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THE POLICEMAN'S LOT

The announcement by the Commissioner of Police, Mr W. H. Sharp, that the findings of the Police Tribunal in respect of disciplinary charges brought against seven policemen arising out of an incident in Alexandra some months ago, will be made public, marks a welcome and, it might be said, more enlightened approach to the relationship between the police and the public they are designed to serve.

The head of any organisation which serves the public must, from time to time, by the very nature of things be torn between the need to demonstrate loyalty to his staff—essential for departmental morale—and the conflicting need to show openness and fairness to the public. It is easy to overlook the latter in favour of the former, particularly as departmental staff are often personally known to their head, and "the public" is a vague and amorphous being.

One may ask just what it is that has prompted this change in policy, since the same Commissioner refused to reopen the Agnew demonstration inquiry, even after the Ombudsman, Sir Guy Powles, had found that the inquiry fell short of what was required. In that instance, it will be recalled, both the Minister of Police, Hon. D. Thomson, and Commissioner Sharp made premature denials of misconduct, with the result that they were subsequently trapped by their public utterances.

In the present case, no such precipitous commitment has been made and the affair has, at least to the time of writing, been handled in a way which suggests that the police are coming to terms with their need for more skilful and more sophisticated public relations.

The job of the policeman depends upon public support. And with society tending more and more to polarise into camps of "us" and "them", hostility has been breeding. The English Royal Commission on the Police reported in 1962—"The Police and the community are one. The police act for the community in the enforcement of the law and it is on this enforcement that the liberties of the community rest. [But] the police cannot successfully carry out their task . . . without the support and confidence of the people."

There will, perhaps, always be groups who regard the police as an anathema. Within these groups must be those to whom the law seems unjustly oppressive—including, at present, homosexuals and those who smoke marijuana—but for all there is a very real need to see the policeman less as a member of the "police" (i.e. one of "them") and more as a "man" (i.e. one of "us").

The policeman may be likened to the refuse collector of society. To him it falls to take in all the many and varied jobs that no one else would dream of touching. Of prising battered, bloodied bodies from the tangled wrecks of motor cars; of cleaning up after suicides; of breaking news of tragedy to next-of-kin; of adopting the position of shield when violence flares to threaten other members of society.

It has been the eternal lot of the policemen that his be not a happy one, and this has been compounded by the political activist. For many simplistically define the role of the policeman as simply that of putting down the demonstrator, of stifling his attemps to exert his democratic rights, and of suppressing those who seek to exercise their so-called "freedom of speech."

How many of the derogators on this score have considered the fact that the policeman himself has his own personal and political convictions? That some at least of the policemen who were forced to take action against both the

Agnew demonstrators and those who were opposing the last rugby tour of South Africa, in fact *shared* the views of the demonstrators and felt grossly humiliated at being forced (either by the demonstrator or by the law) to take the action they did?

For it goes without saying, yet seldom seems to be considered, that the policeman is, above all, a man. As such he is susceptible to the same pressures, the same emotions and the same fears as us all. As the *Law Society's Gazette* noted: "The police consists of ordinary human beings with sensibilities and emotions; the performance of their job as policemen may affect these sensibilities and feelings—this is not surprising, it is not horrifying, it is something to be expected." And again: "Susceptibility to ordinary human feelings may create problems . . . but ultimately is surely our surest guarantee that police power, though it may not be *exactly* in tune with the sense of the community at any one time, will never be very far from it."

However, the fact that the strength of the police force lies in these susceptibilities tends to be overlooked and to be obscured by what some have seen as an attempt to "hush up" or "whitewash" complaints. The result has been a loss of public confidence in the police's ability to investigate complaints made against it's own members.

So far have matters deteriorated that some have publicly claimed that Commissioner Sharp is not now going far enough; that he should open the hearings of the disciplinary tribunals to the public and not merely make public their findings. This is plainly unacceptable. There is a tendency amongst news media to dramatise reports of all descriptions. To permit the press to report the actual proceedings at disciplinary hearings could only lead to the public crucifixion of many a good constable (on the old premise that "where there's smoke there's fire") and would inevitably create a critical lack of confidence within the force itself.

Perhaps the Press Council-to-be will be able to take the matter up, as there may well be a supervisory role here that the press could play. By this it is meant that the press might well be admitted to proceedings in much the same way as they are admitted to Court hearings which are otherwise closed to the public. But, as in the case of closed Court hearings, the press would not be permitted to publish actual reports of proceedings. However this would not prevent the press from commenting on procedures, on the system itself, and generally how fairly matters were conducted, and their ability to be present at the hearings would, in this respect, represent the public interest. A better step might be, as has previously been suggested, to use laymen (i.e. those who are not members of the police) on the tribunals which deal with complaints against the police. The statutory authority for such a policy already exists (*cf* s. 33 of the Police Act 1958), and what really is lacking is the determination to publicly implement this provision. Possibly both steps could be combined.

For it is of paramount importance that the credibility gap which so patently exists not only be bridged but be bridged in such a way that public confidence is restored and both police and public enabled to revive an atmosphere of mutual trust, confidence and respect.

JEREMY POPE.

CROWN SOLICITOR APPOINTED

The appointment has been announced of Mr W. F. Thomson as Crown Solicitor at Dunedin in succession to the late Mr J. B. Deaker. The new Crown Solicitor is a member of the firm of Adams Bros. He assisted the former Crown Solicitor for many years in the Crown work at Dunedin.

In announcing the appointment, the Acting Attorney-General, Rt Hon. J. R. Marshall said that following the practice adopted in recent years in Christchurch and Wellington, a small panel of barristers from other Dunedin legal firms will be established who will be briefed from time to time in cases for hearing in the Supreme Court.

Mr Thomson was born in 1915 in Western Australia and came to New Zealand at an early age. He was educated at Christchurch Boys' High School, the University of Canterbury and Victoria University of Wellington. He was admitted as a Solicitor of the Supreme Court in 1940 and a barrister in 1947. He served with the Royal New Zealand Artillery overseas during the war and at the end of 1944, he joined his present firm of Adams Bros. For the past four years he has been a member of the Council of the Otago District Law Society.

Barristers' Hair Length—"At the English Bar there have not been any long haired barristers yet but that, I suggest, is because they think old buffers like myself and my contemporaries might be slightly unconsciously prejudiced": Lord Diplock.

SUMMARY OF RECENT LAW

CRIMINAL LAW—CRIMES AGAINST RIGHTS OF PROPERTY

Fraudulent conversion—Partner with authority from co-partners obtaining cheque for specified purpose—Part of proceeds of cheque fraudulently converted to his own use—Theft—Crimes Act 1961, ss. 220, 222. The appellant had been convicted of failing to account for part of the proceeds of a cheque for $6,000 and fraudulently converting to his own use $1,500. The appellant was an investment consultant in partnership with one J. J's parents had deposited $25,000 with a firm of solicitors. The appellant was overdrawn on his private account in excess of his limit of $600 which was secured by a term deposit of $600. The appellant wished to complete a transaction for $4,500 on behalf of the firm. J. obtained written authority from his parents to obtain $6,000 out of the $25,000 for—"first mortgage covers for 3 or 4 months' duration, after which period the money will be returned by him (j) to your trust fund." Upon this authority the appellant collected a cheque for $6,000 and paid it into his firm's account. Subsequently he withdrew $4,500 for the purpose of the contemplated transaction and a further cheque for $1,500 which he handed to the bank manager to increase his term deposit from $600 to $2,100 hereby increasing his personal overdraft limit to $2,100. *Held*, 1. While s. 220 of the Crimes Act 1961 defines "common theft" s. 222 renders persons criminally responsible in other circumstances as well. Any person acting in breach of s. 222 is regarded as having committed theft. (*R.* v. *Tennent* [1962] N.Z.L.R. 428, followed. 2. Section 222 of the Crimes Act 1961 contains two different offences: (a) fraudulent conversion of moneys received on account of another and (b) fraudulent omission to account for or pay money received on account of another. 3. At common law there could be no larceny without asportation, but under s. 222 of the Crimes Act 1961 which deals with fraud asportation is not necessary. 4. A person who pays money into a bank account and subsequently withdraws it in breach of the terms on which he has been entrusted with th money is guilty of conversion under s. 222. (*R.* v. *Bruges* (1906) 9 G.L.R. 66, referred to.) Appeal from the judgment of Roper J. (unreported) dismissed. *Mead* v. *The Queen* (Court of Appeal. Wellington. 6, 9, 25 August. North P. Turner J. Haslam J.)

HUSBAND AND WIFE—MAINTENANCE

Discharge of maintenance order—Maintenance order "unfair and unreasonable" being so at variance with the original contemplation of parties—Domestic Proceedings Act 1968, s. 85 (2), (3)—Husband charged with disobedience of maintenance order—Oral application by husband to vary maintenance order—Wife not entitled to notice of oral application but must have opportunity to be heard—Domestic Proceedings Act 1968 s. 107 (6)—Domestic Proceedings Rules 1969 (S.R. 1969/262) r. 20. This was an appeal by a wife against the decision of a Magistrate suspending a maintenance order in her favour. The husband and the wife entered into a separation agreement on 16 February 1970 whereby the wife was to receive $18 per week and $4 per week for each of the three children making a total of $30 per week. The agreement was registered in the Magistrate's Court on 13 March 1970. It was agreed that she should go to Invercargill and take a flat there. She did not do so and the husband eventually located her at Gore where she and the three children were living in the home of S. The husband stopped paying maintenance for the wife and petitioned for divorce on the ground of adultery with S. The petition was dismissed, the evidence being that the wife was employed by S. as a housekeeper and she and the three children were receiving free board and lodging and in addition $6 per week wages. The husband did not resume payments of maintenance for the wife and the maintenance officer at Gore issued an information against him under s. 107 of the Domestic Proceedings Act 1968. The information was heard at Upper Hutt, counsel for the husband gave notice in Court that he would apply for suspension of maintenance for the wife and the case was adjourned to enable the wife to be heard. The wife took no action until after a further adjournment when her evidence and that of S. was taken at Gore. The Magistrate dismissed the information against the husband and suspended the existing order for maintenance of the wife and increased the maintenance for the children. *Held*, 1. On an oral application by a husband under s. 107 (6) of the Domestic Proceedings Act 1968 the wife is not entitled to notice thereof pursuant to r. 20 of the Domestic Proceedings Rules 1969. All that is necessary is that she should have an opportunity to be heard. 2. The relevant date for considering a change of circumstances is the date of the separation agreement. 3. At the date of the separation agreement the husband believed that in accordance with their arrangement the wife was going to Invercargill. In fact at that date she was living at Gore. 4. The subsequent discovery of material evidence as to circumstances existing at the time of the original order can never amount to a change of circumstances to give the Court jurisdiction under s. 85 (3) of the Domestic Proceedings Act 1968. (*Kennedy* v. *Kennedy* [1966] N.Z.L.R. 297, followed. *Green* v. *Green* [1959] N.Z.L.R. 1246, not followed.) 5. There was no change of circumstances. 6. The expression "unfair or unreasonable" in s. 85 (3) includes any matter which is so at variance with the original contemplation of the parties that in the opinion of the Court the person seeking the variation would not have entered into the particular agreement had the true position been known. 7. The original agreement was so at variance with the existing position as to make the order "unfair or unreasonable", that the appeal was dismissed on that ground under s. 85 (3) which had not been considered by the learned Magistrate. *Richards* v. *Richards* (Supreme Court. Wellington. 17, 20 August 1971. Quilliam J.).

HUSBAND AND WIFE—MATRIMONIAL PROCEEDINGS (SUPREME COURT)

Maintenance—Amount of order—Husband remarrying—Maintenance of wife—Matrimonial home—Application for vesting of matrimonial home after decree of divorce—Matrimonial Proceedings Act 1963, ss. 41 (1) (b), 59 (1). This case deals with three different matters (a) the amount of maintenauce (b) the matrimonial home and .c) the paymcnt of a lump sum for the cost of repairs to the matrimonial home. The appellant and the respondent had been married for twenty years and had six children. The appellant was the concert master of an orchestra of which the respondent was a regular salaried member. The appellant after the marriage had

been dissolved remarried another salaried member of the same orchestra. In the Court below the learned Judge fixed the maintenance at $75 per month but in the Court of Appeal the true amounts of the income of the respective parties was put forward by agreement and these amounts differed from those upon which the learned Judge based the order for maintenance. *Held*, 1. The obligation to provide for the first wife is the primary duty of a husband and the obligations arising from the husband's second marriage must not be discharged or allowed to be in any substantial sense at the expense of the first wife. (*Lyne* v. *Lyne* [1951] N.Z.L.R 287, 289, applied.) 2. In England where the standard is less rigid an innocent wife is generally entitled to be supported at a standard as near as possible to that which she enjoyed before cohabitation was disrupted by the wrongful conduct of the husband. (*Roberts* v. *Roberts* [1970] P. 1; [1968] 3 All E.R. 479, referred to.) 3. The Court's discretion is not limited and it may make whatever order it considers just if the standard of comfort of the first wife is lower than it should be. 4. The amount of maintenance is not to be decided by the application of some strict arithmetical process and the Court must exercise its discretion to obtain a fair result on the facts of the particular case. (*Powell* v. *Powell* [1951] P. 257, 262, followed.) 5. It is doubtful whether the Court may order a settlement of the matrimonial home under s. 41 (1) (b) of the Matrimonial Proceedings Act 1963 in a case where application has been made too late to exercise the jurisdiction to do so under s. 59 (1) of that Act. 6. Where an order for a capital sum is made for the purpose *inter alia* of enabling the wife to have necessary repairs done to the husband's house the husband is entitled to know what is being spent by way of repairs. 7. A condition was attached that if the wife proposed to spend more than $100 for any one purpose she must inform the husband in writing and if he disputed the proposal within 14 days the question was to be referred to some competent independent person. 8. The husband was ordered to execute a mortgage over the matrimonial home in favour of the first wife to secure due compliance by him with the order of the Court. *Lindsay* v. *Lindsay* (Court of Appeal Wellington. 18, 27 August 1971. Wild C.J. North P. Haslam J.)

INCOME TAX—ASSESSABLE INCOME

Trading stock—Sale of farm land live and dead stock for global sum—Value of live stock fixed in agreement by parties—Commissioner's power to attribute value to live stock—Income Tax Act 1954, ss. 98 (7) (8), 101 (1). The objectors carried on a farming partnership at Glen Murray and conditionally agreed to sell the farm and live and dead stock for a global sum of £200,000 on 1 December 1964. Under the agreement if the conditions were fulfilled possession was to be given on 2 June 1965. In the agreement the live stock were valued at £27,750 and it was accepted that the value of the land was £147,500 and the value of the dead stock was £3,600. The Commissioner purporting to act under s. 101 (1) of the Land and Income Tax Act 1954 attributed the sum of £82,555 to the live stock based on a valuation made for the purchaser on 14 June 1965, twelve days after settlement of the transaction. The objectors contended that s. 101 (1) was only applicable where the purchase price of the stock was not ascertainable from the terms of the agreement itself and secondly if s. 101 did apply then the valuation of the live stock should have been made as at 1 December 1964 and not as the Commissioner contended as at 2 June 1965. *Held*, 1. Section 101 (1) of the Land and Income Tax Act 1954 is applicable to every case where any trading stock is sold together with other assets of a business whether or not the parties have attributed a price to the trading stock. 2. The agreement executed on 1 December 1964 was a conditional agreement. 3. The proper date for valuing the stock was at the date of settlement. The judgment of Woodhouse J. (unreported, Hamilton, 2 November 1970), affirmed. *Hansen and Others* v. *Commissioner of Inland Revenue* (Court of Appeal Wellington. 17, 18 May; 16 July 1971. North P. Turner and Haslam JJ.).

INCOME TAX—INCOME TAX PAYABLE

Assessable income—Expenses exemptions and deductions—Taxpayer company purchasing assets and goodwill of another company—Goodwill included import licences and customer lists—Taxpayer claimed deductions in respect of licences and customer list—Licences and lists properly part of goodwill payment—Impermanence of goodwill irrelevant—Deductions disallowed—Land and Income Tax Act 1954, ss. 111, 112 (a). This appeal by way of case stated raised the question whether the respondent was entitled to deduct for the purposes of income tax the sum of £8,750 in relation to the value of import licences and £3,000 in relation to the value of a list of customers. The respondent in 1966 offered to purchase from A. J. Entrican Sims and Company Ltd. the latter's wholesale grocery, tobacco, confectionery and fancy goods business including all stock in trade, import licences and goodwill and its retail grocery businesses at Wellsford and Pukekohe. The offer contained detailed particulars of the various items included in the offer one of which was headed "goodwill". Under the latter heading there was included all import licences and a complete list of retail and institutional customers and a requirement that the vendor co-operated in circulating these customers. The amount stipulated in the offer for this goodwill was £11,750. On 20 May 1966 this offer was accepted. The respondent claimed deductions for the years ending 31 July 1966 and 1967 described as a "provision for write-off of Entrican's licences" for the purposes of income tax. The Commissioner disallowed the claims and eventually a case was stated for the Supreme Court. In the Supreme Court the only matters in issue were whether the two sums of £8,750 and £3,000 were deductible. Hardie Boys J. held that the sum of £8,750 was a capital payment and not deductible and that the sum of £3,000 was a revenue payment and was deductible. The Commissioner appealed against the deductibility of the £3,000 and the respondent cross-appealed against the non-deductibility of the £8,750. *Held*, 1. The language chosen by the parties to describe an item is not necessarily conclusive of its legal attributes. (*Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* (1946) 30 T.C. 11; [1948] 1 All E.R. 555, applied.) 2. The true approach was to examine what items were comprehended under the general heading of "goodwill" and decide whether or not they fell within the accepted definition of "goodwill". 3. Where a trader buys out a rival in order to secure his goodwill or to suppress it and so provide or maintain a clear field for his own enterprise over a substitutional period, that is a capital item. 4. "Goodwill" of a business although composed of a variety of elements must be treated as one whole and not split up into its component parts. 5. The purpose of a payment for "goodwill" is to buy out opposition. The fact that the benefit was not perpetual does not deprive it of its capital attributes. (*Sun Newspaper Ltd. and Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation*

(1939) 61 C.L.R. 337, applied.) 6. All the benefits included under the heading "goodwill" were all matters falling within the accepted definition of the kind of goodwill which attaches to the proprietor of a business and normally speaking, lies in the probability that customers will continue to resort to the business on a change of ownership. Appeal as to £3,000 allowed and the cross-appeal as to £8,750 dismissed. *Commissioner of Inland Revenue* v. *L. D. Nathan and Company Limited* (Court of Appeal Wellington. 12 July; 4 August 1971. North P. Turner and Haslam JJ.).

PUBLIC WORKS—COMPENSATION FOR LAND TAKEN

Amount—Notice from respondent of requirement for public work under s. 21 of Town and Country Planning Act 1953—Designation in proposed review of district scheme—Designation "prospect of the work"—Designation disregarded in valuation—Finance Act (No. 3) 1944, s. 29 (1) (d). The plaintiff claimed compensation under the Public Works Act 1928 for land taken by the respondent for the purposes of sewage works (sludge disposal) pursuant to a proclamation dated 3 October 1969. The appellant's land had been zoned "rural" but on the quinquennial review on the requirement of the Minister of Works under s. 21 of the Town and Country Planning Act 1953 the land had been rezoned "rural 5". The latter zoning is appropriate to cases in which the land is most unlikely to become available for urban use. Prior to the quinquennial review architects had prepared a scheme for developing 1,100 acres for urban purposes of which the appellant's land formed part. The appellant and others objected to the "rural 5" zoning but prior to the City Council hearing these objections, the appellant's land had been taken by the respondent and the appellant's objection was allowed to lapse. The other objectors called no evidence and their objections were finally disallowed and the objectors appealed to the Town and Country Planning Appeal Board who had not adjudicated thereon at the time of hearing this action. *Held*, 1. The respondent's requirement of the land for "sewage disposal" fell within the phrase "the prospect of the work" in s. 29 (1) (d) of the Finance Act (No. 3) 1934. 2. In valuing the land no account should be taken of the zoning "rural 5" and it should be valued as "rural" but with such prospect of being zoned "residential" as it would have had but for the respondent's requiremeut. *Lewis* v. *Christchurch Drainage Board* (Supreme Court (Administrative Division) Christchurch. 27, 28, 29 July; 25 August 1971. Wilson J.).

TRANSPORT AND TRANSPORT LICENSING—DRIVING WHILE ALCOHOL IN BLOOD IN EXCESS OF STATUTORY LIMIT

No statutory requirement that appellant be continuously in presence of traffic officer after latter suspects commission of offence—Transport Act 1962, s. 58A. The appellant was convicted in the Magistrate's Court of driving a motor car when the proportion of alcohol in his blood exceeded the statutory limit. The traffic officer saw the appellant's car approaching with only one headlight and turning his car he chased the appellant's car. The appellant did not stop when called upon to do so but eventually turned into a driveway and the traffic officer followed him. The officer had good grounds for requesting a breath test and one was carried out in the appellant's car and was positive. The appellant was asked to accompany the traffic officer to the police station. The appellant asked whether he could first go into the house and tell his wife that he would be away for a while. Permission was given and he remained in the house for 16 minutes and then accompanied the officer to the police station where the second breath test was taken. The appellant appealed on two grounds (a) that the traffic officer had no jurisdiction on private property and (b) that he had not been in the company of the traffic officer from the time the officer had good cause to suspect the commission of an offence under s. 59A of the Transport Act 1962. The first ground failed on the principle decided in *Kelly* v. *Lower Hutt City* [1972] N.Z.L.R. 126. This case is reported only on the second ground. *Held*, There is nothing in the statute which requires a suspected person to remain continuously in the presence of the traffic officer who suspects him. (*Stewart* v. *Police* [1970] N.Z.L.R. 560, 566, explained and distinguished. *Moore* v. *Brian* (Unreported, 27 November 1970, Quilliam J.), followed.) *Potter* v. *Transport Department* (Supreme Court Wellington. 11 November 1970; 13 August 1971. Quilliam J.).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Driving whilst under the influence of drink or drug—Evidence—Officer having "good cause to suspect" commission of offence—Standard of proof—Transport Act 1962, s. 59B. Criminal Law—Appeal in summary jurisdiction—Case stated—Appeal to Court of Appeal from Supreme Court decision on a case stated—Jurisdiction of Court of Appeal—Summary Proceedings Act 1957, ss. 107, 144. This was an appeal from a judgment of the Supreme Court reversing the decision of the Magistrate's Court. The respondent was charged with driving a motor vehicle while the alcohol content in his blood was in excess of the statutory limit. Breath tests were validly taken and were positive. On analysis the blood specimen was recorded as having an alcohol content of 220 milligrams. The respondent had successfully contended in the Supreme Court that the evidence did not establish that the traffic officer had "good cause to suspect" that the respondent had committed an offence. *Held*, 1. The powers of the Court of Appeal to review the judgment of the Supreme Court in respect of summary offences are limited by s. 144 of the Summary Proceedings Act 1957 to questions of law. 2. Whether the traffic officer "had good cause to suspect" that an offence had been committed was a question of fact. 3. The decision of the Supreme Court was not reviewable by the Court of Appeal unless it was first shown the findings of fact were dependent on an erroneous view of the law. (*Pinner* v. *Everett* [1969] 1 W.L.R. 1266, 1282; [1969] 3 All E.R. 257, 266, applied.) 4. "Good cause to suspect" on the part of the officer is a statutory condition precedent without the fulfilment of which the subsequent use of the statutory procedures will be in vain. 5. The ordinary standard of proof is sufficient in judging whether a traffic officer "had good cause to suspect", it is not required to be proved beyond reasonable doubt. 6. Although the Court of Appeal is given jurisdiction under s. 144 of the Summary Proceedings Act 1957 on questions of law only, if it finds that the Judge misdirected himself in law, the Court in order to decide the case, assumes jurisdiction over questions of fact. (*Levin & Co.* v. *Commissioner of Inland Revenue* [1963] N.Z.L.R. 801, 818, 827, followed.) Judgment of Roper J. (unreported, Timaru, 29 June 1970), reversed. *Police* v. *Anderson* (Court of Appeal Wellington. 10 May; 14 July; 27 August 1971. North P. Turner and Haslam JJ.).

WILLS—CONSTRUCTION

Description of relationship—Inclusion of illegitimate relations—Bequest to children—Status of Children Act 1969, ss. 3. 4. Wills—Construction—Admissibility of extrinsic evidence to explain testatrix's intention—Surrounding circumstances. In this case the plaintiff claimed the testatrix's house under the Law Reform (Testamentary Promises) Act 1949 but the claim was rejected on the evidence. The plaintiff also claimed for further provision out of the testatrix's estate under the Family Protection Act 1955 and she was granted a life interest in the estate and subject thereto the will was to take effect according to its tenor. The testatrix had died on 9 May 1967 and under her will bearing date 28 April 1967 the residue was divided into three equal parts and *inter alia* provided as follows: "As to two such parts for such of them the children of my said daughter (including Tony Sisson, Sally Sisson, Harley Sisson, Liecester Sisson, Yulette Sisson and Verity Sisson) as are living at my death and if more than one in equal shares." The testatrix knew at the time of making her will that the plaintiff, her daughter, was separated from her husband. Two months later the plaintiff gave birth to a daughter Kasey who was not the child of her husband. The question arose whether Kasey was entitled to a share in such two parts of the residue. This case is reported on that point only. *Held*, 1. Prior to the passing of the Status of Children Act 1969 the general rule was that only legitimate children could take under a class gift to children. 2. Under the provisions of s. 4 of the Status of Children Act 1969 all instruments executed before the passing of that Act are governed by the rules of construction applicable prior to the passing of the Act. 3. There were two exceptions to the general rule (a) where no legitimate children could take under the gift and (b) where upon the face of the will and upon its true construction the intention of the testator was to include illegitimate children. (*Hill* v. *Crook* (1873) L.R. 6 H.L. 265, 282 and *Re Stevenson* [1944] N.Z.L.R. 301, 309, applied.) 4. The youngest child named in the will was eight years old when the testatrix made her will and by use of the word "including" it could be deduced that the testatrix contemplated her daughter might have other children. 5. In the circumstances the will operated as a guide book and so the Court was entitled to look at the available extensive evidence. (*Re H.* (*deceased*) *Smith* v. *Public Trustee* [1956] N.Z.L.R. 48, referred to.) 6. The testatrix knew that her daughter was separated from her husband and it was reasonable to conclude that she knew her daughter was pregnant. 7. The child Kasey was entitled to take a share under the will. *Re Langley* (*deceased*), *Sisson* v. *Public Trustee* (Supreme Court Napier. 3, 4 June; 12 July 1971. Wild C.J.).

REGULATIONS

Regulations Gazetted from 27 January to 10 February 1972 are as follows:

Chiropodists Regulations 1967, Amendment No. 2 (S.R. 1972/7)

Economic Stabilisation (Charges for Aerial Topdressing) Regulations 1971, Amendment No. 1 (S.R. 1972/1)

Exchange Control Exemption Notice 1965, Amendment No. 9 (S.R. 1972/6)

Exchange Control Regulations 1965, Amendment No. 5 (S.R. 1972/5)

Meat Board Regulations 1970, Amendment No. 1 (S.R. 1972/2)

Revocation of Standards Regulations (S.R. 1972/3)

Sales Tax Exemption Order 1967, Amendment No. 9 (S.R. 1972/4)

CATCHLINES OF RECENT JUDGMENTS

Administrative Law—Broadcasting—Functions of Broadcasting Authority—Scope of appeal—Decision to grant warrant on condition that N.Z.B.C. gives up warrant wrong in principle. *N.Z.B.C.* v. *Avon Broadcasting Co. Ltd.* (Supreme Court Administrative Division. Wellington. 1971. 30 November. Wild C. J.)

Income Tax—Payment for goodwill of lease and motel business—Whether income or capital—s. 88 (1) (d) of Land & Income Tax Act 1954. *Romanos Motels Ltd.* v. *Commissioner of Inland Revenue.* (Supreme Court. Wellington. 1971. 10 December. Quilliam J.)

Insolvency—Whether s. 138 (1) (v) of the Bankruptcy Act 1908 is repealed by the Insolvency Act 1971 for the purposes of an offence which was committed before 1 January 1971 but in respect of which proceedings were not begun till after that date. *The Queen* v. *Mackay.* (Supreme Court. Hamilton. 1971. 2 December. Moller J.)

Limitations of Time—Power to extend—Whether exercisable after expiration of initial time limit. *Johnsonville Licensing Trust* v. *Johnsonville Gospel Hall Board & ors.* (Supreme Court, Administrative Division. Wellington. 1971. 15 December. Wild C. J.)

The Lion with the Lamb. Chief Justice Warren Berger's plea for the necessity of civility was eloquently answered at a recent political action seminar in Wellington. Organised by the Wellington Inner City Mission, a number of speakers, ranging from the Hon. R. D. Muldoon to HART's Trevor Richards, spoke to a gathering which included representatives from organisations whose aims traverse all shades of the political spectrum, from the brightest red to the darkest black. The seminar was rated an outstanding success, but perhaps its social implications are greatest in that it demonstrated that the lion *can* lie down with the lamb, and that sheep *may* safely graze.

CASE AND COMMENT

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

"Thin Skull Cases" and Remoteness of Damage

The judgment of McMullin J. in *Stephenson* v. *Waite Tileman Ltd.* (Supreme Court, Auckland, 11 August 1971) is of more than passing interest on two counts. First, because of its discussion of the relationship of the "Thin Skull cases" to the principle of foreseeability of damage enunciated by the Privy Council in *"The Wagon Mound"* (*No. 1*), [1961] A.C. 388. Secondly, because it shows that difficulties from a procedural point of view can arise out of issues put to a jury so that even where the law is comparatively clear (as it was not in the instant case), the jury may answer the issues in a way which conflicts with principles of law.

The plaintiff, a steeplejack was employed by the defendant. On the day of the accident he was employed resetting the wire rope system of a crane at a multi-storey construction site in Auckland. The wire rope sprang free from a sheave and struck the plaintiff's right hand cutting or slashing it on the back. The plaintiff came down from the crane and washed the hand in cold water, but several days later it swelled up, he developed a fever and eventually was admitted to hospital. He then had quite extended periods in hospital and was at the time of the hearing unable to concentrate, prone to headaches, loss of balance, unable to walk without the aid of a stick and practically unable to look after himself. The learned Judge described his condition as "pitiful."

Although there was some difference of opinion by the medical experts as to his real condition, this would seem on the face of it to be arguably either a "Thin Skull case" (personified in *Smith* v. *Leach Brain & Co. Ltd.* [1962] 2 Q.B. 405) or a case which fits into the *"Wagon Mound"* (*No. 1*) rule.

One of the medical experts was of the opinion that the scratch on the back of the plaintiff's hand had become infected, and that from the infection a virus had spread and attacked the nervous system, so that the plaintiff's disabilities were directly attributable to the original scratch.

The other expert was prepared to agree that some sort of infection had entered the cut but he did not think that this infection had affected the brain or nervous system. He thought that the plaintiff was merely suffering from litigation neurosis and that his anxiety state and general condition would improve after the case had reached finality.

The main difficulty in the case arose because of the answers received to the issues put to the jury. These were:

> "Issue No. 2. Was the said cut the cause of the plaintiff's disability?
> *Answer*: Yes.
> Issue No. 3. Was such disability of a kind reasonably foreseeable by the defendant?
> *Answer*: No."

The answers being unsatisfactory the plaintiff moved for the entry of judgment in his favour; or alternatively for a new trial. This motion resulted in the judgment under discussion.

The difficulties which then arose were partially caused by the fact that to a degree the medical experts had been in conflict in their views as to why the plaintiff had suffered from the injury to the extent he had. One can say that the plaintiff's medical witness thought that all the injuries flowed from the infection which entered the hand at the time of the original accident. If that is the case obviously a question of foreseeability becomes relevant because following *"The Wagon Mound"* (*No. 1*) two questions have to be answered, namely, whether the original cut was foreseeable, and if it was, was the entry of the infection and its damage to the nervous system damage of the same kind as was foreseeable. Whereas the view taken by the defendant's medical witness was that the plaintiff was a man with a peculiarly susceptible temperament, in other words a "Thin Skull case", and that the damage flowed directly from the effect of the original infection.

The problems which arose in this case may well have arisen because not enough issues were put to the jury with the result that they became confused between the two tests. If the damage to the nervous system was caused in the way suggested by the plaintiff's medical witness then Issue No. 3 was clearly relevant, but if it were caused by the effect of the scratch on his existing temperament then Issue No. 3 was not relevant. But it appears that in giving the answer "No" to Issue No. 3 the jury may have become confused by the two tests.

On the weight of evidence, whichever way one treated this particular case the damages assessed by the jury should presumably have been the same. If it was a "Thin Skull case" then the defendant, accepting that it owed a duty of care, would be liable for all the damage the plaintiff suffered, but if it were not the defendant would be liable for damage "of the same kind" and the weight of evidence suggested that all the damage suffered was indeed "of the same kind".

That the "*Wagon Mound*" (*No. 1*) can produce complex results is illustrated by the recent English decision in *Tremain* v. *Pike* [1969] 1 W.L.R. 1556 which seemed to ignore the existing state of medical knowledge as well as sound common sense. (In that case a rare disease, Weil's disease, caused by a person coming into close proximity with rat's urine was not regarded as being foreseeable even although some other injury or illness contracted from rats might have been foreseeable.) When read in conjunction with *Wieland* v. *Cyril Lord Carpets Ltd.* [1969] 3 All E.R. 1006 and *Malcolm* v. *Broadhurst* [1970] 3 All E.R. 508 the difficulties of "*The Wagon Mound*" (*No. 1*) test become even more apparent.

In view of his deciding that the answer to issue 3 was not only against the weight of evidence but also that there was no evidence to support it, the learned Judge had to consider whether the situation was one of the rare cases where judgment for the plaintiff could be entered in spite of the jury's answer to the particular issue (as discussed in *Jensen* v. *Hall* [1961] N.Z.L.R. 800) but he concluded that in this particular case it would be better to order a new trial on the question of the damages only.

M.V.

Occupier's Liability—Landlord's Liability in respect of injury suffered by Tenant's Visitor

The case of *Grindley* v. *Mayor etc. of Dunedin* (the judgment of Roper J. was delivered on 14 September 1971) shows that in spite of the existence of the Occupiers' Liability Act 1962 there are still areas of difficulty and uncertainty in the operation of the legal rules relating to injuries on premises.

The question which the Court had to consider in this case was whether a landlord, who is a non-occupier with no duty to repair, has a non-activity duty as well as an activity duty. If the landlord were to have a non-activity duty this would bring his duty very close to a negligence duty.

In brief the facts in the present case were that the plaintiff's mother moved into a pensioner's flat which she leased from the Dunedin City Council. The day after her mother moved in the plaintiff, Mrs Grindley, while cleaning the windows, walked backwards off a small terrace attached to her mother's flat. She fell on to rough ground some two and a half feet to three feet below the level of the terrace and suffered a quite serious injury to her right leg, as a result of which she claimed damages. The terrace from which Mrs Grindley fell had no guard rail, it being the Council's intention to build the ground up to within a few inches of the top of the terrace and sow it in grass.

Mrs Grindley alleged that the Council were in breach of the duty which they owed to her under s. 8 of the Occupiers Liability Act 1962.

At common law a landlord was under no liability for injuries suffered by the tenant's family or visitors, and this was accepted as being the rule in *Cavalier* v. *Pope* [1906] A.C. 428. The strictness of this rule, however, was modified by s. 8 of the Occupiers' Liability Act 1962 which put a duty on to the landlord in those cases in which he has the obligation to repair.

The learned Judge examined the tenancy agreement and surrounding circumstances and found that there was no obligation on the part of the defendant to repair, either express or implied, and that in fact the duty to repair rested with the tenant. He therefore concluded that the plaintiff had no cause of action under s. 8 of the Act.

The plaintiff also brought her claim in negligence, alleging that the defendant council were in breach of a general duty of care. Had *Donoughue* v. *Stevenson* [1932] A.C. 562 been decided before *Cavalier* v. *Pope* and the line of authorities which subsequently followed it, the plaintiff might have been more successful. The learned Judge, in spite of the forceful argument put forward to him by counsel for the plaintiff that the House of Lords case of *G. C. Billings & Sons Ltd.* v. *Rider* [1958] A.C. 240 was authority for the proposition that landlords owed a general duty of care, could not agree. (In *Billings* case, a visitor to a house was injured by a dangerous condition created by a building contractor and the House of Lords held the contractor liable.) Whilst *Billings* case might be authority for the proposition that a non-occupying landlord could be liable under the general law of negligence if he actively created a dangerous situation, the learned Judge thought that there was nothing to suggest that the common law rules (where the landlord had merely

acquiesced in the dangerous situation) as expounded in *Cavalier* v. *Pope* had been overruled by *Billings'* case. For this reason the plaintiff could not succeed since the landlord was out of occupation, under no obligation to repair, and was not engaged in work which was likely to endanger others.

The learned Judge expressed the opinion that his decision might not accord with "fairness and reason" but he apprehended "it to be in accordance with the law as it stands at present". This case might well form the basis for an argument showing the need for a reform of the law. At the present time if the injured party can bring himself within the ambit of the tort of nuisance (e.g. if injured on an adjoining property, in some circumstances he will succeed). The English Law Commission in its Report on "Civil Liability of Vendors and Lessors for Defective Premises" (Law Com. No. 40 1970) has recommended a change in the law, by adoption of the "foreseeability" test. Its recommendations only go as far as recommending the application of the foreseeability test in those situations in which the landlord has an obligation to repair. It could be that reforming legislation could go further so as to introduce the "foreseeability" test into situations such as that which arose in the instant case, where the landlord is not in occupation, and has no duty to repair, but where he "ought" to appreciate that a danger might be present on the land.

M.A.V.

TAXATION CASES
contributed by C. N. Irvine

Real Nature of the Transaction

The issues in *Commissioner of Inland Revenue* v. *Europa Oil (N.Z.) Ltd.* [1971] N.Z.L.R. 641 are so complex that it is difficult to deal with them adequately in an article such as this, yet the judgments are so important that they must be noticed. This article must, therefore, be regarded as a mere introduction to a study of the judgments in detail.

The question arose out of the purchase by the respondent company (Europa) from the Gulf Oil Corporation (Gulf) of gasoline at "posted prices", that is, recognised world prices. Gulf could not give Europa a discount on these prices but agreed to the formation of a company in the Bahamas called "Pan-Eastern" which would buy the crude oil from Gulf, *notionally* refine it and then sell it back to Gulf at posted prices. It was never intended that Pan-Eastern should do any actual refining and its transactions with Gulf comprises only a series of book entries which showed Pan-Eastern a profit of 5 cents per gallon on the cost of the gasoline bought by Europa.

The shares in Pan-Eastern were held by Gulf and by a subsidiary of Europa equally and this subsidiary thus received a half share of the profit earned by Pan-Eastern, amounting to 2½ cents on each gallon of gasoline bought by Europa.

These arrangements were evidenced by a series of agreements between the parties which are fully summarised in the majority judgment delivered by Lord Wilberforce in the Judicial Committee.

Europa claimed to deduct the gross price paid for gasoline in arriving at its assessable income but the Commissioner contended that the profit received from Pan-Eastern was in reality a discount allowed off such gross price and should be deducted in arriving at the amount to be allowed for purchases of gasoline. He also contended that the expenditure incurred by Europa under its contract with Gulf was not exclusively incurred in order to produce assessable income through the resale of petroleum profits, but was incurred in part for the purpose of producing a return to Europa through Pan-Eastern, and that such part of the expenditure was not deductible.

It was not contended, nor was it found by the various Courts, that the series of contracts shortly referred to above, and including other contracts which I have not found it necessary to mention, were a sham. With this view his Lordship agreed, and he also rejected the argument that the profits derived by Europa from Pan-Eastern were a discount on the cost of the purchases from Gulf. He said that the question before the Board necessitated a close consideration of the terms of s. 111 of the Land and Income Tax Act 1954 and an analysis of the relevant contracts. For a claim to disallow a portion of expenditure on the purchase of trading stock to succeed, the Commissioner "must show that, as part of the contractual arrangement under which the stock was acquired some advantage, not identifiable as, or related to the production of, assessable income, was gained, so that a part of the expenditure, which can be segregated and quantified, ought

to be considered as consideration given for the advantage. Taxation by end result, or by economic equivalence, is not what the section achieves".

His Lordship then embarked on a close consideration of the contracts and came to the conclusion that they amounted to a single interrelated complex of agreements under which Europa should be considered as incurring expenditure for a compound consideration consisting partly of gasoline to be supplied and partly to profits to be derived through Pan-Eastern. The Commissioner's case was therefore made out and his appeal succeeded.

In view of this decision it was not necessary for their Lordships to consider an alternative ground of appeal based on s. 108 of the Act that the agreements constituted an attempt to alter the incidence of, or avoid liability for, income tax.

The minority judgment of Lord Donovan and Viscount Dilhorne opened with the statement that, where the parties to a bargain agree upon what they want from each other and execute contracts to carry out their wishes, those contracts not being mere shams, their Lordships knew of no doctrine which enables a taxing authority to refuse to recognise those contracts. They rejected the "discount", and also the "dual purpose" arguments, holding that the payments from Europa to Gulf were exclusively for the purchase of petroleum products. In making such payments Europa was not partly purchasing the right to a share of profits from Pan-Eastern, since it already had that right.

Having reached the decision that the Commissioner's case failed on both these grounds their Lordships found themselves faced with the necessity to consider the contention based on s. 108 which, however, they immediately said was hopeless. The Pan-Eastern dividends were declared by the Act to be free of tax and the Commissioner's contention was an attempt to tax them. This argument therefore failed also.

In the result, of course, the Commissioner's appeal was allowed.

Taxability of Profit on Sale of Land

Of all the cases reported on s. 88 (1) (c) of the Land and Income Tax Act 1954 and arising out of assessments by the Commissioner of profits on the sale of land one of the most interesting is that to be reported as 5 N.Z.T.B.R. Case 13.

In this case the objector was a company comprising two shareholders which, according to the case stated, had carried on business as a property dealer. In later years, however, it described itself in its tax returns as a property investor.

As a result of an investigation of the company's affairs the Commissioner issued amended assessments for various years bringing in as assessable income the profit on the resale of certain properties which had earlier been bought by the company. The company objected and the objections came before the Board of Review.

The evidence before the Board disclosed that down to the date of hearing the company had purchased 62 properties for resale and 25 as investments. Of these 60 of those bought for resale had been sold as had five of those purchased as investments, and it was the profit on the sale of these five which was in dispute. It was not so stated but one may assume that tax had been paid on the profit arising from the resale of the 60 properties admittedly bought for resale.

The Board considered the evidence relating to each of these five properties in detail.

Property N. had been held for some eleven years and in the meantime was occupied by tenants. The property was not in a good state of repair when purchased and had deteriorated beyond repair at the date of sale although it was in fact repaired by the purchaser. The profit on this sale was $1,285.40.

Property J. was held by the company for some five years and it also was let to various tenants. The main building was destroyed by fire and the property was then sold. The profit from the sale plus the insurance money was $2,756.91.

Property L. was held for approximately seven years and was sold at a profit of $543. It was not disclosed whether it was tenanted while held by the company but one would assume that this was the case.

Property K. was also held for some seven years and was an old property, the building being said to be over 100 years old. The profit on sale was only $130.67. It was claimed by the company that this property and property L. were sold to provide capital to finance a television business being set up by the shareholders.

Property M. was held for only four years and was also very old. It was sold as the result of an unsolicited offer at a profit of $2,153.54.

In approaching the question as to whether these gains were capital or income the Board quoted from *Australian Income Tax Law and Practice*, 1969 ed., p. 420, para. 26/6 which stresses the need to consider all the circumstances.

The company's principal contention was that where a property was purchased for resale it was resold almost immediately or after a lapse of

time which could be satisfactorily explained. In most such cases the properties were not let pending sale, and where a tenant was allowed into occupation this was for a particular reason. Properties bought as an investment, on the other hand, were let and retained by the company for a much longer period.

The Board found that the letting of the properties and the lapse of time before resale were not conclusive of their being bought as an investment, and pointed out that there could have been reasons for the delay in their resale. What was more relevant was the fact that the company, and a partnership between the shareholders which preceded the formation of the company, were involved principally in dealing in land, while one of the shareholders was a licensed land agent.

The Board also mentioned a lack of evidence in the company's records as to the purpose for which individual properties were bought and also the absence of any discrimination in the company's accounts between properties allegedly acquired as investments and those intended for resale.

Another factor to be considered was the fact that all five properties were situated close to the hub of a city, and two were in or adjacent to, industrial zones. The point here was apparently that the properties were ripe, or becoming ripe, for redevelopment. The Board did not find convincing the explanations advanced for the sales of what were alleged to be investments.

The Board therefore found that the profits from the sales were revenue receipts of the company and thus correctly assessed.

A further point concerned the taxability of a deposit paid on the sale of one of these properties which was forfeited to the company on the default of the purchaser. The Board's view was that, as it had already held that this property was not a capital investment of the company and that the profit on its sale was assessable, the deposit was a revenue receipt and therefore taxable. The objections therefore failed on all grounds.

Proprietary Income

The case of *Commissioner of Inland Revenue* v. *Associated Motorists Petrol Co. Ltd.* [1971] N.Z.L.R. 660 turned on an attempt by the Commissioner to treat dividends from a foreign company as proprietary income of a New Zealand taxpayer, this attempt, of course, being based on s. 138 of the Land and Income Tax Act 1954.

The respondent company held half the shares in an overseas company called Pan-Eastern, the other half being held by a company based overseas. Apart from the question of domicile, Pan-Eastern therefore fell within the definition contained in s. 138 (1) but, as the Judicial Committee put it, the question was whether that section should be read as applying to a company incorporated, and having its centre of administration, outside New Zealand which derived no income from New Zealand.

The Commissioner relied strongly on the definition of a "company" in s. 2 of the Act as being "any body corporate, whether incorporated in New Zealand or elsewhere". On the other hand the respondent pointed to s. 165, and particularly subs. (3), whizh declares that, "subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax". Their Lordships pertinently observed that the strength of this argument was weakened by the fact that the section was made subject to the other provisions of the Act.

Their Lordships referred to paras. (f), (g), (h) and (i) of s. 138 (1), saying that they represent a logical and consistent progression to be followed before arriving at the final sum which represents what is assessable in the hands of the shareholder in a proprietary company. This lease to the ascertainment of "assessable income", "taxable income", and finally of "total income" of the company which involve the application of detailed provisions of New Zealand tax legislation which are quite inappropriate in the case of an overseas company.

Their Lordships then quoted with approval from the joint judgment of Turner and McCarthy JJ. in the Court of Appeal, and agreed that an overseas company which derived no income from New Zealand derived no "assessable income" for the purposes of the New Zealand legislation because its income was not subject to New Zealand income tax. Having no "assessable income" it could have no "taxable income" and thus it could have no "total income" as defined in s. 138 (1) (g). Since it has no "total income" it becomes impossible to apply s. 138.

The appeal was therefore dismissed, but their Lordships reserved the case where an overseas company derived income from New Zealand. In such a case different considerations might arise.

EXEMPLARY DAMAGES AND THE DOCTRINE OF PRECEDENT

Broome v. *Cassell & Co. Ltd.* [1971] 2 All E.R. 187 is a case of prime importance from several points of view. In *Rookes* v. *Barnard* [1964] 1 All E.R. 367 Lord Devlin, in a judgment agreed with by the other members of the House of Lords, laid down what many thought was a new test for the award of exemplary or punitive damages in tort. Whereas before 1964 exemplary damages could be awarded whenever the defendant had acted in contumelious disregard of the plaintiff's rights, Lord Devlin attempted to circumscribe severely the circumstances in which they could be awarded. They would lie, he said, only in three types of case: (1) "where there has been oppressive arbitrary or unconstitutional action by the servants of the government"; (2) where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff"; (3) where exemplary damages are authorised by statute.

This statement of the law did not escape without criticism. It was expressly repudiated in both Australia and Canada, and was not treated with wholehearted approval in New Zealand. However obviously the English Courts felt themselves bound by it, and it was applied a number of times in the High Court and Court of Appeal.

But then came *Broome* v. *Cassell & Co. Ltd.*, which has boldly opened a new chapter in this branch of the law. The plaintiff had been the officer commanding the naval ships escorting a merchant convoy to Russia during the second world war. The convoy was ordered to scatter in the mistaken belief that it was about to be attacked; as a result many ships were lost. The second defendant wrote a book in which he stated that the plaintiff was largely to blame for the whole affair, and had been both cowardly and indifferent to the convoy's fate. Despite the threat of a libel action the book was published by the first defendants, who felt, as did the second defendant, that the profits from sales would outweigh the damages for libel. The libel action was brought, and succeeded. The jury awarded a total of £40,000 damages, being made up of £15,000 compensatory damages and £25,000 exemplary damages. The defendants appealed unsuccessfully, the Court of Appeal stating that in any event what had happened brought the case within Lord Devlin's second category; that the category should be construed broadly so as to include all cases where the defendant knew that his words were or might be libellous, but nevertheless took a chance because of the profit he hoped to make from the book.

The second ground of the Court of Appeal's decision, however, was far more revolutionary. It unanimously held that *Rookes* v. *Barnard* was wrong on the question of exemplary damages, and should not be followed. This was done openly and directly without resort to the time honoured devices of distinguishing the earlier case, or of explaining the passages in question as being *obiter dicta*. The Court of Appeal simply refused to follow the House of Lords, and held that Judges should in future direct juries in accordance with the law as it was understood before 1964.

Yet, unless the doctrine of "binding" precedent was to be given the go-by altogether, it was clear that this remarkable proceeding had in some way to be explained as falling within an established exception to that doctrine. The Court managed to find that *Rookes* v. *Barnard* was decided *per incuriam* on the question of exemplary damages. Lord Denning M.R. gave four reasons for so holding: (1) Before 1964 the law as to exemplary damages was so well settled that only the Legislature could overthrow it; it was not open to any Court to do so. (2) The exemplary damages point was not argued by counsel in *Rookes* v. *Barnard*: indeed all counsel seemed to assume that the law on the point was well-settled. (3) Lord Devlin had said that "there is not any decision of this House approving an award of exemplary damages"; that was inaccurate, for it had done so, particularly in *Ley* v. *Hamilton* (1935) 153 L.T. 384. (4) Finally, "I say that the new doctrine is hopelessly illogical and inconsistent". Without so much as a "with respect", his Lordship then showed that there can be no reason for limiting the category of oppressive, arbitrary or unconstitutional action to servants of the government: other people can be just as oppressive and arbitrary as the

servants of the government. Further, there is no reason why one should punish the cold, cynical calculator of profit but not the person who invents calumnies with the malicious purpose of ruining a reputation.

Lord Denning concluded: "All this leads me to the conclusion that, if ever there was a decision of the House of Lords given *per incuriam*, this was it." Yet this is to give *per incuriam* an extremely wide meaning. Although there has admittedly been dispute about the exact scope of the phrase for years, the definition normally given of it is "decided in ignorance of some binding authority." If that definition is right, only Lord Denning's third reason seems really to come within it. The mere fact that there has been a lack of argument has not usually been treated as sufficient, and the fact that the rule laid down by the former case is illogical has never been treated as sufficient—were it to become so the doctrine of binding precedent would indeed be in jeopardy. Lord Denning's first reason is in many ways the most interesting (see also Phillimore L.J. at p. 213): while it is commonly admitted that there are limits to how far a Court can go in over-throwing established law, no-one has ever suggested before that if a superior Court oversteps those limits this can be a reason for refusing to follow its decision.

So it is not surprising to find that, while Salmon and Phillimore L.JJ., the other two members of the Court, echoed all of Lord Denning's objections, they seemed to feel that *Rookes* v. *Barnard* was *per incuriam* for only one reason: that Lord Devlin was wrong when he said that the House of Lords had never approved an award of exemplary damages. In 1964 the House was bound by its own decisions (*quare* what would have been the position if *Rookes* v. *Barnard* had been decided in 1967?) and in *Ley* v. *Hamilton* it had approved such an award. Yet even this is not entirely satisfying. For as stated, *per incuriam* is usually taken to mean "decided in *ignorance* of binding authority," and in *Rookes* v. *Barnard* Lord Devlin was not ignorant of *Ley* v. *Hamilton*; in fact he discussed it. The Court of Appeal felt, however, that he had misinterpreted that decision, and that this was enough to brand his judgment *per incuriam*.

Whatever one thinks of the devices used by the Court of Appeal to evade *Rookes* v. *Barnard* one cannot but be struck by the uncompromising vigour with which they attacked the case. Expressions were used which would never have been found in judgments in the earlier years of this century. Speaking of Lord Devlin's interpretation of Lord Atkin's judgment in *Ley* v. *Hamilton* Phillimore L.J. said (at p. 213): "no one reading *Ley* v. *Hamilton* could doubt that the views of Lord Atkin were poles apart from those of Lord Devlin. Lord Atkin was talking about punitive damages as such and not about 'so-called' punitive damages, whatever they may be". At p. 203 Salmon L.J. said: "As a rule no point . . . is decided by our Courts without counsel on both sides having the fullest opportunity of being heard on it. It seems a pity that this rule was not followed in *Rookes* v. *Barnard* — particularly as Lord Devlin's opinion was open to the devastating criticism to which it was later subjected in the High Court of Australia . . . , and to a good deal of further criticism as I shall attempt to show." Since what matters for the maintenance of a doctrine of binding precedent is the attitude of the Courts rather than the way in which the doctrine and its exceptions are formulated, could this be yet a further signal that the English doctrine of precedent is slackening?

It is only fair to say that both Denning and Salmon L.JJ. seemed to have misgivings about what they were doing. Lord Denning actually said: "I am conscious that, in all that I have said, I may myself be at fault", (p. 200) and thus proceeded to his alternative ground of decision. Salmon L.J. expressed the hope that the case could proceed to the House of Lords to rescue the lower Courts from the invidious position in which they would now find themselves. One sees his point: what is the present law of England on the topic of exemplary damages?

A further noteworthy feature of the case was the readiness of the Court to look at decisions from other Commonwealth countries. There can be little doubt that the desirability of uniformity throughout the common law countries was one of the factors influencing the Court's decision. Indeed, Phillimore L.J. said that he was not attracted to the idea that the common law can vary from one country to another: "it seems to me that it would cease to qualify for the description 'common'." (at p. 212).

It is to be hoped that the view of the law of exemplary damages set out in *Broome's* case is upheld. Exemplary damages are most often claimed in defamation cases, and they are our only real means of according different treatment to the malicious scandalmonger and the responsible newspaper which publishes a defamation

through an honest and unavoidable mistake. The *Rookes* v. *Barnard* doctrine could only have undesirable side effects. In the first place, it requires a jury to draw a line between an award of damages which is purely compensatory and one which contains a punitive element —a task which, while possible, makes Herculean demands on an untrained jury. Secondly, it is bound to lead (and was beginning to lead) to a reliance on the concept of "aggravated" damages. What you cannot do by punitive damages you do by aggravated damages. (See for example, *Fogg* v. *McKnight* [1968] N.Z.L.R. 330). The distinction between these two is a deal too fine for most of us and such hair-splitting does not do the law any good. Thirdly, there is the danger that, even if juries are directed not to award punitive damages, they will occasionally be tempted to insert an unspoken punitive element to swell the amount of the "compensatory" damages, and this could have the unfortunate result that the sum required to compensate a man for an injury to reputation comes to be thought of as being higher than it really should be. There are many who feel that damages for defamation are far too high already.

J. F. BURROWS

WHEN IS AN AGREEMENT TO PAY MAINTENANCE NOT A "MAINTENANCE AGREEMENT"?

The Domestic Proceedings Act does not permit registration of every agreement to pay maintenance. Section 54 defines what is registrable.

It is not generally appreciated that there are three different types of maintenance agreement envisaged by the section:

(a) Husband and wife maintenance, or
(b) Maintenance of child by father (paternity), or
(c) maintenance of child in terms of Part IV.

Each of the quite separate and distinct maintenance agreements is linked with the word "or" not "and".

Also subs. (2) of s. 54 makes a clear distinction between a "maintenance agreement" and the "document" which contains it. Within any one document there may be a number of "maintenance agreements". For example X. agrees to pay maintenance for his wife and each of his three children. There would be a maintenance agreement in respect of the wifes' maintenance and three maintenance agreements—one in respect of each child. This accords with what the Court would do when making maintenance orders in respect of the same persons. The *four* maintenance agreements arising out of the one document could be registered. It would not be necessary to lodge *four* separate applications for registration. Only one copy of the document need be lodged in the Court.

A perusal of s. 54 and ss. 26, 31 and 39 (dealing with orders for periodical payments) makes it clear that there are common ingredients in orders made by the Court and maintenance agreements made by the parties.

Section 26—*Wife*

(a) Period not to exceed joint lives.
(b) Periodical sum.
(c) Towards the future maintenance.
(d) Of his wife.
(e) As Court thinks reasonable.

Section 39—*Child*

(a) Periodical sum.
(b) As Court thinks reasonable.
(c) Towards the future maintenance.
(d) Of the child.

Section 54

(a) Written agreement.
(b) Periodical payment.
(c) Sums of money.
(d) Towards maintenance of the other party (wife).
(e) Towards the maintenance of the child.

Notes

(*a*) *Joint lives*

Registration brings into effect Part VII and the proviso in s. 125 (1). Section 59 applies and, whatever the agreement says, no proceedings for enforcement of a registered maintenance agreement can be taken after the death of the person liable.

(*b*) *As the Court thinks reasonable*

The Court must take it that the parties have taken into account all matters which the Court might have done and that the agreement is just as between the parties. This is subject only to the provisions of s. 85 (3) which empowers the Court to vary or cancel a registered maintenance agreement if at the date of its

execution its provisions were unfair or unreasonable. As to this see the comments of Beattie J. in *Hall* v. *Hall* [1970] N.Z.L.R. 1132.

This leaves the three requisites which in all four sections are identical:

The Court *orders* and the agreement *provides* for:

(a) Periodical payment.
(b) Of sums of money.
(c) Towards the maintenance of wife; towards the maintenance of child.

(a) Periodical payment: Agreements for payment of lump sums cannot be registered. The same restriction is placed upon registration of Supreme Court orders (s. 87) and overseas orders (s. 61). The Court reserves to itself the sole right to make and enforce lump sum orders for maintenance

(b) Sums of money: This must mean specific amount of money

(c) Towards the maintenance of . . .: These words mean something. They are not meaningless surplusage. They qualify the two earlier requirements "periodical payment" and "sums of money". They also mean that each person in respect of whom maintenance is to be paid must be specified and a specific amount designated as being towards the maintenance of that person. This accords with the general scheme of the Act.

It is also important to note that the Court must "order" and the agreement must "provide" These words import certainty. The order must be clear. The agreement must say what it is intended to say. This is quite different from reading something into an order or agreement by implication or inference.

The conveyancer, then, must be careful to meet the statutory requirements. If he does not, his agreement to pay maintenance may contain no maintenance agreement capable of registration. His client will then have to rely on contractual remedies only.

The point can be illustrated by examining a clause in common use:

> "The husband will during the joint lives of himself and the wife so long as they shall live separate and apart from each other pay to the wife the weekly sum of $24 on Monday of each week the first of such payments to be made on the 1st day of July 1971 provided that if and when any child shall attain the age of sixteen years or shall become a charge upon any other person or any charitable institution then each of the said weekly payments shall be reduced by the sum of $4 in respect of each child attaining that age or dying or becoming a charge as aforesaid."

Notes—1. It is doubtful whether this constitutes any kind of maintenance agreement.

2. There are two parts: (a) a *present* obligation to pay the wife $24 per week, (b) a proviso in terms of which at a *future* date $4 per week may be deducted.

3. The clause does not provide for the *maintenance* of any *person*.

4. The clause merely says that $24 per week is to be paid to the wife.

5. No doubt this clause is meant to provide a composite sum of $24 per week for the maintenance of wife and child(ren). The fact that a wife may have custody of child(ren) and the wording of the proviso strongly supports this view.

But the agreement does not say so.

6. If the clause covers wife *and* child(ren) it is not a maintenance agreement.

7. It is not a maintenance agreement in respect of any child for $4 per week.

8. It is not a maintenance agreement in respect of the wife.

The use of this type of clause should be discontinued. It is much better to specify each person to be maintained and to specify the amount of maintenance to be paid for the maintenance of that person.

If this is not done, the draftsman may well ask himself later, "When is an agreement to pay maintenance not a 'maintenance agreement'?"

DOMESTICUS.

Judiciary under Spotlight—"[The Sub-committee of *Justice*, the British section of the International Commission of Jurists, has proposed reforms in the appointment and retirement of Judges which] says Judges should be given time off to keep up with advances, especially in actuarial, sociological and psychological fields. What has undoubtedly irked those critical of this report include suggestions that there be machinery for complaining about Judges' behaviour—and that this be independent of both Parliament and the Government.

Also discomforting is the recommendation that there should be a method for removing Judges from office for proved incapacity, mental or physical, and that in any case they should submit to regular medical examination"—KENNETH JOACHIM writing in the *Christchurch Star*.

THE MODIFICATION OF RESTRICTIVE COVENANTS

In England, restrictive covenants have been recognised for well over a century as a valuable means of preserving standards of development. But covenants are useless unless the law provides for the devolution of the burden and the benefit of them. Otherwise, they will cease to operate when the original parties cease to be concerned with the land affected.

In New Zealand, there has been no difficulty in regard to the title to the benefit of restrictive covenants, whether affecting freehold or leasehold land. Nor has there been difficulty in regard to the running of the burden of restrictive covenants in a lease; the ordinary rules of common law have applied to that. But the burden of a covenant, except between lessor and lessee, has never run at law; it runs only in equity and only if the covenant is negative. Until s. 126 of the Property Law Act, 1952, came into operation, there was no effective way of ensuring that a purchaser of freehold land, registered under the Torrens system, was affected by notice of the covenant. It followed that, since an equitable interest is inoperative as against a purchaser of the legal estate for value without notice, most covenants become ineffective on the first transmission of the title to the burdened land.

Since 1st January, 1963, however, this difficulty can be got over by noting of the covenant on the register, under s. 126. This particular form of noting, however, does no more than that; it confers no validity higher than that which the covenant already had. This was always the rule in England in regard to covenants affecting registered land. (*a*) The situation in New Zealand has been comparable with the English situation for towards 20 years.

In that period, no doubt, a number of freehold restrictive covenants has become inconsistent with the practical situations in which they exist, and there must be many covenants in old leases of which the same is true. The time must be coming, very soon, when it will be desirable to consider whether the machinery for altering covenants created under s. 127 of the Property Law Act, 1952, is satisfactory.

This section, which applies also to easements, seems to have been used to a remarkably small extent and that only in relation to easements. It is in terms almost, but not quite, identical with the comparable English enactment, s. 84 of the Law of Property Act, 1925, a section which, for many years, was much used and on which a body of reported cases has grown up. These decisions are, of course, only of persuasive authority in New Zealand; but none of them seems even to have been cited in a reported case here. The English section became almost unworkable through a certain decision of the Court of Appeal in 1962, which will be discussed below. The section, therefore, has had to be amended by the Law of Property Act, 1969. No corresponding amendment has been made here; but it is one purpose of this article to show that, due to differences between the two sections, no amendment is necessary, at least until the section in its present form has been given a thorough trial, which has not yet been done.

It is sometimes said that restrictive covenants are an anachronism and ought to be abolished —all that is necessary to do so being satisfactorily effected by the planning legislation. Recent English experience shows the fallacy of this suggestion. In *Re Hornsby's Application*, (*b*) Mr Stuart Daniel, Q.C., sitting as the Lands Tribunal, said that "Vigilant insistence on the covenants has preserved the character and amenity of (a particular) Estate to a standard which planning control would lamentably have failed to achieve." And twice lately, in *Re Dolphin's Conveyance* (*c*) and in *Re Shaw's Application*, (*d*) it was the planning authority itself which tried, without success, to destroy a valid system of restrictive covenants in order to erect houses below the standard required by the covenants. Nevertheless, in a growing society, there must be some proper means of ensuring the alteration or disappearance of such restrictive covenants as can be proved, in their unmodified form, to have outlived their usefulness. For at least a decade before 1939, and again for some years after the end of the war, this result was primarily achieved in England, in a way that was distinctly haphazard, by the Court being astute to fault the validity of the title to the benefit of the freehold restrictions. It has always been very difficult to ensure the

(*a*) *Wille* v. *St. John* [1910] 1 Ch. 84, 328.
(*b*) (1968) 20 P. & C.R. 495.
(*c*) [1970] Ch. 2 All E.R. 664.
(*d*) (1966) 18 P. & C.R. 144.

modification of leasehold covenants. But there were many cases in which freehold covenants were thus destroyed, only a few of which found their way into the Law Reports: *Re: Ballard's Conveyance* (*e*) and *Re Pinewood Estate, Farnborough* (*f*) will serve as examples. In each such case, the restrictions were declared unenforceable for reasons which were purely technical. These decisions were frequently made upon originating summons under s. 84 (2) of the English Act of 1925, which corresponds with s. 127 (3) of the Property Law Act, 1952, though some were, of course, made in actions on the covenants.

The first sign that the tide was going to run in a different direction was in 1952, when Upjohn J. in *Newton Abbott Co-operative Society* v. *Williamson & Treadgood Limited* (*g*) upheld a covenant which would earlier have at least been of very dubious validity. The new current begun to run strongly in 1961, with *Marten* v. *Flight Refuelling Limited* (*h*) and the new attitude has continued ever since. *Re Pinewood* above, is the last reported case in the old style. *Mrs Marten's* case would almost certainly have been decided the other way a generation earlier; the judgment is most important for the approach of Lord Wilberforce, then a Judge of the first instance; he expressly disapproved the former technical attitude. After a series of other cases with the same tendency, came *Re Dolphin's Conveyance*, above, where Stamp J. upheld a "building scheme"; such decisions had been exceedingly rare since before the first war and this one is on grounds so broad as to rehabilitate such schemes as a means of ensuring the validity of covenants. In view of *Re Dolphin's Conveyance*, indeed, it must now be regarded as certain that *Re Pinewood Estate*, above, would not now be followed. (*i*)

This new attitude to the validity of the benefit of covenants, coupled with the effluxion of about 20 years since it has been possible to make the burden secure under s. 126, makes it necessary to examine the means of modification. If they are ineffective in proper cases, legitimate building and development projects will be impeded and developers held unjustifiably to ransom by the need to buy a release at any price that the vendors care to ask.

In New Zealand, the power of modification is conferred by s. 127 of the Supreme Court itself. In England, s. 84 originally conferred it on certain Official Arbitrators, and it was transferred in 1950 to the Lands Tribunal. This body is a most respected one, consisting of Queen's Counsel and Chartered Surveyors and the profession is well satisfied with it. But it is a Court of subordinate jurisdiction, even though the right of appeal from it is confined to matters of law and goes direct to the Court of Appeal. This distinction is critical, as will appear.

In another important respect, the New Zealand jurisdiction differs from the corresponding English one. Under s. 127, the Supreme Court can make orders varying restrictions affecting "land", which is defined by s. 2 as including all leasehold land. Under the English section, leasehold covenants could only be altered if the lease was long and old; since an amendment made in 1954, the lease must originally have been for over 40 years, and 25 years of it must have expired. The jurisdiction in New Zealand is therefore very much wider, since any restriction in any lease can be dealt with.

Again, in the English section, there was an express power to grant compensation on making an order. This power became a dead letter in view of the manner in which the rest of the enactment was construed, and a fresh statutory power has had to be granted by the Act of 1969. The New Zealand section has no express reference to compensation. If there had been one, it would have been impossible to suggest that there might be an implied power. This was the English case. But in the absence of all reference to compensation, this possibility is open and, indeed, there almost must be such a power, as will appear. (*j*)

These are significant differences. The framework of the two sections is, however, the same. Each begins by giving to the chosen Court powers to make orders where land is subject to a "restriction arising under covenant or otherwise". Such orders may, in New Zealand, "modify or wholly or partially extinguish . . .

(*e*) [1937] Ch. 473

(*f*) [1958] Ch. 280.

(*g*) [1952] Ch. 286.

(*h*) [1962] Ch. 115.

(*i*) A building scheme was upheld in *Buckleigh* v. *Brown* [1968] N.Z.L.R. 647 and there is no reason to suppose *Re Dolphin's Conveyance* will not be considered good law in New Zealand.

(*j*) There is also the major difference that s. 127 authorises the modification of easements as well in restrictive covenants, but s. 84 does not. For the present purpose, however, this difference is not so important as the above.

the restriction upon (the Court) being satisfied . . ." and then follow three paragraphs, (a), (b) and (c). It has bene held in England by the Court of Appeal in *Re Ghey and Galton's Application* (*k*) that the jurisdiction depends on fitting any given case within one at least of the three paragraphs. This appears to be correct and is likely to be followed here.

Paragraph (a) is in two portions—"limbs" they are usually called in England. Only the first limb survives in England since the Act of 1969; but the second limb also survives in New Zealand and there is English authority in the Court of Appeal as to what it means.

The first limb gives jurisdiction if "by reason of any change in the user of any land to which the . . . benefit of the restriction is annexed (*l*) or in the character of the neighbourhood or other circumstances of the case which the Court may deem material . . . the restriction ought to be deemed obsolete". The last phrase was construed in England by the Court of Appeal in *Re Truman, Hanbery Buxton & Co. Ltd's Application*, (*m*) Romer L.J., giving the leading judgment. He said that the real question is whether the original object of the covenant can, or cannot still be achieved. This seems to be, in effect, the same test as was laid down by the Court of Appeal in *Knight* v. *Simmonds*, (*n*) in respect of cases where equity will refuse to enforce a covenant the purposes of which can no longer be achieved. This is a clear test and quite a lot of orders have been made in England under the first limb of paragraph (a). (*o*) This is likely to continue and the same process is available in New Zealand.

The second limb consists of the words "or that the continued existence thereof would impede the reasonable user of the land subject to the . . . restriction without securing practical benefit to the persons entitled to the . . . benefit of the restriction, or would, unless modified, so impede any such user". The corresponding words in the English statute have been very narrowly construed. They have been held to mean that there must be some proper evidence that the restriction is no longer necessary for *any* (my italics) reasonable purpose of the person who is enjoying the benefit of it. (*p*) The Act of 1969 re-words this part of the subsection, so as to enable modification if "some" reasonable purpose is impeded and if various other requirements are fulfilled. There is no similar amendment in New Zealand, and it will continue to be difficult to get relief under the second limb.

Paragraph (b) reflects closely the corresponding English paragraph. Neither is of much use, since they apply only when there is an express or implied consensus that the restriction should be modified; in that event, there is seldom any need for proceedings. The real advantage of this provision is, however, that it enables the Court to say that a potential upholder of the restriction who, after due notice, does not appear to defend it, has impliedly consented to the proposed modification.

Paragraph (c) on the other hand, is of great importance. It is as follows:

> "That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the restriction".

The English paragraph does not include the word "substantially", so that it is much narrower. Nonetheless, it was the basis of scores of orders until 1962. One could put the case in either of two ways; (i) no one at all will be injured; or (ii) no relevant person will be injured because a relevant person is one entitled to the benefit of the restriction and no one is entitled to the benefit of the restriction. In *Re Purkiss' Application*, (*q*) however, the Court of Appeal put a stop to (ii). It said that the Lands Tribunal was not a fit body to decide esoteric questions of Chancery law such as "What is a building scheme?" This, with respect, was very odd; the Tribunal, to the general satisfaction, decides questions of law in every other branch of its extensive jurisdiction, which includes all matters to do with compensation for compulsory purchase, the sums involved being enormous.

(*k*) [1957] 2 Q.B. 650.

(*l*) To this point the English words are different and refer to changes in the burdened land as distinct from the land benefited. The rest is substantially identical.

(*m*) [1956] 1 Q.B. 261.

(*n*) [1896] 2 Ch. 294.

(*o*) The reported decisions of the Lands Tribunal are not binding on anyone, but they serve as a guide. Those from 1950 to 1956 inclusive were published in a special issue, Vol. 7. of the Planning & Compensation Reports. Since 1957, those cases have been systematically reported in the ordinary annual volumes of the same series of Reports. I have, in fact, selected them myself.

(*p*) So held by Farwell J. in *Re Henderson's Conveyance* [1940] Ch. 835 at p. 839, later approved by the Court of Appeal in *Re Ghey and Galton's* Application [1957] 2 Q.B. 650.

(*q*) [1962] 1 W.L.R. 902.

The Court also made the more substantial point that the Lands Tribunal is a Court of limited jurisdiction and that the section only empowers it to act in respect of land "affected by" (*r*) a restriction. If there is no one entitled to the benefit of the restriction, the land is not affected by it (or subject to it). Hence, in so deciding, the Tribunal decides that it has no jurisdiction. In my opinion, *Re Purkiss' Application* does not apply at all in New Zealand. The jurisdiction is not conferred on a subordinate Court but on the Supreme Court itself, and by subsection (3) the Court is expressly given power to decide whether a restriction is enforceable and if so by whom. It is therefore open, in New Zealand, to argue cases under paragraph (c) as they were argued in England before *Re Purkiss' Application*, at a time when the Lands Tribunal made a very large number of orders under that paragraph. (*s*)

There are two further points. First, the word "substantially" must let in many cases which would be impossible in England. For example, I once had a case which was impossible to argue under paragraph (c) because, in a £50,000 project, there was going to be undoubted injury, valued at £150, to a single adjacent house belonging to a person entitled to the benefit of the restriction. We had this very case in mind in discussing the amendments later made by the Act of 1969. But it would fit easily enough into paragraph (c) in its New Zealand form, without any amendment.

Second, the English paragraph contemplates that there must be *no* injury to persons entitled to the benefit. Hence, there is no basis for compensation. The New Zealand paragraph contemplates that persons entitled to the benefit of the restriction *may* be injured by the order, though not "substantially". If there is to be no compensation, this is pure confiscation, since the benefit of a covenant is a right of property. The Court will surely struggle against this conclusion. I therefore suggest that compensation can be and, in a case where there is actual injury, should be awarded. It would be done thus. The opening words of s. 127 (1) give power to modify the restriction. The modification would be to alter the restriction as prayed "from or after the payment by the applicant to the respondent A.B. of the sum of £x"

For those reasons, it is submitted that the New Zealand section is useful, and is going soon to be more useful as we get further from 1953 when restrictive covenants could first be noted on the register. The difficulties which arose in England on s. 84 seem not to apply here, and there seems to be no need, at least at the present stage, for amendment comparable with those made in England by the Law of Property Act, 1969.

G. H. NEWSOM, Q.C.

(*r*) "Subject to" in the New Zealand Act.

(*s*) Numerous examples can be found in Vol. 7 of the Planning and Compensation Reports and in the volumes from 1957 to 1962.

The Moral Code of a Peeping Tom

A letter from Tokyo tells us that an 82-year-old gentleman, a graduate of the old Tokyo Imperial University, was among 102 men recently listed by the police as "professional and semi-professional" Peeping Toms who nightly lurk behind trees and thickets in Tokyo's Ueno Park. The nightly appearance of Peeping Toms in Tokyo's dark alleys and public parks heralds more accurately the approach of the summer than predictions of the Meteorological Agency. Everyone of them wears a pair of Jika-tabi (black duckshoes with a corrugated rubber sole). This makes it easy for them to dart from tree to tree and climb down the bank to hide under an arched stone bridge. The main difference between the pros and the semi-pros, however, is that the pros always put on fatigue clothes dyed black and persimmon juice while at work. This special outfit, once worn by spies of feudal lords, is said to be practically invisible to outsiders in darkness. Another major difference is that the former can crawl forward at a high speed over a distance of 50 yards or so and reach within a few yards of their objectives. And they can stay there for hours without stirring a whiff of air. This wonderful technique must have been learnt through years of hard training, police guessed, and some of them might have been ace infantry men of the old Japanese Imperial Army.

"The professionals, nevertheless, have their own code of morals and etiquette to guide them in their nocturnal operations. These masters of occult art hate and despise the amateurs who use flashlights or noctovision cameras. They believe that to rouse a couple out of their state of bliss by playing a flashlight or taking a snap of the scene is simply outrageous. Everything must be done properly they declare. For example, you stay motionless at a spot close to the scene and with utmost patience scan and listen through pitch darkness. Even the burning of a mosquito coil while on duty is not recommended. Be patient and bear it even if your feet become swollen with mosquito bites!"

CORRESPONDENCE

Law Practitioners Co-operative

Sir,

Further to my forwarding you a copy of the Chairman's first Annual Report, I have to advise that a notice of motion was passed by the Annual Meeting changing the Co-operative's name to The Law Practitioners Co-operative Society Ltd. This follows endorsement by the New Zealand Law Society of the Co-operative's objectives in providing Superannuation and other benefits to law practitioners and their staffs throughout New Zealand.

To date there are indications from many sources that many practitioners will avail themselves of membership of the Co-operative and that by the end of the first financial year's trading on March 31, the Co-operative will have been successfully launched throughout the country.

Yours faithfully,

J. M. FOSTER.

The Law Practitioners Co-operative Society Ltd.

Careers in Law

Sir,

Little reliable information is held as to the employment of graduates in law and the career plans of those who are now studying law.

One of our Honours candidates is working with the Auckland Law Graduates Association collecting data under four heads:

1. The present occupation of those who graduated in law at Auckland from 1930 onwards;
2. The present vacancies for law graduates and their likely future employment in private legal practice in the Auckland Province;
3. The number of Auckland law graduates employed outside private legal practice and likely future employment for them in companies, firms, etc;
4. The career plans of those now enrolled in the Auckland Law School.

During February 1972 a questionnaire will be sent to all law firms in the Auckland Province and to all Auckland law graduates from 1930 onwards whose addresses are known to us. The group whose addresses are likely to be most difficult to find are those who are not included in the *Law Register*, 1972. I am therefore seeking the assistance of those who read the JOURNAL in the survey now being undertaken. We shall be most grateful if we could be given the name, address and, if possible, the occupation of any Auckland law graduate known to be employed otherwise than in private legal practice. That information may be sent to me.

Yours faithfully,

J. F. NORTHEY.

Dean, Auckland Law School.

Previous Convictions

Sir,

There is a small matter which has concerned me for some time and that is the manner of production of his Police record to a defendant who has either pleaded guilty or been found guilty in the Magistrate's Court. The Police Constable on duty normally waves the sheet (or sheets) of paper in front of the defendant and says something that nobody can hear but which we all trust is to the effect:

"Do you admit these previous convictions?"

There is sometimes an affirmative nod from the defendant and perhaps more often no reaction at all and the Police Constable thereupon passes the sheet or sheets to the Registrar of the Court and the ceremony is at an end.

Being conscious of the need for justice to be seen to be done etc., might I make a plea for something audible to be said by the Police Constable as he waves the aforesaid sheet or sheets of paper before the defendant's eyes? None of us obviously believes that he says, out of the side of his mouth:

"Listen mate, you'd better start nodding your head up and down, or you're for the high jump" (or whatever the current idiom is).

But surely it would remove any lingering doubt that exists as to whether certain defendants have any idea what is being asked of them.

Yours faithfully,

G. D. G. BAILEY.

Lawyers' Talk-In—"Cyprus is a nation of lawyers . . . like all members of the legal profession, talk is the very breath of life. So long as the problem exists, both sides will talk; so long as they talk, there will be a problem". *The Times*, October 22.

Gleeson *v.* Napier City

Special Town and Country Planning Appeal Board. Napier. 1971. 23 February.

Objectionable elements—Notice served requiring occupier to comply with certain stipulations inter alia that activities cease by a certain date—Stipulations varied on appeal—Town and Country Planning Act 1953, ss. 34A, 36, 50A, 50B.

Appeal under s. 34A (4) of the Act.
Donovan, for the appellant.
Gallen, for the respondent.

The judgment of the Board was delivered by CARSON S.M. (Chairman). This appeal, made under s. 34A (4) of the above Act, relates to a notice to cease use of land dated the seventeenth day of August 1970 served on behalf of the respondent Council on the appellant, James Patrick Gleeson, as owner and occupier of a property situated at and known as 30 Vigor Brown Street, Napier, which property has an area of 39.77 perches more or less and is described as being part of lot 1 on Deposited Plan No. 3102 more particularly re-defined as Deposited Plan No. 6710 and is the whole of the land comprised and described in Certificate of Title C1/92 Hawkes Bay Registry.

It was recited in such notice that, by an earlier notice dated the sixth day of August 1969 and served upon the appellant on the eighth day of August 1969, the respondent had claimed that the appellant was using the above-described land for the purpose of wrecking motor vehicles and that the Council considered the storage of motor vehicles and parts of motor vehicles and that the Council considered that such use of the land had objectionable elements and constituted a detraction from amenities to other persons and property in the area, and further, that the respondent had by such notice required the appellant within three months of the date of receipt by him of the same to cease using the land in question for the above purposes.

As a consequence of the serving upon him of the notice of 6 August 1969, the appellant appealed against the requirements of that notice. The appeal was heard by the No. 1 Town and Country Planning Appeal Board, in a decision dated the ninth day of March 1970, after recording its view that the relevant statutory provisions permitted it to consider the appellant's case on its merits and without declining jurisdiction on the ground that the notices served on the appellant were a nullity, found:

(i) That the appellant's operations on, *inter alia*, the land in question were such as to cause a detraction (primarily visual) from the amenities of the neighbourhood

(ii) That the form in which the relevant notice was served would require not the cessation of some ancillary activity but the main existing use itself, and

(iii) That, on the basis of the decision in *Henderson* v. *Waipa County* [1967] N.Z.L.R. 685, the Board did not have power under s. 34A of the Town and Country Planning Act 1953 to order the cessation of the main existing use except in a case where a user who was lawfully required to remove or reduce an objectionable element failed or refused to do so.

On the basis of the foregoing findings the No. 1 Board allowed the appeal to the extent that it vacated the respondent Council's requirement that the appellant cease the uses complained of in the notice served upon him but, being satisfied that detractive elements existed which were removable or reducible by means that were reasonably available to the user of the land, ordered and directed the appellant to comply with the requirements set out in a Schedule to the Board's decision.

The notice of 17 August 1970 served on the appellant on behalf of the respondent set forth that, of the requirements laid down in the Schedule to the No. 1 Board's decision of 9 March 1970, the appellant had in particular failed to comply with the provisions set out in paras. 2, 4 and 8 of such Schedule, namely:

"2. A neatly painted gate of solid construction and of a height of six feet to be erected, to be kept well maintained and kept shut when not actually in use for entrance and exit purposes and to extend between back of house and neighbours' fences.

"4. Save for an existing bus or caravan body (which is to be removed at the earliest practicable date) no vehicles, vehicle bodies or vehicle parts are to be stacked against any fences or the exterior wall of any shed.

"8. Above requirements, where applicable, to be complied with within three months from the date of this order.

It was recited also in the said notice of 17 August 1970 that the respondent Council considered that the appellant's use of his land for the purpose of wrecking motor vehicles and the storage of motor vehicles and parts of motor vehicles had objectionable elements in that it constituted a detraction from amenities to other persons and property in the area and/or that his failure to comply with the order and direction of the Town and Country Planning Appeal Board in his use of his land amounted to a user of such land with objectionable elements and constituted a detraction from amenities to other persons and property in the area, the detraction from the amenities in both cases being primarily visual. The Council therefore gave notice that it required the appellant within three months from the date of the receipt by him of such notice to cease using his land for the uses thereinbefore set forth, that is, for the wrecking of motor vehicles and the storage of motor vehicles and the storage of parts of motor vehicles.

In setting forth in the notice of appeal filed that the grounds upon which his appeal were based were " . . . against the requirements of the Napier City Council as specified in the said notice, against the time allowed for complying therewith, and against the authority of the Napier City Council to issue the said notice . . . ", the appellant thereafter enumerated the following specific grounds of appeal:

(i) That his use of the land in question did not have objectionable elements as defined in s. 34 A (1) of the Town and Country Planning Act 1953, and in particular that his use of the land did not constitute a detraction from amenities to other persons and property in the area.

(ii) That he had not failed to comply with the requirements of the Town and Country Planning Appeal Board.

(iii) That if it should be shown that in fact his use of the land constituted a detraction from amenities or that he had failed to comply with the requirements of the Town and Country Planning Appeal Board (both of which were denied) the situation could be met by the responsdent's either requiring him to reduce the alleged objectionable element, or permitting him further time within which to comply with the requirements of the Town and

Country Planning Appeal Board, it being preferable in the interests of justice that that alternative course be adopted.

(iv) That his use of the land constituted an "existing use within the meaning of the section" in terms of s. 36 (1) of the Town and Country Planning Act 1953.

(v) That it was not possible for him to cease the said use of the land within the time specified in the notice, namely three months from the date of receipt thereof by him, and

(vi) That the land had been continuously used for commercial or industrial purposes since approximately 1915 and that his use of such land for the purposes referred to in the notice had continued since 1938.

The relief sought by the appellant was that:

The respondent should be required to withdraw its notice, or if it should be found as a fact that the appellant had failed to comply with the requirements of the Town and Country Planning Appeal Board that situation could be met either by the respondent's requiring him to reduce the alleged objectionable element or by the Council's allowing him further time within which to comply with the Appeal Board's requirements.

In a reply to the above appeal filed on the respondent's behalf, it was recited, *inter alia:*

(i) That the appellant's land was zoned Residential in the City Westshore section of the City of Napier District Scheme and that the wrecking of motor vehicles and the storage of motor vehicles and motor vehicle parts was not a predominant or conditional use in a residential zone in such scheme.

(ii) That the respondent's district scheme was at present under review and the reviewed scheme was awaiting the hearing of objections; that the land concerned continued to be within a residential zone under the reviewed scheme and the wrecking of motor vehicles and the storage of motor vehicles and motor vehicle parts was not a predominant or conditional use in a residential zone in such reviewed scheme.

(iii) That the respondent contended that the appellant was, and had for some considerable time, been using the land concerned for the purpose of wrecking motor vehicles and the storage of motor vehicles and parts of motor vehicles and that the respondent considered that that use of the land had objectionable elements within the meaning of s. 34A of the Town and Country Planning Act 1953, as amended, in that it constituted a detraction from amenities to other persons and property in the area, the detraction from amenities being mainly visual.

(vi) That the respondent contended also that the appellant had failed to comply with the requirements of the Town and Country Planning Appeal Board set forth above in items 2, 4 and 8.

(v) That the respondent further contended that the detraction from amenities which resulted from the use of the land for the purposes for which it was being used by the appellant arose substantially from the particular use and that it was not possible to remove or reduce the detraction from amenities unless that use ceased.

(vi) That the respondent admitted that the use of the land constituted an existing use within the meaning of the Town and Country Planning Act 1953, and finally

(vii) That the respondent considered that the appellant had had ample time to comply with the provisions of the order of the Town and Country Planning Appeal Board dated 9 March 1970 and to cease the use of the land within the time specified in the notice served upon him on 18 August 1970.

The decision of the No. 1 Town and Country Planning Appeal Board given on 9 March 1970 makes it apparent that that Board was concerned to determine, *inter alia,* the extent, if at all, to which the conclusions at which Richmond J. arrived in *Henderson's* case (*supra*) as to the meaning and effect of s. 34A (3) of the Town and Country Planning Act 1953 had been affected by amendments made to that particular subsection subsequent to the hearing of such case. In the event, the No. 1 Board concluded that any amendment made did not override or alter the guiding principles laid down by Richmond J. or (except to the extent expressly laid down by the section) derogate from the existing use rights referred to in s. 36 of the Act. The Board did, however, express the opinion that such amendment permitted it to consider on its merits the case with which it was dealing and without declining jurisdiction on the ground that the notice served upon the appellant in that instance was a nullity. In thereafter proceeding to record its findings, the No. 1 Board went on to say, as has already been recorded in the course of this decision, that, on the basis of the decision in *Henderson's* case, it had "no power under s. 34A to order the cessation of the main 'existing use' except in a case where a user who is lawfully required to remove or reduce an objectionable element fails or refuses to do so".

Having regard to the respondent's election in the instant case to give a notice limited to requiring the appellant to cease using his land for the specific uses referred to in such notice, it may well be that the Council was persuaded to adopt that course by what was said by the No. 1 Board in the finding above adverted to. Be that as it may, this Board proposes to dispose of the present appeal upon the basis that it is competent for the Board, if the facts so warrant, to order the appellant to do something other than cease using his land for the uses referred to in the notice served upon him.

Upon its evaluation of the evidence adduced at the hearing, supported by a view made of the appellant's premises, this Board finds:

(i) That the use made by the appellant of the land in question for the wrecking of motor vehicles and the storage of motor vehicles and the storage of parts of motor vehicles has objectionable elements which cause a detraction (primarily visual) from the amenities of the neighbourhood.

(ii) That the appellant did not, as he was ordered by the No. 1 Board to do, erect a neatly painted gate of solid construction and extending between the back of his dwellinghouse and his neighbours' fence but, in fact, erected a fixed fence or barricade at a position closer to the front boundary of his land.

(iii) That the appellant failed to remove at the earliest practicable date the existing bus or caravan body referred to in the No. 1 Board's order and that the explanation given by him in evidence as to why he did not do so is not acceptable.

(iv) That, in respect of the requirements referred to in (ii) above, the appellant failed to comply with those requirements within three months from the date of the No. 1 Board's Order.

In considering the nature of the action it should take upon the basis of the findings so made, the Board has paid appropriate regard to the submission, so strongly advanced on the respondent's behalf, that an order should be made conforimng with the terms of the notice of 17 August 1970. In relation to that matter it should at once be said, however, that Mr L. C. Leikis, the respondent's city planning officer, conceded in evidence not only that no formal complaints concerning the use made by the appellant of his land had been received by the Council during the twelve months preceding the date of the hearing of this appeal (that is to say, since the hearing by the No. 1 Board of the appeal previously made) but also that the state of the appellant's property had (as the view made by the Board confirmed) improved considerably during that time. It is relevant also to say that, leaving aside for the moment the question of detraction from amenities, of the nine requirements set forth in the No. 1 Board's Order with which the appellant was directed to comply, only three, one of them designating the time within which some of the other requirements were to be complied with, were put forward by the respondent as warranting the action this Board was asked to take.

In the circumstances above narrated, the Board is satisfied, and so holds, that this appeal should be allowed but only to the extent of disallowing the respondent Council's requirement that the appellant should within three months from the date of the receipt by him of the notice of 17 August 1970 cease using his land for the wrecking of motor vehicles and the storage of motor vehicles and the storage of parts of motor vehicles. The Board, being satisfied, however, that the uses made by the appellant of the land in question are such as to cause a detraction (primarily visual) from the amenities of the neighbourhood and that those objectionable elements are removable or reducible by means that are reasonably available to the appellant as user of such land doth hereby order and direct the appellant to comply within three months from the date of service upon him of this Order with the requiremnts hereunder set forth:

(a) To erect between the most Westerly corner of the dwellinghouse erected upon his land and the North-Western boundary of such land and keep well maintained and closed when not actually in use for entrance and exit purposes a neatly painted gate of solid construction and of a height of six feet attached by hinges to a substantial post and secured at its opposite end by an appropriate fastening.

(b) To remove wholly from such land the bus or caravan body referred to in the No. 1 Board's Order as well as in evidence given by the appellant before this Board.

(c) To arrange and store in an orderly and tidy manner but not so as to be raised beyond a level of six feet above the surface of the land those items at present indiscriminately placed and being in the area of land located between the South-Western side of the large shed located on the appellant's land and the South-Western boundary of such land.

Having regard to the fact that a substantial amount of this Board's time has had to be expended in hearing an appeal and making an order in respect of requirements substantially all of which might reasonably have been expected to have been carried out by the appellant in complying with the order and direction made by the No. 1 Town and Country Planning Appeal Board on 9 March 1970, it seems appropriate in this instance to record that, where a person fails to comply with or acts in contravention of any condition, restriction, obligation, prohibition or covenant imposed by a Town and Country Planning Appeal Board, recourse may be had to the provisions of ss. 50A and 50B of the Town and Country Planning Act 1953.

Finally, in respect of the ground of appeal wherein the question of the respondent's authority to issue the notice of 17 August 1970 was raised, the Board records that that matter was only briefly mentioned before it and does not, in the Board's opinion, call for any comment additional to this present mention of such matter.

Appeal allowed.

Rotorua Supermarket *v.* Rotorua City

Number One Town and Country Planning Appeal Board. Rotorua. 1971. 17 February.

Jurisdiction—Change of use—Application under s. 38A of the Act lodged before but granted after first district scheme became operative—Ultra vires—*Not a consent under s. 35 and incapable of being cured by Reg. 4—Question of jurisdiction and not procedure—Jurisdiction declined—Town and Country Planning Act 1953, ss. 35, 38A; Town and Country Planning Regulations 1960, Reg. 4.*

Jurisdiction—Status to apply under s. 35—Whether applicant was a person entitled—"Owner"—Proceedings a nullity—Jurisdiction declined—Town and Country Planning Act 1953, ss. 2, 35.

Jurisdiction—Status to object—Association did not claim to be affected in its own right—Section 35 makes no provision for representational objections and appeals.

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

Dennett, for the first appellant.
O'Sullivan, for the second, third and fifth appellants.
Brewster, for the fourth appellant.
Palmer, for the respondent.
Gillespie, for the applicant.

The decision of the Board was delivered by TURNER S.M. (Chairman). By application dated 18 December 1969, Commercial Centres Limited applied to the respondent "for consent to a change of use to permit the erection on the land hereunder described of a toursit and shopping centre incorporating supermarket, departmental and specialty stores, community facilities including medical and dental clinics, plunket rooms, service station and playground." The land described in the application is situated in Fairy Springs Road, Rotorua, contains 17 acres 2 roods 30 perches and is part Kaitao Rotohokahoka 1L1 Block Certificate of Title 10B/436. (It is hereinafter referred to as "the property".) The application was expressed to be made under s. 38A of the Town and Country Planning Act 1953.

At a meeting held on 15 June 1970, the respondent considered the report of its Town Planning Committee and resolved that the application be granted subject to conditions.

The first district scheme for the district of the respondent became operative on 1 March 1970. In terms of the operative district scheme, part of the property is zoned Special Industrial B and the remainder is zoned residential A. The uses proposed by the application are not permitted in either zone.

Subsequent to the resolution referred to in paragraph two hereof, appeals were lodged with this Board by five persons or bodies who had lodged objections to the application. All appeals were expressed to be brought under s. 35 (6) of the Act and were expressed to be against the application for consent to a specified departure from the district scheme.

The preliminary question therefore arose as to the legal effect of the respondent's consent given on the application. In Appeal No. 351/70, *Rosedale Processors Limited* v. *Invercargill City*, the Chairman of the No. 2 Town and Country Planning Appeal Board ruled that where a Council grants an application under s. 38A after the district scheme has become operative, it acts *ultra vires*. This Board follows that ruling and declares that if the respondent's resolution is construed as having been a consent given under s. 38A, it was nugatory, the section having ceased to have effect in the circumstances.

It was assumed that the resolution of the respondent was effective as a consent under s. 35 of the Act to a departure from the provisions of the operative district scheme and the appeals were therefore brought pursuant to that section. The Board further rules that the resolution of the respondent was not a consent under s. 35. Although Reg. 32 prescribes an identical procedure for the bringing of applications for consent to change of use, specified departure and conditional use and although the forms of application and advertisement are similar in each case, the matter is one of jurisdiction and not of procedure and cannot be cured under Reg. 4. On any application brought pursuant to the procedure prescribed by Reg. 32 the Council has jurisdiction to grant no more than is sought by the express terms of the application. Furthermore, there are significant differences between the relevant sections of the Act as to the persons entitled to bring applications and as to the matters relevant thereto (and hence as to the matters to be advanced in opposition thereto); separate and distinct rights of appeal are given.

Even if the respondent had power to amend the application before adjudicating thereon (and the Board doubts whether it would be proper so to amend without requiring re-service and re-advertisement of the application), the record placed before the Board established that no amendment of the application had been made. The matter is fundamental, because if the applicant acting on the respondent's resolution of 15 June 1970, were to implement its proposals then it would be necessary for it if it were not to be in breach of s. 36 of the Act to be able to establish from the record of the respondent that it was doing something (in the words of subs. (4) of s. 36) "pursuant to a consent given under s. 35 of this Act."

Even if the respondent had been able in the circumstances to give a consent under s. 35 the further preliminary question arose as to whether the applicant was a person entitled to make an application under that Section. It expressly allows an application to be made only by "the Minister, any local authority or public authority or the owner or occupier of the land concerned." By virtue of the extended definition contained in s. 2, the term "owner" in relation to any property which is the subject of an application for departure includes any person who has agreed to purchase that property conditionally upon the departure being granted.

On that question, the evidence established that the applicant is not the occupier of the property nor the owner of the property in the ordinary sense. The applicant's interest in the property arises solely by virtue of a document which can be sufficiently described as an option for a specified period of time granted by the owner to the applicant in common form, but containing the following clause:

> "5. From the date of granting the option, you shall with due diligence take all necessary steps to have the whole of the land or so much thereof as may be feasible but in no event less than *twelve acres* (12 acres) rezoned 'Commercial' under the Ordinances of the City of Rotorua District Scheme or any amendment thereof, and you shall bear all expenses in connection with such application and any appeal necessary to obtain such rezoning, including all survey, engineering, architects' and legal fees."

The document has not been executed by the applicant but by it the owner acknowledges payment to it by the applicant of $1.00 as consideration for the option.

In the opinion of this Board the applicant is not, in the words of the extended definition of the term "owner", a person who has agreed to purchase the property. The opinion of the House of Lords in *Helby* v. *Matthews* [1895] AC 471 appears still to be authoritative on that point and unaffected by later decisions. The Board particularly refers to the words of Lord Herschell L.C. at p. 477:

> "It was said in the Court of Appeal that there was an agreement . . . to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words 'agreement to sell' be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, *certainly does not connote an agreement to buy* [emphasis added], and it is only in this sense that there can be said to have been an agreement to sell in the present case."

Counsel for the applicant relied upon the authority of *Buyn* v. *Ogg* [1967] N.Z.L.R. 279. In the opinion of the Board that case is authority only for the proposition that an option to purchase land confers an interest in the land upon the holder of the option; and that that case, and other decisions quoted in support, were concerned with the contractual position of the owner who has granted an option and the interest thereby created in favour of the holder of the option, rather than the contractual position of the latter. Taking the words "has agreed to purchase" in their ordinary sense, the Board cannot construe them so as to include a person who has the present right to purchase but who has yet to assume the obligation to purchase and may still elect not to do so.

Counsel for the applicant argued that the Board should take into account commercial practice in respect of options and the difficulty of preparing a conditional contract in the circumstances of the present case. The Board cannot see any greater difficulty in preparing a conditional contract than in preparing the simple form of option used in this case. Nor can the Board go beyond the proper interpretation of the

(To be continued.)