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JUST RAMBLING ON

AT a time when no special topic is offering on which an article is called for, it seems appropriate to make some brief reference to a number of disconnected subjects which have come to our attention during the last few weeks, but which do not individually, at this stage at least, warrant a separate article. In regard to two of these subjects—namely, the Ombudsman and the Bill of Rights, legislation is pending but has not yet been introduced. It may be available by the time this issue reaches our subscribers, in which case we may have further comment to offer, and we even face up to the possibility of having to eat some of our words.

The Ombudsman

The appointment of an official to carry out the functions of an Ombudsman has been the subject of discussion for some months now, and the Government announced that it accepted the proposal "in principle". There has obviously been a great deal of confusion and loose-thinking in some quarters as to what the powers and functions of such an official would be, but to some at least he appeared to be a final appeal authority from the administrative decisions of Government Departments and Ministers of the Crown. The generally accepted idea seems to have been that any person aggrieved by such a decision could go to the Ombudsman, who would put the matter right. We now see how far from the facts this idea has turned out to be.

A moment's thought would have shown that the creation of an office, the holder of which would have such wide powers, was both impracticable and undesirable. The Government is elected to govern the country and proper government would become impossible if decisions could be over-ruled in this manner. The vesting of such wide-reaching powers in one person, and we may add, a person not responsible to the electors, would be a negation of all the principles of democratic government.

Even apart from these considerations, it is to be assumed that the jurisdiction of the Courts would not be restricted, so that, where the complaint was based on some lack of jurisdiction or other legal defect in the decision, the appropriate remedy would still be available in legal proceedings. This would then leave for the Ombudsman the practical aspects of decisions, with particular reference to considerations of equity and justice. On such matters the opinions of reasonable men may differ widely, especially when there is to be weighed in the balance the advantages to the public of a certain line of action against the hardship which would be imposed on an individual by its adoption. Obviously, then, the Ombudsman's power must be restricted to the investigation of complaints and the recommendation of remedies.

The Government's proposals on this topic were released by the Attorney-General recently, and have been well publicised. It is intended to appoint a Parliamentary Commissioner of Investigation who would be an officer of Parliament with similar protection to that enjoyed by the Controller and Auditor-General, his powers being "to review acts and omissions and decisions of State agencies". He would have wide powers with Departmental records and could question public servants on oath. Generally speaking, he would decide what was reasonable and make a recommendation to the Department concerned. If no remedial action is taken he could report to the Minister concerned and, if the Minister would not act, he could report to Parliament and his report could be discussed on the floor of the House.

Frankly, we regard the proposals as a very damp squib. The Minister is reported as saying that, although the Commissioner would have no power to alter a decision, it was expected that his suggestions would be adopted. The Minister does not say why he holds this expectation when so often the recommendations of Parliamentary Committees, made after at least as complete an investigation as that to be carried out by the Commissioner, are completely disregarded by the Government of the day. Is the Commissioner then to have a higher status than a Parliamentary committee? That would, in our opinion, be unthinkable.

There are two important points on which this idea of a Commissioner stands or falls. The first is the ability and integrity of the person appointed to the office. So far we have heard nothing of any special qualifications required by the appointee, and this is a vital matter. We may be somewhat biased towards our own profession, but we can think of no better qualification than that required for appointment to the Supreme Court Bench. The second point is the extent to which the Government will follow the Commissioner's recommendations, and this applies, of course, not only to the present Government, but also to its successors. As we have said, our outlook on this point is not hopeful.

Another matter which has been left open is the effect of the appointment of this Commissioner on the citizen's right to petition Parliament. Is the appeal to the Commissioner to replace that right? If not, are the two rights to be concurrent? Or is the right to petition to be exercised only by those aggrieved either by the Commissioner's decision or by the fact that effect has not been given to it? We appreciate that the Minister's statement could not be exhaustive and that the answers to our questions may be in the Bill when introduced. If they are not, some amendment will obviously be required.

There are only two further comments we have to offer at this stage. First, according to the Minister's statement, the Commissioner will have power to examine public servants on oath. We suggest that, to give full effect to the intention behind the scheme, this power should be extended to the examination of *any* witness, whether a Government employee or not. Secondly, we adopt Mr Moohan's comment in the House that the Commissioner is going to be "a busy young fellow". May he not also become "a frustrated young fellow"!

The Bill of Rights

Mr Nigel Wilson Q.C., of Auckland, is reported as having told the annual meeting of the Constitutional Society that the proposed Bill of Rights was a piece of "political eyewash" on the grounds that it would be of no greater validity, and would offer no greater protection, than any other statute on the books. Without necessarily concurring in the rather derogatory implication involved in the use of the term "eyewash", we agree entirely with Mr Wilson's conclusions.

Unless some means can be found of entrenching the provisions of the Bill against amendment or repeal, the enactment of the Bill must be regarded as a waste of time. We have already expressed the view, when writing on the subject of a Written Constitution, that any entrenching provisions would be ineffective, and we have found no reason to alter this opinion.

It may well be that the Government has the idea that, once the Bill of Rights has been enacted and found beneficial, the weight of public opinion will prevent its repeal or its amendment in any way which may curtail the liberties of the subject guaranteed by it. We have grave doubts whether this reasoning is sound. Whatever its weight may have been in the past, and we concede that at one time it was very powerful, public opinion has waned in its effect as has been evidenced by happenings over the last few years in New Zealand. Politicians have come to realise that it can be effectively expressed only at the triennial polls, and that the public have short memories. This is the sort of legislation that can do no harm. Whether it can do any good is problematical.

Royal Commission Into the Public Service

Two matters in connection with the setting up of this Commission occur to us as of interest to our readers. As to the personnel of the Commission, we welcome the appointment of Mr Justice McCarthy as chairman, and feel that our subscribers will wholeheartedly agree. A Commission of such importance obviously required a Judge as chairman and of all those available we say, with the greatest respect, that none possesses in greater degree than Mr Justice McCarthy the special attributes needed for the handling of this inquiry.

The second point on which we wish to comment is what we consider to be the Government's extraordinary handling of the Dunk Report. Sir William Dunk has already made certain comments and suggestions regarding matters now referred to the Commission. Had this report been published and the Commission *then* set up to report, *inter alia*, on those comments and suggestions all would have been well. But the Government has seen fit to go about the matter in the other, and, we say, the wrong way. It first appointed the Commission and laid down its Order of Reference. Only at that stage did it publish Sir William's report which to us savours of presenting the Commission with a piece, and a valuable piece, of *ex parte* evidence bearing directly on the subject-matter of the Commission's inquiry. We suggest that it is now open to any party, or to the Commission itself, to demand Sir William as a witness to be subjected to cross-examination. If this situation does arise the Government has only itself to blame.

Highway Authorities and Non-feasance

The Highways (Miscellaneous Provisions) Bill now before Parliament in London has had added to it a clause whereby "the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways" will be abrogated. If not already enacted, this clause, sponsored as it is by the Government, is almost certain to be adopted, thus changing a rule which stems from the decision in *Russell* v. *Men of Devon* (1788) 2 Term. Rep. 667; 100 E.R. 359.

The operation of the clause is deferred for three years, and two types of defence are available to the local authority: (a) To establish that it has taken all reasonable steps to see that the highway was not dangerous; (b) That it had no reasonable opportunity of taking such steps. It is no defence that the maintenance work has been entrusted to a competent contractor unless it is also proved that the Authority had given him proper instructions with regard to the maintenance of the highway and those instructions had been carried out.

We can expect pressure, once this clause has been adopted, for similar legislation in New Zealand. To the motorist who has suffered damage as the result of non-repair of a road it must be regarded as beneficial, but this is a case where the benefit to the individual must be weighed against the detriment to the taxpayer and the ratepayer.

With our system of trial of actions for damages before a jury there tends to be adopted an impossible standard of care for the defendant and special defences such as those provided by the English clause have little efficacy, standing or falling as they do on the jury's view of the facts. The Government should therefore pause long before imposing liability for non-feasance on itself and on local authorities, lest by so doing it places an intolerable burden on the shoulders of ratepayer and taxpayer alike.

Women and Jury Service

We were somewhat amazed to read in a Wellington daily newspaper recently a letter from a lady advocating

the subjection of members of her own sex to jury service on the same basis as that applying to men. This type of feminism puzzles us. We had always thought that women, in this respect at least, had the best of both worlds. The privilege of jury service (if it be a privilege) is available to them if they so wish, but without compulsion. Why, then, should they demand compulsion as a right ?

Jury service is not greatly sought after among women if one can judge from the relatively small number of women offering themselves. We would rather suspect, therefore, that the writer of the letter in question would not be popular with women in general if her proposals were accepted. We would go further and say that most men would willingly surrender their " privilege " in this regard and go on to jury service on a voluntary basis, leaving compulsion for women.

We have kept the best to the last. The lady who so strongly advocates compulsory jury service for women is herself a practising barrister and solicitor, and thus exempt from jury service.

EDITOR

SUMMARY OF RECENT LAW

ARBITRATION

Arbitrator—Contract containing agreement for submission of future disputes to arbitration before person closely associated with one party—Application for stay of action for breach—Effect of agreement—Arbitration Amendment Act 1938, s. 16. The common-law rule is that *prima facie* an arbitrator should not be a person who is a party to the dispute or who holds a position whereby he is closely identified with such a party. Where, however, the parties to a contract agree that any future disputes shall be referred for arbitration to a person *prima facie* disqualified under this rule, the effect of their agreement is to derogate from the *prima facie* rule to the extent of any interest possessed by the arbitrator of which they know or ought to have known at the time of the agreement. The effect of s. 16 of the Arbitration Amendment Act 1938 is to modify the exception to the general rule so that a party to a contract containing provision for submission of future disputes to arbitration before the other party to the contract or someone closely associated with him is not, merely because of the bargain made at a time when no dispute had arisen, deprived of the benefit of the rule first stated above requiring complete impartiality on the part of the arbitrator. The section has no application to an agreement for submission to arbitration of a dispute which has already arisen at the date of such agreement. *Canterbury Pipe Lines Ltd.* v. *Attorney-General.* (S.C. Christchurch. 1961. 20 April; 30 May. Richmond J.)

ARMS

Firearm forfeited as part of penalty for offence—No power to order restoration—Arms Act 1958, ss. 28, 29. Section 28 of the Arms Act 1958 does not empower a Magistrate to order the restoration of firearms forfeited under s. 29 but relates only to firearms seized or detained in pursuance of the right of search, seizure or detention conferred by the Act. *Re Nicoll's Application.* (1961. 26 May. Harlow S.M. Napier.)

BANKRUPTCY

Order and disposition—Reputed ownership—Debt for proceeds of stock sold in name of bankrupt—Instructions by bankrupt that proceeds be paid to true owner—Notoriety of bankrupt's financial position—Order and disposition clause not applying—Bankruptcy Act 1908, s. 61. The bankrupt before his adjudication bought sheep and lambs with money furnished by M. on terms that he was to receive one-third of the profits, M. remaining the sole owner of such sheep and lambs. They were sold to a freezing company and the bankrupt instructed the purchaser to pay the proceeds to M. Before such payment was made the proceeds were seized by the sheriff under a writ of sale, but before a cheque drawn in his favour had been paid the bankrupt filed his petition in bankruptcy. Both the Official Assignee and M. claimed the amount of the proceeds and the sheriff interpleaded. It was contended on behalf of the Official Assignee that he was entitled to the proceeds of sale under s. 61 of the Bankruptcy Act 1908 on the ground that the debt owing by the purchaser of the stock was " goods " for the purposes of the section and was in the possession, order or disposition of the bankrupt with the consent of the true owner, M. *Held*, 1. That assuming that such debt came within the term " goods " as used in s. 61, the bankrupt's precarious financial position was notorious and persons knowing of his apparent possession of the debt must also be taken to have known those facts concerning his financial position which were the subject of general knowledge or which would immediately become known to a person choosing to make inquiry. (*In re Ryley, Ex parte Swanwick* (1897) 15 N.Z.L.R. 325; *Ex parte Wingfield* (1879) 10 Ch.D. 591; *In re Fox* [1948] 1 All E.R. 849; [1948] Ch. 407, applied.) 2. That as M. believed that a cheque for the proceeds of the stock would be paid into her bank account as soon as the stock had been slaughtered and knew that the bankrupt had given instructions to that effect, she had not unconscientiously permitted the debt for the proceeds of the stock to remain in the order and disposition of the bankrupt. 3. That the debt did not therefore pass to the Official Assignee. *Fyne Gould Guinness Ltd.* v. *Jurrius.* (S.C. Christchurch. 1961. 28 April; 11 May. Macarthur J.)

CRIMINAL LAW

Two accused—Police witness giving evidence as to previous knowledge of one of the accused—Discharge of jury—Whether to be discharged in regard to both accused. Where in the course of a criminal trial a police witness gives evidence that he had previously known the accused and it is impossible to decide what effect that evidence may have on the minds of the jurymen the proper course is to discharge the jury if the evidence is subject to the interpretation that it is a reference to something in the accused's previous record or that at least the accused had been the subject of police investigation on a previous occasion. (*R.* v. *Firth* (1938) 26 Cr. App. R. 148, applied.) If there are two persons jointly charged but the evidence relates to only one of them it is a matter for consideration whether the jury should be discharged only in regard to that one. Where the case for the prosecution is that the two accused were engaged in a common enterprise the proper course is to discharge the jury in regard to both accused. *R.* v. *Schipper and Fieret.* (S.C. Wellington. 1961. 10 May. McGregor J.)

DIVORCE

Desertion—Constructive desertion—Adultery—Discovery of past adultery—Adultery not continuing or persisted in—Whether innocent party justified in leaving matrimonial home. If one spouse discovers that the other has committed adultery, or has reasonable grounds, induced by the other's conduct, for believing that adultery has been committed, the innocent spouse may be justified in leaving the matrimonial home and subsequently in alleging constructive desertion, even though the adultery neither was persisted in nor is continuing. (*Teall* v. *Teall* [1938] 3 All E.R. 349, considered and explained. *Baker* v. *Baker* [1953] 2 All E.R. 1199; *Everitt* v. *Everitt* [1949] 1 All E.R. 908, and *Glenister* v. *Glenister* [1945] 1 All E.R. 513, considered.) *Kemp* v. *Kemp.* (Probate, Divorce and Admiralty Division. Lord Merriman P., and Baker J. 1961. 1, 2, 3 May. [1960] 2 All E.R. 764.)

FAMILY PROTECTION

Social Security benefits—Plaintiff's entitlement to benefit not to be taken into account in determining provision to be made for her—Family Protection Act 1955, s. 13. The fact that an applicant under the Family Protection Act 1955 is in receipt

of a benefit under the Social Security Act (other than one of those exempted from the effect of s. 13 of the Family Protection Act 1955) may not be taken into account by the Court either in considering whether the testator has failed to perform his normal duty to the applicant or in considering the extent of the provision to be made for the applicant once he or she has established such a failure of duty. (*In re McGookin, Rowland* v. *McGookin* [1955] N.Z.L.R. 511, explained.) *In re Drager, Barkwith* v. *Public Trustee.* (S.C. Palmerston North. 1961. 13 April; 1 June. Barrowclough C.J.)

FOOD AND DRUGS

Milk—Sample taken without notice to person charged and without giving him part—Not a pre-requisite to establishing offence —Food and Drugs Act 1947, ss. 6, 12, 15, 16—Food and Drugs Regulations 1946 (S.R. 1946/136), Reg. 99 (1). Sections 12, 15 and 16 of the Food and Drugs Act 1947 are not inherently essential to the establishment of an offence against s. 6. Compliance with the sampling provisions of the Act is not necessary where the officer is proceeding on an actual sale of adulterated foods from the wholesale supplier to a purchaser, and upon the basis of a compulsory sale by a retailer to an inspector for the purposes of analysis. (*Middleton* v. *Incledon* (1914) 34 N.Z.L.R. 182; 17 G.L.R. 307; *Lincoln* v. *Sole* [1939] N.Z.L.R. 176; [1939] G.L.R. 105 and *Dairy Farmers' Co-operative Milk Supply Co. Ltd.* v. *Fink* [1946] N.Z.L.R. 205; [1946] G.L.R. 66, followed.) *Campbell* v. *Kirton.* (S.C. Hamilton. 1961. 27 February; 12 June. T. A. Gresson J.)

LIBEL

Pleading—Striking out pleading—Defence—Justification, fair comment, fair and accurate report of judicial proceedings—Bad reputation in mitigation of damages—Dicta in judicial proceedings involving plaintiff. The defendants in their Sunday newspaper referred to the plaintiff as (a) "a notorious, dodgy operator of London slum properties", (b) "this wily dodger" and (c) "the man whose estate agency was described . . . by Lord Goddard, then Lord Chief Justice, as 'a fraudulent business from beginning to end'". In their defence to an action for damages for libel the defendants admitted that the words were defamatory but pleaded (i) justification, (ii) fair comment on a matter of public interest, (iii) that the words at (c) above were a fair and accurate report of judicial proceedings, and (iv) in mitigation of damages that, as a result of certain judicial proceedings, the plaintiff had already been brought into scandal, odium and contempt. They cited three judicial proceedings: first, a criminal prosecution in 1953 for alleged offences of dishonesty, on appeal from which the plaintiff's convictions were quashed by the Court of Criminal Appeal on the ground of a defective summing-up and the Lord Chief Justice's observations were made; secondly, a civil action by a company in which the plaintiff was interested in which the County Court Judge dismissing the claim suggested fraud by the plaintiff; and thirdly, proceedings by companies in which the plaintiff was interested in which the Court of Appeal criticised the companies. On an application to strike out of the defence the passages relating to the proceedings under each of the several heads of defence on the ground that they disclosed no reasonable answer to the plaintiff's claim, *Held,* The allegations would not be struck out because: (i) the plea of justification might answer some meaning that the jury would place on the words complained of. (*Cadam* v. *Beaverbrook Newspapers Ltd.* [1959] 1 All E.R. 453, considered.) (ii) It must follow from the decision not to strike out the matter pleaded in justification that the repetition of it in relation to the plea of fair comment should stand. (Dictum of Lord Oaksey in *Kemsley* v. *Foot* [1952] 1 All E.R. at p. 508, applied.) (iii) The question whether the words at (c) above were a fair and accurate report was a question for the jury, and (iv) The plea in mitigation of damages that the plaintiff had already been brought into public odium by the judgments in the proceedings referred to did not go beyond what was permissible as evidence of bad reputation in a sector of life relevant to the alleged libel. (*Flato Films Ltd.* v. *Speidel* [1961] 1 All E.R. 876, applied.) *Waters* v. *Sunday Pictorial Newspapers Ltd.* (C.A. Willmer and Danckwerts L.JJ. 1961. 17, 18 May. [1961] 2 All E.R. 758.)

LICENSING

Practice—Issue of search warrant on hearsay evidence—Warrant not to be attacked on that ground—Licensing Act 1908, s. 228. A duty to act judicially in the case of a person or body who or which is not in himself or itself a Court of law does not carry with it an obligation to observe strictly the principles of evidence which are binding upon Courts of law. (*Local Government Board* v. *Arlidge* [1915] A.C. 120, applied.) A Justice acting under s. 228 of the Licensing Act 1908 may be satisfied by hearsay evidence of high reliability that there is reasonable ground to believe that on certain premises there are illegal sales of liquor and may issue a valid search warrant under s. 228 in respect of those premises. (Dictum of Starke J. in *McArthur* v. *Williams* (1936) 55 C.L.R. 324, 329, approved. *Mitchell* v. *New Plymouth Club (Inc.)* [1958] N.Z.L.R. 1070, explained.) *Inglewood Servicemen's Club Incorporated* v. *Mauriri.* (S.C. New Plymouth. 1961. 2, 31 May. Hutchison J.)

MUNICIPAL CORPORATION

Powers—Land vested in corporation as recreation ground—Used for many years as botanical gardens—Shown in proposed district town-planning scheme as such—Power of council to change use of land to open park. Land was acquired by the defendant corporation on trust for a public recreation ground. For many years it treated and maintained the land as botanical gardens and described it as such in its proposed district scheme under the Town and Country Planning Act 1953. It expressed the intention of converting the gardens into an open park and action was brought for an injunction restraining it from doing so. *Held,* 1. That the conduct of the defendant did not amount to or constitute such an irrevocable declaration as to establish that the original trust upon which the land was held had been narrowed to a trust for the purpose of establishing and maintaining botanical gardens. 2. That the approval of the proposed district scheme by the city council did not place any restriction on what it may do at any stage with any land under its control. If it should change the use of any such land it may thereafter change the scheme to correspond subject to the requirements of ss. 22 or 35 of the Town and Country Planning Act 1953. *Attorney General ex. rel. Butler and Others* v. *Gisborne City.* (S.C. Gisborne. 1961. 27 March; 22 May. Hutchison J.)

PUBLIC REVENUE

Income tax—Money deposited by importing company in England to avoid exchange "freeze"—Loss arising from bankruptcy of firm with which money deposited—Money part of circulating capital of company—Loss arising from bankruptcy deductible—Land and Income Tax Act 1954, ss. 111, 112. The appellant, a company engaged in the importation of goods, had reason to believe that there was a possibility of the control of remittances between New Zealand and England being stiffened. It placed £2,000 on deposit in London at short call at 5 per cent interest with a firm known as large negotiators of sterling and Australian funds, the intention being to provide sterling funds to pay for the commodities which the company imported. The members of the firm became bankrupt and the company sustained a loss of part of the money deposited with it. *Held,* 1. That having regard to the purpose for which the deposit was made, the sum of £2,000 deposited was preserved as part of the circulating capital of the company, secure as far as possible against exchange freezing, easily and quickly available for the purpose of the company's business and in the meantime earning some interest. 2. That the loss suffered through the bankruptcy of the firm was a loss of such circulating capital suffered in the course of the production of the company's assessable income for the year in which it accrued and was therefore deductible under s. 111 of the Land and Income Tax Act 1954, notwithstanding the provisions of s. 112. *F. R. and U. Ltd.* v. *Commissioner of Inland Revenue.* (1961. 13, 21 February; 20 March. Rothwell S.M. Auckland.)

TENANCY

Dwellinghouse—Lease containing right of renewal—Lease assigned and right of renewal then exercised—New tenancy created —Application of provisions of Tenancy Act—Tenancy Act 1955, s. 13. On the exercise by a tenant of a right of renewal contained in his lease a new tenancy arises between the parties. Where, therefore, a lease containing a right of renewal is assigned and subsequently the right of renewal is exercised by the new lessee s. 13 of the Tenancy Act 1955 can have no application. *Haslip and Another* v. *Brownson.* (1961. 28 February; 15 March. Coates S.M. Auckland.)

General—Order for possession of tenement on ground of non-payment of rent—Arrears and costs paid—Proceedings at an end —Magistrates' Courts Act 1947, s. 32 (3)—Tenancy Act 1955, s. 37 (3)—See MAGISTRATES' COURTS, p. 211 (*ante*).

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

The Vicarious Immunity of Servants, Agents and Subcontractors

The decision of T. A. Gresson J. in *Campbell* v. *Russell and Griffin* (11 April 1961) raises a problem of some interest and importance. The facts were that the respondents, intending passengers on a Road Services bus, had been told by the appellant, the driver of the bus, not to load their suitcases on to the vehicle but to leave them in a vestibule across the road. From this position, by the admitted negligence of the appellant, the suitcases were lost. The respondents lodged claims in the Magistrates' Court against both the driver and the Attorney-General who was sued in respect of the New Zealand Railway Road Services Department, as the driver's employer. There having been no special declaration as to the nature and value of the contents of the suitcases, the learned Magistrate held that s. 23 (b) of the Government Railways Act 1949 and s. 6 of the Carriers Act 1948 applied to limit the liability of the Department to £20 in respect of each package or unit. He declined, however, to extend the protection of this statutory limitation of liability to the bus driver, and duly entered judgment against him in the respondent's favour for a total sum of £170 18s. 6d.

Clearly, if the decision is correct, it indicates a way in which the statutory protection of all classes of common carrier can be circumvented, provided only that the negligent servant can be identified.

Both s. 6 of the Carriers Act 1948 and s. 23 (b) of the Government Railways Act 1949 contain the words "no person shall be entitled to recover for any loss of or damage to or in connection with any goods . . .". On the subsequent appeal to the Supreme Court, counsel for the appellant bus-driver urged that these words constituted an absolute limitation on what could be recovered by the owner of goods entrusted to a carrier, no matter against whom the action might be brought. The learned Judge was not prepared to accept this interpretation. Neither Act contained any express limitation upon the liability of a carrier's servant, and any inference that the benefit of the limitation provisions extended by necessary implication to cases where claims were made against servants in their personal capacity was unwarranted.

His Honour then went on to consider briefly whether the appellant might be entitled to the benefit of any limitation in the contract between the respondents and the Department. There had been no express attempt to limit the liability of the Department's servants, and while it was true that the driver committed his tort while participating in the performance of the contract of carriage between the Department and the respondents, this did not entitle him to the advantage of a term within the contract expressly limiting the liability of his master. The learned Judge referred to *Cosgrove* v. *Horsfall* (1945) 175 L.T. 334; *Adler* v. *Dickson* [1955] 1 Q.B. 158 and *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1961] 1 Q.B. 106. He concluded that the appellant could not invoke any limitation, statutory or otherwise, upon the extent of his personal liability. Accordingly, he dismissed the appeal.

The question whether a servant who causes damage in the course of performing his master's contract can take advantage of exceptions or limitations of liability in his master's favour has been the subject of much litigation and comment over the last 35 years. The most famous enunciation of the view that a servant has this right was that of Scrutton L.J. in *Mersey Shipping Co.* v. *Rea* (1925) 21 Ll. L.R. 735, where, at p. 378, he said:

> ". . . Where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of Lord Cave and of Lord Sumner, with whom Lord Dunedin concurs, in the *Elder, Dempster* case."[1]

The *Elder, Dempster* case was one where the House of Lords held that a shipowner could take advantage of an exception clause in a bill of lading contract between a charterer and an owner of goods. Viscount Finlay, at p. 548, used words very similar to those of Scrutton L.J.:

> " If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation of liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of goods could get rid of the protective clauses . . . of the bill of lading by suing the [shipowner] in tort."

The principle thus stated was subsequently accepted and applied by Owen J. in the Supreme Court of New South Wales in *Gilbert Stokes* v. *Dalgety* (1948) 48 S.R. (N.S.W.) 435, and by the Full Court of New South Wales in *Waters* v. *Dalgety* (1952) 52 S.R. (N.S.W.) 4. It appears to have been followed also in the American cases of *Collins* v. *Panama R. Co.* (1952) 197 Fed. 2d 983; *Ford* v. *Jarka* [1954] A.M.C. 1095 and *Autobuses Modernos S. A.* v. *The Federal Mariner* 125 Fed. Supp. 780. Again, in *Pyrene* v. *Scindia Steam Navigation Co. Ltd.* [1954] 2 All E.R. 158; [1954] 2 Q.B. 402, Devlin J. purported to follow the *Elder, Dempster* case in holding that the vendor of goods in that case was bound by a limitation clause in a contract between a shipowner and the purchaser of the goods.

In the past few years, however, there have been three decisions, in three different common-law jurisdictions, where Appellate Courts each dealing with substantially similar facts, have flatly denied the validity of the principle of vicarious immunity enunciated by Scrutton L.J. The three decisions are that of the High Court of Australia in *Wilson* v. *Darling Island Stevedoring Co.* (1956) 95 C.L.R. 43, of the

[1] *Elder, Dempster* v. *Paterson, Zochonis & Co. Ltd.* [1924] A.C. 522. For other statements by Scrutton L.J. of the same principle see *Paterson, Zochonis* v. *Elder, Dempster* [1923] 1 K.B. 420; 441-442; *Bradley* v. *Federal Steam Navigation Co.* (1926) 24 Ll. L.R. 446, 453.

Supreme Court of the United States of America in *Krawill* v. *Herd* [1959] 1 Lloyd's Rep. 305, and of the English Court of Appeal in *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1961] 1 Q.B. 106. In each case an independent contractor a stevedoring company, had damaged goods in the course of unloading or storing them, and had attempted to take advantage of a limitation of liability in the bill of lading contract between the company's employer, (the shipowner) and the owner or consignor of the goods. In each case, the decision went mainly on the ground that a person not a party to a contract cannot take advantage of a provision contained in it, the principle invoked being that laid down by the House of Lords in *Dunlop* v. *Selfridge* [1915] A.C. 847.

Now, as has been most forcibly pointed out by Professor C. J. Hamson in (1959) C.L.J. 150 *et seq.* it is quite incredible to suppose that so great a master of the common law as Scrutton L.J., when he stated his principle of vicarious immunity, could have overlooked the decision in *Dunlop* v. *Selfridge* (*supra*) or that he was in any way addicted to new-fangled innovations. No doubt the same could be said of those other distinguished Judges who have both before and since expressed a similar view. In the present writer's respectful submission, at least as credible an explanation of the present conflict of opinion, is that those who have rejected the Scrutton view have overlooked some vital points which he did not.

It is unfortunately true that at no stage did Scrutton L.J. attempt to state the grounds for the principle he enunciated. Nevertheless it is submitted that his principle can be justified and *Dunlop* v. *Selfridge* can be distinguished on at least two grounds.

In the first place, reliance on the *Dunlop* v. *Selfridge* principle can be conclusive *only* on the basis that liability in tort can be excluded only by contractual means. That this is a fallacy was pointed out by Kitto J. in *Wilson* v. *Darling Island Stevedoring Co.* (*supra*).[2] One has only to refer to the body of learning surrounding the doctrine of *volenti non fit injuria* and the voluntary assumption of risk. Another illustration is provided by *Ashdown* v. *Samuel Williams & Sons Ltd.* [1957] 1 All E.R. 35; [1956] 2 Q.B. 580, where the Court of Appeal held that a person entering upon land was bound by terms set out in a notice board affixed to the land. Once it is seen that a contractual *nexus* is unnecessary to the exclusion of tort liability, the fact that a servant or agent is not a party to his master's contract ceases to be relevant. *A fortiori* the principle in *Dunlop* v. *Selfridge* is seen to be inapplicable.

The other point concerns the nature and effect of an exclusion of liability for negligence. For the purposes of a short note, it is possible to do no more than merely assert that the effect of such an exclusion is to destroy the corresponding duty of care. In other words, where tort liability is excluded, whether by assumption of risk or otherwise, the otherwise wrongful act ceases to be tortious—it ceases, that is, to constitute a legal wrong.[3] If this contention is accepted the principle of vicarious immunity enunciated by Scrutton L.J. can much more readily be said to be as self-evident as he apparently thought it to be; for it is a basic rule of agency that acts lawful if done by the principal are lawful if done by an agent acting with the authority of the principal.[4] Indeed the situation could be absurd (to use Viscount Finlay's expression) if this were not so. Suppose, for example, that a dealer in scrap metal were to send some cars to a wrecker for breaking up, and the wrecker had his servants do the actual demolishing, would it be suggested that the dealer could then recover against the servants for trespass to his chattels? Similarly, if, by reason of an exclusion of liability for negligence, acts would be lawful if done by a master in the performance of his contract, it is submitted that they ought equally and in principle to be lawful if done by a servant, agent, or subcontractor who is performing his master's contract for him. Further, it is to be noted that the employee's immunity would arise, not from any express exclusion of his liability but from his status and function as a servant or agent performing his master's contract.

To revert now to *Campbell* v. *Russell and Griffin* it will be apparent if the argument so far has been accepted, that while the principle stated by Scrutton L.J. was directed in terms to exemption clauses contained in contracts, it must apply equally where the exemption is a statutory one. Accordingly if (say) the Carriers Act 1948 wholly excluded the carrier's liability for negligence its effect would be to make lawful acts by the carrier in the performance of his contract of carriage, which otherwise would have been tortious. As before, this absolution of duty to the carrier would constitute an absolution of duty to his servant or agent performing the contract of carriage for him even though the servant were not expressly mentioned in the statute.

Unfortunately for the present argument, of course, the Carriers Act 1948 does not in fact exclude liability for negligence and thus absolve the master from duty, but merely limits the amount which can be recovered from the master where breaches of duty occur. The question then is whether vicarious immunity is to be restricted to cases where liability is excluded rather than limited. It would indeed be unfortunate if this were the case, since those employers who at present limit their liability would no doubt take steps to exclude it entirely if that were necessary to protect their servants (and in most cases, therefore, themselves). Certainly Scrutton L.J. did not limit his principle in this way, and in *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus* [1922] A.C. 250, the House of Lords took the view that there was no difference in principle between words which save a party from having to pay at all and words which save him from paying as much as he would otherwise have had to pay. Perhaps the better view would be that while the Scrutton principle is reinforced in cases where liability for negligence is wholly excluded, it does not in fact depend on an absolution of duty.

It may well be that just as in the ordinary case an authorisation to an employer automatically implies an authorisation to his servant in the absence of any indication to the contrary, so there is by implication an automatic extension of any form of immunity to a

[2] *Wilson* v. *Darling Island Stevedoring Co.* (1956) 95 C.L.R. 43, 81 *et seq.* See also *M.P. Furmston* 23 M.L.R. 373, 385 *et seq.*

[3] See for example, *Salmond on Torts*, 12th ed., 1959, p. 39; *Wilson* v. *Darling Island Stevedoring Co.* (1956) 95 C.L.R. 43, 82, per Kitto J.; *London Graving Dock* v *Horton* [1951] 2 All E.R. 1; [1951] A.C. 737, per Lord Reid.

[4] *Hanbury Agency* (1952) pp. 192-193; *Bowstead's Agency*, 12th ed. (1959) p. 290.

servant performing his master's contract, again in the absence of any indication of a contrary intention.[5]

Nevertheless, whatever the precise limits of the principle of vicarious immunity might be, it is submitted that it has been overruled if at all only on grounds which are questionable, and that Lord Justice Scrutton's statement of it ought at the least still to to be considered seriously should an Appellate Court ever have to decide whether s. 6 of the Carriers Act 1948 extends to protect the servants of a carrier.

B. C.

[5] *C.f. Wilson* v. *Darling Island Stevedoring Co.* (1956) 95 C.L.R. 43, 81-82, per Kitto J. He however took the converse view that the implication could be made only where the circumstances specially indicated that it should be made.

CORRESPONDENCE

"In re Lolita"

Sir,

The trial in this case poses, I think, an interesting subject of thought to the legal student; I mean as to the mode of trial.

A month ago, in the place where I practise, the Borough Council had before it an application for leave to open a picture theatre on Sunday evenings. The newspaper that serves the citizens reported that councillor after councillor said that "the people want pictures on Sunday evenings and we must give them what they want"; and consent was given. Picture theatres purvey much the same *pabulum* as—according to reports—the writer of *Lolita* did. The decision arrived at by my Borough Council was one decided by 12 representative citizens.

Our New Zealand *Lolita* case was tried first by a single Judge and then by an Appeal Court of three Judges. England's *Lady Chatterley's Lover* case was tried by a Judge and jury of 12. Socrates, who was charged with perverting the youth of his day, was tried by an *ecclesia* of 501 men. The doubt in my mind is whether or not, a panel of Judges, or even a jury directed by a Judge is a tribunal competent to decide the issue in cases like *Lolita*.

It is inevitable that Judges are drawn from a comparatively high stratum of society and they cannot help carrying into the performance of their duties ingrained conceptions of right and wrong. It is the same in divorce. Divorce or no divorce is, at bottom, a social question. Yet in cases concerning such, it can, at times, be seen that decisions have rested on religious convictions. In democratic societ es, the people ought, in some way, to be compelled to assert what they think wrong or the reverse—and, of course, the majority view should prevail.

A month ago, Mr Theo Ruoff, of London, who contributes a page or two to each issue of the *Australian Law Journal*, devoted two pages to the *verba ipsissima* comments of papers and citizens of all ranks on the *Lady Chatterley* case. These, as expected, varied from one extreme to its opposite.

I leave the matter with the comment that sometime, perhaps, a scheme calculated to ascertain public opinion on the issues in these trials will be employed; perhaps by referendum or by an *ecclesia*.

I am, etc.,
L. A. TAYLOR

"Case and Comment"

Sir,

I should like to make it clear that I did not contribute the note on the *Lolita* case to which reference is made in the correspondence in your issue of 4 July, although it might be inferred from the editorial note in that correspondence that I did so.

In so much, however, as *Case and Comment* is stated to be, and in fact is, contributed by the Faculty of Law of this University, I deemed it my duty, as Dean of that Faculty, to reply to your correspondent's letter, without, however, admitting any personal responsibility for the note in question. Hence my letter.

I am, etc.,
A. G. DAVIES,
Dean of the Faculty of Law
University of Auckland

OBITUARY

Mr Thomas Verdon Mahoney

We regret to record the sudden death on 11 July of Mr T. V. Mahoney, a well-respected and loved practitioner of Invercargill.

Mr Mahoney was born at Invercargill and educated at Marist Brothers' High School in that city. His connection with the legal profession commenced in 1916 when he joined the firm of Russell and Sons as a law clerk. On qualifying he was admitted as a solicitor in 1926, commenced practice on his own account in 1929 and was admitted as a barrister in 1935.

In 1959 Mr Mahoney was compelled by poor health to dispose of his practice to Messrs Hanan, Arthur and Co. and entered the employment of that firm, where he remained until his death.

Mr Mahoney was a keen follower of most sports and had been a player of tennis, rugby and cricket.

On 12 July there was a large and representative gathering in the Magistrates' Court at Invercargill to pay tribute to Mr Mahoney. Mr E. S. J. Crutchley S.M. presided. Speakers were Mr T. R. Pryde, Mr G. Hall-Jones, Mr H. E. Russell, Mr I. A. Arthur and Mr Crutchley. All paid high tribute to Mr Mahoney's qualities as a practitioner and to his services to the Southland District Law Society in various capacities and to the district as a whole. The function concluded with all present standing in silence as a mark of respect.

LORD PARKER OF WADDINGTON

LORD CHIEF JUSTICE OF ENGLAND

LORD Parker of Waddington, Lord Chief Justice of England, who visited New Zealand this month, is without doubt one of the legal personalities of his time, and in the third year of his office, at a mere 61 years of age, presents a significant contrast to the tenacious, unpredictable and frequently belligerent

Lord Parker of Waddington

octogenarian Lord Goddard whom he succeeded in September 1958. He is known to the English Bench and Bar as a gentle character without an enemy, and as an erudite scholar as well as a brilliant lawyer. He enjoys a distinction, not common to a great many of his predecessors in the august office of Lord Chief Justice, of knowing that his appointment arose from judicial merit and not past political services.

The third son of a great Chancery Judge, the first Lord Parker of Waddington, he could almost be said to have been swaddled in a stuff gown. He comes from a 600-year-old Yorkshire family and, at the time of his birth, his father was Junior Counsel to the Treasury, a post which the present Lord Chief Justice held before becoming a Judge. His father became a Lord of Appeal in Ordinary 49 years ago and on being created a life peer took the title of Lord Parker of Waddington. Last year, when the present Lord Chief Justice received a life peerage as a baron, he took the same title as his father.

Lord Parker is a product of Rugby and Trinity College, Cambridge, where he was a Senior Scholar and took two First Classes in natural science. He was called to the Bar from Lincoln's Inn in 1924 and has been a Bencher of his Inn since 1947.

His early specialty as a barrister was commercial cases, but his outstanding qualifications derive from his experience as a Treasury Counsel, which must be invaluable to him today when the holding of the balance between the State and the subject is a more urgent function of the Judiciary than ever before. As the son of his father, he inherited something of the tradition of the system of equity, and as an Honours man in his youth in the natural sciences the approach of scientific thought to modern problems must be familiar to him.

He was first a pupil of and then "devil" to Lord Somervell of Harrow, one of the present Lords of Appeal in Ordinary of the Judicial Committee of the Privy Council, and was appointed Junior Counsel in Common Law to the Admiralty in 1934. He held a similar position in the Treasury from 1945 to 1950, and for many years before 1950 he acted as Junior Counsel to the Commonwealth of Australia in Appeals to the Privy Council. His law is a genuine compound of the schools and careful study and experience, and as one who has the power to express legal principles in clear English of rare literary quality he need not fear comparison with the best of his predecessors.

In 1950, Lord Parker was appointed a Justice of the High Court (King's Bench Division) and he was made a Lord Justice of Appeal three years later, in which capacity he enhanced an already enviable reputation by his chairmanship in 1957 of the tribunal set up to inquire into the alleged leakage of information concerning the bank rate.

Lord Parker, whose hobbies are farming and collecting old furniture and books, met his American wife from Covington, Kentucky, while she was reading English at Cambridge and married her in 1924. Lady Parker shares her husband's interest in farming having successfully bred and exhibited Jersey cattle, Irish wolfhounds and Maremma dogs.

Lord Parker, accompanied by Lady Parker, arrived in New Zealand as the guest of the Government on 1 August and left on his return to England on 18 August. After spending three days in Auckland, the party visited Waikato, the thermal region of Rotorua and Wairakei and the Chateau Tongariro. They arrived in Wellington on 7 August and for four days were the guests of the United Kingdom High Commissioner, Sir Francis Cumming-Bruce. On 8 August, Lord and Lady Parker were entertained at Government House by the Deputy Governor General, Sir Harold Barrowclough C.J. and Lady Barrowclough and on the following evening they attended a cocktail party tendered by the Wellington District Law Society. On 10 August the United Kingdom High Commissioner gave a dinner party for the visitors, and the following weekend, 11 August to 14 August, was spent in Christchurch where Lord and Lady Parker attended the Grand National race meeting of the Canterbury Jockey Club at Riccarton.

After their return to Wellington on 15 August, Lord and Lady Parker were the guests at dinner of the President of the Court of Appeal, Sir Kenneth Gresson, and Lord Parker met the Medico-Legal Society of Wellington at dinner on 17 August.

THE HONOURABLE EARL WARREN

CHIEF JUSTICE OF THE UNITED STATES

CAST in a very different mould from the Lord Chief Justice of England, in whose company he was a guest of honour at the Twelfth Legal Convention in Australia last month, the Hon. Earl Warren, Chief Justice of the United States, who preceded Lord Parker in New Zealand by a fortnight, represented for the law in this country a unique if not actually foreign conception of judicial pre-eminence.

When in 1953, at the age of 62 years, Mr Warren was appointed by President Eisenhower as Chief Justice of the United States he was chosen on his reputation " for integrity, honesty, middle-of-the-road philosophy, experience in government, and experience in law ", attributes which were such as to " convince the United States that he is a man who has no ends to serve except those of the United States ", and when he assumed the duties of his office political commentators were agreed that beyond the new Chief Justice's lack of formal judicial experience were the more fundamental issues of his political, economic and philosophical beliefs.

Mr Warren's background, even including the early days of his practice of the law in the State of California, of which he was to be Governor for 12 years with the blessing of both the Republican and Democratic Parties, has always been dominantly political. He was born in Los Angeles in 1891, and graduated in law from the University of California in 1912. Within a few years he was in the thick of the politico-legal arena of the second largest State of the Union, and graduated from deputy city attorney of Oakland, by way of district attorney of Alameda County, to the attorney-generalship of California. From there it was a short step to the governorship of the State. He is the only man to have been elected to that post for three four-year terms.

During the 34 years of public life which preceded Mr Warren's elevation to the highest judicial office in the country, he displayed an almost unique impartiality in his personal politics, and added to this distinction an indefatigability in his campaign against crime and corruption in high places which was emphasised by the fact that he never had a conviction reversed by a higher Court in the hundreds of cases he brought to trial in 13 years.

But always behind the scenes there was a political urge and aspiration that made him more publicist than lawyer. In 1948 he was the unsuccessful Republican Party candidate for the United States Vice-presidency, and four years later launched a determined, but equally vain, bid for the Presidential nomination against the then Mr Eisenhower. Nailing his colours to the mast of what he called " progressive conservatism ", his opponents complained that he was the too willing victim of " creeping socialism ", and he returned to the implementation of his liberal policies in California.

The " middle-of-the-road " character of his politics is clearly demonstrated by the fact that, when he offered himself for re-election as Governor of California in 1946, he won the nomination of both major parties, even though he was elected as a Republican. And to make his position doubly sure he gathered to his banner large sections of organised labour. Fears of his " creeping socialism " had their origin in his frequently expressed belief that in a free-enterprise economy the State has social obligations. To this end he sponsored higher old-age pensions and unemployment-insurance benefits, child-welfare centres and improved housing and educational facilities. He also overhauled the State's prison system and established a Youth Authority to supervise all criminals under 21 years of age.

Mr Warren has been described as judicial, deliberative and rational in politics with a keen sense of the legal nature of things, and his tenure of office to date on the Supreme Court Bench has confirmed the peculiarly American paradox that the best Judges have mostly been those who have approached the task with little previous experience and limited academic equipment.

During his brief visit to Wellington last month with his wife, Mr Warren was entertained by the Governor-General, Lord Cobham, by the Prime Minister, the Hon. K. J. Holyoake, by the Chief Justice, Sir Harold Barrowclough, by the Wellington Judges in chambers, and by the Wellington District Law Society at a Bar dinner over which Mr J. C. White presided. Among

Hon. Earl Warren

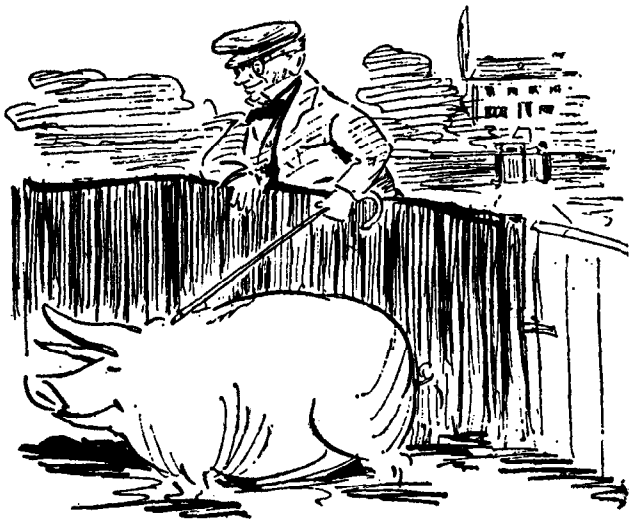
the guests at the dinner were the Chief Justice, Mr Justice Hutchison, Mr Justice McCarthy, Mr Justice Cleary, Mr Justice Leicester, Mr Justice Woodhouse, the Attorney-General, the Hon. J. R. Hanan, the American Ambassador, Mr Anthony B. Akers, and Mr J. B. Thomson S.M. The toast of " The Judiciary " was proposed by the president and replied to by Mr Warren.

FORENSIC FABLE

By "O"

The Wise Old Bird Who Retired

There was Once a Wise Old Bird who Retired from the Bench the Very Moment he had Done his Fifteen Years. The Wise Old Bird's Friends Assured him he would be Bored to Tears. They also Hinted Darkly that, Deprived of his Customary Employment, he would Probably Pass Away in the Near Future. Were they Right in their Gloomy Prognostications? Did he Miss the Dear Old Courts of Justice? Not a Bit of it. The Wise Old Bird took a Nice Little Place in the Country, and Thought Out an Admirable Routine. He Rose Late, Breakfasted Comfortably, Read *The Times* (Skipping the Law Reports) and had a Look



at the Pigs. Then he Lunched and Read a Novel. At Four-Thirty the Wise Old Bird Took a Cup of Tea and had Another Look at the Pigs. At Seven-Thirty he Dined, Finishing Up with Two Glasses of Vintage Port, an Old Brandy, and a Cigar. Before Retiring to Rest he Consumed a Stiff Whisky and Soda, and had Another if he Felt he Wanted it. When in Need of Society he Invited his Niece Emily for the Week-End, but he Always Expected her to Go Home by the Ten-Forty on Monday. The Wise Old Bird Firmly Declined to be Bothered with Quarter Sessions, Petty Sessions, or Any Nonsense of that Kind. He thus Survived to Celebrate his Ninety-Eighth Birthday and had the Extreme Satisfaction of Outliving All his Contemporaries.

Moral—*Retire.*

Appointment of Crown Solicitor at Napier.—Mr G. E. Bisson has been appointed Crown Solicitor at Napier to succeed Mr Justice Woodhouse. Mr Bisson was born at Napier in 1918 and was educated at Napier Boys High School and at the Victoria University of Wellington, where he graduated LL.B. During the war he served for five years with the Navy, attaining the rank of Lieutenant-Commander and was mentioned in dispatches while serving in H.M.S. Warspite at the Normandy landings. He has served for six years on the Council of the Hawke's Bay District Law Society being Vice-President this year. He is a member of the firm of Bisson, Moss, Bisson and Robertshawe.

PERSONAL

Mr N. A. Morrison of the firm of Chapman, Tripp and Company, Wellington, left recently for London where he will appear before the Judicial Committee of the Privy Council as junior counsel in the appeal *Australian Mutual Provident Society* v. *Commissioner of Inland Revenue.*

Mr Roderick Morrell Smith was admitted as a solicitor on 14 July by Mr Justice Hardie Boys in the Supreme Court at Auckland. Mrs M. L. Smith appeared in support.

Mr Mervyn H. Mitchel of Mitchel and Broughton, Invercargill, left on 4 August for a month's holiday in Australia.

On 31 July Invercargill practitioners gathered in the Law Library to farewell Mr Crutchley, who has transferred to Christchurch, and to welcome his successor, Mr J. K. Patterson S.M. Valedictory speeches were also made at Mr Crutchley's last sitting in Invercargill on the same day.

BILLS BEFORE PARLIAMENT

The Bills now before the House are as follows:

Agricultural and Pastoral Societies Amendment
Apprentices Amendment
Births and Deaths Regulations Amendment
Chiropractors Amendment
Coal Mines Amendment
Cook Islands Amendment
Criminal Justice Amendment
Dairy Production and Marketing Board
Education Amendment
Engineering Associates
Gas Industry Amendment
Government Railways Amendment
International Finance Agreements
Land Settlement Promotion Amendment
Land Transfer Amendment
Law Reform (Testamentary Promises) Amendment
Lincoln College Amendment
Local Elections and Polls Amendment
Maori Education Foundation
Maori Social and Economic Advancement Amendment
Massey College
Mental Health Amendment
Mining Amendment
Monetary and Economic Council
Motor Spirits Duty
New Zealand Army Amendment
Penal Institutions Amendment
Quarries Amendment
Republic of Cyprus
Social Security Amendment
Staff Superannuation (Private Member's Bill)
Universities Transport
University of Auckland
University of Canterbury
University of Otago
Victoria University of Wellington
War Pensions Amendment
Workers' Compensation Amendment.

LEGAL ANNOUNCEMENTS

(*Continued from p. 1.*)

ENGLISH SOLICITOR, aged 48, wishes to settle in North Island. Admitted England 1935, now practising in Kenya since 1952. Hard worker with general experience, but recently specialised in conveyancing and company work; no advocacy or litigation. Partnership prospects desirable but not essential. Apply :—

No. 160,
c/o C.P.O. Box 472,
WELLINGTON.

Messrs GRAHAM EDWARDS EDMONDS and PETER GORDON WILSON, practising as Barristers and Solicitors under the name of Welham, Edmonds & Wilson at Matamata, announce that as from 1 August 1961 they have admitted into partnership JOHN SELWYN MARSHALL. The practice will be carried on at Matamata under the new firm name of EDMONDS, WILSON & MARSHALL.

G. E. EDMONDS
P. G. WILSON.

Messrs Woodward, Iles & Furness of Gisborne, Barristers and Solicitors, wish to announce that they have admitted into partnership THOMAS ANTHONY KAY of Gisborne, Barrister and Solicitor, a member of their staff. The firm will continue to practise under the firm name of WOODWARD, ILES & FURNESS.
Dated 30 June 1961.

K. A. WOODWARD
D. W. ILES
C. A. CHAUVEL.

STANLEY KEITH SIDDELLS, Barrister and Solicitor, practising at Pahiatua and Woodville, under the firm name of SIDDELLS & SIDDELLS, has pleasure in announcing that he has been joined in partnership as from 1 June 1961 by RONALD WILLIAMS MATHIESON, formerly of Te Awamutu. The practice will be carried on under the firm name of SIDDELLS & MATHIESON, both at Main Street, Pahiatua, where Mr S. K. Siddells will be the resident partner and at Vogel Street, Woodville, where Mr R. W. Mathieson will be the resident partner.

JOHN ROSS MARSHALL, ELLETT FORBES PAGE, KEITH GORDON GIBSON and WILLIAM NEWTON SHEAT, practising as Barristers and Solicitors under the name of MARSHALL, PAGE, GIBSON & SHEAT, at Streatham Chambers, Dudley Street, Lower Hutt, and formerly at Bowen House, Bowen Street, Wellington, have pleasure in announcing that they have been joined in partnership by PATRICK JAMES DOWNEY, M.A., LL.B. The practice will be carried on under the same name as previously. N.P. [The Wellington address of the practice has been changed. The practice is now being carried on at Mayfair Chambers, 48-52 The Terrace, Wellington].

JOHN BAIN JACK, WALTER MAX WILLIS, ROY EMILE JACK, COLIN LANG RIDDET and DONALD ALEXANDER RENNIE wish to announce that as from 1 June 1961 the practices formerly carried on by them under the names of Currie, Jack & Davis and Marshall, Willis, Riddet & Rennie have been amalgamated. The practice is now carried on under the firm name of JACK, WILLIS, RIDDET & RENNIE, 12 and 25 Wicksteed Place, Wanganui.

JOHN BAIN JACK, WALTER MAX WILLIS,
ROY EMILE JACK, COLIN LANG RIDDET,
DONALD ALEXANDER RENNIE.

Solicitor with some experience since qualified required to take charge of recently opened Branch Office at Taupo (population now 5,300 Borough, 13,000 County).

EAST & BREWSTER,
ROTORUA.

Christchurch firm requires qualified Solicitor for advisory, general, conveyancing and estate work, with some Court work during absences of partners from New Zealand up to September 1962. Commence 1 November 1961 or thereabouts. Prospects of permanent position. Salary according to qualifications and experience. Apply to :—

HARPER, PASCOE, BUCHANAN & PENLINGTON,
Solicitors,
118 Hereford Street,
CHRISTCHURCH.

Messrs NOEL STORRIER JOHNSON, TREVOR ROBERT GILLIES and GRAEME HENRY CHADESLEY CORBETT, practising as Barristers and Solicitors under the firm name of Johnson Gillies and Corbett at Government Life Buildings, Marlbro Place, Hamilton, announce dissolution of their partnership as from 30 June 1961. Messrs Johnson and Corbett will continue practice at the above address under the firm name or style of JOHNSON AND CORBETT as from 1 July 1961, and Mr Gillies will commence practice on his own account at Central Chambers, 249 Victoria Street, Hamilton.

JOHN HOUSTON, O.B.E., LL.B., and PHILIP ALPHONSUS MCCARTHY, LL.B., who have heretofore carried on in partnership under the name of Welsh, McCarthy, Houston & McCarthy, the practice of Barristers and Solicitors at Hawera and Manaia, have pleasure in announcing that as from 1 August 1961 they have admitted to partnership THOMAS ALLEN ROSS, B.A., LL.M., formerly of Hughes, Gray & Ross, New Plymouth. The new firm will be known as WELSH, MCCARTHY, HOUSTON & ROSS.

WILFRED ALLEN SUBRITZKY and KEVIN RYAN who have hitherto practised as Barristers and Solicitors under the firm name of Subritzky & Ryan at 312 Karangahape Road, Auckland, announce that as from 1 August 1961 they have admitted into partnership MAURICE PHILLIP TETLEY-JONES. The business of the new partnership will henceforth be carried on under the firm name of SUBRITZKY, RYAN & TETLEY-JONES at the above address.

SYDNEY AUGUSTUS BURNETT and REGINALD GEORGE PALMER, practising as Barristers and Solicitors under the firm name of Burnett & Palmer at 100 Ridgeway Street, Wanganui, announce that as from 1 July 1961, they have admitted into partnership MICHAEL HENRY WALKINTON LANCE, LL.B., Barrister and Solicitor, who has been an employee of the firm for the past six months. The practice will be carried on at the same premises under the firm name of BURNETT, PALMER AND LANCE.

SOUTH AFRICA AND THE BRITISH COMMONWEALTH

The day is fast approaching when we will have to regard South Africa as just another foreign country and to the ordinary citizen in New Zealand, and probably also to the ordinary citizen in what once we called the British Empire, the change evokes barely a passing thought. This is the age of instability when the only things abnormal are those that endure or have endured from times past. We have literally seen the British Empire become the British Commonwealth of Nations and it looks as if we may also in our own time see the British Commonwealth decline and disintegrate. The fellaheen process seems to be at work. Will each retire to his own mud hut ?

The meeting of Commonwealth statesmen so recently held in London, and so likely to be remembered as marking the time from which the dissolution of the Commonwealth is dated, probably deserves to be recorded as the most tragic example of bungling, misunderstanding and downright ignorance which has ever beset the English-speaking people ; second only to that similar instance which set the American colonies free from British suzerainty ; and likely enough with similar consequences. It obviously failed to appreciate the significance of the subject-matter with which it purported to deal. Most of the members appeared to be completely uninformed as to the real issues involved. Many it seemed were mentally ill-equipped for their task. In this so-called age of Democracy, there is some reason to criticise and condemn the quality of the political leaders that the system appears almost blindly to hurl into positions of leadership. Seldom, if ever, have its disastrous consequences been so apparent as at this meeting of blind passion and unreason. In this age of instability, when every remaining atom of intelligence demanded that South Africa should be retained within the fold, when almost any terms should have been conceded, when indeed South Africa in the last resort should literally have been begged to remain, we saw the unedifying spectacle of ill-informed representatives insisting upon burning the shelter upon which they all depended for survival. Passion and prejudice ruled the day.

There is only one real reason for British Empire and British Commonwealth—plain survival. It can be garlanded with many blossoms ; loyalty to the Queen ; brotherhood ; our own brand of Democracy ; common language and culture ; but it is survival, and mainly economic survival, which is the essential backbone. Who then was to gain most by keeping South Africa within the fold ? Unquestionably the other members. Why then should this assembly assume that it was conferring a favour upon South Africa to allow it to remain within the Commonwealth when the hard fact of the matter is that South Africa was conferring a favour by remaining ? The attitude of the assembly to South Africa was no more than a pretence and any member who did not know it was a pretence has only his own ignorance to blame.

South Africa is an enlightened and cultured nation composed of two dominant classes, Dutch and British. They have proved themselves to be solid, responsible, thinking people and their achievements economically and culturally are second to few and worthier than most. Yet lesser men presumed to lecture and would presume to dictate. Amateurs sought to impose their half-baked notions founded on superstition and prejudice. In plain brutal language they set out to teach their grandmother to suck eggs. And grandmother smiled indulgently and left them to it.

Had they forgotten or had they ever heard of the history of South Africa ? Did they not realise that South Africa was started by a colony of Dutchmen—Dutchmen who came from one of the sturdiest nations of Europe with an economic and cultural background to which many modern nations may never attain ? British influence came there as a result of bargain. That influence was not compatible to the Dutch settlers so they quietly packed up and moved away across the Vaal. But gold and diamonds caused the British influence to follow and the Dutch again retreated until retreat was no longer possible. Then came the South African War which was little more than a struggle by the Dutch to be left alone. Then the years of integration which were little more than a " live and let live " arrangement. It all speaks clearly of one simple lesson. There is and always has been a strong tendency for South Africa to go its own way and this tendency has been but thinly glossed over in the present century, chiefly because of the personal influence of one or two outstanding Dutchmen. Not that there was any real hostility or bitterness—just the old desire of the Dutch to be left alone.

It is true that the course of time brought to South Africa many people of British stock, but the real roots were Dutch. Much of this British stock became engrafted upon the Dutch root. A good deal of it accepted the Dutch philosophy. To this people the Statute of Westminster gave the right to determine its own destiny. With such an historical background, the manifest question before the assembly of Prime Ministers was not whether South Africa should remain but whether South Africa could be prevailed upon to remain.

While South Africa remained within the Commonwealth its valuable resources in wealth and man power added to our strength. In time of war, good fighting contingents could be counted upon ; relatively secure bases were available ; steady production assured ; and a huge gold revenue recovered. In times of peace, our bargaining power was increased ; a ready outlet for population and investment funds assured ; primary production of food materials and metals almost limitless.

What right have we, or any other outsiders, to throw this away just because we want to dictate to South Africa about her own affairs ? What right have any outsiders to attempt to impose upon South Africa their own pet notions of how her internal problems should be handled ? The South African people and statesmen handling these problems are the equals of any, and probably the superior of many, in educational and cultural attainments. It is their problem and they and their forbears have lived with

it. They may or may not be right. Time alone will tell. But right or wrong, it is the height of presumption, if indeed it is not sheer impertinence, for outsiders to attempt to impose their ideas. And when all is said and done there is at least some evidence that most of the extremely vocal outsiders are dim-witted crack-pots, still wet behind the ears, insisting upon trying to mind other people's business however unsuccessful they are in minding their own.

Furthermore, with all due respect, it is far from an accepted fact that any association of nations or people can by *ex post facto* action lay down canons of acceptability other than by unanimous consent. The fundamental principle of the Commonwealth was free self-determination in regard to domestic affairs. Even if, as has been suggested, one member decided to re-adopt the institution of slavery, that is absolutely no concern of the others. Even if all the remainders condemn slavery, that does not mean they are necessarily right and the other chap necessarily wrong. If men of equal intelligence, experience, responsibility, and culture come to different decisions, the dictates even of common honesty demand that each respect the other's viewpoint. Even so far as slavery is concerned the time is not so long past when the best intellects approved the practice; when nations and cultures achieved eminence based on a foundation of slavery; and we today are counselled to admire these men and endeavour to absorb some of their cultural heritage. Let it not be forgotten that this modern age has still to demonstrate that it can outreach the heights achieved by many of these ancient cultures in which slavery was an accepted part of the social and economic order. But however that may be, in the present case of South Africa, for those who don't know to insist upon the superiority of their views over the views of those on the spot who do know is just plainly insulting.

But what of the future of South Africa as an independent nation? It is difficult to think of anything essential to her welfare that she will lose by the parting. Defence, in this age, need not worry her; rather will she be freed from many expensive ties of doubtful efficacy. Economically her horizons have become almost boundless. For many years her gold production has been fastened to the economy of Britain. Now, with the world to choose from, she can make her own bargain, and it will not be surprising if the opportunity is not long in coming. It seems reasonably certain that if South African gold production went direct to U.S.A., instead of through London, British balance of payments would be so adversely affected that competition for gold would be inevitable. At present, the bulk of the financial ties relating to gold appears to be in London, but how long that will obtain remains to be seen. Economically, South Africa appears to stand on three Empires. The diamond empire, substantially controlled in U.S.A., all the gold and base-metals empire, substantially controlled in London, and the remains of the Rhodes empire, also controlled in London. Many of the properties concerned are outside the Union. It seems inevitable that the Rhodes empire must entirely disintegrate into local African ownership with a tendency to draw the outlying provinces into the Union. The base metal empire already displays a tendency to go to U.S.A. Over-all it might seem reasonable to anticipate a change of economic allegiance from London to U.S.A., and we can rest assured there are many wealthy men in U.S.A. ready and willing to take full advantage of it.

The rate of economic progress in South Africa since 1945 appears phenomenal when compared with the lethargy of the backward countries such as New Zealand, but that should not cause us to forget that the potential of South Africa is so enormous as to warrant comparison with that of U.S.A. at the close of the Civil War. In spite of the progress that has been made, much of it backed by U.S.A. interests, there is reason to think that South Africa has literally been held back by the channelling of much of its business through the financial sources of London. It may well be that South Africa as an independent nation can get much better terms for her financial transactions from London than she could get as a member of the Commonwealth.

In the general fields of primary and secondary production, there is evidence that the work unit cost in South Africa will compare favourably with that of any other country. That probably means that South Africa will always be able to export whatever she wants to export, GATT, imperial preferences, and European common markets to the contrary notwithstanding. Population increase from migration is attractive; it is doubtful whether equal opportunity is available anywhere else. All in all, it seems reasonably certain that the historians of future years will find nothing comparable to this wrong-headed meeting of Commonwealth Prime Ministers—except perhaps "the Boston Tea Party".

J. C. PARCELL

CONVEYANCING PRECEDENT

Application to Effect Merger Under the Land Transfer Act

Under the Land Transfer Act merger is not automatic, as it was at common law. Section 30 of the Property Law Act 1952 (which applies to estates and interests registered under the Land Transfer Act 1952) provides that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. In equity the answer to the question of merger or non-merger is usually to be found by ascertaining the *intention* of the parties to the transaction.

The Australian cases on merger under the Torrens System are not exactly relevant, for in New Zealand we have a specific provision governing the practice as to merger. The latest Australian case which I have been able to find, however, is consistent with my statement that under our Land Transfer Act merger is not automatic: *Cooper* v. *Federal Commissioner of Taxation* (1958) 32 A.L.J.R. 270.

Regulation 56 of the Land Transfer Regulations 1948 (S.R. 1948/137) reads as follows:

> The registered proprietor of any estate or interest claiming that such estate or interest has merged in a greater estate or interest of which he is also the registered proprietor may make an application to the Registrar to note the merger of the lesser estate or interest, and the application shall be supported by the statutory declaration of the registered proprietor or such other evidence as the Registrar deems necessary. The Registrar on being satisfied that the merger has been effected at law or in equity, and on payment of the prescribed fee, shall notify it upon the Register Book and upon the appropriate instruments of title.

It will be observed that the Registrar must be satisfied that there has been a merger of the two estates or interests not only in equity but also at law; that is to say, the *registered* estate or interest of the lesser estate or interest must get into the name of the registered proprietor of the greater estate or interest or *vice versa*, before any application for merger can be accepted by the Registrar. The Regulation does not make it mandatory for the District Land Registrar to be furnished with a statutory declaration before effecting merger: the nature of the evidence is at his discretion. It used to be almost the universal practice in New Zealand for the Registrar to be satisfied by a certificate signed by the registered proprietor of both estates or interests, or by his solicitor, that there were no outstanding equities to prevent a merger. However, in at least one Registry, the Registrar appears now to be asking for a statutory declaration in the case of every application for merger and on request will furnish a precedent in the form given below. A suitable declaration will also be found in the second edition of *Goodall's Conveyancing in New Zealand*, at p. 649 and in *Supplement No. 2 to the New Zealand Supplementary Volumes of the Encyclopaedia of Forms and Precedents*, at p. 45.

The precedent given below is based on the presumption that, in the particular case concerned, there is no advantage for the holder of the two estates or interests in keeping the lesser one alive, and also that there is no advantage to any other person in keeping the lesser estate alive. The law as to merger was pithily set out by the late Mr Justice Shorland in *In re Waugh (deceased)*, *Sutherland* v. *Waugh* [1955] N.Z.L.R. 1129, where the aspect of "advantage" is emphasised.

PRECEDENT

STATUTORY DECLARATION IN APPLICATION TO D.L.R. TO EFFECT MERGER

IN THE MATTER of the Land Transfer Act 1952

AND

IN THE MATTER of Memorandum of Transfer No. dated from to

I, A. B. of.....butcher, do hereby solemnly and sincerely declare as follows:

1. That I am the transferee named and described in the said Memorandum of Transfer.

2. That I am the registered proprietor of the dominant tenement in the easement created by Transfer.....affecting C.T. Vol.....Folio.....Wellington Registry the servient tenement.

3. That no other person will be affected by the merger of the said easement in the fee simple estate by virtue of the said transfer.

4. That I do hereby apply for the registration of the said transfer and the consequent merger of my said interest in the said easement with the fee simple estate in the land comprised in the above Certificate of Title.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Act 1957.

DECLARED at.....by the said A. B. this.....day of.....196.....

before me:

A Solicitor of the Supreme Court of New Zealand

N.B. *The fee for noting the merger will be 10s.*

E. C. ADAMS

PRACTICAL POINTS

Appointment of new Trustees by Court—*Devolution of legal title under the Land Transfer Act—Trustee Act 1956, ss. 51 and 52—Land Transfer Act 1952, s. 99.*

QUESTION: Two persons were appointed executors and trustees. After the estate was got in and debts paid, one trustee died and the other became mentally unsound. The Supreme Court, on application by two other persons, made an order under s. 51 of the Trustee Act, appointing them as trustees of the estate in the room of the other two.

I then applied to the Land Registration Office to register the new trustees as owners of several mortgages. The District Land Registrar refused and said that I must apply under s. 52 of the Act for a vesting order. Was the District Land Registrar correct in so requisitioning

ANSWER: The order which was procured under s. 51 must have been made under para. (c) of subs. (2) thereof. Subsection (4) expressly provides that nothing in s. 51 shall give power to appoint an executor or administrator. Therefore the two new trustees have not been appointed executors by the Court; that is consistent with the statement that "the estate was got in and debts paid". The position would have been different had the Court appointed new executors under s. 11 of the Administration Act 1952, for subs. (3) provides that upon every such appointment all the estate and rights of the administrator discharged or removed as aforesaid which are vested in him as administrator shall become and be vested in the person appointed by the Court; and that person shall have the same powers, authorities, and discretion, and may in all respects act, as if he had been originally appointed administrator. As to this section see *In re Hepburn* [1918] N.Z.L.R. 190; [1917] G.L.R. 452, where, however, the real estate remained subject to a mortgage, and also *In re Clover* [1919] N.Z.L.R. 103,; [1919] G.L.R. 703, an intestate estate, where Hosking J. pointed out that a mortgage debt created by the intestate had not then been paid off and active functions still remained to be discharged by a legal representative of the estate.

There is under s. 51 of the Trustee Act 1956 no automatic statutory vesting of the estate or trust funds as there is under the Administration Act 1952 or the Bankruptcy Act 1908. This is really shown by subs. (3) itself which refers to "any consequential vesting order or conveyance", words clearly implying that one or the other is necessary to effect a transfer of the assets of the trust to the new trustees. Here in the instant case a survivorship transmission and a conveyance by the former trustee still alive is not possible because he is *non mentis compos* (*In re Goodwin* [1937] N.Z.L.R. 30): therefore recourse must be had to a vesting order by the Court under s. 52 of the Trustee Act 1956. See also *Nevill's Trusts, Wills and Administration in New Zealand*, 3rd ed., p. 77, and *Adams' Land Transfer Act*, p. 167.

X.

TOWN AND COUNTRY PLANNING APPEALS

Canterbury Stone Co. Ltd. *v.* Christchurch City Council

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

Zoning—Land zoned Industrial B—Used for stone-dressing, cutting and crushing and also for monumental and terazzo manufacture—Stone-cutting and dressing a non-conforming use—Some of this work incidental to monumental masonry—Zoning upheld with direction that stone-cutting and crushing be a conditional and not a non-conforming use—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 of a property known as No. 169 Durham Street comprising an area of 2 ro. 14 pp., being part of Lot 2 on Deposited Plan 13075, Lot 5 on Deposited Plan 303 and part of Town Reserves 142, 142X and 142T. This property was in an area zoned as Industrial B under the respondent Council's proposed district scheme, as publicly notified. The company lodged an objection to this zoning, claiming that its property should be zoned Industrial C. The objection was disallowed and the appeal followed.

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

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

1. The company carries on the business of stone-cutting dressing and crushing, monumental masonry and terazzo manufacture. Under the Council's Code of Ordinances, stone-cutting or dressing is not permitted in an Industrial B zone, though monumental masonry is. It follows, therefore, that the company has a predominant use of part of the property in so far as it relates to monumental masonry but the work of stone-cutting and dressing is a non-conforming use.
2. The appellant objected and appealed, asking for its property to be zoned as Industrial C, but when the appeal came to hearing it abandoned the proposal to change the zoning of the whole property and asked that a direction be given that pursuant to Ordinance 6, section 2, its stone-cutting activities should be declared a predominant use.
3. The property under consideration is part of a very large industrial area, zoned as Industrial B and is closely adjacent to a large Industrial C area fronting on to the southern side of Moorhouse Avenue. There is no residential zoning anywhere near the property.
4. The Board considers that as a certain amount at least of the stone-cutting and dressing carried on by the appellant is directly and solely concerned with its business of monumental masonry, the appellant's request should receive favourable consideration. The Board, invoking Ordinance 6, section 2, directs that such part of the appellant's business as carried on at present, which is not a predominant or a conditional use in an Industrial B zone, is to be deemed to be a conditional use in an Industrial B zone. This will enable the respondent Council to have sufficient control over the manner in which the company's stone-cutting operations are carried on.

Appeal allowed.

Cashmere Properties Ltd. *v.* Christchurch City Council

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

Zoning—Land zoned as residential—Adjoining Milk Treatment Station—Detraction from amenities—Schemes directed to future development—Milk Treatment Station preparing to move—Amenities then restored—"Spot" commercial zone in residential area undesirable—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant company was the owner of a property known as Nos. 254 and 256 Hereford Street, containing 31.5 pp., being Lot 1 on Deposited Plan 15155 part of Town Sections 787 and 789. This property was in an area zoned as residential under the respondent Council's proposed district scheme, as publicly notified. The appellant lodged an objection to this zoning, claiming that the property should be zoned as Commercial B. The objection was disallowed and the appeal followed.

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

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

1. The property under consideration is in a block bounded by Hereford Street, Barbadoes Street, Cashel Street and Madras Street. The northern half of the block fronting on to Hereford Street is zoned as residential; the southern half fronting on to Cashel Street is zoned as commercial. The area under consideration is on the east of Madras Street and part of it looks on to Latimer Square.
2. In an appeal to the Board in April 1959—*Presbyterian Church Property Trustees* v. *Christchurch City Council*—the Board held that the Council was justified in endeavouring to restrain the encroachment of commercial uses into residential areas. That appeal related to a property in the block under consideration. In a more recent appeal—*The Trustees A. J. Orchard Estate* v. *Christchurch City Council*—the Board held that the Council's proposals to restrain commercial development to the western frontage of Latimer Square was in accord with sound town-planning principles. The land lying to the east of the Square is all zoned as residential so that although the land to the south of the property under consideration here is zoned as commercial, a very substantial area to the east and north of it is zoned residential.
3. The main ground advanced by the appellant in seeking to change its zoning, was that its property adjoins on the eastern side the premises occupied by the Christchurch Milk Co. Ltd. and the operations carried on by that company detract seriously from the amenities of the appellant's property for residential purposes. The company purchased the property in 1959 with the knowledge that it was zoned residential and that it adjoined the Milk Company's property. On the evidence there could be no doubt that the operations of the Milk Company do detract from the amenities of the appellant's property, but town-planning schemes are directed, in the main, to future development, not tied to existing conditions. The evidence is that the Milk Company has acquired two other large areas—one in the Riccarton area and one in the Aranui area—and it is proposed to establish the milk-treatment plant at these points and remove the business altogether from its present site. When this happens, the detraction created by the company's operations in the area under consideration will cease. The Board considers the zoning of the appellant's property as residential is appropriate and in accord with town-planning principles. It is not prepared to create a "spot" commercial zone by re-zoning the appellant's property.

Appeal dismissed.

Bridgman and Another *v.* Alexandra Borough

Town and Country Planning Appeal Board. Alexandra. 1961. 7 April.

Building permit—Application for permit to extend already existing joinery factory—Residential area built up around factory since it was established—Relevant factor—Extension causing no further detraction from amenities of neighbourhood—Town and Country Planning Act 1953, s. 38.

Appeal under s. 38 of the Town and Country Planning Act 1953. The first-named appellant was the owner of a property in the Borough of Alexandra, being Sections 42, 43, 44 and 54 on Deposited Plan 8562, being part of Section 9, Block XXXVII, Town of Alexandra. The second-named appellant was the lessee of the property.

In 1956 the Council issued a building permit for the erection of a joinery factory on Lot 44 and in 1958 it granted a further permit for an extension to the building. In September 1960,

(Continued on p. 240)

IN YOUR ARMCHAIR—AND MINE

By Scorpio

Change of Status—It is well established that a marriage after the making of a will invalidates the will. However, we wonder how many practitioners have considered the effect of a decree absolute in divorce on a pre-existing will. On many occasions the termination of a marriage by divorce is an even more drastic change of status than marriage, by virtue of the fact that children are affected. One case has been drawn to our attention where a farmhand made a will in 1923 leaving his entire estate to the girl whom he had married two weeks earlier. In 1959 he divorced his wife on the grounds of adultery under particularly unpleasant circumstances. He was killed in a tractor accident some two weeks after the decree absolute and his wife inherited his farm and substantial assets under the will of 1923. It does seem that legislation could well provide for the cancellation of a will by decree absolute. Some barristers do make a point of notifying their clients after decree nisi that they should make a new will. It may be also thought advisable that when a decree absolute is sealed there should be an immediate drawing of attention of the parties to the necessity for looking into their testamentary dispositions. This could be done by an addendum to the final decree emphasising attention to this point.

The Quick and the Dead—If for no other reason the mere name of the case of *In re St. Peter the Great, Chichester* [1961] 2 All E.R. 513 conjures up interesting possibilities. In the dignified City of Chichester there exists a disused burial ground which nevertheless contains the bodies of many loved ones who have therein been held for possibly three centuries. The march of progress has dictated that the local Electricity Board of the City of Chichester erect a new substation and the only logical place is the ancient and disused churchyard. Under the Disused Burial Grounds Act 1884, s. 3, any building is forbidden on a graveyard. However, in this case both the Vicar and the Church Wardens petitioned for permission to have the substation therein erected. The Court graciously conceded that progress must precede tradition and permission was accordingly granted.

Right or Wrong—For half a century now there has been an increasing reluctance to condemn anything on the simple ground that it is wrong. You are allowed to say that it is stupid, or wasteful, or inconvenient, or revolting, but a purely moral judgment is received with barely concealed impatience. Yet the English still like to preserve what they feel vaguely and dimly are the "decencies" of life but, without the backing and authority of a generally accepted moral code, they are finding themselves more and more obviously in difficulties, since ultimately it is only by a public opinion, pretty clear in its own mind about what is right and what is wrong, that there can be even a beginning of controlling the behaviour of the individual. One of the dilemmas is that, just at present, people are particularly reluctant to admit that something which is very agreeable can also be very wrong. Hence, to take an example, the fumbling attempts of the common man in the person of the average police officer to explain why he considers a particular exhibition at a strip show in Soho obscene. In Imperial Rome, when public opinion had long advanced beyond thinking that there was anything wrong in sexual promiscuity (any more than in mass slaughter or mass torture in the arena), a prosecution for a strip show would have seemed fantastic. In Victorian England, when public opinion really did believe that provocative nudity was wrong and even vice paid virtue the tribute of hypocrisy, so that "correct" people would hardly mention even the "leg" of a table, it would have seemed fantastic to make any defence at all. But now the common man, the *homme moyen sensuel*, hovers uneasily between the two ideas that sex is "natural" but that its exploitation is somehow not quite "decent". So that one could properly say of his "double think"; "You do like that which, taken at your word, you find abundantly detestable". Thus, a police officer in Court defined "obscene" as something which "would arouse man's instincts" and, on being asked whether the shows in question did that, replied, "They aroused mine". Then he was questioned about Miss Marilyn Monroe.

Q. Do you think she is obscene?
A. Where?
Q. On the films.
A. Generally speaking no.
Q. But sometimes, yes?
A. A little.

One of the shows, he said, had "some artistic ability," but the "longing" voices included in it made it obscene.

Off Wicket—The recent action against Mr F. S. Trueman, the England and Yorkshire cricketer, in the Leeds County Court gave rise to an interesting point of law. It seems that Mr Trueman bought a Rolls-Royce car which was stated by the seller to have been owned by "the late King" and, on discovering that the vehicle had not been royally owned, he purported to repudiate the contract. His Honour, Judge D. O. McKee, held that he was entitled to do so and that the seller's action to recover the purchase price should fail. The newspaper reports of this case have not made the grounds of the decision very clear, but it would seem that the seller's statement amounted to an innocent misrepresentation and that Mr Trueman was able to repudiate the contract because there had been no final acceptance of the vehicle: *cf. Long* v. *Lloyd* [1958] 2 All E.R. 402; [1958] 1 W.L.R. 753; in *Leaf* v. *International Galleries* [1950] 1 All E.R. 693; [1950] 2 K.B. 86, Jenkins L.J. said that it

> "behoves the purchaser either to verify or, as the case may be, to disprove the representation within a reasonable time, or else stand or fall by it",

and it appears that Mr Trueman had disproved the seller's representation "within a reasonable time".

No Wonder—"So you have no driving licence, lady?" yelled the traffic officer. "Don't you know you cannot drive without one?" . . .

"That explains everything" said she. "I thought it was because I was nervous and near-sighted that I hit two cars and ran into the back of a bus."

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 238.*)

the company applied for a building permit to make further extensions to the factory premises. This permit was refused under s. 38 of the Act, as a detrimental work. The appellants appealed against this decision.

Parcell, for the appellants.
Sunderland, for the respondent.

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

1. The existing building is of solid construction, being of concrete block. The expected life of the building is at least 50 years. When the permit for the erection of this building was issued, there was no residential occupancy of any of the surrounding property, the nearest house being at least a quarter of a mile away. Since the factory was erected, however, houses have been built in the vicinity. The only grounds upon which the Council could refuse the permit sought would be that the proposed extension constituted a "detrimental work" within the meaning of s. 38 (1) (b) of the Act, that is to say, that the extension would detract from the amenities of the neighbourhood likely to be provided or preserved by or under the Council's undisclosed district scheme.
2. At the hearing the Council made a formal appearance but made no submissions and called no evidence. The evidence tendered for the appellants establishes that this factory was erected before there was any residential occupancy anywhere near it and that at no time have there been any complaints from any owners or people in the vicinity with reference to the factory's operations.
3. In considering the question of amenities of a neighbourhood, regard must be had to the pleasantness, or agreeableness of the neighbourhood as it in fact is, in pursuance of an intention that it should not become less pleasant or agreeable. The area under consideration here is zoned as residential, but its residential character is that of a residential area which has been built up around an already existing factory. It follows, therefore, that in considering the amenities of the neighbourhood, regard must be given to the fact that the owners of residential properties went into the area, acquired their properties and built their homes with the full knowledge of the existence in the area of a substantial joinery factory. In the absence of any evidence to the contrary, the Board is unable to find that the amenities of the neighbourhood will be further detracted from by an extension of the existing factory.
4. In its application to the Council for a building permit, the company asked for an extension of 1,200 sq.-ft. and a lean-to extension of 50 ft. x 50 ft. A plan produced at the hearing of the appeal, showed the proposed workshop extension as having 1,550 sq.-ft., which is in excess of what was applied for, and this appeal can only be related to the original application for extension of 1,200 sq.-ft.

The appeal is allowed. The building permit is to be issued to the appellants for the erection of:

(a) A workshop extension of 1,200 sq.-ft., and
(b) A lean-to extension of 550 sq.-ft.

Appeal allowed.

Merivale Flats Ltd. and Another *v.* Christchurch City Council

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

Zoning—Land zoned as residential—Hardship caused to owners—Not a factor to be taken into account by the Board—"Spot" industrial zones in residential areas contrary to principle—Board not to be influenced by action of local authority in allowing such zones—Town and Country Planning Act 1953, s. 26.

As they related to the same property, they were heard together. The first-named appellant was the owner of a property known as 122 Burke Street, containing 1 ro. 1.5 pp., being Lot 26 on Deposited Plan No. 3. The second-named appellant was the lessee of the property and the lease contains a compulsory purchase clause binding the lessee to purchase the premises at the end, or sooner determination, of the lease. Under the Council's proposed district scheme, the property under consideration was in an area zoned as residential. The appellants lodged objections to this zoning and when the objections were disallowed, the appeals followed.

Eales, for the appellants.
W. R. Lascelles, for the respondent.

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

1. On the property under consideration an ice-cream factory was erected pursuant to a permit issued by the Council in 1955 at a time when the property was in an area zoned as proposed Industrial B. A month after this building permit had been issued, the Council changed the proposed zoning of the area from Industrial B to Residential B. The appellants were not notified of this change in zoning and they proceeded with the erection of a modern factory in the firm belief that their land was to be zoned as industrial. Not unnaturally, the appellant companies are aggrieved at what appears to them to be an injustice in that they were not notified of the Council's intention of changing the zoning before they commenced their building operations. That, of course, is a matter of hardship and hardship is a factor the Board is not empowered to take into consideration.
2. The property in question is an area zoned as residential and substantially residential in occupation. To allow the appeal would be to create a "spot" industrial zone in a predominantly residential area. This would be contrary to town-and-country-planning principles. The Board, in frequent decisions, has repeatedly held that it does not approve, and is not prepared to approve, of "spot" zoning. At the hearing of this appeal, and of other appeals heard by the Board during this session, it has become apparent that the Council, on the hearing of objections, has allowed a considerable amount of "spot" zoning to be permitted in the City of Christchurch, but the fact that the Council has seen fit to allow "spot" zoning in some areas, in fact in reasonably close proximity to the property under consideration here, is not in itself an argument for this Board departing from the principles which it has laid down in the past, and which it considers should be adhered to. Although the Board considers that the appellants here are deserving of the utmost consideration, it finds itself unable to depart from the principles it has laid down and the appeals are disallowed.

Appeals dismissed.

Berry *v.* Christchurch City Council

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

Zoning—Land zoned residential—Buffer between residential and industrial zones—Desirability of continuity of residential frontage to predominantly residential street—Preservation of amenities of area—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 of property situated at the corner of Nursery Road and Tuam Street, Christchurch. containing 26.8 pp. more or less being part Lot 82A on Deposited Plan No. 38. Under the Council's proposed district scheme, as publicly notified, this property was zoned Residential B. The appellant objected to this zoning, submitting that the property should be zoned Industrial C. The objection was disallowed and the appeal followed.

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

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

1. The appellant's property is situated on the north-eastern corner of a block bounded by Tuam Street, Nursery Road, St. Asaph Street and Phillips Street. With the exception of the appellant's property and two residential properties adjoining its Nursery Road frontage, the block is zoned as Industrial B.
2. The Council zoned the appellant's property and the adjoining properties as residential in order to provide a buffer between the industrial zone and the substantial residential zone lying to the east and so preserve the residential amenities of Nursery Road. Nursery Road is zoned residential and is predominantly residential in occupancy. Continuity of a residential frontage on both sides of Nursery Road is desirable to preserve the amenities of the area and is in accord with town-planning principles.

Appeal dismissed.