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THE UNITED NATIONS SEMINAR ON THE PROTECTION OF HUMAN RIGHTS.

NOW that the Seminar has concluded the time is ripe for a discussion of certain aspects of the matters dealt with. Anything in the nature of a full report is out of the question for the JOURNAL and as we are at this stage very largely dependant on reports in the daily Press for our knowledge of what took place, and these reports obviously cannot be full and verbatim, even our comment may not be as full as can be desired. For any deficiencies we apologise in advance.

First as to the purpose of the Seminar. This was no doubt to enable a full and frank discussion among the delegates of the various countries represented in the hope that they might all gain information which would enable them to put forward suggestions for the improvement of the law in their own countries. As a corollary, of course, each delegate was charged with the responsibility for putting forward those aspects of his own country's laws on the subject of human rights which he thought worthy of adoption.

As was to be expected, the discussion ranged far and wide and various proposals, many of them of great value were made. Just what the practical effect of the holding of the Seminar is likely to be cannot be judged as yet, or indeed for some time to come, but it must be remembered that this is not an isolated meeting of the representatives of the countries concerned, but is only one of a series of such meetings. The results will therefore come to be judged by the effects of the whole series and not by those flowing from that held in New Zealand.

One question will concern all thinking persons—namely, how long should this series of Seminars continue ? It is right that they should carry on for so long as they are seen to produce useful results. They are however controlled (and, we understand, paid for) by United Nations, and with such a remote form of control there is always the danger that they will be continued as a matter of habit long after they have ceased to serve any useful purpose. Whether that point has yet been reached we are unable to say. The persons best able to judge would be the delegates themselves who would know what difficulties they were experiencing in finding matters suitable for discussion which had not already been adequately dealt with at earlier Seminars. All we do suggest is that this point should be kept under close review so that the Seminars may be abandoned when their usefulness has passed or, perhaps, that their frequency should be reduced as fewer and fewer suitable topics arise for discussion.

BLOOD TESTS FOR MOTORISTS.

One of the most interesting matters under discussion was the question whether a motorist under suspicion of being intoxicated should be made to undergo a blood test to ascertain the percentage of alcohol in his blood. The discussion turned largely on the legal questions involved and two of the principal protagonists of the proposal were Mr H. A. R. Snelling Q.C., Solicitor-General for New South Wales, and Professor Norval Morris, Dean of the Faculty of Law at Adelaide University.

Mr Snelling claimed that blood testing had reached a stage where its reliability was almost without question, provided that proper account was taken of the size of the man and his constitution. He thought that it might be going a little far to make the tests compulsory but said that voluntarily testing should be encouraged, which would of course necessarily imply that a refusal to undergo a test should not count against the suspect. Professor Morris went further, and advocated compulsory testing.

The legal aspects involve a consideration of the question whether compulsion is an infringement of the subject's human rights. It involves the use of force if the taking of the necessary blood is resisted, but this was likened to the legal use of force in arresting a suspect by the Solicitor-General for Hong Kong. Mr Chandbury Nazier Ahmed Khan, Attorney-General for Pakistan said that the needle injection required to obtain the blood sample might be considered an invasion of the inviolability of the human body but as people had to live in civilised society it was necessary in some cases to make the accused submit.

So far as we are aware, none of the delegates raised a point which was brought up in New Zealand some years ago when compulsory blood tests were being considered. It was suggested in some quarters that to make a suspect give blood for testing was analogous to forcing him to answer incriminating questions. We can see no force in this analogy. An incriminating question is one the answer to which is likely to incriminate the person being questioned. A blood test is one designed to establish innocence or guilt as the case may be, and has no bias either way. In any case the giving of blood for testing is no more self-incriminating than undergoing the physical tests now

applied to suspects. We suggest that this objection is without validity.

Interesting as it was, this discussion of the legal aspects of blood testing seems to be putting the cart before the horse, and some of the delegates appreciated this. Despite the view of Mr Snelling that blood tests under proper conditions are near infallible which seems to have been concurred in by Professor Morris, grave doubts were expressed whether the tests were reliable. With these doubts we agree. The tolerance of the individual is left out of account altogether, and as every one knows this varies greatly between individuals. In addition to this, the one person's resistance may vary from day to day and even from hour to hour according to the degree of fatigue, hunger and other factors to which he is subject at the particular time.

It is interesting that while this matter was under discussion at the Seminar there came to hand the February issue of *The New Zealand Motor World*, containing comment on this very point. There was there reported a case before one of the Victorian Courts in which a pathologist under cross-examination said that the previous medical assumption that, if blood from the heart gave a certain percentage of alcohol blood samples from other parts of the body would give the same result was not correct; in fact four samples from different parts of the body had given different results. In the result, the evidence of the blood test was disregarded.

Until the medical profession can assure the Courts that blood tests taken under proper conditions will give a reliable result, the discussion of the legal aspects of compulsion in submitting to such tests appears to be premature.

Confessions as Evidence.

To us it was surprising to see that the Seminar agreed that an entirely uncorroborated confession should not be regarded as sufficient to warrant a conviction where the accused has pleaded not guilty. This seems somewhat illogical if a plea of guilty, which is no more than a confession, is to be accepted as conclusive without corroborative evidence provided, of course, that the Court is satisfied that the accused person is fit to plead.

We suggest that under New Zealand law at least there are ample safeguards to ensure that a confession is not acted upon if it has been improperly obtained. If a confession has been obtained by violence, force or other form of compulsion it is inadmissible. If it is proved that it has been induced by a promise, threat, or other inducement it is admissible if the Crown proves to the satisfaction of the Judges that the means by which it was obtained were not in fact likely to cause an untrue admission of guilt (s. 20 Evidence Act 1908 as enacted by s. 3 Evidence Amendment Act 1950).

Where a confession is tendered in evidence the onus is always on the Crown to show that it was made freely and voluntarily or, if there has been some inducement short of force or compulsion, that that inducement was not such as to cause an untrue admission of guilt. It seems to us that these are adequate safeguards, well tried in practice, and that the complete exclusion of a free and voluntary confession for lack of corroborative evidence would be only another unjustifiable advantage conferred on a self-confessed criminal.

Preliminary Hearings in Camera.

This is a subject on which varying views are held. Undoubtedly much harm can be done by the publication of the uncontradicted evidence for the prosecution in a sensational case, particularly where the trial is held shortly after the preliminary hearing, as so often happens. On the other hand it is alleged that the publication of such evidence does good since it leads to the volunteering of other evidence.

On balance we would suggest that the advantages to the accused of a hearing in camera outweigh any disadvantages which may be brought about by such a system. We certainly cannot agree with the editorial comment in the *Evening Post* that its adoption would mean " the holding in camera of criminal proceedings ". The Magistrate or Justices holding the preliminary hearing of an indictable charge are not sitting as a Court in the true sense of that term. They have no power of determination or punishment and can only commit for trial or dismiss the charge. The safeguard of a public trial is open to, and, indeed, forced on the accused when the case comes before the Supreme Court (apart from the most exceptional of cases) and he would lose nothing if the first hearing were in camera without publication of evidence.

Lawyers as Guardians of People's Rights.

The question whether lawyers should speak out when the rule of law or any matter of principle was in jeopardy as a result of any proposed legislation was posed by the New Zealand Solicitor-General, Mr H. R. C. Wild Q.C., and according to the daily press few delegates attempted to answer it, although those who did expressed an affirmative opinion. We should have thought that the delegates would have been unanimous on this point. Lawyers are in a unique position to estimate the effect of proposed legislation and should use their knowledge for the benefit of the nation generally. We can safely say that the New Zealand Law Society has always faced up to its responsibilities in this regard, usually with a complete lack of publicity so that the general public do not know what is being done on its behalf.

Many other matters were dealt with which cannot be covered within the scope of an article such as this. In particular the status and security of tenure of office of Judges and Magistrates, the necessity for and desirability of wire-tapping as a means of gathering evidence and the power of arrest were the subject of valuable contributions to the discussion on which we should have liked to comment had space permitted.

Perfection.—" Earlier it was said that there are some cases that no attorney can lose and some cases that no attorney can win. These cases teach a second principle of trial advocacy: Every case should be so tried that, when it is concluded, no one will compliment the winner on his skill but all will wonder why the loser ever had the temerity to bring the case to Court at all. The cause should seem to have done the pleading, not the pleader."—*Nov.-Dec. 1960, Case and Comment*, 10.

SUMMARY OF RECENT LAW.

ARBITRATION.

Procedure—Umpire—Status of arbitrators appearing at commercial arbitration before umpire—London Cattle Food Trade Association—Arbitrators becoming advocates for parties who appointed them—Judicial notice of practice—Power of arbitrator, in capacity of advocate, to waive irregulatity in procedure before umpire. A dispute having arisen between buyers and sellers under a contract in the form of the London Cattle Food Trade Association (Incorporated) as to the buyers' right to reject goods, each of the parties appointed an arbitrator in accordance with r. 1 of the association's rules of arbitration which formed part of the contract. By r. 1, if the arbitrators disagreed, they were required to appoint an umpire who was a member of the association and whose decision would be final. The two arbitrators having disagreed, appointed an umpire who was a member of the association and arranged for a hearing of the dispute at the umpire's office. At the hearing before the umpire, at which the only other persons present were the two arbitrators, the buyers' arbitrator addressed the umpire first by outlining the facts, which were not in dispute, and arguing the law. When he had finished the sellers' arbitrator put forward his opposing arguments in the course of which he referred to a written opinion of counsel obtained by the sellers of which he had been furnished with a copy. The sellers' arbitrator read out to the umpire all the paragraphs of the opinion dealing with the point he was advocating, stressing the importance of the opinion and suggesting that it strongly confirmed his (the arbitrator's) contentions. The case on which counsel's opinion was obtained was not seen by the umpire. The buyers' arbitrator did not object to the reading of counsel's opinion, and at the end of the hearing the umpire asked the buyers' arbitrator if he, too, wished to submit a legal opinion; the buyers' arbitrator said that he did not. Both arbitrators handed to the umpire their files of documents which, in the case of the sellers arbitrator, contained the copy of counsel's opinion. The umpire made an award in favour of the sellers. The buyers sought to set aside the award for irregularity in procedure amounting to misconduct by the umpire in that counsel's opinion was read to the umpire and taken away for consideration by him. *Held*, Once the arbitrators had disagreed and appointed an umpire whose decision was final they were *functus officio* as arbitrators and appeared at the hearing as advocates for the parties who appointed them (a fact of which the Court should, in arbitrations of this character, take judicial notice); accordingly if it were an irregularity for the sellers' arbitrator to have read and handed counsel's opinion to the umpire, the buyers' arbitrator in his capacity as advocate had implied authority to waive the irregularity and on the facts had plainly done so. *Wessanen's Koninklijke Fabrieken N.V.* v. *Isaac Modiano Brother & Sons Ltd.* (Queen's Bench Division. Diplock J., 31 November; 1 November 1960). [1960] 3 All E.R. 617.

HUSBAND AND WIFE.

Matrimonial home—Wife leaving home—Entitled to half share in property less one half of all payments made by husband for outgoings and after she left home—Not entitled to allowance in respect of husband's period of sale occupation—Married Women's Property Act 1952, s. 19. A property was bought as a matrimonial home by a husband and wife in their joint names. In May 1953 the wife left the home and the husband continued to occupy it, paying instalments of principal and interest under a mortgage as well as other outgoings without contribution from the wife. On application under s. 19 of the Married Women's Property Act 1952. *Held*, 1. That the beneficial interest in the property belonged to the husband and wife in equal shares. 2. That the wife's share should be debited with one half the amount paid by the husband for principal interest, rates and other outgoings including repairs and she was not entitled to any credit in respect of the husband's period of sale occupancy. *Richards* v. *Richards* (S.C. Nelson. 1960. 22 June. Macarthur J.)

Separation agreement—Agreement providing for immediate separation but parties residing under same roof for two days thereafter without sexual intercourse—Agreement not for future separation and not void as contrary to public policy. Although an agreement made between husband and wife during cohabitation and providing for separation at some future time is void as being contrary to public policy, the authorities which require a valid separation agreement to provide for an immediate separation do not mean that the separation must take effect the instant the agreement is signed. A separation agreement was signed between husband and wife in anticipation of the wife leaving the country two days later. Until her departure the parties continued to live under the same roof but there was no sexual relationship between them and no attempt at a reconciliation. *Held*, by the Court of Appeal, That the agreement was a valid and effective one. Appeal from the judgment of T. A. Gresson J., dismissed. *T.* v. *T.* (S.C. Auckland. 1960. 22, 23 February; 11 March. T. A. Gresson J.) (C.A. Wellington. 1960. 10, 11 October; 10 November. Gresson P. North J. Cleary J.)

INDUSTRIAL CONCILIATION AND ARBITRATION.

Jurisdiction—Application of Act to Waterfront Industry—Section 168 not applied—Purpose of s. 168—Industrial Conciliation and Arbitration Act 1954, s. 168—Waterfront Industry Act 1953, s. 44 (3). Section 168 of the Industrial Conciliation and Arbitration Act 1954 is not intended to apply to the breach of an award by any party bound thereby, nor was it intended to prohibit the incitement or instigation of such a breach. The purpose of the section is to enable penalties to be imposed when steps are taken, either by employer and worker in combination, or by one or the other independently, with the express object of preventing an award from applying to a situation to which it would normally apply, and so ousting the provisions of the award from an operation they were intended to have. It is not necessary that there should be an intention to defeat the application of the award to a whole industry; it is sufficient if the intention is to defeat its application to the employment of some person or class of persons. Section 168 of the Industrial Conciliation and Arbitration Act 1954 is not made applicable to the waterfront industry by s. 44 (3) of the Waterfront Industry Act 1953. *Wellington Amalgamated Watersiders' Industrial Union of Workers* v. *N.Z. Port Employers' Association (Inc.).* (C.A. Wellington. 1960. 15 November; 1 December. Gresson P. North J. Cleary J.)

INFANTS AND CHILDREN.

Custody—Appeal from exercise of Magistrate's discretion as to custody—Principles applicable Infants Act 1908, s. 6. An order for custody of a child made by a Magistrate under s. 6 of the Infants Act 1908 is discretionary and the Supreme Court may interfere with the exercise of the Magistrate's discretion if it reaches the clear conclusion that no weight or insufficient weight has been given to relevant considerations which are important to the just determination of the matters in issue and that injustice may be done if it does not interfere. If the Magistrate's exercise of discretion has been influenced in some measure by an advantage which he has gained from seeing and hearing witnesses, the Supreme Court should attach the greatest weight to his opinion but is free to reverse his conclusions if they are clearly unsatisfactory. In general circumstances a child of tender years is best left in the care of its mother and should not be removed from such care unless the interests of the child clearly and unmistakeably call for such action. Observations on the matters relevant to the exercise of the discretion above referred to. *Palmer* v. *Palmer* (S.C. Wellington. 1960. 14 September. McCarthy J.)

LAND DRAINAGE.

Land Subdivision in Counties—Christchurch Drainage Board not a "controlling authority"—No right of appeal from its requirements as to drainage—Land Subdivision in Counties Act 1946, s. 9 (3)—Christchurch District Drainage Act 1951, ss. 36, 54. There is nothing in the Land Subdivision in Counties Act 1946 which derogates from the powers of the Christchurch Drainage Board under the Christchurch District Drainage Act 1951. The term "a controlling authority" in the proviso to s. 9 (3) of the Land Subdivision in Counties Act 1946 (as inserted by s. 9 (1) of the Land Subdivision in Counties Act 1953) does not include the Christchurch Drainage Board. The result is that, while an owner subdividing land in a county where the jurisdiction as to drainage is in the hands of the County Council and not of a separate Board has full rights of appeal to the Town and and Country Planning Appeal Board and cannot be required to supply and lay pipes for sewage unless a seqage disposal system is available for connection thereto or is likely to be available within three years, the owner subdividing in the Christchurch Drainage District is deprived both of his right of appeal and of the benefit of this time limit. Appeal from the judgment of Haslam J. (reported [1960] N.Z.L.R. 239) dismissed. *Weston Investments Ltd.* v. *Christchurch Drainage Board* (C.A. Wellington. 1960. 18, 19 May; 15 September. Gresson P. Cleary J. McGregor J.)

LIMITATION OF ACTION.

Actions against Crown and local and public authorities—Limitation period of one year may apply to action in contract—Non-payment of moneys due under a contract not in execution of "Act duty or authority"—Limitation Act 1950, s. 23 (1)—See CHATTELS TRANSFER (*ante*, 4).

Actions against Crown and Public and Local Authorities—Plaintiff withholding information as to relevant facts—May but need not necessarily strengthen suggestion of prejudice—Long delay between filing and hearing motion for leave to proceed to be taken into account in weighing prejudice—Limitation Act 1950, s. 23. Where an intending plaintiff is required to show that delay in bringing an action has not materially prejudiced the proposed defendant in his defence, an attempt to withhold information at to the relevant facts may, but does not necessarily, strengthen the suggestion of prejudice when associated with long and unreasonable delay. (Dictum of Stanton J. in *McCullough* v. *Attorney-General* [1956] N.Z.L.R. 886, approved and explained.) A lengthy delay between the filing and the hearing of a motion for leave to bring proceedings is to be taken into account in weighing the prejudice alleged to have been suffered by the proposed defendant. *Petrie* v. *Ashburton Electric Power and Gas Board.* (S.C. Christchurch. 1960. 20 October; 9 December. Barrowclough C.J.)

MINES, MINERALS AND QUARRIES.

Mineral Prospecting Warrant—Marking out of land not necessary—No prospecting licence to be granted over land already subject to prospecting warrant—Mining Act 1926, ss. 70, 77, 79, 169. An applicant for a Mineral Prospecting Warrant under s. 77 of the Mining Act 1926 is not required to mark out the land included in his application. It is implicit in the terms of s. 79 of the Mining Act that no mining privilege or grant in derogation thereof can be granted while a mineral prospecting warrant remains in force, and once the warden has granted such a warrant under s. 77 of the Act no jurisdiction remains to grant a prospecting licence under s. 70 in respect of the same land unless and until the Minister refuses his consent to the grant of such warrant. *Re French's Application.* (S.C. Auckland. 1960. 17 October; 18 November. Shorland J.)

POLICE.

Retirement on medical grounds—Jurisdiction of Appeal Authority—Limited to determining whether appellant is substantially medically unfit to perform the duties specified by the Commissioner—Police Act 1958, s. 28. The Appeal Authority under s. 28 of the Police Act 1958 has not been given unfettered powers of discretion. The limit of its jurisdiction is to determine after full inquiry whether or not the appellant is substantially unfit to perform the duties specified by the [Commissioner. Appeal from the judgment of F. B. Adams J 1960] N.Z.L.R. 796, allowed. *Commissioner of Police* v.. *Sterritt.* (C.A. Wellington. 1960. 19, 20 October; 1 December. Gresson P. North J. Cleary J.)

PUBLIC REVENUE.

Income Tax—Appeal to Supreme Court from Magistrate's decision—Security for costs given late—No jurisdiction to hear appeal—Land and Income Tax Act 1954, s. 36. The giving of security for the costs of an appeal under the provisions contained in s. 36 of the Land and Income Tax Act 1954 is a condition precedent to the right of appeal and if the statutory provisions are not exactly fulfilled the Court has no jurisdiction to hear an appeal on the merits. (*Quartermain* v. *Parcell* [1936] N.Z.L.R. 798; [1936] G.L.R. 567, distinguished. *Ly Bow* v. *Magnus* (1897) 15 N.Z.L.R. 705, followed.) *McKenna and Another* v. *Commissioner of Inland Revenue.* (S.C. Palmerston North. 1960. 3 October; 14 November. Barrowclough C.J.)

TRANSPORT.

Transport Licensing—Offences—"Linked-up" service—Each offender liable to pay Crown amount equal to railway freight properly payable—Transport Act 1949, ss. 46, 46A, 46B (Transport Amendment Act 1949, s. 7). Where two parties carry on a "linked-up" goods service within the meaning of s. 96A of the Transport Act 1949 (s. 7 Transport Amendment Act 1959) and are convicted of carrying on a goods service otherwise than pursuant to the authority of a goods-service licence, each offender is liable under s. 96B of the Act to pay to the Crown a sum equal to the amount which would have been payable to the New Zealand Government Railways Department as freight at the appropriate goods-freight rate if the goods had been carried by road only to the extent legally permissible. *Attorney-General* v. *Gore Carrying Co. Ltd.* (1960. 29 November; 22 December. Crutchley S.M. Gore.)

Licensing—Available route—Meaning of available—No train service at time required by consignor—Route still available—Transport Licensing Regulations 1950 (S.R. 1950-28), Reg. 29 (2) (b)—Transport Licensing Regulations Amendment No. 10 (S.R. 1955-188), Reg. 2. There is no justification for reading into the word "available" as used in Reg. 29 (2) (b) of the Transport Licensing Regulations 1950 (S.R. 1950-28) as amended by Reg. 2 of Amendment No. 10 (S.R. 1955-188), the added ingredient of being usable for the carriage of goods to suit the individual convenience or economic requirements of any particular consignor or consignee of goods. The word means capable of being used for the carriage of goods of the particular type generally and not for specific deliveries from time to time required, however reasonably, by any consignor or consignee. *Dobbin* v. *West Otago Transport Ltd.* (S.C. Invercargill. 1960. 2, 25 November. Henry J.)

Offences—In charge of motor-vehicle while in state of intoxication—No onus on prosecution to prove intention of driving—Not a defence of intention to drive disproved—Transport Act 1949, s. 40A (Transport Amendment Act 1953, s. 8 (1)). It is not a defence to a charge under s. 40A of the Transport Act 1949 (s. 8 (1) of the Transport Amendment Act 1953) of being in charge of a motor-vehicle on a road while under the influence of drink or drugs to such an extent as to be incapable of having proper control of such vehicle that the defendant (if in *de facto* control of the vehicle) had no intention whatsoever of driving it, nor does any onus rest on the prosecution to prove that the defendant intended to drive the vehicle or that there is some reasonable possibility that he would drive it. *Stoops* v. *Police.* (S.C. Nelson. 1960. 21 September; 6 November. Richmond J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

Sub-contractor—When contract "abandoned"—Retention moneys to be set aside but liable to set-off by employer of damages for contractors' breach of contract—Wages Protection and Contractors' Liens Act 1939, s. 32. For the purposes of s. 32 of the Wages Protection and Contractors' Liens Act 1939 a contract is "abandoned" when either the contractor walks off the job or acquiesces in the cancellation of his contract by the other contracting party. Moneys retained under s. 32 of the Act are to be set aside by the employer, and 31 days after the completion or abandonment of the contract they become amenable to charges. (Dictum of Kennedy J. in *Stern* v. *Redpath and Sons Ltd.* [1950] N.Z.L.R. 50, 60; [1950] G.L.R. 417, 422, not followed.) In the final account between owner and contractor after the abandonment of the contract when the contractor has been credited on one side of the account with all moneys payable to him, whether actually payable or merely notionally payable because they should have been retained and were not and has been debited on the other side of the account with all proper deductions, including any counterclaim for damages for non-completion, there is found to be a final net sum still payable to the contractor, this sum may be charged. If there is no such sum there can be no charge. *J. J. Graig Ltd.* v. *Gillman Packaging Ltd. and Another.* (S.C. Auckland. 1960. 14, 15 September; 8 November. Turner J.)

WATERFRONT CONTROL.

Application of Industrial Conciliation and Arbitration Act—Section 168 not applied—Industrial Conciliation and Arbitration Act 1954, s. 168—Waterfront Industry Act 1953, s. 44 (3)—See INDUSTRIAL CONCILIATION AND ARBITRATION (*supra*).

WORKERS' COMPENSATION.

Application to end weekly payments—Employment "available"—Locality relevant to suitability but not to availability—Workers' Compensation Act 1956, s. 30 (3) (b). Employment is "available" for an injured worker under s. 30 (3) (b) of the Workers' Compensation Act 1956 when it is still open for him to take up at the time when the employer's application to end or diminish weekly payments comes before the Court. The locality where the employment is available is a matter that has to be taken into consideration by the Court in deciding whether or not it is suitable. *In re Keith.* (Comp. Ct. Dunedin. 1960. 20 October; 7 November. Dalglish J.)

LEGAL ANNOUNCEMENTS.

Concluded from p. i.

A firm of Solicitors in the Waikato has an opening for a qualified Solicitor. Good prospects for the right man. One not recently qualified preferred. Please reply to :—

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CONVEYANCING BY UNQUALIFIED PERSONS: LAW PRACTITIONERS ACT 1955, SECTION 18.

The recent prosecution in a Magistrate's Court of a public accountant and licensed land agent for acting as a conveyancer has drawn attention to a penal provision of the Law Practitioners Act 1955 which, fortunately, rarely needs to be invoked, but which is of great importance to the profession. The provision is s. 18, which reads as follows :

> " Every person commits an offence against this Act, and shall be liable on summary conviction to a fine not exceeding fifty pounds, who, not being the holder of a licence as a landbroker in force under the Land Transfer Act 1952, or of a practising certificate as a barrister or solicitor in force under this Act, acts as a conveyancer."

The facts which led to the recent prosecution were that a tenant holding premises under a tenancy agreement and involved in eviction proceedings consulted a solicitor, who asked to see his client's copy of the agreement. The solicitor then learned that the agreement was retained by a firm of accountants who declined to surrender the document until payment was made of their costs for preparing it. Very properly the solicitor reported the matter to his District Law Society which took steps to have an information laid against a member of the firm under s. 18.

No evidence was called but an agreed statement of facts was put in by counsel which showed, *inter alia*, that the defendant was a public accountant holding a licence as a land agent issued under the Land Agents Act 1953 but not holding a licence as a landbroker under the Land Transfer Act 1952 nor holding a practising certificate as a barrister or solicitor within the provisions of the Law Practitioners Act 1955 ; that the defendant acted for the landlord as her accountant ; that on the instructions of the landlord he prepared a form of tenancy agreement, obtained the signatures to it of both parties, and witnessed both signatures. Following the tenant's entry into possession the defendant's firm sent the tenant a bill for engrossing the tenancy agreement, attending upon execution and stamping at a cost of £5 plus £1 7s. stamp duty. Subsequently, following a notice to quit and the issue of a summons for possession of the premises, a claim for possession was heard in a Magistrate's Court when the tenancy agreement was produced and an order for possession was made.

Both the tenancy agreement and the bill of costs were produced at the hearing of the information. The agreement followed a form familiar to all practitioners.

Having stated the facts the learned Magistrate commenced his judgment as follows :

> " When one considers that a considerable portion of the work of lawyers deals with the interpretation of statutes it is somewhat ironical that the statute relating to the legal profession should fail to provide a definition of the term ' conveyancer ' more particularly when the term is used in a penal section."

After referring to a number of dictionary definitions submitted by counsel for the prosecution he continued :

> " Counsel were unable to refer me to any reported cases in New Zealand dealing with this section nor have I been able to find any. Similar research has not produced any report either in English or Commonwealth country reports where the term ' conveyancer ' is judicially defined.
>
> " I think it might be fairly said, however, that the argument narrowed to a consideration of the term ' conveyance ' and whether or not the document produced in this case could be correctly so called."

Counsel for the defendant (possibly with the first chapter of *Sheppard's Touchstone* in mind) submitted that the definitions cited could be divided into two classes—those which dealt with real property, and the wider definitions which enlarged the scope of the term. He contended that words should be construed in their popular sense and that if a layman turned to a reputable legal dictionary he would find a conveyancer to be one who prepares documents for the conveyance of property and that in this sense a tenancy agreement would not be included.

It seemed to the learned Magistrate that if a layman should conceivably adopt this course it was more likely that he would turn to some New Zealand work and would look for one on the subject under discussion. The second edition of *Goodall's Conveyancing in New Zealand* provided an introduction devoted to a discussion of the subject and while the Magistrate did not regard this as authoritative he thought it might be taken as a useful guide in arriving at the popular meaning of the terms under discussion and of the related term " conveyancing ". He cited the following passage from p. 1 :

> " Conveyancing has, therefore, to do with the accomplishment of vestitive and divestitive facts in relation to title to property both real and personal, and with the incidence of rights and obligations between parties ; it is associated closely with the law of property and the law of obligations ; it is concerned with both the conveyance and the contract. It is further concerned with the law of evidence for it records transactions in form appropriate for proof thereof between parties and for notice thereof to others."

His Worship pointed out that none of the definitions of " conveyance " cited to the Court included the primary and popular meaning of that word in the dictionary sense of " The action of conveyancing or transporting ; carriage " : *Shorter English Dictionary*, 388. However, *Maxwell on Interpretation of Statutes*, 10th ed., at p. 54 pointed to the solution thus :

> " In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense : *uti loquitur vulgus*. But when dealing with particular businesses or transactions, words are presumed to be used with the particular meaning in which they are used and understood in the particular business in question, that meaning being rejected, however, as soon as the judicial mind is satisfied that another is more agreeable to the object and intention."

He proceeded to examine the context of s. 18 of the Law Practitioners Act. He observed that the section is contained in Part II which is under the general heading—" Practice in the legal profession ". The marginal notes to ss. 14 to 20 read as follows :

> " 14. No person to act as a barrister unless enrolled ;
> 16. No person to act as a solicitor in Court unless enrolled ;
> 17. Offence for unqualified person to act as solicitor ;
> 18. Qualified persons only to act as conveyancers ;

19. Unqualified persons not to act through agency of solicitors;
20. Solicitors not to act as agents for unqualified persons."

The common element in these sections is the necessity for proper qualifications. As was said by Parke B. in *Taylor* v. *Crowland Gas and Coke Co.* (1854) 10 Ex. 293, 296, in construing a similar provision:

> "Now, looking at the statute I am of opinion that the object of the Legislature was to confine the practice of drawing the instruments therein specified to a certain class supposed to have a competent knowledge of the subject and to protect the public against mistakes of inexperienced persons in matters of this kind; and with that view, the Legislature has prohibited these acts being done except by a particular class of persons."

In the opinion of the learned Magistrate the views so expressed might be applied with equal force in the construction of s. 18 and he decided accordingly to construe the terms of the section in a technical sense.

He proceeded to examine the language of the document, noting in particular the terms "landlord's fixtures and fittings"; "good and tenantable repair and condition, damage by fire, earthquake, tempest and reasonable wear and tear excepted"; "to yield up" and "demised premises"; and to observe that those were expressions in common use in legal documents all of which had been the subject of judicial interpretation. The agreement included a covenant against assignment, a covenant excluding provisions of the Tenancy Act 1955, and one implying powers contained in s. 108 of the Property Law Act 1952. Taking all those matters into consideration His Worship concluded that their use in such a document indicated the necessity for careful consideration and for the need of advice and explanation to a client by a properly qualified person.

The concluding clause of the tenancy agreement provided that the tenant should pay the landlord's solicitor's costs of and incidental to the preparation of the agreement and the stamp duty on the counterpart. Observing that the bill of costs forwarded to the tenant by the defendant bore a remarkable resemblance to a solicitor's bill of costs, His Worship made pointed reference to *Ferguson's Conveyancing Charges in New Zealand* (4th ed.) and to the scale for Tenancy Agreements at p. 33.

Finally, the learned Magistrate found that it was not necessary for the purposes of his judgment to attempt a definition of the terms "conveyance" or "conveyancing", but that having regard to the nature and form of the document and to his conclusion on the object and intention of the statute, the document in question was of a kind the preparation of which was properly the work of a conveyancer as that word is understood by the legal profession in New Zealand and was of a kind intended by the Legislature to be prohibited by s. 18.

The Court held that one transaction was sufficient to found a charge. A conviction was entered and a fine imposed.

It is of interest to note that the English provision corresponding with s. 18 of the Law Practitioners Act 1955 does not employ the terms "conveyance", "conveyancer" or "conveyancing". The prohibition contained in s. 20 of the Solicitors Act 1957 (*37 Halsbury's Statutes of England*, 2nd ed., 1053) is the drawing or preparin gby unqualified persons of any instrument relating to personal estate or any legal proceeding. The expression "instrument" does not include wills, agreements under hand, powers of attorney, or stock transfers containing no trust or limitation. Further, the section does not extend to a public officer drawing or preparing instruments in the course of his duty, nor to any person employed merely to engross any settlement or proceeding. Finally it is a defence to prove that the act was not done for or in expectation of any fee or reward.

It will be seen that these provisions differ significantly from those of s. 18 first, in the avoidance of the term "conveyance" or its derivatives and the exception of certain classes of instruments, and secondly, in the reference to remuneration. With regard to the former, the question whether the English or the New Zealand device is preferable in such a statute, is one not easily settled. Despite the learned Magistrate's deprecation of the absence of a definition of "conveyancer", it may be said, with respect, that he adopted a classic approach to the problem and reached a satisfactory solution without finding any necessity, as he himself said, to attempt a definition of either that term or its derivatives.

That the English provisions create interpretative difficulties of their own will be recognised on reference to such reported cases as *Harte* v. *Williams* [1933] All E.R. Rep. 288; [1933] 1 K.B. 210 and *Kushner* v. *Law Society* [1952] 1 All E.R. 404; [1952] 1 K.B. 264, which were concerned with the construction of the expression "agreement under hand only" now appearing in the proviso to s. 20 of the Solicitors Act 1957.

Section 18 of the Law Practitioners Act 1955 is the lineal descendant of s. 52 of the Law Practitioners Act 1861 through s. 42 of the Act of 1882, s. 43 of the Act of 1908, and s. 40 of the Act of 1931. The offence of acting "as a conveyancer" appeared in all the earlier provisions. It may be noted that the maximum penalty of £50 has not been increased in 99 years.

Section 43 of the 1908 Act fell for consideration by Mr Page S.M. (as the late Judge then was) in a civil action in 1927. In *Taylor* v. *Tamihana Heta* 23 M.C.R. 31, the plaintiffs, who were described as "native agents", but who were neither solicitors nor licensed landbrokers, claimed from the defendant the sum of £5 5s. being their fee for the preparation of a power of attorney. The main defence to the claim was that the plaintiffs were unqualified persons acting as conveyancers in breach of s. 43 and of s. 216 of the Land Transfer Act 1915 (relating to unlicensed landbrokers) and that, their action in so doing being illegal, no fee or reward could be recovered.

In accepting this defence, His Worship said:

> "I entertain no doubt that the preparation of this power of attorney (giving as it does the power to borrow money upon mortgage and to execute securities containing powers of sale) constitutes a form of conveyancing. In preparing it for reward the plaintiffs acted as conveyancers in breach of the provisions of the above statutes."

As has been noticed, the element of remuneration is not an ingredient of the offence created by s. 18 of the Law Practitioners Act. In this respect that provision may be contrasted with s. 233 of the Land Transfer Act 1952. This makes it an offence to

" transact business for fee or reward under this Act ", or wilfully and falsely to pretend to be entitled to transact any such business. The requisite qualifications for transacting such business and the maximum penalty for an offence are the same as in s. 18. Consequently, if an unqualified person " acts as a conveyancer " in transacting business under the Land Transfer Act and there is evidence that he did so for fee or reward, a charge may be laid for an offence under either enactment. But in the absence of such evidence a charge should be laid under the Law Practitioners Act.

A prohibition, absolute on the face of it, against acting as a conveyancer without the prescribed qualifications and whether or not for fee or reward casts a wide net. But the ambit of the provision lends emphasis to the purpose—the protection of the public.

There remains the question, what is comprehended in the expression " acts as a conveyancer "? Perhaps the best answer of recent times is to be found in the judgment of Sir Frederick Jordan C.J. in *In the Will of Kerrigan* (1935) 35 S.R. (N.S.W.) 242. There for the purpose of determining the proper remuneration of an executor, the Court had to consider how much of the work done in an estate was conveyancer's work and how much was not ; and, accordingly, to determine what classes of work fell to be done by a conveyancer as such.

After tracing the history of the practice of conveyancing in England and of the restrictive statutes passed there and in New South Wales, the Chief Justice referred to the provisions of s. 13 of the Attorneys' Bills and Conveyancing Act 1847 (N.S.W.), and s. 40 of the Legal Practitioners Act 1898. At p. 250 of the report, he continued :

> " But neither section, in my opinion, provides much help in determining what work comes within the scope of a conveyancer acting as such. This must be determined by reference to usage and common knowledge. Mr Pulling, in the 3rd edition of his book on *Attorneys*, published in 1862, says at p. 481 that 'the practice of conveyancers is confined to the drawing of legal documents, and investigating and advising on legal titles'. I am of opinion that the work of a conveyancer as such includes preparing any document or doing any act for the purpose of creating, transferring or extinguishing any interest in any form of property, and anything incidental or ancillary to any such act, where the document or act is of a kind calling for something more than ordinary business knowledge, skill or ability."

P. A. CORNFORD.

THE COOK ISLANDS.

The following extracts from a letter from Mr C. J. Stace who recently completed a term of office as Chief Judge of the High Court and Judge of the Native Land Court of the Cook Islands are published as a matter of interest to our subscribers :

" I have found the work here most varied and interesting. The jurisdiction of the High Court is both civil and criminal of course, and is extensive and, in some ways peculiar.

I have also had the privilege of presiding over sittings of the Native Appellate Court, which sits every three years, Native Land Court and Coroner's Court. In the last nine months I have travelled about 5,500 miles, mainly by island schooner, (which makes me look forward a little to the contrast which will be provided by the *Monterey* on which we are to return to New Zealand), to hold sittings on eight of the nine main islands of the group.

My last long trip was to Penrhyn (750 miles away) to hear a charge of attempted murder, the information being sworn before Mr J. J. MacCauley, now Resident Agent there, and formerly well-known to Wanganui-Taranaki-King Country practitioners for several years as a most knowledgable and helpful Clerk and Interpreter (albeit a Scot by birth) of the Maori Land Court."

Training of Solicitors.—Details of proposed changes in the system of training of articled clerks, which are intended to become effective on 1 January 1963, were set out in the September issue of the *Law Society's Gazette*, at p. 541. The alterations which the Council of the Law Society have in mind are bold and imaginative, and will affect, in one way or another, every stage of the training. Service under articles is to consist of a two years' uninterrupted period in a principal's office, while for the remainder of the term absence will be allowed in preparation for examinations and law school attendance, and such periods will be reckonable as the equivalent of good service. The intermediate and final examinations are to be replaced by a qualifying examination in two parts : Part I will comprise basic subjects and Part II is designed to test whether a candidate has knowledge of those aspects of the law in common practice ; it will comprise conveyancing, accounts, revenue law, commercial law and family law, and the candidate will also be required to pass in one of the following subjects, namely, succession, local government law or magisterial law. At either part of the qualifying examination a candidate who has already passed in three subjects of his choice at one examination, will be permitted at any subsequent examination to take any one or more subjects of his choice. Only those articled clerks who take Part I and have not taken a degree, which need not necessarily be a law degree, will be required to attend at a law school in preparation for Part I ; it is thought to be unnecessary to require attendance at a law school in preparation for Part II, although those who wish to do so may be allowed absence from their principal's office during the last six months of their articles. The standard of general education required of those entering into articles is to be raised, and it is the considered view of the Council that the recruitment of sufficient men and women of the requisite standard into the profession could be notably increased by the adoption in general of the practice of the payment of remuneration to articled clerks and the abandonment in general of the practice of receiving premiums.

CASE AND COMMENT.

Contributed by Faculty of Law of the University of Auckland.

Memorandum of Association—Powers and Objects.

Company lawyers have become familiar with the distinction made by Lord Parker of Waddington in *Cotman* v. *Brougham* [1918] A.C. 514, 520, where it is stated :

> " The question whether or not a company can be wound up for failure of substratum is a question of equity between the company and its shareholders. The question whether or not a transaction is *ultra vires* is a question of law between the company and a third party."

In the substratum cases, the Courts are concerned to discover the main object and, if the company is not pursuing it, it is liable to be wound up. There is also a group of cases devoted to the problem of discovering what is the *real object* or *main purpose* of a company. One of these is *M. K. Hunt Foundation Ltd.* v. *Commissioner of Inland Revenue*, where Hardie Boys J. was asked to decide whether the company, the trustee for a charitable trust, was entitled to an exemption from conveyance duty under the Stamp Duties Act 1954, s. 69 (f) which reads :

> " The following conveyances shall be exempt from conveyance duty :
>
> (f) A conveyance of property to be held on a charitable trust in New Zealand or elsewhere."

In terms of a judgment of Ostler J. in *Mayor etc. of Lower Hutt* v. *Minister of Stamps* [1925] G.L.R. 387, 388, if

> " . . . the conveyance is to a corporation associated for a charitable purpose the conveyance is exempt even though the land is not conveyed to be held in a charitable trust ".

It is the *real object* or *real purpose* of the transferee company that determines whether the conveyance is exempt from duty. The fact that ancillary powers are non-charitable does not destroy the exemption ; *Keren Kayemeth le Jisroel Ltd.* v. *Commissioners of Inland Revenue* [1932] A.C. 650, 658, per Lord Tomlin, and *Tennant Plays Ltd.* v. *Inland Revenue Commissioners* [1948] 1 All E.R. 506, 511, per Cohen L.J.

But though cases dealing with the problem of *ultra vires* are clearly of no assistance in determining *real purpose* or *real object*, the substratum cases do appear to be more relevant. This was recognised by the learned Judge. But it is interesting to analyse the cases he cited in support of his proposition that " the Courts . . . have long recognised that within the Memorandum a main purpose will be found ". These cases were *Cotman* v. *Brougham* itself (where it was alleged that a contract was *ultra vires* the company), *In re Haven Goldmining Co.* (1882) 20 Ch.D. 151, and *In re German Date Coffee Co.* (1882) 20 Ch.D. 169, (where in each case winding up was ordered on the ground that the substratum was gone, and two revenue cases, *North of England Zoological Society* v. *Chester R.D.C.* [1959] 3 All E.R. 116 [1958] 1 W.L.R. 1258 ; (liability to rates), and *Tennant Plays Ltd.* v. *Inland Revenue Commissioners* (*supra*) (liability to income tax).

The Courts in some of these cases were not deterred by a variety of clauses in the Memoranda designed to prevent a construction being placed on the objects clause that a particular object was the main object. Hardie Boys J. remarked that " the search for the main object [will not] be fettered by a clause which nominates each paragraph of the Memorandum to be definitive of a separate and independent object ". There is some support for this proposition in *Cotman* v. *Brougham*, but the dictum cited by the learned Judge—that of Swinfen Eady J. in *Stevens* v. *Mysore Reefs (Kangundy) Mining Co. Ltd.* [1902] 1 Ch. 745, 750, does not go as far as he has suggested. This was a *vires* case, and what was the main object did not arise. The clause there construed (para. 25) was quite unlike those now being included in memoranda to limit the application of the substratum cases. Logically, if a memorandum declares all objects to be primary objects, and that none is subsidiary or ancillary to the others, it is somewhat difficult to accept the proposition that the *real purpose* or *real object* of the company is a *single* object.

The learned Judge concluded, however, that the company was a company formed to buy land, subdivide it, build houses upon it and then to sell those houses at a profit. This, he said, was a commercial activity and the fact that there was an ultimate charitable destination for the profits and capital of the company did not make its present activities other than commercial. Hence, as the main purpose of the company was to take part in commercial activities, the exemption from duty did not extend to it.

J.F.N.

Cross Limitation or Partial Intestacy

In *In re Sedgley* the Supreme Court was called upon to interpret the provisions in a testator's will concerning his residuary estate.

The will provided that the widow should receive the income from the residue for life or until she remarried and on her death or remarriage the residue was to be held

> " . . . IN TRUST to divide the income into four equal parts, one part for each of my [four named] children as and when they attain the age of twenty-one years for the term of their respective lives . . . and thereafter IN TRUST capital as well as income for the benefit of their children who may attain the age of twenty-one in equal shares absolutely. . . ."

The testator was survived by his wife who died without remarrying. Of the testator's four children three survived the testator and the widow, and were still living at the time of the action. The eldest had one child, the second child four children, and the third child, although unmarried, had adopted a child. The fourth child, Edgar, who was unmarried, predeceased the testator, and the case was mainly concerned with the destination of his share of the estate.

The first matter the Court had to decide was whether the testator intended the residue of his estate to remain " in one entire mass until the death of the last survivor

of his children ", on which event it would be distributed *per capita* among the grandchildren, or whether he intended the residue to be notionally divided into four shares on the death or remarriage of his widow, in which case the grandchildren would take *per stirpes* on the death of each of the testator's children.

Richmond J., considered that in deciding this " the critical question appeared to be to determine the meaning of the word ' thereafter ' which occurs in the will immediately before the trust of corpus ". After considering the context the learned Judge decided that it meant " after [the] respective lives " of the testator's children and concluded

> " that the testator intended that a quarter share of corpus should pass on the death of each of his respective children to the children of such deceased child *per stirpes* ".

This being the opinion of the Judge, it followed that the testator's will failed to make provision for the contingency that actually occurred—namely, the death of a child of the testator without leaving a child or children attaining the age of 21. What was to be the destination of the share of this child ? Was the Court to invoke the principles which permit the Court to fill by implication gaps left by a testator in his will and imply cross limitations in favour of the living children as to the income and in favour of the grandchildren as to capital, or was there to be an intestacy as to this share ?

Although there are many cases where the Courts have filled by implication gaps left by a testator in his will, it is submitted that the principle is not of very wide compass. As was said by James L.J. in *In re Ridge's Trusts* (1872) L.R. 7 Ch. App. 665, 668 (cited and impliedly approved by Vaisey J. in *In re Smith* [1948] Ch. 49, 54) :

> " The implication only applies to events for which the testator has not in terms provided, but as to which no person applying merely commonsense to the will can have any doubt what he intended."

In the instant case, in addition to the principle of implication, the presumption against intestacy principle, which applies to prevent a partial intestacy as well as a total intestacy, could be called in aid. Again this principle is not as wide as may at first be supposed. In applying this principle it is submitted that the Court is not answering the question, Did the deceased *mean* to die intestate or not ? The fact that he made a will at all would be evidence in answer to this question. It is submitted that the question being answered in such a case is, Has the deceased effectually disposed of his estate by this will ? If there is a doubt about the answer to this question then the Court tends to adopt a construction which avoids an intestacy.

The concurrence of these two principles of implication and presumption against intestacy was discussed by Smith J. in *In re Sawtell* [1945] N.Z.L.R. 92, 98, and he perceived that there was

> " . . . the difficulty of reconciling in any particular case the two opposing tendencies : on the one hand, not to find an intestacy as the alternative to the implication of a gift unless the language requires it ; and, on the other hand, not to imply a gift as the alternative to an intestacy unless a contrary intention cannot be supposed."

The learned Judge in *In re Sedgley* considered that in reconciling the two tendencies two principles emerged:

1. The mere fact that failure to make the implication will result in a partial intestacy is not sufficient in itself to justify the making of the implication ; and

2. There must be words in the will which, construed in the light of the Court's reluctance to find an intestacy, point so strongly to the making of the implication that a contrary intention on the part of the testator cannot be supposed.

Applying these principles to the case before him, the learned Judge did not think that there was such a " gap in the limitations as [he] would be justified in filling by judicial interpretation ". He accordingly held that Edgar's death resulted in an intestacy as to his one-quarter share of the corpus of the residuary estate.

It is respectfully submitted that this conclusion was in conformity with the established principles. It is possible to argue that when the will was drafted a suitable kind of accruer clause was accidentally left out. On the other hand, it is submitted that the words used by the testator in his will were not such that, by " applying merely commonsense " to them, they led to the inevitable conclusion that such an accruer clause was intended to be included. Communication with Venus by sputnik notwithstanding, the only method a Court yet has of communicating with a deceased testator is through the words actually used by him in his will, and a Court will not insert a provision in a will by implication unless it is quite obvious from the words that are in the will that such a provision was intended by the testator.

D.J.W.

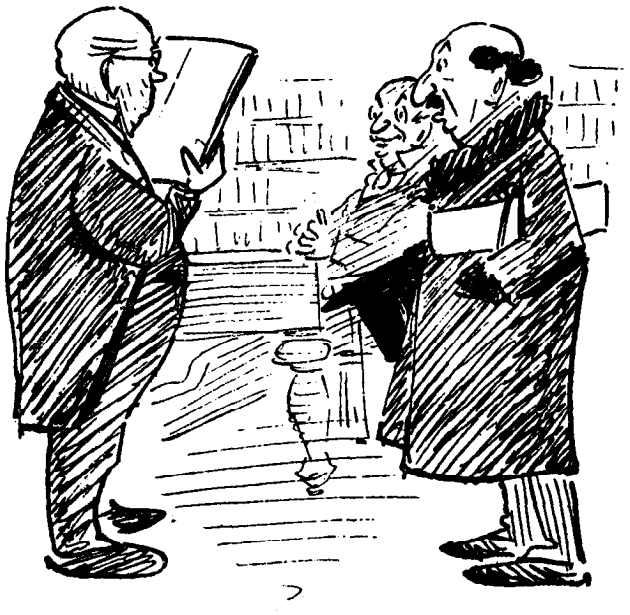
Fitness to be Received.—We have implied that the innkeeper is not obliged to entertain or accommodate anyone who is not in a fit state to be received. What is meant by that ? In posing this question, we do not anticipate merely stock answers about stock situations, *e.g.*, drunkards, chimney-sweeps who have neglected to wash and brush-up, and callers with offensive or ferocious dogs. What the modern innkeeper would like to know is whether Mrs X comes within this category ; she is not a drunkard nor a chimney-sweep, and she has no dog whatsoever, but she has stiletto heels and he fears his parquet floors will be ruined if he admits her. Or what action can be taken against the man who likes to take his jacket off when he sits down for dinner Last year summer was unusually prolonged (this year, if summer occurred, it happened so quickly that scarcely anyone seems to have noticed it), and letters appeared in *The Times* from aggrieved guests who had been cozened into replacing unwanted jackets by tactful head-waiters. One writer pointed out that matters could be put right by removing one's braces at the same time. This is a doubtful proposition and, in any case, removing one's braces seems a very risky business indeed ; until there are proper precedents to guide us the prudent man will do well to keep his braces where they belong. —(1960) *110 L.J.*, 827.

FORENSIC FABLE.

By "O"

The Zealous Clerk Who Overdid It.

A Silk, whose Professional Activities were not as Extensive as they had been, was Sitting in his Chambers Contemplating Some Venerable Papers which Represented Struggles of the Past. He was Immensely Cheered when his Zealous Clerk Informed him that an Old Client had Turned Up with a Brief. The Zealous Clerk Confided to the Silk that he Thought he could get it Marked Up to Twenty-Five. The Silk Directed that the Old Client should be Shown In At Once. The Old Client Said he was Afraid it was a Small Affair, but he would be Greatly Obliged if the Silk would Give it his Personal Attention. It was a Common Jury, Fixed for Next Monday. The Silk, Winking Slightly at his Zealous Clerk, Asked him to Look at the Book and See what his Engagements were for that



Day. The Zealous Clerk Produced a Large Diary, Scanned it with Attention, and Found that Monday was Free, Except for the Privy Council Case, which would Probably not be Reached, a Special Jury, which he was Sure Sir John would Agree to Adjourn, and the Part-Heard before the War Compensation Court, in which they had a Capable Junior. These Causes and Matters Existed Only in the Imagination of the Zealous Clerk; but he Hoped they would Create a Favourable Impression on the Mind of the Old Client. Unfortunately the Old Client was so Startled to Hear of the Many Calls upon the Time of the Silk that he Took the Brief Away and Delivered it to Somebody Else.

Moral.—*Draw It Mild.*

Complete Defence.—On a later occasion the same Bench had to deal with a labourer who was charged with riding his bicycle in the wrong direction down a one-way street. His defence was blunt. "Under Magna Carta there is no such thing as a restricted street!" I am happy to report that the charge was dismissed.—Theo Ruoff in (1960) *34 A.L.J.*, 241.

LEGAL LITERATURE.

Bingham's Motor Claims Cases (4th ed.). 1960. London: Butterworth & Co. (Publishers) Ltd. Pp. xlvii + 775 pp. £N.Z.4.

The first edition of *Bingham* appeared fifteen years ago and the third in 1955. Although it is not as well known in New Zealand as *Mazengarb's Negligence on the Highway*, *Bingham* is recognised in the United Kingdom as a standard work providing not only a summary of the leading cases governing the liability of owners and drivers of motor-vehicles, but also a discussion of the law on allied topics.

Although a New Zealand practitioner must use *Bingham* with care because not all of the United Kingdom statutes have corresponding New Zealand provisions, he will find much of assistance in this book. The summaries of cases, though restricted to between 100 and 150 words, cover such a variety of fact situations that it is unlikely that a practitioner would be unable to find a case without many similarities to that on which he was being asked to advise.

Bingham covers negligence, including contributory negligence, the liability of the motorist to passengers and others, claims by a motorist, for example, against those offering parking facilities, actions against the Crown, the principles governing the award of damages, as well as notes on allied questions such as evidence, arbitration and insurance. It is remarkable that the decision in *Romford Ice & Cold Storage Co. Ltd.* v. *Lister* [1957] 1 All E.R. 125; [1957] A.C. 555, is not mentioned.

As a companion volume to *Mazengarb*, this book should prove invaluable to those whose clients number insurance companies and it should be found useful by the practitioner who has only an occasional client with a motor-accident problem.

J.F.N.

PERSONAL.

Mr J. A. Wicks S.M., was farewelled by Christchurch practitioners at a luncheon given on 22 February. Mr Wicks took his seat on the Bench at the Wellington Magistrate's Court on 1 March.

Mr Evan Rockell, formerly office solicitor to the New Zealand Electricity Department has been appointed to the position of Crown Solicitor, Crown Law Office Wellington.

Mr R. Gray, Crown Solicitor, Crown Law Office, Wellington, retired on 24 February after the completion of over forty years' service. He proposes to continue to reside in Wellington.

Mr J. J. Watts, son of the former Minister of Finance (Mr J. T. Watts), was admitted as a barrister and solicitor on the motion of his father by Mr Justice Haslam in the Supreme Court at Wellington. Later this year Mr Watts will go to England on a Shell bursary, where he will read economics at Pembroke College, Cambridge.

Mr A. W. Yortt S.M. will be leaving New Zealand on 20 April for a trip overseas and is not expected to return until 23 November.

CORRESPONDENCE.

Letters to the Editor.

A Written Constitution and a Second Chamber.

Sir,

The editorial which appeared under this title in the issue of the Law Journal of 22 November 1960 reached the tentative conclusions :

(a) that a written Constitution for New Zealand would suffer from the disadvantage that it could probably be revoked or changed at will by the Parliament of New Zealand ;

(b) that, even if that difficulty be surmounted, grave disadvantages would result from giving the Courts the power to review the constitutional validity of legislation in that :

(i) the power would give rise to much litigation ; and

(ii) the Courts would be powerless to enforce their rulings if the Government defied them ;

(c) that no one has yet proposed an acceptable form of Second Chamber and until this is done a unicameral Legislature is preferable.

Fortified by the courage which I derive from my ignorance of constitutional law, I venture to suggest that none of these conclusions are valid and that, on the contrary, it is perfectly possible to devise and impose a written Constitution which could not be altered by the Legislature, that such a Constitution need not lead to a spate of litigation of serious proportons or run any serious risk of Government defiance of adverse Court decisions and that the written Constitutions of other States provide examples of second chambers which neither stultify government by the majority party of elected primary chambers nor provide an opportunity for the exercise of political patronage and which yet enable law-making to be a considered and deliberate process.

These propositions I shall now endeavour to support.

Establishing a Written Constitution.

It is obvious that, in order to be binding and to have the requisite degree of permanence, a written Constitution must be imposed by the sovereign power in the State. It is here, I think, that the illusion of impossibility in the case of New Zealand has influenced our thoughts in the past. It is said that the New Zealand Parliament is the sovereign power. That statement must, however, be read subject to important qualifications. It is probably more correct to say that Parliament *exercises* sovereign power with the consent of those to whom it belongs—namely, the people of New Zealand. Dicey, in his *Law of the Constitution*, says (at p. 449) :

> " Here we come round to the fundamental dogma of modern constitutionalism ; the legal sovereignty of Parliament is subordinate to the political sovereignty of the Nation."

Reference may also be made to *Wade and Phillips' Constitutional Law* (5th ed.) where, at p. 47, the electorate is described as the " political sovereign ".

It seems, in fact, that modern constitutional thought accepts the ultimate sovereignty of the people and that this sovereignty is not limited to what Dicey describes as " political sovereignty ". It is exercised directly through the ballot box and indirectly through the Parliament which is elected. (For this reason, I think that it is open to serious doubt whether Parliament may in fact lawfully prolong its life indefinitely.) A modern example of the assertion of this ultimate sovereignty of the people is to be found in the Constitution of Eire, the preamble of which states :

> " We the people of Eire . . ., do hereby adopt, enact and give to ourselves this Constitution ".

The Constitution of the Independent State of Western Samoa contains a similar statement. It is not correct to state that that Constitution was imposed by the politically superior Government of New Zealand, although it was, no doubt, prepared with the assistance of our Government.

If then the problem is (as indicated by the learned editor) to find an authority which could impose a Constitution which not even Parliament could revoke, that authority is here at hand—in ourselves, the people of New Zealand. Instead of Parliament imposing the Constitution by statute, which it could probably alter or revoke whenever it saw fit, the people could by referendum adopt a Constitution which would be binding on Parliament, the Executive and the Courts and which could be lawfully altered or revoked only by the people themselves. There is nothing new in this procedure. It has been employed with success on a number of occasions and appears to be the ideal method by which a civilised people may acquire a written Constitution.

Supposed Disadvantages.

The learned editor was voicing no new criticism of written Constitutions when he referred to the amount of litigation which they engender. But a study of constitutional cases in the Commonwealth of Australia and the United States of America reveals that the great majority of such cases arise out of arguments touching the respective powers of Federal and State Legislatures. In Eire and the Union of South Africa (which, like New Zealand, are unitary States) no such undue amount of litigation has resulted from a written Constitution and there seems to be no reason why the position should be different in New Zealand. I cannot regard it as a disadvantage that a written Constitution should give to people the right of access to the Courts when they feel that they have suffered in justice.

The suggestion that Parliament or the Executive might refuse to accept the decisions of the Courts *is*, however, new. With respect, I do not think that the analogy of the events at Little Rock is apt. There the conflict arose between the views of the majority of the people of a State and those of the majority of the people of the nation. Without the support of this local popular majority, the school and the State government could have offered no effective defiance of the Supreme Court. It may be a valid criticism of a written Constitution that it provides no adequate

protection against a ruthless minority which has the will and the means to defy the Courts, but the same criticism holds in respect of an unwritten Constitution and cannot, therefore, be claimed as a disadvantage of the former as against the latter.

A common objection to the written Constitution is that it is inflexible. So is statute law in comparison with the common law but the former frequently has advantages of certainty and clarity. For example, few people in New Zealand would prefer common law to statute law on the subject of criminal jurisprudence. There is no reason why a Constitution adopted by the people should be more inflexible than statute law. It would be elementary drafting to provide procedure for amendment and the people who had adopted the Constitution are not likely to be slow in approving amendments necessary to meet changing conditions. Such a Constitution would probably be much more flexible than one imposed by a political superior, which tends to be insensitive or resistant to "winds of change".

BICAMERAL GOVERNMENT.

The learned editor has said (at p. 387):

> "With all that has been said and written in favour of the Second Chamber no one, to our knowledge, has brought forward one method of appointment or election that is acceptable".

This, of course, begs the question, acceptable to whom? A solution which appeals to the man in the street may very well find little favour with the political parties whose members comprise the House of Representatives. A party which is, or expects to be, in power is naturally opposed to any form of Second Chamber which might prove an obstacle to the implementation of its policy, and makes much play with the pseudo-constitutional catch-cry of "thwarting the will of the electors". (The cynical elector may be surprised to learn that his will is regarded as being of such importance.)

It seems, then, that "acceptability" should be judged by an objective standard and I am content to accept for this purpose the test of acceptability suggested by the learned editor—namely, that the Second Chamber must, on the one hand, be effective to revise legislation brought before it and to delay legislation of doubtful worth, forcing an appeal to the electors where the matter is of sufficient importance, and, on the other hand, it must be a body of reasonable men who do not obstruct for the sake of obstruction.

The proposal which has been put forward most frequently—namely, that the members of the Second Chamber should be nominated by the parties represented in the House of Representatives in proportion to their respective strengths in that House, appears objectionable in principle in that the temptation would be there to use the right of nomination as a means of political patronage. Moreover, a Chamber so appointed would tend to reflect all too faithfully the political views of the parties in the House, so that an objective review of bills would be unlikely and a forced appeal to the electors practically impossible.

A Second Chamber elected in the ordinary way would escape the first criticism, but not necessarily the second, unless elected for a different term from the House of Representatives. In theory there is a great deal to be said in favour of a Second Chamber comprising persons elected by functional groups but the practical difficulties in the way of a satisfactory selection of groups and a satisfactory mode of election by the selected groups may be considerable. The Republic of Eire elects the majority of its Senate by popular vote from candidates who must come within one of five different categories, thus combining the democratic ideal with functional representation. I see no reason why an adaptation of this scheme should not work very successfully in New Zealand. Another scheme which should prove "acceptable" is a combination of an elected majority in combination with a minority nominated by the respective parties in the House of Representatives from persons having defined qualifications.

No doubt there are many other satisfactory methods of providing the personnel of a Second Chamber. I think, however, that I may at least claim to have demonstrated that this problem is not insoluble.

N. WILSON.

Corporal Punishment.

Sir,

In your issue Vol. 36, page 396, you suggested that the "birch" should be re-introduced and given "a trial for five years under proper conditions and with careful statistics taken". But the "birch" and more drastic forms of corporal punishment have already been tried for thousands of years and found to be futile.

Mr Harry E. Barnes, internationally known historian writing in "Federal Probation" (June 1959 issue) points out that until about 1800 mutilation, not imprisonment was the usual form of punishment. But the most cruel and repulsive mutilations did not deter the crime rate. Mr Barnes says that in England "the crime rate was not notably reduced until the brutal English code was legislated out of existence." The brutal criminal is generally the subnormal person or the one who, usually in childhood, has missed those loving influences which beget kindliness and respect for the rights of others. The only practical way to handle such cases is to bring them under the guidance and control of the sympathetic and understanding prison staffs, psychiatrists and welfare workers who, by firmness and kindness, may be able to give the offenders the correct social outlook. Meantime such offenders must be kept where the public will be safe, as health authorities would segregate persons with a dangerous and contagious malady.

I am etc.,

F. C. JORDAN,

Hon. Sec., Howard League for Penal Reform.

[Our correspondent overlooks the fact that his method of treatment of criminals has already been tried and found wanting. We do not suggest a wholesale return to the brutality of former days which placed too much emphasis on punishment and its deterrent effect, overlooking completely any question of reformation of the criminal. What is wanted is a form of treatment which will hold the balance between punishment, deterrent effect and reformation, something which our correspondent's proposal does not do. Our comment to which he refers was necessarily short, but what we had in mind, and still consider the right approach, is to provide corporal punishment for those on whom milder methods have been a failure. EDITOR.]

WOMEN BARRISTERS' DRESS.

On Monday 13 February two women were admitted to the Bar by Mr Justice Macarthur at Christchurch, Miss Ann Barcham, as a barrister and solicitor and Miss Angela Satterthwaite as a barrister. The *Christchurch Press* sought His Honour's permission to photograph him with these ladies and this was granted subject to their being properly dressed in accordance with the rules of the profession.

The condition apparently caused some little stir, since no one in Christchurch was sure how a woman barrister should be dressed. The difficulty was resolved after research by his Honour and the Registrar, Mr J. L. W. Gerken, who found an article on the subject in (1922) *57 Law Journal.* The essential rules taken from this article, which were said to have been expressed as a wish by a Committee of Judges and Benchers, are as follows:

"(1) Ordinary barristers' wigs should be worn, and should completely cover and conceal the hair.

"(2) Ordinary barristers' gowns should be worn.

"(3) Dresses should be very plain, black or very dark, high to the neck with long sleeves, and not shorter than the gown, with high, plain, white collar and barrister's bands; or plain coats and skirts may be worn, black or very dark, not shorter than the gown, with plain, white shirts and high collars and barrister's bands."

The photograph was duly taken and is reproduced above, Miss Barcham being on the left of the Judge and Miss Satterthwaite on the right.

The Judge Who Disliked Trying Cases.—(*A new Forensic Fable: With apologies to "O".*) There was Once a Judge of County Courts who Heartily Disliked Trying Cases. His Thirst for Administering Justice was Easily Quenched by Judgment Summonses, of which he Did Quite a Few. Thereupon he Lured Learned Counsel into the Friendly Atmosphere of his Private Room, and Proceeded to Extract from them Embarrassing Admissions, or to Assist them by disclosing the Provisional View he had Formed on the Merits. He Pointed Out the Probable Need to Adjourn to a Most Inconvenient Day in Early August. And if All Else Failed to produce an Amicable Settlement, he claimed a Distant but Disqualifying Kinship with the Plaintiff's Mother, or Sadly Confessed that his Impartiality was Impaired by an Inadvertent Discovery that the Defendants were Fully Covered by Insurance. Since in consequence he Never Actually Delivered Judgment (except By Consent), there was a Certain Degree of Accuracy in his boast that he had Yet to be Upset on Appeal. But it was Once a Very Near Thing. The Parties in *Pinprick* v. *Showdown* were Implacably Resolved on Fighting It Out, and could not be Persuaded to See Reason. Did His Honour, then, Compose the Unhappy Dispute Between the Implacable Adversaries? Not a Bit of It. He found, as the Case Proceeded, that he was so Out of Touch with the Law, so Unfamiliar with the Rules, and so Unaccustomed to Sifting Evidence, that the Prospect of Delivering a Judgment that would Hold Water filled him with Acute Dismay. And so, when Nobody was Looking, he Capsised a Handy Inkbottle over the Assembled Documents, Uttering Profuse Apologies to All Concerned. Giving Judgment (By Consent), His Honour gave Unstinting Approval to the Sensible Terms Concluded between the Implacable Litigants, whose Evident Consternation was (he remarked) an Invariable Sign of a Satisfactory Settlement. Moral: *Interest Rei Publicae ut sit Finis Litium.*—P. A. in (1960) *110 L.J.*, 831.

RECENT DISTRICT ADMISSIONS.

Barristers and Solicitors.

By courtesy of the Registrars of the Supreme Courts in the various centres we have been supplied with the names of persons recently admitted to the profession, and we publish these in the hope that they will be of interest and assistance to our subscribers. The details are as follows, the name of counsel moving in each case being shown in brackets :

Auckland

(By Mr Justice Turner on 17 February 1961)

Barristers and Solicitors

A. Hart	(Mr H. K. Brainsby)
W. C. Edwards	(Mr M. F. Chilwell)
M. Friedlander	(Mr A. G. Gray)
C. L. Jamnadas	(Mr I. L. Haynes)
J. G. Hundleby	(Mr A. C. Stevens)
B. N. Davidson	(Mr L. F. Rudd)
F. M. Morice	(Mr E. P. Hutchinson)
L. C. J. Lees	(Mr E. W. Henderson)
P. F. Fookes	(Mr H. F. Murphy)
R. W. D. Acraman	(Mr R. L. Ziman)

Barristers

C. J. Griffiths	(Mr I. L. Haynes)
B. M. Atkins	(Mr E. T. Pleasants)
R. W. R. McKinnon	(Mr E. T. Pleasants)
J. H. Wallace	(Mr M. E. Casey)
B. R. Driver	(Mr P. F. Clapshaw)

Solicitors

B. M. Scott	(Mr F. J. Newbery)
C. R. Pidgeon	(Mr E. W. Henderson)
J. S. Marshall	(Mr C. B. Mead)
I. D. Parton	(Mr A. H. Burns)

Hamilton

(By Mr Justice Turner on 10 February 1961)

Barrister and Solicitor

B. J. Bassett	(Mr E. F. Clayton-Greene)

(By Mr Justice Turner on 16 February 1961)

Barrister and Solicitor

C. E. Graham	(Mr B. W. Bell)

Wellington

(By Mr Justice Cleary on 27 January 1961)

Barrister and Solicitor

K. N. Govind	(Mr B. D. Inglis)

(By Mr Justice McCarthy on 31 January 1961)

Barristers and Solicitors

Mrs E. M. Schellevis	(Mr G. P. Barton)
L. W. Stubbs	(Mr W. E. Leicester)
D. R. D. Burnand	(Mr R. S. V. Simpson)
P. P. Burkitt	(Mr L. M. Grieg)
J. M. Pope	(Mr R. R. Scott)
J. H. Marshall	(Mr P. J. Treadwell)
N. R. A. Netherclift	(Mr H. Taylor)

Barristers

J. A. Laurenson	(Mr J. H. Carrad)
E. H. Abernethy	(Mr L. M. Papps)
I. W. Lawrence	(Mr G. I. Joseph)
J. A. L. Gibson	(Mr R. Stacey)

Solicitors

P. J. Loftus	(Mr E. F. Page)
B. L. Keys	(Mr N. T. Gillespie)
C. A. N. Beyer	(Mr W. Olphert)

(By Mr Justice McCarthy on 3 February 1961)

Barristers and Solicitors

P. D. McKenzie	(Mr G. C. Kent)
B. J. McKerr	(Mr G. C. Kent)
M. W. H. Lance	(Mr D. W. Virtue)

(By Mr Justice McCarthy on 10 February 1961)

Barristers and Solicitors

J. Downing	(Mr R. Stacey)
T. G. Twist	(Mr N. A. Morrison)
F. B. N. Fox	(Mr C. Evans-Scott)
A. Rubinstein	(Mr G. P. Barton)
K. L. Peterson	(Mr I. L. McKay)

Barristers

I. M. MacKay	(Mr N. A. Morrison)
C. M. D. Kerr	(Mr C. Evans-Scott)

Solicitors

T. G. G. Evans	(Mr N. A. Morrison)
E. L. James	(Mr A. Kiel)

Invercargil

(By Mr Justice Henry on 8 February 1961)

Barristers and Solicitors

G. S. Noble	(Mr H. K. Carswell)
B. W. Stokes	(Mr H. K. Carswell)

A Valid Protest.—However, in these days of sentimental dalliance with criminology, the attitude to crime of a few of our highbrows is daily getting softer and more unrealistic. If it were not so, it is scarcely credible that the hooded bandits who recently knocked out the guard of a Brighton to London train and made off with £A.10,000 worth of registered mail, would have presumed to protest, as indeed they did, to those who arrested them, that they were "only working men, like you, trying to get a living".—Theo Ruoff in (1960) *34 A.L.J.*, 241.

Husband and Wife : Tort.—"It is anomalous that at the present day a husband should be in a worse position than his wife in regard to the right of action in tort. This anomaly is accentuated by the fact that there is no restriction on a wife's right to sue her husband for a tort committed before marriage (*Curtis* v. *Wilcox* [1948] 2 All E.R. 573), though he cannot sue her for an ante-nuptial tort (*Baylis* v. *Blackwell* [1952] 1 All E.R. 74). The law is unjust in its effect on the spouses themselves as well as on third parties. The fact that the wife's right of action is limited to the protection of her property means that in no circumstances can she sue her husband for personal injuries inflicted on her, however grievous (*Tinkley* v. *Tinkley* (1909) 25 T.L.R. 264). . . . A further unsatisfactory result of the present law is that a husband's (or wife's) third-party insurance is of no avail to a spouse who is injured by the other's negligence."—*9th Report of Law Revision Committee* (Cmd., 1268).

MR. W. CARROLL HARLEY S.M.

Tributes in Court.

On 8 February a representative gathering of Taranaki practitioners in the Magistrate's Court New Plymouth paid tributes to the late Mr William Carroll Harley who had been stationed at New Plymouth for some years as Stipendiary Magistrate. Mr A. W. Yortt S.M. presided. There were also present representatives of the Police and the Transport Department, and also of the Justices of the Peace Association, whose patron Mr Harley was and in whose affairs he took a lively interest. An apology was received from Mr W. H. Woodward who was Mr Harley's predecessor in office, and who was unable to be present owing to absence in the South Island.

Mr Yortt outlined Mr Harley's career and referred to the part he had played in the civic and educational affairs of the City of Nelson. He continued: "Though Carroll Harley had a sound legal background, he would not wish it said that he was learned in the law. Not for him the fine legal point nor the neatly-turned legal phrase. He preferred to deal with those matters and those people who came before him with a broad and kindly commonsense, based on a wide experience of men and affairs, and coupled with a lively and, at times, almost irrepressible sense of humour. If he erred it was on the side of leniency, and though he would find it necessary to be stern at times, no man with the milk of human kindness in his veins could sit for years in judgment on his fellow men without showing at times some feelings of compassion. So if to be human and compassionate is to err, then surely it is a goodly fault.

"He was a forthright though friendly man. He was good company. He loved his fellow-men and was loved in return, and throughout the length and breadth of this country there are friends in many walks of life who are with us today in spirit and who, if present, I am sure would wish to endorse all that is being said".

Mr Yortt then extended the sympathy of all those present to Mrs Harley and her daughter Mrs Walkley, and concluded his address in the following terms:

"William Carrol Harley has passed on. In war and in peace, he served his country well and the country is the poorer for his passing".

Mr C. H. Strombom, president of the Taranaki District Law Society, spoke on behalf of the members of the society, associating it with the tribute of respect expressed by Mr Yortt. He referred to the fact that Mr Harley had come to the district only in the later years of his life, but with a background of wide experience as Magistrate, soldier and public administrator.

"Mr Harley utilised to good effect in his judicial office the beneft he had gained from this wide experience" said Mr Strombom. "We appreciate what you have already referred to, his forthright manner of speech, his direct approach, and his practical ability to get to the crux of any matter with which he was dealing.

"In this Court we appreciated, too, his courteous and kindly manner and his helpfulness to all those who appeared before him.

"His was a nature that always liked to be doing something, and even when he retired in 1956 he still felt the desire for work and when his health permitted, his services were readily available.

"During his residence in New Plymouth, Mr Harley continued to take an interest in community affairs, and his highly-regarded opinion and advice, whenever sought, were always readily forthcoming.

"The late Mr Carrol Harley will be remembered with esteem and respect, as a worthy citizen who served his country well.

"In sorrow for his death, but with respectful admiration for his qualities, we in the legal profession mourn his loss, and on behalf of the Taranaki members of the Law Society we wish to join with you, sir, in expressing to Mrs Harley and her daughter our deepest sympathy in their loss".

OBITUARY.

Mr. W. G. R. Mellish J.P.

Well-known to Wellington practitioners both as a lawyer and as Coroner for more than 20 years, Mr Mellish died at his home on 17 February. He was aged 69.

Mr Mellish received his early training in the office of Bell, Gully and Co., Wellington, and was admitted in 1916. He practised in partnership first with Mr J. A. Scott and later with Mr R. M. Morgan, but was alone from 1954 until 1960 when he retired after an illness.

In sport Mr Mellish was for many years a member of the Lyall Bay Bowling Club, served on the executive of the Wellington Bowling Association, and as a vice-president of the Athletic Rugby Football Club.

PRACTICAL POINT.

QUESTION: I have two conveyancing problems and feel certain that they will have both been covered by articles in the JOURNAL in the last ten years or so. I would be most grateful if you could refer me to the volume and page of the LAW JOURNAL in which precedents appear.

The first precedent is for an easement in respect of air strips. With the great number of air strips being formed in the country I have no doubt that many people wish to obtain easements for their protection.

Secondly, I would like to obtain a suitable form of deed evidencing an agreement between adjoining owners of land as to the boundary fence between them and the rights of each party and liabilities for repairs and maintenance. It is intended to register the deed in the Land Registry Office.

ANSWER: (1) Precedents for easements in respect of air strips will be found in (1954) 30 N.Z.L.J. 276. (2) Precedent for an agreement between adjoining owners as to boundary fence is in (1950) 26 N.Z.L.R. 13.

X.

TOWN AND COUNTRY PLANNING APPEALS.

Blythes Ltd. *v.* Napier City Council.

Town and Country Planning Appeal Board. Napier. 1960. 28 November.

District Scheme—Change of use—Application for authority to use section as car park—Public car park not required in area—Permission to use as private car park—Town and Country Planning Act 1953, s. 38A.

Appeal under s. 38A of the Town and Country Planning Act 1953.

The appellant company was the owner of a property situate in Hastings Street, Napier, containing 11.5 pp. more or less being part of Town Section 214 and 215 Napier and being also Lot 1 on Deposited Plan 6172 and part of Lot 2 on Deposited Plan 6131. This property was a vacant section adjoining the appellant company's business premises. The company wishes to use it as a car park providing off street car parking and it applied to the respondent Council for consent under s. 38A (1) to a change of use. The Council refused its consent and this appeal followed.

Zohrab, for the appellant.
Sproule, for the respondent.

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

1. Hastings Street is one of the principal streets in the inner area of Napier City and the Council's main reasons for refusing its consent to the proposed change of use are (a) that a car park on this property would tend to create a traffic hazard for both pedestrian and vehicular traffic using Hastings Street, and (b) that there is adequate parking space within a reasonable distance of the appellant's property in the free and unrestricted parking areas on Marine Parade.
2. The Council's undisclosed district scheme makes provision for requiring owners or occupiers to provide off-street parking for vehicles used in conjunction with a site, but the Council has decided as a policy not to require such provision to be made in the inner commercial area of Napier.
3. The Board is satisfied that an off street car park on this property open to the public or to licensees of the appellant company should not be permitted but it considers that the appellant has made out a case for justifying its use as a private car park.

The appeal is allowed in part: The company is to be permitted to use the property for a car and bicycle park to be used only by the company's directors, employees, and invitees subject to the condition that no charge is made for the use thereof and subject to the car park being constructed in general conformity with the plan annexed to the appeal.

Appeal allowed in part.

Herne Bay Service Station Ltd. *v.* Auckland City Council.

Town and Country Planning Appeal Board. Auckland. 1960. 28 November.

Departure from District Scheme—Land zoned "residential"—Application to re-zone "Commercial B"—Change of advantage to applicant and customers—Public interest paramount—Change not in public interest—Town and Country Planning Act 1953, s. 35—Town and Country Planning Regulations 1960, Reg. 32 (1).

Application under s. 35 of the Town and Country Planning Act 1953 for consent to a specific departure from the provisions of the Auckland City Council's proposed district scheme by rezoning a block of land described as all those pieces of land containing 1 ro., 37.61 pp., being Lots 5, 6, 7, 8 and 101 on Deposited Plan 7073 and Lots 95 and 96, part Allotment 22, Section 8, Suburbs of Auckland. The property had a frontage to Jervois Road, Ponsonby, and on the east to Islington Street and on the west to John Street. Under the relevant Scheme it is zoned as "residential". The application as originally filed applied for the rezoning of this land as "industrial", but when the application came to hearing, counsel for the applicants indicated that they now wished to have the property rezoned as "commercial B". The application as originally filed was made on behalf of the Herne Bay Service Station Limited. At the hearing application was made for Thomas Charles Southward and Robert Arnold Harris to be joined as co-applicants. The position was that the applicant company has acquired the right to purchase this land conditionally upon its being rezoned. The co-applicants who were joined in the proceedings were the registered proprietors of the property under consideration.

Webster, for the applicant.
Butler and *Hollis*, for the respondent Council.
Young, for Thomas Charles Southward.
Maclaren, for Robert Arnold Harris.

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

1. When public notice of the application was given pursuant to Reg. 35 of the Town and Country Planning Regulations 1954, no objections to the application were lodged but the Council having considered the application and all arguments submitted in support of it resolved to oppose the application on the grounds that an industrial zoning would permit uses detrimental to the amenities of the district.
2. The application was not considered by the Board on the basis of a proposed "industrial" zoning but on the basis of a proposed "commercial B" zoning. Under the "commercial B" zoning the uses to which the applicants wish to put the property would be a conditional use. The applicant company carries on the business of a commercial garage and service station in premises situated in Jervois Road. These premises are inadequate to cope with the volume of business now being done by the company and it wishes to move the main part of its business to the property under consideration.
3. By virtue of the provisions of Reg. 32 (1) of the Town and Country Planning Regulations 1960 the paramount consideration in considering applications for specific departures under s. 35 must be that of public interest. It is clear that it would be of considerable advantage to the applicant company and to its customers if this application were granted and the applicant company able to move to more spacious premises, but the Board is unable to find that such a change is a matter of public interest. What is of public interest is that town-planning schemes in general should be regarded not from the point of view of the advantages that might accrue to individuals by a change but what is desirable in accord with town-and-country-planning principles in the interests of the community as a whole. In planning for this particular area of Auckland City, the Auckland City Council has planned to consolidate commercial development in Jervois Road and Ponsonby Roads into limited blocks rather than to permit the ribboning of commercial uses along substantial lengths of street frontage. The property under consideration here has never been used for commercial purposes and on a long-term view it is suitable for the purpose for which it is zoned—"residential". It is in a substantially developed residential zone and the area in which it is situated is predominantly residential in character. The evidence is that the plan makes more than adequate provision for the commercial requirements of this part of Auckland in the areas already zoned as "commercial" and the Board is satisfied that it would not be in the public interest to extend that "commercial" zoning.

The application is disallowed.

Application refused.