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THEFT OR CONVERSION.

FROM time to time there are rumblings of dissatisfaction with the penalties imposed for the conversion of motor-vehicles and opinions are expressed, particularly by the Motor Unions and Automobile Associations, that the definition of the crime of theft contained in the Crimes Act should be amended to bring car conversion within its scope. Much of the criticism is ill-informed and it is thought desirable to review the position as it exists at the present day and then to consider some new provisions contained in the Crimes Bill relating to conversion.

Whatever the position may be ethically, it is clear that the usual case of conversion of a motor-car for use in getting from one place to another where it is then abandoned is not theft in law. Theft is defined in s. 240 of the Crimes Act 1908 as follows :

> Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour or right converting to the use of any person, anything capable of being stolen, with intent :
>
> (a) To deprive the owner, or any person having any special property or interest therein, permanently of such thing or of such property or interest ; or
>
> (b) To pledge the same or deposit it as security ; or
>
> (c) To part with it under a condition as to its return which the person parting with it may be unable to perform ; or
>
> (d) To deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking or conversion.

Where, therefore, a motor-vehicle is unlawfully taken, it is necessary, in order to sustain a charge of theft, to prove one of the four forms of intent specified in the section. If such intent cannot be established, then a conviction on a charge of theft cannot be obtained.

It would, of course, be a simple matter to so amend the definition of theft as to include what is now called conversion. There are, however, many valid objections to such a course, the most important of which is that it would put our criminal law out of step with other members of the British Commonwealth.

The need to establish an intent to deprive the owner permanently of the thing stolen in order to sustain a charge of theft goes back to the common law : *R.* v. *Guernsey* (1858) 1 F. and F. 394 ; 175 E.R. 778. It was brought forward in the United Kingdom into the Larceny Acts, and appears in s. 1 of the Larceny Act 1916 (Eng.) *5 Halsbury's Statutes of England* 2nd ed., 1015. This definition is rather narrower than that in the New Zealand statute and provides no alternative to the intent to deprive the owner permanently of the thing stolen.

All the relevant Australian statutes are not available to us, but in the cases of New South Wales and Victoria they contain no definition of theft, or rather of larceny. In each case the position at common law is adopted for the purposes of the relevant statute, and this preserves the requirement of the intent to deprive permanently. In Western Australia, s. 371 of the Criminal Code Act 1913 contains a definition of theft which, although expressed differently, is to much the same effect as that contained in s. 240 of our Crimes Act.

The disadvantages of departing from a widely accepted definition of such a common crime as theft are obvious and such a course should not be adopted without the most compelling reason, which does not exist in regard to the matter under consideration.

There are further reasons against the amendment suggested. Such amendment would be general in nature and could not be logically applied only to motor-vehicles and the other classes of property which are specified in s. 32 of the Police Offences Act 1927 and which may thus be made the subject-matter of a charge of conversion under that section. This would have the effect of extending the definition enormously and the practical effects cannot be foreseen.

Another suggestion frequently made is that the penalties for car conversion should be brought into line with those for theft. The present penalties for theft are contained in s. 247 of the Crimes Act 1908 as enacted by s. 5 (1) of the Crimes Amendment Act 1952. The theft of a motor-car would fall under para. (d) of that section and would carry a maximum penalty of three years' imprisonment compared with the maximum penalty for conversion of two years' imprisonment, plus a fine of £200, plus an order to pay for damage done, prescribed by s. 32 of the Police Offences Act. Which is the heavier penalty is a matter of opinion, but there does not seem to be much difference between the two.

It is worthy of note that, when this matter was raised at a recent meeting of the North Island Motor Union, Mr H. W. Dowling, of Napier, himself a lawyer, expressed the opinion that the present penalties were sufficient, and that the main difficulty lay in detecting the offender. With this statement we agree entirely.

A further suggestion made at the same meeting of the North Island Motor Union was that a charge of theft should be laid where circumstances warranted. We can safely say that this is done by the Police in all cases where such a course is justified, but the results are not always happy, as is exemplified by a case which has been brought to our attention.

A motor-car valued at £650 was parked in Wellington and was taken without the consent of the owner. It was recovered some ten days later with different number plates on it, and in an extensively damaged condition. It had been driven approximately 1,300 miles since it was taken.

The person in possession of the car at the time of its recovery was charged with theft, and alternatively, with receiving. He put forward the usual story, unsupported by any evidence, that he had been in an hotel and someone had told him that the car was stolen and invited him to go for a drive in it. The jury, in its wisdom, apparently accepted this story since it convicted of receiving only. So far as can be ascertained neither prosecuting counsel nor the Judge referred to s. 32 (6) of the Police Offences Act, under which, on the charge of theft, the accused could have been convicted of conversion. If the jury were directed to this effect. they saw fit not to exercise their right to so convict.

The conviction being of receiving under the Crimes Act, the Court had no power to order the prisoner to pay for the damage as it could have done had there been a conviction of conversion.

This is a case then where the owner of the vehicle would probably have been much better off had the prisoner been charged only with conversion. As to penalty, it is perhaps worthy of mention that the prisoner was an Australian with some seventeen previous convictions of crimes involving dishonesty. The Judge apparently considered it in the interests of the public that he should return whence he came, and deferred the question of sentence until the following July 31, allowed bail of £100 pending sentence, and granted the prisoner liberty to arrange for his return to Australia. On its being reported to the Court that the prisoner had returned to Australia, he was ordered to come up for sentence when called upon.

In the meantime, the owner of the vehicle sued in the Magistrates' Court to recover the amount of the damage and obtained judgment. On a judgment summons, the defendant was ordered to make immediate payment, but the Supreme Court issued a writ of prohibition against the Magistrate restraining him from proceeding further on the order for committal (*Hill* v. *Hayman* [1952] N.Z.L.R. 655; [1953] G.L.R. 12).

The proceedings in this case took a most unusual course but at least illustrate the fact that a charge of theft does not necessarily bring forth the results that the lay members of the North Island Motor Union seem to expect.

It has also been suggested that, on conviction for conversion, there should be an automatic order for repayment of the damage. This is another example of the loose thinking which has taken place on this subject. Automatic penalties are objectionable in principle but apart from this the motorist's representatives, while pressing for increased penalties, presumably in the form of imprisonment, ask for an automatic order for payment of money, overlooking the fact that the two are quite incompatible. While the offender is in prison he cannot earn funds to meet the order. If he has assets they can be distrained upon, but in the majority of these cases the offenders have nothing and are either youths who take a car for a joy ride or criminals who take it to assist in the commission of their crimes or to escape after their commission. In general then when such an order is made, it can only be complied with out of the earnings of the offender, and to imprison him is to destroy his earning power for the time being. Under the present legislation the making of such an order is discretionary and Judges and Magistrates can be relied upon to consider the making of an order where circumstances warrant.

Moneys payable under such an order are recoverable as a fine. If an order is made and is not met the moneys are recoverable under the Summary Proceedings Act 1957, and, in the absence of assets which may be seized under a Distress Warrant, the alternative is a warrant of commitment. The issue of the latter results in the imprisonment of the offender so that he is, in effect, punished twice for the same offence, but this does not help the owner of the vehicle.

There is also rather a trap for the vehicle owner in the making of an order under s. 32 of the Police Offences Act. Subsection (7) which authorizes such an order also provides as follows:

> "The making or enforcement of an order under this subsection shall not effect the right of the owner or of any other person to recover by civil proceedings any damages *in excess of the amount specified in the order*."

As we read this provision, the making of the order, whether it is met or not, is pro tanto in satisfaction of the owner's claim to recover damages by civil proceedings, so that, where an order is made but not satisfied, the owner is so much the worse off. This does seem to be a defect in the legislation which could well be removed. The owner's civil rights should obviously be curtailed only to the extent of the amount *recovered* under the order.

The crime of conversion is in future to be covered by the new Crimes Bill. As the Bill now stands, it applies to the conversion of:

(a) Any motor-car or vehicle of any description.
(b) Any ship.
(c) Any aircraft.
(d) Any part of any motor-car, vehicle, ship or aircraft.
(e) Any horse mare or gelding.

Conversion simpliciter carries a maximum sentence of three years' imprisonment with a maximum of two years' for an attempt. The provision for the making of an order for compensation for damage is repeated with the defect noted above. If the conversion is carried out for the commission, or to facilitate the commission, of a crime, or to avoid arrest, or to facilitate the flight of any person upon the commission or attempted commission of a crime, the maximum sentence is increased to seven years' imprisonment. A new offence is also created, having in one's possession an instrument capable of being used for the conversion of the things specified with intent to use the same for that purpose. These provisions should do much to quieten the complaints which have been made in the past. The Motor Unions may however still seize on the fact that although the new penalty for simple conversion is heavier than that in force at present, the margin between that penalty and the penalty for theft is widened in the Bill. Theft of a motor-car in the future will earn a maximum penalty of seven years' imprisonment.

JUSTICE DENIED.

Practitioners with a client who claims to have suffered damage as a result of the operations of a Government Department, but who has no legal remedy, have no doubt sometimes felt inclined to advise him to petition Parliament for some redress. Those who have done so may have experienced the frustrations involved but few would have expected to suffer the same treatment as Mr H. M. Mackay whose case was recently ventilated in the daily press.

With the merits of Mr Mackay's claim or with the facts on which it is based we are not concerned. It is enough to recall that in 1936 he petitioned Parliament and his petition was considered by the appropriate committee which referred it to the Government for most favourable consideration.

This is the highest recommendation that a Parliamentary Committee can give to a petition, and no doubt when he heard the result of the Committee's deliberations Mr Mackay thought that he had achieved his object. That was not the case, however. It was not until 1949 that the Government agreed to institute an inquiry to see whether Mr Mackay was entitled to compensation and if so the amount. In the following year the Government decided to take no action.

In 1954 another petition was presented, and the Committee recommended a Magisterial inquiry. Again however, the Government decided to take no action.

This year again Mr Mackay presented a further petition which again received a recommendation for most favourable consideration. What the upshot will be is not yet known.

This history reflects no credit on the various Governments which have considered this matter. Parliament is the highest Court in the land and when it sees fit to delegate consideration of a petition to a Committee, on which the Government is amply represented, it is due both to the petitioner and to the Committee itself that the Committee's recommendation should be carried into effect, or valid reasons given in the House. To ignore such a recommendation without explanation as has been done in this case, is to make a mockery of the procedure of the House and can only bring it into disrepute.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

General—Bets made by bankrupt with Totalizator Agency Board after date to which order of adjudication related back—Amount staked not recoverable by Official Assignee—Bankruptcy Act 1908, s. 82 (d)—See GAMING (*infra*).

CONTRACT.

Exercise of option in lease—Time within which option to be exercised—Extension of time—Rule against perpetuities—Failure of one of the parties claiming option to give evidence—Option clause referring to sale according to 'Usual Terms 6nd conditions of sale of the Real Estate Institute of New South Wales'—Whether void for uncertainty. A memorandum of lease conferred an option upon the tenants to purchase the land demised and certain other land for a named price upon notice to the lessor. The option was to be exercised at any time prior to February 1 1956. By deed executed January 23 1956, the tenants secured an extension whereby the option should be exercisable at any time until expiration of 30 days' notice from the lessor. The lease expired in May 1956, and the lessor served a notice to quit on the tenants in June 1956. In September 1956 the tenants purported to exercise their option and ultimately sued for specific performance of the contract under the option clause. *Held:* (1) As the deed extending the time for the exercise of the option contained an express limitation as to the time within which it was to be exercised, the prima facie rule that an option to purchase contained in a lease must be exercised during the currency of the lease, or at least while the relationship of landlord and tenant still existed, did not apply. (2) The option, though unlimited in point of time, was not, as a contract, affected by the rule against perpetuities. *Hutton* v. *Watling*, [1948] Ch. 26; [1947] 2 All E.R. 641, applied. *Trustees Executors and Agency Co. Ltd.* v. *Peters* (High Court of Australia. 1959. November 20, 23, 24 1960. April 4. McTierman, Kitto, Menzies JJ.) [1960] A.L.R. 327).

CRIMINAL LAW.

Autrefois convict—Escape of prisoner—Disciplinary proceedings before, and award of punishment by, visiting justices for the offence of escaping created by Prison Rules 1949 (*S.I. 1949 No. 1073*), *r. 42 (13)—Subsequent trial on indictment for prison breach—Separate count for simple escape struck out—Whether award of visiting justices a bar to indictment.* The appellants, while serving sentences of preventive detention, escaped from prison. Punishments were awarded to them by visiting justices for escaping, that is, for the offence against prison discipline created by r. 42 (13) of the Prison Rules 1949. They were subsequently tried on indictment for prison breach, viz., escape by force, and were convicted and sentenced. A separate count of the indictment for simple escape was struck out by the trial judge in view of the proceedings before the visiting justices. *Held:* although prison breach was an aggravated form of the offence of simple escape and arose in this case from the same matter as the offence for which the appellants had been punished under the Prison Rules 1949, yet the visiting justices in imposing punishment for the escape were dealing with a matter of internal prison discipline, and their decision was not that of a court of competent jurisdiction so as to bar an indictment for the same escape; accordingly the conviction of the appellants should stand, the consequences of the previous convictions for breach of prison discipline having been taken into consideration in imposing sentences. *R.* v. *Miles* (1890) 24 Q.B.D. 423 explained and approved. PER CURIAM: strictly, the count for simple escape should not have been struck out, but in deciding on any sentence for it the court would have had to take into consideration the consequences of the proceedings before the visiting justices. *R.* v. *Hogan. R.* v. *Tompkins.* [COURT OF CRIMINAL APPEAL (Lord Parker C.J., Cassels and Donovan JJ.), July 4 1960]. [1960] 3 All E.R. 149

Cross-examination of accused such as to suggest accused of bad character—'Bad character'—Such cross-examination permissible where purpose is to prove facts in issue—Crimes Act 1958 (Vic.), s. 399 (e). Where an accused person is cross-examined as to certain incidents which are relevant to the question of whether he committed the offence charged, such cross-examination is permissible notwithstanding its tendency to show the accused is a person of bad character. *Attwood* v. *The Queen* (High Court of Australia. 1960. February 25, 26. March 31. Dixon C.J. McTiernan, Fullagar, Taylor and Menzies JJ. [1960] A.L.R. 321)

Evidence—Corroboration—Jury to have pointed out to them matters which might be regarded as corroboration.—Joint trial of two accused—Separate statements made by each—Misdirection to tell the jury that they could consider concord or inter-relation of statements. See CRIMINAL LAW—TRIAL (*supra*).

Trial—Joint trial of two accused—Separate statements made by each—Misdirection to tell the Jury that they could consider concord or inter-relation of statements.—Corroboration—Jury to have pointed out to them matters which might be regarded as corroboration. Where two persons are charged jointly with an offence it is a misdirection to tell the jury that the concord or inter-relation of separate statements made by the accused was something they might consider. Where there has been such a

misdirection the convictions should be quashed and a new trial ordered. *R.* v. *Rhodes* (1960) 44 Cr. App. R. 23, followed. Where corroboration of the complainant's story is required the jury should not only be told that there is corroboration but should have pointed out to them matters which might be regarded as corroboration. *R.* v. *Mountain* [1945] N.Z.L.R. 319; [1945] G.L.R. 105; *R.* v. *Spring* [1958] N.Z.L.R. 468, affirmed. *R.* v. *Baynon and Pitama* (C. A. Wellington. 1960. July 5; August 4. Gresson P. Cleary J. Turner J.)

DESTITUTE PERSONS.

Cruelty—Adultery may be the basis of a charge of cruelty—Destitute Persons Act 1910, ss. 17, 18.—Separation—Discretion to be exercised in favour of wife where she establishes undoubted right to live separately—Destitute Persons Act 1910, ss. 17, 19. In proceedings under ss. 17, 18 of the Destitute Persons Act 1910, adultery may be the basis of a charge of cruelty, provided the other necessary ingredients are there. Adultery, especially if persisted in flagrantly over a lengthy period is perhaps more likely than criminal sexual conduct to afflict the wife with the sort of misery that may affect her health. *Cooper* v. *Cooper (No. 1)* [1955] P. 99; [1954] 3 All E.R. 415 and *Cox* v. *Cox* [1952] 2 T.L.R. 141, explained. *Jamieson* v. *Jamieson* [1952] A.C. 525; [1952] 1 All E.R. 875, referred to. Separation orders ought not to be made unless there is some reasonable necessity for them and the question whether they are necessary for the protection of the wife requires always to be considered, where a wife establishes an absolute right to live separately from her husband, the right being based on a continuous course of adultery in the form of living with another woman as man and wife, the granting of a separation order is no more than a recognition and legal effectuation of the wife's undoubted right to live separately and discretion should be exercised in her favour. *Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, explained. *McNally* v. *McNally* (S.C. Christchurch. 1960. February 8, 9; July 18. F. B. Adams J.)

Maintenance—Separation agreement providing for lump sum payment in satisfaction of wife's future claims for maintenance—Reconciliation terminating agreement—Delay by wife in applying for maintenance and also lump sum payment to be taken into account—Destitute Persons Act 1910 s. 17. Held, That in deciding whether the husband has wilfully and unreasonably failed to maintain his wife the Court is entitled to take into account the lump sum pzyment previously made and the delay on the part of the wife in making application for maintenance. *Foulston* v. *Foulston* (1960. March 14; April 28. Crutchley S.M. Gore.)

Maintenance—Wife in receipt of Universal Superannuation not a destitute person—Destitute Persons Act 1910, s. 2. A wife in receipt of universal superannuation is not a "destitute person" for the purposes of the Destitute Persons Act 1910. Husband and wife had entered into a separation agreement and the husband had paid the wife a lump sum in settlement of all future claims for her maintenance. Subsequently the parties lived in the same house for a period of three weeks with a view to a reconciliation but again parted. On a complaint by the wife brought some 8 years after this attempted reconciliation seeking a maintenance order on the ground of the husband's alleged failure wilfully and without reasonable cause to provide for her adequate maintenance. *Held,* That the resumption of cohabitation brought the separation agreement to an end—See FOULSTON v. FOULSTON (*supra*).

GAMING.

Bets made with Totalizator Agency Board by person later adjudicated bankrupt—Order of adjudication relating back to date prior to date of bets—Amount not recoverable by Official Assignee—True nature of Transactions—Gaming Act 1908, s. 70. A person later adjudicated bankrupt made bets through the Totalizator Agency Board during the period between the date to which the order of adjudication related back and the date of the order itself. The Official Assignee brought an action to recover from the Board the total of the amounts so staked. *Held* by the Court of Appeal (Gresson P., Cleary and Hutchison J.J.) that the said amount was not recoverable because: Per Gresson P. and Cleary J.: (1) Moneys paid to the Totalizator Agency Board in making wagers on horse races are received by the Board as agent for the respective Racing Clubs conducting such horse races, and the moneys are in fact paid to such Racing Clubs. Any right of recovery which might exist would therefore lie against the respective Clubs and not against the Board. (2) Any action to recover moneys lost in a bet made with the Totalizator Agency Board is barred by s. 70 of the Gaming Act 1908. Per Hutchison J. Transactions with the Totalizator Agency Board are made for valuable consideration and fall within the words of s. 82 (d) of the Bankruptcy Act 1908. Also held per Gresson P. A contract or agreement for the making of a bet on the totalizator lacks valuable consideration s. 70 of the Gaming Act 1908 it is provided that no action shall be brought or maintained to recover any sum of money won, lost or staked in any betting transaction, and consequently such contract or agreement does not fall within s. 82 (d) of the Bankruptcy Act 1908. Observations on the nature of bets made on the totalizator. Appeal from the judgment of Haslam J. [1959] N.Z.L.R. 481, dismissed. *Official Assignee* v. *Totalizator Agency Board.* (C.A. Wellington. 1960. March 8, 9; July 25. Gresson P. Cleary J. Hutchison J.

Totalizator Agency Board—Acts solely as agent for individual Racing Clubs—Gaming Amendment Act 1949—See OFFICIAL ASSIGNEE v. TOTALIZATOR AGENCY BOARD (*supra*).

LOCAL AUTHORITIES.

Local authorities and highways: What is a misfeasance? *(1960) 230 L.T. 4.*

MASTER AND SERVANT.

Action by employer arising out of Injury to Employee. *(1960) 13 Australian Lawyer 123.*

NEGLIGENCE.

Road collision—Defendant pleading guilty to charge of driving without due care and attention—Charge involves same degree of negligence as that required to constitute tort. The degree of negligence involved in a charge under s. 46 of the Transport Act 1949 of driving without due care and attention is the same as that involved in a charge of driving negligently under s. 40, and is also the same as that required to constitute a tort. Where in the course of the trial of an action for damages arising out of the alleged negligent handling of a motor-vehicle the defendant admits that he has pleaded guilty to a charge of driving without due care and attantion arising out of the same circumstances, such admission cannot be elevated into the realm of estoppel but merely amounts to an inconsistency with evidence given at the trial and may be capable of explanation on various grounds. *Brierly* v. *Want* (S.C. Wellington. 1959. October 9, 29. Haslam J. C.A. Wellington. 1960. April 12; July 25. Gresson P. Cleary J. Hutchison J.)

PRACTICE.

New trial—Misdirection—Misdirection must be substantial to justify ordering of new trial. While it is a misdirection for the trial judge to tell the jury that driving without due care and attention is something less than negligence it would be in order to tell the jury that many motorists might admit a charge of driving without due care and attention in the absence of any belief that it involved an admission of negligent driving for the purposes of the civil law. The difference between these two directions is so narrow that the jury could not have been misled as to the weight which they might attach to the one piece of evidence. To be the ground of a new trial misdirection must be substantial, and the misdirection in the present case did not satisfy this test. *Brierley* v. *Want* (S.C. Wellington. 1959. October 9, 29. Haslam J. C.A. Wellington. 1960. April 12; July 25. Gresson P. Cleary J. Hutchison J.)

PUBLIC REVENUE.

Income Tax—Compensation for land taken fixed by agreement at "an amount equal to £28,000 plus interest from the date of possession until the actual date of payment of compensation"—Amount paid in excess of £28,000 taxable as interest—Land and Income Tax Act 1923, s. 79 (1) (g). Land held by the appellant P. on certain trusts under which the appellant R. was life tenant was taken by the Crown under the Servicemen's Settlement and Land Sales Act 1943, and the resulting claim for compensation was settled at "a sum equal to" £28,000 plus interest from the date of possession to the date of payment of the compensation. The amount added to the sum of £28,000 was £4,194. 4s. 11d. The compensation was paid to P. in June 1951 but was not immediately disbursed by him. On October 17, 1952, an order was made by the Supreme Court on the petition of R. awarding R. the sum of £7,763. 15s. 8d. out of the compensation moneys, and that sum was thereupon paid to her by P. The respondent assessed the sum of £4,194. 4s. 11d. to P. under s. 102 (a) of the Land and Income Tax Act 1923. The appellants incurred substantial costs first in resisting the taking of the land and, secondly, in negotiating the settlement

of the claim for compensation and claimed a deduction of a proportion of this sum from any part of the compensation moneys which might be held to be income. *Held*, (1) That the reference to interest in the terms of settlement of the compensation claim was not included for the purpose of the calculation of a capital sum, but the said sum of £4,194. 4s. 11d. was income for the purposes of the Land and Income Tax Act 1923. (2) That the said sum was received by P. as agent for R. and could forthwith have been paid to R. without awaiting the Court Order above mentioned. It was therefore properly assessed to P. under s. 102 (a) of the Land and Income Tax Act 1923. (3) That the legal costs were incurred in protection of the capital and no portion of them was therefore deductible as an expense incurred in the production of income. NOTE: The judgment in this case was upheld by Hutchison J. in the Supreme Court but on rather different grounds ([1960] N.Z.L.R. 365). It has been decided to report the judgment in the Magistrates' Court since it contains a valuable survey of the authorities on the conditions under which an amount calculated as interest is in fact capital.] *P. and another* v. *Commissioner of Inland Revenue* (1957. September 9, 10; December 20. Carson S.M. Wellington.)

Income Tax—Trustees income—Sum received by trustee who was in doubt whether it was capital or income in his hands—Later determined to be income—Life tenant entitled to receipt in possession at date of receipt by trustee notwithstanding such doubt—Land and Income Tax Act 1923, s. 102 (a)—See P. *v.* COMMISSIONER OF INLAND REVENUE (*supra*).

TENANCY.

Possession—Service Tenancy—Principle to be adopted in deciding whether service tenancy or not—Agreement in writing unnecessary to create service tenancy—Tenancy Act 1948, s. 11. The "agreement" referred to in s. 11 of the Tenancy Act 1948 is not necessarily an agreement in writing. In determining whether s. 11 applies to any particular case the Court should pose to itself the question "would the landlord have let the premises to the tenant had he not been in their employ?" If the answer is in the nagative the section applies. *Braithwaite and Co. Ltd.* v. *Elliot* [1947] K.B. 177; [1946] 2 All E.R. 537 applied. (*Goldsmith* v. *Levy* 1959. October 29; November 26. 1960. February 25, 29; March 1. Carson S.M. Wellington).

TRANSPORT.

Goods Service vehicle—Truck with front end loader attached used principally for loading lime and fertiliser into aircraft—Not a goods service vehicle—Design to be looked at rather than use—Transport Act 1949, s. 2. In applying the definition of a Goods Service Vehicle contained in s. 2 of the Transport Act 1949 to any particular vehicle the Court should be concerned rather with its design than with its use. A motor truck, originally designed for the carriage of goods, had been modified by the attachment of afront end loader and was used principally for loading fertiliser and lime into a topdressing aircraft though on occasion it was used for the carriage of aviation fuel. *Held*, That in view of the above modification the vehicle was no longer designed exclusively or principally for the "carriage of goods" and consequently was not a goods service vehicle. *Hill* v. *Barr Brothers Ltd. (No. 2)* (1960. July 18. Herd S.M. Maungaturoto).

Offences—Negligent driving and driving without due care and attention involve same degree of negligence—Transport Act 1949, 40, 46—See PRACTICE (*supra*).

Heavy Motor Vehicle—Licensing fees exemption—Used for purpose of loading lime and fertiliser into topdressing aircraft and carrying aviation fuel in permanently attached tank—Fuel also carried in drums—Exemption not lost—Motor Vehicles (Licensing Fees Exemption Regulations 1948 (S.R. 1948:208) Reg. 6—Motor Vehicles (Licensing Fees Exemption Regulations 1948 Amendment No. 6 (S.R. 1956:200) Reg. 2.) Where a vehicle obtains exemption from heavy traffic licence fees under the Motor Vehicles (Licensing Fees Exemption) Regulations 1948 (S.R. 1948:208) on the ground that it was designed and used partly for the purpose of loading lime and fetiliser into topdressing aircraft and partly for carrying aviation fuel in a permanently attached tank for use in topdressing aircraft it is not necessarily deprived of the exemption because it is also used for carrying aviation fuel in drums not permanently attached as a supplementary means of getting the fuel to the aircraft. *Hill* v. *Barr Brothers Limited.* (1960. May 20. Herd S.M. Maungaturoto.)

WORKERS' COMPENSATION.

Assessment of compensation—Delay in hearing of action not due to fault of plaintiff—Compensation to be awarded to date of judgment and not only to date to which it is claimed in writ. Where a writ is issued claiming weekly compensation to a specified date but through no fault of the plaintiff the action is not heard until a considerably later date the proper course is for the Court to award compensation to the date of judgment plus such further compensation as is payable for permanent physical injury or neurasthenia unless an appropriate offer of settlement or payment into Court has been made. *Hill* v. *Thompson Timbers Ltd.* [1945] N.Z.L.R. 310; [1945] G.L.R. 94, followed. *Evans* v. *Canterbury Frozen Meat Co. Ltd.* (Comp. Ct. Christchurch. 1960. June 17; August 4. Dalglish J.)

Assessment of compensation—Whether trial allowance and payment for travelling time to be included as part of workers' earnings—Workers' Compensation Act 1956, s. 15(5). The tool allowance payable to a carpenter is a payment to cover a special expense within the meaning of s. 15 (5) of the Workers' Compensation Act 1956 and is to be disregarded in the computation of the weekly rate of compensation payable to a carpenter who has been injured in an accident arising out of and in the course of his employment. The payment for travelling time is not a payment to cover a special expense but is a payment in respect of time occupied in travelling to work and is the same whatever means of conveyance are used. It is therefore to be regarded as part of the worker's earnings. (*Gooch* v. *H. C. Clarke Ltd.* [1941] N.Z.L.R. 206; [1941] G.L.R. 69, dissented from.) *Peck* v. *Reg. Muirson Ltd.* (3omp. Ct. Christchurch. 1960. June 16; July 25. Dalglish J.)

Arising out of and in the course of employment—Emergency Rule—Conditions on which act outside scope of employment will be brought within it under emergency rule. Where a worker in an emergency attempts to rescue another person, whether a fellow worker or not, his action is within the scope of his employment if it is something sufficiently related to his employment as to make the worker reasonably regard it as his duty as an employee to do in order to deal with or avert an emergency which is threatening his employer's interests. (*McKenzie* v. *William Holyman and Sons Pty. Ltd.* (1939) 61 G.L.R. 584, followed. *Jones* v. *Tarr* [1926] 1 K.B. 25; 18 B.W.C.C. 386, distinguished.) *Hampton* v. *Hart's Aerial Topdressing Ltd.* (Comp. Ct. Christchurch. 1960. June 15, 16; July 18. Dalglish J.)

Probationer Asks for More.—Probation rests, and had always rested, on the willingness of the probationer to comply with its requirements, and it is fitting that the law provides for the proposed requirements to be explained before the order is made, with the probationer's agreement. The *Cambridgeshire Independent Press and Chronicle* reports an unusual request from a defendant at Cambridge, who had been told she would be put on probation for a year. She had pleaded guilty to obtaining money by means of a forged document. Her request was that the period might be two years instead of one year. To this the court agreed, but the chairman added that it was hoped that the defendant would be able to stand on her own feet after a year and that the court would be able to discharge the order. We believe that many probation officers feel that in a great many cases a period of two years to begin with is preferable to a shorter period. It is often found that one year is not enough, and then application for extension has to be made. That is not so satisfactory as probation for a longer period with the possibility of its being shortened by a discharge following a good response to probation. This latter procedure is an encouragement to the probationer, whereas an application for an extension may occasionally be discouraging. At the same time, although the defendant at Cambridge showed a due appreciation of the help that a probation officer could afford her, it was well that the chairman of the bench reminded her of the desirability of learning to manage without such support as soon as possible.—31 *J. P. and L. G. Review* (1960) 495.

LAW REPORTS AND LAW REPORTING.

VI. A Merger and Statutory Incorporation.

While the *New Zealand Law Reports* today enjoy the distinction of exclusiveness, as well as the statutory authority conferred upon them by the New Zealand Council of Law Reporting Act 1938, they have not always remained unchallenged in this field of legal literature. Sixteen years after the appearance of Volume 1, in 1883, a new series came into being—the *Gazette Law Reports* founded, and conducted in his role of managing editor for thirty-seven years, by Mr Thomas Gregory Russell, of Christchurch.

The new reports rendered valuable service to the profession for fifty-five years until they were acquired by the publishers of the *New Zealand Law Reports*, Messrs. Butterworth and Co. (Australia) Ltd., in 1953. During almost the whole of the practising years of many of the older members of the profession today the *Gazette Law Reports* occupied a conspicuous and valued part in the practice of the law. Though their functions and form in most respects ran parallel with those of the *New Zealand Law Reports*, they also had a complementary character which the profession found of the greatest use and value. In this connection mention should be made of the fact that the *Gazette Law Reports* pioneered the reporting of cases under the Industrial Conciliation and Arbitration Acts and the Workers' Compensation Act.

But perhaps their most interesting and memorable characteristic is to be found in the manner of their establishment which was due to the vision and indefatigability of one man. When Mr Russell edited and published his first volume of the *Gazette Law Reports* in quarterly parts in 1898 he was in active practice, and for more than twenty years combined the editing of his reports with the ardours of a substantial and successful civil and criminal practice in Christchurch. Even on his retirement from the Bar in 1920, his enthusiasm for the not unformidable responsibilities of editorship continued and he remained in editorial control until his death in December, 1935.

Mr Russell was a man of many parts and varied abilities, with wide commercial interests and successes apart from his legal practice and the *Reports* he founded. His work in the field of law reporting was on numerous occasions the subject of special commendation by members of the Judiciary, among whom Sir Michael Myers C.J., Sir Archibald Blair, and Sir Hubert Ostler may be numbered as some of his principal admirers.

Control and Management

The *Gazette Law Reports* were published quarterly in their first ten months from December 1898, to October 1899, and thereafter fortnightly for the next fifty-four years. In 1912, a company, the Gazette Law Reports Ltd., was formed, with Mr T. G. Russell as managing director, and Messrs. H. Walshaw and L. F. Blewett as directors. When Mr Russell relinquished the editorship after thirty-seven years in 1935, he was succeeded by Mr H. D. Muff, who had been assistant editor under Mr Russell for six years following the death in 1929 of Mr T. A. Murphy, who had joined Mr Russell as assistant editor in 1903. Mr Muff retired in 1941 and was followed in the editorial chair by his assistant, Mr G. R. Butler. After eight years Mr Butler retired and Mr H. W. Thompson was appointed to the position for the remaining few years of publication.

The *Gazette Law Reports* completed fifty-five years of service to the profession with their second part of March 1953, at which date they were incorporated with the *New Zealand Law Reports*. The change-over was affected by their sale to Messrs Butterworth and Co. (Australia) Ltd., who thirty-eight years before had entered into an arrangement with the New Zealand Council of Law Reporting for the publication and distribution of the *New Zealand Law Reports*. Thus ended a record of service which comprises an important chapter in the unfortunately too unstoried history of the legal profession in New Zealand, and it may be conjectured that, for those who grew up with the *Gazette Law Reports*, one of the most interesting features of their rise and development was their origin in private enterprise and personal enthusiasm.

Statutory Incorporation

With the eclipse of the *Gazette Reports*, the *New Zealand Law Reports* were left virtually in undisputed possession of the sphere of law reporting in New Zealand. This was no monopoly by sufferance, but rather an exclusive right by statutory authority. In 1938 the New Zealand Council of Law Reporting Act had been passed "to provide for the incorporation and reconstitution of the New Zealand Council of Law Reporting, and to define its powers and functions".

Section 12 (3) of the 1938 Act clearly established the authority and exclusiveness of the publication rights of the Council of Law Reporting and at the same time gave to the *New Zealand Law Reports* the official character they now enjoy. The relevant subsection reads:

> 12. (3) It shall not be lawful after the passing of this Act for any person, firm, or company other than the Council to commence the publication of or to publish a new series of reports of decisions of the Supreme Court or the Court of Appeal (either separately or in conjunction with reports of any other judicial decisions) except with the consent of the Council of the New Zealand Law Society, which may be given on the ground that the New Zealand Council of Law Reporting has failed to publish or to arrange for the publication within a reasonable time and at a reasonable cost to purchasers of adequate reports of the decisions of the Supreme Court or Court of Appeal, but shall not be given on any other ground.

Section 38 of the Statutes Amendment Act 1949 added the Land Valuation Court to the list of tribunals covered by the Act of 1938.

The 1938 Act also provided for the reconstitution of the Council of Law Reporting. Section 6 directed the Council of the New Zealand Law Society to appoint five of its barrister members to be members of the Council, and the succeeding section added to this membership with a provision for three ex officio appointments. These were the Attorney-General for the time being, the Solicitor-General, and the person holding office at the relevant time as the President of the New Zealand Law Society. It is under this statute and this membership that the Council of Law Reporting still functions.

Reconstituted Council

The first Council under the 1938 reconstitution was as follows: The Attorney-General, the Hon. H. G. R. Mason, the Solicitor-General, Mr H. H. Cornish K.C., (later Mr Justice Cornish), the President of the New Zealand Law Society, Mr H. F. O'Leary K.C., (afterwards Sir Humphrey O'Leary C.J.), Mr C. L. Calvert (Dunedin), Mr P. B. Cooke, K.C. (later Mr Justice Cooke) (Wellington), Mr M. J. Gresson (Christchurch), the Hon. W. Perry M. L. C. (Wellington) and Mr H. P. Richmond (Auckland). Before the passing of the 1938 Act, Law Society members numbered two from each of the four main judicial districts, and under the reduced provision in the statute Messrs R. McVeagh (Auckland), A. T. Donnelly (Christchurch) and F. B. Adams (Dunedin) retired. The remaining five, as above, all were reappointed The first secretary of the reconstituted Council was Mr H. J. Thompson, then secretary of the New Zealand and Wellington District Law Societies, and later a Stipendiary Magistrate.

Twenty-two years later the New Zealand Council of Law Reporting still functions under the presidency of the Hon. H. G. R. Mason Q.C., who resumed the portfolio of Attorney-General three years ago after an absence from Ministerial office of eight years. The rest of the present Council are as follows: the Solicitor-General, Mr H. R. C. Wild Q.C., the President of the New Zealand Law Society, Mr D. Perry, Mr E. C. Champion (Christchurch), Mr L. P. Leary, M.C., Q.C., (Auckland) and Mr A. T. Young (Wellington). Mr A. M. Cousins (Wellington) retired in 1960, and his place on the Council has been filled by the New Zealand Law Society appointing Mr W. R. Birks (Wellington). The present secretary is Mr A. E. J. Anderson, assisted by Miss F. Parker.

REQUISITIONS FROM THE DISTRICT LAND REGISTRAR.

At a cheerful ceremony held at the Deeds Office at Auckland on August 17, 1951*, to celebrate the demise of the Deeds system Mr S. T. Barnett, then Secretary for Justice, said: "In all my life I never got anything from a Registrar except a requisition, but it now appears that we shall get some sherry and a piece of cake."

Well, we all of us at some time or other get a requisition from the District Land Registrar, and the occasion is not one for cakes and ale: indeed, if one has settled and paid the purchase or mortgage money over to the other side, the requisition can prove very awkward. It is the duty of course of the vendor or the mortgagor to give a registrable instrument to the purchaser or the mortgagee: *Schiska* v. *Peddle* [1927] N.Z.L.R. 132, ; [1926] G.L.R. 517. That is why in the strict theory of the law all Land Transfer transactions should be completed at the Land Registry Office: at that instant not only should the Land Transfer Register be searched in order to ascertain whether any dealings have been registered since the date of the last search but inquiries for that purpose should be made at the Land Registry Office, e.g. by searching the Journal and making inquries at the Land Transfer registration counter: *Rosevear* v. *District Registrar* [1916] N.Z.L.R. 482; [1916] G.L.R. 364; *Ferguson's Conveyancing in New Zealand*, 4th ed., pp. 10 to 14.

Let us have a look at some of the requisitions which the Registrars have made in the past, the authority for same, and how they have fared when their validity has been tested in the Courts.

An example of a Registrar's requisition being disallowed by the Court is *In re Fairbrother to Allen* (1896) 15 N.Z.L.R. 196. The requisition read:

> The transferor being executrix, and the transfer not disclosing that she is selling for the purpose of paying debts, or pursuant to an order of the Supreme Court, evidence must be produced that she is acting within her legal powers in executing the said transfer, and for that purpose the probate of the will of the late Richard Fairbrother must be produced.

Model of Conciseness

The judgment of Prendergast C.J. is a model of conciseness, and would I think warm the heart of the present President of the New Zealand Law Society (Mr David Perry) who, at the recent Legal Conference held last Easter at Wellington, in gentle tones pointed out the prolixity of many modern judgments ("in these busy days, I do sometimes wish that they would model themselves upon the late Sir William Sim, who never took pains to say in twenty words what he could say in one, and who never took twenty pages to say what he could say in two."). Well, here is the full judgment of Prendergast C. J. in *In re Fairbrother to Allen*:

> I do not think it is incumbent upon the District Land Registrar to concern himself about any possible breach of trust. If the papers are in order and he has no express notice of a breach of trust, he is bound to register; and an order is made accordingly, costs of and incidental to this application to be paid out of the Assurance Fund.

The position would have been different, of course, if the Registrar had previously lodged a caveat, and the Court has even held that, if a transfer is presented for registration immediately after a transmission in favour of the deceased registered proprietor's legal representative, the Registrar can intervene by lodging a caveat and so prevent the registration of the transfer.† However, Land Transfer practice has almost invariably followed *Fairbrother's* case.

Australian Case

An Australian case which greatly resembles *Fairbrother's* case in principle is *R.* v. *Registrar of Titles*: *Ex parte Briggs* [1913] V.L.R. 549.

The will provided that R. should receive the income arising from the land during her life, and after her death the land should be held for her children. In pursuance of an agreement between the trustees and R. and all the children of R., all of whom were of full age, the trustees executed a transfer of part of the land to one of

* See (1951) N.Z.L.J. 271: *The Demise of the Deeds System.*

† *In re Griffin, Flynn* v. *District Land Registrar* (1898) 1 G.L.R. 101.

her children. The Registrar refused to register the transfer unless it were shown that there was no possibility of R. having further issue. It was held that the Registrar was not entitled to make the requisition. On the other hand, where the registered proprietors, who as executors had been registered by transmission, purported to transfer the land for valuable consideration to the wife of one of the registered proprietors it was held that it was the duty of the Registrar General before registering the transfer to satisfy himself that the sale was in good faith and for an adequate consideration. This was because a Court of Equity will presume that a contract of sale between a trustee and his wife is for the benefit of the trustee and will require evidence to displace that presumption: *Re Douglas* (1928) 29 S.R. (N.S.W.) 48. N.B. In this case Harvey C. J. in Equity discussed the judgment of Salmond J. in *Robertson* v. *Robertson* [1924] N.Z.L.R. 552; [1924] G.L.R. 71, where it was held that a trustee's wife could not purchase the trust property.

The general rule is that prima facie it is the duty of the Registrar to register any instrument presented in proper form and signed by a person competent in law, and according to the title as appearing on the register, to effect the dealing represented by the instrument. But where the Registrar knows facts which show that an instrument proposed to be registered is a breach of trust, he may decline to register it, although no copy of the trust deed has been deposited under s. 128 (2), or no caveat has been lodged to protect the trust.: *Templeton* v. *Leviathan Proprietary Ltd.* (1921) 30 C.L.R. 52. But the Registrar should not decline to register (unless of course a caveat has been lodged) where there is no *manifest* breach of trust: *R.* v. *Registrar of Titles*: *Ex parte Briggs* [1913] V.L.R. 549.

Another leading case on this topic is *In re the Kaihu Valley Railway Company and John Owen* (1890) 8 N.Z.L.R. 522, where the District Land Registrar of Auckland refused to register an instrument executed by a company on the ground that the company had thereby exceeded the borrowing powers conferred on it by its memorandum of association. It will be noted that in this case the Registrar's opinion was not shared by the Registrar-General of Land, thus illustrating that each Registrar is autonomous and acts judicially when deciding whether or not he will accept an instrument for registration. If he declines to register there is a right of appeal at the appellant's choice either to the Registrar-General of Land or direct to the Supreme Court. In this case, the appellant chose the right of appeal direct to the Supreme Court, and by consent the case was removed into the Court of Appeal.

Registrar's Functions

Section 216 of the Land Transfer Act 1952 provides that, if the Registrar refuses to perform any act or duty which he is required or empowered to perform under that Act or any other Act, or if the proprietor of or other claimant to any land, estate, or interest is dissatisfied with the direction or decision of the Registrar and Examiner of Titles, or of the Registrar acting alone, in respect of any application, claim, matter, or thing under that Act or any other Act, the person deeming himself aggrieved may require the Registrar to set forth in writing the grounds of his refusal, direction, or decision.

And so at this stage there may or may not have been any written requisition by the Registrar. Section 217 proceeds to provide that any such person may, if he thinks fit, call upon the Registrar to appear before the Supreme Court to substantiate and uphold the grounds of such refusal, direction, or decision as aforesaid, by a notice served upon the Registrar six clear days at least before the day appointed for hearing.

But there is also a primary right of appeal to the Registrar-General of Land conferred by s. 221, and this has now become the more usual procedure where a person is aggrieved by a decision of the Registrar. That section provides that when an appeal may be had to the Supreme Court under the Act from the decision of any Registrar acting also as Examiner of Titles or of any Registrar in respect of any matter with which he is empowered to deal without the concurrence of an Examiner of Titles, the person dissatisfied with the decision may refer the same in the first instance to the Registrar-General, whose decision shall be binding on the Registrar. There is the like appeal to the Supreme Court from the decision of the Registrar-General as from the decision of a Registrar.

The exact procedure is not indicated in s. 217 which authorizes an appellant to "call upon" the Registrar to appear before the Supreme Court to substantiate his decision. The statutory predecessor to s. 217 began: "Such person may, if he thinks fit, *summon* the Registrar to appear" etc., and the wording of that section was very similar to s. 55 of the Life Insurance Act 1908. In the *Reprint of the Statutes of New Zealand* 1908-1957, the compiler has inserted after that section of the Life Insurance Act, the following note in small print:

> It appears that the procedure by summons has now been replaced by a procedure by motion: see rules 394 (1) (b) and 398 of the Code of Civil Procedure as set out in *Sim's Practice and Procedure* (1955) and s. 38 (3) of the Statutes Amendment Act 1941 (re-printed with the Judicature Act 1908).

It appears to me that the proper procedure under s. 217 of the Land Transfer Act 1952 is also now by motion.

Court of Appeal Decision

The Court of Appeal unanimously held in the *Kaihu Valley Railway Company* case (*supra*) that the Land Transfer Act does not throw on the Registrar the duty of inquiring whether a mortgage by a company presented for registration is ultra vires the company. If the instrument is in proper form and the seal *appears* to be properly affixed, the Registrar must accept the instrument for registration. And it logically follows from *Boyd* v. *Mayor etc. of Wellington* [1924] N.Z.L.R. 1174; [1924] G.L.R. 489, that when such a mortgage is registered under the Land Transfer Act the mortgagee, in the absence of fraud, gets an indefeasible state-guaranteed title. But practitioners should note that, if collateral security is taken (for example, a debenture in the normal form, a mortgage under the Life Insurance Act, or the Chattels Transfer Act, or the Mining Act, or the Deeds Registration Act 1908), the collateral mortgage would be *ultra vires* with the result laid down by the House of Lords in the leading case of *Sinclair* v. *Broughan* [1914] A.C. 398. To prevent such a result the memorandum of association and the articles of association should be searched in the Companies Office before the offer of a collateral security is accepted.

It is not always possible for the Supreme Court on an appeal from a decision of the District Land Registrar to decide the point at issue, because some interested party may not be before the Court. Such would have

been the position in the *Kaihu Valley* case (*supra*), had the Court held that the Registrar had the right to search the memorandum and articles of association and to issue his requisition.

At times the Judges while disallowing a Registrar's requisitions have commended him for bringing the matter before the Court, the reason being that a Registrar should not take it upon himself to decide a novel or difficult point of law: an example of such a case is *Ex parte de Latour*, (1904) 6 G.L.R. 433, where, by mistake, a memorandum of transfer held as an escrow was inadvertently registered by a law clerk, and the Registrar doubted whether the Act gave him power to cancel the registration, when the mistake was not his but that of the person who had presented it for registration. And in *Deacon* v. *Auckland District Land Registrar* (1910) 30 N.Z.L.R. 369, 13 G.L.R. 531, the same Judge (Edwards J.) said:

> He (the Registrar) properly discharges his duty, and imposes no hardship upon the applicant, in raising these questions and leaving them to be decided by this Court (i.e. the Supreme Court). It is his duty not to expose the Assurance [now the Consolidated] Fund to an apparent risk of loss, and this duty is best discharged by leaving all questions which appear to him to be really doubtful to be so determined.

1948 Regulations

Requisitions by the District Land Registrar are expressly authorised by Reg. 27 of the Land Transfer Regulations 1948 (S.R. 1948/137) which reads:

> If, after any application, instrument, or dealing has been received, any material defect, error, or omission shall be discovered therein, or if any caveat prevents the registration being proceeded with, the Registrar shall forthwith give notice of the fact by requisition in writing to the person by whom the application, instrument, or dealing was presented.

Regulation 28 provides that if such requisition cannot be complied with the application, instrument, or dealing may be withdrawn or the Registrar may take the action provided for in s. 43 of the Land Transfer Act 1952.

Section 43 of the Act provides inter alia that where the Registrar's requisitions are not complied with the Registrar may refuse to complete or proceed with the registration of the instrument or to do any act or make any entry in relation thereto and he may dispose of the instrument by delivering the same to the person by whom the instrument was presented or by posting it by registered letter to that person or addressed to the person entitled under the instrument.

Hosking J's Comment

The only case I can find where Land Transfer Regulation 27 (or to be more precise its predecessor) has been the subject of judicial comment is *In re Hinewaki No. 3 Block* [1923] N.Z.L.R. 353, 363; [1922] G.L.R. 591, 595, where the District Land Registrar declined to register a partition order of the Maori Land Court because it was not connected with the names of the registered proprietors shown on the certificate of title: Hosking J. in the course of his judgment said:

> If the partition order does not afford sufficient particulars to enable him to do this (i.e. to register against the correct title) then the Land Transfer Regulations would enable him to requisition for sufficient particulars to enable registration to be correctly effected: See Regulation 22 [now Regulation 27]. How such a requisition, like any other requisition, is to be satisfied must depend upon the circumstances of the particular case. It is for the Registrar to determine what the nature of the requisition is to be, subject to this, that his demands must be reasonable and proper. If they are objected to, the Court or a Judge upon an appeal has power to determine their propriety.

It is understood that nowadays the majority of Registrar's requisitions relate to a subdivision of land. That is not to be wondered at when we consider how complex our laws have become with regard to subdivision of land. Thus, Land Transfer Regulation 46 provides that no plan by way of subdivision and no plan showing new roads, streets, or rights of way shall be deposited until all necessary consents of public officers or of local bodies have been given and all requirements of the Public Works Act 1928, the Municipal Corporations Act 1954, the Land Subdivision in Counties Act 1946, and other Acts regulating the subdivision of land, the laying out, dedication, formation, or widening of roads and streets, have been complied with.

Until a few years ago once a plan was formally deposited by the Registrar one could be reasonably certain that instruments dealing with lots shown on that plan were registrable and that the provisions of the subdivisional laws had all been complied with. But that is no longer the case, for now, both under the Municipal Corporations Act 1954 and the Land Subdivision in Counties Act 1946, the consenting authority can make its consent conditional on the creation of certain easements which have now become known as mandatory easements, and such a requirement of the consenting authority does not justify the District Land Registrar in declining to deposit the plan, for until there is a severance of ownership no easement can be registered. Therefore, when one is acting for a transferee or mortgagee of a lot in whose favour or against which a mandatory easement is to be created, one should not pay over the purchase or the mortgage money until the necessary easements have been drawn in registrable form. Sometimes on a subdivision of land the Registrar waives the deposit of a plan accepting in lieu thereof a diagram on the transfer. But there are probably still to be complied with the provisions of the relevant Acts, and also before paying over the money one should be certain that the Registrar has consented to a diagram and that he is satisfied with the diagram proffered.

E. C. Adams.

Long Sentences.—It is sometimes said that long sentences of imprisonment damage a man's personality and unfit him for a return to freedom. The extent to which this is true must depend largely on the kind of prison to which the offender is sent, but even if the statement be true that does not dispose of the necessity for protecting the public from persistent or dangerous criminals. It is better that a criminal should suffer some damage to his personality than that he should be free to pursue a life of crime and possibly put people in fear by his violent methods. Long sentences do at least protect the public for a considerable time, and they are certainly more deterrent than short sentences." (1960) 123 J.P. 466.

IN PARLIAMENT.

Two highly contentious measures have now been passed by Parliament, and it is to be hoped that this will now clear the way for more progress with the session's legislative programme.

The measures in question were the Police Offences Amendment Bill and the Political Disabilities Amendment Bill, both of which were the subject of spirited debate resulting in lengthy sittings.

During the current session we have now had the spectacle of three attempted "stonewall" debates which have proved to be futile, and it is timely to suggest that the Opposition should review its attitude to contentious legislation. It is the function of the Opposition to oppose, but to oppose with discretion. It is proper for it to call attention to all the defects, both in principle and in form, in legislation placed before the House. but we suggest that its opposition should not be carried to such lengths that it merely wastes the time of the House without any prospect of serving any useful purpose.

The objects of expressing opposition to a measure, apart from informing the public of the party's views are first, to persuade the Government of the day that the Bill is undesirable and should be dropped, secondly, to force the dropping of the Bill for fear of a defeat, and, thirdly, to endeavour to persuade waverers to vote against the Bill. With the present two-party system of government and with strict party discipline on both sides of the House, the second and third objects are unlikely to succeed whatever the position may have been when there three parties with perhaps some independents. The first object is not likely to be achieved by long debates full of tedious repetition.

The public is becoming increasingly aware of the waste of time which is taking place in Parliament, and the National Party would increase its prestige if it put up comparatively few speakers in debates on contentious Bills and selected those speakers carefully. Once the party's views have been adequately publicized and it has become obvious that the Bill must pass then the party should bow to the inevitable without further waste of time.

Another unfortunate feature of these debates is the amount of heat which has been generated and the personalities which have been exchanged. The attempt to link the Prime Minister with Communism, in particular, reflects no credit on anyone and will make no friends for the members concerned.

Another highlight of the period under review was the petition of Mr H. M. Mackay, of Dunedin, which is dealt with in our editorial pages.

Additions to the list of Bills before Parliament are as follows :

Antarctica Bill
Inland Revenue Department Amendment Bill
Juries Amendment Bill
Nurses and Midwives Amendment Bill
Poisons Bill
Social Security Amendment Bill
Stamp Duties Amendment Bill
Unit Trusts Bill
War Pensions Amendment Bill
Waitangi Day Bill

The Inland Revenue Department Amendment Bill is of great interest and importance to practitioners, since it sets up Boards of Review to deal with objections in regard to Land and Income Tax, Stamp Duties, Estate and Gift Duties and Amusement Tax. The Bill does not itself create any right of objection or appeal to the Boards of Review, and amendments to the various statutes relating to the subjects enumerated above will be required to specify the matters to be referred to the Boards. The decision of a Board of Review is to be final as to any question of fact, but there is a right of appeal to the Supreme Court, with a further right of appeal to the Court of Appeal, on any question of law. It is expressly provided that no costs shall be allowed to or against an objector and this is a provision which may require further consideration before the Bill is passed.

The Juries Amendment Bill is a purely machinery measure relating to the compilation of the rolls and services of summonses.

The Stamp Duties Amendment Bill is the first of the Bills necessary to bring the Inland Revenue Amendment into force. It gives to an objector the right in respect of certain objections under the Stamp Duties Act to require his objection to be heard by a Board of Review instead of the Supreme Court. The Bill also provides for the abolishing of stamp duty on marine insurance policies.

Statutes enacted in the latter part of August are as follows :

Republic of Ghana Act
Police Offences Amendment Act
Political Disabilities Removal Act

STATUTORY REGULATIONS.

The following statutory regulations of general interest were made during the latter days of July and the month of August :

Land and Income Tax Regulations 1946, Amendment No. 4 (1960/117). Applying the provisions of the principal regulations as to objections and procedure on appeals to assessments of excess retention tax.

Machinery (Aircraft) Exemption Order 1960 (1960/122). Exempting from the provisions of the Machinery Act 1950, the engine, propeller or other machinery of an aircraft, but only while the same is mounted or incorporated within the air frame of the aircraft.

Traffic Regulations 1956 Amendment No. 5 (1960/135). These regulations contain a number of amendments to the principal regulations, the most important of which are the prohibition of an increase of speed by a driver approaching an uncontrolled intersection which another vehicle is approaching or crossing, and the requirement that, at a "stop" sign, the driver shall stop his vehicle in such a position as to be able to see whether the way is clear or not.

FORENSIC FABLE.

By "O"

The Kindly Judge and Little Effie.

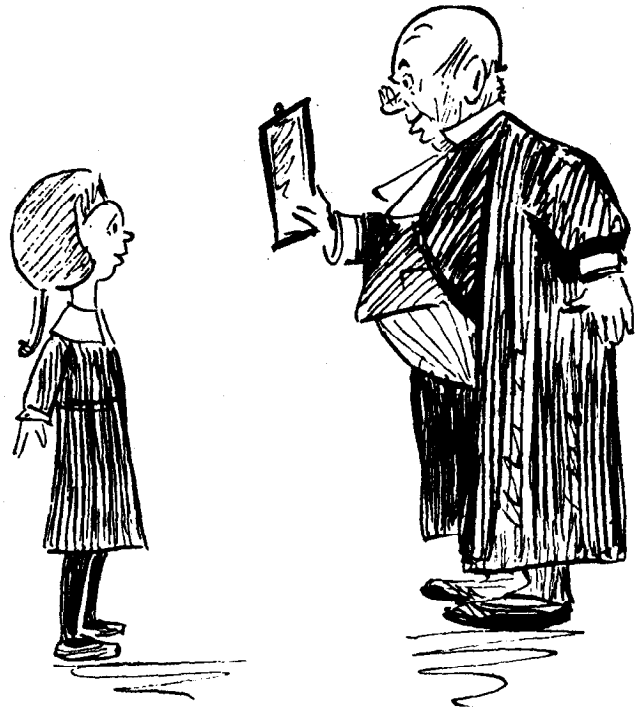
A kindly Judge (of the Chancery Division) found himself Confronted by a Difficult Problem. Was Little Effie (a Ward of Court) to go to School, or Not ?

Counsel Representing Little Effie's Grandmother Contended that Little Effie, by Reason of her Nervous Temperament, was not Fitted for Contact with the Rough Companions whom she would Doubtless Encounter at the Proposed Educational Establishment.

The Advocate Voicing the Opinion of the Maiden Aunt Took the Line that Little Effie was a Perfectly Normal and Healthy Child who would Derive Immense Benefit from the Discipline and Gaiety of School Life.

The Kindly Judge Wisely Suggested that before Reading the Affidavits he should Interview Little Effie in his Private Room.

When Little Effie Presented herself the Kindly Judge (who was a Family Man) Found himself Attracted by her



Cropped Head and her large Blue Eyes. To Put Little Effie Completely at her Ease the Kindly Judge Invited her to Try on his Wig and to Observe the Effect in his Looking-Glass. After a Pleasant Little Chat the Kindly Judge Resumed his Wig and Returned to Court. Counsel Thereupon Set to Work.

"A Month Ago," ran Paragraph One of the Grandmother's Affidavit, "Effie Suffered from a Bad Attack of Ring-Worm and her Head had to be Shaved" The Kindly Judge forthwith Adjourned the Proceedings *Sine Die*, and Sent his Clerk Out for a Bottle (Large Size) of Condy's Fluid.

Moral—*Read the Affidavits First.*

CORRESPONDENCE.

Legal Education.

Sir,

I feel bound to reply to Mr G. J. Fuller's letter (*ante*, 286), concerning legal education. I consider that I am qualified to do so, being in my final year at Victoria University of Wellington at which I attended for two years as a full-time student and subsequently as a part-time student while working in a Government Department and a private law office.

I have found that while I attended University full-time, I tended to spend much of my energy in pursuits other than swotting and that the majority of students were similarly inclined. When one commences part-time study, he realizes that his available swotting time is limited; I think that in such circumstances, just as much *useful* work is done by the student as by his counterpart who is attending University on a full-time basis. By *useful*, I do not mean just enough to pass the final examinations but rather, sufficient to instil in the student the basic principles of the subject and the ability to apply them, which should be the specific objective.

I submit that the general or overall objective of attaining an LL.B. or Solicitor's Professional comprises what I have termed the specific objective and the additional experience gained from personal contact with the living law through working in a law office. I consider that the better-equipped student is he whose daily academic life is balanced between his University studies and the practice of the law and proximity to those of experience. I do not think that it can be said that too great a burden is placed on part-time students—the two different types of work compensate one another.

With my fellow-students, I have found that it is impossible to gain "terms" and thus the right to sit the final examinations without reading a considerable number of judgments—it is quite common to be required to answer a question differentiating either between the judgment of one case or between several conflicting cases and to give a reasoned opinion why you consider one is preferable to the others. Knowledge of the headnotes to the cases would gain few marks!

Mr Fuller's remarks on the subjects of Constitutional Law, Jurisprudence, Conflict of Laws and International Law are, I think, too harsh. The case law method (discussing cases previously read) is used in Constitutional Law and Conflict and it certainly is not boring—especially if you went out the night before and did not read the case! International Law covers a varied field and its singularity among law subjects proves most interesting. Jurisprudence can be boring in some aspects, but it is not contemptible; those aspects which I had found boring at the time I appreciated when the whole syllabus had been covered. Accordingly, I attribute boredom to lack of understanding of their significance.

Thus I suggest that the part-time student does not merely pick up scraps of legal principles and of legal practice—he obtains a well-grounded, well-balanced legal education by the best method. That we have so many competent lawyers among us is *because* of this system, not in spite of it.

Yours, etc.,
STATUS QUO.

LETTER FROM AMERICA.

(Reprinted from the *Law Journal*)

It is to the English nothing strange that the leaders of the Bar should ultimately take their places upon the Bench, since it is normal and natural that those who have proved their merit in practice should finally graduate to positions of authority. It is also accepted that political preference should be restricted to the positions of the Lord Chancellor and the Law Officers, the executive's direct link with the administration of justice.

In the United States, the position is so very different that a recent comment in the *Journal of the American Bar Association* on the selection of leaders of the Bar for judicial office has an air of great anomaly. The present practice varies between the Federal and State jurisdictions and between the States themselves. Vacancies on the Federal Bench are filled by Presidential appointment on the advice of the members of the Executive and of Congress, or on occasions in the light of his personal preferences.

The members of the Supreme Court are appointed personally by the President. Again, there is no prerequisite either of success in practice or even of prior judicial experience. Some Judges in the not-too-distant past have been appointed as reward for their political services; others for their potential of supporting executive policy. The "Court-packing" plan of Franklin Roosevelt, who wanted to enlarge the Supreme Court so that he could appoint a majority of its members sumpathetic to his "New Deal" policies, is a very recent reminder of the dangers of a politically weighted Bench. In fact, the plan failed both because Congress refused to accept the enlarging scheme and because even those Judges appointed by Roosevelt proved to be the leaders of the wing of the Court which struck down the "New Deal". At the moment, of the present Supreme Court, four were Federal Circuit Judges before their appointment, two were professors of law at leading universities, one the Federal Attorney-General, one the Governor of California, one a member of the Senate. Each, as practice demands, was approved by Congress after appointment.

A Political Status

The Constitutional position of the Supreme Court being so very different from that of any Court known in England, there is no general agreement that "pure" judicial calibre should be the stamp of its members. Its power to strike down legislation and executive actions as contrary to the spirit of the Constitution gives it a status as a political organ much higher than the House of Lords. True, it also acts as the ultimate Appeal Court in private disputes but, much of its important work is carried on in its capacity as a check on Governmental power. There is, as a result, a good case to be made out for its members' possessing political acumen and insight before they are properly qualified to sit.

In the individual States, it is considered essential to democracy—even embodied in some State Constitutions—that Judges should be elected by and directly responsible to the general public. Generally, therefore, State Judges are elected in the same way as the Governor and members of the legislative body and, so closely is this parallel drawn, that the elections are invariably conducted on a political party basis. The length of their appointment varies greatly from State to State, and with the importance of the office, but the writer knows of no State which elects its judiciary on a permanent, life-time basis. Bryce's comment on the system, as long ago as 1889, is typically shrewd: "Popular elections have thrown the choice into the hands of the political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the Judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence".

In 1940, the State of Missouri amended its Constitution and changed the method of selection and tenure of the Judges of the State. It is the advent of the twentieth successful year of the plan's operation that occasioned the comment in the *A.B.A. Journal* referred to above. The Missouri plan, in the words of one of its framers, "is intended to make possible the recognition of . . . essential judicial qualities in selection and to make the tenure of the Judge dependent upon satisfactory service and not upon political prowess". There are three separate elements: (i) the nomination of the Judges by non-partisan, non-salaried commissioners, both lawyers and laymen; (ii) the appointment of the Judge by the State Governor from a list of three candidates presented to him by the commissioners; (iii) after a trial period of at least twelve months in office, the approval of the Judge by the electorate in a general election.

Elaborate Safeguard

The safeguards surrounding each of these steps are elaborate in ensuring the utmost impartiality. The commission which nominates the candidates comprises the Chief Justice of Missouri, three lawyers elected by the State Bar Association and three laymen appointed by the Governor, none of whom can hold any public office or official position in a political party. All except the Chief Justice are appointed for terms of six years, the terms being staggered so that one vacancy occurs every year. As the Governor himself only holds office for a non-renewable term of four years, no one Governor can appoint all three lay members of a commission. At the general election following a Judge's appointment, the voters are asked whether or not he should be returned for a full term—in the lower Courts for six years, in the Appeal Courts twelve years. Unlike the elections to other offices, the Judge has no opponent and represents no political party. He stands or falls on his record as a Judge, and experience has shown that, with a good record, a Judge will invariably be elected. Towards the end of his term of office, he must intimate whether he is willing to continue and he may stand for re-election.

The activities of the Bar on these occasions will certainly cause some surprise to English lawyers. The desire to secure the best judicial candidate has forced the members of the profession in Missouri into zealous campaigning at election times. At all times the Bar Association has urged members of the public

to use their votes. It sponsors a secret poll of its members on the Judges who are candidates and publicizes the results at it own expense so that the public may get an impression of what the practitioners feel about their Judges.

To the Judges themselves, raised no doubt in a competitive atmosphere, the Missouri plan gives some feeling of independence. They are able to devote their whole time to their judicial activity and, as a recent commentator has remarked, are spared "making speeches at political meetings and attending barbecues, fish fries and other social and political functions." Moreover, they are largely free of political pressure in reaching their decisions. This is not to suggest that even under the political election system Judges yield very much to pressure; the local and national Press is a constant scrutineer and critic of Court decisions but the danger of political bias is nonetheless a reality. Whether or not all the complex provisions of the Missouri plan are necessary, it does at least reflect the anxiety of the Bar to ensure that the Bench is kept above political faction in the interest of equality before the law.

ALAN MILNER.

LEGAL LITERATURE.

Maori Land Law. By NORMAN SMITH, a Judge of the Maori Land Court. Pp. XXV and 376. Wellington: A. H. & A. W. Reed. Price: 42s.

Although a very large volume of legislation, going back to an early period in New Zealand's history, has been enacted in respect of Maori land and there has at various times been a considerable amount of litigation on the subject, Judge Smith is the first author to provide practitioners with a systematic guide to this rather specialized and complex branch of our law.

The opening chapters of Judge Smith's book are devoted to a discussion of the origin of the Maori Land Court and to the present-day jurisdiction and practice of that Court and of the Maori Appellate Court. He then proceeds to make a comprehensive survey of the various aspects of Maori Land and Family Law; and in this exposition of the law he not only sets out in a concise and convenient form all the relevant provisions of that very voluminous enactment—the Maori Affairs Act 1953—but he also makes full reference to the not inconsiderable body of case law bearing on the subject. The book also incorporates and brings up-to-date his earlier monograph on *Native Custom Affecting Land*, much of which, however, has been rewritten.

A useful feature of the book are the Appendices which contain not only the Maori Land Court Rules 1958, but also the Maori Assembled Owners Regulations 1957, the Maori Incorporated Owners Regulations 1955 and the Licensed Interpreters Regulations 1958.

This work will be of invaluable assistance to all those practitioners and officials who are concerned with Maori Land Court practice and with Maori land matters generally. But it should also make a much wider appeal for it contains a wealth of information in respect of the history and development of the law relating to Maori land from the time of the Treaty of Waitangi down to the present day. In view of this it should be of particular interest to students of New Zealand history and to those jurists who are interested in the study of comparative law.

E. J. H.

Books Received or Published in New Zealand by Butterworth & Co. (New Zealand) Ltd. July to September, 1960.

Cunningham's Taxation Laws of New Zealand, Fourth Edition, edited by M. I. THOMPSON, LL.B., A.P.A.N.Z. and R. P. KELLAWAY, B.A., A.R.A.N.Z. £6 10s. Butterworths Taxation Service, 65s. per annum.

Law of Hire Purchase, by DAVID WILD, of the Middle Temple, and Midland Circuit, Barrister-at-Law. 60s.

New South Wales Reports. Volume 1, commenced July, 1960. Annual subscription £7 10s. (loose parts and bound volume).

New Zealand and Australian Law List 1960. 42s.

Wiseman & Vickery's Motor and Traffic Law, Second Edition, £6 12s. 6d.

Intention in Law.—The devil himself knoweth not the mind of man, and the proof of intention, which plays so large a part in our law, is forever raising difficult questions. We are most familiar with these in criminal cases, but they arise also in the law of contract and in other branches of our law. No one knows what another thought at a particular moment, and the man himself may not remember or may not say truthfully what it was, or may not at the crucial moment really have thought at all. Yet the root of evil lies in men's thoughts and justice requires that legal consequences should depend on proof of intention. This requirement of justice provides the key, we suggest to an understanding of the practical aspect of the proof of intention in most branches of the law. For the function of the Court is to administer justice according to law, and if a man's intent is not remembered or is not truthfully told by him, or if he did not think about the matter at all, the Court has still to do justice between the parties. Thus it must at times presume or infer that requisite intention is proved, and in so doing must follow an objective test independent of the actual thoughts of the person concerned. This is a view that can claim some support from Lord Wright in the *Firbrosa* case ([1942] 2 All E.R., at p. 140) in the realm of contract, and can claim to be in accordance with the recent decision of the House of Lords in *D.P.P.* v. *Smith* ([1960] 3 All E.R. 161) in criminal matters. The difficulty that we have indicated is possibly another that derives largely from language; if, for example, the mental element of a rule of law were stated as being either an intent that a party in fact had or an intent that he was deemed justly to have had in the circumstances of the case, the proof of intention would be much easier to understand at first approach. This does express, we suggest, what "intention" as an element in our law normally connotes, though no doubt, like other generalisations, this one also is dangerous and will be found not always to hold good. (1960) 110 L.J. 630.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Aspect of Crime

Mr Kenyon I. Scudder, addressing delegates last month to the second United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in London, said that he thought notice might be taken of a jingle current in America:

"Sing a song of T.V.
For the little ones;
Four-and-twenty Gaolbirds
Packing tommy-guns.
When the scene is finished
When the blood is ankle-deep.
Wasn't that a pretty dish
To send the kids to sleep".

At the same Congress, the director of the United States Bureau of Prisons, when talking on "personal sentences" told the following story: A bank robber entered a California bank and held up a sheet to the girl clerk on which was written: "This is a hold-up. Give me all the money in the till." She did this but he paused to ask humourously, "Would you like to have me sign a receipt?" This offer was accepted, and while he was writing the receipt, she was able to arrest attention from others in the bank and he was caught. It was then discovered that he himself was a depositor in the bank to the extent of £2,500, the amount which he had obtained from the clerk being substantially less. The authorities regarded his behaviour in the light of an aberration, and, on his being examined, arterio-sclerosis was diagnosed. In accordance with an enlightened policy existent in California in regard to sentences, he was able to obtain a reduced term.

Responsibility for Consequences

An important decision of the House of Lords relates to the case of one Smith who, on March 2, 1960, had been driving a car in which there were stolen goods in sacks. The police constable told him to draw in at the kerb, but instead he accelerated. The police constable clung to the side of the car but was finally skaken off and fell in front of another car coming in the opposite direction, receiving fatal injuries. Smith drove on some 200 yards and dumped the stolen property. He then returned, and said that he had been the driver of the car the constable had been hanging on to. On being told that the constable was dead he said that he had known him personally but had become frightened. In evidence he said that it all happened in a matter of seconds, and that when he was going up the road he did not realize that the officer was still hanging on to the car. At the trial, Donovan J. in his summing-up applied an objective test—namely, the test of what a reasonable man would contemplate as the probable result of his acts and therefore would intend. The jury found the prisoner guilty of capital murder. The Court of Criminal Appeal reversed this decision and substituted a verdict of manslaughter, its ground being that it was for the jury to decide whether, having regard to the panic in which the prisoner said he was, he, in fact, at the time contemplated that serious bodily harm would result from his actions, or, indeed, whether he contemplated anything at all. Unless the jury were so satisfied, the Court considered the necessary intent to constitute malice would not in its view have been proved. For the first time in a great many years, the Director of Public Prosecutions obtained the fiat of the Attorney-General to appeal to the House of Lords against that decision. Here, the views of the Court of Criminal Appeal were not followed. The Lord Chancellor said that there had never been any suggestion that Smith meant to kill the police officer, but it was contended by the prosecution that he intended to do the officer grievous bodily harm, as a result of which the officer died. The only test available for that was what the ordinary responsible man would in all the circumstances of the case have contemplated as the natural and probable result. That indeed had always been the law. The law being as His Lordship had endeavoured to define it, there seemed no ground on which the approach by Mr Justice Donovan in the present case could be criticized. The appeal was allowed. It may be mentioned in passing that the case for the prisoner was conducted by Mr Edward Clarke Q.C., a grandson of the illustrious Sir Edward Clarke who, while the case was on, appeared as a leading character in two films at the same time running in London and relating to the part that he played in the trials of Oscar Wilde, this character being taken in the one film by Peter Finch and in the other by Robert Morley.

Privy Council Appeals

At the recent sessions of the Judicial Committee of the Privy Council, in a list of nineteen appeals, New Zealand had two, as did Nigeria, Ghana and the West African Court of Appeal, while Ceylon and the East African Court of Appeal provided three. The result of *Truth (N.Z.) Ltd.* v. *Holloway* is known, but decision has yet to be given in *Lee* v. *Lee's Air Farming Ltd.* [1959] N.Z.L.R. 393, involving the question whether a governing director of a company is a "worker" within the rules under the Workers' Compensation Act 1955. The relations between the Privy Council and Ghana have been short-lived in that, as from July 1, when Ghana became a republic, appeals from that country to Her Majesty in Council ceased. Provision was made for the Privy Council to hear appeals pending immediately before that date, provided the records had then been registered in the office of the Privy Council, but all Ghanaian appeals remaining unheard on June 30, 1961, will abate.

From my Notebook:

"Ever since I have been on the Bench I have seen that no issue ever caused so much excitement and argument as that of costs." . . . . Sellers L.J. in *Mayer* v. *Harte* (The Times 2/6/60).

Mr Denys Hicks, of Bristol, who claims to be the youngest president in the history of the Council of the Law Society (England) and who is the father of four daughters, declared on his election: "One of my hobbies is trying unsuccessfully to maintain my dignity in an all-female household."

A Wellington counsel engaged last year in the fixation of beer prices and more recently concerned in obtaining a fixture before a Full Court in Wellington in a case involving compensation for shipping losses has received from his Auckland agents the following garbled telegram: "Leary confirms fixture full quart Wellington 17th October."

TOWN AND COUNTRY PLANNING APPEALS.

Paihia Historical and Scenic Preservation Society *v.* Bay of Islands County

Town and Country Planning Appeal Board. Paihia. 1960 April 27.

Zoning—Seaside tourist resort—Commercial sites on water-front to be kept reasonable minimum—Town and Country Planning Act 1953 s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953.

When the Council's proposed district scheme (Paihia Section) was publicly notified pursuant to s. 22 of the Act the appellant exercising its right so to do pursuant to s. 24 lodged an objection to the zoning of certain sections fronting on to Marsden Road in Paihia as "commercial" on the grounds that they should be zoned as residential. The Council heard the objections and allowed them in the main, re-zoning the majority of the sections as residential. Although the appeal as filed related to all sections zoned as commercial—fronting Marsden Road, when the appeal came to hearing the appellant's counsel indicated that he would proceed only in respect of five sections which the appellant contended should be zoned residential.

The decision of the Board was delivered by

REID S.M. (Chairman). Having inspected the area under consideration the Board finds:

1. The appropriate zoning of Paihia presents somewhat unusual and difficult planning problems in that in preparing its plan the Council has, of necessity, had to provide for the needs of a small permanent population estimated at about 550 and, during some six months in each year for a very large influx (normally estimated at from 1,200 to 1,500), of holiday period residents, of visitors to hotels, boarding houses, motels and motor camps and for visitors and picnic parties visiting the beaches by day.
2. The main feature of Paihia is its three attractive beaches and its water-front. The topography is such that there is not land available for the setting aside of substantial reserves on the water-front and the most that can be done to preserve the amenities of the locality is to provide so far as is practicable for the aesthetic amenities as well as provide for the day to day commercial needs of both permanent residents and transient visitors.
3. The water-front at Te Ti Beach, Horotutu Beach and Paihia Beach is already substantially built on and the Board agrees that future residential expansion can be expected to take place to the north in the Te Ti area and the south in the Te Haumi area. Accordingly there should not be too much land zoned for commercial use in the already established areas fronting on to Horotutu and Paihia Beaches. The character and the amenities of these beaches can best be preserved by reducing commercial sites fronting on to the water-front to a reasonable minimum.

   The Board considers that this objective can best be achieved by restricting commercial zoning on the water-front to corner sites leaving future commercial development to side street frontages.
4. The Board allows the appeal in part, that is to say, the following sections fronting on to Marsden Road at present zoned as commercial are to be rezoned residential.
   (a) Lots 3 and 2 adjoining the proposed Post Office site, on the corner of Marsden Road and Williams Road.
   (b) Lots 2 and 10 adjoining the Chemist's shop on the corner of Marsden Road and Kings Road.

   Lots 1 and 14 on the corner of Marsden Road and Bay View Road are to remain zoned as commercial.

Appeal allowed in part.

Nelson Buildings Ltd. *v.* Auckland City Council

Town and Country Planning Appeal Board. Auckland, 1960. May 27.

Zoning—Land zoned as industrial B—Required for erection of non-residential club—Neither a predominant nor conditional use—Amendment of Code of Ordinances to include non-residential clubs as a conditional use for industrial B land—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953.

The appellant company was the owner of a property situated in Nelson Street in the City of Auckland containing 34.79 pp. being first Lots 1 and 2 on Deposited Plan No. 42193 and being part Allotment 15 of section 40, City of Auckland, and secondly, portion of Allotments 15, 16 and 17 of the said section 40, City of Auckland. When the Council's proposed district scheme was publicly notified, the appellant lodged objections to the scheme. The objection was couched in very broad terms, but it was finally considered on two grounds: (a) An objection to the provisions contained in the scheme for the widening of Nelson Street. (b) An objection to the zoning of the appellant company's land.

The objections were disallowed and this appeal followed.

The decision of the Board was delivered by

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

1. *Street Widening.*

   The proposal for the future widening of Nelson Street forms part of a comprehensive plan for the improvement of the main transport system for Auckland City. The Board has already held in other decisions relating to Nelson Street that this provision is in accordance with town-and-country-planning principles and it disallows the appeal in respect of that proposal.

2. *Zoning.*

   The company is a holding company on behalf of a body known as the Yugoslav Benevolent Society. It is proposed at some future date to erect a club premises, a hall and offices for the general purposes of this society on the the property under consideration. The property is in an area zoned under the Council's proposed scheme as industrial B. The appellant asks to have this zoning changed to commercial B or C so that it could use the land as a club as of right. Under the relative Code of Ordinances for industrial B zones, no reference is made to non-residential clubs being either a predominant or conditional use in industrial B zones. The Board considers that this is probably an omission or oversight and whilst it is not prepared to re-zone the company's land, it is prepared to allow the appeal in part. The Board directs that the Council's Code of Ordinances, under the heading of "Industrial B zone—Conditional Uses" is to be amended by adding to cl. (c) of the conditional uses after the words "churches and halls" the words "non-residential clubs".

Appeal allowed.,

In re the matter of an application by Whangarei Dry Cleaning Company Limited

Town and Country Planning Appeal Board. Kaitaia. 1960. May 5.

Zoning—Application for specific departure from district scheme—Objections—Onus on objector to establish that it would be contrary to town-and-country-planning principles to grant application—Hardship to objector not to be taken into consideration—Town and Country Planning Act 1953, s. 33 (1).

Application for a specific departure from the provisions of the Kaitaia Borough Council's Operative District Scheme.

The applicant was the owner of a property in Commerce Street, Kaitaia being part Lot 94 Deposited Plan No. 10009 being part Old Land Claim No. 7. This property was in an area zoned as commercial under the Kaitaia Borough Council's operative district scheme.

The applicant asked for consent to a specific departure from the provisions of that scheme by permitting it to operate a dry-cleaning business on part of the premises. When notice of the application was advertised pursuant to the provisions of Reg. 35 the objectors, who carried on a dry cleaning business under the name or style of "Northern Dry Cleaners", lodged an objection to the application, and objection was also lodged on behalf of the Postmaster-General.

The application and the objections were duly considered by the Kaitaia Borough Council which intimated that it supported the application subject to certain conditions. Those conditions satisfied the Postmaster-General's objection.

The Board accordingly directed a public hearing of the application in order to hear the objection of the present objectors.

The decision of the Board was delivered by

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

1. That the provisions of Reg. 35 of the Town and Country Planning Regulations 1954 have been duly complied with.
2. That as the Kaitaia Borough Council supports the application the onus is on the objectors to establish that it would be contrary to town-and-country-planning principles to grant the application or that the granting of the application would lead to a detraction from the amenities of the neighbourhood.
3. The objectors' own business is situate in the commercial zone and, with the approval of the Borough Council, the business is carried on as a conditional use.

The real ground of objection is that the granting of the application will give the company a more advantageous site than the one on which they are permitted to operate.

In substance this is a plea of hardship and the Board is not empowered to take hardship into consideration.

The only question calling for determination by the Board is whether or not to grant the application would be contrary to town-and-country-planning principles or detract from the amenities of the neighbourhood. The Board is satisfied that it would not do so.

The application is granted.

The applicant is to be permitted to carry on a dry cleaning business on the designated premises as a " conditional use " subject to the following conditions :

1. That the vent or flue from the cleaning tank is to be carried above the level of any windows opening out of the adjoining buildings, and
2. That the steam for pressing be obtained from an electrically-heated boiler.

Application granted on conditions.

Mount Wellington Borough *v.* Minister of Works

Town and Country Planning Appeal Board. Auckland. 1960. June 15.

District Scheme—Requirements of Minister of Works—Land zoned as Government reserve (Quarry) across road from residential zone—Zoning confirmed on conditions—Requirements of scheme as to frontage and area more severe than those of Minister—Tolerance clause—Town and Country Planning Act 1953, s. 26 (2) (a).

Appeal under s. 26 (2) (a) of the Town and Country Planning Act 1953. When the recommended District Scheme of the appellant Borough Council was submitted to the Minister, pursuant to s. 21 (5) of the Act, the Minister made the following requirements under s. 21 (6) :

1. *New Zealand Railways Department* :

   It is required that the railway land fronting Ireland Road, Panmure, shown edged red on the attached plan No. T.P. 4204, which is at present zoned residential, be shown as Railway Land.

2. *Ministry of Works* :

   It is required that the land lying adjacent to the western boundary of the Borough and adjoining the Ellerslie-Howick Main Highway as shown edged red on the attached plan No. 4206, which is at present shown in part as Government Reserve and in part is zoned Residential, be shown as Government Reserve (Quarry).

3. *Ministry of Works—Housing Division* :

   It is required, in respect of public works to which the district scheme applies by virtue of s. 2A of the Act as enacted by section 3 of the Town and Country Planning Amendment Act 1957, that the bulk and location requirements and the sub-divisional standards and building site requirements be those of the district scheme as submitted to the Minister with the exception that :

   (a) the front yard requirements for corner sites in residential A zones be 25 feet on one street and 15 feet on the other ; and that

   (b) the minimum nett area for rear sites in residential A zones be 30 pp. excluding access strips.

When the district scheme was publicly notified, pursuant to s. 22 of the Act, the Council lodged an objection to these requirements. When the objection came to be heard, the Minister was not represented at the hearing of the objection and the objection was formally disallowed. The Council then lodged this appeal.

Pleasants, for the appellant

Macklow, for the respondent

The judgment of the Board was delivered by

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

1. *New Zealand Railways Department* :

   The appeal here relates to a block of land fronting on to Ireland Road, Panmure, and backing on to the Panmure Station yard. Land on the opposite side of Ireland Road is zoned as residential. A substantial part of the land is occupied by timber merchants and used for industrial purposes. It was contended for the appellant that the use of this land for industrial purposes would tend to detract from the amenities of the adjoining residential area. For the respondent, it was contended that the land is likely to be required for railway development in the future and that it will not continue to be used for any industrial use. The present industrial use can be continued as an existing use as of right, but the Board does not consider that in the future this land should be used for industrial purposes. It is satisfied, on the evidence, that development of railway goods sheds at Panmure Station may become necessary in the future with the anticipated growth of industrial use of land in the Borough of Mt. Wellington. The appeal is disallowed in respect of this block in that the Board does not consider the land suitable for residential occupation, but it directs that the land is to be zoned specifically, as ' railway land reserved for railway purposes '.

2. *Ministry of Works* :

   The appeal here relates to a block of land zoned in part as Government Reserve and in part as residential. The Ministry of Works require the whole block zoned as Government Reserve (Quarry). The property in question fronts on to the Ellerslie-Panmure Highway. The portion which the Council wishes zoned as residential, fronts on to the Panmure Highway. The whole block of the Quarry Reserve comprises 69 ac. 3 ro. 29.3 pp. There is a residential zone on the opposite side of the highway. The Council's main concern is that it considers it undesirable that quarrying should be permitted right up to the road boundary in view of the residential area opposite the Quarry Reserve. The Board considers that this attitude is reasonable, but it does not consider that the situation can be best met by zoning this land as residential. It is satisfied with the necessity for the retention of this block as a Quarry Reserve and is not prepared to alter the zoning. The land in question is to remain zoned as Government Reserve (Quarry) but subject to the condition that no buildings are to be erected or excavations carried out within 2½ chains back from the Ellerslie-Panmure Highway frontage.

3. *Ministry of Works—Housing Division* :

   The appeal here relates to two requirements which involve alterations in the Council's Code of Ordinance relating to bulk and location requirements and the sub-divisional standards and building site requirements.

(a) *Front Yard Requirements* :

The Minister's requirements relating to corner sites in residential a zones are that the frontyard requirements be 25 feet on one street and 15 feet on the other. The Council's scheme provided for 25 feet frontage to both streets. The Code of Ordinance contains a tolerance clause which gives the Council power to waive the full requirements in appropriate cases. The Board considers that this provision should meet the situation. The appeal is allowed in respect of front yard requirements.

(b) *Rear Sites* :

The Council's Code, as originally compiled, required the minimum area for a rear section to be 40 perches. The Minister requires a minimum net area for rear sites in residential zones to be 30 pp. excluding access strips. The Board agrees with the Council's submission that it is most undesirable to have one standard for private subdivisions and another for Housing Department subdivisions. The Auckland City Council's proposed District Scheme provides for rear lots to have an area of 40 pp. and this standard appears to be generally adopted by metropolitan local authorities in Auckland. The Code of Ordinance provides a tolerance clause which allows of the Council relaxing the 40 pp. requirement by permitting, in appropriate cases, a lesser area. The Board considers that this affords ample protection and the appeal in this aspect is allowed.

Appeal allowed in part.