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THE NEW ZEALAND LAW CONFERENCE 1963

Our Distinguished Visitors

AN outstanding feature of the 1963 Law Conference was the number of distinguished overseas visitors who attended, and it is proposed in the pages of the Journal preliminary to the Conference Issue to give our readers brief biographical details of these gentlemen who have honoured us by being present.

Lord Parker of Waddington, Lord Chief Justice of England

Before giving personal details of Lord Parker it is appropriate to refer to the high judicial office which he holds. By virtue of s. 2 (2) of the Supreme Court of Judicature (Consolidation) Act 1925, 5 *Halsbury's Statutes of England*, 2nd ed. 341, the Lord Chief Justice is, in the absence of the Lord Chancellor, the president of the High Court of Justice, and under s. 4 (1) (ii) he is President of the King's Bench Division. He is also *ex officio* a member of the Court of Appeal, in which he ranks in precedence over the Master of the Rolls. The Lord Chief Justice in fact holds the second highest judicial office in England, being outranked only by the Lord Chancellor.

Lord Parker of Waddington, the present holder of this high judicial office, comes from a 600-year-old Yorkshire family and in choosing the Bar as his profession he was following in footsteps of his father, who, at the date of the present Lord Parker's birth, was Junior Counsel to the Treasury, later being appointed a Lord of Appeal in Ordinary.

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

In 1950 Lord Parker was appointed to the High Court (King's Bench Division) and three years later he was appointed to be a Lord Justice of Appeal. He succeeded Lord Goddard in his present position of Lord Chief Justice of England on 30 September 1958.

The Honourable Leslie James Herron, Chief Justice of New South Wales

Mr Justice Herron was born at Mosman in 1902 and was educated at Sydney Grammar School and Sydney University, graduating LL.B. (Hons.) in 1924. He was admitted to the Bar in 1925 and soon established a leading practice in the Common Law Courts. He took silk in 1939 and served for a period as an acting Judge of the District Court. In February 1941, at the age of 38, Mr Justice Herron was appointed to the Bench of the Supreme Court of New South Wales and served as a Puisne Judge for 21 years, sitting mostly in criminal and civil causes. He was appointed acting Chief Justice in March 1962 and Chief Justice on 25 October 1962.

The Chief Justice has always been a keen supporter of amateur sport. For 19 years he has been, and is now, President of the Australian Golf Club, and is a life member. He was President of the New South Wales Rugby Union (he is now a life member) and first Chairman of the Australian Rugby Union, of which body he is now Vice-President. In 1927 he was Chairman in London of the International Rugby Board. He is also President of the Amateur Swimming Association of New South Wales, was a champion mile runner in former days and is a member of Surf Life Saving Clubs and the Royal New South Wales Bowls Association. He is also President of the Athletic

Association of the Great Public Schools of New South Wales.

Sir Charles Lowe

Sir Charles Lowe, one of the best known Judges of the Supreme Court of Victoria, was born near Warrnambool, Victoria, on 4 October 1880. He graduated in Arts and Law at the University of Melbourne and later had conferred upon him the honorary degree of Doctor of Laws.

Sir Charles was admitted to the Bar in 1905 and was appointed to the Bench of the Supreme Court of Victoria in 1927. By 1949 he had become senior Puisne Judge and acted as Chief Justice in 1950-51, 1953 and 1961. During the second and third of these periods he was also Administrator of the State of Victoria.

Sir Charles was knighted in 1948 and later was created a Knight Commander of St. Michael and St. George.

Sir Charles has always retained his interest in his old University and held the position of Chancellor from 1941 to 1955.

Sir Thomas Lund C.B.E.

Sir Thomas Lund, Secretary of the English Law Society, is a son of the late Dr. K. F. Lund of South Kensington, London. He was educated at Westminster School and qualified as a solicitor of the Supreme Court (with Honours) in 1929. In 1930 he joined the staff of the Law Society and was appointed Secretary in 1939 at the early age of 33.

Sir Thomas became treasurer of the International Bar Association in 1950 and of the International Legal Aid Association in 1960. He is a director and past chairman of the Solicitors' Benevolent Association, has been a member of the British Council since 1947 and is also a member of the Professional Classes Aid Council. He is also a Past Master of the Worshipful Company of the Solicitors of the City of London and a Liveryman of the Cordwainers Company.

Sir Thomas was a foundation member of the British Academy of Forensic Science and has been chairman since 1961. He also holds membership of the Grotius Society and of the British Institute of International and Comparative Law.

What Sir Thomas perhaps should regard as the outstanding achievement of a varied life is the establishment of the Legal Aid and Advice Scheme administered by the Law Society for the Government, of which Sir Thomas was the architect, and the success of which must be very largely attributed to his careful planning and competent administration.

Mr George B. Powers

Mr George B. Powers, one of the two representatives at the Conference of the American Bar Association, received his LL.B. degree from the University of Kansas School of Law.

Since 1952 he has been a member of the Association's House of Delegates, and is a member of the House's Committee on Credentials and Admissions and is also the Kansas representative on the associate and advisory committee of the Association's committee on Continuing Education of the Bar.

Mr Powers is senior member of a law firm in Wichita, Kansas. He has been secretary-treasurer of the Kansas Bar Association since 1950 and is a former president of the Wichita Bar Association. He is also a Fellow of the American College of Trial Lawyers.

Despite a busy professional life Mr Powers has not neglected civic and community affairs in Wichita and he has held office in many Associations in that City.

Mr Joe F. Balch

Mr Balch, also a representative of the American Bar Association, is another native of Kansas, U.S.A. He is senior member of the firm of Balch and Briley of Chanute, Kansas, and was educated at the University of Kansas, Lawrence, and Washburn University School of Law, Topeka.

In 1935 Mr Balch was admitted to practice before the Supreme Court of Kansas and Federal Courts. In 1956 he was appointed a member of the Executive Council of the Bar Association of the State of Kansas and last year as a member of the House of Delegates of the American Bar Association, appointments which he still holds. From 1938 to 1951 he was City Attorney for Chanute, Kansas and he served as a member of the Kansas Legislature from 1941 to 1943.

During the war Mr Balch saw active service as a Lieutenant (j.g.) in the United States Navy.

Mr John Bruce Piggott

Mr Piggott is the official representative of the Law Council of Australia, of which body he is president. He was born in 1913 at Hobart and was educated at the Hutchins School, Hobart, and the University of Tasmania whence he graduated LL.B. in 1935.

Mr Piggott was admitted as a Barrister of the Supreme Court of Tasmania in 1935 and

in 1936 he established the firm of which he is still a member, Messrs Piggott, Wood and Baker of Hobart. He was appointed a Notary Public in 1958.

In July 1960 Mr Piggott was elected as President of the Southern Law Society of Tasmania and in December 1961 he became president for a term of two years from July 1962 of the Law Council of Australia. He is also Vice President and a member of the International Bar Association and a member of the association Advisory Committee of Professional Ethics and Privilege.

Apart from his professional career Mr Piggott has wide cultural and charitable interests. He was President of the Arts Council of Tasmania from 1945 to 1949 and is at present chairman of its Council. He was also president of the Dante Alighieri Society in Tasmania from 1956 to 1961 and is a member of the Royal Society of Tasmania and of the Institute of International Affairs.

Mr Piggott was first elected president of the United Nations Association in Tasmania in 1945 and has held that office continuously to the present time. He was also Vice President of the Australian Association for the United Nations for varying periods from 1950 to 1960.

Mr Piggott has served as Chairman of various United Nations appeals in Tasmania and was elected the first honorary life member of the United Nations Association in Tasmania in 1959. Apart from his activities in the United Nations appeals Mr Piggott has assisted in many other charitable appeals.

Mr Piggott was awarded the Coronation Medal in 1954, M.B.E. in 1960 and C.B.E. in 1962.

SUMMARY OF RECENT LAW

CRIMINAL LAW—PRACTICE

Judge's discretion to discharge accused—When to be exercised—Crimes Act 1961, s. 347 (1). If after reading the depositions taken at the preliminary hearing of a criminal charge the Judge is satisfied that it is unlikely that any jury properly directed would convict or *a fortiori* that it would be wrong for such a jury to convict he should exercise the discretion conferred upon him by s. 347 (1) of the Crimes Act 1961 to direct that no indictment be presented or, after presentment, that the accused should not be arraigned thereon. *The Queen* v. *Myers* (S.C. Nelson. 1963. 26 February. Wilson J.).

EVIDENCE—PRIVILEGE

Press—Newspaper reporter—Source of information—Whether privileged from disclosure—Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo. 5 c. 7), s. 1 (2) (b), (3). Tribunal—Tribunal of inquiry—Refusal to disclose source of information of newspaper report—Whether a question which tribunal might legally require him to answer—Relevance—Privilege—Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo. 5 c. 7), s. 1. The terms of reference of a tribunal set up by warrant of the Home Secretary and to which the Tribunals of Inquiry (Evidence) Act 1921 applied, were to inquire into the circumstances in which offences under the Official Secrets Acts were committed by V. and in particular, *inter alia*, any other allegations brought to the tribunal's attention reflecting on the honour and integrity of persons who, as ministers, naval officers and civil servants, were concerned, any breaches of security arrangements which took place and any neglect of duty by persons directly or indirectly responsible for V.'s employment and conduct, and for his being treated as suitable for employment on secret work. On the day after V.'s trial, an article appeared in a daily newspaper, one passage of which, for which the respondent accepted full responsibility, was that V.'s spying led to Russian trawler spying fleets turning up with uncanny accuracy in the precise area of secret N.A.T.O. sea exercises. The respondent was called as a witness before the tribunal and refused in the course of his evidence to answer a question as to the source of his information for the passage in question, saying that he knew the source of his information but that, in conscience, he was not prepared to say who it was. The chairman of the tribunal signed a certificate that the respondent refused in the course of his evidence to answer a question which the tribunal required him to answer, and which, in the opinion of the tribunal, was relevant to the purposes of the inquiry and necessary for the respondent to answer. By s. 1 (2) (b) of the Act of 1921, if any person being in attendance as a witness refused to answer any question to which the tribunal might legally require an answer, the chairman of the tribunal might certify the offence of that person to the High Court, who might thereupon inquire into the alleged offence and punish that person in like manner as if he had been guilty of contempt of the Court, and by s. 1 (3), a witness before the tribunal was entitled to the same immunities and privileges as if he were a witness before the High Court. *Held*, Whether a question was one to which the tribunal might legally require an answer, within s. 1 (2) (b) of the Tribunals of Inquiry (Evidence) Act 1921, depended on whether the question was relevant and whether answering it was excused by any immunity or privilege that a witness in the High Court would have, and in the present case the respondent had committed an offence before the tribunal and a writ of attachment would issue, because—(i) the question that the respondent had declined to answer was relevant. (ii) the question was one from answering which the respondent was not protected by immunity or privilege for the following reasons—(a) confidentiality of itself had never been recognised as a valid ground of immunity. (*Dictum* of Sir George Jessel, M.R., in *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. at p. 681 applied.) (b) The confidential

relationship in which a journalist stood towards his informant was not one that was covered by privilege of immunity from answering at a trial questions concerning the source from which information was acquired; and, although it was still open to a Court to hold, in the special circumstances of a particular case, that public policy demanded that the journalist should be immune, yet this was not a case in which public policy did so demand. (*McGuiness* v. *A.-G. of Victoria* (1940) 63 C.L.R. 73 applied; *dictum* of Buckley L.J. in *Adam* v. *Fisher* (1914), 30 T.L.R. at p. 288 explained.) *Per curiam:* it has now become not merely a rule of practice but a rule of law that, in matters of discovery where the press are concerned, and only where the press are concerned, they will never be required to reveal the source of their information, the reason being that, in interlocutory proceedings, the whole essence of the question is whether it is proper and necessary at that stage that certain matters should be disclosed, and the Court has a discretion in the matter, and that has nothing to do with what may ultimately have to be ordered or required at the trial itself. *Attorney-General* v. *Clough* [1963] 1 All E.R. 420.

NEGLIGENCE—DUTY OF CARE

Donoghue *v.* Stevenson *principle—Manufacturer of article having good reason to suppose that subsequent user will examine it—Whether owing duty of care to such user—Whether Contributory Negligence Act affects application of principle—Contributory negligence—Whether enactment of Contributory Negligence Act modifies* Donoghue *v.* Stevenson *principle—Contributory Negligence Act 1947, s. 3.* The enactment of the Contributory Negligence Act has not amended or altered in any way the doctrine enunciated in *Donoghue* v. *Stevenson* [1932] A.C. 562; [1932] All E.R. Rep. 1. If the manufacturer of an article has good reason to suppose that it is probable that a subsequent user will make an examination of the article which should disclose any patent defect he owes no duty of care to such user under the *Donoghue* v. *Stevenson* doctrine. In such a case if the anticipated examination is made but fails to disclose such a defect there is no room for the application of the Contributory Negligence Act because of the absence of any such duty of care and consequent absence of liability on the part of the manufacturer. (*London Graving Dock* v. *Horton* [1951] A.C. 737; [1951] 2 All E.R. 1, applied; *Denny* v. *Supplies and Transport Co.* [1950] 2 K.B. 374, distinguished.) *Cathcart* v. *Hull and Others* (S.C. Hamilton. 1963. 4 February. Barrowclough C.J.).

PRIVY COUNCIL

Judicial precedent—Conflict between Privy Council and House of Lords—Victorian Court follows Privy Council—Evidence—Production of documents—Crown privilege—Minister's opinion that production prejudicial to public interest—Power of Court to inspect documents—Contents of Minister's affidavit. Where there is a direct conflict between a decision of the Privy Council and a decision of the House of Lords, a Victorian Court is required by the established rules of judicial precedent to follow the decision of the Privy Council. At the hearing of an information for an offence, the informant, a police constable, though subpoenaed by the defendant to produce certain documents, refused to do so and based his refusal upon an affidavit sworn by the Chief Secretary to the effect that in his opinion it would be injurious to the public interest for the documents to be produced on the hearing of the information. The affidavit did not state that the Minister himself had seen the documents in question. The Magistrate ordered that the documents be produced for the purpose of his determining whether the objection taken by the Minister should be upheld, and he adjourned the further hearing of the information to enable the documents to be produced and also to give the Minister the opportunity of justifying his opinion that the documents should not be produced. *Held,* 1. Though a Court has a duty to safeguard the public interest from prejudice which might arise from compelling the production of a document where objection has been taken by the Minister to its production, the Court has, in reserve, as an incident of that duty, a power to inquire into the nature of the document in question and to require some indication of the nature of the injury to the public interest apprehended, and the Court may decline to give effect to the objection until it has first determined for itself, either by inspection of the document or upon further evidence, whether the objection is well founded. The Magistrate was not, therefore, in error in deciding that the affidavit was not conclusive. 2. Where the Minister takes such an objection, it should be based upon an examination by the Minister himself of the document in question, and the Minister's affidavit should so state. (*Duncan* v. *Cammell Laird & Co. Ltd.* [1942] A.C. 624; [1942] 1 All E.R. 587; *Robinson* v. *State of South Australia* (No. 2) [1931] A.C. 704; [1931] All E.R. Rep. 333, and *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878, considered.) *Bruce* v. *Waldron* [1963] V.R. 3.

PUBLIC REVENUE—INCOME TAX

Assessable income—Profit-making scheme—Area of land acquired allegedly for use as farm—Land sold over period of ten years partly in subdivision—Other parcels of land bought and sold during same period—Some of these parcels allegedly acquired for purpose of building residence thereon—Whether profits on sales assessable—Income Tax and Social Services Contribution Assessment Act 1936-1958, s. 26 (a). In February 1948 taxpayer bought 477 acres of land for £750. Most of the land was below flood level. Parts of the land were subdivided from time to time and during the years 1950 to 1958 some 95 allotments were sold. The remainder of the land was sold in 1958 to a land development company. The Commissioner included the profits on these sales, and on the sale of several other parcels of land during the same period, in taxpayer's assessable income. Taxpayer contended that the area of 477 acres had been purchased for use as a farm. He alleged that the first subdivision of part of the land into 24 allotments in 1950 was undertaken to provide finance for the construction of a drain. However, evidence was given that a condition of council's approval of the subdivision was that the allotments should be filled and that the cost thereof was substantially more than the cost of the drainage work which was not undertaken until 1952. As regards the other parcels of land, taxpayer stated that four of these had been purchased for the purpose of erecting his residence thereon. *Held,* 1. Taxpayer had failed to prove that the whole of the 477 acres had been purchased for use as a farm and the profits on the sale of the 95 allotments (but not the profit on the sale of the remaider of the land) were assessable as profits arising from the carrying out of a profit-making undertaking or scheme; (2) as regards the profits on the sale of the other parcels of land, the profits on the four lots acquired for building a home thereon were not assessable, but the profits on the sale of two other parcels were assessable income in terms of s. 26 (a). *Dudman* v. *Federal Commissioner of Taxation* [1963] A.L.R. 31.

IN YOUR ARMCHAIR—AND MINE

By Scorpio

Misdelivery of Car: Liability

When a motorist garages his car he will usually find that the proprietor has purported to exclude himself from all liability in the event of its loss or damage. What is the position if delivery of the vehicle is given to the wrong person? This was the question to be decided in *Hollins* v. *J. Davy Ltd.* [1963] 1 All E.R. 370. Here the owner of a car had entered into a contract with the garage whereby it should be stored there on a long-term basis. The terms of the contract provided that "the customer relieves the company of all liability for loss of or damage to customer's goods, however caused. All customers are therefore respectfully notified that we do not accept responsibility for loss or misdelivery of any vehicle whilst in our hands for any purpose, arising from any cause including negligence"

The garage attendant gave delivery of the car to a man who told him that he had been sent by the owner to collect it, adding that as it was raining, the owner was going to drive him home and then return the car to the garage himself. The attendant felt that he knew the man, who had in fact been employed at the garage some time previously for a short period. The car was recovered nine months later, and the owner sued the garage for breach of contract. Sachs J. held that the action failed, on the ground that the loss clearly fell within the exception clause stated above. The position would have been different if the car had been handed over to someone known not to have authority, for then there would have been a fundamental breach of contract; but here the attendant, when allowing the car to be driven away, honestly believed the thief to represent the owner, and an honest error of this kind is not a deliberate disregard of the prime obligations of the contract.

Criminal Generosity

In the *Newcastle Journal* of 30 October is reported the case of a woman shop assistant who was fined £30 for stealing two parcels of groceries from her employers. It was put forward, by her advocate, as a mitigating circumstance, that she had derived no benefit from the theft because she had given the parcels to a woman customer who was separated from her husband and who was thought by the offender to be starving. The advocate said: "This is a case of a person whose kindness overcame her judgment." That the offender made no profit by her offences is clear, but can she properly claim that it is an act of kindness on her part to steal her employer's property and give it away? Surely, if she wished to be kind to someone in need, she should have given away something which belonged to her—for example she could have purchased some groceries and given them to the needy customer.

We are approaching the Christmas season, when it is unfortunately not uncommon for Courts to have to deal with offenders who have been caught shoplifting in order to obtain articles which they wish to give away as Christmas presents. What value have presents which are obtained in this way? Is it any real mitigation that the offenders wish to have the satisfaction of giving the stolen articles away rather than of using them personally? We think not: *Justice of the Peace and Local Government Review.*

Just and Faithful

A Northern practitioner tell us of a client who recently called on him and said: "My wife is claiming that I've been carrying on with another woman but there's nothing in it. Besides, I'd be mad to try it on because I'd have the income tax blokes down on me like a ton of bricks." The solicitor said: "I beg your pardon. Why is that?" "Because of the partnership—you remember when I was trying to work out that tax fiddle and you told me that the only way was to have a partnership deed and stick to it. I've just been reading the deed and it says, 'each of the partners shall be just and faithful to the other'."

A Clot

We have just found on our desk this message per telephone—"Mr X phones to say that he is back from Hong Kong and has a box of *Coronary* cigars for you".

Innocent Misrepresentation by Buyer

A point concerning innocent misrepresentation, on which there appears to be no previous authority, recently arose in *Goldsmith* v. *Rodger* (1962) 2 Lloyds Rep. 249. The seller of a fishing vessel claimed rescission of the contract on the ground that he had been induced to sell the vessel at the price of £100 instead of £400 which would have been a fair sum for her, by a statement by the buyer that he had examined the vessel and found extensive rot and worm in her keel. The seller naturally assumed that the boat had been taken out of the water and the keel examined, for unless that were done, no proper examination could be made. In fact, however, this had not been done, the buyer merely relying on the opinion of local fishermen that rot and worm were present in the keel. It was contended on the part of the buyer that the remedy of rescission was not available to a seller, but this argument was rejected by the Court of Appeal. Donovan L.J. observed that "it may be that in 90 per cent or more of cases of innocent misrepresentation the representor is the vendor. But what difference should it make whether one party rather than the other is induced to contract by a misrepresentation? I feel myself that there is no substance in that point, and no authority has been quoted in support of it".

As regards the general development of the law of innocent misrepresentation it is, perhaps, unfortunate that the Court of Appeal did not have to consider whether the right of recission is available where the contract is an executed one, because on the facts it was not proved that the contract was executed. In any event, the matter did not directly arise because it was not on the notice of appeal. Donovan L.J. commented that it was still an open question in the Court of Appeal. There were old cases which suggested that once a contract was executed the remedy of rescission was no longer available, but it had been pointed out in the textbooks that most of the cases could have been decided on another ground. The whole question of innocent misrepresentation was recently considered by the Law Reform Committee (Cmmd. 1782) who strongly criticised the restrictions that exist on the right to rescind a contract for misrepresentation. The Committee recommended, *inter alia*, that save in the case of a contract for sale or other disposition of land, the fact that a contract has been executed should not of itself be a bar to proceedings for rescission: *Law Journal.*

The Quality of Mercy

That liberal humanity in criminological treatment may not be without its dangers is illustrated by a report, in *The Times* of 22 November, of a hearing in Sunderland Magistrates' Court. Several persons were charged with uttering, or attempting to utter, allegedly forged £1 and £5 banknotes, and some with having in their possession paper on which (it was alleged) certain words, figures, marks, lines and devices similar to those on Bank of England notes had been printed. The prosecution alleged that the "notes" on which the charges were based had been printed by inmates of Broadmoor, with the full permission of the authorities, as "a kind of occupational therapy". The inmates have "a very strong amateur dramatic group," and the notes were for use as "stage money". The issue, it was said, had been produced at Broadmoor by the aid of a stencilling machine used for the publication of the prison hospital magazine. A departmental male nurse gave evidence that, on one of his duty visits to the office, he had seen one of the patients "running off" imitation £1 and £5 "notes" for the purpose of these theatrical activities. The £5 "notes" were marked "stage money," but the £1 "notes" were not.

One of the three accused (a woman) had been visiting relatives at Broadmoor, and somehow (it was alleged) got hold of certain of these "notes". The prosecution said that this woman handed a £1 "note" to a girl to go to a near-by inn, where she used it for the purchase of three packets of potato-crisps and came back with 19s. change. Nothing succeeds like success, and it was alleged that a similar dodge was repeated with one of the £5 notes. This had been more carefully examined, and rejected by the innkeeper; the reported prosecution was the result.

The accused have been committed for trial at Durham Assizes, so there has been no conviction, and we do not yet know the nature of the defence. It would be improper at this stage to comment on the story told by the prosecution: but it is of such a bizarre nature as to merit a mention in this column. It is only fair to add that none of the persons charged is an inmate of Broadmoor, so far as *The Times* report discloses: *Law Journal.*

Pure Kindness—Foreman of Jury: "Before we announce the verdict, we would like to thank the defendant for the delicious drinks and sandwiches which he sent us during our long hours of deliberation."

TOWN AND COUNTRY PLANNING

Evans *v.* Town and Country Appeal Board and Another

Supreme Court. Gisborne. 1962. 14 August; 26 November. Hutchison J.

Town and Country Planning—Right of objection to proposed district scheme—To whom available—Whether limited to those whose property is affected by scheme—Town and Country Planning Act 1953, s. 23.

The right of objection to a proposed district scheme created by s. 23 of the Town and Country Planning Act 1953 is limited to those whose property is affected by the scheme. The extent to which such property is affected must be appreciable before the right of objection arises.

Evans v. *Gisborne Borough* (1962) 2 T. & C.P.A. 25, approved.

MOTION for a Writ of Mandamus directed to the first defendants, the members of the Town and Country Planning Appeal Board, requiring the Board to hear and determine on the merits an appeal by the plaintiff to that Board. The plaintiff appeared in person.

Nolan, for the first defendants, withdrew by leave.
R. A. Chrisp, for the second defendant.

Cur. adv. vult.

HUTCHISON J. In a previous action *Attorney-General ex. rel. Butler* v. *Gisborne City* 1961 N.Z.L.R. 795, I dealt with certain matters arising earlier between the plaintiff and others on the one hand and the Gisborne City Council on the other hand.

Before my judgment was delivered, on 18 April 1961, being the last day for the lodging of objections to the district scheme, the plaintiff lodged an objection, seeking, as his objection states, " a definitive effective and binding reservation as Botanical Gardens " of the 11 acre area between Aberdeen Road and the Taruheru River which had in part been maintained and used as botanical gardens. On the same day the Gisborne City Council lodged two objections to its own scheme, seeking the deletion from the Planning Map of (*inter alia*) the words "Botanical Gardens " and the removal from the Scheme Statement of the words " Botanical Gardens ". In lodging these objections, the Council was taking a step to alter its Scheme, and its doing it in this way and not under ss. 22 or 35 was simply an alternative way of doing what I contemplated in the judgment would be done by the use of those sections. My judgment not then being available, the step taken by the Council may have been because of what I had said in the course of the argument as reported to it by counsel.

The plaintiff, becoming aware from notice in the newspaper of the Council's objections, filed on 18 August 1961 a formal notice under s. 23 (3) of the Act of what is called a cross-objection to the Council's objections so lodged. The committee of the Council hearing the objections under s. 25 disallowed the plaintiff's objection and cross-objection and allowed the Council's own objections.

The plaintiff appealed to the Town Planning Board against these decisions. On 13 April 1962 there was a hearing before that Board at Gisborne of preliminary legal questions raised on his appeal; the Board's decision was then reserved, was delivered on 15 May and is reported at (1962) 2 T. & C.P.A. 25. The judgment of the Board commences:

The relevant facts may be stated shortly as follows:

The respondent Council's proposed district scheme, as publicly notified, contained in the planning map a designation of an area vested in the Council as " botanical gardens ". The Council itself lodged objections to its own scheme, the purpose of these objections being *inter alia* to delete the marking of this area as botanical gardens on the planning map and changing the designation to " reserve " and by amending the scheme statement by deleting the words " Botanical Gardens " from the scheme and substituting the word " reserve ". The appellant thereupon lodged a cross-objection to this proposal. His objection, as filed, stated that he objected to the Council's objection " as a citizen of Gisborne in common with the interests of Gisborne citizens and the public generally ".

The appellant is the owner of a property in the City of Gisborne, but his property as such is in no way affected by the proposed change in the scheme. The respondent Council allowed its own objection and disallowed the cross-objection. The appellant then appealed under s. 26 against the disallowance of his cross-objection.

When this appeal was filed, the attention of the appellant was drawn to the question of whether he had, in the circumstances, any right of appeal as his property was in no way affected by the proposal to which the objection and cross-objection related. The judgment refers to certain alternative appeals with which we are not now concerned, and then turns thus to the matter with which we are concerned.

First: The question calling for determination here is whether the appellant, under s. 23 (3), had any right of cross-objection. If he had such a right it is clear he had, within the time limited by s. 26, a right of appeal against the disallowance of his cross-objection. Section 23 (1) provides that every owner and every occupier of property affected by any proposed district scheme which has been prepared shall have the right to object to the scheme. By virtue of subs. (3) every owner and every occupier of property affected by any district scheme has a right to give notice of opposition to an objection, and upon giving such notice, shall be deemed to be an objector.

It is not proposed to traverse the detailed and meticulous examination of the wording of this section advanced by the appellant. It may be summarised shortly by stating that his contention is that any owner or occupier of property within a district has a right of objection to *any* provision of the proposed district scheme, even though it does not touch or affect his property. If this submission is sound, then, taking the City of Wellington as an example, the owner of a residential property in Island Bay can object to the zoning of a block of land in Johnsonville. Counsel for the respondent submitted that the word " affected " relates or attaches to the word " property ", and unless the property, which in this context must be limited to real property or land, is in some way affected by the scheme, there is no right of objection and, there-

fore, no right of appeal. This is the construction placed on the section by the Board in an unreported decision given in Auckland. For the purpose of illustration, the circumstances of that decision were as follows:

The appellant was the owner of a property in the City of Auckland. The Auckland City Council's proposed district scheme contained provision for a motorway traversing the City forming part of the major transportation scheme for the development of Greater Auckland. This proposed motorway did not in any way touch or affect any property owned by the appellant, or in which he had any interest, but he considered that he had a scheme of his own devising for the siting of this motorway and he thereupon lodged an objection to the proposed motorway as sited on the Auckland City Council's plan and urged that his own plan for the motorway should be adopted. His objection was disallowed and he then appealed.

In an oral decision, the Board held that as the proposal to which he had objected in no way touched or affected any property owned by him, or in which he had any interest, he had no right of appeal. The Board then declined jurisdiction.

In this present case the Board finds itself unable to accept the submission that the Legislature in enacting s. 23 intended to give every property owner or occupier a right to object to any and every provision in a scheme. In this case the Board holds that the appellant had no right of objection and, therefore, no right of appeal (*ibid.*, 26).

While the first paragraph under the head "Firstly" says that the question calling for determination is whether the appellant had any right of cross-objection under s. 23 (3), the question also was whether he had any right of original objection under s. 23 (1); but the Board obviously enough intended to cover both in what it was saying and nothing turns on the particular reference to cross-objection.

The plaintiff claims that he has the right of objection and a right of appeal if that objection were not sustained. There was no dispute that, if he had a right of objection, he would have a right of appeal in the event of the decision on the objection being adverse to him, and the question in the case is whether he had any such right of objection.

The question involves a consideration of s. 23 (1) and (3) with such assistance as may be obtained from any other provisions in the Act.

The plaintiff's main submission is that, being the owner of property in the City of Gisborne, he is entitled on that account to object to all provisions of the Scheme. He concedes that the Board was right in its view that the word "affected" in s. 23 (1) relates to "property" and not to "owner" or "occupier"; but contends that every property within a scheme area is necessarily affected by the scheme and all provisions of it. Alternatively, without in any way contending that the proximity of his property to the area in question causes it to be affected in any particular way, he submits that every property within the scheme area is necessarily affected by the existence and status of reserves of the nature of that with which we are concerned. He made certain general submissions with regard to interpretation of statutes, with which I fully agree, and presented an exhaustive consideration of the legislation, and cited a number of authorities.

I have followed him on the consideration of the legislation and have read the relevant parts of the authorities cited; but it seems to me that the decision of the case depends entirely on the words "affected by any proposed district scheme" as applicable to the word "property". One of Mr Evans' points related to s. 17 (3) of The Town Planning Act 1926, when the borough was the planning unit. In this, the forerunner of s. 23 (1) of the 1953 Act, the provision was:

Every occupier of rateable property within the borough shall have a right of objection to the scheme.

The present section may enlarge the ambit of those entitled to object to a scheme by giving the right to persons outside the scheme area, but, contrary to Mr Evans' submission, it may also, and in my opinion does, restrict the ambit of those within the area entitled to object; for the test now with any person, whether within or without the area, is whether his property is affected by the scheme. It is, in my opinion, impossible to read out of this alteration in the law a legislative pronouncement that all rateable property in the scheme area is necessarily affected by the scheme. On the contrary, I think that the indication from the alteration is that the Legislature recognised that there are properties within the area which are not affected by it. There being the test provided by the words "affected by any proposed district scheme" and that test being applicable to property within the scheme area as well as to property without it, I reject Mr Evans' primary submission.

There is a difficulty with his alternative submission, which he fully realised, and which is that the Board in its judgment of 15 May has stated as a fact that "his property as such is in no way affected by the proposed change in the scheme". While the Board was dealing only with preliminary legal questions, it must, for the purpose of its consideration of the question now before the Court, have considered the facts to the extent necessary to enable it to arrive at that finding. I am therefore invited to examine that question of fact for myself. Mr Chrisp, for the second defendant, the Corporation, submitted that the right of objection is given only to those whose property is materially affected by the provisions of a scheme. There is no such word as "materially" in the section, and I am inclined to think that he was there rather stating what, in his submission, the decision of the Board would be on the merits of a case than dealing with the preliminary matter of the jurisdiction of the Board. I go this far, however, with him that the affecting of the property must, for the purposes of the section, be appreciable—*de minimis non curat lex*. In this case, the only way in which it is suggested that the property of plaintiff and other owners would be affected is by the Council's refusal to define the land in question as a botanical gardens rather than simply as a reserve. I am of the opinion that that would not affect these properties to any extent that would be appreciable. I do not think that we are in any way assisted by a consideration of rights of objection in other fields, for in each case the right depends on the terms of the particular Act. I cannot think that the plaintiff's alternative submission is any different from his saying that he has a right to object and to appeal in the public interest; and the only right to object in the public interest, as distinct from the right of a person to object on account of his property's being affected, is that given by s. 24 to such bodies as are there mentioned. I must therefore reject Mr Evans' alternative submission.

The Motion is accordingly dismissed. It may be some consolation to Mr Evans in my rejection of his submissions, to realise, from the examples given by the Board in its judgment, how difficult his case would have been before the Board on the merits, if he had succeeded in this action.

Judgment accordingly.