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COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE

IT was interesting to see in our English contemporary *The Law Journal*, an article on the above subject, dealing in particular with the report of a Working Party which was appointed in 1959 to examine the practical problems involved in a scheme for the compensation of victims of crimes of violence (Cmd. 1406). The article appears at p. 513 of Volume 111.

The person affected by such a crime would in general have a civil remedy by way of an action for damages. Unfortunately in most cases such remedy is worthless owing to lack of means on the part of the offender and it is little consolation to the injured party to know that his attacker has been apprehended and punished. It is reported in the article under discussion that in one case a man blinded by an assault did pursue a civil claim against his two assailants and was awarded £11,500 in damages. The defendants had no means, and in the upshot were each ordered to pay 5s. per week towards satisfaction of the judgment. The article points out that the victim would need to live 442 years before the damages were paid off, and this statement disregards the interest which would be accruing on the judgment and which would be much greater than the weekly payments so ordered.

All would probably agree that if some means could be found whereby the victim could be adequately compensated at the expense of the aggressor, this would be the ideal solution. Not only would the aggrieved party receive his compensation but the liability to pay the compensation would tend to add to the deterrent effect of the ordinary range of punishments which could be imposed. As was said in a White Paper published in 1959 on *Penal Practice in a Changing Society*:

> "Our penal system . . . would find a greater moral value if the concept of personal reparation to the victim were added to the concept of deterrence by punishment and of reform by training. It is also possible to hold that the redemptive value of punishment to the individual offender would be greater if it were made to include a realisation of the injury he had done to his victim as well as to the order of society and the need to make personal reparation for that injury."

The Working Party's opinion on this view-point agrees with our own that it was impracticable because of the fact, already mentioned, that most offenders would not have the means to pay reparation. Apparently it had been suggested that prisoners' earnings could be raised to the level of wages outside the prison, part to be ear-marked towards payment of compensation, but it was pointed out that the first charge on those earnings should be the cost of maintaining the prisoner in prison. Again such a scheme would be of no benefit to the injured party if his attacker were not caught, convicted and imprisoned.

The report of the Working Party concludes on this point that any scheme for compensating victims must provide for the payment of the compensation out of State funds with recourse against the offender who should be required to pay the whole or part of the compensation.

Superficially a scheme such as this has many attractions but it is pertinent to inquire why the State should assume the liability which is involved in it. It may be taken that most of the moneys paid out under the scheme would be irrecoverable and would therefore be a burden on the taxpayer.

It has been said in some quarters that the State has a duty to protect its subjects from violence and if it fails to do so should compensate them. Such a view is fallacious and places on the State a liability in tort higher than that borne by any other prospective defendant. In fact the liability of the State would be absolute and could not be avoided even on positive proof of lack of negligence.

In fact there is really no logical basis for the adoption of such a compensation scheme, and it could only be justified as an extension of the benefits conferred by the Welfare State. Whether such activities should be extended is a matter of opinion for the individual who should take into account the ability of the country to carry any additional burden of this nature.

The adoption of such a scheme is fraught with difficulties, quite apart from its rights or wrongs. For example, what machinery would be set up for the assessment of compensation? Would the applicant have to bring an action and prove his damage in the Court according to established principles? Or would there be a special quasi-judicial body set up to make the necessary assessment?

Then again there would have to be some means of distinguishing the deserving claimant from the undeserving. It would go very much against the grain for taxpayers to see their money going to compensate

a criminal wounded by another criminal in a fight, while he who first provoked the violence which resulted in his injury should suffer at least some diminution of his compensation, if he is not completely disentitled.

Another difficulty lies in determining the basis on which compensation is to be assessed. It might be based on the ordinary rules for assessment of damages for personal injuries but this would lead to anomalies. It would be cheaper to assault the man with low earning power. Again on what basis can compensation for crimes such as rape be assessed ?

The proposal considered by the Working Party was limited to compensation for victims of crimes of violence. Persons so affected naturally attract the sympathy of the public and there is a greater readiness to see them compensated, but it is questionable whether there is any real justification for so limiting the right to compensation if such a right is granted. The person of modest means robbed of his life's savings by a crime, whether a straight-out theft or something in the nature of a confidence trick, seems to be equally deserving of compensation as the person injured by an assault. Yet if provision were made for compensation for such a person how could it be refused to a wealthy individual or company ? Certainly the company would probably protect itself by insurance but the insurance company would naturally claim subrogation to the company's right to compensation.

So far as is known no scheme comparable with that being considered in England has yet been suggested for New Zealand. We gather, however, from the fact that the Working Party was set up to consider such a scheme and report on it that the British Government is seriously considering the provision of compensation in some shape or form. The contributor who wrote the article for the *Law Journal* mentions that public opinion is rightly demanding more sympathy for the victims of crime and suggests that the Government should introduce legislation immediately. The movement having begun in England, it will probably not be long before it spreads to New Zealand and there is agitation for the introduction of a compensation scheme in this country.

We would strongly support the principle of compensating the victim of any crime provided that this could be done at the expense of the offender. On the other hand we should not like to see the State itself undertake the burden, which would be extremely heavy. This could result only in a substantial addition to the load of taxation already imposed to maintain the benefits granted by our Welfare State.

The risk of loss or damage as the result of crime has always been regarded as one of the ordinary dangers of life, which all accept. To most of us the risk is remote, in that the number of citizens suffering loss in each year is small. Against many of the risks we can insure at small expense. There is therefore, it is submitted, no real justification for the adoption in New Zealand of any scheme such as that mooted in England.

EDITOR

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SUMMARY OF RECENT LAW

BILL OF LADING

Exception of loss or damage caused by effects of other goods—Relating to goods of other shippers—Onus of proof whether loss or damage within exception. A clause in a bill of lading relieving the shipowner from liability for loss or damage arising from the injurious effects of other goods is not limited to the effects of the shippers' own goods. (*New Zealand Shipping Co. Ltd.* v. *Tyree* (1912) 31 N.Z.L.R. 825; 14 G.L.R. 671, followed.) Where in cases arising out of loss or damage to goods carried under a bill of lading containing exceptions it is said that the loss or damage is *prima facie* within an exception this does not mean *prima facie* as a matter of law but *prima facie* as a question of fact. If the facts are clearly established the Court proceeds to rule on whether the damage is an excepted peril. If it is so held the Court passes on to consider negligence with the onus on the plaintiff to establish it. But if in a particular case there is no clear-cut evidence as to the cause of the damage but enough evidence to enable the Court to say that the damage is *prima facie* within the exception, there is then again cast on the plaintiff the onus of displacing, by proof of negligence, the protection which the exception clause afforded to the shipowner. The issue then becomes one of fact on the evidence within the law of negligence. Observations as to what is meant by the shifting of the onus of proof during the course of a trial. *Scott Timber and Hardware Co. Ltd.* v. *Northern Steam Ship Co. Ltd.* (S.C. Auckland. 1961. 27 March; 12 July. Hardie Boys J.)

DAMAGES

Mitigation—Assault occurring during fight—Effect of provocation in mitigation of damages. The mere fact that the plaintiff is a wrongdoer is not in general a defence to an action in tort. The right to recover damages in respect of a fight with fists on both sides depends on the circumstances, among which will be the times which intervene between the several blows, the nature and severity of the blows or of the threats to deliver blows and, most importantly, whether the blows were struck in self-defence. He who strikes the first blow is not necessarily and in every case debarred from recovering damages. In a claim for damages for assault provocation, although it does not amount to a threat to the defendant's physical security, may nevertheless go in mitigation of damages. *Green* v. *Costello.* (S.C. Palmerston North. 1961. 21 April; 3 July. Barrowclough C.J.)

DESTITUTE PERSONS

Maintenance (Wife's)—Wife having custody of young children—Unable to take employment because of her responsibilities to them—In receipt of emergency social security benefit—Whether a destitute person—Destitute Persons Act 1910, ss. 2, 24. A woman who has the custody of young children and who is unable to take employment because of her responsibilities for their care is unable to support herself by her own labour and is therefore a destitute person within the meaning of the Destitute Persons Act 1910 and the Court has power under s. 24 of that Act to make an order for her maintenance notwithstanding any agreement between her and her husband that no such maintenance shall be payable. The fact that such a woman is in receipt of an emergency benefit under the Social Security Act should be disregarded in determining whether she is a destitute person. (*Ranson* v. *Ranson* (1939) 1 M.C.D. 236, distinguished; Dictum of Christie J. in *Dobbin* v. *Dobbin* [1947] G.L.R. 288, applied.) *Evershed* v. *Evershed.* (1961. 20, 27 July. Izard S.M. at Timaru.)

FAMILY PROTECTION

Grandchildren—Grandchildren whose parent has died after testator—Principles applicable to considering applications—

Family Protection Act 1955, s. 3. A testator died in 1916 and probate of his will was granted in the same year. The will gave a life interest to his widow with remainder to three of his children. The widow died in 1958, and an application for leave to present a claim under the Family Protection Act 1955 was made by four grandchildren whose respective parents, children of the testator, had died after his death. The applicants were living at the testator's death but were then all under six years of age. *Held*, by the Court of Appeal (Gresson P., Cleary and Turner JJ.), that the application should be refused on the grounds: (Per Gresson P. and Turner J.) 1. That the Family Protection Act 1955 did no more than consolidate additions to the earlier legislation of the last 50 years and at the same time enlarge to some extent the class of persons qualified to apply, but that it did not disturb or derogate from the principle that it is essential to the making of an order under the Act that there should have been a disregard by the testator of a moral obligation resting on him by reason of the circumstances present at the date of his death, whether or not he was fully aware of them, or reasonably to have been foreseen at that date. 2. That on the facts the testator was under no such moral obligation to provide for the applicants. Per Cleary J. 1. That claims by grandchildren whose parent has died after the testator cannot be dealt with by considering whether there was a moral obligation in the circumstances existing at the date of the testator's death, but they can de dealt with by considering whether a moral obligation should have been recognised if the testator had been able to foresee the circumstances in which the grandchildren would be left on the death of their parent, although those circumstances were in fact quite unforeseeable by him. It would be necessary to weigh the merits of any claim of the grandchildren in those circumstances against the merits of the claim of the testator's defendants as actually known to him. 2. That applying this test, the testator was not on the facts under a moral obligation to make provision for the applicants. Appeal from the judgment of McCarthy J. [1960] N.Z.L.R. 220, dismissed. *In re McGregor (deceased), McGregor and Others* v. *Beattie and Others.* (C.A. Wellington. 1960. 14, 15, 18 July. 1961. 10 August. Gresson P. Cleary J. Turner J.)

JURISDICTION

Supreme Court—Mental defective—Effect of passing of Mental Health Act 1959 (Eng.)—Power to authorise pre-payment of death duties—Judicature Act 1908, s. 17. The jurisdiction given to the Supreme Court over the estates of mentally defective persons by the enactment of the Judicature Act 1908 was not taken away by the enactment in England of the Mental Health Act 1959, and s. 17 of the Judicature Act 1908 must be read as giving and continuing to give to the Supreme Court the jurisdiction formerly entrusted to Judges in England under the Signmanual, even though none now enjoy it. Such jurisdiction enables the Court to sanction administrative proposals such as the pre-payment of death duty which, though not specifically included in the terms of s. 101 of the Mental Health Act 1911, are nevertheless shown to be proposals manifestly in the interests of the mental patient which he, if in possession of his full faculties, would clearly adopt, even where those proposals are in fact put forward primarily in the interests of the patient's successors. (*In re the Earl of Sefton* [1898] 2 Ch. 378; *Attorney-General* v. *Marquis of Ailesbury* (1887) 12 App. Cas. 672 and *In re W.* [1954] N.Z.L.R. 183, applied.) The Public Trustee when administering the estate of a mental patient under s. 88 of the Mental Health Act 1911 is in the same position as if he had been appointed the committee of the patient after inquisition. *In re P. (A Mental Patient).* (S.C. In Chambers. Auckland. 1961. 17 July. Turner J.)

MENTAL DEFECTIVES

Jurisdiction of Supreme Court—Not diminished by passing of Mental Health Act 1959 (Eng.)—Power to authorise pre-payment of death duties—Judicature Act 1908, s. 17—See JURISDICTION *(supra).*

Public Trustee—Position as statutory administrator—Same as if appointed committee after inquisition—Mental Health Act 1911, ss. 88, 89—See JURISDICTION *(supra).*

ONUS OF PROOF

Bill of lading—Exception—Whether loss or damage within exception—Shifting of onus during trial—See BILL OF LADING *(supra).*

NUISANCE

Encroachment of roots of trees—Nuisance not trespass—Continuing nuisance—Liability of occupier of property from time to time on which trees growing—Commencement of cause of action. A mandatory injunction may be granted to the owner of land suffering actual and sensible damage from the encroachment of roots of trees from an adjoining property to restrain the owner of that property from permitting the roots to encroach and to order him to remove them. There is no material difference between the position of overhanging branches and of encroaching roots of a tree over and on to the land of an adjoining owner. It is no answer to a claim for damages for a nuisance that the plaintiff could abate the nuisance. The encroachment of roots is not a trespass, but a nuisance, and no one can acquire by prescription or under the Limitation Act 1950 any right to have the roots of his trees encroaching on the land of another. Such a nuisance is a continuing one and a fresh cause of action does not arise from each fresh damage arising from it, it being the continuance of the cause of action plus the fresh damage which constitutes the cause of action. Where the occupier of land did not commence the nuisance but has the fact of its existence brought to his notice and has had ample time to put the matter right but has done nothing, he is equally responsible with the actual tortfeasor for the adverse consequences of the nuisance. *Khyatt* v. *Morgan.* (S.C. Wellington. 1961. 18, 19, 26, 27, 28 April, 23 May; 20 July. Leicester J.)

PRACTICE

Appeals to Supreme Court—Appeal against Magistrate's decision on Case Stated regarding objections to assessments of income tax—Procedure to be followed on delivery of judgment of Supreme Court—Land and Income Tax Act 1954, s. 37—Magistrates' Courts Act 1947, s. 78 (1). When the Supreme Court sitting on appeal from a Magistrate under s. 37 of the Land and Income Tax Act 1954 has delivered its judgment, s. 78 (1) of the Magistrates' Courts Act 1947 applies and once the Registrar of the Supreme Court has transmitted to the Registrar of the Magistrate's Court a memorandum of the decision of the Supreme Court the whole question of the objections to assessments is returned to the Magistrate's Court whence it sprang. It is then for the Magistrate to apply the Judge's rulings to the assessments before him. (*Zimmerman* v. *Commissioner of Inland Revenue* [1960] N.Z.L.R. 8, referred to.) *P.* v. *Commissioner of Inland Revenue.* (S.C. (In Chambers). Auckland. 1961. 4, 7 August. Hardie Boys J.)

Injunction—Encroachment of roots of trees—Nuisance not trespass—Mandatory injunction available—See NUISANCE *(supra).*

PUBLIC REVENUE

Income tax—Appeal to Supreme Court from Magistrate—Procedure to be followed on delivery of judgment by Supreme Court—Land and Income Tax Act 1954, s. 37—Magistrates' Courts Act 1947, s. 78 (1)—See PRACTICE *(supra).*

TREES

Encroachment of roots—Nuisance not trespass—Continuing nuisance—Mandatory injunction available—Liability of one who continues but does not create nuisance—Commencement of cause of action—Principles regarding overhanging branches applicable to encroaching roots—See NUISANCE *(supra).*

TRESPASS

Assault—Fight between plaintiff and defendant—Fact that plaintiff a wrongdoer not in itself a defence—Principles applicable—Provocation in mitigation of damages—See DAMAGES *(supra).*

TRIAL BY JURY.

Case set down for trial before Judge alone—Adjourned to next sittings—Right to give jury notice in respect of adjourned trial—Judicature Amendment Act (No. 2) 1955, s. 2 (2). If an action to which s. 2 (2) of the Judicature Amendment Act (No. 2) 1955 applies is properly set down for hearing before a Judge alone but is subsequently adjourned to the next sittings of the Court it does not automatically become a case for trial before a Judge alone at the later sittings. Section 2 (2) re-applies to the action and either party retains the right to trial by jury at such later sittings subject to giving the requisite notice. (*Kay* v. *Baker* [1957] N.Z.L.R. 1078 and *Kemble* v. *Bedogni* [1961] N.Z.L.R. 118, followed; *Begg and Co.* v. *Naujoks* (1903) 23 N.Z.L.R. 565, distinguished). *Henry Williams and Sons Ltd.* v. *Ferguson Construction Co. Ltd.* (S.C. Napier. 1961. 26 May; 29 June. McGregor J.)

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Proof of Foreign Marriages

A *sine qua non* of the Court's jurisdiction to dissolve a marriage is proof that a valid marriage exists to be dissolved. Because of the present-day mobility of populations, the New Zealand Courts are quite frequently called upon to deal with cases involving marriages celebrated elsewhere than in New Zealand. The recent decision in *Harding* v. *Harding and Anor.* (7 August 1961) is a reminder that such marriages cannot always be proved in the manner in which New Zealand marriages can, namely by the evidence of the petitioner supported by the production of a copy of a "marriage certificate".

Harding v. *Harding* was an undefended suit for divorce brought upon the ground of adultery. Barrowclough C.J. found adultery proved, and was also satisfied on the question of domicile. Before a decree could be made, however, the further question whether the existence of a valid marriage had been established had to be determined. The petitioner testified that he had been married in Vancouver, British Columbia, and produced a document which he described as a copy of his marriage certificate. This document purported, on the face of it, to be an extract from the records of the District Registrar of Births, Deaths and Marriages in Vancouver. It was apparently tendered in the usual way, without any evidence of its nature or authenticity. Barrowclough C.J. held the certificate inadmissible to prove the marriage. He was able, nevertheless, to find the marriage proved without recourse to the certificate, upon the basis of the presumption which arises from proof of a ceremony of marriage, cohabitation, and reputation. He accordingly granted the decree.

In holding that the certificate was inadmissible, the learned Chief Justice drew attention to the fact that documents of this kind which originate in certain countries, states, and territories are admissible under the Evidence Act 1908, s. 44A (enacted in its present form by the Evidence Amendment Act 1958). This section had been applied to a number of British countries and territories (see the Recognition of Overseas Registers Order 1959) but not to British Columbia. In the absence of any applicable statutory authority, a document of this kind does not "prove itself" merely upon production. Further evidence is required to establish its admissibility at common law. (A full discussion of what is required will be found in Montrose, *Proof of Foreign Marriages* (1948) 11 Mod. L.R. 326.) As Barrowclough C.J. said in the present case:

> No proof was tendered as to the authenticity of the signature or the seal nor was there any evidence as to the law of British Columbia as to the requirements of a valid marriage—modes of celebration etc.—or as to the manner in which this particular marriage was celebrated. . . . I am satisfied that I am not entitled to look at the purported Vancouver certificate for any presently relative purpose.

Fortunately, the production of an admissible marriage certificate is not the sole means of establishing a valid marriage for the purpose of divorce and similar proceedings. As Barnard J. said in *Russell* v. *Attorney-General* [1949] P. 391, 394:

> Where there is evidence of a ceremony of marriage having been performed, followed by a cohabitation of the parties, the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary.

Even evidence that the parties have cohabited as man and wife and that they are reputed among those who know them to be married to each other may be sufficient to raise the presumption: see *Piers* v. *Piers* (1849) 2 H.L. Cas. 331; *Re Shephard, George* v. *Thayer* [1904] 1 Ch. 456. But, as Barrowclough C.J. pointed out in the case under discussion, when it is sought to base the presumption upon proof of the ceremony of marriage followed by cohabitation, it is usual to call a witness who was present at the ceremony and can describe it, as was done, for example in *Romanos* v. *Romanos* [1920] G.L.R. 155. The petitioner's own evidence is not sufficient for this purpose: see *Burfield* v. *Burfield* [1918] G.L.R. 18; *Rooker* v. *Rooker* (1863) 33 L.J. (P.M. & A.) 42. In the present case there was no evidence of the ceremony other than a vaguely worded statement of the petitioner himself. There was, however, evidence of cohabitation and some evidence, apparently very slight, that the parties were reputed to be husband and wife. In view of certain special features of the evidence the learned Chief Justice was able to hold, though with hesitation, that the facts proved did, in the circumstances of the particular case, give rise to the presumption of a valid marriage. He added the warning, however, that the decision depended upon its particular facts and could not be regarded as establishing a principle that a valid marriage can be presumed from the fact of cohabitation without more.

From the Chief Justice's discussion in *Harding* v. *Harding* and from the authorities referred to above, the principles governing proof of a valid marriage when an admissible marriage certificate is not available may be summarised as follows: The evidence to be adduced is (1) the petitioner's own evidence of the marriage ceremony and subsequent cohabitation; (2) the evidence of an independent witness who was present at the ceremony and can describe it; (3) independent evidence of cohabitation. Evidence along these lines may be reinforced for the purposes of the presumption by evidence that the parties are reputed to be husband and wife. When, as may happen, no witness to the ceremony is available, it is open to the Court to apply the presumption of marriage upon proof of cohabitation and reputation alone. But the hesitation expressed by Barrowclough C.J. as the sufficiency of the evidence before him in *Harding* v. *Harding* shows that brief, casual and passing references in the evidence to the fact of reputation will not normally be sufficient. Full and cogent evidence of this should be given.

P.B.A.S.

Family Protection—Claims by Grandchildren

In *In re McGregor (deceased)* (judgment 10 August 1961), the Court of Appeal was concerned with an application under the Family Protection Act 1955 for an order granting an extension of time to apply and for provision out of a grandfather's estate. The testator had died in 1916 leaving a will made in 1903. The parents through whom the applicants were related to the testator had died after the testator's death. The applicants had become entitled to apply for provision from their grandfather's estate following the enactment in 1955 of the Family Protection Act of that year which made possible for the first time claims by grandchildren whose parent (being a child of the testator) had died *after* the testator. (Claims by grandchildren whose parent had died in the testator's lifetime were made possible earlier by the Statutes Amendment Act 1947.) The claims foundered (as they had in the Court below) upon the absence of a moral duty on the testator's part to provide for the applicants. All three members of the Court held that, in the circumstances, no breach of moral duty had been shown. But the case raised the question how the moral duty principle should be applied to claims by this class of applicant. The difficulty arises, of course, because the very circumstance, namely the death of a parent, which makes the application possible, and which would, in most cases, be that which creates the need for provision, must, *ex hypothesi*, occur after the testator's death.

The testator's moral duty, it has long been held, must be measured by the facts as they existed at the date of his death. This includes, as the Privy Council recently reiterated in *Dun* v. *Dun* [1959] 2 All E.R. 737 ; [1959] A.C. 272, such happenings as the testator might reasonably be expected to have foreseen. The learned members of the Court of Appeal repudiated the radical suggestion that the terms in which the legislation was re-enacted in 1955 had abolished altogether the necessity to show a breach of moral duty on the part of the testator. They differed, however, as to how this principle should be applied to claims by grandchildren whose parent died after the testator. Cleary J. thought that such claims could not be dealt with by asking simply whether there was a moral obligation in the circumstances existing on the date of death. He considered it necessary (and on the authorities justified) to credit the testator with a notional knowledge of the events which had actually happened, whether in fact he could possibly have foreseen them or not. But the other members of the Court, Gresson P. and Turner J., took a different view. They held, in effect, that the principles governing this class of case are the same as those which govern any other. Consequently, as the learned President put it :

> [The testator's] moral obligation is to be measured by attributing to him a knowledge of all the relevant circumstances existing at the date of his death and circumstances which should have been foreseen by him at the time of his death. A testator is not however to be judged on the position as it afterwards comes to be because of circumstances which he could not reasonably have been expected to foresee.

How will this retention of the traditional approach, even in cases of claims by grandchildren whose parent has died after the testator, affect the making of such claims ? Turner J. was able convincingly to demonstrate, by a series of examples, that there is a considerable variety of circumstances in which successful claims could be made even on this principle. The obvious case in which the death of a parent ought to have been foreseeable by the testator because of the parent's state of health is by no means the only possibility. But both Gresson P. and Turner J. recognised that there will be hard cases in which a parent has unexpectedly died and the grandchild is, from the point of view of his circumstances, in need of provision, but in which a successful claim will be impossible. The formula preferred by Cleary J. would cover many such cases ; that adopted by the majority has, as Turner J. said, the merits of historical consistency and consistency as between the various classes of applicants, but it will nevertheless leave these hard cases uncatered for.

P.B.A.S.

Nuisance From Trees

In *Webster* v. *Norrie* (28 July 1961) Leicester J. had to decide the relationship between the common-law remedy of an injunction in respect of " interfering " trees and the statutory remedy provided by s. 26A of the Fencing Act 1908 (as enacted in the Fencing Amendment Act 1955). Section 26A gives to a Magistrate a very wide jurisdiction to order the removal or trimming of " interfering " trees whether or not their interference amounts to a legal nuisance. Subsection (8) enacts that when an order is made under the section the reasonable cost of removing or trimming any tree shall be borne by the applicant for the order,

> unless the Court is satisfied that the applicant would have been entitled to an order for the removal or trimming of the tree if this section had not been passed.

That the poplar trees involved in the instant case constituted a legal nuisance there can be little doubt. Some branches overhung the respondent's property by some 20 feet with roots penetrating some 70 feet into the property. The trees impoverished the soil of the respondent's land and expense was incurred by the respondent in clearing away from the property the leaves from the trees. The Magistrate had ordered their removal and his order was upheld by Leicester J. But the salient question which the learned Judge had to decide was whether, if the applicant had taken action at common law, an order would have been made for the removal or trimming of the trees. To decide this question he referred to several recent New Zealand cases : *Mandeno* v. *Brown* [1952] N.Z.L.R. 447 ; [1952] G.L.R. 342 ; *Woodnorth* v. *Holdgate* [1955] N.Z.L.R. 552 ; *Darroch* v. *Carroll* [1955] N.Z.L.R. 997 ; *Roud* v. *Vincent* [1958] N.Z.L.R. 794 and *Perry* v. *Brett* (1960)—an unreported decision of Richmond J. In the first-mentioned case an order was made for the removal of the trees, but in the other cases the orders were restricted to the trimming of overhanging branches and the removal of offending roots.

Leicester J., on a consideration of the facts of the present case and of the authorities referred to and of the terms of s. 26A of the Fencing Act 1908, decided that while the Magistrate was justified in making an order for the removal of the trees, an order for their removal would not have been made if the action had been brought at common law.

He did not state specifically that had the action been brought at common law an order would have been made for the cutting back of the overhanging branches and the removal of the encroaching roots,

but that such an order would have been made is implicit in his discussion of the authorities referred to above.

Dealing with the question of the cost of removal of the trees, his Honour said :

> Unless the Court is justified in finding that the respondent would have been entitled to an order for the removal of the trees if the section had not been passed, the cost of removal should be borne by the respondent ;

and later,

> I find that, the evidence being insufficient to warrant at common law a mandatory injunction for the removal of the trees, the respondent must bear the reasonable cost of the removal.

The application before the Court, as his Honour stressed, was one for the removal of the appellant's trees. It was to the question of removal and not trimming that the evidence was directed. Upon this basis the Court decided the matter. It was unfortunate for the respondent that the application was so restricted and that an alternative application for the trimming of the trees was not made. Subsection (8) enacts that the applicant must pay the cost of removal or trimming

> unless the Court is satisfied that the applicant would have been entitled to an order for the removal *or* (italics supplied) trimming of the tree if this section had not been passed.

Had the issue of trimming the trees been before the Court, there can be little doubt that his Honour would have held expressly that the applicant would have been entitled to an order at common law for the trimming of the trees and thus the cost of removal would, in accordance with the provisions of subs. (8), have been payable by the appellant.

A.G.D.

WHAT HAS HAPPENED TO THE McNAGHTEN RULES?

I make so bold as to suggest that for 50 years the law relating to insanity in New Zealand has been misunderstood and misapplied ; for 50 years our Judges have been misdirecting juries on the meaning of insanity and that for this reason there have been during the period miscarriages of justice. I submit that there is no such thing as the McNaghten Rules in New Zealand and that s. 43 of the Crimes Act does not exist. Before I get more extravagant I must concede that there is no judicial authority in this country in support of this view. Indeed there is of course strong judicial authority against it and Sir John Salmond, when Solicitor-General, is on record as repudiating such a notion. In spite of this formidable opposition I shall state my case.

The core of my submission is in s. 31 of the Mental Health Act 1911. That section reads as follows :

> 31. *Indictable offence* : *Finding of insanity*—(1) If upon the trial of any person charged with an indictable offence it appears in evidence that he was insane at the time of the commission of the offence, and he is acquitted, the jury shall be required to find specially whether he was insane at the time of the commission of the offence, and to declare whether he was acquitted on account of his insanity.
>
> (2) If the jury finds that such person was insane at the time of the commission of the offence, and declares that he was acquitted on account of his insanity, the Court before whom the trial is had shall order him to be kept in strict custody in such institution within the meaning of this Act or penal institution as to the Court seems fit, until the pleasure of the Minister of Justice is known.
>
> (3) For the purposes of this Part of this Act a person shall be deemed to be insane if he would have been deemed to be a lunatic if this Act had not passed.

If subs. (3) were not there, there would not be the slightest difficulty in reconciling s. 31 with s. 43 of the Crimes Act 1908. It would follow that " insane " both in the Mental Health Act and in the Crimes Act would bear the Crimes Act meaning and the two sections, one setting out the test of insanity, and the other the procedure to be followed in insanity cases, could be read harmoniously. However, subs. (3) is there and it specifically relates the definition of " insane person " to the old definition of " lunatic ". This throws us back to the definition of lunatic in s. 436 of the Crimes Act 1908 (now repealed). With regard to this definition, it is sufficient perhaps to say that it is a wide definition, almost as wide as the present definition of " mental defective ". It means any insane person, idiot, lunatic or person of unsound mind . . . It is plain beyond argument that a " lunatic " under s. 31 (3) is not necessarily the same thing as an " insane person " within the meaning of s. 43 of the Crimes Act.

What are the consequences of this? It must I think be obvious that if s. 31 is read in isolation without reference to the Crimes Act, the test for insanity to be applied in indictable cases is whether or not the accused qualifies as a " lunatic ". That is the clear meaning of s. 31. It must follow that if the section is to be given its literal effect the McNaghten Rules of s. 43 are superseded. Section 31 of the Mental Health Act and s. 43 of the Crimes Act cannot stand together and applying the ordinary rule of construction the later statute in such circumstances overrides the earlier. By this reasoning s. 31 is supreme and accordingly s. 43 is extinguished.

At this stage I must concede that it is most unlikely that the Legislature intended to bring about such a result. By 1911 the McNaghten Rules had been in the common law of England and in our own law for many years and, to say the least, it would be extra-extraordinary if the Legislature suddenly made such a drastic and fundamental change in our criminal law in such a way as this. It is submitted, however, that the question for our Courts is not what the Legislature intended, but what the Legislature actually did and said. It has, of course, been assumed through the years that in fact no change was made in the law. The point has been referred to once or twice ; for example in *R.* v. *Aldred* (1914) 33 N.Z.L.R. 926 ; 16 G.L.R. 548 and *R.* v. *Adams and Carr* [1916] G.L.R. 288. So far as my investigations extend the point was not seriously grappled with until *Murdoch* v. *British Israel Federation* [1942] N.Z.L.R. 600 ; [1942] G.L.R. 390. In that case all five Judges held that s. 43 of the Crimes Act was still in force and unaffected by s. 31 of the Mental Health Act. It is submitted, however, that the judgment of the Chief Justice, Sir Michael Myers, shows

LEGAL ANNOUNCEMENTS

Concluded from p. i.

Messrs KENNETH GILLANDERS SCOTT, ROBERT ALFRED WILSON and RONALD ANDREW BARBER, practising as Barristers and Solicitors at Gisborne under the name of Gillanders, Scott & Wilson, announce that, due to the appointment of Mr Scott as a Judge of the Maori Land Court, their partnership has been dissolved as from 17 October 1961, and that as from that date the practice will be carried on by ROBERT ALFRED WILSON, RONALD ANDREW BARBER and KEVIN BERNARD CULL, LL.B., formerly of Dunedin and Cromwell, at the present address, 124 Bright Street, Gisborne, under the name or style of WILSON, CULL & BARBER.

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that he had misgivings. After a careful historical analysis he says ;

> . . . although implied repeals are not favoured, s. 31 read literally would seem to create a very real difficulty (*ibid.*, 625 l. 4 ; 399).

Further on he states :

> However, since 1911, as before, the Courts have acted on the assumption that s. 43 of the Crimes Act still applied and I think that this result follows, and can only follow if subs. (3) of s. 31 of the Mental Health Act be read as a separate section and the words in it " For the purposes of this part of this Act " be read as if they were " For the purposes of the following sections of this part of the Act " (*ibid.*, 625 ; 399).

After saying that it was impossible to read the statutes without feeling that in 1882 and since the draftsmen paid insufficient attention to provisions of the criminal law relating to insanity, Sir Michael went on to say :

> However this may be and whatever one's view might be, if the matter came before the Court on a consideration of merely s. 43 of the Crimes Act and the provisions of the Mental Defectives Act *res integra* and without the curious history I have related, I think it is too late now to say that the McNaghten rules . . . have been abrogated (*ibid.*, 625 ; 399).

The Chief Justice went on to say that he " frankly disliked the Procrustean method of construction that appears necessary to bring about this result."

I suggest that the above quotations show that Sir Michael Myers was not entirely happy about the result he had reached and the way he had reached it. To arrive at it he was compelled to alter the wording and construction of a subsection which on the face of it was as plain as it could possibly be. Instead, he reads the subsection as if it were a separate section and alters its meaning so as to prevent it from applying to its own s. 31. Such a major operation to a statute by Judges is rare. The use of the word " Procrustean " is certainly apt. Though I have not made an exhaustive search I have been unable to find any case which has gone so far. As *Maxwell on Interpretation of Statutes*, 10th ed. 230 says :

> " The Courts are very reluctant to substitute words in a statute or to add words to it ".

The same author makes it clear that in certain circumstances in construing difficult statutes a presumption arises that the intention of the Legislature will be in accord with convenience, justice and legal principles thus giving a certain latitude to the interpreter. But *Maxwell* adds at page 200 :

> " It is hardly necessary to add that all such considerations are immaterial where the language of the Act is not open to doubt ".

In *Murdoch's* case however, the Judges did concur in Sir Michael's manipulative surgery which had the effect of turning a subsection into a new section and altering its former meaning and effect. It is suggested that this is not interpretation but legislation, and that the judiciary were intruding into fields where they have no business to be. It is conceded at once that it was an expedient decision and a practical decision compelled by the stupidity of draftsmen who had " paid insufficient attention to the provisions of criminal law relating to insanity ". However, the question of principle remains. Can a Judge alter the primary and plain meaning of a statute because he is satisfied that it does not carry out the intention of Parliament ? In other words, can a Judge disregard the intention of Parliament as expressed because he may think it is not correctly expressed ?

These questions are, I think, answered by Lord Halsbury in *Commissioner for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, when he said :

> That in fact the language of an Act of Parliament may be founded on some mistake and that words may be clumsily used I do not deny. But I do not think that it is competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. (*ibid.*, 549).

In *Vacher & Sons Ltd.* v. *London Society of Compositors* [1913] A.C. 107, Lord Atkinson cited with approval the words of Lord Esher in *R.* v. *The Judge of the City of London Court* [1892] 1 Q.B. 273, 290 :

> If the words of an Act are clear you must follow them even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity.

It is appropriate here, I think, to consider why it is that Judges are so reluctant to depart in the slightest degree from their function of interpretation even though their interpretation appears on occasions to bring about an absurdity or an error. The point is that judicial independence is founded upon the rule that the Judiciary shall not intrude into legislative fields. A Judge who presumed to ignore or alter the law as expressed by Parliament would at once clash with the Legislature which would not tolerate the usurpation of its functions. If there was any serious invasion by Judges into legislative territory there can be little doubt that Parliament would impose its will ; the Judges would be removed or controlled and this would be the end of judicial independence as we know it. It is of paramount importance that the independence of our Judges shall never be questioned or placed in jeopardy. Recognising this, the judiciary has always been at pains not to go too near to the shadowy border between Legislative Acts and judicial interpretation. Far more than the personal security and dignity of the Judges is concerned. Judicial independence is a matter of supreme importance in our conception of justice and freedom.

I have tried to show on the authorities that if the words of an Act are plain a Judge has no power to alter such meaning merely on the ground that a plain interpretation leads to a result which he thinks could not have been intended by the Legislature. My argument, of course, falls to the ground if it can be said that subs. (3) of s. 31 is ambiguous thus giving the Judges scope for their interpretative powers. In these circumstances of course a Judge can consider the intention and purpose of Parliament. But I emphasise that before doing this the Judge must find some ambiguity or repugnancy in the words being construed. As Lord Sterndale M.R. put it in *Wankie Colliery Co. Ltd.* v. *Commissioner of Inland Revenue* [1921] 3 K.B. 345 :

> If the words are ambiguous and are fairly capable of two different meanings one of which will or may work an injustice and the other will not then the latter interpretation is to be preferred. *But if the words are plain then the Court has no right to put an unnatural interpretation upon them simply because the putting of the natural interpretation upon them might work an injustice* (*ibid.*, 355).

The italics are mine. I suggest that however one tries one cannot see any ambiguity or difficulty about the meaning of subs. (3) of s. 31. It is specific, clear, and leaves no room for misunderstanding.

I refer now to the undoubted proposition that the Courts will not favour implied repeal. It must be

faced that s. 31 of the Mental Health Act read literally, and s. 43 of the Crimes Act cannot be construed together. Accordingly, if s. 31 in its present shape is to survive then s. 43 must be repealed by implication. It must be conceded that, because of the historical background of the two sections in question, repeal by implication in the present case should be given effect to only if there is no room for any other course. The difficulty was surmounted in *Murdoch's* case by resorting to the Procrustean methods employed by the Chief Justice. If that procedure is proper then my argument that s. 43 is repealed must fail. I have tried to submit however that the right and the power to alter and add to the words of a statute arises only when there is ambiguity obscurity or uncertainty in the meaning of the statute. If the statute is plain in its meaning the consequences must be faced. I submit that the words :

> For the purpose of this part of the Act a person shall be deemed to be insane if he would have been deemed to be a lunatic if this Act had not been passed.

are clear and unambiguous and should be given effect to as a plain expression of the Legislature's will. I follows that it should be assumed that the Legislature intended an alteration in the law, and the s. 43 of the Crimes Act is repealed by implication. " When two statutes ", said Brett J. in *Dickinson* v. *Fletcher* (1873) L.R. 9 C.P. 1 " dealing with the same subject-matter have different language it is generally a fair presumption that the alteration in the language used in the subsequent statute was intended ". In the present case such a presumption cannot be avoided.

The Court of Appeal having taken a different view, I cannot imagine that the submissions I have made will disturb anyone unduly. However, whether my opinion is right or wrong there is certainly a case for tidying up Part IV of the Mental Health Act so that it can be read harmoniously with the Crimes Act. In particular, the archaic definition of " lunatic " should be flung out of the Act so as to put an end to some of the misunderstandings that exist today. In the present Mental Health Act there are three different tests of sanity. To be certifiable a person must come within the wide definition of " mental defective ". To be acquitted on the ground of insanity in a criminal case the mental affliction must fall within the narrow bounds of s. 43 of the Crimes Act. But to qualify as " insane " for the purposes of (e.g.) ss. 32 and 33 of the Mental Health Act a third standard must be applied—the accused must come within the category of a lunatic as defined by the repealed s. 436 of the Crimes Act. It cannot always be easy to recognise these distinctions and apply the law correctly. For example, a Judge utilising s. 33 (1) is in a curious position. He may suspect that an accused person who has pleaded guilty before him " was insane at the time of the alleged offence ". If so, the Judge may direct that a plea of " not guilty " be entered and for the trial to proceed accordingly. For the purpose of deciding whether he should make such a direction the Judge must employ the " lunatic " definition of insane. Having so decided, and the issue of insanity being raised at the trial, the Judge must then direct the jury that the accused can only be acquitted on the grounds of insanity if he is insane within the meaning of s. 43 (McNaghten Rules). Several other examples could be given of the peculiar difficulties which arise under Part IV as a result of this archaic definition of " lunatic " being allowed to survive in the Act. As both the Crimes Act and the Mental Health Act are being revised I suggest it is an appropriate time to amend them and so take notice of Sir Michael Myers' reproach that the original " draftsman paid insufficient attention to the provisions of the criminal law relating to insanity ".

LIBRA.

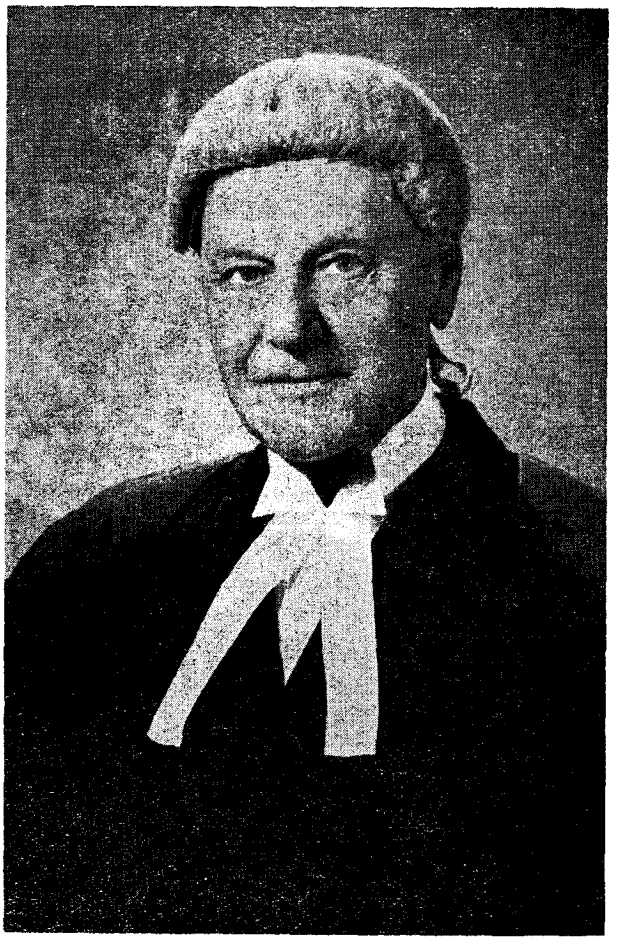
Gentility at Sea.—Not content with kindly giving the lawyers a classification, the same leader writer sails into yet deeper water with the Royal Navy, maintaining that seamen were never gentlemen and gentlemen never seamen. Landlubber though I am, I am inclined to doubt that, too. In " Peter Simple ", which draws such a vivid picture of naval life in the Napoleonic Wars, Mr Chucks, the boatswain, always liked to consider himself a gentleman. " He attempted to be very polite, even when addressing the common seamen, and, certainly, he always commenced his observations to them in a very gracious manner : but as he continued he became less choice in his phraseology . . . As a specimen . . . he would say to a man on the forecastle : " Allow me to observe, my dear man, in the most delicate way in the world, that you are spilling that tar upon the deck, a deck, sir, if I may venture to make the observation, I had the duty of seeing holystoned this morning. You understand me, sir, you have defiled His Majesty's forecastle. I must do my duty, sir, if you neglect yours ; so take that, and that, and that, you damned haymaking son of a sea cook. Do it again, damn your eyes, and I'll cut your liver out ! " To the new midshipman he explained : " You must observe how gently I always commence when I find fault. I do that to prove my gentility ; but, sir, my zeal for the service obliges me to alter my language to prove in the end that I am in earnest. Nothing would afford me more pleasure than to be able to carry on the duty as a gentleman, but that's impossible." Mr Chucks had some reason to suspect that he was the by-blow of a gentleman and preferred that to being the legitimate offspring of a boatswain and his wife. Peter at first thought his gentlemanly aspirations absurd, but his Irish fellow-midshipman O'Brien disagreed : " When did any of his shipmates ever know Mr Chucks do an unhandsome or mean action ? Never—and why ? Because he aspired to be a gentleman and that feeling kept him above it."—Richard Roe in (1961) 105, Sol. Jo. 175.

Better than Black Coffee—" A judge was once heard to observe that no case was so good that it could not be improved by a lady barrister. Besides, it helped him to keep awake."—(1961) 105 S.J. 621.

An Appeal-prone Judge—" One remembers with feelings akin to affection that Judge whose decisions were so often appealed against that some wit suggested that it was *prima facie* evidence of professional negligence not to take that step. Yet, in spite of a string of king-size clangers, his judicial career was brought to an end only by his retirement at the age of 72, though exactly what the members of the Court of Appeal put on the birthday card that they sent him remains a closely guarded secret."—(1961) 105 Sol. Jo. 313.

MR JUSTICE SPRATT

PERHAPS the most significant, certainly one of the most interesting features, of the appointment, on 29 September 1961 of Frederick Campbell Spratt as a temporary Judge of the Supreme Court of New Zealand is that he should have entered upon that office later than the normal retiring age of Her Majesty's Judges, robust and long lived as many of Bench and Bar may be. In doing so, special legislation was called for and its passing is a tribute to the New Zealand Legislature as well as recognition of a particular individual. It is not given to many to maintain health, strength and mental vigour beyond the normal span, sufficient to sustain the taxing duties and responsibilities of a Supreme Court Judge.



Earle Andrew, Photo

Mr Justice Spratt

Campbell Spratt comes to the Bench as a New Zealander born, bred and reared, apart from living in Australia for a brief period as a child. This should not be held against him. Infancy would appear to be a good defence.

He turned to the study of law at Canterbury College, as it was then known, from a family background which had not previously provided a member of the legal profession and at an age when many law students are well advanced towards qualification. This increased the difficulty of obtaining a footing in a legal office which he secured in 1910 with the Christchurch firm of Messrs J. A. Flesher & Son who still practise in the person of the son and grandson of the late Mr J. A. Flesher who gave Campbell Spratt his first job. Then followed admission to the Bar in 1913 and some months later the plunge into solo practice in Christchurch. Very soon, however, he was invited by Herbert Halliwell to join the Hawera firm which became known as Halliwell, Spratt & Thomson, now the well-known firm of Messrs Horner & Burns.

First world war service which did not go further than Trentham Military Camp because of illness which almost ended fatally was followed by a return to his Hawera firm and continuation of an ever-increasing practice, particularly at the Bar, both in Taranaki and beyond.

Much of the litigation of those years had a dairy-farming flavour. There were notable successes which every successful barrister treasures in retrospect, although "the ones that got away" may be more dear to his heart. The Bench of those days was strongly manned but with a residue of the older, possibly slightly awesome, Judges still in office. With all of these and the appointees of the 1920's, as well as his rivals at the Bar, the new Judge more than held his own.

Of the Taranaki Bar of those days, Mr Patrick (Paddy) O'Dea of Hawera was one of the leaders and Mr Justice Spratt will remember with affection and respect their encounters. It is said that the great Taranaki case of those times, *Graham* v. *Bartlett* [1921] N.Z.L.R. 345 in which the latter figured was the first occasion upon which a decision of the late Mr Justice Salmond was reversed, a performance which the new Judge again achieved some 29 years later in *John Fuller & Sons Ltd.* v. *Brooks* [1950] N.Z.L.R. 94. No doubt he will look forward in his own turn to being struck down, always remembering that it is more blessed to give than to receive.

By 1927 Mr Spratt had achieved such a position at the Bar that he felt tempted, as he had been in Christchurch 13 years before, to put fortune to the test by once again commencing solo practice. So he departed from Taranaki, being followed in his Hawera firm and practice by Mr A. K. North who later achieved judicial rank and now holds an honoured place in the Court of Appeal.

After one year of practice in Wellington on his own account, Mr Spratt amalgamated his practice with that of Messrs Morison, Smith & Morison, following the elevation of Sir David Smith to the Supreme Court Bench. While it cannot be said that every member of the profession in Wellington welcomed the newcomer, the profession as a whole did so. He continued on his professional way, in comradely association with Mr D. G. B. Morison, in a quiet and steady manner, gaining ever greater recognition in the Courts and

among his professional brethren.

In 1930 he published the textbook known as *Spratt's Law of Bankruptcy* and in 1933, following the passing of the Companies Act of that year, edited the second edition of *Morison's Company Law in New Zealand*, first published in 1904 by the late Mr C. B. Morison K.C. In addition, for some eight years he held the position of editor of the *New Zealand Pilot to the Second Edition of Halsbury's Laws of England*. The foregoing added considerably to the work load of a heavy commercial and Court practice, interspersed with appearances before sundry commissions and tribunals, among which were the Waterfront Industry Commission, the Licensing Commission and several commissions on Maori affairs.

As an advocate, Mr Spratt was completely zealous. No case was won or lost until judgment had been finally given. Then followed the *post mortem*. The discussions and consideration as to what might have been done otherwise or better, ever seeking to establish that elusive, ultimate standard of advocacy.

Apart from his practice, Mr Justice Spratt has been a member of the Wellington District Law Society and was its president in 1950. He has also served on the Rules Committee and the Disciplinary Committee of the New Zealand Law Society.

In the private field, he is a staunch churchman, a lifelong upholder of the New Zealand Alliance and a prominent figure in the councils of the Wellington Acclimatization Society. He is also a trout fisherman of known qualities, given to private excursions to fishing rivers of the Wellington and Canterbury districts. His attempts to inveigle some of his professional brethren into similar activities have not always been successful, although we believe he almost persuaded one of the more recent appointments to the Bench to take up this soul-satisfying pastime.

The elevation of the new Judge removes from the practice of the profession one who has been a tower of strength to his many partners over the years, a wise counsellor of his clients and, at times, of his professional brethren. He brings to the Bench qualities of integrity, character, knowledge and experience of a high order and with which he will unstintedly serve our country. With it all, he attains not to the mischief of being wise. If, as has been said, justice is applied truth, then the new Judge will find and apply it.

Readers will join in echoing and confirming the congratulations and good wishes with which the appointment has been received by Bench and Bar alike and wish both Mr Justice Spratt and Mrs Spratt pleasure and well-being in his new office, with the hope of return to practice at the termination of his appointment.

THE LAND TRANSFER MORTGAGE

Oddments

Appointment of Receiver by Mortgagee

It is not customary in this country for a mortgagee of land to take power to appoint a receiver. Should he do so what advantages would accrue to him if he does?

The practice in company conveyancing is, of course, quite the contrary. Few debentures or trust deeds supporting them do not contain a receivership clause.

Under s. 101 of the Law of Property Act 1925 (U.K.) 20 *Halsbury's Statutes of England*, 2nd ed., 427 a mortgagee by deed is declared to have power to appoint a receiver when the money is due and this power may be extended or modified in the instrument. By s. 109 the receiver is the agent of the mortgagor, who is solely liable for his acts and defaults.

This power is available to a debenture holder (6 *Halsbury's Laws of England*, 3rd ed., 501 (s)) unless perhaps there is no mortgage by deed but merely a series of debentures.

In New Zealand we have no similar statutory declaration although there has been no hesitation here in taking this power contractually in company debentures. Part VII of our Companies Act 1955 makes various references to a receiver *appointed under an instrument*. It is thus accepted that the instrument may contain power to appoint him, and that without specific statutory foundation. This being so a mortgagee of land in New Zealand could it seems likewise by contract take power to appoint a receiver; there appears nothing in the Property Law Act or Land Transfer Act to prohibit this.

Ball's Law of Mortgages at p. 135 states that there is no reason why the English practice should not be adopted here but mentions that it is not. In the 5th ed. of *Garrow's Law of Real Property*, p. 569, the question of the liability of a mortgagee in possession to account is discussed, with the observation that perhaps the difficulty may be got over by appointment of a receiver (a more guarded statement than at p. 498 of the 4th ed.).

It is stated at 27 *Halsbury's Laws of England*, 3rd ed., 312 that it is unusual to insert in an ordinary mortgage express power to appoint a receiver, and that reliance is placed on the statute. If, however, we take this power in this country in company mortgages without statutory authority, there seems no reason why we may not take it also in simple land mortgages.

It is clearly the position in England that, by entry into possession by a receiver, the mortgagee frees himself of the liabilities of a mortgagee in possession while continuing to enjoy the advantages of that. (See for example 27 *Halsbury's Laws of England*, 3rd ed., 311). If the appointment is made under the statute, the receiver is the agent of the mortgagor. If the appointment is made under the instrument, the clause should declare any receiver so appointed to be the agent of the mortgagor (*ibid.*, 312).

Hence, in this country the clause should contain that specific declaration in order to shift responsibility to the mortgagor.

The history of the law of mortgages is the history

of a substantial sector of the Lord Chancellor's jurisdiction.

By the 15th century the mortgage (in Dr Cheshire's precise language) had become a species of estate upon condition created by a feoffment defeasible upon condition subsequent. That is, a conveyance of the legal estate defeated if the mortgagor repaid the debt. If he did not do so on the due day, the conveyance became absolute. That was not all; the mortgagee while thus retaining the property, still had his action for recovery of the debt. Little wonder that the Lord Chancellor found a rich field here for his equitable scythe. But the doctrines of redemption and clog were some expressions only of Equity's indignation. The entry of the mortgagee into possession was also attended by abuses; the mortgagee who has ousted the mortgagor for technical or unimportant default could, unless restrained, often remove all hope of redemption by depriving the mortgagor of the property and so the means to redeem. Equity corrected that too; the mortgagee in possession was obliged to act in a reasonable manner, accountable for fair revenue whether he received it or not, so long as he should have received it; and he was to allow credit, too, for his own occupation if that took place. All this is trite knowledge but having reminded ourselves of it, it becomes all the more surprising that a mortgagee can by the simple device of appointing a receiver, enter into possession and free himself from these obligations to the mortgagor. If some ingenious lawyer of bygone centuries ever did put up the proposition that the mortgagee could exempt himself from Chancery interference by acting through an agent, we can well imagine the swelling of the Lord Chancellor's foot as he prepared to deal with this anachronistic stooge. However, times change.

If the receiver does not act reasonably he is presumably, as the mortgagor's agent, accountable to his fictional principal, the mortgagor. So, in exchange for the mortgagee's liability to account there is substituted the like obligation of the receiver. The mortgagor will normally have no say as to the identity of the person the mortgagee appoints. He may be an irresponsible straw man or a dishonest absconder; the security may be dissipated with no practical recourse for its owner. It may be that the Court would endeavour to hold the mortgagee liable if he acted negligently in the appointment; and certainly if there was fraud. But there is wide scope for loss by the mortgagor short of these factors. A receiver who does not promptly relet the property on vacation by its tenant may or may not on the facts be liable to the mortgagor or may or may not be worth suing. The mortgagor, however, cannot set off this loss against the mortgagee and continues to be liable to the mortgagee whether he can recover from the receiver or not.

But no difficulty has occurred in holding the receiver to be the agent of the mortgagee when his liability to account to the mortgagee is in issue: *Leicester Permanent Building Society* v. *Brett* [1943] 2 All E.R. 523 where a receiver who had been appointed by a mortgagee and had failed to account to the mortgagee, was held obliged to do so despite a plea that he was the mortgagor's agent and accountable to him, not the mortgagee. The mortgagee succeeded because of the principle that a person who is interested in the performance of a statutory duty may maintain an action against the party liable to perform that duty. One wonders whether the result would have been the same if contract only were the basis of the appointment. And if the mortgagee appoints a receiver before he has complied with the terms of his mortgage as to service of notices, or the mortgagor is not in default, the receiver is the agent of the mortgagee, not the mortgagor: *Barclays Bank Ltd.* v. *Kiley* [1961] 2 All E.R. 849.

In *Welsh* v. *Nilsson* [1961] N.Z.L.R. 644, the Court of Appeal was invited to rule that a sale to the debenture holder by his receiver was invalid. This, it was submitted, must be so on the principle that a mortgagee cannot sell the mortgaged property to himself, unless through Registrar's sale procedure. The Court observed (*ibid.*, 659) that there was no direct authority on the question, and did not express an opinion on it, being able to adjudicate between the parties on other grounds. On general principles it seems to follow that if the receiver is indeed the agent of the mortgagor he can just as well sell to the mortgagee as to anyone else and a sale to the mortgagee is in no different position from a sale to a stranger and could be attacked by prejudiced parties on the same grounds.

The conclusion of these inconsequential remarks is that it may be best to let sleeping dogs lie; that land mortgagees here should not break with tradition by insertion of receiver clauses in their mortgages, simply because it does not seem fair to do so. The responsibilities upon a mortgagee who enters into possession are salutary and justified and he should not avoid them by such a technicality. With perplexing inconsistency we will continue to put receiver clauses in company securities and may one day have the benefit of a Court decision on the legal effect of that practice in New Zealand.

Offer to Redeem

In *Welsh* v. *Nilsson* (*supra*) we are shown limitations on the doctrine that a mortgagor cannot proceed against his mortgagee without first offering to redeem him. Some early pronouncements on the rule were wide enough to require the offer to redeem whatever the type of action against the mortgagee. It was considered illogical that a debtor could harass his creditor with litigation while leaving the debt unpaid. Let the debtor first repay his debt, or offer to do so, so that the parties could then litigate on an equal footing. There were exceptions to this, as indicated in *Ball's Law of Mortgages*, 286. Doubts as to the applicability of the rule to land under the Torrens registration system were dispelled in the well known Queensland case.

In the instant case the plaintiff sought to have set aside the sale of certain plant by the receiver to the debenture holder and claimed an accounting for the use of that plant. The erstwhile mortgagee was not in possession as mortgagee; he was a purchaser in his own right. The Court pointed out (*ibid.*, 658) that a mortgagor could not have accounts taken and then please himself whether he redeemed. This indeed was the root of the rule; the mortgagee should not be obliged to submit to repeated actions for account while he continued in possession. He was entitled to termination of the relationship once and for all before the action for accounts was commenced. The Court showed, however, that that was not the position

in the case before it; the mortgagee was not in possession and claimed as absolute owner. It is respectfully submitted that this is correct in principle. The doctrine arose out of the desire of the Court to afford the mortgagee the power of having the parties litigate on an equal footing, not as debtor and creditor. There is no scope for it where the relationship of mortgagor and mortgagee has ceased. The failure of the plaintiff to offer to redeem was not, therefore, fatal to him, although he was unsuccessful in his action because of his laches.

NOTICE UNDER S. 92 OF PROPERTY LAW ACT

The mortgagee is to serve notice specifying the default complained of . . ." and requiring the owner to remedy the default . . ."

What if it is physically impossible to remedy the default? Some mortgagees tend nowadays to require covenants to do or not to do all manner of things and once done or undone the *status quo* cannot be restored. For instance a covenant not to cut timber is irremediably broken the moment a tree within the covenant is cut down. It is not right to require mortgagee to serve notice demanding that the mortgagor remedy such a default. The point is not a theoretical one; the mortgagee may well have wished to have preserved on his security a valuable stand of timber and, having taken such a covenant, may not be willing to see the timber milled without repayment of the loan. He is required by s. 92 to serve a notice on the mortgagor, as a preliminary to exercise of powers, requiring him to remedy the default. The mortgagor may respond that he is willing to do so if the mortgagee will show him how, or he may make a less polite response.

A similar situation can arise with some positive covenants, e.g. a covenant to reside personally. Once the mortgagor has broken this covenant by residing elsewhere nothing can rectify the breach.

The question is more circumspectly handled in s. 118 (notice by forfeiting lessor) which requires the lessee to remedy the breach only if it is capable of remedy.

This section does not condition the requirement of notice on the performance of an irremediable broken covenant. The right of forfeiture does not arise until a notice is served specifying the breach and requiring it to be remedied, if that is possible, and requiring compensation. If the breach is incapable of remedy, that will not relieve the lessor from serving the notice; but the lessee is not required to attempt an impossibility.

The ability of the mortgagee to exercise his powers, however, is made dependant on two conditions:

(i) the service of a notice requiring the mortgagor to remedy the breach, and

(ii) the mortgagor failing to do so.

If it is impossible for him to do so the mortgagee can proceed when time has run for his notice but the law is brought into disrepute by this handling. The section should be brought into line with s. 118 and made independent of any requirement that the mortgagor remedy the breach where that is not possible.

G. CAIN

A DICKENSIAN EPISODE

The following judgment, while not suitable for reporting in the *Magistrates' Court Decisions*, is well worth recording:

David Copperfield, Wilkins Micawber, Nicholas Nickleby and Barkis were grazing leisurely in a well grassed field: Oliver Twist had recently died: however, these Dickensian quadrupeds still enjoyed the company of Saphonia and Podsnap.

The latter's life was nearly ended when she wandered through an open gateway on to the Huia Highway: here, whilst gambolling gleefully along the grass verge, she was fated to be met by a car owned and driven by a youthful Law Clerk.

Whilst driving his aunt in a vintage V-8 he first noticed Podsnap trotting towards him, on the same side of the road upon which he was driving: she was approximately 2½ chains distant from him: he was travelling uphill at a speed of approximately 25 miles per hour: he refrained from reducing his speed: he barely moved across to his right: the gap was closing and the inevitable happened: when Podsnap was nearly abreast of his car she careered across its path: she was felled and lay prostrate across the road immediately in front of the car.

The budding barrister's car struck the pregnant ass in the buttocks: her pelvis was fractured: her issue was born dead.

Up to this time the driver's studies had not reached the stage of reading *Davies* v. *Mann*: its recital of a conflict between a smartish conveyance and an encumbered asset may have been to him a topic in real estate rather than in tort.

It is not uncommon on country roads for motorists to meet with stock on the move: inevitably, motorists must of necessity by reason of the circumstances confronting them, reduce speed sometimes to a walking pace and even to stopping their vehicles until the manoeuvre of the mutual passing is safely completed.

In this case the motorist refrained from reducing his speed: he barely moved from his position on the road until the impact was inevitable: he had ample opportunity to slow down and stop his vehicle: the accident happened in broad daylight and under the circumstances his negligence has been clearly established.

The items of special damages have been proved satisfactorily but general damages are reduced to £10.

Judgment will therefore be for plaintiff (a policeman's wife) against defendant in the sum of £53 5s., with costs and witnesses' expenses to be fixed by the Registrar.

ADDENDUM

The storm which raged when Wellington witnessed the fall of Napoleon's sons, also contributed to the collapse of Podsnap: her grazing venue has changed from the Waitakere Water Shed to the Fields of Elysium.

BILLS BEFORE PARLIAMENT

The Bills now before the House are as follows:

Agricultural (Emergency Regulations) Confirmation
Broadcasting Corporation
Chiropractors Amendment
Cinematograph Films
Civil List Amendment
Counties Amendment
Criminal Justice Amendment
Customs Act Amendment
Education Amendment
Emergency Regulations Amendment
Engineering Associates
Factories Amendment
Harbours Amendment
Health Amendment.
Indecent Publications Amendment
Industrial Conciliation and Arbitration Amendment
Inland Revenue Department Amendment
Interest on Deposits
Juries Amendment
Land Agents Amendment
Law Practitioners Amendment
Licensing Amendment
Licensing Trusts Amendment
Lincoln College
Local Authorities Loans Amendment
Local Government Commission
Machinery Amendment
Maori Education Foundation
Massey College
Mining Amendment
Municipal Corporations Amendment
National Military Service
Nature Conservation Council
Parliamentary Commissioner for Investigations
Primary Products Marketing Regulations Confirmation
Public Revenues Amendment
Quarries Amendment
Staff Superannuation (Private Member's Bill)
Stamp Duties Amendment
Statutes Amendment
Summary Proceedings Amendment
Taranaki Scholarships Trust Board Amendment
Tenancy Amendment
Town and Country Planning Amendment
Transport
Universities
University of Auckland
University of Canterbury
University of Otago Amendment
Victoria University of Wellington
Wages Protection and Contractors' Liens Amendment
Wool Industry Amendment
Workers' Compensation Amendment.

STATUTES RECENTLY ENACTED

Agricultural and Pastoral Societies Amendment
Apprentices Amendment
Auckland Electric Power Board Amendment
Births and Deaths Registration Amendment
Child Welfare Amendment
Coal Mines Amendment
Cook Islands Amendment
Crimes
Electric Power Boards Amendment
Estate and Gift Duties Amendment
Family Benefits (Home Ownership) Amendment
Gas Industry Amendment
Government Railways Amendment
Hydatids Amendment
Imprest Supply (No. 5)
Land and Income Tax Amendment
Land Settlement Promotion Amendment
Law Reform (Testamentary Promises) Amendment
Local Elections and Polls Amendment
Magistrates' Courts Amendment
Maori Social and Economic Advancement Amendment
Mental Health Amendment
New Zealand Army Amendment
Penal Institutions Amendment
Poultry Amendment
Public Works Amendment
Republic of Cyprus
State Advances Corporation Amendment
Wool Commission Amendment

FORENSIC FABLE

By "O"

The Careful Lawyer Who Could Not Make Up His Mind

There was Once a Careful Lawyer who, as the Result of a Variety of Unexpected Circumstances, Found himself Elevated to the Bench. The Careful Lawyer was not Entirely Satisfied that he had the Necessary Qualifications for Judicial Office, and his Misgivings were Shared by those who Knew him Best. For, Most Unfortunately, he could not Make Up his Mind. In Chambers the Careful Lawyer Got on Well Enough by Affirming the Order of the Master and Directing

that the Costs should be Costs in the Cause. And in Jury Cases the Careful Lawyer Discovered that it was not a Bad Plan to Read over the Evidence to the Jury and Ask them Such Questions as Counsel Suggested. But as a Rule the Careful Lawyer Found himself Sadly Puzzled. On Circuit he Spent Sleepless Nights Wondering whether the Prisoner ought to Have Two Months with Hard Labour or Three Months in the Second Division; and when he Tried a Non-Jury Case it was his Custom to Reserve his Judgment for so Long a Period of Time that he Often Forgot what the Case had been About. One Day, for a Change, they Put the Careful Lawyer in a Divisional Court. It was Hoped that he would Find the Job an Easy One. But the Careful Lawyer was so Bothered by Trying to Decide, whilst the Other Judgments were being Delivered, whether he should Say that he Agreed with Them or that he Concurred with them, that he had a Nervous Breakdown from which he Never Recovered.

Moral—*Toss Up.*

PERSONAL

Mr Justice Cleary was admitted to Calvary Hospital on 21 October.

Mr H. R. C. Wild, Q.C., Solicitor-General, returned to New Zealand on 29 October after appearing before the Judicial Committee of the Privy Council.

Dr O. C. Mazengarb, Q.C., has now been discharged from hospital and is convalescing at his home.

TOWN AND COUNTRY PLANNING APPEALS

The Church of Jesus Christ of Latter Day Saints Trust Board *v.* Auckland City Council

Town and Country Planning Appeal Board. Auckland. 1961. 4 July.

District Scheme—Building permit—Land zoned as Residential B—Proposal to erect building for office work of Church—Building "used for religious purposes"—Not detracting from amenities of neighbourhood—Meaning of word "amenities"—Conditions imposed—Town and Country Planning Act 1953, s. 38.

Appeal under s. 38 of the Town and Country Planning Act 1953. The appellant Trust Board was the owner of a property situated at No. 48 Arney Road, Remuera, in the City of Auckland, containing 3 ro. 7.2 pp., being Lots 1 and 2 on Deposited Plan 40244 and being part of Allotment 8 of Section 16 of the Suburbs of Auckland. The appellant applied to the Auckland City Council for a building permit for the erection of an office building to be used in carrying on the administration of the missionary work of the Church in New Zealand. At the time that the application was made and considered, the respondent Council had a proposed District Scheme, although that scheme had since become operative. The permit was refused on the grounds that the proposed building would detract from the amenities of the neighbourhood "to be provided or preserved by or under the proposed District Scheme for the City of Auckland". It was against this refusal that this appeal was lodged.

Davison, and *Hannah*, for the appellant.
Butler, and *Hollis*, for the respondent.

The judgment of the Board was delivered by

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

1. Before considering the application, the respondent Council gave public notification of the application and invited objections. No objections were received, but three owners of adjoining properties supported the application.
2. The property in question is in an area zoned as residential B under the relevant district scheme and is part of a large area so zoned. This area can be fairly described as a high-class residential area. The appellant Board has already erected on the property a residence which is used and occupied by members of its missionary staff and by the President of the New Zealand Mission of the Church. What the appellant seeks is a permit to erect a building, which is designed to be in general conformity with the existing residence, to be used exclusively for the office work of its mission. Under the relevant Code of Ordinances under the heading "Conditional Uses in Residential Zones" are included "Churches and buildings used for religious purposes". The meaning of the words "buildings used for religious purposes" were under consideration by the Board in an appeal heard in Christchurch on 8 April 1959, *Presbyterian Church Property Trustees* v. *Christchurch City Corporation*, reported in (1959)1 T. & C.P.A. 81. The Board there held that the words "buildings used for religious purposes" in the context in which they appear here should be construed as meaning any building used for the general advancement and propagation of the tenets and views of any recognised religious order or sect. Following that decision, the Board holds that the purposes for which the appellant Board wishes to put the proposed building is a conditional use under the relevant Code of Ordinances.
3. It follows, therefore, that the question calling for decision is whether the proposed building and the use to which it is to be put, will detract from the amenities of the neighbourhood. The interpretation of "amenities", s. 2 of the Act, means those qualities and conditions in a neighbourhood which contribute to the pleasantness, harmony and coherence of the environment. The topographical situation of the property under consideration is such that a building of the type it is proposed to erect would be below the level of the surrounding residences and, in some cases, obscured from view. The Board considers that a building in architectural conformity with the existing Mission House would blend in effectively with its surroundings and would not interfere with the view from neighbouring houses, nor would the building itself detract from the amenities of the environment.
4. As a general proposition, the Board agrees with the submission of the respondent's counsel that offices as such must be considered to detract from the amenities of a residential neighbourhood as such, but the particular use to which this property is to be put is different from what would be considered as general office purposes. It is considered that this is an exceptional case, having regard particularly to the fact that the site of the proposed building is well concealed and that the building itself would not be used for the constant coming and going of people and cars usually associated with a commercial office. There is also ample parking space available within the confines of the property itself.

The Board considers that the appeal should be allowed, but subject to certain conditions, that is to say:

(a) A permit is to be issued for the erection of the proposed building on condition that it is in general conformity with the plans and specifications submitted during the hearing of the appeal.

(b) The building is to be used only for the administrative work of the appellant Board and is to be confined to work of a clerical nature. No printing is to be carried out on the premises and no machinery installed therein.

(c) No meetings other than staff meetings of persons actually working on the premises and no religious services are to be conducted on the premises.

Appeal allowed.

Hargreaves and Another *v.* Waimairi County Council

Town and Country Planning Appeal Board. Christchurch. 1961. 11 May. 6 June.

Non-conforming use—Existing use in residential zone—Direction by Council to cease non-conforming use within one year—Such use protected by s. 36—Mutual effect of ss. 34A and 36—Principles applicable—Town and Country Planning Act 1953, ss. 34A, 36.

Practice—Right to begin—Respondent to begin when onus rests on it—Town and Country Planning Act 1953, s. 34A.

Appeals under s. 34A (4) of the Town and Country Planning Act 1953. As they related to the same property they were heard together. The first-named appellant was the owner of a property known as No. 196 Yaldhurst Road, Christchurch, containing 1 rood 8 perches, being part Lot 2 on Deposited Plan No. 6890. The second-named appellant was the occupier of the land.

On 10 November 1960 the respondent Council issued a Notice under s. 34A (3) requiring the second-named appellant to cease using the land for industrial purposes within one year from the date of such Notice. It was against this requirement that the appellants appealed. These appeals, and another, No. 22/61, *Bryenton* v. *Christchurch City Council*, were heard at the same sitting and were the first appeals coming before the Board under s. 34A. The property under consideration in this appeal was in an area zoned as "Residential" under the respondent Council's undisclosed District Scheme. The business carried on was that of an engineering workshop.

A. C. Perry, for the first appellant.
Atkinson, for the second appellant.
Hutchison, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). If the residential zoning is maintained when the Scheme becomes operative the business would be a "non-conforming use" but as such it would be entitled to the protection of s. 36 (4).

In both instances, counsel found considerable difficulty in interpreting the provisions of s. 34A when they came to be considered in relation to the provisions of s. 36.

The effect of s. 36, put briefly, is to provide some measure of protection to the owners of properties having a "non-

(*Concluded on p. 320*).

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Adultery Without Mens Rea—Insanity rears its head again in the recent case of *S.* v. *S.* and *O.* and *B.* (105 Solicitors' Journal, 532). A wife petitioned for divorce on the grounds of her husband's adultery with the intervener. The husband admitted the charge, but cross-charged the wife with adultery, cross-praying for divorce. The act of adultery admitted by the husband took place in a mental hospital where he was employed as a porter, the intervener being an in-patient there. The Official Solicitor appeared as guardian *ad litem* for the intervener pleading that she was not guilty of adultery because at the time of the adultery she was insane and did not know what she was doing. Evidence was called to the effect that her mental state was such that she would not have known that she was doing wrong. The Court accepted the submission that the intervener fell within the second branch of the McNaughton Rules and a decree was granted to the wife on the grounds of the husband's adultery with a woman against whom a case had not been proved.

New Russian Claim—*Pravda* the mouthpiece of the Soviet Union has switched its claims for the moon towards another claim on behalf of the Soviet Union. *Pravda* now claims that the Soviet Union contains more centenarians per one thousand of population than any other country in the world. They claim that 10 per 100,000 of the population comparing with 0.6 for the United Kingdom, 0.7 for France, 0.1 for Japan and 1.5 for the United States are centenarians. The Russians go on to claim that there are 592 persons in their territory aged over 120 and as many as 21,708 over the age of 100. The *London Observer* cast doubts on the Russian figures and produces statistics claiming that China holds the record in this regard and refers to a gentleman by the name of Li Chiang Yun who is reputed to have attained the age of 252 years and to have been married 24 times. The comment can, of course, be made—Who wishes to live to be 100 in the Soviet Union anyway ?

Beauty and the Floor—No doubt man will survive these insidious traps as he has survived more obvious assaults in the past. Indeed, the indestructibility of the human race in general and the female sex in particular is powerfully emphasised by a recent case in West London County Court, arising out of a dispute over the flooring laid down in a ladies' hairdressing salon. One of the innumerable ways of regarding ladies is to look at them as a gastronomic connoisseur looks at the most exquisite banquets, with his mind resolutely averted from the farmyard, the slaughter-house and the butcher's shop, to look, that is, at the final finished artistic production without regard to the processes by which it was achieved. Another way, of course, is represented by Swift's ruthlessly realistic poem on a lady's dressing room and it is unfortunately the approach forced on those who contract to lay flooring in those establishments dedicated to the art and mystery of creating enhancing and perpetuating female beauty. In this particular case after the floor had been laid in a "shampoo and tinting room" about a fifth of its surface became broken and developed a mysterious stickiness.

Fresher Than Fresh—A company dealing in frozen foods was recently charged in a Sussex Court alleging the application of two false trade descriptions to a packet of frozen beans, the first being "net 10 oz." and the second "fresh frozen English vegetables". The legend on the packet went on to say: "These are fresh vegetables fresher than fresh", and it was this latter phrase which featured as headlines in many National newspapers. It was acknowledged that the beans had been packed in fact in 1957. These reports gave the impression that apart from the summons relating to underweight the sole basis of the prosecution's case was the fact that the beans had been packed as long ago as 1957. It is clear from the report that the main ingredient of the prosecution's case was the purchaser's discovery of bad smell and colour. According to the defendant the packet in question was one of six which had been overlooked when instructions were given last year to return all beans packed in 1957 to the factory and that a valid reason was advanced for the loss of weight.

Human Tissue Act 1961—The Human Tissue Act 1961 (England) enables a person to authorise in writing at any time, or orally and in the presence of two or more witnesses during his last illness, the use of his body, or a specified part of his body, after his death, for therapeutic purposes, or for medical education or research. In structure, the Act is similar to the Corneal Grafting Act 1952, which it repeals. Thus, in the absence of a request by a deceased person, the party having lawful possession of the body may authorise the removal of any part of the body for the purposes indicated above unless he had reason to believe that the deceased had objected to that course and had not withdrawn the objection, or the surviving spouse or any surviving relative objects to the body being so dealt with. The removal itself can only be effected by a fully registered medical practitioner, and the Coroner's consent is required in any case where there is reason to believe that there may be an inquest. Notwithstanding the provisions of s. 15 of the Anatomy Act 1832 a *post mortem* examination to establish or confirm the causes of death, or to investigate the existence or nature of abnormal conditions from which the deceased may have suffered, may lawfully be carried out, by virtue of s. 2 of the present Act, by or in accordance with the instructions of a medical practitioner, provided there are no known objections on the part of the deceased person in his lifetime, or of his spouse, or any surviving relative. The provisions of s. 13 of the Act of 1832 are amended so as to enable bodies which have been used for anatomical examination to be lawfully cremated.

Expert Witness

Question: Officer, do you think two years' experience as a police officer qualifies you to state definitely that this man was drunk ?
Answer: No, sir.
Question: Upon what, then, do you base your assumption that the defendant was drunk?
Answer: 21 years of bar-tending.

Tailpiece—Prosperity is something created by hard-working citizens for politicians to boast about.

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 318.*)

conforming use." Such owners can continue to use their properties as an existing use, as defined by that section, subject to the conditions set out in the section. In the majority of cases, non-conforming uses are industrial or commercial uses in residential zones, and sometimes industrial uses in commercial zones or *vice versa*. In many cases the non-conforming use has been established before there has been any marked residential development around it.

In the majority of cases non-conforming uses must *per se* detract in some degree from the amenities of the neighbourhood in that they detract to a certain degree from the pleasantness, harmony and coherence of the environment, but the Legislature in enacting s. 36 has clearly indicated that owners of non-conforming use properties are entitled to some protection. Recognition of non-conforming uses is well established in Town Planning practice.

It was submitted by counsel for the respondent Council that s. 34A over-rides s. 36, and if there is in relation to any given property any detraction from amenities, then the Council can by virtue of the provisions of s. 34A direct that the non-conforming use shall cease.

If it had been the intention of the Legislature that s. 34A was to over-ride s. 36, then it would have been a simple matter to have said so. Any amendment to a statute taking away or affecting an existing statutory right, should be expressed in clear and unequivocal language and not left as something to be determined by inference or implication. Maxwell *on the Interpretation of Statutes*, 10th ed., 285-6, says: "Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to strict construction. It is a recognised rule that they should be interpreted, if possible, to respect such rights. If there is ambiguity as to the meaning of the section in as much as it is a disabling section, the construction which is in favour of the freedom of the individual (to contract) should be given effect".

The difficulty here arises from the use in s. 34A of the words "or detract from amenities". It is interesting to compare these words with the words appearing in Reg. 35, Town and Country Planning Regulations 1960 (S.R. 1940:109) (governing the procedure in relation to changes of use under s. 35). In the Regulations, the words "*serious* detraction from amenities" are used. Had the draftsman used similar words in s. 34A, little difficulty would have arisen. In the circumstances, the Board, in an endeavour to make s. 34A operate reasonably, must turn to the Acts Interpretation Act 1924, s. 5 (j): "every Act and every provision or enactment thereof shall be deemed remedial . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit".

An examination of s. 34A as a whole, leads to the conclusion that the intention of the Legislature was obviously to control objectionable elements pertaining to the use of property. If that is correct, then the only was in which the section can be made to work is by inquiring whether any use of land or property has some objectionable element going beyond, in the case of non-conforming uses, what may be described as a "*per se* detraction". If there is some such objectionable element that can be removed or reduced by reasonable means available to the owner, then the owner can be directed to take appropriate action. If the objectionable element can be so removed or reduced and is substantial, and the owner refuses to or omits to take such means then and then only should a cesser order be made.

Turning now to the merits of the appeals under consideration, after hearing the evidence adduced and the submissions of counsel the Board finds as follows:

1. The appellant Company's existing use is a *per se* detraction from the amenities of the neighbourhood.
2. The property under consideration has been used for industrial purposes for many years. It was originally a blacksmith's shop, then used as an engineer's workshop and, finally, has been used for many years by the appellant Company as an engineering workshop. Oringinally it was situated in a rural area, but residential development in the area has come closer to it and it is claimed that the noise from this workshop is a serious detraction from the amenities of the neighbouring property.
3. The only property owner called to give evidence lives one section removed from the property under consideration and his main complaint is on the grounds of noise emanating from the Company's workshop, but this particular resident is a shift worker who frequently wishes to sleep during the day. It was also established that the respondent Council had, by one of its inspectors, canvassed the neighbourhood for other evidence as to objectionable noise but its efforts to obtain such evidence have been abortive.
4. On the evidence, the Board is not satisfied that the appellant Company's operation constitutes such a serious detraction from the amenities of the neighbourhood as would justify their being put out of business on this particular property.

Both appeals are allowed.

The usual procedure in appeals is that the appellant begins but in appeals under s. 34A the Board directs that, as the onus of proof lies on the Council, it will be for the Council to open.

Appeals allowed.

Walker *v.* Tuakau Borough

Town and Country Planning Appeal Board. Auckland. 1961. 29 June.

Proposed District Scheme—Zoning—Land zoned as Residential —Used as public garage, service station and engineering workshop —Application for re-zoning as Commercial B—Situated in area almost entirely residential in use—Opposite large primary school —Re-zoning refused—Principles applicable—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant was the owner of a property situate at the corner of Church Street and School Road, Tuakau, containing 39.4 pp. being Lot 1 on D. P. No. 40820. Under the respondent Council's proposed District Scheme as publicly notified this property was in an area zoned as residential. The appellant objected to this zoning, claiming that his land should be zoned as industrial C. His objection was disallowed and this appeal followed.

Clark, for the appellant.
B. P. and *R. H. P. Hopkins*, for the respondent.

The judgment of the Board was delivered by

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

1. The appeal as filed prayed that the appellant's land should be zoned as industrial C, but when the appeal came to hearing counsel intimated that the appellant was now seeking a commercial B zoning. It is open to question, having regard to the manner in which the objection was worded, that the Board would have jurisdiction to hear the appeal on the amended grounds, but with the consent of counsel for the respondent, it was agreed that to avoid further delay the Board should consider the appeal and give a decision on the merits.
2. The appellant has erected on the property a commercial garage, service station and engineering workshop. This is a non-conforming use in a residential zone, but it would be a conditional use in a commercial B zone.
3. The property is situate in the middle of an area zoned as residential A and almost entirely residential by use and occupation. It is situate on a corner site opposite the primary school.
4. The Board considers that to re-zone this land as commercial would be contrary to town and country planning principles on two grounds:
   (a) It would create a spot zone in the middle of a predominantly residential area;
   (b) Having regard to its situation immediately opposite a large primary school any extension of the activities associated with a commercial garage on such a site would be contrary to town planning practice.
5. The appellant is entitled as of right to continue his business as an existing use, and the Board is not prepared to re-zone his land so that it could be at any time used for any of the predominant or conditional uses associated with commercial B zones.

The appeal is disallowed.

Appeal dismissed.