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SUMMARY OF RECENT LAW

CRIMINAL LAW—EVIDENCE AND PROOF

Evidence of accomplice—Corroboration—Necessity for warning—Rule of law. The case for the Crown substantially rested on the evidence of two girls who clearly fell within the term "accomplices" and the Judge was obliged to warn the jury that it was dangerous to convict on their uncorroborated evidence. As the learned Judge inadvertently failed to warn the jury in accordance with this rule, which has now the force of a rule of law, the convictions are quashed and a new trial directed. (*Davies* v. *Director of Public Prosecutions* [1954] A.C. 378; 38 Cr. App. Rep. 11; [1954] 1 All E.R. 507, followed.) *The Queen* v. *Hicks* (Court of Appeal. Wellington. 1970. 13 April. North P. Turner J. Haslam J.)

INJUNCTION—INTERLOCUTORY INJUNCTION

Trespass—No defence on facts—Whether interlocutory remedy available for substantial relief before final judgment—Execution — Possession — Writ of possession — Jurisdiction to grant leave to issue writ of possession on interlocutory application. From September 1969 caravans belonging to the appellants were left on a vacant site which belonged to the respondents. The site had no sanitary facilities, water supply or provision for refuse disposal and the presence of the appellants there had rendered it a danger to public health. In December 1969, the respondents issued a writ in the Chancery Court of the County Palatine of Lancaster seeking an injunction restraining the appellants from, *inter alia*, entering on the land and permitting their caravans to remain there. On a motion the Vice-Chancellor made an interlocutory order granting the injunction and further ordered that the appellants give up possession to the respondents "who are to be at liberty to issue a writ of possession. . . ." *Held*, (i) Although the injunction gave the respondents their whole remedy before the action was tried it should be continued, since plainly there was no defence to the action and the only object in raising a defence was delay. (ii) There were no provisions in either the Supreme Court of Judicature (Consolidation) Act 1925 or the Rules of the Supreme Court to allow the Court to make an order for possession and give leave to issue a writ of possession on an interlocutory motion before final judgment had been obtained. *Manchester Corporation* v. *Connolly* [1970] 1 All E.R. 961.

POLICE—CONSTABLE

Assault on, in execution of duty—Duty—Scope—Attempt to stop suspect to make inquiries—No charge or arrest at that time—Constable touched suspect on shoulder—Suspect struck constable—Alleged assault on constable in execution of duty. The appellant was walking along the pavement when a police officer in uniform came up to him with a view to making inquiries about an offence which the officer had cause to believe that the appellant might have committed. The appellant ignored the officer's repeated requests to stop and speak to him. At one stage the officer tapped the appellant on the shoulder, and shortly after the appellant tapped the officer on the chest. It became apparent that the appellant had no intention of stopping. The officer then again touched the appellant on the shoulder with the intention of stopping him (but neither then nor previously had the officer any intention to arrest the appellant), whereupon the appellant struck the officer with some force. The appellant was charged with and convicted of assaulting the officer in the execution of his duty. On appeal, *Held*, The touching of the appellant's shoulder was a trivial interference with his liberty and did not amount to a course of conduct sufficient to be outside the course of the officer's duties; accordingly the appeal would be dismissed. *Donnelly* v. *Jackman* [1970] 1 All E.R. 987.

PRACTICE—APPEALS TO SUPREME COURT

Tribunals, Boards, Commissions—Licensing Control Commission—Appeal on point of law—Case to set out facts, grounds of determination and specify question of law—Not sufficient merely to refer to contents of judgment—Summary Proceedings Act 1957, s. 107—Summary Proceedings Regulations 1958 (S.R. 1958/38), First Schedule, Form 35—Sale of Liquor Act 1962, s. 226 (3). In an appeal on a point of law under s. 107 of the Summary Proceedings Act 1957, the case stated to the Supreme Court must set out the facts and the grounds of the determination and specify the question of law on which the appeal is made. It is insufficient merely to refer the Court to the contents of the judgment under review and to leave the Judge to speculate about the issue of law he is asked to determine. Any supplementary material mentioned should also be furnished in the case stated itself. Case remitted for amendment. *Andrews Hotel Limited* v. *Licensing Control Commission* (Supreme Court. Palmerston North. 1969. 17 April; 6 May. Haslam J.).

BILLS BEFORE PARLIAMENT

Age of Majority
Antarctica Amendment
Appropriation
Berryfruit Levy Amendment
Chattels Transfer Amendment
Customs Acts Amendment
Equal Pay for Equal Work
Estate and Gift Duties Amendment
Fuel and Energy
Illegal Contracts
Land Valuation Proceedings Amendment
Local Elections and Polls Amendment
Marine Farming
Marine Reserves
Medical Practitioners Amendment
Narcotics Amendment
Niue Amendment
Rating Amendment
Sale of Liquor Amendment
Shipping and Seamen Amendment (No. 2)
Shops and Offices Amendment
Timaru Airport Development and Improved Air Service
Tokelau Islands Amendment
Tonga
Voluation of Land Amendment
Valuation of Land Amendment (No. 2)
Water and Soil Conservation Amendment

STATUTES ENACTED

Apprentices Amendment
Civil List Amendment
Coal Mines Amendment
Hospitals Amendment
Imprest Supply
Post Office Amendment
Public Revenues Amendment
Republic of Gambia
Republic of Guyana
Reserve Bank of New Zealand Amendment
Shipping and Seamen Amendment
Social Security Amendment
State Advances Corporation Amendment
War Pensions Amendment

REGULATIONS

Regulations Gazetted on 16 July 1970 are as follows:
Earthquake and War Damage Regulations 1956, Amendment No. 3 (S.R. 1970/143)
Smoke Restriction Regulations Application Notice (No. 2) 1970 (S.R. 1970/142)
Social Security (Dental Benefits) Regulations 1960, Amendment No. 3 (S.R. 1970/144)
Supreme Court Fees Regulations 1970 (S.R. 1970/145)

If Birds Could Sue—There is a high, old wall in Middle Temple which has, since time almost immemorial, been festooned with a thick curtain of ivy. The ivy was a favourite nesting-place for large numbers of birds of which, apart from the carrion pigeon, all too few find life liveable in central London any more. Recently, on one of the bitterest days of the winter, the Benchers of the Middle Temple, by their servants or agents, tore down the ivy. The birds returned to a catastrophe, which their demented behaviour suggested might, in human terms, be compared with the wiping out of Lidice during the last war. Their homes swept away by some monstrous invaders, it seems likely that few would have survived in the weather conditions that prevailed at the time. That those who were responsible for the suffering that this caused have their defence prepared, we do not doubt; the ivy was destroying the wall and so the ivy had to be torn down. But we are not, my Lords, appearing for the ivy, but for the birds. We concede that if the ivy had to go, the eviction of the birds was inevitable, but the onus is, we think, on those who perpetrated this minor act of genocide to explain—if there is any other explanation than sheer absence of respect for life—why it was necessary to destroy the ivy, and so to destroy the birds to whom it was home, on one of the coldest days of the winter. Could it not have waited until the spring, or even the summer? Perhaps it is not entirely unfitting that Middle Temple should have been the scene for acting out this sad parable on the necessity for protective legislation for the defenceless. How different things might have been if birds could be given a right to written notice that the premises in which they live are required by the landlords and a right to be provided with alternative accommodation, not to mention compensation for disturbance. How different things might be if men had no such safeguards. For even in the Temple—*nemo securus, sine lege*: *The New Law Journal.*

CASE AND COMMENT

N.Z. Cases Contributed by the Faculty of Law, University of Auckland

Two Decisions under the Domestic Proceedings Act 1968

It is thought that the two following decisions of Mr D. G. Sinclair S.M. in Auckland will be of professional interest to family lawyers since there has been so far no guidance by way of reported decisions on how the new Domestic Proceedings Act 1968 is being applied.

In *Davies* v. *Davies* (judgment was delivered on 1 May last) the applicant wife sought a separation order; a custody order in respect of the two children of the marriage; maintenance orders for herself and the two children of the marriage; an order for past maintenance and a non-molestation order. The conciliator had reported that he had failed to bring about a reconciliation.

Wisely, no doubt, the wife had been advised to plead s. 19 (1) (a) ("serious disharmony") and s. 19 (1) (c) ("act or behaviour") in the alternative. The defendant husband denied the allegations and stated his desire to be reconciled. In view of s. 15 (1) of the 1968 Act the Court dispensed with further reference to a conciliator and the hearing was begun.

It would appear that the parties were very young at the time of their marriage in 1966—the husband was nineteen, the wife seventeen. They lived in a home owned by the husband, save for one short period, until September 1969 when the wife left because of the husband's behaviour. Unfortunately, the report does not describe in detail the acts and omissions on the husband's part, so that it is not possible categorically to state the kind of conduct which may come within s. 19 (1) (a) and (c) and it is necessary to be content with the learned Magistrate's finding that "the wife had good and sufficient reason for leaving" and that "throughout the marriage the question of money was a cause of disharmony". It does, however, emerge from the report that the husband "had little idea of a husband's responsibilities in the matrimonial sense", and that he "did not show his wife sufficient consideration", which "culminated in a state of disharmony which reached a breaking point when the wife decided to leave". The strained situation was worsened by the husband's visiting the wife at her mother's home and his acting "very irrationally and unwisely".

At the end of the hearing, his Worship found the view that reconciliation might still be possible and referred the case, under s. 15 (3) of the Act, to a conciliator. Again the endeavour proved unsuccessful, so the hearing had to be concluded.

His Worship's findings were as follows:

(1) There had been a state of serious disharmony of such a nature that it was unreasonable to require the wife to continue cohabitation and that this state of affairs was still continuing. But, as he was still not satisfied that the spouses were unlikely to be reconciled—and this despite the conciliator's efforts—he held that the first ground had not been made out.

(2) The acts and behaviour of the husband affecting the applicant had been such that, in all the circumstances, the wife could not reasonably be required, *at the present time*, to resume cohabitation with the defendant. Thus, the alternative ground had been made out.

(3) A separation order would be refused in the exercise of the Court's discretion, for the following reasons:

(a) Because "the parties were matrimonial babes in the wood".

(b) The wife's leaving had given the husband "a substantial shock".

(c) The shock had caused the husband to give serious thought to his former inconsiderate and selfish attitude and he was determined to re-adjust his ideas.

(d) The husband was sincere in his repeated assertions that he loved his family and wanted them back.

(e) Because the wife had said that she was quite certain at the present that she would not return to her husband, but, if he were sincere, he would have to "court [her] all over again as he did before". This appears to have impressed the learned Magistrate more than anything else.

His Worship concluded this part of his judgment by saying:

"This is the husband's chance. If he is sincere, as I think he is, he has to make the effort to persuade his wife to return. If, after a reasonable period and a reasonable effort is

made there is till no reconciliation, the first ground may then be proved. The Court may then if further application is made consider the marriage as ended and exercise its discretion in making a separation order".

This decision very clearly and strongly underlines the need to understand that the requirement as to the unlikelihood of reconciliation in s. 19 (1) (a) is no mere verbiage. It also drives home the point that the possibility of reconciliation is a major factor in exercising the discretion to refuse to make an order under s. 19 (1) (c). One might, however, be tempted respectfully to ask whether the "lesson" might not have been brought home more forcibly still to the husband by the grant of a separation order. His Worship declined to make the non-molestation order which the wife had asked for, since he did not think such an order was necessary and because he thought that, having granted custody of the children to the wife with liberal access to the husband, conciliation would be impeded. It is certainly true that a non-molestation order would impede reconciliation, but a separation order under the 1968 Act as opposed to one under the Destitute Persons Act 1910, need not necessarily have this effect. However that may be, the learned Magistrate saw and heard the parties and it would be wrong to criticise him for the course he took.

One or two further valuable points emerge from the judgment. His Worship pointed out that it was not necessary to show that a defendant is not making proper provision for maintenance *and* is likely not to do so if ss. 25 and 35 (1) of the Act are invoked. This is a sound warning, for too quick a reading of the provisions might easily cause the unwary to overlook that the grounds for applying for maintenance are alternative. His Worship found that the wife had made out her claim for maintenance for herself and the children and that s. 29 of the Act did not apply since he had already found that the wife could not reasonably be required to live with her husband.

The calculation of the amounts of future and past maintenance need not detain us here; all that need be said is that his Worship paid careful and detailed regard to the relevant provisions of the Act, though two items call for comment. Because of the chance of reconciliation, it was thought right not to put the husband in a position where he was forced to sell his house. Secondly, the husband was paying $19 weekly for a car. This was not, evidently, a necessity in the eyes of the Court, for his Worship described it as "low in priority when compared with his liability towards his wife and children so he will either have to dispose of his car or make other arrangements".

A final point of law which occurred to the writer was this: his Worship remarked that, in his opinion, it was—

> "a more practical approach to have regard to the overall needs of both wife and children in a case such as this when the wife has full responsibility for the children. Individual orders may be arrived at after the total needs are assessed".

The present parties had been living at a standard above subsistence level, but not greatly above it. His Worship's approach was undoubtedly right in such a case, but, it is respectfully submitted that practitioners should not be encouraged thereby to slip into the habit of asking for comprehensive orders in one sum to cover both wife and children. If this were done, then all that was said in *Hallwright* v. *Hallwright* [1967] N.Z.L.R. 936 (C.A.); P. B. A. Sim, [1967] N.Z.L.J. 366 in the context of divorce would appear to be applicable in contexts such as the present.

There is also a final noteworthy practical point. The learned Magistrate noted with satisfaction that the applicant had put in a statement of her income, assets and liabilities, no item or amount of which the husband's counsel had challenged. As his Worship observed, evidence in this form is helpful to the Court, since it would save time and would carry greater weight seeing that it would be the product of careful preparation rather than guesswork and thus provide the defence with due opportunity to check the reasonableness of the applicant's requirements. No doubt many Courts will make the production of "budgets" a general rule.

The second case is *Wright* v. *Wright* (the decision was given on 9 March last). Here there were cross-applications by the spouses to vary the amounts payable under a maintenance agreement entered into in May 1968 which had been registered in a Magistrate's Court a year later. The specified sums were $20 weekly for the wife and $5 weekly for each of the two children, who were in the wife's custody. The basic question was thus, whether, since the date of the agreement, the circumstances had so changed that the agreement ought to be varied: see s. 85 (3) of the 1968 Act. The wife's contention was, in essence, that the cost of living had gone up: the husband put forward the fact that he had had to change his place of residence as his place of employment had been changed

and that though he now earned slightly more, this was more than offset by the increased rent he had to pay.

His Worship found that the wife had been able to go out to work, was still working and earning $15 weekly and that there was nothing to suggest any foreseeable inability on her part. He also found that she had agreed to accept a reduction of $3 a week maintenance while she continued to work, but that this variation was never registered for fear that her health might not allow her to continue in work.

Following *Kennedy* v. *Kennedy* [1966] N.Z.L.R. 297 his Worship held that his jurisdiction to vary was not one to refix *de novo* the amount of maintenance, but that he must take the date of the agreement, i.e., May 1968, as his starting point and consider by how much, if at all, he should vary the agreement by virtue of changes which had occurred subsequently to that date. In his opinion the husband's financial position revealed so small a change that no variation was justified. As to the wife, her position, by virtue of her earnings, had not substantially changed since the date of the agreement. Neither application was granted.

Two points are worth noting in addition. The learned Magistrate was perfectly willing to allow that increased cost of living was an element he could properly take into account, but the tenor of his judgment shows that "guesswork, generalities or mere estimates" are not acceptable bases upon which to ask a Court to arrive at a reasonably correct sum. It is clear, then, that claims for variation should be supported by figures of some exactitude.

Secondly, the husband here earned a very small sum indeed from intermittent, secondary employment. His Worship's views why he did not take such employment into account were as follows:

(a) It was a small amount.

(b) Save where substantial amounts were earned, as a general rule the rewards of such employment should stay with a husband so he could have something extra to provide for future and unforeseen contingencies.

(c) To take some of this extra reward would be likely to remove his incentive to make the extra effort to earn.

(d) Secondary employment was, like irregular overtime, rather unpredictable and could cause temporary hardship and further litigation if included in a permanent order.

P.R.H.W.

Solicitor's Negligence—Option to Purchase

The judgment of Roper J. in *Murray and Another* v. *Bannerman and Others* (27 April 1970) provides a salutory reminder of the high degree of professional knowledge and skill expected of the conveyancer in general practice. The facts are relatively simple and give no prognosis that the end of the matter would be an award of $5,000 damages against the defendant firm of solicitors for professional negligence.

In 1964, the plaintiffs Mr and Mrs Murray agreed to lend to one Graham a sum of $10,000 so that Graham could purchase the share of a partner in a farming property. The money was urgently required by 3 p.m. on the day requested and the plaintiffs lent the money upon the condition that they were given an option to purchase the farm. Because of the urgency, the money was paid over before any of the parties consulted a solicitor, but next day, the parties met by arrangement at the offices of the defendent firm to record the transaction in proper legal form. The appointment was late on a Friday afternoon, and a partner in the firm took details of the arrangement and then wrote out a document which the plaintiffs and Graham signed. The document recited (*inter alia*):

> "Agreement is Murrays lend to Graham £5,000 on 2nd mortgage of his farm property at Heriot of 389 acres for a time of two years from 9 July 1964 with interest at 6 percent. Graham to have the right to repay at any time. Graham gives to Murrays an option to purchase the farm property on 30 June 1966. The option to be declared in writing before the 31 March 1966. . . . The price of the property to be £70 per acre. The option to be subject to the Land Settlement Promotion Act 1952."

The evidence of Mrs Murray indicated that the parties were to return at a later date to sign a typed agreement but no further documents were prepared. At this stage, it is apposite to ask conveyancers if they can spot the fundamental defect in the agreement. If not, they should, with the greatest of respect, check their insurance cover. The writer admits with shame that he did not recognise the legal defect raised upon first reading. Obviously, the option required that an application be made under the Land Settlement Promotion Act 1952 within one month of its execution, and this aspect was overlooked by the partner concerned. When the plaintiff attempted to exercise the option in 1966, an application for an extension of time in which to obtain approval was made. but rejected by the Land Valuation Court. (Reported as *Murray* v. *Graham* [1967] N.Z.L.R. 835.)

However, the failure to obtain the consent of the Land Valuation Court to the option was not the only ground for the claim against the solicitors. When the Murrays attempted to exercise the option, Graham consulted another solicitor. A letter was written on behalf of Graham expressing doubts that the option was enforceable and offering to repay the loan with interest and in addition a small *ex gratia* sum. The plaintiff, after failing to obtain leave to apply to the Land Valuation Court, claimed against his former solicitors on two bases. First, failure to apply for the Court's consent, secondly, negligence in failing to draw the agreement to mortgage and option to purchase in such a manner and form to be valid. The invalidity? Simply that in its present form the option was a clog on the equity of redemption.

In the words of his Honour, "The crux of this case to my mind is this: was Folster negligent in failing to ensure, in so far as lay within his ability, that Murray was not left saddled with a classic example of a clog?"

The defendant partner admitted in evidence that the possibility of a clog did not occur to him. His Honour however had no hesitation in holding that an option to purchase contained in a mortgage was a clog and therefore invalid. Curiously, as a result, the defendants themselves were able to argue that the failure to obtain the Court's consent to the option did not give rise to damages in a causative sense as the option could not have been validated by approval of the transaction. His Honour considered this ingenious submission would have been more acceptable had Graham been the defendant and not the legal advisers.

His Honour further considered that the defendant partner was negligent in not detecting the point concerning the clog and its consequences as to the agreement. A helpful statement was made as to how the agreement between the parties could have been validly completed, by separating the mortgage from the option.

> "It would have required this agreement to mortgage to be executed first, followed by a clear explanation to Graham that he was not compelled to sign the option, the purport of which would also have to be explained to him. . . . There is no guarantee of course that if the matter had been presented to Graham in that way he would have signed the option, but the effect of it not being put to him at all was that the Murrays lost the chance or opportunity to secure the benefit of a valid option."

The damages claimed comprised $8,400 being the difference between the option price per acre, and the actual land value in 1966, and a further sum of $532.64 for costs and disbursements on the fruitless application to the Land Valuation Committee. His Honour disallowed the latter claim upon the ground that even the obtaining of consent would not have overcome the "insurmountable hurdle of the clog." It was not clear from the judgment whether any of the parties were aware of the clog at this stage. The substantive claim was reduced because of the possible contingencies relating to the signing of a valid option and its proper exercise, and a round sum of $5,000 damages awarded against the defendants.

The drawing of a valid option to purchase requires a degree of skill in any circumstances, as the cases of *Willetts* v. *Ryan* [1968] N.Z.L.R. 720, 863 and *Buyn* v. *Ogg* [1967] N.Z.L.R. 279 attest. However, an option combined with a loan which amounts to a clog is a hazard which cannot be overlooked, and this decision will remind conveyancers of their obligation to know and apply the law.

K.A.P.

Picking the Winners

There are several points in the recent decision of *Racing Enter-Prizes Ltd.* v. *Police*; *Organ Bros. Ltd.* v. *Police* [1970] N.Z.L.R. 307 to make it worthy of inclusion in "Case and Comment". The second appellant, Organ Bros. owned the sporting journal "Sportsweek" for which the first appellant, Racing Enter-Prizes Ltd., devised an ingenious scheme for boosting sales. Each week the second appellants would advertise, on the front page of their journal, a competition inviting readers to select the winners of horse races at nominated race meetings. The first appellant promised $200 to the entrant who chose all the winners, or if no such entry was received, then $100 to the entrant with the highest number of points. In each case, prizes were to be shared equally if more than one entrant was successful. The first appellant was responsible for paying the prize-money, receiving a fee from the second appellant as its stipendium. No stake-money had to be sent to anyone; Organ Bros. hoped to recover all their expenses from an increased circulation. Both parties were convicted in the Magistarte's Court under s. 63 (c) of the Gaming Act 1908; the first appellant for "causing to be published", and the second appellant for "publishing" an advertisement "inviting any person to make a bet on an event or contingency relating to horse races."

The argument on appeal was essentially threefold; whether the advertisement was an invitation to make a bet; whether the Magistrate was right to overlook the submission that there was no bet (or invitation to bet) either among the competitors themselves, or between the competitors with either appellant; and whether the Magistrate was also right to ignore the submission that a bet involved a relationship, absent (it was said) from the facts of this case, akin to contract.

Counsel had conceded that, as far as the first submission went, there would have been liability had either party administered the scheme, but that the division of functions between the appellants ruled out liability in the instant case. Haslam J. rejected this argument since it was plain that Racing Enter-Prizes Ltd. undertook to pay the prize-monies on receipt of winning coupons, while Organ Bros. Ltd. simultaneously undertook that the prize would be awarded in accordance with the rules set forth.

This is an uncontentious argument as far as it goes, but some difficulty lies in the Judge's approval of counsel's concession that the 15c. paid for the newspaper constituted a stake. His Honour's approval was apparently based on *McLennan* v. *France* [1938] N.Z.L.R. 391. But in that case the entry coupon had to be accompanied by a 1s. stake: in the present case, nothing was payable beyond the price of "Sportsweek". Haslam J.'s finding that 15c. purchase-price was stake-money poses some problems. What, for instance, would have been his decision had none of the purchasers of the journal read the advertisement, but had then entered the contest; would the 15c. still have constituted stake-money: can someone, in other words, inadvertently embark upon a bet or wager? Perhaps this problem could have been surmounted, but what would have been the result if (regardless of whether they read the advertisement or not) none of the journal's buyers had entered the competition? Surely in that case no stake could have been paid, since no one can pay a stake when he does not even make a bet. But although these could, in other circumstances, be weighty objections, they were avoided in this case (not expressly, since these problems were never canvassed) by the Judge's finding that "a substantial majority of purchasers were induced to buy [Sportsweek] solely in order to qualify for entry in the competition" (*ibid.*, at p. 310).

With respect to the appellants' remaining arguments, his Honour's findings cannot, it is respectfully suggested, be criticised. The second submission he answered by citing Tompkins J.'s decision in *Police* v. *Steel* [1964] N.Z.L.R. 492. In this case the Judge had gone back as far as *Dark* v. *Island Bay Park Racing Co.* (1886) N.Z.L.R. 4 S.C. 301 for his finding that in a "picks" competition, where each entrant selects his horse in a series of races and is awarded points according to the respective placings, every competitor makes a bet with the others. This, said Haslam J., was also the case in the present situation. And his Honour further stated that Racing Enter-Prizes was also betting with each competitor that he could not win either of the amounts set forth in the advertisement.

To rebut the appellant's final submission, Haslam J., relied on the description of a bet put forward by Lord Hunter in *Strang* v. *Brown* [1923] S.C. (J) 74. In essence, Lord Hunter had said, it is a delivery of a particular sum to another "on the understanding that he will receive a larger sum of money if some uncertain future event occurs" (*ibid.*, at p. 78). The Gaming Act, said Haslam J., did not force him into restricting a bet, so defined, as existing only where the person to whom the stake was paid was also the person who paid the prize-money. Certainly its prohibition on betting houses in general "tends" to limit the "forbidden transaction" to such a bilateral situation, but, said his Honour, there is nothing in the Act to say that arrangements such as existed in the instant case could not also be given the title of a bet. Section 36 (1) (b), he noted, in embracing dealings in which the stake is received "for the consideration for a promise or for securing the paying or giving to some other person of any money or valuable thing on the event or contingency", appears in any case wide enough to cover schemes in which the prizes may be provided by a third party, and so would cover cases like the present.

R.G.L.

BAR NONE!

It's a well established practice, which
Has always made good sense—
That if you're ignorant of the Law
It's never a defence.

There is only one exception
That I have found so far—
When you sue for negligence
A member of the Bar.

J.B.J. in *Justice of the Peace and Local Government Review.*

SOME RECENT CASES ON COMPANY LAW

Is Revocation of a Winding Up Permissible?

The first case to be considered is *Ross* v. *P. J. Heeringa Ltd.* [1970] N.Z.L.R. 170. This was a case of a small private company with a nominal capital of $2,500 carrying on business as a builder: the only shareholders were a man and his wife, the wife holding only one share.

Acting on the advice of the plaintiff as accountant and secretary of the company the shareholders on 6 February 1969 passed the following resolution:

> "That the Company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the Company be wound up voluntarily, and that Mr I. A. R. be nominated as liquidator."

Only a week later the company purported to rescind this resolution in the following terms:

> "It is hereby resolved that the extraordinary resolution that it is advisable that the company be wound up voluntarily which was passed on the sixth day of February 1969 be and the same is hereby rescinded and that the company continue to trade and carry on its affairs as if no resolution that the company be wound up had ever been passed."

No nomination under s. 285 of the Companies Act 1955 for the office of liquidator was made by the creditors and the plaintiff initiated legal proceedings to clarify the status of the company and of himself.

Both counsel agreed that there was no reported decision supporting the contention that a resolution for voluntary winding up under s. 268 could be revoked and rendered a nullity *ab initio* by a subsequent resolution of members. His Honour Mr Justice Haslam said at p. 172: "I confess that such a proposition appeared somewhat startling when I first heard it, and in carefully considered legislation designed for daily application by layman as well as lawyer, some reference to such a power to cancel, if it existed, might be expected in the Act itself." After a careful examination of the relevant sections in the Act (*a*) his Honour concluded: "No reference is made to revocation of winding up and the section implies its continuance until the liquidation is complete."

Mr McKinlay, counsel for the company, put up a good argument to the contrary based on the meaning of "deemed" in s. 270: "A voluntary winding up shall be *deemed* to commence at the time of the passing of the resolution for voluntary winding up." This word, which also appears throughout s. 224 (commencement of winding up by the Court), said counsel, expressed only a notional date, and that therefore the status of winding up at that stage was merely provisional or interim and could accordingly be nullified.

His Honour, however, disposed of this argument: "While this term, which is popular with legal draftsmen, is commonly used to create a statutory fiction and to extend a meaning to a subject-matter which the latter does not literally embrace (*R.* v. *Norfolk County Council* (1891) 60 L.J.Q.B. 379; *Muller* v. *Dalgety & Co. Ltd.* (1909) 9 C.L.R. 693), this connotation cannot apply throughout s 224 (I), which provides *inter alia* that 'unless the Court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be *deemed* to have been validly taken' in the event of a later petition for a winding up by the Court. In that context, I think 'deemed' must be given a significance, which does not necessarily imply an artificial quality attributed to the commencement of winding up, but should be read as the equivalent of 'conclusively considered' for the purposes of the Act (*Re Rogers and McFarland* (1909) O.L.R. 622, 631); or "to all intents and purposes" (*Hall* v. *Eafit and West India Dock Co.* (1884) 9 A.C. 448, 455). The fictional implication of the word "deemed arises more aptly where the plain fictional situation is directed by statute to be ignored for a certain purpose. Here the legislative intent expressed in s. 270 is to fix a date to which the legal incidents of winding up shall relate back and from which the changed status of the company shall operate."

His Honour further held that, as this was a creditors' winding up, s. 285 was applicable, and since the creditors at the meeting nominated no one as liquidator, the plaintiff being "the person nominated by the company" thereupon became liquidator.

Rights and Duties of a Receiver

Our second case is *Airlines Airspares Ltd.* v. *Handley Page Ltd.* [1970] 1 All E.R. 29; [1970] 2 W.L.R. 163, dealing with the rights and duties of a receiver appointed under the powers con-

ferred in a debenture. The receiver had the wide powers conferred on a mortgagee under the Law of Property Act 1925 (U.K.). The plaintiffs were the assignees of the benefit of an agreement dated 23 December 1966, and made between K. Ltd. and K. of the first part and the defendants (Handley Page Ltd.) of the other part, under which the first defendants agreed, *inter alia*, to pay to K. Ltd. and K. a commission of £500 in respect of every aircraft of a type known as "Jetstream" sold by the first defendants.

The receiver, in order to carry out his duties in the most effective manner, caused the first defendants to create a subsidiary A. Ltd., to which the first defendants on 15 August 1969 assigned such parts of their undertaking as represented an economically viable business, namely, their business connected with the "Jetstream" aircraft. The receiver then entered into negotiations for the sale of the shares of A. Ltd. to American interests, and notified K. and the plaintiffs that he could no longer comply with the agreement of 23 December 1966. The plaintiffs sought an injunction to restrain the sale of the shares, and a declaration that they were entitled to the agreed commission.

Graham J. at 32; 167, in declining the injunction said: "Is a receiver and manager, appointed by the debenture holders, in a stronger position, from the legal point of view, than the company itself, in respect of contracts between unsecured creditors and the company? Assuming that the company, on the authority of *Southern Foundries Ltd.* v. *Shirlaw* [1940] 2 All E.R. 445; [1940] A.C. 701, cannot put it out of its own power to perform contracts it has entered into, can a receiver in effect do so on its behalf, if at the same time, he has made it clear that he is not going to adopt the contract anyway and, if, as is, in my judgment, the case here, the repudiation of the contract will not adversely affect the realisation of the assets or seriously affect the trading prospects of the company in question, if it is able to trade in the future?

"Counsel when I asked them, were not able to produce any authority which gave a direct answer to this question, but there is a helpful passage dealing generally with 'current contracts' in *Buckley on the Companies Acts*, 13th ed., 244. This passage to my mind, makes it clear that, in the author's view, the answer to the question I have posed above must be 'yes'. It seems to me that it is common sense that it should be so, since otherwise almost any unsecured creditor would be able to improve his position and prevent the receiver from carrying out, or at any rate carrying out as sensibly and as equitably as possible, the purpose for which he was appointed. I therefore hold that the receiver, within the limitations which I have stated above, is in a better position than the company, *qua* current contracts, and that, in the present case, the receiver, in doing what he has done and is purporting to do, in connection with the transfer of Aircraft's shares, is not doing anything which the plaintiffs are entitled to prevent by this motion".

Payment of Costs in a Liquidation

Our final case is *Re Introductions Ltd.* (*No.* 2) [1969] 3 All E.R. 697; [1969] 1 W.L.R. 1359, dealing with the costs of liquidation of a company. It was incorporated in March 1951 for the purpose of offering information to overseas visitors in connection with the Festival of Britain, and thereafter to give services and information to visiting business men generally. That business was apparently lucrative while it lasted. But in November 1960 the company embarked on the business of pig-breeding and that venture proved disastrous.

On 14 May 1968, Buckley J; [1968] 2 All E.R. 1221, held that the pig-breeding business was *ultra vires* the company's memorandum of association, and his decision was affirmed by the Court of Appeal [1969] 1 All E.R. 887; [1969] 2 W.L.R. 791. The company went into liquidation. The official receiver, by leave of the Court, employed a special manager to deal with the pigs. Solicitors, accountants and auctioneers were employed. All the animals and farms were sold; The proceeds were paid into a suspense account.

In the result the statement of affairs produced by the accountants showed an estimated total liability of £1,341,350 with estimated total assets available for unsecured creditors subject to the costs of liquidation, £129,190.

The liquidator took out a summons for an order that directions might be given as to the payment of the costs of the liquidation generally: the Court being apprised that there was no provision in the Board of Trade Fees Order for the official receiver to charge fees for his services in an *ultra vires* case, although in similar cases it had been the practice of the official receiver to do so.

The judgment of Stamp J. was short but sweet. "A labourer is worthy of his hire. It is quite plain that I must direct payment of the official receiver's costs, charges and expenses out of the assets in hand, without prejudice as to how any of the costs, charges and expenses ought ultimately to be borne."

And so the *ultra vires* aspect of the transactions involved had no legal consequences. The nearest analogy I know of lies in the realm of trustee law. It has there been laid down that, if trustees purchase land which they have no authority to purchase, they may nevertheless confer title to a subsequent purchaser of such land, without the consent of the beneficiaries: *Re Jenkins and Randall (H.E.) & Co.'s Contract* [1963] 2 Ch. 362; *Re Patten and Edmonton Union Poor Guardians* (1883) 52 L.J. Ch. 787.

E. C. ADAMS.

CORRESPONDENCE

Maori Affairs Act 1953, ss. 213, 215

Dear Sir,

I read with interest the remarks of Mr L. A. Taylor in [1970] N.Z.L.J. 255 commenting on my article published on page 157.

Before replying to Mr Taylor, I would like to point out an error in my article, which was, partly at least, my fault. Paragraph 4 purports to quote the words of Judge Haughey but only the first sentence contains the Judge's words. Commencing at "But no attempt", the words are, of course, my own comment on the Judge's remarks.

Mr Taylor asks from what order Hoera Ruru appealed. The order was, of course, the order under s. 213 made by Judge Haughey, which is the only order I mention up to the time of mentioning the appeal.

As to the ultimate fate of the dealing, I think the article makes it clear that the Appellate Court, having dismissed the appeal against Judge Haughey's order referred to above, the order was confirmed and the dealing was carried through by vesting order accordingly.

In this transaction, there were more than four owners, as the first paragraph of my article mentions.

As Mr Taylor says, s. 213 (5) says a vesting order shall (not may) be used *if* the Court is satisfied that an effective transfer by act of the parties would be impracticable or disproportionately expensive. Mr Taylor says "I cannot envisage this". What it is he cannot envisage I am not clear. All I can say is that in the *Bialek* case, a transfer was *not* impracticable or disproportionately expensive. No meeting of assembled owners was held in this case because the sale was by one individual owner of her undivided share. I agree that, on the Court's finding, "the gate to operating by vesting orders is nearly wide open". My contention is that it is not open wide enough to cover the *Bialek* case.

It is true that, if a transfer had been allowed by the Court, it would have had to be confirmed under s. 224, but as the Court has regard to the same conditions whether the transaction is carried through by transfer or vesting order, this has no bearing on my views.

I am, etc.,

R. A. WILSON.

A CENTURY OF SERVICE

The Oamaru legal firm of Hislop and Creagh and Main celebrated its centenary on 22 May 1970.

Thomas William Hislop came to Oamaru 100 years ago under the aegis of the Dunedin firm of Sievwright and Stout (later Sir Robert Stout). Soon after, Mr Hislop commenced practice under his own name and in 1875 was joined by Arthur Gethin Creagh who had been articled to D'Arcy Haggitt of Dunedin. Mr Hislop was appointed Crown Solicitor in 1881. Later he entered politics and as Minister of Education and Colonial Treasurer in the Atkinson administration, went to Wellington to join Mr A. de B. Brandon.

Mr A. G. Creagh carried on alone until 1920 when he took his son, Terence Edmond Creagh into partnership. Mr T. E. Creagh died in 1923 as a result of war injuries.

John Hunter Main who came from Christchurch joined the firm in 1924. In 1930 he was appointed Crown Solicitor, an office he still holds. His son Ivan and Mr S. L. Henry became partners of the firm in 1953 and were joined in 1968 by Mr J. M. White formerly of Dunedin. Mr Henry retired in 1969. Both Mr J. H. Main and Mr I. H. Main hold the office of Notary Public.

DEEP SEA MINING

Recent developments in the law of the sea appear to be leading to a settlement of several outstanding problems. Perhaps more important than the possible decisions is the likelihood that a settlement may be reached by and through United Nations processes.

In December 1969 the General Assembly adopted four resolutions. The Secretary-General was requested to ascertain the views of members on the desirability of convening a conference on the law of the sea to discuss the regimes of the high seas, continental shelf and ocean bed. The projected conference would also deal with the territorial sea and contiguous zone, fishing and conservation, and define the ocean bed area beyond national jurisdiction.(*a*) Despite the failure of the 1960 Conference to resolve even a relatively small part of these issues, the resolution was passed by a large majority. There were thirty abstentions.

At the same time another controversial resolution was passed. In 1968 the Assembly had resolved that the sea bed and ocean floor beyond the limit of national jurisdictilon should be exploited for the benefit of mankind as a whole. (*b*) Now the Assembly decided that, pending the establishment of an international regime, states and persons were bound to refrain from all exploitation of the sea bed and ocean floor and subsoil beyond national jurisdiction.(*c*) Sixty-two states voted in favour of the resolution. Of this number only two were developed nations (Finland and Sweden). Twenty-eight states abstained. Twenty-eight states voted against the resolution, including the U.S.S.R. and the Peoples' Republics, the U.K., the Commonwealth and the U.S.A.

Of particular interest is the fact that Malta, the originator of the debate on a regime for the ocean bed, voted against this resolution. The Maltese delegation pointed out that as it was not known where the limits of national jurisdiction lay the recommendation of the General Assembly was meaningless. Furthermore if the only criterion for extension of national jurisdiction over the continental shelf was exploitation, then as soon as a sea bed area became exploitable national jurisdiction would automatically extend to it, if this type of claim had been made. (*d*) In the United States a continuing debate has been carried on between the various interested parties. The American Petroleum Institute put forward its view that the United States had the right to exclusive jurisdiction over the entire submerged continent "out to where it meets the abyssal ocean floor" under the Continental Shelf Convention. Decision on precise arrangements for the exploitation of the ocean floor beyond nation jurisdiction should, it was suggested, be deferred until more was known of the deep sea environment.(*e*) The United States has already asserted jurisdiction over Cortes Bank, 120 miles off San Diego, which is fifty feet under water and separated from the coast by waters up to 6,000 feet deep.(*f*) In 1967 the Department of the Interior granted a permit to Humble Oil & Refining Co. to drill cores beneath the floor of the Atlantic Ocean on the continental slope off the East Coast of the United States at a depth of 5,000 feet.(*g*) Jurisdiction has been asserted to prevent the founding of new countries by erecting buildings on the continental shelf. (*h*) On the other hand the U.S. Navy was concerned to limit assertions of national jurisdiction for fear of provoking a spate of extensive claims, many to total sovereignty, over wide ocean areas. (*i*)

The discussion has been given an added impetus by the decision of the International Court of Justice in the North Sea Continental Shelf Cases that the continental shelf doctrine was

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(*a*) Res. 2574A (XXIV).

(*b*) Res. 2467A (XXIII).

(*c*) Res. 2574D (XXIV).

(*d*) 7 (1) U.N. Chron. (Jan. 1970) 75.

(*e*) American Petroleum Institute, "Statement of Policy—Jurisdiction over the Natural resources of the Ocean Floor" (Nov. 1969).

(*f*) R. B. Krueger, "The State of International Law as Applied to Ocean Mining and an Examination of the Offshore Mining Laws of Selected Nations", Offshore Technology Conf. Paper No. OTC 1037 (preprint) (1969) 337.

(*g*) R. B. Krueger, "The Development and Administration of the Outer Continental Shelf Lands of the United States", 14th Ann. Rocky Mountain Mineral Law Institute (1968) 643, 664.

(*h*) *U.S.* v. *Ray* 161 N.Y.L.J. 1; 63 A.J.I.L. (1969) 642.

(*i*) "The Oceans, Whose Hunting Preserve?" Forbes (15/3/70).

part of customary international law(*j*) despite the limited degree of acceptance of the Convention.

In the light of these conflicting opinions the recent announcement of President Nixon appears to be a signal advance towards a solution of some of the major problems.(*k*) The President has suggested adoption of a treaty by all nations, renouncing national claims over natural sea bed resources below a depth of 200 metres. Such resources would be the common heritage of mankind. Beyond this limit an international regime would exploit sea bed resources "for international community purposes". Coastal states would act as trustees for the international community in an international trusteeship zone of the continental margins deeper than 200 metres, receiving a share of revenues. International machinery would regulate exploration and exploitation beyond the margins. Until signature of a treaty, permits beyond 200 metres depth would be issued subject to the international regime to be agreed upon.

The President also announced that the United States is currently discussing with other states the possibility of a treaty to establish a twelve-mile limit for territorial seas whilst providing free transit through international straits. Possibly it is considered that the question of the status of the Gulf of Elath could be avoided by not defining "international straits" thus leaving each side the argument that the particular strait in question is (or is not) "international".

It may be somewhat premature to attempt an evaluation of the Nixon proposals, but some preliminary suggestions may be made. Revenues from the areas deeper than 200 metres would not be turned over to the international community until a sufficient number of other States join the interim policy. Perhaps a more serious obstacle to such a scheme is that Congress would have to approve the diversion of funds for international purposes. Taking into account the strong support shown by Congress in the past for an extended national jurisdiction(*l*) difficulties may arise in such an allocation of funds, when exploitation begins.

The President's announcements refer to "continental margins". The phrase adds to the current confusion of geological and legal terminology. It may be suggested that "continental margin" refers to "the continental land mass seaward generally to where the submerged portion of that land mass meets the abyssal ocean floor."(*m*) If this is the case the proposal represents a compromise having some attractive features for the oil companies, whilst at the same time conceding much ground to the pressure of the underdeveloped countries for an international regime.

Present extraction would continue with firm tenure as it is generally confined to the 200 metres limit. Exploitation of the abyssal ocean floor is not a matter of immediate concern. The submersibles which can reach these depths have, for the time being, limited capabilities.(*n*) Assuming the above definition of "continental margins", exploitation of the sea bed below 200 metres, reaching down to the ocean floor is just beginning. If a "sufficient number" of other States agree to President Nixon's suggestions, and Congress allocates the funds for international purposes it may be suggested that the oil companies are unlikely to be faced with financial demands approaching those of foreign governments. There may well be sufficient foreign governmental exploitation of the international trusteeship areas to provide several examples of relatively modest allocations for international purposes. Such examples could legitimately be followed by the United States and other nations. The "international tax" would presumably be deducted from local tax, if any is payable.

The present proposal appears to provide an effective shield against full internationalisation of the continental margins. Coastal nations would apparently retain immediate control over operations. If this factor is taken together with a presumably firm definition of national jurisdiction to a depth of 200 metres, it would appear that the United States is proposing a compromise between national jurisdiction and full internationalisation which would not seriously injure the interests of the petroleum industry for many years to come. Furthermore firm tenure can be given, which would encourage deeper exploitation; this may be contrasted with the effects of Resolution 2574D which could well halt exploitation until the hoped-for establishment of an international regime.

F. M. AUBURN.

(*j*) R. Y. Jennings, "The Limits of Continental Shelf Jurisdiction" 18 I.C.L.Q. (1969) 819.

(*k*) "United States Oceans Policy", Press Release USUN-70 (70) 25/5/70.

(*l*) In 1967 22 Resolutions were introduced in the House of Representatives against Internationalisation.

(*m*) "Petroleum Resources under the Ocean Floor" National Petroleum Council (9/7/68) 6.

(*n*) P. M. Fye, A. E. Maxwell, K. O. Emery and B. H. Ketchum, "Ocean Science and Marine Resources," in E. A. Gullion (ed.) *Uses of the Sea* (1968) 26-28.

OBITUARY

Mr J. F. Keane S.M.

Mr John Francis Keane, senior Magistrate at Lower Hutt, died suddenly on 29 June 1970 at the age of 58 years.

At a special sitting of the Magistrate's Court at Lower Hutt, tributes were paid by Mr J. K. Patterson S.M., Mr A. Bignall of the Justices of the Peace Association, Mr J. F. Jeffries on behalf of the Wellington District Law Society, Mr N. T. Gillespie on behalf of the Lower Hutt City Council and Hutt Valley practitioners, and Superintendent K. Vincent of the Hutt Valley Police Division.

Born at Gisborne, Mr Keane was educated at St. Patrick's College Wellington and Victoria University where he graduated LL.B. He was in practice in Rotorua from 1938 to 1959.

In 1959 Mr Keane took up his appointment as a Magistrate in Lower Hutt and had been there from that time. He was also chairman of a number of important tribunals, including the Public Service Appeal Board from 1959 to 1962, the Government Service Tribunal, the Government Railways Industrial Tribunal and the Police and Staff Tribunal in 1966. Last year he was appointed a member of the Prisons Parole Board.

Mr Keane served as a pilot in the Royal New Zealand Air Force from 1940 to 1944, flying missions in Europe, the Middle East and Africa.

While in Gisborne Mr Keane was a highly ranked tennis player and was active in athletic circles as a sprinter. As a youth he worked for a period in the Magistrate's Court in Gisborne.

Mr Keane is survived by his wife and four sons, Patrick, Terence, Philip and Leo. The eldest son, Patrick is following in his father's footsteps in the profession of law.

Mr C. F. Atmore M.C.

Mr Charles Frederick Atmore a well known Otaki lawyer and senior partner in the firm of Harper, Atmore and Roussell died suddenly on 30 June 1970.

Born in 1893, he was educated at Otago Boys' High School, Wellington College and Victoria University where he graduated LL.M.

In the First World War he joined the Otago Regiment as a private and rose to captain, being awarded the Military Cross for "leadership and conspicuous courage".

Mr Atmore moved to Otaki in 1919 and was in practice there until his death.

Mayor of the Borough for 17 years, Mr Atmore also gave his services as borough solicitor free to the community. He was patron of the Horticultural Society and the Otaki Drama Society and honorary solicitor for the Returned Services Association.

Taking an active interest in farming, he was president of the local dairy suppliers' society and president for four years of the Wellington Dairy Farmers' Co-operative Association.

A University tennis blue, Mr Atmore also represented Horowhenua at cricket as well as being a keen golfer and bowler.

He is survived by his daughter Mrs Bush of Karori and by his son Colin of Te Horo.

PERSONAL

Mr K. H. Mason of Palmerston North has been appointed a Stipendiary Magistrate and will take up appointment as relieving Magistrate in Auckland.

Mr Mason was a partner in the firm of Loughnan, Mason & Co. of Palmerston North. He was born in Oamaru in 1935 and educated at Greymouth High School and at Otago University and Victoria University where he graduated LL.B. in 1959. He took an active part in rugby football and athletics.

Mr Mason served as Chairman of the Palmerston North Maori Education Foundation Committee, and at the time of his appointment was President of the Palmerston North Y.M.C.A. and Vice-President of the Manawatu Lions Club. He is married with four young children.

No indeed!

"The provisions of the Wills Act allow Nicholas to sign the will by emanuensis (sec) if he is not able to do so himself—i.e. someone at his direction signs the will. It must be in his presence and he ought not to be already dead."

The above "howler" appeared in the final examination script of an Equity student last year.

RULES FOR DICTATORS

We are indebted to an overseas publication for the following rules for dictators, feelingly drafted by a shorthand typist of many years' experience.

1. Never start work first thing in the morning. Typists much prefer a terrific rush in the late afternoon.

2. Please smoke whilst dictating. It assists pronunciation.

3. Do not face the typist while dictating. This would be too easy for her.

4. Hours of dictation: during the lunch hour, morning or afternoon tea break and at any time between 4.30 p.m. and 5.30 p.m.

5. When dictating please parade up and down the room. Typists can understand what is said more distinctly.

6. Please call in the typist for dictation and then proceed to sort papers, look up old files, telephone and receive calls, etc.

7. Please lower the voice to a whisper when dictating names of people, places, etc., and in no circumstances spell them to the typist. Typists are sure to hit upon the right way of spelling them—they know the name of every person, firm and place in the world.

8. When typists do not hear a word and dictators are asked to repeat it, shout it as loudly as possible. The typists find this most gentlemanly. Alternatively, dictators should refuse to repeat them at all. The typists have second sight and it may come to them.

9. Whenever possible, dictators should endeavour to keep the typists late. Typists have no homes and are only too thankful for somewhere to spend the evening.

10. Should a letter require a slight alteration after it is typed, score the work heavily through about four times, and write the correct word beside it—preferably in ink or heavy pencil—and always make sure the alteration is on the top copy.

11. Should a typist be too busy or too lazy to take down dictation, please write letters with a blunt pencil held in the left hand, whilst blindfolded. Incorrect spelling, balloons, arrows and other diagrams are very helpful to typists.

12. Should work be required urgently (a most unusual occurrence) it aids the typist considerably if the dictator rushes in at intervals of 30 seconds to see if it is done.

13. If extra copies of a letter are required this desire should be indicated either after "yours faithfully" or overleaf, so as to ensure that it is the last thing the typist will see when the letter is completed.

14. If a typist is making a tricky alteration requiring concentration and precision, always stand over her and breathe down her neck while she does it.

15. With regard to statements, do not on any account use lined paper. If figures are altered please write heavily over those previously inserted, the correct figure in each case being the one underneath.

In view of the foregoing rules and the fact that many offices are now using dictaphones, we have incorporated the following rules to include such machines.

16. Never on any account indicate to the typist the length of the letter. If she does not guess at the beginning of the letter she will soon find out.

17. Always change your mind when in the middle of a sentence so that it is impossible for the typist to correct the mistake.

18. When dictating long documents, remember to give the typist the number of copies you require right at the end of dictating.

19. A typist loves to look through files for addresses of people as it helps to fill in her day.

20. Run as many words as possible together when speaking as it makes it more interesting for the typist. She has a wonderful way of knowing exactly what you are saying.

21. At the end of dictating a letter, make sure to add another paragraph after "yours faithfully" or better still, indicate that it is to go in the middle of the letter.

22. If dictating figures, be sure to give the wrong amount. A typist has a way of knowing these things.

23. Never give a typist a half-full tape. She loves to wait until it is completely full.

24. Never pause at the end of a sentence. A typist knows exactly where to put full-stops.

25. It also helps to use as many "ands" as possible together with as many "ums" and "aahs" in between.

TO BLOOD TEST OR NOT TO BLOOD TEST—THAT IS THE QUESTION

The Civil Division of the Court of Appeal has lately had before it two further cases, *W.* v. *W.* [1970] 1 All E.R. 1157 and *S.* v. *McC.* (*formerly*, *S.*) *and M.* (*S. intervening*) *ibid.*, at p. 1162 concerned with the thorny question of whether the Court should order a blood test of a child. The cases are of particular interest because in each of them there is a dissenting judgment.

In *W.* v. *W.* (*supra*), the husband and wife, both white persons, had been married in 1957 and had two (white) children in 1959 and 1961. Late in January 1963, the wife committed adultery at her mother's house with a coloured Guyanan on one occasion. In July 1963 she left the matrimonial home and lived elsewhere. Early in the following December, she gave birth to a full-term child of negroid appearance. Nearly a year later she sought a divorce on the ground of her husband's cruelty and desertion. The husband, by his answer, alleged adultery with the Guyanan, who had, by this time, disappeared. Service upon him had, in fact, been dispensed with. A *decree nisi* was granted to the husband on the ground of the adultery. Hence the blood test was not being sought in order to prove the adultery. However, when the necessary issue whether the husband was the child's father came to be tried, the Official Solicitor represented the child at the Court's direction. The husband and wife were both willing to be blood-tested and the wife was willing for the child to be tested. The blood of the Guyanan could not be tested, of course, but, even so, there was a seventy percent chance that the husband could be shown not to be the father. Hence the result "could be useful", as Lord Denning M.R. stated at p. 1159. The Official Solicitor argued that the child's best interests would not be served by an order for a test and this contention was upheld by Sir Jocelyn Simon P.

On appeal, Winn and Cross L.JJ. following *M.* (*D*) v. *M.* (*S.*) *and G.* (*M.*) (*D. A.*) *intervening*) [1969] 2 All E.R. 243, noted by the writer in [1969] N.Z.L.J. 567, thought it was not in the child's best interests to order a test. They both considered that the sole criterion was the child's best interests: see at pp. 1160, 1161. Winn L.J. at p. 1161, feared that, were the order made, the child—

> "might be told, either at the age of six or later, that the husband of his mother was not his father, without giving him any indication of the identity or characteristics in any respect of the man who in nature begot his birth".

Cross L.J. (*ibid.*) observed that the child had been living since birth with his mother, who took the view, whether rightly or wrongly, that the husband was the father, added that he thought it likely that she would have told all three children that Paul's father was her husband and asked:

> "What will be the effect on [the child] of taking this test? If it showed that the husband could not be the father, which is one possible result, [he] would be left in the position of having no identifiable father at all and would sooner or later realise that his mother had been lying when she told him that her husband was his father. . . . If . . . the test showed that the husband could be the father, [the child] would gain nothing, for it is most improbable that his attitude would change".

There is certainly something to be said for this majority view when one takes into account the fact adverted to by Lord Denning M.R. (but not by his learned brethren) that the wife's family had Spanish, French and North American Indian blood in it. However, the writer finds more robust good sense in the dissenting judgment of the learned Master of the Rolls. In his view it was:

> "in the best interests *of everyone* (italics supplied) that [a Court should decide a paternity issue] on the best evidence available. The issue is of such importance and affects so many persons that it should be decided on all the evidence and not half of it. In the old days the Court had no option: it had to rely on presumption of legitimacy. Now when it has blood tests ready to hand, it should make use of them" (*ibid.*, 1159).

He went on to point out that the child's best interests were bound up with all those about him and that they could all see that there was a question mark about the child's paternity and concluded:

> "Take [the child] himself. Whenever there is a question mark as to the parenthood of a child, the one thing the child will want to know when he grows up: who is my father?

> He will be torn apart unless he knows. It is better for him, as for everyone else, that the truth should out".

We considered that the wife's evidence, her mother's evidence as to the coloured lodgers she took in and as to the weekends the wife had spent there and the blood test might enable the Court to decide that the husband was the father. If, on all this evidence, the Court did so find, it would be the better for the child as the husband would then have to pay maintenance for him and might, perhaps, take an interest in him. Lastly, his Lordship adverted to the fact that, were the test to be refused, the husband and wife could have tests and have the child tested also, for nobody, Official Solicitor included, could stop them. The tests might prove the Court to be wrong in its finding and the Court ought not, in his view, to "expose itself to such a condemnation". In the later case of *S.* v. *McC.* (*formerly S.*) *and M.* (*S. intervening*) (*supra*) Lord Denning M.R. and Karminski L.J. held that a child should undergo a test and Sachs L.J. dissented vigorously. Here the wife, a dark-skinned woman according to the Official Solicitor, had borne a female child whom the husband regarded as coloured, for which reason he refused to accept her. In due course, he obtained a decree of divorce on the ground of the wife's adultery with a Pakistani co-respondent. A paternity issue was ordered to be tried; the Official Solicitor refused to consent to the child's blood being tested on the ground that a test could be ordered only when it was shown to be in the sole and exclusive interest of the child. The husband and wife, on the other hand, were willing for themsleves and the child to be tested. The co-respondent, about whom very little was known save that there were adjourned affiliation proceedings at the suit of the wife outstanding against him, refused to allow himself to be tested. The divorce commissioner having ordered that the child should be tested, the Official Solicitor appealed.

Lord Denning M.R. as might be expected, thought it right to order a test, for much of the same reasons as he gave in the earlier case. At p. 1164, he made the point that, if there were no test, the wife would probably lose her affiliation summons because she had made statements before the present Court saying the husband was the father and the Justices would disbelieve her evidence that the co-respondent was the father. If, on the other hand, the test proved the husband was not the father, her chances of success in the affiliation proceeding would be enhanced. In his view, besides being in the child's financial interests to make an order, it was also "in the social interests of the child—so that she can take her place in society" (at p. 1165). Karminski J. mentioned (at p. 1170), with the same point in mind, that there was a good deal to be said in favour of ascertaining the child's paternity since, in a few years' time, the child might—

> "reach adolescence without a known father or any known brother, and hence a sense of insecurity which so often leads to serious trouble".

His Lordship was less sanguine than the Master of the Rolls, however, on the financial aspect: it is clear from the report of his judgment that, (as Sachs L.J. had also observed), so little was known of the co-respondent that the financial situation was indefinite. The majority Judges were also clear in their minds that the interests of justice required that the Court should have the best evidence available before it in deciding whether or not the child was legitimate, so that the truth would prevail.

Sachs L.J. in his very compelling dissenting judgment, followed the majority view in *W.* v. *W.* (*supra*) and would have refused the test. In brief, he modestly preferred to leave it to wiser heads than his own to give guidance whether the human outlook on the stigma of illegitimacy had changed, always remembering that views might vary in differing sections of the community. In his opinion, therefore, the onus was on those who asserted that the human outlook had changed, that the onus had not been discharged and that the presumption of legitimacy must stand: see pp. 1167-1169, *passim*.

It has to be conceded that the majority view means, to use the words of Sachs L.J. at p. 1166, "that truth should out *ruat coelum*" and hence that the child's best interests are not the *sole* criterion after all. It is respectfully submitted that, at any rate since the passing of the Status of Children Act 1969, this is the view that should commend itself to the Supreme Court of New Zealand in cases of this kind where a father is not seeking to prove adultery by means of blood tests. In cases of that kind there is undoubtedly room for the "let sleeping dogs lie" doctrine which was applied in *M.* (*D*). v. *M.* (*S.*) (*supra*). In cases of the kind under review, on the other hand, it is submitted that Lord Denning M.R. was correct when he said, in *S.* v. *McC. and M.* (at p. 1165) that:

> "should it come to the crunch, then the interests of justice must take first place".

P. R. H. WEBB.

MR PENNYFEATHER

By Scilicet

The Wagers of Sin

I had heard much from the lips of Mr Pennyfeather concerning a new client, one Tobias Hazard. The details of his problem had at once intrigued and amused me to the degree that I could hardly wait to meet him. The primary purpose of my partner in discussing this particular problem with me was to persuade me to carry out some devilling into a somewhat unusual sphere of law in the hope of finding some precedent buried deeply in the hallowed and musty volumes of decided cases which covered almost every inch of wall in the room which Mr Pennyfeather referred to as "the library". However the large chamber also served other purposes such as coffee making, storage for broken chairs and a depository for wet coats and dripping umbrellas. My research revealed nothing which aided or handicapped the cause of Mr Tobias Hazard and indeed it seemed to me that I was searching into new law without precedent.

Thus it was with a feeling of pleasurable anticipation that I heard Mr Pennyfeather inform me that Mr Hazard was due for a conference at three o'clock that afternoon and that it would be appreciated if I would attend.

Mr Tobias Hazard looked as much like a Lothario as did Mr Pennyfeather bear a resemblance to Richard Burton. Our client was a small rotund fellow of indeterminate age, but at least in his late fifties, a clearly designed toupe which I could recognise as both my uncles possessed the same vanity, small alert green eyes and a red button of nose. Unusually large and pointed ears and hypertension purple did little to enhance his appearance. However to offset the handicaps bestowed by nature, the round little body was attired in a well cut suit which suggested a price of a hundred and fifty guineas, a large platinum set pearl on his silk tie and on each hand a diamond of considerable carats. I could recite at least ten London streets where Mr Hazard would be in mortal danger at any minute of darkness.

As a warm moist hand clasping mine accepted Mr Pennyfeather's introduction, our client said hoarsely, "I suppose Mr Pennyfeather has told you that I'm a ruined man."

"He has told me of your dilemma," I admitted while thinking that the value of the pearl and diamonds which adorned him would probably pay off my overdraft with Barclays' and also the mortgage on my modest Hampstead home.

"He's told you everything?" demanded Mr Hazard.

"I think so."

"Anyway I'd like to tell it again. Makes me feel a bit better to talk about it."

Mr Tobias Hazard was the proprietor of an old established and respected turf accountants firm practising in the West End with branches in Manchester, Birmingham and Liverpool numbering amongst his clients, names from Debrett and Burke's Landed Gentry to say nothing of a Cabinet Minister who invested and regularly lost wagers on horses which he had dreamed had flashed home lengths ahead of the field. As side-

lines Mr Hazard owned an Italian restuarant in Charlotte Street and two Soho night clubs. He admitted that he was—or had been—a very wealthy man.

Somewhere or other I had heard a song to the effect that into each rich middle-aged man's heart a chorus girl must fall and indeed this had happened to our Tobias.

One of Mr Hazard's night clubs known as the Tight Slipper featured a small but carefully selected chorus of night life's most beautiful and curvaceous females. To this chosen few came Flossie Furori, the most beautiful and curvaceous of them all. At first sight, our client had been smitten. He brought to bear all his charm and assets and before long Flossie had left her bedsitter in Maida Vale to be happily ensconced in a six-room flat in Lancaster Gate. There Mr Hazard found solace at the end of his long exciting days. He fell deeply in love with Flossie Furori and he was sure that he was the sole recipient of her favours.

Suddenly Flossie became ill. A chill had seeped through the Russian sable coat, a gift from Mr Hazard—the coat, not the chill, after the favourite had dropped its rider in the Grand National. The chill deteriorated dangerously into pleurisy and other complications. Harley Street's best was summond but it appeared that Flossie Furori was indeed gravely ill. Sir X of Harley Street knowing Mr Hazard's profession gave Flossie's chances of survival at forty-sixty. Our client was bowed down with grief.

One night as he sat at the bedside of his loved one as she tossed and moaned in the bed where her benefactor had shared joys and no sorrows, Tobias Hazard gave way to his despair.

"Darling Flossie," he cried, "speak to me."

But the answer from the white lips was a whimper of fear.

"You must live for me, darling. Without you I am nothing. I will die too."

Another whimper.

Seizing his loved one's hand, he pleaded, "get well, Flossie, get well for me. Look—look—if you promise to get well, I'll give you something —yes something wonderful."

He pulled out his cheque book and scribbled for a moment.

"Look darling," he cried, "this is for you if only you'll get well again," and he fluttered the cheque before Flossie's eyes.

He wasn't sure but Mr Tobias thought he saw a flicker of interest in the green eyes of his loved one. He placed the cheque on the bedside table.

"She got well all right," continued our client. "She was weak for a while so I packed her off to Monte Carlo for a couple of weeks. It was after she'd gone that I found out what she'd done. She'd gone and banked the cheque and then drawn all the money out of her account. I'd forgotten all about the darn thing or I would have stopped payment."

"The cheque was for a hundred thousand pounds, wasn't it?" I murmured.

"It certainly was."

"Didn't the bank . . .?" I began.

"No, they didn't. I've drawn cheques for larger sums before. And when Flossie came back to London what does she do? Gives me the ice man treatment and goes to live with my head waiter. I fired him of course. Now I want you to get my money back from that hussy."

"We'll have to sue," murmured Mr Pennyfeather.

"Then sue."

"There'll be a lot of publicity," I opined.

"So what? I know I'll be the laughing stock of the business but I'm not going to let her get away with it."

"Your wife," I began.

"Don't worry about her. She won't divorce me—worse luck."

"Brunt", sighed Mr Pennyfeather, "get Drubble."

The day prior to the hearing of Hazard *v.* Furori, I called on Mr Drubble Q.C. at his chambers.

"This is no pushover," he sighed. "I sounded out the other side on a settlement basis. They thumbed their forensic noses at me."

"But he didn't give her the cheque seriously."

"Why not?"

"How about illegal consideration?"

"No consideration required for a gift as such. Natural love and affection, the desire to inspire a dear one to live. That'll be their argument."

I sighed, "Mr Pennyfeather has already told him that his chances are slim but he insists on proceeding."

At the hearing Sir Amos Peabody Q.C. argued accordingly with an additional submission—

"The plaintiff is in the profession of laying the odds. What did he do but offer a wager of £400,000 to nothing that the defendant would recover from her grave illness? And did she not win the wager?"

Mr Justice Kickawich seemed to be not entirely with us.

His bifocal framed gaze rarely left the glorious face and framework of Miss Flossie Furori who was wearing a sable coat although

it was July. The lovely defendant had given her evidence with demure impressiveness. In the box, our client had been choleric, angry and obviously had not favourably influenced the learned trial Judge.

Two weeks later, Mr Justice Kickawich delivered his reserved judgment.

"I find that the plaintiff made a *bona fide* gift to the defendant for the consideration of love and affection. This is borne out by the fact that he took no steps to stop payment of his cheque. Only when he learnt that the defendant had transferred her affections elsewhere did he like a jealous lover scorned, take steps to recover his gift. I therefore find in favour of the defendant with costs of course."

Mr Drubble advised strongly against an appeal.

A month later, Mr Hazard drawn and haggard was ushered into my room.

"I asked for Mr Pennyfeather," he said tonelessly, "but they tell me he's out, but I guess you'll do."

"What can I do for you, Mr Hazard?"

Silently he produced from his breast pocket, a sheet of paper which he handed to me.

I read on the inexpensive notepaper of Her Majesty's Inland Revenue Commissioners—

"My attention has been drawn to a gift of £400,000 which you made to one, Miss Flossie Furori in the month of November last. This gift is subject to gift duty and as soon as an assessment has been calculated you will receive the usual demand. I have the honour, to be, dear sir . . ."

Cried our client bitterly, "I'm still the laughing stock of London and now this!"

"Mr Hazard," I murmured with an attempt to infuse sympathy into the words, "You know, you did give long odds, didn't you?"

FAMILY TRUSTS AND INCOME TAX

Many and varied attempts have been made by setting up family trusts to reduce the liability for income tax. The principal difficulty in each case is, of course, s. 108 of the Land and Income Tax Act 1954, and the latest to come before the Court were the two cases *Marx* v. *Commissioner of Inland Revenue* and *Carlson* v. *Commissioner of Inland Revenue*, heard together by Sir Richard Wild C.J., and reported together at [1969] N.Z.L.R. 464. Subsequent proceedings on appeal are reported at [1970] N.Z.L.R. 182.

The facts of the two cases differ in certain respects but as the differences had no bearing on the results of the cases it is not necessary to go into them in any great detail.

The really relevant facts are that each appellant owned a farm in Taranaki. In each case a trust was set up by a third party for the benefit of the appellant's wife and family, and the initial trust fund was fixed at a small amount. On the setting up of these respective trusts each appellant then leased his farm to the trustees, who were the same in each case, at a rental found (in Marx's case) to be reasonable. There was no evidence as to the adequacy of the rent in *Carlson's* case. Marx included the plant and stock in the lease but Carlson's lease included only the land.

The trustees thereupon appointed Marx as manager of his own farm at a salary of £20 per week. Carlson, on the other hand was engaged as a sharemilker on a 50 percent basis, he supplying his own plant and stock.

When taxation returns were filed, the trustees returned the farming profits as their income in each case and the appellants returned as their income in *Marx's* case his salary and rent and, in *Carlson's*, his income under the sharemilking agreement and the rent. In each case there were other minor items not relevant to this article.

The Commissioner considered that the arrangements between the appellants and the trustees were void in each case under s. 108 and reassessed the whole farming income to the respective appellants. The case then ultimately came before the Supreme Court.

Section 108 reads as follows:

> "Every contract, agreement or arrangement made or entered into, whether before or after the commencement of this Act shall be absolutely void in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax."

The Chief Justice found himself faced with two questions. The first, which he described as "ultimately a question of fact", was whether s. 108 applied in each case to render the arrangements between the respective appellants and the

trustees absolutely void in so far as they affected the appellants' liability to income tax. If this question were answered in the affirmative, the second question would arise, namely, whether the tax liability assessed properly fell on the respective appellants.

On the first question his Honour drew certain guiding principles from the decision of the Judicial Committee of the Privy Council in *Newton* v. *Commissioner of Taxation* [1958] 2 All E.R. 759; [1958] A.C. 450.

Stated very briefly they were as follows:

1. The section strikes at real transactions and not merely at shams;
2. An "arrangement" can be something less than a binding contract;
3. The word "purpose" relates not to the motives of the parties but to the end in view. The word "effect" means the end accomplished. The whole set of words denotes concerted action to the end of altering the incidence of tax or effecting relief from income tax;
4. The purpose and effect is ascertained by examining the overt acts by which the arrangement was implemented. It is enough that one of the purposes was to alter the incidence of tax or give relief from tax even if there were other purposes as well;
5. If the transaction is capable of explanation by reference to ordinary business or family dealing without necessarily being labelled as a means of altering the incidence of tax or affording relief from tax, then it is not caught by the section.

In the light of these principles, his Honour proceeded to consider the facts. He found that some parts of the transactions, e.g. the salary and rental payable to Marx and the remuneration payable to Carlson under the sharemilking agreement were reasonable and in accord with local practice. However he found many other aspects of the arrangements unusual, details being set out at p. 469 of the report, and held that the arrangements could not be regarded as ordinary business or family dealings. Even if they had become so in accord with a widespread practice adopted in Taranaki, of which there was some evidence, this had occurred only as a means of spreading income with a view to relief from taxation and thus fell within s. 108. He therefore held the arrangements in both cases void.

This, then, raised the second question, whether the appellants were liable to tax on the farming income seeing that they had not received that income. On this point his Honour reviewed a number of authorities, some of them rather conflicting, but accepted it as arising from *Peate* v. *Federal Commissioner of Taxation* [1966] 2 All E.R. 766; [1967] 1 A.C. 308 that it was correct for the Commissioner to assess each appellant "on the income he would have received . . . if the arrangements coming within [s. 108] had not been made." This was a simple, straightforward matter in the instant cases and the Commissioner had acted correctly in making his assessments. Both appeals therefore failed.

On appeal the judgment of the Chief Justice was upheld by North P. and McCarthy J. and, although they did not in so many words approve or adopt the five principles stated by the Chief Justice and set out above, nothing in their judgments derogates from what he said.

The Court of Appeal, however, was faced with a submission that s. 108 applied only where a transaction affected a taxpayer's liability to tax on income already derived by him and did not apply where the effect of the transaction was to divert from the taxpayer income to which he would otherwise have been entitled, thus reducing or eliminating his liability for tax. Founding themselves in the main on the opinion of Lord Donovan in *Peate's* case (*supra*) their Honours rejected this submission.

Turner J., in a dissenting judgment, took a contrary view. He considered that what had been done in the present case by way of diversion of income did not amount to "altering the incidence of income tax" for the purposes of s. 108 nor did it relieve the taxpayers from their liability to pay income tax. In his view, therefore, s. 108 had no application. It is noteworthy that Turner J. distinguished Australian cases on the ground that the Australian section differs from ours mainly in including in the banned transactions those whose purpose is to "avoid" income tax, a word not used in our section. North P. and McCarthy J. found that the differences were not material and did not prevent the application of certain Australian decisions to our Act.

The case is a valuable one for those interested in the application of s. 108. The treatment of the various judgments in this article has necessarily been fairly cursory and they call for a much more intensive study both for their value and for their intellectual interest. In particular, the discussion by the Judges in the Court of Appeal on the opinion of Lord Donovan in *Peate's* case (*supra*) is most interesting.

C. N. IRVINE.

St. Ninian's Presbyterian Church *v.* Auckland City

Special Town and Country Planning Appeal Board. Auckland. 1970. 4 March.

Zoning—Land used for church purposes—Zoned residential R4 deferred—Application to change zoning to manufacturing or commercial—More advantageous for sale—Resiting of church—Factors to be considered—Town and Country Planning Act 1953, s. 26.

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

K. L. Sellar, for the appellant.
Lee for the respondent.

The judgment of the Board was delivered by

CARSON S.M. (Chairman). This appeal relates to an area of land 3 roods 38.41 perches in extent adjacent to the junction of and having frontages to St George and Great North Roads, Avondale. Such land, as the appellant's name implies, is used for church purposes. There is also a graveyard located thereon but no interments have been made therein for approximately 10 years. Although the land is zoned residential R4 deferred and is bounded to the south by land zoned residential R3, it can at once be said that, generally speaking, other lands in the immediate vicinity, and particularly to the north, are zoned either manufacturing M1 or commercial C2.

Mr K. L. Sellar, the church's present minister, said in evidence that he spoke not only for tde trustees of his own church but also on behalf of the trustees of the Methodist Church at Avondale. He submitted that the land in question was not suitable for residential purposes in that, on Great North Road, more than 20,000 vehicles passed the site between 6 a.m. and 10 p.m. daily while the vehicle count on St George Road during the same period was 3,300. It was claimed, also, that, as a consequence of industrial development taking place adjacent to the last-mentioned road, traffic thereon was likely to increase. Notwithstanding the nature of that evidence, Mr Sellar claimed that the church's land was not itself well served by public transport. His description generally of the property concluded with a statement that "with a graveyard on the third side, one could not think of a less attractive area or a less safe neighbourhood to live in".

It was suggested on the appellant's behalf that a more appropriate zoning for the property would be manufacturing M1, which, it was claimed, would result in the more effective and economic utilisation of the land and would be consonant with the uses made of other lands in that neighbourhood.

During the course of the hearing it became apparent that the question of the appropriate zoning to be applied to the appellant's land was, to a measurable degree, bound up with proposals for the establishment by the appellant, in conjunction with the Methodist Church (with the possible addition of other churches), of a Union Church in the Avondale area. In furtherance of that plan, a site for a combined church centre had been purchased in Rosebank Road and it was contemplated that, coincidental with that new development taking place, the appellant's present site would become redundant and would, except for the graveyard, be sold. Mr Sellar at the same time properly pointed out, however, that certain circumstances, if found to exist, could well result in a change in those plans. If, for example, a suburban tavern was established near the site in Rosebank Road, the appellant's present site might well then become the site of the Union Church. Upon the assumption, nevertheless, that the plan would proceed to fruition in Rosebank Road, it was stressed that the appellant would then be under the necessity of selling that part of its land previously indicated "in order to obtain funds for the new centre at Avondale", in which event, according to Mr Sellar's submission, the property was "not likely to sell for residential purposes, except for an unrealistically low price. . . ." In regard particularly to that topic, the witness said:

> "I understand that the Appeal Board does not normally consider aspects of price. In this case, however, it is submitted that saleability and price has a direct effect on planning, in that every cent that is realised from the sale of St Ninian's site will be used for the improvement of the site at Rosebank Road, and conversely every cent that is not obtained from the sale will not go towards the betterment of the Rosebank site *in the same area*. From a planning aspect this would have the effect that both properties would be down-graded, would not 'tend to promote and safeguard the health, safety, convenience, and general welfare of the inhabitants.' "

The situation confronting the Board so far as the foregoing aspect of this appeal is concerned is comparable with that which arose recently in relation to other premises located in Auckland where it appeared to the Board, as it had occasion then to observe, that a change of zoning had been asked for mainly because an appellant's representatives and advisers believed that a sale of land might be more easily and more advantageously effected if a manufacturing or similar zoning were given to such land in place of an existing residential zoning. We were not persuaded upon that occasion, nor are we persuaded now, that considerations of that nature should be regarded as being determinative of the question whether land has been properly zoned in accordance with town and country planning principles. The Board accordingly rejects the proposition that factors such as the extent to which a sale would be facilitated or the likelihood of an enhanced price being obtained should properly be taken into account in determining whether a change of zoning asked for in circumstances such as exist in this case would be warranted.

In so holding, the Board should also, it is thought, observe that, although Mr Sellar stated that, in the event of the appellant's site being selected for the Union Church, such church would have to operate under conditional use procedures, that situation would appear no longer to obtain. In the amendments made by the respondent Council to its reviewed district scheme as a result of objections made to it, which amendments were adopted on 11 April 1969, predominant uses for land zoned residential R4 def. include:

> "Churches, Sunday schools and Church halls being in each case the whole of a building used only for public or private worship, religious ceremonies, religious instruction, Church meetings and Church functions of a social character."

Finally, in respect of this appeal, the Board records its view that, upon the grounds of traffic generation alone, the according of an M1 or similar zoning to the appellant's land would, so far as the available evidence shows, not be warranted. The Board is clearly of the opinion, therefore, that this appeal should be disallowed.

Appeal dismissed.

Tomas and Others *v.* Rodney County

Number Two Town and Country Planning Appeal Board. Warkworth. 1970. 4 February.

Zoning—Operative district scheme—Land zoned rural—Rezoned residential A—Objections by neighbouring owners—Adverse effect on their land—Disallowed by Council—Appeal—Whether right to object and appeal—Town and Country Planning Act 1953, ss. 23 (1), 26, 29.

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

Riley, for the appellants.
Lee, for the respondent.

The judgment of the Board was delivered by LUXFORD S.M. (Chairman).These two appeals are against the decisions of the respondent County disallowing the objections of the appellants to the alteration of the district scheme of the Rodney County pursuant to the provisions of s. 29 of the Town and Country Planning Act 1953. The alteration objected to is the zoning of an area of land in the County Town of Wellsford belonging to Mr N. Kelly, from rural A to residential A. This area of land is part Allotment 118 S.E. of the Parish of Oruawharo, containing 8 acres 3 roods 26 perches, and is contiguous to the northern extremity of the land on the east side of State Highway No. 1, which is zoned residential A. In effect, the alteration of the zoning of Mr Kelly's land extends the residential A land northwards on the east side of the Highway by the width of this land.

The appellants allege that their lands lying to the west of the Highway will be adversely affected if the altered zoning of Mr Kelly's land is confirmed because each of them is in the course of subdividing their properties into 19 and 30 lots respectively, and if Mr Kelly subdivides his land (which he will be able to do) the disposal of their lots will be slower and may be at lower prices than otherwise would be the case.

It is contended on behalf of the respondent County that neither appellant had the right to object and consequently has no right of appeal. That contention is based on the interpretation of the relevant words in s. 23 (1) (which confer upon an owner or occupier of property the right to object to a district scheme) by Hutchison J. in *Evans* v. *Town and Country Planning Appeal Board* [1963] N.Z.L.R. 244.

The relevant words of the subsection are:

> "The owner or occupier of property affected by any proposed scheme which has been prepared shall have the right to object to the scheme. . . .".

Those words apply to a change in an operative scheme under s. 29 or on review under s. 30; see s. 30A (1). Where any objection is disallowed in whole or in part, an appeal lies under s. 26 (1).

Hutchison J. interpreted the relevant words to mean that the owner or occupier of property has a right to object if the property is affected by the scheme. That is to say, the adverse affect must relate to the property itself and not to the public interest. That is made clear by s. 24 about which the learned Judge said:

> "I cannot think that the plaintiff's alternative submission is any different from his saying that he has a right to object and to appeal in the public interest: and the only right to object in the public interest, as distinct from the right of a person to object on account of his property, is by s. 24 to such bodies as are there mentioned."

In the opinion of the Board, the effect referred to in s. 23 (1) is an adverse effect in the nature of a detraction from amenities sufficient to justify a finding that it would be unreasonable and unjust to allow the portion of the district scheme to which objection is made, to remain in the scheme.

In the present cases neither appellant has proved that his property will be so affected by the alteration made to the district scheme of the Rodney County, and each appeal must therefore be dismissed.

Appeals dismissed.

Mark *v.* Hutt County

Number Two Town and Country Planning Appeal Board. Wellington. 1970. 4 February.

Conditional use—Application to erect two blocks of flats and a commercial building—Refused by Council—Logical line of demarcation between zones—Adjoining commercial building—Public interest—Suitability of site—Drainage system—Town and Country Planning Act 1953, ss. 28C, 28D, 35.

Appeal under ss. 28D and 35 (6).

Ball, for the appellant.
Wiltshire, for the respondent.
Relling, for the objector.
Simpson, for Paraparaumu Developments Ltd.

The judgment of the Board was delivered by LUXFORD S.M. (Chairman). This is an appeal against the refusal of the respondent to consent to:

(a) The conditional use of portion of a block of land with a 12-foot carriage way access from Amohia Street in the Township of Paraparaumu for the erection of two blocks of flats each containing two units and two gargaes—and
(b) A specified departure to enable the balance of the block to be used for the erection of a building having two storeys containing shops and offices for letting as such.

The block of land is rectangular in shape having a 68-foot frontage to Amohia Street (which is part of No. 1 State Highway) and a uniform depth of 330 feet. The portion proposed to be used for the flats is at the rear or north-east end of the block with the access way to Amohia Street to which reference has already been made. The remainder of land proposed to be used for the shops and offices is in the south-west corner of the block and has a street frontage of 54 feet and a uniform depth of 51 feet.

The zoning of the land comprising what is known as Paraparaumu Township has proceeded on the basis that the development of the land needed for commercial and industrial purposes should be to the west of Kapiti Road. That is the road which connects the No. 1 State Highway with the Airport, and carries the main traffic to and from Paraparaumu Beach. It is a logieal line of demarcation between the commercial and industrial zones on the west and the residential zone on the east. There is, however, a large commercial building, known as Braziers Building, on the land on the south-east corner of the intersection of Kapiti Road with Amohia Street. This building occupies 135 of the 174 feet of the frontage of the land on which it stands. That land adjoins the block, the subject-matter of this appeal.

In the opinion of the Board, it would be contrary to the public interest to allow any further commercial development north of Kapiti Road except in circumstances which constitute a public need of sufficient importance to outweigh any effects adverse to the

public interest caused thereby. No such circumstances exist in the present case, and that part of the appeal is therefore disallowed.

The proposed use of the rear portion of the land for erecting two blocks of flats each containing two units and a garage for each unit could properly have been granted if the site were suitable. The provisions of s. 28C (3A) (a) require the local authority in the first instance, and the Appeal Board on appeal to have regard to—

"The suitability of the site for the proposed use determined by reference to the provisions of the operative district scheme."

This mandatory provision relates to the bulk and location provisions applicable to the particular purpose for which the consent is sought and any other provisions in the district scheme which also may be applicable, but it is not exclusive That is to say, the Board may have regard to other matters which are relevant to the suitability of the site, notwithstanding that it complies with all requirements prescribed by the district scheme. In the present case, the evidence of the (County) acting locality engineer and of the (County) health inspector establishes, *prima facie*, that the proposed site for the flats is not suitable for residential purposes because, in the absence of a public sewerage system and a public system for the disposal of storm water, the soil structure is not adequate for safe disposal of these things and the health of persons occupying the flats may be endangered. This *prima facie* evidence was not rebutted. For that reason, it would not be in the public interest to consent to the conditional use of the land applied for.

This part of the appeal is therefore also disallowed.

Appeal dismissed.

Kean *v.* Auckland City

Special Town and Country Planning Appeal Board. Auckland. 1970. 27 February.

Zoning—Freemans Bay Reclamation Area—Land within "total clearance area"—Application to revoke proclamation and rezone area—Town and Country Planning Act 1953, s. 26 (1)—Housing Improvement 1945, Part 2.

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

Appellant, in person.
Lee, for the respondent.

The judgment of the Board was delivered by

CARSON S.M. (Chairman). This appeal, made under s. 26 (1) of the Town and Country Planning Act 1953, shows that the appellant is the owner of two areas of land in Ponsonby in the City of Auckland, namely a block of shops at Nos. 18, 20, 22 and 24 College Hill and a residential property at No. 36 College Hill. Those lands come within the Freemans Bay Reclamation Area, parts of which were successively gazetted under Part 2 of the Housing Improvement Act 1945 in 1950 and 1951. The total extent of the land now included within such Area (which is, in turn divided into a number of sub-areas) appears to be 238 acres. The appellant's lands are located within Area I of the sub-areas above referred to. Of that particular Area, the respondent's Assistant Chief Town Planner in the course of his evidence said, *inter alia:*

"1. Total Clearance Areas: In Area I, Council policy is to achieve total clearance and redevelopment.

"As it is proposed to complete this work in ten years, Council will not encourage rehabilitation of properties in these areas. Also, because total clearance and redevelopment can result in a new street and subdivision pattern, private redevelopment will not be permitted unless it accords with Council's own plans for the area, or is to a development plan, for an area of not less than three acres, which has been approved by Council.

"2. . . . it is only in Area 1 (the total clearance Area) and Area 6 (motorway land) that private redevelopment by individual property owners is precluded.

"3. The appellant's properties are within Area 1, the total clearance Area of the Reclamation Area, and are zoned R. 5. The total clearance Areas, together with those blocks already redeveloped by the Council, form a belt across the lower portion of the Bay, which contains most of the worst housing within the Reclamation Area.

"It is the Council's strategy to firstly redevelop this belt, so as to form a barrier between the industrial uses to the east and the existing housing on the western slopes of the Bay. It is considered that this will do much to improve the aspect of the western slopes and in this way encourage private rehabilitation and redevelopment.

"As a result of other objections to the reviewed district scheme, the warehousing 1 zone has been extended to Cascade and Middle Streets, as this increase in the warehousing area would not appreciably increase the loss of amenity to future residential development, provided access to the W.1 zone was not by way of Cascade or Middle Streets.

"However, it is considered essential that no further land in the area be re-zoned W.1 and that all the land between College Hill, England Street, Franklin Road, and Cascade and Middle Streets, should be retained in the total clearance area, so as to preserve a block of adequate dimensions for a comprehensively designed housing development.

"It is further considered that it is important that the residential development front on to College Hill, so that it is visible to the substantial amount of traffic using College Hill. It is in the best interests of the future redevelopment of the Bay if it presents a 'residential face' rather than an 'industrial face' to the public, so that as many people as possible are aware of improvements, and can see that the Bay is again becoming a desirable residential area."

Upon the basis of assertions such as that no recommendation had been made for the provision of alternative accommodation for home owners dispossessed of their homes under the district scheme, that the Freemans Bay Reclamation scheme was now hopelessly out of date, uneconomic, unrealistic and totally beyond the financial resources of the Auckland City Council and that it would take over 200 years to complete the scheme, the appellant prayed that:

(i) The above-mentioned Proclamation made under the Housing Improvement Act 1945 be revoked;
(ii) The area in which his lands are located be rezoned in accordance with an undertaking he claimed to have been given by the Auckland City Council in 1960.
(iii) The block in which his property is situated "be zoned light industry or commercial".

The Board has considered carefully such evidence as was made available to it in this case and has concluded that, even if it had been shown that appropriate jurisdiction resided in it to entertain and determine

upon the appellant's prayer that the above-mentioned Proclamation should be revoked, no grounds are apparent upon which a finding favourable to the appellant in that regard would have been warranted. Nor is there any acceptable evidence, in the somewhat unusual circumstances of this case, to warrant a finding either that an undertaking such as was contended for by the appellant was given to him by the respondent in 1960 or that the zoning of his land should for that or any other reason be changed. It follows, therefore, that this appeal must be disallowed.

Appeal dismissed.

G. D. Bunting Limited *v.* Auckland City

Special Town and Country Planning Appeal Board. Auckland. 1970. 4 March.

Zoning—Land zoned residential R3—Application to zone as commercial C2—Disallowed by Council—Appeal —Need for further land for commercial purposes—Town and Country Planning Act 1953.

Davidson, for the appellant.
Lee, for the respondent.

The judgment of the Board was delivered by

CARSON S.M. (Chairman). This is an appeal against the respondent's disallowance of the appellant company's objection to the zoning as residential R3 of two properties, each being part of Allotment 29, Section 10, Suburbs of Auckland, and located at Nos. 1 and 3 Alba Road, Epsom, Auckland. The appellant requested that such lands should be zoned commercial C2. The grounds upon which its appeal was based were that commercial areas in the neighbourhood had been or shortly would be substantially reduced as a result of the carrying out of public works, that it was unlikely that the commercial areas remaining would be redeveloped, that the area was in need of further property capable of commercial development, that the development for commercial purposes of the company's properties would not create a traffic hazard and, generally, that the respondent's decision in respect of the objection made to it was contrary to the principles of town and country planning and such objection accordingly should have been allowed.

The evidence tendered on the appellant's behalf consisted of that of Mr G. D. Bunting, the company's managing director, whose business was said to be that of a real estate agent. That business had been carried on at premises located at the corner of Manukau and Alba Roads, Epsom, that is to say in a property east of and adjacent to the lands to which this appeal relates.

The evidence adduced made it clear that the situation obtaining in the area in which the appellant's properties are located had been materially affected by the construction of the first section of the Green Lane-Mt. Albert Regional Road. The works associated with such road were said to have resulted in the acquisition for public utilisation of approximately one acre of commercially zoned land forming part of the Epsom shopping area. Included within the land so acquired was the property wherein Mr Bunting had carried on his business operations.

Mr Bunting's evidence was presented with a considerable measure of detail and was calculated, as it did, to acquaint the Board of the situation, from the witness's point of view, now obtaining within the Epsom shopping area.

For the respondent, Mr J. E. Bolton, a senior town planner employed by the Council, said that the Council's policy "for future treatment of the Epsom commercial centre was, in essence, the redevelopment of the area within the existing framework of commercial zoning" until such time as the land at present so zoned was insufficient to meet the needs of the area. Mr Bolton expressed the opinion that, to achieve investment of capital in existing premises, it was necessary as a first step to limit commercial zoning to the land now so zoned; also that existing premises within that commercial area were structurally sound although, in the main, somewhat run-down and of poor appearance. Commercial centres of that type and in that condition, he said, were particularly vulnerable to pressures from more modern centres and were likely to succumb to those pressures in the absence of deliberately initiated counter action. Mr Bolton concluded that part of his evidence by saying that, if further commercial development were allowed to take place outside the present zoning framework and a policy encouraging regeneration of existing commercial facilities was not promoted, the amount of land committed to unattractive, inconvenient and poorly supported retailing premises would, in effect, be materially increased. For those reasons, he asserted, the Council had not extended the existing commercial zoning and that action on its part could be regarded as a first step toward encouraging redevelopment and regeneration of existing commercial premises.

The Board has studied carefully not only the evidence made available to it in this appeal but also the plans produced in support thereof. It is noted that, except where Alba Road meets Manukau Road (where the zoning is commercial C2), the land fronting upon the northern boundary of Alba Road between Manukau Road and The Drive is zoned either residential R3 or residential R4 deferred. To the immediate north the land fronting upon the southern boundary of Queen Mary Avenue is zoned residential R4.

A material factor to be considered in determining whether land fronting upon the northern boundary of Alba Road should or should not be zoned commercial is that, although, consequent upon the construction of the Regional Road, provision for the parking of 75 vehicles appears to have been made in part of Alba Road not required for the purposes of the Regional Road, it was not made clear in the course of evidence as to how access to that area was to be obtained and it could well be that access for vehicles would be obtained only from The Drive, and then only by making a U turn so far as at least some vehicles were concerned. The Board has considered carefully that and all such other factors as appeared to it to be material to the determination of this appeal and is satisfied that, in the situation now obtaining in the area wherein the lands to which this appeal relates are located, the zoning for commercial purposes of lands fronting Alba Road and at present zoned residential R3 would not be warranted. Rather does it seem that, if circumstances should later arise warranting the zoning for those purposes of further lands within such general area, serious consideration will then require to be given to the question whether that zoning should preferably and more appropriately be applied to lands other than those having a frontage to Alba Road.

For the foregoing reasons this appeal is disallowed.

Appeal dismissed.