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CAPITAL PUNISHMENT AND POLITICS

WITH the expected re-introduction and, we hope, the enactment of the new Crimes Bill, the topic of capital punishment has become a very live issue. We do not propose, at this stage at least, to enter into a discussion of the merits or otherwise of this form of punishment, but we do think it timely to point out some most unsatisfactory features of the way in which the statute law is administered at the present time, and to suggest some means by which the deadlock on this most important subject which has arisen between the main political parties may possibly be broken.

The nature of this deadlock is of course well known to our readers. The present Government is committed to the retention of capital punishment, although we understand that the members of the Party are not by any means unanimous on the question; the Opposition is firmly and, we believe unanimously, opposed to it. In principle there is nothing wrong with this situation, and the Labour Party, then in power, were perfectly justified in procuring the enactment of s. 2 (2) of the Crimes Amendment Act 1941 which substituted life imprisonment for the death sentence as the mandatory sentence on conviction of murder. Likewise, no one could challenge the propriety of the National Party, as Government of the day, procuring the enactment of s. 2 (1) of the Capital Punishment Act 1950 which re-instated the death penalty as the punishment for murder.

What we do challenge as quite wrong in principle is what we can only describe as the misuse of the Royal prerogative of mercy by the Labour Government during periods in which it held office when the statute prescribed a sentence of death as the only punishment for murder. During those periods the prerogative of mercy was automatically exercised to reprieve all convicted murderers without regard to the merits of the case. In short, the Party refused to carry out the law for lengthy periods without taking steps to amend it.

Not only is this in itself disturbing, but it led to the result that the fate of a convicted murderer depended on political considerations quite divorced from the question of the merits or otherwise of capital punishment. We have even had the spectacle of a person accused of murder awaiting trial at the time of an election. Had the National Party been returned to office he would in all probability have hanged. Fortunately for him the Labour Party was successful, and on conviction the murderer was reprieved and is still serving a life sentence in Mount Eden prison. That such a situation could arise in a civilised State can only be regarded as barbarous.

We would be the last to suggest that the prerogative of mercy should be exercised on formal lines and hedged in by restrictions through a slavish following of precedent, but we do suggest that it should be properly exercised having regard to the merits and justice of the case and not as a means of frustrating the statute law of the country. Whatever the personal views of the members of the Government in power, they have, by accepting office, bound themselves to carry out the law of the country until they have the opportunity of changing it.

There is of course another objection, and a very valid one, to the automatic reprieve of convicted murderers. The passing of a death sentence in the Supreme Court should be one of the most solemn moments in its proceedings; yet with everyone having the knowledge that the sentence will not be carried out it becomes a meaningless sham in which our Judges should not be asked to participate. In fact, it must have a certain effect in reducing the respect of the public for the law.

Our first proposition then is that all political parties on coming into office should face up to their responsibilities and administer the law as to capital punishment as they find it on sound lines, recommending the exercise of the Royal prerogative in suitable cases, but allowing the law to take its course in others.

Next we come to the question of periodic changes in the law to conform to the policy of the Government of the day, which is much more difficult. In such a matter the law should be stable over a considerable number of years and not changed frequently, perhaps even at three-yearly intervals if there are changes of Government so frequently. This obviously calls for co-operation between the two main political parties who are likely in the foreseeable future to be in power, and such co-operation can be secured only by a substantial measure of compromise, both sides retiring in a measure from insistence on their principles. It has been announced that the Prime Minister proposes to investigate the possibility of reaching some compromise but on what lines we do not as yet know.

One possible method is perhaps the dividing of murder into the two classes of capital and non-capital, as has been done in Britain. From our reading, we should say that the experiment has not been an un-

qualified success, but that has perhaps been due, in some measure at least, to what is regarded in some quarters as a rather faulty classification. Such a proposal seems to be the most likely way of obtaining a compromise, but what are the prospects of success we are unable to say.

The acceptability of an alternative we have to offer depends on the basis on which the Labour party founds its objection to capital punishment. There are two possibilities, the first being that, on humanitarian grounds, it is unalterably opposed to being responsible for the taking of human life, even indirectly by allowing to remain unchanged the law providing for capital punishment. The second is that those members of the Party who are appointed to the Executive Council may not be prepared to take the direct responsibility of deciding whether or not a fellow man should be put to death.

If the Party's attitude is due to the first cause suggested above there is little that can be done about it, unless the Party is prepared to depart from its principles to the extent of agreeing that certain types of murder should carry the death sentence. In this connection it is not irrelevant to note that in 1941, when abolishing the death penalty for murder, the Party left it untouched in respect of treason and piracy. We should be loath to believe that this was done on the grounds that such crimes are not committed in New Zealand as a general rule, and that if a case did arise it could be covered by the granting of a reprieve. We prefer to give the Party and its leaders credit for honestly believing that some crimes were so serious as to merit the death penalty. If we are correct in this assumption then it would not be too much to expect that the Party would be prepared to place certain types of murder in the same category, subject always, of course, to the *proper* consideration of the exercise of the prerogative of mercy in each case.

If the real objection to the imposition of the death penalty is chiefly based on the second ground which we have suggested above, then such objection can be overcome simply either without or in conjunction with the subdivision of the crime of murder into the two classes of capital and non-capital. The solution would be to set up a body, either permanent or *ad hoc*, to consider all the material normally placed before the Executive Council and to make a recommendation as to the grant of mercy or otherwise, such recommendation being binding on the Executive Council which would then do no more than pass it on to the Governor-General.

We cannot put this solution forward as satisfactory. It is constitutionally unsound, since in such a matter the Executive Council should not delegate its responsibilities. Yet the position is so unsatisfactory that virtually any measures to resolve the deadlock should be resorted to.

As to the personnel of this body, the first requisite should be that every member should be prepared to act voluntarily and not be forced to do so by virtue of holding some office. The members should, as far as possible, be impartial on the question of capital punishment and we would suggest that one or more Supreme Court Judges should be appointed along with one or more of the leading psychiatrists. The body should of course be completely divorced from any political control or influence, should deliberate in private and its decision should be the decision of the whole body without reference to the individual opinions of its members. There should be no appearance of counsel.

The task of such a body would be a distasteful one, yet we think that, if it were set up on a proper basis, there would be no lack of responsible and qualified persons who would be willing to serve on it, regarding such service as a contribution to the welfare of the community.

Compromises are rarely satisfactory. What is really required is a conference of representatives of the parties concerned who, putting aside all questions of personal prejudice, could decide on logical grounds whether the retention of capital punishment is a good thing for the community at large, and also the type of crime for which it should be prescribed. Perhaps in the future we may be able to reach this ideal solution of the problem but it seems too much to hope that it can be brought about at the present moment. Until that stage can be reached we must make do with something much less satisfactory but certainly better than the system which obtains at the present.

SUMMARY OF RECENT LAW

BYLAW.

Purporting to regulate and control erection of hoardings—Possibility of application as total prohibition—Ultra vires—*Meaning of "regulating and controlling"—Counties Act 1956, s. 401 (9)—Bylaws Act 1910, s. 13.* A bylaw purporting to be made under s. 401 (9) of the Counties Act 1956, which gives power to make bylaws "regulating and controlling" hoardings and advertising structures, did not in terms prohibit the erection or keeping of hoardings but created the offence of doing so without first having obtained the consent of the County Council. The bylaw was silent as to any necessary requirements to obtain permission from the Council, and gave the Council full power to refuse permission in respect of any particular hoarding or in respect of all hoardings. *Held*, 1. That in making the bylaw the Council had sought to confer on itself a power of total prohibition on the erection or keeping of hoardings which was beyond the power conferred on it by s. 401 (9), and the relevant parts of the bylaw were therefore *ultra vires*. (*Parkes* v. *Mayor Aldermen and Burgesses of Bournemouth* (1902) 86 L.T. 449, followed. *Slattery* v. *Naylor* (1888) 13 App. Cas. 446, distinguished.) 2. That being *ultra vires* and invalid the bylaw could not be saved by s. 13 of the Bylaws Act 1910. Observations as to the meaning of the words "regulating and controlling". *Chandler and Co. Ltd.* v. *Hawke's Bay County.* (S.C. Napier. 1961. 17 February; 10 April. McGregor J.)

CARRIER.

Limitation of liability—Not extended to claim against servant of carrier for personal negligence—Carriers Act 1948, s. 6. The benefit of s. 23 (b) of the Government Railways Act 1949 or of s. 6 of the Carriers Act 1948 does not extend to claim made against servants of the Government Railways Department or of a carrier as the case may be in their personal capacity. (*Cosgrove* v. *Horsfall* (1945) 175 L.T. 334; *Adler* v. *Dickson* [1955] 1 Q.B. 158; [1954] 3 All E.R. 397 and *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1961] 1 Q.B. 106; [1960] 2 All E.R. 737, applied.) *Campbell* v. *Russell and Another.* (S.C. Auckland. 1960. 7 November. 1961. 11 April. T. A. Gresson J.)

CRIMINAL LAW.

Appeal against sentence—"Convicted"—Plea of guilty in Magistrates' Court results in conviction—Offender committed to Supreme Court because liable to preventive detention—Right of appeal against sentence imposed by Supreme Court—Statute not exactly complied with—Whether fatal to committal—Summary Proceedings Act 1957, s. 44—Criminal Justice Act 1954, s. 24 (3) (Criminal Justice Amendment Act 1960, s. 5)—Committal for sentence—Statute not exactly complied with—Whether fatal to committal—Summary Proceedings Act 1957, s. 44—Criminal Justice Act 1954, s. 24 (3) (Criminal Justice Amendment Act 1960, s. 5). A plea of guilty in the Magistrates' Court is sufficient to satisfy the phrase "is convicted by a Magistrates' Court" as used in s. 24 (3) of the Criminal Justice Act 1954 (s. 5 of the Criminal Justice Amendment Act 1960). (*R.* v. *Crago* [1917] N.Z.L.R. 863; [1917] G.L.R. 607; *R.* v. *Blaby* [1894] 2 Q.B. 170 and *R.* v. *Grant* (1936) 26 Cr. App. R. 8, applied.) The committal of an offender to the Supreme Court for sentence pursuant to s. 24 (3) of the Criminal Justice Act is a committal under s. 44 of the Summary Proceedings Act 1957 and gives the offender the status of an appellant to the Court of Appeal under s. 2 (2) of the Criminal Appeal Act 1945. The provision in s. 44 of the Summary Proceedings Act 1957 as applied by s. 24 (3) of the Criminal Justice Act 1954 that the Magistrate "may" endorse on the information the certificate and the statement therein specified imposes an obligation on the Magistrate to make such endorsement. The requirement is however directory and not mandatory, and substantial though not exact compliance with it is sufficient. *R.* v. *Townes.* (C.A. Wellington. 1961. 24 February; 13 March; 8 May. Gresson P. North J. Cleary J.)

Appeal against sentence—Successive appeals against conviction and sentence—Both applications to be filed in time. An appellant who desires to appeal against both conviction and sentence is required either to include both applications in the same Notice of Appeal or, if he prefers to file separate notices both applications must be filed in time. (*R.* v. *Banks* [1950] N.Z.L.R. 415; [1950] G.L.R. 186, discussed and explained.) *R.* v. *Ingram.* (C.A. Wellington. 1961. 18, 21 April. Gresson P. North J. Cleary J.)

Corroboration—False denials by accused—Whether they amount to corroboration—Evidence of wife of accomplice—May corroborate her husband's evidence. In appropriate cases false denials by the accused either to the police or whilst giving evidence at his trial can amount to corroboration. It is for the trial Judge to decide whether the denials can in the circumstances constitute corroboration, and, if he considers they can, to leave it to the jury as a question of fact whether they do. (*Eade* v. *R.* (1924) 34 C.L.R. 154; 30 A.L.R. 257, followed; *Collie* v. *Collie* [1922] V.L.R. 269; 28 A.L.R. 123; *Hoxman* v. *Barnden* (1914) 33 N.Z.L.R. 957; *Morrison* v. *Taylor* [1927] V.L.R. 62; 33 A.L.R. 30; *Ready and Manning* v. *R.* [1942] A.L.R. 138, considered). The evidence of the wife of an accomplice may be used as corroboration of her husband's evidence. *R.* v. *Tripodi* [1961] V.R. 184, Supreme Court of Victoria, Lowe, Gavan Duffy and Dean, JJ. 1960. 3, 22 November.

Police offences—Obstructing footpath—Meaning of "obstruct"—Onus of proof of "lawful justification or excuse"—Police Offences Act 1927, s. 3 (eee) (Police Offences Amendment Act 1958, s. 2 (1))—Summary Proceedings Act 1957, s. 67 (8). On a charge of obstructing a footpath laid under s. 3 (eee) of the Police Offences Act 1927 (s. 2 (1) of the Police Offences Amendment Act 1958) it is sufficient for the prosecution to prove that the defendant was guilty of a continuous physical occupation of a portion of the footpath which appreciably diminished the space available to the public in passing and repassing along the footpath, and it is immaterial whether any other person was in fact affected by his action. (*Haywood* v. *Mumford* (1909) 7 C.L.R. 133, followed.) The words "without lawful justification or excuse" used in s. 3 (eee) are words of qualification of the offence thereby created and as such fall within s. 67 (8) of the Summary Proceedings Act 1957. It follows that, once a *prima facie* case of obstruction is made out against a defendant, the onus lies on him to satisfy the Court that his conduct was with lawful justification or excuse. (*Police* v. *Hardaker* (1959) 9 M.C.D. 403, dissented from.) *Stewart* v. *Police.* (S.C. Christchurch. 1961. 11 April. Richmond J.)

Police offences—Obstruction of police officer in execution of his duty—Police officer called to evict trespasser—Reasonable grounds for suspecting that breach of peace will occur—Right to arrest trespasser—Police officer acting in course of duty in doing so—Police Offences Act 1927, ss. 73, 77. When a police constable is called to privately-owned premises to eject a trespasser and has reasonable grounds for suspecting that a breach of the peace will occur if the trespasser is not ejected, the constable is entitled to act under s. 73 of the Police Offences Act 1927 and arrest the trespasser without a warrant. Any resistance offered under these circumstances is an obstruction of the constable in the execution of his duty. *Allen* v. *Police.* (S.C. Wellington. 1961. 20, 26 April. Leicester J.)

Recognisance—Court's power to mitigate debt—Principles to be applied—Crown Proceedings Act 1950, ss. 21, 23. In considering whether to grant relief under s. 23 of the Crown Proceedings Act 1950 against the estreatment of bail, the Court should in general not regard it as a relevant factor that the accused person has appeared and stood trial. Such an appearance is a prerequisite to any question of moving the Court under s. 23. The result of the trial is also not a determining factor. (*In re Fox and Fox* [1949] N.Z.L.R. 722, explained.) Observations on the principles to be followed in dealing with such an application. *Attorney-General* v. *Ware.* (S.C. Hamilton. 1960. 8, 29 September. Hardie Boys J.)

Summary proceedings—Order granting leave to withdraw information—Not made in determining information—Not appealable—Summary Proceedings Act 1957, ss. 115, 157. The phrase "on the determination of any information" used in s. 115 of the Summary Proceedings Act 1957 does not mean "on the termination or ending of the information" but has reference to the making of a decision. An order made under s. 157 of the Act granting leave to withdraw an information is not an order made in determining the information and is therefore not appealable under s. 115. *Burton* v. *Police.* (S.C. Wellington. 1961. 22 March; 17 April. Barrowclough C.J.)

CUSTOMS ACT.

Customs entry form—Requirement to state c.i.f. value of goods intra vires*—Meaning of c.i.f. value—Customs Act 1913, s. 309—Customs Amending Regulations 1948, No. 2 (S.R. 1948/213) Schedule.* The requirement of Form 14 in the Schedule to the Customs Amending Regulations 1948, No. 2 (S.R. 1948/213) that an importer of goods shall insert (and thus make a declaration of) the c.i.f. value of the goods is *intra vires.* It falls within the terms of s. 309 (1) of the Act as being part of a regulation "for the conduct of any business relating to Customs" and is also a matter "prescribed" for the purposes of s. 309 (2). The c.i.f. value to be declared is not governed by commercial usage and parlance concerning c.i.f. contracts, but includes all remittances in respect of the goods including commission payable to a buying agent. *British Products Ltd.* v. *D'Audney.* (S.C. Auckland. 1961. 21 March: 18 April. Hardie Boys J.)

EXECUTORS AND ADMINISTRATORS.

Claims—Testamentary promise—Plaintiff surrendering to deceased his interest in house—Tantamount to the provision of accommodation—Such provision a "service"—Law Reform (Testamentary Promises) Act 1949, s. 3. The plaintiff and the deceased as beneficiaries in the estate of their deceased mother were entitled in equal shares to a house property in which the deceased was living. The plaintiff, on representations being made by the deceased, agreed to disclaim his interest in the house property so that the deceased could continue to live in it, in return for which the deceased undertook to leave the house property to the plaintiff in his will. The necessary disclaimer was duly executed but the deceased failed to carry out his promise. *Held,* That the plaintiff's act in enabling the deceased to continue to live in the house property, in other words the provision of accommodation for him, was a service rendered by the plaintiff to the deceased for the purposes of s. 3 of the Law Reform (Testamentary Promises) Act 1949 and thus supported a claim under that Act. *Tucker* v. *Guardian Trust and Executors Co. of N.Z. Ltd. and Others.* (S.C. Wellington. 1961. 19, 20 April; 12 May. McCarthy J.)

GIFT.

Husband and wife—Hire purchase acquisition—Motor car being acquired by husband on hire purchase—Whether effectively given to wife by way of simple gift—Whether equitable assignment of benefit of hire purchase agreement by conduct—Whether intention to create legal relationship. Spellman v. *Spellman* (Court of Appeal (Ormerod, Willmer and Danckwerts, L.JJ. 1961 April 26, 27); [1961] 2 All E.R. 498.

JURY.

Duty of trial Judge in charging—Further discretion. The duty of a trial Judge, after defining the issues for the jury, is to

relate the evidence to the issues by bringing to the attention of the jury in a general way how the evidence which has been given bears upon those issues. Beyond this, the Judge has a discretion to recapitulate particular evidence, or to express his own views on questions of fact, or to deal with arguments advanced by any party, provided always that he leaves the jury in no doubt that what he says on these matters does not bind them and that what he leaves unsaid would neither distract the jury from the issues nor leave the jury with a false picture of the case as a whole. He is not bound to comment on all the facts. (*Jones* v. *Dunkel* [1959] A.L.R. 367, at pp. 376-377, per Windeyer J., referred to). *Schulmann* v. *Peters* (High Court of Australia Dixon C.J., McTiernan, Taylor, Menzies and Windeyer JJ.) 18, 19 February 1960—Melbourne. 29 March 1960—Sydney [1961] A.L.R. 209.

INSURANCE.

Life—Protected policy assigned to bank with another asset as security for a debt—Later general assignment of estate for benefit of creditors—Application of doctrine of marshalling—Life Insurance Act 1908, s. 65 (1). Neither the words nor the tenor of s. 65 (1) of the Life Insurance Act 1908 are applicable to the indirect process by which the doctrine of marshalling notionally re-arranges the assets of a debtor so as to cause his secured creditors to be paid. Consequently when a secured creditor holds security over certain assets including a protected life-insurance policy which has been transferred to it and the debtor later enters into a general assignment of his estate for the benefit of creditors, the bank is bound to marshal. *Quaere*, Whether it is ever in the power of the debtor himself to invoke or resist the application of the doctrine of marshalling. *Bissett* v. *Australia and New Zealand Bank Ltd. and Another.* (S.C. Auckland. 1960. 12 October. 1961. 29 March. Turner J.)

MARSHALLING.

Protected life-insurance policy assigned to bank with another asset as security for a debt—Later general assignment of estate for benefit of creditors—Bank bound to marshal—Life Insurance Act 1908, s. 65 (1)—See INSURANCE (*supra*).

LIMITATION OF ACTION.

Actions against Crown and public and local authorities—Long delay between filing and hearing of motion for leave to proceed—Not due to inaction of plaintiff's advisers—Not to be taken into account in considering questions of prejudice—Limitation Act 1950, s. 23. Where a lengthy delay occurring between the filing and the hearing of a motion under s. 23 of the Limitation Act 1950 for leave to bring an action out of time is not shown to be due substantially to the inaction of the plaintiff's legal advisers, the case requires to be dealt with as it stood when the motion was filed, and such delay is not to be taken into account in weighing considerations of prejudice. *So held*, By the Court of Appeal (Gresson P., North and Cleary JJ.), reversing the judgment of Barrowclough C.J. [1961] N.Z.L.R. 239. Observations as to the principles to be applied in considering such a motion. Appeal from the judgment of Sir Harold Barrowclough C.J. [1961] N.Z.L.R 239. *Petrie* v. *Ashburton Electric Power Board.* (C.A. Wellington. 1961. 12 April. Gresson P. North J. Cleary J.)

MOTOR CAR.

Third party motor insurance—Indemnity for injury caused by or arising out of the use of insured vehicle—Mechanical loader mounted on tractor—Motor Vehicles (Third Farty Insurance) Act 1952-1951 (N.S.W.), s. 10. One J. was the driver and operator of a mechanical loader which was a tractor fitted with a bucket or grab which could gather material from the front of the tractor, travel on rails above the head of the operator to the rear and there deposit its load in a receptacle for removal. While the loader was being so used, the bucket, the mechanism of which had been defective for some time, jammed and when J. attempted to free it, it fell on and injured him. The owner of the loader held in respect of the loader a current insurance policy issued pursuant to the Motor Vehicles (Third Party Insurance) Act 1942-1951 (N.S.W.), s. 10, which purported to indemnify the owner and driver of the loader against liability in respect of bodily injury to any person caused by or arising out of the use of the loader. Held, 1. The loader was a "motor vehicle" for the purposes of the Motor Vehicles (Third Party Insurance) Act 1942-1951 (N.S.W.), s. 10; 2 the policy covered not only the use of the vehicle as a vehicle but also its use as a loader, and the owner was accordingly entitled to be indemnified in respect of payments made by it to J. in respect of his injuries; 3. the owner was so entitled to indemnify, notwithstanding that J. was the driver of the loader. *Digby* v. *General Accident Fire and Life Assurance Corporation Ltd.*, [1943] A.C. 121; [1942] 2 All E.R. 319, followed). *Fawcett* v. *B.H.P. By-Products Pty. Ltd.* High Court of Australia Dixon C.J. McTiernan, Kitto, Menzies and Windeyer JJ. 16, 17 May, 15 August 1960—Sydney) [1961] A.L.R. 180.

PARTNERSHIP.

Deed of partnership—Construction—Surviving partners having right to acquire share of deceased partner "at par"—Meaning of expression "at par"—Value of goodwill not to be taken into account. A partnership deed contained the following provision: 11. In the event of the death of any partner during the term hereof such death shall not determine the partnership, but the surviving partners shall have the right to acquire the share of the partner so dying at par in proportion to the capital held by the surviving partners respectively. From time to time there were changes in the membership of the partnership and in the amount of capital held by each partner, but on such changes taking place no new deed was entered into but the partners agreed to carry on under the old deed. F., one of the partners died, having according to the books of the partnership a share of £15 in the capital and of £1,254 19s. in the undistributed profits. *Held*, 1. That when the deed spoke of the surviving partners having the right to acquire the share of a deceased partner at par, what was contemplated was the capital share of the deceased partner. No revaluation was to be made of the fixed or capital assets of the partnership, the purchase price being determined by the deceased's credit in respect of capital in the books of the partnership. 2. That the value of the goodwill of the partnership business was not to be taken into account since no items of goodwill were included in the firm's balance sheet. 3. That the total amount due to F.'s estate was therefore the sum of £15 standing to his credit in the capital account and his share of undistributed profits, £1,254 19s. *Gifford and Others* v. *L. E. Harris Ltd. and Another.* (S.C. Napier. 1961. 27 March. McGregor J.)

PRACTICE.

Renewal of expired writ—Motion after expiration of currency of writ—Not fatal to application—Limitation period expired—Power to renew writ where Court has discretion to extend limitation period—Principles applicable—Code of Civil Procedure, R. 35—Limitation Act 1950, s. 4 (7). A writ may be renewed under R. 35 of the Code of Civil Procedure although the application is not made until the currency of the writ has already expired. (*In re Jones, Eyre* v. *Cox* (1877) 46 L.J. Ch. 316, followed.) In general, the Court will not exercise its discretion to renew a writ if the effect of so doing is to deprive a defendant of a limitation which has already accrued, but where, as in s. 4 (7) of the Limitation Act 1950, the Court has a discretion to allow the issue of a fresh writ after the expiration of the prescribed period of limitation, it may deal with an application for the renewal of an expired writ or the same basis as if it were dealing with an application for leave to issue a fresh writ out of time. (*Battersby* v. *Anglo-American Oil Co. Ltd.* [1945] K.B. 23; [1944] 2 All E.R. 387, distinguished.) *Stuhlmann* v. *O'Donnell'* (S.C. Auckland. 1961. 10 March; 10 April. Hardie Boys J.)

Trial by jury—Difficult questions of law but not inextricably mixed with questions of fact—Case not to be tried by Judge alone—Principles applicable—Judicature Amendment Act 1960, s. 4. The plain purpose of s. 4 of the Judicature Amendment Act 1960 is to give a Judge power to withdraw from a jury the trial of actions or issues in which a substantial ingredient is the consideration of difficult questions of law. If the questions of law likely to arise in an action are not inextricably mixed with the questions of fact requiring the consideration of the jury or if the questions of fact do not call for a difficult direction from the Judge the case for trial before Judge alone has not been made out. In such cases the issues of fact should be left for determination by the jury and the questions of law can then be determined by the Court. *Lidgard* v. *Guardian Assurance Co. Ltd.* (S.C. Auckland. 1960. 9 November. Turner J.)

VENDOR AND PURCHASER.

Sale of land—Area not to exceed one acre—Boundaries as described may have included more than one acre—Admissibility of evidence to show that one boundary tentative only and to be fixed definitely on survey. A sale was affected of a piece of land of an area not exceeding one acre. Three of the boundaries were described accurately and the other was referred to as a certain fence line. The area included within these boundaries might have exceeded one acre. *Held*, That evidence was admissible to show that the boundary represented by the fence line was tentative only and that the parties intended that on a survey this boundary line would be fixed accurately so that the area included in the sale would be not more than one acre. *Dwyer* v. *Angelo* (1960. August 1. Herd S.M. Whangarei).

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Two Constitutional Issues. Freedom of Assembly : Powers of the Police

Two recent decisions deal with prosecutions under the Police Offences Act 1927. At first sight they might appear to involve nothing more than the interpretation of certain sections of that statute; but they go further than that. They are authorities on the important constitutional issues of freedom of assembly and of the powers of the police.

The first case is that of *Stewart* v. *Police* (11 April 1961)—a decision of Richmond J. The appellant was convicted in the Magistrates' Court of an offence under s. 3 (eee) of the Police Offences Act 1927 in that, without lawful authority or reasonable excuse, he did obstruct a footpath in a public place. On the admitted evidence the appellant was sitting against the Post Office in Christchurch with his feet out on the footpath which at that point was something over 11 ft. wide. Some eight feet of the footpath were free for people to use, but, as the appellant admitted in cross-examination, people would have to walk round him. Counsel for the appellant contended that the word "obstruction" meant "some real physical obstruction". This submission appeared to the learned Judge to mean that there was no obstruction having regard to the number of people about and to the amount of footpath left free.

His Honour rejected this meaning of the word "obstruct". He adopted the words of Griffith C.J. in *Haywood* v. *Mumford* (1908) 7 C.L.R. 133. In that case the High Court of Australia was considering the meaning of the word "obstruction" as used in a Victorian statute which empowered local authorities to make regulations for preventing any obstruction on footways. At p. 138 the learned Chief Justice said :

> "In my opinion the term 'obstruction' as used in the Police Offences Act 1890, includes any continuous physical occupation of a portion of a street which appreciably diminishes the space available for passing and repassing, or which renders such passing or repassing less commodious, whether any person is in fact affected by it or not."

Richmond J. said that some element of degree must enter into the matter when deciding whether or not the appellant did obstruct the footpath, but he came to the conclusion that the learned Magistrate was justified in finding the appellant guilty of the offence with which he was charged.

His Honour further held that, having regard to s. 67 (8) of the Summary Proceedings Act 1957 the onus was on the appellant to satisfy the Court that his conduct was with lawful authority or reasonable excuse. No question of lawful authority arose and on the evidence as a whole—the appellant having given no reason for his decision as to what he did—the learned Judge was not satisfied that there was any reasonable excuse. The appeal was, consequently, dismissed.

Dicey in *The Law of the Constitution*, 10th ed. p. 271, says :

> "The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases . . . the right of B to do the like, and the existence of the same rights of C, D, E and F, so on *ad infinitum*, lead to the consequence that A, B, C, D and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner. . . . In other words, A, B, C and D, and ten thousand such, have a right to hold a public meeting."

Any legislation such as that under consideration in this note, which may curtail the freedom of the individual to meet in a public place may, consequently, as *Dicey* shows, place a fetter on the right of public meeting. The interpretation of such legislation is a matter of importance to the constitutional, as well as to the criminal, lawyer. While it is not suggested for one moment that, in the instant case, Richmond J.'s interpretation or application of the section was in any way wrong—the evidence tended to show that the appellant was engaging in a campaign of petty annoyance to the police and to the public—it is important to ensure that the section is not used, as in some circumstances it might be, to curtail one of the too few—and diminishing—rights of the individual.

The other case, *Allen* v. *Police* (26 April 1961)—a decision of Leicester J.—deals with the powers of the police. The appellant appealed against his conviction under s. 77 of the Police Offences Act 1927 of obstructing a policeman in the execution of his duty. The appellant, in a slightly intoxicated state, went to a Wellington coffee bar. Requested by the proprietor to find a seat, he caught hold of her waist, used offensive language, declined to leave the premises when requested and was sufficiently truculent for the police to be called to the premises.

The constable warned him on several occasions that he had been requested to leave and was therefore trespassing. The appellant persisted that he had a right to stay and finish his coffee. When the constable took hold of his arm, he pushed the constable away. Another constable was called and the appellant was taken to the police station and formally arrested.

Counsel for the appellant, while admitting that the appellant was trespassing, contended that such obstruction as the appellant gave to the police was not obstruction to the constable in the execution of his duty, since the constable, in ejecting him, was not doing so in pursuance of any duty, but merely as agent of the proprietor. It must be noted that, in ejecting the appellant, the constable was protected against any action for assault by s. 82 of the Crimes Act 1908, which justifies the using of force in removing a trespasser.

Leicester J. rejected counsel's contention. Whether a constable who is called upon to remove a trespasser necessarily ceases to be in the execution of his duty depends, he said, upon the circumstances of the case. In the present case, the learned Judge thought it was not unreasonable for the constable to think that, had the appellant remained in disagreement with the proprietor, leading to a breach of the peace, might well have ensued.

constable had reasonable cause to suspect that a breach of the peace might be committed and having formed this view, he was entitled under s. 73 of the Police Offences Act 1927, to arrest the accused without a warrant.

Section 73 of the Police Offences Act 1927 enacts that a constable may take into custody without a warrant any person whom he has good cause to suspect of being about to commit any breach of the peace. The section therefore is one in the application of which a constable's beliefs or suspicions are of paramount importance. *Allen's* case is therefore akin to—*albeit* of a cadet branch of the family—such important constitutional cases as *Duncan* v. *Jones* [1936] 1 K.B. 218 and *Thomas* v. *Sawkins* [1935] 2 K.B. 249. In the first case it was held that a constable had the authority to order a speaker to desist from speaking (with the result that a street meeting was dispersed) if he believed, on reasonable grounds, that such an action was necessary to prevent a breach of the peace. In the second case, it was held that the police had a right of entry to any meeting to which the public is admitted if they have reasonable grounds for apprehension of a breach of the peace if they are not present. (As *Dicey's* editor points out presence of the police may be a powerful deterrent to free discussion of, at all events, political matters.)

Both these cases were heard on cases stated—one by Quarter Sessions and one by the local justices. In both cases there was, consequently, a full and material statement of the facts as found by the lower Court—and the basis on which the beliefs of the constables were founded. In the instant case the issue as to the basis of the constable's suspicions was dealt with by the learned Judge in the following words. He said :

> "When the constable arrived, the wilful trespass of the accused was continuing, even if he was then doing no more than quietly drinking his coffee and I consider that it was not unreasonable for the constable to expect that, had the accused remained, some further argument with the proprietor leading to a breach of the peace might well have ensued. In my view, the constable had reasonable cause to suspect that a breach of the peace might be committed, and, having formed this view, he was entitled to . . . arrest the accused without any warrant."

With respect, it is submitted that Leicester J.'s judgment would have shed more light on this vexed, and important, question of the powers of the police, when those powers are founded on a belief or suspicion, had he considered, in somewhat greater detail, the evidence on which the constable might properly have had cause for his suspicions.

One final point. His Honour referred to the constable having "*reasonable* cause to suspect". The words of s. 73 are "*good* cause to suspect". It is submitted that stronger evidence is required to support a *good* cause of suspicion, than a *reasonable* cause of suspicion; and that, consequently, there was the greater need for the learned Judge to examine, in greater detail, the basis of the constable's suspicions.

A.G.D.

—Prohibition or Regulation

egulate an activity empower the he activity in whole or in part ? posed in a number of recent in *Chandler & Co. Ltd.* v. *Hawke's Bay County Council* (10 April 1961), decided that a bylaw made under a power to regulate was *ultra vires* when the County Council acting under the bylaw purported to prohibit the activity in question. Under the Counties Act 1956, s. 401 (9), county councils are authorised to make bylaws for all or any of the following purposes :

> Regulating and controlling hoardings and similar structures . . .; and regulating, restricting, or prohibiting the exhibition of advertisements. . . .

Paragraph 4 of the bylaw made by the defendant Council exempted certain posters and signboards from its operation but the Council claimed the power to control the number and design of such posters or signboards as were within the exemption. Paragraph 6 provided that any person was guilty of an offence who erected or kept erected, without the permission of the Council, any poster or signboard visible from a public place. The plaintiff which had erected 18 hoardings in the County before the making of the bylaw was served with a notice requiring their removal. It thereupon sought to have the bylaw quashed on the grounds that it was *ultra vires* and unreasonable. The bylaw was held to be *ultra vires*.

In addition to the specific powers relating to hoardings and advertisements conferred by the Counties Act, the local authority was also able to rely on the Bylaws Act 1910, s. 13, which provides that no bylaw is invalid

> because the bylaw leaves any matter or thing to be determined, applied, dispensed with, ordered, or prohibited from time to time in any particular case by the local authority making the bylaw, or by any officer or servant of the local authority, or by any other person.

It will be noted that the Counties Act conferred a power to *regulate* and control hoardings and a power to regulate, restrict or *prohibit* the exhibition of advertisements. This possibly means that if a County were held unable to prohibit hoardings it could make them unprofitable by prohibiting the exhibition on them of advertisements.

It had been established in earlier cases that a power to regulate does not confer a power to prohibit. It was argued that the effect of the bylaw was tantamount to a prohibition although the bylaw had not been drafted in this form. It had made it an offence to erect or keep erected hoardings without permission. Reliance was placed on the views expressed by Lord Davey, on behalf of the Judicial Committee of the Privy Council in *Municipal Corporation of Toronto* v. *Virgo* [1896] A.C. 88, 93 :

> "No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order, but their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

Hence, if only a power to regulate is given, the activity must be permitted to continue and cannot be totally prohibited. But a power of partial prohibition is conferred by a power to regulate. This was recognised in *Hookings* v. *Director of Civil Aviation* [1957] N.Z.L.R. 929, where the Court held that a power to regulate civil aviation entitled the Governor-General to make a regulation prohibiting the use of aircraft for the purpose of towing other aircraft, this merely being a partial

prohibition within the wide field of aviation and thereby valid in accordance with the decisions in *Slattery* v. *Naylor* (1888) 13 App. Cas. 446, and *Melbourne Corporation* v. *Barry* (1922) 31 C.L.R. 174.

McGregor J., however, decided that the bylaw amounted to a total prohibition, despite the exemptions and the manner in which the bylaw was worded. The Court rightly, it is respectfully suggested, treated s. 13 of the Bylaws Act as relevant only if the bylaw conferring the discretion was otherwise *intra vires*. This construction could also be placed on the comparable provision dealing with discretionary authority conferred by regulations, the Statutes Amendment Act 1945, s. 2 (2), considered by the Court of Appeal in *Hawke's Bay Raw Milk Producers' Co-op. Co. Ltd.* v. *New Zealand Milk Board* [1961] N.Z.L.R. 218, and noted in (1961) 37 N.Z.L.J. 43, 44. This section and the provision in the Bylaws Act may make it unnecessary to pursue the distinction drawn in such cases as *Mackay* v. *Adams* [1926] N.Z.L.R. 518, where the discretionary power was described as a dispensing power, and therefore valid, and *Geraghty* v. *Porter* [1917] N.Z.L.R. 554, where the power, being described as legislative, invalidated the regulations.

But that portion of the judgment where the bylaw was treated as a total prohibition is the least satisfying. The bylaw in its operation *vis-a-vis* the plaintiff had in fact operated as a prohibition of its hoardings but there is no suggestion in the judgment that all hoardings had been treated in a similar fashion. Moreover in the plaintiff's case the Council may have refused permission on the basis of the exhibition of advertisements on the hoardings which, in terms of the Counties Act, the Council was able to prohibit. If the bylaw had been treated as having been made under a statute authorising prohibition of an activity, it would apparently be valid in terms of the decision in *Williams* v. *Weston Super-Mare Urban District Council* (1910) 103 L.T. 9: but that case was distinguished by McGregor J., on the basis that the Urban District Council had been given a power to regulate and prohibit. The learned Judge did not attach any special importance, so far as can be gathered from the judgment itself, to the list of posters exempted from the operation of the bylaw. The existence of exemptions is inconsistent with there being a total prohibition under the bylaw.

J.F.N.

CORRESPONDENCE

Pitfalls of Precedent

Sir,

The case of *Almond* v. *Heathfield Laundry* [1960] 1 W.L.R. 1939; [1960] 3 All E.R. 700 of which your learned but rather unobservant contributor has culled an excerpt (p. 151 of your last issue) apparently goes on to the House of Lords.

Their Lordships while taking the opportunity of applauding the apt application of alliteration's artful aid in Lord Justice Harman's allusion to the danger of "sliding slowly down the slippery path" of precedent, will no doubt be more circumspect in avoiding the pitfall over which he stumbled in confusing Bumble the "mis-hasspirating" parish beadle in Oliver Twist with the learned Serjeant Snubbin in the *Pickwick Papers*.

It is equally surprising that neither of the Editors of the W.L.R. or of All E.R.—nor for that matter your contributor—thought of dissociating himself from this lamentable lapse by interpolating in the text a timely and self-protecting (*sic*)!

I am, etc.,
R. J. LOUGHNAN

Corporal Punishment

Sir,

I am sorry that we seem to be taking it in turns to contradict each other, but as it is now my turn, I must ask leave to reiterate that the methods advocated by the Howard League and mentioned by Mr F. C. Jordan cannot possibly have been given any effective trial in New Zealand because there are no signs of our having available either the suitable buildings or the requisite trained professional staff, of the various types I previously mentioned. Nor are we in a position to make any scientific evaluation of any such experiment if it could be carried out; because we are almost entirely without the sort of trained observers who could conduct proper research upon the effects (and the long-term after-effects) of such methods in a wide range of individual cases.

The fact that you discuss the subject in terms of "harshness *v.* mildness" or "severity *v.* kindness" shows that you have no appreciation of the modern scientific approach to the matter. If a surgeon tells you that a child's appendix or tonsils must be removed, does it seem to you that he is being "severe" and ought to be "milder"? Does it seem to *him* that he is being harsh? The diagnosis and treatment of the psychological state of an offender is a matter for a medical man who has specialised in psychological medicine, and who proceeds to treat the person, just as he would treat any other patient, according to need. The treatment may appear at times quite ruthless, just as a surgeon or dentist sometimes appears quite ruthless.

We all know what it is like to receive instructions in a matter after it has with well-meaning incompetence been thoroughly messed up for us by someone not trained in our profession. One of the bitterest parts of the business is that the resultant failure is apt to be laid at our door. The psychiatrist has a good deal of this sort of thing to put up with, and we as professional people should be particularly careful not to trespass on his ground. It is no use saying that we do not agree that this is his ground. Thirty years ago we might have got away with a statement of that sort, but today we shall only betray our own ignorance, and the backwardness of public opinion in our country.

It is perhaps necessary to emphasise that it is not being suggested that all offenders are "

" insane ", but it is being asserted that mental health varies as much as physical health, and no person who commits an offence can possibly have been in a robust state of mental health at the time, because first-class mental health precludes that sort of conduct. The offender therefore needs a psychiatrist and if he does not get treatment he is unlikely to improve and may get worse. As a taxpayer and citizen rather than as a humanitarian, I favour doing everything possible to make a responsible citizen of the offender, without loss of time.

As a taxpayer and citizen I also deplore the frequent tendency to expend public moneys in ways that cater to popular prejudice and are in complete disregard of some established body of painstaking scientific research. I wouldn't like any part of my own professional interests to become a political football and it certainly ought not to happen to the interests of the medical profession, nor those of the profession of trained social worker.

You are concerned with the question of an adequate deterrent, and so are we all . . . but here also we cannot afford to jump to any conclusions. Most people talk as if it could be assumed that what would deter the ordinary person would also deter the offender ; yet all the evidence points the other way. A large proportion of offenders show themselves incapable of learning by experience, and many are found to be totally lacking in foresight.

While in South Africa, I had the privilege of hearing a learned debate in the course of which the Reverend H. P. Junod, a chaplain at the Pretoria Central Prison, stated that he had attended well over four hundred condemned persons before their execution and had satisfied himself that the threat of the death penalty had not only failed to deter them but had never been given a thought until it was too late. I cite this opinion because he was at the time attending conferences on the subject of criminology and prison psychology, at the international level.

In the *New Statesman* of 3 March 1961 there is a brief review of the Streatfeild Committee's Report which I am assured is by no means breaking new ground when it recommends in a manner entirely consistent with the foregoing, and with the suggestion I formerly mentioned, that sentencing should not be carried out in Court, but left in the hands of those whose task it should be to correct and restore the offender to the condition of responsible citizen again. There is not the slightest reason to suppose that the offender will find the process enjoyable. What matters is that it works.

I am, etc.,

MARION KIRK,

Hon Secretary,

Auckland Mental Health Assn. (Inc.)

[We gain some comfort from a statement attributed to Dr Bourne, lecturer in psychiatry at the Medical School recently. Dr Bourne is reported as saying : " Your best bet with any type of psychological treatment is to select those who are likely to get better anyway ".—EDITOR.]

PRACTICAL POINTS

Estate Duty—*Gift of land to a trust—Subsequent sale of other land to same trust—Estate and Gift Duties Act 1955, ss. 5 (1) (c), 41, 42 (f).*

QUESTION : Many years ago a settlor transferred land to a trust for his family by way of gift. He is now transferring for adequate consideration some further land by way of sale to the same trust.

The question is this. Will the fact that the settlor, who as the result of the sale has now a debt from the trust on which interest is payable, vitiate the previous gift for the purpose of estate duty in the settlor's estate ?

ANSWER : To answer this question one need only ask oneself two other questions. What was the subject-matter of the first transaction, the gift ? What was the subject-matter of the second transaction, the later sale ? The subject-matter of the first transaction was a parcel of land. The subject-matter of the second transaction was a different parcel of land. Therefore for death-duty purposes the second transaction cannot in any way vitiate the first transaction, the gift. After the lapse of such a long time it could not successfully be set up that the two transactions formed parts of the one and same transaction : *Commissioner of Stamp Duties* v. *Card* [1940] N.Z.L.R. 637 ; [1940] G.L.R. 384, *c.f. Gordon's* case [1946] N.Z.L.R. 625 ; [1946] G.L.R. 329 and *Robertson* v. *Commissioner of Inland Revenue* [1959] N.Z.L.R. 492.

The only statutory provision which evokes the inquiry is obviously para. (c) of s. 5 (1) of the Estate and Gift Duties Act 1955. That paragraph commences thus : " *Any property comprised in any gift* made by deceased at any time " etc. [illegible]ly property comprised in any gift in the instant case is the gift many years ago of the first parcel of land. Even if that gift is caught by s. 5 (1) (c) (it probably is not) it is comprised merely of the first parcel of land and cannot be affected by the present sale of the other second parcel : even if the second transaction were a *gift* and not a sale of the second parcel, it still could not be added to the first transaction so as to widen the scope of the first gift. This follows also from the definition of " gift " in s. 41 of the Estate and Gift Duties Act : " gift means *any disposition* of property " etc.

Land Transfer—*Conditions of Sale—Memorandum of Transfer—C. T. subject to " Frontage Minimum 40 Feet "—Effect of same—Land Act 1924, s. 16 (2)—Land Subdivision in Counties Act 1946.*

QUESTION : Our client has asked us to prepare Conditions of Sale for a contemplated sale by auction of a freehold section. On making a search of the title we notice that the District Land Registrar has with a rubber stamp noted the certificate of title " Frontage Minimum 40 Feet ". Will it be necessary to note this apparent restriction in the Conditions of Sale and in the subsequent transfer from our client to the purchaser at the sale ?

ANSWER : It will not be necessary to mention or note it in the Conditions of Sale or in the subsequent transfer. The position is that this restriction has now been covered by the Land Subdivision in Counties Act 1946. On request the Land Registry will note both the certificate of title and the appropriate folium of the Register Book, " Restriction Removed ".

X

SOME ASPECTS OF THE LAW RELATING TO MATERNITY PRACTICE *

In the present century great advances have been made in all branches of medicine and nursing. Marching alongside those advances, (or perhaps just a little behind) the law has adapted and applied its established principles to the changing conditions. Administrative law has played its part, and there is a mass of statute law and regulation applying to almost every field.

In this brief address I can only deal with the main questions as they occur to me, without boring and confusing you with detail.

Statutory Obligations

The first important statute is the Nurses and Midwives Act 1945. It is under this Act that your profession is established. The statute which gives the profession its being must be carefully studied and strictly observed.

I do not intend to deal with this statute in detail, but content myself by reminding you that under s. 33 of this Act, the Nurses and Midwives Board has considerable disciplinary powers, where any person registered under the Act has been convicted of an offence punishable by imprisonment which has dishonoured that person in the public estimation, or has been guilty of gross negligence or malpractice, or has been guilty of grave impropriety or misconduct, whether in respect of his calling or not.

This Act enables the Governor-General in Council to make regulations under the Act for various things, the most important of which are the prescribing of training and instruction, and prescribing conditions relating to the conduct of maternity hospitals, defining malpractice or negligence, and the like. These regulations are the Nurses and Midwives Regulations 1947, and the amendments thereto.[1]

Relevant Regulations

The regulations, relevant to the topic of this address, are those relating to appliances, requirements of practice, records and notifications, abnormal conditions in which medical help shall be sought, negligence, and malpractice.

Regulation 45 sets out the appliances which are to be carried by every midwife and every maternity nurse. It also provides for the sterilisation of instruments.

Regulation 46 sets out a number of requirements of practice. The regulation is too detailed for me to cover, but it can be summarised by saying that it provides detailed requirements for cleanliness and asepsis, the prevention of examinations except under the explicit directions of a medical practitioner, and only where necessary, essential requirements as to what must be observed in the conduct of the case, the prohibition, (except in emergency), of attending a patient unless a medical practitioner is in charge, and the need to observe all other regulations which from time to time may be issued by the Minister or the Board.

Regulation 47 sets out in detail abnormal conditions in which medical help shall be sought, and requires the midwife to state in writing the condition of the patient, and the reason for seeking medical aid.

Regulation 48 deals with records and notifications, and it is seen from the form in the Schedule that great detail has to be set out in the records. There is also a duty upon the midwife, if engaged in domiciliary practice, to instruct the parents of the infant of their duties as to notification and registration of the birth, and she herself has to notify the Registrar of Births on each occasion on which she is present at a birth. Other notifications have to be made by the midwife to the Medical Officer of Health where a child has been still-born, or where the death of the mother, or the infant, occurs before the attendance of the registered medical practitioner.

A most important regulation is Regulation 49 which states that any midwife or maternity nurse who commits a breach of the Regulations to which I have already referred shall be deemed to have been guilty of an act of negligence in respect of each such commission or omission respectively. To this Regulation must be extended Reg. 50 which deals with malpractice. It provides that no midwife or maternity nurse shall administer chloroform except in the presence of, and under the express direction, of, a medical practitioner. It also prohibits a midwife or maternity nurse from using any instruments to aid delivery, or from administering any ecbolic drug before or during labour, or administering any sedative drug or any anaesthetic other than chloroform except by the express direction of a medical practitioner in each individual case. Failure to observe this regulation is deemed to be malpractice in respect of the nurse's calling.

The observance strictly of these regulations is most important as will be seen when I deal with the next topic.

General Principles of Liability to Pay Damages

Where damage by way of personal injury has been suffered by the mother or the child, there may be a liability to pay damages for such injuries. Such a liability arises from the breach of the duty of care—in other words from negligence. Negligence may arise either out of the breach of statutory duty (the failure to observe the regulations to which I have already referred), or to a breach of the general duty of care which a doctor or nurse owes to his or her patient, and to the child who is being born.

Death of Mother: If the mother dies as a result of statutory negligence, or negligence in the broader sense, there is an action available to those who have lost by her death under the Deaths by Accidents Compensation Act 1952. The measure of damages is the pecuniary loss which has been suffered by the plaintiff. In the case of a father, he can sue for the

*Text of an address given by Mr E. S. Bowie, of Christchurch, to the medical and nursing staff of St. Helen's Hospital, Christchurch.

[1]The Nurses and Midwives Regulations 1947 and amendments; (S.R. 1947/60: 1950/151: 1952/48: 1955/81 reprint: 1958/92).

loss of services of his wife to himself and the family. In the case of a child there could be a claim for the pecuniary loss which attaches to the services of the mother to her child. No damages under this Act are recoverable for emotional loss, but only for the actual money value of the services or other pecuniary benefits which have so been lost. If, however, a mother has been working, and would have resumed her occupation, damages could include the loss of such amount as the mother had been subscribing to the general upkeep of home and family, and what might be expected by way of benefit from her savings.

Injuries to the Mother: Here there can be two types of action, the first, by the father for the loss of the services of his wife if the injury has resulted in her being unable to carry on her household duties. The second type of action is by the mother herself, who can sue for pain and suffering, and for any permanent disability which has resulted from the negligent act.

Death of the Child: Here there is no action (except possibly where the death has caused physical injury from nervous shock to the mother). That, however, is essentially an injury to the mother, and is covered by the earlier heading. There is no property in a child, and even though the death has occurred from negligence, there is no action vested in the parents to recover damages for loss of that child. The only damages which could be recovered would be the funeral expenses. Any claim for loss of prospective services of the child would be to too speculative and remote.[2]

Injury to the Child: Here the action would be taken in the name of the child. Strangely enough, there is a paucity of authority as to whether a child can take action for injuries done to it before its birth. Despite the lack of authority, at least two learned authors have expressed the opinion that there is no reason why a living plaintiff should not have the right to claim damages where he has been injured by acts done before his birth.[3] In one Canadian case,[4] a mother was injured when she was seven months pregnant. Two months later her child was born with a club foot. The verdict of the jury, which awarded damages, was affirmed by the Supreme Court of Canada.

It is perhaps significant that very few of such actions have been before the Courts. This may be due partially to the fact that the parents are unaware of any negligence and secondly because of the difficulties of proving the causal connection between the negligent act and the injuries which have been suffered by the child. Once however, such negligence is established, and the causal connection between the negligence and the injury is established, the damages which might be recovered could be very substantial. There was one case in England last year[5] where a boy aged 20 months was injured in a road accident. He became mentally defective, and while he might go into a private institution in the first instance, in a few years he would probably have to go into a state institution for mental defectives. He would never be able to earn his living. Damages were assessed at £11,000 and the Court of Appeal held that the infant should be compensated for expenditure for extra help in the home and sending him to a private institution. He should also be compensated for loss of the amenities of life, such as loss of opportunity to marry, to earn his living and enjoy life, whether he knew or did not know he had lost those amenities. The Court further held that the following factors should be ignored: The reduction in the infant's expectation of life and the probability that a large part of the award of damages would never be expended by or on behalf of the infant.

Who may be Liable?

Until 1936, there was some doubt whether the hospital would be liable for the professional negligence of a doctor or a nurse. These doubts were closely examined by the Court in a case which was decided in 1935,[6] and in 1936, the Legislature passed legislation which resolved those doubts. That legislation is now to be found in s. 86 of the Hospitals Act 1957. It provides that where damage is suffered by any person as a result of any wilful or negligent act or omission of any medical practitioner, matron, nurse or midwife (and others) employed or engaged (whether in an honorary capacity or otherwise) by any Board and acting in the course of his or her employment or engagement, an action in respect of the damage shall lie against the Board by or on behalf of the person suffering the damage, and in any such case the Board shall be liable in the same manner and to the same extent as if the damage had been caused by an act or omission of a servant of the Board acting in the course of his employment. Where, as in the case of your hospital, it is a public hospital which is being sued, the hospital will be liable if the negligence is established even though the negligence is by a doctor acting in an honorary capacity. It will also be liable for the negligent acts of nurses whether or not they can be said to be strictly performing the acts in a professional capacity.

The position is different in the case of a private hospital, at least in regard to the liability for negligent acts of doctors. The doctors, in the private hospitals, are not acting under any contract of employment, but the theatres in the hospital are allowed to be used upon licence by those doctors. It would probably be otherwise in the case of negligence on the part of nurses in private hospitals, as they are engaged by and paid by the hospital itself. In this respect there may have been a change in the existing law.

In a case in England in 1909[7] it was held that a hospital would not be liable for the conduct of the hospital staff in matters of professional skill, as opposed to liability for the negligence of the servants in the performance of purely ministerial or administrative duties. The situation has, of course, changed radically in England by the nationalisation of hospitals, and in 1951 it was held[8] that if the patient himself selected and employed the doctor, the hospital authorities were not liable for his negligence but otherwise, (whether the doctor be a consultant or not), if he were employed

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[2] See *Cole* v. *Jones* [1958] N.Z.L.R. 699 where the authorities are fully considered.

[3] *Salmond on Torts*, 12th ed., 74: *Winfield on The Unborn Child* (1942) 8 *Camb. L.J.* 76, 89.

[4] *Montreal Tramways* v. *Leville* [1933] 4 D.L.R. 337.

[5] *Oliver* v. *Ashman* [1960] 3 All E.R. 677.

[6] *Logan* v. *Waitaki Hospital Board* [1935] N.Z.L.R. 385; [1935] G.L.R. 421.

[7] *Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820 at pp. 828-829.

[8] *Cassidy* v. *Ministry of Health* [1951] 1 All E.R. 574; [1951] 2 K.B. 343.

and paid by the hospital authorities the hospital authorities are liable for his negligence in treating the patient. This case, and another,[9] are authorities for the proposition that the hospital is liable for negligence of its nurses who are employed by the hospital. The distinction earlier made between professional nursing duties, as opposed to ministerial or administrative duties, is likely in future cases not to be observed. The distinction appears now to be accepted as an unreal distinction. While, therefore, a private hospital will not be liable for the negligence of a doctor, not employed by the hospital, the hospital is likely to be held liable for the negligence of a nurse, (unless specially engaged and paid by the patient).

Apart from the liability of the hospital, the person who is actually negligent is of course liable for the injury. A doctor, a matron, a nurse, or a midwife, who is in breach of the duty of care is liable jointly with the hospital for any damages which may ensue. Even if the hospital is sued alone, it would be competent for the hospital to recover from the person whose negligence actually caused the damage, all damages which the hospital has been held liable to pay.[10] This must be qualified by saying that there may be cases where the responsibility lies partly on the doctor or nurse and partly on the hospital. In one case in England[11] an anaesthetist administered pentothal after a patient had been partially anaesthetised by nitrous oxide and oxygen. This was held to be negligence. The patient died, and in an action by his widow the Court held that the anaesthetist was negligent, but the hospital was also negligent. The hospital's negligence consisted of negligence on the part of the senior surgeon employed by it, but also on the part of the hospital in entrusting the administration of the anaesthetic to an inexperienced doctor without adequate supervision. The anaesthetist was held liable as to one-fifth of the damages and the hospital as to four-fifths.

The Standard of Care

Except where there is a direct breach of the regulations, and consequently there is statutory negligence, the standard is that of reasonable care. There is no liability just because things go wrong. There is liability only where there is a breach of the duty of care which causes the damage. That is a breach of the duty to observe the standard which is expected of the particular person who is claimed to have been negligent. The standard may vary in application as to whether the person is a doctor, a nurse, a specialist or some other person. The standard is the same in all cases (that of reasonable care) but it may differ in application as to the person who is being accused of negligence. For example, a general practitioner will not have the same standard applied to him as would be applied to specialists in a particular field. A nurse would not have the same standard applied to her as the standard which would be applied in the case of the general practitioner. It all depends on what was the reasonable standard to be expected of the person in respect of whose duty negligence is alleged.

It has sometimes been said that the onus of proof has been put upon the hospitals, and the doctors and not on the plaintiff who is suing. This however is not the case. The Courts require the plaintiff to establish negligence. There are, however, some cases where the very damage speaks for itself. In those cases the law does say there is *prima facie* negligence, and where that is established by the happening itself, the onus of establishing that there was no negligence shifts to the defendant. This is quite a reasonable approach. If a patient goes to a hospital for an operation on an eye, he does not expect to come out with severe damage to a leg caused by some negligence on the part of the hospital or its staff. He may not be able to establish the precise negligence. In such a case the hospital is put upon its defence to establish that the injury was sustained without negligence on the part of the hospital or its servants.

In 1954[12] two patients were operated upon in a hospital. A spinal anaesthetic was injected. The anaesthetic was contained in glass ampoules which were, before use, immersed in a phenol solution. The plaintiffs developed permanent paralysis from the waist down. It was established that the injuries were caused by the anaesthetic becoming contaminated by the phenol, which had percolated into it through molecular flaws or invisible cracks in the ampoules, and that at the date of the operations the risk of percolation through molecular flaws in the glass was not appreciated by the competent anesthetists in general. The Court held that having regard to the standard of knowledge to be imputed at the particular time, the anaesthetist could not be found to be guilty of negligence. Accordingly the plaintiffs were unable to succeed. This case illustrates the attitude of the law by showing that even in a case where one would clearly suggest negligence in the first instance, the defendants were able to show that the accident, though disastrous to the plaintiffs, was not caused by any negligence on their part. The types of action are of course manifold. Actions have been taken for swabs left in the patient in a surgical operation,[13] forceps found in a patient following a surgical operation, where the presence of the forceps has not been discovered[14] and the contraction of puerperal fever by a patient, where there had been earlier cases of puerperal fever in the hospital.[15] In this last case, which is of particular importance to you, the Court held that the hospital or its staff knew or ought to have known that in admitting the plaintiff to the hospital they were exposing her to the danger of infection, and the hospital was consequently negligent in not duly warning the patient of the existence of that risk.

By way of contrast to the case of the anaesthetic resulting in paralysis, there was the case of a plaintiff who was suffering from contraction of the fingers of his hand. After operation bandages were applied, and, on the removal of the bandages, all four fingers of the plaintiff's hand were stiff, and the hand was practically useless. In that case it was held that the evidence showed a *prima facie* case of negligence, and the Ministry of Health was liable for the negligence of the staff of the hospital.[8]

(To be concluded)

[9] *Gold* v. *Essex County Council* [1942] 2 All E.R. 237; [1943] 2 K.B. 293.

[10] *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] 1 All E.R. 125; [1957] A.C. 555.

[11] *Jones* v. *Manchester Corporation* [1952] 2 All E.R. 125; [1952 2 Q.B. 852.

[12] *Roe* v. *Ministry of Health* [1954] 2 All E.R. 131; [1954] 2 W.L.R. 915.

[13] *Mahon* v. *Osbourne* [1939] 1 All E.R. 535; [1939] 2 K.B. 14.

[14] *MacDonald* v. *Pottinger* [1953] N.Z.L.R. 196; [1952] G.L.R. 623.

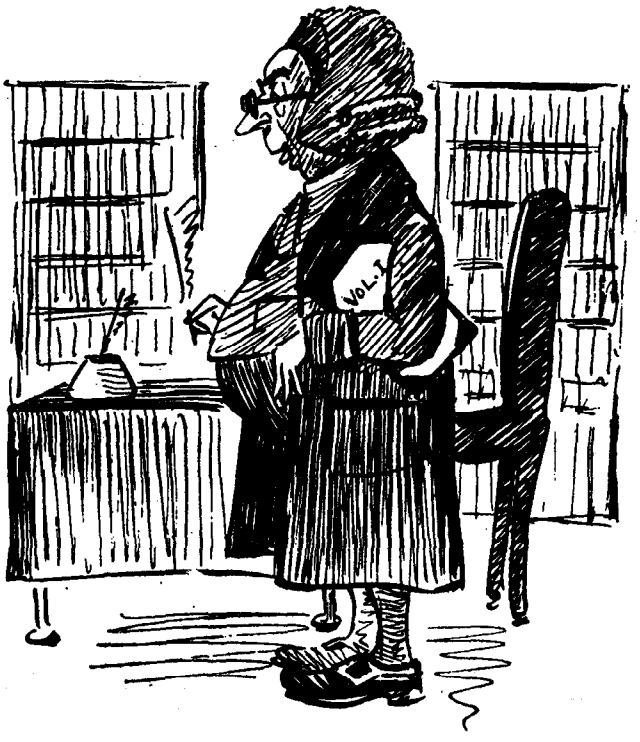
[15] *Lindsey County Council* v. *Marshall* [1936] 2 All E.R. 1076; [1937] A.C. 97.

FORENSIC FABLE

By "O"

The Deaf Reporter, the Diligent Young Counsel, and the Glorious Win

There was Once an Old Gentleman who Practised as a Special Pleader in the Early Part of the Eighteenth Century. Being Very Deaf and Extremely Stupid, he Thought he would Take to Reporting. His Reports, by Reason of his Above-Mentioned Disabilities, were Shockingly Bad. As his Contemporaries Knew that the Old Gentleman Heard One Half of the Case and Reported the Other, they Paid No Attention to his Efforts. When the Deaf Reporter had Produced One Volume he Passed Away, much Regretted by his Laundress, to whom (according to Some) he was Secretly Married. Two Hundred Years Rolled by,



and a Diligent Young Counsel, who was Accustomed to Go to the Root of Things, Unearthed the Forgotten Volume. To his Joy he Discovered therein an Authority which Exactly Fitted the Difficult Case he had to Argue on the Morrow in the County Court. The Startling Proposition Contained in the Head-Note was Due to the Fact that the Deaf Reporter had Omitted the Word "Not" when Taking Down the Observations of Mr Justice Punt in the Court of Common Pleas. The Diligent Young Counsel Waited till the County Court Judge Showed Signs of Wobbling and then Loosed Off his Splendid Find. The County Court Judge, who was Anxious to Catch his Train, was in no Critical Mood. Thus the Diligent Young Counsel had a Glorious Win and Sowed the Seeds of a Large and Lucrative Practice.

Moral—*Si Auctoritatem Requiris Circumspice.*

PERSONAL

Judge William Field Porter, of the Maori Land Court died suddenly in Whangarei on 27 May at the age of 61. Before his appointment to the Maori Land Court, Judge Porter practised law first in Auckland with the late Mr John Alexander, and later as a partner in the Wairoa firm of Messrs Lush, Willis, Sproule and Woodhouse. He also acted as legal officer to the State Advances Corporation. On his appointment to the Land Court in 1958 he went to Whangarei where he remained until his death. Judge Porter is survived by his wife and a son and daughter.

After nine years' service on the Maori Land Court in the Poverty Bay district, Judge Norman Smith, of Gisborne has transferred to the Rotorua registry of the Court. He moved from Gisborne last month.

Mr John Phillips was admitted as a solicitor by Mr Justice Turner on 2 June 1961 on the motion of Mr B. H. Slone.

Mr L. F. Moller of Auckland has been appointed to be a member of the Rules Committee to hold office until 31 December 1963. Mr Moller replaces Mr Justice Leicester who resigned from the Committee on taking up his appointment to the Supreme Court Bench.

Mr R. W. Roussell was on 21 June admitted as a barrister and solicitor by Mr Justice Haslam in the Supreme Court at Wellington on the motion of Mr C. F. Atmore of Otaki.

Mr S. R. Duncalf was admitted as a solicitor by Mr Justice Turner in the Supreme Court at Auckland on 9 June on the motion of Mr D. B. Pain.

Mr John Fernyhough of the Law Faculty of the Victoria University of Wellington has been awarded a British Commonwealth Fellowship and a Fulbright Travelling Grant. Later in the year Mr Fernyhough will be leaving for the United States of America and will attend the University of Chicago for one academic year. His object is the degree of Doctor of Laws. After completing this course of study Mr and Mrs Fernyhough will be visiting Great Britain.

STATUTORY REGULATIONS

Detention Centres Order 1961 (1961/53). Declaring that ss. 16, 16A and 17 of the Criminal Justice Act 1954 (s. 4 of the Criminal Justice Amendment Act 1960) shall come into force on 1 June 1961 in respect of male offenders sentenced by Courts in the North Island.

Natural Love and Affection —"Although cries of protest and emotional outbursts in support of the prisoner are not uncommon in criminal Courts when sentence is pronounced, there was an unusual disturbance in a recent case at Sheffield when a lorry driver was sentenced to six months' imprisonment. A woman rose from her seat and applauded, but this action does not defy explanation. The woman was the prisoner's mother-in-law!" (1961) 105 S.J., 390.

UNTO CAESAR—WHAT?

Some years ago Advocatus was second in command of a company on active service. One day his company commander, whom we sometimes remember as Bricky, was promoted to the rank of Major, and Advocatus offered our perfectly insincere compliments. Next morning, however, even these compliments seemed overdone when Bricky blasted us for not saluting him properly in semi-private. Since then we have always endeavoured to render to Caesar what is due to Caesar, remembering however that someday, as *Nesfield* says, " Even Caesar dead and turned to clay, may stop a hole to keep the wind away."

These thoughts came to us because of a recent lapse on our part. We visited a golf tournament and as we got out of our car we noticed casually the secretary with a neatly dressed man apparently 10 years our junior. Very few of our acquaintances on the golf links answer to this description, so while making our way towards the secretary, we transferred our attention to the men on the 18th green. When we reached the secretary we found that his well dressed companion was one of Her Majesty's Judges—a contemporary and a friend. It was much too late to salute so we shook hands and sat down in the sun. For a while we talked of cabbages and kings—for a while, as Wordsworth has it, we talked " of far off happy things and battles long ago ".

The secretary drifted off but presently returned and said that Mr Justice X would be in shortly and would we like to lunch with him. Our companion pointed out that X and he met frequently, and it was probable that X for the day would enjoy the company of his golfing four.

This interested Advocatus and, as we sat in the sun, Advocatus watched the learned members of our profession come up and say " How do you do " to our companion and pass on. Even the most exalted members were obviously and properly much more interested in their golf than in any stray tournament visitors, and Advocatus wondered whether in New whether in New Zealand we treated our Judges correctly. He (the Judge) probably would have been interested in what happened at the thirteenth.

We remember some thirty years ago chatting to a comparatively young man who shortly afterwards was elevated to the Bench. His complaint was that he had worked hard all his life and now, when he might sit back and enjoy the companionship of his fellow-man, threatened elevation to the Bench would again cut him off from his contemporaries. We had been his captain in the second fifteen and we used language normally confined to the front rank of the scrum to combat this idea, but he merely sighed and told us that we wouldn't understand. It did remind us of our nurse. We told him of Low's cartoon when Billy Hughes, Prime Minister of Australia, went to England in 1918. Off stage Hughes was noted among other things for taking his hair down so as to get acquainted. The cartoon showed Hughes and George V turning over a pile of Bulletins and the caption read :

" Did you hear that one about . . ? "

We told him that Hughes's only human failure was Woodrow Wilson.

In many ways the British Regular Army sets a social standard with its work and its responsibilities neatly subdivided and equally neatly interwoven. It would be hard to find a body which sets higher store on the personal dignity of its senior members, at the same time demanding (and receiving) an equally high standard of conduct from those senior members. In a Regular Army Mess the Colonel of the regiment is at all times addressed as " Sir " so long as he remains the Colonel. On his elevation to say Brigadier then, with his contemporaries of higher or lower rank, he reverts to his given name Joe. His second in command Major Montmorency—recognised as a martinet on parade—must be addressed in the mess by even his youngest subaltern as " Ginger ", the name he has carried since his school days. Even in the New Zealand Army this habit of mind is not unknown. Once, at a cross-road in Flanders, we flagged what we thought was as empty car. To our horror it contained a temporary brigadier who had taught us at school and who, recognising the position (and the flagger), called out, " Sorry, Advo., I'm going the other way."

Which brings us back to our starting point: In New Zealand is it the Bench or the Bar that is responsible for the wide social gap that undoubtedly exists between two groups of educated—sometimes even cultured—gentlemen ? We expect our Bench to remain human. Do we as individuals help or do we dodge round the first corner ?

When we were very young we were told that the art of a good conversationalist is to be a good listener. Perhaps because of their daily occupation by this test Judges are usually good conversationalists, but, if his family is to be believed, Advocatus has certain habits that so far have prevented him from making the grade. This may or may not affect the attitude of members of Her Majesty's Bench towards us. We would hate to walk down a street, say in Rotorua, where we were both unknown with a Judge who was so awkward as to say we might walk with him, but on the other hand we are sufficiently a snob to be pleased if we were asked to accompany him.

We recently acted as host to an ex-Attorney-General who visited our town. He had been knighted for his service overseas. He did not want to leave our town without first calling on a friend of 45 years ago. In those days this friend had been a blacksmith but they had both played in the backs for the Auckland reps., and when they met, did they enjoy themselves.

ADVOCATUS RURALIS.

A Relevant Question ?—" What the case was really about was noise arising from the keeping open of a fish and chips shop after 11 p.m. This caused some merriment in Court. Harman L.J., asked the defendant's counsel: ' Do you think it desirable to encourage the eating of fish and chips at 11.45 at night ? I should think it most indigestible. The medical officer of health should look into it. I think it's perfectly awful !' "—(1921) 125 J.P. 214.

TOWN AND COUNTRY PLANNING APPEALS

Sullivan and Others *v.* Stratford Borough

Town and Country Planning Appeal Board. Stratford. 1960. 6 May.

Proposed District Scheme—Land adjoining proposed new railway station designated as reserve—In accordance with town-and-country-planning principles—Application for order for taking of land—Reserve not to be created in immediate future—No imminent change in use of land—Application declined—Town and Country Planning Act 1953, s. 47 (3) (b).

PART I

Appeals under s. 26 of the Town and Country Planning Act 1953. As they all related to the same proposal, and the appellants owned adjoining properties, they were, by consent of the parties, heard together.

The respondent Council's proposed district scheme, as publicly notified, designated a strip of land having a depth of approximately 150 links and bounded by the New Plymouth-Wellington railway, Warwick Road, Broadway South and Romeo Street as a proposed reserve. There were nine sections in this strip of land being Town Sections 768 to 776, both inclusive. The appellant Sullivan owned four sections, Nos. 768-771 both inclusive; the appellant Eagar owned Sections 773 and 774; the appellant Allan owned Section 775 and the appellants Meads owned Section 776. Section 772 was a vacant section which was owned by the respondent Council. The appellants lodged objections to this zoning and when their objections were disallowed they appealed.

J. H. Sheat, for all appellants.
Till, for the respondent.

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

1. The present occupancy of the lands under consideration is predominantly residential in character although the appellant Sullivan also has a workshop on his property as well as a residence and the appellant Eagar has a shop in addition to his residence. The land on the eastern side of these properties is owned by the Railways Department and that Department is at present in the process of shifting its shunting yards from the centre of the town to the southern end of the town adjacent to the properties of the appellants. It is also proposed to shift the Railway Station from its present site to a site just north of the appellants' properties.
2. The purpose of zoning this land as a proposed reserve is that at some future date the respondent Council intends to convert this narrow strip into a reserve with lawns, shrubs and plants. This proposed development is intended to make the southern entrance to the town more attractive to both rail and road travellers, and also to make provision for parking near the new Railway Station. When the Railway Station is established on the new site and the new shunting yards are in operation, the effect will undoubtedly be to detract from the amenities of this area as a residential one. The Board considers that the Council's proposal to use this strip of land as a reserve in the future is in accord with town-and-country-planning principles, and constitutes a proper use of the land in the future.
The appeals are disallowed.

PART II

At the hearing, each of the appellants filed a written application asking for an order under s. 47 (3) of the Act directing the Council to take their land under the provisions of the Public Works Act 1928. These applications call for consideration and interpretation of this difficult section.

If the appellants are entitled to the orders sought, they are entitled only by virtue of the provisions of subs. (3) (b), that is to say, that the scheme will prevent future use of the land for every purpose consonant with the vicinity for which the owner or occupier, but for the scheme, could lawfully have used it without detracting from the amenities of the neighbourhood.

In preparing Town Planning Schemes, Councils are required to plan for future development over a period of 20 years. It follows, therefore, that when it first publishes its scheme, the scheme or the relevant plan should indicate not only the Council's present or immediate intentions, but also what it envisages as the future needs of the district under consideration. It follows, therefore, that the scheme and the relevant plan must indicate the Council's proposals for the development of the area, and it must do so with sufficient clarity to inform residents and ratepayers of what its intentions are. In these particular cases the evidence is that the respondent Council has no present intention of interfering in any way with the appellants' properties, or with their right to continue the use and enjoyment of them. The Council's intention is to make provision now for the time when the existing buildings have reached the end of their useful life.

In determining whether or not the order should be made under this section, the Board is directed in mandatory terms by subs. (4), to have regard to the imminence or otherwise of any change in the use of the land. The only way in which the Board can construe this part of the section is by saying that if the respondent Council proposed to create a reserve in this locality in the more or less immediate future, then the appellants would be entitled to the order sought, but if, as is the case here, the Council's proposal is one that is not likely to be given effect to except at some distant date, then there is no imminent change in the use of the land and the appellants would not be entitled to the order sought.

Counsel for the respondent Council drew attention to the provisions of s. 44 (5) (d). Section 44 is the section dealing with the right of persons injuriously affected by a scheme to claim compensation. Subsection (5) (d) provides that compensation shall not be payable under that section in certain cases, one of them being:

"(d) By reason merely that any District Scheme shows, whether in the context thereof or in any map or plan relating thereto,
(i) . . .
(ii) Any proposed public reserve or open space."

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

The applications are accordingly declined.

Appeals dismissed.
Applications declined.

Thomson *v.* Christchurch City Council

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

Zoning—Land zoned Commercial B in residential zone—Owned by Caledonian Society—Part used for hall for functions and dances—Re-zoned Residential B with direction that hall be allowed as conditional use subject to such restrictions as local authority might impose to minimise interference with amenities of residential neighbours—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant was the owner and occupier of a residential property containing 20 pp. situated at No. 132 Peterborough Street. This property adjoined a property known as Nos. 128 and 130 Peterborough Street owned by the Canterbury Caledonian Society. Under the respondent Council's proposed district scheme, as publicly notified, the Canterbury Caledonian Society's property was zoned as Residential B. The society lodged an objection to this zoning, claiming that its property should be zoned as Commercial B. The appellant lodged a cross-objection to the society's objection. After the hearing of the objections, the Council allowed the objection in part by zoning the southern half of the property in question as Commercial B and the northern half, with a

(Continued on p. 208)

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Law and Morality—The gap between ethics and law appears to be a growing one with commercial development. This was recently emphasised by Sir Patrick Devlin in an address to Birmingham University. Sir Patrick said that he thought it a pity that the distinction between the criminal and the quasi-criminal had become blurred. In his opinion, this had damaged the law and would have done so far more were it not that the ordinary man still retained the distinction in his mind, but he could not be expected to do so forever if the law jumbled morals and sanitary regulations together and taught him to have no more respect for the Ten Commandments than the woodworking regulations. The commentary in an English Law magazine is that "we hazard the suggestion that a wilful breach of the woodworking regulations or of many sanitary regulations is as morally reprehensible as a breach of some at least of the Ten Commandments. However, the real trouble is that our values are confused. Morality has not marched as fast as science."

A Clean Sweep—The following was an exchange in the Supreme Court at Hamilton recently.

Counsel: "How many rooms are there in this bach of yours?"

Witness: "Two".

Counsel: "What are they?"

Witness: "One hard, one soft."

Hardie Boys J. (somewhat puzzled): "One hard, one soft? I do not quite follow."

Witness: "Well, one hard for the concrete, one soft for the rest. Use them every day."

Hardie Boys J. repeats in a slow disbelieving tone: "One hard room for the concrete, one soft room for the rest?"

Witness: "Oh, you said 'rooms.' I thought you said 'brooms'."

Thereupon all judicial doubt appeared swept aside.

It Happened in England—A foxhound escaped from a pack and lived wild on a common for three months. The Master of Foxhounds made several sorties to catch the hound, and being unsuccessful, authorised a man named Cowper to kill it. At a time when the lambing season was approaching, Cowper found the hound asleep and shot it dead. Cowper was charged with maliciously killing the hound, but the charge was dismissed in the Lower Court on the grounds that Cowper had acted reasonably and not maliciously. However, on appeal, this decision was overruled and it was held that there was no legal justification for killing the hound as it had not shown any real danger to anyone or to property. The case of *Cresswell* v. *Searle* [1947] 2 All E.R. 730 was applied.

Justice from Heaven—New Zealand Law Courts are not the only Courts who are having their troubles in meeting the alarming increase in work. A committee was appointed in London in June 1958 to consider the speeding up of work in the Law Courts. They appear to be still considering the problem. One suggestion is that during the long vacation a "Flying Squad" of three Judges should swoop on various Assize towns to hold supplementary Assizes. The mental picture conjured up is very far removed from that of the static symbolic lady, blindfold and holding a pair of scales, who satisfied our leisurely and classically-minded forefathers, and rather suggests a hawk swooping from the skies, unerring, with beak and claws. After all, the hawk does give that on which he swoops the swiftest sort of decision as to its fate. He has speed and accuracy and that is what we are told is wanted in this day and age. Or perhaps, less symbolically, the judicial "Flying Squad" should be envisaged as three men in a helicopter brooding over the coloured counties of England and Wales—and Taranaki and Manawatu—scanning the landscape for signals of distress from cathedral towers and town-hall balconies, or blazing beacons on Cambrian mountain peaks, signifying that thereabouts were gaols bursting to be delivered, lest a miscarriage of justice might supervene. Viewing the signals from afar, they would descend with equal alacrity in the Close at Salisbury or the municipal playing fields of Manchester—or the plains of Taranaki—and set to work, there and then, on the emergency operation of bringing justice to birth. After a little practice, they could make it a parajudge operation, descending from the skies in billowing scarlet at the end of parachutes suitably emblazoned with the Royal Arms and other emblems of judicial authority. *Fiat justitia*; *ruat judex de coelis* might be the motto of the Queen's Flight Division of the Sky High Court of Justice.

"**A Tax On Thine House**"—It appears that some of our New Zealand barristers are finding some success in the writing of fiction. They may derive a certain amount of relief and pleasure from the recent decision of *Shiner* v. *Lindblom* (*Inspector of Taxes*) reported in [1960] 3 All E.R. 832. Mr Shiner is a well-known English actor and some years ago he purchased for £200 an option for the film rights of a novel. Eventually a film company produced the film and Mr Shiner received £4,000 for his rights. The question was whether Mr Shiner's profit was taxable. The Court held that, as Mr Shiner's sole source of income was his acting, the purchase price for the film rights did not form part of his remuneration in respect of his profession as an actor but was the realisation of an investment. Furthermore, it did appear that this was an isolated transaction and, therefore, the Court sympathetically informed Mr Shiner that he was not liable to income tax on the film rights.

Barrister in Dock—Recently in the Divisional Court in London the name of a barrister who was present wigged and gowned was called in a criminal matter. The barrister (a junior) rose to his feet to make an application on his own behalf. The learned Judge refused to hear him, directing him to make his application in person and not as counsel. The barrister left the Court and returned unrobed. He then made his application from the well of the Court.

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 206.*)

frontage to Peterborough Street, remained zoned as Residential B. The appellant appealed against that decision.

E. B. E. Taylor, for the appellant.
W. R. Lascelles, for the respondent.

The judgment of the Board was delivered by

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

1. The area in which the appellant's property is situated is zoned as residential and is predominantly residential in character and occupancy.
2. There can be no doubt that an extension of the society's buildings on to the southern half of the property under consideration would detract to some degree from the amenities of the appellant's residential property.
3. The evidence indicates that the residences in Peterborough Street do suffer some detraction from the amenities of the area by reason of some of the functions and dances which are held in the nearby Caledonian Hall. Such disturbance as does take place may arise in part from the conduct of patrons after they leave the hall but that is not a matter which can be controlled in any way by the Caledonian Society itself.

   Residents in residential areas such as this situated on the fringe of the centre of the city cannot escape some disturbance from the activities of people parking in the streets and going into the centre of the city to attend various places of amusement.
4. The relative Code of Ordinances permits, as conditional uses in Residential B zones, "places of public and private assembly". These are predominant uses in Commercial B zones.
5. The Board considers that an unrestricted use of the southern half of the society's property could well detract from the amenities of the appellant's home, but it has also given consideration to the useful function which the society's activities perform in the community life of the city. It is considered that the position can be reasonably met by allowing the appeal and directing that the southern half of the society's property be re-zoned as Residential B, with a direction that the society should be permitted to extend its buildings on to the southern half of its Peterborough Street property as a conditional use, subject to such restrictions as the Council may see fit to impose in order to minimise, as far as possible, any undue interference with the amenities of the residential neighbours.

The appeal is accordingly allowed.

Appeal allowed.

De Thier and Another *v.* Christchurch City Council.

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

Zoning—Land zoned as rural—Abutting urban fence line—Special position of Sumner as a separate entity—Need to provide for needs of citizens wishing to live near sea—Principles applicable—Town and Country Planning Act 1953, s. 26.

Appeals under s. 26 of the Town and Country Planning Act 1953. As they related to adjacent properties and to the same provision of the respondent Council's proposed district scheme, they were taken together. The first-named appellant was the owner of two properties:

(a) All that piece of land comprising 16 acres 1 rood 15 perches being Lots 6 and 7 on Deposited Plan 17405 and part Rural Sections 204 and 744, and

(b) All that piece of land containing approximately 6 acres being the balance of Lot 16 on Deposited Plan 17015, part Rural Sections 204 and 744.

The second-named was the owner of two properties:

(a) All that piece of land containing 5 acres 1 rood 3.2 perches or thereabouts, being the balance of Lot 6 on Deposited Plan 17015, part Rural Sections 204 and 744, and

(b) All that piece of land containing 18 acres and 24.7 perches or thereabouts, being part Rural Sections 21418 and 3987 and Lots 2,11 on Deposited Plan 18691.

These properties were all zoned as rural under the Council's proposed district scheme, as publicly notified. The appellants lodged objections to this zoning, claiming that their land should be zoned as residential. Their objections were disallowed and the appeals followed.

Hill, for the appellants.
W. R. Lascelles, for the respondent.
A. C. Perry, for the Regional Planning Authority.

The judgment of the Board was delivered by

REID S.M. (Chairman).

1. The lands under consideration all abut on to the urban fence line and are situated, generally speaking, in that part of Sumner at the immediate foot of the Lyttelton-Sumner Road. They have frontages, generally speaking, to that road, to Ocean View Terrance and access to Wakefield Avenue.
2. When the appeal came to hearing, the appeal of the second-named appellant, in so far as it related to the area of 18 acres and 24.7 perches, was amended to relate only to an area of approximately one and one-half acres lying to the south of the urban fence and abutting on to residential sections having frontages to Ocean View Terrace and Heberden Avenue.
3. The Council, in its reply, submitted that the land under consideration, being within the rural zone of the Regional Planning Authority's operative District Scheme, it was by virtue of the provisions of s. 4 of the Act, required to adopt that zoning. The Council, itself, also considers that the zoning is appropriate and that sufficient land has been set aside under the scheme for residential development.
4. The Regional Planning Authority opposed the appeal on the grounds that the urban fence line was determined by this Board by its decision in the Appeal No. 21/59, *Christchurch Regional Planning Authority* v. *Waimairi County Council* (unreported) and that since that decision other appeals seeking an extension of the urban fence at various points have failed and that as a matter of town-planning principle, the urban fence line must be maintained inviolate until such time as it is due for review. The Board agrees with that submission in general terms, but the decisions referred to did not touch in any way upon what may be described as the local area of Sumner. The appeals that have been disallowed have not related to this area.
5. As was submitted by counsel for the appellants, although Sumner is administratively one with the City of Christchurch, it is in many respects still a separate entity. It is separated from the main city area by a wide area of rural zoning and though there may be sufficient land set aside for residential purposes in the city area as a whole, it may well be that insufficient land has been set aside to allow for the natural growth of Sumner regarding it as a separate entity.
6. There is evidence that there is an unfilled and strong demand for sections in Sumner and that there is no other building land of this type available in the area.
7. The Board considers that Sumner, from a town-planning angle, can reasonably be considered as a separate entity and some provision should be made to meet the needs of those citizens who may wish to live in reasonably close proximity to the sea. There is also evidence that in so far as the land under consideration is concerned having access to Wakefield Avenue, the land rises gently towards the hill on the western side until the last few chains, where there is a very steep rise to Captain Thomas Road, and part of it at least, by reason if its topography, would not be suitable for residential occupation. Topographically this land in the main is suitable for residential occupation, and it appears to have little value now for any other purpose. All normal services—high pressure service, sewer and electric power—are available.
8. In all the circumstances, the Board considers that a case has been made out by the appellants for some relaxation of the urban fence line in this particular special locality. Both appeals are allowed in part, that is to say, the land owned by the appellant W. de Thier and first described above having access to Wakefield Avenue and the adjoining block owned by G. de Thier first hereinbefore described as his property, are to be re-zoned as Residential A back to a line to be drawn parallel with and below Captain Thomas Road to a depth of two chains from that road, and returning along the southern boundary of Lot 6, Deposited Plan 17405 to the original urban fence line. The appeals are disallowed in respect of the other lands referred to.

Appeals allowed in part.