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HEART CASES AND THE WORKERS' COMPENSATION ACT

WHERE a worker collapses and dies at his work from some sort of heart attack questions of extreme nicety as to whether or not his death arose out of his employment arise. There are many cases, some of which fall on one side of the line and some on the other, but in every case the question is really one of fact to be determined on the medical evidence which in turn is based largely on the nature of the attack which caused the worker's death and also the degree of effort which he had been exerting at the relevant time.

It is not proposed to attempt in this article to make any survey of the cases, which are dealt with in *Macdonald's Workers' Compensation in New Zealand*, 3rd. ed., p. 176, para. 283. Three recent cases however, two reported and one unreported, illustrate the difficulties facing the Court when called on to decide in any particular case whether compensation is payable or not.

The first of these in point of time was *Taituha* v. *Attorney-General* [1960] N.Z.L.R. 925. The worker there was working in a coal mine shovelling coal on to a conveyor belt. After working for about 30 minutes he complained to a work-mate that he had a sore head and a sore chest. He went on working but some 15 minutes later was seen leaning on his shovel and again complained of not feeling well. He rested for up to 30 seconds and then continued with his work but another 15 minutes later made a further complaint. He was advised to pack up his gear and leave the mine but endeavoured to carry on. However, another 15 minutes later he announced that he was too ill to work and obtained permission to leave. He began to walk out of the mine but was later found lying some 10 minutes' walk away from his working place and died some two hours after leaving work.

The medical evidence on both sides was impressive. It was common ground that the deceased was suffering from advanced coronary disease and, in the words of one witness, was "a candidate for sudden death whether he was at rest or exerting himself". The plaintiff's medical witnesses were, however, of opinion that the pain suffered by the deceased while at work was anginal due to acute coronary insufficiency, and that if he had heeded the warning given by the pain he would probably not have died when he did.

Dr P. P. Lynch who was called for the defendant placed some weight on complaints made by the deceased to his wife the night before his death and he regarded the complaints made on the morning of his death as not a clear complaint of anginal pain, such as is usually excited by effort, but as being rather vague in their nature and a continuation of the vague complaints made to his wife the night before. Dr Lynch pointed out that in the initial stages of the formation of an infarct there is a period of vague ill-health until the point where the infarction or the occlusion which gives rise to the infarction has fully developed, when there is the onset of acute and unmistakeable symptoms. Dr Lynch summed up the effect of his evidence in the following terms:

> I believe that from the evening before this man was to be inevitably smitten by fatal heart attack, that his symptoms existed before he went to the mine, that he was then, I believe, in a dying condition, that there was the opportunity to cease from what he was doing. I think that the most that the work could have done was to have elicited pain and discomfort as he proceeded with it, to make him aware of his unfitness to do it.

Dr D'Ath in his evidence followed a similar line. He held the view that the deceased's death was due to a coronary occlusion due to a thrombus formation which had begun the day before the deceased's death.

Faced with such a conflict of opinion Dalglish J. considered the evidence carefully and weighed the probabilities. He came to the conclusion that the more probable explanation of the cause of Taituha's death was that advanced by the plaintiff's witnesses and awarded compensation accordingly.

The second case was *Greenhill* v. *Attorney-General* [1960] N.Z.L.R. 1029, a case of disablement and not death. The plaintiff was a surfaceman in a coal mine, and, when engaged in a heavy lift on ground giving a poor footing, he felt a sharp disabling pain. On other occasions during the next few weeks he felt similar pain and on medical investigation of his condition it was found that he had suffered a cardiac infarction. In this case also the plaintiff was suffering from fairly advanced heart disease.

The plaintiff's medical evidence was to the effect that, if the plaintiff had not had the experience mentioned above, he might have continued to work for one or two years before experiencing pain from the heart in the normal course. They considered that the infarct probably coincided with the effort at work.

Dr Lynch, called by the defendant, held the view that the plaintiff suffered an infarction due to a coronary occlusion. He described the process of a coronary

occlusion as being a gradual, almost imperceptible, narrowing of the lumen of the artery but, although the process is gradual, the onset of symptoms may be sudden and dramatic and come without warning, and it may happen that a person whose coronary arteries are undergoing these changes may suddenly, on slight effort or sometimes without effort at all, but more often on substantial effort, suffer his first bout of angina. He thought that it was a mistake to assume that, because the effort elicited the first symptoms, it had any influence whatever on the progress of the disease.

Dalglish J. on this occasion accepted Dr Lynch's view that, although the onset of pain was related to the effort at work, such effort did not cause or hasten the formation of the thrombus which led to the infarction. The claim for compensation therefore failed.

The final case to which we propose to refer is *Public Trustee* v. *Attorney-General* (unreported). The case will not be reported because it fell to be decided on its own facts and no questions of law arose.

The Public Trustee was suing as executor of the will of one Burnell whose death was alleged to have arisen out of and in the course of his employment by the Ministry of Works. Burnell was a truck driver and on the day of his death was throwing boulders off the tray of a truck which had become stuck in mud in the bed of a river, when he suffered a heart attack from which he died within about 30 minutes.

The plaintiff took up what seems to be an original line in coupling with the effort involved in the deceased's work a number of set-backs which he had suffered in the course of his work on that particular day that were alleged to have caused an emotional disturbance. These two matters were alleged to have caused the death of the deceased, which therefore arose out of his employment. There could be no contest that it occurred in the course of the employment. The defence was the usual one that the worker was suffering from aortic stenosis of long standing, that his death occurred in the normal course of the disease, and that neither effort nor emotional disturbance had any effect whatever in causing or accelerating the worker's death.

The deceased certainly had an unfortunate and frustrating day. He usually travelled to work in his car but that morning he spent some 30 minutes trying to start the car, which involved a considerable amount of cranking by hand. All efforts to start the car failed and he was compelled to travel to work in another person's car. There was evidence that after this incident he was flushed and looked as though the effort and mental upset had taken something out of him.

On starting work the deceased was told to take his truck into a river bed and fill it with boulders, being supplied with assistance. As he was driving out of the river bed the truck became stuck in some mud and after considerable efforts to drive it out, the clutch burned out. He then walked a mile or so to a telephone and reported to his overseer, who decided that it would be necessary to use a crane to extricate the truck.

After lunch the deceased and others returned to the scene with a crane. At first the crane could not pull the truck out, and to lighten it the deceased and another man got on to the tray and began to throw the load of boulders off. It was while he was doing this work that the deceased collapsed and died within a short time. The cause of death was established as left ventricular failure.

In view of the deceased's medical condition it was common ground that he was, to use the phrase which has become usual in these cases, " a candidate for sudden death ". The actual work which he was doing was not of an unusually strenuous nature, nor did it differ from what he was in the habit of doing from day to day. When he collapsed he had been working for only a few minutes and Dalglish J. held that, had there been no other unusual circumstances, there would have been no ground for claiming that the work had in any material degree contributed to his death. Hence it was necessary for the plaintiff, if he were to succeed, to fall back on the emotional disturbance to which the deceased had been subjected.

The medical witnesses were in accord that emotional stress and physical effort together could be responsible for a heart attack. Dr Lynch, called by the defendant, conceded that if the heart attack had occurred while the deceased was vainly trying to start his car he would have been prepared to attribute a causal relationship to the physical and emotional stress occasioned thereby. The only substantial difference between the medical witnesses was whether the emotion generated by incidents at about 7.30 a.m. and 10 a.m. could still have affected the deceased after lunch. On this point Dalglish J. in his judgment said :

> I accept that the effect of emotion on the heart may extend for quite a period after the end of the incident giving rise to the emotion. Sir Charles Burns was asked whether, if the emotion affecting a man is the shame or worry of holding up his mates, the build-up would aggravate the longer the delay carries on. He replied that that would depend on what sort of man he was. From this reply and from the general tenor of the medical evidence given in Wellington I conclude that the extent to which emotion may effect the heart depends on the nature of the person concerned. Similarly the length of time it takes for the effect of emotion to disappear also depends on the nature of the person. If a person is emotional or excitable by nature then the effect of incidents or frustrations like those which occurred to Burnell on the morning of the day of his death would be greater than with a person of a calmer nature. If a person gets over his emotion or excitement quickly then the effect on his heart would disappear more quickly.
>
> Consideration must therefore be given in some detail to the evidence concerning Burnell's nature and concerning the effect which the various incidents had on him.

His Honour then went on to discuss at some length the evidence as to Burnell's temperament and his reaction to the difficulties which he had that day encountered. There was evidence that Burnell was excitable and likely to get " hopping mad " if things went wrong, and the Judge accepted that when he left for work that day he was labouring under a sense of frustration which, with the physical effort of trying to start his car, must have increased the load placed upon his heart. However, later he displayed a normal appearance and was apparently unaffected by the later physical work in which he engaged, and by his difficulties with his truck. His Honour added that even if there were some slight increase in the load put on his heart by his efforts plus the emotion aroused by their failure, the period that followed, during which he had his lunch, was sufficient for it to have worn off completely. The claim for compensation therefore failed.

The cases to which we have referred illustrate not only the great difficulties which face the Court in deciding these cases, but also the heavy responsibility

which counsel must bear in advising whether or not to bring a claim for compensation before the Court. The case last-mentioned is also a reminder that in appropriate cases emotional stress should not be overlooked as a possible ground for attributing a case of heart failure to the worker's employment. The attempt failed in that case but only by a fairly narrow margin. A case need only be a little stronger to succeed.

EDITOR.

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SUMMARY OF RECENT LAW

CONTEMPT OF COURT

Breach of injunction—Successive breaches—Continuing contempt—Jurisdiction to issue successive warrants of committal—Magistrates' Courts Act 1947, s. 79 (2). Where a defendant against whom an injunction has been granted commits a continuing breach of the injunction even after a warrant of committal has been issued and executed, the offence is a continuing one and a second warrant may be issued. (*R.* v. *Hemsworth* (1846) 3 C.B. 745; 136 E.R. 299, followed. *Church's Trustee* v. *Hubbard* [1902] 2 Ch. 784, distinguished.) *Scott* v. *Holloway.* (1961. 1, 29 June. Kealy S.M. Auckland.)

CORONER

Inquest—Human leg found on a beach—Whether inquest to be held—Coroners Act 1951, s. 15. A human leg which may have been separated from the body to which it belonged before or after death does not constitute a body for the purposes of the Coroners Act 1951 and as there is no body to be viewed by anyone as required by s. 15 of the Act an inquest cannot be held. Such a leg is not such a vital organ as to lead to the conclusion that the person to whom it belonged is dead. (*Re Oram, Ex parte Brady* (1935) 52 W.N. (N.S.W.) 109, followed.) *In re the Matter of a Contemplated Inquest in Respect of Human Leg Found on the Beach Near the Mouth of Waikato River.* (1961. 28 June. Coates S.M. Auckland.)

MAGISTRATES' COURT

Practice—Continuing breach of injunction—Jurisdiction to issue successive warrants of committal—Magistrates' Courts Act 1947, s. 79 (2)—*See* CONTEMPT OF COURT (*supra*).

MASTER AND SERVANT

Apprentices—Apprenticeship agreement subject to Apprentices Act 1948—Breach during term of agreement—Apprentice limited to remedies given by statute—Transfer of agreement to new employer—Statutory provisions applicable—Statutory bar to claim for damages for breach—Apprentices Act 1948, ss. 27, 28. The plaintiff and the defendant entered into an apprenticeship agreement whereby it was agreed that the plaintiff should be the defendant's adult apprentice for three years commencing on 7 August 1958. The agreement provided that it was subject to the Apprentices Act 1948. The plaintiff had already been employed by the defendant as an unskilled labourer and it was an understanding that he should continue to be paid at the same rate as previously, notwithstanding the agreement. The defendant ceased to instruct the plaintiff in his trade from March 1959 and in July 1959 the plaintiff's employment was transferred to another company which paid him at the reduced rate payable under the agreement. In an action for damages for breach of the agreement, *Held*, 1. That the plaintiff was limited in his remedies for any breach of the agreement to those provided by the Apprentices Act. (*Burton* v. *Precision Engineering Co. Ltd.* [1934] N.Z.L.R. 734; [1934] G.L.R. 662, followed. *Archer* v. *S.S. Williams Co. Ltd.* [1935] N.Z.L.R. 27; [1935] G.L.R. 145, distinguished.) 2. That on the facts the transfer of the plaintiff's contract to the new employer was effected under s. 27 of the Apprentices Act and subs. (5) of that section was a complete answer to the plaintiff's claim. *Hicks* v. *Fletcher Steel and Engineering Co. Ltd.* (1960. 18 February; 10 August. Keane S.M. Lower Hutt.)

MORTGAGOR AND MORTGAGEE

That unruly clog. (*1961*) *105 Sol. Jo.*, 456.

PRACTICE TRIAL.

Trial—"No Case"—Submission—Appeal against rejection of submission—Election by defendant to adduce evidence—Appeal decided on whole evidence. When in a civil action tried by a judge and jury (or by a Judge alone) the Judge has ruled against a submission by the defendant that there is no case for him to answer and, the defendant having elected to call evidence, his evidence completes the proof of the plaintiff's case, an appeal will be decided on the whole of the evidence (including the defendant's); and, even if the Judge wrongly rejected the defendant's submission of no case, the appeal will not be allowed on a hypothetical basis, as if the defendant's evidence should not have been given. (*Great Western Rly. Co.* v. *Rimell* (1856) 18 C.B. 575 and *R.* v. *Abbott* [1955] 2 All E.R. 899, distinguished; *Groves* v. *Cheltenham and East Gloucestershire Building Society* [1913] 2 K.B. 100, applied). Per Holroyd Pearce L.J.: assuming without deciding that a Judge in a jury case has a discretion to rule without putting the defendant to his election whether he will call evidence, the Judge is certainly not bound to give a ruling until the evidence is concluded. *Payne* v. *Harrison and Another.* (C.A. (Holroyd Pearce, Willmer and Pearson L.JJ.), 7, 8, 9 June 1961.)

PROBATE AND ADMINISTRATION

Practice—Probate—Testatrix domiciled in New Zealand, but resident out of New Zealand at date of death—Registry in which motion for probate to be filed—Order for transfer of papers to proper registry—Code of Civil Procedure, R. 517. Where a person domiciled in New Zealand has died out of New Zealand the proper registry in which to file a motion for probate is that registry in the judicial district in which the deceased last resided before leaving New Zealand which is nearest to such last place of residence and not the principal registry in such judicial district. (*In re Raitt* [1955] N.Z.L.R. 179, explained.) *In re Dunn (deceased).* (S.C. (In Chambers.) Christchurch. 1960. 24 February. Macarthur J.)

Will not forthcoming at death—Application to prove copy—Presumption of destruction animo revocandi—*Presumption of law—Rebuttal—Dependent relative revocation.* If evidence shows that a will not forthcoming at death was last known to be in the custody of the testator and could not despite diligent search be found in his usual repositories after his death, a presumption of law arises that the testator destroyed the will *animo revocandi.* Being a true presumption of law, it can only be rebutted by evidence which raises a balance of probabilities the other way. Such rebuttal may be by positive proof (a) that the testator lost the will and did not destroy it; (b) that he destroyed it in circumstances amounting to dependent relative revocation only; (c) that some other person destroyed the will, or must have done so; (d) that the deceased was insane for some part of the period to which the presumed destruction must be assigned. In order to apply the doctrine of dependent relative revocation, it is unnecessary to prove the destruction by the testator in the belief that he already has a valid new will: it is sufficient if a new will, as yet unexecuted, is in course of contemplation at the relevant time, *viz.*, the time when the earlier will is destroyed, so long as revocation is solely referable thereto. Presumed revocation is available for the application of the doctrine. It is necessary at least to be able to associate the assumed revocation, on the balance of probabilities, with the supposed setting up of a new will. Circumstances in which, where a will was not forthcoming at the date of the death of the testatrix and it was sought to propound a copy thereof, an order for probate was refused because the presumption of destruction *animo revocandi*

which arose was not rebutted by any of the alternative hypotheses of dependent relative revocation, accidental destruction by another, loss by the testatrix, loss after her death, suppression by another after her death, or destruction by the testatrix while *incapax*. *Re Riordan (deceased)*. (Supreme Court of Victoria. Scholl J. 1960. 17, 18, 21, 28 November. [1961] V.R. 271.)

PUBLIC REVENUE

Income tax—Re-opening assessments for 10 years—Meaning of words " in the opinion of the Commissioner "—Power of District Commissioner to form necessary opinion—Necessity to show grounds for opinion—Power of Court to review such grounds—Land and Income Tax Act 1954, s. 24. The expression " the Commissioner " used in s. 24 of the Land and Income Tax Act 1954 includes any District Commissioner who by delegation is authorised to perform the functions of the Commissioner. The Commissioner, as a pre-requisite to his right to re-open assessments of income tax for 10 years under s. 24 of the Act must show reasonable grounds for the opinion which he must form to bring such right into existence and such grounds can be reviewed by the Court on the hearing of an appeal. *M.* v. *Commissioner of Inland Revenue.* (1961. 22 May. Herd S.M. Whangarei.)

Stamp duties—Agreement to acquire interests of unpaid vendors under agreement for sale and purchase—Transfer of legal estate in land to person so acquiring—Transfer liable to ad valorem *duty—Rate of duty—Consideration on which to be assessed—Stamp Duties Act 1954, s. 66 (a).* The appellant agreed to acquire the vendors' unpaid interests under certain agreements for sale and purchase under which the vendors had sold parts of their property. The agreement was in form of an agreement of sale and purchase of a chose in action—namely, the balance of the unpaid purchase money owing by each purchaser. The vendors, in fulfilment of an obligation created by the agreement with the appellant, executed in favour of the appellant a registrable transfer of the fee simple of all the land concerned. *Held*, 1. That the transfer was a transfer of the legal estate in the land which fell within the definition of " property " contained in s. 2 of the Stamp Duties Act 1954. 2. That the transfer was properly assessed with *ad valorem* stamp duty under s. 66 (a) of the Act, such duty to be calculated on the sum of money still owed by the various purchasers of the land, which sum in turn was the consideration for the transfer of the legal estate to the appellant. *Stratford* v. *Commissioner of Inland Revenue.* (S.C. Auckland. 1961. 16 May; 1 June. Hardie Boys J.)

RATES AND RATING

Valuation roll—Annual value—Assessment where owner is occupier and no available evidence of comparable rental values—Resort to fair-rent formula—Inclusion of land tax—Rating Act 1925, s. 2. In assessing for the purposes of the Rating Act 1925 the annual value of a property of which the occupier is the owner and where, because of the special nature of the premises or of the business carried on therein, evidence of comparable market rentals is not available, the valuer may assume that the hypothetical gross rental which a tenant should be prepared to pay and a landlord to accept is a fair rent assessed in accordance with the provisions of the Tenancy Act 1955 less the 20 per cent, arbitrary reduction provided for in the definition of " rateable value " appearing in s. 2 of the Rating Act. (*Graham* v. *Mount Eden Borough Council* (1955) 8 M.C.D. 437, distinguished.) The amount of any land tax which would be payable by the owner of the property if he owned no other land is to be taken into account as an outgoing in the computation of the gross rental value of the property. *In re Objections to the Auckland City Council Valuation List by Europa Oil (N.Z.) Ltd. and Others.* (1961. 11, 19 April; 9 June. Coates S.M. Auckland.)

RES JUDICATA.

Estoppel arising after the issue of the writ—Plaintiffs seeking to rely on estoppel—Amendment of reply—Architects' actions for fees for work on project subsequently abandoned—Defence that remuneration for abandoned projects excluded by agreement rejected—Second action in respect of another abandoned project—Same defence—Writ in second action issued before decision in first action—Whether defendant estopped in second action from raising at the trial the same defence as in the first action. The plaintiffs, a firm of architects, were employed under an oral agreement with the defendant, a property developer, to do architectural work for his development schemes. In an action by the plaintiffs claiming fees for work done on schemes for a particular site, which schemes had been subsequently abandoned, the defendant pleaded, among other defences, that it was agreed that the plaintiffs should not be paid for work done on any scheme which was subsequently abandoned. While this action was pending the plaintiffs issued a writ in a second action claiming fees in respect of another abandoned scheme, and the defendant entered a defence similar to that in the first action. Both actions were heard before the same official referee. In the first action the official referee found that the plaintiffs were entitled to charge fees in respect of abandoned schemes and gave judgment for the plaintiffs. Thereupon, the plaintiffs amended their reply (with leave) in the second action by adding a plea of *res judicata*, viz., that the defendant was estopped by reason of the decision in the first action from raising the issue whether the plaintiffs were entitled by agreement to charge fees. On appeal from a decision upholding the estoppel, *Held*, The estoppel would be upheld because: (i) a judgment in an action could constitute an estoppel *per rem judicatam* in a subsequent action, although the judgment in the first action was given after the issue of the writ in the second action. (*Re Defries, Norton (or Nordon)* v. *Levy* (1883), 48 L.T. 703 and *Bell* v. *Holmes* [1956] 3 All E.R. 449, approved. *The Delta* (1876) 1 P.D. 393, distinguished.) (ii) Although a party might be taken to have waived an estoppel if he had not pleaded it, there was no waiver unless he had opportunity to plead it; R.S.C., Ord. 24, did not by implication prevent the plaintiffs from pleading an estoppel that arose after the issue of their writ, and the plaintiffs had been entitled to plead the estoppel by amending their reply. (Dictum of Holt C.J., in *Trevivian* v. *Lawrence* (1704) 2 Ld. Raym. at p. 1051, applied). *Morrison Rose and Partners (a firm)* v *Hillman.* (C.A. (Holroyd Pearce, Willmer and Pearson L.JJ.), 6, 7 June 1961; [1961] 2 All E.R. 891).

ROADS AND STREETS.

What is a misfeasance? *(1960) 230 L.T. Jo.* 4.

SALE OF GOODS

When goods must be fit for use. *(1961) 111 L.J. 383.*

TRANSPORT

Heavy motor-vehicle licence—Conviction for operating heavy motor vehicle without appropriate licence—Liability of operator for quarter's licence fee—Validity of Regulations—Transport Act 1949, s. 59 (1) (l)—Heavy Motor Vehicle Regulations 1955 (S.R. 1955/59), Regs. 10 (9), 12 (17), 12 (18). Subclauses (17) and (18) of Reg. 12 of the Heavy Motor Vehicle Regulations 1955 (S.R. 1955/59) are validly made under the authority of s. 59 (1) (l) of the Transport Act 1949. Where a person is convicted of operating a heavy motor vehicle without a heavy motor-vehicle licence he becomes liable under Regs. 12 (17) and 12 (18) to pay a quarter's licence fee even though he might have escaped conviction by taking out a weekly licence under Reg. 10 (9). *Attorney-General* v. *Williams.* (1961. 16 February; 9 June. Herd S.M. Whangarei.)

Offences—Operating vehicle after dark without prescribed lights—Mens rea not an ingredient—Traffic Regulations 1956 (S.R. 1956/217), Reg. 34 (1). *Mens rea* is not a necessary ingredient of the offence created by Reg. 34 (1) of the Traffic Regulations 1956 (S.R. 1956/217) of driving a motor vehicle on the road during hours of darkness without being equipped with the prescribed lights. (*Police* v. *Miller* (1952) 8 M.C.D. 77, not followed. *Provincial Motor Cab Co. Ltd.* v. *Dunning* [1909] 2 K.B. 499, followed. *R.* v. *Ewart* (1905) 25 N.Z.L.R. 709, applied.) *Transport Department* v. *Haywood.* (1961. 5 July. Herd S.M. Whangarei.)

WORKERS' COMPENSATION

Apportionment of compensation—Remarriage of widow to be taken into account—Workers' Compensation Act 1956, s. 64 (b)—Assessment of compensation—Effect of widow's remarriage—Still a total dependant—Workers' Compensation Act 1956, s. 2 (2). The remarriage of the widow of a deceased worker does not affect or detract from the statutory presumption that she and the children of the worker were trial dependants and does not affect the amount of compensation payable in respect of his death. (*United Collieries Ltd.* v. *Hendry* [1909] A.C. 383; 2 B.W.C.C. 308, applied.) Such remarriage is a factor to be taken into account when considering the apportionment of the compensation moneys. *Kinsey* v. *Whakatane County.* (Comp. Ct. Auckland. 1961. 28 April; 18 May. Dalglish J.)

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

No Flowers by Request

In *Attorney-General ex rel. Butler and Others* v. *The Mayor etc. of Gisborne* (Supreme Court, 27 March and 22 May 1961) the plaintiff and the relators alleged that the Gisborne City Council would act illegally if it grassed over flower-beds and paths, took out hedges and removed a glasshouse in the Gisborne Botanical Gardens. It had been recommended by the City Engineer and the City Gardener that the Botanical Gardens should be converted into an open park and the report containing the recommendation had been adopted by the Council.

It was argued for the relators that the proposed conversion of the gardens into an open park was illegal under the Reserves and Domains Act 1953 and the Town and Country Planning Act 1953. The relators sought injunctions (i) restraining the Council from implementing its decision to convert the gardens into a park, (ii) restraining it from taking any action in or about the Botanical Gardens except in conformity with the two statutes mentioned and (iii) ordering it to remove heaps of soil which had already been dumped on the pathways preparatory to grassing them over.

The contention that the proposed action of the Council would contravene the provisions of the Reserves and Domains Act 1953 was considered first. This point can here be mentioned only briefly.

The land on which the Botanical Gardens were planted had been acquired by the defendant corporation in two lots, the first by a Crown grant under the provisions of the Public Reserves Act 1877 and the amending Act of 1878 " in trust as a site for a public recreation ground " and the second by purchase in 1920, the memorandum of transfer expressing that the land was purchased for a recreation ground. The relators had to concede, in view of the words used in the Crown grant and in the transfer, that the trust created would not be broken by the conversion of the gardens into an an open park. They endeavoured to show, however, that the Council by its conduct in connection with the preparation of its proposed district scheme under the Town and Country Planning Act 1953 and by habitually using and referring to the land in question as " The Botanical Gardens " had declared a trust of a narrower scope which limited the use of at least part of the land to botanical gardens. Hutchison J. held that the acts of the Council did not amount to an irrevocable declaration narrowing the terms of the trust. He was of opinion that the facts showed only the way in which the Council had carried out the trust in the past and intended to carry it out in the future.

The alternative argument for the relators, on which greater reliance was placed, was that the use of the land as botanical gardens was part of the proposed district scheme prepared under the Town and Country Planning Act 1953 and approved by the Council and that even though the scheme was not operative, the Council must comply with it. It was contended that the Council could not alter the proposed district scheme except by one or other of the methods laid down in s. 22 and in s. 35. Section 22 provides that if, for any reason other than to give effect to a decision of the Town and Country Planning Appeal Board or to meet objections that have been heard by the Council, the Council varies the scheme at any time before it becomes operative the Council shall publicly notify the nature of the variation and make full details available for public inspection. Objections must be called for in the same way as if the variation were an original proposed district scheme. Thus, when a proposed district scheme is varied under s. 22 every owner and every occupier of property affected has the same rights of objection and appeal as he had to the original proposed scheme. Section 35 allows application to be made to the Town and Country Planning Appeal Board to consent to any specified departure from the provisions of either an operative district scheme or a proposed district scheme and the Board may give its consent either unconditionally or subject to such conditions as it thinks fit. Regulation 32 of the Town and Country Planning Regulations 1960 deals with applications for consent to a departure from any provision of a district scheme under s. 35 (1) of the Act and requires every applicant (whether the Council or any other person) to publish twice in a newspaper circulating in the district a notice stating the substance of the application. The notice must require any person objecting to the proposals or desiring variation of them to submit his arguments by a specified date. Persons objecting are entitled to be heard. Both ss. 22 and 35 therefore afford persons who object to a variation of or a departure from a proposed scheme the opportunity of being heard.

Arguments for the defendant (a) that it was not part of the proposed district scheme that the land in question should be a botanical garden, since the Scheme Statement and District Planning Map (both of which referred to " Botanical Gardens ") served only to explain the Code of Ordinances, which Code did *not* refer to botanical gardens, and (b) that even if the Council carried out its intentions there would still be " botanical gardens " were rejected by Hutchison J., who decided that the Scheme Statement and the Map were part of the proposed scheme and also that if the gardens were converted into an open park they would no longer fall within the description of " botanical gardens ".

The question was discussed whether, if no alteration was made in the scheme, the Council would be bound to maintain the land as botanical gardens after the scheme became operative. Counsel for the relators submitted that it would, relying on s. 33 subss. (1) and (2) of the Act. Those subsections provide that every provision of an operative district scheme shall have the force and effect of a regulation made under the Act and that while a district scheme is operative it shall be the duty of the Council to observe the requirements and provisions of the scheme. Counsel for the defendant submitted that the defendant corporation would not be bound, arguing that there could be a non-conforming use of the land as permitted by s. 36 of the Act. The scheme under discussion was not, of course, operative,

but Hutchison J. expressed a tentative opinion *obiter* that s. 36 would not apply to the Council itself. He gave no reasons for this opinion.

The final and most important point was whether the Council had to comply with the scheme which it had itself prepared and approved even though the scheme was not operative. The argument for the relators was that as the Council had approved the scheme and as ss. 22 and 35 of the Act provided machinery by which the scheme could be altered, it should be inferred that the Council should comply with the scheme even at its existing stage. Council for the defendant maintained that the defendant was under no obligation to comply with its own scheme before the scheme became operative.

The learned Judge, upholding the submission of counsel for the defendant, held that the Council was not under any duty to comply with its own proposed district scheme. He was of opinion that the fact that the Council had statutory authority to change the scheme before the scheme became operative did not place any restriction on what the Council might do with land under its control. If the Council changed the use of any such land it could afterwards alter the scheme to correspond subject to compliance with the requirements of s. 22 or s. 35.

The relief claimed by the relators was refused. There were no grounds for the issue of the injunctions sought in paragraphs (i) and (iii) of the prayer of the statement of claim, whilst as far as paragraph (ii) was concerned, there was no threatened breach of the provisions of the Reserves and Domains Act 1953 and the relators had failed in their contention that the provisions of the Town and Country Planning Act 1953 required the Council to comply with the provisions of its own inoperative district scheme. Any injunction such as that sought in paragraph (ii) of the prayer would be premature and unnecessary, since it could not be assumed that the Council would not change the scheme before the scheme came into operation. Hutchison J. did, however, say that the proper course would be for the Gisborne City Council to change its scheme even if, contrary to his tentative view, s. 36 would permit a non-conforming use by the Council itself after the scheme became operative.

The case shows that a Council is not bound by its own proposed district scheme. In view of the opinion expressed by Hutchison J. *obiter* that s. 36 of the Act, which in certain circumstances permits a non-conforming use, does not apply to a Council itself, any Council which contemplates a change in the character or use of any land under its control after the publication of its proposed district scheme but before that scheme becomes operative, should change the scheme under the provisions of s. 22 or s. 35. Under either section persons objecting to the variation or departure from the proposed scheme have the right to be heard. The result could nevertheless be unfortunate. If a Council desires to change the use of land which it controls (such as a botanical garden) after having publicly notified its proposed district scheme it is at liberty to do so provided that it changes the proposed scheme at *some* time before the scheme becomes operative. The important point is that the change of use may apparently be effected *before* the proposed district scheme is varied. Any persons who desire to oppose the variation can thus be faced with a *fait accompli* and their right of objection rendered to all intents and purposes useless.

Under the detailed and far-reaching provisions of s. 38 of the Town and Country Planning Act 1953 a Council may delay any " detrimental work " (a phrase defined in the broadest possible terms and including the erection of buildings, the subdivision of land etc.) which is likely to contravene an *undisclosed* or proposed district scheme. Thus the private citizen can be prevented from developing his property because his project contravenes some district scheme which has not been publicly notified and of which he has no knowledge. The Council, on the other hand, may do what it likes with property under its control even after public notification of its proposed district scheme subject only to altering the scheme (in accordance with s. 22 or s. 35 of the Act) to suit itself before the scheme becomes operative. As already pointed out, the right of objection to such an alteration is likely to be quite ineffective.

The decision of Hutchison J. clearly shows that the provisions of the Act operate unequally as between the Council and the citizen.

G.W.H.

Reputed Ownership in Bankruptcy

The scope of the doctrine of reputed ownership was recently examined by Macarthur J., in *Pyne, Gould, Guiness Ltd.* v. *Jurrius* (May 11, 1961). It became necessary for the learned Judge to decide in what circumstances a bankrupt could be said to be the reputed owner, within the meaning of the Bankruptcy Act s. 61 (c) of a debt. By s. 61 (c) goods in the possession order or disposition of a bankrupt, at the commencement of the bankruptcy, by the consent and permission of the true owner, under circumstances that the bankrupt is the reputed owner of them pass, with some exceptions not here relevant, to the assignee.

The debt in issue—£269—was a cheque which represented the proceeds from the sale of livestock owned by a Miss Millow and payable to her by Borthwicks. The contract between Miss Millow and Jurrius, the bankrupt, entitled him to one third of the " profit " from the proceeds of stock purchased by her but (so far as can be ascertained from the report) fattened on the bankrupt's farm. His share was ascertainable only by reference to the contractual arrangements between the parties. The stock were slaughtered on 10 April and on 16 April Borthwicks prepared a cheque which, in accordance with prior instructions, was made payable to Miss Millow. On that day the bailiff acting as the agent of the Sheriff of the Supreme Court secured the alteration of the name of the payee so that the cheque became payable to " The Sheriff of the Supreme Court A/c T. E. Jurrius ". The cheque which was then seized under a writ of sale was credited to the Sheriff's account on 22 April. The bankrupt had filed his petition on 20 April. The learned Judge decided that on that date (which was assumed to be the commencement of the bankruptcy) the sum of £269 was a debt owed by Borthwicks to Jurrius. (*Quaere*: was it not a debt owed to Miss Millow ?) He was satisfied that because the Sheriff's seizure was ineffective in law the debt remained in the order and disposition of the bankrupt on 20 April. Though it is difficult to see how a debt represented by a cheque expressed to be payable to the Sheriff of the Supreme Court but which had not been paid could be said to be in the order and dis-

position of the bankrupt, the further consideration of the case proceeded on that assumption.

The learned Judge referred to the principal authorities on the application of the reputed ownership clause and to the recent decision of the English Court of Appeal in *In re Fox* [1948] Ch. 407 ; [1948] 1 All E.R. 849, which had emphasised that it is not necessary to prove that the bankrupt *had* obtained credit. But the circumstances must be such that creditors must have been led to believe that the goods were his. The owner of goods is not to be deprived of his goods merely because an inference that the bankrupt was the true owner *might* have arisen.

Jurrius had been in financial difficulties for some time. His dairy stock had been sold up by his landlord. He was able to purchase livestock at the sales only on a cash basis. The bailiff had been told and so, it appeared, had representatives of the plaintiff and Borthwicks, that the livestock on the farm belonged to Miss Millow. The Judge concluded that the financial position of the bankrupt was " notorious ". Thus, he said, it was difficult to imagine persons inferring that the debt owing by Borthwicks belonged to the bankrupt. This inference *might* have been drawn but it was not one that *must* be drawn.

Moreover, Miss Millow, the owner of the debt, had not consented to the bankrupt having possession. The arrangements between her and the bankrupt (which the bailiff had interfered with) were that the proceeds from the sale of the livestock were to be paid to her account. This was a long standing arrangement which Miss Millow was entitled to assume would be observed. She was in no way remiss in the sense of allowing the bankrupt to give false appearance of creditworthiness. For these reasons the Court decided that the debt was not part of the bankrupt's estate.

In most of the cases dealing with the application of the reputed ownership clause to debts, the conflict has been between the claims of the Assignee on behalf of the general body of creditors and a person to whom the bankrupt has assigned the book debts owing to him, e.g. a mortgagee. To take such debts out of the reputed ownership of the bankrupt it is necessary to give notice of the assignment to the creditor or in some other way terminate any reputation of ownership the bankrupt might have. In the *Jurrius* case we have a different situation—it was argued that a bankrupt was the reputed owner of a debt (owing to a third person) which had arisen from a dealing with livestock in the proceeds of which he had a beneficial interest under a contract.

J.F.N.

MILLER v. THE MINISTER OF MINES

Part I

There was once a Judge, and a very good Judge he was too, and he lived in the city of Wellington. Having worked well and worthily in the quarry for many years, he approached the time when he should retire and enjoy the well-earned rest which his industry had accorded him. In a few weeks he was due to take his final leave, and he had planned to spend a year travelling abroad in the company of his wife.

While strolling one Sunday afternoon upon one of those delightful summer days which fall to the lot of those fortunate enough to have chosen Wellington as their home, the Judge and his wife saw a building section, costly as all building sections now are, but offering every pleasant prospect and appeal to those who wish to live a mellow life and have the money necessary to do so. And the Judge turned to his wife and said, " Suppose we buy this section, and when we come back from overseas we will build ourselves a new house just adequate for our own needs. The old home has served us very well, but the children are all grown-up and away, and as we get older the burden of looking after the place will fall increasingly upon us." And his wife said, " Yes, let's buy it."

Now the Judge, having long forgotten all about the practical side of buying sections, sought out a well-known and highly capable Wellington solicitor and paid over his money, £1,500, and told the highly-capable-etc., solicitor to do what was necessary to have the section transferred in fee simple, free from encumbrances, in accordance with the requirements of law.

The solicitor got to work, and because it was the Judge concerned, he personally searched the Land Transfer Register right to its very roots—haunted the Town Hall until satisfied there was no local body or town-planning catch—in fact, he made a thoroughly good job of it and in due course paid over the Judge's money and received a Certificate of Title which appeared to be unexceptionable in every respect.

In due time the Judge and his wife took their holiday and returned to Wellington. It was now time to do something about their new home, so they thought they would take another look at their section. What with the progress in Wellington, and this that and the other, there had been changes even in the year the Judge had been away, but their astonishment knew no bounds when in place of their lovely building section they were faced with a vast quarry from which Ministry of Works lorries were carting loads of rock, stone and road metal.

The Judge having fed on a diet of contretemps for the last 40 years did not " do his bun," but went and saw the highly-capable-etc., solicitor who had attended to the transfer and having stated the facts said, " What about it ? ". And the solicitor said, " We'll find out what about it ". So the solicitor made his way round to the office of his pal who ran the Ministry of Works in Wellington and said to his pal, " How come, what about it ? " and his pal said, " Its quite a story—if you have a minute to spare, I'll tell you all about it ". And the solicitor said, " Too right I have—and it had better be good ".

" It's like this " said the boss of the Ministry of Works, " and you'll find every word of it vouched for in this file if you care to look it over. Years and years ago, about the turn of the century, that section belonged to a bird called Penlington. He noticed there was an

outcrop of stone on it and as in those days the whole show was hardly worth two bob, he thought he ought to make something out of it by selling the stone. So he approached a contractor chappie called Byron and made a deal. Byron gave him a tenner for the mineral rights for five years. Just what they meant precisely nobody bothered to define, but the general idea was that Byron could quarry and take away any stone he liked for the next five years. However, they thought they had better have the deal " properly fixed up ", so they went to a solicitor called Williams and told him to do what was necessary.

Now Williams apparently could see no profit in preparing elaborate documents over a tenner, but he had been amusing himself by reading bits of the Mining Act so he said, " Let's put in an application for a Mineral Licence under the Mining Act and see what happens ". Accordingly, he got some forms and completed them accordingly to the directions thereon and Penlington obligingly signed in the margin: " I consent to the within application as owner and occupier of the land. J. Penlington " and away the application went. Sure enough, after a few months, back came the Mineral Licence under the Mining Act, duly registered in the office of the Mining Registrar at Blenheim, which happened to be the nearest office of the Warden's Court at that time.

" Now Byron proceeded to get himself into a jamb with the Government. He defaulted on a contract and owed the Government a lot of money and the Government decided to take an assignment of what he had in the way of assets and let him go. Amongst the assets assigned (and registered) was the Mineral Licence which was tucked away and almost forgotten. That was many many years ago and the term of the licence expired long since but (and in mining matters there is always a " but "), the Mining Act provides that any licence acquired by the Crown goes on for ever irrespective of its term, so that licence is still a good licence. About 12 months ago one of our bright boys saw the outcrop on this section and reported it was just the thing we wanted. And so it was. The old hands remembered the Byron deal so we dug out the file, and so we are quarrying the stone, and so we are jolly well going to go on quarrying the stone and as for your Judge you can refer him to the decision in *Miller* v. *Minister of Mines*.

The highly-capable-etc., solicitor returned to his office, albeit with a somewhat less sprightly step and telephoned the Judge. Next day the highly-capable-etc., solicitor wrote out his cheque for £1,500 (and interest) and humbly tendered it as damages for his negligence for having failed adequately to search the title, and the Judge, being a decent old boy, accepted it in full satisfaction, notwithstanding that what with the inflation and one thing and another it would now cost him £2,000 to buy another section anything like as good.

The highly-capable solicitor concluded that this searching business can be a complicated and expensive matter and promptly issued an office instruction that every future search must include adequate inquiries to eliminate the possibility of the land being affected by a licence under the Mining Act. Just what he was letting himself in for will appear in the next instalment.

J. C. PARCELL.

WHAT IS A CONTRETEMPS ANYWAY ?

We have a cousin whom we regard as a sort of rich relation—partly because of her undoubted charm and partly because of the financial standing of her husband—she moves in a circle that is normally much too high for us. However, from time to time we are entertained at her home and while there we meet the wives of people who have risen much higher in the world than we have. While we are *en famille*, we are called by our front name and we are apparently expected to call them by their front names. This has its difficulties. We regret to say that we have reached the stage where we look our age, while the cousin and her friends never have looked as if they attended with us that great marriage bureau known today as the New Zealand University. So another question arises. Do we treat them in an avuncular manner and tell them to call us Uncle, or is that too much of a price to pay to disguise the fact that they knew us when all the world was young ? We find that our most popular technique is to explain when explanations are unavoidable that they were at school with our wives.

This all arises from a slight contretemps a few weeks back. We have previously mentioned in these notes a legal near-friend who fishes and farms, but who for some reason mixes us up with Mr Wodehouse's Mr Mulliner. For those whose earliest ambition was to marry Shirley Temple, and for their younger associates, Mr Mulliner had friends and relations of whom it was sung :

> " You will find them living highly,
> Like the old Olympian gods,
> You will find them hiding shyly,
> In the various countries' quods."

Our legal friend is at present chairman of a girls' college. He had invited Sir Joseph Quelqu'un, until comparatively recently one of Her Majesty's Judges (four star), to open or close this college. This Judge happened to be a near contemporary and his wife was a friend of our cousin. We were therefore invited to morning tea to keep the wicket up at the other end while our host made the runs. The first thing our host wanted to know was how to address his man. Does an ex-four-star receive the same courtesies as a current five-star ? We had our own difficulties because although her Ladyship was pretty sure to call us " Advo ", or some such name, we were only on " if your Honour pleases " terms with her husband. This question was quickly settled, because just inside our host's door there was a photograph of a large fish suspended from the scales and from then on we did not exist. We had taken the photograph so we knew exactly how the scales were faked, but when we endeavoured to mention this we were just " shushed ", the matter being of no consequence. Apparently this type of photograph is normal amongst fisherman.

This left us to do our part with Lady Quelqu'un, our hostess like all good hostesses nowadays being kept on the run between us and the source of supply. In spite of our rebuff by the fishermen, we still endeavoured to be polite, so we asked how Sir Joseph was enjoying his retirement. It would seem that her Ladyship was mixing us up with someone else for her reply was,

" Don't be stuffy Advo, you know as well as I do that if I hadn't been there to drive you both home after Bunty's wedding, Joe might never have been Sir Joseph ".

This reminded us sharply of the dangers of giving advice in family matters. Her Ladyship had a nephew who was studying for the legal profession. This nephew, wholly bereft of respect for age, was critical of the learning of Latin in general, and of what he called " Advocatus's perfectly unintelligible Latin references in particular ". We endeavoured to help him by explaining the great value it would be to him in later life if he knew that some time ago all Gaul was divided into three parts. He still doubted, so we explained that we had at one time received most favoured nation treatment from the late Sir Robert Stout because of a reference, apparently correct, to Ossa and Pelion. Instead of being grateful, this youth started a rumour that Advo's limp (gained honourably with our army in Flanders) was caused by Advo's drill sergeant who persisted in teaching his cohort to march in step by calling Sinister Dexter, Sinister Dexter, which brings us back to our starting point. If Dale Carnegie were us, how would he (we) address Sir Joseph when next we meet ?

Arising apparently from this morning tea, our fisherman-farmer-legal friend invited us to fish with him at Taupo. It may mean nothing to city residents but in the farming districts an endeavour is being made to stamp out hydatids and as a result of tests our " f-f-l-friend " had lost one of his dogs. To those of you who do not know the fisherman's area of Taupo, it should be pointed out that the architecture of the older dwellings is early missionary. In consequence matters which city practitioners normally deal with in chambers are at Taupo dealt with in camera in a theatre intime. We thought it right therefore to ask our " f-f-l-friend " if he himself was prepared to pass the hydatids test.

Hence the contretemps.

ADVOCATUS RURALIS.

INTERNATIONAL LAW TODAY *

I have recently returned from a trip overseas, which included stays of varying lengths in the United States, Canada, the United Kingdom, Scandinavia, and parts of the so-called Peoples' Democracies in Eastern Europe. During my stay abroad I spent a year at International Legal Studies, which is a part of the Harvard Law School. I could not help but be impressed with the facilities available at Harvard for study in general and international legal studies in particular. I believe that the University has well over 10 million books in its library. In the Law School alone there are over 100 professors who can, if they wish, read over a million books in their own library. The standard of scholarship is kept high by a policy of selecting only from the top 10 per cent of persons undertaking legal study. All legal study is post-graduate and after the LL.B. the research and scholarship is, so to speak, post-post-graduate.

In international legal studies the students are drawn from many parts of the world. I believe that last year more than 40 countries were represented. Harvard has been particularly well-known for its studies in international law and compares in this respect with Cambridge. Similar programmes to those recently established at Harvard are at present being pursued at other great American Universities, such as Yale, Columbia and Michigan.

By international law I mean public international law, which should not be confused with its half-brother, private international law. The latter, which is perhaps better known under the title Conflict of Laws, is more part of Municipal Law and deals with the effect of Foreign Law on the determination of issues within our own Courts.

Public international law, on the other hand, is concerned primarily with the law between States and so provides a means of adjusting disputes that from time to time arise among nations. International law is also concerned increasingly with the rights of individuals and in particular their rights to life, liberty and property, while in a foreign land. The prime example of the application of international law in this latter category arises in circumstances such as the expropriation by the Government of the United Arab Republic of the property of the Suez Canal Company. Similar disputes have arisen more recently in Indonesia, where the Chinese apparently suffered certain expropriations and, of course, in Cuba, where Dr Castro has nationalised Coca-cola.

International law also concerns us today inasmuch as it provides a criminal code. From time immemorial piracy has been treated as being an international crime. Since the turn of the century, attention has been given to the definition of war crimes and more recently attention has been focussed on the crime of genocide.

I think it is interesting to know something of the reasons why international law is necessary and where it finds its origins. Put in its most simple form, international law is concomitant of the division of our earth surface into State areas. The very question of who or what a State is, itself turns on international law. If States are to exist on any terms other than those of sheer force, then there must be rules governing their conduct. International law provides these rules. From one point of view the rules as to territory or boundaries are the most basic, but from another point of view the question as to who belongs to what State, or the law of nationality, is even more important.

From ancient times, the need for legal ordering has been recognised, as expressed in the maxim *ubi societas ibi ius*. The practice of diplomacy would be impossible

* A report of a talk given by Mr B. H. CLARK, B.A., LL.B. (N.Z.), LL.M. (Harvard), to the Auckland branch of the United Nations Association.

or at least very unsafe, if the traditional respect for the safety of envoys was not regarded. Modern international law dates from the time of the rise in Europe about 500 years ago of the Nation State. It is impossible to emphasise too much that the notion of sovereignty has been the basis on which international law has been built. To use the phrase of Professor Jessop, it has also been " quicksand " on which international law has foundered.

In this day of newly-emergent nations, it is also important to notice that the origins of international law are closely connected with Greek and Roman philosophical ideas, as well as with Christianity and the rise of capitalism. International law is thus a European heritage from the time when Europe was the master of the world and its appeal to other less favoured nations is effected by this factor.

I am frequently asked whether international law is really " law ". The answer is that the term " law " is a very complicated idea, embracing many different aspects. For example, one can regard international law as being the substance of the actual rules which bind nations ; or alternatively, and I think preferably, one can regard international law more as a means of social ordering, having value by the extent to which it achieves the purposes of our international society.

Of course, international law is very different from municipal law. For one thing, it is still in a stage of early development and in many areas there is room for genuine differences of opinion. Of course, you could say that this also applied to ordinary law and that is why there are lawyers !

More significantly under the present international legal order there is no Legislature and almost all new law must be created by agreement. Hence the importance of treaties. Another important differentiation is that there are still no international Courts with compulsory jurisdiction and a police force to enforce their orders.

My own feeling is that international law is properly law. I will concede that if one insists on the nineteenth century Austinian definition of law being the command of a superior sovereign to his inferior subjects, then clearly, quite apart from the questions of sanctions, international law could not properly be called law. If on the other hand you view law more as a means of promoting the community interests of survival and prosperity, then there is no reason why international law does not qualify. This view of law, however, presupposes that States do have some common interests and standards. I think this is clearly the position, even if the only common interest is a desire to avoid mutual destruction.

So far as the present inadequacy of sanctions or enforcement procedures is concerned, while this is important, it does not seem to me to be vital on the question of the legal nature of international law. In any case, States have for long enough accepted international law as binding on them and it can be said that, on the whole, international law is about as well observed as national law.

The sources of modern international law are in brief as follows :

(a) *Custom, by which I mean the actual practice, over a period, of States.* International law basically depends on the consent of States that certain rules are binding on them. Over a period of time, States tend to endeavour to be rational and consistent and to recognise that they have a common interest in preserving the standards thus established.

(b) *Treaties.* I have already mentioned the major importance of treaties. These vary in importance from arrangements for Post and Telegraph purposes to the United Nations Charter.

(c) *Decisions of international Courts and arbitrators.* I think it is important to know here, however, that there are many tasks that cannot properly be assigned to Courts and that in any case it is necessary to have some sort of standard, for a Judge without standards is likely to be little less than a dictator. Sometimes any decision may be better than anarchy, but as a rule it is necessary for the law and some community of purpose to develop together, so that there are common understandings and standards.

I do not wish to leave the topic of the modern sources of international law without referring to the growing importance of persons with a legal education in advising their Governments on diplomatic matters. Not only do these people have the advantage of the wisdom crystallised in their own national law, but they are able by reason of their training to give an informed opinion on international matters and so avoid some of the pitfalls of excessive nationalism.

It is true that from early times, States have often found that their so-called " national interest " was contrary to their obligations under international law. Queen Elizabeth I, for example, renegued on an agreement to continue supplying the Dutch with funds in their war against Spain and there have been numerous other examples of States disregarding their international obligations. Egypt and Cuba perhaps rank among these.

One should not lose sight, however, of the fact that many States have accepted their international obligations, even when it was inconvenient for them to do so.

In the era of European expansion and the associated colonialism, international law undoubtedly operated in favour of the expanding States. They alone were members of the international community with rights under international law. The Treaty of Waitangi, for example, is thus not a treaty in the legal sense, because it was not made with people who qualified as a State.

Since the Russian Revolution this question whether international law favoured some States over others has come to much prominence. The early Russian leaders began with a general repudiation of international law on the old Marxist basis that it was only a class tool. Both in Russia and almost all other countries where there has been a revolution there has been much confiscation of property and we find the Russians in the dilemma of not being prepared to pay compensation, but being very offended where their nationals have their own property confiscated. This has been particularly the case in arguments between Albania and Yugoslavia.

At the same time that the Soviet Union repudiated being under any obligation, they were quick to assert that they should have the rights which international law gives to States. In this respect the Communists have tended to emphasise their sovereign independence

much more than western States. Russia under Stalin was certainly not a pleasant place for an international lawyer with integrity. The leading jurist, Pashukanis, made some effort to reconcile the conflicting viewpoints, but he, perhaps as a result, fell into disfavour and was purged. In the latter period of Stalin's reign, we find that international law was being used primarily as a tool for self-interest and that there was complete double talk from advocates like Vyshinsky, illustrating the total antagonism towards the West. Since the passing of Stalin, the virulence of the attack by Soviet legal writers has undoubtedly moderated. I was most impressed with erudition of certain Polish and Soviet legal advisers and I share the view expressed by Mr George Kennan, the former American Ambassador to Russia, that the Soviet Government now can be expected to act in much the same way as any other Government.

In conclusion, I would suggest to you that there can now be no doubt about the utility of international law in the regulation of both political and economic relationships. It should be recognised that the contemporary law has outgrown many of its old limitations and no longer concerns only the political relations between States. To adopt the language of Professor C. W. Jenks, it can now be regarded as the "Common Law of mankind in an early phase of its development".

It should, however, be emphasised that international law provides a method rather than an answer to particular world problems. There are, of course, many other methods. In the legal sphere the principal problem is undoubtedly to work towards some satisfactory evolution, whereby national interests will be more subject to international law. In the past it has not perhaps been vital if the law fared badly in comparison with the more political interests of the diplomats. In an atomic age, however, the perils of lawlessness are much greater. I need hardly commend to this gathering the task that international organisations, and in particular the United Nations, bear towards this end.

CORRESPONDENCE

Corporal Punishment

Sir,

You were good enough to publish my letter in your issue of 21 March. You added a footnote that my "method of treatment of criminals had been tried and found wanting". I contend such is not the case. In your leading article of your Journal of 23 May you give 1941 as the year in which corporal punishment was abolished. New Zealand's statistics show that the number of offences has declined since the abolishing of corporal punishment. For example the *1946 Year Book*, page 152, shows that in 1940 the number of offences against a person, brought to the Supreme Court was 374. In 1945 the number was 285.

The *1956 Year Book*, page 238, gives the number of sexual offences in 1944 coming before the Supreme Court as 113. Ten years later in 1954 the number was 46. The *1956 Year Book* gives the number of cases of robbery, burglary housebreaking in 1944 as 200. In 1954 the number was 18.

The following are a number of quotations concerning corporal punishment:

IS N.Z. ALONE IN ABOLISHING CORPORAL PUNISHMENT?

(from New Zealand Howard Journal, December 1948, page 10.)

At the end of 1935 New Zealand joined the large group of countries in which corporal punishment is abolished. A return published in 1937 included the following countries in which corporal punishment was no longer used in the penal system: Austria (abolished in 1867), Belgium, Chile, Columbia, Cuba, Czechoslovakia, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Netherlands, Switzerland (abolished in 1874) and Turkey. In the United States of America it was imposed in only six or seven of the backward southern States, the great majority of the States no longer using it. Indeed, it was Great Britain and the British dominions and colonies that, to the surprise of many observers throughout the world, were the stronghold of corporal punishment. That position has been altered somewhat, first, by the abolition of the punishment in New Zealand, and second by the passing in the present year of the Criminal Justice Bill by the British House of Commons, under which corporal punishment can no longer be inflicted by order of the Courts.

CORPORAL PUNISHMENT

(from Howard Journal (1960 Vol. X No. 3) page 165)

It is depressing to have to comment once again on corporal punishment—12 years after its abolition as a sentence of the Court in England and some hundred years after it ceased to be used in most West European countries (Jersey, Guernsey, and the Isle of Man still retain corporal punishment as a judicial penalty). The main clamourers for reintroduction of this penalty seem totally to ignore all the evidence available. The Departmental Committee on Corporal Punishment reported in 1938, after exhaustive examination of a mass of evidence, covering some 75 years, that they could find no indication that the use of corporal punishment led to a decrease, or its less frequent use to an increase in the offences for which it was applied. The Departmental Committee accordingly unanimously recommended the abolition of corporal punishment as a sentence of the court; and this was effected in 1948. After abolition, whilst other crimes of violence steadily increased, robbery with violence, the only offence for which corporal punishment for adults had previously been used to any significant extent, steadily decreased, until six years after abolition the figure was 40 per cent lower than that for 1948. It has risen since, but so long after this increase can hardly be attributed to abolition.

It must be hoped that the Home Office Advisory Council, to whom the question of corporal punishment has been referred by the Home Secretary, will give due weight to the facts, and to the opinions of those who have an opportunity really to get to know and understand offenders. It is interesting that the headmasters of approved schools, who are in constant touch with young offenders and are the only people in these schools who may use corporal punishment, have by a large majority declared their opposition to its reintroduction as a sentence of the Court. A further consideration is that of who should administer the penalty. At a time when police recruitment and relations with the public are causing concern, it would hardly seem helpful to demand that members of the force should once again be required to carry out corporal punishment.

In 1938 the Departmental Committee reported: " We do not regard it as a suitable penalty for serious cases: these require constructive methods of treatment, designed to deal with the causes and conditions underlying the offence, and corporal punishment is essentially non-constructive ". There seems no reason to believe that the treatment of violence by violence would today prove any more effective than it did in the past. There are now a much greater variety of penal methods open to the Court than there were when the Departmental Committee reported. Moreover, they still have power to impose sentences which might be regarded as having a powerful deterrent effect—e.g., life imprisonment for rape or robbery with violence. To return to corporal punishment would certainly be in direct contradiction to all we have learned about effective methods of treating offenders.

BIRCHING AS A COURT PUNISHMENT

Sir William Clarke Hall, former Magistrate, author of *Childrens' Courts* gave up the use of the birch because he found that in his Court, birching brought in its train the *highest percentage of repetitions* of the offence. He said: " This method of dealing with offenders blunts the sensibilities at a time when it is most desirable that the boy should be awakened to intelligent response. Far from proving deterrent, birching sometimes has the exactly opposite effect, as in cases where the boy leaves the Court to repeat his offence immediately. This happens often enough to demand attention. I would there venture to submit a psychological explanation. The type of boy before the Courts charged with theft has little in his life to be proud of, but he is proud of his own pluck and enterprise and is usually supported in this by a small circle of admirers. To *forfeit* their admiration would be the greatest humiliation he could experience. After 12 years of experience and much anxious thought, I would earnestly entreat Magistrates who differ from me again to give the matter their most serious attention ".

Dr Cyril Burt in *The Young Delinquent.*

" When all is said and done, in 99 cases out of 100, corporal punishment, however inflicted, is likely to make the incipient transgressor, not more penitent, but more furtive and defiant ".

" The fact that so many boys who have been officially birched, do sooner or later, commit another offence and come again before the Courts show that the punishment has not had the desired deterrent effect, hoped for . . ."

Quotation from *Boys in Trouble.*

I am etc.,
F. C. JORDAN

[In comparing the number of cases coming before the Supreme Court in 1944 with those in 1954 our correspondent does not appear to have made allowance for the effect of the Summary Jurisdiction Act 1952. To make a true comparison would involve adding to the 1954 figures the number of offences where the acccused elected summary trial—*Editor*].

PRACTICAL POINTS

Sale of Land—*Restrictive covenant in favour of Vendor appurtenant to residue—Property Law Act 1952, s. 126.*

QUESTION: A client of mine has verbally agreed to sell a section of his being lot 2 on a plan, he retaining lot 1.

It was a term of the sale that the purchaser would covenant and agree that he would preserve the puriri trees growing on lot 1.

Will you be good enough to let me have a precedent of a transfer preserving the said agreement in favour of the owner or owners of lot 1.

ANSWER: The precedent printed in (1954) 30 N.Z.L.J. 355 could be employed with the necessary modifications.

The recitals could be easily adjusted. The main covenant, it is suggested, could read as follows:

AND in further pursuance of the said Agreement HE the Transferee for himself his heirs executors administrators and assigns and them the registered proprietor or proprietors for the time being of the land first hereinbefore described DOTH HEREBY COVENANT AND AGREE with the Transferor and him and them the registered proprietor or proprietors for the time being of the land SECONDLY hereinbefore described that HE the transferee will not at any time cut down or destroy the said puriri trees but will at all times carefully preserve the said trees from damage and injury so far as is practicable TO THE INTENT that the said restrictive covenant shall be forever appurtenant to the land secondly hereinbefore described for all purposes connected with the use and enjoyment thereof.

X

The Sense of Shame—" We are often told that it is just as important to know what makes good people good as to know what makes bad people bad. In this connection the small in-groups with low delinquency rates have aroused comment, *e.g.*, the Jews in the U.K., the Chinese in America, Asiatics in Africa, Armenians in the Middle East. Usually it is to the strength of family life in these groups that we have looked for an explanation of the absence of crime. But no less significant is the social atmosphere within which Jews, Armenians or Chinese are reared—the social status for example which such an in-group accords to those of its members successful in the outer world—the shame felt by the whole group when one of its members has let it down by getting into trouble. Such attitudes can be strong determinants of behaviour."—(1961) 125 J.P. 319.

FORENSIC FABLE

By "O"

The Litigants In Person Who Compared Notes

Two Litigants in Person met in the Vaults of the Royal Courts of Justice. Each was Anxious for Refreshment after his Oratorical Efforts. The Lunatic Ordered Roast Potatoes, Two Cold Muffins, and a Double Whisky. The Scientist Thought he would have a Chop. The Litigants in Person then Compared Notes. The Lunatic was Very Happy. It Appeared that, Finding his Incarceration Irksome, he had Escaped from the Asylum in the Laundry Basket. It had then Occurred to him that he was Sane. He therefore Brought Actions against the Doctors who had Certified him (for Negligence) and all his Near Relations (for Conspiracy). No Solicitor would Take up his Case, so he had Appeared in Person. The Judge had

been Charming and the Jury Most Sympathetic. In fact, they had Just Awarded him £10,000. Damages. The Scientist Congratulated the Lunatic and Took Up the Running. Some Years ago he had Invented a New Explosive. The Dishonest Representative of a Government Department had Stolen it, Used it, and Denied having Done so. The Scientist, Advised by Eminent Lawyers, had Proceeded by Way of Petition of Right and had been Told by the Court that he Ought to have Sued in Tort. Now (as his Money was Gone) he had Sued in Tort in Person and had been Defeated. The Judge had Suggested to the Jury that he had a Bee in his Bonnet, and the Jury had Stopped the Case. The Lunatic Expressed his Sorrow, and after Firmly Declining to Pay his Bill and Embracing the Waitress, Fled from the Dining-Room. The Scientist Proceeded to his Lodgings in a Bus. The Same Evening the Lunatic Blew his Brains Out because the Asylum Authorities Refused to Re-Admit him, and the Scientist was Taken to the Workhouse.

Moral—*Lex Lunaticos Amat.*

PERSONAL

Dr. O. C. Mazengarb Q.C., who recently underwent an operation at Calvary Hospital, Wellington, is still convalescing in hospital.

Mr J. C. Hendrikse was admitted as a Solicitor by Mr Justice Turner at Auckland on 4 August on the motion of Mr M. E. Casey.

BILLS BEFORE PARLIAMENT

The Bills now before the House are as follows:

Agricultural and Pastoral Societies Amendment
Apprentices Amendment
Auckland Electric Power Board Amendment
Births and Deaths Registration Amendment
Child Welfare Amendment
Chiropractors Amendment
Cinematograph Films
Coal Mines Amendment
Cook Islands Amendment
Crimes
Criminal Justice Amendment
Education Amendment
Electric Power Boards Amendment
Engineering Associates
Estate and Gift Duties Amendment
Family Benefit (Home Ownership) Amendment
Gas Industry Amendment
Government Railways Amendment
Hydatids Amendment
Judicature Amendment
Land and Income Tax Amendment
Land and Income Tax (Annual)
Land Settlement Promotion Amendment
Land Transfer Amendment
Law Reform (Testamentary Promises) Amendment
Lincoln College
Local Elections and Polls Amendment
Local Government Commission
Magistrates' Courts Amendment
Maori Education Foundation
Maori Social and Economic Advancement Amendment
Massey College
Mental Health Amendment
Mining Amendment
Monetary and Economic Council
Motor Spirits Duty
Municipal Corporations Amendment
Nature Conservation Council
New Zealand Army Amendment
Parliamentary Commissioner of Inquiry
Penal Institutions Amendment
Poultry Amendment
Public Revenues Amendment
Public Works Amendment
Quarries Amendment
Republic of Cyprus
Social Security Amendment
Staff Superannuation (Private Member's Bill)
State Advances Corporation Amendment
Transport
Universities
University of Auckland
University of Canterbury
University of Otago Amendment
Victoria University of Wellington
War Pensions Amendment
Wool Commission Amendment
Workers' Compensation Amendment.

STATUTES ENACTED

Dairy Production and Marketing Board
Imprest Supply
Imprest Supply (No. 2)
Imprest Supply (No. 3)
International Finance Agreements

TOWN AND COUNTRY PLANNING APPEALS

Rockley *v.* New Plymouth City

Town and Country Planning Appeal Board. New Plymouth. 1961. 16 May.

Non-conforming use—Land zoned as industrial—Use as Guest house permitted on conditions as non-conforming use—Conditions too restrictive—Temporary nature of non-conforming use—Principles applicable—Town and Country Planning Act Act 1953, s. 38A.

Appeal under Section 26 (2A) of the Town and Country Planning Act 1953, relating to a property situate at the corner of Te Atatu and Toru Roads, Te Atatu, owned by the Crown being Lot 12 on Deposited Plan 42624. Under the Council's undisclosed district scheme this property was in an area zoned as urban. Pursuant to s. 21 (7) of the Act the Minister of Works served on the Council a requirement that this property should be shown in the Waitemata County district scheme as " Reserve for Government (Post Office) Purposes ". The Council appealed against that requirement.

Hamer, for the appellant.
McGill, for the respondent.

The judgment of the Board was delivered by REID S.M. (Chairman). The Board finds as follows:

1. It is not proposed to review the events and correspondence leading up to the issue of the requirement nor is it proposed to review the evidence in detail.
2. The proposed Code of Ordinances under the Council's undisclosed district scheme relating to urban zones makes no provision in residential areas for " public utility " buildings.

   The purpose for which it is proposed the land under consideration should be used is for the erection of an automatic telephone exchange. The Town and Country Planning Regulations 1960 (S.R. 1960/109) Ordinance II Fourth Schedule, cl. 1 subcl. (4) (a) provides under the heading of " Public Utilities in relation to zoning " that every public utility that is not provided for in subs. (9) of s. 21 of the Act shall be deemed to be a conditional use in every zone and partition thereof. The wording of Ordinance II cl. 3 under the heading " Residential Zoning " subclause 1 (b) " Conditional uses "—(vii) " Fire Stations electrical substations . . . other structures of public utility " indicates the intention of the Legislature that buildings of public utility can be appropriately sited in residential zones. The expert evidence establishes that the siting of buildings of public utility in residential areas is in accord with recognised town-planning principles and practice. The Board holds that an automatic telephone exchange is a building of public utility and that the erection of such a building in a residential area is not contrary to town-and-country-planning principles.
3. The real question at issue here is where should the proposed automatic telephone exchange be situated. The Council contends that if it is erected on the property under consideration it will detract from the amenities of the neighbourhood and it submits that the position can be met by the Crown taking land for the exchange from the Auckland Harbour Board. A large area of land containing some hundreds of acres lying to the east of Te Atatu Road and between that road, Harbour View Road to the north and the Whau River estuary is vested in the Harbour Board. A proposal to zone this land for industrial use in the future has been approved in principle by the responsible authorities but its development for such use is not likely to take place for many years and nothing has been done in regard to any detailed planning nor is any detailed planning likely to be undertaken for some years. The Harbour Board has indicated that it is not prepared to make any of this land available for purchase for the erection of the proposed exchange. There appear to be no technical difficulties to the exchange being erected on Harbour Board land on the eastern side of Te Atatu Road, approximately opposite to the junction with Toru Road though it could not economically be sited very far away from the junction of Te Atatu and Toru Roads.
4. Expert evidence tendered by the Post Office indicates that there is in the public interest an urgent and pressing need for the early establishment of an automatic exchange to service the Te Atatu area. There was evidence tendered on behalf of residents in the immediate locality that they take no exception whatever to the erection of an exchange on the property in question. Evidence was also given that it is departmental policy in erecting automatic exchanges in residential areas to build to a plan both as to type of building, location and lay-out that will harmonise with residential properties and not on a purely functional basis.
5. Having regard to the fact that an automatic exchange is a permitted use in a residential zone, the Board considers that there will be little if any detraction from the amenities of the neighbourhood if a suitably designed and sited building is erected on the property under consideration. In coming to a decision it has given weight to the fact that to insist on the exchange being erected on the suggested alternative site would lead to further delay in providing the inhabitants of the area with urgently needed telephone facilities.

The appeal is disallowed.

Appeal dismissed.

Waitemata County *v.* Ministry of Works

Town and Country Planning Appeal Board. Auckland. 1961. 28 April.

Zoning—Land zoned as urban—Proposed erection of automatic telephone exchange—Public utility—Conditional use in every zone—Not detracting from amenities of neighbourhood—Town and Country Planning Act 1953, s. 26—Town and Country Planning Regulations 1960 (S.R. 1960/109) Fourth Schedule Ordinance II, cls. 1 (4) (a), 3 (1) (b) (vii).

Appeal under s. 38 (a) of the Town and Country Planning Act 1953.

The appellant was the owner of a property containing 32.84 perches, being Lot 1 on Deposited Plan No. 3958, being No. 238 Devon Street East. This property was in an area zoned as industrial B under the respondent Council's proposed district scheme.

By appeal No. 225/60, the appellant appealed to the Board against the refusal of the Council to re-zone his land as residential. This appeal came to hearing on 13 December 1960 and by a decision dated 19 January 1961, the Board disallowed the appeal.

The appellant carried on the business of a guest house or boarding house proprietor on the premises. This was a non-conforming use and the business had been carried on with the approval of the respondent since 31 March 1959, when the Council agreed to permit a change of use from residential use to a use as a guest house, subject to certain conditions as follows:

(a) That the premises should not at any time be used for the provision of board and lodging for more than 10 persons.

(b) That the consent given to use the premises as a boarding house for not more than 10 persons shall be for the benefit of the said Graham Charles Rockley personally or any member of his family nominated at any time by the said Graham Charles Rockley and approved by the Corporation and if at any time the said Graham Charles Rockley or such approved member of his family shall cease personally to operate and use the said premises as a boarding house, the consent hereby given shall immediately lapse and cease to have any effect.

The appellant was required to enter into a bond in the sum of £100 with a surety for the due performance of the said conditions.

On 19 December 1960, the appellant applied under s. 38 (A) of the Act for a change of use from the existing use as a guest house, subject to the conditions hereinbefore set out, by

(Continued on p. 272)

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Dress Sense and Nonsense—Once you are unsupported by the public's own convictions of right and wrong the trouble starts because the course is uncharted. Even in Russia, where life follows a pattern far more plainly prescribed than anything we ourselves experience, it may overtake you. It seems that there is currently operating there an institution called the Voluntary People's Police to deal with drunkenness, hooliganism and unseemly behaviour, "not to punish so much as to inculcate, not only to seek out evil, but to prevent it". Not long ago, according to *Izvestia*, a detachment of these police, engaged on a raid "for the maintenance of social order", picked up two 17-year-old girls for "being dressed in a way too fashionable for their age". When the father of one of the girls, a university professor, arrived at the police station to rescue her, he became engaged in a three-hour argument and was eventually told that his daughter had not done anything unlawful, but that she had tied her headscarf in a way permissible only in girls over 22, that she ought to have worn her hair in plaits and that the cut of her coat was objectionable. *Izvestia* warmly espoused the girl's case; her head scarf, it said, was charming, simple and elegant, her coat was well and tastefully cut. It is only if one conceives of a right and a wrong in the social significance of the set of a headscarf or the cut of a coat that the incident makes any sense at all, but if there is a right and a wrong the pressure of society makes for more effective enforcement than the pressure of the police.

Little and Naughty—There is the old maxim that all good things come wrapped up in small parcels, but this appears to be contradicted by a recent survey carried out by Glasgow University, which indicates that undersized men are more likely to get into trouble than their better-built fellows.

It was stated that small underdeveloped boys were responsible for much more delinquency than those of average height. The statement goes on to assert that even among boys from good homes the proportion of small boys convicted was twice as high as that of taller boys from similar homes.

There would appear to be considerable merit in this thesis when one remembers certain "naughty boys" such as Hitler (5 ft. 6 in.), Napoleon (5 ft. 3 in.), Mussolini (5 ft. 5 in.—without high heels). Mr Krushchev would appear to be under average height also.

Catalytic—"All animals are equal", says a character in George Orwell's "Animal Farm", "but some are more equal than others". This satirical comment on revolutionary social systems is made in an allegorical sense; but one Douglas Ellison Mist, a paper merchant of Southend-on-Sea, has apparently taken it literally. According to the *Liverpool Daily Post* of 29 April, he was fined £10 with three guineas costs, for entering the names of his cats, Tiny Tim and Ginger Mist, on an Electoral Roll declaration, as entitled to vote at municipal and parliamentary elections, under the Representation of the People Act 1950.

At first blush Mr Mist, as his name implies, would appear to have seen through a glass, darkly, in declaring the two cats as "residents" in his home; but when the mist, so to speak, is cleared away one sees plenty of justification for his action. What creature can have better claim to be regarded as a "resident" than a cat? As has been frequently observed, a cat attaches itself to a home rather than to a person; it habitually ensconces itself in the most comfortable place in the living room, gazing into infinity with that inscrutable expression of age-old wisdom. Despite a regrettable propensity for wandering abroad in the nocturnal hours in search of amorous adventure—a propensity which it shares with many husbands—it is apt to return to the domestic hearth, the very centre of the home, for refreshment and recreation. And though the ecstasies of its love-life are, on occasion, expressed in musical themes of a chromatic rather than a diatonic nature, the cat is for the most part a quiet, dignified, well-conducted member of the household.

Cats have many legal privileges. They are of the class of animals which are presumed not to be of a dangerous disposition (which is more than can be said for some husbands) and the doctrine of "scienter" applies to them: *Mason* v. *Keeling* (1700) 1 Ld. Raym. 606. Their owners have been held exempt from liability to damages from their rare depredations: *Clinton* v. *Lyons & Co. Ltd.* [1912] 3 K.B. 198; *Buckle* v. *Holmes* [1926] 2 K.B. 125. Although, in the bad old days of the common law, a cat could not be the subject of larceny, it is now capable of being stolen under s. 1 (3) of the Larceny Act 1916. Its longevity is proverbial—nine times the normal span; but we know of no case in which this has led to the application of the Rule against Perpetuities—perhaps because another proverb tells us that care kills it at the last. Its cautious ways were recognised in Shakespeare's day; Lady Macbeth admonishes her lord that he is in the habit of:

> "Letting 'I dare not' wait upon 'I would',
> Like the poor cat i' the adage."

The Murderer Succeeds—An interesting case is referred to in the *Solicitors' Journal* (16 June 1961, page 529). The case is *In re Batten's Will Trusts*.

A husband killed his wife, who was a testatrix. He was subsequently charged with her murder, but was found unfit to plead and ordered to be detained during Her Majesty's pleasure. It was also held that he was insane on the date when he killed his wife. The law is, of course, that a person who feloniously kills another is disqualified from taking either under that person's will or intestacy.

In this case, however, the Court held that the rule did not apply where the murderer was insane. It followed that the husband was absolutely entitled to his wife's estate under her will.

Tailpiece—In the Court of Appeal recently. From the Bench: "What does the Judge mean by that sentence in his judgment?". Counsel: "I don't know. I wish I had him here for cross-examination".

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 270.*)

removal of the conditions limiting the number of guests and the requirement of personal management. Consent was also sought to certain alterations to the existing building. The consent sought was refused and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). As the Board was fully cognisant of all the relevant facts, they having been fully canvassed on the hearing of appeal No. 225/60, it agreed to deal with this present appeal on the pleadings. The Board finds as follows:

1. The change of use now sought is a change of use coming within the ambit of s. 38 (A). The use now sought is not of the same character as the existing use.
2. The only grounds on which the Council can refuse its consent are that the proposed change will detract from the amenities of the neighbourhood.

   The Board does not proposed to traverse in detail the submissions made on behalf of the parties.

   It was submitted by counsel for the respondent, that the appellant has entered into a contract with the respondent and that his application is in effect an application to rescind or vary the terms of that contract. Clearly the Board has no power to rescind or vary a contract, but it has power to grant a change of use, and, if it sees fit so to do, the end effect is to revoke the existing conditions of usage and, consequently, the bond would become a nullity.
3. In its decision on appeal No. 225/60, the Board held that the block in which the appellant's property is situate, zoned as industrial, " would appear to be in a transitional stage, moving towards industrial use and occupancy."

   It is still of the same opinion, but it is also of the opinion, drawn from the evidence at the hearing of the earlier appeal, that the factual change from residential *use* and occupancy to industrial use and occupancy will be slow and gradual. In those circumstances, there appears to be no sound reason why the appellant should not be permitted to put his property to the best economical use during the transitional period.
4. The Board considers that the conditions attaching to the present use are too restrictive, and that an amelioration of those conditions will not detract from the amenities of the neighbourhood, although it is not prepared to approve of what may be described as a permanent non-conforming use.

   On the question of the amenities of a neighbourhood, counsel for the respondent stressed the words " harmony and coherence " appearing in the definition of " amenities " given by s. 2 of the Act, with particular emphasis on the word " coherence ", but the Board considers it must give full weight to each of the words " pleasantness, harmony and coherence ".

   On 21 March 1959 the Council resolved that the use of the premises as a guest house would not detract from the amenities of the neighbourhood likely to be provided or preserved by or under the Council's undisclosed Scheme. It is not suggested that conditions have changed in any way since that resolution was passed.

   The Board considers that in respect of an issue of detraction from amenities, a local authority, with its intimate knowledge of its own district, is better qualified in many instances to pass judgment than is the Board itself. In considering whether a limited non-conforming use should be permitted in any area, regard must always be given to the fact that town planning is a long term, not a short term, concept. It is the end result that must be looked at, not the immediate present.

   In the long run, the use of the appellant's property as a boarding house might well not be in " harmony and coherence " with an industrial zone, but during the earlier transitional period, its use for such a purpose is not likely to detract from the amenities of the neighbourhood.
5. The appeal is allowed in part. The appellant is to be permitted to use his land and buildings as a boarding house subject to the following conditions.

   (a) At the expiration of 10 years from 1 April 1961, or if at any earlier date the building should be destroyed by fire or so damaged as to require substantial repair, the use of the property as a boarding house shall cease forthwith.

   (b) No additions or alterations are to be made to the buildings that will increase the present ground coverage. Any alterations or additions that are made shall be subject to compliance with the provisions of Division II—Building, Sanitary, Plumbing and Drainage Bylaws and with Part XXII (Boardinghouses and similar premises) of Division I—General of the New Plymouth City Consolidated Bylaw 1958 and all other applicable bylaws, statutes and regulations.

   (c) If a motor garage on the property is used for any other purpose than the housing of motor vehicles, the appellant shall make provision on the property for the off-street parking of two motor vehicles.

Appeal allowed in part.

Burgess Fraser and Company Ltd. and Others v. New Plymouth City Council

Town and Country Planning Appeal Board. New Plymouth. 1960. 8 December. 1961. 30 January.

Code of Ordinances—Provision for off-street parking in commercial and industrial zones—Amount computed by reference to ground space occupied by building and not to floor space of building—Method adopted reasonable but not ideal.

Appeals under s. 26 of the Town and Country Planning Act 1953 which were, by consent of counsel, heard together. All the appellants named lodged appeals against the disallowance of objections to other provisions of the respondent Council's proposed District Scheme, but this decision dealt only with appeals against the disallowance of objections to the provisions of Ordinance 23 of the respondent Council's proposed Code of Ordinances.

When the respondent Council's proposed District Scheme was publicly notified, pursuant to s. 22, the four appellants each lodged objections to the Scheme. One of the grounds of objection was common to all and related to the provisions of Ordinance 23. The objections were disallowed and these appeals followed.

Ewart, for the first, second and third appellants.
Grayling, for the fourth appellant.
J. P. Quilliam, for the respondent.

The judgment of the Board was delivered by

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

Ordinance 23, which is the subject matter of this appeal, is the Ordinance dealing, under the heading of " Traffic ", with provisions for off-street parking in commercial and industrial zones. The Ordinance provides, cl. 5 (a), for any person proposing to erect or reconstruct or alter or modify substantially any building in a commercial or industrial zone to make provision for off-street parking of motor vehicles in respect of such building in accordance with the respective site areas set out in Column A. The number of spaces are detailed in Column B. Column A deals with sites having an area from 10 up to 150 perches. Column B deals with the proposed spaces to be provided ranging from 1 to a maximum of 20.

The appellants did not contend that the scheme should not make provision for off-street parking, but it was contended that the amount of off-street parking provided should be computed by reference to the area of the building, that is to say related to the floor space and not to the area of ground space. The method adopted by the respondent Council does not completely take cognisance of the density of use, but this is a factor which must vary so much in time and circumstances as to defeat any regular or basic system of computation based on density of use. The method adopted by the respondent Council is not ideal, but, in the opinion of the Board, it is reasonable. In order to succeed in their appeal, the appellants must satisfy the Board that the Provisions of Ordinance 23, which have been appealed against, are so unreasonable that they should not be allowed to stand.

The appellants have failed to discharge this onus and the appeals are disallowed.

Appeals disallowed.