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LICENSING COMMITTEES

IT seems probable that the Government is intending in the forthcoming Licensing Act to abolish Licensing Committees and to transfer their functions to Magistrates. On the merits of this proposal we have no comment to offer, but it has prompted us to look to the past when Committees did not exercise their functions in the calm judicial atmosphere which rules today.

In the memory of most of our subscribers and of ourselves elections of Licensing Committee members have caused no public stir. In fact such elections have been rare and nominees have been for the most part elected unopposed. When an election has been necessary few members of the general public seem to know about it, and fewer still have voted.

This was not always so. Towards the latter end of the last century, in some districts at least, Licensing Committee elections were fought as keenly and in fact as bitterly as Parliamentary elections. Candidates were in the main divided into two parties, the Wets and the Dries, platforms were promulgated and pledges were given. It is not surprising that after such an election campaign decisions of the Committees were frequently challenged on the grounds of bias arising from pre-determination. Such cases are a valuable source of authority to lawyers concerned with proceedings for *certiorari*, *mandamus* and prohibition but they also have an historical interest and are certainly not without their humour.

The first reference to the feeling engendered by the election of Licensing Committees is contained in the judgment of Richmond J., in *Hamilton* v. *Fraser* (1886) N.Z.L.R. 5 S.C. 1, 10, where he said:

> "But the purpose of these elections can only be that the majority of ratepayers shall place upon the committee persons who hold opinions similar to their own in relation to the liquor traffic. On these occasions we all know it is a contest between the publicans and the temperance societies. The inevitable result is that partisans of the one side or the other are placed on the Committee and are prepared to execute the popular mandate which has put them there. This is of necessity inconsistent to a great extent with the existence on these committees of the true judicial temperament. There is therefore great danger that the proceedings will be a travesty of judicial enquiry."

How true these words were is apparent from subsequent cases, but they are even borne out by a statement made by the Chairman of the committee in question mentioned at p. 11 of the report. At an adjourned hearing of the application which was the subject of the proceedings he said:

> "We have been urged to preserve our judicial capacity, as if we were judges or magistrates in criminal Courts, but we are nothing of the kind, and the sooner the fallacy is exploded the better."

The Committee which figured most prominently in the *Law Reports* of the day was the Sydenham Licensing Committee, usually referred to as "Isitt and others". It was first haled before the Court in *Taylor and Others* v. *Isitt* (1891) 9 N.Z.L.R. 678.

The defendants were elected as members of the Sydenham Licensing Committee at an election held on 10 April 1891 and the plaintiffs were a group of publicans carrying on business in the Committee's district. The election campaign was apparently hotly contested, and in the course of it the defendants gave a pledge, in particular to the Sydenham Prohibition League, but also generally to the electors, that if they were elected they would close the whole of the drinking bars in the district and would refuse all applications for licences or certificates for licences under the Licensing Act. With their livelihood threateaned, the plaintiffs were not slow to move, and they sought a declaration that the election was void on a technical ground which need not concern us, an injunction against putting the pledge into effect and an injunction restraining the defendants from sitting on the licensing committee.

The action came before Denniston J. who rejected the plea for a declaration that the election was invalid. He found that the defendants had a strong bias against the applications of the plaintiffs in relation to their licences, but held that that was insufficient to disqualify them from sitting on the Committee. At the same time he felt bound to put the Committee right on what he regarded as an erroneous interpretation of the law. He therefore made an order restraining the defendants from refusing the applications of the plaintiffs on the ground only that the licensing of their premises was not required by the majority of the electors of the district, and declaring that they must consider whether such premises were required according to the reasonable wants of such of the residents as may desire to purchase liquor. He also commended to the Committee the words of Richmond J. in *Hamilton* v. *Fraser* (*supra*) where he said:

> "It is certain that the cause of temperance, holy though it be, cannot be advanced by disregard of the still more sacred claims of justice."

Mr Isitt and his colleagues were not prepared to lie down under this direction, and appealed to the Court of Appeal. Mr Taylor and his associates on the other hand, did not have the same trust in the Committee as Denniston J. had expressed, and cross-appealed seeking

more effective protection than was given by Denniston J.'s order. On the hearing of the appeal it emerged that, at an adjourned annual meeting of the Committee held after the pronouncement of Denniston J's judgment the Committee had granted three out of eight applications which came before it, professing to carry out the principle laid down by Denniston J.

Although the Court of Appeal decided unanimously that the appeal should be allowed and the cross-appeal dismissed, there was some difference of opinion as to the proper means of putting the Committee right on their misinterpretation of the law. Sir James Prendergast C.J., and Williams J., were inclined to think that the Committee could not have been prohibited from hearing the applications on the ground of prejudice, but Conolly J., took the contrary view. Sir Robert Stout who was leading counsel for the appellants, the Committee, was quite willing to accept such a prohibition since, the applications not being heard, no licences could have been granted, which would have been carrying out the intentions of the Committee to the fullest extent.

The judgment of the Court of Appeal was delivered on 23 May 1892, but Mr Isitt was given no rest. On 7 July of the same year an action brought by one Quill was heard in the Supreme Court by Denniston J., in which the plaintiff, the licensee of the Lancaster Park Hotel, sought a writ of *certiorari* to quash the decision of the Sydenham Licensing Committee refusing his application for the renewal of his licence. The ground alleged was of course bias arising out of the election pledge. In the meantime, the three licences which had survived the previous annual meeting of the Committee had been refused renewal on the grounds that the licensing of the house to which each applied was not required in the district. Thus the Committee, no doubt fortified by the judgment of the Court of Appeal, had achieved in two steps what it had originally sought to do in one.

In deciding this case Denniston J., whose judgment in reported at (1892) 10 N.Z.L.R. 663, had to go into certain evidence at some length. He had before him an affidavit in which the Committee asserted that it had heard and determined the application according to law, and did not act on any pledge as alleged. On the other hand there was evidence that Mr Isitt was Chairman of the Sydenham Prohibition League and the editor of a prohibition journal. In a letter to a newspaper he rejoiced in the consequences of the election, one of which was the closing of all the licensed houses in the district by (amongst others) his *judicial* action and he had also attended, as an opponent, a meeting called to sympathise with those whom he had *judicially* deprived of their licences. Having regard to the evidence the Judge had no difficulty in finding the bias necessary to invalidate the decision, and granted the writ of *certiorari* sought.

It is interesting to note from the pleadings in the case that apparently one outsider slipped on to the Committee, no doubt to the chagrin of the other members. The pleadings expressly exclude one William White from the allegations of bias.

Once again Mr Isitt was not prepared to bow to the authority of the Supreme Court, and appealed against Denniston J's decision, the case being reported at (1893) 11 N.Z.L.R. 224. Here is found the explanation of Mr White's holding office as a member of the Committee, as he was appointed by the Governor to replace a Mr Rudd whose seat had become vacant. Whether or not Mr Rudd was a member of the prohibition party is not stated.

Although three of the four judgments delivered in the Court of Appeal are lengthy the Court really had little difficulty in upholding Denniston J., even though this meant that to a certain extent Sir James Prendergast C.J. had to retract or at least qualify some of the *dicta* which he had uttered in the previous case. The writ of *certiorari* was upheld, and Mr Isitt then faded from the *Law Reports*. Perhaps we can say to his credit that he provided the profession with valuable authority on questions of judicial bias.

While this was going on at Sydenham, all was not quiet on the other fronts. At Wanganui, three candidates for membership of the local Licensing Committee were nominated by the Temperance Party and asked, as a condition of standing for election, that they should be instructed as to the need for reducing the number of licences in the district. A meeting of the society then passed a resolution to the effect that every opportunity thought right by the candidates should be taken to reduce the number of public houses to one for each 350 of the population, assuming the population to be 5,000. The candidates then issued a circular stating this as their aim, and in the result the three temperance candidates were elected along with two other persons.

At the annual meeting following the application there were 18 application of which 14 were granted and the remaining four, regarded by the Committee as relating to the least desirable houses, were adjourned. The 14 granted did virtually amount to one licence for each 350 of the population. At the adjourned meeting evidence was heard and the Committee granted one further application and refused the other three.

A motion of *certiorari* was heard by Sir James Prendergast C.J., and Richmond J. sitting together, but the Court held that the Committee had not gone beyond what was allowable in formulating a policy. The Committee had considered the applications judicially and in a proper manner. The decision can be fully justified by comparing the actions of the Wanganui Committee with those of the Sydenham Committee.

Things seemed to settle down for a few years until 1902 when *Penny* v. *Wairau Licensing Committee* (1902) 22 N.Z.L.R. 602 came before the Court. That case is an example of the extraordinary machinations which went on in licensing circles in those days. Details are disclosed in the judgment of Denniston J. (*ibid.*, 606).

Adams Brothers of Blenheim owned licensed premises at Deep Creek, some 42 miles from Blenheim, from which they received a rental of 5s. per week. They conceived the idea that it would be profitable to remove the licence to Blenheim by way of allowing the licence to lapse and applying for a new one in the town of Blenheim. This proposal was, as might be expected, strongly resisted by existing licence-holders in Blenheim and before the 1891 meeting of the Committee there was an active canvassing of the Committee members carried to such an extent that one of the members, a Mr Redgrave, resigned rather than endure it.

At the 1891 meeting the proposal to grant the new licence in Blenheim was defeated on the casting vote of the Chairman, Mr Redgrave having voted against

it. Mr Redgrave was replaced by a Mr H. M. Reader, who was the highest unsuccessful candidate at the last election and who was also opposed to the grant of the new licence, so that it seemed that the position of the existing licensees was secure. However, Adams Brothers were not to be outdone. They responded by selecting as the proposed licensee for the new hotel Mr William Reader, a brother of the new appointee to the Committee. On hearing of this the plaintiff, Penney, who was one of the existing licensees, saw Mr H. M. Reader who said that he hardly knew what steps to take, resign or go on. If he did go on he would have to support his brother.

Adams Brothers had in fact brought off a master stroke. From a deadlock broken only by the casting vote of the Chairman they had put one of their opponents, Mr H. M. Reader, in a position where he either had to vote for the grant of the licence or, what was just as advantageous to them, abstain from voting. In either case there would be a majority in favour of the grant of the licence.

The application came before the Committee, six members being present, and after hearing counsel's addresses, the Committee deliberated in public. The Chairman and one other member spoke adversely to the application. Mr H. M. Reader was on the Bench, but said that he wished to retire, and took no part in the proceedings. He claimed to have been threatened and coerced by lawyers and publicans and desired to abstain from voting. He did accordingly retire to another part of the room and did not vote. The result was a foregone conclusion and the licence was granted by a vote of three to two.

On a motion for *certiorari* it was alleged that the case had been prejudged by two members of the Committee, including Mr Reader. In dealing with the engagement by Adams Brothers of Mr W. Reader as applicant for the licence, Denniston J., said:

> " It appears to me to be a most impudent and bare-faced manoeuvre to obtain success before a tribunal by, in effect, offering a bribe to one of its members. It would be morally on a par with such a transaction as hocussing a voter at a parliamentary election—or indeed hocussing a sufficient number of voters to secure a majority."

In regard to the other member of the Committee who was charged with bias, a Mr Horton, the Judge found that he had acknowledged that he supported the application in order to pay out the publicans for opposing his candidature for the mayoralty and also that he had advised a licensee whose premises had been burned down to transfer to the premises of Adams Brothers, saying " We will get you a licence ". His Honour also commented upon " the almost contemptuous abstinence " on the part of the applicant from calling evidence to show that a further licence was needed in Blenheim, in the face of a police report and other evidence unfavourable to the grant of such a licence.

The Court was rather divided on questions of bias but quashed the grant of the licence mainly on the grounds that the premises did not contain the accommodation prescribed by s. 38 of the Licensing Act 1881. Leave to appeal to the Privy Council was granted but the appeal was apparently not proceeded with. The case would be hard to beat as an example of how justice should not be done.

There are, of course, many other cases concerning Licensing Committees and the exercise of their powers. Most of these relate to mistakes, or alleged mistakes, made in good faith and with no real bias. Those dealt with above do however exemplify the atmosphere of licensing matters at the turn of the century and the lengths to which some persons otherwise of the highest character would go to achieve their objects.

SUMMARY OF RECENT LAW

CROWN PROCEEDINGS.

Set-off—Claim against one department and counterclaim by another department in respect of same contract—Set-off allowed—Code of Civil Procedure, R. 129D. Rules 129A to 129E of the Code of Civil Procedure (Supreme Court (Crown Proceedings) Rules 1952 (S.R. 1952-122)) are not intended to deprive the Crown of any existing right of set-off but consequent on the procedural charges contained in the Crown Proceedings Act 1950 they confine set-off as of right to cases where the same Government Department or officer is involved and allow set-off with leave where claim and cross-claim are reasonably related or connected with one another so that both can be conveniently dealt with in the one proceeding without difficulty or injustice. Where, therefore, the Ministry of Works was indebted to the plaintiff for work done and material supplied under a certain contract and the plaintiff was indebted to the New Zealand Forest Service for material supplied in respect of the same contract leave was granted to the Crown to set-off the one debt against the other. (*Atlantic Engine Co.* (1920) *Ltd.* (*In Liquidation*) v. *Lord Advocate* 1955 S.L.T. 17, applied.) *J. C. Mitten Ltd.* (*In Liquidation*) v. *Attorney-General.* (S.C. Hamilton. 1961. 28 March. T. A. Gresson J.)

HUSBAND AND WIFE.

Maintenance—Agreement—Variation by Court—" Change in the circumstances in the light of which any financial arrangements . . . were made "—Realisation of expectation held at time of agreement—Whether change in circumstances—Maintenance Agreements Act 1957 (5 & 6 Eliz. 2 c. 35), s. 1 (3) (a). The parties were married in 1927 and in 1952 they entered into a written agreement whereby the husband agreed to pay a fixed annual sum to the wife for her maintenance. At the date of the agreement the husband was 49 and the wife 56 years of age. The wife had suffered for some years from osteo-arthritis, and its development was to be expected. She was not then in employment but it was contemplated that she might undertake voluntary work. The husband's income had always been liable to severe fluctuation and, although he had offered to pay to the wife a third of his gross income each year, pointing out to her that in the normal course his average earnings were likely to increase, she preferred to receive under the agreement a fixed annual sum which was agreed at £750 less tax. One-third of the husband's average annual income for the three years preceding the date of the agreement was £666. Since that date his income had substantially increased, but it would always be a fluctuating income. He had made gifts of money to the wife apart from the payments made under the agreement. Each of the parties had only a modest capital. In 1960 the wife applied under the Maintenance Agreements Act 1957, s. 1 (3), for the alteration of the financial terms of the agreement by reason of " a change in the circumstances in the light of which " any financial arrangements contained in the agreement were made ". *Held*, The expression " circumstances in the light of which " financial arrangements were made, occurring in s. 1 (3) (a) of the Maintenance Agreements Act 1957 meant the circumstances which influenced the parties and were in their contemplation when the agreement containing the arrangements was made, and the words included events anticipated by the parties; therefore, there was not a " change in the circumstances " when an expectation held at the time of the agreement was realised, although there might be one when an expectation so held was not realised, and, accordingly,

the wife was not entitled to have the agreement altered under s. 1 (3) as the possibility of an increase in the husband's income had been in the contemplation of the parties at the time of the agreement when she had deliberately chosen a fixed income. *K.* v. *K.* (C.A. Holroyd Pearce, Harman and Davies L.JJ. 1961. 23, 24 February.) [1961] 2 All E.R. 266.

LACHES.

Action between mortgagor and mortgagee—Need for promptitude where security a business undertaking—See COMPANY LAW (*ante*, 163).

LAND TRANSFER.

Certificate of title—Alleged encroachment—Original survey marks disappeared—Fixing on ground of land described in certificate of title—Effect of proof of long and undisputed occupation—Property Law Act 1952, s. 129. Where the land comprised in a certificate of title cannot be fixed from the original survey, or where there are no natural boundaries and the original survey marks are gone, a long occupation acquiesced in throughout the period by the surrounding neighbours is evidence of a convincing nature that the land so occupied is that comprised in the certificate of title in the absence of striking differences in admeasurement or some significant countervailing circumstance. However, mere proof of such a long and uncontested occupation does not relieve the Court of the duty of inquiry and of considering the history of the property and the technical evidence bearing on the dispute. (*Attorney-General* v. *Nicholas* [1927] G.L.R. 340, followed.) *Cable and Another* v. *Roche and Others.* (S.C. Wellington. 1961. 26 April. McCarthy J.)

LIMITATION OF ACTION.

When time begins to run—Actions of tort—Personal injuries sustained on 8 November 1954—Writ issued on 8 November 1957—Whether day of event causing injuries excluded—Limitation Act 1939 (2 & 3 Geo. 6 c. 21), s. 2 (1)—Law Reform (Limitation of Actions, etc.) Act 1954 (2 & 3 Eliz. 2 c. 36), s. 2 (1).—Time—Computation—Period within which an act may be done. At 1.30 p.m. on 8 November 1954, an accident occurred whereby the plaintiff was injured in the course of his employment with the defendants. On 8 November 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the defendants' negligence. By their defence the defendants pleaded, *inter alia*, that the plaintiff's cause of action, if any, accrued on 8 November 1954 and that proceedings had not been commenced within the period of three years thereof contrary to s. 2 (1) of the Limitation Act 1939. The injuries having been held to have been caused by the defendants' negligence, on the plea as to limitation, *Held*, That the day of the accident was to be excluded from the computation of the period within which the action should be brought and that the defendants' plea therefore failed. (*Radcliffe* v. *Bartholomew* [1892] 1 Q.B. 161, followed. *Gelmini* v. *Moriggia* [1913] 2 K.B. 549, not followed.) *Per curiam*, The principle established by *Radcliffe* v. *Bartholomew* [1892] 1 Q.B. 161 [*viz.*, that the day on which a cause of action arises or an offence is committed is to be excluded in computing a limitation period thereafter] is of general application to statutes whether they deal with civil or criminal matters. *Marren* v. *Dawson Bentley & Co. Ltd.* (Leeds Assizes. Havers J. 1961. 8, 9, 13 March.) [1961] 2 All E.R. 269.

MAGISTRATES' COURT.

Practice—Application for commission to take defendant's evidence in England—Defendant leaving country while proceedings pending—Circumstances under which order will be made—Magistrates' Courts Act 1947, s. 55. Under suitable circumstances it is proper for the Court to make an order for the issue of a commission for the examination in England of the defendant in an action brought in the Magistrates' Court even where the defendant has left the country while the proceedings are pending. Observations on the matter to be taken into account *Tselentis* v. *Bares.* (S.C. Wellington. 1961. 28 February. McGregor J.)

MORTGAGE.

Winding up—Petition opposed by majority of creditors—Court to give effect to wishes of majority unless valid reason given to the contrary—Companies Act 1955, ss. 217 (e), 332. Where a great majority of the creditors of a company oppose the winding up of the company then, even though it is established that the company is unable to pay its debts, the Court should give effect to the wishes of the majority unless the petitioning creditor can give some valid reason why effect should not be given to those wishes. (*In re Vuma Ltd.* [1960] 3 All E.R. 629; [1960] 1 W.L.R. 1283, distinguished. *In re Bryan Construction Co. Ltd.* [1957] N.Z.L.R. 748, followed.) *In re J.R.S. Garage Ltd.* (S.C. Wellington. 1960. 14 December. 1961. 21 March. Barrowclough C.J.)

PHARMACY.

"*Drugs*"—"*Drugs and pharmaceutical goods*"—"*Pharmaceutical service*"—*Interpretation—Pharmacy Amendment Act 1954, ss. 7 (2), 9 (b).* The meaning of the word "drugs" as used in s. 7 (2) of the Pharmacy Amendment Act 1954 is not limited by the provisions of s. 32 of the Pharmacy Act 1939 which provides that chemists shall not have a monopoly of the sale of certain drugs. The word is to be construed in the light of the definition contained in s. 2 of the 1939 Act. Photographic goods and toilet requisites are excluded from the scope of the term "drugs and pharmaceutical goods" as used in s. 7 (2) and services in connection with both of these types of goods are excluded from the scope of the term "pharmaceutical services" as used in s. 9 (b) of the 1954 Amendment Act. On the other hand surgical appliances and services in connection with them do fall within the scope of such respective terms. *In re an Application by Boots the Chemists (New Zealand) Ltd.* (S.C. Wellington. 1961. 20, 21 March; 10 April. Hutchison J.)

PRACTICE.

Appeals to Supreme Court—Province and powers of Supreme Court where questions of the credibility of witnesses arise. It is not the province of the Supreme Court sitting on appeal from a Magistrate in a civil action to re-try the case as if the witnesses were giving their evidence in the presence of the Court. So long as the advantage enjoyed by the Court of first instance of seeing and hearing the witnesses is sufficient to explain or justify the conclusion reached in that Court, it ought to be upheld. However, the Supreme Court, either because the reasons given by the Magistrate are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that the Magistrate has not taken proper advantage of his having seen and heard the witnesses, and the matter will then be at large for the Supreme Court. (*Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326; [1955] A.C. 370, and *Watt (or Thomas)* v. *Thomas* [1947] 1 All E.R. 582; [1947] A.C. 484, followed. *Gillard* v. *Cleaver Motors Ltd.* [1953] N.Z.L.R. 885, not followed.) *O'Callaghan* v. *Galt.* (S.C. Dunedin. 1961. 3, 10 March. Henry J.)

STATUTORY REGULATIONS

The following Statutory Regulations of general interest have been made in recent months:

MAGISTRATES' COURTS RULES 1948, AMENDMENT NO. 3 (1961/13).

Revoking subcl. (2) of r. 338 of the principal rules. The lodging with the Registrar of a Trust Account receipt by a solicitor withdrawing money from a Magistrates' Court is no longer necessary.

MAGISTRATES' COURTS RULES 1948, AMENDMENT NO. 4 (1961/22).

Re-enacting r. 338 as amended.

BOARD OF REVIEW REGULATIONS 1961 (1961/24).

Prescribing the procedure of a Board of Review set up under the Inland Revenue Department Amendment Act 1960.

HIRE PURCHASE CREDIT SALES STABILISATION REGULATIONS 1957, AMENDMENT NO. 4 (1961/34).

Varying permissible minimum deposits and maximum periods of credit in respect of hire purchase agreements.

TRANSPORT.

Offences—Overtaking without clear view of road and traffic for 300 ft.—Clear road for 300 ft. not required—Traffic Regulations 1956 (S.R. 1956-217), Reg. 9 (1) (b). Regulation 9 (1) (b) of the Traffic Regulations 1956 (S.R. 1956-217) requires an overtaking motorist to have a clear view of the road ahead and the traffic thereon for at least 300 ft., but does not require him to have a clear road ahead for that distance. (*Fletcher* v. *Jack* (1948) 5 M.C.D. 532, approved; *Archer* v. *Ramstead* (1940) 1 M.C.D. 342 and *Roxburgh* v. *Lambert* (1947) 5 M.C.D 163, referred to.) *Safi* v. *Butterfield.* (S.C. Christchurch. 1961. 21 April. Richmond J.)

LEGAL ANNOUNCEMENTS

Continued from page i.

THOMAS HUGH IAN FLEMING, MARTYN UREN and MAURICE WYLLY HUNT, practising as Barristers and Solicitors, under the firm name of MCVEAGH FLEMING, UREN AND HUNT, of Hunt's Building, Great South Road, Manurewa, announce that as from 1 April 1961 they have admitted into partnership DESMOND ARTHUR WISHART, LL.B., Barrister and Solicitor, who has been associated with the firm for the past six months. The practice will be carried on at the same premises under the same name.

KENNETH LESLIE SANDFORD and DUNCAN WALLACE MCMULLIN, practising at Hamilton as Barristers and Solicitors under the firm name of Strang, Sandford and McMullin, announce that as from 1 April 1961 they have admitted into partnership MAURICE ANDREW MCBREEN, who for some time past has been associated with the firm. The practice will be carried on at the same premises under the name of STRANG, SANDFORD, MCMULLIN AND MCBREEN.

Solicitor, aged 46 years, with a growing family, desires position with a firm in or near Auckland or Wellington. Lengthy experience in conveyancing and estate work at principal's level. Prospects of an early partnership after a reasonable trial period essential. Apply to :—
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JOHN BRADLEY YALDWYN, LL.B., Barrister and Solicitor, has pleasure in announcing that he has been joined in partnership as from 1 June 1961 by THOMAS LASZLO VON POKORNY, LL.B. (Lond.), previously a member of his staff. The practice will be carried on under the firm name of YALDWYN & POKORNY, Barristers and Solicitors, at Bowen House, Bowen Street, Wellington.

The New Zealand Trustee Companies thank the members of the Law Faculty of the four Universities for their co-operation in connection with the Second Annual Wills-Drafting Competition. The enthusiasm of the Conveyancing Students resulted in a very keen and successful contest.

The awards were :

1st prize of twenty guineas to Mr D. J. F. SLOW of Wellington.

2nd prize of ten guineas to Mr K. H. D. BURT of Christchurch.

3rd prize of five guineas to Mr P. W. HOGG of Lower Hutt.

Messrs N. C. MCLEAN, L. F. MOLLER, S. G. BAWDEN and J. H. WALLACE, at present practising as Barristers and Solicitors under the firm name of WALLACE, MCLEAN, MOLLER AND BAWDEN, at Yorkshire House, Shortland Street, Auckland, announce that they have been joined in partnership as from 1 June 1961 by Mr W. T. HUME, B.A., LL.M., formerly of New Plymouth. The firm will continue to practise under the same name at the same address.

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Liability of A Husband to Maintain A Deserting Wife

Some years ago, in an article in this JOURNAL (1954 30 N.Z.L.J. 351), the present writer considered the question whether a Judge of first instance was bound by the decisions of a brother Judge sitting in a co-ordinate jurisdiction. The conclusion was then reached that the Judge was not so bound, though judicial comity required that a Judge should not decline to follow a previous decision, whether of his own or of a brother Judge, unless he felt that the justice of the case required it. Examples were given of instances where, before departing from a previous decision, the Judge had discussed the case before him with the Judge whose decision he was not following.

Cases decided since that article was published have made it clear that the main conclusion in that article was justified: that a Judge of first instance is not bound by the previous decision of a Judge sitting at first instance. Nowhere, it would appear, has this principle been more clearly recognised than in cases dealing with matrimonial disputes. The recent decision of Hardie Boys J. in *Hodder* v. *Hodder* (14 April 1961) not only recognises that principle, but is also an interesting illustration of the principle that a deserting wife may claim maintenance from her husband.

A Magistrate made a maintenance order in favour of a wife, despite the fact which, for the purposes of his decision, he assumed, that the parties were living apart owing to the wife's constructive desertion. From that decision the husband appealed. The appeal, apart from the question of quantum, was dismissed.

In *Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, F. B. Adams J., held that the usual rule that "grave and weighty grounds" must be shown in order to entitle a wife to refuse cohabitation, provides the standard which the Court should bear in mind in considering the application of s. 17 (7) of the Destitute Persons Act 1910 which provides that where a wife has, in the opinion of the Magistrate, reasonable cause for refusing or failing to live with her husband, the husband shall not be deemed to have provided her with adequate maintenance merely by reason of the fact that he is willing and ready to support her if and so long as she lives with him.

But in *Fodie* v. *Fodie* [1959] N.Z.L.R. 721, Henry J., without expressly saying that he disagreed with F. B. Adams J., did say (at p. 724) that in his opinion it might be wrong to substitute the phrase "grave and weighty" or other similar terms for the words chosen by the Legislature, which were "reasonable cause". He did not think the terms were necessarily the same.

In *T.* v. *T.* [1959] N.Z.L.R. 843, Hutchison J. quoted the words of F. B. Adams J. in *Bulman* v. *Bulman* (*supra*) and added (at p. 846):

> "I understand the learned Judge there as not laying down any new principle, but simply as pointing out the need of caution in the exercise of the discretion; and, with respect, I am in general agreement with what he says."

In *Rolfe* v. *Rolfe* [1959] N.Z.L.R. 1227, Turner J. said that the judgment of F. B. Adams J. [in *Bulman* v. *Bulman*] could not be taken as deciding that the Magistrate's discretion under s. 17 (7) was to be regarded as fettered by the decisions defining "grave and weighty reasons" which alone could be used as a foundation for constructive desertion. He added (at p. 1229):

> "With great respect, therefore, to the views expressed by F. B. Adams J., I will take my place beside Hutchison J. and Henry J. in following the long line of established authority . . . and I hold with them . . . that the discretion given to the Magistrate is not one of which it is to be said that 'seldom if ever' is it to be exercised unless grave and weighty cause is shown; on the contrary, it is one untrammelled by decisions which are directed to the definition of conduct which will support a submission of constructive desertion."

McGregor J. in *King* v. *Wilson* [1960] N.Z.L.R. 272 was of the same opinion. After quoting at length from the judgment of F. B. Adams J. in *Bulman* v *Bulman* (*supra*) he said (at p. 275):

> "I regret that I am not able to agree with this statement of the law in its entirety, as it seems to me to detract from the wide and unfettered discretion given to the Magistrate by s. 17 (4) (*sic, quaere* (3)) of the Act. It seems to me that once the relationship of husband and wife is established, the jurisdiction to make a maintenance order is in all cases discretionary."

Later he added:

> "I agree also with the view of Turner J. in *Rolfe* v. *Rolfe* (*supra*) that a reasonable cause to justify a wife failing to live with her husband may fall short of the 'grave and weighty cause' contemplated by F. B. Adams J. in *Bulman* v. *Bulman*."

F. B. Adams J. failed to be impressed by these criticisms and in *Grieve* v. *Grieve* [1960] N.Z.L.R. 808 he affirmed what he had said in *Bulman* v. *Bulman* (*supra*). He said that the decisions to which he had referred in that case appeared to him to settle the law to the effect that s. 17 (7) confers an arbitrary discretion in the exercise of which the authorities governing the right of a wife to live apart may be disregarded. He added (at p. 811):

> "My point was that, while the discretion may be arbitrary, it does not follow that it should be exercised arbitrarily; and I ventured to express the opinion that the recognised legal standard should always be taken into account in deciding whether a wife has reasonable cause for living apart. This seems to have been quite clear to Hutchison J. in *T.* v. *T.* (*supra*) and also to Henry J. in *Fodie* v. *Fodie* (*supra*), though the latter suspected a substitution of the words 'grave and weighty grounds' for the words of the statute, 'reasonable cause'. Perhaps I am wrong, but to my mind the two expressions are legal synonyms, and I imagined it to be settled by binding authorities that, in general and apart from this particular statutory provision, when the law speaks of 'reasonable cause' in such a connection, the reasonable cause has to be found in the 'grave and weighty grounds' upon which alone the law will absolve a wife from her duty of cohabitation."

The learned Judge added that there appeared to be a clear difference of opinion between him and McGregor J. in *King* v. *Wilson* (*supra*) as to the meaning and effect of s. 17 (1) and (4) and that he must accordingly, though with regret and with all respect, reconcile himself to a difference of opinion between that learned Judge and himself.

Finally, Hardie Boys J. in *Hodder* v. *Hodder*, after considering *Bulman* v. *Bulman* (*supra*), says:

"I prefer to align myself with McGregor J. in . . . *King* v. *Wilson* (*supra*) and with Turner J. in *Rolfe* v. *Rolfe* (*supra*) where, after respectfully dissenting from the view of F. B. Adams J. that grave and weighty cause must be shown to justify a wife's refusal to live with her husband, and referring to the discretion given to a Magistrate to make an order under s. 17 (7), he says of this discretion: 'It is one untrammelled by decisions which are directed to the defence of conduct which will support a submission of constructive desertion'."

Hardie Boys J. says later:

"In my view this wise provision was inserted in the Act to provide for, and make clear answer to, the so frequently encountered case of the Victorian and Edwardian husband whose attitude was 'I'll maintain her only if and when she returns home'."

In the instant case, evidence showed that the wife had no income at all and her health precluded her from working to earn money. The husband, unwilling to return and maintain her in the family home, had left her entirely unprovided for. Consequently there was a failure to provide "maintenance reasonably sufficient for the necessities" of the wife. Strangely enough, no reference is made in the decision of Hardie Boys J. to *Grieve* v. *Grieve* (*supra*) in which F. B. Adams J. affirmed his decision in *Bulman* v. *Bulman* (*supra*).

One doubt remains. While four Judges have declined to follow F. B. Adams J., a fifth Judge might prefer to interpret s. 17 (7) in a way which favours the attitude of the Victorian or Edwardian husband and thus to follow F. B. Adams J. It is submitted that no rule of law or practice would preclude him from doing so. As Professor T. F. T. Plucknett points out in his *Concise History of the Common Law*, 4th ed. p. 328:

"One case constitutes a precedent; several cases serve as evidence of a custom."

But as the decision of Judges of first instance do not constitute *binding* precedents, in this matter custom appears to be likely to prevail.

A.G.D.

Import Control—Final Chapter?

The story of import controls—from the legal angle—begins with *F. E. Jackson & Co. Ltd.* v. *The Collector of Customs* [1939] N.Z.L.R. 229, when the first Import Control Regulations of 1938 were attacked as *ultra vires*. The plaintiff succeeded, it being held by a judgment delivered on 22 May 1939 that neither the Customs Act 1913, s. 46, nor the Reserve Bank of New Zealand Amendment Act 1936, s. 10, conferred authority wide enough to support regulations giving the Minister of Customs complete control over the importation of all goods into New Zealand.

The Government, when Parliament assembled in 1939, secured the passage in September of that year of the Customs Acts Amendment Act which provided in s. 11:

(1) The Import Control Regulations 1938 (S.R. 1938/161), are hereby declared to be and to have always been valid.

(2) Nothing in this section shall be construed to affect any judgment heretofore given by any Court.

The result was that the goods the subject of the successful action brought by F. E. Jackson & Co. Ltd. were probably the last goods subject to licence imported into New Zealand without an import licence. This seemed to settle the issue. In 1960, however, an ingenious plea was made in *In re Finch* [1961] N.Z.L.R. 257, when it was argued that a person who had not secured a licence for the importation of goods could not be convicted of an offence against the Customs Act 1913, s. 46, which provides for severe penalties including the foreiture of the goods for goods imported in contravention of s. 46. The commercial community must have been delighted when the Court upheld the plaintiff's submission because it meant that goods imported without a licence were no longer liable to forfeiture. McCarthy J. held that the effect of the Customs Acts Amendment Act 1939, s. 11, was merely to validate the Regulations; it did not sufficiently identify them with s. 46 as to make them validly made in terms of that section. McCarthy J. stated at p. 259:

"In terms, the validating provisions of s. 11 of the 1939 Act do no more than declare that the regulations are and have always been valid. It is upon that Act, therefore, that they now in fact depend for their validity. That validity does not derive from any of the powers originally invoked by the draftsman, it derives from the 1939 Act alone. Had that Act said in some appropriate phrase that the regulations should be deemed always to have been validly made under s. 46, then the Court would doubtless be obliged to attribute to the regulations that particular source of power, but it does not say that."

Consequently the appellant had not been guilty of a breach of s. 46 and the penalty fixed by that section could not be exacted. The maximum penalty to which the offender was liable was a fine of only £10.

This decision was relied on by the appellant for *British Products Ltd.* v. *D'Audney* (18 April 1961) which may be described as the last chapter in the story of import controls. The appellant had been convicted of an offence against the Customs Act 1913, s. 213, which is directed to securing the production of genuine and correct documents to Customs officers. It was alleged that the C.I.F. value of goods delivered by the appellant was false. He argued that because the Import Control Regulations had been declared invalid in *Jackson's* case (*supra*), there was no legal basis for requiring a declaration of C.I.F. value. This argument was quickly disposed of by Hardie Boys J., who pointed out that the decision in *In re Finch* (*supra*) had not invalidated the Regulations but had merely quashed convictions for actions which were not offences under the Customs Act 1913, s. 46, as charged. The decision in that case in no way invalidated the Regulations themselves. In fact the statutory provision in s. 11 of the 1939 Act was so clear that in the words of the learned Judge "one would have thought there could be no challenge". Thus until the law is amended yet again (and this seems to be likely to be the outcome of *In re Finch*) offences against the Import Control Regulations will be visited with an extremely modest penalty but their validity has been shown to be beyond challenge.

J.F.N.

Marriage by Cohabitation and Repute.—"If it is generally accepted that cohabitation and repute are enough, the importance of a ceremony may well be lowered and when it comes to an evaluation of the evidence required to establish a marriage by cohabitation and repute, the points relied upon in the various cases are so diverse, if not actually conflicting, that it is a matter of the greatest difficulty to advise whether parties are, or are not, within the line. Uncertainty in this branch of the law is, perhaps, particularly unwelcome." (1961) 111 L.J. 151.

PROVING A HOLOGRAPH WILL IN NEW ZEALAND

The ship's engineer referred to in my recent article (*ante*, 167) on applications for leave to swear to death was a Scotsman. While domiciled in Scotland and whilst home on leave from his ship on one occasion, he had made a holograph will, witnessed by only one witness. Subsequently he had changed his domicile to New Zealand and that was his domicile when he lost his life in the shipwreck. The relevant law will be found outlined in the Memorandum to Mr Registrar being Precedent No. 5. (*post*). The deceased remained a bachelor and so no question arose as to revocation of this holograph will by subsequent marriage. We all know, I think, that a holograph will, being one written throughout in the testator's own handwriting, has not in English and New Zealand law any greater force than a will written in the handwriting of another or typed, or partly in print and partly in writing by another. But most of us know, I think, that in some systems of law (e.g., the Scottish) special force is allowed to a holograph will so that it will be valid even if there are not witnesses : *In re Peat* (1903), 5 G.L.R. 408 ; *In re the Will of Catherine Ronaldson*, 1891) 10 N.Z.L.R. 228. (the latter case being a holograph Scottish will unattested granted probate in New Zealand but no beneficial interest in New Zealand realty given by it). This case may be contrasted with *In re Eugster*, [1929] G.L.R. 440, where a Swiss domiciled in New Zealand made his will in Switzerland in a form not in accordance with the form required by New Zealand law. The will was held invalid both as to realty and as to personalty. *Garrow* adds that had he been domiciled in Switzerland when he made his will it would have been valid as regards movables.

But, although we may perfectly know all this, when the validity of a will depends upon some system of law other than that of New Zealand, that law must be established to the satisfaction of the Court. " Foreign law, and its application, must in English (and *semble* in New Zealand) Courts be proved like any other facts by properly qualified witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words and the legal meaning and effect of them as applied to the case in question " : *Nelson* v. *Bridport* (1845) 8 Beav. 527, per Lord Langdale, M.R. In that very handy and useful text book, *Dobbie's Probate and Administration Practice in New Zealand*, at p. 114 we find the following passage :

> " The affidavit filed in probate matters should contain evidence showing (a) the qualifications of the deponent, (b) how he acquired the knowledge of the foreign law concerned, and (c) what that law is. The evidence of a person whose only knowledge of the laws of a foreign country is derived from having studied them cannot be received in proof of the operation or effect of such laws : *In bonis Bonelli*, (1875) 1 P.D. 69 ; but see *In bonis Whitelegg*, [1899] p. 267 (where the evidence of a solicitor and notary public well acquainted with the law of the foreign country was accepted), *Brailey* v. *Rhodesia Consolidated Ltd.*, [1910] 2 Ch. 95. (where the evidence of an expert in foreign law but who had not practised in the foreign country was accepted), and *In the Goods of Dost Aly Kahn*, (1880) 6 P.D. 6 (law applicable allowed to be proved by a Persian Ambassador)."

This extract will explain the necessity for Precedent No. 4 (*post.*)

Finally, attention may be drawn to the fact that the will was not the will of a seaman ' being at sea ", and therefore the provisions of s. 4 of the Wills Amendment Act 1955 * could not be availed of. Thus in *Euston v. Seymour* (1802), cited in *In bonis Hayes* (1839), 2 Curt. 338 ; 163 E.R. 431, at p. 339n, 432, a nuncupative codicil made on short at Jamaica by the Admiral of the Fleet while permanently stationed there was refused probate on the ground that he was not " at sea ". So, too, in *In re Broadbent*, [1916] N.Z.L.R. 821 ; [1916] G.L.R. 555, probate was refused of a holograph unattested document written by an officer on one of the Union Steamship Company's steamers while he was on shore at Sydney for nearly six weeks on leave. On the other hand a will made by a New Zealand mariner on shore in the port of London and informally attested was held valid : *In re the Will of Helgeson* (1890) 9 N.Z.L.R. 167.

For permission to use the following precedents I an much indebted to Mr T. Coles, solicitor, Petone and to Mr P. E. Martyn, solicitor, Wellington.

E. C. ADAMS.

PRECEDENT No. 1

AFFIDAVIT BY ADMINISTRATRIX OF A HOLOGRAPH WILL
IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

IN THE ESTATE of A.B. of Wellington in the Dominion of New Zealand, Ship's Engineer, Deceased.

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

1. That I knew A.B. formerly of Wellington, Ship's Engineer now deceased when alive, he being my son, and that the said A.B. was resident or was domiciled at Wellington within this Judicial District and that the nearest Registry Office of this Court to the place where the said A.B. resided or was domiciled is at Wellington.

2. That the said A.B. died on or since the ..... day of ..... 1960, as I am able to depose pursuant to an Order made by the Honourable Mr Justice ..... at Wellington on .... 1961 a sealed duplicate of which Order is hereto annexed and marked " A " (Number M. .....).

3. That the said deceased was my natural and lawful child and was never married and that the said deceased left him surviving me this depenent and his father Q.R. of Wellington, Engineer, who is my lawful husband.

4. That I believe the handwritten document now produced and bearing date the fourth day of March 1949 and marked with the letter " B " to be the last Will and Testament of the said deceased and that I am the beneficiary named therein and that there is no executor or executrix named therein.

5. That at the date of the said Will—to wit the fourth day of March 1949—the said deceased was domiciled in Scotland and that the said Will was executed in Scotland and thatat the date of his death—to wit on or since the ..... day of..... 1960—the said deceased was domiciled in New Zealand. and that he was a British subject by birth and remained a British subject up to the date of his death.

6. That I was well acquainted with the handwriting of the said A.B., the said deceased, and I verily believe that the said

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* As to this section, see *Garrow and Willis, Law of Wills and Administrations*, 3rd. ed., p. 8 *et seq.*

Will was in the handwriting of the said deceased and that the signature thereto was the signature of the said deceased.

7. That I will faithfully execute the said Will by paying the debts and legacies of the said Deceased so far as the property will extend and the law binds and will whenever ordered so to do after the grant of Letters of Administration with Will annexed to me file in this Court and verify by affidavit a true, full and perfect inventory of all the estate, effects, and credits of the said deceased which shall come into my hands, possession or knowledge and also a full distinct and proper account of my execution of the Will which shall set forth the dates and particulars of all receipts and disbursements and show which of the same are, in my opinion on account of capital and on account of income respectively.

8. That to the best of my knowledge information and belief the estate effects and credits of the said deceased to be administered by me are under the value of three thousand pounds (£3,000).

9. That all of the deceased's debt's (including liability for income tax and social security charge) have been paid.

10. That as the deceased's body has never been recovered there are no funeral expenses payable in respect of his death.

SWORN at Wellington by the said A.B. this ..... day of ..... 1961, before me :

E.F.
A solicitor of the Supreme Court of New Zealand

PRECEDENT No. 2

AFFIDAVIT BY FATHER OF DECEASED A.B.

I, Q.R. of Wellington, Engineer make oath and say as follows :

1. That I knew A.B. formerly of Wellington, Ship's Engineer now deceased when alive, he being my son, and that the said A.B. was resident or was domiciled at Wellington within this Judicial District and that the nearest Registry Office of this Court to the place where the said A.B. resided or was domiciled is at Wellington.

2. That I believe the handwritten document now produced and bearing date the fourth day of March 1949 and marked with the letter " B " to be the last Will and Testament of the said deceased.

3. That at the date of the said Will—to wit the fourth day of March 1949—the said deceased was domiciled in Scotland and that the said Will was executed in Scotland and that at the date of his death—to wit on or since the ..... day of ..... 1960 —the said deceased was domiciled in New Zealand.

4. That I was well acquainted with the handwriting of the said A.B. the said deceased, and I verily believe that the said Will was in the handwriting of the said deceased and that the signature thereto "....." was the signature of the said deceased.

SWORN at Wellington by the said A.B. this ..... day of ..... 1961 before me } Q.R.

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

PRECEDENT No. 3

CONSENT BY DECEASED'S FATHER TO GRANT OF ADMINISTRATION

I, Q.R. of Wellington, Engineer DO HEREBY CONSENT to the grant of Letters of Administration with Will Annexed of the estate effects and credits of my late son A.B. to my wife C.D. of Wellington, Married Woman AND DO FURTHER CONSENT to an Order dispensing with sureties to the Administration Bond. DATED at Wellington this ..... day of ..... one thousand nine hundred and sixty-one.

SIGNED by the said Q.R. in the present of

S.T.
Law Clerk, Wellington

PRECEDENT No. 4

AFFIDAVIT AS TO FOREIGN LAW BY A WRITER TO THE SIGNET

I, U.V. of Edinburgh, Scotland, Writer to the Signet make oath and say as follows :

1. THAT I am a Writer to the Signet and have been in practice in Edinburght for ..... years.

2. THAT I have full knowledge of the laws and constitutions of Scotland.

3. THAT I have perused a copy of the Will of A.B., Deceased bearing date the 4th day of March 1949 and such copy is annexed hereto and marked with the letter " A ".

4. THAT I am informed and verily believe that at the time he made the said will the said deceased was twenty-five years of age.

5. THAT I am informed that the said will apart from the signature of ..... is entirely in the handwriting of the said deceased.

6. THAT if the said will is entirely in the handwriting of the said deceased down to and including the signature of the said deceased it is duly made in accordance with, and conforms to, and is valid by the said laws and constitutions of Scotland.

SWORN at Edinburgh by the abovenamed U.V. this ..... day of 1961 before me :

L.S.
Notary Public

——— The signature was that of the only attesting witness.

PRECEDENT No. 5

MEMORANDUM FOR THE REGISTRAR
RE : ESTATE A.B.

1. This application is made in reliance on Section 4 of "The Administration Act 1952 " and Rules 517 *et seq.* of the Code of Civil Procedure and the attention of the Court is respectfully drawn to *In re Morrison*, (1931) 7 N.Z.L.R. 115.

2. The will, of which Letters of Administration *cum testamento annexo* are sought to be granted, was made by the deceased in Glasgow Scotland on 4 March 1949. It is a holograph will, but does not comply with the provisions of s. 9 of The Wills Act 1837 inasmuch it is attested by only one instead of at least two witnesses : *Garrow's Law of Wills and Administration*, 2nd edition page 43. It is " an informal will " as that term is defined in s. 3 of the Wills Amendment Act 1955. Deceased was a British subject by birth, was a British subject at date of will, and remained a British subject up to the date of his death. However some time in the period between the date of his will and the date of his death (4th March 1949—..... ..... 1960) he became domiciled in New Zealand and at the date of his death he was resident and domiciled in New Zealand : see affidavits filed herein by his mother and father. Deceased was born at ..... Scotland on 17th June and thus was twenty-five years of age at date of will : his birth was registered in the Register Book of Births for the District of ..... in the County of ..... as appears in his Birth Certificate under the seal of the General Registry Office, New Register House Endinburgh issued on .... 1961. At date of his will he had attained full age and testamentary capacity.

3. As to the present statutory law determining the validity of wills of " movable " property made out of New Zealand see s. 14 of the Wills Amendment Act 1955 " movable " property being defined in subsection (4) of that Section. However subsection (5) thereof provides that the section shall apply to all wills made on or after the date of the commencement of that Act (27 October 1955). *The validity of all other wills shall be determined as if that section had not been passed.*

4. Therefore we must refer back to the statute law in New Zealand as it existed before the commencement of theWills Amendment Act 1955. S. 14 thereof consequentially repeals s. 40 of the Administration Act 1952. Subsections (1) and (3) of that section are relevant to the instant will and they read as follows :

> " 40. (1) Every will and other testamentary instrument made out of New Zealand by a British subject or a citizen of the Republic of Ireland (whatever may be his domicile at the time of making the same or at the time of his death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in New Zealand to probate if made as required either by the law of the place where the same was made, or by the law of the place where the person was domiciled when the same was made, or by the law then in force in that part of the Commonwealth or of the Republic of Ireland where he had his domicile of origin.

"(3) No will or other testamentary instrument shall, so far as relates to personal estate in New Zealand, be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of comicile of the person making the same."

5. So far as the instant will is concerned s. 40 of The Administration Act 1952 is the appropriate New Zealand statutory law. The statutory predecessor to that section is s. 31 of The Administration Act 1908, which is commented on in *Garrow (ibid)* at pages 83 and 84 :

"Three ways are provided by the subsection according to which the will of personal property of a British subject may be made out of New Zealand and still be valid :

1. According to the law of the place where it was made :
2. According to the law of the place where the testator was domiciled at the time he made the will :
3. According to the law then in force—i.e., when he made the will—in that part of the British Dominions where he had his domicil or origin."

6. It is respectfully submitted that the instant will (as regards "personal estate") qualifies under all of the above three grounds as set out by *Garrow*. As to the meaning of personal estate see *Garrow (ibid)* at page 83. As to the validity in Scotland of a holograph will see the affidavit filed herein by U.V. Writer to the Signet. As to the qualifications of a witness in probate matters testifying as to the law of another country see *Dobbie's Probate and Administration in New Zealand* page 114. The validity of holograph wills in Scottish law has frequently been established in the Courts of the British Commonwealth e.g's., *In re the Will of Catherine Ronaldson* (1891) 10 N.Z.L.R. 228 at page 231, *Bridgeford's Executor* v. *Bridgeford*, 1948 S.C. 416.

7. As to the form of the grant in the instant case reference may be made to *In re Henry Deed* [1957] N.Z.L.R. 1110. Deceased in the instant case owned no real estate ; nevertheless it would appear that in the grant Letters of Administration after the phrase "estate effects and credits of the deceased" there shall be inserted the words "other than any real property in New Zealand."

PRECEDENT No. 6

NOTICE OF MOTION FOR LETTERS OF ADMINISTRATION

(cum testamento annexo)

TAKE NOTICE that Counsel for the Applicant WILL MOVE this Honourable Court FOR AN ORDER that Letters of Administration with Will Annexed of the estate effects and credits of A.B. of Wellington, Ship's Engineer, deceased be granted to C.D. of Wellington, Married Woman, the sole beneficiary under the Will of the said deceased AND FOR A FURTHER ORDER dispensing with sureties to the Administration Bond UPON THE GROUNDS :

1. That the said deceased died leaving a Will under which no Executor is appointed.
2. That the said C.D. is the sole beneficiary under the said Will
3. That the debts left by deceased have all been paid
4. AND UPON THE FURTHER GROUNDS set out in the Affidavit of the said C.D. sworn and filed herein.

DATED at Wellington this ..... day of ..... 1961.

To :

The Registrar of the Supreme Court at Wellington.

Certified pursuant to the Rules of the Court to be correct.

Counsel Moving

PRECEDENT No. 7

LETTERS OF ADMINISTRATION

To C.D. of Wellington, Married Woman the sole beneficiary under the will of A.B. deceased.

WHEREAS the said A.B. died on or since the ..... day of ..... 1960 leaving a will which has been duly proved in this Court :

AND WHEREAS no executor is named in the will :

AND WHEREAS letters of administration with the will annexed, of the estate of the deceased have this day been granted in Chambers by Mr Registrar at Wellington, acting under Rule 426H of the Code of Civil Procedure :

You are therefore fully empowered and authorised by these presents to administer the estate effects and credits of the deceased, other than any real property in New Zealand and to demand and recover whatever debts may belong to his estate, and to pay whatever debts the deceased owed and also the legacies contained in the said will so far as the said estate, effects, and credits extend ; you having already been sworn faithfully to execute the will and, whenever ordered so to do, to file in this Court and verify by affidavit a true, full, and perfect inventory of all the estate, effects, and credits of the deceased which shall have come into your hands, possession, or knowledge, and also a full, distinct, and proper account of your execution of the will. You are therefore by these presents constituted administratrix with the will annexed of all the estate, effects, and credits of the deceased.

GIVEN under the Seal of the Supreme Court of New Zealand at Wellington, this ..... day of ..... 1961.

L.S.

Registrar

PRECEDENT No. 8

ADMINISTRATION BOND

KNOW all men by these presents, that I, C.D. of Wellington, Married woman, am held and firmly bound unto ....., Registrar of the Supreme Court for the above-named district in the sum of £3 000 for which payment well and truly to be made to the said ..... or to such Registrar for the time being, I for myself and my executors and administrators do hereby bind myself firmly by these presents.

Dated this ..... day of ..... One thousand nine hundred and sixty-one (1961).

WHEREAS by order of the Registrar of this Honourable Court at Wellington on the ..... day of ..... 1961 it is ordered that letters of administration with the will annexed of the estate effects and credits of the above-named A.B., deceased be granted to the said C.D. on her giving security for the due administration thereof :

AND WHEREAS the said C.D. has sworn that to the best of her knowledge, information and belief the said estate, effects and credits are under the value of £3 000 :

Now the condition of the above-written bond is that if the above-bounden administratrix well and faithfully executes the will of the said deceased, and whenever ordered so to do files in this Court and verifies by affidavit a true full and perfect inventory of all the estate effects, and credits of the said deceased which shall have come into her hands, possession or knowledge and also a full, distinct and proper account of her execution of the will then this bond shall be void and of none effect, but otherwsie shall remain in full force.

SIGNED by the above-named C.D. in the presence of : } C.D.

S.T.

Law Clerk, Wellington

A Matter of Convenience.—Much might be written of contrasting national viewpoints (regarding public conveniencies) exemplified by the linguistic terms in current usage. The Germans use the somewhat forbidding word *Abort*—literally, "the place apart". The Italians prefer *gabinetto* ("cabinet"), or *luogo comodo*, which is an almost literal translation of the American "comfort-station". The French are much more direct—*uniroir* and even *pissoir* are in common use. Only the English, victims of some strange inhibition, have invented a number of polite euphemisms, most of which have nothing to do with the case. "Lavatory" ought to mean a place to wash in ; "toilet" really signifies the process of cleansing, dressing and adorning the person ; "cloakroom"—perhaps mistakenly believed to take its derivation from the Latin *cloaca*—"sewer"—is absymally vulgar and quite meaningless. Local authorities are satisfied with the laconic "gentlemen" and "ladies", or even the stark "men" and "women" which are perhaps the most sensible of all. As for "convenience", that is a mere evasion—perhaps an adaptation from the Latin tag—*Interest reipublicae ut finis sit litium*, which may be translated this : "There should be some limit to disputes for the public convenience". *A.L.P. in* (1961) 125 *J.R.* 66.

FORENSIC FABLE

By "O"

The Circuiteer and the Nice Old Buffer.

A Circuiteer, Recently Elected to the Bar Mess, Determined to Try his Luck at the Assizes. Arriving at the Railway Terminus Rather Late, he Just had Time to Fling himself into a Carriage as the Train Steamed Out. It was Occupied by an Elderly Party, whom the Circuiteer Diagnosed as a Nice Old Buffer. He had a Rug over his Knees and he Wore a Top Hat. He was Smoking an Excellent Cigar. The Nice Old Buffer Appeared to be Rather Surprised at the Circuiteer's Intrusion; but the Latter, being of a Chatty and Affable Disposition, Soon Put him at his Ease. Before Long the Nice Old Buffer had Offered the Circuiteer a Cigar and they were Getting on Like a House on Fire. The Circuiteer Told him about his University Career, his Uncle Thomas, the Man he had Read With in Chambers, and a Lot of Other Things. Turning to the Object of his Travels, he Mentioned to the Nice Old Buffer that he was Going to the Assizes; that Mr

Justice Stuffin was the Presiding Judge; but that the Profession did not Think Much of him. Stuffin, said the Circuiteer, would Never have got a Judgeship on his Merits; but he had Married a Woman with a good Deal of Money and had a Safe Tory Seat. He was just going to Tell the Nice Old Buffer what the Court of Appeal had Said the Other Day about One of Stuffin's Judgments when the Train Arrived at its Destination. There were Javelin-Men and Trumpeters on the Platform, together with the High Sheriff of the County and his Chaplain. They had Come to Meet the Judge. Sick with Horror, the Circuiteer became Aware from their Demeanour towards his Travelling Companion that the Nice Old Buffer was Stuffin J. He Made up his Mind Then and There that he had Better Adopt Some Other Profession, and Caught the First Train Back to London. He is Now a Stockbroker, and Doing Very Well Indeed in the Industrial Market.

Moral.—*Take Care.*

Judicial Notice—Harman L.J. (in a case based on alleged nuisance caused by noise): "There is no judicial knowledge of the noisiness of Women's Institutes."

CORRESPONDENCE.

Case and Comment

Sir,

Case and Comment in your issue of 2 May comes from the Faculty of Law of the University of Auckland and deals solely with the judgments of the Court of Appeal in the *Lolita* case.

Approximately half of the article comprises four copious quotations from the judgments and the balance is devoted to summarising the remainder of them—in fact, a species of expanded headnote. Few will, I suggest, deny the usefulness of intelligent summarising of this kind, nor will they underrate the difficulty of providing useful legal comment upon the thorny subject of literary censorship and the interpretation of our relative legislation. But when the Law Faculty of one of our Universities speaks *ex cathedra* we are surely entitled to look for and expect more than mere synopsis.

With diffidence, I venture to suggest that this decision, resting as it must on the findings under ss. 5 and 6, is so essentially a matter of fact (or mixed law and fact) as to render general comment of small value save the comment that this case decides nothing except that *Lolita* is, in New Zealand, (though not in Europe or America) an indecent document. Should this in fact be the opinion of the Auckland Law Faculty their article fails to make it plain.

I am, etc.

J. TATTERSALL

[This letter was referred to our contributor whose reply appears below—Ed.]

Sir,

I appreciate your courtesy in sending me a copy of Mr Tattersall's letter. I think he may have misunderstood the purpose of the *Case and Comment* contributed by members of the Faculty of Law at the University of Auckland. As originally planned, the notes were to be approximately 600 words in length so that there could be three notes in each issue of the JOURNAL. Already it has been found that this self-imposed limitation must be abandoned. It is certainly not our intention to speak *ex cathedra* as a Faculty, but as individual members to bring to the notice of the profession, before the publication of the reports, cases of more than passing interest.

So far as the *Lolita* note is concerned, the note for the JOURNAL was deliberately shortened so as to draw the attention of your readers to the salient portions of the lengthy judgments. Any attempt to deal in a critical manner with all the issues involved—whether of law or of fact—would have overburdened your pages unduly. It is agreed that the case decides nothing except that in New Zealand *Lolita* is an indecent document within the meaning of the Act. What is of more importance and of greater interest is the way in which that decision was reached. This the contributor sought to explain.

I am etc.,

A. G. DAVIS

Dean of the Faculty of Law

THE LIENS ACT: SOME RECENT CASES

Canadian Appeal

It is with some smugness that we learn that the interpretation of a Canadian statute, the Mechanics Liens Act of Alberta, can in the words of Viscount Simonds raise some questions of difficulty. The statute was examined by the Privy Council in *Ponoka-Calmar Oils Ltd.* v. *Earl F. Wakefield Co.* [1959] 3 All E.R. 571, where the general effect of the mechanics liens created by the statute was stated thus :

> . . . to give a security to those who have by work or service effected an improvement on land by way of charge on that land. Its registration is for the purpose of protecting the title to an estate or interest in land which is created by the lien . . .

This, then, is very close to the lien created by our own Act, Indeed, the definition of " owner " in the Albertan statute follows our definition of " employer " so closely that some copying has been done somewhere.

The facts were involved, but the Privy Council supported an oil-drilling contractor's right to lien and right to a charge on the sale proceeds of oil from the well, the statute extending the owner's liability under the Act in respect of oil or gas after severance from the realty.

When is the Work Finished ?

In *Stern* v. *Taylor* [1960] N.Z.L.R. 669, a plastering subcontractor substantially performed his subcontract by 17 September 1958 and removed his plant and men from the job. He rendered his account for £130 in October but was not paid. The owner's architect considered the head contract completed in December and on 20 January 1959 authorised a substantial payment to the head contractor, including the liens retention money. On 16 March he served the head contractor with a list headed " Schedule of maintenance items for contractor's attention ", and included in it were two items referable to the plasterer (plastering gully trap etc., and a small area of wall—this latter had not been done earlier because the head contractor had obstructed the spot with rubbish). The total value of the work required was about £3.

The plasterer was accordingly asked by the head contractor to attend to these items, which he did on 19 June and not having yet been paid by the head contractor issued notice claiming a lien for £130 on 26 June.

The Court found that the plasterer had acted *bona fide* ; he had not deliberately left undone the trivial items with a view to later performance and support of his lien. He was " prompt to appreciate the advantage of the requisition " to himself and could not be criticised.

The result was that the owner had to pay the £130, with no doubt small prospects of recovery from the head contractor who was by then in financial difficulties. The owner was thus bound by the action of his architect in requiring, under the name of maintenance, completion of an uncompleted contract. However trivial the uncompleted items may be, so long as they are indeed necessary to complete the performance of the contract they are part of it and time for a lien claim and for owner's retentions does not run until the work is complete.

While it is respectfully submitted that the decision is unquestionably right, it does show the narrow path the owner has to tread. Had his architect not requisitioned for the two items the plasterer would never have known of the omissions and the possibility of a lien claim would not have occurred to him. There may be ground for enacting that if a contractor renders his final account or otherwise treats himself as having finished his work, he should be taken at his word and if some work is required of him after the liens money has been *bona fide* released his rights should be limited to payment for the requisitioned work only.

However, one hesitates to suggest the introduction of any further complication into this legislation. Already, one feels, technicalities are blurring the fair face of justice. Amendments with justice in view may only discompose the lady further. The position now is that the employer who has released the liens retention money must be very circumspect in requiring any further work done, lest it be held that he is asking for contract and not maintenance items ; thereby exposing him to pay again for work for which he has already paid someone else.

He should be educated to take legal advice on whether contract items are included in his requirements of his contractor. Perhaps he should call for some acknowledgment from sub-contractors that they have completed their contract before he releases the retention money. He is bound in contract to pay his head contractor and could not in the absence of a lien claim safeguard himself by paying the sub-contractors direct unless by arrangement with the head contractor. The employer must decide for himself, at his peril, when the contract is finished. The burden placed on him seems unfair.

In the instant case he was the author of his own misfortune (by the acts of his architect). His danger is not less real whenever he has to decide on the date of completion. He must be guided by his technical advisers but can, e.g. architects, be expected to be alert to avoid the trap that was sprung here ? Should he get some binding admission from all possible or likely claimants fixing the date of completion and release his s. 32 retention money accordingly ? Most employers will, however, carry on as in the past in ignorance of angels who fear to tread. But their legal advisers may be disturbed at the wide danger zones.

Three Possible Situations

There seem to be three possible situations arising from the facts in *Stern* v. *Taylor* (*supra*).

(a) Where the lien claimant is unaware of his omission until he is told by the owner to rectify it.

(b) Where the lien claimant returns to the job in the hope of finding out for himself whether he has left anything undone which he can now do to support his lien claim.

(c) Where he deliberately leaves something undone against the possibility of his later having to claim a lien.

In *Stern* v. *Taylor*, the Court was able to distinguish *Ross* v. *McGregor* [1930] G.L.R. 317 (disallowing the lien claim of a plumber who returned after nine months

to do work valued at 4/6d.) on the ground that all parties there had treated the contracted as completed. The instant case admits the lien claim under (a) but would not, on this reasoning, admit (c). The possibility (b) will have to await determination but if both parties had already treated the contract as performed it seems that the claimant should be estopped from asserting otherwise.

Joinder of Mortgagee

If a question of priority may arise between a claimant for lien and a mortgagee the mortgagee should be joined in the action. This would be so where, as in *Ngapuna Timber Co. Ltd.* v. *Wallis* [1960] N.Z.L.R. 771, the mortgagee was retaining portion of the loan against work to be done. The mortgagee is presumably entitled to his costs out of the fund and with some prominent lenders the point could probably be covered by correspondence to save formal joinder.

Abandonment

In *J. J. Craig Ltd.* v. *Gillman Packaging Ltd.* [1961] N.Z.L.R. 287 we have the first decision on what amounts to " abandonment ", the word inserted by the 1958 Amendment. There was little difficulty in deciding whether abandonment had taken place. Progress on the contract was unsatisfactory and work finally ceased. The value of the work done by the contractor was valued by quantity surveyors for both builder and owner and a figure agreed upon. A further contract was let to complete the job. The owner, had, as appears from counsel's submissions, actually rescinded the contract and it was suggested that this being so, the contract had not been abandoned by the contractor. Turner J. was however prepared to interpret abandonment with regard to the mischief aimed at by the 1958 amendment and held that a " contract may be abandoned not only by a builder who ' walks off ' his job but by one who acquiesces in the cancellation of his contract by the other contracting party."

Nature of the s. 32 Retention

The same case contains a ruling on the nature of the retention under s. 32 which the employer is to " retain in his hands " from each progress payment until the expiration of 31 days from completion or abandonment of the contract.

Does this retention create a special fund to which lien claimants have first access and if so is the money " subject to equities " as between employer and contractor ? It was held in the first place that the retention money does become a special fund amenable to subcontractors' charges.

In *Waters* v. *Gunn* (1910) 29 N.Z.L.R. 468 ; 12 G.L.R. 669, Edwards J. considered that the corresponding section then in force did not establish as a special fund the retention money independent of the employer's solvency. Turner J. was of opinion that the 1940 amendment (by which the rentntion basis was altered to relate to a percentage of each progress payment in lieu of a percentage of the contract as a whole) had the effect of establishing the accruing retention money as a fund amenable to charges under the Act.

It may perhaps be arguable whether this change had the effect of transforming what may not earlier have been a special fund into a special fund. Turner J. could see (p. 292, l.27) no purpose in the amendment if it did not. It seems doubtful if the Attorney General had this intention. All that was said in the House was : (*257 N.Z. Parliamentary Debates*, 992) : " The clauses under the heading ' Wages Protection and Contractors Liens ' are simply for the removal of ambiguities."

A Special Fund

However, it seems common ground that a special fund is established ; what is its nature ? The section directs the employer to retain the money in his hands. It is not abstracted and placed elsewhere in neutral custody. It is presumably saved from involuntary loss or diminution in the employer's hands by s. 24 (2) which says that no money payable under the contract may be attached or pass by operation of law and although this section appears to be directed at preserving the contract money intact against the contractor or his creditors it is wide enough to protect the s. 32 retention in the hands of the employer against his own creditors. As to voluntary dissipation, the employer is liable where he has not made the retention or does not continue to hold it for he cannot claim credit for wrongful payment of retained money (s. 22). Oddly enough, while he is declared by s. 31 (2) personally liable to the claimant serving notice, there is no similar declaration in s. 32 as to retention money ; personal liability however does arise by application of s. 22 and repetition of this declaration in s. 31 was presumably unnecessary as both ss. 31 and 32 are referred to in s. 22.

The case is valuable for its affirmation of the principle that a lien and charge under the Act can arise only in respect of a fund either in existence or notionally so by operation of s. 32. If the employer has valid contractual claims against the contractor these must be allowed to the employer on account and if this results in no balance or a diminished balance being payable to the builder, claimants under the Act can be in no better position. If the builder so badly performs his contract that the employer has a greater claim against him than is payable to him there is nothing left for the lien claimants to intercept.

The Act is at pains to establish that an employer who performs his duties under the Act is liable for the contract price and nothing more : s. 21, (3) (4). Likewise, if the employer has a valid counterclaim against the contractor, that may be met first out of money retained under s. 32.

Three Separate Points

In *Ngapuna Timber Co. Ltd.* v. *Ryan* [1961] N.Z.L.R. 377 we have three separate points ruled on.

First, an action to enforce a lien or charage under s. 34 is not premature although brought before a period of credit allowed by the claimant has expired. This is consonant with s. 30 (2) which allows the notice of lien or charge to be given before the time for payment of the money claimed has arrived. The Court thought that the power it had on a pending lien action to extend the time within which an action to enforce any other lien or charge may be commenced, s. 34 (5), was limited to actions to enforce the lien or charge, and not to actions seeking judgment.

Secondly, the principle is affirmed that the goods or services the subject of the claim for lien or charge must be identified with the land and the head contract-Timber supplied generally to the builder without refer.

ence to a particular house did not entitle the supplier to a lien on the house and land in which it happened to be incorporated. Suppliers should whenever possible thus "tie" their supply to a particular job and say so in tendering, invoicing or correspondence.

Lastly, where parties who have given their notices within the time specified in s. 26 are joined under s. 36 in the action brought by a plaintiff who was late with his notice, the added claimants do not lose their priority by being reduced to the ranking of the late plaintiff.

Lucas *v.* Harlow

In *Lucas* v. *Harlow* [1961] N.Z.L.R. 463, it was held that a subcontractor who gave his notice and commenced his action within 60 days of completion of his subcontract but *before* the head contract was abandoned was entitled to his charge as the 60 days (s. 34 (4)) ran from the completion of his own contract, not the head contract. The Court thus did not find it necessary to deal with the Magistrate's ruling (10 M.C.D. 94) that the action must be commenced within the period of 60 days commencing from completion or abandonment of the head contract, and that as the instant action was brought before this period commenced, it was premature. The Supreme Court, by ruling that time ran from the completion of the *subcontract*, did not have to consider whether an action commenced *before* the period began complied with s. 34 (4), which speaks of commencing action "within sixty days . . . ".

The subcontractor had commenced his action after he had finished his subcontract and before the head contract was abandoned. The Magistrate's decision as to the meaning of "within 60 days" is thus left intact and can clearly still have room for operation.

If we take the two decisions together and apply this timetable:

1 May	Head contract commences.
1 June	Subcontract commences.
1 July	Subcontract completed.
1 December	Head contract completed.

the subcontractor should give his notice within 30 days of 1 July and commence his action within 60 days of 1 July. If he commences action before 1 July he is premature (although he can give notice before the money is due: s. 30 (2)). If he commences action on say 2 September he is too late, but may be able to utilise the joinder sections. It is submitted that it would be preferable to run the 60 days from 1 December (see p. 53, *ante*).

G. CAIN.

TO WHOM IT MAY CONCERN

Recently we dipped into that part of the commercial world marked on the town planning map (unfinished) as heavy industry. So many things have been introduced into the employment of apprentices and others that we have found it safest to hand over these questions to the students of the law upstairs.

This time, however, we were approached by the manager of a firm in which we have some pecuniary interest and the manager thought he should get his advice free. Apparently it is compulsory, on request, to give an apprentice who has completed his time a thing called a reference or character. Our client's newspaper reading touched on the realm of defamation and he wanted to know whether he was responsible so long as he told the truth. Unlike Pilate he waited for an answer.

He remembered that on two occasions he had accepted a reference from firms which he believed to be of good repute and the employee recommended had not proved equal to the character supplied. The manager had taken the matter up with these firms and told them that he had been advised that he had a cause of action for any loss suffered as a result of this character supplied. We agreed that this sentiment was good but, in our experience, there was frequently a considerable hiatus between a cause of action and recovery of damages.

In reply he said that his firm was in a difficult position. It had been in business over seventy-five years and it liked to stand by its word. Also it was not prepared to say that a youth had been trained in their premises if, in fact, the training had failed because the youth had not co-operated in the training. In reply to a request for a character our client had written the following:

> "A. B. Newsants has just completed his apprenticeship contract of 5,000 hours. He proved to be a very difficult apprentice and a disruptive influence, but during the last few months he has shown considerable improvement in both his attitude to work and his ability. He is capable of doing good work if he wants to, but he is still A. B. Newsants. He leaves of his own accord and with our best wishes for his future."

Was this actionable? We thought this had better go upstairs for comment. We may or may not be wrong, but we have always felt that the barrister's department merely gives its opinion whether a case would be won or lost but the solicitor endeavours to keep his client out of trouble. The barrister's side said our client was safe but the solicitor's side said that it was the custom of this particular firm to encourage apprentices to do work for themselves in their spare time. To do this they had let the apprentices have goods either free or on credit. A. B. N. had obtained goods on credit but when asked to pay he had quoted s. 11 of some Act which apparently makes it impossible for the employer to sue for goods sold on credit to an apprentice and, in fact, A. B. N. had not paid. It might be possible for A. B. N. to say that because he had not paid the reference was given from malice which we understand could cost anything up to five figures. We told our client that it seemed a good question for the next students' moot.

ADVOCATUS RURALIS.

TOWN AND COUNTRY PLANNING APPEALS.

Minister of Works *v.* Horowhenua County.

Town and Country Planning Appeal Board. Wellington. 1959. 19 October.

Subdivisional standards in rural zones—Need to guard against urbanisation of zone—Land to be used for primary production—Minimum area for subdivision as of right in rural zone five acres—Possible exception—Town and Country Planning Act 1953, s. 26.

When the respondent Council's district scheme (Waikanae Section), was publicly notified, the Minister of Works raised an objection to the minimum area and frontage of subdivision permitted in the rural zone under the scheme. Under that scheme the Council had laid down the following subdivisional standards for rural zones: minimum area, 2 acres; minimum frontage, 198 feet.

The grounds of appeal were that these subdivisional standards were: (a) contrary to the public interest; (b) not in conformity with the principles of town and country planning; (c) would give rise to sporadic urban development and urbanisation in a rural zone.

McGill, for the appellant.
D. J. Cullinane, for the respondent.

The judgment of the Board was delivered by

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

1. Within the Waikanae Section of the district scheme an area of approximately 3,720 acres has been designated as a rural zone. It is a recognised principle of town and country planning that subdivisional standards in a rural zone need to be high enough to guard against any urbanisation of the zone and ensure that land in rural zones is used for primary production in some form or other. The scheme under consideration makes more than ample provision in the areas zoned as residential for the foreseeable residential development within the area for many years to come.
2. To permit subdivision in rural areas into blocks of two acres as of right could well lead to sporadic urban development in a rural zone. Experience has shown that two acre lots are frequently originally occupied by people requiring more spacious grounds for residential occupation, but that as time goes on the difficulties attendant upon maintaining two acres of land as a residential site lead to demands for further subdivision.
3. The Board has expressed the view in previous decisions that a five acre minimum area is in general the most appropriate minimum area for subdivisions as of right in rural zones. It may well be that on occasions the nature of the land sought to be subdivided, its situation, and its soil quality, may be such as would justify its subdivision into two acre lots for some forms of intensive market gardening or horticultural production, but the Code of Ordinances relating to the scheme (Ordinances 10 (1) and (2)) provide for dispensation to be granted to people who need to develop such sites by permitting subdivision into lesser areas and frontages than the standard area for allotments in the rural area.

The appeal is allowed.

The Board directs that the Code of Ordinances is to be altered so as to provide that the minimum subdivision standards for the rural zone are to provide for a minimum of five acres and a minimum frontage of 264 feet.

Appeal allowed.

Airey and Others *v.* Christchurch City Council.

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

Zoning—Land zoned as residential—Application for re-zoning as Commercial—Principles applicable—Undesirability of small commercial "spot" zones in residential area—Town and Country Planning Act 1953, . 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 heard together.

The first-named appellant was the owner of a property containing 10.1 perches being Lot 1 on Deposited Plan 222 and part Lot 3 on Deposited Plan 1197, having a frontage to Cambridge Terrace. The second-named appellant was the owner of a property containing 10 perches being Lot 8 on Deposited Plan 222, part of Section 479 situated on the south-eastern corner of Cashel Street and Cambridge Terrace. The third-named appellant was the owner of a property containing 23.8 perches, being part of Lot 3 on Deposited Plan 1574, part of Town Section 483, having a frontage to Cashel Street. These three properties lay in an area bounded on the north by Cashel Street, on the east and south by Cambridge Terrace and on the west by Montreal Street. This block was zoned as residential "C" under the Council's proposed district scheme, as publicly notified. Each of the appellants objected to the zoning of their properties as residential "C" claiming that they should be zoned as commercial. Their objections were disallowed and the appeals followed.

A. C. Perry, for the appellants.
W. R. Lascelles, for the respondent.

The judgment of the Board was delivered by

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

1. The first-named appellant's property is used by him as a surgery. The second-named appellant's property is a residence which has been converted into offices. The third-named appellant's property is used as a freight depot. With the exception of two other properties, the area under consideration is predominantly residential in character and in occupancy. The Council opposes any further commercial development in this locality, and one of the grounds is that a survey indicates an average ratio of 1.7 of the floor area to ground area over the 29 street blocks lying within the area already zoned as Commercial "C". This is a very low occupancy rate for a main commercial centre and there should be more than sufficient land available for commercial development within the zoned commercial area of the city without further intrusion into residential areas.
2. It was contended on behalf of the Council that zoning of this area as residential, allied with the residential zones lying to the west and northwest, affords a suitable and desirable buffer between the commercial areas lying to the north and east and the open spaces of the Hospital grounds and Botanical Gardens. The Board agrees with that submission, and it also agrees with the submission that the situation of this area and its proximity to the river make it admirably suited for residential development, preferably by way of flats. There is already a substantial block of flats in the area and other older houses have been converted into flats.
3. To allow the appeals would be to create small commercial "spot" zones in a predominantly residential area and this would be contrary to town-planning principles and practice.

Appeals dismissed.

Joinery Services Ltd. *v.* Christchurch City Council.

Town and Country Planning Appeal Board. Christchurch. 1961. 17 March.

Zoning—Land zoned as Residential A—Development for residential purposes not economic—Not suitable for industrial purposes—Virtually waste land—Immaterial how zoned, so long as not zoned for industrial use—Continuation of existing use—Town and Country Planning Act 1953, s. 36.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant company was the owner of a property known as No. 205 New Brighton Road containing 6 acres 1 rood

(Continued on p. 192)

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Drop of Scotch.—A well-known country practitioner has often dined out on this one which he swears is true. Our friend who is a Scot—let us call him Mr McHaggis—is Chief of the clan McHaggis in New Zealand. Some time ago he had occasion to instruct a firm of solicitors in Aberdeen to execute a certain commission on behalf of a client. He consulted the *Empire Law List* and to his delight found that there was a firm of McHaggis, McCrea, McBusby and McHaggis practising in Aberdeen. He, therefore, instructed them to act. This they did expeditiously and in due course our New Zealand Mr McHaggis received their bill of costs. Enclosed with the bills of costs was a covering letter and a receipt for the amount of the bill with the comment "We make the practice of enclosing a receipt for costs rendered. This saves the costs of the stamps in sending the receipt after payment." The attitude was explained by the fact that when our New Zealand Mr McHaggis consulted the letterhead of Messrs McHaggis, McCrea, McBusby and McHaggis he learnt that there was only one partner, whose name was Isaac Isadore McHaggis!

Substituted Sentences—The Judicial Committee of the Privy Council has recently found itself in somewhat of a quandary in the case of *R. v. Edirimanasingham* [1961] 1 All E.R. 376. This was an appeal from a judgment of the Court of Criminal Appeal, Ceylon, and the Judicial Committee allowed the respondent's appeal. The respondent had been found guilty on three charges; one of murder and two of attempted murder; and a sentence of life imprisonment had been imposed on the murder charge, but no sentence was imposed in respect of the other two charges. The Court of Criminal Appeal quashed the conviction for murder on the grounds that the verdict was against the weight of evidence. The Court then had to decide whether they had power to sentence the accused on the other two charges. The relevant section is s. 5 (1) of the Criminal Appeal Act 1907, which states:

> "If it appears to the Court of Criminal Appeal that an appellant though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment the Court may either affirm the sentence passed on the appellant at the trial or pass such sentence *in substitution* therefor as they think proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the Court considers that the appellant has been properly convicted."

The Court of Criminal Appeal held that the subsection enabled them to pass sentence only in substitution for the sentence passed by the trial Judge, and as the Judge had passed no sentence at all the question of substitution did not arise. The decision of *R.* v. *O'Grady* (1941) 28 Cr. App. R. 33, was criticised, but nevertheless followed. The appeal was allowed, the Court holding that the Court of Criminal Appeal had power to pass sentence on the two counts of attempted murder. The case was remitted to the Court of Criminal Appeal in Ceylon to take such action as that Court might consider appropriate.

How to cure Speeding—At a recent legal conference in Boston, U.S.A., a Federal Court Judge gave a formula for the cure of speeding: "The experience of society shows that if the penalty for crime is a savage one, it will not deter people. It is the certainty of punishment, not the savagery of it, which acts as a positive deterrent. Thus, if the penalty for speeding were death, the probability is that there would be plenty of speeders on the highways. As a matter of fact, the penalty for speeding often is death, but it doesn't matter. On the other hand, if law enforcement became so efficient that the probability of punishment were great, speeding would vanish as a menace. If mechanical devices were able to make the prospects of being caught certain, it would disappear entirely. These mechanical devices could exist right now—right in each vehicle. All the law has to do is to make it a crime to manufacture a car which can exceed the speed limit."

Incriminating Evidence—An interesting case involving a point of law which may be taken to the High Court was decided by a London Magistrate recently. The case is reported in the London *Daily Telegraph* of 4 March. In consequence of an alleged parking offence the owner of a car was asked by virtue of s. 32 (1) of the Road Traffic Act 1956 to give to the police information to identify the driver of the car. The owner replied that at the material time his wife was the driver. The wife was then asked who was driving the car at the time. She refused this information on the grounds that the answer could incriminate her. However, in the Magistrates' Court, the learned Magistrate decided in favour of the prosecution, stating that the section (which is similar to the New Zealand provision) obliged the driver to give information. The report goes on to state that no comment can be made because defence counsel stated his intention to appeal.

Romeo and Juliet (Commercial Version)—The London *Daily Telegraph* of 8 March reports that the present day rivalry between the two princely houses of industry—the Bearsteds and the Melchetts—bids fair to destroy the happiness of love's young dream; for a 22-year-old girl trainee—technologist of the Shell Chemical Company at Stanlow, Cheshire, has been warned that, if she persists in her intention of marrying a 24-year-old sales-clerk, employed by Imperial Chemical Industries in Manchester, she will have to consider resigning. "Shell and I.C.I. are competitors," says a Shell Company spokesman. "Such a marriage could well lead to an embarrassing situation for themselves and their employees." No doubt it could, but Stanlow is no Verona; nor, certainly, is Manchester either. Not since the days of feudalism, when the lord of the manor numbered among his privileges the maritagium—the right to dispose of his tenant's heiress in marriage—has such a preposterous claim been made. The feudal system gradually declined, and had virtually disappeared in England, by the end of the 13th century; the statute Quia Emptores 1289 (18 Edw I) gave it its death-blow. The few surviving manorial incidents—reliquial curiosities of a benighted past—were disinterred, only to be swept away by the Law of Property Act 1922. It will be a pretty kettle of fish if attempts are made to revive the whole business—fines, reliefs, heriots, dues, sporting rights and all the rest—by the industrial barons of the 1960's.

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 190.*)

36.8 perches being part of Lots 1 and 3 on Deposited Plan 13174 and part of Lot 1 on Deposited Plan 3786, patr of Rural Section 861. Under the respondent Council's proposed district scheme, as publicly notified, this property is in an arrea zoned as Residential A. The appellant filed an objection to this zoning, claiming that its land should be zoned Industrial B. The objection was disallowed and an appeal has followed.

Matson, for the appellant.
W. R. Lascelles, for the respondent.

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

1. The appellant company operates a joinery factory on part of this land having a frontage on to the New Brighton Road. The balance of the land is low-lying, swampy country, having no present value for any particular purpose.
2. The whole property is situated in the centre of a large area zoned as Residential A and predominantly residential in occupancy and use. The Board accepts that the bulk of the appellant's land could not be developed for residential occupancy at present except at a cost that would make development entirely uneconomic.
3. In order to meet the Drainage Board requirements the property would have to be filled to a level of 35.5 feet above the Drainage Board's datum level. This would involve an averege depth of filling of 3 ft. 6 ins. and the filling, in places, would be as much as 4 ft. 6 ins. In addition a culvert and bridge over a drain which traverses the property would have to be provided. These are the factors which contribute to make residential development an uneconomic proposal.
4. Having regard to the low-lying nature of the land in relation to the surrounding residential areas, the Board considers that it should not be developed for industrial use. There was evidence that at some time in the future it may be possible to obtain road access to the north-eastern end of the property by the opening up of a road reserve from Lake Terrace Road, but this is a far distant project.
5. The Board considers that the major portion of the appellant's property is at present virtually waste land which could not be adequately developed for any purpose and from the town-planning angle it does not particularly matter how it is zoned so long as it is not zoned for industrial use. The appellant company has a substantial building on the part of the property which it is using in connection with its business and it can continue to carry on the business as an existing use.

The appeal is disallowed.

Appeal dismissed.

Nutting *v.* Masterton County.

Town and Country Planning Appeal Board. Wellington. 1960. 1 July.

Departure from District Scheme—May include re-zoning of small sections when original zoning inappropriate—Town and Country Planning Act 1953, s. 35.

Application under s. 35 of the Town and Country Planning Act 1953 for consent to a specific departure from the provisions of the Masterton County Council's (No. 1 Section) district scheme. The applicant was the registered proprietor of all the piece of land situated in the Masterton County containing 2 acres 1 rood 7 perches more or less situated in Block IV of the Tiffin Survey District being part of Section 43 of the Manaia Block being also part of Lot 141 on Deeds Plan No. 163. This property was in an area zoned as rural under the county's district scheme. The applicant wished to erect on the land a factory for the carrying on of structural steel work and general engineering.

Ryan, for the appellant.
Gooding, for the Masterton County Council.

REID S.M. (Chairman). This is an industrial use. The scheme makes no provision for industrial zoning. The applicant asks:

(a) That the land be re-zoned from rural to industrial C, or
(b) Alternatively that he be permitted to use the land for the carrying on thereon of structural steel work and general engineering and for a direction that the Masterton County Council issue a building permit for that purpose.

The applicant complied with the provisions of Reg. 35 of the Town and Country Planning Regulations and no objections to the proposal were filed by anyone entitled to object. The Masterton County Council advised the applicant that it was not prepared to consent to the proposal to change the zoning of the land from rural to industrial but that it would not oppose the application for permission to use the land in the manner indicated above, subject to certain conditions. The applicant was not prepared to accept these conditions and the Board accordingly directed a formal hearing of the application.

The Board finds:

1. The property in question is situate at the corner of Railway Road and West Bush Road, Solway, opposite to the Solway Railway Station. It was originally owned by the Masterton Borough Council and was used as a gravel pit and later as a rubbish dump. The applicant purchased the property from the Masterton Borough Council and has to a certain extent filled it in and has been using it for the storage of steel and machinery. Although the land is zoned as rural it is not, in its present condition of any use for any rural purpose, and it has no productive value. It was suggested, on behalf of the Council that it might be filled in, covered with topsoil and generally brought up to a condition in which it could be used as rural land but the Board is satisfied that although this might be a physical possibility the cost of restoring it would be out of all proportion to any benefits that might be derived from it.

It was submitted on behalf of the Council that re-zoning of land is not a specific departure from the provisions of a scheme and that section should not be invoked for such a purpose. The Board is *not* prepared to accept this proposition in its entirety. It has granted specific departure on the application of local authorities and others for the re-zoning of small sections when it has been shown that the original zoning was inappropriate. In this case, however, the Board is not prepared to re-zone the property under consideration as industrial C. If this were done the property could in future be used as of right for any of the uses permitted in an industrial C zone and some of these might well detract from the amenities of this particular neighbourhood. It is, however, prepared to consent to the applicant's alternative proposal but subject only to the conditions suggested by the Counsel. THE BOARD HEREBY CONSENTS to a specific departure from the provisions of the Masterton County Council (No. 1 Section) operative district scheme by permitting the applicant to carry on on the property the business of structural steel work and general engineering and it directs that the Council shall issue a building permit for the erection of a factory for that purpose. This consent is subject to the following conditions:

(a) As the Council's Code of Ordinances does not contain bulk and location requirements for an industrial use the Board directs that the following bulk and location requirements shall apply, the maximum permitted height of any building is to be 35 feet excluding chimneys, masts etc. Front yard is to have a minimum depth of 35 feet and side and rear yards to have a minimum of 15 feet.
(b) No buildings or other structure or parking space or dump likely to obstruct vision is to be erected, constructed, sited or permitted at the northern end of the property on the corner of Railway Road and West Bush Road in front of a line commencing on Railway Road at a distance of 3 chains from West Bush Road and running to the north-wester corner of the said land, as delineated on the plan attached hereto. The Council also asked for a direction that the applicant dedicate as a road a portion of his land on the corner of Railway Road and West Bush Road. This proposed dedication is part of a wider scheme for the re-alignment of Railway Road at this point. The Board considers that if any of the applicant's land is required for this purpose the Council should take it under the Public Works Act and pay the appellant what compensation, if any, might be found to be due to him.

Consent granted to specific departure from District Scheme.