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NEW LEGISLATION OF INTEREST TO PRACTITIONERS.

THE good work of the Law Revision Committee continues. Its recommended contributions to the Statute Book for 1959 include the following:

Estate and Gift Duties Amendment Act 1959, s. 5
Family Protection Amendment Act 1959
Joint Family Homes Amendment Act 1959.
Land Transfer Amendment Act 1959
Public Contracts Act 1959

Two other proposed enactments, recommended by the Law Revision Committee, which did not fit into the legislative programme, were the Cheques Bill 1959 (see hereon (1957) 33 LAW JOURNAL, 341), and a Bill to amend the Judicature Act so as to give the presiding Judge power to dispense with a jury in a civil action at any time before or during a trial either on the application of a party or on the Judge's own motion, where it appears to him that the action or any issue can more conveniently be tried before the Judge alone. These Bills stand over until next Session.

In this issue, Mr E. C. Adams explains the nature and effect of amendments made in the property legislation mentioned above. In the next issue, he will review the scope and effect of the Estate and Gift Duties Amendment Act 1959.

It is our purpose here to consider the remaining new statutory provisions of particular interest to practitioners.

FAMILY PROTECTION.

On applications for further provision under the Family Protection Act 1955, it has been the practice for the personal representative of the deceased testator to file an affidavit in which he deposed to the facts of the financial position of the estate. It was not usual for him to have any active part in the argument being presented to the Court. He contented himself by appearing by counsel and saying he abided the Court's decision. This practice is mentioned in *Stephens's Family Protection in New Zealand*, 2nd ed., 130, and in *Wright's Testator's Family Maintenance*, 50.

The Law Revision Committee was of the opinion that the executor should be of more assistance to the Court, and that, as the testator's representative, his duty should be to uphold the will under discussion.

In two recent cases brought to the Committee's notice, orders were made in favour of members of the testator's family. The Court, without further evidence, had to act on a statement of the relationship which had existed between the testator and his family. This information came from the one source, the interested members of the family.

In the first case, the testator had had years of matrimonial dispute with his wife. The files of his solicitor contained evidence of the wife's blameworthy conduct. The parties were living apart, the husband providing her with a small allowance more as an act of charity than of legal liability. By his will, the testator continued this small allowance and left the bulk of his estate to charities. Upon application by the widow, the charities, who had no knowledge of the matrimonial circumstances, properly abided by the decision of the Court. The executors, though permitted access to the solicitor's files, considered that their duty was to be neutral. In the absence of opposition, the very one-sided version of the facts supplied by the widow was therefore necessarily accepted by the Court. A substantial order was made in her favour, and the conduct of the testator was criticized. To those who knew the contents of the files, the criticism and the order were difficult to accept.

In the other case, the Court approved of a consent order making further provision for widow and children, substantially by a general rearrangement of the testator's dispositions, without doubt appropriate to the needs and the claims of the claimants. However, it was not considered the duty of the executors to contest those claims, despite knowledge of the family circumstances from which the testator's reasons for his dispositions could have been ascertained.

If, in either case, the testator's own version of his difficulties with his family had been before the Court, it might have been a factor leading to a different order altogether.

Section 11 of the Family Protection Act 1955 provides that the Court may have regard to any ascertained reasons for the dispositions made by the deceased. In practice, executors were disposed to disclose such reasons only if they were specifically given by the testator to the draftsman of his will or to his executor, orally or in writing.

It seemed to the Law Revision Committee that there was justification for the suggestion made to it that the executor should regard himself as under a duty to uphold the testator's will he had to administer, and, to that end, to place before the Court all material available to him which was relevant for the Court's

consideration. Accordingly, he should be required to appear or be represented at the hearing of an application for further provision, not merely to abide the Court's decision, but to present argument that the will be upheld. It seemed only logical that the executor should be the spokesman for the testator whose will it was, and who had no opportunity of having his version of family circumstances put before the Court.

Such circumstances, while relevant, may not necessarily fall within the meaning of the words "the deceased's reasons, so far as they are ascertainable" in s. 11 of the Family Protection Act 1955. By this suggestion, the facts of an application were likely to be more fully explored, and the danger of orders made in absence of opposition, based on one version only of relevant facts, averted.

A new section, s. 11A (added to the Family Protection Act 1955 by s. 2 of the Family Protection Amendment Act 1959) is as follows:

> 11A. On any application under this Act it shall be the duty of the administrator to place before the Court all relevant information in his possession concerning the financial affairs of the estate and the deceased's reasons for making the dispositions made by his will or for not making any provision or any further provision, as the case may be, for any person:
>
> Provided that the duty imposed by this section shall not extend so as to require the administrator to place any such information before the Court if it is known to him by reason only of its having come to his knowledge in circumstances which impose an obligation, whether legal or moral, on the administrator not to disclose it, and its disclosure in connection with any application under this Act would be a breach of that obligation.

The new section thus gives effect to the recommendation of the Law Revision Committee, and provides that, on any application under the principal Act, it shall be the duty of the executor or administrator to place before the Court all relevant information in his possession concerning the financial affairs of the estate and the deceased's reasons for making the dispositions made by his will or for not making any provision or any further provision, as the case may be, for any person. This duty does not extend so as to require personal representatives to disclose information known to them by reason only of its having been communicated to them in circumstances which impose an obligation, whether legal or moral, on them not to disclose it, if its disclosure in connection with any Family Protection application would be a breach of that obligation.

Before leaving the Family Protection legislation, we refer to s. 18 of the Maori Purposes Act 1959.

Section 119 (4) of the Maori Affairs Act 1953 required the Maori Land Court, before it grants probate, to make inquiries whether a Maori testator has made adequate provision for his widow, children, or orphan grandchildren. Such an inquiry at that stage appeared to be premature and the necessity imposed by the subsection to embark upon it could cause inconvenient delays in the grant of probate.

Subsection (4) of s. 119 has now been repealed. It is replaced by new subss. (4) to (4c), the general effect of which is to enable the Court to make amendment to a vesting order it has earlier made in respect of succession, if it should become necessary to give effect to further provision which the Court then considers should be made for family-protection purposes.

Public Bodies Contracts.

In *Reynolds* v. *Nelson Harbour Board* (1904) 23 N.Z.L.R. 965, 988, Edwards J. observed that s. 148 of the Municipal Corporations Act 1954 (in its original form and as in the words of s. 66 of the Harbours Act 1878) was intended to be exhaustive and constituted a complete code defining the powers of the local authority with respect to contracts, and the methods in which alone those powers could lawfully be exercised; and it was held by the Court of Appeal that those provisions were mandatory. Section 148 (4) was enacted in 1910 to mitigate the hardship arising from the decision in the *Reynolds* case. Its effect is seen in *Metcalfe* v. *Mayor, etc. of Whangarei* (1914) 33 N.Z.L.R. 1484. But it seemed to the Law Revision Committee that subs. (4) had become quite out of touch with modern conditions when it required that every contract for a sum exceeding £20 had to be in writing, signed by two members of the Council "acting on behalf of or by direction of the Council" and that every oral contract, no matter how small the amount involved, had to be made by two councillors.

The Law Revision Committee considered that, instead of amending local body legislation piecemeal, it would be more effective to create a code for all local authorities and public bodies with provisions that would apply to them all. Its recommendations have borne fruit in the enactment of the Public Bodies Contracts Act 1959, which came into operation on October 23, 1959.

Application of Act. Section 2 of the new statute comprehensively defines the term "public body", used therein, as meaning every local authority or public body of any of the classes for the time being specified in Part I or Part II of the First Schedule, and any class of local authority or public body later included therein by Order in Council from time to time.

The public bodies to which the Act applies at present are City Councils, Borough Councils, County Councils, Town Councils, Road Boards, Harbour Boards, Hospital Boards, Boards of Trustees of separate institutions under Part IV of the Hospitals Act 1957, Electric Power Boards, Drainage Boards, River Boards, Catchment Boards, Water Supply Boards, Urban Fire Authorities, Fire Boards, Metropolitan Milk Boards, District Milk Boards, Rabbit Boards, Railway Boards, Nassella Tussock Boards, Underground Water Authorities, Education Boards, the controlling authorities of secondary schools and combined schools and technical schools, Licensing Trusts, the Auckland Transport Board, the Christchurch Transport Board, the Dunedin Drainage and Sewerage Board, the Auckland Harbour Bridge Authority, the Christchurch-Lyttelton Road Tunnel Authority, and the Waikato Valley Authority. As we have said, power is given to apply the Act to other public bodies by Order in Council.

Mode of contracting by public bodies. In prescribing the mode of contracting to apply to all public bodies, s. 3 prescribes the manner in which public bodies are to enter into contracts, and applies generally, with some modifications, the provisions of s. 148 of the Municipal Corporations Act 1954. The most important modifications are that a written contract may be signed by one member or officer of the public body on behalf of the public body, and that oral contracts may be entered into for amounts up to £200. Most of the

existing legislation requires the contract to be signed by two members of the public body and limits oral contracts to £20.

Delegation of power to enter into contracts. In most cases, the previously-existing legislation, when authorizing local authorities or public bodies to delegate powers, expressly forbade the delegation of any power to enter into a contract.

Now, by s. 4 of the statute, a general power is given to all public bodies to delegate to their committees and officers power to enter into contracts.

A public body may delegate power to enter into a contract by resolution in that behalf. The resolution will require the approval of the Minister of Internal Affairs in any case where it provides for a delegation to enter into a contract for a consideration exceeding a lump sum of £500 or instalments aggregating more than £500 or a contract for payment by instalments for an unspecified period exceeding £25 a week.

Section 148 of the Municipal Corporations Act 1954, which the new s. 3 replaces, is repealed.

There are a number of amendments and repeals of specified provisions in existing local and public bodies legislation consequential on the passing of the new statute.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Petition—Summons and Copy Petition to be "served upon the debtor forthwith"—Such Requirement directory only—"Forthwith"—Bankruptcy Act 1908, ss. 37 (2), 167. The provision in s. 37 (2) of the Bankruptcy Act 1908 that a copy of a bankruptcy petition and summons "shall forthwith be served upon the debtor is directory and not mandatory". Consequently, a bankruptcy petition is not necessarily to be dismissed if service has not been effected within such a time as can reasonably be regarded as coming within the meaning of the word "forthwith" in the subsection. If there is an irregularity leading to delayed service, it can, in any event, be cured under s. 167 of the statute. (*In re a Debtor* [1939] Ch. 251; [1938] 4 All E.R. 92, distinguished. *In re Neale* [1928] G.L.R. 75, referred to.) *In re Van der Jagt (A Debtor).* (S.C. Christchurch. 1958. December 19. F. B. Adams J.)

CONTRACT.

Warranty—Corporation agreeing to provide Pulling Machine with which Defendant was required to harvest Linen Flax Crop at Time decided by Corporation's Factory Manager—Implied Warranty by Corporation that Machine reasonably fit for Purpose of Intended Use—Such Warranty also to be implied to give Contract Business Efficacy—Machine dangerous to Its Operator and Operable only in Breach of Machinery Act 1950, and so not reasonably fit for Intended Purpose—Breach of Implied Warranty. The Corporation agreed to provide a pulling machine with which the defendant was required to harvest on his property a linen flax crop, which was the property of the Corporation, although grown on the land of the defendant. The defendant was bound to pull the crop at the time decided by the factory manager of the Corporation. The defendant provided a tractor, which he used to draw the puller and to supply power for the machinery which comprised the puller. The defendant drove the tractor and the plaintiff was engaged to attend the operation of the puller. The plaintiff, who was a servant of the defendant, sued for damages in respect of injuries sustained by him, arising out of and in the course of his employment. The Corporation was joined in the action as third party. The plaintiff's claim against the defendant was settled out of Court. The third party concurred in such settlement as to amount, but not otherwise, and the settlement was duly carried out by payment. It was agreed that, if the defendant was entitled to succeed against the third party, the quantum, including a fair sum for costs incurred by the plaintiff, was the sum of £2,013 18s. 5d. On the questions of law arising between the defendant and the Corporation, *Held*, 1. That, in the circumstances, there was an implied warranty by the Corporation that the machine was reasonably fit for the purpose for which the parties intended it to be used—namely, for pulling the crop in the manner in which it was being used when the plaintiff was injured; and the Corporation was bound to provide a puller which was reasonably fit for the contemplated purpose. Furthermore, such a term should be implied to give to the contract between the defendant and the Corporation business efficacy. (*Francis* v. *Cockerill* (1870) L.R. 5 Q.B. 501, followed. *The Moorcock* (1889) 14 P.D. 64, and *Hamlyn & Co.* v. *Wood and Co.* [1891] 2 Q.B. 488, applied. *Robertson* v. *Amazon Tug and Lighterage Co.* (1881) 7 Q.B.D. 598, distinguished.) 2. That, it was in the contemplation of the parties that either the defendant, or some person employed by the defendant, should stand on the rear platform during its operation to carry out the duties which the plaintiff was carrying out. 3. That the puller supplied by the Corporation did not comply with the provisions of s. 17 (1) of the Machinery Act 1950, as the plaintiff's accident was caused solely by reason of failure to have a sufficient guard between the operator standing on the plank and the moving chains with which the plaintiff came into contact; and that the puller could not be operated by the defendant on the basis contemplated in the contract, except in breach of the statutory duty to have it securely fenced. (*John Summers and Sons Ltd.* v. *Frost* [1955] A.C. 740; [1955] 1 All E.R. 870, applied. *Burns* v. *Joseph Terry and Sons Ltd.* [1950] 2 All E.R. 957, referred to.) 4. That, as the machine in operation was dangerous to the operator, in that its moving parts were insufficiently guarded while in operation, and it could be operated only unlawfully and in breach of the Machinery Act 1950, it was not reasonably fit for the purpose, for which it was contemplated by the parties that it should be used. 5. That the defendant, when engaging the plaintiff to operate the puller, exposed the plaintiff to unnecessary or unreasonable risk in the operation of the puller as contemplated by the contract; and that, accordingly, the plaintiff was entitled to receive from the defendant, as his employer, the damages which he suffered. 6. That there was no proof that the plaintiff was guilty of contributory negligence; and there was no evidence that the defendant was guilty of any negligence other than that which was referable to the puller provided by the Corporation. 7. That the amount of damages which the defendant was responsible to pay to the plaintiff was recoverable in full from the Corporation; and also that, as the plaintiff could have succeeded in an action against the Corporation if he had chosen to sue it either solely or jointly with the defendant, the damages were not too remote. (*Mowbray* v. *Merryweather* [1895] 2 Q.B. 640, and *Oliver* v. *Saddler and Co.* [1929] A.C. 584; [1929] All E.R. Rep. 131, followed.) 8. That, as the defendant was liable for the amount he had paid to the plaintiff, irrespective of the liability of the Corporation, there was no reason why, pending a determination of a question between the defendant and the Corporation, the Corporation should be ordered to pay interest to him. Judgment was accordingly given for the defendant against the Corporation for £2,013 18s. 5d. and costs. *Smith* v. *Stockdill (Linen Flax Corporation of New Zealand, Third Party).* (S.C. Timaru. 1959. June 15. Henry J.)

DAMAGES.

Native Grass Pasture Burnt by Fault of Tortfeasor—Negligence admitted—Method of Assessing Damages. The proper basis upon which damages should be assessed on a claim respecting injury to land caused by fire, the result of negligence, is the diminution in value of the land resulting from the fire. In special circumstances where improvements are involved and particularly where the damage is not permanent in character, and the action is brought in negligence, the cost of reinstatement could be the basis of an award. (Observation of Denning L.J. in *Philips* v. *Ward* [1956] 1 All E.R. 874, referred to.) It depends on the circumstances which method of assessment is adopted, as, even in the case of land without buildings, there is not necessarily one sole and exclusive route in assessing damages which must be trodden inexorably in all cases. Where the land is without buildings, though the measure of damage is, generally speaking the diminished value of the land, this, in fact, often coincides with the fair cost of restoring the land

to its former state. This was the position in the present case, where 75 acres of native grass pasture were burnt, as the result of negligence (which was admitted), the diminished value was £1 per acre, and the fair cost of reinstating was the same amount. *Logan and Others* v. *Attorney-General.* (S.C. Nelson. 1959. October 7. McCarthy J.)

DESTITUTE PERSONS.

Maintenance Officer—Maintenance Officer not authorized to accept Service of Summons—Defendant absent from New Zealand —Magistrate's Power to hear Complaint for Variation of Order Ex parte "if he thinks fit"—Destitute Persons Act 1910, s. 73—Destitute Persons Amendment Act 1926, s. 9 (2B). Section 9 (2B) of the Destitute Persons Amendment Act 1926 gives the Maintenance Officer the right of appearance that a solicitor has; but it does not authorize him to accept service of a summons for a person. A distinction is drawn by s. 73 of the Destitute Persons Act 1910 between the procedure in the case of complaints under Part I or Part II, and other complaints. Even under s. 73 (1) there must be a consideration of the position, for the Magistrate may, under that subsection, hear and determine the complaint, ex parte as it seems, "if he thinks fit"; as, under it, the rights of a person absent from New Zealand may be taken away or varied without his being heard at all, even where his or her address is known. Under s. 116 (2) of the Summary Proceedings Act 1957, the Registrar of the Magistrates' Court, upon receiving a notice of appeal, must forthwith "deliver or post one copy to the respondent or his solicitor". Where the defendant's whereabouts are known, even if he is out of New Zealand, the notice should be posted to him or her. *Swanson* v. *Maintenance Officer.* (S.C. Wellington. 1959. October 28. Hutchison A.C.J.)

HEALTH.

Nuisance—Noise—Trade So Carried on as to be Unnecessarily "offensive or likely to be injurious to health"—Nuisance diminishing Comfort of Persons in Neighbourhood included—Health Act 1956, s. 29 (1). Although ways of carrying on a business which offend the senses in ways clearly irrelevant to health may be outside s. 29 (1) of the Health Act 1956, yet those which unnecessarily offend the senses so as materially to diminish the comfort of persons in the neighbourhood who are subjected to them are covered by s. 29 (1). (*Bishop Auckland Local Board* v. *Bishop Auckland Iron Company* (1882) 10 Q.B.D. 138, and *Bates* v. *Penge Urban District Council* [1942] 2 K.B. 154, applied.) Consequently, the word "offensive" in the phrase "offensive or likely to be injurious to health" as used in s. 29 (1) of the Health Act 1956 is applicable to a noise which, besides being aesthetically unpleasing, is one which—according as the facts may be held to show—may substantially diminish the comfort of those who are subjected to it. *Murray* v. *Laus.* (S.C. Auckland. 1959. November 11. Turner J.)

MACHINERY.

Accident to Operator caused solely by Failure to guard Moving Parts—Breach of Statutory Duty on Part of Operator's Employer —Machinery Act 1950, s. 17 (1)—See CONTRACT (*supra*).

MASTER AND SERVANT.

Negligence—Vicarious Liability—Servant in Control of Wharf Tractor in Course of Employment—Tractor driven by Third Party appointed by Servant and over whom Servant retained Right of Control—Accident caused by Third Party's Negligent Driving—Vicarious Liability of Master Established without Proof of Servant's Negligence, independent of Negligence of Third party while driving Tractor. The action of an employee who is an authorized driver of a vehicle in allowing another to drive it, does not take the authorized driver outside the scope of his employment so long as he remains in control of the vehicle as this can rightly be regarded as a mode—though an improper mode—of doing the authorized work. (*Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550 and *Canadian Pacific Railway Co.* v. *Lockhart* [1942] A.C. 591; [1942] 2 All E.R. 464, followed.) A power of actual physical control of vehicle need not be found on the part of an authorized driver before responsibility can be imputed to the employer for the act of an unauthorized person allowed by the authorized driver to drive the employer's vehicle; and the employer can be held liable if the authorized servant, acting within the scope of his employment, is present, and, by his very presence, has some measure of physical or oral control of the vehicle. (*Ricketts* v. *Thomas Tilling Ltd.* [1915] 1 K.B. 644; *Kuproski* v. *North Star Oil Ltd.* [1934] 3 D.L.R. 450, and *Marsh* v. *J. Moores and Marsh* v. *P. Moores* [1949] 2 K.B. 208; [1949] 2 All E.R. 27, considered. In such a case it is not necessary for the plaintiff, in order to fix liability on the employer, to show that the employee, while retaining control of the vehicle, was himself guilty of an act of negligence independently of his appointed driver. (*The Trust Co. Ltd.* v. *de Silva* [1956] 1 W.L.R. 376, followed.) *So held,* by the Court of Appeal. Kidd, a servant authorized to drive his employer's tractor, allowed Clark, a fellow-servant, to drive a tractor on the direct route of an authorized journey. While Kidd, the authorized driver, was seated beside Clark, who was in the driver's seat of the tractor, the plaintiff, a bystander, was struck by the tractor and injured. The jury found negligence on Kidd's part in a manner causing or contributing to the accident in allowing Clark to drive and failing to see that he drove properly, and awarded damages to the plaintiff. Hutchison J. dismissed a motion by the defendant for nonsuit or judgment for the defendant, or alternatively, for a new trial. On appeal from that judgment, *Held,* by the Court of Appeal, 1. That there was evidence justifying a finding that Kidd, in allowing Clark to do the actual driving, was still in control of the tractor; and that Kidd when he allowed Clark to drive, was acting within the scope of his employment as an employee of the defendant company though performing his work in an unauthorized way. (*The Trust Co. Ltd.* v. *de Silva* [1956] 1 W.L.R. 376, followed.) 2. That it was not necessary for the plaintiff to show that there was any act of actual personal negligence on the part of Kidd independently of Clark, during the time when Clark was driving the tractor, as, if Kidd had been driving, his employer would have been liable for the consequences which arose by reason of the negligent way in which Kidd drove, provided it was found that Kidd throughout retained control of the vehicle. Judgment of Hutchison J. [1959] N.Z.L.R. 127, affirmed. *Union Steam Ship Co. of New Zealand Ltd.* v. *Colville.* (C.A. Wellington. 1959. October 16. North J. Cleary J. Shorland J.)

NEGLIGENCE.

Breach of Statutory Duty—Third Party—Accident to Employee —Employer Exposing Employee to Unnecessary or Unreasonable Risk in Operation of Machine as Contemplated by Agreement with Provider of Machine—Employer's Negligence referable to Machine provided by Third Party—Damages payable to Employee by Defendant Employer recoverable in full from Third Party—Interest not payable by Third Party to Defendant—See CONTRACT (*supra*).

PRACTICE.

Appeals to Supreme Court—Destitute Persons Notice of Appeal from Order—Respondent absent from New Zealand—Duty of Registrar to post Notice of Appeal to him if His Whereabouts Known—Summary Proceedings Act 1957, s. 116 (2)—See DESTITUTE PERSONS (*supra*).

PROPERTY LAW.

Mortgage—Restriction on Exercise of Mortgagee's Rights—Notice—Notice requiring Mortgagor to remedy Default and pay Principal Sum Invalid and Ineffectual—Property Law Act 1952, s. 92. Section 92 (1) of the Property Law Act 1952 requires the mortgagee to give a notice which, inter alia, requires the mortgagor to remedy the default. A notice by a mortgagee requiring the mortgagor not merely to remedy the default, but also to pay the principal sum, does not comply with the section. The principal moneys secured by a mortgage were repayable on November 27, 1960. Clause 5 of the mortgage provided that, if the mortgagor made default in any matter, then the principal sum should, at the option of the mortgagee become immediately payable without notice. The mortgagor was at all material times in default of covenants contained in the mortgage in respect of certain weekly payments of interest on the mortgaged property, and in respect of certain collateral securities. A notice by the mortgagee purported to be given under s. 92 of the Property Law Act 1952 correctly specified in its recitals certain breaches of covenant. It also recited so much of cl. 5 of the mortgage as purported to provide that upon the happening of such defaults as were recited, the principal moneys secured became due and payable; and finally it called upon the plaintiff "to remedy the said default by making payment to the first defendant of £27,745 odd, being all the interest and principal plus rates owing, or which could be owing under the mortgage, by the mortgagor". The mortgagor sought an injunction restraining a sale through the Registrar of the SupremeCourt of the property which was security for the mortgage. *Held,* 1. That the effect of s. 92 of the Property Law Act 1952 upon cl. 5 of the mortgage was that cl. 5 must be read subject to the section; and, when so read the principal moneys became payable under the provision if—but only if—the mortgagee, having given notice specifying the defaults and breaches of

covenant relied upon, the mortgagor fails to remedy those breaches by the date fixed by the notice. 2. That the effect of the notice was to specify the non-payment of the principal sum secured by the mortgage, as one of the defaults complained of, and to require the mortgagor to pay the principal sum so as to remedy one of his alleged defaults. As such a notice denied the mortgagor the privilege which s. 92 was intended to give, and defeated the purpose for which the section required the notice to be given, it was invalid and ineffectual as a notice under the section. (*Campbell* v. *Commercial Banking Co. of Sydney* (1879) 40 L.T. 137, distinguished). 3. That, accordingly, the mortgagor was entitled to an injunction restraining the sale. *Jaffe* v. *Premier Motors Ltd.* (S.C. Auckland. 1959. September 30; October 1. Shorland J.)

PUBLIC REVENUE.

Estate Duty—Second Mortgages—Method of Valuation—Estate and Gift Duties Act 1955, ss. 76, 77. Among the assets of the estate of the deceased, who died on June 22, 1956, there was a second mortgage from his two sons securing £15,600 with interest at 5 per cent., and payable in the ordinary course on May 1, 1963. The Commissioner valued the mortgage at £16,103 3d., being the amount of the principal sum plus interest accrued at the death of the deceased, £502 3d. The deceased had a half interest in an unregistered third mortgage securing £875, with no interest, and payable in the ordinary course on March 8, 1964. It was subject to a first mortgage of £1,200, and a second mortgage securing a suspensory loan by the State Advances Corporation of £185. The Commissioner valued the deceased's half interest in the mortgage at £299 10s. 4d.; being half of its present value, calculated at 5 per cent. per annum compound interest with annual rests, of the principal sum of £875 payable on March 8, 1964. He assessed the estate duty accordingly. The appellants objected. On Case Stated by the Commissioner, *Held*, 1. That, in view of s. 76 of the Estate and Gift Duties Act 1955, there is no rule of law as to the manner in which each mortgage should be valued. 2. That the Commissioner had valued the mortgages on the basis of their retention in the deceased's estate until they fell due; and that method was the one calculated best to arrive at the value of the mortgages as at the time of the deceased's death. 3. That s. 77 of the Estate and Gift Duties Act 1955 did not apply to this case. 4. That, in making his value of the sons' mortgage the Commissioner should consider, first, what should be allowed for contingencies in relation to the capital between the date of the death of the deceased and the date before which the capital could not be called up, and, secondly, what should be allowed for the fact that the rate of interest was 5 per cent. only while the rate for a second mortgage, in the absence of family reasons, was seven per cent. Those two matters were linked together, and an allowance should not be made twice for the same risks. 5. That, looking at the matter not over conservatively, but reasonably conservatively, and having regard to contingencies (stated in the judgment), the value of the sons' mortgage as at the date of the death of the deceased should be £15,102 3d. 6. That no alteration should be made in the valuation which the Commissioner placed on the deceased's half interest in the third mortgage securing £875. *In re O'Grady (deceased).* (S.C. Wellington. 1959. August 27; October 5. Hutchison A.C.J.)

TENANCY.

Fixation of Fair Rent—Alterations to Premises almost doubling Pre-existing Capital Value—Previous Fair Rent no longer applying—Tenancy Act 1955, s. 21. Where alterations are made to premises after the fixing of the fair rent by the Magistrates' Court, it is in each case a question of fact and degree, depending on the nature and extent of the alterations, whether the premises have been so altered as to have lost their former identity so as to render no longer applicable the fair rent which had been fixed. (*Brand* v. *Zavos* [1948] N.Z.L.R. 1; [1947] G.L.R. 492, and *Solle* v. *Butcher* [1950] 1 K.B. 671; [1949] 2 All E.R. 1107, followed.) In the present case, the value of a two-flat building before the alterations were made was £1,650. The flat in question was valued at £825. After the alterations made in 1957 and the early part of 1958 at a cost of £1,055, the capital value of the flat was increased by £750. The redecoration was not extravagant or out of character. On an appeal from a judgment of the Magistrates' Court which made an order for possession of the flat and gave judgment for arrears of rent. *Held*, That the previous fair rent fixed in 1954 no longer applied as what was done in the way of alterations created a different dwellinghouse. *Quaere*, Whether the Tenancy Act 1955 continued to apply to the premises. *Peach* v. *Sievers.* (S.C. Wellington. 1959. November 18. McCarthy J.)

Wife in Occupation of Matrimonial Home—Action by Husband claiming Possession, as from Unauthorized Occupier—Wife Currently Proceeding in Supreme Court under s. 19 of the Married Women's Property Act 1952—No Jurisdiction in Magistrates' Court to Entertain Husband's Action—Tenancy Act 1955, ss. 53, 54. The plaintiff was the husband of the defendant against whom he claimed an order under s. 54 of the Tenancy Act 1955 for possession of a dwellinghouse, on the ground that the defendant was occupying the dwellinghouse for residential purposes without the authority of the plaintiff, and in contravention of s. 53 of the statute. The wife had commenced proceedings in the Supreme Court under s. 19 of the Married Women's Property Act 1952 for determination of the dispute as to which of the parties was entitled to possession of the property. *Held*, That, as the defendant had commenced proceedings in the Supreme Court for determination of her claim to possession, the same issue involved in this action was also before the Supreme Court; and the Magistrates' Court had no jurisdiction, at least for the time being, to entertain this action. *Thorpy* v. *Thorpy.* (1959. October 10, Coates S.M. Auckland.)

TRANSPORT.

Licensing—Restriction on Licence in Carriage of Livestock, Fresh Milk, etc.—Restriction applying to any Available Route involving Fifty Miles of Open Government Railway at Commencement, Middle, or End of Route—Transport Licensing Regulations 1950 (S.R. 1950/28), Reg. 29 (2) (b) (Amendment No. 10 (S.R. 1955/188) Reg. 2 (1)). Regulation 29 (2) (b) of the Transport Licensing Regulations 1950 (inserted by Reg. 2 (1) of Amendment No. 10) catches any available route which involves fifty miles of open Government railway, and it matters not whether the length of fifty miles is at the commencement, in the middle of, or at the end of the route. (*Hanna* v. *Garland* [1954] N.Z.L.R. 945, followed. *Tuakau Transport Ltd.* v. *Donovan* [1958] N.Z.L.R. 903, and *Loper* v. *Transport (N. C.) Ltd.* [1959] N.Z.L.R. 686, applied.) *Dunlop* v. *Dugdale.* (S.C. Wanganui. 1959. September 9. McCarthy J.)

Isolated Letting of Motor-car—Such Letting not a "passenger service"—Transport Act 1949, ss. 2 (1), 95. Q.'s motor-car had been damaged in an accident while he was working for A. A. hired a car to Q. for £5 a week, an arrangement that lasted for six months. In an action by A. to recover the hire charges from Q., *Held*, 1. That, the phrase in the definition of "Passenger service" in s. 2 (1) of the Transport Act 1949 "a service for the letting of a motor-vehicle . . . on hire . . . to a person who himself drives" applies only to something in the nature of a business of letting, and not to an isolated transaction. 2. That the letting of the car to Q. was an isolated act of letting for hire; and, consequently, the transaction was not in breach of s. 95 of the Transport Act 1949. *Alve* v. *Quartley.* (1959. September 22; November 3, Yortt S.M. Palmerston North.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Waterside Worker ceasing work and Returning Gear in Accordance with Normal Approved Procedure to Locker in Hall wherein kept—Worker slipping on Wharf and Injured—Worker in Place to which Public entitled to go and in Same Position as any other Member of the Public—Compensation not payable—Workers' Compensation Act 1956, s. 3 (1). D., a waterside worker was employed until 9 p.m. in connection with the loading of general cargo at a wharf. At 8 p.m. the work of the loading ceased, and D. gathered his gear together and began to take his gear to the hall whence he had taken it in the morning. This was in accordance with normal procedure and understanding. After he had walked towards the hall, a distance of eight or nine paces, he slipped and fell and had to go off work. The place where he fell was on the wharf where he had been working and he was still in the vicinity of the ship in connection with which he had been working. In an action claiming compensation, *Held*, 1. That compensation was not payable as although D., when the accident occurred, would not have been at the place where the accident occurred but for his employment, and although at the end of his employment his employer could well have expected that he would return to the Hall with his gear to place it in the locker, there was no duty imposed upon him to be where he was. When he was leaving his place of employment he was not doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service; he was in a place to which the public were entitled to go, and he was in the same position as any other member of the public. (*Ayling* v. *Union Steam Ship Co. Ltd.* [1943] N.Z.L.R. 30; [1942] G.L.R. 741, followed.) *Dalton* v. *Attorney-General.* (Comp. Ct. Christchurch. 1959. October 20; November 12. Dalglish J.)

RECENT LEGISLATION AFFECTING THE CONVEYANCER AND REAL PROPERTY LAWYER.

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

The Statute Book for 1959 will be rich in material of interest to the conveyancer and real property lawyer. Let us examine briefly the various relevant statutes one by one.

STATUTORY LAND CHARGES REGISTRATION ACT 1928.

This Act and the Land Transfer (Compulsory Registration of Titles) Act 1924 are the principal Acts passed in our time dealing with the registration of title to land: to a great measure we owe them both to the late Mr C. E. Nalder, who held the position of Registrar-General of Land from 1921 to 1932. The Statutory Land Charges Registration Act 1928 had its genesis in this way: about the year 1927 Mr Nalder came across a list of requisitions which appeared to be typical in a certain State of Australia, when land under the Torrens system was being dealt with. Mr Nalder was determined, if he could possibly do so, to prevent such an undesirable practice from arising in New Zealand in connection with dealings under our own Land Transfer Act.

Now may we just listen for a moment to what an English solicitor, while on a visit to this Dominion a few years ago, had to say about our Statutory Land Charges Registration Act: *

> The man in the street is bound to lose faith in the efficacy of a system which allows unregistered charges in favour of a Government or a local authority to take priority over private charges that are actually on the register. But in New Zealand the excellent provisions of the Statutory Land Charges Registration Act 1928, as amended by the Statutory Land Charges Registration Amendment Act 1930, ensure that the same disastrous and, indeed, ludicrous position, cannot arise there. Section 6 of the principal Act allows public bodies to apply for charges to be entered on the register book whenever (subject to deliberate exceptions) a charge is created or arises under a past or future statute which does not expressly provide for its entry in the register book (s. 8, *ibid.*). Most wisely, the onus of registering is put upon the chargee and the duties of the Registrar are purely ministerial. Registration is compulsory in the sense, not that a defaulting chargee can be compelled to remedy a default but that, if it fails to apply for entry of a charge that is capable of being registered, the charge will be void as against a purchaser, mortgagee or lessee for value under any deed, contract or instrument which is registered first (*ibid.*, ss. 2, 5, as amended).

Perhaps Mr Ruoff would not have been so well pleased in this respect with our system, had somebody told him that in our mining districts it is necessary to search not only the Land Transfer register, but also the Mining Register before one can safely deal with a parcel of Land Transfer land: see, for example, *Miller* v. *Minister of Mines* [1959] N.Z.L.R. 220.

By some curious omission, the Statutory Land Charges Registration Act was not made to apply to registration under the Mining Act 1926. It is really remarkable how often the Legislature seems to forget the existence in New Zealand of a large body of land registration under the mining legislation, such as residence sites and business sites.

When the Joint Family Homes Act was first enacted in 1950, it was not possible to register under that very popular Act a residence site registered under the Mining Act 1926. But that omission soon raised most vocal protests, and it was soon remedied. Now amendments of ss. 2, 6 (6), and the Schedule of the Statutory Land Charges Act 1928 (effected by s. 2 of the Amendment Act 1959) make the provisions of the principal Act apply to registration under the Mining Act, but it has taken the Legislature thirty-one years to repair this particular omission.

I trust that it will not be considered out of place here for me to mention that a few years ago a Bill was presented to Parliament providing for such mining privileges, as residence sites and business sites, to be brought under the Land Transfer Act, which would have given them State guarantee. For some reason or other, the Bill was not proceeded with: but *ex facie* it appeared a most desirable Bill. Another effect of the proposed legislation would have been that in future the administration of business sites and residential sites would have been taken away from the Warden and vested in the Lands and Survey Department, which it appears to me would also have been an advantageous change.

THE LAND TRANSFER ACT: IMPORTANT AMENDMENTS.

Variation of Easements and Profits a Prendre. Although for many years now provision has been made for, the registration of instruments varying registered mortgages and leases, until the passing of the Land Transfer Amendment Act 1959, it had not been possible to vary the terms and conditions of easements and *profits a prendre*. If it was desired to vary an easement or *profit a prendre* it was necessary for the registered proprietor of the easement or *profit a prendre* to surrender the easement or profit (which in practice is effected by a memorandum of transfer from the registered proprietor of the easement or profit to the registered proprietor of the servient tenement followed up by a request to the District Land Registrar to effect merger) and then to obtain and register a new grant: this of course entailed fairly heavy legal costs.

Now, a new s. 90A of the Land Transfer Act 1952 (added by s. 3 of the Land Transfer Amendment Act 1959) enables easements and *profits a prendre* to be varied by a memorandum of variation in a similar manner to that in which mortgages and leases have and may be varied. The variation must be signed by the registered proprietor of the servient tenement and also by the registered proprietor of the dominant tenement or, in the case of an easement or a profit in gross, by the registered proprietor of the easement or profit. If the servient tenement or dominant tenement or easement or profit is mortgaged, the easement or profit may not be varied by a memorandum of variation without the consent of the mortgagee.

* "Land Transfer Through English Eyes", by Theodore B. F. Ruoff, senior Assistant Land Registrar, H.M. Land Registry, London (1953) 29 N.Z.L.J. 217.

The form of the Memorandum of Variation, as prescribed in the Amendment Act 1959 appears in the Schedule thereto and is quite simple:

"Form S

MEMORANDUM OF VARIATION OF EASEMENT OR PROFIT A PRENDRE

The terms, covenants, and conditions contained or implied in the easement (*profit a prendre*) created by memorandum of transfer No..... are hereby varied as follows [*Here state any variations agreed upon*].

Dated this.....day of.....19.....

Signed by A. B., as the registered proprietor of the dominant tenement (*or, in the case of an easement or a* profit a prendre *in gross,* the registered proprietor of the easement (*profit a prendre*)), in the presence of: E. F., [*Occupation and address.*]	A. B., Registered proprietor of dominant tenement (easement) (*profit a prendre*).
Signed by C. D., as the registered proprietor of the servient tenement: G. H., [*Occupation and address.*]"	C. D., Registered proprietor of servient tenement.

Bringing Down of Encumbrances on Registration of New Leases. The bringing forward by *request* of mortgages and encumbrances on new leases in *renewal* of or in *substitution* of registered leases, first appeared in s. 5 of the Land Transfer Amendment Act 1939, and later was enacted as s. 117 of the Land Transfer Act 1952. But it has always appeared to me that these provisions were put into a sort of strait-jacket by the Legislature and I could never understand the reason or the necessity for these restrictions on the operation of such a useful section. Thus, until the passing of s. 4 of the Land Transfer Amendment Act 1959, s. 117 of the principal Act provided that, when a new lease was registered in renewal of or in substitution for a lease previously registered, the new lease was to be subject to all encumbrances to which the former lease was subject, provided the following conditions were complied with:

(a) The Registrar had to be satisfied that the lease was in renewal of or in substitution for the former lease and that the lessee under the new lease was the lessee under the former lease; and

(b) The lessee had to request that the encumbrances be brought down on the new lease and the new lease had to be registered within one year after the expiry or surrender of the former lease.

Now, an amendment of s. 117 enables the Registrar to bring down existing encumbrances where the lessee under the new lease is the lessee under the former lease or the personal representative of the lessee under the former lease, and provides that the request for this to be done may be made either by the lessee under the new lease or *by the person registered as the proprietor of any encumbrance or lien or interest* to which the former lease was subject. The request may be made at any time within *three* years after the date of the expiry or surrender of the former lease, instead of within one year as previously provided.

Lengthening the Time in which Claims may be made against the Consolidated Fund. It is obvious that one effect of the Land Transfer provisions conferring indefeasibility of title by registration is that an owner of land through no fault of his own may be deprived of his land. Hence, when the Land Transfer system was inaugurated in New Zealand, it was found necessary to establish an Assurance Fund against which such an owner could claim compensation for the loss which he had suffered. In the depression years the moneys standing to the credit of that fund were transferred to the Consolidated Fund which thereupon took over the liability hitherto borne by the Assurance Fund.

These provisions authorizing compensation in appropriate cases will now be found in Part XI of the Land Transfer Act 1952, which Part is headed, "*Compensation for Loss or Damage*". The corresponding provisions of the Land Transfer Act 1885 were given great prominence by their Lordships of the Privy Council in *Assets Co. Ltd.* v. *Mere Roihi* (1905) N.Z.P.C.C. 275, which, as we all know, is one of the leading cases on indefeasibility of title conferred by registration under the Torrens system.

It is therefore provided by statute that a person may receive out of the Consolidated Fund compensation if he is *deprived* of his land, either by the bringing of same under the Land Transfer Act in favour of another person, or by some mistake being made in the Land Transfer Office in connection with any dealings with such lands when under the operation of the Act, and, if he is barred from the provisions of the Act from recovering possession: s. 172 (b).

In more general terms, s. 172 (a) gives a right of action to any person who sustains any loss or damage through any omission, mistake, or misfeasance of any Registrar, or any of his officers or clerks in the execution of their duties. It has been held that contributory negligence by a claimant for compensation will put him out of Court.

Section 180 of the Land Transfer Act 1952, which provides a time-limit, has been found in certain circumstances to work unfairly against a claimant for compensation under the Act. No action for recovery of damages shall lie or be sustained against the Crown unless the action is commenced within the period of six years *from the date when the right to bring the action accrued*, but any person being under the disability of infancy or unsoundness of mind may bring such action within three years from the date on which the disability ceased. It is, however, enacted by s. 180 (2) of the Land Transfer Act 1952 (as added by s. 5 of the Land Transfer Amendment Act 1959) that for this purpose a right to bring an action does not accrue until the plaintiff becomes aware, or *but for his own default should have become aware*, of the existence of his right to make a claim.

I rather think that this amendment has been made as the result of a fairly recent Canadian case, which has attracted great attention in almost every jurisdiction where the Torrens system of registration operates: *Turta* v. *C.P.R. & Imperial Oil Co. Ltd.* (*Alberta*) [1954] 3 D.L.R. 1. In this case, there was a wrongful omission from a title of a reservation of mines and minerals. It is certain that a registered proprietor of land held under the Torrens system should not be expected to search all relevant titles every six years in order to protect his title which purports to be State-guaranteed. Nevertheless the amendment contains within itself the principle of contributory negligence: it does not, as we have seen, protect the negligent owner.

Inroads on the common law concept of an estate in fee simple. Every student of the English system of law

early in his studies is faced with the maxim, *Cujus est solum, ejus est usque ad coelum ad inferos.* At common law, the grant of an estate in fee simple entitled the grantee not only to the surface of the land but to everything both above and below it—e.g. minerals, mineral oil, gas, metals, or valuable stones—except as decided in Elizabeth the First's reign, gold and silver.

This common-law conception of an estate in fee simple is well illustrated by *Commissioner of Crown Lands* v. *Bennie* (1909) 28 N.Z.L.R. 478, 955.† The various statutory inroads on this principle will be found in *Garrow's Real Property*, 4th ed. 7. Now that I am at present engaged in editing a fifth edition of that work I shall have to add two more further statutory inroads.

Iron and Steel Industry Act 1959.

As its Title indicates, this is

> An Act to vest in the Crown the right to prospect for and mine ironsands in certain areas, to enable the Minister to grant certain powers, and to make provision in respect of an iron and steel industry in New Zealand.

The Act is not of universal operation in the whole of the Dominion, being restricted to three areas set out in the Schedule to the Act.

In s. 2 we find the following definitions:

> "Ironsands" means sands containing iron-bearing minerals; and includes materials in solid formation containing iron-bearing minerals:
>
> "Ironsands area" means any area described in the Schedule to this Act for the time being subject to the provisions of this Act:

The main provision is s. 3 (1) which reads as follows:

> (1) Except as otherwise provided by this Act and notwithstanding the provisions of any Act or of any Crown grant, certificate of title, lease, or other instrument of title, the right to prospect and mine for ironsands in any ironsands area is hereby vested in Her Majesty, subject to the provisions of this Act, and no person, other than the Minister, or a person authorized under this Act by the Minister, shall, after the commencement of this Act, prospect or mine for ironsands in any ironsands area.

Section 7 provides that, where the Minister is of the opinion that any land in an ironsands area is required for the mining of ironsands, or that any land in any part of New Zealand, is required for the establishment or operation of an iron and steel industry, the land may be taken under that Act and may be taken or set apart in accordance with the provisions of the Public Works Act 1928, as if the land were required for a public work under that Act. By s. 8 every person having any estate or interest in any land taken under the Act shall be entitled to compensation therefor which shall be ascertained and paid in all respects as if the land had been taken for a public work under the Public Works Act 1928, provided that in assessing compensation under this section, the value of any ironsands which are or may be on or in the land shall be excluded. But every person having an estate or interest in any land taken under the Act shall be entitled to to receive royalties in respect of any ironsands mined from the land: s. 9.

The Schedule to the Act which sets out the three areas affected by the Act is as follows:

> Ironsands Area
>
> (a) All that area in the North Island contained in a strip of land 3 miles wide measured inland from mean high-water mark and extending along the coastline of the sea and of its bays, inlets, and creeks from the South Head of the Kaipara Harbour to the northern bank of the Whangaehu River, together with all tidal lands contiguous to that land.
>
> (b) All that area in the South Island contained in a strip of land 3 miles wide measured inland from mean high-water mark and extending along the coastline of the sea and of its bays, inlets, and creeks from the southern bank of the Karamea River to the northern bank of the Haast River, together with all tidal lands contiguous to that land.
>
> (c) All that area in the Nelson Land District contained in the Survey District of Waitapu.

The Bauxite Act 1959.

This Act describes itself as

> An Act to vest in the Crown the right to prospect and mine for bauxite in certain areas.

The actual machinery of the Act follows very closely that of the Iron and Steel Industry Act 1958 which I have just described.

In s. 2, we find the following interpretations:

> "Bauxite" includes gibbsite, boehmite, and diaspore:
>
> "Bauxite area" means any area described in the Schedule to this Act for the time being subject to the provisions of this Act.

I must confess that this definition of "bauxite" is very bewildering to one like myself who commenced his education when Queen Victoria was still on the throne and the air was not so thick with these technical terms of modern science. It was therefore rather providential good luck for me to read in the *Evening Post* (Wellington) just as I was preparing this article, the following interesting extract:

> **Bauxite Find Was Side Issue to Soil Research**
>
> The discovery of bauxite in North Auckland was a side issue from the investigation of soils designed to help agricultural production, with no thought of new sources of mineral wealth, states the "New Zealand Science Review", adding that thereby is again illustrated the importance of basic research to New Zealand.
>
> The samples examined are described as sufficiently rich in alumina to warrant prospecting for deposits that can be mined.
>
> The scientists commend the action of the Government in vesting in the Crown the sole rights to prospect or mine, so ensuring that New Zealand need not suffer the experience of other countries where areas have been laid waste because mining companies were not required to repair damage to land from which bauxite was removed.
>
> Shallow Source
>
> Because in many places in North Auckland deposits are too shallow a source of ore, they need to be proved by boring to find deposits of suitable depth. This job, it is considered, can best be done under the guidance of scientists who did the initial work.
>
> "At this stage it seems likely that New Zealand will be enriched by another industry, an industry that could have been long delayed if the young scientist who made the commercial tests had accepted earlier offers of employment overseas", states the article. "When established, the new industry might well celebrate the luck that gave it birth by paying a small royalty, on every ton won, to a science fund for the purpose of aiding our impoverished sciences."

If these two Acts do indeed become the means by which two more industries will enrich New Zealand, then they will indeed be worthwhile; and it appears to me that, although they both entrench considerably on the common-law conception of an estate in fee simple, they are nevertheless both eminently fair to the landowner on whose land ironsands or bauxite may be found.

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† Where a Crown lessee was held entitled to purchase the fee simple, including all minerals other than gold or silver: c.f. *Brighton* v. *McClure* (1913) 32 N.Z.L.R. 1073, C.A.

THE JOINT FAMILY HOMES ACT.

Settling of additional Areas. Although passed only nine years ago, the Joint Family Homes Act 1950 is a much-amended Act, and practitioners must have heaved sighs of relief when the recent *Reprint of the Public Statutes* put all the many amendments into their right places in the main Act, thus rendering the reading of the Act much easier than before.

A new s. 3A (added by s. 2 of the Amendment Act 1909) provides that, where a husband and wife or either of them owns additional land contiguous to land settled on them as a joint family home, that additional land may be separately settled as part of the joint family home in cases where, under the legislation, all the land could have been settled together as a joint family home if the existing settlement had been cancelled.

This, in practice, will be found a most convenient amendment, for it sometimes happens that an additional piece of land is purchased to form part of the matrimonial home—such as land for a tennis-court, extra land for a vegetable garden, or perhaps for the purpose of keeping poultry. Previously, when extra land was purchased as accessory to the matrimonial home, if one desired to add it to the Joint Family Home settlement, it was first necessary to cancel the existing settlement and then to resettle under that Act the full area desired, which of course all entailed extra expense.

Section 3 of the Joint Family Homes Amendment Act 1959 effects a machinery amendment consequent on the fact that now there is no limit on the value of a home which may be settled, although of course there is still a limit of £2,000 as to protection from creditors, and a limit of £3,000 as to exemption from death duties.

Section 3 (1) (a) of the principal Act is further amended by s. 3 (1) of the Amendment Act 1959 so as to impose a condition that land could not be settled as a joint family home if the dwellinghouse thereon was being erected or repaired at the date of the application to register the land as a joint family home. This condition was related to s. 3 (1) (e) of the principal Act which limited the value of the land which could be settled. This limitation was removed by s. 3 (1) (a) of the Joint Family Homes Amendment Act 1955. The new amendment removes the condition. The matter is sufficiently covered by the requirement in s. 3 (1) (a) of the principal Act that land cannot be settled unless the husband and wife reside and have their home in a dwellinghouse erected on the land.

THE LAND SETTLEMENT PROMOTION ACT 1952 AMENDED.

All practitioners are, I think, aware now that the Land Settlement Amendment Act 1959 made several important amendments to the principal Act. Without question the main amendments are those effected to ss. 24 (1) (c), 29 (1) (b), and 33 of the principal Act to revive until August 31, 1962, the provisions of the principal Act *relating to personal residence* on farm land, which, it will be recollected, expired on August 31, 1955. The effect of this provision is that in the case of transactions entered into after October 7, 1959, and before August 31, 1962, persons purchasing or leasing farm land must be farmers who will reside on the land for at least three years and farm it for their own use and benefit, unless exempted from this requirement by the Land Valuation Court under s. 29 of the principal Act.

Section 24 of the principal Act ,which is an exempting section, provides that the consent of the Land Valuation Court to any transaction is not required where the purchaser or lessee does not own any other farm land and has not after the passing of that Act created any trust in respect of farm land, and (as amended by s. 2 of the Land Settlement Promotion Amendment Act 1959) either intends to reside personally on the land and farm it exclusively for his own use and benefit or the Minister has consented to the transaction, and the purchaser or lessee deposits a statutory declaration to this effect with the District Land Registrar or the Registrar of Deeds.

It may be mentioned here that the form of declaration has been prescribed by the Land Settlement Promotion Regulations 1959 (S.R. 1959/165); and that the form must be followed precisely. The District Land Registrar is instructed not to register any dealing which is in contravention of the Act.

The amendment of s. 24 (1) (a) of the principal Act (effected by s. 3 (1) of the Land Settlement Promotion Amendment Act 1959) is that the provisions of s. 24 of the principal Act will apply only where the purchaser or lessee enters into the transaction solely on his own behalf as the person beneficially entitled under the transaction. In other cases, the consent of the Court will be necessary.

New paras. (e) and (f) of s. 24 (3) (added by s. 3 (2)) of the Land Settlement Promotion Amendment Act 1959) provide that, for the purposes of s. 24 of the principal Act prescribing the case in which the consent of the Land Valuation Court to a transaction is not required, land owned, leased, or occupied held by the parent of a child under seventeen years of age shall be treated as being owned, leased, held, or occupied by the child also, and land in which any person has any interest, whether legal or equitable and whether vested or contingent, under any trust or will or intestacy shall be treated as being owned by that person.

The effect of this amendment is that, in those cases, the child (or, as the case may be, the beneficiary under the trust or will or intestacy) will not be treated as landless, and the consent of the Court will be required to the transaction.

A new s. 29A provides that, unless the Minister has consented in writing to the transaction, the Land Valuation Court or the Committee may not make an order consenting to any transaction where the purchaser or lessee is a trustee and any beneficiary under the trust is under seventeen years of age, or where the purchaser is a company having less than ten members and any shareholder is under seventeen years of age or is a trustee for a beneficiary under that age.

Section 31 (1) of the principal Act provides that, in addition to considering certain specified matters, the Land Valuation Committee, when considering whether the acquisition of the land would cause an undue aggregation of farm land, must take into account such other matters as, having regard to the circumstances of each particular case, the Committee considers relevant. This general provision is now amended to provide that the Committee must consider whether a refusal or consent would result in an unavoidable and substantial hardship to the owner of the land.

Section 31 (2) of the principal Act provides that, for the purposes of considering any question of aggregation, land in respect of which the purchaser or lessee has

created a trust is to be considered as still owned by him, unless the Minister or the Committee or the Court has consented to the transaction. Now, however, the consent of the Minister or the Committee or the Court will not operate to exclude from consideration any land in respect of which the purchaser or lessee has created a trust, unless the application is substantially in accordance with the statements made by the purchaser or lessee for the purpose of obtaining that consent.

The addition of new paras. (e), (f), and subs. (3) to s. 31 (2) provides that for the purposes of considering any question of aggregation, land owned, leased, held or occupied by the parent of a child under seventeen years of age shall be treated as land owned, leased, held or occupied by the child also, and land in which any person has any interest, whether legal or equitable and whether vested or contingent under any trust or will or intestacy shall be treated as being owned by that person. The fact that a refusal of consent would result in the vendor being unable to obtain an excessive price for the land is not to be a ground for deciding that the refusal would cause unavoidable and substantial hardship to him.

A new subs. (3A) is added to s. 32 to provide that, where land is held by trustees under any deed or declaration of trust, the conditions as to personal residence and farming the land may be fulfilled by any of the beneficiaries under the trust, or by any person or persons approved by the Minister, or as the Committee or the Court directs.

The Property Law Act 1952: Two Important Amendments.

Security for Further Advances: A new s. 80A, added by s. 2 of the Property Law Amendment Act 1959 strengthens the position of a mortgagee who advances further money to a mortgagee after the execution of the mortgage by the mortgagor. The new section reads as follows:

> 80A. Where a mortgage purports to secure a principal sum the amount of which is specified therein (whether or not the mortgage also purports to secure further advances), the mortgagee shall have the right to advance from time to time to the mortgagor the whole or any part of the principal sum the amount of which is so specified so as to rank in priority to any subsequent mortgage, notwithstanding that the advance is made after the execution or registration of the subsequent mortgage, and whether or not the mortgagee has actual or constructive notice of the subsequent mortgage at the time of making the advance:
>
> Provided that any part of the principal sum which has been repaid to the mortgagee and readvanced to the mortgagor shall be deemed for the purposes of this section not to form part of the principal sum specified in the mortgage:
>
> Provided also that nothing in this section shall derogate from the provisions of subsection four of section one hundred and two of the Land Transfer Act 1952.

The last proviso to this new section is particularly to be noted. The section shall not derogate from the provisions of s. 102 (4) of the Land Transfer Act 1952. That subsection provides that a memorandum or instrument varying the terms or conditions of any mortgage of land subject to a subsequent mortgage shall not be binding on any mortgagee unless he has consented thereto in writing on that memorandum or instrument, but that consent shall render the said memorandum or instrument binding on the mortgagee so consenting, and shall be deemed to be notice to and shall be binding on all persons who may subsequently derive from him any interest in the mortgaged property. That provision got a good airing in the leading case of *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co. Ltd.* [1916] N.Z.L.R. 489; [1916] G.L.R. 306.

The new s. 80A affects mortgages of any class of property, and being of general application it has correctly been included in the Property Law Act and not in the Land Transfer Act. It appears to be aimed at the rule in *Hopkinson* v. *Rolt* (1861) 9 H.L. Cas. 514; 11 E.R. 829. In my book on the Land Transfer Act, at p. 177, I have the following note:

> As *Hutchen* points out, however, a mortgage may be given to secure further advances and the mortgagee will be protected if the further advances are made without notice of a subsequent dealing: *Hopkinson* v. *Rolt* (1861) 9 H.L.C. 514; *West* v. *Williams* (1899) 1 Ch. 132. It is, however, permissible in mortgages under the Land Transfer Act, to insert covenants abrogating the rule in *Hopkinson* v. *Rolt* and also in *Clayton's* case (1816) 1 Mer. 572.

In future, provided the amount of the further advances is *specified* in the prior mortgage, the advances will be protected against and shall have priority over any subsequent mortgage, whether or not the prior mortgagee has notice of the subsequent mortgage. I think that we can all give our blessing to s. 2 of the Property Law Amendment Act 1959.

Lessor Exercising Right of Re-entry or Forfeiture to give Notice to Mortgagee of Lease: Section 118 of the Property Law Act 1952 provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, condition, or agreement in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor.

Now, the new subs. (1A) of s. 118 (added by s. 3 of the Property Law Amendment Act 1959) provides that the lessor must also serve a copy of that notice on every mortgagee of the lease whose name and address are known to the lessor, in order that the mortgagee may, if he so desires, take steps to protect his security by remedying the breach. This amendment also appears to the writer to be most desirable.

"Child".—"First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament, that 'child' prima facie means lawful child, and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as 'filius nullius'. This prima facie meaning may, in certain circumstances, be displaced and a wider meaning given to the words. . . ."—*Galloway* v. *Galloway* [1956] A.C. 299, 310, per Viscount Simonds.

DOMINION LEGAL CONFERENCES: A RETROSPECT.

I. Successive Venues.

The Eleventh Dominion Legal Conference will be held in Wellington during the Easter vacation this year—thirty-one years after the local District Law Society first acted as host to the representatives of the profession, and thirteen years after the last Conference was held in the capital city.

The occasion began as an annual fixture, but that arrangement lasted only three years. After a recess enforced by the difficult economic climate of the early thirties a start was made with two-yearly Conferences which, except for a nine-year recess begun during World War II, continued until 1951, when the principle of a Conference every three years was adopted.

Although it is just over ninety years since the statutory incorporation of the New Zealand Law Society by an Act of 1869, the history of the Dominion Conference goes back no further than thirty-two years to the convening of the first national gathering in Christchurch in 1928. The idea of periodical conventions was first suggested in 1927 by Mr W. J. Hunter, who practised law in Canterbury for thirty years and was afterwards a Judge of the Court of Arbitration. This appealed to the Council of the New Zealand Law Society, and since the proposal had had its genesis in Christchurch, that city was accorded the courtesy of being the venue of the First Legal Conference.

With the national barometer set fair after the difficult and complex years of reconstruction following World War I, conditions could be regarded as favourable for the launching of such a venture, since the legal profession, in common with most other sections of the community, could hardly fail to be flourishing in a virtual boom period. But the writing was already on the wall economically, and in 1929, when a full representation of practitioners from all over New Zealand met in Wellington for the Second Legal Conference a cloud, perhaps no larger than a man's hand, had appeared on the world horizon.

By the following year when the Conference moved north to Auckland at Easter, 1930, a major depression had descended on the Old World. Trade was at a standstill, commodity prices receded disastrously, and it was apparent that New Zealand must soon suffer the worst effects of a world-wide slump that had already crippled overseas economies.

The 1931 Conference fixed for Dunedin was postponed in February of that year. With successive annual postponements, it was to be six years before practitioners packed their bags for the 1936 Conference in Dunedin. World conditions, and with them, New Zealand's export trade and internal economy had recovered; but when the Fourth Conference met in Otago the national scene had altered vastly. A new field of law had arisen with the emergency and lessees and mortgagors rehabilitation legislation which intimately concerned the legal profession; and there were intriguing and formidable prospects resident in the first manifestations of the Welfare State, which was eventually to emerge in the next fourteen years and to expand for many years, even after the temporary eclipse of its architects. It was the most significant development of New Zealand's first hundred years, and as such demanded the closest attention of the profession.

But, even so, more tremendous issues were pending. It was two years before the next Conference was held in Christchurch in 1938. When practitioners forgathered, Munich had still to come. While the international outlook was disturbing in the extreme, with Hitler bestriding the ancient Holy Roman Empire like a Colossus, only the best-informed or the most pessimistic, could have realized in that Easter period that it would be nine years before the profession could regard it as possible or politic to resume its national Conferences.

With World War II won, the profession's multitude of surviving participants back in their chambers and offices, and the world confronted by the uneasy peace, the New Zealand Law Society in 1947 invited the Wellington District Law Society to be hosts for the Sixth Legal Conference. The legacy of conflict still constituted a heavy national burden; but the future offered a sufficient prospect of much-needed stability for the Conference to return to Auckland in 1949. The improving atmosphere of world affairs had engendered a feeling of confidence and an appearance of security which achieved a striking justification in the boom year of 1951 when the Eighth Conference was held in Dunedin.

Unprecedented export incomes and record overseas trading brought their problems in the first years of the 'fifties; but, since at this stage the Conference assumed its present triennial character, the calm waters of steady progress had been regained in 1954, when, with a departure from precedent that has not so far been repeated, the Conference forsook the metropolitan centres and went to Napier. The recourse to a provincial setting provoked an episcopal guest speaker in his inaugural address at Napier to commend the profession for having elected to sit in conference in a city " outside what are known in the four main centres as the four main centres ".

The experiment was a success and may well warrant a repetition at some future date; but, in 1957, thirty years after the notion of periodical Conferences had come to life in Canterbury, the Tenth Legal Conference was held in Christchurch, giving that centre the honour of being the first to be entitled to boast three Conferences. Wellington this year achieves a similar distinction. Practitioners may rest assured that everything possible is being done to ensure that the high standards of organization and hospitality set in the past are maintained in the coming Easter vacation. There should be a record attendance.

Although there has been an admirable response to the general invitation to the profession to visit Wellington this Easter, the Conference Committee would welcome any additional applications from those who have so far overlooked the matter. It is still not too late for questionnaires to be returned, or for accommodation to be arranged for those who now find that they are able to attend.

TOWN AND COUNTRY PLANNING APPEALS.

Roskill Properties Limited *v.* Mount Albert Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 21.

Zoning—Area zoned "Residential"—Large Concrete Building formerly used for Industrial Purposes—Area zoned "Industrial B" adjoining—Application for Change of Zoning refused—Creation of Industrial "Spot" Zone in Residential Area—Town and Country Planning Act 1953, s. 38A.

Appeal by the owner of a property at 55 Leslie Avenue in the Borough of Mount Albert containing 24.24 pp. being Lot 32 on Deposited Plan Number 3988.

This property was in an area zoned as "residential" under the Council's proposed district scheme. When the scheme was publicly notified the appellant lodged an objection to the zoning claiming that its property should be zoned as "Industrial B".

The objection was disallowed by the Council and this appeal followed.

The judgment of the Board was delivered by

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

1. On the property under consideration is erected a concrete building covering 6,075 sq.ft., that has been used for some years for a variety of industrial uses and can be continued to be so used as an existing use.
2. The property is in an area zoned as "residential" and predominantly residential in character. It is true that the north-western corner of the property infringes on the south-eastern corner of an area zoned as "Industrial B" under the proposed scheme but on the north east and west it is bounded by "residential" properties.
3. At the hearing expert evidence led in support of the appeal was directed to the submission that the Council in preparing its scheme should have zoned a larger area as "Industrial B" so as to make wider provision for industrial use and provide a more adequate buffer zone between the "Industrial C" zone lying to the north and north west and the residential zone to the east, but this larger issue is not before the Board in these proceedings. The adequacy or otherwise of the "Industrial B" zone is a question which may arise in future when the scheme comes up for revision and the Board declines to express any view on a question that is not before it.
4. To allow this appeal would be to approve of the creation of an industrial "spot" zone in a residential area and would be contrary to town-and-country-principles.

The appeal is disallowed.

Appeal dismissed.

Rowbottom *v.* Waitemata County.

Town and Country Planning Appeal Board. Auckland. 1959. June 22.

Subdivision—Area zoned "Rural"—Subdivision into Eighty-four Residential Sections—Developed Residential Area adjoining on Eastern Side—Land Predominantly Rural on Western Side—Line to be drawn between Areas Zoned for Urban and Rural Use—Approval refused—Town and Country Planning Act 1953, s. 38 (1) (c).

The appellant was the owner of a property comprising approximately 26 acres being part of Lots 5, 6, 7, and 8 on Deposited Plan 4707, being part of Allotment 187 of the Parish of Takapuna. He submitted a scheme plan (No. 7476) for the subdivision of this property into approximately eighty-four residential sections to the respondent Council for its approval. The Council refused approval acting under s. 38 (1) (c) as the land in question was in an area zoned under its undisclosed district scheme as rural. This appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, and having inspected the area in which the property is situated, the Board finds as follows:

1. In February, 1954, the Minister of Lands approved a plan of subdivision of part of the appellant's land into eight building sections fronting on to the East Coast Road. At the same time a scheme plan for the rear area, being the land now under consideration, was also approved, but the appellant did not proceed with this subdivision. No land-transfer plan was ever deposited with the result that that plan lapsed in 1957. At the time that these plans were approved, the Council had not commenced any town-planning operations.
2. It is true that this property on its eastern side adjoins a developed residential area in the East Coast Bays Borough, but to the west the land is zoned as rural and is predominantly rural in character. In any town-planning scheme there must, of necessity, be a boundary line between the areas zoned for urban and rural use respectively, and it is not an acceptable submission that the mere fact that rural lands adjoin a residential area means that they are in all respects suitable for urban or residential development.
3. As has been intimated in previous decisions, the Council's undisclosed district scheme appears to make adequate provision for the foreseeable urban development within the Waitemata County for many years to come in land already zoned for urban development. In respect of this particular part of the Waitemata County, there is zoned for urban development a very substantial block of land lying to the south of Sunset Road. This has not yet been developed for urban use, and the Board considers that this area makes ample provision for the urban development of this part of the county for some years to come.
4. Counsel for the appellant submitted that this appeal should be treated as a special case under special circumstances, and he referred to the Board's decisions in *Clarke* v. *Manukau County Council* (1956) 32 N.Z.L.J. 96; 1 T.C.P.A. 6; *Roger* v. *Hawke's Bay County Council* and *Apperley* v. *The Hawke's Bay County Council* (1956) 32 N.Z.L.J. 126; 1 T.C.P.A. 8, But in each of those cases the lands under consideration were very small blocks and all that was sought was to subdivide them into two allotments. In this particular case the area under consideration is 26 ac. and the proposal is to subdivide it into eighty-four allotments. The Board is unable to find any similarity between the cases cited and this particular case. The Board considers that the Council acted properly and in accordance with town-and-country-planning principles when it refused its approval to this subdivision.

The appeal is accordingly disallowed.

Appeal dismissed.

Luketina and Another *v.* Henderson Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 21.

Zoning—Area zoned "Residential A"—Building on Property formerly used as Wine Cellar, and intended to be sold for Use in Light Industry—Change of Use approved on Conditions—Town and Country Planning Act 1953, s. 38A.

Appeal by the executors and trustees of Ivan Luketina, deceased, the registered proprietors of all that piece of land situated in McLeod Road in the Borough of Henderson containing 32 pp. more or less being Lot 1 on Deposited Plan 42256 being part of Allotment 90 of the Parish of Waikumete and being part of the land comprised in Certificate of Title volume 845 Folio 29 Auckland Registry.

This property was in an area zoned as "Residential A" under the respondent Council's proposed district scheme.

The appellants lodged an objection to this zoning and asked that this land be zoned as "Industrial". Their objection was disallowed and this appeal followed.

On the property was erected a substantial concrete building formerly used as a wine cellar in connection with the business of viticulture and wine-making formerly carried on by Ivan Luketina (now deceased). This business was no longer in existence and the appellants wished to have the zoning of their land changed to "Industrial" so that they could sell it for use in some form of light industry.

The judgment of the Board was delivered by

REID S.M. (Chairman). Counsel for the appellants concedes that the land is in an area predominantly residential in character and appropriately zoned as such. In those circumstances the

Board would not consider changing the zoning for to do so would only create an individual "spot" industrial zone in a residential area.

After hearing evidence and conferring with counsel, the Board indicated that it would be prepared to give favourable consideration to approving a change of use of the said land and building so as to enable the most economic use being made of it.

Counsel having agreed upon appropriate conditions the Board makes the following order:

1. That this appeal be regarded as an appeal against the refusal by the respondent of an application by the appellants for a change of use of the building referred to in the said appeal under the provisions of s. 38A of the Town and Country Planning Act 1953.
2. That consent be and the same is hereby granted under the said s. 38A to the use of the said building as a non-conforming building for use as accessory to any of the uses in a "residential A" zone prescribed or permitted by Ord. 9 of the Code of Ordinances of the Council's proposed district scheme.
3. That until such time as the land on which the said building is erected shall be sold or is converted to any of the uses prescribed for "residential A" zones in and by the said Code of Ordinances, the said building may be used for such purposes, other than those referred to in the preceding para. (2) hereof, as the Council may from time to time approve and subject to such reasonable conditions as may from time to time be imposed by the Council.
4. That in the event of any such use as that referred to in the preceding para. (3) hereof being approved by the Council in the manner aforesaid, the Council will, subject to compliance by the appellants with the by-laws of the Council for the time being in force, permit the appellants to install in the said building such sanitary and toilet facilities as may be necessary to the enjoyment of that building for such use.
5. That the appeal be and the same is hereby allowed and the said proposed district scheme amended to the extent and in the manner indicated by the foregoing paras. 2 to 4 both inclusive) hereof.

Appeal allowed.

Dymock *v.* Takapuna Borough.

Town and Country Planning Appeal Board. Auckland. 1959. September 9.

Industrial Building—Area zoned "Residential"—Land Partly in Area Zoned "Residential" and partly in Area zoned "Industrial A"—Building Contractor Owner seeking Approval of Erection of Industrial Building—Permit refused, Without Prejudice to Right of Appeal against Zoning—Town and Country Planning Act 1953, s. 23.

Appeal by the owner of a property comprising 3 ro. 11.2 pp. more or less situate in the Borough of Takapuna being Lot 3 Deposited Plan No. 37416 and part of Lot 45 Deposited Plan No. 4553 and being part of Allotment 71 Parish of Takapuna being all the land comprised in Certificate of Title volume 1387 folio 11. This land had a frontage to Taharoto Road access being by way of a long access strip. The appellant who carried on business as a building contractor originally owned only Lot 3 Deposited Plan 37816 and his workshop was erected thereon. In 1957, he purchased adjoining land being part of Lot 45 Deposited Plan 4553. That purchase involved a subdivision of Lot 45. It was a condition of that subdivision that an amalgamated title should be issued for Lot 3 Deposited Plan 37816 and the said part of Lot 45 Deposited Plan 4553. This had been done. The appellant applied to the Council for approval in principle to the erection of an industrial building on part Lot 45. The Council declined approval on the grounds that part Lot 45 was in an area zoned as "Residential" under its undisclosed district scheme. This appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The appellant is placed in an unusual position because part of his land Lot 3 Deposited Plan 37816 is in an area zoned under the respondent Council's undisclosed district scheme as "Industrial A" while the balance of the land in his title part Lot 45 Deposited Plan 4553 is zoned as "Residential", the boundary line between the two zones bi-secting his property.

2. The appellant has prayed that the zoning of Part Lot 45 Deposited Plan 4553 be changed from "Residential" to "Industrial". In earlier decisions the Board has held that it will not alter the zoning of land under an undisclosed district scheme at the request of an individual owner because to do so might prejudice the right of owners or occupiers of property affected to object under s. 23 when the scheme is publicly advertised.

3. At the hearing the Board was informed that the respondent Council's undisclosed scheme will be publicly notified in the immediate future.

It considers that the proper course for the appellant to follow is to lodge an objection to the zoning of his land when the scheme is publicly notified. If his objection is disallowed, he will have a right of appeal to the Board.

4. In the circumstances the Board does not deem it proper to comment in any way on the merits.

The appeal is disallowed but without prejudice to the appellant's right of objection under s. 23.

Appeal dismissed.

Eaglehurst Properties Limited *v.* Ellerslie Borough.

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

District Scheme—Objection—Steel Merchants—Part Land in One Borough Zoned "Residential"—Other Part in Another Borough zoned "Industrial C"—Warehouse for Storage of Steel on Latter Part—Office Accommodation and Showrooms desired on Former Part—Isolated Spot Zone in Residential Area disapproved—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant company was the owner of a property situate in Eaglehurst Road, Ellerslie, containing 2 ac. 6 pp. more or less being Part Lot 2 of Deposited Plan No. 44752 and being part of Allotment 26 of Section 12 of the Suburbs of Auckland.

This property formed part of a block of land containing 4 ac. 2 ro. 35 pp. owned by the appellant. The land first described was situated within the Borough of Ellerslie and provided the only road frontage to the whole block. The balance of the land with no road frontage was situate in the Borough of Mount Wellington. The Ellerslie land was zoned as "residential" under the Borough Council's proposed district scheme while the rear end, the Mount Wellington block, was zoned "industrial C" under the undisclosed district scheme of the Mount Wellington Borough Council. When the Borough's proposed district scheme was publicly notified the company lodged an objection to the zoning of the Ellerslie land as "residential" and claimed that it should be zoned as "industrial". This objection was disallowed and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The company carries on business as roofing contractors and steel merchants and it has erected on the Mount Wellington land a stock warehouse used for the storage of steel. Its object in seeking to have the zoning of the Ellerslie land changed to "industrial" is to permit of its erecting office accommodation and showrooms and a warehouse for use in connection with its business.

2. The company purchased this land in March of 1957 and it was well aware that the Ellerslie portion of the property was zoned as "residential". It must have been aware that it was in a locality zoned as "residential" and predominantly "residential" in character and occupancy. Its main contention is that the land is unsuitable topographically for residential use. On the evidence adduced at the hearing the Board is satisfied that a considerable part of this land would be suitable for residential use in its present state with very little work done upon it and that although there are depressions in part of the land, the history of the development of the locality indicates that it is economically possible to fill in the depressions, level the land off, and make it entirely suitable for residential occupation. It was also suggested on behalf of the appellant that the position might be met by zoning the back portion of the Ellerslie land approximately two-fifths of the total, as some form of special commercial or industrial zone so as to allow the appellant company to erect the offices and other buildings it wishes to put there. This is "spot zoning" and the Board will not approve of the creation of isolated spot zones simply to meet the requirements of individual owners. The property under consideration is in an area zoned as "residential" and predominantly residential in character and occupancy and the Board is satisfied that the zoning of the appellant's land as "residential" is appropriate.

Appeal dismissed.

Homeland Developments Ltd. *v.* East Coast Bays Borough.

Town and Country Planning Appeal Board. Auckland. 1959. May 21.

Municipal Corporation—Subdivisional Plan for Road Reserve—Compliance with Borough's District Town-planning Scheme—Claim by Borough for Contribution towards Cost of Plan by Subdivision Owners—Road Reserve for Benefit of Public—After Approval of Scheme Plan, Further Conditions subsequently imposed not maintainable—Claim for Contribution Unlawful—Municipal Corporation Act 1954, s. 351.

Appeal under s. 351 of the Municipal Corporations Act 1954 against a decision of the respondent Council given on December 10, 1958, requiring the appellant to make a cash contribution of £300 as a condition of the final approval by the Council of a Land Transfer plan submitted by the appellant.

The facts were as follows: The land the subdivision of which was the subject matter of this appeal was situate in the Borough of East Coast Bays of which the respondent was the local authority. On or about June 19, 1957, the appellant submitted to the respondent for approval under s. 351 of the Municipal Corporations Act 1954 a plan for the subdivision of the said land which plan was prepared by a registered surveyor in accordance with subs. (1) of that section. On the plan provision was made for a "road reserve" over part of the land in compliance with the East Coast Bays District Town Planning Scheme. By letter of September 16, 1957, the respondent informed the appellant's agents that the respondent had approved of the plan "subject to the engineer's recommendations":

> "Stormwater drainage easement granted in favour of Council, ten feet wide down the western boundary of Lots 12, 11 and 2 from Park Road to the main gully, and a similar easement being granted from Park Road down the access strip etc."

The respondent made no other requisitions or demands on the appellant in respect of the plan other than those stated.

The appellant then had prepared a Land Transfer Plan in accordance with the requirements of the Land Transfer Act 1952 and some time before December 5, 1957, submitted it to the Council for the endorsement thereon pursuant to s. 352 of the Municipal Corporations Act 1954 for its approval.

The appellant was then informed that the Council would not release the plan until such time as the appellant made a cash contribution for "Reserves Contribution", the amount of which was to be determined after the separate lots of the subdivision had been separately valued by the Land Valuation Department.

The appellant through his solicitors protested against this requirement. It was unnecessary for the purposes of this decision to traverse the negotiations and correspondence between the parties leading up to the filing of this appeal.

The issues falling for determination were:

1. Could the appellant be lawfully called on to make any cash contribution? and,
2. If such a contribution were lawfully due what should be the amount thereof?

The judgment of the Board was delivered by

REID S.M. (Chairman). The scheme plan as originally submitted made provision for a "road reserve". This was put in because the appellant's surveyor was aware that the Council's undisclosed district scheme made provision for a road reserve at this point.

The Council required provision to be made for drainage easements and the Land Transfer plan made provision for these easements in positions approved by the Council's Borough Engineer.

Under s. 351 (2) (c) of the Act the Council could before approving the plan require the owner "to make provision or *further* or other provision . . . for the making of reserves". It is to be noted that it is on consideration of the "scheme" plan that the Council is empowered to make requirements in regard to provision of reserves. By virtue of the proviso, the Council may, where in its opinion it is undesirable or unnecessary to require the owner to make provision for the making of reserves, *in lieu thereof*, make it a condition that a cash contribution be paid.

The Board agrees with the submissions of counsel for the appellant that on the authority of *Mowbray* v. *The Mayor etc. of Takapuna* [1929] N.Z.L.R. 99, any conditions imposed by the Council must be *conditions precedent to approval* and cannot be conditions subsequent.

Counsel for the respondent endeavoured to answer this by submitting that the Land Transfer Plan put in in December, 1957, was in effect a new plan and was a plan "submitted in substitution" of the first plan but the Board considers that these words must be construed as relating to a substituted "scheme" plan. It is true that in this case the Land Transfer Plan differs slightly from the scheme plan as to the number of sections and in some cases as to their size but there is nothing unusual in that scheme plans are frequently prepared from plan data and when the actual Land Transfer plan comes to be prepared on the ground some variations in shape and size of sections are often made, but fundamentally the plans are one and the same.

In evidence, an expert witness, called by the Council in answer to the Board, said that he regarded the two plans as essentially the same.

The Board takes the same view and holds that the scheme plan and the Land Transfer Plan are the same and that the latter cannot be regarded as a "substituted plan" under s. 351 (2) (c) and the Council could not, when asked to give its formal approval under s. 352, treat it as such and seek to impose further conditions.

Counsel for the respondent further submitted that if the Board held that the plans were one it was still open to the Council to claim a cash contribution because the "road reserve" and the drainage easements are not "reserves" with the meaning of the Act. He submitted that the word "reserves" must be construed as meaning "recreational reserves" for use by the public. He also submitted that as the "road reserve" was shown on the scheme plan when submitted its provision was something that had not been "required" by the Council but the fact is that if it had not been shown on the plan it would have been asked for. The Council was not bound to accept it, it could have rejected it.

In the course of its duties, the Board has seen many scheme plans produced in evidence—it is a common practice for surveyors when preparing scheme plans to make provision for a reserve. Sometimes that provision is accepted by the local authority and sometimes it is rejected and a cash contribution required in lieu of it.

The language of the section under consideration is clear and unequivocal a cash contribution can only be demanded *in lieu of* a reserve not "in addition to" or "as well as"—but the respondent here says in effect: "The road reserve and the drainage easements are not 'reserves' so we can require a cash contribution".

The Municipal Corporations Act gives no definition of the word "Reserves" but some light is thrown on what the Legislature had in mind by examining the proviso to subs. (2) (c) as to the disposition of cash contributions. "All moneys so received shall be paid into a separate account and shall be applied for the purchase of land to be held as public reserves subject to the provisions of the Reserves and Domains Act 1953".

That Act (s. 2) under the heading "Public Reserve" or "reserve" provides that except as hereinafter provided for in this definition "public reserve" or "reserve" means any land set out for any public purpose, and includes:

(a) Any land which immediately before the passing of this Act was a public reserve within the meaning of the Public Reserves and Domains Act 1928.

Turning to the latter Act (s. 2), one finds a similar definition of "public reserve" save that for "1928" one must read "1908".

Looking now to the 1908 Act one finds that in the second schedule to that Act under the heading "Classification of Reserves" Class 1 "Reserves for County Local and Municipal Purposes" includes (inter alia) "Drains & Watercourses".

In this case it is clear that the "Road Reserve" is "land set apart for a public purpose" and also that the drainage easements come within the definition of "reserves" under the Public Reserves and Domains Act 1953.

It follows therefore that the "Road Reserve" and the "Drainage Easements" are "reserves" and the respondent Council cannot have both "reserves" *and* cash contributions.

(*Concluded on p. 16*).

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

An Issue of Costs.—The other day a fellow-practitioner informed Scriblex that a near relative for whom he had done work complained bitterly about his scale charge and inferred that the legal profession could well do with some transfusions from the practice of medicine where remuneration was concerned. In this regard there has been much to admire in the generous outlook of doctors particularly in the case of successful and popular surgeons, although there is probably less unpaid attention in the Welfare State than formerly when physicians would even refuse to accept fees from unbeneficed clergymen (provided their beliefs were orthodox) and from fellow-doctors, chemists, military and naval officers, and their respective families. Percival in his *Medical Ethics* (1800) ruled that a physician degraded himself and his profession by accepting a small fee from a wealthy man, but it was proper that he should exercise his discretion whether he charged his personal friends the standard fees. John Timbs (*Doctors and Patients* (1873)) cites the instance of the celebrated Sir Theodore Mayerne who died leaving the then enormous sum of £140,000. It seems that on one occasion a friend who called for a consultation afterwards placed two gold pieces on the table, "confident that they would be refused and that therefore he could afford to seem generous". Much to his indignation and astonishment, Sir Theodore pocketed the coins, explaining to his friend, "I made my will this morning, and if it should appear that I refused a fee I might be declared *non compos*".

Medical Bravery.—Tributes by all the members of the Court of Appeal (Morris, Ormerod, and Willmer L.JJ.) to the courage and high sense of duty of the medical profession are to be found in *Baker and Another* v. *T. E. Hopkins & Son Ltd.* [1959] 3 All E.R. 225. There, a doctor called to a well where two employees had been overcome by a concentration of monoxide gas due to the working of a petrol engine insisted, despite warnings of the great danger involved, in going into the well, his body roped, to see if he could rescue the men. He was overcome by fumes. The rope caught in a down-pipe in the well and all three died before further help arrived. In answer to the allegation that the doctor caused or contributed to his death by his own negligence, Willmer L.J. observes: "The burden of proof with regard to this allegation is on the defendant company, and in order to succeed I think they would have to show that the conduct of Dr Baker was so foolhardy as to amount to a wholly unreasonable disregard for his own safety. Bearing in mind that danger invites rescue, the Court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger. Moreover, I think it should be remembered that it is fatally easy to be wise after the event. It is not enough that, when all the evidence has been sifted and all the facts ascertained in the calm and deliberate atmosphere of a Court of law, the rescuer's conduct can be shown *ex post facto* to have been misguided or foolhardy. He is entitled to be judged in the light of the situation as it appeared to him at the time, i.e., in a context of immediate and pressing emergency. Here Dr Baker was faced with a situation in which two men were in danger of speedy death in the well, unless something were done very quickly. He was a doctor, and he had been specially summoned to help. Any man of courage in his position would have felt impelled to act, even at the risk of his own safety. Time was pressing; immediate action was necessary if the men in danger were to be helped; there was virtually no opportunity for reflection, or for estimating the risks involved in an act of rescue". He cites from the American case of *Wagner* v. *International Railway Co.* 232 N.Y. Rep. 176 (1921) in which he says that Cardozo J. "foreshadowed in a remarkable way" Lord Aitkin's statement of principle in *Donoghue* v. *Stevenson* and applied it to a typical rescue case. "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."

Evidence Note.—In a recent case, counsel for a plaintiff named Carbon objected to the production of a particular document in the possession of his client on the ground that his client had scribbled all over it. "Perhaps", observed the trial Judge (T. A. Gresson J.) helpfully, "he could take it away first and decarbonize it!".

Mr. Justice Holmes.—"He (Mr Justice Holmes) was in the habit of studying the opposing briefs as soon as they were argued. He would brood on them for a day or two at most and write and deliver his opinion. This habit, which was natural to his temperament, alarmed his colleagues and spread the rumour that he was a glib and offhand fellow. He accordingly changed his routine while staying true to his bent. He wrote his opinion as before, but aged it in a desk drawer for a month or two and then uncorked it for his brethren. He thereby, he later disclosed, acquired that reputation for mellow judgment and judicial restraint which guaranteed his later transfer to Olympus."—Alistair Cooke in "Today's Wrapper for Tomorrow's Fish".

Tailpiece:

In answer to an inquiry as to why he hated lawyers, Dr Johnson once observed: "I don't hate them, sir; neither do I hate frogs, but I don't like to have either hopping about my chamber". September last marked the 250th anniversary of his birth.

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 14.*)

It should be noted that neither the "road reserve" nor the "drainage easements" are there for the benefit of either the appellant or any subsequent purchasers of land from it—the road reserve will be for the benefit of the public. The drainage easements are for the sole benefit of the respondent Council to facilitate the drainage of storm and surface waters from Park Road.

Finally, the Board is of the opinion that the appropriate time for the Council to make known its requirements in relation to scheme plans is when the scheme plan is first submitted, that is to say, that those requirements must be conditions precedent not conditions subsequent.

Once a scheme plan has been approved or approved subject to specified conditions, as is the case here, a Council cannot go on thinking up further conditions and seeking to impose them at a later date.

Appeal allowed.

Blackburn and Another *v.* Horowhenua County.

—Town and Country Planning Appeal Board. Wellington. 1959. October 19.

District Scheme—Objection—Land zoned "Rural"—Application to re-zone as "Residential"—Land suitable for Production of Vegetables and Fruit—Retention for Use in Primary Production desirable—Sufficient Land available for Residential Occupancy within Area Zoned for Residential Use—Other Part of Land Valueless for Productive Purposes—Such Land re-zoned as "Residential", subject to Conditions—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appeal related to two blocks of land (1) an area of approximately 110 ac. being part of Section 41 Ngarara West C Block situate in Block IX Kaitawa Survey District; (2) an area of land known as the Hemi Matenga Bush Area to the east of Winara Street between Reikorangi Road and Keruru Street containing approximately 16 ac.

The first block of land was zoned as rural under the Council's proposed District Scheme (Waikanae Section). The appellants objected to this zoning, claiming that the land should be zoned as "residential". This objection was disallowed. The second block of land was zoned under the scheme as publicly notified as residential. An objection to this zoning was made by the Waikanae County Town Committee which claimed that the land should be zoned as "rural". This objection was upheld by the Council and the land was zoned as "rural". The appellants appealed against the allowance of this objection.

The judgment of the Board was delivered by

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

First Ground of Appeal:

The land in question here lies to the east of the Main Trunk railway line and abuts on to the northern boundary of the Waikanae County Town. The land lying to the south of it was formerly owned by the Hemi Matenga estate and for the past four-and-a-half years this land has been progressively subdivided for residential use. 266 building sections have been sold and in this area some seventy-five houses have been erected and ten are in the course of construction. The land under consideration has been used in the past for pastoral purposes and the evidence is that it is capable of carrying three ewes to the acre and some cattle. There is some conflict of evidence as to the suitability of this land for production of vegetables and tree and shrub fruits, but the weight of evidence indicates that it is suitable for such purposes. It is well situated and it has a reasonable type of soil which with cultivating and manuring will be capable of production both of vegetable and horticultural products.

It follows, therefore, that having regard to the actual and potential productivity of this land, its retention for use in primary production for as long as possible is a factor which must weigh heavily in favour of its being retained as rural land. The Board has already held in other decisions, and it is still of the same opinion, that the land zoned under the scheme for residential use is more than adequate for the foreseeable population needs of the Waikanae County Town for many years to come. It accepts that there could be some demand for further residential development in this area, but the land in question here, is outside the boundaries of the County Township and the Board considers that the boundaries of that township should not be extended any further into the rural areas until the area within the boundaries has become more consolidated.

The appeal on this ground is disallowed.

Second Ground of Appeal:

As already indicated the Board considers that there is already sufficient land zoned for residential occupancy within the areas zoned for residential use but it also considers that in regard to this particular block of 16 ac. there are certain special circumstances that are not applicable to the main block. Of this area approximately 6 ac. are in native bush. The remaining 10 ac. do not appear to have any particular value for production purposes. The land is joined on the northern and western sides by residential lands and the Board considers that on balance it would be better for this land to be developed for residential occupation rather than be left idle.

The appeal on this ground is allowed, but subject to the condition that when it is subdivided it is to be subdivided in general conformity with the plan produced by the appellants at the hearing of the appeal and, in particular, that the 6 ac. of bush is to be subdivided so as to provide for minimum blocks of approximately two acres.

Judgment accordingly.

Crombie *v.* Hastings City Corporation.

Town and Country Planning Appeal Board. Napier. 1959. November 13.

District Scheme—Objection—Area zoned "Residential"—Part of Property zoned as "Park Extension" Preventing Sale of Land for Residential Use—Locality inadequately provided with Parks and Open Spaces—Order made that Local Authority Acquire Part of Property Zoned "Park Extension"—Town and Country Planning Act 1953, ss. 27, 47 (3).

Appeal by the owner of a property comprising 9 ac. 3 ro. 22 pp. being part of the Heretaunga block, being Lot 43 on Deeds Plan 3B. This property fronted on to Murdoch Road and was within the boundaries of Hastings City. The rear part of the property, that was to say to the north, abutted on to Akina Park. Under its proposed District Scheme, as publicly advertised, the Council had zoned an area of approximately 7½ ac. of the appellant's property for park extension. The appellant lodged an objection to the zoning of this part of his property for park extension and his objection having been disallowed, this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). The appellant's property is in an area zoned as "residential" and were it not for the zoning of part of it as a park it could be subdivided and sold for residential use. It is true that subdivision might be expensive because of the necessity for making provision for the supply of water and sewerage, but that is neither physically nor economically impossible. On the other hand, however, it is quite clear that this part of Hastings City is inadequately provided with parks and open spaces. The existing area of Akina Park, by reason of its configuration, does not provide adequate recreational facilities for the neighbourhood and the adjoining schools. The Board considers that the Council's proposal to extend Akina Park by taking in part of the appellant's property is sound and in accord with town-and-country-planning principles. The appeal is disallowed.

At the conclusion of the hearing the Board intimated that it would withhold its decision to enable the appellant and his advisers to consider whether he should make an application under s. 47 (3) of the Act requiring the respondent to take the land in question under the Public Works Act 1928.

The appellant has now made an application and accordingly the Board *hereby orders* pursuant to s. 47 (3) of the Act that the City Council shall within three months from the date hereof take under the Public Works Act 1928 the estate or interest of the appellant in that piece of land containing approximately 7½ ac. being part of lot 43 on Deeds Plan 83B as the same is delineated and designated "Zoned for Park Extension" on the plan of the Council's proposed district scheme for the City of Hastings.