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TRADE PRACTICES: RECENT DECISIONS.

In previous articles we have dealt with the decisions of the Trade Practices Appeal Authority in the *Fencing Materials* case and the *Hairdressers* case. This leaves for consideration only the decision in the *Master Grocers'* case which was delivered on 21 September 1960.

The appellants in the case were the New Zealand Master Grocers' Federation and the Master Grocers' Associations of Auckland, Wellington, Canterbury and Otago, and the appeal referred to price lists or guides issued by various Master Grocers' Associations to their members. It is recounted in the decision that such price lists were first issued by individual Associations in or shortly after 1939, following the institution of price control at the outbreak of the war. Most of the commodities sold by grocers were until 1950, subject to price control, but from that time there has been going on a process of freeing an increasing range of groceries from such control.

We may comment at this stage, although it is not so stated in the decision, that as originally instituted, the price lists would appear to have been unexceptionable under the Trade Practices Act, since they amounted to no more than an advice to the Association members of the authorised maximum price for various lines of groceries which were subject to price control. In this form they could not have been taken as an agreement or arrangement between the grocers themselves.

In 1950, following an increase in wage costs, the Federation sought an increase in gross profit margins in respect of groceries still subject to price control. No such increase satisfactory to the Federation was then obtained and, following a review by a Committee set up by the Federation in 1952, increased margins were adopted for application in respect of a number of commodities not subject to price control, and since that time price lists or guides have been regularly issued by various Associations to their members. Both at annual conferences of the Federation and at meetings of the national executive the matter of profit margins was kept under review, and from time to time margins for new lines of goods have been introduced and existing margins have been varied. Particulars of these margins were supplied to the local associations which constituted the Federation and were used by them in making up their price lists, although one of the local associations set margins on a small number of lines which varied from those adopted by the Federation.

As to the four main associations which were parties to the appeal now under discussion there was no dispute as to the procedure adopted in the preparation and issue of their price lists. Each association by reference to or with the active aid of the wholesale merchants operating in its areas ascertained the wholesale prices, added the percentage margin as fixed by the Federation and then published the result in a list or guide sent to its members. In the case of goods still subject to price control, the prices shown were the maximum prices fixed or approved under the Control of Prices Act.

Most of the lists or guides so issued carried an endorsement to the effect that they were intended only "as an indication of suggested retail prices" and that "the determination of the actual prices charged by any storekeeper is always his responsibility".

In November 1959, acting on a report furnished by the Commissioner of Trade Practices and Prices, the Trade Practices and Prices Commission held an inquiry. The Commissioner's report was to the effect that the pricing methods adopted by the Federation, its constituent associations and their members amounted to a trade practice which was substantially within the category described in s. 19 (2) (c) of the Act, namely an agreement or arrangement to sell goods only at prices agreed upon between the parties to the agreement or arrangement, and further that it fell within s. 20 (d) of the Act in that it prevented or unreasonably reduced or limited competition in the sale of groceries.

Following the inquiry the Commission issued a decision adopting the Commissioner's view and subsequently sealed a formal order requiring the members of the Federation and of the four associations respectively to discontinue the trade practice. In particular the Commission ordered that the Federation discontinue the practice of setting, prescribing or recommending retail grocery margins for incorporation by associations in price lists issued by them, and that the four appellant Associations discontinue the issue to their members of price lists incorporating such specified retail margins or such specified or indicated retail selling prices. The appeal to the Appeal Authority followed.

Counsel for the appellants stated the grounds of appeal as follows:

(1) That on the facts as found by the Commission, the finding that there was an agreement or arrangement in terms of s. 19 (2) (c) was wrong in law.

(2) That if that finding was not wrong in law then the findings of fact upon which it was based were

wrong and cannot be supported having regard to the evidence.

(3) That the finding of fact that the trade practice was contrary to the public interest was wrong and cannot be supported having regard to the evidence.

(4) That the Commission failed to consider the discretion which it has under s. 19 (1) and failed to consider whether it should or should not make an order, even although it considered that all the pre-requisites to the making of an order had been established; and, further, that, even if an order were warranted, the Commission in any case made an order which was wider in extent than the evidence or circumstances justified.

In support of the first and second grounds of appeal, Mr Davison for the appellants submitted that to constitute an agreement or arrangement within the meaning of s. 19 (2) there must be a legal or moral sanction that parties will be bound by the agreement or arrangement in its entirety, a loose understanding with no such sanction or under which the parties are not bound not being within the section.

As a matter of law this submission would appear to be untenable, having regard to previous decisions of the Appeal Authority. In the *Wellington Fencing Materials* case (1960) N.Z.L.R. 1121, the Appeal Authority dealt with a similar submission and held that the word arrangement would include

> " An understanding arrived at between individual traders and a third party, for example a trade association, under which traders are bound to follow a common course of action although no rights by one trader against another may arise from the arrangement and although the obligation to follow the common course of action may not be legally enforceable. The word ' arrangement ' also contemplates something which is ' arranged ' by an organization and which the members of the organization are bound to follow " (*ibid.* 1130).

In the *Hairdressers'* Appeal (to be reported) the same submission was disposed of by the Authority in the following terms:

> " In my view the existence of an agreement or arrangement can be inferred from circumstances and from a course of action. If, for example, a number of traders decide amongst themselves that they will charge a particular price for certain goods or services and if in fact they carry out that decision it would be idle to suggest that there was no agreement or arrangement to charge that price. It is not necessary that there should be any legally enforceable obligation or any evidence of compulsion to charge the price arising from the possible imposition of a penalty or sanction or the fear of possible consequences."

In the *Master Grocers'* case, the Appeal Authority more or less repeated what he had said in the other two cases, in the following terms:

> " In two earlier decisions which I have given on appeals under this Act (in the *Wire Netting* case and in the *Male Hairdressing* case) I have discussed the meaning of the expression " agreement or arrangement ". I do not think it necessary, therefore, in this decision, to discuss it fully again. I cannot accept Mr Davison's submission as to the meaning of the expression. The expression in my view would include anything in the nature of an understanding between two or more persons to follow a common course of action. It is not necessary that there should be any legally enforceable obligation or any evidence of compulsion to observe that common course of action arising from the possible imposition of a penalty or sanction or from the fear of possible consequences. There is an agreement or arrangement between parties when they come to an understanding that they will each follow a certain course of action."

He then went on to consider whether the evidence before the Commission warranted a finding as a matter of fact that there was an " agreement or arrangement " in the instant case. Evidence was given of an extensive survey of prices charged by grocers in the Auckland, Wellington, Christchurch and Dunedin Metropolitan areas which disclosed that the local association's price guide price was charged in 83.87 per cent. of the commodities tested. The Government Statistician gave evidence commenting on the selection of items and selection of shops for the purposes of this survey and although he had some criticism to offer he stated his view as follows:

> " The results of the Commissioner's sample can reasonably be taken as indicating that a substantial number of members of the Master Grocers' Association adhere fairly closely to list prices on low priced decontrolled items."

The Appeal Authority then discussed the evidence and found that the results of the survey justified the conclusion that a substantial number of members of the Associations adhered fairly closely to list prices in respect of all classes of goods. He said, however, that a finding to that effect is not by itself sufficient to justify a finding that there is an agreement or arrangement amongst those members to adhere fairly closely to list prices.

He then divided the goods dealt with by grocers into three categories—namely:

> Price controlled goods which are still subject to control under the Control of Prices Act.
>
> Price maintained goods in respect of which the manufacturer or wholesaler nominates a retail price.
>
> Price free goods in respect of which the retailer would be free to fix his own retail price in the absence of any agreement or arrangement limiting that right.

As to price controlled goods, it was submitted by counsel for the appellants that the fact that the majority of sales were at the maximum prices fixed did not justify any inference that there was an agreement to sell such goods at maximum prices and no less, because grocers could not legally sell above the maximum price and there were not sufficient margins allowed to enable them to sell at lower prices. This was accepted by the Appeal Authority but he found evidence elsewhere that the Federation had taken steps on behalf of its members towards observance by non-members of maximum prices for certain price-controlled goods.

As to price-maintained goods, there was evidence that the Federation and its constituent Associations desired to see that the manufacturers' nominated prices for such goods were maintained. This was, however, subject to the qualification that if the nominated price

did not return to the retailer what was regarded as a sufficient margin, the price guides would show a price for such goods higher than the nominated price. Conversely, if the nominated price returned a margin greater than that approved by the Federation for similar goods the price in the price guide would be lower than the nominated price. There was also evidence of a certain amount of consultation between the Federation and manufacturers prior to retail prices being nominated by the manufacturer of certain goods.

As to price-free goods, the evidence showed a 30 per cent. deviation from the guide prices in the Auckland and Wellington shops taken together, and this was submitted to be a marked degree of non-compliance with the guide prices. The Appeal Authority however took the opposite view of the figures, assuming the correctness of the figure of 30 per cent., and read them as meaning that there was a 70 per cent. degree of conformity with the guide prices. In any case he considered that for the reasons mentioned in the last paragraph, price-maintained and price-free goods should be taken together, and when so taken showed a fairly close adherence to list prices by a substantial number of members.

The Appeal Authority also reviewed certain evidence as to "dispensations" allowing special prices for certain lines, and also dealt with a submission that if there were no price guides many grocers using their own methods of calculation would arrive at the same prices for the same goods. Admitting that this might well be the case with low priced goods, his Honour held that in the higher priced goods, over say 1s. 8d. in price, the difference in overhead costs of different types of business would result in the use of different margins and different prices.

On a review of all the evidence it was found that, despite the endorsement on the price guides, there was an agreement or arrangement within the meaning of s. 19 (2) of the Act.

Next to be considered was the question whether such agreement or arrangement fell within s. 19 (2) (c). The material parts of this provision read as follows:

> "(2) No order shall be made under this section unless the trade practice concerned is, in the opinion of the Commission, substantially within one or more of the following categories: . . .
> (c) Any agreement or arrangement between . . . retailers . . . or any combination of persons engaged in the selling of goods . . . to sell goods . . . only at prices or on terms agreed upon between the parties to any such agreement or arrangement."

In regard to this the Appeal Authority commented as follows:

> "Mr Davison drew attention to the word "only" and submitted that the meaning of that word is such that to come within para. (c) an agreement or arrangement must be an agreement or arrangement to sell at agreed prices or on agreed terms and not to sell at any other prices or on any other terms. Mr Orr would not place the same meaning on the word "only". He submitted that it is purely a word of emphasis which does not in fact add anything material to the meaning of the paragraph. I accept that the word "only" is a word of emphasis, but it seems to me that if it is to be expressed in any other way the emphasis must be expressed somewhat in the manner suggested by Mr Davison. An agreement or arrangement to sell only at prices agreed upon contemplates that all sales will be at those prices and that there will be no sales at any other prices.
>
> "In the present case the agreement or arrangement is an agreement or arrangement to adhere fairly closely to the prices listed in the price lists or price guides issued by the Associations. It is not, to use the terms of para. (c) of section 19 (2), an agreement or arrangement to sell "only at prices agreed upon" between the parties.
>
> "That, however, does not dispose of the matter. The effect of the use of the term "substantially" in the opening words of section 19 (2) must be considered. The agreement or arrangement between the grocers is not an agreement or arrangement to sell *only* at list prices, but is it *substantially* an agreement or arrangement to sell only at list prices?"

He then made a careful survey of the evidence and reached the conclusion that an agreement or arrangement in s. 19 (2) (c) was established in respect of the Auckland and Canterbury Association but not in respect of the Wellington and Otago Associations. The appeals by the two last-mentioned associations were therefore allowed.

The next matter for consideration was whether the agreement or arrangement found to exist in Auckland and Canterbury was contrary to the public interest for the purposes of s. 20 (d) or in other words whether the effect of such agreement or arrangement was "to prevent or unreasonably reduce or limit competition in the . . . sale . . . of any goods". His Honour had no difficulty in finding that the practice did have the effect of reducing or limiting competition but the key-word is "unreasonably", and the rest of this portion of the decision is devoted to a consideration of the question whether the limitation of competition already found was unreasonable. This involved a fairly lengthy consideration of certain submissions made on behalf of the appellants, following which his Honour reached a decision in the following terms:

> "Summed up briefly, the position on the question of the reasonableness or otherwise of the reduction or limitation of competition in the field of prices is as follows. Except for a very limited number of lines, which might differ from shop to shop, by far the greatest number of shops charge the same price for each grocery line notwithstanding that the services provided at the shops may vary considerably and notwithstanding that that fact or other circumstances may not justify the charging of prices as high as those that are charged. The charging by all these shops of the same price for each line is the direct result of the trade practice in question.
>
> The trade practice in my view unreasonably reduces or limits competition in the sale of groceries and is contrary to the public interest."

This left only one further matter for consideration, namely, whether the Commission in exercise of its discretion under s. 19 should have made an order prohibiting or restricting the trade practice. The appellants' submission on this point was that the Commission's order went too far in directing the discontinuance of the issue of price guides, and that it would have been sufficient to direct the Federation and the Associations to cease enforcing compliance

with the guide prices, leaving to the trade the advantages which accrue from the publication of the price guides. The Appeal Authority pointed out however that some 50 per cent of the turnover of the average grocer was in price-controlled goods, and the Commission's order did not prohibit notifications of the maximum prices for such goods. A further 30 per cent consisted of price-maintained goods, where the retail price was notified by manufacturer or wholesaler. This then leaves the grocer with only about 20 per cent of his turnover on which he has to calculate for himself the retail price. His Honour then continued :

" The grocer, in respect of these lines, would be in no worse position than his competitors. Looked at from the point of view of the public a much greater advantage which the grocer derives from the price guides and the trade practice in relation thereto, is the knowledge that competition in the field of prices has been so substantially reduced that he does not need to concern himself with seeing that his prices are made as attractive to the public as the circumstances of his business enable him to make them.

" As against the advantages which grocers derive from the price guides must be weighed the disadvantage which the public suffers in the loss of the chance of reductions in price that might be secured under free competition. The public is entitled to whatever benefits would flow from reductions in price brought about by competition. No estimate can be made as to the extent to which prices might be reduced, but it is clear from the evidence that cases of price reductions have from time to time occurred and have caused some concern to the Federation. These price reductions have not all been made by members of Associations and the Federation has on occasions taken steps to see that even non-members have come into line.

" I am satisfied that there are no advantages in the present trade practice which outweigh the disadvantages thereof from the point of view of the general public interest.

Having regard to the purposes of the Act, I consider that, unless appropriate action is taken under section 19 (6) to ensure that a trade practice ceases to be contrary to the public interest, very cogent reasons against making an order would need to be established to persuade the Commission to refrain from making an order in respect of a trade practice which it finds to be contrary to the public interest. In the present case no such cogent reason exists. The Commission was in my view, correct in deciding to make an order against the Federation and against the Auckland and Canterbury Master Grocers' Associations and the members of those Associations. So far as those parties are concerned the order does not appear to go any further than is necessary."

The appeals of the Federation and of the Auckland and Canterbury Associations were therefore dismissed.

This is another careful and thoughtful decision which will do much to clarify the interpretation of the Act and to lay down a policy for its enforcement.

This article contains only a brief summary of the salient points in the decision, and when it is reported in the *New Zealand Law Reports* it is recommended for study to all whose work brings them into contact with the provisions of the Act.

SUMMARY OF RECENT LAW.

CHATTELS TRANSFER

Instrument by way of security—Advances made by one party but instrument by way of security taken in name of another—Grantee a trustee for party making advances. Advances were made to the defendant by a Maori Land Board, and as each advance was made, an Instrument by way of security over chattels was given by the defendant to His Majesty the King, by whom no advances were made. Subsequently, the instruments by way of security were transferred to the Maori Land Board and ultimately became vested in the Maori Trustee by virtue of ss. 4 and 7 of the Maori Land Amendment Act 1952. *Held*, That the instrument by way of security was taken by the Crown as trustee for the Maori Land Board. they effectively secured the advances made by the Board and questions arising under the Limitation Act 1950 were to be determined upon the basis that such advances were secured by deed. *Hardoon* v. *Belilios* [1901] A.C. 118, applied). The defendant counterclaimed for a sum alleged to be due to him by the plaintiff for timber sold to the Maori Land Board. The timber was purchased for housing purposes under the Maori Housing Act 1935 and its amendments pursuant to a delegation of its powers by the Board of Maori Affairs under s. 49 of the Maori Affairs Act 1936. The alleged cause of action arose more than six years before the issue of the counterclaim. *Held*, 1. That s. 23 of the Limitation Act 1950 can under appropriate circumstances, apply to actions in contract. (*Firestone Tyre and Rubber Co. (S.S.) Ltd.* v. *Singapore Harbour Board* [1952] A.C. 452, followed). 2. The Maori Land Board was entitled to the protection of that section when exercising functions under the Maori Housing Act. 3. The non-payment of moneys due by a public authority under a contract is not " in the execution of any . . . Act, duty or authority " but is subsequent to and following upon the execution by the public authority of its public duty. A claim for such moneys therefore does not fall within s. 23 of the Limitation Act 1950. (*Milford Docks Co.* v. *Milford Haven Urban District Council* (1901) 65 J.P. 483, followed.) 4. Certain provisions in the instrument by way of security above referred to, placed on the grantee thereunder, an obligation to pay for the timber sold and the defendant was therefore entitled to a twelve year period of limitation under the Limitation Act 1950. *Maori Trustee* v. *Walker and Another* : *Maori Trustee* v. *Walker* (S.C. Gisborne. 1960. 18, 19, August ; 9 September. Hutchison J.)

CIVIL AVIATION.

Liquid dropped from aeroplane damaging vegetable crop—Liquid an "article" —Civil Aviation Act, 1948 *s. 5 (3)*. The word " article " used in s. 5 (3) of the Civil Aviation Act 1948 includes chemical liquid carried by an aircraft for the purpose of spraying weeds. (*Longhurst* v. *Guildford Water Board* [1960] 1 All E.R. 54 applied.) Judgment of McCarthy J. (Reported [1959] N.Z.L.R. 777 affirmed on a different ground.) *Weedair (N.Z.) Ltd.* v. *Walker* (C.A. Wellington. 1960. September 22. Gresson P., Cleary J., Turner J.)

CONTRACT.

Covenant in restraint of trade—Area covered by covenant vague and uncertain—Covenant unenforceable. The defendant was employed by the plaintiff club under an agreement which required him to serve in an " assigned area " which was to be defined in a schedule to be attached to the agreement, signed by both parties and approved by the Chief Veterinary Executive Officer of the Veterinary Services Council. No such defined area was agreed upon or approved, although the plaintiff employed four veterinary surgeons stationed in four different towns in its district. It also kept in its office a map of its entire district subdivided into four sections, each respectively surrounding one of the towns above-mentioned. The defendant was stationed at Pahiatua but carried out his services in a district which embraced areas outside the Pahiatua district as defined on the map above mentioned. The agreement contained a provision restraining the defendant from practising his

profession for one year from the date of termination of his employment within any of the assigned areas in which he should have carried out his professional duties within twelve months prior to such date of termination. The defendant resigned from the service of the plaintiff and commenced practice in Pahiatua and surrounding areas. The plaintiff brought an action for an injunction restraining the defendant from so doing. *Held*, 1. Before the plaintiff should be allowed to take advantage of the restraining covenant, the Court should be able to decide with certainty the district in which the defendant was to be restrained from practising. It must be a district clearly defined and agreed on with the consent of the Veterinary Services Council. (Dictum of F. B. Adams J. in *Ashburton Veterinary Club (Inc.)* v. *Hopkins* [1960] N.Z.L.R. 564, 570, doubted.) 2. In any event, in considering whether the restraint is reasonable, the area covered by it is an essential consideration and cannot be fully taken into account where the Court is left without satisfactory evidence as to the extent of such area. 3. In the absence of any schedule, of any evidence as to the area (if any) to which the Council consented and of satisfactory evidence as to the area in which the defendant had carried out his duties within the last twelve months of his employment the covenant was so vague and uncertain as to be unenforceable. *Bush and Southern Hawkes Bay Districts Veterinary Club (Inc.)* v. *Jacob*. (S.C. Palmerston North. 1960. 10 August; 20 September. McGregor J.)

COVENANT.

Covenant in restraint of trade—Area covered by covenant vague and uncertain—Covenant unenforceable—See CONTRACT (*supra.*)

CRIMINAL LAW.

Obtaining credit by fraud—Need for proof of intent to defraud existing when credit obtained—Crimes Act 1908, s. 253. It is essential to the commission of the offence created by s. 253 of the Crimes Act 1908 of obtaining credit by fraud that an intention to defraud should be proved to have existed at the time when the credit was obtained. (*R.* v. *Jones* [1898] 1 Q.B. 119 followed). *R.* v. *McKay* (C.A. Wellington. 1960. 9 December. Gresson P., Cleary J., McGregor J.)

DAMAGES.

Measure of damages—Assessment of damages for future economic loss—Likelihood of future fall in value of money to be disregarded. In assessing general damages for future economic loss the liklehood of future depreciation in the purchasing power of money, and the probable extent of it, should not be taken into account, and evidence that the value of money is likely to fall in the future, and the probable rate of its fall is inadmissible. (*Donaldson* v. *Waihohu County Council* [1952] N.Z.L.R. 731; [1952] G.L.R. 373 and *LeBagge* v. *Buses Ltd.* [1958] N.Z.L.R. 630, discussed. *Philips* v. *Ward* [1956] 1 All E.R. 874 and *Bishop* v. *Cunard White Star Co. Ltd.* [1950] P. 240; [1950] 2 All E.R. 22, applied). *Gollan* v. *Duncan* (S.C. Wellington. 1960. 27 July; 12 September. Barrowclough C.J.).

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Respondent of unsound mind—Test of legal responsibility—Respondent suffering from paranoid schizophrenia—Expression of regret by respondent—Whether respondent knew that what she was doing was wrong—Meaning of "wrong" in the M'Naghten rules when applied as a defence in divorce—Cogency of evidence of medical expert who saw respondent once only. The parties were married in 1937 and there were four children living. The marriage was unhappy owing to the wife's constant nagging, complaining and outbursts of temper. In 1942 the parties, then living in Rangoon, were evacuated to Bombay. In 1946 the wife had an abortion performed on herself. There was evidence that she had thereafter been troubled in her mind about having had the operation performed. From 1946 her conduct became worse and she assaulted the husband on a number of occasions. In 1950 the parties moved to Israel where the wife resented the living conditions. She threatened to burn down the canvas hut in which they lived. During 1953 and 1954 she used to threaten to commit suicide in order to get her own way. In 1954 a child was born to the parties and died after two and a half months. The wife accused the husband of causing the child's death by black magic. In the summer of 1954 the husband left the wife for two months as he could stand her conduct no longer. She asked him to return, promising to behave better towards him and expressing sorrow for her past behaviour. He returned to her, but she soon reverted to her former conduct. In November, 1954, she entered a mental hospital in Haifa as a voluntary patient where she remained for five weeks. In April, 1956, she entered the same mental hospital and stayed there for about ten weeks. Then the family came to England. In 1958 the wife, having been charged with larceny, was certified insane and was detained in a mental hospital where she had ever since remained. On the husband's petition for divorce on the ground of the wife's cruelty, the Court found that the wife was guilty of cruelty and the question, therefore was whether she established that she was not legally responsible for her acts by virtue of the M'Naghten rules. The medical evidence showed that the wife was suffering from paranoid schizophrenia which had developed over a long time. The medical expert opinion on whether the wife could distinguish between right and wrong in or before 1958 was partly to the effect that she could not and partly to the effect that she could. There was evidence that the wife had condemned the conduct of a relative in making illicit profits in the "black market." *Held*, 1. The wife was legally responsible for her conduct since on the evidence she failed to discharge the onus of bringing herself within the second branch of the M'Naghten rules, viz., she failed to show that she did not know that what she was doing was wrong, the word "wrong" bearing for present purposes a sense which included that which was culpable or blameworthy; principal factors showing that the wife had appreciated what was wrong were—(a) her expression of regret in August, 1954, for her conduct, since that showed realisation that there was something to regret, connoting a realisation that acts done in the past were wrong; dictum of Hodgson L.J., in *Palmer* v. *Palmer* [1954] 3 All E.R. at p. 497 followed. (b) her condemnation of the conduct of a relative in making illicit profits, and her threats, e.g., to commit suicide, made with a view to obtaining her own ends. 2. The wife's accusations of black magic being practised by the husband on her were prompted by delusion and did not constitute cruelty, but they formed a small part of the whole and their exclusion did not affect the general conclusion. *Sofaer* v. *Sofaer (by her Guardian)*. (Probate, Divorce and Admiralty Division Collingwood J., 18, 19, 20, 21, 29 July, 1960). [1960] 3 All E.R. 468.

VALUATION.

Racecourse—Land subject to restrictive trusts, conditions and provisos materially affecting its value—Whether, in ascertaining "unimproved value" of land, valuation should take into account existence of restrictions—New South Wales Valuation of Land Act 1916-1951, s. 6. The appellants were the owners and trustees of land in New South Wales used as a racecourse. The land was the subject of two deeds of grant of 1863 and 1935, whereby it was vested by the Crown in the appellants' predecessors in fee simple, subject to a peppercorn quit rent, on the trusts and subject to the conditions, reservations and provisos mentioned in the deeds. Under the deeds of grant, the appellants were to allow the land, in their discretion, to be used (a) as a racecourse for horse-racing, (b) as a training ground for training racehorses and for the erection of appropriate buildings, (c) as a cricket ground, (d) for rifle shooting, and (e) for any other public amusement or purpose that the Governor of New South Wales might declare, and if the land or any part of it should be used for any other purpose than such as was allowed by the trusts, the land would be forfeited and revert to the Crown. The lands were and always had been in lease to the Australian Jockey Club. Section 6 of the Valuation of Land Act 1916-1951, enacted that the unimproved value of land was the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that any improvements thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title, had not been made. In 1954 the unimproved value was assessed and the appellants objected to the assessment on the ground that account should be taken of the restrictions in the deeds of grant. *Held*, The unimproved value of the land under s. 6 of the Valuation of Land Act 1916-1951, should be assessed on the hypothesis of an unencumbered fee simple estate subject to no condition restricting the use and enjoyment of the land; therefore, the restrictions in the deeds of grant should not be taken into consideration in assessing the unimproved value. *Royal Sydney Golf Club* v. *Federal Comr. of Taxation* (1955) 91 C.L.R. 610 approved and applied. Reasoning of Isaacs C.J., and Starke J., in *Stephen* v. *Federal Comr. of Land Tax* (1930), 45 W.L.R. 122 disapproved. *Gollan and Another* v. *Randwick Municipal Council*. (Privy (Privy Wouncil. Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker andL ord Morris of Borth-y-Gest), 12, 13, 14, 18 July; 11 October 1960). [1960] 3 All E.R. 449.

THE DISMISSIBILITY OF CROWN SERVANTS.

It is a matter for some concern that the law governing the tenure of Crown servants should be left in its present uncertain state. It is understood that the number of persons employed by the State, here termed Crown servants, [1] exceeds one hundred thousand and is a substantial part of New Zealand's labour force. Many of those employed by the State are casual workers whose engagements may be terminated without the formalities associated with permanent appointments. Those employed in the Armed Services are subject to different rules from those applying to civilian employees. In fact, one of the sources of confusion is the application to civilian State employees of principles first applied to members of the Armed forces. In this note, attention is focused on the tenure of civilian employees who are normally described, perhaps inaccurately, as having permanent employment with the State.

Since the decision in *Deynzer* v. *Campbell*, [2] the law governing those Crown servants who are under the control of the Public Service Commission has been amended, but the principle previously settled and applied in that case continues to govern the tenure of all Crown servants. The principle can be stated briefly, but there is controversy—demonstrated in *Deynzer* v. *Campbell* itself—as to the operation of the principle. O'Leary C.J. stated the principle in these words :

> The result of these authorities is that it is an implied term in the engagement of every person in the Public Service that he holds office during pleasure, unless the contrary appears by statute.[3]

The last phrase is the source of difficulty, because it remains uncertain whether the common-law rule as to dismissibility at pleasure is excluded by express words, by implication, or by statutory provisions which are merely incompatible with the common law. [4]

Because the Court of Appeal in *Deynzer* v. *Campbell* was evenly divided the appeal from the decision of Northcroft J. in the Supreme Court was dismissed. This difference of judicial opinion meant that no clear answer was given to a number of questions concerning the tenure of Crown servants. It has been suggested that matters should not have been left as they were and that the Legislature should have intervened to establish a clear rule as to tenure.[5]

It is probably desirable, before the narrower question of tenure of Crown servants is further discussed, to make at least a passing reference to the general issue of contracts entered into by the Crown. [6] Despite the celebrated but somewhat misleading dictum of Rowlatt J. in the *Amphitrite* case [7] that it is not competent for the executive to fetter its future executive action, the Crown can undoubtedly make a valid and binding contract. Probably the authority giving clearest support to this proposition is *New Souht Wales* v. *Bardolph*, [8] where the Crown was held liable under a contract made by the Superintendent of Advertising with a newspaper for publicising the tourist attractions of the State. That case also made it clear that although execution could not issue against the State and despite the need for the appropriation by Parliament of the funds needed to discharge contracts, this did not affect the obligation undertaken. Dixon J. (as he then was), said :

> . . . the prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract . . . It would be strange if liability to suit in contract were dependent upon the antecedent fulfilment of the condition that moneys have been made available to satisfy the claim. [9]

There are, of course, certain peculiarities attaching to Crown contracts [10] and the dictum of Rowlatt J., already mentioned, expresses an undoubted limitation applicable to Crown contracts. Earlier contracts made by the Crown must give way to later executive decisions. Presumably, the other contracting party would have action for breach of contract if the case did not fall under the doctrine of frustration. Furthermore, the contract must be made with a person who had authority to contract on behalf of the Crown, but this principle is a familiar one in the law of agency and in company law. A principal is not bound unless the contract is made by its authorised agent. Dixon J. (as he then was) stated :

> No statutory power to make a contract in the ordinary course of administering a recognised part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and, subject to the provision of funds to answer it, binding upon the Crown . . . In this manner the principle that Parliament shall control the expenditure of public moneys is preserved, but the subject is given a means of establishing the existence and validity of his claim against the Executive Government . . . But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available.[11]

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[1] The term Crown servant embraces those under the control of the Public Service Commission (the Public Service Act 1912), the General Manager of the Railways (Government Railways Act 1949), the Director-General of the Post and Telegraph Department (the Post and Telegraph Act 1908), the Commissioner of Police (Police Act 1958), those engaged in the Armed Forces as well as those who are employed under a number of other statutes, e.g. the External Affairs Act 1943, and who receive their salaries from State funds.

[2] [1950] N.Z.L.R. 79¢.

[3] *Ibid.*, p. 809, citing his statement in *Campbell* v. *Holmes* [1949] N.Z.L.R. 949, 980.

[4] For instance, if it is provided that Crown servants are dismissible on three months' notice, or that they hold office during good behaviour, do these provisions expressly or impliedly exclude the common law rule or are they merely incompatible with it ?

[5] See C. D. Beeby (1960) 3 *V.U.W. Law Review* 1, 13

[6] Probably the most authoritative review of this question (including the dismissibility of Crown servants) is J. D. B. Mitchell, *The Contracts of Public Authorities* (1954) esp. Chap. 2.

[7] *Rederiaktiebolaget Amphitrite* v. *The King* [1921] 3 K.B. 500, 504.

[8] (1934) 52 C.L.R. 455.

[9] *Ibid.*, 510.

[10] See Mitchell (op. cit.) Chap. 2 and A. E. Currie, *Crown and Subject* (1953) Chaps. 2 and 6.

[11] *New South Wales* v. *Bardolph* (*supra.*), 508-9.

LEGAL ANNOUNCEMENTS.

Continued from p. i.

TREVOR NEOL HOLMDEN, JAMES LEONARD MACINTOSH HORROCKS and DUNCAN DRAYTON BAMFIELD, practising as Barristers and Solicitors under the firm name of HOLMDEN & HORROCKS of New Zealand Insurance Company Building, Queen Street, Auckland, announce that as from the 1st day of April 1960 they have admitted into partnership RICHARD JOHN CRADDOCK, LL.B. The new partnership will be carried on at the same address under the firm name of HOLMDEN, HORROCKS & Co.

Messrs ROY WALDO FRY WOOD and ALARIC CALDO WOOD practising as Barristers and Solicitors at Lynton Buildings, 250 Great South Road, Otahuhu, announce that as from the first day of December 1960, they have admitted into partnership GEOFFREY FRANCIS RUCK, LL.B. The practice will be carried on under the firm name of WOOD, WOOD AND RUCK at the above address.

Messrs GASCOIGNE, WICKS AND WALTON, practising in partnership as Barristers and Solicitors at High Street, Blenheim, announce that they have been joined in partnership as from 1 January 1961 by MR R. D. ROUT, LL.B., for some time past a member of their staff. The practice will continue at the same address under the name of GASCOIGNE, WICKS, WALTON & ROUT.

PETER CECIL CALTHORPE KEETON, practising as a Barrister and Solicitor at Main Street, Upper Hutt, under the firm name of Macalister, Mazengarb, Parkin and Rose, wishes to announce that as from the 1st day of January 1961 he has admitted into partnership RODNEY BARTHOLOMEN GRUBI, LL.B. and the practice will continue to be carried on at the above address under the same firm name of MACALISTER, MAZENGARB, PARKIN AND ROSE.

MR D. J. SULLIVAN, formerly of D. J. Sullivan and Smith, Westport, has commenced practice as a Barrister and Solicitor at 25 Rangitikei Street, Palmerston North.

RALPH PATTICK THOMPSON, HAMISH STEWART THOMAS and FREDERICK JOHN SHAW all of 168-170 Hereford Street, Christchurch, Barristers and Solicitors, until now practising under the firm name of CHARLES S. THOMAS, THOMPSON & HAY, hereby give notice that as from 16 January 1961 the firm name will be known as RALPH THOMPSON, THOMAS & SHAW.

R. P. THOMPSON.
HAMISH S. THOMAS.
F. J. SHAW.

Messrs R. R. Aspinall, M. Joel, H. L. Aspinall and R. M. Hall at present practising in partnership as barristers and solicitors at Halsbury Chambers, 150 Rattray Street, Dunedin, under the firm name of Apinall Joel and Hall announce that they have admitted into partnership Mr K. C. Marks LL.B. for some years a member of their staff. The firm will continue to practise under the same name at the same address.

SOLICITOR. A vacancy exists for a Solicitor in the General Manager's Office of the New Zealand Government Railways, Wellington. Applications from partly qualified persons will also be considered. The successful applicant will receive a salary commensurate with his qualifications and experience. Write, giving full particulars, or apply in person, to:

Law Officer,
NEW ZEALAND RAILWAYS,
Private Bag,
WELLINGTON.

It has been established that the Crown is competent to make binding contracts. It is possible, therefore, that the relationship between the Crown and its servants arises from a contract of service. There has been some controversy about this, but the New Zealand Court of Appeal has expressed itself as supporting the "contract" theory.[12] Elsewhere, there is also support in somewhat more definite terms, for the contractual basis for the civil as distinct from military service.[13] But there is judicial opinion tending in the opposite direction.[14]

The contractual basis for tenure is attractive, possibly because the dismissal of Crown servants is more easily understood if a contractual basis for the engagement of civil as distinct from military servants is assumed. Dismissibility is best understood on the basis that rules as to tenure are part of the terms of the contract made with the Crown. In *Shenton* v. *Smith*[15], the Judicial Committee stated the rule as to dismissal in these terms:

> . . . unless in special cases where it is otherwise provided' servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service.

Moreover, in *Reilly* v. *The King*[16], the Judicial Committee gave, in the extract that follows, some indication of the circumstances in which the common law rule as to dismissibility at pleasure would be excluded:

> If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded . . . [Their Lordships] content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined.

After his examination of the authorities Mitchell expresses himself as satisfied that:

> If the rule of dismissibility at pleasure is to be maintained, some other justification for it must be found than prerogative. There remains . . . the basis of an "implied term".[17]

Despite these points of controversy, the principle as to tenure is clear enough. Rowlatt J. stated it:

> . . . except under Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure.[18]

O'Leary C. J. expressed it thus:

> The result of these authorities is that it is an implied term in the engagement of every person in the Public Service that he holds office during pleasure, unless the contrary appears by statute.
>
> Unless, then it is otherwise provided by statute, the annulment of his appointment or his dismissal gave plaintiff no rights. Is it otherwise provided?
>
> To answer this question, it is necessary to examine the provisions of the statutes dealing with the Public Service. Section 51 of the Public Service Act 1912, provides:
>
> > Every officer shall be deemed a three-monthly servant, and removable by the Commissioner at any time after three months' notice.
>
> It is therefore, "otherwise provided by statute" in respect of the termination of an "officers'" service, and, if the plaintiff was an "officer," then his appointment was wrongly annulled. Section 3 of the Public Service Act 1912, define "officer" as follows:
>
> > "Officer" means a person employed in any capacity in any branch of the Public Service to which this Act applies, but does not include a person serving on probation in terms of sections thirty-nine, forty-three, or forty-four hereof, nor a person temporarily employed.
>
> If, then, plaintiff was a probationer, s. 51 would not apply: his appointment, as will be seen, could be annulled: in other words, his appointment could be determined at pleasure.[19]

As already stated, however, the difficulty lies in applying the principle to given facts. Is inconsistency with the common law rule sufficient to exclude dismissibility at pleasure? The recent cases will be examined to determine the application of the principle.

In *Campbell* v. *Holmes*,[20] the Court of Appeal decided:

(1) that probationary public servants are dismissible as pleasure;[21]

(2) that officers[22] (i.e. persons whose appointments had been confirmed) could not have their appointments terminated on the same basis as probationers. Officers are entitled to the benefit of s. 11 of the Public Service Amendment Act 1927, by which provision is made for the investigation of complaints and charges against officers.

On the facts of the *Holmes* case it was necessary to decide only that because Holmes was not a probationer he could be dismissed under s. 39 and was entitled to claim the protection of s. 51.

In the following year, it became necessary for the Court of Appeal[23] to examine the question of tenure

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[12] The judgments in *Campbell* v. *Holmes* [1949] N.Z.L.R. 949 and *Deynzer* v. *Campbell* [1950] N.Z.L.R. 790 are concerned with whether the term implied at common law has been excluded from the contract.

[13] See *Cary* v. *The Commonwealth* (1921) 30 C.L.R. 132, 137, per Higgins J., *Reilly* v. *The King* [1934] A.C. 176 and *R. Vencata Rao* v. *Secretary of State for India* [1937] A.C. 248, which accept the contractual basis of the engagement.

[14] See Mitchell (op. cit.), 37-52 and Currie (op. cit.), 18-24 and 31-4. Neither writer is prepared to state his view as to where the balance of authority lies.

[15] [1895] A.C. 229, 234-235. This statement negatives the suggestion that it is a prerogative power. Cf. *Mitchell* (op. cit.) 46-48.

[16] [1934] A.C. 176, 179-80.

[17] Op. cit. 48. Mitchell sees nothing illogical in prefering the "implied term" approach while expressing no opinion on whether there is a contractual basis for Crown service.

[18] *Amphitrite* case, *supra*, at p. 504.

[19] *Campbell* v. *Holmes*, *supra*, at p. 980.

[20] *Supra*. Earlier New Zealand cases include *Thorne* v. *Government Insurance Commissioner* (1885) 3 N.Z.L.R. S.C. 200 (an insurance agent),, *The King* v. *Power* [1929] N.Z.L.R. 267 (a police constable), *Barnes* v. *The King* (1933] N.Z.L.R. s. 167 (a Crown servant under the control of the Public Service Commissioner—referred to below as a public servant).

[21] The application of the common-law rule or reliance on the terms of the Public Service Act 1912, s. 39, would produce the same result.

[22] See Public Service Act 1912, s. 3

[23] With the exception of Hay J. in the *Holmes* case, and Gresson J. in the *Deynzer* case, membership of the Court was the same.

much more deeply. Deynzer had been transferred from the Department of Scientific and Industrial Research to the Social Security Department because the Public Service Commission did not regard him as a good security risk. He asked the Court for a declaratory order under the Declaratory Judgments Act 1908, that the Commission had acted *ultra vires* and for writs of *certiorari* and prohibition. Northcroft J. refused to grant him the relief sought, and the Court of Appeal was evenly divided, O'Leary C.J., and Finlay J., holding that the appeal should be dismissed while Gresson and Hutchison JJ., would have allowed the appeal. Although this case involved the *transfer* of a public servant, the reasoning of most of the Judges was that if a public servant could be dismissed without notice in these circumstances, he was liable to transfer at the discretion of the Public Service Commission. Northcroft J. decided that Deynzer was properly transferred under the powers given to the Commission by s. 12 of the Act.[24] O'Leary C.J. considered that there was, in addition, the power of transfer given by s. 50. Moreover, the security of the State was involved.

He stated :

> In considering the status of a public servant and the power to deal with him, regard must be had to the fundamental maxim *Salus populi suprema Lex*, for the welfare of the State must at all times be paramount in determining the relations of the Crown and the public servant . . . If the servant is dismissible at the Crown's pleasure, then he must be transferable at the Crown's pleasure, with the alternative of dismissal if he does not accept transfer. If, in the present case, the responsible advisers of the Crown honestly concluded that the applicant was not a good security risk, what could have been done ? I think without doubt appellant could have been dismissed, or, if dismissal was thought to be too drastic, and if it was thought that appellant could do useful work in another Department and would not be a potential danger, then the Crown (his employer) could transfer him to another Department, and, failing his concurrence, he could have been dismissed. The interests of the community and the welfare of the State would demand such action. What I have said would have reference to the question if there were no relevant legislation affecting the position.[25].

The last sentence of this statement indicates that unless there is statutory protection against dismissal (or transfer) in such cases the rule stated will apply. After examining the statute, the learned Chief Justice decided that the Act did not alter the common-law rule. It was Finlay J., who introduced the notion of a " code "—that the common-law rule as to dismissibility applied unless the Public Service Act could be described as containing all of the rules governing the employment of public servants. He stated :

> . . . that the legislation is not an exclusive code for the governance of the Public Service, and that it was not the intention of the Legislature to detract from the rights of the Crown to any greater extent than the statutes, by express provision or by necessary implication, make manifest . . . [26]

Although this is a useful method of approach it has one disadvantage—the word " code " tends to suggest provisions of some length and in some detail, whereas what the Courts must decide is whether the statute has excluded the common-law rule of dismissibility at pleasure. This it is submitted, can be as effectively excluded by a single section which grants tenure to the office-holder as by a statute which is devoted to determining in detail the rights and obligations of employees and which could be described as a true " code " in the generally accepted sense.

Gresson and Hutchison JJ. decided that Deynzer could not be transferred without compliance with s. 11 as to complaints and charges against officers. Furthermore, the common-law rule of dismissibility had been excluded by the terms of the Public Service Acts. Hutchison J. took a different view from Finlay J. on the question of whether the legislation constituted a code. He stated :

> The provisions of the statute are inconsistent with a term that the Crown may put an end to the employment of these officers at pleasure ; and I do not think that there is room for a view that a residuum of the common-law right still remains with the Crown in its relationship to them. In my opinion, the effect of the Act and its Amendments is to provide a code regulating the employment of public servants to whom it applies, and these officers fall within the category illustrated in *Gould* v. *Stuart*.[27].

The majority reached the conclusion that for certain reasons, including the interests of security, public servants are dismissible at pleasure despite the terms of s. 51 under which three months' notice must be given to an officer before he can be removed. Presumably, those who decided contrary to Deynzer's claims would have said that although s. 51 gives the Commission the power to dismiss any officer by giving three months' notice, this is without prejudice to the immediate dismissal of persons who are security risks. If this is so the protection thought to have been given by s. 51 may prove to be illusory in that it can be construed so as not to apply in other circumstances as the occasions arise.

In *Kaye* v. *A.-G. for Tasmania* [28] it was argued that the regulations governing the Police Force constituted a code and therefore excluded the operation of the common-law rule as to dismissibility at pleasure. But Dixon C.J., Fullagar, Kitto and Taylor JJ. disposed of the argument in these words :

> It was argued that ss. 10, 11 and 12 amounted to a " code ", dealing exhaustively with the appointment and dismissal of " officers of police " and " other police officers " respectively, and vesting the power of dismissal exclusively in the Governor in the former case and exclusively in the commissioner (subject to the approval of the Minister) in the latter case. But what was essentially the same argument was put and rejected in *Ryder* v. *Foley* . . . It was argued that these provisions, which are clearly intended for the benefit of police officers, are inconsistent with the continued existence of a term of the contract of service that the Crown may put an end to it at pleasure.[29]

In this case there was a substantial volume of legislation dealing with conditions of service, but the Court held, nevertheless, that the common-law rule had not been excluded.

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[24] Under s. 12 the Commission has power to inspect Departments and to dispense with the services of persons who cannot be usefully and profitably employed.

[25] At pp. 810 and 811.

[26] At p. 815. Finlay J., also considered that the Public Service Acts merely settled the powers of the Commission, leaving unaffected the powers of the Crown. Hence the power of dismissal at pleasure was always available to the Crown, though it might not be possible, because of inconsistent statutory provisions, for the Commission to exercise it. On this question see O'Leary C.J., who offered no view (p. 812) and Hutchison J., who saw no room for a residuum of power in the hands of the Crown (p. 831).

[27] At. p. 831.

[28] (1956) 94 C.L.R. 193 noted in (1957) 1 *Melb. U.L.R.* 114.

[29] At pp. 200-2. The judgment of Williams J. was to similar effect. He spoke of the power of dismissal as if it were a prerogative power of the Crown which could be taken away or derogated from only by a statute.

These decisions show that the common-law rule as to dismissibility at will, will apply unless the Crown servant can point to a statutory provision which is in consistent with the common law. Obviously if legislative intention to exclude the common-law rule can be shown, the common law will have no application. The question is not, it is submitted, whether the legislation is a *code*, but rather is it a question of an inconsistency between the statute and the common law. Of course, if the legislation is a *code*, the common-law rule will of necessity be excluded. But a legislative provision may be sufficient to exclude the common rule without being a code in the usual sense of that word.

We are left with a principle as to tenure, about which there is no controversy, and a series of cases where the Courts have attempted to apply that principle but have failed to supply the essential element of predicability to the law. For this reason, the present state of the law is unsatisfactory and legislative intervention is desirable. Most state employees with " permanent " appointments assume that their tenure is protected but on the basis of the cases examined in this note, their confidence is misplaced.

J. F. NORTHEY.

WHAT EXACTLY IS A SANCTION:

We once knew a man who was a considerable success in Court even though he felt he had never been trained for it. His outlook on Court matters was, first, that the law was not an ass and, secondly, that it helped clear thinking if one could draw a parallel from a familiar background. Students of Agatha Christie will recognise that this is the method used by Jane Marple when dealing with murders.

We remember that when, in 1915, America changed from a borrowing nation to a lending nation, it acted rather like a small boy with a stick and a corrugated iron fence. It did everything possible to bring attention to itself without worrying about the effect on the neighbours. When the neighbours took umbrage the small boy could not belive that any action of his could be disapproved. In fact one of the small boys in 1942 wrote a book called " One World ", which showed how rich and wonderful the small boys were. Fortunately, the boy is growing up and no doubt in time he will be able to get on with his neighbours. During the second German war, Mr Nassar became for a short while an apparently rich man—the head of a creditor nation—and he borrowed the stick and the fence.

The process seemed easy and more recently Mr Limpopo tried to capture the stick and the fence—which was then being used by Mr K. Unfortunately for Mr Limpopo he apparently did not have the spending power of his predecessors.

These thoughts have been engendered by the reports of the Battle of Hastings. Fifty years ago it was the ambition of one group of people to reach a stage where every man should be entitled to a wage which would provide for himself his wife and two children (incidentally this meant in 1910 a basic wage of £4. 10s. per week). They worked hard to achieve this end. They were not quite sure whether this standard wage should cover the single woman school-teacher in the five or six years between becoming a B.A. and her retirement in order to become an M.A. There were other difficulties in regard to this standard wage which no doubt time would have smoothed out, but about 1935 this group ceased to be student economists and became, with others, in charge of the shop.

Unfortunately the student economists were at this time a minority in this group, and the group took steps to make every boy and girl financially independent immediately he or she left school. This left the parents and the community at large without any sanctions while the children were growing up. This obviously led, in a comparatively short time, to the Battle of Hastings.

This question of sanctions was well illustrated towards the end of last football season. A football team wished to recapture a shield which apparently had a certain amount of importance. To a listener on the radio it seemed that the challengers, adopting the methods favoured by the French League players, thought that the match could be won if certain active members of the shield-holders' side were incapacitated. Public opinion did not appear to object to this method, but the referee did, with the result that, by the exercise of the referee's sanctions, the defenders scored three penalty goals in the first twenty minutes.

And as Alice would have told us " The moral of that is—Don't throw your sanctions away." As however, the sanctions have been thrown away and as we object to the strap, what are we going to do to restore them ? To *Advocatus* it seems that one simple method would be to restrict the wages payments to all infants to a fixed sum. Any wages earned in excess of the standard payments should be retained in a common fund, preferably the Social Security Fund, which department allready knows so much about us. Interest could be allowed on this fund at say two per cent, tax-free, but the capital fund would not be payable until the youth reached 21,or preferably 23. Interest earned by the department above the two or three per cent could help to pay the working of the funds and in effect would be payment of taxation. If it became necessary for a young wage earner to be paid from his own earning more than the standard wage—as, for instance, in the case of sickness or marriage—then this could be done by approaching a Magistrate (or should it be a Minister of the Crown) for an interim order which application should be backed by the parent, and by reports similar to the existing reports under the Adoption Act. Possibly variations would be necessary in the standard wage where the youth lived at home so that a parent should receive a just payment for board. On becoming 21 or 23 there would thus be a fund available for marriage—or for setting up a home. One other interesting repercussion of this method would be the indirect control exercised on landladies.

We have a Supreme Court Bench of which any country could be proud. Part of the character-building of these gentlemen was due to the direful times of the 1930's. The men who grew up or lived through that period learned that money was something which had, first, to be earned and, secondly, to be saved. We know nothing of school-teaching, but we feel that life cannot be lived on the play-way system.

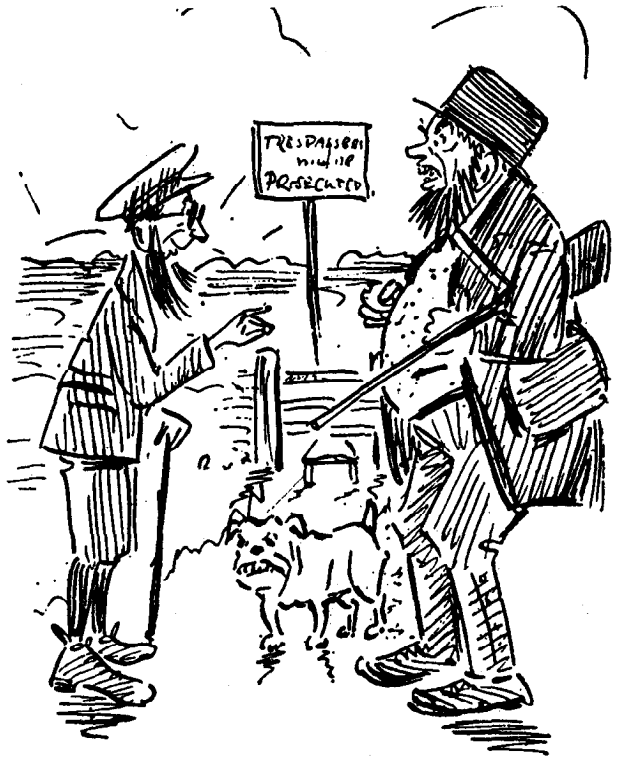
ADVOCATUS RURALIS.

FORENSIC FABLE.

By "O"

The Real Property Lawyer and the Surly Gamekeeper.

Once Upon a Time there was a Learned Real Property Lawyer whose Industry and Erudition were the Pride and Joy of Lincoln's Inn. He Knew All About Reversions, Easements in Gross, Registration of Title, and Ancient Lights. In Short, he was Hot Stuff. At the Same Time he was not a Mere Book-Worm. Every Sunday he Took a Long Country Walk in Order that his Physical Frame, Exhausted by the Labours of the Week, might be Recuperated and Refreshed. After a Comfortable Tea at a Wayside Inn he would Return by Train to Porchester Terrace, where a Cold Supper Awaited him. Familiar as he was with the Niceties of the Law, Notices Forbidding him to Trespass under Pain of Prosecution Caused him no Alarm. If Challenged by the Owner of the Messuage or Hereditament through which he was Minded to Pass, he would Point Out that he was Making no Claim of Right, that his Act was Tortious and not Criminal, and that he was Ready to Pay any Damages which a Civil



Court might Assess. He Found that the Owner Invariably Permitted him to Proceed upon his Way. One Sunday Evening the Real Property Lawyer, Some-what Fatigued by a Twelve-Mile Walk, Took a Short Cut through the Deer-Park Surrounding the Elizabethan Mansion of Sir Moses Blumenkopf, First Baronet. By so Doing he was Making Sure of Catching the Six-Forty-Three Train to Victoria. When the Real Property Lawyer was a Few Hundred Yards from the Highway, he Encountered a Surly Gamekeeper who was Accompanied by an Ill-Looking Dog. Barring his Progress, the Surly Gamekeeper Asked him in an Angry Voice and Highly Illiterate Terms What the Blazes he Meant by Coming on to Land Where he hadn't No Business not to Be. The Real Property Lawyer Adjusted his Spectacles, and Replied that he was Well Aware that he was Committing a Civil Trespass. He Added that he was Prepared to Accept Service of a Writ of Summons, should Sir Moses See Fit to Institute Proceedings in the Chancery Division. The Real Property Lawyer then Drew from his Pocket the Sum of Sixpence and Offered it to the Surly Gamekeeper, Begging him to Note that he had Made a Tender of An Adequate Sum by way of Damages. Did the Real Property Lawyer's Entirely Correct Demeanour Pacify the Surly Gamekeeper? Far from It. Uttering Strange Oaths, he Seized the Real Property Lawyer by the Left Whisker (Causing him thereby Considerable Pain) and Intimated that if he did not Forthwith Retrace his Steps he would Jolly Well Bash his Face In. The Ill-Looking Dog meanwhile Emitted Growls of a Very Unnerving Character. Deeming it Prudent to Close the Discussion, the Real Property Lawyer Silently Limped Away in the Direction Indicated by the Surly Gamekeeper. In Consequence he Missed his Train, was Very Late for Supper, and Incurred the Grave Displeasure of his Housekeeper.

Moral.—*Good Law Makes Hard Cases.*

PERSONAL.

Mr Justice Shorland left New Zealand by air for Australia on 28 December at the commencement of his sabbatical leave. After a month in Australia he will travel by air to Great Britain and return to New Zealand early in August 1961.

Mr T. C. Brandon was admitted as a solicitor by Mr Justice Haslam in the Supreme Court on 13 December on the motion of his father, Mr P. Brandon.

Mr J. J. Fordham was admitted as a barrister by Mr Justice Haslam in the Supreme Court on 13 December on the motion of Mr P. J. Treadwell.

Mr J. R. Reddy was admitted as a solicitor by Mr Justice McCarthy on 16 December on the motion of Mr L. M. Papps. Mr Reddy intends to practise law in Fiji.

The Hon. Arthur George Lowe, Chief Justice of Fiji was created a Knight Bachelor in the New Year Honours List. Sir George was born and educated at Auckland and practised law at Helensville until 1935, when he became Legal Secretary at Tonga and acted as Chief Justice for a period. After serving in the Royal New Zealand Air Force for some five years he joined the Colonial Legal Service in 1945 and served in Kenya, Malta and Tanganyika, where he was appointed a Judge of the Supreme Court. In 1958 he was appointed to his present position of Chief Justice of Fiji.

Mr A. L. Tompkins Q.C., has returned to Hamilton after an absence of seven months on a visit to Europe and America, in the course of which he attended, as New Zealand's delegate, the International Bar Conference at Salzburg in July last. Immediately prior to Christmas Hamilton practitioners held an informal function to welcome back Mr Tompkins and also Messrs. W. C. Henry and H. M. Hammond, two senior practitioners who had also travelled overseas during 1960.

THE INTERNATIONAL COMMISSION OF JURISTS.

Report on South Africa

Recent developments in South Africa have focused the attention of the world on the seriousness of the situation in that country. For several years now the International Commission of Jurists—in conformity with its general policy of promoting and strengthening the Rule of Law throughout the world—has watched that situation and has made known its concern about cases of systematic injustice and of repeated violations of human rights by sending observers to the Treason Trial and by publishing legal reports and information on those abuses of fundamental rights.

The re-opening of the interminable Treason Trial, now entering its fourth year, provided the Commission with an opportunity to re-examine the South African situation and to bring it again to the attention of the world. The disturbances and shootings at Sharpeville made that re-examination imperative.

The Commission was fortunate to obtain the agreement of Mr F. Elwyn Jones, Q.C.,M. P., to go to South Africa as its observer. Mr. Elwyn Jones is the Recorder of Cardiff and a busy practitioner in the English Courts. He appeared just before his departure to South Africa on behalf of the Civic Trust in the famous inquiry into the proposed re-building of the Monico site at Piccadilly Circus. He was a prosecuting counsel at the Nuremburg trials and was an observer at the Poznan trial of 1956. He is a Labour Member of Parliament and during the Labour Administration from 1945-1951 was Parliamentary Private Secretary to the Attorney-General, then Sir Hartley Shawcross.

Widespread Inquiries

During his visit to South Africa, Mr. Elwyn Jones heard two days of the evidence at the Sharpeville Inquiry at Vereeniging and spent one day at the Treason Trial at Pretoria. He also attended the Native Commissioner's Court at Forsburg and heard eighteen cases alleging Pass Law offences being tried. He talked to the Judges at the Treason Trial and to Mr. Justice Wessels, who was conducting the Sharpeville Inquiry. In the absence of Mr. Erasmus, the Minister of Justice, he had an interview with Dr. C. J. Greef, Secretary of the South African Ministry of Justice and, in addition, talked to many of the Judges, barristers and attorneys of South Africa, Members of Parliament and many other people, European and African, in various walks of life.

The purpose of the visit was to inquire into the state of human rights and fundamental freedoms in the Union. Much despair and anxiety were found among most of the people to whom he spoke. There was a great deal of indifference or unconcern among much of the European population (English as well as Afrikaner) about what was going on, but he did find a good deal of awareness of what was at stake among not only Africans, but Europeans.

Mr. Elwyn Jones reported that the Africans to whom he spoke or whom he heard giving evidence, showed no sign of being cowed, despite the sixty-nine African dead of Sharpville and the other grim events that had happened this year.

Sharpeville Inquiry

They had reached the last stages of the evidence at the Sharpeville Inquiry at Vereeniging when Mr. Elwyn Jones went there on May 23. The Inquiry was being conducted by the Honourable Petrus Johannes Wessels, Judge of the Natal Provincial Division of the Supreme Court of South Africa. Its terms of reference were simply "to inquire into the events in the Districts of Vereeniging (at Sharpeville Location and Evaton) and Vanderbijl Park on March 21, 1960". The terms of the Langa Inquiry however were "to inquire into and report upon the events in Langa Location on March 21, 1960".

"Nevertheless", said Mr. Elwyn Jones "there is no doubt that Mr. Justice Wessels will report on Sharpeville and it would not therefore be appropriate for me to try to prejudge his conclusions. It is regrettable that the South African Government has not exercised similar restraint. Mr. Louw and Mr. Erasmus, the Minister of Justice, have both made public statements expressing opinions on the main issues the inquiry Judge must decide. The Government's Information Office in New York has issued a statement that the disturbances at Sharpeville were the result of a planned demonstration by some 20,000 Bantu in which demonstrators made a deliberate attack on a police station with assorted weapons, including firearms. Every allegation of fact made in this statement was being energetically challenged by the able counsel appearing for the victims at the inquiry. Were these ordinary criminal proceedings, such comments (and other similar comments have been made publicly by leading members of the Government) would constitute a flagrant contempt of Court.

"Just as surprising in a country which has had a notable tradition of respect for the law, was the activity going on in the adjoining Vereeniging Court on May 23. About fifty singing and cheering detainees were brought there in two wire-enclosed lorries on charges of "public violence" at Sharpeville on March 21. Some of them had themselves been shot that day. Relatives and friends crowded the yard at the back of the Court to give them parcels of food and clothing".

One of the detainees complained in Court about the bad conditions in prison—assaults and lack of blankets. He told the Magistrates that if the attacks continued, the prisoners would retaliate. The Magistrates said that there was a visiting Magistrate to whom the complaints could be made. The prisoner said he had not seen one. Another prisoner was an African schoolmaster named Lechael Musibi who had given evidence in the adjoining Inquiry Court. He was arrested after he had given evidence. He applied for bail. The Magistrate requested recognisances of £50. This the schoolmaster could not provide and so he stays in prison. The Attorney-General, Mr. Claasens and also Dr. Greef, of the Ministry of Justice, were asked whether it was proper for the Government to lay charges alleging public violence against members of the crowd before Mr. Justice Wessels had made his report and determined the important issue whether the

crowd had been peaceful or violent. Dr Greef admitted that the circumstances might give " some slight cause for misgivings ". Both he and the Attorney-General thought that probably none of the public violence cases would be heard before Mr. Justice Wessels reported. The Attorney-General did not think these cases impinged directly on the terms of reference of the Sharpeville Inquiry. A copy of the summonses against the fifty Africans concerned disclosed that eleven to eighteen charges were based in terms on the police version of the Sharpeville incidents. Here again there seemed to be a flagrant contempt of the inquiry Judge. Dr. Greef's justification was that unless these accused were held " they will disappear as they are part of a migratory population ". But the fact is that they can be detained without trial under the emergency regulations.

One of the witnesses heard giving evidence at the inquiry was a grave African Presbyterian Minister, Rev. Robert Maja. By the time he testified the little Court room (partitioned for Africans on the right and Europeans on the left) was packed. There was apartheid in the witness box, too ; it, too, was partitioned. Though witnesses swore the same oath, the Africans took it in the half of the witness box further away from the Bench and Europeans in the other half. Most dramatic was the moment when a youthful policeman (who, sten gun in hand, had been on top of one of the Saracens within the police station compound) was shown the amazing photographs taken by a cameraman before, during, and after the shooting ; these photographs may well be of the greatest assistance to Mr. Justice Wessels when he comes to make his report.

Treason Trial

The Treason Trial was being held in a de-consecrated synagogue in Pretoria. All the defendants were in custody as detainees under the emergency regulations. "Again I will not comment on the proceedings," said Mr. Elwyn Jones " but one wonders whether the trial has not been rendered abortive by the fact that the African National Congress (which in a broad sense is the principal accused) has been banned by the Government as an unlawful organization, and the individual defendants have all been detained under the emergency regulations ; during the previous three years they have been on bail."

A visit was paid to the Native Commissioner's Court at Forsburg on May 30 which was the day before the Fiftieth Anniversary of the Act of Union ; in consequence there was an amnesty for certain classes of prisoners. This was presumably why sixteen out of eighteen of the prisoners charged with offences against the Pass laws (who were dealt with in 38 minutes) were remanded for inquiry. One prisoner was a barefooted schoolboy of 16 who had never had a Pass. " The fact that you are at school does not mean that you don't need a Pass," said the Magistrate. " You must get a Reference book and the Principal of the school must sign it every quarter and the Registrar must sign it to show that you are permitted to be here."

There followed a barefooted African in rags who said " I am a miner. I was discharged on Friday and arrested on Saturday. I'm going to another mine."

" See you get your papers in order," said the Magistrate. In an adjoining Court another Magistrate was also hearing these pathetic Pass cases, eloquent of the personal degradation the Pass laws cause.

Aspects of Apartheid

One dignified African woman met said that two things distressed her most. " One is the Bantu education system " she said. " They are teaching our children just enough to keep them as menial servants. They have shut the door on our progress. The other thing is the Pass system. It is a torture and a humiliation, made worse by the way it is enforced. Young policemen will stop an elderly African and say : 'Kaffir, where is your Pass ? ' The African is struck in the face if he is slow in producing it."

A lawyer told Mr. Elwyn Jones he had once given a lift to an African during the bus boycott days. A young policeman questioned him about it. The lawyer asked him why he was molesting people like this African who had been " working for us all day in a factory ". " By God, Sir," said the Policeman, " they are our enemies." Incidentally, only African policemen have numbers on their tunics to enable them to be indentified by the public. European policemen have none.

A Sombre Scene

" The Population Register, the Pass system and the establishment of Group Areas are the main pillars of apartheid " said Mr. Elwyn Jones " Race classification is now taking place in South Africa. Humiliating inquiries are being made into people's social antecedents and many individual tragedies have been caused. Recently, the Minister of the Interior justified these actions by saying that many people had lived all their lives in a state of unease because it was uncertain to which racial group they belonged. But now certainty has been given and the clouds which hovered over them had disappeared. In truth a case can be re-opened should it be alleged that a person has been wrongfully classified, so that unless a case has been taken to appeal there is no certainty."

Mr. Elwyn Jones reported that, to the lawyer brought up in the traditions of the English common law, South Africa presented a sombre scene particularly as that law prevailed in wide areas of the criminal and constitutional law of the land. For the Nationalists regarded the Rule of Law, as interpreted by an independent judiciary, as an unfortunate legacy of British colonial rule of the 19th century. Boer farmers resented then the influence of the English criminal law which, for example, allowed African farm workers in the Cape to bring charges against their white masters. Incidents which arose soon after the British occupied the Cape showed that racial discrimination and equality before the law were incompatible. In the Transvaal Republic, for example, President Kruger dismissed Chief Justice Kotze, who sought to adjudicate upon the validity of the legislation of Kruger's Government. The Nationalists' attitude to the Rule of Law was never more apparent than in the struggle between the Government and the Courts during the constitutional crisis of the 1950's.

At the Ministry of Justice in Pretoria, Dr. Greef told Mr. Elwyn Jones that 1,813 non-whites and 84 whites were still in detention. He said that the interrogation of mothers with children was being speeded up and that the release of detainees would continue. Those who remained in detention had not yet had any charge made against them, nor had the nature of the proposed charges yet been decided upon. Dr. Greef said that of the 18,011 Africans arrested during the emergency,

1,700 were detained under the emergency regulations. The cases of approximately 16,300 of those arrested were disposed of by the beginning of May.

Duration of Emergency

Dr. Greef was asked when the emergency was likely to be ended. He said that twenty-seven of the ring leaders had "escaped the net" and that twenty of them were in the High Commission Territories, fourteen in Swaziland and six in Basutoland and Bechuanaland. The others had disappeard into thin air.

"Until the British authorities deliver them to us, we are in a position of stalemate," Dr. Greef said.

When informed that it was manifest that no British Government would be a party to the handing over of political refugees Dr. Greef said that even if the stalemate continued this did not mean that the emergency would go on indefinitely.

In a subsequent letter to Mr. Elwyn Jones Dr. Greef said: "I now wish to place on record the following three further reasons advanced by the Honourable the Minister of Justice in the House of Assembly for the continuation of the state of emergency:

"(a) The 26th day of June is known and annually observed by members of the congress movement as the so-called "Freedom Day". It is considered unwise to lift the state of emergency prior to that date and so soon after the recent disturbances.

"(b) The interrogation of a number of persons who have been arrested and are being detained in terms of the Emergency Regulations had not yet been completed.

"(c) In terms of the Emergency Regulations the main urban areas are at present being cleared of Bantu idlers who during the disturbances, proved to be the shock troops of the inciters."

The original emergency regulations containing twenty-six sections are well-known. On May 17, 1960, the Governor-General made a further proclamation in which three further very important regulations were added. The most disturbing is the section which declares that the Courts cannot entertain any application arising out of the detention of any individual. Thus Habeas Corpus does not exist for detainees (who most need its protection) nor can there now be any application to the Courts such as was made in the case of Miss Hannah Stanton.

Legal Advice Withheld

In these circumstances, a legal adviser can be of little assistance except to hear the complaints of the detainee against the manner and circumstances of his detention, upon which he might be instructed to make representations to the appropriate authorities. But even this modest protection has been removed. The new Proclamation states that "no person, who has been arrested and is being detained under Regulation 4 or 19, shall, without the consent of the Minister or person acting under his authority, be allowed to consult with a legal adviser in connection with any matter relating to the arrest and detention of such a person."

When asked for an explanation of this infringement upon the rights of the detainees the Ministry of Justice replied that certain defending lawyers would be likely to tell their clients not to answer any questions during interrogation.

There is a third clause in the new Emergency Regulations which states that no proceedings, whether civil or criminal, shall be brought in any court of law against "the Governor-General, any member of the Executive Council of the Union, a Commissioned Officer, or a Magistrate, or any person employed by the Government and even any person "acting by the direction or with the consent of" any Government employee, by reason of any act done in execution of his powers or the performance of his duties in pursuance of the Regulations. So long as such persons have acted in good faith, no proceedings can be brought against them in any Court of Law and moreover the Regulations create a presumption that the acts by them were done in good faith.

One of the few areas of freedom remaining in South Africa has been the legal profession, which has played an honourable part in resisting encroachments upon the Rule of Law and has fearlessly taken up the cases of those concerned, for example, in the Treason Trial, the Sharpeville and Langa Inquiries and many criminal proceedings of a political character.

Control of Bar

"The threat therefore of a system of governmental control over the Bar is a grave one" said Mr. Elwyn Jones. "A Bill has been drafted by the Ministry of Justice which is now being considered by the Bar. Under its terms there will be established a body to be known as the Advocates' Admission Board which would consist of a Chairman, who would be the Chief Justice of South Africa, two practising barristers appointed by the Minister from persons nominated by the Bar Council, two professors of law (again appointed by the Minister) from a list of nominees made by the University Law Faculties, and the Secretary for Justice or his nominee. This Board is to have the power "to make rules in regard to the admission to practice, suspension and removal from practice" of barristers."

Mr. Erasmus, the Minister of Justice, stated in the Senate on April 25, 1960, that "in South Africa, lawyers came too easily into the position where they could act as lawyers under the protection of "Officers of the Court". He added that he had instructed his Department to inquire into and to make recommendations as to how the admission of lawyers could be undertaken under stricter control than the Law Societies applied today and how the platte-land lawyer could come into his own again. The Selection Board could possibly also act in regard to a recommendation for removing lawyers from the roll. The definition of who was a "suitable or proper" person to become a lawyer, as was required by law, would have to be more strictly interpreted.

"In view of this statement by the Minister of Justice and the terms of the proposed Bill," continued Mr. Elwyn Jones, "it is not surprising that the South African Bar is apprehensive that the proposed measure is a challenge to the independence of the Bar, particularly since there is no indication in the draft Bill as to the grounds upon which a barrister may be refused admission or disbarred. A similar measure is said to be proposed to control the side-bar (solicitors).

TOWN AND COUNTRY PLANNING APPEALS.

General Trust Board *v.* Auckland City Council.

Town and Country Planning Appeal Board. Auckland. 1960. 23, 29 July.

Proposed District Scheme—Widening of Parnell Road, Auckland —Building line restriction—In accordance with town and country planning principles.

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

The appellant was the owner of a property bounded by St. Stephens Avenue, Parnell Road and St. George's Bay Road. The Council's proposed district scheme as publicly notified made provision for the future widening of Parnell Road from its present width of 66 feet to a width of 86 feet. This provision involved the imposition of a building line restriction along the Parnell Road frontage of appellant's property. The appellant lodged an objection to the proposed building line and when its objection was disallowed it appealed.

Aubin, for the appellant.
Butler and *Hollis*, for the respondent.
The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds that the provision for the proposed widening of Parnell Road in this locality is appropriate and in accord with town-planning principles.

The appeal is disallowed.

Appeal dismissed.

Queen Street Motors Ltd. *v.* Auckland City Council.

Town and Country Planning Appeal Board. Auckland. 1960. 27 June; 1 July.

Zoning—Land zoned as Residential D—Factors to be taken into account—Spot commercial zone in predominantly residential area contrary to town and country planning principles.

Appeal under s. 26 of the Town and Country Planning Act 1952. The company was the owner of a property situate at 365 Queen Street, Auckland where it carried on the business of motor-car dealers. This property was in an area zoned as residential D under the Council's proposed district scheme, as publicly notified. The appellant lodged an objection to that zoning claiming that its property should be zoned commercial C. This objection was disallowed and the appeal followed.

Henry, for the appellant.
Butler, and *Hollis*, for the respondent.

The judgment of the Board was delivered by

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

1. The property under consideration is on the western side of Queen Street, approximately 100 yards south of the Town Hall.

   It backs on to and overlooks Myers Park, and land on the opposite side of the Park on Grey's Avenue is also zoned as residential D.

2. In zoning the area in which this property is situated as residential D the Council was actuated principally by two factors, (a) the topography in that the land has a north westerly aspect and covers the sunny slopes at the higher end of Queen Street and Grey's Avenue. This makes it well suited for high density residential development, and (b) it is close to the proposed Civic Centre and to the hub of the shopping and business centre of Auckland. Residential D zoning permits of the land being used not only for high density residential development but also, inter alia, for professional offices, private hospitals, private hotels and some types of shops. The Board considers a residential D zoning to be appropriate.

3. To zone the appellant's property as commercial C would be to create a "spot" commercial zone in a predominantly residential area.

   This would be contrary to town-and-country-planning principles.

The appeal is disallowed.

Appeal dismissed.

J. Fraser and Sons Ltd. *v.* Invercargill City Council.

Town and Country Planning Appeal Board. Invercargill. 1960. 14, 29 September.

Conditional use—Land zoned residential—Churches and buildings used only for religious purposes a conditional use—Funeral parlour—Used commercially and not solely for religious purposes —Detraction from amenities of neighbourhood—Town and Country Planning Act 1953, ss. 38, 38A.

Appeal under ss. 38 and 38A of the Town and Country Planning Act 1953. The appellant company was the owner of a property No. 143 Gala Street, Invercargil, containing 1 rood, being 9 Block LIX, on the public map of the city and also property known as No. 138 Leet Street, Invercargill, containing 1 rood, being section 14 in the said Block LIX. These two properties together formed one block. The appellant carried on the business of funeral directors. They applied to the Council for a permit to demolish the existing residential buildings at No. 143 Gala Street and erect a building of a funeral chapel. They also applied for permission to use No. 138 Leet Street as a car park for the use of persons attending the funeral chapel. The Council refused its consent to the proposal relating to Gala Street upon the grounds that its recommended Code of Ordinances contains under the heading "Conditional Uses in Residental B Zones", a provision for "Churches and buildings used only for religious purposes". It was the opinion of the Council that the proposed funeral chapel did not constitute a building used only for religious purposes. The objectors objected to both the proposals on the grounds that they would detract from the amenities of the neighbourhood.

Arthur, for the appellant.
Schofield, for the respondent.
Hewat, for Park Hospital Ltd. and other objectors.
Dolan, for Leet Street Hospital Ltd., an objector.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence, and having inspected the area under consideration, the Board finds as follows:—

1. The properties under consideration are in an area zoned as residential B under the Council's undisclosed district scheme. The area is a good class residential area in an admirable situation facing, in so far as Gala Street is concerned, on to Queens Park. It can be reasonably anticipated that this residential character will enure.

2. It was contended by the Council that the words "building used for religious purposes" in the context in which they appear in the Code of Ordinances should be construed as meaning any building used for the general advancement and propagation of the tenets and views of any recognized religious order or sect. This is following a decision by this Board in the case of the *Presbyterian Church Property Trustees* v. *Christchurch City Council* (*ante* 81).

3. The question calling for determination is a very narrow one. The Board considers that in one sense a funeral chapel is a building used for religious purposes during such time as funeral services are being conducted therein, but it finds itself unable to divorce that use from the undertaking business of which it forms an integral part, and this business is, of course, a commercial one. The Board considers that it cannot be held that a funeral chapel is a building used only for religious purposes. Such a building must be tinged with a commercial colour.

The appeal is disallowed on this ground. In any case if the Board had not come to a decision on the question of the interpretation of the Code of Ordinances, it would and does decide that a funeral chapel in the middle of a good class residential area must detract from the amenities of the neighbourhood. In coming to this decision, the Board has been mindful of the fact that such a chapel could be used on every day of the week except Sundays, and on occasions could be used two or three, if not more, times a day. The attendant concentration of cars and the coming and going of funeral corteges would detract from the amenities of the neighbourhood.

The objections are upheld and the appeal is disallowed.

Appeal dismissed.,

(Continued on p. 16.)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The "Use" of the Vehicle. The phrase "arising out of the use of" a motor-vehicle has been the subject of some of the more interesting decisions under our Motor Vehicles Insurance (Third Party Risks) Act 1928, and Transport Act 1949. The toppling from a lorry of a crated motor-car (*A.P.A. Union Assurance Society* v. *Ritchie and Barton Ginger and Co. Ltd.* [1937] N.Z.L.R. 414); the falling of a bale of paper from the stationary tray of a motor-lorry (*Commercial Union Insurance Co. Ltd.* v. *Colonial Carrying Co. of New Zealand Ltd.* [1937] N.Z.L.R. 1041) and the mis-use of a mobile crane being operated to move concrete (*State Fire Insurance Office* v. *Blackwood and Ors* [1956] N.Z.L.R. 128) have all provided scope for differences of judicial opinion. In *Government Insurance Office of New South Wales* v. *King* (1960) A.L.R. 629, one Smith fitted a new part to his motor-car which was standing on the highway. To start the engine, Smith poured petrol from a tin directly into the carburettor. He pressed the self-starter and the engine started and then stopped. His brother then poured petrol from the tin directly into the carburettor while Smith again pressed the self-starter. The engine started and Smith was "revving" it as his brother continued to so pour in petrol. Flame came out of the carburettor and set the tin of petrol alight. When the petrol ignited, Smith's brother cast the tin of burning petrol from him and it burnt King who had been standing about six feet from the car and had commenced to walk forward to tell Smith's brother to stop pouring petrol or Smith to stop the engine. The motor-cat was insured under a third-party policy. The respondent King joined Smith as defendant in an action for damages founded on the negligence of Smith whereby King suffered personal injuries. The jury awarded damages in the sum of £500. Judgment fcr this sum and costs was not satisfied, whereupon King, pursuant to s. 15 (1) (a) of the Motor Vehicles (Third Party Insurance) Act 1942-1951 (N.S.W.), applied to the Supreme Court of New South Wales to enter judgment against the appellant, the Government Insurance Office of New South Wales. Collins J., granted the application and on appeal, the Full Court (Herron and Sugerman JJ.; Else-Mitchell J. dissenting) affirmed the decision. The appellant appealed to the High Court (McTiernan, Kitto, Menzies and Windeyer JJ.) which unamimously held that the bodily injury suffered by King was not caused by nor did it arise from the use of the insured vehicle.

Drivers, Wicked and Errant. At the 41st annual general meeting of the Magistrates' Assoication held in London in October, Devlin L.J. gave an address to the members which is noted in the "General Intelligence" section of the *Law Times*. He spoke of the reluctance of juries to convict in cases of dangerous driving and driving when under the influence of drink. He recalled that in 1959 of 543 persons tried by jury for dangerous driving 36 per cent were acquitted, and of 621 tried for driving under the influence of drink, 43 were acquitted, which was about four to five times the normal proportion of acquittals. This reluctance of juries to convict was a tendency which must seriously affect the penalties which magistrates could usefully impose. In 1956 the offence of killing by dangerous driving was created to replace manslaughter in which motor vehicles were involved and the law had been left in an unsatisfactory state by a decision in the House of Lords. Since juries could not give a compromise verdict in such cases, they now tended to acquit, and the punishment of imprisonment was now being reserved for the minority of realley bad cases. He believed that for dangerous driving as it was now interpreted, a jury was not a suitable tribunal. Juries were not always strong enough to see the need for discipline. The criminal law had lost much of the respect it ought to have because of a failure to distinguish between what was sinful and disgraceful and the measuring up to a required standard of good discipline. He would like to see an errant motorist treated primarily as a licensee who held his licence only during a period of good behaviour. He should be in no better position than the pilot of an aeroplane or the master of a ship. Offending motorists should not be divided into classes of the careless and the dangerous but into the wicked and the errant. An errant motorist should not be tried by a jury but by a magistrate and should be punished by disqualification. If he had not the skill and care which safety required, his licence should be taken away. The wicked alone, for whom imprisonment was an apt sentence, should be tried by a jury.

The Value of Compromise: "Sir Fletcher Norton, when at the Bar, was reputed to take Fees on both sides, and had acquired the Nick Name of Sir Bullface Double Fee. I remember going to a Consultation at Durham at Mr Lees Lodgings, when among other Things, he said the first Consultation he attended at Durham was in that same Room, when Sir Fletcher was the leading Counsel on the Circuit—that, instead of proceeding to discuss the Merits of the Case, upon which they meant to consult, Sir Fletcher said it was useless so to do. That his Clerk had taken in the Plaintiff's brief, and he had read it—that the Blockhead had also taken the Defendant's brief and he had, unluckily and accidentally read that too, forgetting that he was Counsel for the Plaintiff. Now, added he, if I go into Court Counsel for the Plaintiff God help the Defendant—if I go into Court Counsel for the Defendant, God help the Plaintiff! Now all this arises from the Folly of my Clerk, who took both briefs and both Fees. One of the Parties, who was there said, 'Why, Sir, you ought to return both Briefs and both Fees. When you read the Second Brief, you could not have forgotten the First, and therefore, your Clerk is not the only Person to blame.' 'Why, Sir,' said Sir F. 'how can you pretend to say what I had not forgotten? As for forgoing both Fees, the Thing is quite impossible. They must, they must compromise the Matter." They were forced to compromise, and he kept both Fees."

Lord Eldon's Anecdote Book.
(Stevens & Sons Ltd., 1960)

Tailpiece:

"I've heard it said that Sir Barnabas Beer
Spent most of his long and distinguished career
In moving masses of paper about
From a tray marked "In" to another marked "Out".

Daene Baldson.

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 14.*)

General Trust Board of the Diocese of Auckland *v.* Auckland City Council.

Town and Country Planning Appeal Board. Auckland. 1960. 27 July; 19 August.

Predominant use—Church, Sunday School and Church Hall—Does not include Private School—No appeal lies in respect of such schools when not included in objection.

Code of Ordinances—Bulk and location requirements—Churches in residential zones to be kept away from adjoining residences—Right to apply to Appeal Board for specific departure from standards laid down by Code—Town and Country Planning Act 1953, s. 35.

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

The first-named appellant lodged twentyfour objections to the respondent's district scheme. Such objections were made on a number of grounds but the appellant abandoned all such grounds except the following, which, in its relation to all zones specified, was common to all such objections.

"That the designation "Churches" (including the building or part of a building used for religious purposes as a Conditional Use in a [specifying in each case the respective zone] is inappropriate and not in conformity with the principles of town-and-country-planning."

The second-named appellant objected to the respondent's district scheme on the following grounds:

"I hereby wish to make a formal objection to the Ordinance of the district town plan designating Churches 'to be conditional uses' in all zones of the Auckland City Council's district planning scheme".

The remaining appellants supported the first and second-named appellants' objections.

The respondent allowed the said objections by and to the extent of the following amendments to Ordinance 9 of the Code of Ordinances:

(a) The inclusion of the following predominant use in following zones, residential B, C and D, commercial B and C, industrial B:

"Churches (being in each case the whole of a building)."

(b) The inclusion of the following conditional use in all the above-mentioned zones:

"Churches (being in each case the part of a building)."

(c) The inclusion of the following bulk and location requirements relating to Churches as predominant uses in residential B, C and D zones:

Front yards least dimension	..	20 feet
Rear yards least dimension	..	40 feet
Side yards least dimension	..	40 feet

The appellants contended that the Code of Ordinances should be amended in the following manner:

(a) That the phrase "Churches (being in each case the whole of the building)" be deleted wherever it occurs in the list of predominant use in Ordinance 9 and that the phrase "Churches (including a building used for religious purposes being in each case the whole of a building") be substituted therefore in each instance.

(b) That the phrase "Churches (being in each case part of a building)" be deleted wherever it occurs in the list of conditional use in Ordinance 9 and the phrase "Churches (including a building used for religious purposes) being in each case part of a building", be substituted therefore in each instance.

(c) That the bulk and location requirements are unreasonable in that the site and rear yard restrictions are unduly severe.

Aubin, for The General Trust Board of the Diocese of Auckland.

Wright, for the Roman Catholic Bishop of the Diocese of Auckland.

Turner, for the Baptist Union of New Zealand and The Stewards' Trust of New Zealand Incorporated.

Urquhart, for the Presbyterian Church Property Trustees.

Buddle, for The Salvation Army Property (New Zealand) Trust Board.

Peak, for the President of the Conference of the Methodist Church of New Zealand.

Butler and *Hollis*, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence the Board finds as follows:

1. During the hearing, counsel for the Council intimated that the respondent agreed that the definition for a church simpliciter was too restricted and the respondent was prepared to concede that the Code of Ordinances should be altered in relation to churches as predominant uses in residential B, C and D, commercial B and C and industrial B zones and should be extended as follows:

> Churches, Sunday Schools and church halls, being in *each case the whole of a building* used only for public or private worship, religious ceremonies, religious instruction, church meetings and church functions of social character.

The appellants, however, were not prepared to accept this as an answer to their appeal because no reference is made to schools. The Roman Catholic Church regards its schools as an integral part of its church, and it was claimed that the Code of Ordinances should be extended to include church schools in the definition. The position is, however, that private schools are a predominant use in residential zones and that in itself should meet the position, but in any case the Roman Catholic Bishop's objection made no reference whatsoever to schools and therefore schools were not considered by the Committee hearing the objections or by the Council and no decision was given touching schools. It follows, therefore, that there having been no objection to the zoning of schools there is no right of appeal in respect of that zoning. The Board considers that the Council has done all that it could reasonably be expected to do in making the concessions it has done in respect of the first ground of appeal. As to the second ground of appeal, the respondent is prepared to agree that the definition of churches should be extended by amending the Code of Ordinances so that a conditional use in all the above-mentioned zones should include an amended definition reading as follows:

> Churches (including a building or part of a building used for religious purposes) and being in each case part of a building should be included in conditional uses.

The Board directs that the appeal in respect of the Code of Ordinances should be allowed in part and the Code of Ordinances be amended in the manner indicated.

2. *Bulk and Location Requirements*: There is a conflict of evidence as to the reasonableness of otherwise of the bulk and location requirements appealed against. Having regard to the fact that these requirements relate to residential zones, the requirements are not too restrictive. Churches in residential zones should, wherever possible, be kept a reasonable distance away from adjoining residences. It must be remembered that it is the future not the present that is being planned for under this scheme. No doubt there must be many churches in and about Auckland that do not comply with the bulk and location standards, but the Code of Ordinances contains a waiver clause empowering the Council, in appropriate cases, to waive strict compliance with these bulk and location requirements and lay down bulk and location requirements best adapted for the situation to be dealt with. This, in fact, has already been done in recent months. The appellants say, in effect, in answer to this that they have no fear of the present Council not adopting a reasonable attitude, but they fear that some time in the future they may be faced by a hostile Council not prepared to give reasonable consideration to the bulk and location requirements of a Church. The Board is not prepared to accept such a statement as being well founded. It is not prepared to believe that any responsible City Council would adopt a hostile attitude towards the churches, but even if that unlikely event should come to pass, the Act provides a means by which the matter in dispute can be dealt with by this Board. If any Council acts in what is regarded as an unreasonable manner, then the church affected has the right to apply to this Board under s. 35 of the Act for the Board's consent to a specific departure from the standards laid down by the Code. The Board considers that this, in itself, affords all the protection that the appellants can be expected to need. The appeals are disallowed in respect of bulk and location requirements.

Appeals allowed in part.