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A WRITTEN CONSTITUTION AND A SECOND CHAMBER

IN our issue of 22 November 1960 (36 N.Z.L.J. 385) we published an article on the above topic and invited contributions from our subscribers. Various contributions have been received all of which have been published and the time is now ripe for a review of the opinions expressed by our various correspondents.

One notable feature of the correspondence received has been the fact that it has in the main been critical of the views which we expressed. This is understandable. We should however let our readers know that there have been just as many oral commendations of such views in whole or in part, so that it should not be thought that the attitude of the profession generally was condemnatory of the article in question.

In one respect we were severely disappointed. The object of the article was to provoke discussion, and we hoped that the Constitutional Society would spring to the defence of one of its main objects and furnish a worth-while contribution to the discussion. In fact the Society has officially maintained silence although, to be fair, we must say that it is fairly obvious that some of our correspondents are connected with the Society.

Before dealing in detail with the correspondence received we should like to refer to an address given by Professor H. R. Gray, Professor of Law at the University of Canterbury, to the annual meeting of the Council for Civil Liberties on 27 April. To date we have seen only the account of the address published in the *Christchurch Press*, but it is sufficiently in point to tempt us to refer to it.

Professor Gray opened by mentioning that New Zealand already has a constitution provided in the Act of 1882. He described this as having the minimum constitutional requirements and among other things established a General Assembly and provided for revenue and the expenditure of money. He then went on to refer to the more elaborate constitutions of South Africa, Australia and the United States and he put the question whether we preferred the skeleton framework as in the United Kingdom and New Zealand or a full and detailed provision. As to the former he said that the advantage of the skeleton form was its adaptability with its corollary of Parliamentary Sovereignty. This means that Parliament may make or unmake any law, and civil liberties are at the mercy of Parliament. Generally a full and detailed constitution has not this defect since the Legislature has only those powers specifically conferred upon it by the constitution, and this may or may not include the power of constitutional amendment. The result is usually to put effective control in the hands of the Courts.

Professor Gray then posed a further question when he asked whether it was necessary to rewrite the constitution or whether we merely wished to entrench civil liberties. He quoted the civil liberties written into the Constitution of the United States and expressed the view that all of these ought not necessarily to be unqualified. Freedom of speech could lead to defamation, obscene or abusive language, sedition or what has been called "trial by newspaper". Freedom of assembly has as its reverse side the creation of a public nuisance.

In conclusion, the Professor is reported as saying:

> "If I have asked more questions that I have answered it is because there is no use in calling for a constitution for New Zealand unless those questions, both political and legal, are answered."

We hope that we are doing Professor Gray no injustice if we say that the tenor of his address shows that he has, to say the least of it, substantial reservations as to the desirability of the adoption of a written constitution for New Zealand.

To come back to our correspondents, the first letter on the subject was from Mr J. A. Russell (*ante*, 44) who made three points in criticism of our article. First he took us to task for suggesting that the greater number of people who signed the petition for the adoption of a written constitution had no real idea what they were asking for and went to some lengths to show the care which was taken by those presenting the petition for signature to select thinking and educated people to approach and then to explain the aim and object of the Society in detail. We do not doubt for one moment that this care was taken by Mr Russell and by those with whom he was in close contact, but we do take leave to doubt whether it was general throughout New Zealand. The very large number of signatures obtained in a comparatively short space of time suggests the contrary. In any case, the answer to Mr Russell's statement is contained in a letter from Mr F. C. Jordan published at page 45 of the same issue of the Journal. He sums the position up by saying "Many of us want to know the wording of

the constitution before we are willing to commit ourselves to a written constitution."

There is no magic in a written constitution itself. What does matter is what is written into it, and,until a draft has been prepared, it is impossible for anyone to judge whether its adoption would be advantageous or disadvantageous. It appears that a committee of the Constitutional Society has only now completed a draft, and whether that draft is acceptable to the Society as a whole remains to be seen. Until this stage is reached and the draft can accompany the petition we suggest that signatures to the petition are of little value.

Mr Russell's second point was that if the constitution provided that the will of the people must be expressed in a referendum then the attention of the people would be focalised on any ordinary Act of Parliament which sought to amend its terms. That may be so, but it does not answer the question whether Parliament can limit its future legislative power in this way. The focussing of public attention on an attempt to circumvent such a restriction will do little good unless someone is prepared to challenge the actions of the Legislature with every prospect of having to fight the case through to the Privy Council. Our point was that it was not good policy to place ourselves in a position where we were virtually inviting protracted and costly litigation with a period of grave doubt and uncertainty as to the powers of Parliament. We maintain that this objection is valid, despite the view of our correspondent to the contrary.

Finally Mr Russell draws attention to the fact that the amount of litigation engendered by a written constitution would be the less because New Zealand is not a federal state, and remarks that every constitutional case before the Court would necessarily have to do with some alleged infringement of an individual liberty. Much of the litigation in the United States and Australia does rest on alleged conflicts of law between States and the Federal Government but even a good deal of that really stems from an alleged injustice to an individual. We still contend that with everyone aggrieved by an Act of Parliament scrutinising it to see whether it could be attacked on constitutional grounds we would be faced with a heavy body of litigation and its resulting disruption of the business life of the community.

There is a thoughtful letter from Mr J. H. Evans in criticism of our article (*ante*, 57). He expresses the opinion, with which we agree, that it is virtually impossible to imagine a written constitution without a second Chamber of some kind. He then goes on to set out a method of creation of such a second Chamber and the adoption, by both Houses sitting together, of a written constitution. We should have liked to have had the views of an expert in Constitutional Law on his proposals but to us they do seem to overcome the objections which we based on the doubt as to whether Parliament could fetter itself by prescribing a particular method of amendment of the statute adopting the constitution. The success or otherwise of his scheme depends however very largely on the extent to which the second Chamber is protected against domination by the Government of the day, with which we deal below.

Mr Evans then goes on to deal with the method of appointment to the second Chamber, and criticises our statement that nomination by the Executive is completely undesirable. He suggests that our statement is not valid provided that nomination is combined with some other method "*and that the Executive pays attention to the national interest rather than to mere party advantage*". We may be cynical, but we have no faith in the suggestion that the words italicised above would be applicable at all times. The history of the old Legislative Council in its later years shows that it became a rubber stamp, and a very expensive one at that, for the Government of the day, and if a second Chamber is to be established there must be safeguards against that position ever arising again.

Our correspondent then puts forward the suggestion that at least a proportion of the members of the second Chamber should be elected by members of various professions, occupations, and associations. This proposal has been raised before and has merit. The difficulty is, of course, to select the members of what we may call the "Electoral College", but no doubt this could be overcome. The suggestion is well worth further consideration.

The next contribution was from Mr N. Wilson Q.C. (*ante*, 75). On the establishment of the constitution he suggests that this be done by referendum but this overlooks the fact that a referendum *in itself* has no legislative effect. We have always supposed that a referendum would precede the adoption of any constitution, but legislation in the form of a statute would be necessary to bring it into force. This statute would still leave open the question whether any entrenching provisions would be effective.

We have already dealt with our correspondent's second point regarding the amount of litigation which would be engendered by a written constitution, and have nothing to add to our previous comments. We do join issue with him when he says that there is no reason why a constitution adopted by the people should be more inflexible than statute law. Procedure for amendment will necessarily be included as it is in the Constitutions of the United States and Australia, but if these safeguards are to serve any good purpose, they must provide for a regular procedure which will give the people time to realise what is being done. One would assume, for example, that in the case of a constitution adopted after a referendum a similar referendum would be required before any amendment could be adopted. Whether the people will approve a highly technical amendment which they have difficulty in understanding is a matter of some doubt.

Mr Wilson chides us for saying that no one has brought forward a method of appointment or election to a Second Chamber which is acceptable, and asks to whom it is to be acceptable. The obvious answer is to the electorate and to the Government of the day. He then goes on to suggest in general terms various methods and says that the problem is not insoluble. We agree with him on this point but again say that we have not seen *in detail* any scheme which would provide a Second Chamber which would have effective powers and which could never be brought under the complete domination of the Government of the day.

Finally there is a further letter from Mr F. C. Jordan (*ante*, 92) who suggests a Second Chamber of 20 to 30 members elected by proportional representation, the Chamber having only power to defer for three months any bill not declared by the Government to be urgent. The merits of this suggestion can only be investigated by trial, since it is impossible to say how a vote under

a system of proportional representation might go, as compared with a vote at the same time for the lower House under the present system. The proposal undoubtedly has merit and is worth further thought and investigation. We question the wisdom of allowing the Government virtually to by-pass the Second Chamber by declaring a Bill to be urgent. Such power could be freely used in the dying stages of a session when the urgency arose out of delay in introducing legislation, such delay even being deliberate.

Even if our article has served no other purpose it at least provoked thought in some quarters, and this was one of its objects. Everyone has now had an adequate opportunity of putting forward his views and in the circumstances the correspondence must be regarded as closed.

SUMMARY OF RECENT LAW

ADOPTION OF CHILDREN.

Interim order made with consent of natural mother—Natural parents marrying—Consent of father becoming necessary to adoption—Interim order revoked—Legitimation Act 1939, s. 3—Adoption Act 1955, ss. 7, 12. The mother of an illegitimate child, being herself a minor and unable to marry the father of the child because of the refusal of consent by her parents, told the father of the child that it was dead and consented to the child's adoption, an interim order being made. Subsequently the parents of the child married, and the mother informed the father of what she had done. The natural parents then applied for the revocation of the interim adoption order. *Held,* That on the marriage of the child's parents it became legitimated under s. 3 of the Legitimation Act 1939. The father's consent to the adoption order then became necessary unless there were sound reasons for dispensing with it and that as there were no such reasons the order should be revoked. *In re C. (An Infant).* (1961. 10 March. Inglis S.M. Hamilton.)

COMPANY LAW.

Shares and shareholders—Shareholder paying money on account of amount unpaid on his shares—No sale made—Effect of payment—To be taken pro tanto *in satisfaction of future sales—Court's power to go behind company's records—Transaction not a fraudulent preference.* Where without a sale being made, moneys are accepted by a company from a shareholder on account of the amount remaining unpaid on his shares the effect of the transaction is that the company borrows the money from the shareholder which it need not repay. Such moneys cannot, in the absence of a special provision in the constitution of the company, be returned to the member, and must be treated *pro tanto* in satisfaction of future sales. (*Re Bourdot Ltd.* (1914) 17 G.L.R. 320 and *Liquidators of South Canterbury Building Society* v. *Stumbles* (1893) 12 N.Z.L.R. 58, followed.) In considering the nature of such a transaction the Court may look behind the records of the company and ascertain the true position if there is satisfactory evidence that the records do not disclose it. (*In re the New Zealand Pine Co., Ex parte the Official Liquidator: Guthrie's* case (1898) 17 N.Z.L.R. 257; 1 G.L.R. 193, followed.) Such a transaction cannot be a fraudulent preference since its motive is the provision of capital for the company and not the obtaining of a preference of any sort. *In re Smith and Landreth Ltd., Ex parte Landreth.* (S.C. Dunedin. 1961. 1, 3 March. Henry J.)

CONTRACT.

Performance—Sale of racing motor cycle—No warrant of fitness handed over at time of delivery—Duty imposed by regulation—Motor cycle not exempted by class or description—Breach not avoiding contract of sale—Traffic Regulations 1956 (S.R. 1956/217), Reg. 53 (1). A racing motor cycle is not exempt from the provisions of Reg. 53 of the Traffic Regulations 1956 (S.R. 1956/217), by reason of its class and description. It merely does not require a warrant of fitness while it is being used in a limited manner, e.g. on grass-racing tracks, and not on the road. Once it is used on the road it must carry a warrant of fitness but it does not then change its class and description but merely its place of use. Regulation 53 (1) of the Traffic Regulations 1956 does not impliedly prohibit a contract for the sale of a motor vehicle which is valid in its formation but is so performed as to contravene some provision of the regulation. Such a contract does not therefore become illegal and void by reason of non-compliance with the regulation. (*Markin* v. *Fairbairn* (1959) 9 M.C.D. 430, dissented from; *Buchan* v. *Ngatai* (1959) 9 M.C.D. 369, approved; *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267; [1956] 3 All E.R. 683; *Le Bagge* v. *Buses Ltd.* [1958] N.Z.L.R. 630 and *Richards et Ux* v. *Hill* [1959] N.Z.L.R. 415, applied.) *Williams* v. *Chamberlain.* (1961. 22 March. Barry S.M. Marton.)

DESTITUTE PERSONS.

Separation—Persistent cruelty alleged—Jurisdiction of Court to order particulars—Destitute Persons Act 1910, ss. 17 (1) (c), 64 (1). While there is no special rule under which the Court can direct the giving of particulars on a complaint alleging persistent cruelty, particulars should be given on request and the Court will in a proper case employ its power of adjournment and require particulars to be given in the interests of justice. Alternatively the Court may adopt by analogy the provisions of r. 7 (2) of the Magistrates' Court Rules 1948 to proceedings under the Destitute Persons Act and make an order for particulars in an appropriate case. A domestic proceeding is one *inter partes* and at least to that extent is akin to a civil proceeding. *Lock* v. *Lock.* (1961. 23 January; 10 February. Crutchley S.M. Invercargill.)

INDECENT PUBLICATIONS.

Novel of literary merit—Standards to be applied in considering whether there is undue emphasis on sex—Indecent Publications Act 1910, ss. 5, 6—Customs Act 1913, s. 257. The words "unduly emphasises matters of sex" as used in s. 6 of the Indecent Publications Act 1910 means dealing with matters relating to sex in a manner which offends against the standards of the community in which the book or document in question is published or distributed. (*Wavish* v. *Associated Newspapers Ltd.* [1959] V.R. 57 and *MacKay* v. *Gordon and Gotch (Australasia) Ltd.* [1959] V.R. 420, followed.) *So held,* by the Court of Appeal (North and Cleary JJ., Gresson P., dissenting), affirming the judgment of Hutchison J. [1960] N.Z.L.R. 871. *Further held,* Per North J. 1. The list of topics contained in s. 6 of the Indecent Publications Act 1910 which, if they form the subject-matter of a book or other document may result in its being held to be indecent, is not exhaustive; therefore a book or document which does not fall within s. 6 may nevertheless be held to be indecent if it tends to deprave or corrupt persons whose minds are open to immoral influences. Even in such cases the Court is required to give consideration to the various matters set out in s. 5 which is of general application to all cases where documents are alleged to be of indecent character. 2. The selection of a particular theme relating to sexual matters might itself result in a book being held to emphasise matters of sex unduly. The theme of a book cannot be separated from the treatment of the theme, and if an author decides to write a novel about a perverted or abnormal sexual relationship he must be content for his book to be judged as a whole. The Court is entitled to pay due regard to the theme as well as to the method of treatment of the theme by the author. Per Cleary J. 1. In so far as undue emphasis on matters of sex and a tendency to deprave or corrupt are expressive of separate notions, the provisions of the Indecent Publications Act 1910 require the Court to find both to exist before there can be a finding of indecency. 2. Once it is accepted that the theme of a book is a legitimate one the book cannot be held indecent unless the author's treatment of the theme becomes objectionable but in considering the manner in which the author treats his theme attention is not to be confined merely to the prose style and literary merit of the book. A repugnant theme may receive such constant and disproportionate emphasis as in itself to render a book objectionable notwithstanding an admirable literary style and an absence of coarse language. 3. In deciding whether a book has a tendency to deprave or

corrupt it is not necessary that it should have a tendency to evoke sexual behaviour of the kind actually portrayed. It is sufficient if the book might well have a debasing effect on the moral standards of those susceptible to influences of such a kind, so that there would be a tendency to evoke immoral or mischievous behaviour of some kind or other. Per Gresson P. (dissenting). 1. It may well be that a narrative which unnecessarily devoted overmuch attention to sexual episodes might be condemned as unduly emphasising matters of sex but it is otherwise when the work itself is a study of a particular aspect of sex. In such a case matters of sex will of necessity be given prominence; the nature of the work demands it, and such emphasis as there is is not "undue". 2. A Judge considering whether a work unduly emphasises matters of sex should use his own judgment and not attempt to decide whether the manner in which sex is dealt with offends against the standards of the community in which the work is to be published. *In re Lolita.* (C.A. Wellington. 1960. 16, 17 November. 1961. 7 March. Gresson P. North J. Cleary J.)

LAND SETTLEMENT PROMOTION.

Application for order that land is not farm land—By whom to be made—Proposed purchaser competent to apply—Land Settlement Promotion Act 1952, s. 2 (3). A person with a colourable claim to be regarded as a purchaser of land having a contractual relationship with the registered proprietor thereof is entitled to apply to a Land Valuation Committee for an order under s. 2 (3) of the Land Settlement Promotion Act 1952 and to be heard by the Committee despite the objection of the registered proprietor. *In re a Proposed Sale, Grigg to Green and McCahill (Holdings) Ltd.* (1961. 15 March. Auckland. No. 2 Land Valuation Committee.)

LICENSING.

Licences—Application for removal of wholesale licence granted by licensing committee and Chairman and Clerk authorised to endorse licence on receipt of approval of Licensing Control Commission—Decision a final determination of application—Void when made but validated by subsequent legislation—Licensing Act 1960, ss. 14 (2), 14 (3). On an application for the removal to new premises of a wholesale-liquor licence the first defendant made a decision expressed in the following terms: "The application heard and resolved that the Committee is of the opinion that the application should be granted and is prepared on receipt of the Licensing Control Commission's approval to grant it. Further resolved that Chairman and Clerk be authorised to make endorsement on the licence accordingly." The removal of the licence was subsequently approved by the Licensing Control Commission and the licence was thereupon endorsed by the first defendant's Chairman and Clerk without any further meeting or decision of the first defendant. The plaintiff's took proceedings for (*inter alia*) a writ of *certiorari* to quash the removal of the licence on the grounds that the purported removal was a nullity since it was granted without the *prior* approval of the Licensing Control Commission as required by s. 127 (10) of the Licensing Amendment Act 1908. On 8 September 1960 judgment was delivered by the Supreme Court ([1961] N.Z.L.R. 35) ordering the issue of the writ sought. After the delivery of the judgment but before any formal order had been sealed the Licensing Amendment Act 1960 was enacted providing in s. 14 (3) that where at any time before the passing of the act any order for the removal of, *inter alia*, a wholesale licence had been made by a Committee and approved by the Licensing Control Commission the order should be deemed for all purposes to have been validly made notwithstanding that such approval may have been given after the making of the order. The plaintiffs moved for a stay of execution under the judgment of 8 September 1960. *Held*, 1. The decision of the first defendant quoted above was a final determination of the application for removal of the licence, suspended however in effect pending receipt of the approval of the Licensing Control Commission. 2. The order so made was one which, as from the passing of the Licensing Amendment Act 1960, was "deemed for all purposes to have been validly made" pursuant to s. 14 (3) of that Act. 3. No formal order in pursuance of the judgment of 8 September 1960, having been drawn up and sealed, such judgment could be withdrawn, altered or modified, the Court's discretion in this regard to be exercised judicially and not capriciously. (*In re Harrison's Share under a Settlement, Harrison* v. *Harrison* [1955] Ch. 260, followed.) 4. In view of the change in the law effected by s. 14 of the Licensing Amendment Act 1960 the issue of a writ of *certiorari* as earlier ordered would no longer serve any useful purpose in the interests of the public. (*Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* [1912] A.C. 788, referred to.) 5. The judgment delivered on 8 September 1960 should be varied by withdrawing the order for the issue of a writ of *certiorari* and substituting an order dismissing the motion by the plaintiffs for such relief. *Johns and Another* v. *Westland District Licensing Committee and Others (No. 2).* (S.C. Greymouth. 1961. 17, 27 February. Richmond J.)

Licensing Committee—Jurisdiction to hear and determine application for removal of wholesale licence at quarterly meeting—Licensing Act 1908, ss. 54, 127. A Licensing Committee has jurisdiction to hear and determine at a quarterly meeting an application for the removal to new premises of a wholesale licence granted under the Licensing Act 1908. *Warren Smith and Co. Ltd.* v. *Napier Licensing Committee.* (S.C. Napier. 1961. 21 February; 2 March. McGregor J.)

LIMITATION OF ACTIONS.

Breach of trust—Express trustee entitled to plead statute in absence of concealed fraud—Time when cause of action accrues—Limitation Act 1950, s. 21 (2). An express trustee is entitled to plead s. 21 (2) of the Limitation Act 1950 in reply to an action for a breach of trust alleged to have been committed more than six years before the action is brought. (*Soar* v. *Ashwell* [1893] 2 Q.B. 390 and *Rochefoucauld* v. *Bousted* [1897] 1 Ch. 196, distinguished. *How* v. *Earl Winterton* [1896] 2 Ch. 626 and *In re Blow* [1914] 1 Ch. 233, followed.) In the absence of a concealed fraud the cause of action for a breach of trust arising out of the alleged neglect of a trust property accrues when the neglect complained of takes place and not on the subsequent ascertainment of the loss or damage sustained. (*Thorne* v. *Heard* [1894] 1 Ch. 599, followed.) The beneficiaries under a will agreed to enter into a Deed of Family Arrangement under which (*inter alia*) they agreed to release "the trustee" from liability for alleged breaches of trust upon the terms of the deed being carried into effect. Before the deed was executed the surviving trustee, E. E. S., died and the second respondent, as his personal representative, became entitled to appoint new trustees of the will above-mentioned. A Deed of Appointment of three new trustees was executed by the second respondent and by all the beneficiaries under the said will, the draft Deed of Family Arrangement being annexed. The draft was incomplete in certain respects. The parties agreed that the beneficiaries should execute the Deed of Family Arrangement "subject only to such amendments as may be necessary on account of the death of" E. E. S. *Held*, That upon the Deed of Family Arrangement being amended as required by the Deed of Appointment, the discharge contained in it operated for the benefit of the new trustees being appointed and did not protect the estate of E. E. S., from liabilityfor breaches of trust committed during his term of office. Appeol from the judgment of Haslam J., dismissed, but judgment of the Supreme Court varied. *Short* v. *Short and Others.* (S.C. Palmerston North. 1959. 7, 8 July; 11 November. Haslam J.) (C.A. Wellington. 1960. 21, 22 November. 1961. 20 February. Gresson P. North J. Cleary J.)

Proof of claim disclosing that period of limitation expired—No appearance by defendant or plea of statute—Plaintiff entitled to judgment—Limitation Act 1950, s. 4. Section 4 of the Limitation Act 1950 bars the remedy and not the right. It provides a defence which the defendant may raise if he thinks fit but if he does not do so and the plaintiff proves his claim the plaintiff is entitled to judgment even though the facts proved disclose that the limitation period has expired. (*Dawkins* v. *Lord Penrhyn* (1878) 4 App. Cas. 51, applied.) *Reed and Others* v. *Peters.* (1961. 20 January. Izard S.M. Christchurch.)

PRACTICE.

Judgments and orders—Judgment ordering issue of writ of certiorari *to quash invalid removal of licence—Order for removal validated by legislation before formal order or judgment drawn up and sealed—Power of Court to vary judgment—Nature of variation to be made—See* also LICENSING *(supra).*

PUBLIC REVENUE.

Income tax—Loss exclusively incurred in production of income for year—When loss incurred—Land and Income Tax Act 1954, s. 111. The appellant B. and one M. entered into a profit-sharing agreement in relation to the growing of crops of tree-tomatoes and passion-fruit. The profits made for the year

ended 31 March 1957 were divided in accordance with the agreement but on 23 January 1957 the appellant terminated the agreement. M. then commenced an action for an injunction restraining the appellant from preventing him from carrying out his duties under the agreement and sharing in the profits until 30 September 1957 and in the alternative claiming an order for an account of the profits to 30 September 1957 and judgment for M.'s share thereof. On 16 July 1957 an agreement was reached that the action be discontinued on payment of £500 to M., and this amount was paid in October 1957. The appellant sought to deduct this sum from his income for the year ended 31 March 1957, claiming that it was a loss exclusively incurred in the production of income for that year. *Held*, That the loss was incurred when the settlement of M.'s claims was agreed to on 16 July 1957, and the appellant's liability arose out of that agreement. The said sum of £500 was therefore not deductible from the income for the year ended 31 March 1957. *B.* v. *Commissioner of Inland Revenue.* (1961. 27 March. Coates S.M. Auckland.)

Income tax—Taxpayer living in New Zealand for four years but intending to return to England—Whether he had a home in New Zealand—Meaning of home—Principles applicable—Land and Income Tax Act 1954, s. 76. For the purposes of s. 76 of the Land and Income Tax Act 1954 a person may be absent from New Zealand but still have a home here while the mere physical presence of a person in New Zealand does not of itself mean that such person has a home in New Zealand. A home must be regarded as a place to which the characteristics of stability and permanence are attached. It is one's fixed or settled abode and the place where one's roots or permanent attachments are to be found. Whether a person has a home in a particular place is a question of fact to be determined on all the circumstances of the case. The appellant had come to New Zealand as an employee of the contractors building the Auckland Harbour Bridge. He remained in New Zealand for approximately four years when his work on the bridge was completed and he returned to England. *Held*, That on the facts the appellant did not have a home in New Zealand for the purposes of s. 76 during any part of his physical presence in New Zealand. *W.* v. *Commissioner of Inland Revenue.* (1961. 24 January. Coates S.M. Auckland.)

TRANSPORT.

Licensing—Breach of goods-service licence—Amount payable to Railway Department—Compensation and not penalty—Transport Act 1949, s. 96B (Transport Amendment Act 1959, s. 7). The amount payable to the New Zealand Government Railways Department under s. 96B of the Transport Act 1949 (s. 7 of the Transport Amendment Act 1959) is intended to be compensation to the Railways Department for loss of earnings and is not a penalty. The section is designed to put the Department in the position in which it would have been had the defendant acted in conformity with the conditions of his licence. The defendants were entitled to carry goods between (*inter alia*) Woodville and Waipukurau. In fact they carried goods between Palmerston North and Waipukurau, and were convicted of a breach of the conditions of their licence. *Held*, That they were bound to pay to the Railways Department an amount equal to the freight between Palmerston North and Woodville and not the total freight between Palmerston North and Waipukurau. *Attorney-General* v. *McKinnie and Another.* (1961. 8 March. Harlow S.M. Napier.)

ABOLITION OF THE GRAND JURY

The present pressure for the abolition of the Grand Jury and the opposing arguments in favour of its retention have come to the fore in New Zealand only recently. In view of the controversy now in progress the following article from the *Law Journal* is of particular interest:

"GRAND JURIES.

"A MAGISTRATE" writes to *The Times* as follows:

"A learned Recorder, Q.C., in charging the grand jury of a county town (there were no prisoners for trial!) made the following remarks:

> He thought it possible that one of the these days it might be considered that the attendance of a Grand Jury at Quarter Sessions was unnecessary, and there was a sufficient protection that persons would not be improperly put upon their trial as the cases were heard in the first instance by the Magistrates.

"How devoutly it is to be wished that this blessed day may come soon, and that the common sense of this recorder may prevail!

"In former days, when the squire heard the case of the poacher upon his own preserves and committed him with no other assistance than his own legal lore, the institution of a grand jury was indeed a safeguard; but in these enlightened times of magistrates' clerks and well-regulated Petty Sessions it is nothing less than absurd, as regards Quarter Sessions at least, that the deliberate opinions of justices advised by a lawyer should be submitted *quasi* for approval and should be liable to be overruled by less cultured minds. It is very doubtful, too, even as regards assizes, if the institution of a Grand Jury can be of any real utility, except to share with a Judge the responsibility of saying that such and such a prisoner shall not be put upon his trial in a particular class of case of an unmentionable character for want of evidence. But the Judge in such cases is surely able to bring about the same result by a timely hint to counsel.

"Is there, however, any such further necessity, or even propriety, in the institution of a Grand Jury that it is worth while to continue the trouble and expense and loss of time involved? This is no age for pedantic and cumbersome methods of obtaining justice. No one travels nowadays by a stage-coach, except as a curiosity. The blast of the trumpet down St. James's Street is interesting, no doubt; but for the dozen persons sitting upon the coach there are a dozen thousand travelling in the railway.

"The relationship of a grand jury to a modern Court of justice is somewhat in the same ratio. Magistrates and commercial men who are bound to attend there know that they are doing no good whatever, except, perhaps, to swell the triumph of a judicial car on a Roman holiday.

"Pedantry will not fail, I am aware, to dish up some sort of argument for the continual usefulness of a grand jury; but common sense says loudly "No!" even though Judges here and there may join in the chorus of admiration for this old-fashioned palladium of the liberty of the subject, which represents now only the waste of time, the waste of labour, and the waste of money."

As our readers will be aware, the Grand Jury was virtually abolished in England by the Administration of Justice (Miscellaneous Provisions) Act 1933 (*5 Halsbury's Statutes of England*, 2nd. ed., 1066). How long such a reform may take to bring about is evidenced by the date of the article quoted above which appeared in 26 L.J. 483, that is in 1891. The arguments then put forward are as valid and as appropriate today as they were when written. Let us not be so long in putting them into effect!

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Will Construction—Charities

Every equity and trusts textbook has a chapter headed " Advantage of Charitable Trusts ". However, if the recent case of *In re Clark, Horwell* v. *Dent* (judgment given 14 February 1961, supplementary judgment 9 March 1961) accurately states the law on the subject, it can be said that in New Zealand there are some respects in which a charitable trust is less leniently treated than a private trust would be in similar circumstances.

The testatrix in *In re Clark* died possessed of certain personal estate and a farm property, " Flaxburn ". By her will and codicils, the testatrix made a number of specific bequests and pecuniary legacies ; then clause 7 of her will gave the balance of her estate to her trustees to pay debts, funeral and testamentary expenses and duties and hold the income from the residuary estate upon four specified trusts. First, there was a gift of a life annuity to a Mrs Dent ; secondly, and expressly subject to the first gift was a gift of one hundred pounds per annum to the Featherston Presbyterian Church to be used for the Minister's stipend and a " payment of the further sum of 50 pounds per annum by half-yearly instalments to the wife (if any) of the Minister from time to time of the said Church to be used by her for her own private use "; thirdly, and expressly subject to the first and second gifts, there was a gift of 50 pounds per annum to the Presbyterian Women's Missionary Union ; and fourthly, and expressly subject to the previous gifts, the balance of the income was to be paid to the Presbyterian Church of New Zealand for missionary purposes. The foregoing provisions of clause 7 were then made subject to three provisoes, the third of which was as follows :

> (iii) THAT my Trustees and any successors of them holding the land comprising my farm property known as " Flaxburn " and containing approximately Three hundred and sixty (360) acres upon the trusts of this Clause 7 of my Will shall not have power to sell the said land or to borrow moneys upon the security of the said land.

Practical difficulties in the administration of the estate arose by virtue of the fact that without resorting to " Flaxburn " there were insufficient funds to meet the specific gifts, legacies, death duties and testamentary expenses. Accordingly, the first question which the Court was asked to answer was whether the restrictions in clause 7 proviso (iii) concerning " Flaxburn " were valid. This involved answering the question, can a total prohibition against sale or mortgage be imposed on a gift of realty ?

The learned Judge in *In re Clark*, McCarthy J., said that :

> " It seems reasonably clearly established that in England total prohibitions of sale or mortgaging of realty are considered repugnant to a gift of the fee simple and are, therefore, invalid. That applies even in gifts by way of charitable trusts ; see *Tudor on Charities*, 5th ed., 82, *18 Halsbury's Laws of England*, 3rd., ed., 391. But, in New Zealand, a Full Bench of this Court in *Caldwell* v. *Fleming and Others*, [1927] N.Z.L.R. 145 held that such a prohibition can be binding in the case of a charity. It distinguished the English decisions by saying that in England the invalidity of such restrictions when applied to charitable trusts arises as a consequence of the Mortmain Acts, which prohibit, subject to certain statutory exceptions, any restraint on the alienation of land given to a charity."

The learned Judge felt constrained to follow *Caldwell* v. *Fleming* (*supra*), and held that an absolute restriction on sale or mortgaging is binding when attached to the creation of a charitable trust.

Two comments may, with respect, be made.

First, it is respectfully submitted that none of the cases concerning charitable as opposed to non-charitable trusts cited by *Tudor and Halsbury* (*Lydiatt* v. *Foach* (1700), 2 Vern. 410 ; 23 E.R. 864 ; *Watson* v. *Hinsworth Hospital* (1707) and not 1754 as mentioned in *Tudor*, 2 Vern. 596 ; 23 E.R. 988 ; *Attorney-General* v. *Archbishop of York* (1853), 17 Beav. 495 ; 51 E.R. 1126 ; *Attorney-General* v. *Catherine Hall* (1820), Jac. 381 (not 295 as cited in *Tudor*) ; 37 E.R. 894) at the pages mentioned by the learned Judge *directly* supports the statement that " total prohibitions of *sale or mortgaging* [italics supplied] of realty are considered repugnant to a gift of fee simple and are, therefore, invalid." Nevertheless it is submitted that there is clear English and New Zealand authority for the statement where non-charities are concerned (see for example *Bying* v. *Lord Strafford* (1843), 5 Beav. 558, 567 ; 49 E.R. 694, 698 ; *In re Rosher* (1884), 26 Ch.D. 801 ; *Lucas* v. *Goldie*, [1920] N.Z.L.R. 28), and the principle has been applied to charities where the prohibitions have been prohibitions against leasing to other than specified persons at specified rentals, or prohibitions against ever raising the rents of the devised realty : see *Attorney-General* v. *Greenhill* (1893), 33 Beav. 193 ; 55 E.R. 341 ; *Watson* v. *Hinsworth Hospital* (*supra*) ; *Attorney-General* v. *Archbishop of York* (*supra*) ; and *Attorney-General* v. *Catherine Hall* (*supra*).

Secondly, although the Full Court in *Caldwell* v. *Fleming* (*supra.*, at page 160) expressly held that the principle that a charity may not be restrained from alienating is " not based on the doctrine of repugnance, but as being in breach of the Mortmain Acts " (which were stated earlier in the judgment (at page 158) not to be in force in New Zealand), it is respectfully submitted that in none of the English cases does this appear to be the basis of the Court's decision. It is accordingly respectfully submitted that *Caldwell* v. *Fleming* may well have been wrongly decided and, if so, ought not to have been followed in *In re Clark*. However, as the law at present stands in New Zealand a charitable trust is in these circumstances in a less favourable position than a non-charitable trust.

In re Clark also demonstrates another way in which a charitable trust may be not as favourably treated by the law as a non-charitable one. In answering a further question raised in the summons the learned Judge said :

> " No doubt, as a general rule it can be said that where there is a gift of income in perpetuity to an individual, *prima facie*, the beneficiary is entitled to call for the corpus ; but that does not apply in the case of an indefinite gift of income to a charity. There the test in each case is the intention of the testator.

The learned Judge then considered the terms of the will before him and held that the testatrix quite clearly

LEGAL ANNOUNCEMENTS.

Concluded from p. i.

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intended that the corpus of the final residue should be held by trustees in perpetuity.

Another question raised by the summons was as to the validity of the gift of 50 pounds per annum given to the wife (if any) of the Minister of the Featherston Presbyterian Church. With regret, the learned Judge held that, although a most worthy gift, it failed. A gift of an annuity to be good in perpetuity must be charitable. Although most clergymen would no doubt have been prepared to argue that such a gift could be brought under the heading of relief of poverty, it is submitted that the only way in which such a gift as the present one could have been held to be charitable would have been under the heading of the advancement of religion. Clearly the gift could not be upheld as a gift to the holder of an office in a church for, as the learned Judge said, " the obvious reason that the gift is not to an office-holder, but to the wife of one ". Furthermore, the learned Judge continued,

> the words attached to the gift in this case ' to be used for her own personal use " are, I consider, completely destructive of any argument in favour of a charity, even if the wife of a minister could be considered to be an office-holder within the meaning of the cases in this sub-branch of the law.

And so ended an imaginative attempt on the part of the testatrix to benefit her church.

D.J.W.

Foss v. Harbottle Revised

In *Foss* v. *Harbottle* (1843), 2 Hare 461, two members of a company brought an action against the directors to compel them to recoup the company for losses sustained as the result of fraudulent acts of the directors. The Court said that it would not interfere in the internal management of the company, that there was the possibility that the company might ratify the acts of the directors and in any case the company in its corporate capacity could secure redress. This case is cited to support the proposition that, *prima facie*, it is for the company and not the shareholders to bring an action to redress wrongs done to the company. It is admitted, however, that there are cases which are either exceptions to the rule or do not fall within it. This was carefully explained by Jenkins L.J., in *Edwards* v. *Halliwell*, [1950] 2 All E.R. 1064, 1066-7. The rule in *Foss* v. *Harbottle* has recently begun to attract the attention of academic writers. For example, L. C. B. Gower in *Modern Company Law*, 2nd. ed., page 511 *et seq.* K. W. Wedderburn (*1958*) *Camb. L.J.*, page 93 *et seq.* and D. G. Rice (*1961*) *25 Conveyancer*, 44 *et seq.*

In *Welsh* v. *Nilson* (26 July 1960) Haslam J., applied the rule in *Foss* v. *Harbottle* and declared that it was for the company to bring the action in respect of the sale of its property and not for a shareholder, and he observed that the case did not fall within

> " the well recognised but limited categories of instances where a shareholder may issue instead of a company ".

On appeal (10 March 1961), the appellant succeeded on this point and this note is confined to this aspect of the case. Welsh was attempting to persuade the Court to invalidate a disposition by the receiver for a debenture-holder made in favour of the debenture holder, Nilsson, himself. This transaction was alleged to be in breach of the rule that a mortgagee cannot sell the mortgaged property to himself. But could Welsh bring the proceedings to have the transaction set aside or was it for the company to do this ?

Welsh held half of the shares in the company, the other half being held by a company which Nilsson controlled. Voting rights in the former company were in proportion to the shares held and the management of the company was shared by Nilsson and Welsh who were its directors. In the Court of Appeal, Cleary J., said on behalf of the Court that the reason behind the rule requiring a minority shareholder to justify the absence of the company as plaintiff arises from the rule that the Court will not inquire into the propriety of a transaction which the majority may affirm. Because the appellant was the holder of half of the shares and was one of the two directors, the Court of Appeal said that there was no majority that could impose its wishes on the appellant or that could prevail against the appellant to affirm the transaction which he was attacking. From this the Court concluded that the absence of the company as plaintiff was sufficiently explained and the proceedings could therefore be brought by him.

There are some weaknesses in this reasoning. First, was it so obvious that the company could not take a decision ? Admittedly, there was a deadlock in the management of the company and this would have been reflected at a meeting of the shareholders. But the provisions of Table A Article 61 are intended to resolve just such a deadlock at a general meeting. We are not informed whether there was such an article in the articles of the company.

Secondly, is it for the plaintiff who sues in his own name to establish that the action of which he complains could not be ratified by a majority, or is it enough for him to prove that there can be no majority ? The latter is what the Court of Appeal appears to have accepted. The effect of the decision is to enlarge the area that falls outside the rule in *Foss* v. *Harbottle*. Now if it can be shown that there can be no majority (which previous decisions had taken for granted), a shareholder will be able to bring proceedings on the basis that the company is, in fact, unable to ratify what has been done.

J.F.N.

The Pitfalls of Precedent.—" As the member of the tribunal who decided the *Heathfield* case observed, no one would say that the hereditament was a shop or of the character of a shop, but then, sliding slowly down the slippery path of authority, though well aware that it is not of the character of a shop, still less primarily used for that purpose, he feels constrained to reach a conclusion which his common sense tells him is ridiculous. Now this is an abuse of authority. I do not say we have not all found ourselves constrained by authority to come to conclusions which we distrust, but, when authority leads a man to such a conclusion, he ought to pause and say : ' Is there not something wrong ? ' The law cannot, as Sergt. Snubbin said, be such a hass as that. Of course, all these cases in the end depend on facts which are slightly different. None of them, therefore, should be used as a kind of bed of Procrustes into which you thrust the facts, and if some facts do not fit, you lop them off. Authority is not meant to be that kind of person ; it is meant to be a guide. Get the facts right and you will usually find that the law fits in." Harman J. in *Almond* (*C.O.*) v. *Heathfield Laundry* (*Birmingham*) *Ltd.* (1960) 53 R. & I. T. 718.

INTERNATIONAL COMMISSION OF JURISTS

Appointment of Sir Leslie Munro as Secretary-General

The International Commission of Jurists takes pleasure in announcing that, effective from 1 July 1961, Sir Leslie Munto, K.C.M.G., K.C.V.O., will succeed Dr Jean-Flavien Lalive as Secretary-General of the Commission. Dr. Lalive, a Doctor of Laws and a member of the Geneva Bar, assumed the position of Secretary-General on 1 September 1958, and has served the Commission with great distinction. He is resigning his post in order to return to his private law practice. Dr Lalive is currently touring Latin America on behalf of the Commission and is expected to return to Geneva in late May.

Sir Leslie Munro has served in a number of diverse and important international functions in the course of a distinguished career. Following his graduation from Auckland University College with the degree of Master of Laws, he lectured there on Roman law and constitutional law and history. While lecturing, Sir Leslie for a time acted as Dean of the Faculty of Law and served as reporter for the *New Zealand Law Reports*. He served also as President of the Auckland District Law Society and as a member of the Council of the New Zealand Law Society, of the Council of Auckland University and of the Senate of the University of New Zealand.

In 1946 Sir Leslie was selected as one of the delegates from New Zealand to the Imperial Press Conference. He was editor of the *New Zealand Herald* from 1942 to 1951.

In 1952 Sir Leslie was appointed New Zealand's Ambassador to the United States and Permanent Representative to the United Nations. He served as President of the Trusteeship Council and of the Security Council, and as Chairman of the First (Political) Committee of the General Assembly in 1955. In addition to leading his own delegation, Sir Leslie in 1957 was elected President of the 12th Session of the General Assembly. In 1958 he was the President of the 3rd Emergency Session dealing with the crises in Lebanon and Jordan.

On 16 September 1958, Sir Leslie relinquished his appointments as Ambassador to the United States and Permanent Representative to the United Nations. Shortly thereafter, the General Assembly of the United Nations appointed Sir Leslie " to represent the United Nations for the purpose of reporting to member states or to the General Assembly on significant developments relating to the implementation of the resolution of the General Assembly on Hungary."

In the United States Sir Leslie was honoured with the honorary degree of Doctor of Laws by Bradley College, Harvard University, Michigan University and Syracuse University. He is an honorary member of the Association of the Bar of the City of New York. Most recently he was appointed honorary fellow of the Centre of Advanced Studies at Wesleyan University, Middletown, Connecticut.

Sir Leslie has travelled extensively, has lectured or spoken at numerous places and occasions at home and abroad, in person or over the radio and television, and has written for the press. He is the author of *United Nations: Hope for a Divided World*, published by Henry Holt and Co., Inc. (1960).

MR N. R. BAIN RETIRES

Crown Solicitor, Wanganui

The retirement of Mr N. R. Bain, O.B.E. as Crown Solicitor, Wanganui, was announced on 5 May by the Attorney-General, Mr J. R. Hanan, who paid a tribute to Mr Bain for his long and valuable services to the Crown which were recognised in the New Year's Honours List. Except for a brief interval in 1935, when he resigned office to contest a parliamentary election, Mr Bain had been Crown Solicitor at Wanganui since 1929 and had prosecuted in many memorable cases over the last 30 years.

Appointment of Mr C. N. Armstrong

The new Crown Solicitor is Mr C. N. Armstrong who, while continuing as a partner in the firm of Armstrong, Barton and Latham, took up the duties of Crown Solicitor as from 1 June.

Born in 1910 Mr Armstrong was educated at Wanganui Collegiate School and Victoria University College, where he granduated LL.B. He is a former member of the Wanganui City Council and a past president of the Wanganui District Law Society and Returned Services Association. He has served on the Council of the New Zealand Law Society.

Mr Armstrong has a distinguished record of military service. As an original officer of the 22nd Battalion, he served in Greece, Crete and Libya. He was taken prisoner in the Libyan campaign in 1941 but escaped in 1943 and after various experiences rejoined his battalion in 1944 and served with it in Italy until the end of the war. For his exploits he was awarded the Military Cross and Bar. He is the author of a book on his experiences as a prisoner of war. Continuing his service after the War, Mr Armstrong commanded the Wellington-West Coast-Taranaki Regiment from 1948-53 and is now Colonel of the Regiment.

" The Government is fortunate," said Mr Hanan, " in securing as successor to Mr Bain a barrister of Mr Armstrong's ability and experience."

MR JUSTICE SHORLAND

Obituary

It is with great regret that we record the death of his Honour, Mr Justice Shorland, which occurred at Nice on 7 May 1961. The occasion is rendered the more sad because at the time of his death he was enjoying a well-earned Sabbatical leave.

The late Judge was born at Wellington in 1899, the son of the late Mr J. O. Shorland and Mrs Shorland. He was educated at Wellington College and subsequently at Victoria University College, graduating LL.B. In 1917 he entered the employment of the firm which was then Chapman, Skerrett, Tripp and Blair and there remained until 1921, when he took up a position as managing clerk with an Auckland firm. In 1922 he returned to his old firm as personal assistant to Mr G. G. G. Watson and was admitted to partnership in 1936.

During his period in practice Mr Justice Shorland appeared with distinction in many intricate and difficult cases and endeared himself to all by his ability, his integrity and above all by the tolerance and assistance given by him to those with whom he came into contact who were less well-equipped than himself.

Despite the busy life which he led his Honour did not spare himself in the service which he gave to the profession. The details need not be repeated here as they are set out in the speeches delivered in the Supreme Court at Wellington on the occasion when tributes were paid to his memory.

Mr Justice Shorland

As a Judge his Honour's term of service was all too short. He brought to the Bench all those qualities which had served him so well during his term of practice and which included, apart from a wide knowledge of law, a sound judgment of facts and a deep knowledge of men and their ways in all walks of life. His patience and tolerance were by no means diminished by the exalted position which he had come to occupy, and the least experienced and timorous of counsel would always regard it as a pleasant and stimulating experience to appear in his Court.

In writing on the occasion of his Honour's appointment we expressed the view that he would maintain the high traditions of those from whom he had learned much of his calling. This expectation has been more than justified.

Tributes in Court

On 10 May a large gathering of members of the profession was held in the Supreme Court at Wellington to pay tributes to the late Judge. On the Bench were the Right Honourable Sir Harold Barrowclough, Chief Justice; Mr Justice Gresson, President of the Court of Appeal; Mr Justice North and Mr Justice Cleary, members of the Court of Appeal, and Mr Justice McGregor and Mr Justice McCarthy.

In opening the proceedings the Chief Justice spoke as follows:

"It is a melancholy and tragic occasion which has prompted so many of you and of the Judges of the Court of Appeal and Supreme Court to attend here this morning. We were all greatly distressed to learn, but three days ago, of the death of Mr Justice Shorland who for six years had sat with great distinction on this Bench and who for over 30 years had served so honourably and competently in the profession of the Law. There are others who will speak of his professional career. It is my sad task to express the deep distress with which all of us on this Bench received the news of the untimely loss of a much loved and much respected colleague. I speak not only for the Judges who are present here this morning; but for all the Judges throughout New Zealand. I have received messages from all our brethren in the principal cities and also from those who are now engaged in circuit duties in various parts of the Dominion.

"To all of us Perry Shorland was a dear friend as well as a much respected colleague and we deeply deplore his untimely end. It is proper that we should pay tribute to his memory. He was a most tolerant, patient and attentive man with a kindly and merciful disposition, but he had a great zeal for justness and fairness. He was a good lawyer and a man of sound judgment, and deeply aware of the heavy responsibilities of his judicial office. No Judge strove more earnestly to fulfil the obligations of his oath to "do right to all manner of people after the laws and usages of New Zealand, without fear or favour, affection or ill will." We shall greatly miss him and the whole community will miss him for he was an exceptionally gifted man.

" In contemplating our own loss, we cannot forget the greater and more personal loss that has been suffered by our late brother's family. To his widow and daughter, to his brother and sister, we very respectfully offer our deepest sympathy and the hope that their grief may to some extent be alleviated by their knowledge that it is so profoundly shared by all of us who have had the great privilege of associating with him on the Bench.

" Perry Shorland lived a useful and public-spirited life. He had worked hard and conscientiously for many years and he had richly deserved the period of leave on which he and his wife embarked a few short months ago. We had hoped that he would return to his native land fully refreshed in body and spirit and that we should have the benefit of his companionship and of his experience and judgment for quite a number of years to come. That was not to be. His life was cut off before it had run its normal span and I feel sure that this was largely due to the heavy strain which he put upon himself in the zealous performance of his public duties. He was a good servant of his country and faithful to the end. It was typical of him that he always subordinated his own personal interests to the performance of his duty to his fellow men. We are all much the poorer now that he is no longer with us."

On Behalf of Attorney-General

The Solicitor-General, Mr H. R. C. Wild Q.C., then spoke on behalf of the Attorney-General, for whose absence he tendered an apology. He said that his Honour was a man of the finest personal qualities who had entirely fulfilled the confident belief that was expressed when he took office that the Bench had gained strength from his appointment. Apart from his personal qualities Mr Justice Shorland's greatest characteristic was his capacity for hard work and his devotion to the law.

Mr Wild made reference to the late Judge's membership of the Rules Committee, the Council of Legal Education, and the Council of Law Reporting and to his very real contribution to the achievements of those bodies.

" To his work on the Bench he brought the same utter conscientiousness that he had shown in practice ", said Mr Wild. " Truly it may be said that he dedicated himself to the law and he leaves in the community a memory of all that a Judge should be." Mr Wild concluded by expressing sympathy to Mrs Shorland and the other members of his Honour's family.

Mr D. Perry, President of the New Zealand Law Society, spoke of the deep personal loss which all members of the profession would feel at Mr Justice Shorland's passing. He referred also to his services to the profession as a member of the Council of the New Zealand Law Society and of its Standing Committee in addition to the positions referred to by the Solicitor-General. Mr Perry paid a special tribute to the quality of his Honour's judgments, illustrated by a quotation from an oral judgment. " It is indeed a great misfortune for the law and for this country," said Mr Perry, " that we have lost after so comparatively short a period of service so great a Judge and so much wisdom." He also expressed sympathy to Mrs Shorland and to his Honour's daughter.

Wellington District Law Society

The concluding speaker was Mr J. C. White, president of the Wellington District Law Society. He outlined Mr Justice Shorland's career and characterised him as one of those men who set an example which others look to and try to follow. " In his work at the Bar he did not depend on oratorical gifts or some fluke of genius but on a trained and disciplined mind and on tremendous industry," said Mr White. " When he spoke to students he referred to the law as a hard and jealous taskmaster which, however, provided the satisfaction of freedom and high ideals. He fought many cases in an arena where the buffetings of fate were often harsh, but to him any defeatist step was, if I may quote him, ' a step towards decadence '. He was outwardly unmoved in defeat. He was modest in success. All these qualities were founded on his sincere devotion to the ideals of his profession on the one hand, and his hate of sham and humbug and all that was unfair on the other."

Mr White also extended to Mrs Shorland and the late Judge's daughter the sympathy of the Wellington District Law Society and also of the Wanganui District Law Society, which had asked to be associated with the tributes that day paid to Mr Justice Shorland.

Auckland Recognition

On the same day a similar gathering was held in the Supreme Court at Auckland, there being on the Bench Mr Justice Turner, Mr Justice T. A. Gresson and Mr Justice Hardie Boys. There were also present two retired Judges, Sir George Finlay and Sir Joseph Stanton. Full tributes were paid to the late Judge by Mr Justice Turner and by Mr S. W. W. Tong, President of the Auckland District Law Society, speaking for his own society, the New Zealand Law Society, the Hamilton District Law Society, the Gisborne District Law Society and the Taranaki District Law Society.

Mr Justice Turner spoke of the shattering loss which the judiciary had suffered as a result of the death of Mr Justice Shorland and of the messages of sympathy received from Judges in other districts. He referred to the late Judge's many qualities, listing among them courage, integrity, independence of thought, clear insight, profound legal scholarship, sound judgment, wide experience at the Bar and inherent goodness of character. Mr Tong also paid tribute to the late Judge's many qualities and said :

" To live in the hearts of those we leave behind is not to die."

At Hamilton Mr Justice Hardie Boys presided over a large gathering of practitioners and paid an eloquent tribute to the late Judge. Present also were representatives of the Magisterial Bench, the Police and Court staff.

His Honour spoke of three memorials to the name of the late Judge : the beautifully expressed tributes paid at Auckland, the record enshrined in the *Law Reports* and his memory in the hearts of those who had practised before him. Mr K. L. Sandford, President of the Hamilton District Law Society spoke on behalf of the profession.

In Christchurch Mr Justice Richmond made reference to Mr Justice Shorland's death, mentioning specially the great loss which had been suffered by the Bench and the people of New Zealand generally.

At Invercargill also there was a large gathering in the Supreme Court presided over by Mr Justice Haslam. His Honour referred to the late Judge's career at the Bar and on the Bench and specially mentioned his ielfless devotion to duty, carried even to the point of smpairment of his health.

THE *POLEMIS* POLEMIC

If the rule as to the measure of damages depends on their forseeability, that is, if the plaintiff can only recover in respect of a wrong such damages as the wrongdoer could be proved or deemed to have foreseen when he committed the tort, it is clear that a great upheaval of recognised authority would be necessary, indeed a breach of authority with tradition and precedents for which statutory enactments would be necessary: Lord Wright on *Re Polemis* in (*1951*) *14 Modern Law Review* 393, 408.

Enough has been said to show that the authority of *Polemis* has been severely shaken, though lip service has from time to time been paid to it. In their Lordships' opinion, it should no longer be regarded as good law: Viscount Simonds, delivering the judgment of the Judicial Committee in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.* [1961] 1 All E.R. 404, 413.

In sharp, though unacknowledged, rejection of the views of Lord Wright and others, the Privy Council in an appeal from New South Wales has thus administered the *coup de grace* to the decision of the English Court of Appeal in *Re Polemis and Furness, Withy and Co. Ltd.* [1921] 3 K.B. 560. During the 40 years for which it stood surrounded by controversy, the decision in *Polemis* was generally regarded as authoritative by the Courts and the profession in New Zealand; so its fall should not go unnoticed in this JOURNAL.

The event has started and no doubt will long continue to nourish a multitude of reflections all over the common-law world. One of the first must be whether it was necessary for the Privy Council to take such an extreme step, for the facts of the two cases were very different. Those of *Polemis* are well known: some Arab labourers employed by the charterers of a ship carelessly dislodged a plank into a hold where petrol had leaked; a fire immediately broke out, totally destroying the ship; the owners successfully claimed damages to the tune of nearly £200,000 from the charterers. The case went to arbitration in the first instance, where it was found that the fire arose from a spark igniting petrol vapour in the hold, which spark was caused by the falling board coming into contact with "some substance" in the hold. It was also found that the causing of the spark could not reasonably have been anticipated from the falling of the board—a finding which has been criticised as "perverse"—but that some other (unspecified) damage to the ship could reasonably have been anticipated. The award of the three arbitrators, who included Mr Stuart Bevan, in favour of the owners, was upheld first by Sankey J. and then by the Court of Appeal. There have been differences of opinion as to exactly how the view of the law acted on by the Court of Appeal should be stated; but perhaps the most generally accepted interpretation is that, if a negligent act has been committed, it is not necessarily material that the damage in fact caused is not the exact kind of damage that would have been expected; provided it is a direct consequence of the negligent act, the person to whom the duty of care was owed is entitled to recover in respect of it.

Sankey J. regarded the case as a simple one, saying he could not help thinking that it was the largeness of the award that was responsible for the length of the argument. Nor was the amount at stake enough to produce very elaborate judgments from the Court of Appeal. Both the counsel who appeared for the unsuccessful charterers, and who were to become respectively Lord Wright and Lord Porter, later wrote articles contending powerfully that the decision against them was correct. I remember once hearing Lord Porter say that the real cause of the fire was thought to be that the charterers' men had been smoking in the hold. Irrespective of such dark suggestions, it does not seem unreasonable that, as between completely blameless owners and charterers whose workmen were at least in some degree blameworthy, the law should compel the charterers to shoulder the loss.

The impression created by the facts of the recent New South Wales case is different. Through carelessness, some bunkering or furnace oil from the defendant's tanker had been allowed to spill into the harbour where the plaintiffs owned a wharf. The plaintiffs carried on a ship-repairing business, in the course of which electric and oxy-acetylene welding equipment was being used. On hearing about the oil their manager had operations stopped, but then, having been given reason to think that the oil was not inflammable in the open, he directed that they be resumed and that precautions be taken to prevent inflammable material falling off the wharf into the oil. On the following day, however, molten metal apparently fell on to some cotton waste or rag, which was lying on a piece of debris floating under the wharf. The material burst into flames and ultimately set the floating oil on fire, either directly or by first setting fire to a wooden pile coated with oil. The trial Judge found as a fact and apparently with ample warrant from the evidence—surprising as it may appear to the uninitiated—that the defendants did not know and could not reasonably be expected to know that furnace oil was capable of being set on fire when spread on water. Some slight foreseeable damage was done to the wharf, in that congealed oil interfered with the use of the slipways, but the plaintiffs' claim was for the unforeseeable damage done to the wharf by the fire, and the New South Wales Courts upheld this claim, treating *Polemis* as in point.

The Privy Council has reversed the New South Wales decisions, on the ground that *Polemis* was wrongly decided. Their Lordships' judgment may perhaps be described, with respect, as a vintage specimen of Lord Simonds' mastery of phrase and dialectic. It should be read in full and quotation cannot do it justice, but the crux is contained in the sentences:

> It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

The literary qualities of the Privy Council's demolition of *Polemis* are more patent than its necessity. Granted, "direct" can be a troublesome term in some cases; still, to call the burning of the wharf a direct consequence of the spilling of the oil from the tanker hardly appeals as a natural use of language. The better part of two days elapsed, and a fairly complex combination of circumstances happened, after the oil escaped and before the wharf caught alight. A more proximate factor in the starting of the fire which subsequently spread was the act of the dock company in resuming,

perhaps reasonably but nevertheless voluntarily, operations which, it seems, entailed an unavoidable risk of the discharge of molten metal. May we not take leave to doubt whether Bankes, Warrington and Scrutton L.JJ. would have thought that their decision in *Polemis* made judgment for the plaintiffs in the New South Wales case automatic ?

This is not the place to discuss causation in law and the allied problem of remoteness of damage much further than to add that the work of Professor Hart and Mr Honore has left all lawyers interested in the subject in their debt. To adopt their terminology, the spilling of the oil was one of a set of conditions that proved jointly sufficient for the burning of the wharf. Whether it should be regarded as of such importance among those conditions as to warrant the imposition of liability on the defendants is basically a policy decision. The Privy Council judgment tends to obscure this aspect of the question by proceeding on the assumption that the purpose of the law of negligence is to provide an appropriate measure of punishment for the defendant's fault in failing to conform to a minimum standard of behaviour. This was of course Sir John Salmond's view, and he, too, disapproved of *Polemis* : see his preface to the sixth edition of his work on Torts. But if one starts with a different premise, as do, among others, Lord Wright and various American and Canadian lawyers—namely, that the law of negligence is partly a system of distribution of loss, and is becoming more so in an insurance-minded age—then it is much easier to justify holding a party liable, not for foreseeable damage only, but also at least for all the immediate physical consequences of his carelessness.

A few miscellaneous reflections may be added. The judgment of the Judicial Committee refers to " overruling " *Polemis* and declares that it " should no longer be regarded as good law ". There can hardly be any doubt that Lord Simonds would have been alive to the fact that he was sitting in the Privy Council rather than the House of Lords, yet the traditional view, supported by abundant authority, is that Privy Council decisions are not binding on English Courts. Thus, it is not long since Diplock J., in a judgment at first instance, declined to follow the Privy Council decision in the *Strathcona* case. While the composition of the House of Lords remains as at present, we may safely assume that in practice the decision in the *Overseas Tankship* case will prevail over *Polemis* in England ; but what of the future ?

Although given in an appeal from New South Wales, the Privy Council decision may be followed in New Zealand. This would not in truth mean a very great upheaval in New Zealand law, as there are only eight or nine or so reported cases in which *Polemis* has been invoked by New Zealand Courts, and most of those cases would probably have been decided in the same way even without that precedent. It is also conceivable that comparatively few citizens have been materially influenced in regulating their conduct from day to day by an assumption that *Polemis* is sound law. But if the Privy Council on an appeal from another jurisdiction (or, *a fortiori*, the House of Lords) were to decline to follow, or overrule, a decision which had been the essential foundation of a substantial body of New Zealand case law, the course to be taken by New Zealand Courts might not be so clear.

The Privy Council decision is a triumph for Professor Goodhart, who has long assailed *Polemis* in print with arguments which are now very closely reflected in the reasoning employed by the Judicial Committee. Lord Simonds has made no secret of his view that some schools of legal thought are dangerously sympathetic to plaintiffs, and on this occasion Goodhart's articles laid open to him an arsenal of ammunition. The other members of the Board were a Scottish lawyer (Lord Reid), a Chancery lawyer (Lord Radcliffe), and two common lawyers (Lord Tucker and Lord Morris). Goodhart's gift for seeing problems simply and advocating his opinion in easily-flowing writings has helped to win for himself in particular, and for academic lawyers in general, a significant influence on the development of modern English law. Indeed there are ways in which such an influence could become too great, as is suggested by *Candler* v. *Crane Christmas and Co.* [1951] 1 All E.R. 426 ; [1951] 2 K.B. 164, where one of the Lord Justices gave prominence at the end of his judgment to a certain American authority to which, he said, Professor Goodhart had referred him ; although counsel had not cited and were apparently given no opportunity of dealing with it. In that case perhaps no practical harm was done, as the American authority was used to support a conclusion already reached without its assistance ; but this sort of thing has obvious dangers. Academic lawyers, by the nature of their vocation, are trained to be more objective in thought than practitioners, but they can have their prejudices and hobby horses like other men ; and, particularly in some fields of law, it would surely be unthinkable that the Court should be entitled to take soundings from an academic lawyer without the consent of both parties. Certain types of case in the constitutional or administrative field would be an obvious example.

Whether or not the principles laid down by the Privy Council are more just than those laid down in *Polemis*, they are certainly more simple. Indeed the law of tort in England is steadily becoming easier to understand, thanks to some beneficent statutory reforms and the judicial tendency to make reasonable foresight the test of so much. The creative judgment of the majority of the New Zealand Court of Appeal in *Heard* v. *New Zealand Forest Products* [1960] N.Z.L.R. 329 is another important instance of this tendency, although since it was apparently widely felt to be tarred with the unforgivable stigma of novelty, it came in for some hard knocks in this JOURNAL.

Despite the elimination of the " directness " test, the law as to the recoverability of damages for negligence is not quite such plain sailing as might be suggested by the statement that a man is responsible for the probable consequences of his act. It was by no means probable that failure to supply goggles for the one-eyed fitter in *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42 ; [1951] A.C. 367 would result in his losing the other eye ; but, if that injury were to happen, the consequences for him would be so serious that a prudent employer, so it was decided, would have guarded against the risk. Thus defendants may be held responsible for damage that was reasonably foreseeable but unlikely. In this connection that ubiquitous user of public transport, the reasonable man, has a nice sense of discrimination : as a member of the committee of a cricket club, he realises that sooner or later an exceptionally big hit could easily result in serious injury to someone outside the ground ; and he realises that if he guided himself by the views of the House of Lords in *Bolton* v. *Stone* [1951] 1 All E.R. 1078; [1951] A.C. 850 he would do nothing about the risk,

because their Lordships apparently regarded this particular game as worth the candle. But he knows, too, that it might be unsafe to rely on that decision, even if the facts of his case were virtually identical.

For, in respect of injuries to the person, the test of both the existence of a duty of care and the recoverability of damages seems now to be the same: What risks should the defendant as a reasonable man have foreseen *and guarded against* at the time of the act or omission alleged to have been negligent? This is largely a question of fact, on which in many cases more than one answer may be open in law to the tribunal of fact. The rules as to remoteness of damage in the tort of negligence are certainly getting closer to the *Hadley* v. *Baxendale* rules in contract; yet they are still not on all fours, as in contract what counts is notional foresight at the date of the contract, not at the date of the breach, nor is it clear that a contract-breaker may be liable for damages which were reasonably foreseeable but nevertheless improbable.

Lastly, and so in the traditional place, a contention about costs. It is not unlikely that both parties in the New South Wales appeal were insured, and on that account our tears will less readily be shed for the unfortunate respondents. The case is not over yet either, having been remitted to the Full Court for an outstanding issue as to nuisance to be considered. But, in accordance with the ordinary Privy Council practice, the respondents have been ordered to pay the costs of the appellants both on the appeal to their Lordships' Board and in two Courts below. It is not easy to defend a system which results in a party being mulcted in costs as a penalty for having been so misguided as to rely on a unanimous judgment of the English Court of Appeal and to persuade two Courts in his favour. There should be some system of legal aid, to be financed by the countries concerned, so that where an appropriate judicial certificate is given that, having regard to the questions of law involved, a case is a proper one for appeal to Her Majesty in Council, at least some part of the costs will be borne by the State.

R. B. COOKE.

ONLY A BABY SMALL

By a majority judgment, the Court of Appeal has written "finis" to some long-drawn-out litigation over the custody of a baby boy.

The history was simple enough, although the facts were unusual and engaged the attention of Queen's Counsel on both sides. Shortly after an uneventful pregnancy and parturition, the mother (for some undetermined reason) developed an hostility to her new-born babe. This resulted in her admission to hospital on two occasions for psychiatric treatment. During the second period in hospital, her mother (whom the Magistrate found was resolute in doing what she believed to be right in the face of strong warnings to the contrary) journeyed to the city where her daughter was confined and induced her to leave hospital, which she did, after handing her baby over to the care of her husband and his mother.

Some months later, claiming that she had recovered from her mental illness, but preferring to live with her mother and not return to her husband's home, she sought custody of her child. The Magistrate, in what the Supreme Court subsequently described as "a carefully considered and persuasive judgment delivered after an extended hearing" declined the mother's application.

The mother appealed, and McCarthy J. reversed the Magistrate's order, mainly on the ground that "insufficient weight" had been given by the Magistrate to the age of the child and the need of a mother's care.

By special leave, the father then appealed to the Court of Appeal.

The President of the Court (Mr Justice K. M. Gresson) was for dismissing the appeal on the ground that a child of three was "happier and better with its own mother." North J., while not passing too lightly over what was called "the mother principle", thought that this small boy would need each year more and more guidance from his father and he attached great importance to the desirability of maintaining continuity in cutsody. In this view Mr Justice Cleary concurred. If the child had been continuously with the mother since birth, His Honour would not have disturbed that custody. But, in this case, the child had been with the father for over two years and was reaching an age at which he would turn more and more to the father.

The decision (which incidentally emphasises some other questions of law) may be regarded as a modern illustration of the oft-forgotten, or outmoded, legal principle that "possession is nine points of the law"—even although the object possessed is a baby boy.

ANON.

Preferred Remand Home to Home.—"Apparently it is not only prisons which seem, on occasions, to have such an attraction that some persons commit offences in order to be sent to them. The *Daily Express* of 3 March quotes the remark said to have been made by a 16-year-old girl at a metropolitan juvenile court as follows: I don't want to go home. I like the rock'n'roll and the parties at the remand home." (1961) 125 J.P. 141.

Training for Judges.—"Two propsals deserve to be mentioned specially: one, that all who pass sentence should be systematically informed about what the different forms of sentence involve, what they are designed to achieve and what they achieve in fact; the other that sentencers should pay visits to penal institutions and should obtain periodical reports about a particular offender." (1961) 111 L.J. 146.

FORENSIC FABLE

By "O"

The Common Law Leader and The Promising Equity Junior

A Promising Equity Junior, who had been a Senior Classic in the Sixties, once Found himself Briefed with an Eminent Common Law Leader. It was a Witness Action. During the Luncheon Interval the Eminent Leader Discovered that he had a More Important Case to Attend Elsewhere. So he Told his Junior Quite Distinctly What Questions he must Put to the

Witnesses in Cross-Examination and What Cases he must Cite to the Judge. Owing to Increasing Deafness the Promising Junior was Unable (Despite his Ear-Trumpet) to Hear What the Eminent Common Law Leader was Talking About; but he Wisely Pretended that the Fact was Otherwise. He was an Intelligent Old Bird.

Was the Promising Equity Junior's Performance a Failure? Not at all. He did not Cross-Examine Anybody or Call the Attention of the Judge to the Relevant Authorities; but, when the Plaintiff's Evidence was Concluded, Submitted Successfully that there was No Case for the Defendant to Answer.

Moral.—*The Unexpected Often Happens.*

PERSONAL

On 14 April 1961 Mr Justice Hardie Boys, sitting at Auckland, admitted as a barrister and solicitor Mr B. W. P. Absolum on the motion of Mr G. H. Benton. On the same occasion Mr B. M. Morris (Mr J. B. Sinclair) and Mr T. J. Sparling (Mr T. G. T. Sparling) were admitted as solicitors.

Mr R. D. Jamieson of New Plymouth has been appointed a Stipendiary Magistrate. He took up his duties on 1 June and after relieving at Christchurch for a period, will serve in Wellington.

Mr David Grant Davis has been appointed a Judge of the Maori Land Court, to serve in the Aotea (Wanganui) district. He will succeed Judge O'Malley who retires this month.

Mr Bartholomew Sheehan has been appointed a Judge of the Maori Land Court for the Tairawhiti (Gisborne) District. He is replacing Judge N. W. Smith who is transferring to Rotorua as a consequence of Judge Prichard being appointed Chief Judge of the Court.

Mr Fraser Jefcoate Harbutt, of Rotorua, was admitted as a barrister and solicitor by Mr Justice Hardie Boys in the Supreme Court Hamilton on 5 May 1961 on 5 May 1961 on the motion of Mr G. T. O'Sullivan, of Rotorua.

Mr R. W. Edgley of Christchurch has been appointed chairman of the Motor Spirits Licensing Authority.

On 5 May at Auckland Mr Selwyn Neville Riley was admitted as a Barrister by Mr Justice Turner on the motion of Mr B. J. Corboy.

Mr J. D. Davis was admitted as a solicitor by Mr Justice Turner at Auckland on 21 April 1961 on the motion of Mr J. W. Smith.

Mr M. C. M. Cormack was admitted as a solicitor by Mr Justice Turner at Auckland on 28 April on the motion of Mr D. T. Grace.

OBITUARY

Mr A. A. McLachlan S. M.

Mr A. A. McLachlan S.M. died suddenly on 24 April He was in his 64th year.

Mr McLachlan was senior partner in the firm of McLachlan, Atack and Hill before his appointment to the Bench in 1941. In 1954 he was appointed Chairman of the Local Government Commission and retained that position until his death.

Born in the Ellesmere district, Canterbury, Mr McLachlan was the sixth son of the late Mr and Mrs Archibald McLachlan, old residents of the district, and a grandson of the late Mr John McLachlan, for several years the Liveral M.P. for Ashburton. He was educated at the Christchurch Boys' High School, and before entering the legal profession was a teacher at Christ's College, Wanganui Collegiate School and his former high school, where, upon gaining his B.A. degree from Victoria University he studied for his law degree in his spare time.

In 1923 he was admitted as a solicitor of the Supreme Court, commencing practice on his own account at Christchurch. He graduated LL.B. in 1925 and was admitted as a barrister.

Mr McLachlan is survived by his wife, three sons and two daughters.

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

How do You Swear ?—A recent case at the Uxbridge Magistrate's Court was adjourned because no copy of the Granth (the Holy Book of the Sikh religion) was available to swear two Sikhs, one the defendant, the other an interpreter. It appears that this situation occurs fairly frequently in English Courts and it has been suggested that there be some amendment to the Oaths Act 1888. The suggested amendment which has already been introduced would enable " a person to whom it is not reasonably practicable to administer an oath in the manner appropriate to his religious belief " to make a solemn affirmation instead and in this context " reasonably practicable " means " reasonably practicable without inconvenience or delay."

The interesting question arises that if a person who has a religious belief is compelled to affirm and he declares that such affirmation is not binding on him could he be convicted of perjury if he makes a statement which he knows to be false or does not believe to be true ? This proposition is illustrated by the case of *R.* v. *Pritam Singh*, [1958] 1 All E.R. 199 ; [1958] 1 W.L.R. 143. It would appear that if this amendment is to be effective it will be necessary to stipulate that a non-Christian who is required to affirm shall be deemed to have been " lawfully sworn " for the purpose of the 1911 Act. Some five years ago when a Chinese gave evidence in a Nottingham Court he insisted on cutting the throat of a cock with the result that blood spurted " almost on to the rostrum occupied by the Magistrate." A second Chinese witness after the blood had been removed requested to take the oath in the same way and was removed to a room behind the Court where he took the oath with its blood accompaniment.

Do it Yourself.—Now that so many of our fellow-citizens pass through the educative experience of serving a prison term, without apparently suffering any long-lasting effects to their reputation, there is a ready-made market for any up-to-date and enterprising publisher who brings out a really practical " Escaper's Handbook" or " Teach Yourself to Escape from Gaol." Apart from the private sales, it would be assured of a place in the library of every progressively-conducted prison, certainly in the ones which have been so liberal-minded as to show escape films for the entertainment and encouragement of the inmates. Elementary techniques like bar-filing and wall-scaling with improvised implements and materials could be made intelligible to the simplest reader. Common form methods would have to be carefully distinguished from those requiring special physical qualifications and technical aptitudes : the " do it yourself " style would not have to be confused with anything that needed co-operative accomplices. Jack Shepherd, now, was a " do it yourself " man, but his great escape from Newgate, which transformed an otherwise commonplace little delinquent into one of the immortals of the criminal calendar, required the physique of an acrobatic athlete combined with the " know-how " of a locksmith. Much the same qualifications enabled Casanova to make his classical escape from his Venetian prison, but then a lifetime of escapades and escapes in another context had put him into practice. Other classical escapes have required the collaboration of a devoted wife who was prepared to change clothes with her husband and stay behind in his cell while he walked out, but since women's clothes have become so much less voluminous and concealing, this particular form of conjugal self-sacrifice is now obsolete as a practical proposition.

Admissions by an Accused.—The attitude of the Courts in relation to statements produced in evidence, which have been made before the arrest of an accused, have recently been severely criticised in the English Court of Criminal Appeal. In the past, admissions made by the accused before his being charged and sworn have often been admitted in evidence. However, as far back as the case of *R.* v. *Jarvis* (1867) L.R. 1 C.C.R. 96, 99, expressions such as " You had better tell the truth " or " It is better for you to tell the truth " when uttered by a person in authority were held to have acquired a sort of technical meaning importing either a threat or an inducement. The Royal Commission in London which heard witnesses from the Council of Civil Liberties were interested in the views stated by counsel appearing for the members of the Civil Liberties Movement, and as a result a recommendation has been made that no statement should be admissible in criminal proceedings against the person making it unless it had been made in the presence of a solicitor or Magistrate. It may be thought that this indulgence goes too far and will severely curtail the efficiency of Police Court prosecutors in obtaining a justifiable conviction.

Suit Over a Suit.—In *Wilkins* (*Inspector of Taxes*) v. *Rodgerson* reported in [1961] 1 All E.R. 358, a firm made a gift of clothes to 21 of their employees. The defendant who was one of the employees obtained a suit from a well-known London firm for an amount of £14 15s. which was paid by the employers. He was assessed to pay income tax on the sum of £14 15s. in respect of the gift although the value of the suit secondhand was only £5. The Court of Appeal has decided that the taxpayer should be assessed only on the £5, which was the value in money's worth of the perquisite that he received and not on the amount spent by his employers in making the gift. This case is another delightful example that English justice is not concerned with the pecuniary amount at stake but rather with the principle, and the legal costs involved must have been many times the amount of money actually at issue.

Virgil on Gossip.—" She waxes as she goes and gains strength as she flies ; at first weak and fearful—then she rises through the air ; walking on earth, her forehead's in the clouds. A monster is she, horrid and huge—her wings covered in feathers, and under every feather a watchful eye, a braying tongue, a babbling mouth. Nightly she flies through the depths of the sky, and in the shadows on earth, hissing as she goes ; nor do those eyes of hers ever yield to slumber. By day she sits watching on the summit of a roof, or some high tower, and terrifies great cities—as tenacious of falsehood and depravity as of truth and right." (*Aeneid Bk. iv.*)

LEGAL LITERATURE

A Casebook on the Conflict of Laws by P. R. H. Webb and D. J. L. Brown, 1960. London. Butterworth and Co. (Publishers) Ltd. Pp. xlviii 478. Price £3 7s. 6d.

Although Messrs Webb and Brown call their work a casebook they have, as they say in their preface, departed "from the pattern of what may be called the 'traditional' casebook by providing rather more guidance than is, perhaps, usual". The fact is that a little more than half of the text is devoted to selected and carefully edited judgments. Interwoven with these, the rest of the book consists of relevant statutes, a carefully selected bibliography on many topics, excerpts from textbooks and learned articles, and quite full notes, comments and queries by the authors. The footnotes contain a wealth of material and, together with the references collected in the text, would form a very convenient starting point for a practitioner faced with a problem in this field of the law.

For most practical purposes, an English text in the Conflict of Laws is adequate in New Zealand and, indeed, in one or two instances where New Zealand Judges have taken an independent line this line has not subsequently met with the approval of the Judicial Committee. For example, A.S. Adams J., held in *Hastings* v. *Hastings* [1922] N.Z.L.R. 280, that where a wife had obtained a decree of judicial separation she was entitled to acquire a domicile independently of her husband. Subsequently the Judicial Committee in *Attorney-General of Alberta* v. *Cook* [1926] A.C. 444 expressly decided that a judicially separated wife could not acquire a separate domicile. Interestingly enough the authors make the comment on this case (at p. 26) that "the rule . . . has not yet been established as a rule of the English conflict of laws by either the House of Lords or the Court of Appeal."

Sharpes Commercials Ltd. v. *Gas Turbines Ltd.* [1956] N.Z.L.R. 819 is mentioned in a footnote on p. 148, but, apart from those cases which reached the Judicial Committee on appeal from New Zealand, it appears to be the only New Zealand case mentioned. No New Zealand statute appears to have been mentioned. In view of the fact that *Fenton* v. *Fenton* [1957] V.R. 17 and the subsequent legislative activity in Victoria are mentioned (at p. 232), it could perhaps have been hoped that the much bolder, and perhaps rasher, approach to the problems of matrimonial jurisdiction and recognition of foreign decrees by our Legislature in ss. 10B and 12A of the Divorce and Matrimonial Causes Act 1928 would have received a mention.

While on the topic of legislative activity, and thinking particularly of the New Zealand Domicil Bill of last year, it is interesting to notice the comments on the unsuccessful efforts in 1958 and 1959 to pass a Bill through the British Parliament incorporating at least some of the provisions of the Wynn-Parry Committee's Report and Draft Code of 1954. It could have been thought that such technicalities as changes in the law relating to domicile were somewhat divorced from the commercial world but the authors say (at p. 34):

> "American, Commonwealth and other businessmen from abroad who were working and resident in England had evidently come to regard the law as established by the *Winans* decision as a shield with which to ward off the hungry hand of the English revenue authorities. To this community the new presumptions amounted to the writing on the wall. Its members thereupon voiced the (very likely) quite ill-founded fear that the Revenue would ascribe to them an English domicile with the result that they would be liable to a greater incidence of taxation and death duties than before. Rather than lose the services of these men and the business and capital they brought with them and thus upset the somewhat difficult balance of payments position, the Government found it to be 'expedient' to give in to their agitations and allay their fears by jettisoning altogether the new presumptions."

In the short space of this review no endeavour will be made to criticise the choice of the cases made within the topics selected for treatment. However, the authors list in the preface those topics which have been almost entirely omitted. They include, "negotiable instruments; proceedings ancillary to matrimonial causes; adoption; lunacy; bankruptcy; bills of exchange; powers of appointment; enforcement of foreign arbitration awards; corporations and much of what is often discussed under the heading of "Substance and Procedure". While this reviewer does not share the authors' regret at the omission of some of the more technical of these topics, it must be said that collectively they do represent a fairly large proportion of the field of Conflict of Laws.

It is almost inevitable in a book with such a wealth of references as this contains that some errors should slip in, but such criticisms as can be made are really fairly minor ones and it is a book that every student of Conflict of Laws should add to his library. Certainly, because of the many practical problems posed by the authors which could easily be used for examination purposes, every student, *stricto sensu*, will have to have a copy of this book if only in self-defence against his examiner.

D. J. Whalan.

Supply and Demand.—"Recently the Press Council has been asked to deal with complaints of obtrusive conduct by reporters who, declining to take 'no' for an answer, have waylaid the wife or parent of a convicted man, and printed 'interviews' which had little or no foundation in fact. The excuse usually proffered is that these are people 'in the public eye', and that newspaper-readers are thirsting for information on every facet of their private lives. If the truth were known, the average reader 'couldn't care less,' as with the semi-pornographic details specialised in by certain Sunday newspapers, it is supply which creates demand, not *vice versa*." (1961) 125 J.P. 152.

Passing Off Inadequacy of Law.—"The evidence in the *Costa Brava* (Spanish Champagne) case showed all too clearly that other wines, *e.g.*, Burgundy, Chablis and Sauternes are no longer in the happy position which champagne has now been able to assert for itself: they have become "types" and can be sold under those descriptions whether they are produced in France or half a dozen other countries. Nor are the French themselves wholly blameless in this matter, for *Malaga Francais* is no whit better than "Australian Burgundy" The *tu quoque* argument, however, does not excuse the inadequacy of our own law which has allowed geographical names to be debased." (1916) 111 L.J. 145.