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TOWN AND COUNTRY PLANNING: RIGHTS OF APPEAL

In its first report presented in January 1968, the Public and Administrative Law Reform Committee concluded that decisions of the Town and Country Planning Appeal Boards should not be final in all cases, and recommended that an appeal should lie, with leave, to the Administrative Division of the Supreme Court.

With that recommendation, the legal profession, the business community and the general public would undoubtedly agree. There can be no real argument that some further right of appeal is desirable although, as the Committee says, there may be differences of opinion as to whether leave should be required and the criteria for granting leave.

In January of this year the Committee's third report stressed that action should be taken as a matter of urgency to implement this recommendation. The Committee pointed out that the volume of adjudication in the town planning field is ever-increasing and that last year Parliament had to make further provision for this work. There are now two permanent Appeal Boards and one Special Board. Decisions of the Boards affect the environment and circumstances in which large sections of the community live, work or seek recreation. The Committee pointed out that this had become one of the major jurisdictions in New Zealand and that the determinations of the Boards were of enduring influence affecting not only present rights but also future rights of many people.

The Committee considered that the increase in the volume of planning cases and the resultant establishment of a third Board added to the urgency of the matter. The report states that "As far as possible any system of administration of justice should try to avoid the creation of several tribunals of equal status, subject to no ultimate authority capable of resolving inconsistencies". To dispose of their formidable programmes, the Boards which are usually presided over by a Magistrate, have to work under a considerable degree of pressure. While recognising the quality and efficiency of much of the work done, the Committee considered it no disrespect to mention that decisions of Magistrates on cases much less important than the average planning case are open to appeal to the Supreme Court.

Much of the Town Planning Act is recognised to be complex and most difficult to interpret. On the relatively few occasions that the legislation has come under the attention of the Courts. Judges have referred frankly and sometimes bluntly, to the difficulties which they were called upon to resolve. As decisions vitally affecting many people are constantly being made by planning authorities and the Appeal Boards, it is clearly desirable that appeal rights should be provided to enable parties to have the governing provisions authoritatively interpreted by the Courts.

The Committee then considered the effect of the new provisions of the Urban Renewal and Housing Improvement Amendment Act 1969 which empower local authorities to designate comprehensive urban renewal areas. The new legislation may be said to be the positive aspect of town planning in contrast to the more negative aspect of controlling the activities of land owners. The machinery for designating an area includes application to the Minister of Housing for approval and the preparation of a plan and code of ordinances, to be incorporated in the district scheme. Rights of objection and appeal under the town planning legislation are likewise incorporated.

Because the urban renewal legislation is closely connected with ordinary town planning legislation, the Committee considered that logi-

cally the same appeal rights should apply, although the drastic nature of urban renewal controls made an even stronger case for further appeal rights. The Committee therefore regarded the appeal rights under the new Act as reasonable, but as a *temporary measure only*, and concluded "We trust that at an early date both the urban renewal and the town planning legislation will be amended to permit appeals to the Administrative Division of the Supreme Court."

Many will take the view that on points of law leave should not be required for appeals to the Administrative Division and there should also be rights of appeal to the Court of Appeal. Such a right has been given by the Cinematograph Films Amendment Act 1969 in the field of films licensing and registration and some of the matters arising in the field of town planning and urban renewal are equally important.

It is interesting also to compare the present appeal rights under the Sale of Liquor Act 1962 with those under the Town and Country Planning Act 1953. Where a person wishes to use his land for an hotel he must obtain planning approval and he has no right of appeal beyond the decision of the Town and Country Planning Appeal Board. On the other hand, where the licensee of an existing hotel wishes for example to use one of the hotel bars to entertain his private guests, he can take the matter on appeal to the Licensing Control Commission, the Administrative Division of the Supreme Court and the Court of Appeal. At present therefore we have the anomalous position that the use of the whole premises is dealt with finally at the Planning Appeal Board level whereas the use of one room may go to the highest Court in the land.

It is earnestly hoped that as urged by the Law Reform Committee, legislation will be introduced this Session to provide adequate appeal rights in the increasingly important field of town planning and urban renewal.

A. B. THOMSON.

SUMMARY OF RECENT LAW

COMPANIES—ARTICLES OF ASSOCIATION

Directors—Article providing director with special voting rights on resolution to remove him from office—Validity—Companies Act 1948, s. 184 (1). The articles of association of a company incorporated Table A excluding Art. 96 (empowering a company to remove a director by ordinary resolution). They included a special article: "In the event of a resolution being proposed at any general meeting of the company for the removal from office of any director, any shares held by that director shall on a poll in respect of such resolution carry the right to three votes per share . . . *Held*, (Lord Morris of Borth-y-Gest dissenting) the special article effectively gave a director on the occasion of a poll on a resolution for his removal from office three votes for every share which he held notwithstanding s. 184 (1) of the Companies Act 1948. Decision of the Court of Appeal [1969] 1 All E.R. 1002 affirmed. *Bushell* v. *Faith* [1970] 1 All E.R. 53.

CRIMINAL LAW—EVIDENCE

Confession—Inducement—Inducement resulting from question by accused to police officer. The appellant, suspected by the police of having been connected with the commission of an offence, was told by a police officer that an identification parade had been arranged; if he was not picked out he would be allowed to go. He then asked the officer whether he would be given bail at once if he made a statement. The police officer said "Yes" and the appellant made a statement admitting guilt. On the question whether the statement was admissible. *Held*, The question asked by the appellant together with the police officer's answer amounted to an inducement; accordingly, since the statement followed an inducement held out by a person in authority of the advantage of getting bail the statement was inadmissible. (*R.* v. *Northam* (1967) 52 Cr. App. Rep. 97 followed.) *R.* v. *Zaveckas* [1970] 1 All E.R. 413.

CRIMINAL LAW—SUMMARY PROCEEDINGS

Information—Trespasser supplying false particulars to "occupier" of land—Whether properly laid—Whether offence disclosed—First identification of accused by informant in Magistrate's Court—Trespass Act 1968, ss. 8, 9—Summary Proceedings Act 1957, s. 17—Trespass—Trespass to land—Offences—Trespasser supplying false particulars to occupier—Trespass Act 1968, ss. 8, 9. The respondent heard shots on his farm property at Raorikia and saw a man come out of the bush carrying a rifle and with a deer on his back. The man gave his name as Don Anderson living in Cornfoot Street but refused to hand over the rifle to take its bolt number. The police could find no Donald Anderson residing at Cornfoot Street and no person by this name was the registered owner of a firearm. At the Magistrate's Court hearing, the respondent identified the man as being the appellant. The Magistrate convicted the appellant on a charge under s. 8 (3) of the Trespass Act 1968 that being a person found trespassing on private land and being required to give particulars of his name and address supplied false particulars to the occupier. *Held*, 1. The description in the body of the information of Mr Kirk as occupier sufficiently informs the appellant that the information is laid by the occupier and the respondent complied with s. 9 of the Trespass Act 1968 by proving at the hearing that he was the occupier of the land concerned. (*Key* v. *Bastin* [1925] 1 K.B. 650, distinguished. *Anderson* v. *Hamlin* (1890) 25 Q.B.D. 221, considered.) 2. The information as laid has suffi-

cient detail to inform the appellant that he was found trespassing on private land and supplied false particulars to the occupier. (*Udy* v. *Police* [1964] N.Z.L.R. 235 and *Police* v. *Wyatt* [1966] N.Z.L.R. 1118, applied.) 3. The phrase "supplied false particulars" used in the information is encompassed within the meaning of the phrase "supplied any false evidence with respect thereto" in s. 8 (3). (*R.* v. *Holloway Prison Governor* (1916) 85 L.J.K.B. 689 and *Ford* v. *Police* [1961] N.Z.L.R. 494, applied.) 4. The identification of the appellant in the lower Court by Mr Kirk, the farmer who confronted and was vitally interested to identify the hunter trespassing on his land, leaves no reasonable doubt on the matter of identification. (*R.* v. *Glass* [1945] N.Z.L.R. 496 and *Page* v. *Police* [1964] N.Z.L.R. 974, followed. *Davies and Cody* v. *The King* (1937) 57 C.L.R. 170, distinguished. *Chalklen* v. *Kirk* (Supreme Court. Wanganui. 1969. 20 November; 2 December. Beattie J.).

DIVORCE—MAINTENANCE OF WIFE

Assessment—Factors to be considered—Conduct of parties—Matters not raised at trial of suit—Public policy —Res judicata—*Undefended petition by wife on ground of adultery—Marriage irretrievably broken down—Evidence of wife's desertion and denial of allegations in her discretion statement sought to be adduced by husband in maintenance proceedings.* In September 1968, the wife petitioned for divorce on the ground of the husband's adultery with Mrs K. on dates between March 1968 and the date of the petition, praying the Court to exercise its discretion in respect of her own adultery. In her discretion statement the wife stated that the husband had confessed in 1966 to intercourse with a Mrs R., and that as a result of the husband's encouragement the wife had had intercourse with Mr R. on four occasions in 1966. Notice was served on the husband that the wife's discretion statement alleged that he had conduced to her adultery with Mr R. and had admitted his own adultery with Mrs R. The husband did not defend the petition as he had no defence to the allegations in it and, the marriage having irretrievably broken down, he did not wish the Court to refuse to exercise its discretion in the wife's favour. The wife was granted a decree on her petition. When subsequently she brought proceedings for maintenance the husband wished to adduce evidence that the wife had deserted him in June 1967, and to deny the allegations in the discretion statement that he had conduced to her adultery and had confessed to adultery with Mrs R. The county Court Judge ruled that the husband was precluded from giving evidence on any of these matters in the maintenance proceedings on the grounds of estoppel per *rem judicatam* and public policy. At the hearing of the husband's appeal against that ruling the wife conceded, rightly as the Court held, that the ruling could not be supported on the ground of *res judicata* and that public policy did not preclude the husband from denying the allegations in the discretion statement, but it was contended that public policy did require that the husband should be debarred from alleging that the wife had deserted him. *Held,* Where a marriage had irretrievably broken down and would be dissolved there was no principle of public policy which inhibited the right of the parties to bring to light in maintenance proceedings all matters relevant to the conduct of the parties whether or not they had been raised at the trial of the suit and accordingly, the husband was not precluded by any rule of public policy from alleging in the maintenance proceedings desertion by the wife. (*Restall* v. *Restall* [1930] All E.R. Rep. 372 applied. *Dicta* of Denning L.J. in *Trestain* v. *Trestain* [1950] P. at 202, and of Sachs L.J. in *Porter* v. *Porter* [1969] 3 All E.R. at 644 approved. *Robinson* v. *Robinson* [1943] 1 All E.R. 251 overruled.) Observations on the application of the doctrine of *res judicata, Tumath* v. *Tumath* [1970] 1 All E.R. 111.

INCOME TAX—REPAYMENT

Management expenses—Investment company—Rate of repayment applicable—Dividends subject to double taxation relief—Income bearing tax at different rates—Rate appropriate—Income Tax Act 1952, s. 425 (1). The taxpayer company, an investment company entitled to a repayment of tax equal to the amount of tax on any sums disbursed as expenses of management under s. 425 (1) of the Income Tax Act 1952, received dividends: (a) from companies which had received double taxation relief as a result of trading activities abroad subject to foreign tax; and (b) from foreign companies which withheld foreign tax to which the dividends were subject, in respect of which dividends the taxpayer company claimed double taxation relief. The result of the double taxation relief was that the dividends in case (a) bore United Kingdom tax at a rate lower than the standard rate although the taxpayer company had paid tax thereon at standard rate; and in case (b) the dividends suffered U.K. tax less in amount than if calculated at the standard rate. The taxpayer company claimed a repayment under s. 425 (1) in both cases of tax calculated at the standard rate on a sum equal to its expenses of management regardless of the rate at which any part of its gross income, to which the expenses were attributed, had suffered tax, even if lower than the standard rate, the standard rate being the only rate discoverable in the interstices of Sch. 16 relating to an effective rate of tax. But in the light of the provision in s. 350 that no repayment in respect of tax deducted under (a) should exceed the net United Kingdom rate, it submitted that it could claim the whole amount of "the tax on" the expenses at standard rate by claiming repayment of tax paid on more than one dividend in respect of the same expenses. It submitted further that under its power to marshall dividends in the manner most favourable to it, the whole of foreign tax credit under (b) should be attributed to one dividend leaving other dividends to suffer United Kingdom tax at standard rate, and enabling tax at the rate to be recoverable. *Held,* (i) On the true construction of "so much of the tax paid by [the company] as is equal to the amount of the tax on any sums disbursed as expenses of management" in s. 425 of the Income Tax Act 1952, "the tax on" was so related to "the tax paid" in respcet of the gross income considered as having met the relevant part of the expenses as to be calculated at the same rate as that tax paid, and was not an unvarying standard rate. (ii) While the taxpayer company was entitled to have disbursements on management expenses attributed to its gross income in the manner most favourable to it having regard to the varying incidence of liability to United Kingdom tax, whether the tax was taken at standard rate or at the lower effective net rate, it could not claim repayment of tax in respect of more than £100 of gross income for any £100 of expenses (which was what the claim as framed under (a) amounted to) or of any greater sum than the United Kingdom tax in fact exigible in respect of income to which expenses were attributed; and there was no warrant for the suggested special marshalling of dividends in Sch. 16. Decision of Cross J. [1969] 2 All E.R. 1158 affirmed. *Jones* v. *Shell Petroleum Co. Ltd.* [1970] 1 All E.R. 426.

INCOME TAX—INCOME TAX PAYABLE

Proprietary company—Incorporated in the Bahamas—No income derived from New Zealand—Land and Income Tax Act 1954, ss. 138, 165, 166. The provisions of s. 138 of the Land and Income Tax Act 1954 as to proprietary companies do not apply to a company which neither resides in New Zealand nor derives income from New Zealand. *So held* by McGregor J. in the Supreme Court; affirmed by the Court of Appeal. (*Colquhoun* v. *Heddon* (1890) 25 Q.B.D. 129 and *Re Adams* (1905) 25 N.Z.L.R. 302, applied.) (*Commissioner of Inland Revenue* v. *Associated Motorists Petrol Co. Ltd.* (Supreme Court. Wellington. 1969. 1, 2 April; 8 May. McGregor J. (Court of Appeal. Wellington. 1969. 8, 9 September; 21 November. North P. Turner J. McCarthy J.).

INCOME TAX—OBJECTIONS TO ASSESSMENTS

Amended assessments—Deduction of payments for purchase of gasoline—Whether dual purpose in the payments—Land and Income Tax Act 1954, ss. 110, 111—Income tax—Objections to assessments—Taxpayer participating in refinery profits on gasoline purchased by it—Profits in Bahamas—Whether arrangement had purpose or effect of altering incidence of income tax or relieving from liability to pay income tax—Land and Income Tax Act 1954, s. 108—Income tax—Estoppel and exhaustion of discretion—Application of principles—Commissioner's statutory duty—Land and Income Tax Act 1954, s. 22. In 1956 Europa entered into a series of contracts with the Gulf Oil Corporation of the United States for the supply by Gulf of Europa's gasoline requirements in New Zealand. By the supply contract Europa agreed to pay "posted" (market) prices and by a contemporaneous contract Gulf and Europa agreed to set up in the Bahamas a company called Pan-Eastern, the shares in which were held equally between a subsidiary of Gulf and A.M.P. a subsidiary of Europa. Pan-Eastern contracted to buy at posted prices sufficient crude oil from Gulf to meet Europa's requirements under the supply contract, have the crude oil refined by Gulf for a fee; and sell the resultant products to Gulf. From these steps Pan-Eastern derived a profit, A.M.P.'s share of which amounted to a return equivalent to 2.5 cents per gallon of gasoline purchased by Europa under the supply contract. In 1959 an annual reduction in the price of crude oil sold to Pan-Eastern was agreed in order to maintain its profits at the intended level, movement in posted prices having reduced its income. In 1961 Europa entered into a contract with B.P. for the purchase by Europa of certain refined products at posted prices and an associated contract allowed P.T.T., a London subsidiary of Europa, ten percent discount on such purchases. In 1964 when the New Zealand refinery at Whangarei was about to be established Europa entered into a further series of contracts with Gulf for the supply to Europa of its feedstock requirements for the refinery at posted prices. The Pan-Eastern structure was continued and that company earned profits which reached Europa through A.M.P. In February 1963 the Commissioner conducted an investigation into Europa's affairs and on 27 June 1963 advised Europa by letter that he would "take no action to disturb the present position". In 1965 the new Commissioner reopened the matter and issued amended assessments in respect of the income years ended 31 March 1960 to 31 March 1965. He claimed to include as assessable income to Europa the sums it received from Pan-Eastern through A.M.P. and from P.T.T. justifying these assessments on two grounds: (1) the sums in dispute were not a permissible deduction as part of the cost of purchases of supplies under s. 111. (2) the contracts were an arrangement under s. 108 having the purpose or effect of altering the incidence of income tax or relieving from liability to pay income tax. In the Supreme Court McGregor J. found that Pan-Eastern was not a conventional refining arrangement and that the primary object of the arrangements was to enable Europa to obtain products and feedstocks at a concession price. Applying s. 111 to this finding, McGregor J. held that the Commissioner was entitled to apportion Europa's expenditure on supplies between the part attributable to the production of its assessable income in New Zealand and the part attributable to the concession obtained through Pan-Eastern and P.T.T. As to estoppel, his Honour found that the directors of Europa possessed a considerable amount of relevant information which was not disclosed to the Commissioner prior to the letter in question but in any case liability for income tax was imposed by the Act, the Commissioner merely quantifying it. He could not waive liability for payment of tax and was under a statutory duty to assess a taxpayer in accordance with the Act; in doing so he was not exercising a statutory discretion. As to s. 108, McGregor J. concluded that the purpose of the arrangement was not in its initial stages to avoid tax liability but having found for the Commissioner under *s. 111* he left the point open. From this decision Europa appealed. *Held, Per totam curiam.* Appeal allowed in respect of s. 111 and s. 108. *Per* North P. Gulf could not in 1956 agree to supply Europa with gasoline at a discount on posted prices; Europa was given a half share in the refining sector of Gulf's overseas earnings, calculated by reference to the quantity of gasoline it imported; this was not an indirect way of giving Europa a price concession or discount from posted prices. Nor could the profits received by Europa from Pan-Eastern under the 1956-59 contract be regarded as a discount. As to the 1964 contracts, there was insufficient evidence to show that discounts on posted prices were then obtainable in New Zealand. In respect of s. 111, *Per totam curiam.* The Commissioner is not precluded from attacking the purpose of expenditure claimed as a deduction under s. 111 where the money was paid for trading stock. *Per* Turner J. It is a question of fact which the Commissioner may decide in the first instance whether expenditure on supplies claimed as a deduction under s. 111 is exclusively incurred in the production of the assessable income; and, *per* McCarthy J. the degree of overpayment (where present) is relevant. *Per* North P. Before the Commissioner is entitled under s. 111 to disallow part of an expenditure under s. 111 there must be evidence that the taxpayer was not obliged to pay the full amount claimed as a deduction. *Per* Turner J. While the onus of proving that payments claimed as a deduction under s. 111 are exclusively incurred in the production of the assessable income rests upon the taxpayer, the burden may be discharged at an early stage if he can demonstrate that the payments were made in discharge of a contractual liability. *Per* McCarthy J. If the expenditure was incurred in the purchase of goods for the ordinary processes of trading, there is a *prima facie* assumption that the expenditure was for the purposes of trade alone. The evidentiary burden then passes to the Commissioner. *Per* Turner J. In deciding whether expenditure may be apportioned under s. 111 between two purposes the test of ordinary business or family dealing may be used. *Per* Turner and McCarthy JJ.: The doctrine in *Salomon* v. *Salomon* [1897] A.C. 22 prevents the term discount being fairly descriptive of the benefits Europa obtained under the

contracts with Gulf and B.P. In respect of s. 108; *Per* North P. and Turner J. Section 108 has no application where the arrangement is capable of explanation by reference to ordinary commercial dealings. *Per* North P. and McCarthy J. Where the Commissioner seeks to deny a deduction under s. 111 it is doubtful if s. 108 can have application to the transaction. In respect of *estoppel;* Although not necessary to decide the point, observations by North P. on the difficulties for Europa in relying on the letter in question; and Turner J. confirmed the judgment of McGregor J. on this aspect. (*Aspro Ltd.* v. *Commissioner of Taxes* [1932] A.C. 683; [1932] N.Z.P.C.C. 630; *Usher's Wiltshire Brewery Ltd.* v. *Bruce* [1915] A.C. 433; *Ward & Co.* v. *Commissioner of Taxes* [1923] A.C. 145; *Ronpibon Tin N.L.* and *Tong Kah Compound N.L.* v. *Federal Commissioner of Taxation* [1949] 78 C.L.R. 47; [1949] A.L.R. 785; *Duke of Westminster* v. *Inland Revenue Commissioners* [1934] 19 T.C. 490; *Secretary of State in Council for India* v. *Scoble* [1903] A.C. 299; *Inland Revenue Commissioners* v. *Land Securities Investment Trust Ltd.* [1969] 1 W.L.R. 604; [1969] 2 All E.R. 430; *Inland Revenue Commissioners* v. *Korner* [1969] 1 W.L.R. 554; [1969] 1 All E.R. 679 and *Littlewoods Mail Order Stores Ltd.* v. *Inland Revenue Commissioners* [1969] 3 W.L.R. 1241; [1969] 3 All E.R. 855, considered. *Reckitt & Colman (New Zealand) Ltd.* v. *Taxation Board of Review* [1966] N.Z.L.R. 1032; *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* [1937] A.C. 610; [1937] 1 All E.R. 748 and *Salomon* v. *Salomon* [1897] A.C. 22; [1895-9] All E.R. Rep. 33, applied. *Elmiger* v. *Commissioner of Inland Revenue* [1967] N.Z.L.R. 161 and *Newton* v. *Commissioner of Taxation of the Commonwealth of Australia* [1958] A.C. 450; [1958] 2 All E.R. 759, distinguished. *Cecil Bros. Pty. Ltd.* v. *Federal Commissioner of Taxes* (1964) 111 C.L.R. 430; [1965] A.L.R. 416, doubted in part. *Europa Oil (New Zealand) Limited* v. *Commissioner of Inland Revenue* (Supreme Court. Wellington. 1969. 17, 18, 19, 20, 21, 24, 26, 27 February; 24, 25, 26, 27, 28, 31 March; 1, 2 April; 8 May. McGregor J. (Court of Appeal. Wellington. 1969. 25, 26, 27, 28, 29 August; 1, 2, 3, 4, 5, 8 September; 21 November. North P. Turner J. McCarthy J.).

CASE AND COMMENT

New Zealand Cases Contributed by the Faculty of Law, University of Auckland

Customary Hire Purchase Agreements—Apology

In [1969] N.Z.L.J. 672, under the above heading, I contributed a case note on *Bateman T.V. Ltd.* v. *Coleridge Finance Company.* This note contained comments on counsel's conduct of the defence in the Supreme Court and implied that new counsel was engaged in the Court of Appeal because his predecessor in the Supreme Court had not advanced all the arguments that ought to have been used. These remarks were based on my inferences from the report of the Court of Appeal judgment and, in the light of subsequent information, are not supportable.

I wish therefore, to apologise to counsel at first instance for the debtor companies and to withdraw these comments.

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Liability for Wandering Stock—Correction

In [1970] N.Z.L.J. 30 under the heading "Liability for Wandering Stock" I discussed the Court of Appeal decision in *Ross* v. *McCarthy* (judgment 5 November 1969). The article read in part as though I was critical of counsel in the preparation and conduct of the case before both the Supreme Court and the Court of Appeal in that I claimed that certain decisions "were not put to the Court". In fact the decisions *were* put to the Court although they were not cited in the transcripts of the judgments available to me. For my part I deeply regret the mistake and unreservedly apologise for any reflection on counsel or the profession generally.

I have been further advised by counsel that, in addition to American authority, also cited before the Court of Appeal was the decision of the Lord Ordinary, Lord Thomson, in *Gardiner* v. *Miller* (1966), referred to in the 1968 Report of the English Law Commission (No. 13). In this case, which is reported in [1967] S.L.T. 29, it was held that the law of Scotland imposes the duty contended for by the appellant in *Ross* v. *McCarthy.*

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The New Car and the Trade-in

The Court of Appeal has now affirmed the earlier judgment of Woodhouse J. [1969] N.Z.L.R. 1057 holding illegal the practice of a motor car dealer demanding a trade-in as part of the consideration for the purchase of a new car. The case concerned is *Kirk Motors (Auckland) Ltd.* v. *Holland* (Industries and Commerce Department) and the judgment of the Court was given by McCarthy J. on 5 December 1969.

The facts were as follows. The appellant motor dealer had been charged under ss. 19 (1) and 29 (3) of the Control of Prices Act 1947 with seeking to obtain for himself, by insisting on a trade-in at its own valuation as part payment for a new car, a consideration in excess of the con-

trolled price. The appellant had offered the prospective purchaser of a new Chrysler Valiant motor car $656 for his six-year-old Zephyr. The purchaser had agreed to this figure but later changed his mind before it was clear that a binding contract had come into existence. Subsequently, the appellant was proceeded against under the 1947 Act by an official of the Department of Industries and Commerce.

The Magistrate before whom the case first came dismissed the informations on the grounds that:

(1) The dealer was entitled to make a reasonable profit in relation to the trading of the Zephyr and it had not been established that "the line where a reasonable profit in the present circumstances had come to an end had been exceeded";

(2) It had not been proved that the dealer had offered to sell the Chrysler for a price that was not in conformity with the Price Order or approval as to its maximum price.

Woodhouse J. on appeal had little difficulty in overruling the Magistrate's decision. Concerning the second ground above, he pointed out, that, irrespective of the law of contract, the Control of Prices Act furnished its own statutory definition of "an offer to sell". Under s. 50 it was provided, *inter alia*, that the giving of a quotation for any goods "shall be deemed to constitute an offer to sell those goods at the price so specified or indicated". He therefore concluded that within the terms of the Act there had been an offer to sell.

The learned Judge also disagreed with the Magistrate's first ground as set out above. The term "price", he said, also has its own special definition. Under s. 2 (1) it includes:

> ". . . every valuable consideration whatsoever, whether direct or indirect; and includes any consideration which in effect relates to the sale of any goods . . . although ostensibly relating to any other matter or thing".

The Company undoubtedly considered that there was some trading advantage in demanding a trade-in, his Honour said, and this advantage (which amounted to an opportunity of reselling the Zephyr at a profit) was a valuable consideration over and above the controlled price. This was not to say however, he said, that a dealer could never accept a trade-in from the purchaser of a new car by way of part-payment:

> "An entirely *independent and voluntary* arrangement for the sale and purchase of a used car made by such a purchaser on the one hand and the motor-vehicle dealer on the other could in my view be subject to no criticism. Any consequential trading advantage to the dealer could not then be imported into 'the price' charged by him on an *independent* sale of a new vehicle. But the situation is entirely different where, as the vendor of goods in limited supply, the dealer unilaterally insists upon such a trading advantage as a condition of selling those goods. The parties are not in an equal bargaining position and, recognising the fact, the statute has as one of its important purposes the control not merely of profiteering in such goods, but of their price in a wider sense."

In the Court of Appeal, McCarthy J. affirmed the validity of Woodhouse J.'s reasoning and concluded that the provisions of the Act applied wherever a dealer insisted on a trade-in. Where that element was lacking, however, he said, the Court expressed no opinion. The reader can exercise his own mind, therefore, on the following situations to which my inquiries among Auckland new car dealers led me:

(1) The dealer offers me a new car which has been locally assembled and says that if I want a model of the same car which has been assembled in the country of origin then I must provide a trade-in;

(2) The dealer says that I can have a new car in three months time but that if I want it sooner I must trade-in my old car.

J.A.F.

Ministerial Decisions—Adequacy of Evidence

The recent decision of the Court of Appeal in *Shand* v. *Gordon and the Attorney-General* (Judgment 19 December 1969) concerned the validity of the decision of the Minister of Railways to close the branch railway from Washdyke to Fairlie. Two grounds were advanced for the conclusion that the appeal should be dismissed. The first ground was that the decision was within the inherent powers of the Minister and the second, that the decision was a valid exercise of the statutory powers conferred on the Minister. Though it would be interesting to pursue the question of what falls within the inherent powers of a Minister when statutory powers have also been conferred (*vide Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508; [1920] All E.R. Rep. 80, as to the effect of statutory powers on the prerogative), this note will be confined to the second issue—whether it is necessary for a Minister to justify, in the sense of disclosing the evidential basis for, his decision.

Because McCarthy J. indicated his agreement with the reasons stated by North P. and Turner

J. in their joint judgment, the Court of Appeal can be taken to have accepted the following proposition:

> "It is, we think, perfectly plain that this section confers on the Minister the power to come to an administrative decision and issue an executive order. When such a power is conferred on a Minister of the Crown we are of opinion that so long as he acts within the scope of his statutory power and acts in a *bona fide* manner in exercising the power, his decision cannot be called into question in a Court of law except in the possible case where there was no evidence at all before him justifying the decision he reached. Indeed it has been questioned whether the Minister can ever be called upon in a Court of law to justify his administrative decision on this ground."

The contrast suggested here presumably is between a decision which is made after a hearing where an obligation to act judicially is imposed and a decision which is made without the need to discharge such an obligation. This distinction is clearly made in such cases as *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 where the Privy Council described the action of the Controller of Textiles in Ceylon as executive action to withdraw a privilege. It is also made in *Re City of Plymouth (City Centre) Declaratory Order* 1946, *Robinson* v. *Minister of Town and Country Planning* [1947] 1 K.B. 702; [1947] 1 All E.R. 851, to which North P. and Turner J. referred. But because the facts of the *Robinson* case are very different from those in *Shand*, care must be taken not to extend the *dicta* in the former, as to the effect of the Town and Country Planning Act 1944, to other statutory provisions. In the *Robinson* case the Minister was empowered to designate by order areas of extensive war damage for compulsory acquisition when he was satisfied that it was necessary. That order was described as one made in the course of the Minister's executive or administrative functions. But the plaintiff had asserted that at the inquiry held subsequent to the making of the order those who objected to it were entitled to have disclosed to them the evidence on which the order was based. This was denied them and the case is cited as authority for the proposition that in the making of the initial order and in confirming it after the holding of a public inquiry the Minister was to be guided by questions of policy and opinion as well as the evidence adduced by objectors; he was entitled to act on reports and opinions obtained from sources within or outside his Ministry which he was not obliged to disclose to the objectors.

Although there was no inquiry in the *Shand* case, the principle that a Minister, when exercising a statutory power of an executive or administrative kind should not be obliged to disclose the evidence on which he acted seems reasonable enough. But the citizen is not left without any protection from the Courts. The *Robinson* case indicated that the exercise of powers such as the one being examined could be invalidated if the Minister had overstepped the limits of his statutory powers—a clear example of *ultra vires*—or if it could be proved that he had not acted *bona fide*. These two grounds, and possibly a third, taking a decision without any evidence, are reaffirmed in the judgment of the Court of Appeal.

On the question of an evidential basis for a decision of this kind, the recent Report made by the McRuer Commission to the Ontario Government contained this extract at p. 314 of Volume I:

> "Decisions on questions of fact or opinion should not be subject to review. Although a hearing may be required to inform a Minister or other tribunal, and to afford opportunity for persons who will be affected by proposed action to influence the decision to be made, the decision remains a political one. It is founded on opinion or judgment and may take into account facts or matters not contained in the record of the hearing. It follows that all material upon which the decision is based cannot be placed before a Court on review. The responsibility for political decisions of this kind under our constitution should be left to the Minister who is responsible to the Legislature. The responsibility should not be placed on the Courts. They are not tribunals to make political decisions and are not responsible to the Legislature. To ask the Courts to decide political matters is to abandon Governmental responsibility.
>
> "It is not to be overlooked that the exercise of these administrative powers is subject to full review on all grounds of *ultra vires*."

Ultra vires in this context includes as the Commission stated at p. 247 invalidity in appointment to the tribunal, absence of preliminary matters of fact, law or mixed law and fact, bias or partiality, failure to comply with mandatory procedure requirements, excess of jurisdiction, use of power for an improper purpose or the taking into account of irrelevant or wrong considerations, and a number of other less obvious examples of action taken without legal authority.

J.F.N.

RECENT ADMISSIONS

The following were recently admitted to membership of the legal profession:

Barristers and Solicitors

6 March	Abbott, D. H.	Auckland
6 March	Adams, J. G.	Auckland
6 March	Anderson, S. L.	Auckland
6 March	Baker, J. F.	Auckland
6 March	Bosworth, D. A.	Auckland
6 March	Broadbent, L. G.	Auckland
6 March	Carson, T. J.	Auckland
6 March	Cavit, A. J.	Auckland
6 March	Chapman-Smith, D. A.	Auckland
6 March	Cole, W. J.	Auckland
20 March	Coleman, J. A.	Wanganui
6 March	Collings, J. M.	Auckland
6 March	Costello, G. V.	Auckland
6 March	Daniel, D. G.	Auckland
6 March	Davison, B. L.	Auckland
6 March	Dawson, B. S.	Auckland
6 March	Ellis, G. E.	Auckland
6 March	Faire, J. A.	Auckland
6 March	Fleming, T. C. H.	Auckland
6 March	Flower, T. H.	Auckland
6 March	Fong, J.	Auckland
6 March	Forster, B. W. C.	Auckland
6 March	Garstang, C. A.	Auckland
6 March	Gorringe, P. R.	Auckland
6 March	Gould, T. C.	Auckland
6 March	Halstead, S. W.	Auckland
6 March	Harder, M. R.	Auckland
6 March	Harris, T. T. C.	Auckland
6 March	Harrison, G. M.	Auckland
6 March	Harte, M.	Auckland
6 March	Herbert, L. C.	Auckland
6 March	Hibbitt, T. J.	Auckland
6 March	Howard-Smith, P. M.	Auckland
6 March	Hubbert, C. A.	Auckland
18 March	Knight, C. C. H.	Christchurch
6 March	Littlewood, C. B.	Auckland
6 March	Lorrigan, P. V.	Auckland
6 March	MacDonald, J. H.	Auckland
6 March	McFadgen, T. N.	Auckland
6 March	MacKenzie, P. M.	Auckland
6 March	Mills, E. F.	Auckland
6 March	Moorhouse, M. K.	Auckland
6 March	North T. J.	Auckland
6 March	Osborne, P. H.	Auckland
6 March	Perkinson, S. W.	Auckland
6 March	Popovic, P. A.	Auckland
6 March	Quarrie, B. D.	Auckland
6 March	Ralph, A. G.	Auckland
6 March	Revell, P. G.	Auckland
6 March	Rhodes, P. F.	Auckland
6 March	Rikys, R. P.	Auckland
6 March	Sargent, P. J. R.	Auckland
6 March	Short, D. G. R.	Auckland
6 March	Stephens, D. W.	Auckland
6 March	Stevens, G. J.	Auckland
25 March	Stevens, L. L.	Auckland
6 March	Thomas, D. B.	Auckland
6 March	Treston, P. I.	Auckland
6 March	Whale, R. B.	Auckland
6 March	Whitlock, B. T.	Auckland
6 March	Wilson, B. S.	Auckland
6 March	Worth, R. W.	Auckland

Barristers

6 March	Bush, R. E.	Auckland
6 March	Patel, H. M.	Auckland
6 March	Williams, P. W.	Auckland

OBITUARY

Mr B. W. Hewat.

Mr Brian Wilfred Hewat, a well-known Invercargill lawyer and senior partner in the firm of Stout, Hewat, Binnie and Howorth, died recently after 50 years of active practice in that City.

Born at Oamaru in 1894 and educated at Waitaki Boys' High School and Otago University, he interrupted his law course at the age of 20 to serve in World War I. After serving at Gallipoli and in France where he was commissioned from the ranks in 1917, he returned to complete his LL.B. degree in 1919.

In 1919 he commenced practice in Invercargill and in 1929 amalgamated with Stout and Lillicrap to form the firm of Stout, Lillicrap and Hewat.

Mr Hewat was a man of many interests and gave wide services to the community. He served the City both as mayor and as a councillor. He had been president of the Southland Law Society, the Invercargill Public Art Gallery Society, and the Rotary Club of Invercargill as well as the Southland Lawn Tennis Association and the Invercargill Golf Club.

He was one of three Notaries Public in Southland.

Mr Hewat is survived by his widow and two sons.

ATTEMPTS TO AVOID THE HIRE PURCHASE AND CREDIT SALES STABILISATION REGULATIONS

The stringent requirements of the Hire Purchase and Credit Sales Regulations 1957 (reprinted S.R. 1967/192) have proved a thorn in the side of dealers in consumer goods ever since their original enactment in 1955. The limitations contained in the First and Second Schedules as to minimum deposits, periods of repayment, spread of instalments, etc., have no doubt affected considerably the efforts of dealers to foist their products on to the (hire) purchasing public. Many have been the attempts therefore to devise foolproof schemes which will circumvent the regulations and thus give scope for increased sales. The attempts, it will be seen, have as yet been largely in vain but, despite a series of adverse judicial rulings, lawyers instructed by retailers and finance companies continue to try.

The regulations do not, it should be noted, apply to a sale or disposal of goods "otherwise than at retail": Reg. 2 (3). The Court of Appeal has held that the word retail "presupposes a trading or a commercial transaction and is used in contradistinction to the word 'wholesale'." It does not, the Court said, apply for example to sales between two private individuals: *Provident Life Assurance Co. Ltd.* v. *Official Assignee* [1963] N.Z.L.R. 961, 965; applied in *Coleman* v. *Belmont Investments Ltd.* [1968] N.Z.L.R. 939. Nor would it apply to a trading arrangement between two companies having the same shareholders and directors: *Bateman T.V.* v. *Coleridge Finance* [1969] N.Z.L.R. 794, 808. A word of warning, however, to persons or companies who fall within either of these exempt categories. Should the hire purchase form used be one of standard forms available at stationers, care should be taken to delete any description on the form of the vendor as a dealer. Parol evidence may not, it seems, be admitted to show that the vendor is in fact not carrying on business as a dealer in the goods sold: *Stevens* v. *Anderson* (Wily S.M., Auckland, 13 October 1964).

So far as genuine dealers are concerned, it has not availed them to assign (for example, to a finance company) their interest in a hire purchase agreement entered into in contravention of the regulations. True, the assignment of the illegal agreement as between the assignor (vendor) and assignee (finance company) is not necessarily in itself illegal, although it will be so held if its purpose or effect is to encourage or assist the original illegality in the contract between the purchaser and the assignor (vendor): *Portland Holdings Ltd.* v. *Cameo Motors Ltd.* [1966] N.Z.L.R. 571. So far as the position between the assignee and the purchaser of the goods is concerned, the agreement "is no more valid in the hands of [the] assignee without notice than in the hands of the original assignor": *Luhrs* v. *Baird Investments Ltd.* [1958] N.Z.L.R. 663, 668; *Stenning* v. *Radio and Domestic Finance Ltd.* [1961] N.Z.L.R. 7. On the other hand, it has been held that an assignee is not a "vendor or bailor" under Reg. 10 and is therefore not liable to refund to the buyer the amounts paid under the illegal agreement. The original vendor alone is the only party so liable: *Hawke's Bay Credit Corporation Ltd.* v. *Official Assignee* [1964] N.Z.L.R. 154.

Dealers (and their finance company associates) have thus been forced to try other means of avoiding specific requirements laid down in the regulations. In one situation, to be discussed below, the effort has been made because of the administrative inconvenience involved in inserting in the agreement the details as to deposit, cash price, period of instalments and amount of instalments *before* the goods are disposed of: Reg. 3; First Schedule. In a second situation, the motivation has been the commercial one of having to obtain payment of (in some cases a very high) minimum deposit *at the time of the signing of the agreement*: First Schedule.

Completion of the Agreement before disposal of the Goods

The requirements of the First Schedule which must be satisfied before the goods are disposed of include the following:

> "1. The agreement is in writing.
>
> . . .
>
> "2. Except as provided in Regulations 4 and 5 of these Regulations, the agreement provides for the payment of the balance due in respect of each description of goods comprised therein either:
>
> "(a) By approximately equal instalments at approximately equal intervals spread over a period not exceeding the maximum period of credit specified in

the Second Schedule hereto in relation to that description of goods; or

"(b) In the case of a hire purchase agreement, by one payment to be made within three months".

The problem is that interest, insurance, office and other charges have to be worked out before the repayment amounts can be calculated precisely. This amounts to a practical difficulty, particularly where the charges are in fact those of a finance company which is to take an assignment of the hire purchase agreement from the dealer. The customer is of course anxious to take possession of the goods (often a motor car) and the dealer, eager not to lose his sale, often feels he cannot afford the delay of forwarding the agreement to his financier for completion and return before obtaining a legally binding deal. An attempt was made therefore to avoid this dilemma by inserting in the agreement such items (e.g., cash price, period of repayments, deposit) as are readily available at the time when the goods are disposed of and the agreement signed and then expressly providing in that agreement that:

(1) The finance company assignee should have the purchaser's authority to write in to the agreement subsequently particulars of the amounts payable by him for interest, insurance premiums, bank exchange, costs of the agreement, etc. (and thus from these, the amount of repayments);

(2) These particulars should be calculated in accordance with the current practice of the finance company assignee (or any other named finance company).

This device, when finally tested in Court, appealed to Tompkins J. as satisfying the requirements of the regulations. In *Central District Finance Corporation Ltd.* v. *Cotton* [1965] N.Z.L.R. 373, he held that such an agreement was one in respect of which all the terms were either in writing at the time of signing or else were ascertainable under its written terms. There was nothing still to be agreed between the parties and both dealer and purchaser were bound by the current practice of the named finance company as to the calculation of the details. As an analogy, the learned Judge relied on the cases of agreements for sale at a valuation or where quantities and measurements were to be appraised.

The Court of Appeal, however, reversed this decision (see [1965] N.Z.L.R. 992), thus restoring the full rigidity of the regulations. The fatal defects of the agreement were outlined by North P. as follows:

". . . it is wholly inconsistent with the purposes of the regulations that additional terms should be added after the agreement has been signed and possession has been given of the vehicle. In my opinion, the words 'the agreement is in writing' mean that the whole agreement is there and then in writing so that the authorities could call for the agreement in order to see whether it complied with the regulations: . . .

". . . [A]t the time the agreement was signed, and possession of the vehicle given to the purchaser, no agreement had been reached that the purchase price was to be paid 'by approximately equal instalments at approximately equal intervals spread over a period not exceeding the maximum period of credit specified in the second schedule' . . . the fact remains that the agreement speaks of ' . . . equal consecutive monthly instalments of £ each and one final instalment of £ . Who is to say what the monthly instalments were to be? . . . The particular difficulty which in my opinion exists is that there is nothing to say that the final instalment should not be greater than the undefined equal consecutive monthly instalments, and it is plainly the intention of the Legislature that in the case of goods acquired under hire purchase agreements, not only should the period of credit be no greater than the maximum period allowed under the regulations, but also that the goods should be paid for by equal instalments at approximately equal intervals, spread over the period of credit. I can see no way of overcoming this deficiency in the agreement" (*ibid.*, 996-997).

And so the position still rests.

Attempts to circumvent the Minimum Deposit Requirements

The third requirement listed in the First Schedule to the regulations is that:

"At the time of the signing of the agreement payment was made in respect of each description of goods comprised in the agreement of not less than an amount equal to the minimum deposit specified in the Second Schedule . . ."

The recent judgment of Woodhouse J. in *Turner* v. *B. V. Wright Ltd.* [1969] N.Z.L.R. 1073 shows how strict the Courts will be in their insistence that the *full* deposit be paid *at the time of the signing of the agreement.* The appellant had agreed to buy a motor car for $530. The deposit of $265 was to be met by a trade-in allowance of $260 and a cash balance of $5. He did not have $5 cash on him at the

time but promised to bring it to the dealer on the next day. On the strength of this undertaking, the dealer allowed him to take the car away. The appellant did in fact pay the $5 on the next day but Woodhouse J. ruled on appeal that the transaction was illegal, reversing the decision of the Magistrate below. There was, he said, no provision in the Hire Purchase Regulations for the application of the principle *de minimis non curat lex*. The requirements laid down therein must, he said, be strictly adhered to.

The defect in *Turner's* case was of course an inadvertent one. Shortly after that decision, Henry J. was faced with a serious deliberate attempt to avoid the Regulations by the use of a leasing arrangement. The case was *Quartel* v. *Parkway Motors Ltd.* (as yet unreported—23 July 1969, Auckland). The first respondent, a car dealer, had assigned or sold the car to the second respondent, a finance company, and the customer had taken a lease of the car from the second respondent. The lease contained a clause which provided that on the expiration of the lease the car would have an agreed "residual value". The lessor undertook to sell the car by public auction or through the trade "at the best price" the lessor could obtain. If the sale or disposal price exceeded the appraised residual value, then the lessee would pay the difference to the lessor.

Henry J. in his judgment first set out the definition of "hire purchase agreement" in the regulations. (If the above agreement were a hire purchase agreement, then it would be illegal in so far as the required deposit on motor cars had not been paid). The definition reads:

> " 'Hire purchase agreement' means an agreement for the bailment of goods under which the bailee *may buy* the goods or under which the property in the goods will or *may* pass to the bailee, whether on the performance of any act by the parties to the agreement or any of them or in any other circumstances; and includes any agreement for the bailment of goods, with or without expressly giving to the bailee an option to buy the goods, under which instalments are payable by the bailee during a specified or ascertainable period at the end of which the bailee may continue the bailment without any payment or subject to the payment of a nominal rent only".

Henry J. referred to an Australian case (*Kay's Leasing Corporation* v. *Fletcher* [1965] A.L.R. 673) and, relying on an *obiter dictum* in that case, held that the agreement would be caught by the regulations if a right to buy was given to the lessee in the agreement, even though the right to buy was not exclusive to the lessee (thus overruling a reported Magistrate's Court decision—*Broad Leases Ltd.* v. *Woolley* 1968) 12 M.C.D. 311). The lessee, the Judge said, had a contractual right to require the lessor to sell the car at the best price which *ex necessitate* gave him a right to become the purchaser if he offered the best price. The fact that the lessee was not the only person who could buy at the sale did not take the matter outside the wide meaning of the words "may buy" in the regulations. The inference indeed is that the fact that the lessee might not even be interested in buying at the sale was irrelevant. The essential point was that he had a contractual right to insist that the lessor sell the goods on the termination of the lease and this necessarily meant that it was possible for him to buy at that sale. In fact, as Henry J. pointed out, the lessee was in a very strong position because he could offer a very high price (thus ensuring that he had the highest bid). And yet he would only pay the appraised residual value in fact, because under the contract, any moneys in excess of that figure were to be refunded to him. The agreement was thus declared illegal and void.

It seems to me that any scheme that is devised under which the lessee or bailee has a contingent future possibility of receiving title to the goods or of buying the goods must suffer from the defect found by Henry J. in the above case. The words used in the definition "may buy" and "property may pass" are clearly wide enough to catch any agreement at all which envisages the mere possibility of the lessee or bailee obtaining title at some future date. Nor will it help the vendor to attempt to achieve the desired end by a series of agreements, none of which by itself comprises a hire purchase agreement, for by Reg. 2 (2):

> "Where by virtue of two or more agreements, none of which by itself constitutes a hire purchase agreement or a credit sale agreement, there is a transaction which is in substance or effect a hire purchase agreement or a credit sale agreement as hereinbefore defined, the agreements shall be treated for the purposes of these regulations as a single agreement made at the time when the last of those agreements was made".

Conclusion

What solution, if any, is there available to the enterprising dealer or financier in the face of the above difficulties? The answer, in my

view, is that *Quartel's* case successfully stops all the gaps—at least all the gaps which will provide both vendor and purchaser with the legal security which they desire. Thus, it would always be open for the parties to enter into a straight lease of the goods and provided there was no provision whereby the customer was given a right to continue the bailment on the expiration of the lease without any payment or with a nominal payment only (see extended definition of "hire purchase agreement" above), there could be no objection under the regulations. The commercial problem, however, is that the customer would not be satisfied because he would, under a simple lease or rental agreement, have no right or expectation of ever owning the goods. The lease agreement would therefore have to be followed up at a later time with a further agreement, this time one giving the customer either an option to buy at the expiration of the lease or the kind of contractual right outlined in *Quartel's* case. This agreement would, of course, in any subsequent litigation, be read by the Court with the earlier lease agreement as a single agreement under Reg. 2 (2) (above). However, by that regulation such a (single) agreement is to be treated as having been made "at the time when the last of those agreements was made". Thus, the full deposit would become due and payable only when the second agreement was entered into. This agreement could provide too that any moneys already paid under the lease as rental be credited towards the deposit (provided that some nominal consideration were found).

The result would be that the customer would in effect be given time to pay off his deposit (under the lease) while at the same time having the use of the goods. The catch, however, is that there would be no binding obligation to buy or agree to buy until the second agreement had been entered into. The customer could, if he wished, adhere to the original lease and could not be compelled to enter into the second agreement. This would probably not matter very much to the vendor who would in those circumstances retain title. But the real objection is that the customer could not compel the vendor to convert his lease into a hire purchase agreement. With the last gap closed—in *Quartel's* case above—and with the apparent death of the *non est factum* plea recently sounded by the English Court of Appeal in *Gallie* v. *Lee* [1969] 1 All E.R. 1062, the temptation for commercial abuse in the future is all too obvious.

J. A. FARMER.

BILLS BEFORE PARLIAMENT

Chattels Transfer Amendment
Civil List Amendment
Local Elections and Polls Amendment
Narcotics Amendment
Republic of Guyana
Tokelau Islands Amendment
War Pensions Amendment

REGULATIONS

Regulations Gazetted from 25 March to 9 April are as follows:

Agricultural Chemicals (Fensulfothion) Notice 1970 (S.R. 1970/43)

Armed Forces Equivalent Ranks Order 1970 (S.R. 1970/57)

Criminal Justice Regulations 1954, Amendment No. 2 (S.R. 1970/44)

Customs Tariff Amendment Order (No. 7) 1970 (S.R. 1970/55)

Diplomatic Privileges (New Zealand-United States Educational Foundation Order 1970 (S.R. 1970/45)

Education (Assessment, Classification and Appointment) Regulations 1965, Amendment No. 4 (S.R. 1970/58)

Education Board Grants Regulations 1970 (S.R. 1970/46)

Education (Salaries and Staffing) Regulations 1957, Amendment No. 10 (S.R. 1970/59)

Education (Secondary Instruction) Regulations 1968, Amendment No. 4 (S.R. 1970/47)

Hospital Boards (Staff Amenities) Regulations 1970 (S.R. 1970/48)

Legal Aid Districts Notice 1970 (S.R. 1970/54)

Legal Aid Regulations 1970 (S.R. 1970/49)

Magistrates' Courts Rules 1948, Amendment No. 10 (S.R. 1970/60)

Petroleum Regulations 1939, Amendment No. 5 (S.R. 1970/50)

Quantity Surveyors Regulations 1969, Amendment No. 1, (S.R. 1970/51)

Summary Proceedings Regulations 1958, Amendment No. 6 (S.R. 1970/52)

Therapeutic Drugs (Permitted Sales) Regulations 1970 (S.R. 1970/53)

Water and Soil Conservation Regulations 1968, Amendment No. 1 (S.R. 1970/56)

PERSONAL

Mr J. A. Laurenson has been appointed Crown Solicitor at New Plymouth following the appointment of Mr Justice Quilliam as a Judge of the Supreme Court.

Mr Laurenson was educated at Wellington College and Victoria University of Wellington where he graduated LL.B. A partner in the firm of Govett, Quilliam and Co., since 1962, he has been acting Crown Solicitor since October 1969.

He is married with three sons.

THE MAORI AFFAIRS ACT 1953, ss. 213 and 215: VESTING ORDER OR TRANSFER?

The case of *Bialek to Economic Butchery Limited* concerned a sale of an interest in Maori land by a Maori tenant in common, who was one of more than 10 owners. The price was $2,950 (subsequently, by agreement of the purchaser, increased to $3,120).

On 6 September 1968 an application for vesting order came before Judge Haughey of the Maori Land Court at Gisborne. Counsel for the vendor drew attention to possible difficulty in the Court's exercising the vesting order jurisdiction on the grounds that an effective transfer would not be impracticable or disproportionately expensive and the Judge agreed to hear counsel's argument. In his judgment, however, the Judge drew attention to s. 215 (1) (a) of the Maori Affairs Act 1953, and said an owner is, in effect, empowered to invoke the procedure provided for in s. 213 for the alienation of his interest and that the Court may, for the purpose of giving effect to any arrangement or agreement between the parties concerned, make a vesting order for the transfer to *any person* of the freehold interest, whether legal or equitable, of an owner in common in Maori freehold land, subject to certain exceptions which did not apply in the instant case. He went on to say that a vesting order *shall* be made under s. 213 if the Court is satisfied as to the terms of s. 213 (5) (a) and (b). He proceeded to say that although s. 213 was no doubt designed primarily to provide a convenient and inexpensive procedure for dealing with small interests in Maori freehold land it does not contain any ceiling on the value of those interests which are capable of being dealt with under subs. (5) thereof. If the relevant requirements of paras. (a) and (b) of that subsection are satisfied it would therefore appear that there is no limitation on the value of interests which can be dealt with by means of vesting orders thereunder. In the opinion of the Court this view was not in any way irreconcilable with the removal by subs. (8) of the restrictions on "the undue aggregation of farm land" in the case of interests disposed of by means of vesting orders made under s. 213. This was merely a statutory exception which the Legislature had seen fit to make to the general statutory provisions relating to the aggregation of land.

In the present case the completion of the transaction by means of an instrument of alienation executed by Mrs Bialek herself was necessarily precluded by the express language of s. 215 (1). In view of this the Court was satisfied that the effective transfer by her of her interest in this land to Economic Butchery Limited by "act of the parties" was "impracticable" within the meaning of s. 213 (5) and that accordingly the Court had the necessary jurisdiction to entertain the application.

As the price was adequate, an order under s. 213 was made. The Judge says:

> "If the relevant requirements of 213 (5) (a) and (b) are satisfied there is no limitation on value. But no attempt is made to explain how the relevant provisions are satisfied seeing that an effective transfer was not impracticable or disproportionately expensive. Maybe the learned Judge considered that s. 213 (1) gave the Court power to make a vesting order in all cases and that s. 213 (5) merely made it obligatory. With respect, I find this unconvincing."

An appeal was lodged by Hoera Ruru, a person who was affected by the application. The Maori Appellate Court held in December 1968 that "This Court is satisfied that the only jurisdiction conferred by s. 213 is the making of a vesting order and that no additional jurisdiction is conferred by subs. (5) (a) thereof. This latter subsection does not say that if a Court is satisfied that an effective transfer would be practicable or not disproportionately expensive an instrument of alienation by way of transfer may or must be used for the alienation; nor does it say that unless the Court is so satisfied it may not make an order. What the section does say is that if the Court is satisfied on the matters set out in the said subs. (5) a vesting order shall be made.

"This Court cannot accept the submission of counsel for the appellant that s. 213 makes it possible to complete the transaction by way of transfer whether or not the owners number more than ten—there is nothing in that section to support such submission." It agreed with the lower Court's finding that an effective transfer by Mrs Bialek, precluded expressly by the language of s. 215 (1), was therefore "impracticable" within the meaning of s. 213 (5).

The Court dismissed the appeal.

The Court says the only jurisdiction conferred by s. 213 is the making of a vesting order. But it makes no attempt to explain why the reference to transfers appears in s. 213 (5) (a). The Court perhaps took the view that s. 213 (1) gives the Court *power* to make a vesting order in all cases, which power is not affected by subs. (5) which, as I have said, is perhaps the view of Judge Haughey. But this seems to ignore the words in subs. (1) "Subject to the provisions of this section". The Court says that a vesting order must be made if an effective transfer is not available (s. 213 (5)) and then goes on to say, in effect, that a vesting order must be made if an effective transfer *is* available otherwise there is no provision at all for alienation. This seems to mean that the reference to transfers must be ignored because such reference makes no difference whatever to the meaning of the section.

I contend, with respect, that both judgments were erroneous. All submissions made in this article are, of course, made with great respect to both Courts, and this is to be assumed throughout.

I commence by pointing out that s. 211 says that a Maori may alienate any interest in land in the same manner as a European, subject to the provisions of the Maori Affairs Act 1953 or any other Act. Reading s. 211 alone, a Maori may alienate by transfer.

Section 213 (1) says that, *subject to the provisions of that section*, the Court may make vesting orders which means, in my view, that a transferor may alienate by vesting order *if* the later provisions of the section so lay it down and any conditions or qualifications attached to the Court's jurisdiction are strictly complied with. Section 213 (1) in itself, in my view, gives no power whatever to make a vesting order in any particular case: The Court may make such an order only *if*. . . . For example, subs. (2) could have said "This section shall not come into force until authorised by the Governor-General in Council" which would have meant, of course, that until then no vesting orders could be made at all. Again subs. (2) specifically prohibits the making of certain vesting orders.

If transfers are effective, practicable, not disproportionately expensive and the price is adequate, I shall hereinafter call the transfer simply "effective".

I submit, as mentioned above, that the "shall" in subs. (5) is really not necessary (if the Appellate Court is right) because the Court would have to make a vesting order, subject to the provisions of the section, otherwise no alienation could be made at all: *Re King and Scott* [1931] N.Z.L.R. 162 and *36 Halsbury's Laws of England* 433, note (*d*).

Therefore, it is s. 213 (1) *plus* 213 (5) that gives the Court jurisdiction (if any) to make a vesting order, if those subsections when read together direct such a course in any particular case.

Contrary to the view of the Court, I submit that the reference to transfers is a matter of substance: *36 Halsbury's Laws of England* 468, para. 712 which states:

> "To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case."

If transfers are "out", as the Appellate Court says, why does not s. 213 (5) read "In any case where the provisions of subs. (3) or (4) of this section do not apply, a vesting order shall, subject to subs. (2) of this section, be made if the Court is satisfied that, having regard to the relationship, etc. in 5 (b)."

I submit then, that the Court *must* make a vesting order but the impracticability of an effective transfer is condition precedent to that duty, because transfers by tenants in common are, since the 1967 Amendment Act, provided for by s. 213 (5) (a), and s. 211 is partially repealed in so far as such transfers are concerned. Section 213 (5) (a) is a fresh enactment as to the type of transfer a tenant in common may use. As I have submitted, the Court has a duty to make vesting orders whether authorised or directed (*Re King and Scott (supra)*) so that the impracticability, etc., of an effective transfer cannot be merely a condition precedent to the Court's duty, because it already exists.

When s. 215 (1) (a) says an alienation must be made as provided by s. 213, it means, I submit, that it must be carried out as laid down or required by s. 213 but only if and when so laid down, i.e., 215 (1) (a) imports all the provisions of s. 213. As Judge Haughey said, one of more than 10 owners is, in effect, empowered to invoke the procedure provided for in s. 213.

I cannot believe that the Court has a discretion to make a vesting order *or* a transfer under s. 213 (5). The aggregation provisions in the Land Settlement Promotion Act are Government policy and I submit that it is incredible that the parties, the Maori Land Court or the Maori Appellate Court could decide, in its dis-

cretion, whether the aggregation restrictions will apply or not. Lands worth huge sums could be involved and it seems to me that the Government would not give what would be legislative powers to the Courts. Where the Court is given a discretion, the 1953 Act uses words like these "may, if it thinks fit" (s. 93), "may, in its discretion" (s. 213), "may, in its discretion" (s. 227 (6)). The alteration in the new s. 213 from "may, in its discretion" to simply "may" is, I think, particularly significant.

So, if I am right so far, we have vesting orders and effective transfers. The Court has no discretion. Either one *or* the other but not both is correct because of the aggregation provisions. It shall make a vesting order if, but only if, the particular case comes within the four corners of s. 213. 2 *Stroud's Judicial Dictionary*, 3rd. ed. 1258, says "if" generally creates a condition precedent. The *Bialek* case required a transfer because effective transfers are *provided for* by s. 213 (5) (a) and s. 215 (1) (a) says an alienation shall be made "As provided in section 213". It has never been disputed that Mrs Bialek could have signed an effective transfer. The land was held under certificate of title. I contend such effective transfers are "provided for" because effective transfers are created by s. 213 (5) (a) and the power to use transfers, whether effective or not, as provided in s. 211, is repealed by that subsection where the alienor is a tenant in common.

The above view accounts for the reference to transfers which neither Court, I respectfully submit, made any convincing attempt to do. Every word in a statute must be given a meaning: *36 Halsbury's Laws of England* 389, para 583, "It is presumed that words are not used in a statute without a meaning . . . and are not superfluous and so effect must be given, if possible, to all words used, for the Legislature is deemed not to waste its words or say anything in vain".

As I have said above, I do not consider that the reference to transfers is inserted merely to compel an order because such compulsion would be essential to give the section any value or effect at all.

It is significant, too, that s. 215 (1) (a) says "as provided in section 213" while s. 277 (3) of the 1953 Act said (admittedly in another context) "by means of a vesting order made under s. 213 hereof, and not otherwise". In my view, this change of wording may well have been deliberate and I respectfully suggest that the Courts may have read s. 215 (1) (a) as if the wording was the same as s. 277 (3).

For the purposes of construction of a statute, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute. Thus a statute should be construed as a whole. The literal meaning of a particular section may in this way be extended or restricted by reference to other sections: *36 Halsbury's Laws of England* 395, para. 594.

There is nothing in s. 213, in my submission, to indicate that the Legislature desired *all* alienations by a tenant in common, where the owners number more than 10, to be free of the provisions preventing undue aggregation. Nearly one-third of all Maori blocks have more than 10 owners. The deadline fixed for uneconomic interests is $50, the same figure as appears in s. 213 (2) and (3). The Court has ample powers in various sections of the Act to eliminate these uneconomic interests. The figure of $50 fixed for uneconomic interests seems to indicate that in general, interests of greater value are not "uneconomic" as an owner of an interest of over $50 can transfer it to as many owners as he likes so long as each transferee takes at least $50 worth of land. This leads, of course, to further fragmentation. As Judge Haughey said, s. 213 contains no ceiling on the value of those interests which can be dealt with under subs. (5). So very substantial interests indeed can be alienated by vesting order without undue aggregation being taken into account, which it would be if a transfer were used, but there is no ceiling on the number of transferees either. The Legislature has seen fit to allow vesting orders where ineffectiveness, impracticability or undue expense is involved in a transfer but, in my opinion, not otherwise. The Legislature has recently been pressed to repeal the undue aggregation provisions but without success, but apparently an undivided interest in Maori land is an exception no matter what the interest is worth. It must be remembered, too, that after acquiring a substantial undivided interest the transferee may apply for partition, and, if granted, the transferee gets a valuable (perhaps very valuable) piece of land in his sole ownership, whether he is unduly aggregating or not. Even if he cannot get partition he can get a substantial income from his undivided share. If partition is impracticable, then under s. 175 the transferee has an excellent opportunity of acquiring the whole block and no aggregation to be considered. Just because land is Maori land no matter how much it is worth, I cannot conceive that aggregation is to be ignored, where an effective transfer can be used, except in interests up to $50. The number of owners in a block is not as

important, in my submission, as the value of the individual owner's interests. It is the minuteness of the shares that is the cause of the trouble. The wealthier a man is (and his wealth will probably be invested in farm land if he is buying more) the easier it is to get more. As I have submitted, it is the owner of an interest of small value that causes the fragmentation trouble, and even this can sometimes be overcome by incorporation or by leasing, etc., by a meeting of assembled owners. Again, if there are 11 owners in a block, as tenants in common each interest exceeding $50 in value, all owners being in favour of a sale at an agreed price, which is adequate, and an effective transfer is available, a meeting of assembled owners can be called and aggregation will be taken into account. But, if the Court has power to make a vesting order only, whether an effective transfer is available or not, (as both Courts held) each owner can individually apply for a vesting order, and aggregation will be ignored. Is this reasonable? It seems contrary to the rule of statutory construction that the Court should have regard to consequences, if a statute is ambiguous, and the view must not be adopted that leads to (*inter alia*) unreasonableness.

The general scheme of the legislation, at least up to the passing of the 1967 Amendment Act, whether in respect of European, Maori or Crown land, requires undue aggregation to be considered, whether the interests are those of tenants in common or not, and I submit that, in the event of ambiguity, the Amendment Act should be construed in accordance with that scheme: *Fendoch Investment Trust Co.* v. *Inland Revenue Commissioners* [1945] 2 All E.R. 140, 144. Both Courts, in the instant case, found that in so far as an undivided interest in Maori land is concerned, it can be sold without reference to that scheme. If this is so, it makes it very easy for blocks to be acquired piecemeal whatever their value or, at least, valuable interests in them. It is true, of course, that if an effective transfer cannot be signed, then aggregation will be ignored but this may be due to the fact that effective transfers are perhaps less common in Maori land transactions than others because of the chaotic condition of Maori land titles in many instances, as emphasised in the Prichard report, and to fix a dividing line at ineffective, impracticable or disproportionately expensive transfers may be reasonable but, in my view, to ignore aggregation where it would not be ignored in the case of European or Crown land or Maori land solely owned is not the proper construction to put on the legislation, unless no other is possible. This aspect could perhaps be described as a make-weight in favour of the views herein expressed.

The provision that if a transfer is not effective, the Court must make a vesting order seems entirely meaningless if a transfer is not to be used where a transfer *is* effective, particularly, as I have submitted, that a vesting order would be mandatory anyway.

In a leaflet issued by the Department of Maori Affairs in December 1968, it says "Under section 213 of the Maori Affairs Act 1953, there is an inexpensive and easy means of transferring small undivided interests in Maori land from an owner to another person by a vesting order of the Maori Land Court. This power is not to be used where a transfer could reasonably be made by a document". Moreover, I am aware that at least one Judge, prior to the Appellate Court's decision, insisted on transfers if effective, and refused vesting orders. It is fair to say, I think, that judicial minds can take two views of the sections, i.e., there is possible ambiguity.

I respectfully submit that what the Legislature is saying is:

A transfer must be confirmed if effective (and aggregation and price do not prohibit confirmation) and the Court may only make vesting orders *if* an effective transfer is not possible. An effective transfer must be confirmed under s. 211 (as partially repealed) and s. 227 (3). In other words, the Court *shall* confirm an effective transfer under s. 211 (as above) and s. 227 (3) (in the new Act) and *shall* make a vesting order *if* an effective transfer is not possible. This proposition dovetails the two procedures nicely and ensures that an alienor *must* get his deal through, subject to the conditions applying to confirmation of transfers and the making of vesting orders. So transfer is the correct procedure where an effective transfer can be signed.

The policy of ss. 211, 213 and 215 seems to be that where an effective transfer can be used it must be. A certificate of title is conclusive evidence of ownership and indefeasible. "The register is everything." It seems not unreasonable that where an alienee can get such a title, instead of another capable of attack or involving disproportionate expense that he should have to face the aggregation provisions. If my respectful submissions are correct, they will give little satisfaction to owners, purchasers or the profession, because proof that there is no undue aggregation will in the case of effective transfers be required. But the legislation must be interpreted in accordance with its true intent, meaning and spirit and cannot be interpreted otherwise because it may be distasteful to any person or group.

R. A. WILSON.

MR PENNYFEATHER

By Scilicet

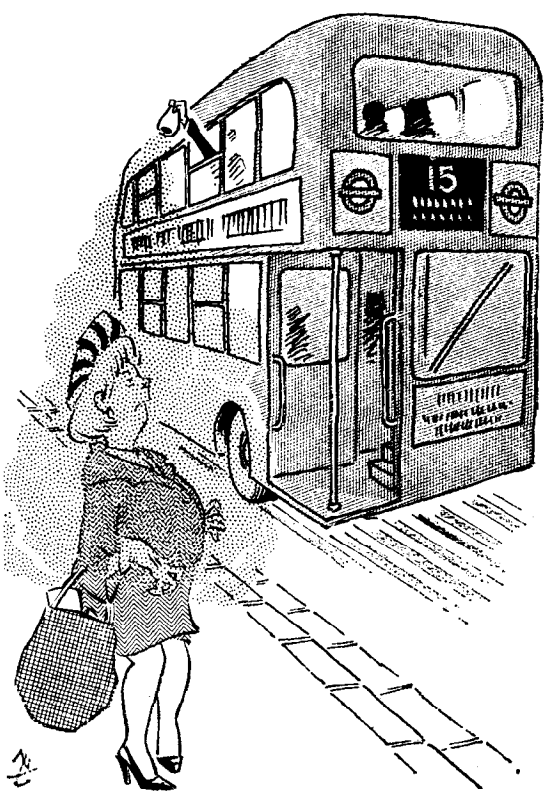
"Litigation in the Eye of the Beholder"

Mrs Patsy Parkin was a small rotund lady in her early forties. She was pink cheeked and possessed a sweet mouth twinkling a dimple at each corner. One eye was long lashed hazel. The other could not be seen as it was covered with cotton wool held by gauze. And Mrs Parkin's tale was indeed a remarkable one. I was "sitting-in" as I so often did, with Mr Pennyfeather and this is what we heard.

Some three weeks prior to our meeting with Mrs Parkin, and the reason for her visit had occurred on a Friday afternoon—it had been the 13th of the month, she had completed her weekend shopping at the local supermarket. She was walking along the pavement when she felt a sudden stabbing pain in her right eye which momentarily blinded her. She was aware of a bus moving slowly near to the kerb on which she stood—she had been about to cross the road. Suddenly the pain became so acute that she almost fainted. With her good eye, she saw approaching her, a Mrs Amy Titler a lady whom she knew fairly well because of a common interest in local church affairs. She told Mrs Titler what had happened and acting on the latter's advice, the two ladies proceeded to the rooms of a Dr Monet Hogarth some fifty yards away. There the physician bathed the eye after removing fairly large deposits of what appeared to be grey ash. Feeling considerably better, Mrs Parkin thanked Dr Hogarth profusely and in company with her friend she returned home and made a pot of tea for two.

On the following morning and after a sleepless night, her eye was painfully inflamed and was almost sightless. She was however able to read the '*Daily Mirror*' and a front page spread told of the somewhat unique request in the Will of the late Alderman Benjamin Milhill. He had requested that he was to be cremated and that his ashes be scattered to the winds from the top deck of a Number 15 bus, as for some forty years, he had regularly travelled this route. His wish had been fulfilled and The '*Mirror*' displayed a picture of a solemn faced gentleman sitting on the bus with an open urn between his knees. The caption read "Mr Silas Socrow, gardener to the late Alderman Milhill about to fulfil his Master's Last Wish."

In some excitement and almost forgetting the agony of her eye, Mrs Parkin telephoned the news room of the '*Daily Mirror*' and after a little delay she learned that the bus had been travelling its usual course and would have passed the point of her accident at approxi-



mately 3.45 p.m. And that was near enough to the time of her agony. Mrs Parkin was sure that part of the mortal remains of the late Alderman had entered her eye.

Later in the day, the pain had become so severe that she returned to Dr Hogarth who after a brief examination referred her to Mr Watson-Holmes, a well known eye specialist in Baker Street for that very day. Mr Watson-Holmes had carried out an extensive examination, had removed further ash and had stated, "this could be quite serious, Mrs Parkin. I shall

prescribe an ointment which will lessen the pain but I must make no secret of the possibility of permanent impairment to your eye. My nurse will make a further appointment for say a week hence." And Mr Watson-Holmes on hearing of the disposal of the Alderman's ashes, conceded that indeed some of the contents contained in the urn could have entered her eye, causing serious damage.

Mr Pennyfeather murmured something about witnesses.

"Oh yes," cried our client, "my husband is very upset about all this. He's secretary to the Drainlayer's Union." She said this with pride. "He set out to make inquiries. We have two witnesses. Mr Briskett, the butcher was standing at the doorway of his shop. He says he saw a hand waving outside the bus window at about the time the ash hit my eye. Then there's Mrs Polly Dawkins. She works for Remember Always, the florists. She was about to cross the road as I was and she saw the same as did Mr Pilbrow."

I asked for the address of the witnesses and noted them.

Mrs Parkin had paid six visits to Mr Watson-Holmes but if anything, the eye was worse and the pain always with her. Mr Watson-Holmes had told her that she could expect little if any improvement and that it was possible that in a short space of time, she could lose the sight of her eye.

"I think you have a case, Mrs Parkin" decided my partner. "I will ask Mr Watson-Holmes for a medico-legal report and we will communicate with you later."

When we were alone Mr Pennyfeqther said, "a fascinating case, Brunt. *Tort de manus mortis*. I seem to remember a case where a coffin was dropped on the ankle of one of the pall-bearers, breaking the bone badly. The unfortunate man if I remember correctly received damages because I think that one of the handles had come off the coffin causing the accident. In the meantime I shall write to the solicitors for the estate evidencing our decision to claim damages."

A few days later Mr Pennyfeather informed me that he had heard from the solicitors acting in the estate of the late Alderman. This is what he related.

The gruff voice on the telephone had announced. "Bellow here Pennyfeather. Bellow of Trump, Falder and Trump. What's this you're trying to pull for your Mrs Parkin. I'm acting for old Milhill's Estate. You can't prove a word of what you allege and you know it. You won't get a farthing. Sue and be damned."

"That's precisely what I intend doing," murmured my partner. And I am yet to meet a solicitor who has been damned for suing."

A week later and before we had issued our writ, Nita our receptionist wearing the minimum of nether garments announced that a Mr Milhill wished to see me. A stout rubicund gentleman with the anachronism of a gold watch chain across his ample paunch held out his hand. The rubicund face was kindly in the mould of a Cheeryble brother.

"My name is Solomon Milhill," he announced with gravel in his voice. "Benjamin was my elder brother and I am executor of his estate."

"You shouldn't be seeing me," I warned removing my hand from the moist cushion of his palm.

"Perhaps not but I told Bellow I was coming and he said, 'I wouldn't go if I were you but please yourself'."

"Pray be seated."

But he remained standing, always an attitude discomfiting to a solicitor.

"This is why I have come. Benjamin was my only brother. He was a widower, no children. He left a substantial estate, most of which comes to me. I am sorry for that poor woman. It was a silly idea of Benjamin's and a dangerous one as it turned out. So I have come to settle." He drew a cheque form from his breast pocket. "Will this do the trick?"

The cheque was for £600.

"It possibly will. I will advise settlement of course."

"Then there is the question of medical fees and your costs. I will be happy to pay those also. If you will send the particulars to Bellow, I'll see that they are paid."

"Thank you."

He coughed in embarrassment.

"One thing," he murmured and he didn't look quite so Cheeryble brother now. "I'm standing for Parliament in the bi-election next month. Would you mind if I arranged for the '*Daily Mirror*' to publish a little story of the settlement?"

I could not help saying, "I wonder how many votes £600 will get you, Mr Milhill."

He smiled. "You'd be surprised. People vote for an image, or didn't you know."

Mrs Parkin was delighted,

She held our trust account cheque as though it were a fragile thing.

"Thanks ever so much. Hector—that's my husband will be delighted."

We thought we would never see Mrs Parkin again. We were wrong.

It was perhaps three weeks later that Mr Pennyfeather opened my door, poked in his venerable head and said brusquely, "Please come to my room, Brunt."

Mrs Parkin was seated near my partner's desk. She rose at my entry and bobbed a little curtsey. I noticed that there was no covering on her eye which appeared to me to be normal.

"Conscience has brought Mrs Parkin back to us, Brunt." I remembered then that Mr Solomon Milhill had taken a bad beating at the bi-election. "Please repeat what you have just told me, Mrs Parkin."

And this is what she said.

The door bell rang and Mrs Parkin opened the door to find on the threshhold a small stout man who removed a bowler hat to reveal a naked pate.

"Mrs Parkin?"

"Yes."

"My name is Barlow, Jake Barlow. I've come to offer an apology and amends."

"What do you mean?"

"May I come in?"

Mrs Parkin hesitated briefly. He looked nothing like a rapist or a salesman.

In the living room, Mr Barlow said, "Only a few days ago I learnt what happened in the High Street. My old friend Briskett the butcher told me about the ash that got into your eye. You see it was all my fault. I was walking along smoking a cigar. As I passed you I saw ash caught by the wind and I remember you giving a little cry and putting your hand to your eye. I didn't know how serious it was and as I was in a hurry, I didn't stop to apologise. So I've come to pay your doctors' bills and any other expense you've been put to."

Mrs Parkin said faintly, "I'll discuss it with my husband."

Mr Barlow departed leaving his card.

Mrs Parkin said pathetically, "do I have to give that £600 back?"

Mr Pennyfeather half closed his eyes.

"Let your conscience be your guide, dear lady. Consortium Rubber is good buying at the moment. Eighteen shillings a share. Bound to go up I'd say to twenty-five shillings before the end of the year. But please yourself, dear lady. Few lawyers would advise their clients on the obligation of conscience."

Sauviter in Modo—Gilchrist Alexander in an article published some years ago in the *Law Times*, subsequently reprinted in *After Court Hours* (Butterworths: 1950), described Hawkins as one of the ablest Judges of the time but "probably its most mischievous". "There he sat a wizened old man biting his quill pen and compassing with an almost malicious glee the discomfiture of the unwary and the inexperienced".

The same writer, in his delightful *Temple of the Nineties* (Hodge 1938), describes an occasion on which the Judge was outwitted. Winch Q.C., who had been briefed in a case at an assize town not far from London, was anxious that his case should come on and be finished that day. The rest of the story is best told in Alexander's own words:

"There was a case immediately in front of his own which was dragging along its weary way. Winch intervened and asked his Lordship if he would release the parties in the following case as the case which was on seemed likely to last the rest of the day. Hawkins bit his quill. In his usual fashion he refused to say yea or nay. He could not say how long the case before him would last. It might last all day or it might not, and so on and so on. Winch bowed and retired from the Court. Presently he rushed into Court wearing his overcoat and with his hat in his hand, obviously having disrobed with the intention of taking his chance and returning to London. Somewhat ostentatiously he consulted the associate and searched feverishly for a train in a timetable. Apparently he found what he wanted, for suddenly he shut up the timetable and rushed out of Court. Meanwhile old Hawkins had been cocking his eye over the front of the Bench and taking guarded but judicial notice of these on-goings. The moment that Winch had disappeared through the doors he sat up. 'Mr—', he said, 'there are a great many accounts and much detail in this case'. Mr— agreed. 'I have decided to deal only with the question of liability', he announced. 'I shall refer the accounts to an Official Referee'. Counsel on both sides were only too happy to acquiesce in the suggested course. Argument was thereupon narrowed down to a simple issue and in a comparatively short time the case had been disposed of, subject to the Official Referee's findings. Hawkins sat up delightedly. 'Now we can take the case which Mr Winch was so anxious about', he announced. 'Call the next case'. The next case was called. The door opened and in walked Mr Winch Q.C., complete in wig and gown": G., in the *New Law Journal*.

THE VALUE OF SHARES FOR DEATH DUTY PURPOSES

In New Zealand as well as in the United Kingdom the value for death duty must be assessed on the basis of a hypothetical sale. The point was argued recently in the English Court of Appeal as to whether in valuing shares certain category "B" documents were admissible in evidence: *Re Lynall* [1969] 3 All E.R. 984; [1969] 3 W.L.R. 771.

As stated by Harman L.J., "the sale envisaged by the section is, as agreed, not a real but a hypothetical sale and must be taken to be a sale between a willing vendor and a willing purchaser see, for instance the speech of Lord Guest in *Re Sutherland* [1963] A.C. 235, 262. It is true that the so-called willing vendor is a person who must sell: he cannot simply call off the sale if he does not like the price; but there must be on the other side a willing purchaser, so that the conditions of the sale must be such as to induce in him a willing frame of mind."

The crucial date of the valuation is as at the date of death of the deceased. In the instant case the deceased died on 21 May 1962: the accounts for the previous year had been drawn up and audited prior to deceased's death but were not passed until the meeting on 7 June 1962. It was common ground that these accounts were to be taken into account. The accounts for the year to 31 July 1952, when drawn up, showed a substantial increase in profits, but these were not conclusive as to value as at 21 May 1962.

The whole case resolved itself into a contest as to whether or not the said category "B" documents were admissible in evidence as to value. What were these category "B" documents which were the cause of the litigation? They contained information of two kinds. First, the interim monthly statements in the possession of the members of the board showing the progress of the company during the nine months which had passed since the period covered by the last information in the hands of the shareholders, which was that contained in the accounts for 1961. Second, such facts as there were in the knowledge of the board to show the prospects or the likelihood of the company going public. "Now the "B" documents show that this had been in fact under consideration by the board since 1959, that a firm had been called in to report and advise on this very subject and had advised an immediate issue to the public. They show, moreover, that the board had sanctioned the taking of advice from a well-known firm of stockbrokers, who had at the beginning of 1962 reported in favour of a public issue and discussed ways and means." The category "B" documents therefore contained vital evidence as to the value of the shares. Why then were they excluded in the Court of first instance? Plowman J. there had ruled that the Court should have regard to published information and information which the directors would have given in answer to any reasonable question likely to be asked by any vendor-shareholder or intending purchaser, but not to unpublished information which would not be so obtainable. But the Court of Appeal unanimously rejected this view.

I cite from the concluding part of the judgment of Harman L.J.: "It was the taxpayer's argument that directors must be excluded from amongst possible purchasers because they would be 'special' purchasers. I do not accept this, and am of opinion that this is not an ingredient in the *Crossman* decision. In *Crossman's* case [1936] 1 All E.R. 762 (H.L.); [1937] A.C. 26, it was decided that the fact that a "special" purchaser, namely a trust company, would have offered a special price, must be ignored, but this was because that particular purchaser had a reason special to him for so doing. So, here, a director who would give an enhanced price because he would thus obtain control of the company would be left out of account. But that is not to say that directors as such are to be ignored. *All* likely purchasers are deemed to be in the market. What the Act says is that the sale is to be treated as an open market sale, that is to say the restrictions on transfer are to be ignored for the purpose of the hypothetical sale which is to fix the price, but I cannot see why the hypothetical sellers are not to be treated as being what they are, namely directors in possession of the information which a purchaser would reasonably require and which on the evidence he would have obtained if he were to be a willing purchaser."

E. C. ADAMS.

Paradise Unsought—"It is not for this House to create a paradise for The Law Society. We must try to use language which is meaningful to people": —Mr E. L. Leadbitter, M.P. on the second reading of the General Rate Bill, *Hansard* (Commons), 10 November 1969.

Eade and Others v. Ellerslie Borough

Eade and Others *v.* Ellerslie Borough
Number Two Town and Country Planning Appeal Board. Auckland. 1969. 11 December.

Zoning—Operative district scheme—Land zoned residential A—Rezoned commercial B1—Proposed supermarket shops and offices—Appeal against change of zoning—Planning principles to be considered—Town and Country Planning Act 1953, ss. 26, 29, 35.

Appeal under s. 26 (1) of the Act.

Turner, for the appellant.
Southwick, for the respondent.
Bradford, for the developer.

The judgment of the Board was delivered by

LUXFORD S.M. (Chairman). This is an appeal against the change made by the respondent to the operative district scheme for the Borough of Ellerslie, pursuant to s. 29 of the Town and Country Planning Act 1953, whereby the properties fronting Amy Street and the Ellerslie-Howick Highway (hereafter referred to as "the Highway") being lots 1, 2, 3 on Deposited Plan 16591 and Lot 3 on Deposited Plan 10883, which were zoned residential A in the first reviewed district scheme, were rezoned as commercial B 1.

This land (which is hereafter referred to as "the said land") was purchased by Amy Investments Limited (hereafter referred to as "the developer") with a view to erecting thereon a three-storey building having a floor space of 24,685 square feet divided as follows:

Ground floor—Supermarket	..	6,000 square feet
Six Shops	..	9,245 square feet
First and second floors—		
Offices ..	..	9,440 square feet

The total area of the said land is one acre twelve and four tenths perches. It is on the north side of the Highway; bounded on the east by the Borough's recreational reserve and is about 10 chains from the intersection of the Highway with Wilkinson Road. That road is the main link to and from the motorway, and from the Great South Road by a road which passes over the motor way to Wilkinson Road.

Ellerslie is a small Borough with a population, according to the 1966 census of 4,200, but is expected to increase to 5,000 by 1972. It lies at the eastern end and includes a fractional part of the industrial complex of 1,500 acres running west into the Borough of Onehunga and forming part of five local authority districts.

The Borough was seriously affected by the southern motorway which passes through the Borough alongside the old main trunk railway line, now used for suburban, railcar, and goods railway services. The eastern portion is for all practical purposes almost cut off from its former direct connection with the western portion, and the main access to the eastern portion is now by way of Wilkinson Road to which reference has already been made. That is to say the junction of Wilkinson's Road with the Highway now serves as the principle entrance to and an exit from the central shopping area of the Borough, whichever direction the traffic comes or goes.

The total area zoned for commercial purposes is six acres of which four acres are in the central shopping area, extending from Robert Street in the west to Arthur Street in the east on the north and south sides of the Highway. Part of the southern side of that Highway between Arthur Street and the junction of Wilkinson Road with the Highway is zoned industrial, and is used for commercial or light industrial purposes, and part is zoned residential and is either vacant or is used for residential purposes. The land between Arthur Street and the recreation reserve on the northren side of the Highway to which reference has already been made, was, prior to the change the subject of the present proceedings, zoned residential, but the eastern corner of the intersection of the Highway with Amy Street has erected thereon shop premises which were at one time zoned commercial but later changed to residential.

It is common ground that most of the central shopping area of the Borough is old, obsolete, and overdue for redevelopment. According to the evidence of the mayor, the land necessary to provide parking areas to serve the central shopping area or to provide service lanes at the rear of the shops cannot be used for that purpose because the Borough cannot afford to acquire it and in any case it and all the residential land in the triangle between the southern side of the Highway and the motorway and Cawley Street (hereafter referred to as "the triangle") may be required by the Auckland Regional Authority for parking purposes if Ellerslie becomes a commuter station in the proposed rapid rail system for the Auckland Metropolitan area.

In the meantime the central shopping area remains (except for a few of the shops) far below the standard of any shopping area in Metropolitan Auckland, and without any comprehensive plan for its redevelopment.

The change of the zoning, the subject-matter of these proceedings, is the result of an application made by the developer for the consent of the respondent to a specified departure from the provisions of the district scheme to enable it to use the said land for the erection of the same building it will be able to erect if the objection now under consideration is disallowed. The respondent refused its consent on the ground that the effect of giving consent would have more than little significance beyond the immediate vicinity of the said land, and therefore it was precluded by virtue of s. 35 (2) (a) of the Act from granting its consent.

The respondent, however, intimated that it was willing to change the scheme, pursuant to its powers under s. 29 of the Act, by rezoning the land commercial B 1, and making shops and offices a predominant use in that zone. This was done accordingly.

There are three well established principles of town and country planning which should not be departed from unless in circumstances which justify doing so in the public interest.

First: An isolated small area should not be "spot zoned"; that is to say such an area should not be zoned differently from the zone of the adjoining areas to enable it to be used for purposes which do not conform with the permitted uses of that zone.

Secondly: New commercial development should not be permitted at a distance from existing commercial development where there is suitable land that could be zoned for the purpose.

Thirdly: Commercial development in a suburban area should be confined to one side only of a Highway.

In the present case there is a special factor that should be taken into consideration, namely, the said land lies between the western boundary of the recreational reserve which at present has access only from the Highway. In the opinion of the Board it would be in the public interest if the said land were designated as an open space with a view to it being included in the reserve, thereby extending the reserve to Amy Street.

The respondent called evidence to show that the special circumstances of Ellerslie justified the changed zoning of the said land. It has already been stated that

the redevelopment of Ellerslie's commercial area is necessary. Mr Bagnall, the planning consultant called by the respondent considered that the changed zoning of the said land was justified as "zoning to achieve redevelopment". The basis of this opinion appears to be that the likelihood of sufficient capital being found to demolish an acre of existing commercial premises to make way for the floor space and parking now needed would be "fanciful". If that were correct, the obsolescent and inadequate existing commercial area is to remain until it can no longer be used, which in the opinion of the Board would be contrary to common sense, good planning and the public interest.

The Board shares the mayor's and Mr Bagnall's opinions of Ellerslie's potential. The likely renewed significance of the rapid rail system for Metropolitan Auckland and of Ellerslie Station becoming a commuter station; the large area of flat land lying in "the triangle", and the freedom of hindrance from "through traffic" calls for a comprehensive plan for redevelopment of the area. As the evidence indicates that the Auckland Regional Authority is likely to be directly interested in this development, the respondent may consider it advisable to request the Authority to prepare such a scheme for consideration.

Be that as it may, the Board has come to the conclusion that there are no circumstances to justify a modification of the principles to which reference has been made in support of the changed zoning, and the appeal must be allowed.

Appeal allowed accordingly.

Appeal allowed.

Brown and Sons Ltd. *v.* Auckland City

Number One Town and Country Planning Appeal Board. Auckland. 1969. 24 November.

Zoning—Land designated for street widening—Appeal by owner—Application that Council be required to take land under Public Works Act 1928—Imminence of change of use—Town and Country Planning Act 1953, ss. 26, 47.

Appeal under s. 26 and application under s. 47 of the Act.

Smytheman, for the appellant.
Hanna, for the respondent.

The judgment of the Board was delivered by KEALY S.M. (Chairman). The appellant, as owner of a property fronting Upper Queen Street, Auckland, appeals against the allowance by the respondent Council of an "objection" by the said Council as a result of which the said property of the appellant was "designated" as required for street widening purposes.

After hearing the evidence the Board, being satisfied that the said street widening proposals are justified, disallows the said appeal.

In addition to the said appeal a formal notice was lodged on behalf of the appellant seeking an order in terms of s. 47 of the Act requiring the respondent Council to take the said land under the Public Works Act 1928.

It was conceded by the respondent Council that when the proposed street widening works came to be undertaken it would be reasonable for the whole of the above referred to land of the appellant to be acquired. It was also conceded that substantial areas of land in the locality had already been acquired for the purpose of widening Upper Queen Street.

It was contended on behalf of the respondent Council, however, that there had been no proof of the "imminence" of any change in the use of the said land.

The question of the need for proof of "imminence" of change in use was dealt with by Woodhouse J. in the case of *G.E.C. (New Zealand) Limited* v. *Town and Country Planning Appeal Board and Another* [1968] N.Z.L.R. 695; 3 N.Z.T.C.P.A. 105.

In the course of that decision the following passage occurs:

> "In the plaintiff's submission the discretion to make or refuse an order is unfettered provided only that the imminence or otherwise in the change in use is given appropriate consideration.
>
> I accept the last part of this submission. The words of subs. (4) are clear enough and in my opinion they require no automatic exercise of the discretion one way or the otner. It may be that in ordinary circumstances the discretion would quite rightly be exercised against an application of this sort in the absence of any imminent change in use."

At the present time a great deal of land is being "designated" throughout New Zealand for road widening, proposed motorways, and other similar purposes. In many cases quite considerable times elapse before actual acquisition to enable a proposed work to be carried out becomes necessary. This is quite understandable, for the very purpose of such designation is to "freeze" land in its present state, and so prevent the placing upon it of further improvements which will add to the cost of its ultimate acquisition by the Crown or by a local authority.

In the normal case, while land remains so "frozen" its ordinary use—whether for farming, residential, commercial or industrial use, continues until it is actually acquired, and no special hardship is suffered by the owner. In this type of case, in the Board's view, no order should be made in terms of s. 47 (3) of the Act until such time as it can be said that the construction of the proposed public work is actually "imminent".

In another type of case *bona fide* proposals of an owner for re-building, substantial alteration, etc. are stultified by the designation. In this type of case the Board considers that an order in terms of s. 47 (3) should be made if the Board is satisfied that the re-building proposals are *bona fide*, and would actually have been proceeded with in the more or less immediate future had they not been prevented from being so proceeded with by the designation.

There is yet a third type of case, of which the present application may be taken as an example. This arises where, while there are, in fact no actual plans for immediate re-building or development, the Board is satisfied upon convincing evidence that the owner of the designated property has an urgent need (arising quite apart from the designation) to realise upon his asset, and such realisation at a normal fair price is for practical purposes prevented by the designation.

It is, in the view of the Board, this last type of case which is covered by the Supreme Court decision referred to.

In the case of the present application the Board is satisfied, on the evidence, that the owners of the asset are elderly, that they have been endeavouring for a considerable time to effect a sale of the property, and that their prospects of effecting a sale at a reasonable price have been gravely jeopardised, if not completely destroyed, by the designation.

The Board therefore orders and directs that the Auckland City Council shall within three months of the date of this order take under the Public Works Act 1928 for the purposes of the district scheme the estate or interest of the applicant in the land described in the Schedule hereto.

Appeal dismissed. Order made under s. 47.

SCHEDULE

Nine and five-tenths perches more or less being lot 2 on Deposited Plan 27474 being portion of allotment 8 of Section 7 of the suburbs of Auckland and being the whole of the land comprised and described in Certificate of Title 697/317 North Auckland Registry.

Keast and Others *v.* Taranaki County

Number Two Town and Country Planning Appeal Board. New Plymouth. 1969. 24 December.

Specified departure—Combined district scheme—Review overdue—Land zoned rural—Application to use land for industrial purposes—Objections disallowed—Council consenting to specified departure—Validity of resolution—Public interest—Urgency—Town and Country Planning Act 1953, ss. 19, 30, 35.

Appeal under s. 35 (6) of the Act.

Little and *Reeves*, for the appellants.
Moss and *Lee*, for the respondent.
Ewart and *Irwin*, for the applicant.

The judgment of the Board was delivered by

LUXFORD S.M. (Chairman). These appeals are against the decision of the respondent which disallowed the objections of the appellants to an application by Technic Group Limited, (hereafter referred to as "the applicant") for consent to a specified departure from the provisions of the New Plymouth City and Taranaki County combined district scheme. The departure was sought to enable the applicant to use an area of land containing 13 acres in a rural zone for industrial purposes. This land (hereafter referred to as "the relevant land") is situated in Smart Road within easy distance from the City Boundary, and is part of a 20-acre block adjoining the south boundary of the New Plymouth-Wellington railway, and conditionally purchased by the applicant. Seven acres of the conditionally purchased land is shown in the amended district planning map as designated for proposed motorway purposes, and lies between the relevant land and the railway land.

The applicant is a company associated with two other companies—the Fitzroy Engineering Limited and Stainless Steel Products Limited, a company recently taken over by the applicant. The principal activities of the applicant are engineering and electroplating, and servicing things connected with these activities. The business of the company is carried on in three separated premises, one of which adjoins that part of the 20-acre block conditionally purchased by the applicant and is part of the land designated for motorway purposes.

The evidence shows that the rapidly expanding operations of the applicant justify its decision to relocate its business premises on a site large enough for its present and future needs; also that the relevant land would be ideal for that purpose if it were in a zone in which industrial purposes were predominent uses. That is not the case; consequently the application for consent to a specified departure has to be determined in accordance with the relevant statutory provisions.

The principal factors relevant to the application additional to those already referred to are:

1. There is a large industrial zone immediately north of the railway and a large rural zone immediately to the south of the railway on both sides of Smart Road in which there are three small pieces of land zoned industrial, including the piece forming part of the applicant's business premises to which reference has already been made.

The northern side of the railway is predominantly industrial; the southern side is predominantly rural on the east side of Smart Road, and predominantly semi-residential-rural on the west side. The railway is the line of demarcation and when the proposed motorway is formed a much more distinct line of demarcation will be created.

2. A report made by the town and country planning officers employed by the City and the County (to which reference has been made in a later part of this decision) states that an area of 94 acres on the east side of Smart Road, including the relevant land, is likely to be required for industrial purposes within 20 years.

3. Steps have been taken by the respondent to provide industrial zones to meet the industrial requirements of the environs of New Plymouth up to the year 1986. On 1 March 1968 an important amendment to the district scheme came into force. The scheme statement referred to in that document states:

"The demand for and development of industrial land in the environment of New Plymouth has readily shown a need for additional land in the County of Taranaki. The amendments to the district planning map . . . are expected to provide for such development up to the year 1986".

A table setting out particulars of land zoned industrial prior to and after the amendment shows:

(1) Prior to the amendment: 316.1 acres being 194.3 acres in the Bell Block area and 121.8 acres in Glen Avon-Katere area.

(2) After the amendment: 631.8 acres being 507.8 acres in the Bell Block area and 124 acres in the Glen Avon-Katere area; and

(3) Areas in rural zone likely to be developed for industrial purposes added to the district planning map, marked "rural zone—deferred use" with appropriate notation and symbols of the year in which such area is estimated to be zoned for industrial purposes.

4. If the consent to the specified departure is not granted the applicant intends to continue its operations in its existing premises because the only land available in an industrial zone is in the Bell Block industrial zone and that is, according to the applicant, too far from the City area for its servicing department to operate, and the price of land in that zone is too high.

5. The demand for industrial land in the County close to the boundaries of the City exceeds the areas already zoned industrial.

6. The location of "Service industries proper" in areas reasonably close to the areas which such industries serve is desirable.

The applicant's application duly came before the respondent for hearing at the meeting held on 6 August 1969. The sequence of events from that time may be summarised thus:

(1) All relevant documents, objections, evidence, and exhibits were considered by the respondent, but the application was not finally determined on that day;

(2) Between 6 August 1969 and 12 September 1969:

(a) The members of the respondent Council inspected the relevant area and the surrounding locality.

(b) The planning officer for New Plymouth City and the planning officer for the Taranaki County were requested by the respondent to examine and report upon industrial zoning in and around the City for a period of at least 20 years.

(c) The report was duly made and submitted to the respondent. The date on which it was considered by the respondent is not known to the Board, but the report is dated 21 August 1968, and it is assumed that the report had been considered prior to the resolution referred to in the next paragraph.

(d) At a meeting of the respondent Council prior to 13 September 1968, it was resolved to bring down a change or variation of the district scheme so as to change the present rural zoning of the relevant land to industrial.

(e) At a meeting of the respondent Council on 12 September 1968 a resolution was passed which, after reciting the matters referred to in paras. (a) and (d) is as follows:

"Being of opinion that the departures now applied for are of such urgency as to warrant their immediate authorisation without waiting the time involved in completing the change or variation, and being of opinion that approval thereof is in public interest, hereby resolves to consent to the departures set out above subject however to the following conditions. . . ."

The decision of the respondent consenting to the application for the specified departure, if justified by the evidence, complies with the requirements of s. 35. That is to say, the respondent found that the condition precedent referred to in para. (b) of subs. (2) had been fulfilled, and that the granting of the consent would be in the public interest within the meaning of subs. (4).

The provisions of subs. (2) (b) are as follows:

"The Council may consent to such a specified departure only where:

"(a) . . .

"(b) The departure is in respect of a matter for which the Council has resolved to bring down a change or variation to the scheme but which is of such urgency as to warrant its immediate authorisation without waiting the time involved in completing the change or variation."

A preliminary question for determination before the question of the urgency of the matter for which the specified departure is considered, is whether the resolution referred to in para. (2) (d) of the sequence of events which lays the foundation for the resolution granting the consent is valid, and if so whether such a resolution was reasonably necessary in the public interest.

The validity of the resolution was challenged on the ground that s. 29 (2) of the Act precludes any change in respect of a district scheme being made while it is due for review, and that any change proposed after the scheme becomes due for review is to be dealt with wholly under s. 30 of the Act as part of the review.

The district scheme became due for review more than two years ago, and is not likely to be publicly notified until November 1970.

It was contended by the appellants that the provisions of s. 35 (2) (b) should be read with those of s. 29 and construed to mean that the resolution referred to in para. (2) should be a resolution to make a change pursuant to s. 29, which can be passed only in respect of a scheme not due for review.

The Board rejects the contention that s. 35 (2) (b) should be read with s. 29. A local authority is entitled to change or vary the district scheme by whichever procedure is available. Once the district scheme becomes due for review, the only procedure available is that prescribed by s. 30: if the scheme is not due for review and the local authority considers the proposed change should not wait until it is, the only procedure available is that prescribed by s. 29. It is not necessary for the local authority when passing the resolution referred to in s. 35 (2) (b) to make any reference to the procedure under which the change or variation is to be made.

The question next for decision is whether the circumstances justified the change proposed to be included in the reviewed district scheme.

It is well established by judicial decision that a specified departure does not change the zoning of the land to which the departure relates and that somewhat different principles apply in determining whether consent to a specified departure be given or refused to those where there is an objection to the zoning in a proposed or reviewed district scheme. In a case like the present, however, it would seem that an Appeal Board, in order to determine whether the local authority was justified in passing the resolution referred to in s. 35 (2) (b), must, of necessity apply the same principles as it would in an appeal against the proposed zoning in a proposed or a reviewed district scheme.

It is an accepted principle of town and country planning that it is contrary to good planning practice to zone an isolated area of land solely to enable any person or body corporate to use the land for a particular purpose which does not conform with the purposes authorised by the zoning of the surrounding lands in the same vicinity, unless there are special circumstances which justify the exception. An exception is generally made where the proposed zoning is an extension of an existing zone, which would have been the case with respect to the relevant land had the definite line of demarcation between the industrial zone and the rural zone to which reference has already been made not existed.

In the opinion of the Board there are strong reasons why the zoning of the land to the south of the railway should remain unchanged until the time arrives for determination of the zoning, not only of the 94 acres on the east side of Smart Road referred to in the report of 21 August 1969, but the land on the other side as well. It is clear from the report that the time for determining the zoning of the 94 acres has not yet arrived, and in the opinion of the Board is not likely to arrive for some time to come. When that time does arrive the question for decision probably will be whether the public interest will best be served by changing the zoning to residential or industrial, because it is unlikely that the public interest would best be served by retaining the rural zoning.

For these reasons it would be contrary to the public interest to "spot zone" the relevant land for industrial purposes, to a degree far greater than the public interest may be adversely affected by the inability of the applicant to find a suitable site for the relocation of its business as quickly as it hoped to do.

It follows from this finding that there are no circumstances which justify an exception being made to the principle to which reference has already been made, and therefore the consent of the respondent is revoked.

The appeals are allowed accordingly.

Appeals allowed.