The New Zealand
LAW JOURNAL

7 MARCH 1972 No. 4

COUNSEL OF ONE'S CHOICE

In recent months defence counsel in a number of centres have received what the press has chosen to described as "sharp censure" from the bench at their failing to appear when defended matters in which they were engaged have been ready to proceed.

In each case it is understood that defence counsel were engaged in other Courts, and in some instances in Courts of a jurisdiction superior to the Magistrate's Court in which venue the rebukes were made.

Difficulties beset the busy Court man who, in addition to his many other facets of expertise, is expected to be something of a soothsayer when it comes to estimating the duration of defended matters. A recent building dispute in Wellington was expected by all counsel involved to last under two days; in fact it dragged on for no fewer than nine. Of course when the Court is unable to accommodate all those with cases and witnesses waiting to be heard the position is reversed—and one commentator has suggested that an airline would not be long in business which simply directed all passengers to be at the airport at 10 a.m., to be accommodated as and when it suited the airline.

The consequences of a failure to appear when a case is called are comprehensively canvassed in the Court of Appeal decision of *R.* v. *West* [1960] N.Z.L.R. 555. The headnote reads: "It is not incumbent on the Court to grant an adjournment in every case where a criminal trial comes on earlier than has been anticipated and senior counsel, or any counsel who has been briefed, is not present or available and a junior or someone on his behalf seeks an adjournment with an intimation that, if it is refused, there will be a withdrawal by counsel leaving the accused altogether unrepresented. Every case must depend on its own facts, and the responsibility of counsel to be present when his case is reached is a grave one. Where, however, the *wholly unavoidable absence* of counsel might leave the accused person *without representation in any real sense of the word* it would be proper to grant an adjournment." (italics supplied).

The facts of that case are given in the judgment of the Court of Appeal, delivered by the then President, Sir Kenneth Gresson; "It was anticipated . . . that the murder trial would be taken first. It was expected to occupy a week. It was found [the accused] was not [fit to plead] and accordingly . . . the trial for murder [did] not take place. The appellant had engaged Mr Stacey, of Wellington, as his counsel, but as well Mr Gallate, then visiting Napier, was engaged as junior counsel. Mr Gallate learned by 11 o'clock in the morning of February 16th, that it was intended to proceed with the appellant's trial at 2.15 that day and he immediately communicated with Mr Stacey in Wellington. At approximately noon, Mr Stacey learned that the appellant's trial was to start at 2.15. It was of course quite impracticable for him to reach Napier by that time even if he had been free to leave Wellington immediately.

"Shortly before 2.15 Mr Gallate, accompanied by the Crown Prosecutor attended in Chambers and made a request to the [then] Chief Justice to adjourn the trial to the following day, upon the grounds that Mr Stacey would not be able to reach Napier from Wellington before 7 p.m. that day. He stated that he himself had only a superficial knowledge of the facts, was of limited experience, and that Mr Stacey had the papers in Wellington . . . the application was accordingly refused. Mr Gallate apparently stated that he had been instructed by his senior

to withdraw from the case if the application for an adjournment was not granted. Unfortunately, the Chief Justice did not hear this statement . . . Accordingly there was not in [the] mind [of the Chief Justice] any appreciation that the accused was not going to be represented by counsel if the trial proceeded. . . . Mr Gallate then withdrew from the Court leaving the accused unrepresented."

The Court of Appeal, in allowing the appeal against conviction and ordering a re-trial, has been commonly misunderstood as endorsing the notion that an accused person is entitled not simply to counsel, but to counsel of his choice.

This misconception should be laid by the heels before it becomes more widespread than it already has.

In *R.* v. *West*, reference was made to *R.* v. *Kingston* (1948) 32 Cr. App. R. 183, from which emerged two points taken by the then Solicitor-General in argument before the Court of Appeal:

"1. If the accused had been represented *by any counsel present in Court* then the conviction would have been allowed to stand.
2. If counsel failed to do his duty to the Court and to his client by not attending when a case is in the list then the Court is justified in proceeding with the trial even though the accused be unrepresented." (italics supplied).

To quote further from the judgment of Gresson P: "In the present case, unfortunately, it had not been made plain to the learned Chief Justice that a refusal to adjourn would have the consequences that there would be a complete withdrawal of counsel and the accused would then be left unrepresented . . . nevertheless it is inescapable that the refusal to grant an adjournment until the next day did have the effect of depriving the appellant of the right he had of being defended by counsel. That the learned Chief Justice was unaware that his refusal to adjourn would have that effect is we think irrelevant when applying the principle which is fundamental and which admits of no departure therefrom—namely, that every accused person must have the fullest opportunity of putting forward his defence and there is, too, the supplementary principle that it is important in the conduct of judicial proceedings not only that what is done shall in fact be perfectly fair, but that it should bear the appearance of fairness."

JEREMY POPE.

SUMMARY OF RECENT LAW

ALIENS—PROHIBITED IMMIGRANT

Entrance into New Zealand without permit—Under coercion not an offence—Unlawful landing by prohibited immigrant—Immigration Act 1964 ss. 5, 15, 17. The appellant, a Tongar citizen, stowed away on the "Australis" at Suva with the intention of going to Mexico in May 1971. He was discovered and kept on board for two months and travelled round the world. He was locked up whenever the ship was in port and released after the ship left port and set to work as a crew member. The "Australis" called at Auckland on 24 July and sailed at midnight. The appellant had been locked up as usual and was released when the ship left the wharf. He then jumped into the harbour but got into difficulties and was picked up by the pilot boat which took him to Queen's Wharf and thence by ambulance to hospital. He was convicted under s. 15 (5) of the Immigration Act 1964 of entering New Zealand without having previously obtained a permit. He appealed against conviction. *Held*, 1. Since the appellant not being the holder of a permit nor within the class of persons exempted was deemed to be a "prohibited immigrant" by virtue of the provisions of s. 17 of the Immigration Act 1964. 2. A person who entered New Zealand without any free choice in the matter should not be held criminally liable under s. 15 (5) of the Act. 3. A person enters New Zealand within the meaning of s. 15 (5) at least when he crosses into New Zealand inland waters with the necessary *mens rea*. 4. A person, who because of coercion, arrives in New Zealand without committing an offence under s. 15 (5) cannot thereafter be found guilty of "entering" New Zealand by leaving ship whilst it is still within New Zealand inland waters. 5. Exercising the powers conferred by s. 132 (1) (a) of the Summary Proceedings Act 1957 the conviction was amended by substituting for the offence mentioned therein an offence under s. 5 (1) (a) of landing unlawfully in New Zealand. *Sione* v. *Labour Department* (Supreme Court. Auckland. 3, 10 September 1971. Richmond J.).

CRIMINAL LAW—MURDER

Intent—Effect of taking drugs—Defence of automatism—Voluntary and conscious act—Whether verdict of acquittal open—Manslaughter—Mens rea—*Death caused by unlawful act.* H., a 15-year-old boy, consumed a quantity of valium tablets. Shortly afterwards he broke into a nearby house and consumed a quantity of whisky. He then found a rifle and ammunition. He tested the marksmanship of the rifle within the house and then fired further shots which went beyond the house. One of these shots struck and killed a woman. He was charged with the murder. Evidence for the defence included psychiatric evidence to the effect that the acts, including the fatal shot, performed by the accused within half an hour after the consumption of the valium tablets, were acts that were, or might have been, performed in a state of automatism. At the close of the evidence a ruling was sought by the Crown on a submission that even were the jury to accept the proposition that at the material time H., being subject to the influence of the drug, or the drug and the alcohol, was unable to perform a voluntary act, or at all events, if they had not been satisfied beyond reasonable doubt

that such was not the case, nevertheless, since the condition was due to self-induction of the drug in question, it was not open to the jury to do other than consider the alternatives of murder or manslaughter. *Held*, In respect of either murder or manslaughter the Crown must show that the act of the accused causing the death was a conscious voluntary and deliberate act of the accused. Here if the jury was not satified that the act of the accused was voluntary in the sense of constituting an intentional assault and battery, the proper verdict would be one of acquittal. *R.* v. *Lamb* [1967] 2 Q.B. 981; [1967] 2 All E.R. 1282; *R.* v. *Ryan* [1967] A.L.R. 577 and *R.* v. *Holzer* [1968] V.R. 481, at p. 482, applied. *R.* v. *Lipman* [1969] 3 All E.R. 410, not followed. *Bratty* v. *Attorney-General for Northern Ireland* [1963] A.C. 386; [1961] 3 All E.R. 523, and *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349; [1961] 3 All E.R. 299, referred to. *R.* v. *Haywood* [1971] V.R. 755.

CRIMINAL LAW—POLICE OFFENCES

Disorderly behaviour in a public place—Presence of only person likely to be seriously annoyed unknown to accused—Police Offences Act 1927, s. 3D. A girl aged eighteen was with the appellant in the bottle store of an hotel when the appellant was making a purchase. A police sergeant having asked the girl how old she was warned her that her presence on the premises was illegal and told her to leave. The appellant intervened in an argumentative way. They left the hotel and with another companion joined a number of persons who were waiting to cross an intersection. Unknown to the appellant the sergeant followed them and heard the appellant exclaim in a loud voice, "officious bastard". The sergeant took the appellant into custody and he was subsequently charged and convicted under s. 3D of the Police Offences Act, 1927, of behaving in a disorderly manner. The appellant appealed against conviction. *Held*, 1. Conduct in order to be "disorderly" within s. 3D of the Police Offences Act 1927 did not have to be such as calculated to provoke a breach of the peace but had to be something more than just fitting the description of disorderly. (*Melser* v. *Police* [1967] N.Z.L.R. 437, applied.) 2. The Court has to apply an objective test to the conduct in question and determine as a matter of time place and circumstance whether it was likely to cause serious annoyance or disturbance to some persons or person. 3. There was no proof that the appellant knew that there was any likelihood of his remark being overheard by the one and only person to whom it could have been a serious annoyance. Appeal allowed. *O'Connor* v. *Police* (Supreme Court Hamilton. 12 August; 14 September 1971. Richmond J.).

DISCOVERY AND INSPECTION OF DOCUMENTS

Production and inspection of documents—Relevant documents—Documents containing matter raised in issue in proceedings are relevant—Production and inspection ordered. Practice—Discovery and inspection—Respondent resisting inspection of documents on ground of irrelevance—Documents not irrelevant if containing matters raised in issue in proceedings—Code of Civil Procedure, R. 163. Arbitration—Practice—Order for production and inspection of documents. This was an application for production of documents for inspection in an arbitration to fix the rental of motel premises for a renewal of a lease. The Court of Appeal on a case stated by the arbitrators as to whether it was competent for them to receive evidence touching the profits earned during the first term of the lease determined that the evidence was admissible in law but it was for the arbitrators to decide whether they would receive it and if so what weight to attribute to it. The applicant sought production of the statements of account of the motel business relating to the first five years of the lease. The respondent resisted on the ground that the arbitrators had not yet decided whether to receive such evidence. *Held*, 1. Apart from privilege a party as of right is entitled to inspect all documents held by the opposing party which directly or indirectly tend to advance his own case or damage that of his adversary. 2. The cases in which it has been decided that inspection has been refused on the grounds that the documents were irrelevant are founded upon the fact that the matters contained in those documents were not in issue in the action. *Chater* v. *Brisbane Tramways Co. Ltd.* [1919] S.R.Q. 123; *Fox Bros. & Co. Ltd.* v. *W. S. Cook & Son Ltd.* [1914] V.L.R. 1 and *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington* [1895] 2 Q.B. 148, explained.) 3. The applicants having contended that the statements of account were admissible were entitled to an order for production and inspection. *Romanos Motels Limited* v. *L. H. & C. P. Smith Limited* (Supreme Court Wellington. 10, 15 September 1971. Quilliam J.).

GUARANTEE—PROOF OF GUARANTEE IN WRITING

No consideration shown—Valid and enforceable—Contracts Enforcement Act 1956, s. 3.—Real Property and Chattels Real—Land Transfer Act—Caveat—Removal only if caveator has no right—Land Transfer Act 1952, ss. 137, 143. The applicant sought the removal of a caveat over his land under s. 143 of the Land Transfer Act 1952 on the grounds that the respondent was not entitled to the estate or interest which it claimed there being no consideration therefor and the document not being a deed. The applicant had signed a document guaranteeing a company's indebtedness to the respondent and in support thereof assigned and transferred to the respondent her equity in a property. *Held*, 1. If the respondent wished to enforce the guarantee the document was sufficient because s. 3 of the Contracts Enforcement Act 1956 provides that in the case of a guarantee the consideration need not appear in writing. 2. If the respondent wished to enforce the charge on the land by action the document would be insufficient because of the absence of expressed consideration. 3. The Contracts Enforcement Act 1956 rendered the document unenforceable by action but did not render it void or illegal. 4. A caveat should not be removed unless it is patently clear that the caveator has no right. (*Plimmer Bros.* v. *St. Maur* (1906) 26 N.Z.L.R. 294, 296; *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1923] N.Z.L.R. 1137, 1151 and *Re Stewart & Co., ex parte Piripi Te Maari* (No. 2) (1892) 11 N.Z.L.R. 745, 749, applied.) Application dismissed. *Scott* v. *Broadlands Finance Limited* (Supreme Court Auckland. 20 August, 3 September 1971. Perry J.).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Orders for Maintenance—Effect of Social Security—Where husband capable of paying maintenance—Social Security benefit for wife disregarded. This was an appeal from the Magistrate's Court by the husband against the quantum of a maintenance order on the grounds that in fixing maintenance regard should be had to the ability of the wife to apply for a benefit under the Social Security Act. *Held*, That as a matter of general public policy persons who can afford to perform their

statutory obligations under the Domestic Proceedings Act 1968 should not be permitted to throw the burden of maintenance on to the Social Security Fund. (*McGill* v. *McGill* (No. 2) [1958] N.Z.L.R. 257, followed.) Appeal dismissed. *Spanjerdt* v. *Spanjerdt* (Supreme Court Auckland. 1 September 1971. Richmond J.).

INCOME TAX—INTERPRETATION

Transfer of income producing asset to company with accumulated losses—Retransfer of asset after accumulated losses used to avoid income tax—Arrangement void as against Commissioner—Land and Income Tax Act 1954, s. 108. The objector was the owner of half the share capital in White Hart Hotel Ltd. In the three years ending 31 March 1957, 1958 and 1960 the company made losses totalling £3,989 16s. 10d. and as from June 1959 until revived in 1960 it was moribund. The objector also had an interest in a partnership which operated the Naenae hotel. In November 1960 he sold his interest in the Naenae partnership to White Hart Hotel Ltd. for £76 being the value of one week's goodwill since the partnership's lease of the hotel was determinable by a week's notice. In October 1960 the objector had obtained by transfer all the shares in White Hart Hotel Ltd. save 100 shares which were retained by the other original shareholder. As at 31 March 1961 White Hart Hotel Ltd. was entitled to the income of the objector's former interest in the Naenae partnership. In December 1961 White Hart Hotel Ltd. resold its share in the Naenae partnership to the objector for £76. The income of White Hart Hotel Ltd. from the Naenae partnership was £4,765 which was more than sufficient to use up its accumulated losses. The objector did not include in his personal tax return any income from the Naenae partnership. The Commissioner treated the £4,765 derived from the Naenae partnership as income of the objector relying on the transaction with White Hart Hotel Ltd. being void as against the Commissioner for income tax purposes under s. 108 of the Land and Income Tax Act 1954. The objector contended that he entered into this transaction for the purpose of gathering together his hotel interests so that he could deal more effectively with New Zealand Breweries Ltd. Subsequently he sold his interest in the Naenae partnership to another company in which he was a major shareholder and by means of that company did enter into an arrangement with New Zealand Breweries Ltd. *Held*, 1. An "arrangement" within the meaning of s. 108 is something in the nature of an understanding between two or more persons and comprehends an initial plan and all the transactions by which it is carried into effect. (*Newton* v. *Commonwealth Commissioner of Taxation* [1958] A.C. 450, 465; [1958] 2 All E.R. 759, 763, applied.) 2. The transactions between White Hart Hotel Ltd. and the objector were such an "arrangement". 3. An "arrangement" which falls within s. 108 must have as its sole or its principal purpose the avoidance of tax. *Mangin* v. *Commissioner of Inland Revenue* [1971] N.Z.L.R. 591, 598, applied.) 4. The transactions between the White Hart Hotel Ltd. and the objector were done for the predominant if not the sole purpose of using the accumulated losses of White Hart Hotel Ltd. to avoid tax. *Martin* v. *Commissioner of Inland Revenue* (Supreme Court Auckland. 2, 3 August; 28 September 1971. McMullin J.).

OBJECTIONS TO ASSESSMENT

Interpretation—Whether transaction was void—Effect of void transaction—Income Tax Act 1954, s. 108. Income Tax—Assessable income—Expenses and deductions—Income Tax Act 1954, s. 111. N., W. and M. carried on the practice of solicitors for some years. N. retired from the partnership on 31 March 1965. In May and September 1964 W. and M. created family trusts. In 1961 W. and his wife had set up the Marlborough company as a property investment company but it had never operated The two family trusts by arrangement became the shareholders of Marlborough in equal shares. W. and M. held the agency of the South British Insurance Co. as successors to the previous partnership of N., W. and M., which they relinquished after persuading the insurance company to give the agency to Marlborough. Marlborough became the insurance company's registered agent about 30 June 1964. In September 1964 W. and M. required two dictating machines. They arranged for these machines to be hired to Marlborough which in turn hired them to W. and M. at a higher rental. On 31 March 1965 W. and M. assigned the lease of their office premises to Marlborough. By a deed also dated 31 March 1965 W. and M. sold to Marlborough all their plant, furniture, library and equipment. On 1 April 1965 W. and M. admitted K. to partnership. W. and M. dismissed all their staff all of whom were then engaged by Marlborough. On 1 April 1965 by deed made between Marlborough and W., M. and K. Marlborough undertook to supply the latter with premises, staff, library, furniture, plant and equipment. On 1 April 1966 K. whose share of the partnership was less than the shares of W. and M. was brought level with the others so that each had a third share in the partnership. Subsequently the two family trusts each transferred some shares in Marlborough to Mrs K. so that each trust held 834 shares and Mrs K. held 332. shares The commissions derived from the insurance company were paid to Marlborough which had no banking account for the first year and were accordingly paid into the partners' trust account. The Commissioner acting under s. 108 of the Land and Income Tax Act 1954 considered that these transactions were avoided and assessed the partners accordingly. On a case stated Sir Richard Wild C.J. upheld these assessments but varied the assessment to the extent that deductions for plant and equipment should be allowed against W. and M.'s income and not against K's income since in avoidance the plant and equipment reverted to the original assignors W. and M. *Held*, 1. The arrangement whereby the partners assigned the office lease and sold the furniture, library and equipment to Marlborough which undertook to supply the partners with premises, furniture library, and equipment was absolutely void under s. 108. (*Elmiger* v. *C.I.R.* [1967] N.Z.L.R. 161; *Marx* v. *C.I.R.* [1970] N.Z.L.R. 182; *Mangin* v. *C.I.R.* [1971] N.Z.L.R. 591, applied.) 2. The transaction being void between the appellants and Marlborough the appellants were entitled to deductions for rent depreciation and insurance. 3. The arrangement between the appellants and Marlborough for the provision of staff for the appellants was void under s. 108. Since the appellants did not pay the staff salaries it was doubtful whether the appellants could claim such salaries as a deduction but the Commissioner had voluntarily allowed the salaries to be deducted. 4. Notwithstanding that a deductible item on the facts cannot be deducted under s. 111 the Commissioner can hold the transaction void under s. 108. (*Cecil Bros. Pty. Ltd.* v. *F.C.T.* (1964) 111 C.L.R. 430, not followed. *Newton* v. *C.T.C.* [1958] A.C. 450, 466; [1958] 2 All E.R. 759, 764 and *C.I.R.* v. *Europa Oil (N.Z.) Ltd.* [1971] N.Z.L.R. 641, 649, referred to.) 5. Marlborough having been appointed the agent of the South British Insurance Co. by that company the avoidance of the arrangements between the appellants and Marlborough did not revive the

agency which had been relinquished by the partners. The commissions received by Marlborough were not income of the appellants. The decision of Sir Richard Wild C.J. (1969) 1 A.T.R. 434, affirmed but reversed as to (5). *Wisheart, McNab and Kidd* v. *Commissioner of Inland Revenue* (Court of Appeal Wellington. 8, 9 March; 21 July 1970. North P., Turner and Haslam JJ.).

LOCAL GOVERNMENT—MUNICIPAL CORPORATION

Drainage—Owner installing stormwater drain, not complying with regulations—Continuing offence—Owner on sale of premises no longer continuing offence—Information laid out of time—Summary Proceedings Act 1954, s. 14. Public Health and Local Administration—Sewers and drains—Original owner installing stormwater drain not complying with regulations—Continuing offence—On sale original owner no longer continuing offence—Drainage and Plumbing Regulations 1959, Regs. 4, 16, 95. The appellant in 1966 was the owner of premises and installed a stormwater drain which did not comply with Regs. 4 and 16 of the Drainage and Plumbing Regulations 1959. On 28 February 1968 he sold the premises. He was charged with the continuing offence of non-compliance with the regulations as at 18 June 1969 and was convicted. The conviction was upheld in the Supreme Court. The appellant now appealed. *Held*, 1. In February 1968 the appellant having ceased to be the owner of the premises did not continue to commit an offence by omitting to do something which only the owner was commanded by statute to do. (*Marshall* v. *Smith* (1873) L.R. 8 C.P. 416, 423; *Rowley* v. *T. A. Everton & Sons* [1941] 1 K.B. 86; [1940] 4 All E.R. 433; *Thomas Welsh & Son* v. *West Ham Corporation* [1900] 1 Q.B. 324 and *London County Council* v. *Worley* [1894] 2 Q.B. 826, referred to). 2. After the lapse of six months the appellant could no longer be charged because of the provisions of s. 14 of the Summary Proceedings Act 1957. Judgment of Macarthur J. (unreported, Christchurch. 11 February 1971), reversed. *Moir* v. *Christchurch City* (Court of Appeal Wellington. 5, 20, August, 1971. North P., Turner and Haslam JJ.).

PRACTICE—PARTICULARS

Order for particulars before summons for directions—Special circumstances—Action by managing agents for wrongful dismissal—Defence alleging breaches of duty as managing agents—Allegations couched in general terms—Order that defendants give particulars of breaches known to them and on which intending to rely at trial—Particulars not limited to breaches known to defendants at date of dismissal. Master and servant—Dismissal—Summary dismissal without notice—Breach of duty—Master's knowledge of grounds for dismissal—Relevance—Action by servant for wrongful dismissal—Defence alleging servant's breaches of duty—Whether master entitled to rely on grounds for dismissal discovered subsequently. The plaintiffs brought an action against the defendants, a group of 42 property companies, for terminating their appointment as the defendant's managing agents without giving the notice required by their contract. By their defence the defendants alleged, *inter alia*, that they were entitled to terminate the contract "by reason of the failure of the plaintiffs to exercise due care, skill and diligence in the managing of the defendant's properties". This allegation was followed by "particulars" of the alleged breaches of duty which, in effect, consisted of an enumeration in general terms of the duties of managing agents coupled with bare allegations that the plaintiffs had failed to perform those duties. Thereupon, before the summons for directions and order for discovery, the plaintiffs requested further and better particulars of that defence "specifying all such failures of the plaintiffs known to the defendants at the date of [the] termination" of the contract. The defendants contended that the plaintiffs were not entitled to particulars at that stage of the proceedings, i.e. before the summons for directions and order for discovery. Plowman J. however, granted the plaintiffs' application for an order for particulars in the terms sought, i.e. limited to the alleged breaches of duty known to the defendants at the date of the termination of the contract. On appeal, *Held*, (i) Although in normal circumstances an order for particulars would not be made before the summons for directions, in the present case there was such a total lack of relevant detail in the defendants' allegations that the plaintiffs were entitled to particulars of the alleged breaches of duty which were known to the defendants and on which they intended to rely at the trial. (ii) If the plaintiffs had, before the alleged premature determination of the contract, been guilty of conduct such as would deprive them of the right to insist on the contractual provision for notice to determine, the defendants would have a good defence to an action for wrongful dismissal even though they were not aware of the plaintiff's conduct at the time when they determined the contract; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* [1886-90] All E.R. Rep. 65, followed; *Carvill* v. *Irish Industrial Bank Ltd.* [1968] I.R. 325, not followed. (iii) Accordingly the defendants should be ordered to give particulars of the alleged breaches of duty but the order should not be limited to those breaches which were known to them at the time when the contract was terminated because such a limitation was irrelevant. *Cyril Leonard & Co.* v. *Simo Securities Trust Ltd.* [1971] 3 All E.R. 1313 (C.A.)

SALE OF LAND—REMEDIES UNDER AN UNCOMPLETED CONTRACT

Forfeiture and recovery of deposit—Contract rescinded—Vendor unable to claim unpaid deposit. The appellant had entered into a contract to purchase a property from the respondent conditional upon raising mortgage finance within 21 days. The appellant had paid $1,000 in respect of the deposit of $2,000 dollars required by the contract. The appellant rescinded the contract on the grounds that the condition had not been fulfilled, and brought an action for the return of the $1,000 paid as deposit. The respondent counterclaimed for payment of $1,000 by the appellant, being the balance of the deposit unpaid at the date of rescission. The Magistrate gave judgment against the appellant on her claim and in favour of the respondent on the counterclaim. The Court upheld the Magistrate's decision against the appellant on her claim. This case is reported only on the question as to whether the respondent was entitled to be paid the balance of the deposit. *Held*, If a vendor, having stipulated for the payment of a deposit which is to be forfeited if the purchaser defaults, fails to collect the deposit before he elects to rescind or before he accepts the purchaser's recission by reselling the property he cannot subsequently sue for the deposit. (*Lowe* v. *Hope* [1970] 1 Ch. 94; [1969] 3 All E.R. 605, followed. *Dewar* v. *Mintoft* [1912] 2 K.B. 373, not followed. *Hodgens* v. *Keon* [1894] 2 I.R. 657 and *Hinton* v. *Sparkes* (1868) L.R. 3 C.P. 161, explained and distinguished.) *Johnson* v. *Jones* (Supreme Court Auckland. 1 June; 10 September 1971. McMullin J.).

TOWN AND COUNTRY PLANNING—OPERATIVE DISTRICT SCHEME

Offences—Dumping waste material in gully on farm and covering with soil—Improvement of farm land within permitted use of "farming"—No offence committed—Town and Country Planning Act 1953, s. 36 (2). The appellant timber miller arranged with a farmer to dump quantities of sawdust and slab timber in a gully and cover it with soil. Previously at intermittent times sawdust and waste timber had been dumped in this gully but not so as to create an "existing use". The appellant had been convicted in the Magistrate's Court of an offence of using land zoned rural in non-conformity with the respondent's district scheme and appealed. *Held,* The improving of inconvenient or irregular surface of land by filling with unobjectionable material was a use within the general category of farming. Appeal allowed and conviction quashed. *Onehunga Timber Holdings Limited* v. *Rotorua City* (Supreme Court Hamilton. 12 August; 14 September 1971. Richmond J.).

TRANSPORT AND TRANSPORT LICENSING

Accidents caused by unidentified motor vehicles or uninsured motor vehicles—Action against nominal defendant—Time within which notice must be given—Court's discretion to grant leave to bring action where notice given out of time—Transport Act 1962, s. 90E. Application for leave to bring an action against the nominal defendant. The plaintiff was injured in a car accident on 14 March 1969 near Christchurch and was in hospital for twelve days. The accident was reported to the police and to his own insurance company but he was unable to give the name or registered number of the Holden car which was the alleged cause of the accident. In April he got into touch with his Auckland solicitor who wrote to the police at Christchurch and his insurance company to obtain details of the identity of the Holden car. On 10 June 1969 the plaintiff's solicitors wrote to the State Insurance Office at Christchurch with details of the plaintiff's version of the accident and of his intention to make a claim against the nominal defendant. A statutory declaration made by the plaintiff was sent to the State Insurance Office on 25 June 1969. The notice and declaration were not given within the prescribed 42 days and application was made to the Court to exercise its discretion to grant leave to bring the action. *Held,* 1. The plaintiff was not justified in waiting to give notice until after he had made reasonable inquiries. 2. The point of time at which there has been "a failure to give the notice" is at the expiration of the 42-day period. (*William Cable Limited* v. *Trainor* [1957] N.Z.L.R. 337, applied). 3. The onus of proof that the nominal defendant was not prejudiced lies throughout on the applicant and is not discharged by raising *prima facie* presumptions. 4. The nominal defendant in all the circumstances was not prejudiced by the applicant's delay in giving notice. Leave to commence action was granted. *Playdell* v. *Nominal Defendant* (Supreme Court Auckland. 16 July; 6 August; 6 September 1971. Richmond J.).

CATCHLINES OF RECENT JUDGMENTS

Income Tax—Family trust—Arrangement to alter incidence of tax—Farmer conducting contracting business with equipment transferred to family trust—Whether s. 108 avoids transaction to which objector not a party. *Udy* v. *C.I.R.* (Supreme Court. Wellington. 1972. 26 January. Wild C.J.)

Income Tax—Family trust—Arrangement to relieve from liability—Return to solicitor of capital in firm followed by loan free of interest to family trust followed by loan back to firm at 10 percent—s. 108. *Mc Kay* v. *C.I.R.* (Supreme Court. Wellington. 1972. 26 January. Wild C.J.)

Companies—Take-over bid—Companies Amendment Act 1963 s. 11—Action by offeree company to recover expenses from offeror—Recoverable expenses limited to those reasonably incurred for purposes of informing shareholders of matters relevant to value of shares which are subject of offers. *Canterbury Frozen Meat Co. Ltd.* v. *Waitaki Farmers' Freezing Co. Ltd.* (Supreme Court, Christchurch. 1971. 16 December. Wilson J.)

Divorce—Supplemental petition—Answer filed to original petition but not to supplemental petition—Petitioner not entitled to set down supplemental petition as undefended suit. Procedure by supplemental petition unnecessary and inconvenient. *Edge* v. *Edge* (Supreme Court, Christchurch. 1972. 1 February. Wilson J.)

REGULATIONS

Regulations Gazetted from 14 to 24 February 1972 are as follows:

Diplomatic Privileges (Intelstat) Order 1972 (S.R. 1972/10)
Education (Assessment, Classification and Appointment) Regulations 1965, Amendment No. 5 (S.R. 1972/13)
Exchange Control Exemption Notice 1965, Amendment No. 10 (S.R. 1972/9)
Food Additives Notice 1972 (S.R. 1972/12)
Price Freeze Regulations 1972 (S.R. 1972/8)
Social Security (Pharmaceutical Benefits) Regulations 1965, Amendment No. 2 (S.R. 1972/14)
Teachers Training College Regulations 1959, Amendment No. 9 (S.R. 1972/15)
State Services Salary Order 1972 (S.R. 1972/11)

Lord and Master—In one case, the celebrated Irish counsel, John Curren, found himself facing the Lord Chancellor of Ireland, Lord Clare, who had brought his Newfoundland dog along for company. Curren paused in mid-argument as the Judge was busily petting his dog. After an embarrassing pause His Lordship looked up and invited Curren to proceed with his argument, at which point Curren snapped back at him, "I beg pardon. I thought your Lordships were in consultation."

BEE-GLUE AND THE TREATY OF ROME

Bee-glue is a red resinous substance got by bees from buds with which to stop up crevices.

It is not unlike Parliamentary Paper A. 5, "New Zealand and the European Economic Community" presented to the House of Representatives by leave in mid-1971. This deals with the history of negotiations, details the New Zealand case, records the course of negotiations, and the outcome is the Special Agreement which is discussed at p. 16 et seq.

I share the opinion of many notable economic, legal and political commentators that the Treaty of Rome is an ambiguous, complicated, and involved document giving the E.E.C. absolute power over the whole social and economic life of its members and their financial systems. It confers upon them a common nationality relative to the rest of mankind. The very concept of the community undermines British sovereignty and Commonwealth ties. The implications of the Treaty are so extensive that it is impossible at this stage even to comprehend how far and how wide the ripple of change must spread and swamp the individual characteristics of member nations.

There are no safeguards in the Treaty covering currency or price level stability, or to prevent monetary inflation or deflation, either of which would have catastrophic consequences. Membership of the Community would involve the abdication by the British Parliament of a substantive part of its powers, including the prerogative to issue currency and credit money. Moreover, as Australia and New Zealand and the other Commonwealth countries derive their fundamental rights from the Queen, erosion of her status cuts substantial ground from under Commonwealth feet. This is exemplified by the fact that the legal prerogative of Parliament to issue money stems from the traditional sovereign power of the Queen in Parliament Assembled.

Membership of the E.E.C. commits the destiny of British people to an outside organisation with a fundamentally different ethos and a completely different legal system.

There is no English translation of the Treaty of Rome having legal authority, the official versions being in Dutch, French, German and Italian. The best translation I can find is that produced by the Publishing Services of the European Communities (Reference 8012/5/XII/1961/5).

The publishers make the point that disagreement or uncertainty arising from the English translation could occur with particular reference to Articles 32, 85 (1), 86, 92 (1), 112 (1), 165 para. 4, 166 para. 3, 169, 170, 173, 179, 184, 237, para. 2—a formidable list.

So that, in addition to the ambiguity, complexity and involved nature of the official versions, especially the French, noted by overseas commentators, there are translational difficulties to complicate construction and interpretation.

The translational problem could be the genesis of what might turn out to be insurmountable interpretative difficulties. In discussing the Elements of the Special Arrangements affecting New Zealand on page 16 of Parliamentary Paper A.5, the New Zealand Government advisers have used an "unofficial translation" of "an agreed document", and, avowedly, refer to it as such, doubtless to explicate future differences.

Interpretation of the Treaty is the faculty of the Court of Justice (Art. 177) which operates on completely different legal principles from, e.g., the Supreme Court of New Zealand, or the High Court of Justice, or the House of Lords, or the Board of the Privy Council in the United Kingdom. Language apart, altogether, the construction even of the Elements of the Special Arrangement presents immediate interpretative problems in the context of our (the Common Law) legal system, let alone that of the Community based on the civil law of Rome.

Anyone who picks up the Common Market Law Reports can see the almost insuperable interpretative difficulties at a glance. Take, for example, the case of *Otto Witt K G* v. *Hauptzoll amt Luneburg* (Case 28/70) which was all about the meaning of "farmyard poultry". The particular kind of frozen poultry for which customs clearance was sought was described as "Rock Cornish Game Hens" in the U.S.A. Under Tariff Heading 02.02 the Hauptzoll amt Luneburg classified them as "dead state farmyard poultry . . . and edible offals thereof". An opinion of the Institute of Food Hygiene of the Free University of Berlin said that rock Cornish game hen did not correspond with frozen fowl, but resembled pheasant. However, the Veterinary Inspection Office at Hamburg revealed "no game taste but a typical taste of domestic fowl".

Two further expert opinions came to contradictory conclusions—so this knotty question was eventually submitted to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the E.E.C. Treaty. From a simple question: are fowls fowls? emerged the tremendously tricky legal question: are hens poultry "regarding the gradual establishment of a *common* organisation of the *market* in poultry meat"? Next came the interpretative difficulties because of the linguistic difficulties. The French version uses the term "volaille de basse-cour" (farmyard poultry) for both Tariff Headings 01.05 and 02.02; but the German version of the text enumerates with farmyard poultry "fowls, ducks, geese, turkeys, and guinea-fowls" for 01.05 (live poultry), but not for 02.02 (dead poultry)! There was a side-dispute on "game"—does it really refer to "wildhuhn" (wild fowl) or to "kampfhuhn" (game fowl, fighting fowl, or, in certain circumstances, domestic fowl)? The Court complicated it all by considerations of "galus gallus" (Woodhen—*Tetraonida*) and finally decided that species of poultry produced for food are farmyard poultry for the specific tariff headings. Remember that these were *preliminary* Court proceedings. The case has still to go before the Finanzgericht Hamburg. Doubtless poultry will eventually be equated with hamburghers, lamb chops, or Colonial Goose!

This sort of thing in our context is exemplified by contrasting 6 (3) on page 16 with 6 (8) on page 17 of Parliamentary Paper A.5 on which New Zealand Government advisers place some reliance in dealing with the difficult question of "phasing out". 6 (3) contemplates "a transitional derogation", the basis of "degressivity" being tied to a quinquennium "*subject* to para. 6 below". Para. (6) commences with the phrase "During the *first* five years". The "review clause", para. 7, does, as the advisers mention set out the criteria for determining the position in the next lustrum, but they make no reference to the *unpredictable* effect of para. 8. It is incomprehensible to me upon what legal substratum the optimistic prognostications in New Zealand about 1977 onwards can have been made.

Ostensibly the purpose of the Treaty is to promote economic progress of the Members. Actually this cannot possibly be achieved without "eliminating the barriers which divide Europe" (Preamble), "reducing the differences existing between the various regions" (Preamble), "[accelerating] closer relations between its Member States" (Art. 2), "the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market" (Art. 3). The purposes of the E.E.C. are effectuated through four organs, of which one is "The Court of Justice" acting "within the limits of the powers conferred by the Treaty" (Art. 4).

Without expatiating, it is as plain as a pikestaff to anyone of legal awareness that all this undermines the very *concept* of the monarchy and the monarch as the fountain of justice, involving as, ex hypothesi, inevitably it must do, a cession, or pooling, of these powers to the "Community" as a whole, to say nothing of the position of the Monarch as head of the Commonwealth.

Even if the U.K. enters into and remains within the E.E.C., many obstacles will lie in the way of success—the Commonwealth, Britain's own shakey economy, religious and ethnic variations, differences relating to the legal system, defence, farm policy, cost of living, wages and Welfare State problems.

Moreover, entry terms for Britain are unsuitable and afford little but five years' anxiety for New Zealand. Indeed the Australian position is much worse, it being evident at this stage that fulfilment of many of the proffered arrangements is just simply not feasible.

Europe, at the close of World War II in the summer of 1945, lay virtually devasted by the greatest holocaust in history. Panic-stricken U.S. financiers fearing that a prostrate Europe would fall prey to Communism, came up with the most alarming fiscal measure the world has ever known—the Marshall Plan. The U.S. pumped 50 billion dollars into Europe and the U.K. to help them back on their feet, to the point where this economic monster in Europe began to pulsate, thrive and challenge its creator, the U.S., in world markets.

Admittedly Churchill said at Zurich in 1946: "We must build a *kind* of U.S. of Europe". He contemplated a partnership between France and Germany. In London in 1961 Churchill wrote: "In my conception of a unified Europe, I never contemplated a diminution of the Commonwealth". As presently emerging, the United States of Europe is a resurrection of the ancient German-led Holy Roman Empire.

A heinous entity comprising 10 nations is now rising up on the Continent of Europe which will ultimately voice their power in one central dictator or Fuhrer. This bloc will attack economically, then militarily, the Communist nations—out of fear or self-defence—after having having attacked economically Britain first and then the U.S.A.

While the British Commonwealth proceeds to dismember itself, Germany and France are already cashing in on the markets in Rhodesia and other former colonial areas dominated by Britain. Once Europe really becomes prosperous and powerful she will turn her power and her energies into traditional destructive channels.

Thinking people now stand aghast when they see this U.S.-created, U.S.-financed, German-dominated, religious-controlled resurgence of the Holy Roman Empire, at present 182 million. and in the foreseeable future over 300 million.

Western Germany is the economic power-house in Europe. Even De Gaulle proposed a close Anglo-French concentration to counterbalance German economic and political power over Commonwealth nations; but De Gaulle's dream of a Europe from the Atlantic to the Urals is now dead. He did not want Britain or the Scandinavian countries in because of their Protestant character.

West Germany cannot remain a political dwarf while she is an economic giant. She does not intend to let France, Britain or the U.S.A. or anyone dictate how European economic affairs are going to be managed.

West Germany's Finance Minister, F. J. Strauss, saw Germany's re-unification accomplished through European re-unification. Today Germany is the second leading trading power on earth. At present no single European currency is strong enough to replace the dollar in international trade, but in an emergency situation might drive the E.E.C. bloc to adopt a common currency based on their combined gold and dollar reserves.

The U.S.A. gold supply has dropped to an alarmingly low point. The U.S. may even have to borrow from the International Monetary Fund because of chronic imbalance of international payments. Britain's gold reserves are practically negligible. France now holds one quarter of the world's stock of gold, but vast quantities of gold are poured into Europe.

A gold embargo by the U.S.A. would create a dollar bloc on the one hand, and a gold bloc in Europe. Such a war between dollar and gold could disrupt world trade and bring on a crisis such as mankind has never known before.

All Britain ultimately gets out of this is to become a captive minor work unit in this gigantic trading Babylon.

The first phase of what New Zealand will get out of it is to pump $107 million into a running down sheep industry.

J. A. B. O'KEEFE.

THE COMMON MARKET AND THE TREATY OF ROME

This article was written by Mr A. C. Brassington, of Christchurch, and originally appeared in the JOURNAL *in* [1963] *N.Z.L.J.* 41. *His observations then are perhaps even more pertinent today. Mr Brassington is a former lecturer in International Law and Political Science at Canterbury University.*

The European Community has developed from the pooling of French and German coal and steel production under a treaty signed by six States in Paris in 1951, which set up what is known as E.C.S.C. or the European Coal and Steel Community. In 1957, in Rome, the same six States by a treaty set up E.E.C., the European Economic Community, and Euraton, the European Atomic Energy Community. There are thus three communities which are linked together through a single General Assembly and a single High Court. The process has involved a planned merger of national sovereignty to achieve the creation of economic power. The instrument which has brought the present European Community into being, and which governs it, is what we now call the Rome Treaty.

The European Community is partly designed to counteract the economic power on the one hand of the Soviets and on the other of the United States of America, by creating economic unity in Europe. This unity involves the surrender of national sovereignty and of political and legal rights and duties within each member State in the interests of the trade and commerce of the Community.

Membership of the European Community is not revokable by a member. Once a State joins it submits itself to a process of integration and sheds a part of its sovereignty. As the European Community integrates, its functions increase so as to take in more economic and political activities, while at the same time the sovereignty of each member State decreases.

The question for Great Britain seems to be whether to attempt to join the Six and endeavour then from within the Seven to achieve leadership or at least fair and reasonable equality, or whether to seek other methods to secure her economic and political survival.

The price of entering the Community is the partial surrender of sovereignty, the subordination of English law to a new and unspecified legal system yet to be evolved, and the inability to withdraw from the Treaty which is designed to create a permanent union.

How can the laws of England be altered by the Community? The Council and the Commission of the Common Market are empowered by the Treaty to issue regulations "binding in every respect and directly applicable to each Member State". Such regulations may be passed merely by a majority. A regulation could become part of the law of England even although objectionable to the British Government. Such regulations so enacted by the executive bodies of the Common Market will not be subject to the control of Parliament as they need not be first submitted to Parliament for scrutiny and approval before enactment.

The branches of English law which would be affected immediately upon Britain's entry would be labour laws and social legislation, taxation laws, and laws relating to patents, companies, trade marks, and restrictive trade practices. A new European type of company and a new type of patent will emerge. It is safe to predict that what is known as big business will receive adequate protection as against the rights of workers and consumers.

The Court of Justice of the Community is to apply Continental legal ideas which differ widely from English legal concepts. It is to decide all matters relating to the Treaty and its interpretation, also disputes between member States or between them and the Commission and also between individuals and the Community executive, or its employees and the executive.

The judgment of the Court is to be given by one Judge; a single judgment is given and no dissenting opinions are permitted. Although in this way the Court resembles the Privy Council, it differs vitally in that the rules of precedent are not to apply. Thus the Court can disregard its earlier judgments. It administers what English lawyers contemptuously call palm-tree justice. Yet the decisions of this Court are to be binding on the national Courts of each member State. The English House of Lords would be superseded in all matters of interpretation of Community law.

The common law of England would be set aside in ever increasing measure. This effect would be undoubted, whether one regards the Community as a forward move, or a move backwards. And the setting aside could be by foreign Judges, a dissenting minority of English Judges being not able to express their dissent, but being compelled by their office to acquiesce silently. This also in a Court which is not bound to follow its own decisions. The great constitutional struggles in England for the rule of law would become nugatory before a faceless decision from under a palm tree. No supporter of the Common Market can deny this. Their answer is that the common law of England would be improved and revivified by the injection of the civil law concepts of other States, and that harmony between differing legal systems would thereby be achieved. The rejoinder of the English lawyers should be that the Common Law is not to be altered by foreigners who do not understand it, or who merely dislike it, or who think that they can improve it. We must maintain that the laws of England are the priceless inheritance of the Sovereign and the people of Britain and of the Sovereign and her peoples in the Commonwealth. We must maintain that this priceless inheritance shall never be interfered with except by the tried processes of Parliamentary enactment and that judicial justice shall be done openly and according to established precedent. We must not sell our legal birthright for a mess of Continental pottage. If English law is to take a new direction, it ought not to be directed from the Continent of Europe, where so many legal codes and concepts have failed to preserve the liberties of their peoples, so often, and for so long.

The Court has no power to enforce its decisions against a defaulting member State. If a member State refused to implement a decision of the Court, it would by so doing repudiate its solemn covenant under the Treaty. It would be an act of secession, a unilateral act, which could be dealt with only on a political basis. It would be in effect a lawless, revolutionary action on the part of the defaulting State. The Treaty is silent as to sanctions against such action. But once a State is well within the Common Market and has become dependent economically upon the other member States it would in fact be powerless to withdraw.

Enlightened Sentencing—Lord Braxfield is said to have told an offender, "Ye're a vera clever chiel, but you'll be none the worse of a hanging"

RESTRAINT OF TRADE AND PUBLIC POLICY

When Lord MacNaughton propounded the modern exposition of the law relating to contracts in restraint of trade in the celebrated *Nordenfelt* case (*a*) he probably had little or no idea of the extensive area to which the doctrine would apply some seven decades later. Although he couched his judgment in the most elastic of language, it must be remembered that it was delivered in a less sophisticated commercial era. It had little regard to the complexities of modern business, and it is to the credit of the judiciary that the doctrine has been allowed to extend to areas that could not have been contemplated by Lord MacNaughton (*b*). Nonetheless, the extension of the doctrine has left the law in some confusion, which arises partly from adopting nineteenth century attitudes to the contractual concept and partly because of the refusal of the Courts to examine such agreements in the wider concept of the public interest.

It has long been recognised that the most crucial tests utilised for ascertaining whether or not a contract in restraint of trade should be upheld are those of reasonableness, parties' interest and public policy. In most modern business dealings the most important test should be that of public policy, particularly where the agreement inter the parties is likely to affect outside parties. Unfortunately over the years the Courts have paid little more than lip-service to this aspect of control, preferring to base their decisions on a more personal contractual basis. Rarely has inquiry been made into the intricacies of commercial public policy, it being argued that the first two methods of control satisfy the third, the Courts having no right to undo contracts which are freely negotiated by the parties involved. Freedom and sanctity of contract will prevail in such circumstances. This argument, however, loses much credence in twentieth century commercial life, where monopolies abound and in many cases the standard form contract leaves the individual little or no room for negotiation. Thus whilst the public interest has been recognised as being a dominant factor in various commercial fields, resulting in international acceptance of restrictive practices legislation, it has played an almost inconsequential part in determining the validity of contracts in restraint of trade. Indeed, in 1913, in *Attorney-General* v. *Adelaide Steamship Co.* (*c*) their Lordships stated that they were not aware of any case in which a restraint, though reasonable in the interests of the parties had been held unenforceable because it had involved some injury to the public. It would appear that for some decades, public interest at the most was only a contributory factor to be taken into account. (*d*) Today, it seems that more sophisticated business dealings have forced the Courts to place more emphasis on public policy, though it is submitted that such emphasis is still weaker than it should be. In most large commercial dealings the interests of the individual parties should be overridden, and the public interest should be paramount in ascertaining the validity of contracts in restraint of trade. Only when it has been shown that the agreement is not contrary to the public interest (as opposed to being in the public interest), should the other tests be looked into. Yet the Courts still appear to be unwilling to go this far in the absence of specific legislation.

The aspect of public interest received its strongest emphasis in *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* (*e*) There, it will be remembered, the dispute centred around the validity of "solus agreements" between oil companies and garage proprietors, whereby the company advanced money to aid the purchase or improvement of premises, and the proprietor in return covenants to sell the products of the oil company. Normally the proprietor will agree to extract a similar undertaking from any future purchaser. Here, two such agreements had been made, the first for four and a half years, and the second for twenty-one years. The House of Lords held that such agreements were within the restraint of trade doctrine; that the former agreement was valid, but the latter was not as it was unreasonable and contrary to the public interest. Lord Reid noted that some of the earlier decisions were of little value, for it was not always clear whether

(*a*) [1894] A.C. 535.

(*b*) See e.g. *Pharmaceutical Society of Great Britain* v. *Dickson* [1968] 3 W.L.R. 286; *Eastham* v. *Newcastle United Football Club Ltd.* [1964] Ch. 413; *Bull* v. *Pitney-Bowes Ltd.* [1967] 1 W.L.R. 273.

(*c*) [1913] A.C. 781.

(*d*) See e.g. *Bakers' Bread Supply Ltd* v. *Findlay's Bakery Ltd.*, [1963] N.Z.L.R. 57.

(*e*) [1968] A.C. 269.

the outcome was due to the restrain in question being outside the doctrine or within the doctrine and considered to be normal and reasonable. (*f*) Lord Reid drew the distinction between two classes of cases when he said:

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had. A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant he gives up no right or freedom which he previously had." (*g*)

Lords Morris and Pearce agreed with this viewpoint, and in the end it was decided that both solus agreements came within the restraint of trade doctrine as they did not arise out of the sale or lease of land. The position was plainly outlined by Lord Denning M.R., in the later case of *Cleveland Petroleum Co. Ltd.* v. *Dartstone Ltd.* (*h*) Having referred to the *Esso* case, he went on to say:

> ". . . it seems plain to me that in three at least of the speeches of their Lordships a distinction is taken between a man who is already in possession of the land before he ties himself to an oil company and a man who is *out* of possession and is let into it by an oil company. If an owner in possession ties himself for more than five years to take all his supplies from one company, that is an unreasonable restraint of trade and is invalid. But if a man, who is out of possession, is let into possession by the oil company on the terms that he is to tie himself to that company such a tie is good." (*i*)

The issue arose recently in the Court of Appeal in *Robinson and Another* v. *Golden Chips (Wholesale) Ltd.* (*j*) The dispute arose out of the sale of the respondent's business and leasehold premises. The agreement stated that the appellants would purchase the business on terms that the respondent would supply them with certain deep fried food products, and that the appellants would buy these products from the respondent and no one else. The agreement wascontained in the contract of sale and purchase and the above-mentioned supply agreement, and in pursuance of the former the leasehold interest in the business premises was assigned to the appellants. The lease was for a period of five years with certain rights of renewal up to a maximum term of twenty years. All went smoothly until the appellants became dissatisfied with the position and notified the respondents of their intention to stop purchasing chips, etc. from the respondent. Counsel for the appellants placed reliance on statements made by Lord Wilberforce in the *Esso* case, who had been more cautious than his colleagues. He was of the view that such transactions could be said to be outside the restraint of trade doctrine because:

> ". . . they merely take land out of commerce and do not fetter the liberty to trade of individuals . . . instead of being regarded as restrictive they are accepted as part of the structure of a trading society. If in any individual case one finds a deviation from accepted standards, some greater restriction of an individual's right to 'trade', or some artificial use of a legal technique, it is right that it should be examined in the light of public policy." (*k*)

In *Robinson's* case, it was submitted that if the agreement was held to be valid, complete control of retail prices would remain in the hands of the respondent, though no "risk" lay on his shoulders. This state of affairs could last for twenty years. The Court of Appeal, however, found no deviation from accepted standards and having regarded the *Esso* case, North P. was of the opinion that it would be wrong for a Court to intervene where persons had the benefit of independent legal advice and:

> ". . . freely and voluntarily purchase another's land and business and subject themselves to a tie. It would be wrong for a person to repudiate a tie and retain the benefit thereof." (*l*)

It is respectfully submitted that the implications of the above decisions place a severe limitation on the restraint of trade doctrine which is not in the public interest. It was said that in *Robinson's* case, the appellants had the benefit of independent legal advice. Surely this is the position in almost all cases (with the possible exception of the master and servant agreement), where the restraint of trade doctrine applies? Yet it is no deterrent, and the Courts have the power to determine the validity of the concluded agreement. The sanctity of the personal contract should bow to the more important considerations of the public interest. In the *Esso*

(*f*) See *Catt* v. *Tourle* (1869) L.R. 4 Ch. App. 654; *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1.

(*g*) Ibid., p. 298.

(*h*) [1969] 1 All E.R. 201.

(*i*) *Supra* at p. 202.

(*j*) [1971] N.Z.L.R. 257.

(*k*) Ibid., p. 325.

(*l*) Ibid., p. 267.

case, and in *Robinson's* case, the principle is the same—if the covenant is tied to an interest in land, and a person enters into that covenant by way of purchasing or leasing the land, then he is bound by the covenant, not because it is reasonable in the interests of the parties and in the public interest, but because the restraint of trade doctrine is inapplicable, the party to be tied having given up no existing right which he previously had. Whilst it must be admitted that the principle is faultless in terms of strict legal technicalities, it has many flaws when examined in the wider context of the public interest. In commercial dealings such as those arising in these cases, the public interest element is not adequately dealt with by examining the tests of reasonableness and individual interest. This is so even though these tests may be regarded in the light of public policy, for in that context public interest is an inward rather than an outward looking test. In neither case did the Courts concerned have regard to the possible effect of their decisions on the general public.

It is quite obvious that in almost all cases agreements such as those mentioned above are made to restrict competition. Selfless motives are a rarity. It follows that a restriction on the use of land may harm the public whether undertaken when the land is acquired or at a later date. The supplier in such agreements may well have a monopoly or be the only source of supply in a particular area. Consequently, he may raise the prices as and when he desires. Another supplier may be deterred from entering the market if the primary supplier has already cornered a good part of the market for some years ahead. This situation restricts freedom of competition—the anti-inflationary process urged by all modern economists. Similarly, it has been pointed out that the present law can be too easily evaded. (*m*) The party to be tied who owns his land has only to sell the fee simple to the supplier who will in return grant a long leasehold interest. Nothing is to be sold during the intervening period between these two transactions. Thus where the leasehold interest contains a restrictive covenant it will be binding, there being no curtailment of a pre-existing freedom to trade. Where the party to be tied does not own the land, the supplier only has to grant an interest in land whenever he wishes to exact a tie. Again, let us suppose that the party to be tied goes through the easy formalities of changing his legal status, e.g., by becoming a corporate body and then taking the tie. The corporate body is not fettering any existing freedom which it previously had. Whether or not such arrangements would come under the heading of what Lord Wilberforce describes above as "some artificial use of a legal technique," is uncertain, and in any case it would be difficult for any Court to inquire into the "unapparent" motives of the parties concerned. Even if the Courts would inquire into such arrangements, it is certain that where a purchaser takes an interest in land which includes a business, any restrictive covenant will normally be held to be binding. The test as to whether or not the party to be tied is giving up any pre-existing right ignores the fact that the final outcome is the same, viz. a restriction on freedom to trade, which in many cases is quite contrary to the public interest.

It is, therefore, the writer's view that the present tests should be reversed, and that all agreements which purport to restrict competition should be regarded as being within the purview of the restraint of trade doctrine. Each agreement should be examined in the light of the public interest. If shown to be not contrary to the public interest, it is then, and only then, that the Courts should have regard to the further tests of reasonableness and the interests of the parties. In the absence of legislation the Courts have a duty to safeguard the public interest rather than the outmoded doctrine of the sanctity of contract. The philosophy of Lord Hodson in the *Esso* case, should determine the validity of all covenants where a restraint of trade is the prime objective. In his Lordship's opinion his decision rested on the public interest:

> ". . . rather than on that of the parties, public interest being a surer foundation than the interest of private persons or corporations when widespread commercial activities such as these are concerned." (*n*)

P. L. BRADBURY.

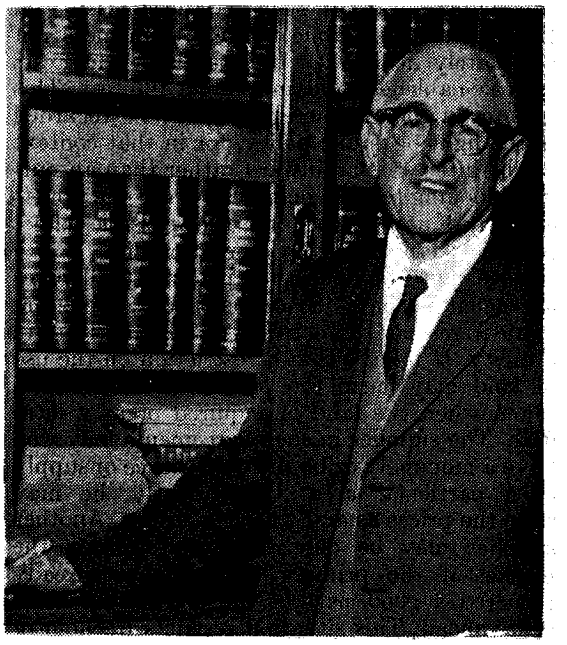
(*m*) 1969 85 L.Q.R. p. 229—"Frontiers of the Restraint of Trade Doctrine", by J. D. Heydon at p. 232.
(*n*) Ibid., p. 321.

Law of Evidence—"I think it's time all of us took a look and got rid of the technicalities. We have done so as a result of a report in England of which I was the author. It's a technicality of the law which we ought to try to get rid of, or at any rate simplify. After all, Jeremy Bentham said this as long ago as 1826 and what we've done in England is close to what he recommended": Lord Diplock.

JOHN HECTOR LUXFORD C.M.G., S.M.
AN APPRECIATION

The death of John Hector Luxford Esquire, C.M.G., S.M. on April 8 1971 brought to an end the illustrious career of a remarkable man. He will long be remembered by those who worked with him and under him, by those on whom he sat in judgment, and by the very many who were recipients of his humanity and kindness. He had a full life, a long life and an exceptionally active life, and in spite of the resultant effects of a serious war injury and some ill health he never deviated from his objective of helping, albeit sometimes where necessary with a firm hand, those who turned to him for help or for mercy. One outstanding feature of his personality was his humanity and his understanding of human problems and weaknesses. This trait of his character showed itself in all his undertakings with his family, his colleagues, practitioners, in Court, and among young people particularly in the Children's Courts. "Love thy fellow man" was close to his sympathetic heart.

Mr Luxford was a man of many parts but was a specialist on whatever he unedrtook: whether as a footballer, student, soldier, lawyer, husband, father, colonial judge, magistrate, author, City Mayor and administrator, Chairman of many Boards, Tribunals, and Commissions of Enquiry, arbitrations, again as a Magistrate at an advanced age and finally as Town and Country Planning Appeal Authority. His extraordinary ability was shown by the ease and certainty with which he handled these various duties with such widely differing functions and legal problems. His great ability and conscientious approach to the then present problem enabled him to be an authoritative person on the very many issues involved in the maze of current legislation. His zeal for work and his quick appreciation of any legal quandary enabled him to give immediate consideration to the so many issues submitted to him. His determination of these problems was rarely wrong and yet litigants were not kept unduly long for his decision. One of his principles was that litigants were entitled to have an answer to that personal problem without delay and he conscientiously all his judicial life worked long hours to give an answer to their trouble as soon as that was humanly possible—again an instance of his humanity and understanding of the troubles of those who appeared before him. As he said to me on more than one occasion, "It is just a case amongst many to those of us who sit in judgment, but it is perhaps the most important incident in the life of the most unwilling or unhappy litigant and he knows no peace until it is settled one way or another. If he feels he has had a just deal he will usually accept the decision with



J. H. Luxford, C.M.G., S.M.

fortitude if not of satisfaction. Undue delay in giving that decision robs it of its appearance of justice." I tried in my period on the bench under his leadership to use that concept of justice as my guide. He was a great leader and guide to those of us who sat with him as his colleagues.

He was proud of his position as a Magistrate and no Magistrate has ever worked so hard towards the recognition of the status of a Magistrate in the judicial system of our country. During the time he was on the bench the civil jurisdiction of a Magistrate increased from a maximum of £300 in civil cases to $2,000 (Incidentally as he died while on active service as a Magistrate, his pay had increased from £700 in 1928 to $10,870 on his death in 1971). The increase in status was largely due to his guidance,

leadership and example as a Senior Magistrate to give the Magistracy in general an uplift to be worthy of such trust imposed on them—a greater jurisdiction than any County Court Judge or Magistrate within the Commonwealth. What an amazing record he had as a Magistrate. Most certainly unsurpassed in New Zealand and extremely unlikely to be overshadowed in the Commonwealth at any time. He was appointed on 6 March 1928 and sat on the Whangarei circuit; was then appointed Chief Judge of Western Samoa 1929 to 1935; a Magistrate at Wellington 1935 to 1941, and then transferred to Auckland as Senior Magistrate 1941 to 1951, in which year he retired. He had then served as a Magistrate for perhaps longer than any other.

As if that was not enough for any ordinary citizen he worked hard at other matters (of which more anon) until 1965 when he was again appointed as a temporary Magistrate and was holding that office at the date of his death. A phenomenal aspect of that appointment was very happily recognised by the Chief Justice, Sir Richard Wild, in a personal letter dated 4 March 1968 which I think I should quote in full as an appreciation by the highest judicial authority in New Zealand and a real tribute to a then working Magistrate.

The letter states:

"This letter is intended to reach you on 6 March (1968) which day, I think, is the 40th anniversary of your appointment as a Magistrate. What an astonishing and magnificent record it is that, after 40 years, you should still be serving the community in that important capacity.

"It occurs to me that your service extends across the terms of no less than five Chief Justices, and your seniority is such that I imagine probably every Judge now in office has appeared before you in your Court. The number of Magistrates who have been your colleagues must be legion.

"I know that your judicial colleagues throughout your service as well as the legal profession and, I believe, the community have always had the highest admiration for the quality of your judicial work and for the manner in which you performed it.

"I count it as a great privilege to be able as Chief Justice to send to you on this day the heartiest congratulations of all judicial officers on this notable anniversary.

With kindest personal regards,

Yours sincerely,
(signed) Richard Wild."

What a tribute—and yet so modest was Mr Luxford that as a close personal friend I knew nothing of this until a few weeks ago.

My first contact with Mr Luxford was in 1928 when he wrote me a very encouraging note, as Magistrate in Whangarei, in relation to my first edition of the Magistrates' Courts Practice. I considered then, and still do, that this was a very kindly and encouraging help to a young practitioner and embryo author. It was an example of his nature to proffer help to those who were trying to succeed.

He disciplined himself and his Court; himself to overcome his personal disabilities arising from serious wounds in France and other medical disabilities, and from difficulties in Court arising from the foibles of learned Counsel. His discipline of himself resulted in maintaining great mental and physical agility until just before his death and in meeting the prospect of death with calm courage and fortitude. I saw him many times just prior to his death and his main concern was to leave no personal or public matters unsettled. He knew his time was up. He faced it squarely and only asked to be given time to finalise, I think, 19 judgments under Town and Country Planning proceedings, which he was concerned would cause inconvenience if not completed in time. On the day before his death he told me "I am now satisfied—I have completed the lot." In similar vein he told a colleague "You know I am 80 not out; I won't mind going back to the pavilion with a score like that." He had his wish—all his work was finished and all his private matters and papers in complete order. As was his wish he died in peace at rest from his completed labours.

These generalisations from a lifetime colleague and friend have, I hope, been of interest but I feel that I must conclude with a more detailed account of his personal history.

He was born in Palmerston North in 1890, educated there and at Dannevirke and Wanganui College; at the age of 18 he joined the legal firm then known as McDiarmid and Mears at Hamilton and, studying extramurally, qualified as a solicitor in 1913. In 1914 he married Laura Dagmar Olton who proved to be a wonderful helpmate with a clear understanding of such a man's requirements and, with mutual pride and love each in the other gave them 57 years of great happiness. They had two sons of their marriage; one died as a result of service overseas in World War II and the other, Mr Peter Luxford, is well known in New Zealand on matters relating to employers' interests. It was in this period in Hamilton before the first war

that Mr Luxford played rugby football as a Waikato representative and he kept his interest in football and cricket to the date of his death.

He then joined N.Z.E.F. in the 1st World War, rose to the rank of Major in the machine gunners, was mentioned in despatches and then severely wounded in France, a wound from which he suffered, without complaint, considerable incapacity for the rest of his life.

On return to civil life he was admitted as a barrister in 1919 and after conducting for a short time a branch at Te Awamutu and a partnership with Mr E. J. Case he joined as a partner in the firm of Fitchett and Rees in Auckland. He was then appointed a Magistrate in 1928 and took over the Whangarei circuit until appointed Chief Judge in Western Samoa in 1929, a position he held until relieved in 1935.

This position in Samoa was, I understand from him, a very interesting time in a somewhat troubled period in what was then a mandated territory. I refer to the Q.F. Nelson trials for one, but the case that gave him some thoughts of a record was one relating to the successions following on the validity of a marriage of the deceased prior to 1920. It involved Samoan custom and the German Civil Code. and Mr Luxford wrote a very long (he said his longest) interim judgment but then sent that judgment by way of case stated to the Supreme Court of New Zealand where apparently it lay in the Crown Law Office and was still there when Samoa achieved its independence. It was then discovered that the issues in the case and in the many depending on the decision had not been solved. Counsel were engaged by the Crown and Hutchison and McGregor JJ. gave a final judgment about 1963. Mr Luxford claimed that 30 years to finalise a judgment on a case stated was probably a record.

He then returned to New Zealand in 1935 and resumed his appointment as a Magistrate settling in Wellington from 1935 to 1941 and then transferring to Auckland in that year as Senior Magistrate, an appointment that then existed under the 1928 Act and which carried an extra emolument of £100. He held this office until his retirement in 1951 after a period on the bench that was exceptionally long. He retired, but not to rest.

Having been honoured by Her Majesty the Queen with the award of a C.M.G. in 1952, he entered the hustings in 1953 and was elected Mayor of Auckland, a position which he held until 1956. His subsequent positions and appointments are exceptional. I do not know if I have a complete list but he has been: Chairman of the War Pensions Appeal Board, Chairman of the Royal Commission on Freezing Works for Southland 1951, Chairman of the Commission of Inquiry on the location of a port for North Auckland 1952, Chairman of a Commission of Inquiry regarding alleged non-payment of tax by Incorporated Owners of Maori Lands 1952, Appeal Authority regarding the Imported Fruits Franchise 1952, Transport Licensing Appeal Authority 1966-68, Transport Charges Appeal Authority 1966-68, Air Services Licensing Appeal Authority 1966-67, Chairman of the Town and Country Planning Appeal Authority (up to the date of his death), and an arbitrator in many other public, semi-public, and private disputes. In addition to all these duties he has been from time to time, since 1965, sitting as a relieving Magistrgte in various Courts.

In addition to the above list of work in which he had been involved Mr Luxford was also one of the most prolific authors in New Zealand on numerous legal subjects. He commenced his writings with an historical work, *With the Machine Gunners in France and Palestine*, the official history of the machine gunners in World War I. The more important of his other works are Police Law in New Zealand (3 edits.) Liquor Law in New Zealand (3 edits.) Commercial Law in New Zealand (4 vols. 2 edits.) Real Estate Agency in New Zealand (4 edits) and Domestic Proceedings in New Zealand (with Mr Astley S.M.)

This is but a brief appreciation of one of the great judicial luminaries of New Zealand. He did his duty as a citizen nobly and well. He could proudly have said "I have done my duty as a citizen".

H. JENNER WILY.

Hong Kong Paradise

Our Hong Kong correspondent writes that 25-year-old Vasuda Balram Daswani was placed on a four months' suspended sentence and his wife fined $HK2,000 for controlling a ring of prostitutes, brought from Manila to work in Hong Kong. The ring was said to have made $HK12,000 in less than three weeks. After the hearing Mr Daswani reportedly told a newspaper: "They begged us to help them come to Hong Kong and promised to pay us back all the air fare money and any other expenses we incurred. They also promised they would give us 30 percent of their income. I had no idea it was an offence. I just thought it was a business venture. We were helping the girls out and in return we had an interest in them."

CORRESPONDENCE

Sir,

Re: **Innocent Until Proved Guilty**

The subject under comment in the enclosed United Kingdom newspaper cutting should cause much greater controversy than, say, the New Zealand butter price or Carribean sugar, or North Sea fishing rights.

In the Common Market, negotiations little has been heard of the possible effects of our legal system. Have the details of this matter been settled? Or is this question one of the "incidentals" to be tidied up at a morning session of the negotiators in Brussels and Luxemburg?

I am, etc.,

R. E. GAMBRILL.

The article forwarded by our correspondent entitled "Innocent Until Proved Guilty—and Don't Let Europe Forget It", written by Fenton Bresler, appeared in the *Daily Express* and reads as follows:

"A basic principle of our legal system—that a person is innocent until proved guilty—is being threatened.

It is under cross-examination by the Common Market Court of Justice in Luxemburg.

From there seven European Judges have come to London to discuss what will happen to our law when we join the Common Market.

So long as they want to learn from us they are welcome.

If they have come to teach us, *their* ways they can pack their briefs and go back home.

For there is a big difference between British and Continental law. A difference that makes ours wholly superior to theirs.

Most Continental legal systems are similar to each other and based on Ancient Roman law. When Common Market law was superimposed on them it did not mean much of a change.

Warned

But British law—and in particular English law—is entirely distinct: in its history, in its basic principles, in its machinery.

Continental Judges are merely interpreters of highly detailed parliamentary codes. Our Judges are law *makers*.

Britain, with its ancient ideals of "innocent until proved guilty," strong, independent Judges, and "fair trials" will be odd man out in the Common Market.

As Judge Carey Evans warned as long ago as 1962 when Mr Heath, then a Cabinet Minister in Harold Macmillan's Government, first flirted with Europe: "It is the pride of our Common Law that the prosecution must always prove its case to the satisfaction of the jury. But don't ask me what will happen when we get into the Common Market!"

Blurred

Such robust sentiments have now become unfashionable. Last month the Attorney-General, Sir Peter Rawlinson, said with apparent unconcern:

"Community law will have to take precedence over domestic laws to avoid conflict between the former and our own national statutes."

But amid the soft soap certain fundamentals must be preserved.

Otherwise, British law and standards of justice built up over centuries will become tarnished and blurred and in the end may cease to exist as a separate legal concept.

The basic fundamentals that must be written into the Market's legal structure are:

1. English must be a language of the Common Market Court of Justice, and all Common Market laws and regulations must be translated into English before becoming valid in this country.

2. Not only must Britain be strongly represented on the Bench of the Common Market Court, but British civil servants should form a substantial part of the Court secretariat.

3. No British citizen or company should ever be convicted by the Appeals Court in Luxemburg except on our time-honoured basis that he is innocent until proved guilty.

4. Legal aid should always be available to take a case to Luxemburg."

Naming a Rose

Sir,

I was very surprised recently to receive a letter from a firm of solicitors, advising of a legacy "to the Opotiki Sub-branch of the Royal New Zealand Society for the Health of Women and Children (Whakatane Branch Incorporated) for its general purposes".

This of course was very pleasing news. What was surprising about the letter was the following passage:

"We have been unable to locate this particular organisation, and have been unable to discover anybody who has the remotest idea of how we could get hold of any of its officers. Thumbing through the Post Office Directory of Box holders we found your address and this is the only evidence we have been able to discover, that this organisation could possibly exist at all. It would appear that your organisation which used to exist under a different name, is not as well known as it ought to be."

Admittedly the Royal New Zealand Society for the Health of Women and Children is perhaps better known as the Plunket Society, but considering that for many years now we have advertised, giving some information about the Society and giving both these titles, it seems strange that a firm of solicitors should not be aware of our existence. However, if one firm of Barristers and Solicitors is unaware of the Society, perhaps there are other solicitors too, who do not know that the Royal New Zealand Society for the Health of Women and Children is in fact the Plunket society. It therefore seems appropriate to remind the legal profession through your Journal that the Plunket Society continues its important work in the New Zealand community in caring for mothers and babies.

Yours sincerely,
MYRA K. MCKECHIE,
Dominion Secretary.

Guardianship in Separation Proceedings

Sir,

At [1971] N.Z.L.J. 510 appears a brief note on the decision of the Court of Appeal in *B.* v. *B.*, in which it was held that a Magistrate's Court has no jurisdiction, when making separation and maintenance orders under the Domestic Proceedings Act 1968, to vest sole guardianship of the children in one of the spouses pursuant to s. 12 of the Guardianship Act 1968. The decision merits closer scrutiny.

In deciding that the phrase "any proceedings for nullity, separation, restitution of conjugal rights, dissolution of a voidable marriage, or divorce" in s. 12 (1) referred solely to proceedings which must be brought in the Supreme Court and did not include separation proceedings in a Magistrate's Court, the Court gave the following reasons:

(a) The way in which the various proceedings are mentioned in s. 12 (1) follows exactly the order in which they appear in the Matrimonial Proceedings Act 1963.

This is of course correct. It also represents a reasonable order of progression which is as consistent with one view as with the other.

(b) Section 12 (3) refers to a refusal "to make it decree" and the last of these words is not apt to describe the formal decision of a Magistrate upon an application for a separation order.

What the subsection actually says is "to make a decree or to give any other relief sought." This *could* refer to other relief under the Matrimonial Proceedings Act 1963 and the use of the same phrase in s. 51 (2) of that Act, which was repealed by the Guardianship Act, perhaps lends some support to this view. On the other hand, the phrase is obviously capable of a wider interpretation, depending on the proper construction of s. 12 (1).

(c) Although s. 12 (1) uses the phrase "before or by or after the principal decree or order", the word "order" does not mean a separation order but is included to provide for the case where the Court makes an order dismissing the petition yet decides to deal with the question of custody or guardianship of children, as it may still do in terms of s. 12 (3).

With respect, this seems a rather strained interpretation. The wording of s. 12 (3) is so unequivocal that it is doubtful whether the draftsman would have thought it necessary to add the term "order" to s. 12 (1) for the reason given by the Court of Appeal.

It would nevertheless be rash to conclude on these grounds that the decision was erroneous. There is however one matter which the Court appears to have overlooked altogether. Certainly, the judgment contains no reference to it. This is that the jurisdiction conferred by s. 12 (1) (and therefore by s. 12 (2)) is expressed to be "subject to s. 24 of this Act and to subsection (2) of s. 15 of the Domestic Proceedings Act 1968." Section 24 is irrelevant to the point under discussion. Section 15 (2) of the Domestic Proceedings Act 1968 states that on an application for a maintenance order, or an order under Part V of the Act (which relates to the matrimonial home), or an order for custody under the Guardianship Act 1968, the Court may, if it thinks it expedient to do so, refer the case to a conciliator. Pursuant to s. 2 of the Domestic Proceedings Act, "Court" means a Magistrate's Court of civil jurisdiction, unless the context otherwise requires.

It is impossible to give any meaning to the words "Subject . . . to subsection (2) of s. 15 of the Domestic Proceedings Act 1968" in s. 12

(1) of the Guardianship Act if proceedings for separation in a Magistrate's Court are excluded *from the ambit of that section*, unless an argument can in some way be constructed that "Court" in s. 15 (2) includes the Supreme Court where custody applications are involved.

While it is granted that s. 12 could have been more explicit, the interpretation placed on it by the Court of Appeal does seem with respect to be open to question.

Yours faithfully,
(Mrs) J. E. LOWE.

LEGAL LITERATURE

"May It Please Your Lordship"—E. S. Turner Michael Joseph

"If Judges are to be dismissed as an Earl of Carlisle once dismissed them, as 'legal monks utterly ignorant of human nature and of the ways of men, governed by their own paltry prejudices,' they are entitled to reply, as Lord Chief Justice Kenyon did, that Judges see more of life than if they were shut up in gaming houses or brothels." So reads the penultimate paragraph of freelance writer and journalist E. S. Turner's review of the English Bench and Bar from the days of Coke to the present day in the scant space of 240 pages.

Rather than pretend to be a history of the law, the book concentrates on the High Court level of Judges in the English Judicial system as well as on the reforms which took place in that system over the centuries. As the introduction says "This book is an attempt to tell the judicial story from the days when a man was as likely to be hanged by an abbot as by a Judge. It describes how the King's Courts and Assize circuits were built up, how Judges were repeatedly purged for corruption and extortion, how they were thrown into dungeons by Barons and lynched in peasant risings; how they resisted, or failed to resist, the encroachments of the Royal prerogative; how, after 1688, they ceased to be the Royal jackals and become the watchdogs of the people; how they attempted to suppress the ideas liberated by the French Revolution; how they fell foul of the trade unions and were accused of laying down inequitable "Judge-made law", which parliament could have changed if it had wanted to; and how, after nine centuries, they reluctantly allowed themselves to become political neuters." The book aims to give some idea of what it was like to a thief up before the justiciar Ralph Basset, a Roman Catholic up before Sir William Scroggs, a libeller up before Lord Ellenborough, a parliamentary reformer up before Lord Braxfield or a Luddite up before Baron Alderson.

If the reader is provided with an uncomplimentary composite picture of the judicial system, revealed as being made by man and therefore imperfect and subject to abuses in the past and presumably in the present, he is not presented with a tale told by a carping critic, but rather by one who obviously has respect for the system and finds some amusement in the almost accidental manner in which the system has developed.

Mr Turner's approach to the subject is largely anecdotal and it is this which will please his readers most. He tells many stories gleaned from a variety of sources, and the book is a "must" for the after-dinner speaker as it is a veritable treasure house of stories to fit every occasion.

J.D.P.

The Development of Admiralty Jurisdiction and Practice since 1800 by F. L. WISWALL, JR. (London: Cambridge University Press. 1970. XXVIII and 217 and (indices) 5 pp.)

That few lawyers in New Zealand have even a nodding acquaintance with Admiralty Law is a massive understatement. It is true that we have some specialists in this esoteric field, who have managed to cope with such problems as actions *in rem*, affixing writs to the masts of ships, and other cognate matters arising in maritime law. But ships may now have neither masts nor funnels; and other vessels may be hovercraft, or jetboats, or small craft on inland lakes and waterways. They may be wholly owned by a foreign state, or they may be on the registry of some newborn and almost unknown state. In sum, things are not what they used to be.

The Sovereign Dominion of New Zealand is still applying the laws of Admiralty laid down by Great Britain last century, in the course of governing colonies, protectorates, and other appendages of an Empire which now seems to be in the penultimate stages of liquidation.

New law is now under consideration in New Zealand in regard to Admiralty. We must undoubtedly make legal changes to meet the demands of present conditions and if we are to produce a viable code, it is essential to have a backward look into the history of Admiralty jurisdiction in England.

At this opportune time we are fortunate to have Dr F. L. Wiswall's elegantly produced book, which has a valuable bibliography, and is graced with two interesting plates, one showing Rowlandson's delightful picture of a Court sitting in Doctors' Commons, and the other showing the Silver Oar Mace of the High Court of Admiralty of England c. Eliz. 1., and the Silver Oar Mace of the Vice-Admiralty Court of the Province of New York, c. 1725. These pleasing illustrations may evoke memories of books which in these busy times are not as well known, as perhaps they should still be, even by the more intellectual and scholarly young lawyers in New Zealand.

There are few who have the time or the opportunity to study R. G. Marsden's two pioneer volumes issued by the Selden Society under the title "Select Pleas in the Court of Admiralty (1390-1602)". For those who wish to work through the scattered literature on the subject, there is an easy approach in E. S. Roscoe's "The Growth of English Law", in which much information, collected from various sources and authorities, is presented in convenient form There is relaxation in Holdsworth's "Charles Dickens as a Legal Historian", especially the delightful selection from "David Copperfield" describing Doctors' Commons.

Dr Wiswall deals principally with the Court of Admiralty from 1798, in which year Sir William Scott, Lord Stowell, began to lay down and develop the jurisdiction and practice in Admiralty law in England. The history of the English Court is compared with its counterpart in American law. This is an important and rewarding aspect of Dr Wiswall's treatment of the subject. The author was a Yorke Prizeman of the University of Cambridge and is a practising lawyer in the City of New York. He devotes a whole chapter to the Doctors and the Proctors-in-Admiralty, under the arresting title "The Fall of Doctors' Commons". His profound knowledge is skilfully deployed in a most readable account of this now relatively obscure subject. There are ample footnotse which can be followed as a guide to sources and as an aid to further study. But Dr Wiswall always maintains a good balance between history, however absorbing, and the need of practitioners for an authoritative work on current law. In addition to his introductory and historical matters the author devotes close attention to modern case law statutes and rules in their practical application. There is an original and unusual study of Admiralty actions *in rem*, with an authoritative examination of the divergence between English and American law of Admiralty.

It is predictable that this book will be of practical utility in cases which will arise in New Zealand, and which will require for sound decision, within a wider framework of maritime law, a scholarly and informed approach, necessarily based on the history and procedures of the old Court of Admiralty.

Dr Wiswall's book is essential to students and practitioners who profess or desire to attain some competence in the subject of international maritime law. It comes most opportunely to lawyers in New Zealand if only because it fills a gap in our knowledge at a time when we are considering the drafting of new laws in our own Admiralty jurisdiction. This book is one to own, to annotate, and to use for many years to come.

A.C.B.

Window dressing—The petition was on the grounds of adultery. The respondent had been observed in a hotel bedroom by a window cleaner who was the corroborative witness. A young lady had entered the room, said the window cleaner, she had undressed very slowly and the young man had then undressed very quickly. He said they moved to the corner of the room where the bed was. The evidence in chief stopped at this point. There was a pause, and then the Judge said, "And then what happened?" The window cleaner told him the ladder broke. Judge: "How did that happen?" Window cleaner: "Well, there were 14 of us on it."

From *The Northern Newsletter.*

On Oz—"The Judge said that because the defendants were poor, only prison would do for them—an alarming penological principle. Oz-28 was certainly a foul piece of work. But we believe that a fine would have adequately reflected the measure of the offence of the social context in which it occurred. What has happened, instead, can be seen only as one man's blind lunge against obscenity in general. Anyone has the right, and many think they have a duty, to make such a gesture: but not, without overwhelming justification, by imprisonment and deportation.": *Sunday Times* (U.K.)

(Continued from page 72)

words used in the statute, because, as was held by the Supreme Court in *Borough of Levin and Others* v. *County of Horowhenua and Others* (Haslam J. on 23 October 1970), the status of "owner" goes to the root of jurisdiction on an application under s. 35.

In addition, it appears doubtful whether Clause 5 of the applicant's option is (as required by the extended definition of the term "owner") a condition that a departure be granted. The term "departure" is specifically used in the extended definition of the term "owner". The term "departure" is defined in the same section of the Act, so that that term, in the extended definition of "owner" must be given its defined meaning and no other.

On the other hand Clause 5 of the option is clear and unambiguous in its requirements. Indeed there appears to have been a careful and exact choice of words by the draftsman. The successful outcome of the procedures specified in that clause would produce legal rights different from those which would result from a successful application for a departure.

The Board therefore rules that the applicant was not in any event entitled to apply for consent to a departure from the operative district scheme.

For all the foregoing reasons the Board rules that the resolution of the respondent was a nullity and that there was no effective decision against which appeals could be brought and accordingly it declines jurisdiction to hear and determine the present appeals.

The applicant requested that should the Board rule as aforesaid, the Board should nevertheless proceed to give its opinion on the merits of the proposal. The Board proceeds to do that, but it emphasises that it is doing so only on the basis of the considerations relevant to an application under s. 35 of the Act.

In plans produced in evidence, the applicant further defined its proposal as one to construct 58,000 square feet of gross lettable space of which all but 4,000 square feet would be devoted to retail uses. A department store would occupy 15,000 square feet, a variety store 10,000 square feet and a supermarket 15,000 feet, there would be a number of specialty stores, post office, banks, restaurant and reception rooms, children's playground and other community facilities. There would be in excess of 400 off-street car parking spaces. The goods offered for sale would be in the proportion of approximately 40 percent convenience goods and 60 percent comparison goods. Other services would also be available and the property would provide room for expansion.

The shopping policy implicit in the operative district scheme is one major urban centre offering the whole range of goods and services (the central business district of the city) and a number of local shopping centres, at locations convenient to the residents, and of a size which limits thme to providing only the day to day convenience requirements of residents.

The Board finds on the evidence that the applicant's proposal would constitute a shopping centre of a kind intermediate between the major urban centre and the local shopping centres provided for in the operative district scheme and that it could be called a suburban centre. The applicant termed it a Community Shopping Centre.

The provisions of s. 35 (2) of the Act would have empowered the respondent to consent to the application (as an application for specified departure) only where:

> "(a) the effect of the departure will have little significance beyond the immediate vicinity of the property in respect of which the departure is sought, and the district scheme can properly remain without change or variation; or
>
> "(b) the departure is in respect of a matter for which the Council has resolved to bring down a change or variation to the scheme, but which is of such urgency as to warrant its immediate authorisation without waiting the time involved in completing the change or variation."

On an appeal in respect of such an application, this Board is similarly limited unless for reasons to be specified by the Board some dispensation from the principles quoted above is warranted in the public interest.

It has been said that the principles quoted in the foregoing paragraph are in the nature of "conditions precedent" to the grant of a departure by a Council. Unless one or other of them are demonstrated to apply in the particular circumstances, then the Council has no jurisdiction to grant an application for consent to a departure. (It is to be noted that although s. 35 imposes a specific limitation upon what may be permitted by way of a departure from a scheme, s. 29 does not limit the changes which may be made to an operative scheme.)

The resolution of the respondent purporting to grant the application did not specify which of the above-mentioned principles it found to apply in this case. On the evidence this Board finds that neither principle applies.

The compelling inference from the findings contained in para. 19 hereof is that the applicant's proposals are a fundamental departure from the shopping policy implicit in the district scheme and if permitted would be of major significance in the planning and development of the City of Rotorua. If they were implemented then the zoning of the property could not properly remain unchanged, because the orderly development of the city would demand that the district scheme itself give recognition to the *de facto* situation and record the existence and location of the "intermediate" kind of shopping centre.

The respondent had not resolved to bring down a change to the scheme with the effect of permitting the proposal.

The Town Planning Officer to the respondent stated in his evidence:

> "As the urban area grows it will become desirable for some of the functions presently performed by the Central Business District to be catered for at outlying locations to serve future residents in the outer areas."

and further:

> "The revolution in shopping patterns and habits over the last 10 years or so has made the reconsideration of present Rotorua planning policy for shopping in urgent need of review and restatement."

The growth of population in the Rotorua urban area over the last fifteen years has been rapid. In 1956 the population was 19,000. It was estimated in evidence that it is now 38,000 and that 30,000 of these persons live within the city boundary.

Having heard the evidence and submissions, the Board agrees that the respondent's planning policy for shopping is in need of review and restatement. However, an application and appeal under s. 35 of the Act is not an adequate or proper method for conducting such a review. The Board holds that the need for such a review does not constitute a reason for departing

from the principles laid down in s. 35 (2) of the Act. Indeed the granting of individual applications under s. 35, which by their very nature tend to be piecemeal and given in isolation, runs contrary to the overall comprehensive planning called for by the Act, and necessary in the case of any review of the respondent's shopping policy.

The applicant gave detailed evidence to the Board as to the total of existing retail floor space in the central business district of Rotorua, the adequacy thereof in terms of existing and projected future population, the area likely to constitute the "catchment area" of the applicant's proposal, the adequacy of the convenience shopping in that catchment area and the likely effect of the proposal on the growth of the central business district and the trade in the convenience shopping centres. Those are relevant matters. But in the case of the urban area of Rotorua a consideration of the need for and the best location of one or more suburban shopping centres involves, more importantly an "in depth" examinaton not only of the existing pattern of residential and industrial growth but also the desirable future form of that growth (both in the City and in the surrounding County area) and of the street network necessary to serve it. Even if the present proceedings were a proper method for testing the results of such an examination, the evidence tendered to the Board fell far short of that necessary to enable firm conclusions to be drawn and proper judgments to be made.

The uncertainty in which the Board was left on the evidence is illustrated by the following statement from the evidence of the respondent's town planning officer:

"The present application presents one alternative to the present policy."

Furthermore, if the need for more than one suburban shopping centre in Rotorua is established, a relevant question is the order in which they should be permitted to develop. Again the evidence did not enable the Board to form a judgment on that issue.

For the foregoing reasons, if the application had been in order procedurally, the Board would have allowed an appeal against the respondent's decision granting the application.

Before parting with these proceedings there are two further matters upon which the Board feels that it is desirable for it to record an opinion.

The first is that should it later be found on proper inquiry that a suburban shopping centre should be established in the vicinity of the property, then the evidence heard on this appeal established:

(i) That it would not be good planning for the traffic to or from such a centre to use Kaka Street
(ii) That a site in the vicinity of the Fairy Springs Road/Clayton Road intersection should have direct vehicle access at suitable points to and from both those roads, and that such vehicle access should be sufficiently far removed from that intersection that no congestion is caused at the intersection
(iii) That such a centre should not be established until it can be serviced by a public sewerage system.

The other is that in any event the Rotorua Progressive Businessmen's Association Incorporated (Appellant in Appeal 287/70) has no status to appeal. An objection to the application was lodged in the name of the Association simpliciter. An appeal was lodged in the name of the Association "acting as agent for and on behalf of the persons or Corporation whose names appeal in the Schedule annexed hereto".

Under ss. 35 and 38A, a right of objection is given only to such persons and bodies as claim to be affected by an application. The right of appeal is by virtue of those sections vested only in those persons and bodies who objected.

In this case the objector was the Association, not the persons and Corporations named in its Notice of Appeal. The Association did not claim to be affected in its own right. Section 35 makes no provision for representational objections and appeals. The decision in *Woolf and Others* v. *Petone Borough* 3 N.Z.T.C.P.A. 152 is authoritative against the Association in the present case.

Dassler *v.* Bay of Islands County

Number Two Town and Country Planning Appeal Board. Kawakawa. 1971. 2 March.

Jurisdiction—Conditional use application treated as application for Specified Departure without fresh application and declined—Council without power to waive requirement—Nor can the Board—Town and Country Planning Act 1953, ss. 28C, 35, 38A; Town and Country Planning Regulations 1960, Reg. 4.

Appeal under s. 35 of the Act.

Keeton, for the appellant.
Kennedy, for the respondent.

The decision of the Board was delivered by

BEAUMONT (Deputy Chairman). On or about the 23 August 1970 Mr L. S. Dassler (hereinafter referred to as "the applicant") applied to the Bay of Islands County Council for its consent to a conditional use of a portion of a block of 12 acres and 27 perches situated at the Puketona junction of State Highway No. 10 and the Puketona-Paihia Road and being Lot 2 D.P. 39381 Part O.L.C.59 and Part Section 8 Block VI, Kawakawa S.D.

The use proposed was for the establishment of a car-wrecking yard and the position of the land proposed to be used was an area of approximately 1 acre 1 rood 0 perches at the north-east corner of the block; which portion is shown on a plan produced to the Board as having frontage to the Puketona-Paihia Road and looking on to the Waitangi River some distance below the confluence of that river and the Waiaruhe River.

The respondent, the Bay of Islands County Council, considered the application as though it were an application for a Specified Departure without requiring that the applicant make fresh application under that Section of the Town and Country Planning Act 1953 and its amendments and by letter of 30 October 1970 received by the applicant on 2 November 1970 informed the applicant that it had resolved to decline the application. An appeal dated 18 November 1970 expressed to be made under the provisions of s. 38A of the Act was lodged with the office of the Boards at Wellington

The first question to be answered is whether or not the Board has jurisdiction to hear and determine this appeal.

At all material times the section of the district scheme relevant to the use proposed has been an "operative" section, the zoning of the subject land, rural A, within which zoning the said proposition is neither a predominant nor a conditional use and s. 38A of the Act has no force and effect.

The *criteria* to be observed in the determination of applications under s. 28C, (3A) s. 35 (2) (a) and (b), and s. 38A (1) all of which have been endeavoured to be invoked are all different and it is doubtful whether the provisions of Regulation 4 of the Town and Country Planning Regulations 1960 are sufficient to empower the Council in the first instance, or a Board on appeal to waive all the requirements relating to applications for consent to Specified Departures when an application has in fact been commenced under the section relating to conditional uses (s. 28C) and a subsequent appeal made under the provisions (in respect) of the section relating to change of use (s. 38A).

In the opinion of the Board, the Council had no power under the said regulation to hear and determine the application without requiring the applicant to commence afresh and it follows therefrom that the Board does not itself have power to hear and determine an appeal lodged under the provisions of an incorrect section nor to permit the appellant at a late hour to endeavour to amend the error.

For those reasons this appeal must be dismissed.

Appeal dismissed.

Attorney-General *v.* Kennard, Oamaru Borough and Others

Supreme Court Dunedin 12 February; 10 May. 1971. SPEIGHT J.

Town and Country Planning—District schemes—Land designated as "reserve"—Designation no longer required—No underlying zoning—Council zoning before designation lifted—Town and Country Planning Act 1953, s. 33A.

Town and Country Planning—Appeals—Power of Appeal Board to cancel and substitute zoning—Town and Country Planning Act 1953, s. 42.

This motion was originally brought by F. an individual for a writ of *certiorari* to be issued against the No. 1 Town and Country Planning Appeal Board, the Oamaru Borough Council and the Oamaru Licensing Trust to test the validity of a decision to zone a public reserve in Oamaru as residential. It was found that the Appeal Board had made a decision by consent zoning the public reserve as rural. The proceedings were then re-constituted by joining the Attorney-General as plaintiff *ex relatione* F.

The reserve was vested in the Council as a reserve for purposes of health and recreation. The Licensing Trust was desirous of erecting a hotel/motel on part of the reserve. The reserve had no zoning designation under the Town and Country Planning Act. The Council sought from the Minister of Lands revocation of the reservation. After compliance with the Minister's request for inquiry as to objectors the Minister indicated that he would be prepared to take the appropriate steps under the Reserves and Domains Act 1953 to revoke the reservation provided that he was satisfied the Licensing Control Commission would be prepared to grant a liquor licence to the Trust and that there had been an appropriate change of zoning. The Council acting under s. 33A (2) of the Town and Country Planning Act 1953, there being no existing zoning, zoned the land "residential". Subsequently the Appeal Board on appeal by consent zoned the reserve with an underlying rural zone. There was no evidence before the Court that the Council had resolved that it no longer needed the land designated as a reserve. The motion was concerned only with the validity of the procedures under the Town and Country Planning Act 1953 and was not concerned with those under the Reserves and Domains Act 1953. The plaintiff contended that s. 33A (2) was inappropriate and that Council should have proceeded under s. 33A (1) as for an existing and continuing public work and then it would have been necessary to proceed under s. 30A which contains different rights of objection and appeal.

Held, 1. In *certiorari* proceedings the Court is obliged only to examine the face of the record.

Straven Services Ltd. v. *Waimairi County* [1966] N.Z.L.R. 996, 999, referred to.

2. The onus was on the plaintiff to prove that the Council had failed to resolve that it no longer required the reserve to be so designated and no evidence had been tendered.

3. The Court was loath to decide the case on the technicality of onus of proof.

R. v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338, 353; [1952] 1 All E.R. 122, 131, referred to.

4. It was inherent in the representations to the Minister of Lands and the subsequent steps that the Council must have decided it required the reserve no longer to be so designated.

5. The wording of s. 33A (2) was not parallel to the wording for the creation of or the release from being a public work which are set out in ss. 22 and 35 of the Public Works Act 1928, and s. 20 of the Public Works Amendment Act 1952.

6. Section 33A provides two different procedures: (a) If the public work is intended to be continued then subs (1) is appropriate and the land designated as required for a public work can be given an underlying zone at a later stage; and (b) Where the existing or proposed public work is not to be continued or proceeded with then it is desirable that the matter should be dealt with forthwith and subs. (2) is appropriate and if the land has an underlying zone such zoning shall continue until changed or varied by the Council and if there is no underlying zone the Council shall determine the zoning.

7. Subsection (2) of s. 33A does not make the lifting of the classification as a public work a prerequisite to be completed before zoning can take place. The only prerequisite is that the person responsible for its original classification no longer requires it to be so classified.

8. The Council having financial responsibility had decided it no longer required the reserve to be so designated and was in the process of requesting the Minister to lift the reservation and he had indicated conditionally that he would do so.

9. The onus being on the plaintiff to prove that the Council had not formally resolved that it no longer required the reserve to be so designated and having regard to all the negotiations the Court in the absence of evidence would not infer that there had been no such resolution.

10. Under the provisions of s. 42 of the Town and Country Planning Act 1953 the Appeal Board has power to cancel an existing zoning and substitute a new zoning.

11. The remedy of *certiorari* is discretionary although delay is not usually taken into account against the Attorney-General but there is no authority to say that it may not be especially in a relator action.

The learned Judge left open the point as to whether on some future occasion if the Appeal Board were to exercise the wide powers conferred upon it under s. 42 without using the provisions of subs. (3A) a person injuriously affected thereby could challenge the validity of the decision of the Board.

MOTION

This was a motion by the Attorney-General *ex relatione* H. E. J. Familton for a writ of *certiorari* against the No. 1 Town and Country Planning Appeal Board, the Oamaru Borough and the Oamaru Licensing Trust to test the validity of a decision to zone a public reserve as residential.

Walker for the plaintiff.
Thompson for the Appeal Board.
White for the Oamaru Borough.
Berry for the Oamaru Licensing Trust.

SPEIGHT J. This motion for a writ of *certiorari* was originally brought with Mr Familton as plaintiff to test the validity of a decision of the Town and Country Planning Appeal Board made on 28 July 1969. This decision had been on an appeal by a number of private persons against a decision of the Oamaru Borough Council to zone a public reserve in Oamaru as residential in purported exercise of the Council's power under s. 33A (2) of the Town and Country Planning Act 1953 (as amended in 1968). It was then apparently realised that that appeal which had been brought by a number of private citizens had apparently been settled by agreement for the decision by the Appeal Board altering the zoning from residential to rural was expressed as being made by consent. Indeed, the file reveals in a subsequent memorandum by the Number Two Town and Country Planning Appeal Board, in a memorandum under the hand of its chairman, Mr Luxford, when dealing with a subsequent conditional use appeal, that there had been no appearance by the parties before the Number One Appeal Board but that a proposed consent order had been lodged by the solicitors for the parties and this had been embodied in a formal consent order by the Board on 28 July 1969. Possibly because of the fact of this consent, steps were then taken to alter the nature of the proceedings by joining the Attorney-General as plaintiff *ex relatione* Mr Familton on the grounds that the action involved matters of public interest and that complete relief against the alleged excess of jurisdiction or absence of legal authority in the Council's actions could not be obtained unless the proceedings were reconstituted in this way. The Attorney-General consented and the matter has been continued as a relator action.

The reserve with which we are concerned comprises approximately eight acres and is vested in the Oamaru Borough Council as a reserve for the purposes of health and public recreation. The third defendant, the Oamaru Licensing Trust, has been anxious to erect a hotel/motel and apparently portion of this reserve is a suitable site. Negotiations took place for the purchase by the Licensing Trust of the appropriate area of land but, of course, there were difficulties because of its reservation for public purposes and also on questions of zoning for it had no zoning designation under the Town and Country Planning Act. Representations for the revocation of the reservation were made by the Oamaru Borough Council to the Minister of Lands. The Minister asked the Council to inquire for objectors under s. 18 (2) of the Reserves and Domains Act 1953. The Council set up a subcommittee which conducted lengthy hearings and sent copies of all the evidence taken from the objectors together with its representations to the Minister. As a result, the Minister indicated that he would be prepared to take the appropriate steps under the Reserves and Domains Act 1953 to revoke the reservation provided that he was satisfied that the Licensing Control Commission was prepared to grant the Trust a liquor licence, provided that there had been an appropriate change of zoning or a conditional use approval and other proper requirements such as the payment of current market value for the land with the price so realised being put aside and utilised for the purchase of a suitable alternative reserve. Having been so advised of the Minister's conditional concurrence, the Council proceeded to operate under what it regarded as the appropriate provision of the Town and Country Planning Act, s. 33A (2) to zone the previously unzoned land so that the Minister's requirements in this respect could be complied with. There is no formal resolution exhibited on the record before me that the Council ever formally passed a motion that it no longer needed the land designated but for reasons which I will develop shortly, I take the view that it is not a formal step required to be taken under the subsection, contemporaneously with the zoning.

It must be borne in mind that we are dealing with two quite separate procedures. One is the creation or revocation of the reservation of land as a reserve and this is in the control of the Minister of Lands and cannot be effected by any resolution of the Council even though the land is vested in the Council. It will also be observed under s. 18 of the Reserves and Domains Act 1953 that there are appropriate provisions relating to public notification and rights of objection and it is not such rights that this case is concerned with.

Quite separate are the procedures under the Town and Country Planning Act for zoning land. Formerly public works were not given a zoning but merely designated as public works on a town plan on the requirement of the Minister of Works or the local authority: see ss. 21 (6) and 21A of the Town and Country Planning Act. Until the 1961 Amendment no reverse procedure was envisaged for lifting the "public works designation". By s. 13 of the Town and Country Planning Amendment Act 1961 a procedure was created in s. 33A for an underlying zoning to be given but to be dormant until a certificate by the Minister or local authority. Consequent upon such certificate certain rights of appeal as to zoning ensued but as I shall mention later, this does not have the effect of freeing the land from the Public Works Act for which a gazetted Order in Council is required.

Now in the 1966 Amendment the certificate procedure was repeated but in 1968, s. 33A (2) was substituted as follows:

> "(2) Where the Minister, local authority or Council having financial responsibility for any existing or proposed public work requires that the land be no longer designated for the existing or proposed public work for which the land is designated, that land shall, if zoned, continue to be so zoned until the zoning is varied or changed by the Council, and shall, if not zoned, be included in such zone as the Council shall determine."

(To be continued.)