In my view, the Commission must give consideration to this aspect of the matter and not conclude that, merely because some traders have agreed upon a common basis of pricing, competition is thereby unreasonably reduced or limited.

The learned Judge considered that the proper action for him to take in the circumstances was to refer the matter back to the Commission for reconsideration. He directed that, in reconsidering the matter, the Commission should specifically direct its attention to the question whether the effect of the trade practice, which it has found to exist is or would be to "unreasonably reduce or limit competition" in the sale of wire netting. The Commission should make such further inquiry as is necessary in order to ascertain such facts as it requires to know in order to reach a proper conclusion.

SUMMARY OF RECENT LAW.

POLICE OFFENCES.

Obstructing Footpath in Public Place—Onus of Proof—Onus on Prosecution to Establish Reasonable Inference that Defendant's Conduct in Some Respect "unreasonable"—If Evidence gives rise to Such an Inference, Onus then on Defendant to prove Justification or Excuse—Police Offences Act 1927, s. 3 (eee) (Police Offences Amendment Act 1958, s. 2 (1)—Summary Proceedings Act 1957, s. 67 (8). On a charge, under s. 3 (eee) of the Police Offences Act 1927, of obstructing a footpath in a public place, the evidence must be such as to give rise to a reasonable inference that the defendant's conduct was "unreasonable" in some respect. If the evidence is such as to give rise to such an inference, then, and only then, do the provisions of s. 67 (8) of the Summary Proceedings Act 1957 come into effect. The prosecution is not required to negative any excuse which there may be; but the defendant is at liberty to prove justification or excuse, if he can. *Police* v. *Hardaker.* (1959. July 23, Ferner S.M. Christchurch.)

Obstructing Footpath—Unreasonable Conduct—"No reasonable excuse"—Meaning of "Reasonable"—Police Offences Act 1927, s. 3 (eee) (Police Offences Amendment Act 1958, s. 2 (1)). It is "without reasonable excuse" in the meaning of that word in s. 3 (eee) of the Police Offences Act 1927 for a person voluntarily to join a group on a pavement and stand with that group when pedestrian traffic is heavy, with the result that other pedestrians must walk round that group or elbow their way through. (*Harper* v. *G. N. Haden and Sons* [1935] Ch. 298, applied.) In this case, the defendant was convicted of an offence under s. 3 (eee), as it was "unreasonable" for him to act in the manner indicated above, particularly after he had been "moved on" by a constable, as, on the facts of this case, he had no regard to the rights of other people also to use the footpath, and, in his own evidence, he had raised no "lawful authority or reasonable excuse". *Police* v. *Wootton.* (1959. July 23, Ferner S.M. Christchurch.)

PRACTICE.

Interrogatories—Incriminatory Matter—Action based on Negligence—Interrogatories relating to Incriminating Admission made by Defendant in Coroner's Court—Answer to such Interrogatories exposing Defendant to Peril under s. 171 of Crimes Act 1908—Interrogatories disallowed—Code of Civil Procedure, R. 155. In an action under the Deaths by Accidents Compensation Act 1952, based on negligence, the plaintiff alleged that her husband's death was caused by an explosion in a launch owned by the defendant. The plaintiff sought interrogatories relating, inter alia, to a statement alleged to have been made by the defendant on oath in the Coroner's Court. Objection was taken on the ground that the answers would tend to incriminate the defendant. *Held,* disallowing the interrogatories, That, the nature of the action was such that any questions put to

the defendant in support of the plaintiff's claim must be directed towards establishing the defendant's negligence and the result would be to expose him to peril under s. 171 of the Crimes Act 1908; and a repetition of an incriminatory admission already made could reasonably increase his peril. (*Warner* v. *Fortune* [1935] N.Z.L.R. 607; [1935] G.L.R. 565, applied.) *Crosse* v. *Pengelly*. (S.C. Auckland. 1959. October 13. Shorland J.)

Joinder of Parties—Test of Right to join a Party—Joinder unnecessary to enable Court to adjudicate upon Issues as pleaded—Joinder refused—Code of Civil Procedure, R. 90. Third-Party Procedure—Plaintiff alleging Negligence on Part of Company as vicariously liable for Its Servant's Act causing Death of Plaintiff's Husband also a Servant of Company—Question whether Such Servant's Negligence Sole Cause or Contributing Cause of Accident arising as between Plaintiff and Company and as between Company and allegedly Negligent Servant—Company Entitled to issue Third-party Notice to Servant—Code of Civil Procedure, R. 95 (c) (2). The test of the right under R. 90 of the Code of Civil Procedure to join a party is not that of convenience, but whether such joinder is necessary to enable the Court to settle all the questions involved in the action before the Court. (*Hood Barrs* v. *Frampton, Knight and Clayton* [1924] W.N. 287, followed. *White* v. *Carrara Ceiling Co.* [1944] N.Z.L.R. 577, referred to.) On August 19, 1958, when the husband of the plaintiff was driving one of the defendant's articulated trucks from Blenheim to Nelson on the main highway a collision took place between the vehicle and another of the company's trucks driven by S. As a result of the collision, the plaintiff's husband suffered injuries from which he died. The plaintiff brought an action against the defendant company under the Deaths by Accidents Compensation Act 1952, alleging that the accident and the resulting death of her husband were due to the negligent manner in which the defendant's servant, S. drove and managed the vehicle driven by him. S. on the other hand, through his solicitor, notified the defendant company that he proposed to commence an action against it for damages in respect of his personal injuries, alleging that the collision and his resultant injuries were due to the negligence of the deceased as driver of the other of the company's vehicles involved. As the defendant company was likely to be involved in two actions arising from the one accident between its two vehicles, and in each action the plaintiff would allege that the defendant was vicariously liable in respect of the negligence of its servant, the driver of the other vehicle, the defendant company moved in the first action, under R. 90 of the Code of Civil Procedure for an order that S. (the driver whom the plaintiff alleged was negligent and for whose negligence the defendant would be vicariously liable) should be joined as a defendant. In the alternative, the defendant company moved that S. should be joined as a third party under R. 95. *Held*, 1. That, while it would be convenient to have S. before the Court as a party, such a course was unnecessary to enable the Court to adjudicate upon the questions involved in the action, as it was not necessary for the determination of the issues as pleaded between the plaintiff and the defendant company; and that, accordingly, an order for joinder under R. 90 of the Code of Civil Procedure would not be made. (*Atid Navigation Co. Ltd.* v. *Fairplay Towage and Shipping Co. Ltd.* [1955] 1 W.L.R. 337; [1955] 1 All E.R. 698, applied.) 2. That the defendant should have leave to issue a third-party notice to S. under R. 95 (c) and (d), as questions would arise whether S. was negligent and whether such negligence was either the sole cause or a contributing cause of the accident and the deceased's resulting personal injuries. This question was substantially the question on which the result of the action depended, and it arose as between the plaintiff and the defendant company and as between the defendant company and the third party. (*Swansea Shipping Co.* v. *Duncan* (1876) 1 Q.B.D. 644, followed. *Mitchell* v. *Walpole and Paterson Ltd.* [1945] N.Z.L.R. 565; [1945] G.L.R. 259, referred to.) *Leaver* v. *Transport (Nelson) Ltd.* (S.C. Nelson. 1959. September 29. McGregor J.)

PUBLIC REVENUE.

Estate Duty—Superannuation Scheme—Contributions by Employer only—Benefit, on Death of Employee, before reaching Retirement Age, payable by Trustees of Superannuation Fund "in their absolute and unfettered discretion" for the Benefit of Any One *or* More of *Deceased Employee Member's Dependants—Such Benefits paid by Trustees of Fund to Son and Daughter of Employee on his Death before Retirement, not forming Part of Deceased's Dutiable Estate—Such Moneys not "provided by the deceased"—Estate and Gift Duties Act 1955, s. 5 (1) (a) (g).* For many years before December 3, 1949, and thereafter continuously up to his death on May 25, 1957, at the age of fifty years, the deceased was employed by a company. On December 3, 1949, by a deed made between the company of the first part, trustees of the second part and certain employees of the company (of whom the deceased was one) of the third part, the company established a superannuation scheme for the benefit of certain of its employees. No contribution was made by any employee. The trustees were to use the contributions of the company in respect of each member (a) to provide the premium payable to the assurers on a temporary insurance policy to be effected by the trustees with the assurers in respect of such member under which upon the death of such member before the retirement age of sixty-five years, a fixed lump sum would be payable calculated according to that member's salary on joining the scheme. (b) To apply the balance of the contributions as premiums on a deferred annuity policy to be effected by the trustees with the assurers to provide for the payment on the death of the member under retiring age of a sum equal to the aggregate amount of premiums paid under such policy. If any member of the scheme should die before reaching the stated retiring age, the superannuation scheme deed provided that the trustees "in their absolute and uncontrolled discretion" were to pay the total of (a) and (b) to the dependants of that member. Upon the death of the deceased the assurers paid to the trustees of the scheme: (a) the sum of £1,000 representing the proceeds of the temporary insurance policy affected by the trustees of the scheme in respect of the deceased; and (b) the sum of £2,177 12s., representing the aggregate amount or all the premiums paid to the assurers in respect of the deferred annuity policy effected by the scheme in respect of the deceased. On April 7, 1959, the trustees of the scheme paid the sums of £1,000 and £2,177 12s. so received by them to the son and daughter of the deceased as dependants of the deceased. The Commissioner of Inland Revenue included these sums in his computation of the final balance of the deceased's estate. The deceased's administrators objected. On Case Stated by the Commissioner, *Held*, 1. That the payments of £1,000 and £2,177 12s. paid by the trustees of the superannuation fund to the son and daughter of the deceased were not caught by s. 5 (1) (a) of the Estate and Gift Duties Act 1955. 2. That the causa causans of the benefits conferred on the son and daughter of the deceased was the payment of the premiums under the deed by the employer company, which was free to discontinue such payments at any time on giving the appropriate notice to the trustees. The deceased's continuance in the service was no more than the causa sine qua non of the benefits which were ultimately paid; and that was not enough to bring the deceased within the purview of the words "provided by the deceased" in s. 5 (1) (g). (Statement of Harman J. in *Re J. Bibby & Sons Ltd., Trust Deed, Davies* v. *Inland Revenue Commissioners* [1952] 2 All E.R. 483, 487, followed.) 3. That, accordingly, the Com-Commissioner's assessment was erroneous in law, in that he included within the dutiable estate of the deceased any portion of the benefit under the superannuation scheme paid by the trustees thereunder to his son and daughter. *Burt and Another* v. *Commissioner of Inland Revenue*. (S.C. Auckland. 1959. September 23. Shorland J.)

Income Tax—Penal Tax—Conviction for Offence of Evasion of Assessment or Payment of Income Tax not Prerequisite to Commissioner's Assessment and Recovery of Penal Tax—"Offence"—Land and Income Tax Act 1923, s. 152—Land and Income Tax Act 1954, s. 231. Practice—Appeal from Magistrate on Case Stated—Magistrate's Judgment on Law reversed—No Finding of Fact in Magistrates' Court—Rehearing on Merits ordered—Magistrates' Courts Act 1947, s. 77 (1). A Magistrate, without any finding on the merits, whether the taxpayer had done any act to evade the assessment or payment of income tax in respect of two tax years, held that the Commissioner of Inland Revenue did not have the power under s. 23 of the Land and Income Tax Act 1954 (or under the former s. 152 of the Land and Income Tax Act 1923), to charge tax by way of penalty for evasion of payment of income tax unless and until the taxpayer had been convicted of the offence involving intent to evade tax by a Court of competing jurisdiction. On appeal from that determination, *Held*, 1. That conviction (whether or not it is procedurally available, to be secured), is not a prerequisite to the assessment or recovery of penal tax under s. 152 of the Land and Income Tax Act 1923 (now s. 231 of the Land and Income Tax Act 1954). 2. That there is nothing either in the Land and Income Tax Act 1954 or in the Income Tax Regulations 1946 to show the basis on which appeals to the Supreme Court from the decision of a Magistrate are to be conducted or determined. On the footing that the present appeal was an appeal in an action, and, as s. 77 (1) of the Magistrates' Courts Act 1947 gave the Supreme Court power to order a rehearing in the Magistrates' Court, a rehearing in that Court on the merits was ordered. *Zimmerman* v. *Commissioner of Inland Revenue*. (S.C. Hamilton. 1959. October 2. Hardie Boys J.)

STATUTE.

Interpretation—Effect of a Proviso—Proviso may be Addition to, and not Qualification of, of Preceding Enacting Provision— *See* TRANSPORT (*infra*).

TENANCY.

Business Premises—Possession—Hardship—Question whether Premises "reasonably required" primarily One of Facts—Relative Hardship—Matters for Consideration—Tenancy Act 1955, ss. 36 (e), 38 (1). The question whether premises are "reasonably required", by the landlord, within the meaning of those words in s. 36 (e) of the Tenancy Act 1955, is a question of fact. The reasonableness is reasonableness from the viewpoint of the landlord, and the position of the tenant requires no consideration at that stage. (*Newbold* v. *Fernandez* [1950] N.Z.L.R. 475; [1950] G.L.R. 163, mentioned.) Relative hardship is but one of the matters to be considered; and the fact that, when the third proviso to s. 38 (1) is invoked, the tenant must inevitably at some not distant point of time yield up possession is a consideration that limits the hardship. (*J. R. McKenzie Ltd.* v. *Gianoutsos and Booleris* [1957] N.Z.L.R. 309, followed.) Among other matters for consideration are the assiduity or otherwise of the tenant in endeavouring to obtain other premises, and the length of time during which the tenant has known that his possession is in jeopardy. *Fearon* v. *Farm Products Co-operative (Wellington) Ltd.* (S.C. Wellington. 1959. September 29. Hutchison A.C.J.)

Rent Fixation—Excess Rent—Methods of Recovery—Tenancy Act 1958, s. 33. The method of recovery of rent which has been paid in excess of the fair rent by deduction from rent, in terms of s. 33 of the Tenancy Act 1955, may be employed in addition to any other methods of recovery, with the result that no question of election of remedies arises. The words in s. 33, "the sum so paid may be deducted by the tenant from any rent payable by him to the landlord within that period of twelve months", are words of description of the particular rent from which deduction may be made. They are not words of limitation fixing a time within which that deduction must be formally claimed. A deduction of excess rent is, in fact, made when payment of a sum representing the deduction is withheld, and a deduction may extend to the whole of the payment which otherwise would be payable. No notice need be given and no formal step need be taken other than the mere withholding of payment of moneys which are due as rent. *Muru* v. *Pragji.* (S.C. Auckland. 1959. September 23. Shorland J.)

TRADE PRACTICES.

Gramophone Records—Agreement between Manufacturers and Distributors affecting Minimum Wholesale and Retail Prices of Records—Such Alleged Trade Practice not "expressly authorized" by Copyright Act 1913—Trade Practices and Prices Commission entitled to inquire into Such Alleged Trade Practice—Trade Practices Act 1958, ss. 19 (4), 20—Copyright Act 1913, s. 25—Copyright Regulations 1913 (1914 New Zealand Gazette, 1325), Regs. 43 (1) (d), 50—(Copyright Amending Regulations 1955 (S.R. 1955/45), Reg. 2). Section 25 (2) and (3) of the Copyright Act 1913 and Reg. 43 (1) (d) of the Copyright Regulations 1913 presuppose the statement of the "ordinary retail selling price" of the individual gramophone record at a time before the sale of the article to the ultimate purchaser. (*Chappell and Co. Ltd.* v. *Nestle Co. Ltd.* [1959] 2 All E.R. 701, referred to.) The scope and purpose of s. 25 (3) of the Copyright Act 1913 and Part III of the Copyright Regulations 1913 is to provide a special exception to what would otherwise amount to an infringement of copyright, and to lay down precise conditions for taking advantage of the exception. In order to comply with s. 25 of the Copyright Act 1913 and the Copyright Regulations 1913 there is no need to fix the minimum prices at which retailers may obtain their supplies of records. There is no authority in the Regulations, either expressly in words or impliedly by necessary implication, that the retail setting price be pre-ordained in accordance with agreement or arrangements perfected in advance between the wholesalers themselves. Whether or not such agreements are justifiable in the public interest is a matter to be tested by the Trade Practices and Prices Commission under s. 20 of the Trade Practices Act 1958. Consequently the Copyright Act 1913 does not "expressly authorize as those words are used in s. 19 (2) of the Trade Practices Act 1958" an agreement or arrangement between wholesalers of gramophone records to fix the prices in the manner appearing in the judgment, and the Trade Practices and Prices Commission may, therefore, inquire into the alleged fixing of minimum wholesale and retail prices and allied trade practices the subject of agreements between members of the New Zealand Federation of the Phonographic Industry. Section 19 (4) of the Trade Practices Act 1928 protects only those trade practices expressly authorized by an enactment from being made the subject of an order under that section. It does not prevent an inquiry being held under s. 18 to inquire into the same trade practice. Furthermore, s. 22 provides for certain reports to the Minister of Industries and Commerce by the Trade Practices and Prices Commission on matters of price control, and this power to make recommendations is independent of the power to make orders conferred by s. 19. *His Master's Voice (N.Z.) Ltd.* v. *Simmons.* (S.C. Wellington. 1959. October 5. Haslam J.)

TRANSPORT.

Licensing—Linked-up Services—Mens Rea—Guilt attached only where Two Operators carry Same Goods by Concerted Arrangement, Each with Knowledge of Other's Acts—"Transferred"—Transport Act 1949, s. 96A. The word "transfer", as used in s. 96A imports a state of mind and implies a deliberate act on the part of at least two persons acting in concert, and suggests an act of volition by a transferor, of acceptance by a transferee, and of contemporaneous knowledge of each other's actions by both parties. Consequently, guilt attaches under the section only where two operators carry the same goods by concerted arrangement, each with knowledge of the act of the other. B. bought some ewes at Amberley and engaged H. to carry them to West Melton. The ewes grazed there that night Next day, M., engaged by B., transported the ewes from West

Christmas Message to the Profession

From the ATTORNEY-GENERAL.

CHANGING times cause new problems to engage the attention of lawyers, however deeply their work may be rooted in the traditions of the past. But after a busy year the coming of Christmas reminds us of what has not changed and will not change with circumstances.

The Christmas message of universal brotherhood brings greater consciousness of the bond of goodwill by which all who follow the law are knit together in a common service.

I gratefully accept this opportunity given me by the Editor of the LAW JOURNAL to express my good wishes to all members of the profession for the Christmas Season and the coming year.

H. G. R. MASON.

Attorney-General's Office,
Wellington.

Melton to B.'s. farm at Hororata. Treated in isolation, the two journeys fell within the scope of H.'s. and M.'s. respective goods-service licences. Neither could have carried the ewes the total distance from Amberley to Hororata without infringing the condition of his licence as imposed by Reg. 29 (2) of the Transport Licensing Regulations 1950 (as substituted by Reg. 2 of Amendment No. 20). H. and M. were charged with carrying the ewes in breach of goods-service licences respectively held by both of them and contrary to ss. 95 (1) and 96A of the Transport Act 1949. B. was charged with aiding M., and assisting, counselling and procuring the commission of the offences alleged against H. and M. A Magistrate dismissed the informations, On appeal from that determination *Held*, 1. That, assuming that the ewes were transported, first, by H. and on the next day by M. " in the course of the carriage of goods " as required by s. 96A. The only relevant facts proved were the two acts of transfer in the course of the carriage of the same goods; but those facts in themselves could not impose criminal responsibility upon H. or M., who each remained in ignorance of the act of the other. 2. That there was no finding by the Magistrate that H. knew of the form of travel proposed for the ewes beyond West Melton; and, consequently, it had not been proved that H. was a party to the transfer of the ewes from his service to M.'s. trucks. 3. That there was no proof that M. was aware of the identity of the earlier operator or that there was any concerted action by M. with H. in effecting the transfer of the ewes from one service to the other. All three appeals were accordingly dismissed. *Wilton* v. *W. A. Habgood and Others.* (S.C. Christchurch. 1959. July 29. Haslam J.)

Right-hand Rule—Driver of Vehicle turning to His Right on approaching Intersection—Duty to give way to Other Traffic approaching That Intersection—Traffic Regulations 1956 (S.R. 1956/217), Reg. 11 (1) (3). The first proviso to Reg. 11 (1) of the Traffic Regulations 1956 requires the driver of one of two vehicles approaching an uncontrolled intersection and about to turn to his right to yield the right of way to the other vehicle approaching the intersection from his left. Although it is a general rule of statutory interpretation that a proviso is intended to operate by way of qualification on, or exception out of, something which would otherwise be within the ambit of the substantive or enacting provision, the object of that rule is to ensure that effect shall be given to the true intention of the Legislature, and is not designed for the purpose of defeating that intention. It is the substance, and not the form, of the enactment, that is to be regarded. The mere use of the words " Provided that " does not always mean that what follows is a true proviso, for it may add to, and not merely qualify, what has gone before, and so be regarded as a fresh enactment independent of the enacting provision. (*No-Nail Cases Pty. Ltd.* v. *No-Nail Boxes Ltd.* [1944] 1 K.B. 629; [1944] 1 All E.R. 528; *Rhondda Urban District Council* v. *Taff Vale Railway* [1909] A.C. 253, and *Egham and Staines Electricity Co. Ltd.* v. *Egham Urban District Council* [1942] 2 All E.R. 154, followed.) Appeal from the judgment of Haslam J., allowed. *Leveridge* v. *Kennedy.* (S.C. Wellington. 1959. February 18. Haslam J.) (C.A. Wellington. 1959. October 16. Gresson P. Cleary J. Henry J.)

Assessment of Compensation—Compensation on Quasi-schedule Basis—Court first to determine Amount payable on Loss-of-earnings Basis and Estimate Worker's Future Earnings—If Former Amount " substantially " less than Latter, Court then to determine whether Compensation on Quasi-Schedule Basis would be Inadequate because of Worker's Circumstances—" Substantially " —Workers' Compensation Act 1956, s. 17 (7). Before the Court can give consideration to the questions raised by s. 17 (7) of the Workers' Compensation Act 1956, it must first determine what amount would be payable if s. 17 (6) did not apply—that is to say, the Court has to determine what compensation would be payable on a loss-of-earnings basis; and, when a lump sum is being assessed on such a basis the Court must make an estimate of the worker's probable future earnings, giving consideration to the likelihood of improvement and the possibility of the worker's resumption of heavier employment. The use of the term " substantially " in s. 17 (7) (a) indicates that a comparison has to be made between the weekly rate on a loss-of-earnings basis, and the weekly rate on a quasi-schedule basis; and the condition laid down in s. 17 (7) (a) is not satisfied unless the amount calculated in accordance with s. 17 (6) is considerably less than the amount calculated on a loss-of-earnings basis. If the condition of s. 17 (7) (a) is satisfied, the Court must then consider the question raised by s. 17 (7) (b)—namely, whether compensation on a quasi-schedule basis " would be inadequate because of the circumstances of the worker ". In the present case, an average loss of earnings of £2 a week was a reasonable one to assume as a fair average for the remainder of the six-year period. Compensation on a loss-of-earnings basis would thus be calculated at the rate of £1 12s. a week. If the compensation were calculated on a quasi-schedule basis at ten per cent. of total incapacity, it would be approximately 18s. 11d. a week. Consequently, the amount of compensation which would be fixed on a quasi-schedule basis under s. 17 (6) was held to be " substantially less than the amount of compensation that would be payable " under the other provisions of the statute. After the accident in respect of which the worker, who had been working as a coal-miner, claimed compensation, he was able to work and to continue working at his original trade of a butcher and earning the full wages payable therein. Consequently, having regard to the fact, to the amount of his earnings, and to all other circumstances, compensation at 18s. 11d. a week on a quasi-schedule basis was held not to be " inadequate " under s. 17 (7) (b). The worker was therefore entitled to judgment for a lump sum arrived at by calculation of compensation on a loss-of-earnings basis from the date when he suffered injury to the date when he ceased working at the mine, and commenced work at his trade of a butcher; and on a quasi-schedule basis of ten per cent. of total incapacity for the balance of the six-year period remaining thereafter. *Trotter* v. *Puremiro Collieries Ltd.* (Comp. Ct. Hamilton. 1959. July 24. Dalglish J.)

WORKERS' COMPENSATION.

Delay in Commencing Action—Notice of Accident given Three Weeks after Its Occurrence—No Reasonable Excuse—Employer prejudiced by Delay—No Mistake or Other Reasonable Cause for Delay—Action for Compensation not maintainable—Workers' Compensation Act 1956, s. 52. W. claimed that on July 28, 1958, while he was employed as a cargo worker, he strained his back and became totally disabled from working as a cargo worker as from August 18, 1958. He finished the job on August 5, and worked until August 15, a Saturday, when he discussed the matter with a foreman who said he had better carry on until the job was finished. After esting during the weekend, he went to a doctor who put him off work and told him to go to bed. No written report of the alleged accident was made by W. or given to the defendant company until August 20, 1958. *Held*, 1. That, in view of serious trouble, W. had had with his back as the result of an incident in 1956 and his claim to have suffered a number of recurrences of back trouble since then including a period off work on compensation, and also in view of the circumstances since July 28, 1958, W. had no reasonable excuse for his failure to give notice of the accident of July 28 until nearly three weeks after its occurrence. (*Murton* v. *Auckland Harbour Board* (1913) 12 N.Z.W.C.C. 23 (approved in *Noble* v. *Henderson and Pollard Ltd.* [1938] G.L.R. 486), applied.) 2. That, apart from the question whether the incident of July 28, 1958, did or did not happen, the defendant was prejudiced in other ways by W.'s delay in giving notice; for example, if the defendant had received notice, it would have had an opportunity of seeing that proper treatment was given. 3. That, as there was no mistake or other reasonable cause excusing the giving of the notice, and as the defendant was prejudiced by the failure to give notice, the action was not maintainable by virtue of s. 52 of the Workers' Compensation Act 1956. (*Macdonald* v. *Flynn* (1944) 37 B.W.C.C. 12, applied.) *Willis* v. *Port Line Ltd.* (Comp. Ct. Auckland. 1959. July 16. Dalglish J.)

Dependency—Claim by Widow—Widow and Son of Deceased before Court—Action " on behalf of the dependants of the deceased "—Doubt as to Existence of Illegitimate Son of Deceased —No Power to bring Separate Action after Entry of Judgment and Payment—Entry of Judgment deferred until Existence or Non-existence of Such Supposed Dependant Established—Workers' Compensation Act 1956, ss. 48 (1), 55 (1). There is no procedure under the Workers' Compensation Act 1956 under which a separate action can be brought subsequently to the entry of judgment and payment to the Public Trustee in accordance with s. 55 (1). (*Groome* v. *Richardson and Co. Ltd.* [1941] G.L.R. 301, referred to.) In the present case, where the action was brought by the widow of the deceased worker (in terms of s. 48 (1)) " on behalf of the dependants of the deceased ", and only the widow and a dependent son were before the Court, and there was a doubt whether the deceased had also left a dependent illegitimate child, the Court refrained from entering judgment and adjourned the case sine die, to be brought on again when the plaintiff's counsel was able to advise whether or not there was any other dependant of the deceased worker. *Glenn* v. *Northern Steam Ship Co. Ltd.* (Comp. Ct. Dunedin. 1959. October 6. Dalglish J.)

MR DAVID PERRY.

President of the New Zealand Law Society.

At its meeting on November 27, the Council of the New Zealand Law Society unanimously elected Mr David Perry to succeed the late Mr A. B. Buxton as President of the Society.

Mr Perry thus becomes the eleventh holder of the highest office which the profession in New Zealand can bestow on one of its members. To this office he brings the experience of nearly forty years' practice and an association with the affairs of the Society spread over a period of nearly thirty years.

Bernard Bennett, London, photo.

Mr David Perry.

Mr Perry was born in Wellington in 1896 and received his secondary education at Wellington College. His studies at Victoria University College (where he was a member of the 1st XV) were interrupted by a period of service in France in 1917 and 1918, during which time he was wounded in action.

At the conclusion of the war he resumed his studies and graduated LL.B. in 1921. In 1923 he joined his brother, now Sir William Perry, in a practice which has become the present firm of Perry, Wylie, and Pope.

His association with Law Society affairs commenced when he was elected to the Council of the Wellington District Law Society in 1931, and he continued as a member of this Council until 1937, serving as President in 1936.

He has been a member of the Committee of Management of the Solicitors' Fidelity Guarantee Fund since 1936, and Chairman since 1949. From 1952 to 1957 he also served as Treasurer of the New Zealand Law Society, and in the latter year was elected a Vice-President.

Two days before the Council meeting Mr and Mrs Perry returned to New Zealand from an extensive trip to England and the Continent. In the course of their tour they attended the annual conference of The Law Society at Scarborough in September; and it may well be that Mr Perry's discussions with the officers of The Law Society will be of advantage in dealing with problems that are common to both Societies.

The new President's sound knowledge of legal principle, coupled with a mind that is capable of getting very quickly to the essence of any problem with which it is faced, has been readily apparent to those who know him well. However, it is probably his close association with the affairs of the profession as a member of the Committee of the Fidelity Fund that qualifies him best for the office of President.

Members of the profession may not realize the immense amount of voluntary effort contributed by members of this Committee in the course of investigating claims against the Fund. In their investigations, the new President and his colleagues come into very real contact with the problems of practice and gain a deeper insight into the affairs and conduct of their brethren than do the majority of members. The understanding that grows from this knowledge is an important quality in any President of the Society, and it is one that Mr Perry possesses to the full.

The President of the Society has to be both a representative and a leader. In the former role, the professional and social responsibilities can be onerous and time-consuming. The members of his own Society, which nominated him for President, together with those members of other Societies who have met him at the many conferences he has attended, will know that these responsibilities are in good hands.

In the role of leader, the President must enjoy the confidence of the whole membership of the Society. It is certain that members in all Districts will endorse the action of their delegates in choosing David Perry as their President.

He succeeds a line of distinguished and devoted men who have rendered invaluable service to the Society. He is well worthy of their succession.

Mr Perry's genial nature and his friendly and courteous qualities make him in any company a worthy representative of a learned profession in its widespread relationships with men and affairs. All wish him a long and happy tenure of the distinguished and arduous office which he is now called upon to perform.

PUBLIC RIGHT TO SEARCH REGISTERS.

In re Wellington Trust Loan and Investment Co. Ltd.
[1959] N.Z.L.R. 1189.

BY JURISTOR.

It is commonplace for certain public registers to be resorted to when information recorded there is required. The search clerk soon learns his way to and within the "L.T.O.", the chattels register, the companies office, and so forth, and may encounter an occasional query regarding his business when endeavouring to search probate or other documents in the Supreme Court office. (The Court Registrar's powers here are considered at the end of this article.)

A different kind of search was the subject-matter of *In re Wellington Trust Loan and Investment Co. Ltd.* [1959] N.Z.L.R. 1189. It will be recalled that s. 121 (1) of the Companies Act 1955 provides that the register of members is to be open to the inspection of any member without charge, and of any other person on payment of a fee. Subsections (3) and (5) then provide as follows:

> (3) Any member or other person may require a copy of the register, or of any part thereof, on payment in advance of two shillings, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied. The company shall cause any copy so required by any person to be sent to that person within a period of ten days commencing on the day next after the day on which the requirement is received by the company.
>
> (5) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the register and index (including all transfers lodged and not registered or returned as aforesaid) or direct that the copies required shall be sent to the persons requiring them.

In this connection, it is relevant to mention that the annual return to be made under s. 130 of the Companies Act 1955 should contain a list of members which becomes available for inspection by the public. However, the applicant in the proceedings proposed to exercise the right apparently available under s. 121, as set out above, no doubt for the reason that the list in the annual return would not be up to date and might well have changed by reason of dealings with the shares since the date of the return filed.

His argument was of an absolute nature—namely, that the applicant, having paid the prescribed fee, had a statutory right to be furnished with a copy of the company's register of members, and that his reason or motive for requiring it was immaterial. "If this be correct, then the applicant is entitled to the order he seeks and the company is disentitled to administer the interrogatories", said Mr Justice Cleary, by whom the application was heard, referring to the company's semi-interlocutory defence in which it sought to administer interrogatories for the purpose of ascertaining whether the applicant wished to communicate with the shareholders of the company, and if so, with what object.

Dealing with this aspect, his Honour pointed out that here the applicant did not seek, and was not required to seek, a mandamus, either prerogative or otherwise, but merely an order pursuant to the statutory power conferred on the Court by s. 121 (5) of the Companies Act 1955. Although the subsection used the word "may", the Court thought that once it was accepted that no inquiry might be made into the motives of the applicant there would ordinarily be no reason why the order should be refused.

THE RELEVANCE OF MOTIVES FOR SEARCHING.

The immediate issue before the Court, then, was whether there is any principle that where a stranger seeks to obtain a copy of a company's register of members, and is refused, the Court is not free to inquire into his motives, and there can ordinarily be no reason why an order under s. 121 (5) should be refused. In this regard, his Honour realized the absolute nature of the issue. He noted that one might sympathize with the reasons which moved the directors to take up their attitude; but, "If the statute confers an unqualified right on the applicant, then it seems to me that I must make an order", he concluded.

From the judgment it appears that in fact the applicant was not a member of the company and had no interest himself in obtaining a copy of the register. It appeared, however, that he was acting as agent for another person who wished to obtain a copy of the register in order to communicate with the members, in all probability with the object of making a "take-over" bid for their shares. An affidavit had been filed by the secretary of the company in which it was stated that many persons had made deposits with the company which aggregated a very large sum, and that the directors felt that they had a paramount responsibility towards these depositors and before they could permit any person to circularize the shareholders they should satisfy themselves that the person wishing to do so had the resources to support any offer that might be made to shareholders and to be responsible for the company's obligations to its depositors. For this reason, they declined to supply the applicant with a copy of the register, although he had paid the prescribed fee.

THE COMMERCIAL ISSUE.

In dismissing the motion for interrogatories, and ordering that a copy of the register be sent to the applicant, his Honour applied the cases of *Oakes* v. *Turquand and Harding* (1867) L.R. 2 H.L. 325; *Holland* v. *Dickson* (1888) 37 Ch.D. 669; *Mutter* v. *Eastern and Midlands Railway Co.* (1888) 38 Ch.D. 92, and *Davies* v. *Gas, Light, and Coke Co.* [1909] 1 Ch. 708, and referred to *In re Kent Coalfields Syndicate Ltd.* [1898] 1 Q.B. 754, and *In re Balaghat Gold Mining Co. Ltd.* [1901] 2 K.B. 665.

In the latest of the cases applied, *Davies* v. *Gas, Light, and Coke Co.* [1909] 1 Ch. 248, and on appeal [1909] 1 Ch. 708, it was held, in a case where a stockholder was insisting on his right under s. 10 of the Companies Clauses Consolidation Act 1845 to obtain a copy of the shareholders' address book, that there was no jurisdiction to inquire into his motive. Although in each of these cases the plaintiff was either a shareholder or a bondholder, Mr Justice Cleary thought the same principle must be applied where the applicant

is "any other person" seeking to exercise his right under s. 121 of the New Zealand Act.

The most interesting reference however was to *Oakes* v. *Turquand and Harding* (1867) L.R. 2 H.L. 325. Here Lord Cranworth at pp. 365-6 pointed out that originally the statutory provision which is the forerunner of our s. 121 confined the right of inspection to shareholders only, but upon the enactment of the Companies Act 1862 (25 & 26 Vict. c. 89), s. 32 provided that the register should be open to the inspection not only of shareholders but, on payment of a fee, to all other persons, and he went on to give reasons why creditors in particular should have this right.

These reasons, which are the kernel of the reason behind what may be called the "statutory publicity" of the share register, are in the following words:

> Except by the introduction of the principle of limited liability, legislation has been confined to the giving facilities for carrying on business differing in no respect from ordinary commercial partnerships save in the vast extent of capital embarked, and the great number of the partners engaged.... The Act seems to me to contain, on the face of it, ample proofs that the rights of creditors were not intended to be affected, except only by the introduction of the principle of limited liability.

In the first place, then, his Lordship referred to the 49th section of the Act of 1844 (7 & 8 Vict. c. 110). It was there provided that the directors of every company should keep a register of shareholders containing their names and addresses, showing also the number of shares they respectively held, and the amount paid up; and by s. 50 every shareholder was to have liberty to search this register at all reasonable times. Nobody however was to be at liberty to search it who was not a shareholder.

There was a similar obligation in the Act of 1862 as to keeping a register; but there was an important change, for, by s. 32, it was provided that the register should be open to the inspection not only of shareholders but, on payment of one shilling, of all other persons, which would therefore include creditors. Lord Cranworth continued (p. 366):

> This seems to me strongly to indicate the intention of the Legislature that the creditors were to look to this document as showing them to what extent they might trust the company. Before the introduction of the principle of limited liability such a power of inspection was not necessary, or, certainly, not at all so necessary. A creditor could hardly fail to know who were some at least of the shareholders, and there was no limit to the extent to which he might obtain execution against shareholders of wealth. But when the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world, indicating, as I think, very clearly that persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. The permission to all persons not shareholders to inspect the register, and so to ascertain who are shareholders, and to what extent they are liable, would have been an unwarrantable exposure of the affairs of the company, were it not that all persons have, or may have, an interest in knowing who are liable, and to what extent.

Court and Other Public Registers: A Curious Omission.

The following authorities expressly provide that the public may search the relevant *public* registers on payment of the prescribed fees, i.e., as of right: Land Transfer Regulations 1948 (S.R. 1948/137), Reg. 36; Chattels Transfer Act 1924, s 15; Companies Act 1955, s. 105 (3). Also, s. 45 of the Administration Act 1952 authorizes such search to be provided for by regulation should a central record office of probates be established.

It is curious that, on the face of the matter, nobody seems to have any express right to search or permit a search of books or documents in the Supreme Court office. Rule 581 of the Code of Civil Procedure, authorizes, in Table D of the Third Schedule, fees payable for searches; but authority for the search itself is difficult to find. Rule 25 (1) of the Magistrates' Courts Rules 1948 (S.R. 1948/197), by contrast, restricts open search to the civil record-book or the documents in an action, and this express provision makes all the more strange the apparent lacuna in the powers of the Registrar of the Supreme Court.

Contempt of Court.—In *Ambard* v. *A.-G. for Trinidad and Tobago* [1936] A.C. 322, 334, Lord Atkin, speaking for the Privy Council, quoted a passage from the judgment of Lord Russell of Killowen C.J. in *R.* v. *Gray* [1900] 2 Q.B. 36, 40, as follows: "Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.-C. characterized as 'scandalizing a Court or a Judge'. (*In re Read and Huggonson* [1742] 2 Atk. 469.) That description of that class of contempt is to be taken subject to one, and an important, qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court." Lord Atkin then proceeded to speak of the right to criticize Courts and Judges. The passage, at p. 335, is worth repeating: "But whether the authority and position of an individual Judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

LIFE TENANT AND REMAINDERMEN.

Dealings In Equitable Estates.

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

EXPLANATORY NOTE.

Dealings between beneficial owners of equitable estates or interests in property are fairly common in practice. Precedent No. 1 is drafted to meet the case of a parent who desires an advance out of the estate for the purpose of continuing the education of two of his sons: he himself has a beneficial interest in a trust fund as life tenant, and his two sons have a contingent interest as remaindermen in the corpus of that fund.

Practitioners doubtless have noticed how, since the coming into operation of the Estate and Gift Duties Act 1955, it is so easy to calculate the value of life estates, annuities and estates and interests in remainder for the purposes of estate and gift duty. Tables are now set out in the Third Schedule to that Act based on the average expectation of life in the Dominion of New Zealand, and one notes with interest that females have an appreciably longer expectation of life than males. The appropriate table for Precedent No. 1 is Table A.

On August 2, 1955, the life tenant released for the purpose stated above his life interest in a capital sum of £400: the precedent is for the second release of his interest in a capital sum of £300. On August 2, 1955, the life tenant was forty-nine years of age: on May 8, 1956, he was fifty years of age. In connection with these tables, annual income is based on a rate of 5 per cent. per annum. Thus, the annual income on a capital sum of £400 is £20: on a capital sum of £300 it is £15. Thus using Table A, the appropriate table for a male, we arrive at the following results:

Age 49 on August 2, 1955. Capital: £400.

Present value of £1	=	13.9965
Annual income	=	20
		£279.9300

Age 50 on May 8, 1956. Capital: £300.

Present value of £1	=	13.74593
Annual income	=	15
		68.72965
		137.4593
		£206.18895

Summary of value of Gifts 1 and 2 above:

First	=	£279.93
Second	=	£206.18
Total Gifts	=	£486.11

The life tenant made no other gifts within twelve months subsequently or previously to these two gifts. As they total less than £500, they are not liable to gift duty and there is no need to file gift-duty statements in the Stamp Duties Office.

Precedent No. 2 represents a division of the trust fund between the life tenant and remainderman: both being *sui generis*, they are thus in a position to put an end to the trusts. As the life tenant is a female in this case, Table B and not Table A applies. The deed has been drawn so as to preclude any possibility of the instrument being treated as a gift for the purposes of gift or estate duty, for note this recital:

> AND WHEREAS it has been agreed by the Life Tenant and the Remainderman that the said fund shall be divided between them proportionately to the respective valuation of each party's share therein calculated in accordance with Table B of the Third Schedule to the Estate and Gift Duties Act 1955.

It is submitted that the only duty to which this instrument is liable is 15s., as a deed not otherwise charged.

PRECEDENT NO. 1.

DEED OF SURRENDER BY A LIFE TENANT OF PART OF HIS INTEREST IN A TRUST FUND TO HIS CHILDREN, THE REMAINDERMEN.

THIS DEED made the 8th day of May One thousand nine hundred and fifty-six BETWEEN THE.....COMPANY..... LIMITED a duly incorporated Company having its registered Office in the City of Dunedin (hereinafter called "the Company") of the one part AND A. B. of Wellington, Company Director (hereinafter called "the life tenant") of the other part WHEREAS C. D. of the City of Wellington, Spinster, by her last Will and Testament dated 19th day of September, 1945, after making certain bequests and devises devised and bequeathed all the rest and residue of her real and personal property unto the Company UPON TRUST to sell call in and convert into money such part or parts thereof as should not consist of money or trustee securities UPON TRUST as follows:

(a) To pay her just debts and funeral and testamentary expenses together with all estate succession and other duties payable in respect of her estate and of every bequest and legacy thereunder

(b) To invest the sum of Ten thousand pounds (£10,000) in trustee securities for that amount and stand possessed thereof UPON TRUST to pay one third part of the income arising therefrom to each of them her "said niece and nephews" during their respective lives AND upon the death of each UPON TRUST as to one-third part of both capital and income for such of his or her children as shall then be living and if more than one equally among them (per stirpes) PROVIDED HOWEVER that should any of them her said niece or nephews die without leaving issue her or him surviving then the part or portion (both original and accruing) of such investments which any such issue would have taken shall be divided among all the children of the other or others of her said niece and nephews as shall then or at the date of her death whichever is the later be alive and if more than one then in equal shares per capita AND WHEREAS the testatrix's said niece and nephews hereinbefore referred to are E. F., G. H. and the said A. B. described herein as the life tenant AND WHEREAS the aforesaid C. D. died at Wellington on or about 16th December, 1945, and Probate of her said Will was granted to the Company by the Supreme Court of New Zealand at Wellington on the 18th day of February, 1946 AND WHEREAS pursuant to the aforesaid recited provision in her Will the Company duly set aside the sum of Ten thousand pounds (£10,000) in trustee securities which it holds on the trusts hereinbefore recited AND WHEREAS pursuant to a power of appropriation conferred on the Company by testatrix in her Will the Company appropriated the

said Trust Fund of Ten thousand pounds (£10,000) into three parts and the part appropriated to the share of the life tenant and his children consists of the securities set out in the Schedule hereunder written AND WHEREAS the life tenant being desirous of continuing the education of his two children I. J. and K. L. at.....College, Auckland, has requested the Company to pay for that purpose the sum of Four hundred pounds (£400) out of the share of the said Trust Fund appropriated as aforesaid to the life tenant and his children AND WHEREAS the Company has agreed to advance the said sum of Four hundred pounds (£400) for the purposes aforesaid upon the life tenant surrendering his life estate in the said sum of Four hundred pounds (£400) and entering into these presents and upon his mortgagee the..... Bank of.....consenting to this Deed NOW THEREFORE in consideration of the premises THIS DEED WITNESSETH as follows:

(i) In consideration of the natural love and affection which the life tenant bears towards his said two children the life tenant hereby surrenders and releases his life interest in the aforesaid sum of Four hundred pounds (£400)

(ii) The life tenant for himself his executors administrators and assigns doth hereby covenant with the company that he will hereafter save harmless and keep indemnified the company from all actions claims suits or demands which can or might arise thereout by reason of the Company advancing the said sum of Four hundred pounds (£400) for the purposes aforesaid.

SCHEDULE HEREINBEFORE REFERRED TO

[*Set out here the securities set apart for the life tenant and his children.*]

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written.

THE COMMON SEAL of THE..... COMPANY.....LIMITED was hereunto affixed at a meeting of the Board of Directors in the presence of:

.....
.....
Directors

.....
General Manager

SIGNED by the said A. B. in the presence of:

THE.....BANK OF.....the Mortgagee of the Life Tenant's interest in the estate of C. D. deceased DOTH HEREBY CONSENT to the foregoing Deed

DATED this 8th day of June, 1956.

THE.....BANK OF.....by its attorney M. N. in the presence of:

O. P.
Bank Officer
Wellington

PRECEDENT NO. 2.

DEED OF PARTITION OF ASSETS BETWEEN THE LIFE TENANT AND THE REMAINDERAN.

THIS DEED made this.....day of.....One thousand nine hundred and fifty-nine BETWEEN A. B. of Wellington, Widow (hereinafter called "the Life Tenant") of the first part C. D. of Wellington, Carpenter (hereinafter called "the Remainderman") of the second part AND THE.....COMPANY..... LIMITED (hereinafter called "the Trustee") of the third part

WHEREAS E. F. late of Wellington Builder died on or about the Third day of June, One thousand nine hundred and forty-nine leaving his last Will and Testament dated the Sixteenth day of February, One thousand nine hundred and forty-nine whereof he appointed the Trustee to be the Executor and Trustee and whereby after bequeathing certain chattels to the Life Tenant he gave the rest of his property to the Trustee UPON TRUST to sell and convert the same into money and after payment of his debts and funeral and testamentary expenses and death duties to stand possessed of his residuary estate UPON TRUST to pay the income thereof to the Life Tenant during her life and after her death to hold his estate UPON TRUST for the remainderman upon his attaining the age of Twenty-one years AND WHEREAS Probate of the said Will was granted to the Trustee by the Supreme Court of New Zealand at Wellington on the Third day of November, One thousand nine hundred and forty-nine AND WHEREAS all debts and funeral and testamentary expenses and death duties in the said estate have been fully paid and satisfied AND WHEREAS the Remainderman has now attained the age of Twenty-one years AND WHEREAS the only asset or fund of the estate of the said E. F. Deceased remaining in the hands of the Trustee and subject to the trusts of the said Will is the sum of [*set out here the sum*].

held in the Trust Account of the Trustee (hereinafter called "the said Fund") the said Fund representing a conversion of the assets set out in the Schedule hereunder written AND WHEREAS the Life Tenant and the Remainderman have agreed on a division of the said Fund and to put an end to the trusts of the Fund on which it is held AND WHEREAS it has been agreed by the Life Tenant and the Remainderman that the said Fund shall be divided between them proportionately to the respective valuation of each party's share therein calculated in accordance with Table B of the Third Schedule to the Estate and Gift Duties Act 1955, AND WHEREAS as so calculated the Life Tenant's interest in the said Fund amounts to [*set out here actuarial valuation of life tenant's share*] and the Remainderman's interest in the said fund amounts to [*set out here actuarial valuation of remainderman's share*] NOW THEREFORE the Life Tenant and the Remainderman DO HEREBY REQUEST AND DIRECT the Trustee immediately after the execution of this Deed to pay to the Life Tenant out of the said Fund the sum of [*set out here sum*] to be held by the Life Tenant as her own property absolutely AND to pay to the Remainderman out of the said Fund the sum of [*set out here sum*] to be held by the Remainderman as her own property absolutely AND in consideration of the payment of the said sums of..... and.....to the Life Tenant and the Remainderman respectively pursuant to the provisions of this Deed the Life Tenant and Remainderman do and each of them DOTH RELEASE AND DISCHARGE the Trustee its successors and assigns from and against all actions proceedings fines claims and damages for or in respect of the said Fund and the income which has arisen or ought to have arisen therefrom or from the investments formerly representing the said Fund and for and in respect of its administration of that part of the estate of the deceased now represented by the said Fund and do and each of them DOTH HEREBY COVENANT with the Trustee its successors and assigns that they and each of them and their respective personal representative will at all times hereafter keep indemnified the Trustee and its successors and assigns from all actions proceedings claims and demands in respect of the said Fund and the moneys so paid to the Life Tenant and the Remainderman respectively.

SCHEDULE HEREINBEFORE REFERRED TO:

[*Set out here details of Government Stock and Cash constituting the trust fund.*]

IN WITNESS WHEREOF this Deed has been executed the day and year first hereinbefore written.

SIGNED by the said A. B. in the presence of: A. B.

G. H.
Solicitor
Wellington

SIGNED by the said C. D. in the presence of: C. D.

E. F.
Solicitor
Wellington

THE COMMON SEAL of THE..... COMPANY.....LIMITED was hereto affixed by Order of the Board of Directors in the presence of:

.....
.....
Directors

.....
General Manager

TOWN AND COUNTRY PLANNING APPEALS.

Dye *v.* Mount Albert Borough.

Town and Country Planning Appeal Board. Auckland. 1959. July 24, August 7.

Zoning—Objection—Area Zoned as "Residential A"—Panel-beating and Motor Repairs carried on by Objector—Zoning of Objector's Section as "Industrial C" disallowed—Objector's Business "Existing Use"—Town and Country Planning Act 1953, s. 23.

Appeal by the owner of a property Nos. 154 and 156 Asquith Avenue in the Borough of Mount Albert. For the past fourteen years he had carried on the business of panel-beating and motor-vehicle repairs in a building on the property. Panel-beating was a predominant use in an "industrial C" zone.

This property was in an area zoned under the respondent Council's proposed district scheme as "residential A", and when that scheme was publicly notified pursuant to s. 22 of the Act the appellant lodged an objection to the zoning of his property as "residential". The Council disallowed the objection and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the submissions of counsel for the appellant the evidence called by the Council and the submissions of its counsel, the Board finds as follows:

1. The area in which this property is situate is predominantly residential in character and occupancy and its zoning as "residential" is appropriate.
2. It would be contrary to recognized town-and-country-planning principles to create a "spot" industrial zone in a residential zone and that is what the appellant asks for.
3. The appellant is entitled to carry on his business in the existing premises as an "existing use" for as long as he wishes during the life of the present building but when that building is no longer usable he will if he wishes to continue in business have to move into an "industrial C" zone. This may present some difficulty because the only "industrial C" zone in the Borough is held in close ownership and occupation. It may well be that in the future the Council may need to extend its "industrial C" zone, but the fact that the appellant cannot at present apparently move into an industrial zone within the Borough would not justify an alteration in the "residential" zoning of his property.

The appeal is disallowed.

Appeal dismissed.

Waipukurau Borough and Others *v.* Waipukurau County.

Town and Country Planning Appeal Board. Napier. 1959. August 12, 13, 25.

Zoning—Change of Use—Area Zoned "Rural"—County given Permit for Change of Use of Land to Metal Quarry—Land outside Boundary of Objecting Borough—No Appeal Maintainable by Borough—Objections by Adjoining or Neighbouring Owners—Existing Amenities of Neighbourhood to be considered, not Amenities Property-owners in Vicinity desired—Operation of Quarry under Imposed Conditions unlikely to cause Further Detraction from Amenities of Neighbourhood—Residents of Rural Zone demanding Advantages of Rural Residence, not in Position to exclude Disadvantages arising therein—Quantum of Detraction likely to arise insufficient to justify Refusal of Change of Use to Quarry—Town and Country Planning Act 1953, s. 38A (3).

Three appeals filed under s. 38A (3) of the Act. They related to an area of land situated in the Waipukurau County, but vested in the Patangata County Council, being part Lots 29, 30, 31, 38 and 39 on Deeds Plan No. 158 of Block XVI, Waipukurau Crown Grant District Block XI, Motuotaraia Survey District, comprising 14 ac. 1 ro. This property was acquired under the Public Works Act by the Patangata County Council in 1957 for use as a metal quarry. This property was in an area zoned as "rural" under the Waipukurau County Council's recommended district scheme. Under the provisions of the relative Code of Ordinances, a metal quarry was a conditional use in a rural zone. The Patangata County Council applied to the Waipukurau County Council for a change of use so as to permit of its using this land as a metal quarry. The Waipukurau County Council gave public notice of this application and subsequently sat to hear objections to it and heard the objectors, who were the appellants in these proceedings, at a meeting held on April 2, 1959. The objections were disallowed and the application of the Patangata County Council for a change of use was granted subject to certain conditions. It was against the disallowance of their objections that the appellants appealed.

The judgment of the Board was delivered by

REID S.M. (Chairman). *Appeal by the Waipukurau Borough Council:* The Waipukurau Borough Council has appealed against the decision on the general grounds taken by the other appellants, but, by virtue of the provisions of s. 38A (3), the only persons having a right of appeal are the applicant for the change of use (in this case the Patangata County Council) and "every person who claims to be affected by the proposed use . . . may appeal to the Board against the decision of the Council". The property under consideration here is distant approximately 22 chains from the southern boundary of the Borough of Waipukurau. The Board is unable to hold that the Waipukurau Borough Council is a person affected within the meaning of subs. (3) and at the conclusion of the first day's hearing it indicated its intention to rule that no appeal lay. The only grounds upon which the Borough Council might possibly have some ground of appeal would have been if there had been any immediate prospect of the land in the vicinity of the proposed quarry becoming part of the Waipukurau Borough, but the evidence is that there is no prospect of that event coming to pass for at least fifteen years—probably more. The unoccupied land within the Borough of Waipukurau would appear to be sufficient for the foreseeable residential development of this Borough for some time to come, but if there is to be any extension of the Borough boundaries southward into the County, that extension would be outwards from the perimeter of the southern boundary of the Borough and would be an extension in depth and not in the form of an isthmus jutting southwards so as to embrace only the residential area along the Porangahau Road.

Appeal by Eric Donald Angus Campbell: The appellant here is the owner of the block of land from which the land, the subject of this appeal, was taken by the Patangata County Council and he is the owner of approximately 28 ac. of land adjoining the land in dispute. His property virtually surrounds the proposed quarry. He is a farmer by occupation and owns a property of some 400 ac. in the Waipawa County and he uses the property of 28 ac. as a run-off for his main farm. It is true that the taking of this land for a quarry will detract to a certain extent from the value of the land that is left, and will mean that that land will probably not be able to be farmed to the best possible advantage, but those matters are matters which would call for consideration when the question of how much compensation is to be paid by the Patangata County Council for the land taken comes for determination. That is not a matter which concerns this Board. It is possible that the appellant's property may at some future date ultimately become residential, but the evidence is that it would be at least 20-25 years before that comes to pass, by which time the quarry would have been worked out, and, in accordance with the conditions, restored.

Appeal by Grant and Others: The appellants here are owners of property along the Porangahau Road, some of which has been developed for residential occupation and is zoned as residential under the Waipukurau County's recommended district scheme. Their properties would have been so zoned because they had been subdivided and, to a certain extent, built on before the Town and Country Planning Act came into force. It is these appellants who, in the opinion of the Board, have the best grounds for appeal.

After hearing the evidence adduced and the submissions by counsel, the Board found as follows:

1. There is already in existence on the Porangahau Road, not far from the appellants' property, a metal pit or quarry known as "The Rodeo Pit", which has been in operation as such for approximately 3*k* years. It has been used by the Patangata County Council and the Waipukurau County Council in conjunction. The Patangata County's area is very nearly worked out, but this pit is still in operation and has been operated continuously for the past 3*k* years. The position, therefore, is that the neighbourhood under consideration here is

partly rural in character, partly residential and in reasonably close proximity to an operating metal quarry. It is the amenities of the neighbourhood as it stands that call for consideration, not the amenities that property owners in the vicinity would like to have. The fact is that the proposed quarry under consideration here, although its operation must to a certain extent detract from the amenities of the already occupied residential area lying to the north of it, is in an area which already has a metal pit operating in fairly close proximity. The question is not one of whether the proposed quarry is going to detract from the amenities of a neighbourhood which has not and never has had a quarry operating nearby, the result of permitting this quarry to be operated will simply be in general terms to substitute in the future one quarry for another. The Board does not consider that the operating of the proposed quarry is likely to cause any further detraction from the amenities of the neighbourhood as that neighbourhood is now subjected to some detraction from amenities by reason of the existing quarry. The land under consideration here is in a rural zone. A metal quarry is a use which is permitted in a rural zone subject only to such conditions as may be imposed by the controlling authority as to the method of use. People who elect to reside in rural areas cannot expect, as of right, to enjoy all the amenities of an urban area. For example, there would be nothing to prevent the establishment of a large pig farm immediately adjacent to the properties under consideration. This would undoubtedly detract from the amenities of the neighbourhood, but in going to reside in rural areas owners must be prepared to take the rough with the smooth. They cannot demand all the advantages of a rural area and seek to exclude any of the disadvantages that may arise from residing in such an area.

2. The Board cannot escape the conclusion that a good deal of the opposition to the establishment of the quarry under consideration stems from the owners' experiences of the operation of the existing quarry, "The Rodeo Pit", but that quarry is operated in a totally different manner to the method proposed to be used in the proposed quarry, and, moreover, no conditions are attached to its use. The conditions imposed by the County Council on the use of the proposed quarry provide that as the quarry is worked out it is to be completely restored to its original condition with the exception, of course, that the level of the land will be some 10-12 ft. lower than the existing level. Under these conditions, the net result is that when this quarry is worked out, which is estimated to be within 10-15 years, the land will be restored in the main to its present character. This event will take place before it is anticipated that there will be any substantial residential development in the immediate locality.

During the hearing, evidence was tendered and submissions made to the effect that the Patangata County Council would not adhere to or carry out the conditions laid down. The Board is not prepared to give any weight to these submissions. It declines to take the view that a responsible local authority, having contracted to do something, would subsequently refuse to honour its obligations under that contract.

At the conclusion of the hearing, Mr Wane and Mr Grant took the point that the conditions finally agreed upon between the two County Councils concerned were not the same as the conditions which were publicly notified and under consideration at the hearing of the objections, and that as the appellants had not had a reasonable opportunity of considering the effect of these amended conditions they asked that on those grounds the proceedings should be dismissed. The Board has given consideration to this submission, but it does not consider that it has very much weight or merit. The appellants' whole case both at the hearing of objections and appeals was directed to the submission "no quarry at all—with or without conditions". Under s. 38A of the Act, the Waipukurau County Council was not required to publish particulars of the application, or to hear objections to it. The only material change in the conditions as first published, and as finally settled, is the deletion of a clause reading as follows: "That the County will not permit any other person or local body to use metal from the said land!". The evidence is that the Patangata County Council proposes to operate this quarry with its own staff, and its engineer, in evidence, stated that compliance with the conditions laid down was possible and practicable and that it was the intention of the County Council to operate the quarry strictly in accordance with those conditions. He gave the reason for the deletion of the clause quoted above as being that although it was the intention of the County Council to operate this quarry itself, occasions might arise where Council staff were engaged elsewhere and might not be available to work for a time at the quarry, in which event it would be necessary for the County Council to have its metal quarried by outside contractors. This appears to be reasonable, but the Patangata County Council's case was based on the urgent and imperative necessity of this metal being available for its own use. The Board does not consider it reasonable that the County should be at liberty to let outside people have the right of extracting metal from this quarry for their own use, and it proposes to re-impose this condition in a somewhat modified form as hereinafter set out.

Conclusion: The Board considers that the quantum of detraction likely to arise from the operation of this quarry for the limited period of its anticipated life is not sufficient to justify a refusal of the change of use sought. The appeals are disallowed and the Board directs that the decision of the Waipukurau County Council to consent to the change of use shall stand, but subject to the conditions as agreed upon being added to as follows:

(a) The quarry is to be operated by the Patangata County Council's staff and the County will not permit any other person or local body to use metal from the said land except as a contractor for the Patangata County Council quarrying metal for use by that County.

(b) That within 12 months from the date hereof the Patangata County Council shall plant the perimeter of the property with suitable quick-growing trees and will maintain those plantations during the working life of the quarry to the satisfaction of and as it may be directed by the County Engineer for the time being of the Waipukurau County Council or any successor to that body.

Appeals dismissed on conditions.

Coffey *v.* Christchurch City Council.

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

Zoning—Area zoned "Residential"—Building formerly used as Shops converted into Flats—Change of Use—Application to Use Building for Light Industrial Use—Change in Predominantly Residential Area not approved—Town and Country Planning Act 1953, s. 38A.

Appeal by the owner of a property situated at the corner of Brougham Street and Brisbane Street in Sydenham, in the City of Christchurch. At one time, part of this property comprised a block of shops, but many years ago these shops were converted into five flats of a not particularly high standard. In fact they were described as being at present in a more or less derelict condition.

The property was in an area zoned as "residential" under the Council's undisclosed district scheme. The appellant applied to the Council under s. 38A of the Act for permission to use part of this property on the corner of the streets for a light industrial use. This application was considered by the Council but permission for change of use was refused.

The judgment of the Board was delivered by

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

That this property is in an area which is predominantly residential in character. It is true that to the north of this property from Brougham Street up to the railway line, there is a good deal of industrial development, but that is scattered in location and was only zoned as "industrial" because certain industrial uses had been permitted in the past before the Town and Country Planning Act 1953 came into force. The Board is not prepared to alter the zoning under an undisclosed district scheme and it does not consider it proper to agree to a change of use from "residential" to "industrial" in a predominantly "residential" area.

The appeal is disallowed.

Appeal dismissed.

Milligan *v.* Horowhenua County Council.

Town and Country Planning Appeal Board. Wellington. 1959. June 16, 22.

Zoning—Objection—Area Zoned as "Residential"—Panel-beating, Spray Painting, and Light Engineering carried on—Objection by County Town Committee supporting Re-Zoning as "Industrial A" disallowed—Appeal by Land-owner disallowed—Town and Country Planning Act 1953, s. 23 (3).

Appeal by the owners of a property being Lot 36 on Deposited Plan 14131 containing 33.9 pp. situate on the corner of Hohiria Street and Ngapaki Street in the Waikanae Town Beach area. This property was in an area zoned as "residential" under the respondent Council's proposed district scheme, Waikanae section.

The appellants themselves did not lodge an objection to the zoning of their land, but at the hearing of objections to the scheme they appeared in support of an objection by the Waikanae County Town Committee which was disallowed. The appellants accordingly had, by virtue of the provisions of s. 23 (3) of the Act, the right of appeal against that disallowance.

The first-named appellant carried on the business of panel-beating, spray painting and light engineering in two buildings erected on the property. This business had been in existence for the past ten years. The two buildings used in connection with the business covered approximately 1,500 sq.ft. The appellants asked that the zoning of their property be changed from "residential" to "industrial A".

The judgment of the Board was delivered by

REID S.M. (Chairman).

1. The property in question is situated in an area subdivided for "residential" purposes and already largely built on, being one of the principal "residential" areas in Waikanae. The area is predominantly "residential" in character and the present zoning appears to be appropriate.
2. The Board is prepared to accept the submission that the appellants' operations as carried on at present do not to any marked degree detract from the amenities of the neighbourhood but if this appeal were allowed then the appellants or any successor in title would as of right be able to use this land for any of the "industrial" uses permitted in an "industrial A" zone. It is quite clear that some if not most of these uses would detract from the amenities of a "residential" area. The appellants are by virtue of the provisions of s. 36 of the Act at liberty to carry on their operations as an existing use.

The appeal is disallowed.

Appeal dismissed.

Howell *v.* Hutt County Council.

Town and Country Planning Appeal Board. Wellington. 1959. May 20.

Zoning—Objection—Area zoned as "Rural"—Application for re-zoning of Nineteen Acres as "Residential" for Subdivision—Proposed District Scheme making Adequate Provision for Residential Development—Rural Character of Area to be maintained—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Act. The appellants were the owners of a property comprising first 19 ac. 3 ro. 32.9 pp., being Lot 1 Plan No. 16710 and, secondly, 1 ac. 2.84 pp., being Lots 1, 2, 3, and 25 on Deposited Plan 16144.

This land was zoned as "rural" in the respondent Council's proposed district scheme for the Paraparaumu-Raumati area and the appellants objected to this zoning requesting that the land in question be zoned as "residential". This objection was disallowed and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman).

1. In 1951 a scheme plan was approved under the Land Subdivisions in Counties Act for the subdivision of part of this land for residential use, but this proposed subdivision was not proceeded with, no plan was ever lodged in the Land Transfer Office, and accordingly that subdivision has lapsed. The question falling for determination here is simple the appropriateness or otherwise of the zoning of this land as "rural".
2. The Board has already held in a previous decision relating to a property close to the property under consideration, *Willis* v. *Hutt County*, 34 New Zealand Law Journal, 286, that the Council's proposed district scheme for this area makes adequate provision for residential development of the area in land already zoned for residential purposes. The Board is still of the same opinion.
3. Although in their appeal the appellants gave as one of their grounds that it is not possible to farm or otherwise use the area of nineteen acres economically as the soil is not suitable for any form of market gardening, the evidence shows that the land first described is farmed in conjunction with an adjoining block of 100 acres which the appellant's farm in partnership with one Walton as a dairy farm milking fifty cows on town supply. While this block of nineteen acres might not by itself be an economic farm unit the fact is that it forms part of an existing economic farm and is being used for the production of food stuffs. It is a recognized town-and-country-planning principle that the rural character of such land should be maintained as long as possible.
4. If a residential subdivision were permitted in this area the result would be to create an isolated "spot" zone which could not be provided with any of the essential services for such an area with the exception possibly of electricity.

The appeal is disallowed.

Appeal dismissed.

Cranwell *v.* Henderson Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 20.

Zoning—Land zoned "Open Public Space"—Claim for Zoning "Residential" allowed in Respect of Part—Balance zoned "Open Space" for Recreational Purposes, with Review of Zoning in Five Years' Time—Town and Country Planning Act 1953, s. 26.

Appeal, under s. 26 of the Town and Country Planning Act 1953 by the owner of all that piece of land situated in the Borough of Henderson containing 21 ac. 16 pp. more or less being parts of Allotment 7 of the Parish of Waipareira.

Under the respondent Council's proposed district scheme this land was zoned as a "public open space". The appellant lodged an objection to this zoning claiming that his land should be zoned as "residential".

The objection was disallowed and this appeal followed.

At the hearing counsel intimated that the parties had reached agreement.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the submissions of counsel, the Board by consent makes the following order:

(a) That the land comprised in Lots 63 to 70 both inclusive on the scheme plan of subdivision submitted by the appellant to the Council for approval be zoned as "residential" and the appeal be allowed in respect thereof.

(b) That the balance of the land shown on the said scheme plan be zoned as "open space" for recreational purposes and the appeal be withdrawn in respect thereof.

(c) That the zoning of the land mentioned in (b) above be reviewed by the Council at the expriation of five years from the date of this order (provided that in the meantime the said land has not been taken by the Council as "open space" for recreation purposes) and the Council will advise the appellant and his solicitors in writing of the zoning as decided upon on such review, and thereupon all the appellant's rights to object to and to be heard by the Council against such decision will arise and obtain as and in the same manner as is provided for by s. 26 of the Town and Country Planning Act 1953 in the case of the preparation of a district scdeme.

Order accordingly.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Testamentary.—A woman went into the office of the caretaker in a cemetery. "I can't locate my husband's grave", she said. "What is his name, please?" "Thomas Jackson." The caretaker referred to his card index. "I'm sorry", he said finally, "we have no Thomas Jackson—only an Elizabeth Jackson". "That's him", she replied. "Everything's in my name."

Simon.—A correspondent writing to Scriblex to express his agreement with the view that Stanley Jackson's "*The Chief*", a biography of Lord Chief Justice Hewart, is one of the best legal biographies to appear in recent years raises the question as to why no one has yet apparently published one of Viscount Simon, described for many years before his death in 1954 as the greatest lawyer in England and possibly in the English-speaking world—a man with a tremendous range of knowledge and learning, of prodigious memory, and, for sheer intellectual superiority, without equal in his time. The answer to this may well be found in his own foreword to *Retrospect*, a volume of memoirs published by him in 1952. "This book of memoirs does not contain much about my busy years at the Bar, for while I have a profound belief in the good sense of English law and regard those who spend their lives in applying it and making it work as engaged in a noble calling, I do not much care to revive the memory of ancient encounters in Court, which may have created a sensation at the time, but have now passed into an oblivion which to some concerned may be welcome. Moreover, in my own case the Bar has been regarded as offering a career which may enable a man without private fortune to enter public life and do his best there. Even though one has played but a subordinate part on this greater stage and may look back to much that might have been better done, the record may have a wider value than the recounting of merely professional success." From the point of view of those in the profession of the law who derive assistance from the experiences of its greatest figures, this attitude is a subject for regret as well as commendation.

From his first big brief given him by Carson, then Solicitor-General, in 1903—a boundary dispute between Canada and Alaska involving thousands of documents, old maps and treaties, many in French and Russian Simon's career as Lord Chancellor and lawyer has all the materials for an inspiring legal biography. His greatest case at the Bar was possibly that of criminal libel against one Edward Mylius for his allegation that George V had committed bigamy—a charge found to be without the slightest foundation. In this he led for the prosecution and there appeared with him Sir Rufus Isaacs, later Lord Reading, and Sidney Rowlatt, later Mr Justice Rowlatt. In the criminal field, he obtained the acquittal of Lieutenant Douglas Malcolm on a charge of murdering his wife's lover—a *cause celébrè* during the concluding stage of World War I, and remarkable for the fact that the accused made no attempt to deny his action and the reasons for it. In the Portuguese Banknote case in which the Bank of Portugal obtained judgment for £570,000 against Waterlows (for whom Sir John Simon appeared) both sides appealed, Waterlows on the ground that the damages awarded were excessive and the Bank because they were not enough. The Court of Appeal accepted Simon's argument and reduced them to £300,000. Both sides took the case to the House of Lords. In the meantime, Simon had become Foreign Secretary in which role, incidentally, he did not appear at his best. The judgment of the Court of Appeal was reversed and the Bank awarded £610,000, the amount originally claimed.

Law and Morality.—In a recent lecture delivered at the British Academy, Devlin J. chose as his subject "The Enforcement of Morals: A consideration of the Jurisprudence of the Wolfenden Report". The three questions which he posed were:

1. Had society the right to pass judgment on morals at all?
2. If society had that right, should it use the law to enforce it?
3. Should there be enforcement in some cases only or in all cases?

In the structure of each society, Devlin J. said, there was a political, a moral, and an ethical element, and it was the duty of the law to protect society as well as the individual; and, in protecting society, it must also protect that community of ideas which included the morals of society. One saw the principle at work in the functions of a jury in serious crimes against morals. In any society where there was a lack of clear moral teaching, the law suffered; in this country morality was based on Christian morality, and without that morality the law likewise suffered. A recognized morality was as necessary to society as a recognized government. Society just as much had the right to use the law to preserve morality as to preserve anything else it held essential to its existence—as, for example, the right to protect its political existence; hence the offence of treason. It must be remembered that, in our society, one great principle helped to hold the balance—there was no grave offence punishable without the verdict of a jury. The learned Judge ended his excellent argument with this phrase: "Society cannot ignore the morality of the individual any more than it can ignore his loyalty. It flourishes on both and without both it dies."

Tailpiece:

At the conclusion of a recent murder appeal to be followed immediately by another case, the President of the Court of Appeal observed: "We will take a short adjournment", and, glancing significantly at the array of books used on the criminal appeal, he added, "while they roll the pitch".

CORRESPONDENCE.

Customary Hire Purchase Agreements.

Sir,

Mr Cain's letter (*ante*, p. 288) appears to necessitate a reply.

Despite the fact that the major benefits of s. 57 could be secured through other channels, nevertheless it substantially improved the position of traders and the hire-purchasing public, as was its purpose.

Taking the points listed (a) (b) and (c) by him I make these comments.

(a) It is much more satisfactory to have the Legislature's stamp of " notorious custom " than to face the possibility of having to prove it.

(b) The section permits not only the *Helby* v. *Matthews* type of agreement but also what was previously impossible, viz. a safe unregistered agreement for sale of chattels under which the purchaser can be compelled to pay the whole price.

(c) As to fixtures, I was only unconcerned about the loss of protection to the public through s. 57. I regard it as very much in the interests of the community that vendors and would-be purchasers on terms of fixable chattels should be free of the burden of registration as they are under the section.

As to Mr Cain's claim that s. 57 has produced tangles and confusions, in my opinion it has greatly simplified, for traders in customary chattels (and their legal advisers), a branch of commercial law whose trickiness this discussion has highlighted. The only " confusion " left is the illogical limitation of the section's benefits to traders.

Finally, in view of the importance of the point to " non-customary " vendors, I feel I must controvert Mr Cain's view that *General Motors Acceptance Corporation* v. *Traders Finance Corporation* [1932] N.Z.L.R. was a decision on the consequences of non-registration of a hire-purchase agreement. Statements on pages 19 and 20 of the case lead one to expect such a decision but these statements—and the discussion about whether the unregistered agreements dealt with in the case were customary hire-purchase agreements or not—were all irrelevant, because the agreements, though *in form* hire-purchase agreements, were eventually (page 33) held to be *in substance* instruments by way of security. The person stated in the agreements as the owner (the appellant corporation) was therefore in effect held to be, not an owner executing a hire-purchase agreement but the grantee of an instrument by way of security, and, although the Court did not say so, the case must be assumed to have been decided on the ground that such instrument being invalid as against the respondent the appellant had no right whatever to the chattels. In other words, it could not prove ownership except by relying on an invalid instrument.

As a further illustration of the trickiness of this subject the Court of Appeal missed the only point that would have been fatal to the appellant if the agreements had in substance as well as form been hire-purchase agreements (though not " customary " ones), viz. that Bishara Bros. could in that case have given a good title to the respondent under s. 27 (2) of the Sale of Goods Act, because they were framed as agreements for conditional sale and purchase and *Lee* v. *Butler* would have applied.

Yours, etc.

AUCKLAND, November 6, 1959. N. A. CAMPBELL.

Dear Sir,

Referring to Mr Campbell's letter, we must really conclude by agreeing to differ.

My main proposition was that s. 57 has caused confusion; the *General Motors Acceptance Corporation* case shows this was commented on by Mr Evans-Scott in (1933) N.Z.L.J. 40, and by Mr Campbell in his own letter. I talk of confusion, he of " trickiness ", and, in my opinion, this trickiness is brought about by the special and peculiar New Zealand legislation which has not been found necessary in England, and the repeal of which would clarify the position and yet still give reasonable protection to vendors. The notorious custom aspect could be handled by Orders in Council under the Bankruptcy Act.

As to fixtures, Mr Campbell has very much at heart the interests of vendors and purchasers of fixable chattels. The protection of a wider body, however, seems desirable to me—the general public at large, from whose ranks are drawn purchasers and mortgagees who are confronted with unregistered interests in fixtures of which they had no notice. The private arrangements between hire-purchase vendor and purchaser are thus carried to extraordinary lengths when elevated to priority over the Land Transfer register.

Thank you for the space.

Yours, etc.

G. CAIN.

WELLINGTON, November 18, 1959.

" **Annoyance.**"—In *Tod-Heatly* v. *Benham* (1888) 40 Ch. D. 80, 93, Cotton L.J., referred to the meaning of the word " annoyance." Speaking of the task of Judges in deciding what amounts to an annoyance, and dealing with the word in a covenant, he said: " They [the Judges] must decide not upon what their own individual thoughts are, but on what, in their opinion and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people; and, in my opinion, an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance, and within the definition given by V.-C. Knight-Bruce in *Walter* v. *Selfe* (1851) 4 De G. & Sm. 315, 322. It is not sufficient in order to bring the case within the words of the covenant, for the plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment would be annoyed or aggrieved by what is being done."—Lindley L.J., at p. 96, said: " Now what is the meaning of annoyance The meaning is that which annoys, that which raises objections and unpleasant feelings. Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant."—Bowen L.J. at p. 98, said: " ' Annoyance " is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."

Good Neighbourliness as Legal Risk.—A continuing problem is set out in the language of Bowen L.J. in *Blount* v. *Layard* ([1891] 2 Ch. 681. n, approved by Lord Macnaghten in *Simpson* v. *Attorney-General* [1904] A.C. 476, 493: " Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."