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ESTREAT OF BAIL

IN September last, Mr Justice Hardie Boys had before him the principal party to a recognisance relating to his own bail, seeking to have satisfaction entered upon a judgment signed pursuant to forfeiture and estreat occasioned by his failing to present himself for trial on due date.

The applicant, Graham Philip Ware, was charged with theft and false pretences and was committed for trial to the Supreme Court Sessions at Hamilton commencing on 2 February 1960. He was admitted to bail in the sum of £100 which was directed to be lodged in cash and the accused's father was surety in the sum of £25 for which he entered into a recognisance. At the hearing it emerged that the applicant could only find the sum of £100 by borrowing from his father, and for all practical purposes, as his Honour put it, " the principal party had nothing of his own to lose and the normal sanctions and compulsions which underlie the notion of recognisance for bail were entirely absent." The application was therefore virtually one made by the son on behalf of the father.

The father's recognisance of £25 as surety was estreated, but in an earlier application the father had been successful in securing that the judgment against him should have satisfaction entered against it to the extent of £20, reducing his liability to £5.

The relevant statutory provisions are ss. 21 and 23 of the Crown Proceedings Act 1950, which read as follows :

21 *Recovery of debts due upon recognisance*—(1) Notwithstanding the foregoing provisions of this Act, where any person has entered into a recognisance to His Majesty, and the recognisance is forfeited, and no other procedure is provided by any Act or rule of Court for the estreat thereof, a Judge or Magistrate of the Court before which, or the Justice before whom, the same was forfeited may cause the recognisance to be estreated as hereinafter provided.

(2) The Judge, Magistrate, or Justice shall, by writing under his hand in the form numbered (3) in the Third Schedule to this Act, or to the like effect, certify that the forfeiture has taken place, and shall deliver or send by post the said recognisance and writing to the Attorney-General, who, upon receipt thereof, shall cause a final judgment to be signed in the Supreme Court for the amount of the recognisance, and a sum not exceeding five pounds for costs.

(3) Every such judgment may be in the form numbered (4) in the Third Schedule of this Act, or to the like effect, and no appeal shall lie therefrom.

23. *Judgments for fines and on recognisance may be vacated by Supreme Court*—Where final judgment has been signed under the provisions of section 20 or section 21 of this Act, the Supreme Court may order satisfaction to be entered upon the judgment, whether execution has been issued thereon or not :

Provided that such an order shall not be made except upon notice calling upon the Attorney-General to show cause ; not unless it is proved by affidavit to the satisfaction of the Supreme Court either that the judgment has been satisfied, or that, according to equity and good conscience and the real merits and justice of the case, the defendant ought not to be required to satisfy the same.

Apart from some minor alterations which do not appear to affect the interpretation of those provisions, the sections are a re-enactment of ss. 5 and 7 of the Crown Suits Act 1908 which in turn were derived from ss. 6 and 8 of the Crown Suits Act 1881.

There is a dearth of authority on these sections which, at first glance, seems remarkable, yet there is every reason for it. Section 23 in particular confers on the Court a discretion in the widest possible terms requiring it, before ordering satisfaction to be entered on a judgment obtained under s. 21, to be satisfied that " according to equity and good conscience and the real merits and justice of the case " the defendant ought not to be required to meet the amount of the judgment. A discretion conferred by statute could hardly be expressed in more general terms and it has been said often that where the Legislature sees fit to confer such a discretion the Court should not impose fetters on itself by laying down rules for its exercise. That no doubt accounts for the very few reported decisions on these sections or their predecessors.

There have, however, been a few decisions bearing on the powers of the Court under the sections. The first in point of time was *R.* v. *Gunn* (1915) 17 G.L.R. 306, which concerned the liability of sureties for the appearance of an accused person, the total amount of the recognisance being £600. The sureties were the brother and brother-in-law of the accused, and, after the accused was admitted to bail, he had lived with his father and virtually in the father's custody. With his father he attended on the day of the opening of the sessions at which he was to be tried and thereafter attended each day until his disappearance. On that day he was in Court, but made an excuse to his father that he was going out to visit what counsel for the sureties euphemistically called the Court's " back premises ". After a few minutes he was followed by his father but had disappeared and was not found. In these circumstances, it is not surprising that Stringer J. found that the sureties had done everything in their power to keep the accused in their custody and bring him to Court, and the Crown does not appear to have disputed this view.

The point which really arose in that case was whether the Court had a discretion as to the estreat of the

recognisance under s. 5 of the Crown Suits Act 1908. Mr R. A. Singer appeared for the sureties and submitted that there was such a discretion, founding his argument on the use in s. 5 (1) of the word "may" which still appears in s. 21 (1) of the Crown Proceedings Act 1950. Tole K.C., for the Crown admitted the existence of the discretion and Stringer J. decided not to estreat.

Four years later the case of *R.* v. *Taura Ngamu* [1919] G.L.R. 169 came before Hosking J. In this case counsel for the Crown urged that the Court had no discretion. Hosking J. estreated the recognisance but would express no opinion on the question whether a discretion existed,

> "without full argument when some future case arises in which the circumstances would appear to justify the exercise of a discretion if it be permissible."

The point did not appear to come before the Court again until 1929, when *R.* v. *Holt* [1930] N.Z.L.R. 283; [1930] G.L.R. 136 came before Adams J. The Judge held that that was not a case where a discretion in favour of the sureties should be exercised if such a discretion existed, and he expressly left open the question whether there was such a discretion or not.

The following year the same question arose again in *In re King and Scott* [1931] N.Z.L.R. 162; [1931] G.L.R. 6. That case concerned an application by the Crown for the estreat of a recognisance. The case first came before Adams J. who removed it into the Court of Appeal where counsel for the Crown argued against the existence of a discretion. The judgment of the Court was delivered by Sir Michael Myers C.J. and held that the word "may" used in s. 5 (1) of the Crown Suits Act 1908 was to be read as meaning "shall", and once a breach of the condition of the recognisance was established there was a forfeiture and a debt due to the Crown. The judgment is particularly noteworthy for a short review of the circumstances under which the word "may" is to be read in a mandatory sense. The Court went on to point out that the person affected by the estreat was not left without a remedy. Section 7 of the Crown Suits Act entitled him to bring the matter before the Court again and have the question of satisfaction of the judgment decided on principles of equity and good conscience. The Court did not deal with the merits of the case but remitted it to the Supreme Court for determination in accordance with the principles laid down by the Court of Appeal. These principles apply of course to the sections now in force—namely, ss. 21 and 23 of the Crown Proceedings Act 1950.

To return to *Ware's* case, the first submission for the defendant was that the accused's father, who would be the sole loser if the £100 cash payment were forfeited, was not at fault. He became aware of his son's intention of leaving the country and requested the Police to act under s. 53 of the Summary Proceedings Act 1957, i.e., to apply for warrant for the arrest of the accused. The application was duly made, but the Magistrate before whom it came was of the opinion that there was insufficient evidence to show that the accused was about to abscond. The accused remained at home for a fortnight thereafter, right up to the opening day of the Sessions, and reported daily to the police as required by the condition of his bail. On the vital day he failed to appear and was eventually arrested late on 4 February when he admitted that he had planned to escape from the country and that he had hidden in the bush for two days. He claimed to have been on his way to give himself up when he was arrested. In view of the course taken in respect of the father's own recognisance, the application in respect of which came before Sir Harold Barrowclough C.J., it appears that the Court accepted that the father was guilty of little if any fault in the matter, and Hardie Boys J. saw no reason to dissent from that view.

Counsel for the applicant suggested that the Court should order satisfaction to be entered but should direct payment out of Court to be made only to the father. His Honour, however, pointed out that any arrangement for indemnity between principal and surety was illegal and said that, as with the loan which the father made to the son, it removes one of the primary objects of ensuring that each party had a strong motive to see that the accused appeared at the time and place specified.

Counsel for the applicant also referred to *In re Fox and Fox* [1949] N.Z.L.R. 722, which was the only reported decision in New Zealand where the applicant was the accused person and the principal party to the recognisance. Fox, the accused, was to attend at the Supreme Court on 26 April 1949 for trial. On 21 April he booked a passage by T.E.A.L. from Auckland to Sydney under a false name and was allotted a seat on an aircraft to leave on April 26. Owing to weather conditions the flight was cancelled and Fox's efforts to obtain another booking were unsuccessful. He was located and arrested on 29 April but he escaped, eluded the police officers who chased him but went to the Magistrates' Court where he gave himself up. The only explanation he offered was that he wanted his liberty to search for a witness but, on learning that the required person was in gaol, he had decided to give himself up, being arrested before he could do so. He subsequently stood his trial and was acquitted.

The application came before Gresson J. (as he then was), who reviewed such authorities as there were available. In particular he referred to *R.* v. *Tomb* (1715) 10 Mod. 278; 88 E.R. 727 in which it was declared:

> "If recognisances are estreated into the Exchequer because not punctually complied with, yet, if the party appear and take his trial at the next session, he may compound for a very small matter in the Court of Exchequer; because the effect, though not the exact form, of the recognisance is complied with" (*ibid.*, 278; 727).

Rather to the contrary effect is *R.* v. *Stewart* (1931) 23 Cr. App. R. 82. There the defendant was on bail pending the hearing of an appeal but absconded. The Court found that the sureties had done all that could have been expected of them and removed the estreat but remarked that becoming bail for an accused person "was not a mere formality."

In regard to Clifford Fox, Gresson J. concluded his judgment in the following terms:

> "As regards Clifford Fox, he deliberately defaulted, and aggravated his offence by escaping from custody when he had been arrested. A good deal of expense and inconvenience must have been caused in efforts to locate and arrest him. To discharge the judgment against him would, in my opinion, be wrong. But I think it is a factor to be taken into account that he stood his trial and was acquitted; there should be some mitigation of the judgment. I hold that, having regard to the history of the Court's powers, the present section is intended to give to the Court the powers previously exercised by the Exchequer Court, and that includes a power to mitigate. There will be an order in his case that there be an entry of satisfaction of one-half the judgment."

In *Ware's* case it was suggested that the two dicta quoted above from *Tomb's* and *Fox's* cases counted

heavily in the applicant's favour but Hardie Boys J. would not accept this approach. He pointed out that the Court was not likely to entertain an application from a man still at large for satisfaction of a judgment consequent upon estreatment of his own recognisance and that his apprehension and trial seemed to be an essential prerequisite to moving the Court under s. 23. He therefore did not regard the fact that the accused had stood his trial as being of any importance except, perhaps, where he had a good excuse for not appearing in the first place and voluntarily appeared: *R.* v. *Davey* (1896) 2 A.L.R. 55. He also suggested that *R.* v. *Tomb* (*supra*) might be capable of the same explanation, although the report does not contain sufficient details to enable this to be ascertained.

In dealing with *In re Fox and Fox* (*supra*), his Honour said:

> "I prefer to treat *In re Fox and Fox* (*supra*) as an act of mercy extended in the circumstances to the principal party there, but not as laying down any principle to be followed in other cases. I prefer also to avoid the easy path of distinguishing this case from it upon the facts, because Ware was convicted and Fox acquitted. Again, with respect, I cannot see that the result of the trial should be the determining factor."

Hardie Boys J., then pointed out that, in looking at the old English cases it must be remembered that where the sum payable under a recognisance of any sort was neither paid nor recovered by seizure of goods, the body of the party responsible was taken into custody so that the relief which the Court of Exchequer was able to afford was against possible imprisonment for life. In *R.* v. *Cartman* (1823) 11 Price 637; 147 E.R. 589 the surety had been in prison for some four months and was relieved, as was the accused in *R*, v. *Dibbens* (1753) Parker 165; 145 E.R. 745, who had been in gaol for over two years for non-payment of a fine. In *R.* v. *Stancher* (1816) 3 Price 261; 146 E.R. 255 on the other hand a surety was refused release after fifteen months in prison.

His Honour concluded his judgment in the following terms:

> "No doubt, in the end, the question must always be to determine the real merit and justice of the case having regard amongst other things to the reason for failure to observe the conditions of bail, the monetary amount forfeited (possibly in relation to the applicant's means) and certainly the expense to which the country has been put as a result of what has happened.
>
> "None the less, I am of opinion that such of Her Majesty's loving subjects as are remanded on bail in a relatively nominal sum like £100, but who fail to present themselves for trial on due date for the reason that they have attempted to flee the country, cannot, when they are eventually apprehended and brought to trial, expect that this Court, as a matter of equity and good conscience or on the merits, will relieve them of the penalty for their default."

The judgment, which will be reported shortly, is a valuable contribution to a branch of the law on which, as we have already said, there is a dearth of helpful authority. In particular, it will show in its proper perspective the merciful judgment of Gresson J. in *In re Fox and Fox* (*supra*).

SUMMARY OF RECENT LAW

CHARITABLE TRUST.

Devise of land with prohibition on sale or mortgage—Prohibition valid—Gift of annuity in perpetuity to wife of minister for time being of specified church—Not charitable. In New Zealand a total prohibition against the sale or mortgaging of realty devised to a charity is valid. (*Caldwell* v. *Fleming* [1927] N.Z.L.R. 145; [1927] G.L.R. 146, followed.) The will of a testatrix, after giving certain specific bequests and legacies, defined her residuary estate, and gave thereout certain annuities, each being expressed to be subject to those which preceded it. It then directed the balance of the residuary estate to be paid to the Presbyterian Church of New Zealand for specified purposes and declared that the trustees should have no power to sell or to borrow money on the security of a freehold farm property known as "Flaxburn". *Held*, That the restriction on the sale or mortgaging of "Flaxburn" applied only to so much of that property as fell within the trusts of the residuary clause in the will, and if it were necessary to dispose of part of the property to meet legacies, duties etc., it would be only on the balance remaining that the trusts and the prohibition would operate. The general rule that, where there is a gift of income in perpetuity to an individual, the beneficiary is entitled to call for the corpus 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. (*Re Levy, Barclay's Bank Ltd.* v. *Board of Guardians and Trustees for the Relief of the Jewish Poor* [1960] 1 All E.R. 42; [1960] Ch. 346, followed.) A gift of an annuity in perpetuity to the wife of the minister for the time being of a specified church is not a charitable gift and is therefore void as infringing the rule against perpetuities. *In re Clark, Horwell and Others* v. *Dent and Others.* (S.C. Wellington. 1960. 7 November. 1961. 14 February; 9 March. McCarthy J.)

COMPANY LAW.

Shareholder seeking to sue for benefit of company—Need to explain absence of company as plaintiff—No action lies where act complained of can be ratified by majority of shareholders—Plaintiff owning half shares—No majority to impose wishes on him—Absence of company sufficiently explained. No mere informality in the conduct of the affairs of a company which can be remedied by a majority of the shareholders will entitle the minority to sue if the act complained of, when done regularly, would be within the powers of the company, and the intention of the majority of the shareholders is clear. Where, however a person seeking to sue for the benefit of the company is the owner of half the shares in the company and is also one of the two directors there is no majority which can impose its wishes on him or that can prevail against him to affirm the transaction which he attacks. This being so, he can sue without joining the company as plaintiff. The English rule that a mortgagor cannot have the state of accounts between himself and his mortgagee examined without first offering to redeem has no application where the mortgagee has become the absolute owner of the mortgaged property and the relationship of mortgagor and mortgagee has ceased to exist. (*National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879) 4 App. Cas. 391, followed.) *So held* by the Court of Appeal (Gresson P., Cleary and Henry JJ.), reversing the judgment of Haslam J. *Further held*, Where mortgaged assets comprise a business undertaking, reasonable promptitude in asserting rights against a mortgagee in possession may become rather more important than where the mortgage charges specific assets producing income and not liable to depreciation or loss. (*Clegg* v. *Edmondson* (1857) 8 De. G.M. and G. 787; 44 E.R. 593 and *In re Jarvis* (*Deceased*) [1958] 2 All E.R. 336; [1958] 1 W.L.R. 815, followed.) *Welsh* v. *Nilsson and Others.* (S.C. Napier. 1960. 26 July. Haslam J.) (C.A. Wellington. 1961. 10 March. Gresson P. Cleary J. Henry J.)

CRIMINAL LAW.

Appeal against conviction—Application for leave to appeal out of time—Court not bound to hear appeal on merits before determining application. Where application is made for leave to appeal against conviction out of time. The Court of Appeal is not bound in every case to allow the appeal to proceed on the merits before it can determine whether the delay is such as can

be excused. (*R.* v. *Jeffries* [1949] N.Z.L.R. 595, explained.) *R.* v. *Wotten.* (C.A. Wellington. 1961. 13 March. Gresson P. North J. Cleary J.)

Summary Proceedings—Theft—Previous convictions rendering offender liable to increased penalty—Not necessary to charge previous convictions in information—Application of s. 255, Crimes Act 1908—Summary Proceedings Act 1957, ss. 6, 7—Crimes Act 1908, s. 255. Whereas s. 6 of the Summary Proceedings Act 1957 by incorporation with the First Schedule lists the offences on which a Magistrate can exercise his summary jurisdiction, the corresponding power of the Magistrate to impose penalties must be looked for not in that Schedule, but in s. 7 of the Act. The omission of any mention of s. 255 of the Crimes Act 1908 from that Schedule does not restrict the power of the Magistrate to invoke that section so long as he observes the comprehensive and precise requirements of s. 7 of the Summary Proceedings Act concerning maximum penalties. Where solely because of previous convictions a defendant has a right of electing trial by jury a formal pleading of the particulars of the convictions in the information is necessary to indicate on the face of the documents that he has been properly committed for trial. But if the effect of the previous convictions is merely to increase the penalty to which the accused is subject it is sufficient if he unequivocally admits those convictions. *Wicks* v. *Police.* (S.C. Wellington. 1961. 6, 28 March. Haslam J.)

MORTGAGE.

Mortgagee in possession—Action for accounts—Need for offer to redeem—No need when mortgagee has become owner of security—Laches—Importance of promptitude when security a business undertaking—See COMPANY LAW (*supra*).

Winding up—Inability of company to pay its debts proved—Creditors evenly balanced for and against winding up—Principles to be applied—Companies Act 1955, s. 220. On a petition by a creditor for the winding up of a company the creditor has a *prima facie* right to the order sought on proving that the company is unable to pay its debts. Weight must be given by the Court in the exercise of its discretion to the views of other creditors, but if the creditors are evenly balanced in number and value the weight to be given to any small majority favouring refusal of the order is slight. In such a case the Court may look at the quality of the respective debts and the circumstances of the creditors, including any extraneous reasons influencing those creditors who oppose the petition to desire the company to remain in existence. (*Re P. and J. McRae Ltd.* [1961] 1 All E.R. 302; [1961] 1 W.L.R. 229, followed.) *In re Jacobs River Sawmilling Co. Ltd.* (S.C. Christchurch. 1961. 23, 24 March. Richmond J.)

TENANCY.

Business premises—Public work declared to be of importance and urgency—Description of premises not necessary in Order in Council—Work covering more activities than indicated by name used in Order in Council—Not material if work identified to satisfaction of Court—Tenancy Act 1955, s. 17. An Order in Council issued for the purposes of s. 17 of the Tenancy Act 1955 declaring a public work to be a work of importance and urgency need not describe the premises to which it applies in a manner sufficient to identify them. It is sufficient if the Order in Council specifies the public work, and it is then necessary for the Crown to show that it requires possession of the premises in question for that particular work. The name given to the work in the Order in Council is not important and where the work is the erection of a building it does not avail the tenant to show that it is intended to house in it activities in addition to those indicated by the name assigned to it in the Order in Council. *Tracey* v. *Attorney-General.* (S.C. Wellington. 1961. 2, 16 February; 6 March. McCarthy J.)

TRANSPORT.

Licensing—Goods service—"Available route"—Extent to which carrier bound to back-track beyond starting point—Meaning of "customary or any other road route"—Transport Act 1949, s. 96 (6) (a) (Transport Amendment Act 1959, s. 7). The effect of the proviso to s. 96 (6) (a) of the Transport Act 1949 (s. 7 of the Transport Amendment Act 1959) is that the carrier does not have to back-track beyond his starting point except to the nearest station. Whether or not a railway station is "beyond" the place of commencement depends upon the route from which it is viewed. That route must be either "the customary or any other road route". The reference to "any other road route" does not permit an informant to choose any road route to suit his own ends and to consider the diversion from that route. He must choose either the "customary" route used by carriers generally *or* the route actually used by the particular carrier with whom he is concerned. *Clarke* v. *Mahood.* (1961. 21 February. Donne S.M. Rotorua.)

TRUSTS AND TRUSTEES.

Dividend paid by company out of capital profit—Capital or income—Payment authorised by amendment to company's Articles of Association—Trustees joining in amendment—Dividend payable to life tenant—Payment postponed to enable interested party to attack action of trustees in joining in amendment of articles. The estate of a deceased person held a large number of shares in a company. The company made a large profit on the sale of one of its properties but could not distribute such profit as a dividend without an amendment in its Articles of Association. The necessary amendment was made by a special resolution in which the trustees of the estate joined and the estate received a dividend of £5,529. The resolution could not have been passed without the concurrence of the trustees. On an originating summons to determine whether the sum of £5,529 was payable to the life tenant as income or fell into the capital of the residuary estate. *Held,* 1. A limited liability company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other distribution of money can only be by way of dividing profits, and if paid to a trustee will *prima facie* belong to the person entitled to the income of the estate in the absence of some provision to the contrary in the trust instrument. There being no such provision in the present will, the said sum of £5,529 was payable to the life tenant. 2. The action of the trustees in supporting the amendment of the Articles of Association being subject to attack, the trustees should be ordered not to part with the moneys for a period to enable any party interested to take appropriate action. (*Hill* v. *Permanent Trustee Co. of New South Wales Ltd.* [1930] A.C. 720; [1930] All E.R. Rep. 87, followed.) *In re Davis, N.Z. Insurance Co. Ltd.* v. *Davis and Another.* (S.C. Auckland. 1960. 9 August; 29 September. Shorland J.)

WILL.

Devises and bequests—Devise of land with prohibition on sale or mortgage—Valid in case of charity—Rule against perpetuities—Gift of annuity in perpetuity to wife of minister for time being of specified church—Not charitable—Void—See CHARITABLE TRUST (*supra*).

WORKERS' COMPENSATION.

Assessment of compensation—Schedule injury—Assessment of compensation to be made without regard to particular employment in which worker engaged—Workers' Compensation Act 1956, First Schedule. The First Schedule to the Workers' Compensation Act 1956 is designed having regard to employment generally and, except in cases where s. 17 (7) applies, claims which fall within the Schedule must be considered without regard to the particular employment in which the worker has been engaged. A worker employed as a coal hewer, suffered an injury to an index finger which was admitted to amount to the total loss of use of the first two joints of that finger. The basal phalanx of the finger, if left, would have been a hindrance to the worker's employment as a coal hewer, but would have been of use in other employment. The whole finger was amputated. *Held,* That the worker was entitled to compensation under the First Schedule only for the loss of two joints of the finger and not for the whole finger. *Pascoe* v. *Attorney-General.* (Comp. Ct. Hamilton. 1961. 6, 7, 22 March. Dalglish J.)

Assessment of compensation—Worker suffering from disability which would yield to surgical treatment—Such treatment refused but not unreasonably—Disability permanent—Workers' Compensation Act 1956, s. 17, First Schedule. Where it is said in the First Schedule to the Workers' Compensation Act 1956 that the expression "loss of" includes "permanent loss of the use of" the word "permanent" means something different from "incurable". The word "permanent" can be applied to a condition which will not disappear, or which cannot be cured or alleviated, without medical or surgical treatment to which it would be unreasonable to require the worker to submit. (*Boyes* v. *Smyth* [1933] N.Z.L.R. 1427; [1933] G.L.R. 843, referred to.) *Dowdall* v. *Attorney-General.* (Comp. Ct. Dunedin. 1960. 5 May. 1961. 6 February. Dalglish J.)

LEGAL ANNOUNCEMENTS.

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CASE AND COMMENT

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Winding Up of a Company.—Views of Creditors.

It is astonishing how often a decision on one legal point is quickly followed by another on the same point. In a case note written recently the decision of Barrowclough C.J., in *Re J.R.S. Garage Ltd.* was discussed. The learned Chief Justice relied heavily on the decision of the English Court of Appeal in *In Re Vuma Ltd.* [1960] 1 W.L.R. 1283. Now we have the judgment of Richmond J. (24 March 1961), in *Re Jacob's River Sawmilling Co. Ltd.*, where the learned Judge was able to adopt certain passages from an even more recent judgment of the English Court of Appeal, *Re P. & J. Macrae Ltd.* [1961] 1 All E.R. 302 ; [1961] 1 W.L.R. 229. All of these cases are concerned with the weight to be attached to the views of creditors by a Court which has been asked to order the winding up of a company.

In the *Jacob's River* case the petitioners were creditors to whom about £2,000 was owing by the company. Three other creditors, to whom some £300 was owing, supported the petition. It was opposed by a creditor to whom over £800 was owing, but this creditor was a major shareholder in the company. Richmond J., found the judgment of Upjohn L.J., in the *Macrae* case particularly helpful. In that judgment the learned Lord Justice had said that the Companies Act gives the Court a complete discretion in the matter of making an order. In deciding what weight is to be attached to the views of creditors, the Court should have regard to the number and value of the debts but it should also have regard to the motives of the creditors. If a creditor was influenced by motives of love and affection rather than of business expediency, it was proper that his views should be discounted. In the *Jacob's River* case the opposing creditor, being the major shareholder, could hardly avoid being motivated rather by desire to protect his investment in the shares of the company than by a desire to secure payment of his debt by the company. The learned Judge therefore made an order for the winding up of the company.

J.F.N.

A Question of Time

Will the Court enlarge the time for renewing an expired writ where, but for the enlargement of time, the plaintiff's claim would be statute-barred ? In *Stuhlmann* v. *O'Donnell* (in Chambers, Auckland, 10 March 1961 and 10 April 1961) an interesting point had to be decided relating to the renewal of a writ which had neither been served nor renewed within the prescribed period of 12 months and which had therefore ceased to be in force. A claim by a new writ would have been statute-barred.

On 22 January 1960 the plaintiff issued a writ against the defendant claiming damages for bodily injuries and other losses arising out of a motor collision which had occurred on 22 March 1958. Service of the writ was not effected within one year of the date of issue, as required by R. 32 of the Code of Civil Procedure, as the defendant could not be found. The plaintiff had made strenuous efforts to locate the defendant and had made all the usual inquiries without success. On 19 January 1961—three days before the writ expired—the defendant called as a customer at a shop owned by the plaintiff's parents but service was not then effected as the writ was not at the time in the physical possession of either the plaintiff or his parents. The defendant was, however, informed that the writ had been issued and was asked for his address. He refused to give his address but stated that an Auckland firm of solicitors would supply it. When approached by the plaintiff's solicitors, however, the firm which the defendant had named declined to disclose the defendant's address and refused to accept service of the writ on behalf of the defendant as they presumably had not received the necessary instructions.

On 1 March 1961 the plaintiff filed a motion under R. 35 to have the writ renewed for a period of six months, the currency of the writ having, of course, already expired. Rule 594 gives a general discretion to the Court to enlarge the time appointed by any rule of the Code of Civil Procedure. Hardie Boys J. was prepared to exercise that discretion in favour of the plaintiff and to follow *In re Jones, Eyre* v. *Cox* (1877) 46 L.J. Ch. 316. That was a case concerning the English rule comparable to our R. 594 (O. LXIV, r. 7) and it has been recognised and followed both in England and in New Zealand as authority for renewing a writ after the period of 12 months has expired.

A much more serious difficulty, however, stood in the plaintiff's path. By virtue of s. 4 (7) of the Limitation Act 1950 the two years' period of limitation for the bringing of the action had expired on 22 March 1960—nearly a year before the application for renewal of the writ was made. A line of authority in the English Courts has held that the power to enlarge time cannot extend to the renewal of a writ when a claim by a fresh writ would be barred by a limitation statute : *Doyle* v. *Kaufman* (1877) 3 Q.B.D. 7 (in the Court of Appeal, page 340) ; *Hewitt* v. *Barr* [1891] 1 Q.B. 98 (Court of Appeal). An exception was made by the Court of Appeal in England in *Holman* v. *George Elliott and Co. Ltd.* [1944] 1 All E.R. 639 ; [1944] K.B. 591 in the unusual circumstances of that case. The following year in *Battersby* v. *Anglo-American Oil Co. Ltd.* [1944] 2 All E.R. 387 ; [1944] 1 K.B. 23 the Court of Appeal disagreed with what had been said in *Holman's* case, regarded that decision as inconsistent with the Court's own earlier decisions and decided to adhere to the principles laid down in *Doyle* v. *Kaufman* and *Hewitt* v. *Barr* (supra). The Court of Appeal in *Battersby's* case decided in effect that there is one circumstance in which the Court's discretion will not be exercised. Goddard L.C.J., delivering the judgment of the Court said (*ibid.*, 28 ; 389).

> " That the widest discretion is given to the Court under that rule," (O. LXIV, r. 7) " none will deny, but there is a line of authority, unbroken until the recent decision in *Holman's* case, that the Court will not exercise that discretion in favour of renewal nor allow an amendment of pleadings to be made, *if the effect of so doing be to deprive the defendant of the benefit of a limitation which has already accrued.*" [Italics supplied].

Hardie Boys J., was able to distinguish the English cases on the ground that the Limitation Act 1950 (N.Z.) contains a provision (in s. 4 (7) enabling the period of limitation to be extended after has run against the plaintiff and that therefore the Court was not being asked to revive in favour of the plaintiff a claim which any statute of limitations has finally and irrevocably barred: See Hill J. in *The Esplanoleto* [1920] P. 223, 226. He pointed out that in *Doyle* v. *Kaufman*, *Hewitt* v. *Barr*, *Holman's* case and *Battersby's* case the claims were barred by statutes which contained no provisions for extension of time analogous to that contained in the proviso to s. 4 (7) of the Limitation Act 1950. He therefore considered that the Court still had a discretion in the matter and that that discretion should be exercised on principles similar to those which would be applied if the Court were dealing with an application under the proviso to s. 4 (7) of the Limitation Act 1950 for leave to bring an action out of time. That proviso requires notice of any application for leave to bring an action to be given to the intended defendant so that he may have the opportunity of opposing it. Nevertheless, having regard to the very important fact that the proceedings in *Stuhlmann* v. *O'Donnell* had actually been brought to the defendant's notice three days before the writ expired and that the plaintiff could still for a further period of nearly three years apply to bring his action, Hardie Boys J. concluded that there was no reason why he should not put himself in the same position as if he were dealing with an application for leave. He considered that it would be a proper case for the granting of leave under the proviso to s. 4 (7) of the Limitation Act 1950; that any possible prejudice was of the defendant's own making and that the plaintiff's writ should be renewed for a further period of six months. Any fault of the plaintiff in not applying for substituted service before the expiry of the writ was not regarded as sufficient to deprive the plaintiff of the order.

Had the order been refused, the plaintiff would, of course, have had to move for leave under the Limitation Act 1950 to bring his action. Substituted service of the motion, probably by advertising, would no doubt have had to be sought. Since the Court was satisfied on the available information that the case would have been a proper one in which to grant leave under the Limitation Act to bring an action out of time, and since the defendant knew that the writ had been issued, it is respectfully submitted that there can be no doubt that the order made was an entirely satisfactory one and one which would result in a considerable saving of time and expense.

The judgment in *Stuhlmann* v. *O'Donnell* clearly shows that the greatest importance was attached to the facts that the defendant had been informed before the expiry of the writ that the writ had been issued and that the defendant had evaded service. It is probable that in the absence of these facts the plaintiff's application for renewal of the writ would have been dismissed and that the plaintiff would have been left to move for permission to bring his action in the ordinary way under the proviso to s. 4 (7) of the Limitation Act 1950. It would seem that the case should not be regarded as establishing a general principle that even when a claim by a new writ would be statute-barred the Court will exercise its discretion to renew an expired writ provided (a) that there is a provision in the relevant limitation statute authorising an extension of the time; and (b) that the circumstances are such that the Court would have granted leave to bring the action. Any such general rule might deprive an intended defendant of the opportunity of opposing the application for leave to bring the action which the plaintiff would otherwise have to make and could thus work injustice. Each application to renew an expired writ should be considered on its merits.

Stuhlmann v. *O'Donnell* ought, then, to be regarded as a decision on the particular facts.

G.W.H.

Acquisition of Partnership Shares "At Par"

The decision of McGregor J., (27 March 1961) in *Gifford* v. *L. E. Harris Ltd.* is concerned with the meaning of a provision in a partnership agreement under which, in the event of the death of a partner, his share could be purchased *at par* by the surviving partners in proportion to the capital held by them. The capital contributed on the formation of the partnership was extremely modest—£100. At the date of the death of the partner concerned the capital remained £100, of which £15 had been contributed by the deceased, £5 by another partner and £80 by the defendant company. At the date of the death of the partner there was £1,255 owing to him as his share of undrawn profits. The question was: was the par value of the deceased's share £1,255 plus £15 or was it to be increased by his share in the goodwill?

The words "at par" were described by the learned Judge as unfortunate but the Court approached its task of ascertaining and declaring the intention of the parties by referring to the dictum of Lord Henley L.C., in *Le Rousseau* v. *Rede* (1761) 2 Eden 1:

> It is the fate of all Courts of Justice upon wills, it is the peculiar destiny of this Court in contracts, wills, and trusts, to be authorised interpreters of nonsense, and to find the meaning of persons that had no meaning at all,
>
> *Ex fumo dare lucem,*
> *ut speciosa dehinc miracula promat*

Not only did the Court have regard to the meaning of the phrase in company law and in relation to exchange transactions between different currencies, but it also made reference to its use in golf. The analogy was found to be somewhat difficult to apply from that context. The learned Judge finally concluded that the expression was used to indicate an intention to avoid fluctuation in the value of the partner's shares. Hence the value of his share was £15, being the capital contributed, plus the undistributed profits of £1,255. While this result is undoubtedly what the Court was entitled to arrive at on a construction of the partnership agreement it is unlikely that this would have been the interpretation which the partner would have agreed to if he had been asked a question as to the meaning of the clause shortly before his death. The introduction into the partnership agreements of terms which have no meaning in that context is clearly to be avoided.

Principles of Law Reporting—"There is a rumour that one editor of the *Law Reports* divided all cases into two categories: those which merely followed in the existing stream of authority, and those which broke new ground. The first, he thought, should not be reported as they were adding nothing to the law; the second, he considered, should not be reported as, since they did not precisely follow what had been previously decided, they might be wrong"—(1961) 111 L.J. 183.

LEAVE TO SWEAR TO DEATH WHERE BODY CANNOT BE FOUND

Applications To Supreme Court

In *In re Moss (deceased)* [1955] N.Z.L.R. 1140, it was submitted by counsel for the Public Trustee that where the body of a testator could not be found, and neither the executor nor any other person could of his own knowledge, prove the fact of his death in terms of R. 518 of the Code of Civil Procedure, a certificate of death (following a coroner's inquest) under s. 8 of the Births and Deaths Registration Act 1951, was sufficient to support an application for grant of probate in common form.

But Turner J. did not accede to this submission. The circumstances were that on 26 December 1954, the deceased in company with two companions left the Fox Glacier Hotel, Weheka, South Westland intending to climb Mount Sefton and other peaks in the area, but did not return when expected. On 12 January 1955, and the four following days, an extensive search was made in the area which was likely to have been covered by the missing climbers and everything possible was done to locate them, but without success. Search parties failed to recover the bodies because, in the opinion of the leaders, the missing climbers met an avalanche on the northern slopes or underneath Mount Sefton and had been swept to their deaths; and the Coroner so held.

His Honour held that, although the death certificate based on the coroner's finding was *prima facie* evidence of death that was not enough to support a grant of probate. He said:

> The provisions of R. 518 amply demonstrate this. The best evidence of death is required by the Court. If the Court will, in this case, accept a death certificate as satisfactory proof of death on the authority of s. 42 of the Births and Deaths Registration Act 1951, it must, I think, accept it in all cases, without insisting, as R. 518 does insist, that death shall be proved by the evidence of someone able to speak at first hand.

Further on, at p. 1143 of the report, His Honour said:

> I have given this submission[1] careful consideration, but am of the opinion that a death certificate by itself will not be sufficient even for this purpose. The best evidence available should be given in support of an application for leave to swear death; for a grant of such leave, while it does not connote that death is an absolute certainty, implies, nevertheless, that the circumstances are such as to satisfy the Court that death is a practical, or what is sometimes called a moral, certainty in that no other reasonable probability is open: see the judgment of Sir Michael Myers, C.J., in the Court of Appeal in *In re Montgomery, Australian Mutual Provident Society* v. *Public Trustee*, [1940] N.Z.L.R. 950, 957, [1940] G.L.R. 569, 570. The death certificate, while *prima facie* proof of death, is, in turn, based upon the certificate furnished to the Registrar by the coroner who held the inquiry into the disappearance, and, indeed, upon the Registrar's interpretation of the words of such certificate. I think that the Court should have at least the actual words of the coroner's finding, if possible, and not merely the record which the Registrar of Deaths has made of that finding, which could conceivably come to differ from the original words, and even from the original sense, in passing through the hands of an additional person before reaching the Court.

Then His Honour points out that it was not until 1930 that a coroner in New Zealand had jurisdiction to hold and inquest where the body had not been found. The present relevant provisions are now ss. 8 and 12 of the Act of 1951. He continued:

> The Act, therefore, now providing in as many words that one of the purposes of an inquest is to establish the fact of death, I think it would be proper to receive the result of such a statutory inquiry, if properly placed before this Court, as satisfactory circumstantial evidence of the kind referred to by Sir Michael Myers C.J. in *In re Montgomery* (*supra*). If, therefore, an application is made in the present case asking leave to swear death, and producing the coroner's finding in properly authenticated form (as, for example, a certificate of his finding of death over the duly authenticated signature of the coroner), I think that such evidence would satisfy the Court on an unopposed application, without re-assembling on oath the mass of circumstantial evidence which was no doubt received at the coroner's inquest.[2].

This case was followed by *In re McKay (deceased)* [1956] N.Z.L.R. 540, where deceased lost his life in the same alpine tragedy. His Honour the Chief Justice followed *In re Moss* (*supra*), granted the application to swear to death but objected to much of the matter contained in the affidavits. He said:

> The coroner, however, did include in his affidavit a statement as to his finding of death in the case of Ernest Graham McKay, and that I regard as properly authenticated proof of his finding. In the present case notice of the application for leave to swear death was given to the life insurance company which was interested, and its counsel appeared before me and offered no opposition.

The precedents hereunder appear to avoid these criticisms by being much more concise but at the same time containing a proper authenticated proof of the coroner's finding as to death. It will also be observed that, as the deceased's life was insured, the insurance company concerned was served with notice of the application and did not in any way oppose it.

E. C. ADAMS.

PRECEDENT No. 1.
AFFIDAVIT BY APPLICANT FOR LEAVE TO SWEAR TO DEATH.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY No.....

IN THE MATTER of A.B. of Wellington in the Dominion of New Zealand, Ship's Engineer, a missing person.

AND

IN THE MATTER of an intended Application by C.D. of Wellington, Married Woman, for letters of Administration *cum testamento annexo* of the estate and effects of the said A.B. deceased.

I, C.D. of Wellington, Married Woman, make oath and say as follows:

1. I am the mother of the above-named missing person who was born on the ..... day of ..... 1923.

2. My son, the said A.B. was never married.

3. By a Will dated .... 1949 he bequeathed all his moneys and properties to me but he did not appoint an executor.

4. My said son was employed by the ..... Shipping

[1]. i.e. That the death certificate, if not accepted to support a grant of probate, should at least be sufficient of itself to upport a grant of leave to swear death.

[2]. It is submitted that a District Land Registrar would be perfectly safe in following a similar practice in respect of a survivorship transmission: *Ex parte Chinn* (1914) 16 G.L.R. 471.

Company Ltd., as the Engineer of the Motor Vessel ..... plying for freight in New Zealand coastal waters.

5. I last saw my said son on the ..... day of ..... 1960 at our home at ..... Street, Wellington.

6. To the best of my knowledge information and belief my said son was on board the said Motor Vessel when it sank at sea approximately eighteen miles east south east of ..... on or about the ..... day of ..... 1960.

7. On the said ..... day of ..... I was absent from New Zealand.

8. I am informed and verily believe that the said Motor Vessel has been located and inspected where it sank by divers employed by the Royal New Zealand Navy but the body of my said son was not recovered.

9. My son enjoyed good health and was in a satisfactory financial position and had no debts.

10. My said son was a fond son to my husband and me and never at any time expressed the intention to end his life.

11. That an inquest concerning my said son's disappearance was held by the Coroner at ..... on the ..... day of ..... 1960 and I verily believe that the Coroner found that my said son died on or about the ..... day of ..... 1960 in the sea approximately eighteen miles east south east of .....

12. My said son was insured in the respective sums of £500 and £100 with bonuses in the ..... Assurance Company Ltd., but his life was not otherwise insured.

13. I desire to obtain leave to swear that my said son died on or about the ..... day of ..... 1960 in order that I may apply to the Supreme Court for a Grant of Letters of Administration *cum testamento annexo* of his estate effects and credits.

14. I have no information or knowledge whatsoever which leads me to doubt the correctness of the finding of the Coroner referred to in paragraph 11 hereof.

SWORN at Wellington by the said ..
G.D. this ..... day of .... C.D.
1961, before me. ..

.....
A Solicitor of the Supreme Court of New Zealand

PRECEDENT No. 2

AFFIDAVIT BY CORONER AS TO HIS FINDING OF DEATH

I, J.J. ..... of the City of ..... in the Dominion of New Zealand, the Coroner , make oath and say as follows:

1. That I am duly appointed one of the Coroners of the said Dominion.

2. That on the ..... day of ..... 1961 at the Courthouse at ..... I held an inquest pursuant to the provisions of Section 8 of the Coroners Act 1951 in respect of the death of the above-named A.B. of Wellington in the Dominion of New Zealand, Ship's Engineer, deceased.

3. That my finding pursuant to Section 24 of the said Act was as follows:

The deceased died on or about the ..... day of ..... 1960 in the sea approximately 18 miles east south east of ..... The deceased is presumed to have lost his life on or from the Motor Vessel ..... and is presumed to have died from asphyxia due to drowning and a certificate of the finding in the prescribed form has been transmitted to the Secretary of Justice.

SWORN at ..... this ..... day of ..
September 1961 before me. .. G.H.

.....
A Registrar of the Supreme Court of New Zealand

PRECEDENT No. 3

AFFIDAVIT AS TO SERVICE

I, K.L. of the City of Wellington, Law Clerk, make oath and say as follows:

1. That I am a Clerk in the employ of Messieurs ....., Solicitors, Wellington for the applicant herein.

2. That I did on the ..... day of ....., 1961 serve upon The ..... Assurance Company Ltd., at its offices at the ..... Building, Lambton Quay in the City of Wellinggon, copy of the Notice of Motion for Leave to Swear Death filed herein and of the Affidavits of J.J. of the City of ....., Coroner, and C.D. of Wellington, Married Woman, filed in support thereof, by handing the same personally to Mr ....., the Manager for New Zealand of the Life Branch of the said Company.

3. That copies of the said Notice of Motion and Affidavits are attached hereto and marked "A", "B" and "C" respectively.

SWORN at Wellington by the said ..
K.L. this ..... of .... M.N.

.....
A Solicitor of the Supreme Court of New Zealand

PRECEDENT No. 4

NOTICE OF MOTION

TAKE NOTICE that on Friday the ..... day of ....., 1961 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard, Counsel for the above-named C.D. of Wellington, Married Woman WILL MOVE this Honourable Court at Wellington FOR AN ORDER that leave be granted to the Applicant to swear on an Application for Letters of Administration *cum testamento annexo* of the estate and effects of A.B. the missing person to be filed hereafter that the said A.B. died on or since the ..... day of ..... 1960 AND for such further or other order as in the circumstances may appear just UPON THE GROUNDS that the said A.B. was the Engineer of the Motor Vessel ..... when it sank on or about the ..... dah of ..... 1960 in the sea approximately 18 miles east south east of ..... and has not been seen or heard of since that date AND UPON THE GROUNDS appearing by the Affidavits of the said C.D. and of J.J. of the City of ....., Coroner, filed herein.

DATED this ..... day of 1961
.. O.P.

.....
Council for C.D. the above-named Applicant.

To: The Registrar of the Supreme Court at Wellington
AND To: The ..... Assurance Company Limited.

This Notice of Motion is filed by O.P. Solicitor for the Applicant whose address for service is at the offices of Messieurs ..... Building, Lambton Quay, Wellington.

PRECEDENT No. 5

ORDER FOR LEAVE TO SWEAR TO DEATH.

Friday the ..... day of ..... 1961.

Before the Honourable Mr Justice ..... a Judge of the Supreme Court of New Zealand.

UPON READING the Notice of Motion of thd Applicant dated the ..... day of ..... 1961, filed herein and the Affidavits of the Applicant and of G.J. of the City of ..... Coroner and of K.L. of the City of Wellington Law Clerk filed herein and upon hearing Mr ..... of Counsel on behalf of the Applicant and the only Life Insurance Company concerned having been duly served with a copy of the Notice of Motion filed herein and of the said Affidavits and having made no objection thereto THIS COURT HEREBY ORDERS that leave be and is hereby granted to the said C.D. of Wellington, Married Woman on any application for Letters of Administration *cun testamento annexo* of the estate and effects of A.B. of Wellington, Ship's Engineer, made hereafter to swear that the said A.B. died on or since the ..... day of ..... 1960.

By the Court
L.S.
Registrar
E. C. ADAMS.

Mayor in Goal.—"It may perhaps come as a surprise to Britons, rigid with traditionalism and age-old custom, to learn that in the United States, or, anyhow, in Georgia, it is possible for a Mayor to continue in office and in receipt of his salary while he is in prison for having paid into his business bank account money lent to his town. This Mayor was actually tried in the middle of his campaign for re-election, sentenced a week before polling day and nevertheless returned over the heads of four other candidates who divided the opposition votes. An attempt by some of his townspeople to get him 'de-mayored' by the Courts failed because it was necessary that he should be present at the proceedings and there were technical difficulties in securing this. The next step is to be an attempt to obtain a Court order cancelling the election. Meanwhile the prisoner is addressed by his gaol-fellows as 'Mr Mayor', although the Warden says that: 'There is no question of his carrying on any Mayoral duties while he is here'".—104 Sol. Jo. 1092.

THE AGE OF CONSENT TO MEDICAL TREATMENT.

Considerable publicity has been given in recent months to the law relating to a person's right to refuse medical or surgical treatment (using the word in a very wide sense) either for himself or for his children. A newspaper report toward the end of last month has once again drawn attention to the question and this time raised an aspect of it which has been little stressed in the past. The report was of an Auckland case where a 19-year-old youth willing to undergo an operation involving a blood transfusion was sent home from hospital because his parents had a religious objection to the giving of blood. The report stated "The [Auckland Hospital] Board's legal advisers said the facts of the case again illustrated the "urgent necessity for legislation." The law was that a father had control over his children until they were over 21 or married under that age."

It seems to widely accepted in New Zealand that the age at which a child assumes full responsibility for the decision whether or not he is to undergo some form of surgical or medical treatment is the age of majority, and it is understood to be the general practice for public hospitals at any rate to require the consent of a parent up to that age. There appears to be no direct authority on the point but it is submitted nevertheless that the view of the law on which this practice is based is incorrect.

It is generally accepted that a person who performs an operation (and the same is true of a medical examination, a blood transfusion or the administration of an anaesthetic) on an adult without the latter's consent renders himself both civilly and criminally liable for assault unless the circumstances are such that the patient's consent cannot be obtained. Nor is there any dispute over the proposition that if the patient is a very young child and consequently unable to give permission himself the consent of his parent or guardian is required instead. These two cases are not exactly parallel. Where an adult refuses to undergo an operation he suffers no legal penalty. If however a parent withholds his consent to an operation for his child he may well find himself facing a charge of failure to supply the necessaries of life or even perhaps manslaughter if death results from the failure. Nevertheless it remains true that his consent to the operation is necessary.

The reason for this rule, it is suggested, is essentially practical—the child's lack of understanding of the issues involved. It seems reasonable therefore that as soon as he has acquired that understanding he should be able to give his own consent, and to suggest that he does not acquire it until he reaches 21 appears both unrealistic and out of line with other legal rules which offer a basis for comparison.

The most important of these is to be found in the law as to mental illness. Under s. 39 of the Mental Health Act 1911 a person of 16 or over may enter a mental hospital as a voluntary boarder on his own written request. Is there any justification for conceding him sufficient maturity to make the decision to enter a mental hospital for care but not to undergo an operation for his benefit? The age of 16 is also the age at which a parent's right to custody as against the child orinarily ceases. If a minor over that age leaves home he cannot legally be forced to return.[1] Similarly, too, 16 is established as the age of consent in relation to sexual offences against a girl. If the law recognises that a person over 16 is too nearly an adult to be any longer treated as a child in these matters is it not legitimate also to infer that at the same age he is legally capable of giving a sufficient consent to medical or surgical treatment for himself, at least where the treatment is usual or reasonable.?

Authorities Examined.

How far is this view supported by authority? There appears to be no direct judicial authority and most of the textbooks deal only cursorily with the question. But such statements as do exist all appear to be consistent with the contention that a minor over the age of 16 is able to give the necessary consent to an operation.

In *Pollock on Torts*, 15th ed., at p. 113, it is said:

"In the case of a person under the age of discretion,[2] the consent of that peron's parent or guardian [to a surgical operation] is generally necessary and sufficient." A footnote refers to *Stephen's Digest of the Criminal Law*, 9th ed., article 310, which reads "Everyone has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care and too young to exercise a reasonable discretion in such a matter . . . "

Taylor's Principles and Practice of Medical Jurisprudence, 11th ed., vol. 1 at p. 38 lists a number of requirements in regard to consent to an examination and amongst them gives the following:

"(c) Where the person is incapable, through age or through lack of understanding, of giving a valid consent, permission must be obtained from the parent or guardian."

This statement is inconclusive in itself but it is followed at p. 72 of vol. 2 by the comment (in dealing with the examinatcn of the victim of an alleged rape):

"The consent of the victim should be obtained if she is of reasonable age and understanding. If she is not, consent should be obtained from her parent or guardian, preferably in her presence."

In *Law and Ethics for Doctors*, by Stephen J. Hadfield, the author expresses the following view:

"In a child under 16, consent, preferably in writing, of the parent or guardian must always be obtained. So must it for a patient over 16 and under 21, unless living away from parents or from boarding school, in which case his own consent is sufficient. In any case it is wise also to obtain the consent of a patient between the ages of 16 and 21."

It is difficult to justify the distinction made in the second sentence in the case of patients between 16 and 21 if, as has been suggested, the true basis for requiring the consent of a parent of a child is the patient's lack of understanding of the issues involved. To require

[1] Lough v. Ward [1945] 2 All E.R. 338, with which at first sight this statement appears inconsistent, was actually an action against third parties and the remedy granted was by way of damages and an injunction against continued harbouring of the minor.

[2] Traditionally said to be 14 for a boy and 16 for a girl but probably today more likely to be held 16 for both.

the parent's consent where the minor was living at home but not otherwise would appear to imply that the need arises from parental rights—a view which does not seem to be borne out by the other writers referred to.

In connection with Hadfield's final sentence, it is to be noted that Pollock uses the word "sufficient" as well as the word "necessary". It would be difficult indeed to argue that an operation carried out against the wishes of a minor who was capable of appreciating the nature of the operation would be justified even though the consent of a parent had been obtained. There is little doubt that an older minor must himself consent to any treatment given him and if his parent's consent is also required then in these cases two consents are necessary.

Implied support for the proposition that a parent's consent is no longer necessary for a person over 16 is to be found in s. 167 of the Crimes Act 1908, which provides a penalty for failure by the head of a family to perform his legal duty of providing necessaries (which includes medical attention) for any child under the age of 16 years. If the head of the family ceases to be liable under that section once the child reaches 16, the implication must be that from that age the child is responsible for providing medical attention for himself.

The view that a minor over 16 is capable of giving a sufficient consent is also taken by a writer in the *British Medical Journal* of 26 March 1960. In an article entitled *Parental Consent to Treatment*, Philip H. Addison, Secretary of the Medical Defence Union, gives it as his opinion that "when dealing with a minor aged between 16 and 21 and able to appreciate the nature and consequences of any particular form of treatment his own consent is all that is necessary."

Finally, in the absence of direct judicial authority in English law it is helpful to consider what is the position in the United States. The law there on the subject of consent to operations is extensively reviewed in a recent article in the *University of Kansas Law Review*, vol. 8, No. 3 by William A. Kelly, Associate Professor of Law, University of Kansas School of Law. Several pages are devoted to the problem as it affects minors and the author comments: "Works on medical jurisprudence commonly state that a minor is incapable of consenting to the performance of an operation on himself and that the act of the surgeon in performing an operation without the consent of the parent is an assault and battery for which the child may recover. While the reported cases dealing with this problem contain language supporting the statements appearing in the test, a careful examination discloses that such a strict rule is not always applied. Emphasis has been placed on such factors as whether the child was of tender years or of mature development although technically a minor, whether the operation was a major or minor, whether an emergency existed and whether the operation was for the benefit of the child or for the benefit of another."

The author reaches the conclusion that "if the infant is sufficiently mature to understand the nature and consequences of the proposed operation and has consented to it after being informed of his condition and the proposed procedure, then the infant should be able to give a valid consent." This is borne out by the American *Restatement of Torts* which says (s. 892 (e)) "The manifestation of assent by a person so young or so mentally defective that he does not understand the nature or effect of an act done is not a defence to an action for such act." And Prosser's *Handbook of the Law of Torts*, 2nd ed., refers in a footnote on p. 84 to cases where a minor over 16 has been held to be capable of consenting, at least to minor operations, for himself.

In the light of all the foregoing considerations it is submitted that a minor of 16 or over is capable of giving consent to the performance of an operation on himself, at least where the operation is usual or reasonable; and that in these cases the consent of his parents is ineffective if relied on alone and legally superfluous if obtained in addition to that of the patient.

P. M. WEBB.

I Would be Very Happy in Prison for Christmas.—"Prison used to be a place to be avoided, and we hope that, to most people, it still is. But the conditions in prison today are such that there are persons who seem to welcome being sent to prison. We heard some little while ago of the habitual offender who complained bitterly to the gaoler of the Court which, on his prompt reappearance immediately after release from a sentence, fined him "10s. or one day". This meant, of course, his release when the Court rose. The gaoler asked what he had to complain about and his reply was, "I wanted to finish that book I was reading". Now we read, in *The Western Daily Press* of 23 December, that a man aged 30 was before a Court charged with wilfully damaging a shop window, the amount of the damage being £19. We make no comment on the merits of the case because it seems clear that it has not yet been heard. The report states that the Magistrates were trying to see whether they could finish the case on that day as they did not wish to keep the defendant in custody over Christmas, but the defendant's reply to this was, "I would be very happy in prison for Christmas". Thereupon he was remanded in custody to appear on the Wednesday after Christmas. The report continues, "The defendant beamed and said a profound 'Thank you' and was led away to his Christmas dinner in prison. The defendant in this case is said to have had only 3d. in his possession, but it is, in some people's view, still somewhat strange that he should regard prison as the desirable refuge rather than some other of the various institutions which cater for people in distressed circumstances. If this is a person's attitude to prison how can a Court punish him if he is found guilty of an offence"—(1961) 125 J.P. 15.

A Mother Who Needed a Lesson.—"A woman pleaded guilty to stealing a number of articles of food from a shop, and her method of doing this was to give signals to her six year old son to indicate to him when he was to take the articles from the counter. The child, being under the age of eight years, could not be guilty of an offence but by using him in this way as her innocent agent the mother clearly committed an offence and one which was far worse than if she had stolen the articles with her own hands. In sentencing her to a month's imprisonment the Magistrate said: 'This was a hideous offence. This is going to be a lesson to you and to any other mother who thinks fit to train her children to steal'."—(1961) 125 J.P. 140.

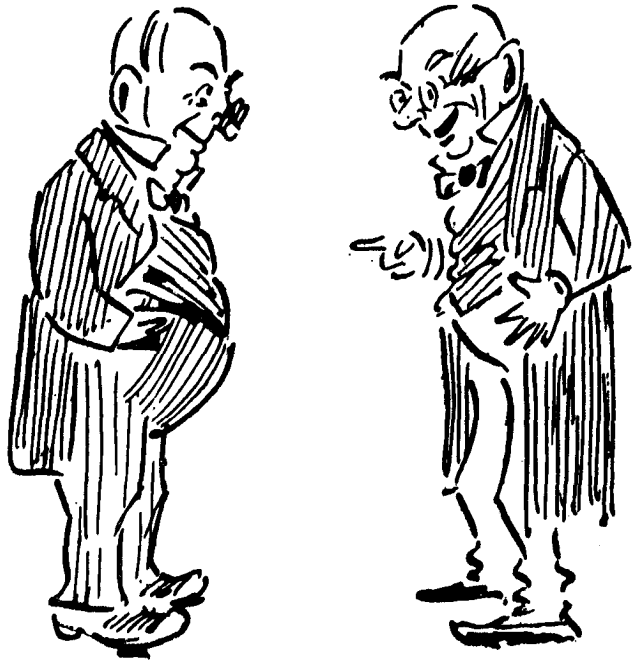
FORENSIC FABLE

By "O"

The Two Aged Conveyancers and the Good Story.

Two Aged Conveyancers (who were also Equity Draftsmen) Lunched Together at the Megatherium Club to Celebrate the Sixtieth Anniversary of Their Call to the Bar. One was Eighty-Two and the other was Eighty-Three.

They did themselves Very Well. After a Second Old Brandy Both Felt Mellow and Comfortable and Ready for Frivolous Conversation. So They Told each other Merry Stories of the Good Old Days. Eighty-Two reminded Eighty-Three of the Humorous Observation Made by Old Buffle when the Originating Summons was Called On in the Vice-Chancellor's Court Out of Its Turn; Eighty-Three (not to be Outdone) Recalled



the Pun Made by Snorter in the Debenture-Holders' Action; and Eighty-Two Retaliated with the Anecdote of the Solicitor's Clerk who Mixed Up the Draft Affidavits of the Spinster Executrix and the *Feme Coverte*.

Then they Turned to Modern Times, and Eighty-Three Opined that on the Whole the Funniest Thing he Remembered was his Pupil's Opinion in the Ejectment Action. Shaking with Laughter, he told Eighty-Two that the Pupil had Advised that the Trustees of the Marriage Settlement should be Joined as Defendants in the Alternative. Eighty-Two's Appreciation of the Story was so Noisy that Several Members Woke Up and Looked at Both of Them Angrily. And so a Happy Afternoon Came to an End.

Moral.—*A Joke's a Joke.*

MR A. A. McLACHLAN S.M.

Tributes in Court

Tributes to the life and work of the late Mr A. A. McLachlan S.M. were paid by members of the Wellington branch of the Law Society in the Magistrate's Court on 11 May.

On the Bench were Messrs. M. B. Scully S.M., J. R. Drummond S.M., J. F. Keane S.M. and J. A. Wicks S.M.

Mr Scully said that Mr McLachlan, a former Senior Magistrate of Wellington, had come to the Bench with an unusual background of experience. He had been a secondary school teacher and later qualified in law and practised with success in Christchurch. He was actively engaged in public life in that city and served on local bodies. After acting as a temporary Magistrate for a short time in 1941, he was appointed to the Bench permanently. He came to Wellington in 1948, and became Senior Magistrate before moving to the Hutt circuit. In 1954 he was appointed chairman of the Local Government Commission and he held that office up to the time of his death. "He was completely free from false pride," said Mr Scully, "and he took real pleasure in the everyday social intercourse with his fellow men. "Each Magistrate has his own peculiar approach to the many problems before him, and Mr McLachlan's approach was his very own. The cold austerity which is one facet of the law was not for him. He would not allow technicalities to steer him from what he believed to be real justice."

The president of the Wellington District Law Society (Mr J. C. White) said members were grateful for the opportunity to pay tribute to the memory of Mr McLachlan. They would always remember and appreciate the friendly and common-sense atmosphere of Mr McLachlan's Court. His kindliness and keen sense of fair play were qualities which impressed litigants, witnesses, and counsel alike.

PERSONAL

Mr Fergus Paterson has been appointed Crown Solicitor, Blenheim, in place of Mr P. L. Molineaux who has recently retired from that office upon his appointment as Attorney-General, Western Samoa. Mr Paterson will conduct the Crown work in conjunction with his own practice which he commenced in Blenheim in 1947.

Mr J. A. Fraser has been appointed Chief Judge of the High Court of the Cook Islands. Since 1958 he has held the appointment of Commissioner of the Maori Land Court at Auckland.

Mr Maxwell Hugh Airey was admitted as a barrister and solicitor at Auckland by Mr Justice Turner on 19 May. Mr J. F. W. Dickson appeared in support.

Simplicity in Correspondence.—"Simplicity, like brevity, often takes more time to achieve. William Randolph Hearst, claimed to be one of the greatest journalists the world has known, once wrote a letter of eight pages to a friend. As a postcript he added 'I apologise for the length of this letter.' I had not time to write a short one' ". (1960) 110, L.J., 791.

MR ALAN WALTER BROWN

Tributes in Court

A large gathering of members of the legal profession with representatives of the Magistracy and the Police was held in the Supreme Court Christchurch on 17 April when tributes were paid to the late Mr A. W. Brown. On the Bench were Mr Justice McArthur and Mr Justice Richmond.

Mr P. H. T. Alpers, President of the Canterbury District Law Society, addressed the Court as follows :

" May it please your Honours, the Bar is gathered to pay its tribute to one of its members Alan Walter Brown who died four days ago, and who practised as a barrister in this Court for nearly 40 years. For four of those years he was Crown Solicitor at Christchurch, and for many more years he acted as a Crown Prosecutor in this Court. For fully 30 years he was in the forefront of the Bar in Christchurch—no more than one or perhaps two others were appearing so frequently during those years. He was almost wholly engaged in barristerial work while a member of the profession. It is some indication of his standing at the Bar that only twice in the post-war years has the Bar gathered in such circumstances—namely, for the late Mr Maurice Gresson and Sir Arthur Donnelly.

" In other walks of life it may be possible to appraise a man's professional, business or vocational qualities separately from his personal qualities, but not so in the case of a barrister. Alan Brown brought into his professional work, above all, his love of human beings and his limitless sympathy with them. His generosity and kindness, his love of fun, were well known. He treasured his friendships and personal relationships touchingly and genuinely.

" It was probably not a coincidence that last Christmas he sent me a book with a card containing these lines by Hillaire Belloc :

'From quiet homes and first beginnings
Out to the undiscovered end
There's nothing worth the wear of winning
But laughter and the love of friends.'

" But however much he loved and sympathised with human beings, both collectively and individually, it never interfered with the performance of his duty. He was a most effective cross-examiner but, with his wit, his quickness of perception and of tongue, there went a sympathy with the person he was cross-examining, so that he had the happy ability of demolishing the effectiveness of a witness without humiliating him. It was not in him to do a mean thing in or out of Court.

" He worked, as we know, at times under great difficulties, but with his astonishing memory to help him, both as regards fact and law, he was seldom, if ever, irritable in Court. Such was his memory that even his hazy recollections of facts and of reported cases to which he had not recently adverted almost invariably proved correct.

" Many of us remember visiting him in that small office room of his overlooking the Avon River where there was always a warm welcome and never a hint that you were a nuisance to him, however pressed he might be with work. No matter how many interruptions there were, the interview was always a useful one and the matter in hand was fully and frankly dealt with.

" Thus it was that he received in return, during all those busy years, the respect and affection which he earned. He had countless friends to whom, on more than one occasion, he had shown his kindness and hospitality. I cannot forget the help he gave me as an extra-mural first-year law student in 1932 when he lectured in jurisprudence. He sensed not only that help was needed but exactly the sort of help that was needed and he gave it liberally and spontaneously. It was typical of him that he had forgotten this entirely when I reminded him of it a few months ago.

" He was extraordinarily widely read, keenly and genuinely interested in all the arts. He loved his garden, his home, his family—all to quite an obvious degree to those who knew him. But he was not merely a good fellow with all these lovable human qualities and extraordinary diversity of interests—he was also a very capable advocate and lawyer. He would never himself have claimed ability as a lawyer in the pure sense, but he had, as I have mentioned, an astonishing memory and great ability to present an argument—little though he would have prided himself on these attainments. Yet, in a sense, all these words may be considered superfluous because, in the case of one who appeared so frequently and for so long in this Court, so long as this Court stands and there are those of us who remember him as he practised in it, his memory will not fade. It is the lot of such a counsel that his attitudes, his gestures, his choice of words and even the intonation of his voice, live on in the memory and are frequently recalled in conversation for many years.

" I trust that these words of tribute and the attendance of the Bar here today and Your Honours' enabling this function to be held, are a sufficient assurance to his widow and his daughters of the sympathy we hold for them and the respect and affection in which we hold their late husband and father."

His Honour, Mr Justice Macarthur, then spoke :

" It is fitting ", he said, " that reference should be made in this Court to the late Mr Alan Brown, because he was a notable advocate and was engaged many times in litigation that was conducted in this very Court.

" Mr Justice Richmond and I, because we practised elsehwere, did not know him well ; but we had always heard that at the Bar he had a reputation not only for hard work but also for very considerable ability as an advocate and lawyer, and that in his later years he was regarded as one of the leaders of the Christchurch Bar. As you have indicated, Mr President, his work covered a wide field, although he was no doubt best known in his capacity as Crown Prosecutor. But his standing as an advocate is not all ; he gave service to his country during both World Wars ; and moreover gave great service to his fellow-men at other times, which you have specially mentioned. For all these things and for his human qualities he should be remembered well.

" The Judges would wish to be associated with you in expressing their deepest sympathy to his widow and to the members of his family."

"CAN WE PERMIT JUSTICE TO REMAIN BLIND?" *

Assuming—but of course not asserting—that all of you in attendance indulge in the use of alcoholic beverages, at least 17 of you in this audience this morning now are, or will become, alcoholics. [There would be about 200 present.] Which individuals are alcoholics, and which are not, I do not know, nor do you. You cannot distinguish them just by looking. However, that revelation is of some reassurance to me this morning because I know that at least many of the lawyers, Judges, barristers and solicitors in this room have a genuine personal interest in the subject I have come here to discuss today.

My initial objective in being here is to offer support for this proposition:

A lawyer without an understanding of this grave illness, alcoholism, is in the same dilemma as a surgeon without an understanding of anatomy. More than 5,000,000 of our fellow citizens in the United States today, are afflicted with it. Unlike most other illnesses, this sickness wreaks its devastation upon those who are associated in any way with the alcoholic. Consequently, it has been reliably estimated that 20,000,000 other Americans are adversely affected by the illness of alcoholism.

A prominent physician in the field of mental health has said, "If alcoholism were a communicable disease, a state of national emergency would be declared!". Every lawyer in this room can cite instances close to his family or professional life, of the loss and tragedy attributable to this disease. You must be aware of the appalling suicide rate among these people. But how many of you know the difference between an alcoholic and a drunk? If you do not have a genuine understanding of this illness, there are 20,000,000 American clients whom you cannot properly serve. And as a member of this great legal profession of ours, what are you doing?

Let's face the reality of the situation. Actually, lawyers have exhibited a strange reticence to bring this problem of alcoholism out into the open.

We are told by the leaders in this field that the greatest deterrent to a solution of this problem is public apathy and ignorance. They say that until the stigma of alcoholism can be removed from public attitudes, no real progress can be expected.

Why does this stigma persist? In my opinion, the stigma of alcoholism is being perpetuated by two influential facets of our society. They are: (1) The churches, many of whom persist in the bigoted view that the sick alcoholic is a moral leper. (2) The legal profession, by and through whom an historically worthless penal approach by law, is nurtured and preserved. (I refer to the punishment of the alcoholic as a criminal offender, or his classification either as a lunatic or as a person who is mentally ill.) It is true that such punitive measures satisfy the wish of our society generally, to get these unfortunate creatures removed from public view—and, thus, from the public conscience.

* An Address by Albert B. Logan, before a joint session of the Law Society of England and the American Bar Association, stressing the need for the legal profession to recognise alcoholism as a disease. Published by permission of *The Grapevine*.

The Penal Approach.

Legal procedures, punitive laws and police handling only aggravate the problem. Judge Murtagh [Chief Stipendiary Magistrate, New York City] has repeatedly declared that the penal approach to the problem is a national disgrace! Alcoholism is the only illness you can have for which society will send you to jail! Many get life sentences—30 days at a time.

Antiquated methods of handling this problem are accompanied by a colossal waste of public funds. The City of Denver annually expends the sum of $1,300,000 just for the arrest, trial and incarceration of inebriates—without any pretence of offering any treatment or rehabilitation. Denver does a magnificent job of maintaining and expanding the sub-standard culture of its prospering Skid Row. If Skid Row habitues had their own chamber of commerce, they wouldn't ask for anything Denver is not giving. But since the Skid Row represents less than three per cent. of America's alcoholic population (and only about 15 per cent. of those on Skid Row are actually alcoholics) our thinking today should be directed to the 97 per cent. who are still existing in ordinary social environments. [That is, those who have not yet lost their jobs or their homes.]

Among this 97 per cent. are your clients and mine, your friends and mine, your neighbours and mine—business executives, Judges, barristers, doctors. Alcoholism recognises no class, makes no distinctions. Many of these are "hidden" alcoholics, who are not known as such to public authorities or to their associates generally. And it seems quite probable that half of our alcoholic population is of the female variety. The fact that they are in the home and are commonly "protected" is the reason this fact of life is not generally considered.

In the January 1960 issue of *Fortune Magazine*, the executive director of the National Council on Alcoholism was quoted as saying,

> "Alcoholism all too frequently strikes the most promising member of a family, a school class, or a business. Granted that it also can strike the dull, the mediocre and the misfit, nevertheless the man susceptible to alcoholism very often seems to be the man who is a little more alert, a little better at his job and a little more intelligent than his fellows in his particular social, economic, or job level. He is more sensitive than the non-alcoholic, more imaginative and more aware and he hates routine. The qualities that make an executive also characterise alcoholics."

History records the role of leadership provided by lawyers in all great political and social movements. Is our profession no longer fulfilling its mission in society?

Suggestions and Recommendations.

My mission here today is to outline the part in this crusade that the American Bar Association is qualified to perform, within the dignified traditions of the organised legal profession. Here are some suggestions and recommendations as to what the American Bar Association could do:

1. Recognise that alcoholism is an illness and that the penal approach to alcoholism is fundamentally and morally wrong.

2. Acknowledge that the problem of alcoholism is of national concern.

3. Recognise that the matter of alcoholism is so involved with most other problems faced by the lawyer in practice, that it is now essential that he make a study of the nature of the illness, and the available facilities for care and treatment.

4. Announce that education on alcoholism is an essential ingredient of law-school education.

5. Urge the Senate Sub-committee on Health, Education and Welfare to provide an appropriation for a new Bureau of Alcoholism Control.

6. Establish in the framework of the American Bar Association a permanent Committee on Alcoholism with a directive to co-ordinate its activities with the work of the American Medical Association, the American Hospital Association and the National Council on Alcoholism. [National Society on Alcoholism New Zealand Incorporated.]

Along the path of freedom and justice, we have found few human beings more cruelly oppressed or more enslaved than these unfortunate fellow-citizens we call "alcoholics"—human beings chained against their will to a compulsive addiction, degraded and despised by ignorance and bigotry, and relegated to the category of outcasts and outlaws. Alcoholics whose acute pain and suffering is characterised by our medical profession as the most excruciating pain of all the ills of mankind known to medicine.

Sparked by the thought-shattering revelations of the great Fellowship of Alcoholics Anonymous—that this incurable malady can be successfully arrested and that the alcoholic is a person worth saving—the resources of physicians, psychiatrists, psychologists, sociologists, penologists are participating in this grand new adventure to improve the plight of man. Conspicuous by its absence, is the legal profession. In this situation, how much longer can we permit Justice to remain blind ?

We know not when this tragic illness will strike close to any of us—our wives, our children, even we ourselves could be its victims tomorrow. (It's a lead-pipe cinch that one of every twelve of you who drink, will become an alcoholic !) Hence, if ever we were moved to invoke the practice advocated by the Man of Nazareth that ". . . whatsoever ye would that men should do to you, do ye even so to them . . ." this great avenue for service presents that opportunity.

[*Editor's Note*: The matter appearing in square brackets has been inserted by W. W. King, barrister, Auckland. This article will be followed by a further article on the deterioration of the alcoholic by Mr King.

CORRESPONDENCE

Do You Move ?

Sir,

The article on his tour abroad by Mr A. L. Tompkins (*ante*, 110) was most interesting, but I do not think that "the Q.C. bows in assent" when asked by the Lord Chancellor, "Do you move ?". He bows to indicate that he has no motion to move ; if he had, he would move it. Of course, on the ceremonial occasion of which your contributor was writing there would be no such motions, but the procedure, which he describes, is routine practice on motion day in the Chancery Division. Each barrister is addressed by name by the Judge in order of seniority, except the unimportant common-law junior, who has been wafted into this strange Court by forces beyond his control, with a brief which he has not read because it was thrust into his hand only a short time ago. As the Judge does not know his name he is left to the last, the formal question, "Do you move ?", is prefaced merely by a look of kindly inquiry, and the interloper rises to do his ill-prepared best.

Fortunately, the Judge usually treats him gently. "I don't suppose *you* want to add anything ?", said one of the present Chancery Judges to me on a similar occasion, to my great relief, after counsel for the other party had spent ten minutes seeking an adjournment of a cause of which I knew nothing for reasons that I did not understand.

I am etc.,
K. H. DIGBY

That Hard "G"

Sir,

With regard to W. M. Bayertz's letter (*ante*, 108) concerning pronunciation, he makes the statement that the word "get" seems to be the only example in common use of the hard "g" before "e" There are however a few other words in reasonably common use "gear, gelding, geese and geyser". Then there are others not so common such as "gewgaw, geiger, and geisha."

I am etc.,
R. W. MATHIESON

Mortgagee's Sale under Conduct of Registrar

Sir,

We would like to say how much we have enjoyed the article on the above (*ante*, 94).

One fact we feel one has to be careful about in fixing the estimate of value is that of arrears of interest. If these are included and the mortgagee buys in we consider that tax is payable on such interest. One is not disposed to include them unless quite confident of reselling at or above the estimate. If in doubt consider leaving out the interest arrears.

We do not for a moment intend to be taken as criticising the article but we thought the above point may be of interest to you.

I am etc.,
G. M. BROUGHTON

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

The Judgment of Solomon—Judge Clifford Cohen of Durham County Court was recently asked to follow the judgment of Solomon in the case of *Pretty* v. *Morrison*. No doubt the learned Judge felt some regrets that the judgments of Solomon had not been codified and bound. The plaintiff and the defendant resided in the same street and each owned a grey West African Parrot. Both parrots decided to leave the comfort of their homes within a day or two of each other, and a week after the joint disappearance one grey West African Parrot gave itself up at the local inn. Both Mrs Pretty and Mrs Morrison claimed that the parrot was her missing pet. Thus Mrs Pretty sued Mrs Morrison for the return of the parrot and £10 damages for detinue. Both parties called evidence as to identity, but the learned Judge at this stage did not follow the famous judgment of Solomon in suggesting that Polly be cut in half and a portion awarded to each of the ladies. He decided that the parrot was the parrot who had left the home of Mrs Pretty, and ordered that the bird be given to the plaintiff. Whereupon, Mrs Pretty burst into tears seized her pet and refused to take costs. Perhaps, this case while not meriting the description of a leading one, is sufficiently rare to warrant a report. However, this case belongs more properly to Sol. J. (ancient) but in its absence Sol. J. (modern) will have to do.

Presumption of Marriage—Some 57 years ago the case of *Re Shephard* [1904] 1 Ch. 456 decided that where a man and woman have cohabited for such length of time and in such circumstances as to have acquired the reputation of being man and wife a lawful marriage between them will generally be presumed, although there may be no positive evidence of any marriage having taken place. This decision was carried even further in the case of *Re Bradshaw* [1938] 4 All E.R. 143, where the parties who had lived together as husband and wife were described as single persons in a certificate of marriage, which marriage was performed after the birth of their children. The Courts have always strained to the utmost to presume a marriage and in some instances would appear to go beyond the requisites of evidence. Reported decisions on the question have now been consolidated in *Re Taylor (deceased)* [1961] All E.R. 55 and the rule as established in *Re Shephard* has been emphasised and adopted.

Odious Comparison—*The Solicitor's Journal* (London) contains a regular column of obituaries which state the ages, dates of admission and estates of solicitors and barristers. It is interesting to note that over the past 12 issues of this famous *Journal* the average age of deceased solicitors is 75 years. The average age of barristers who leave their Inns for their last brief is 63 years. The average fortune of the solicitors over the period referred to is £40,000. The average estate of the barristers is under £20,000.

Biting the Hand—In November 1960 one Jack Day was convicted of the capital murder of Keith Arthur and was sentenced to death. In a December issue the dignified *London Spectator* commenced a series of editorials pleading with Mr Butler the Home Secretary to reprieve the prisoner. A month later the *Spectator* published the sad item that despite their pleas Jack Day had been executed. However, Jack Day had not been executed and a week after the publication of Mr Day's premature obituary the *Spectator* received a writ from Mr Day's solicitors claiming damages for libel on the grounds that the statement implied that his crime was too heinous to warrant reprieve. We do not know if a statement of defence was filed, but Mr Day has now been executed according to law and no doubt his action has died with him. The *Spectator* did not mention the passing of Day.

Broken Teeth—Where a buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose. This was the basis for the decision in *Chaproniere* v. *Mason* (1905) 21 T.L.R. 633. The plaintiff purchased a bun from the defendant which contained a stone. The plaintiff suffered *inter alia* a broken tooth. The Court of Appeal decided that the defendant must have known the purpose for which the bun was bought and he was, therefore, held liable. This decision is difficult to reconcile with a recent case in the Croydon County Court (reported in the *Solicitor's Journal*, 10 March 1961). The plaintiff, who was very fond of custard tarts and ate them blindly, broke some of his false teeth when he bit into a custard tart which still had part of the metal baking tin attached to it. The learned Judge held that the mishap was the plaintiff's fault and the tart itself was reasonably fit for the purpose for which it was supplied.

The Perfect Litigant—A young litigant called on a well-known barrister and asked him to conduct a case for him in the Queen's Bench. This the barrister did and judgment was given against the young client. Whereupon the client said to the barrister, "What can we do now?" The barrister replied, "We can appeal to the Court of Appeal". The client said "Then what are we waiting for?" The case was duly heard by the Court of Appeal which affirmed the judgment of the Queen's Bench Division. The client said, "What do we do now?" The barrister replied, "We can appeal to the Privy Council". The client stated, "Then what are we waiting for?" The Privy Council affirmed the decision of the Court of Appeal. The client said "What do we do now?" The barrister replied, "We cannot do anything further. We have been to the highest Court in the land and we have lost". "Oh!" said the client, "Thank you for all you have done. When you return to your chambers would you kindly send me your bill of costs". The barrister said in pleased surprise. "Tell me young man are you married?" The client replied, "Yes, sir, I am". Whereupon the barrister said with emotion in his throat "Then go home and breed young man. We need men like you".

TOWN AND COUNTRY PLANNING APPEALS.

Gunn and Others v. Christchurch City Council.

Town and Country Planning Appeal Board. Christchurch. 1961. 20 February.

Zoning—Land zoned as rural—Applications for re-zoning as industrial—Land not suitable for production of food—Not needed nor suitable for urban development—Land zoned as rural under Christchurch Regional Authority's operative regional planning scheme—How far City Council bound by such zoning—Town and Country Planning Act 1953, ss. 4, 26.

Appeals under s. 26 of the Town and Country Planning Act 1953. There were three separate appeals but as they related to the same provision in the Council's proposed district scheme, they were, for the sake of convenience, taken together.

The first-named appellant was the owner of a property situated in Ferry Road containing 4 acres 3 roods 5.8 perches, being Lots 1 and 2 on Deposited Plan 19110, part Rural Section 15. The second-named appellants were the owners of a property fronting Ferry Road containing 6 acres 3 roods 8.2 perches, being parts of Rural Section 15. The third-named appellants were the owners of property containing 60 acres 2 roods 12.1 perches, being part of Lots 1 and 2 on Deposited Plan 14561, Rural Section 702 and part of Rural Section 216A. Under the Council's proposed district scheme, as publicly notified, these properties were in an area zoned as rural. The appellants lodged objections to this zoning, claiming that their land should be zoned industrial. Their objections were disallowed and these appeals followed.

Holland, for the first appellant.
Wylie, for the second and third appellants.
W. R. Lascelles, for the respondent.
A. C. Perry, for the Christchurch Regional Planning Authority.

The judgment of the Board was delivered by

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

1. The Council, in its reply, submitted that the land in question is all vacant land and in the rural zone of the regional planning scheme to which the district planning scheme must conform, vide, s. 4 of the Act.
2. The area is almost undeveloped.
3. Sufficient provision has already been made in the district scheme for the industrial requirements for the foreseeable future.

It is correct that the land being zoned as rural under the Christchurch Regional Planning Authority's operative regional planning scheme the Council was, by virtue of the provisions of s. 4, required to adhere to the provisions of the regional planning scheme, but that section gives the local authority a right of appeal at any time so that the Council was not under an absolute obligation to zone this land as rural, but for the reasons given in its reply, it considered that a rural zoning was appropriate. The evidence establishes, in general terms, that none of this land, which is poor quality land, low-lying and in the main subject to flooding, is land having an actual or potential value for the production of food. The zoning of this land as rural goes no further than to indicate that in the view of the Planning Authority it is not needed, or suitable, for urban development at the present time. Both the Regional Planning Authority and the Council have made an exhasutive examination of the City of Christchurch and adjacent lands in particular with reference to industrial use. As a result of these investigations it was considered that for the full planning period of 20 years 725 acres of industrial land would be required within the confines of the City of Christchurch. The scheme, as it now stands, provides for an area of 810 acres zoned as industrial. Under the regional plan there is a total of 2,844 acres zoned for industrial use. In those circumstances, the Board is not prepared to alter the zoning of the appellant's land. The respondent Council's plan will be due for its first review five years after it becomes operative. The position of the industrial needs of the city should be reviewed then in the light of the development that has taken place during that period. It may well be that at some future date the appellants' land will be required for industrial use, but that time has not yet arrived.

Appeals dismissed.

Clearys Motors Ltd. v. Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1960. 9 November.

District Scheme—Land zoned as required for road purposes—Taking of land integral part of Master Transportation Plan for Auckland—Scheme to indicate what required in future as well as present requirements—Land not required for some considerable time—No order for immediate taking—Town and Country Planning Act 1953, ss. 26, 44 (5) (d), 47.

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

The appellant company was the owner of a block of vacant land situated at the intersection of Queen's Road and Domain Road being part of Allotment 62 of Section 2 of the Village fo Panmure. Under the Council's proposed district scheme, as publicly notified, a small part of the appellant's land on the intersection of Queen's Road and Domain Road was zoned as being required for road purposes when the Eastern Motorway, which forms part of the Master Transportation Plan for Greater Auckland, comes to be built. The appellant company lodged an objection to this proposal, but as the provision was in the plan as part of a requirement of the Auckland Regional Planning Authority, the Council could not do otherwise than disallow the objection. This appeal followed.

Slane, for the appellant.
Pleasants, for the respondent.

The judgment of the Board was delivered by

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

1. The ultimate taking of some land at this corner for road widening forms an integral part of the Master Transportation Plan and the Board holds, as it has held in other decisions that the taking of some land for the purposes of the motorway and link roads will be necessary and it is not prepared to direct that the plan be altered by deleting this provision.
2. As part of its appeal, the company asked for an order under s. 47 (3) of the Act that the Council be directed to take the said land under the Public Works Act forthwith. That Board has already held, in previous decisions *Richard Martin* v. *The Wairoa Borough Council*, [1960] T & C.P.A. 120, and *Sullivan and Others* v. *The Stratford Borough Council*, 6 May 1960 (*unreported*), that in preparing town planning schemes councils are required to plan for future development over a period of 20 years. It follows, therefore, that when it first publishes its scheme, the scheme or the relevant plan, should indicate not only the Council's present or immediate intentions, but also what is envisaged as the future needs of the district under consideration The Council must do this with sufficient clarity to inform residents and ratepayers of what its intentions are. In this particular case, the evidence is that it will be some considerable time before part of the appellant's property will be required for road widening purposes and it is therefore inappropriate to make an order for the taking of this land. Section 44 (5) (d) of the Act, provides that compensation shall not be payable under that section in certain cases, one of these being:

" (d) By reason merely that any district scheme shows whether in the context thereof or in any map or plan relating thereto:

' (i) any proposed new highway, any proposed street widening.' "

An order under s. 47 is not an award of compensation, but the quotation from s. 44 at least gives some indication of the legislation in relation to the notations on Town Planning plans. The Board holds that a notation on a plann indicating an intention which is not to be given effect to in the immediate future, is not a ground for making an order under s. 47.

The appeal is disallowed.

Appeal dismissed.