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A COMEDY OF ERRORS

A case shortly to be reported, *In re the Stratford Poultry and Winter Show Association (Inc.) (In Liquidation)*, is noteworthy, not only for the light which it throws on the interpretation of s. 21 (3) of the Incorporated Societies Act 1908, a section which has not previously been before the Court, but also for the nature of the facts which were disclosed in the proceedings, and the extraordinary situation into which the Executive Committee of the association, acting at all times in the best of faith and with the highest of motives, placed the association.

The association was incorporated in 1928 and its rules provided for the payment by all members of an annual subscription of 10s. 6d. which was due and payable on April 1 in each year. It was further provided that any member failing to pay his subscription within one month after due date should cease to enjoy the privileges of the association, and if he failed to pay within six calendar months of due date he should cease to be a member of the association, although the Executive Committee of the association had power to reinstate any such member on a satisfactory explanation of the delay in payment being given. The rules also provided that, in the event of the association being wound up, its net assets and property should be disposed of by gift to the Stratford Agricultural and Pastoral Association.

On May 2, 1936, the then Executive Committee of the association resolved: "That subscriptions be not charged this year" and, in fact, no subscription was paid by any person for the year which commenced on April 1, 1936, or in any subsequent year. There is no mention in the judgment of any authority in the rules for this resolution, and it must be assumed that the committee in passing it acted ultra vires. In fact, had there been any such authority, the position of the then members of the association would have been entirely different from what it turned out to be. It followed from the non-payment of subscriptions by all members that not later than September 30, 1936, all the existing members of the association, including the members of the Executive Committee itself, ceased to be members, and the association was left without any members whatsoever. The question was neither argued nor dealt with by the Court whether, in these circumstances, the association could continue to exist at all, and it was assumed by all concerned that it could do so.

In his judgment, Hardie Boys J. commented that the Executive Committee had not purported to exercise its power of reinstatement, and said that it was curious that, in a situation where every person who had been a financial member for the 1935-36 year could rely by way of "satisfactory explanation" on the decision of the Committee itself, the Committee had not exercised this power. He also pointed out that, under one of the rules, the Executive Committee elected in 1936 could be regarded as still holding office, for the reason that no meeting of financial members had been held to appoint its successors. The explanation probably is that no one realized the situation which had arisen until the association was put into liquidation and the disposal of its surplus assets became a matter of moment. The question of the necessity for reinstatement of those who were regarded as financial members did not therefore arise in the minds of the members of the Committee. In any case, an attempt by the Committee to reinstate the former members may only have led to further complications, since, as mentioned by the learned Judge himself, it was at least open to argument that the members of the Committee itself, by failing to pay their subscriptions, and thus ceasing to be members of the association, had lost their qualification to remain as members of the Committee, and consequently their right to exercise the powers of the Committee, including the power of reinstatement.

There is at least one further disability from which the association may have suffered, although without a full copy of its rules, we cannot be definite, and the question did not arise in the proceedings. It does seem probable however that when the association lost all its members, it also lost the power of replacing them by new members. It is common practice for the rules of such societies to require persons seeking membership to be nominated and seconded by financial members, with perhaps some provision for election of such new members either by the Committee or by the general membership. With no person qualified as a financial member, there could be no nominator or seconder of new members, and, if the rules were as we suppose, there could be no new members elected or appointed.

The position of the association was now desperate. It had no body, probably no head, and no means of acquiring either. However, it did not realize the extraordinary situation into which it has drifted; it continued to operate as a normal incorporated society, holding meetings, and filing its annual returns with the Registrar. The only limitation of its activities was that it did not hold any shows after 1935. The learned Judge remarked that the gentlemen who were still active in the affairs of the association husbanded its assets so well that they came to consist of some £2,400 in various bank accounts, and there were no liabilities.

There was yet another step taken in this complicated tale of error. On March 3, 1938, that is after the association had lost its membership, a special general meeting was held to adopt new rules. While there was some dispute whether all necessary steps had been taken in calling the meeting and adopting the rules, Hardie Boys J. held that this was of no moment in the circumstances, but on the face of things the rules had been complied with, apart, of course, from the fact that the persons who attended the meeting and voted were not financial members of the association, and therefore had no right to be present, let alone to vote.

For the purposes of the proceedings before the Court, the main alteration in the rules was in respect of the disposal of the surplus assets on the winding up of the association. The new rules directed that such assets should be disposed of in such manner as should be decided by the members of the association at a special general meeting, with provision for a confirming resolution at a subsequent meeting. There was a proviso that there should be no distribution of assets among members.

The new rules were duly dispatched to the Registrar of Incorporated Societies signed by three persons as members, and the Registrar then registered the new rules as an alteration to the original rules.

By 1958 the position of the association was apparently realized, and those interested decided that it should be wound up. It was not possible to call a meeting to pass a resolution for voluntary winding up, and the Court was petitioned for a winding-up order which was duly made. The Official Assignee at New Plymouth was appointed as provisional liquidator.

Even in this step there was an apparent irregularity. Section 26 of the Incorporated Societies Act provides that any application to the Court for the winding up of a society incorporated under the Act shall be by petition presented by the society, or by a member, or by a creditor, or by the Registrar. The association itself could present a petition only pursuant to a resolution, and such a resolution could not be passed for lack of members. It had no creditors, and the Registrar was unwilling to act, no doubt because, so far as he was concerned, there had been no irregularity in the administration of the association's affairs. The petition had therefore been presented by one of those interested in the affairs of the association with the concurrence of all others so interested, but it appeared that he was not a competent petitioner. However, although this point was mentioned before him, Hardie Boys J. was able to side-step this apparent difficulty, holding that, as there was no proceeding before him to set aside the winding-up order, he was content to act upon the view that the winding-up order would stand until set aside at the instance of someone entitled to apply. He might well have added that, in the peculiar circumstances, it would be difficult, if not impossible, to find anyone so entitled.

The matter came before the Court on a motion by the liquidator for directions, in which five questions were put. The important point was whether the distribution of the assets was to be governed by the original rules, which directed payment to the Stratford Agricultural and Pastoral Association, or by the amended rules, and, if the latter, to whom the distribution was to be made.

There was no doubt that the adoption of the amending rules of 1938 was irregular for lack of members to pass the necessary resolution. It was contended, however, that any defect in their adoption was cured by the operation of s. 21 (3) of the Act upon the registration of the rules. The latter portion of this subsection declares that registration is " conclusive evidence that all conditions precedent to the making of the alteration or to the registration thereof have been duly fulfilled ".

For lack of authority on the New Zealand subsection, Hardie Boys J. turned to *Carroll* v. *Shillinglaw* (1906) 3 C.L.R. 1099, where the High Court of Australia held that a similar provision in the Victorian Friendly Societies Act 1890 was conclusive only that things which might lawfully be done had been done, and did not have the effect of declaring something lawfully done which, in fact, could not be lawfully done. He also derived assistance from *In re National Debenture and Assets Corporation* [1891] 2 Ch. 505, and held that the amended rules had not been validly adopted, and that the surplus assets of the association should be disposed of under the original rules to the Stratford Agricultural and Pastoral Association.

So ends a story which could well have been the subject of a *Forensic Fable* rather than a legal proceeding seriously argued in the Supreme Court. That the ending was a happy one, though not quite in accord with the wishes of those interested in the affairs of the association, is fortunate, and is in part due to the obvious good faith of all concerned, and the commonsense displayed when the impossible situation of the association was discovered. The whole position could have been avoided, however, had timely legal advice been sought and acted upon, and no doubt those concerned will have learned this lesson and taken it to heart.

Sir H. Lauterpacht.—Sir Hersch Lauterpacht Q.C., M.A., LL.D., F.B.A., a Judge of the International Court of Justice, The Hague, a Member of the Permanent Court of Arbitration, and Whewell Professor of International Law, University of Cambridge, from 1938 to 1955, died on May 8 at the age of sixty-two. The *Law Journal* (CX. 326) pays tribute to his brilliant contributions to international law, as a teacher and writer, and as a Judge of the International Court of Justice will leave an enduring memorial to his name. Known the world over as editor of the standard work on international law and the *International Law Reports*, his advice was sought far and wide, and the editorship of these two important publications alone would have assured him of an honoured place among the outstanding lawyers of our time. His innate modesty would not allow him to take full personal credit for *Oppenheim's International Law* which underwent profound changes under his editorship and should, as many think, long have been known as Lauterpacht's International Law. His other contributions to the science and study of international law, too numerous to mention here, bear the same mark of authority, scholarship and intellectual honesty, and his comparatively short tenure of office at the World Court was marked by a number of judgments which show his firm belief that the rule of law in international affairs is no less important than in the realm of municipal law and that if States are to live in amity they must ultimately act on the conviction that their disputes can only be settled by referring them to a judicial forum.

SUMMARY OF RECENT LAW.

CERTIORARI.

Error of law not appearing on face of record—Tribunal acting within its jurisdiction—Evidence wrongly admitted—Whether evidence to show error admissible. Where an inferior tribunal acting within its jurisdiction makes an error of law (e.g., in acting on no evidence or in acting on evidence which ought to have been rejected or in failing to take into consideration evidence which ought to have been considered), certiorari cannot be granted to quash the decision of the tribunal for that error of law unless the error appears on the face of the record, and the Court, on application for certiorari, is not entitled to look behind the record or to receive evidence for that purpose. (*R.* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128 and *R.* v. *Paddington & St. Marylebone Furnished Houses Rent Tribunal, Ex parte Kendal Hotels Ltd.* [1947] 1 All E.R. 448, followed; dictum of Lord Goddard C.J. in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex parte Hierowski* [1953] 2 All E.R. at p. 6, not followed.) The reasons given by an agricultural land tribunal for their decision to consent to the operation of a notice to quit referred to an admission in evidence by the tenant that he had had abortive negotiations with the landlord for the surrender of the land to which the notice applied. On application by the tenant for certiorari to quash this decision, the tenant contended that, as the negotiations had been without prejudice, the evidence as to them had been wrongly admitted and they should not have been taken into consideration. The fact that the negotiations had been without prejudice did not appear in the reasons given by the tribunal, or in any other part of the record, but the tenant filed affidavit evidence to this effect. *Held*, as the tribunal was acting within its jurisdiction, and as the error alleged was one of law and did not appear on the record, the Court could not look at the affidavit evidence and must refuse certiorari. *R.* v. *Agricultural Land Tribunal for the South-Eastern Area, Ex parte Bracey.* (Queen's Bench Division. Lord Parker C.J., Byrne and Donovan JJ. May 26, 1960) [1960] 2 All E.R. 718.

CRIMINAL LAW.

Indictment—Defect—Count charging possession of explosives contrary to s. 4 (1) of Explosives Substances Act 1883 (46 & 47 Vict. c. 3)—"Knowingly" omitted from particulars of offence—Arraignment of accused by reading particulars, but not statement, of offence—Knowledge admitted by accused at trial—No substantial miscarriage of justice—Whether indictment defective or bad—Indictments Act 1915 (5 & 6 Geo. 5 c. 90), s. 3, Sch. 1, r. 4—Whether proviso should be applied—Criminal Appeal Act 1907 (7 Edw. 7 c. 23), s. 4 (1), proviso. The appellant was indicted on a count wherein the statement of offence was "Possessing explosives contrary to s. 4 (1) of the Explosive Substances Act 1883", which enactment makes it a felony for a person "knowingly" to have in his possession an explosive substance in particular circumstances. The particulars of offence omitted the word "knowingly". On arraignment only the particulars of the offence were read to the appellant and the statement of offence was not read to him. The appellant, who pleaded not guilty, admitted at the trial that he had known that the contents of a bag in his possession at the time of the alleged offence were explosives, and the summing-up referred to that admission, though the jury were not directed that they must be satisfied of the appellant's knowledge. The appellant appealed against conviction on the ground that the indictment was bad and that he had been arraigned on a non-existent offence. *Held*, (i) though the word "knowingly" should have been included in the particulars of the offence, its omission did not make the indictment bad but only defective or imperfect, and (ii) knowledge, which was an essential ingredient of the offence, was established at the trial, and, as no embarrassment or prejudice had been caused to the appellant by the omission from the indictment and the omission on arraignment there had been no substantial miscarriage of justice; accordingly, the proviso to s. 4 (1) of the Criminal Appeal Act 1907, would be applied and the appeal would be dismissed. (*R.* v. *Thompson* [1914] 2 K.B. 99, followed. *R.* v. *Hyde* (1924) 24 Cr. App. Rep. 149, not followed.) *R.* v. *McVitie.* (Court of Criminal Appeal. Lord Parker C.J., Stable, Donovan, Ashworth and Salmon JJ. May 9, 23. 1960.) [1960] 2 All E.R. 497.

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Intention—Concealment of conduct that might cause injury—Inference of absence of intention to injure—Husband's practice of dressing in women's clothing—Refusal of medical treatment—Treatment calculated to increase frigidity. The husband made a practice of dressing in women's clothing and of using unguents and powder like a woman, but made every effort to conceal the aberration from the wife and it was only discovered by her on returning home unexpectedly on two occasions. The discovery on the first occasion in 1955 was a great shock to her and caused a nervous breakdown, but it was not shown to have done so on the second occasion in 1958, and the wife continued to cohabit with the husband for eight months afterwards. The husband saw a psychiatrist about his condition but did not undergo treatment and there was evidence that such treatment would have repressed his sexual desires and so have increased his frigidity towards the wife, which was one of the factors affecting her. On appeal by the wife from dismissal of a petition by her for divorce on the ground of cruelty, *Held*, cruelty had not been established because: (i) the husband's concealment of the continuance of his conduct, the unlikelihood of the wife's discovering it and the absence of injury to her health when in 1958 she did discover it, negatived any inference that the husband was pursuing a couse of conduct which he ought to have foreseen would cause injury to her health, (ii) nor (*semble*) was such an inference justified by the fact that the husband declined to undergo medical treatment, in view of the prospect that it would increase frigidity towards the wife and so, in the circumstances, would not have been effectual to improve marital relations. *Bohnel* v. *Bohnel.* (Court of Appeal. Sellers, Willmer and Harman L.JJ. 1960. April 29; May 2.) [1960] 2 All E.R. 442.

PRACTICE.

Joinder of parties—Claim for contractors' lien—Mortgagee to be joined if question affecting his priority may arise—See WAGES PROTECTION AND CONTRACTORS' LIENS (*infra*).

ROAD TRAFFIC.

Motor vehicle—Taking and driving away without owner's consent—Appellant, boy fifteen years old, not present when motor cycle wrongfully taken by another boy of same age—Whether riding on cycle, some hours later, as pillion passenger, sufficient to constitute offence—Road Traffic Act 1930 (20 & 21 Geo. 5 c. 43), s. 28 (1)—Insurance—Motor insurance—Third-party risks—Using vehicle taken and driven away without owner's consent—Appellant, boy fifteen years old, not party to original wrongful taking of motor cycle by another boy of same age—Riding on cycle subsequently as pillion passenger—Road Traffic Act 1930 (20 & 21 Geo. 5 c. 43), s. 35 (1). On March 1, 1959, a motor cycle was taken without authority from outside its owner's house. At about 4 p.m. on the same day, F., a boy of fifteen years old, was seen driving the cycle, with another boy of fifteen, the appellant, as a pillion passenger. The appellant and F. had been friends for four years. After they were stopped by the police, the appellant said that he knew nothing about the cycle being stolen. Both F. and the appellant were charged with taking and driving away a motor vehicle without lawful authority, contrary to s. 28 (1) of the Road Traffic Act 1930, and with using a motor vehicle on a road without there being in force in relation to the user an insurance policy in respect of third-party risks, contrary to s. 35 (1) of the Act. F. pleaded guilty. The appellant pleaded not guilty and said in evidence that F. had told him that the cycle belonged to F. and had offered him a ride on it. The appellant was convicted of both offences on the footing that the two boys were acting in concert. On appeal, *Held*, (i) the appellant could not be convicted of an offence against s. 28 (1) of the Road Traffic Act 1930, because there was no evidence that he was concerned in the original taking by F. (*R.* v. *Stally* [1959] 3 All E.R. 814, applied.) (ii) since it was not established that the original taking of the motor cycle was a joint enterprise on the part of the appellant and F., the fact that the appellant accepted a ride as a pillion passenger was not sufficient to justify his being convicted of an offence against s. 35 of the Act of 1930 on the ground that he was knowingly aiding and abetting the driving of the motor cycle without the necessary insurance policy. *D.* (*An Infant*) v. *Parsons.* (Queen's Bench Division. Lord Parker C.J., Donovan and Davies JJ. 1960. May 19.) [1960] 2 All E.R. 493.

SALE OF GOODS.

Motor-car—Possession given to purchaser on exchange for valueless cheque—Delivery of possession with consent of owner—Sale of Goods Act 1908, s. 27 (2). The voluntary delivering

of goods to a purchaser without qualification is a delivery with the consent of the owner for the purposes of s. 27 (2) of the Sale of Goods Act 1908, even if induced by the tendering of a valueless cheque in payment of the agreed purchase price for the goods, and the purchaser is thereupon able to give a good title to the goods to a subsequent purchaser receiving them in good faith and without notice of any lien or other right of the original seller. For s. 27 (2) to apply to such a transaction, it is not necessary for the original purchaser to be acting in the ordinary course of business of a mercantile agent or, indeed, acting as an agent at all. *So held*, by the Court of Appeal. *Jeffcott and Another* v. *Andrew Motors Ltd.* (S.C. Palmerston North. 1959. December 8, 16. McCarthy J. C.A. Wellington. 1960. April 6, 7; May 16. Gresson P. Cleary J. Hutchison J.)

Unpaid seller's lien—Possessory lien only—Lost if possession of goods lost even unlawfully—Revival if possession regained—Sale of Goods Act 1908, ss. 41, 42. The unpaid seller's lien on goods created by ss. 41, 42 of the Sale of Goods Act 1908 is a possessory lien only, and is lost if the seller loses possession of the goods. If a buyer of goods obtains possession of them unlawfully, the unpaid seller's lien is not finally lost but may revive if he again obtains possession of them. *So held*, by Hutchison J. in the Court of Appeal following *Wallace* v. *Woodgate* (1824) Ry. & Mood. 193; 171 E.R. 990 and *Dennant* v. *Skinner and Collom* [1948] 2 K.B. 164; [1948] 2 All E.R. 29—*See* SALE OF GOODS (*supra*).

TOWN AND COUNTRY PLANNING.

Change of use of land—Domestic garage changed into commercial garage—Town and Country Planning Act 1953, s. 38A (Town and Country Planning Amendment Act 1957, s. 26).—"Structure"—"excavation, or other work"—Not to be construed eiusdem generis—Petrol pump a structure or work in nature of a structure—Town and Country Planning Act 1953, s. 32 (1) (b). Where a small shed with an earthen floor used normally as a domestic garage but also used on a small scale for "back-yard" motor repairs is enlarged, fitted with machinery, and supplied with electricity on a commercial basis, while a petrol pump and its attendant tank are added, the character and use of the premises is changed for the purpose of s. 38A of the Town and Country Planning Act 1953. The eiusdem generis rule does not apply in the construction of s. 38 (1) (b) of the Town and Country Planning Act 1953 since the use of the words "structure" and "excavation" do not create a genus. A petrol pump on a concrete foundation is either a structure or its erection is work in the nature of a structure and therefore falls within s. 38 (1) (b). *Connor* v. *St. Kilda Borough.* (S.C. Dunedin. April 5, 12. Henry J.)

Licence for petrol pump granted by Motor Spirits Licensing Authority does not exempt from compliance with Town and Country Planning Act or local by-laws—Motor Spirits Distribution Act 1953, s. 16. There is nothing in the Motor Spirits Distribution Act 1953 to show that its provisions override the valid by-laws of a local authority or the provisions of the Town and Country Planning Act and therefore the grant by the Motor Spirits Licensing Authority of a licence to instal and operate a petrol pump does not exempt the licensee from complying with the provisions of such by-laws and of the said Act. *Connor* v. *St. Kilda Borough.* (S.C. Dunedin. April 5, 12. Henry J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

Practice—Joinder of parties—Mortgagee to be joined if question of priority may arise between him and party claiming lien—Wages Protection and Contractors' Liens Act 1939, s. 34 (2). Where in an action claiming a lien under the Wages Protection and Contractors' Liens Act 1939 a question of priority may arise between the plaintiff and a mortgagee of the property affected, the mortgagee should be joined *ab initio* as a party to the action. If it should transpire in the course of the action that no question affecting the mortgagee is involved, this can be taken into account in the award of costs. *Ngapuna Timber Co. Ltd.* v. *Wallis and Others.* (S.C. Auckland. 1960. February 19; June 22. T. A. Gresson J.)

PERSONAL.

Mr J. W. Bain, recently appointed local representative of the Crown Law Office at Auckland, left with his wife and family on July 1, to take up residence in that city. Mr and Mrs Bain were farewelled by the Solicitor-General (Mr H. R. C. Wild Q.C.) and present and former members of the staff of the Crown Law Office at an informal function on June 29. The Solicitor-General referred to the fact that Mr Bain had been with the office for a period of ten years and made complimentary reference to the service rendered by him during that time. In reply, Mr Bain thanked the Solicitor-General for his remarks, and expressed appreciation of the happy relations and spirit of co-operation which had existed at all times among the members of the staff. His main regret at leaving Wellington arose from the loss of personal contacts with his colleagues which he had enjoyed for so long.

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Mr M. B. Scully S.M., of Wellington, is at present on sick leave and is not expected to resume duty until August 1. In his absence, a number of Magistrates from other districts have been assisting with magisterial work in Wellington, including Mr A. W. Yortt S.M., Mr A. A. Coates S.M., Mr W. S. Spence S.M., Mr J. D. Willis S.M., Mr J. W. Kealy S.M., and Mr R. M. Grant S.M.

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Mr J. R. Drummond S.M., of Lower Hutt, entered hospital recently. During his absence from office he has been relieved by various Magistrates, including Mr J. F. Keane S.M., Mr G. A. Nicholls S.M., and Mr S. L. Paterson S.M.

Mr Justice Turner arrived in Wellington on July 4, and is sitting on the Court of Appeal. His Honour is expected to remain in Wellington for approximately two months.

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The death occurred in Auckland on July 5 of Mr K. C. Aekins, O.B.E., a well-known practitioner. Mr Aekins was admitted as a solicitor in 1930 and as a barrister in 1935 and had since his admission practised in Auckland. Apart from his professional activities Mr Aekins took a keen interest in the affairs of the Auckland Returned Services' Association, the Royal Federation of the Society for the Prevention of Cruelty to Animals and the Auckland Red Cross Society, holding high office in each of these organizations.

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The Attorney-General, the Hon. H. G. R. Mason Q.C., recently announced the appointment as Crown Solicitor at Palmerston North of Mr J. A. Ongley, son of the present holder of the office, Mr A. M. Ongley, O.B.E., who has retired after holding the appointment since 1953. Mr J. A. Ongley was educated at St. Patrick's College, Silverstream, and Victoria University of Wellington from which he graduated LL.B. in 1939. After naval service terminating in 1945 he joined his father in practice at Palmerston North where he has since remained.

[Items for publication in this column will be welcomed from practitioners in all districts.]

DISPUTES AS TO PROPERTY OWNED OR CLAIMED BY HUSBAND OR WIFE.

Life is getting more complex, and so are some of the principles being administered in the Equity Courts. Although medical science has lengthened the expectancy of human life, the ecclesiastics despite all their good efforts have not succeeded in lengthening the life of the modern marriage. Questions as to the beneficial ownership of matrimonial property (by that term I mean property which has been acquired during the duration of the marriage) are now frequently arising in practice, and counsel who is asked to advise often has a most difficult task in, first, getting at the relevant facts and circumstances, and then applying those facts and circumstances to the problem posed. Perhaps the question arises in respect of property the legal title to which has been placed in the name of only one of the spouses, although both may claim that they have contributed to the acquisition of that property. The Courts of Equity have had to recognize that many of the older cases were decided in a former age when married women did not, as a general rule, earn money by their own efforts, and were thus not able to contribute to the acquisition of what I have termed " matrimonial property ": nowadays women frequently contribute to the matrimonial assets, and, although some of the modern Equity cases are difficult to follow, one cannot accuse the Judges of not taking into consideration this great change in modern life.

The dispute may arise during the lifetime of the spouses—perhaps they are separated " owing to unhappy differences," as the conveyancer neatly puts it. The dispute may then be determined under s. 19 of the Married Women's Property Act 1952, as in the recent New Zealand case of *McDonald* v. *McDonald* (1960) (unreported), which has prompted me to write this article. It may arise after the death of one of the spouses between the surviving spouse and the legal representative of the deceased spouse: it may even arise between the legal representative of the deceased spouse and the Commissioner of Inland Revenue, as was the case in *Fenton* v. *Inland Revenue Commissioner* [1957] N.Z.L.R. 564, which of course could not have been decided in a summary manner under s. 19 of the Married Women's Property Act 1952; it was determined by way of Case Stated under s. 62 of the Death Duties Act 1921 (now s. 69 of the Estate and Gift Duties Act 1955).

In these difficult matters there are three important matters which the adviser must bear in mind. First, in applications under s. 19 of the Married Women's Property Act 1952 the Court is not empowered to determine the question of title to or ownership of property otherwise than in accordance with the legal or equitable rights of the parties, although apparently the Court has full discretion to deal with the question of possession and to make an order otherwise than in accordance with the rights of the parties at law or in equity—what has been called " palm tree " justice. Secondly, the legal adviser should heed the principle laid down in *Balfour* v. *Balfour* [1919] 2 K.B. 571, at p. 578, which was noted and applied by all the Judges in the English Court of Appeal in *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406. In referring to *Balfour's* case, Lord Justice Bucknill said at p. 411:

> " That was a dispute on an alleged agreement by which the husband undertook to make his wife an allowance of £30 per month whilst he was abroad. He failed to make the allowance and the wife sued the husband, and the Court of Appeal held that the alleged agreement did not constitute a legal contract, *but was only an ordinary domestic arrangement* which could not be sued upon, and that mutual promises made in the ordinary domestic relationship of husband and wife do not of necessity give cause for action on a contract."

Lord Justice Atkin said:

> " It constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within the definition that I have mentioned. Nevertheless, they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s. or £2 per week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Arrangements such as these are outside the realm of contracts altogether."

Thirdly, the adviser should appreciate the statutory presumption arising by virtue of s. 6 (1) of the Married Women's Property Act 1952 which provides that all deposits in any Post Office or other savings bank etc. which are made to stand in the sole name of any married woman shall be deemed, *unless and until the contrary is shown* to be her property.

Let us examine briefly a few of the leading English and New Zealand cases decided before *McDonald* v. *McDonald* (*supra*).

The statutory predecessor to s. 6 (1) of the Married Women's Property Act 1952 was considered by that eminent New Zealand Judge, the late Mr Justice Williams, in *Raymond* v. *Raymond* (1912) 31 N.Z.L.R. 69; 14 G.L.R. 422. I quote the headnote in the N.Z.L.R.:

> " Where a man pays to his wife his surplus earnings, out of which she defrays all household expenses and invests the balance in her own name with his privity and consent, a presumption is raised that it was the object of the husband to make an advancement for his wife, and if he claims that she holds the moneys as trustee for him it is incumbent on him to rebut this presumption. And where it is shown that the wife invested the moneys for fourteen years, and that, although during the last three years of that period she disputed her husband's claim to the moneys, he took no steps during her lifetime to establish his claim, the Court will not act on the evidence of the husband alone unless it is corroborated either by other evidence or the surrounding circumstances."

During the course of his judgment, Williams J. said:

> " In the present case, however, the surplus savings were, as the plaintiff admits, invested in his wife's name with his knowledge and consent. That completely alters the position. It is just as if the plaintiff had himself invested the money in his wife's name."

In sharp contrast to this judgment there is the English leading case of *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579. The facts were that a husband and wife separated in 1941. At that date there was standing to the credit of the wife in the books of a co-operative society a sum of £103 10s., which upon the evidence represented moneys saved from a housekeeping allowance made to the wife while the parties were living together. It was contended for the wife that this sum was her own property, but it was held that in the absence of any evidence of a gift by the husband, this sum belonged to the husband. As pointed out by Shorland J. in *Fenton* v. *Inland Revenue Commissioner* [1957] N.Z.L.R. 569, there was no suggestion that the husband was in any way privy to or even knew that his wife had deposited savings from the housekeeping allowance in the Oxford Co-operative Society, and the inference is that he was unaware. Similarly, in *Birkett* v. *Birkett* (1908) 98 L.T. 540, the husband would be unaware of the fact that his wife had banked savings from the husband's allowance in her own name. Hence in *Fenton's* case (*supra*), Shorland J. came to the conclusion that proof of the fact that the moneys represented savings made by the wife from the allowance made by the husband and that the accounts were opened in her name for the sake of convenience only was sufficient to displace the statutory presumption raised by s. 12 of the Married Women's Property Act 1908 (now s. 6 (1) of the Married Women's Property Act 1952). *Blackwell* v. *Blackwell* was the cause of many vocal and vigorous protests from many women's organizations in England, but so far the Legislature has taken no heed of them. *Blackwell* v. *Blackwell* was followed a few years later by another English Court of Appeal case, *Hoddinott* v. *Hoddinott* (*supra*), a very interesting case dealing with football-pool money, where the Court of Appeal applied the principle of *Balfour* v. *Balfour* (*supra*), and the wife again lost the case. A husband made his wife a housekeeping allowance. The money which she managed to save out of that allowance was used to provide the stake money for football-pool competitions in which *both husband and wife* made forecasts. On one occasion their *joint* efforts at forecasting resulted in a win of £138 7s., which was paid to the husband. For convenience that sum was placed in a banking account on which both were entitled to draw. Sundry drawings included a payment of £17 for hire purchase of furniture. The balance of £100 in the account was eventually used for the same purpose. Matrimonial disputes having arisen, the wife applied to the County Court under s. 17 of the Married Women's Property Act 1882 (Imp.) claiming delivery of the furniture of which the husband was in possession. It was held by a majority decision that the housekeeping money belonged to the husband in trust for whom the wife held it; that if he invested part of it in football-pool competitions, the winnings were also his in the absence of any contract providing otherwise, and since the arrangement between the husband and wife was an ordinary domestic arrangement on which no action could be based, the wife's application must fail. It may be pointed out here that the wife had no means of her own, and after her marriage did no work outside her household duties, so that the house was maintained by her husband's labour. There is in this case just a slight hint of the very modern doctrine of the joint purse or joint business adventure (of which more anon) for Lord Justice Bucknill cites the now well-known case of *In re Rogers' Question* [1948] 1 All E.R. 328, which is referred to by Turner J. in *Sutherland* v. *Sutherland* [1955] N.Z.L.R. 689.

I have noticed the rapid growth in recent years of *beneficial joint tenancies* or joint ownership of both real and personal property, especially as between husband and wife, and therefore the judgment of Lord Justice Cohen (as he then was) in *Hoddinott* v. *Hoddinott* at p. 413 is very useful to the New Zealand practitioner inasmuch as it deals with this aspect of the problem.

Another matter which was mentioned in the course of the argument was the question whether there might not be a presumption of a gift of the money or half of it from the fact of the money being placed in joint names at the bank. *Prima facie*, if a husband places his money in the joint names of his wife and himself, it does raise a presumption of gift; but in the present case, first of all, it is by no means clear that the husband *did* place it in the joint names. It seems just as consistent with the evidence that he placed it in his own name but gave his wife power to draw on his own account. Even if it was placed in the joint names, in the case of a banking account, such a presumption is readily refutable. I would refer to *Marshall* v. *Crutwell* (1875) L.R. 20 Eq. 328, where a husband in failing healh transferred his banking account from his own name into the names of himself and his wife, directed the bankers to honour cheques drawn by either himself or his wife, and he afterwards paid in considerable sums to this account. All cheques were thereafter drawn by the wife at the direction of her husband, and the proceeds were applied in payment of household and other expenses. After his death the wife claimed to be entitled to the balance, but it was held that the transfer of the account, was not intended to be a provision for the plaintiff (the wife), but merely a mode of conveniently managing her husband's affairs.

Let us consider now a few of the joint purse or joint adventure cases. It is often material to consider in which spouse the legal title to the property is vested. In *In re Rogers' Question* [1948] 1 All E.R. 328, it was vested in the husband. Before marriage the wife found a house, the price of which was £1,000, and herself opened negotiations with the vendor. The sum of £100, provided wholly by the wife, was paid on or before the signing of the contract, and the balance of £900 was raised by means of a mortgage of the house with a building society. Both the contract and the conveyance were made in the name of the husband, who also entered into the mortgage, and an indemnity policy required by the building society and paid all instalments and interest due under the mortgage. In proceedings under the Married Women's Property Act, each party claimed that he or she had always intended that the *beneficial* ownership should be in him or her. On conflicting evidence the Judge came to the conclusion that the intention of the parties at the time was that each should contribute a certain proportion to the purchase price of the house, the husband nine-tenths and the wife one-tenth, and he made an order that the husband should hold the house on trust for sale and that the parties should be entitled to the proceeds of sale in those proportions. On appeal the Court of Appeal held that on the evidence it was reasonable to infer that each party intended to contribute to the house in the proportions found by the Judge and his order should be affirmed, subject

to a proviso that, in so far as on a sale nine-tenths of the proceeds of sale was insufficient to discharge what was due in the mortgage, the husband was liable to make good to the wife any deficiency.

The principle of this case was applied (but with a different result) in *Jones* v. *Maynard** [1951] Ch. 573 ; [1951] 1 All E.R. 802, which is an excellent example of the "joint purse" doctrine. It concerned a joint banking account which was opened in the joint names of the husband and wife when the husband was to proceed on active service overseas. Into this account were paid all dividends arising from investments owned severally by the spouses, the rent of the matrimonial home which was jointly owned, the husband's service pay and an allowance which he received from the school at which he had been employed. Both spouses drew on the account for their requirements, and the husband from time to time drew on the account to pay for investments made in his name. There was no arrangement between the spouses as to their several rights in the account. In 1946 the wife left the husband, who shortly afterwards closed the account and drew out the balance. The parties were divorced in 1948 and the former wife brought an action to ascertain her rights as to the investments and final balance of the account. It was held that *the principle of equality* ought to be applied, and that the wife was entitled to one-half of the final balance, and to one-half of the value of the investments existing at the date of the closing of the account. Mr Justice Vaisey thought that once a common purse had been constituted as between husband and wife it should not be dissected proportionately to the respective contributions of each spouse.

> "The husband if he wants a suit of clothes draws a cheque to pay for it. The wife, if she wants house-keeping money, draws a cheque, and there is no disagreement about it."

But one should note particularly the following sentence which shows how strongly Courts of Equity still lean in favour of the wife.

> "If the investments out of the joint account had been made in the name of the wife alone, there is no doubt that the ordinary presumption of law would have applied and she would have been entitled to the investments: but as they were made in the name of the husband, it seems to me that the assumption of half and half is the one which I ought to apply."

Then the learned Judge quotes Plato to support his theme of equality.

Rimmer v. *Rimmer* [1952] 2 All E.R. 863,† also a decision of the English Court of Appeal, followed *Jones* v. *Maynard* (*supra*), each member of the Court distinguishing *In re Rogers' Question*. The principal point of distinction between the two cases was that neither husband nor wife in *Rimmer* v. *Rimmer*, specified or limited, in any way or at any time, their intended contribution to the home, whereas in *Rogers'* case the wife apparently made it clear that her contribution was to be limited to £100. In *Rimmer's* case the legal title to the matrimonial home was vested in the husband. The wife contributed a small amount in cash towards the purchase and the husband assumed liability for the balance on a mortgage. Both were wage-earners and by their joint efforts they paid off the whole of the mortgage. Later they separated, and the house was sold for a sum nearly five times the amount of the original purchase price. It was held that wife and husband should share equally. As Lord Justice Denning (as he then was) pointed out, when it is not clear to whom the beneficial ownership belongs, or in what proportions, then, in this matter, as in others, *equality is equity*.

Rimmer v. *Rimmer* was followed by the English Court of Appeal in *Fribance* v. *Fribance* (*No.* 2) [1957] 1 W.L.R. 384 ; [1957] 1 All E.R. 357, a case which I have found rather difficult to understand, as also did one of the Lord Justices, Lord Justice Morris. The legal title to the home was taken in the name of the husband alone. Lord Justice Denning appears to have applied a special rule to matrimonial assets.

> "The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets—and the product should belong to them jointly. It belongs to them in equal shares."

Lord Justice Morris said :

> "She continued working after the war, and that did undoubtedly enable the husband to save both during the war and after the war. I think, therefore, that the approach of the Judge was justified. The result of that is, that when the discussion took place, although the wife may not have worked it out in her mind, the position was that the house, although taken in the husband's name, was taken beneficially for both of them. Then comes the application of what is laid down in *Rimmer* v. *Rimmer*, and the result then follows in the way my Lords have outlined it."

In *Silver* v. *Silver* [1958] 1 W.L.R. 259, ; [1958] 1 All E.R. 523 the two cases which we have just been discussing were distinguished. Unlike those cases the legal title had been put into the name of the wife alone and she had not gone out to work and contributed to the matrimonial home. With considerable reluctance the Master of the Rolls and the two Lord Justices held that the house belonged absolutely to the wife. Lord Justice Parker (as he then was) expressed his liking for what I term in this article a special rule to matrimonial assets, as enunciated by Lord Justice Denning in *Fribance* v. *Fribance*. But he went on to say :

> "Now, both those cases were cases where the family asset, the matrimonial home, was bought in the husband's name and not in the wife's name. When, however, the house is bought in the wife's name, as here, there is no doubt that the presumption of advancement applies ; it is presumed to be a gift, in the absence of evidence of a contrary intention."

As the trial Judge had held that there was no evidence of a contrary intention the Court of Appeal unanimously held that the matrimonial home belonged beneficially to the wife.

Rimmer v. *Rimmer* and *Fribance* v. *Fribance* were applied by Shorland J. in *Hendry* v. *Hendry* [1960] N.Z.L.R. 48, the principle of those cases being extended to where the wife had contributed to the paying-off of a mortgage after the date of the purchase of the home, the legal title to which had been put in the name of the husband alone. In this way, by going out to work, the wife had contributed £900 to the family purse.

It was in this rather unsettled and confusing background of equity principles that His Honour Mr Justice McGregor had to decide the recent unreported case of *McDonald* v. *McDonald* (*supra*). In this case a husband claimed moneys invested in the wife's name in the Post Office Savings Bank. The Court had to

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* As to *Jones* v. *Maynard*, see also *In re Cohen* [1953] 1 All E.R. 376.

† *Rimmer* v. *Rimmer* was followed in New Zealand in *Dillon* v. *Dillon* [1956] N.Z.L.R. 162, 164.

determine the intentions of the parties as to the beneficial ownership of the moneys, and to take into consideration the various equitable presumptions. When the husband separated from the wife in 1955 there was invested by deposit in the Post Office Savings Bank the sum of £1,113. His Honour went into the history of this account: suffice it to say that it had been contributed to by both the husband and the wife. Counsel for the husband relying on *Fribance* v. *Fribance* (*supra*) submitted that, though acquired in the wife's name, it was acquired chiefly out of the husband's earnings, and was acquired for the future benefit of the husband and wife, and that, as the evidence did not justify any more precise calculation of their respective interests, it should belong beneficially to the husband and wife in equal shares. In short, counsel for the husband pleaded the joint-purse theory. But His Honour citing at length *Silver* v. *Silver*, held that, as the moneys having been invested in the wife's name with the full consent and approval of the husband, the equitable presumption of advancement was applicable, and the wife was the sole beneficial owner thereof.

> "The husband's long acquiescence in the position as it was and his failure to suggest in any way at the time of the maintenance proceedings that he was entitled to any share in the bank credit lends substantial support to the view that all along it was the intention of the parties that this money should be and remain the property of the wife."

Finally, His Honour dealt with s. 6 (1) of the Married Women's Property Act 1952, but applying the reasoning of Mr Justice Shorland in *Fenton* v. *Inland Revenue Commissioner* [1957] N.Z.L.R. 564 again held that the presumption of gift from husband to wife was not rebutted.

> "The banking in the name of the wife was not made without the privity of the husband. It was made with his full knowledge, consent, and approval; and the majority of the deposits to his wife's banking account were actually made by the husband. In effect the husband himself invested the money in his wife's name."

In conclusion it may be stated that the presumption as to advancement, when a husband puts property into the name of his wife, cannot be rebutted, if such evidence establishes an illegal intention. *In pari delicto potior est conditio possidentis* and the legal title will prevail: *Preston* v. *Preston* [1960] N.Z.L.R. 385, a case of a Crown Lease having been put into the name of the wife in contravention of the Land Acts. And in *Re Emery's Investments Trusts* [1959] Ch. 410; [1959] 1 All E.R. 577, a claim by a husband to rebut a presumption of advancement was disallowed because shares had been put in the wife's name for the purpose of avoiding deduction of tax .

E. C. ADAMS.

DEATH CLAIMS UNDER THE WORKERS' COMPENSATION ACT.

A judgment delivered by the Compensation Court (Dalglish J.) on July 4 in *Public Trustee* v. *Christchurch City Corporation* has such far-reaching effects that we take the first opportunity of bringing it specially to the attention of practitioners, since it may affect cases now in the course of settlement.

The Public Trustee claimed as executor of the will of Frank Fedral Adams who died on June 26, 1959, as a result of an accident arising out of and in the course of his employment by the defendant. His dependants were clearly entitled to the maximum amount of compensation payable under the Act, and the only point in issue was the method of calculating that compensation.

With the coming into operation of the Workers' Compensation Act 1956 there was a change in the method of calculation of the compensation payable in respect of the death of a worker. Previously, under s. 3 (1) of the Workers' Compensation Amendment Act 1953, the compensation payable was 250 times the worker's weekly earnings with a certain specified maximum and minimum which do not affect this case, but under s. 11 (1) of the 1956 Act the compensation payable in respect of death where there are total dependants is expressed to be "a sum equal to the aggregate of weekly payments of compensation at the prescribed maximum amount for two hundred and seventy-four weeks".

On November 19, 1959, the Workers' Compensation Order 1957, Amendment No. 2 (S.R. 1959/180), came into force and increased the maximum compensation from the former figure of £9 9s. per week to £10 per week. The date of coming into operation of this order was of course within the prescribed period of 274 weeks from the death of the deceased.

For the plaintiff, it was submitted that the compensation payable in this case should be 274 times £10, the maximum rate of weekly compensation payable at the date of the hearing, or alternatively, a sum arrived at by calculating compensation at the rate of £9 9s. per week to November 19, 1959, and adding thereto the aggregate of weekly payments for the balance of 274 weeks at the rate of £10 per week. For the defendant it was submitted that the correct calculation should be 274 times £9 9s., the maximum rate of weekly compensation payable at the date of the deceased's death.

Dalglish J. accepted the second submission of counsel for the plaintiffs and awarded compensation as follows:

June 26, 1959 to November 18, 1959:	£	s.	d.
20 three-fifths weeks at £9 9s. per week	194	13	5
253 two-fifths weeks at £10 per week	2,534	0	0
	£2,728	13	5

The case will be reported in due course and a note of it will appear in our Summary of Recent Law. There is therefore no need at this stage to go into the reasons prompting the Judge's decision.

LAW AT OXFORD.

I must preface my article by asking for the indulgence of those readers of the JOURNAL who are old Oxford men themselves. Other readers must, I am sure, remember nostalgically their days at "the other place" as Oxonians sometimes (rather rudely) refer to Cambridge. Will the latter pardon me where I seem to lay undue stress on Oxford at the expense of its sister University? (I have no first-hand knowledge about the study of law there in any case). And will readers in both categories forgive me if I emphasize what is peculiar to 1960, or to my own particular Alma Mater, University College? For life here, both work and play, revolves so much around the College that it would be misleading if this were not reflected in my article. Each college has its own individual tradition and *esprit de corps*, even if these are not easy to analyze.

Why should a New Zealander, who has qualified as a barrister and solicitor, and who has perhaps three or four years' experience in an office behind him, venture overseas at all for further study? It is certainly not my purpose to list the *disadvantages* attached to interrupting one's career in this way at its very outset, for they are sufficiently obvious. Nor would there be any point in extolling the value of travel and of meeting foreign students. Hardly any one now doubts the importance of each of these to a well-rounded education. A lawyer, it is confidently submitted, is probably one of those who can profit most in these respects. In passing, however, it should be noted that Oxford Colleges number among their members representatives from almost every conceivable country in the world. "Univ", for example, at present finds places, either in College or in "digs", for men from, inter alia, the U.S.A., Canada, South Africa, Ceylon, India, Japan and Thailand. When the Master, Dr A. L. Goodhart, went on his recent extended tour, which included Australia and New Zealand, in only one of the countries that he visited, Hong Kong, did he not meet any old "Univ" men and, as the Editor of the *College Record* observed, if he had looked harder, he would have found two there.[1]

What I rather want to do is to give an account of the advantages of studying law at Oxford, leaving readers to take into account both acknowledged benefits and obvious drawbacks and to draw up if they will, their own balance-sheet of the pros and cons.

THE SYLLABUS.

First, some facts about the syllabus. A New Zealand graduate will probably find that three courses are open to him. He may read for either the Final Honours School of Jurisprudence (B.A.) or the Bachelor of Civil Law Degree (B.C.L.), as I myself am doing, or the Degree of Doctor of Philosophy (D.Phil.). To deal with the last-mentioned first, some may find it surprising to learn that the University regards the D.Phil. as a degree differentiated from others, not so much by a higher *status* (although the standard required for a thesis is extraordinarily high and the not-so-successful researcher may have to be content with a B.Litt., the junior research degree), but simply by the fact that it *is* a research degree, work towards it therefore being of a different kind, and the degree more appropriate in some ways to the scientist. Law teachers tell one this with appalling Oxford frankness.

Is this another example of Oxford's current philosophical determination not to be bamboozled by terminology?[2]

Only two law "dons" in the whole of Oxford[3] write D.Phil. after their names. Research facilities are ample enough, but research is almost totally disorganized. The degree of D.C.L. is quite different, one hastens to add; this is one of Oxford's most venerable institutions, attained only after long academic standing, accompanied by an outstanding contribution to the literature of the law.

Both B.A. (converted, iniquitously, into an M.A. by cash and the passing of time) and B.C.L. have the advantage of the tutorial system, Oxford's unique contribution to educational method. This normally involves instruction in ones and twos on the basis of the "weekly essay". Lawyers nowadays are normally required to attend two tutorials per week, with different tutors, and are sometimes "farmed out" to an expert in a certain subject who is a Fellow of another college. But then, according to a recent survey by Dacre Balsdon[4] in *Cherwell*, law-students are worked considerably harder now then ever they were just after the war, when the Jurisprudence School was apparently still considered a School for "nice chaps".

The B.A. has the disadvantage for the "colonial" (one gets used to the label!) that it involves the recovering of much old ground. "Practical Subjects" like Company Law or Procedure are rigorously excluded, the English student learning these later when he takes his Bar (or solicitors') finals.

There is moreover a paper on the English Law of Real Property and its intricacies, definitely not an alluring subject for the New Zealander! Other papers cover Constitutional Law, Legal History, Torts, Contracts, International Law, Roman Law and Jurisprudence.

The B.C.L. is open only to highly-classed B.A. men and to overseas graduates; the course is drawn up on the assumption that the student has a reasonable store of knowledge already; it demands a deeper and more analytical grasp of the Law, and of its underlying principles. Considerable accent is placed on the social utility of legal rules, or the considerations of policy masquerading as rules, and the tendency and wisdom of recent developments. I have been impressed

[1] If, however, Oxford recognizes no barriers of race, colour or creed, it still does not fully recognize the equality of the sexes. Oxford is by and large a man's world and callously gives every indication of staying that way. Even the women, now eligible for the highest academic posts, including the Vice-Chancellorship, though not for any degree of membership of the Union Society, admit this.

[2] Oxford philosophy is at present dominated by the exponents of "linguistic analysis".

[3] D. C. M. Yardley, quite well-known in the field of Administrative Law—he teaches at St. Edmund Hall (the Sporting Kings of Oxford. They are e.g. Head of the River for the second year in succession); and W. A. J. Watson, of Oriel.

[4] The author of *Oxford Life*, a round-the-year survey which leaves a reasonably accurate and entertaining impression of the Oxford year, despite its preoccupation with anecdotes. Cf. also *To Teach the Senators Wisdom*", by Sir John Masterman, Provost of Worcester.

by the attention paid to Comparative Law. The B.C.L. syllabus is being reformed this year and will then include Administrative Law and Penology as optional subjects. Some, including myself, think that the present course is a little old-fashioned in its devotion to Roman Law which accounts for two papers out of seven; one on "General Principles", the other on "Ownership and Possession", both involving Latin translation. It must be added, however, that Roman Law is studied at a highly sophisticated level and a continual (and often illuminating) comparison is drawn with English law. The Law of Sale of Goods is a favourite for this treatment. Other papers are Jurisprudence (General and Comparative), Equity, Conflict of Laws, International Law (selected topics only) *or* Evidence *or* Negotiable Instruments and "Common Law" (Crimes *and* Torts *and* Contracts!). Working for the latter paper was immensely stimulating. Mr A. G. Guest[5] forced me to do some fundamental thinking about for example, illegality, mistake and quasi-contract; in tort, Mr N. S. Marsh[6] directed me to interesting questions of intention and malice, causation and remoteness of damage,[7] and the juridical nature of vicarious liability.

Lectures and Lecturers.

Next, lectures. These are, of course, not compulsory, and lecturers tend to receive the audiences they respectively deserve. Prof. Hart, a Fellow of "Univ", has been lecturing on "The Concept of Law", and at the end of his series this last term was accorded a spontaneous ovation. This had no precedent in undergraduate memory (admittedly only three years long). Professor C. H. M. Waldock lectures to a room packed with international lawyers and Prof. David Daube on most Roman law topics—he is noted for his delightful personality and was able to keep the Union in fits of laughter with a series of funny stories last Michaelmas Term. Dr J. H. C. Morris on Conflict of Laws, Dr Rupert Cross on Evidence, Mr R. H. V. Heuston on Torts, Prof. Hanbury's Seminar on Equity . . . this list ought to give an idea of the calibre of the lecturers (though not all those who are justly well-known as legal writers lecture well!)[8]

But that is enough about the syllabus. What of one's extra-curricular activities? The law student at Oxford, like everyone else, has the whole range of University and College clubs and societies to choose from. These cater for almost every taste, as one would expect and some are markedly esoteric, such as the Heraldry Society and the Charon Club[9]. In In particular, however, he will join the O.U. Law Society and his own College Law Society. The former invites Judges and prominent lawyers to address it. At the Annual Dinner in November, 1959, we were entertained by speeches from Lord Evershed M.R., Sir John Wolfenden Bt. and the Marquess of Reading.

The Society also arranges a number of moots and weekly talks. Mr Justice Devlin recently spoke to the Society on the subject of "The Criminal Trial". C. P. Harvey Q.C., author of *The Devil's Advocate* and Mr Edgar Lustgarten have both spoken on some of the problems of advocacy. It also sponsors *The Oxford Lawyer* which has recently started publication as a magazine intended to deal with less technical legal matters and to be understandable by laymen.

The College Societies are also active though in varying degrees. Inter-college moots are popular, being judged normally by a don from a third college, and are notable both for their informality and for the quantity of port and coffee consumed. In "Univ" this august body is called the Eldon Society and in the current year Lord Jenkins and Mr Justice Diplock (an old member of the College—he read Chemistry when he was here!) were invited to its dinner. But the Master, Dr Goodhart[10], Sir Carleton Allen[11] and Prof. H. L. A. Hart were all there too, and a very pleasant dinner it was. I felt very privileged to be able to take the chair as President when such distinguished guests were present.

Disgressing for a moment to the subject of old members—apart from Shelley, who was sent down for writing a pamphlet on *The Necessity of Atheism,* two of "Univ's" more famous ex-members were the brothers Eldon and Stowell. Their two statues grace the entrance to the College Library, but no one has yet been able to say with certainty which is which. Possibly the learned Lord Chancellor and his scarcely less renowned brother who sat in Admiralty would have been content with this result. In features they were remarkably similar, in life[12] they were devoted to one another, and both are wearing D.C.L. robes!

Oxford Libraries.

I come next to libraries, which have already received a brief mention. The Bodleian has an excellent collection of *Law Reports* and text-books, all of which are shortly to be moved to a brand new building in Manor Road. So also has the Codrington, the beautiful College Library of All Souls, in its Anson Reading Room. On the wall in this old (but very well appointed) room is a bust of Sir William Anson and nearby a copy of the original printed announcement, dated June 23, 1753, that Dr Wm. Blackstone proposed shortly to deliver a course of lectures on "The Laws of England". The Rhodes House Library which emphasizes Commonwealth studies in its selection of books, has, I regret to say, the only New Zealand Law Reports to be found in Oxford. The College Libraries are moderately well-stocked; one finds scholarship being pursued in a slightly more informal manner here than in the major libraries.

And now let us go to London (as Oxford people are always doing). Here, among so many pleasures[13], there is the opportunity for the New Zealand law graduate to see the English Courts in action. On one morning last December, I paid a visit to all three "divisions" of the Court of Appeal; on another, I

[5] Editor of *Anson on Contract* (21st ed., 1959).

[6] Now appointed first director of the British Institute of International and Comparative Law.

[7] See *Causation in the Law*, by Prof. H. L. A. Hart and Mr. A. M. Honore, Oxford, 1959.

[8] New Zealand has its own representative among Law dons, Mr D. R. Harris, Fellow of Balliol College.

[9] "Qualification: to have entered the Cherwell unintentionally and fully clad from a punt."

[10] Hon. K. B. E.; formerly Professor of Jurisprudence; Editor of the *Law Quarterly Review* for more than thirty years.

[11] Also for long Professor of Jurisprudence; Warden of Rhodes House, 1931-1952; Author of *Law in the Making* and *Law and Orders.*

[12] "C. K." has pointed this out in a recent historical sketch.

[13] One of which is exploring the Inns of Court, and sighing for the erstwhile glories of the Temple.

climbed up to the attractive room in Downing Street in which the Judicial Committee deliberated until April of this year. Lords Reid and Denning and the Rt. Hon. L. M. D. de Silva were hearing an appeal from a decision of the West African Court of Appeal on a land dispute. But the lesser Courts have their own peculiar fascination, inviting comparison as they do with our own. There are of course the Old Bailey and the Bow Street Courts, but also the run-of-the-mill County Courts and Assizes. While in Dorchester, I attended the opening of the Dorset Assizes and listened to all the preliminary business being translated.

It was in this county that the defendant, in the recent celebrated case of *Fowler* v. *Lanning*[14] " shot the plaintiff ".

Apart from seeing the Courts in action, it is possible to derive a certain satisfaction from suddenly coming across a town or even a factory which has contributed its name as plaintiff or defendant in a well-known case. Thus, on the way from Dorchester to Salisbury, my eye lit on a signpost directing the traveller to Crichel Down.[15] In Bristol, large signs in one part proclaimed the premises of the Bristol Aeroplane Company.[16]

[14] [1959] 2 W.L.R. 241; [1959] 1 All E.R. 290. It was held that this allegation in the Statement of Claim disclosed no cause of action. See note by Goodhart in (1959) 75 L.Q.R. 161.

[15] The well-known dispute over the farming of the Down which caused such a furore. There was never any action taken in the Courts; but plenty in Parliament.

[16] *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718; [1944] 2 All E.R. 293. A search for the Ice Company's premises when passing through Romford was unavailing.

I travelled through Clapham on a tube-train in the rush hour with a heavy suitcase, and saw the point of going there on an omnibus, as the reasonable man is said to do. These pleasures are, of course, not confined to the student, but available to anyone who happens to be visiting this country, but I mention them because one is in Oxford itself for probably only half the year; the rest of the time gives unique opportunities for seeing the country and, of course, for travelling on the Continent.

To sum up (and to plead my cause after all), I think that the total benefits to be gained are eminently worth the interruption of one's professional life. For better or for worse, we are committed to a close adherence to English precedent. Studying in England, one has the chance to understand better the English common-law tradition, its practical application, and (very discreetly) the Judges who are shaping or re-shaping it. The young New Zealand lawyer ought to acquire at Oxford a whole variety of new ideas about legal problems. Certainly he will have met (and drawn swords with) men responsible for some of the most acute legal thinking now going on anywhere. He will make a large number of friends, enjoy a type of legal education very different in emphasis and method from what he has so far experienced and all of this will amply compensate him for what he has thereby missed back at home. At any rate, I am prepared to act upon my own submission.

D. L. MATHIESON.*

* Mr Mathieson graduated B.A., LL.B. at Victoria University of Wellington in 1959 and gained a Rhodes Scholarship.

THE ART OF CORRESPONDENCE.

In the course of our daily work we are required to read carefully every judgment delivered by the Supreme Court and the Court of Appeal and we have been disturbed by the frequency with which criticism is levelled by the Court at correspondence which has been conducted by solicitors. In other cases, although the Court has refrained from criticism, correspondence which has been quoted has shown itself to be badly framed, indefinite in terms, and inaccurate in expression and in substance. Most of the judgments have not been reported but one or two do appear in the NEW ZEALAND LAW REPORTS.

It is perhaps permissible to deduce that the same defects have shown themselves in England from the fact that, in its issue of April 22, 1960, the *Law Times* has seen fit to publish an article under the above heading. The article is short but is well worth reading by principals and referring to staff, since it epitomizes under five headings the essentials of legal correspondence. The discussion under the fourth heading is particularly relevant to our comment above, and it is therefore quoted in full:

"(4) Since correspondence conducted by a lawyer must normally be subject to a risk—sometimes small and sometimes large enough to amount almost to a certainty—that litigation will ensue, its conduct has certain peculiar snags and traps for the unwary. There is no room here to discuss the relative merits of 'open' and 'without prejudice' letters. Both have their part to play in most correspondence with a flavour of litigation about it. A more general, and slightly cynical, comment is that it is well to think how the letter will sound if read out in Court, or, one might add, in cases of a public character, how it will look to a member of Parliament."

With the constant pressure under which practitioners work at present it is difficult not to acquire the habit of dictating letters hurriedly and without adequate preparation, and signing them after a hasty check directed only to the detection of typographical errors. This is a dangerous habit which, at best, may result in the practitioner being subjected to public criticism, and, at worst, may face him with a claim for damages. Time allotted to the test suggested by the author of the above-mentioned article would be well spent.

Visiting Lawyers.—Two leading overseas lawyers will visit New Zealand in September. They are Mr K. Howard Drake, of England, and Mr Phiroze J. Shroff, of India.

Mr Drake will arrive in Auckland on September 12. He is assistant secretary of the Society of Public Teachers of Law, secretary and librarian to the Institute of Advanced Legal Studies, London, and secretary of the Selden Society. Mr Shroff, a well-known Bombay lawyer and broadcaster, is a former deputy-secretary to the Ministry of States of the Government of India, and for a time acted as administrator of one of the central Indian States until its Maharaja came of age. He has held professorships at two Indian law colleges, and is an authority on Indian economic problems.

CORRESPONDENCE.

Letters to the Editor.

" Crisis for South African Legal Profession."

Sir,

In your issue of June 7, you invite correspondence, and you also draw attention to the resolution of the Canterbury Law Society on affairs in South Africa, hoping that other Law Societies will follow suit.

It is certain that if they knew one half of what is going on, they would lose no time in registering their protests. It is hardly going too far to say that any South African lawyer who consistently defends the rights of those who are politically unacceptable to the Government, ipso facto, becomes himself politically unacceptable, and suffers all the usual disabilities of a " communist ". Recent news items have told us that a lawyer who was taking statements from Sharpeville victims was arrested and detained. Of the many people who have been detained without trial, twelve hundred are now being released, subject to shocking restrictions on their liberty. Of the rest, here is the set-up: You can be arrested and detained without trial, and your name is not to be published without permission. You may not know what you have been arrested for; it may be on " information received " or because the policeman wants to sleep with your wife while you are in jail, or just because of mistaken identity. If you are not white (and who is to say whether you are white or coloured, the police and prison officials are quite likely to use their own judgment) you can be forced to work, and if you refuse you can be whipped. (Some detainees got a Court order quashing the prison officers' disciplinary right to have them whipped for refusing to work, whereupon legislation was rushed through to legalize such a step in future.)

Your readers should bear in mind that a few non-whites have succeeded in qualifying as legal practitioners, and these may be expected to be, if they have not already been, detainees on the lines referred to. Conditions in non-white jails are such that the long-term prisoners are deputed to supervise the newcomers and see that they understand what is expected of them. This could lead to robbery, bullying and victimization.

While I was living in Johannesburg, a certain member of the ordinary staff of the Department of Justice was elevated to the Bench with the clear intention that he should serve as one of the Judges before whom a political trial was to take place. The Johannesburg Bar reacted in an unprecedented manner; it was publicly announced that for the first three weeks of his office, no Johannesburg advocate would accept any brief that entailed making an appearance in the Court over which the new Judge was to preside.

One of the most fearless and impartial of the Judges in office while I was in South Africa was Mr Leslie Blackwell, a New Zealander. So long as he remained on the Bench, the Government did not venture to express its opinion of him, but he retired early and went to Rhodesia, whereupon a Cabinet Minister made public statements about him which were beneath the dignity of them both. It is therefore interesting to note that in a recent trial the defence was undertaken by a Q.C. from Rhodesia, named Blackwell. (If he's won his case it is unlikely that he will ever get into the country again!)

The vast majority of offenders do not come before a Judge; they come before a Magistrate, and in South Africa a Magistrate is a senior public servant who has attained his position on the Bench by promotion through the ranks of public prosecutors. He is never chosen from the ranks of the profession, and he is seldom anything like as well educated as the men who appear to conduct cases in his Court. It is to the credit of these men that they do in fact usually uphold the dignity of their position well. But the system lends itself to much criticism, especially when coupled with a Police Force that is inadequate, brutal, and frequently corrupt. Harry Bloom, writing in 1957, pointed out that in spite of the extreme difficulty of succeeding in presenting a charge against the police, there were so many cases being brought against them that in Johannesburg one Court was kept busy four days a week with prosecutions of policemen. It is not to be supposed that the position has in any way improved since then.

When ex-Chief Luthuli was called as a witness in the Treason Trial, he was unable to stand up, because he had just been arrested and manhandled by the police or prison officials. It is, of course, possible that somebody took advantage of this elderly and highly respected gentleman because of his activities on behalf of his people; but it is quite equally possible that he was ill-treated by someone who did *not* know who he was, and therefore did not refrain from giving him the usual handout, the buffeting that is undergone by almost every non-white person when under arrest. This is so much taken for granted that it is frequently carried out in full view of the public.

To end on a lighter note, I once saw an African, handcuffed, walking quietly by himself along a residential street. Nobody pursued him, nor did he seem to be hurrying much. We looked at each other with mild curiosity and went our respective ways.

Yours, etc.,
SOUTH AFRICAN KIWI.

PRACTICAL POINT.

Land Transfer—Certificate of Title subject to statutory restrictions—Land Act 1924, ss. 16, 17—Native Land Act 1931, s. 248—Land Act 1908, Part XIII—Land Act 1924, Part XIII.

QUESTION: We have searched several Land Transfer titles lately and been somewhat concerned to find that they have been expressly made subject to certain statutory restrictions, e.g.: (a) ss. 16 and 17 of the Land Act 1924; (b) s. 248 of the Native Land Act 1931, and (c) Part XIII of the Land Act 1908 or Part XIII of the Land Act 1924. Do we have to make new dealings subject to above restrictions?

ANSWER: The answer is " No ". All the statutory restrictions cited are now obsolete as the result of subsequent legislation. We understand that on request District Land Registrars will expunge all above restrictions from the Register Book, because: (i) ss. 16 and 17 of the Land Act 1924 have now been replaced by the Land Subdivision in Counties Act 1946; and (ii) the other named statutory provisions represented former legislation of an economic nature designed to prevent aggregation of land for which the Land Settlement Promotion Act 1952, has now been substituted.

Charities and Charitable Institutions

HOSPITALS - HOMES - ETC.

The attention of Solicitors, as Executors and Advisers, is directed to the claims of the institutions in this issue :

BOY SCOUTS

There are 42,000 Scouts in New Zealand undergoing training in, and practising, good citizenship. They are taught to be truthful, observant, self-reliant, useful to and thoughtful of others. Their physical, mental and spiritual qualities are improved and a strong, good character developed.

Solicitors are invited to commend this undenominational Association to Clients. The Association is a Legal Charity for the purpose of gifts or bequests.

Official Designation :

The Boy Scouts Association of New Zealand,
159 Vivian Street,
P.O. Box 6355,
Wellington, C.2.

PRESBYTERIAN SOCIAL SERVICE

Costs over £250,000 a year to maintain.
Maintains 21 Homes and Hospitals for the Aged.
Maintains 16 Homes for dependent and orphan children.
Undertakes General Social Service including :
Care of Unmarried Mothers.
Prisoners and their families.
Widows and their children.
Chaplains in Hospitals and Mental Institutions.

Official Designations of Provincial Associations :

" **The Auckland Presbyterian Orphanages and Social Service Association (Inc.).**" P.O. Box 2035, AUCKLAND.
" **The Presbyterian Social Service Association of Hawke's Bay and Poverty Bay (Inc.).**" P.O. Box 119, HAVELOCK NORTH.
" **The Wellington Presbyterian Social Service Association (Inc.).**" P.O. Box 1314, WELLINGTON.
" **The Christchurch Presbyterian Social Service Association (Inc.).**" P.O. Box 2264, CHRISTCHURCH.
" **South Canterbury Presbyterian Social Service Association (Inc.).**" P.O. Box 278, TIMARU.
" **Presbyterian Social Service Association (Inc.).**" P.O. Box 374, DUNEDIN.
" **The Presbyterian Social Service Association of Southland (Inc.).**" P.O. Box 314, INVERCARGILL.

CHILDREN'S HEALTH CAMPS

A Recognized Social Service

There is no better service to our country than helping ailing and delicate children regain good health and happiness. Health Camps which have been established at Whangarei, Auckland, Gisborne, Otaki, Nelson, Christchurch and Roxburgh do this for 2,500 children — irrespective of race, religion or the financial position of parents — each year.

There is always present the need for continued support for the Camps which are maintained by voluntary subscriptions, We will be grateful if Solicitors advise clients to assist, by ways of Gifts, and Donations, this Dominion wide movement.

KING GEORGE THE FIFTH MEMORIAL CHILDREN'S HEALTH CAMPS FEDERATION,
P.O. Box 5013, WELLINGTON.

THE NEW ZEALAND Red Cross Society (Inc.)

Dominion Headquarters
61 DIXON STREET, WELLINGTON,
New Zealand.

I Give and Bequeath to the
NEW ZEALAND RED CROSS SOCIETY (INCORPORATED)
(or).....Centre (or).....
Sub-Centre for the general purposes of the Society/Centre/Sub-Centre.....(*here state* amount of bequest or description of property given), for which the receipt of the Secretary-General, Dominion Treasurer or other Dominion Officer shall be a good discharge therefor to my Trustee.

If it is desired to leave funds for the benefit of the Society generally all reference to Centre or Sub-Centres should be struck out and conversely the word "Society" should be struck out if it is the intention to benefit a particular Centre or Sub-Centre.

In Peace, War or National Emergency the Red Cross serves humanity irrespective of class, colour or creed.

The BRITISH AND FOREIGN BIBLE SOCIETY: N.Z.

P.O. BOX 930,
WELLINGTON, C.1.

A GIFT OR A LEGACY TO THE BIBLE SOCIETY ensures that THE GIFT OF GOD'S WORD is passed on to succeeding generations.

A GIFT TO THE BIBLE SOCIETY is exempt from Gift Duty.

A bequest can be drawn up in the following form:

I bequeath to the British and Foreign Bible Society: New Zealand, the sum of £ : : , for the general purposes of the Society, and I declare that the receipt of the Secretary or Treasurer of the said Society shall be sufficient discharge to my Trustees for such bequest.

PAYMENTS INTO COURT.

In *Lilley* v. *Kay* [1960] N.Z.L.R. 292, Turner J. found himself faced with a submission which he himself said he received "with a little impatience".

Readers will remember that this was a case of claim and counterclaim arising out of a traffic accident. The defendant paid into Court £500 with a denial of liability and said that the amount paid in was "enough to satisfy the plaintiff's claim". The parties both partially succeeded in their claims and the net result was that the sum of £439 14s. 10d. was recoverable by the plaintiff.

Counsel for the defendant contended that, since the net amount recovered was less than the amount paid into Court, the defendant was entitled to the costs of the trial. Counsel for the plaintiff, on the other hand, submitted that the terms of the payment into Court were not sufficient plainly to disentitle the defendant to continue his counterclaim even if he had drawn out and accepted the payment into Court.

Despite Turner J.'s initial impatience with this latter submission, he found himself bound to uphold it and to refuse the defendant's application for the costs of the trial.

It may be some comfort to the Judge and to the parties that a similar question which arose in England was decided in exactly the same way by the Court of Appeal. In *A. Martin French* v. *Kingswood Hill Ltd.* (1960) 229 L.T. Jo. 259 there were both claim and counterclaim and a payment was made into Court by the defendant. This was taken out by the plaintiffs, and this, of course, disposed of their claim. The plaintiff agreed that such a payment into Court must inevitably have the effect of satisfying the claim, less the counterclaim. The Court held however that, under Order 22 r. 1, the defendant was paying in a sum to satisfy the plaintiff's claim as it then stood, and not such a sum as they thought that the plaintiff might recover at the end of the day. The defendant was therefore entitled to proceed with his counterclaim.

PUBLICITY FOR SOLICITORS.

"We applaud the conclusion reached by the council of the British Medical Association that 'the policy of anonymity in all circumstances in broadcasting is no longer tenable and there is no objection to the announcement of a doctor's name', provided that the publicity is justifiable in the interests of the public or the medical profession. The operation of the complete ban was ludicrous: one evening a viewer could see, for example, 'a consultant psychiatrist' in action; the following morning he well might read in his newspaper a summary of the programme mentioning the name, and perhaps also publishing a picture, of the doctor concerned. The whole question of publicity for professional practitioners needs critical review by their respective associations. We should welcome much greater general publicity for solicitors; claims on the compensation fund and activities of the Disciplinary Committee practically monopolize the space allocated by the national Press to solicitors. This is largely the collective fault of the profession. Solicitors' fears about being deemed to be advertising are so great that many general achievements by them go unacclaimed in the Press. Even if a name were mentioned in a professional capacity, e.g., before and after a broadcast, or as an author, we doubt whether an undue amount of desirable professional work would result therefrom, although no doubt the solicitor concerned would have to prepare to meet onslaughts from the 'lunatic fringe'. On balance, the permitting of greater desirable publicity for individual solicitors would help the profession at large, rather as the advertising of a particular brand of, say, vacuum-cleaner increases sales of all types of that commodity. The converse also is true; a general advertisement for, say, beer, helps to boost sales of individual brands. The Law Society is the proper body to organize the general type of advertising for the profession. That approach could be tried first. If, however, it is not practicable quickly to arrange appropriate publicity for the profession as a whole, it might be more beneficial to take a leaf out of the B.M.A.'s book and relax the rules relatingto publicity for individual solicitors. In this age of public relations consciousness, the certain way to achieve the worst of every possible world is to do nothing."—(1960) 18 S.J. 335.

LEGAL LITERATURE.

Garrow and Willis's Principles of the Law of Evidence in New Zealand. (Fourth Edition), by J. D. WILLIS S.M. Pp. xxii and 291. Wellington: Butterworth & Co. (New Zealand) Ltd. Price: 45s.

The late Professor J. M. E. Garrow left behind him for the benefit of practitioners and students an impressive legacy of text books which have acquired an established place in New Zealand's legal literature. In 1944 Mr Willis revised Professor Garrow's Notes on Evidence originally issued for the use of students many years earlier and in their revised and partly rewritten form these were published as the "second edition" of the present work. A third edition followed in 1949 and the recent publication of the fourth edition is an indication of the popularity of the work. The law is stated as at April 30, 1959.

The book does not purport to compete with or displace the larger and older established authorities. In his preface, the editor states its purpose as trying to present a compact and practical text book on the law of evidence in New Zealand, and expresses the hope that the new edition will find some favour with members of the legal profession, students and others. In the relatively compact space of less than three hundred pages, the work provides a handy book of reference for the practitioner and a useful text book for the student. The editor has brought to his task more than a decade of practical experience as a Magistrate.

The index to the work is adequate but perhaps could have been fuller. For example, it contains no reference to the Judge's Rules although these are, of course, dealt with in the chapter on "Admissions and Confessions". Conveniently, both the text and the Table of Cases give references where available both to the *All England Reports* and the *Official Reports*. The Evidence Act is reprinted as an appendix. Paragraphs are clearly headed in heavy type and the type face used makes the latest edition easier to read than previous editions. E.R.W.

TOWN AND COUNTRY PLANNING APPEALS.

Peninsular Hardware Co. Ltd. *v.* Waitemata County.

Town and Country Planning Appeal Board. Auckland. 1960. April 30.

Zoning—Building permit—Non-conforming use—Conditions imposed on grant of permit.

The following order was made by the Board :

" UPON READING the appeal bearing date November 4, 1959, filed herein by the above-named appellant Peninsular Hardware Co. Ltd. and the reply of the respondent bearing date December 16, 1959, AND UPON HEARING Mr C. A. Herman of counsel for the appellant and Mr C. A. Hamer of counsel for the respondent the Town and Country Planning Appeal Board BY CONSENT DOTH HEREBY ORDER as follows :

1. That subject as hereinafter appears the decision of the respondent on July 30, 1959, that permission be granted to the appellant to erect a timber rack at the will and pleasure of Council be varied by deleting the words " at the will and pleasure of Council ".
2. That subject as hereinafter appears the decision of the respondent on August 27, 1959, that the appellant be allowed to erect a workshop on Lots 1 and 5 Deposited Plan 39025 be varied by deleting the qualification imposed thereon viz. " that the building remain there only at the will and pleasure of the Council, permission to be withdrawn should justifiable complaints in respect of any noise caused by the machinery be received " and by altering the description of the land to Lot 3 Deposited Plan 44059.
3. That subject as hereinafter appears the decision of the respondent on September 24, 1959, that the appellant be refused permission to extend its existing shop premises on Lot 1 Deposited Plan 39025 be confirmed.
4. That the timber rack and workshop hereinbefore referred be erected on Lot 3 Deposited Plan 44059 in such situations as the Council shall approve the said timber rack to be of dimensions not exceeding 40 ft. x 20 ft. and the said workshop of dimensions not exceeding 60 ft. x 25 ft.
5. That the buildings now standing on Lot 1 Deposited Plan 39025 be demolished and entirely removed within three years from the date hereof.
6. That if the appellant so applies within the said period of three years from the date hereof the respondent will, subject to the respondent's by-laws, grant to the appellant a permit to erect on said Lot 1 in substitution for the buildings now standing thereon a new building of not more than 3,000 sq.ft. in area to be situated as shown on the plan annexed hereto and marked T.P.M. 35 with a front yard of not less than 40 ft. between the said building and the front boundary on the Whangaparoa Main Highway. Of that front yard the portion for a distance of 20 ft. from the front boundary shall at all times be kept clear of buildings and vehicles and shall be suitably planted and maintained to the satisfaction of the respondent.
7. That the said timber rack and workshop shall not be erected closer than 10 ft. to any boundary of said Lot 3 and no timber or other materials shall be stacked or placed within 10 ft. of such boundaries.
8. That the said new building on said Lot 1 may be erected up to the north-western boundary of said Lot 1 but such building shall have no openings on to that boundary and the windows on to such boundary shall be of the high-light fixed glazing type.
9. That off-street parking shall be provided on said Lots 1 Plan 39025 and 3 Plan 44039 for at least 9 vehicles and the area set aside for such purpose shall be formed, metalled and maintained to the satisfaction of the respondent's engineer. Access to the parking area shall be provided by a driveway of not less than 12 ft. in width. The entrance to the driveway shall be at the north-eastern end of said Lot 1 provided that there shall be no entrance within the distance of 40 ft. along the frontage of said Lot 1 measured from the north-western corner thereof.
10. That all plant and woodworking machinery shall as soon as the said workshop is ready for occupation be removed from the building now on said Lot 1 and placed in the said workshop. No other plant or machinery shall be brought on to either said Lot 1 or Lot 3 other than the plant and machinery now in the building on said Lot 1 being : 1 only 12in. Tanner Thicknesser ; 1 only 10 in. Tanner Saw Bench ; 1 only 9 in. Three Side Planing Machine ; 1 only Portable Skilsaw.
11. That at no time hereafter while the zoning of the area in which the said two lots are situate remains residential will the appellant or any subsequent owner or occupier erect or seek to erect on said Lots 1 and 3 any buildings of a commercial, industrial or business type other than those hereinbefore referred to.
12. That the parties shall enter into a deed of covenant obliging the appellant and any subsequent owner or owners of said Lots 1 and 3 to comply with those provisions of preceding paras. 4, 5, 6, 7, 8, 9, 10, and 11 hereof which impose obligations and restrictions on the appellant and that such deed of covenant be registered against the title or titles to the said lands by a memorandum of encumbrance in the form prescribed by the Land Transfer Act 1952, the costs and disbursements of and incidental to the said documents to be borne by the appellant.
13. That each party pay its own costs and disbursements as between solicitor and client of and incidental to this appeal including the preparation, approval and sealing of this order and any modification or variation thereof.
14. That leave be and the same is hereby reserved to either party to apply to the Town and Country Planning Appeal Board concerning any matter or question arising under this order.

Smale and Others *v.* East Coast Bays Borough.

Town and Country Planning Appeal Board. Auckland. 1960. January 25.

Zoning—Land zoned as Public Reserve—Not within resources of Council to acquire land at present—Not good ground of appeal —Scheme to be directed to development for period of twenty years —No real basis for assessing economic validity of long-term scheme —Board required only to consider whether scheme is in accord with sound town and country planning and will tend to promote and safeguard economic and general welfare of inhabitants— Town and Country Planning Act 1953, s. 18.

Six appeals, all relating to the same proposal, were heard together. The appellants were owners of property situate in Campbell's Bay fronting on to the beach. They were within a block of land bounded by the beach on the east, the Esplanade to the north and Huntly Road to the south. Each of them had riparian rights, that is to say their titles extended down the beach to mean high-water mark though, in so far as actual occupancy and use was concerned, their frontages were some 40 ft. back from mean high-water mark. Under the respondent Council's proposed District Scheme, as publicly advertised, this block was zoned as a proposed reserve. All the appellants lodged objections to this zoning when the scheme was publicly notified. Their objections were disallowed and these appeals followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). It is unnecessary, for the purpose of its decision, to define each appellant's property by titular description. The Board finds as follows :

1. At the hearing, the evidence of the expert witnesses called, Mr Grierson, on behalf of the appellants, and Mr Jones and Professor Kennedy on behalf of the respondent, indicates that the total areas set aside as proposed reserves under the Council's proposed District Scheme are the bare minimum that should be so set aside having regard to the total area within the Borough. All the experts are agreed that from a town-planning angle it is desirable, if possible, to have a reserve in this particular locality. The only qualification from that point of view came from Mr Grierson when he stated in cross-examination : " It is desirable, if possible, to have a reserve here if it can be paid for ".
2. The appellants' case rested almost entirely on the proposition that the provision of this proposed reserve was a project beyond the present financial resources of the

respondent Borough Council. Counsel for the appellants laid considerable stress on the wording of s. 18 of the Act and particularly on the words " in such a way as will most effectively tend to promote and safeguard the health, safety and convenience and the economic and general welfare of its inhabitants and the amenities of every part of the area ". The basis of this submission is that, if the Council is unable to finance the purchase of the proposed reserve immediately, then the proposal should be deleted from the plan as not being in the economic interests of the inhabitants of the area. The Board does not consider that it is required to embark upon an exhaustive or detailed inquiry into the financial status of any Council charged with the preparation of a scheme.

3. The Act casts a duty upon the Council to prepare a scheme directed to the development of the area under its control for a period of 20 years. It follows, therefore, that, in preparing such a scheme, the Council concerned must indicate in its plan what its objectives for the period of 20 years are, and it must do so in such a way that ratepayers and residents who might be adversely affected by the proposals should receive ample notice of the Council's intentions. The Town and Country Planning Regulations 1954, Second Schedule, Part II, under the heading "Notation for District Planning Maps" make it quite clear that the Council must, in preparing its plan, set out clearly what its proposals are. See the Second Schedule at p. 24 under the various headings: " Reserves for Recreation and Open Space—Existing and Proposed "; " Roads—Existing and Proposed "; " Motorways—Existing and Proposed "; " Streets—Existing and Proposed "; " Service Lanes—Existing and Proposed "; " Accessways—Existing and Proposed ".

For the period authorities are required to plan, that is 20 years ahead, it is impossible to forecast with accuracy the cost likely to fall on an authority or the ability of an authority to meet that cost. There can be no real basis for assessing the economic validity of a long term district scheme, either as a whole or of its parts. District Schemes may well contain proposals that may seem unrealistic in relation to present-day financial resources, but that does not mean that the proposals are not in conformity with town-and-country-planning principles. Every proposal set out in a District Scheme must be regarded as if it were qualified by the unexpressed but implied condition " when and as finances permit ".

It is true that in its scheme statement the respondent Council indicates its intention to deal with the matters of water reticulation, sewerage, roading and the provision of reserves within the first 5 years of the plan's operation It may well be that the commitments in respect of water reticulation and sewerage, in particular, may be all that the Council would be capable of carrying out in the first 5 years of the plan's operation, but that is not to say that the proposed reserves cannot be acquired and utilized as reserves during, if not the first 5 years, possibly the first 10 or even 15 years of the plan's operation. The East Coast Bays Borough is expanding rapidly. The population in 1954 is given as 5,745, in 1959, 8,190, and it is estimated that within 5 years the population will increase to approximately 12,000. To attempt to forecast what will be the financial strength of this Council 5 years hence is to venture into the realms of conjecture. The indications are that the North Shore as a whole will, when the full impact of the Harbour Bridge is felt, develop very rapidly. If this should be the case, then the value of properties in the East Coast Bays Borough can be expected to rise and the financial position of the Council to be consequentially strengthened.

4. The Board considers that the only question which it is called upon to decide is whether or not the proposal to establish a reserve of the use of the public as a whole and the residents of the East Coast Bays' Borough in particular at Campbell's Bay is in accordance with sound town-and-country-planning principles and will tend to promote and safeguard the economic and general welfare of the inhabitants. As its name suggests, its beaches are the main important amenity that this Borough possesses, and the Board considers that the preservation of those amenities by providing proper reserves on the foreshores of these beaches is constructive and sound town planning and will tend to promote and safeguard the health and the economic and general welfare of the inhabitants.

5. During the hearing, the appellants made an offer to the respondent Council to transfer free of cost the lands from mean high-water mark to a depth of approximately 40 ft. conditionally upon the remainder of their lands being re-zoned as residential for at least five years. The respondent Council rejected this offer. The Board takes the view that to order a re-zoning of land not on town-and-country-planning principles but as a temporary expedient would be contrary to those principles and would conflict with the duty of the respondent Council in its planning. Furthermore, a temporary re-zoning of land for a limited period would mislead any potential purchaser of any of the affected properties.

The appeals are disallowed.

Appeals dismissed.

Francis and Another *v.* Waimairi County.

Town and Country Planning Appeal Board. Christchurch. 1960. March 21.

Subdivisional plan—Land zoned as rural—Strip subdivision to a depth of 2½ chains on boundary roads which are not State or Main Highways—Re-zoning of such strip of land as urban.

Appeal under s. 38 of the Town and Country Planning Act 1953. The appellants were the owners of a block of land comprising 10 ac. 33 pp. being part of Lot 2, Deposited Plan 12234, part Rural Section 199. The property had frontages to Memorial Avenue, Wooldridge Road and Avonhead Road. They submitted a scheme for the subdivision of this land into residential sections to the Council in 1955. After lengthy discussions between the interested authorities, the subdivision was, at the request of the Christchurch City Council, prohibited by the Waimairi County Council owing to its proximity to the Christchurch Airport. The appellants appealed against such prohibition and their appeal was allowed under a decision dated May 20, 1959.

The next time this property came under consideration was in an appeal under s. 10 (6) of the Act lodged by the Christchurch Regional Planning Authority against the Waimairi County Council. The question at issue in that appeal was, inter alia, whether the appellants' land should be zoned as urban or rural. In a decision given on July 24, 1959, the Board upheld the Regional Planning Authority and directed that the appellants' land should be zoned as rural and not urban.

The judgment of the Board was delivered by

REID S.M. (Chairman). This present appeal is against the refusal of the Council to approve a plan of subdivision of this land into residential lots. As the Board has already held in the decision quoted, that this land land should be zoned as rural and not urban, it follows that the Board cannot approve of its subdivision for urban use. After hearing the submissions of counsel, the Board finds as follows:

1. The appeal is disallowed in so far as it relates to the subdivision of the whole block.
2. In its decision in the appeal between the Regional Planning Authority and the Council, the Board dealt with, under the heading " strip sections," the zoning of land to a depth of 2*k* chains on the outside of boundary roads. The Board there held that this form of development is desirable with the exception that it should not be permitted on State or Main Highways. It is reasonable to permit it on internal or secondary roads provided also that where land is subdivided to a depth of 2½ chains, adequate road reserves are provided in order to ensure adequate access to back lands. The Board intended that decision to apply to all boundary roads other than State or Main Highways. In its decision it enumerated certain lands which it directed should be excluded from the rural zone and included in the urban zone, but that list was not intended to be exhaustive. It enumerated only such roads and land as were referred to in evidence during the hearing. At the hearing of this present appeal, it was agreed that the decision quoted should also apply to the following roads: Withells Road; Avonhead Road, from Withells Road to Wooldridge Road; Wooldridge Road from Avonhead Road to Wairakei Road; Wairakei Road; Farquhar Road. The Board agrees with this and in so far as this appeal is concerned it allows it in respect of that part of the appellants' land having a frontage to Wooldridge Road and directs that for a depth of two-and-a-half chains this land should be zoned as urban and its subdivision into residential lots should be approved.

Appeal allowed in part.

Moore and Another *v.* Otahuhu Borough.

Town and Country Planning Appeal Board. Auckland. 1960. April 30.

Building permit—Land zoned as "Industrial B" in undisclosed District Scheme—Application for building permit to alter dwellinghouse into flats—Alterations all internal—Area predominantly residential at present—Industrial development slow and gradual—Alterations not likely to delay effective operation of Scheme.

The appellants were the owners of a property at 81 Huia Road, Otahuhu, being all that parcel of land containing 2 roo. 29.5 pp. more or less being Lot 8 on Deposited Plan 13953, being portion of the Block situated in the Parish of Manurewa called Fairburn's Old Land Claim Number 268A.

They applied to the Council for a building permit to make alterations to the dwellinghouse erected thereon by converting the same into two self-contained flats.

This permit was refused on the grounds that the building does not conform to the provisions of the Council's undisclosed district scheme for the area, whereby the area is zoned as industrial B and the conversion would tend to delay the effective operation of the scheme.

The appellants appealed against this decision.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds:

1. The appropriateness of the zoning as industrial B was not challenged so that the appellants' property is a "non-conforming use" in an industrial zone.
2. Under the Council's proposed Code of Ordinances repairs and alterations to buildings having an existing use are permitted only if the alterations will not tend to delay the effective operation of the scheme.
3. The area in which the appellants' property is situated is predominantly residential in character, there being some ninety odd dwellings in the immediate area. Although the future development of the area for industrial use may be appropriate town planning the nature of the present occupancy means that industrial development will be slow and gradual.
4. The alterations which the appellants wish to make are all internal alterations.

   If they are permitted to carry out these alterations there will be no external alterations, no increase in floor space and no structural alterations that will tend to strengthen the building.

The Board is of the opinion that the proposed alterations will not detract from the amenities of the neighbourhood nor will they tend to delay the effective operation of the scheme.

The appeal is allowed.

The Board directs that a building permit is to be issued to the appellants to alter their dwelling in general conformity with the plan attached to the form of appeal provided that all alterations comply with the Council's building by-laws.

Appeal allowed.

Clyde Road Supplies Ltd. and Others *v.* Wairoa Borough.

Town and Country Planning Appeal Board. Wairoa. 1960. February 22.

Building permit—Conditional Use—Application granted subject to conditions—Appeal on ground that grant of permit would affect appellant's business and not that there would be detraction from amenities of neighbourhood—Not good ground of appeal—Conditions relaxed as too restrictive.

Appeals under s. 38A (3) of the Act. Both appeals related to the same matter and were by consent of the parties, heard together.

The appellants second named were the owners of a residential property situated on a ¼acre section being No. 22 Campbell Street, Wairoa. They applied to the respondent Council for a building permit to make an addition to their house by adding a small shop to the front of it.

They proposed to carry on the business of a tuck shop and dairy on these premises. This proposal involved a change of use and accordingly the respondent Council gave public notice of the application in pursuance of the provision of s. 38A (2) of the Town and Country Planning Act 1953.

The first-named appellant lodged an objection to the proposal. The respondent Council heard the objection and disallowed it. It authorized the issue of a building permit to the second-named appellants subject to certain conditions.

These conditions were deemed by the second-named appellants to be too restrictive and they accordingly appealed against the imposition of the conditions.

The judgment of the Board was delivered by

REID S.M. (Chairman). The respondent Council made a formal appearance only and indicated that it did not propose to take any part in the proceedings but was prepared to abide by the Board's decision. The Board finds as follows:

1. The property in question is situated in a residential area adjacent to the Wairoa Primary School and the proposal is that the business has as its primary object the provision of school requisites, cut lunches, fruit, confectionery etc. for the pupils attending the school, but this trade alone would probably not be an economic proposition, particularly if it were restricted to the hours imposed under the Council's conditions.

   The applicants wish to be permitted to sell such other goods as are normally sold in suburban dairies.
2. The first-named appellant carries on business as a grocery and dairy in premises situated in Clyde Road, within a distance of approximately six hundred yards from the site of the proposed new premises. It is clear from the evidence that what the first appellant really fears is not that there will be any detraction from the amenities of the neighbourhood, but that the opening of the proposed shop might take away some of its customers and consequently affect its business.
3. There were no objections from any owners or occupiers of residential premises in the area under consideration. The only objections received were from businesses of a similar nature in the area and only one of the objectors has seen fit to appeal.
4. Shops that sell grocery and dairy produce are conditional uses in residential zones and their establishment on a small scale is well recognized throughout New Zealand as being a convenient and necessary form of business in a residential area.

   In this particular case the Board has given considerable weight to the situation of the proposed premises and the fact that the establishment of the tuck shop and dairy at this particular point would undoubtedly be a matter of great convenience to school children attending the Wairoa Primary School, estimated at four hundred, and would also be a convenience for members of the public utilizing the adjoining Clyde Domain and recreation ground adjacent to the school.

   The proposed business would be situated some 600 yards away from the grocery business of Clyde Road Supplies Ltd. which does not cater for school children except in a very minor way. Having regard to all the circumstances, the Board considers that the conditions proposed by the respondent Council are too restrictive and the appeal by the second-named appellants is allowed. The Board directs that a building permit is to be issued to them for the required extension. This extension to be erected in full conformity with the Borough Council's Building By-laws and the Town Planning Code and Ordinances.

   The appellants are to be permitted to carry on the business of a dairy during such hours as similar establishments are permitted to operate and that in addition to the items specified under the conditions laid down by the Council, the appellants shall be permitted to sell all "exempted goods" for the time being classed as such under the Regulations to the Shops and Offices Act 1955.

The appeal by the first-named appellant is disallowed.

Appeal by first appellant dismissed. Appeal by second appellant allowed.