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STATUTE LAW DEFICIENCIES

There is in England, as there is in New Zealand, a growing concern about the mass of statute law. This proliferates annually, to the frequent harassment of those many citizens who are endeavouring to go about their affairs and business in a lawful manner. It is beyond argument that statute law is increasingly difficult to find and to comprehend, partly because of the haste of legislators to resort to frequent and piecemeal statutory amendments, which in turn may produce anomalies, but more importantly because of the lack of time for full discussion and consideration of Bills. There are other reasons and causes which although understood by experts are difficult to explain to the general public.

Our law draftsmen perform a task which is always most exacting, under conditions which should be improved without further delay. Their work is so well done that too much of it is taken for granted. Slips are suprisingly rare. Nevertheless the whole system is ripe for complete overhaul.

The worsening situation in England has attracted informed criticism there, and has led to the formation in London, in May 1968, of the Statute Law Society. Its object is to do something practical and constructive to improve the situation. The expressed objects of this new Society are:

(i) To procure and further the making of technical improvements in the form and manner in which statutes and delegated legislation are expressed and published with a view to making the same more readily intelligible, and

(ii) To further the education of the public in the process and scope of legislation of all kinds and at all stages and for this purpose to gather and disseminate information on legislative processes of all kinds.

The Council of the Society immediately appointed a strong and learned Committee "to examine the ways in which the official system of framing, enacting and publishing statute laws of the United Kingdom Parliament fails to meet the requirements of the user".

The Committee's report was published early in 1970 under the title "Statute Law Deficiencies". After outlining the background to the problem, the Committee dealt with grievances of the statute law user by analysing the inception of laws, the drafting of laws, the making of laws, the form of the statute book and the expression of legislation.

The Committee concluded that "the root of the problem affecting statute law users lies more in the system by which law is made and expressed than in the substantive law itself. Substantive law must have a secure base and this entails efficient and effective methods of producing and communicating it". The Committee stressed that the procedures by which statute law is made and officially promulgated should be governed by the needs of the user. Their detailed recommendations are extensive and of the utmost importance. Indeed they are of such relevance to conditions in New Zealand that they should be applied with appropriate modifications, to our own legislative practice. All these matters are in the 43-page Report. Lack of space prevents extensive quotation from detailed criticisms and conclusions, which may be described most briefly as covering such questions as why legislation is not now found in its latest form in one place (four answers): what affects the comprehensibility of statute law (seventeen answers); why the quality of statute law is further reduced

(twelve answers): and why the system of publishing statute law is inadequate (nine answers).

It is interesting to note that our High Commissioner, Sir Denis Blundell, gave a paper at an open meeting of the Society held on the 28th October 1970 in the Swedenborg Hall in Bloomsbury, London. The title of the address was "The Legislative Process in New Zealand." Sir Denis summarised his remarks by analysing some special points of difference between the New Zealand and the British legislative processes. Readers of this article who wish to learn more about the Society should write to the Hon. Secretary, Mr Christopher Whybrow, 2 Mitre Court Buildings, Temple, London, E.C.4. The annual subscription is about $7.00 N.Z. at current rates of exchange.

A. C. BRASSINGTON.

REPORT ON LAW REPORTS REPRINT

A chance bomb in 1941 landed on the London premises of The Incorporated Council of Law Reporting for England and Wales, destroying their entire stock of volumes of *The Law Reports* and creating acute difficulties for the legal profession which are now about to be eased.

Every lawyer must have recourse to reports of past decisions of the Courts, since English and New Zealand law follows the rule of judicial precedent, and *The Law Reports*, with their records of cases going back to 1865, are therefore essential to legal research. The 1941 disaster, followed by the post-war expansion of the legal profession and the setting up of new law libraries (especially in the new universities and polytechnics), created a situation in which the demand for volumes far outstripped supply and prices rocketed accordingly. Even decrepit, soiled and disintegrating volumes were sought after, so great was the need.

The Council of Law Reporting, the non-profit-making body who publish *The Law Reports*, therefore entered into negotiations with Butterworths (the leading law publishers, who have the necessary resources and expertise) and after a prolonged period of research and discussion an agreement was reached and a contract signed.

Butterworths now announce that—if the expected support is forthcoming, as it surely will be—they will reprint the whole series of Reports from 1865 to 1971, using a facsimile process so that all the essential page references in other publications remain valid. The original 649 volumes, however, will be contracted into 565 by amalgamating some of the smaller volumes.

Publication is due to begin in 1973, and volumes will appear in batches of about a hundred at a time, spreading the production over two years.

The cost of a complete set, even at the special pre-publication price (operative until 30 September 1972) will be over $4,400, but many lawyers are expected to take advantage of the monthly subscription terms. Single volumes and part sets will be available if ordered in advance of printing.

Interest in this project is not by any means confined to the United Kingdom, and Butterworths (who have the sole and exclusive publishing and sales rights throughout the world) expect orders from law libraries as well as lawyers from every corner of the globe.

Some Vital Statistics

Total number of volumes to be produced (1,000 x 565)	565,000
Total weight of volumes	756 tons
Thickness of an average volume	2 inches
If volumes were piled on one another, the height of the pile would be	20 miles
If laid end to end, volumes would reach from London to Salisbury	85 miles
Number of pages to be printed	900 million
Width of paper	40 inches
Length of paper if in a continuous roll (i.e. two people could walk on it arm in arm, all the way to Calcutta!)	5,900 miles
Cost of paper (specially prepared to last for centuries)	£90,000
Amount of cloth to be used for binding (Note: St. Paul's Cathedral is said to occupy one acre)	20 acres (95,000 sq. yds.)
Volumes to be produced per working day (production spread over two years) discounting holidays	1,600
Shelving needed for complete set of 565 volumes	95 feet approx.

SUMMARY OF RECENT LAW

BONDS—INTERPRETATION

Voluntary non-performance of obligation by obliger—Plea of non-fulfilment of condition subsequent unavailable. This case concerns the construction of a bond given to the Education Department on the acceptance by the Department of the first respondent for training as a teacher. The first respondent undertook that he would serve as a teacher in a school or institution approved by the Director of Education for a period of 2 years. The bond provided that the first respondent would perform his obligation or alternatively refund to the Department all or part of the monies paid to him during his training. The respondent resigned before completing a period of training as an assistant on probation. The Department took action on the bond. *Held*, 1. It is not possible to apply a condition subsequent to a subsisting obligation as though it were a condition precedent. 2. Supervening impossibility of performance which is caused by the act or neglect of the obligor does not excuse him. 3. The condition in the bond was not to depend upon the condition that training should be completed. (*Beswick* v *Swindells* (1835) 5 Nev. & M.K.B. 378, distinguished.) 4. The obligation never having been extinguished the Department succeeded in its claim. Judgment of Moller J. (unreported, Auckland, 1971), reversed. *Attorney-General* v. *Mason* (Court of Appeal Wellington. 16, 17 September; 7 October 1971. North P. Turner and Woodhouse JJ.).

CLUBS AND VOLUNTARY ASSOCIATIONS—CONSTITUTION

Rules—Exemption from liability—Notice of bylaws. Practice—Question of law before trial - Calling of evidence—Parties to elect whether to proceed as a Judge alone action or on agreed statement of facts—Code of Civil Procedure, R. 154. In the Supreme Court ([1971] NZLR 348) evidence had been given concerning the rules of the Club but the parties on being put to election as to whether the case should be a Judge alone action or the action stand adjourned pending the decision of the Court adopted the second course and filed an agreed statement of facts. The appeal was concerned with the question of whether the appellant had by its rules exempted itself from liability to the respondent, one of its members, who was injured whilst being flown by an employee of the appellant in one of its aircraft which crashed. In the agreed statement of facts it was admitted that a notice of the Club's bylaws and rules had been posted in the Club pursuant to rule 5 (c) contrary to the finding in the Court below. *Held*, 1. Rule 154 of the Code of Civil Procedure provides for a question of law to be argued *before trial* and the trial of the action stands adjourned and any facts must be in the form of an agreed statement of facts signed and filed by the parties. (*Tuck Construction Ltd.* v. *Waipa County* [1967] N.Z.L.R. 987, referred to.) 2. Bylaw 11 was *intra vires* of the committee's bylaw making power. 3. It was sufficient compliance with rule 5 (c) if a bylaw was posted in the Club; it was not required to remain continuously posted. 4. The principles of law governing the effectiveness of exemption clauses as set out in *Producer Meats (North Island) Ltd.* v. *Thomas Borthwick & Sons (Australasia) Ltd.* [1964] N.Z.L.R. 700, 702 were re-affirmed. 5. Bylaw 11 was only an introduction to bylaw 12 and had to be read with bylaw 12. 6. Since the respondent did not sign an undertaking pursuant to bylaw 12 the appellant was not exempt from liability under its bylaws. Appeal dismissed. *Hawke's Bay and East Coast Aero Club Incorporated* v. *McLeod* (Court of Appeal Wellington. 11, 12 May; 8 October 1971. North P. Turner and Haslam JJ.).

INCOME TAX—OBJECTION TO ASSESSMENT

Special deduction for increase in export sales—Overseas goods sold by duty-free shop to customers departing overseas—"Export sales"—Land and Income Tax Act 1954, s. 129B. The objector carried on the business of a duty-free shop and sold goods to customers leaving New Zealand from the Christchurch International Airport. The Commissioner disallowed the special allowance in respect of income tax on goods exported from New Zealand by a taxpayer being goods sold or disposed of by the taxpayer pursuant to s. 129B of the Income Tax Act 1954 on the ground that the goods sold by the objector were exported by the purchasers and not by the objector. *Held*, 1. The sales of goods by the objector to customers were subject to a fundamental condition that the goods were removed from New Zealand forthwith. 2. The objector after importing the goods had "sorted" them before re-sale to its customers and such goods were "export goods" within the meaning of s. 129D of the Land and Income Tax Act 1954. *International Importing Limited* v. *Commissioner of Inland Revenue* (Supreme Court Christchurch. 28, 29 September 1971. Wilson J.).

LOCAL GOVERNMENT—SUBDIVISION OF LAND

Re-subdivision reserve contribution - Previous plan approved by Council in respect of proposed road—Plan not previously approved for subdivision—Municipal Corporations Act 1954, s. 353 (1). The appellant was the registered proprietor of three lots on D.P. 3271 contained in one certificate of title. There was a dwelling house on the property which straddled the boundary between two of the lots. The appellant desired to re-subdivide the land into three different lots so that the dwelling house was wholly within one lot. The respondent council approved the re-subdivision conditional upon the payment of $1,771.81 in lieu of a reserve contribution. The appellant appealed to the Town and Country Planning Appeal Board contending that she was exempt from payment of a reserve contribution by virtue of the provisions of s. 353 (1) of the Municipal Corporations Act 1954. The Appeal Board stated a case for the Supreme Court as to whether upon the facts found by the Appeal Board D.P. 3271 was "a plan of subdivision previously approved by the Council" within the meaning of s. 353 (1). In 1911 D.P. 3271 had come before the Sumner Borough Council (the then local authority for the district) as a road plan upon which the lots appeared. *Held*, 1. If a plan of subdivision requires the Council's approval under s. 353 (1) the Council as a matter of course may impose conditions under ss. 351A and 351C. 2. The proposed plan of subdivision was substantially different from the subdivision on D.P. 3271. 3. The proposed subdivision was subject to approval under s. 353 (1). 4. The words "a plan of subdivision previously approved by the Council" refer to formal approval by the Council given under statutory authority which en-

titled the Council to approve or reject "a plan of subdivision". 5. The plan submitted to the Sumner Borough Council in 1911 was a plan of proposed roads not a plan of subdivision. 6. D. P.3271 was not "a plan of subdivision" previously approved by the Council. *Worrall* v. *Christchurch City* (Supreme Court Christchurch. 20, 27 October 1971. Wilson J.).

MONEY AND MONEYLENDERS—LOANS BY UNREGISTERED PERSONS

Loan by society registered under the Industrial and Provident Societies Act 1908 to members at flat rate of of interest. Society a moneylender—Recovery of interest in absence of prescribed notice—Contract declared enforceable. Moneylenders Amendment Act 1933, s. 8—Statutes Amendment Act 1936, s. 55—Contract—Bond and illegal contract—Statutory relief under Illegal Contracts Act 1970, ss. 6, 7 (1). The plaintiff was a society registered under the Industrial and Provident Societies Act 1908. The great mojority of its members were taxi drivers and its principal object was to provide financial assistance to members by means of loans or advances or other means secured upon real or personal property for the purpose of purchasing motor vehicles or any other purpose. On 4 March 1969 the defendant applied for a loan of $5,000 plus interest and charges. The application form stated that interest was to be calculated at the rate of 6½ percent p.a. flat. The application was approved and an instrument by way of security was signed by the defendant which recorded that he was indebted to the plaintiff in the sum of $6,337.50 repayable by 48 equal monthly instalments of $132.03. The defendant paid the instalments until November 1970 and in December desired to pay off the balance and requested a settlement statement. The parties having disagreed as to the amount of interest that should be rebated, the plaintiff gave notice of seizure of the defendant's cars. The defendant then lodged the amount in the settlement statement with an independent stake holder and raised the provisions of the Moneylenders Act 1908. The matter came before the Court in the form of a claim by the plaintiff for unpaid instalments since December 1970 and that if the contract was illegal it should be validated under the Illegal Contracts Act 1970 and that if the contract contravened s. 8 of the Moneylenders Act 1908 it should be declared enforceable pursuant to the provisions of s. 55 of the Statutes Amendment Act 1956. *Held*, 1. The business of the plaintiff society was that of moneylending. (*Re A. R. Mackay Ltd.* [1971] N.Z.L.R. 289, applied.) 2. Since the plaintiff was not registered as a moneylender at the relevant time the contract was illegal and void. (*Ansford* v. *New Plymouth Finance Co. Ltd.* [1933] N.Z.L.R. 209, applied.) 3. Section 7 (1) of the Illegal Contracts Act 1970 precludes the Court from exercising its power to grant relief by way of validating an illegal contract if any other enactment expressly declares that the contract in question is illegal or void. 4. The Moneylenders Act 1908 contains no express provision that a contract made by an unregistered moneylender is illegal or void. 5. Under s. 8 of the Moneylenders Amendment Act 1933 in the absence of a note or memorandum in writing a contract for repayment of money lent is unenforceable but under s. 55 of the Statutes Amendment Act 1936 the Court may declare that a contract shall be enforceable. 6. The Court granted relief by way of validation of the contract under s. 7 (1) of the Illegal Contracts Act 1970 and declared that the contract was enforceable. *Combined Taxis Co-Operative Society Limited* v. *Slobbe* (Supreme Court Wellington. 16, 17 September; 27 October 1971. Wild C.J.).

CATCHLINES OF RECENT JUDGMENTS

Administrative Law—Natural justice—Tribunal's failure to provide party affected with relevant report obtained before hearing fatal—Tribunal's failure to provide party affected with report of inspection by one of its own members after hearing not fatal. *South Otago Hospital Board* v. *Nurses and Midwives Board.* (Supreme Court Admin. Div. Wellington. 1972. 21 February. Wild C.J.)

Limitation Action—Where the last day of two-year period falls on a Saturday that is "a holiday" under Section 25 (a) of the Acts Interpretation Act, 1924—Writ issued following Monday in time. *Rowland* v. *Pike* (Supreme Court, Hamilton. 1972. February 14 Speight J.)

Section 209 Companies Act 1955—Owner-occupier shareholding—Sale of undertaking—Proposed distribution in accordance with Articles—Objectors desiring alteration to provide for capital on winding up to be distributed in proportion of value of suites—Whether adherence to existing Articles "oppressive": *Empire Building Limited.* (Supreme Court, Dunedin. 1971. 14 December. Haslam J.)

Any practitioner who wishes to obtain a copy of a judgment mentioned above may do so by applying to the Associate of the Judge who issued the judgment.

REGULATIONS

Regulations Gazetted from 2 to 9 March 1972 are as follows:

Agricultural Chemicals (Pelleted Insecticide Specification) Notice 1970, Amendment No. 2 (S.R. 1972/24)
Armed Forces Equivalent Ranks Order 1970, Amendment No. 2 (S.R. 1972/16)
Customs Tariff Amendment Order 1972 (S.R. 1972/17)
Customs Tariff Amendment Order (No. 2) 1972 (S.R. 1972/18)
Customs Tariff Amendment Order (No. 3) 1972 (S.R. 1972/25)
Drug Tariff 1970, Amendment No. 6 (S.R. 1972/23)
Income Tax (Cook Islands Development Projects) Order 1968, Amendment No. 2 (S.R. 1972/26)
Income Tax (Export Incentive) Order 1969, Amendment No. 2 (S.R. 1972/27)
Income Tax (Non-Resident Investment Companies) Order 1972 (S.R. 1972/19)
Municipal Corporations (Earthquake Dangers) Order 1972 (S.R. 1972/28)
Niue Amendment Act Commencement Order 1972 (S.R. 1972/20)
Penal Institutions Notice 1972 (S.R. 1972/31)
Revocation of the Customs Duty on Government Goods Order 1954 (S.R. 1972/21)
Technical Institutes Regulations 1968, Amendment No. 2 (S.R. 1972/29)
Veterinary Services Sickness or Disability Scheme Order 1963, Amendment No. 1 (S.R. 1972/22)
Wildlife Regulations 1955, Amendment No. 6 (S.R. 1972/30)
Work Centre (Invercargill Adult) Notice 1972 (S.R. 1972/32)

CASE AND COMMENT

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

Joint tortfeasors—indemnity inter se

The case of *Vella* v. *New Zealand Stevedoring Co. Ltd. and Others* (heard by McMullin J. on 13 September 1971) gave rise to the question as to when a condition as to fitness for purpose will be implied into contracts of hire.

The short facts are that the plaintiff was badly injured whilst working a mechanical meat loader. This was owned by the second defendants, the Southland Harbour Board, who had formally hired it out to the third defendants, Blue Star Port Lines. The first defendants, in turn, had possession of the loader under an informal hire from Blue Star.

The jury had found that all three defendants were guilty of negligence subject to a 20 percent deduction for the plaintiff's contributory negligence). Each defendant claimed against the other for contribution as a joint tortfeasor. McMullin J. found that as the Harbour Board was responsible for the manufacture and maintenance of the loader, it should bear more responsibility than the stevedore. Blue Star had only a formal association with the loaders, and should bear the least responsibility. His Honour apportioned the blameworthiness, respectively, at 50 percent, 35 percent, 15 percent.

His Honour then turned to the important part of this judgment, the claims for indemnity put forward by each of the defendants against the other. These claims were based on the implication into the contracts to hire the loader, of a term as to fitness.

The hiring agreement between the Harbour Board and Blue Star was for due consideration, and so constituted a bailment for reward. But it was argued that the contract between Blue Star and the stevedore was simply a gratuitous bailment. If this were so, then the lender would be responsible only for those defects in the chattel of which he had actual knowledge.

McMullin J. reasoned, however, that while no consideration passed between Blue Star and the stevedore it could still be construed as a bailment for reward. The shipping company made no charge because the stevedore would have passed it back to the company as part of its loading costs. There was also the fact that the stevedore had signed the agreement between the Harbour Board and the shipping company as agent for the latter. These points collectively made it impossible to regard this bailment as gratuitous, so it fell to be treated, as they both did in consequence, as one for reward.

This meant that a term could be implied into each agreement to the effect that the goods be reasonably fit for their intended purpose. McMullin J. recognised, however, that such a term only *could*, not *must*, be implied into bailments for reward. Whether such a term was implied depended principally on the understanding of the parties.

His Honour noted that all the parties regarded the loaders as indispensable items of equipment, and that the Harbour Board gave them an annual service. This being so, an implied term as to fitness could be inserted into the agreement.

However, it had been urged that such terms could only be implied into contracts for the hire of a general chattel, but not into contracts for the hire of a specific ascertained chattel, such as that in the instant case.

But McMullin J. pointed out that, while this was once thought to be the law, it could not be maintained in the light of *Reed* v. *Dean* [1949] 1 K.B. 188 and *Yeoman Credit* v. *Apps* [1962] 2 Q.B. 508. And his Honour further ruled against the plea that mere unsafeness, when a chattel is performing its function properly, does not mean that a vehicle is not reasonably fit for its purpose. He referred here to *Smith* v. *Stockdill* [1960] N.Z.L.R. 53.

McMullin J. concluded by holding, on the authority of *Mowbray* v. *Merryweather* [1895] 2 Q.B. 640, that the fact that the stevedore and the shipping company were in breach of their duty to the plaintiff did not disqualify them from seeking an indemnity.

In the result, the stevedore could claim from the Harbour Board the amount the former was to pay the plaintiff; and the shipping company could claim from the Harbour Board both the amount the company has to pay the plaintiff, and the amount to be paid to the stevedore.

R.G.L.

Contract—Negligent misstatements

The issues involved in *McLean* v. *Hockley* and others (the judgment of White J. was given in Palmerston North on September 14, 1971) arose out of a contract for the sale of land.

The plaintiff had purchased a particular property, believing that what appeared to be the boundary was in fact the true boundary. But as it later transpired, the true boundary was 16 feet within the apparent boundary.

The vendor, Hockley, was at all times aware of the real extent of the boundary, and adopted the attitude that it was up to the purchasers to check up on such matters as boundaries. This, said White J., amounted to fraudulent misrepresentation. By leaving the land agents in ignorance of the true position, prospective purchasers would believe that the apparent boundary was the true boundary. Such a representation was intended to be acted upon and did in fact induce the plaintiff to enter upon the contract.

A similar action for fraudulent misrepresentation had been brought against the land agent. His Honour held that this case also had been made out. He quoted Lord Herschell's classic observation in *Derry* v. *Peek* (1889) 14 App. Cas. 337, 374 to the effect that a statement is fraudulent if known to be so by the representor, or is uttered by him without belief in its truth, or is made recklessly careless whether it be true or false.

The land agent was caught by the last of these possibilities. A neighbour had informed the agent of the true extent of the boundary, and White J. declined to believe that the agent could have been honestly satisfied by the vendor's assurances that the real and apparent boundaries coincided.

Although the purchaser's claim was thus made out, White J. turned to examine the alternative claim based on *Hedley Byrne* v. *Heller* [1964] A.C. 465. His Honour thus had the advantage of being the first member of the Bench to discuss the impact on that case of the Privy Council's opinion in *M.L.C.* v. *Evatt* [1971] 2 W.L.R. 23.

The essence of this later case was to restrict liability for negligent mis-statement to those possessing, or professing to have, whatever special skill was being relied on in the circumstances. White J. held that this covered the land agent as he had held himself out as an experienced agent with knowledge of boundaries within a particular area.

But His Honour also pointed out that the Privy Council recognised that a duty of care could arise where the representor had a financial interest in the transaction upon which he gave his advice (see *Anderson* v. *Rhodes* [1927] 2 All E.R. 850). Again, the land agent would be caught since he clearly, through his commission, had a financial stake in the contract which his negligence helped to induce.

Lastly, White J. turned to the assessment of damages. He agreed that it was to be based on the difference between what was paid for the property and its market value once the true site of the boundary was disclosed.

The difficulty lay in assessing this reduced value. The property had been purchased by the buyer at a public auction for $19,000. White J. settled a dispute between valuers, who were in conflict on this point, that a sale by public auction was an excellent test of true market value. His Honour also felt that any normal purchaser would be deterred by the true nature of the boundary.

Taking a conservative view of the matter, White J. agreed with a valuer that the diminution in value was somewhere between one-fifth and one-third of the purchase price. In the end, he awarded $5,000 damages.

R.G.L.

Taxation Cases Contributed by C. N. Irvine

More Light on s. 108 of the Land and Income Tax Act 1954

In *Mangin* v. *Commissioner of Inland Revenue* [1971] N.Z.L.R. 591 the applicability of s. 108 to the facts was the sole matter in issue, and the questions arising finally went to the Judicial Committee for determination.

The appellant was a farmer who, in 1965, leased 25 acres of his farm of 385 acres to trustees for one year at £3 per acre. The land was sown by the appellant in wheat and harvested by him as an employee of the trustees who paid him for his labour and expenses. The proceeds of the wheat sold were paid to the appellant and handed on by him to the trustees, who expended the money for the benefit of the appellant's wife and children as required by the trust deed.

In the following year the process was repeated, a different area of 24 acres being used and the rent increasing to £4 per acre.

The appellant did not include in his return the moneys paid to the trustees, but the trustees filed a separate return showing these moneys as

their income. The Commissioner was not satisfied with the correctness of the returns so filed and issued amended assessments including the trust income as part of the appellant's income.

In the Supreme Court the appellant succeeded in upholding an objection to this method of assessment, but in the Court of Appeal this judgment was reversed.

In the Judicial Committee the leading judgment was delivered by Lord Donovan, who summarised the appellant's contentions as follows:

(a) Section 108 has no fiscal effect but operates only as between the parties.

(b) If it has no fiscal effect, it applies only to tax already accrued.

(c) In any event it can operate only on income "derived" by the taxpayer.

(d) If all else fails the facts of the present case took it outside the orbit of the section.

His Lordship recapitulated the rules applicable to the interpretation of a statute and also went into the history of s. 108. As to the appellant's first contention, he found this contradicted in s. 108 and its counterparts from s. 82 of the 1900 Act through the use of the word "absolutely". The use of this word, he said, indicates that anything affected by s. 108 was void as against the Commissioner as well as all others. The amendment made by s. 16 of the 1968 Amendment Act, which included an express reference to the Commissioner in s. 108, did no more than declare the existing law. The contention failed.

The appellant's second contention, that s. 108 applied only to tax accrued, was based on the omission from s. 162 of the 1916 Act and its successors of the words "or defeating evading or avoiding any duty or liability imposed on any person by this Act or preventing the operations of this Act in any respect".

Their Lordships took the view that these words were probably omitted only because they were tautologous. They also said that, to adopt the construction contended for, would deprive s. 108 of almost all effect, and such a construction should be avoided unless the words of s. 108 compelled it, which they did not. This contention also failed.

Next their Lordships considered the contention that s. 108 applied only to income derived by the taxpayer, and said that it threw into relief the lack of any provision in s. 108 as to the destination of the income once the trust deed was declared void. In this case, however, the difficulty did not arise because the taxpayer did derive the income. He then was required to account for it to the trustees but, if s. 108 declared the trust deed void, one was left with the appellant receiving the income and not being accountable to anyone for it. This contention also failed.

It seems that in this case a fatal mistake was made in allowing the taxpayer to receive the proceeds from the cropping of the leased areas. Had the proceeds been payable direct to the trustees he would possibly have succeeded in respect of this contention, although this may not have resulted in the winning of the whole case.

The appellant was thus thrown back on his final contention, that on the facts s. 108 did not apply but on this point their Lordships adopted a passage from Turner J's. judgment in the Court of Appeal, the essence of which was that this was not a genuine family trust because of the short term of the leases and the unrealistic rent charged. These factors indicated that the principal purpose of the leases and other arrangements was to reduce the appellant's tax bill, and the case was governed by s. 108. The appellant therefore failed on all counts.

In conclusion, their Lordships pointed out that this judgment did not mean that every transaction having as one of its ingredients some tax-saving feature was void under s. 108. If a *bona fide* transaction can be carried through in two ways s. 108 cannot be invoked only because that way is chosen which attracts the lower amount of tax.

A dissenting judgment was delivered by Losp Wilberforce who held that the transacti-nc under consideration neither altered the inoir dence of tax nor relieved the appellant from liability for tax. He considered, also, that the appellant received the proceeds of the wheat sold only as agent for the trustees and did not himself derive it. There was even some suggestion that the payment to the appellant was merely to suit the convenience of the grain merchant who bought the crop, but whether this was really the case is not apparent. If it had been estab'ished this would, one would have thought, have shown conclusively that the proceeds of the wheat were not derived by the appellant. He would have allowed the appeal.

Valuation of livestock

In *Hansen and Smith* v. *Commissioner of Inland Revenue* (1970) 2 A.T.R. 87 there were decided a number of questions of importance to those engaged in farm accounting. In this article I propose to confine my comments to a decision concerning the power of the Com-

missioner to determine for tax purposes the part of the consideration for a farm sold as a going concern attributable to the livestock, even though an apportionment of the consideration is made in the sale agreement.

Stated very briefly the facts were that the appellants sold a farm as a going concern for £200,000 of which, by the agreement for sale, £27,750 was for the livestock, £3,800 for other chattels and the balance of £168,450 for the land. The figure of £27,750 was the book value of the livestock and was used by the appellants in their tax return. The agreement was dated 1 December 1964 but possession was not to be given until 2 June 1965.

In making his assessment of tax the Commissioner wrote up the consideration for the livestock to £82,645, this being the amount of a valuation made by a stock firm some 12 days after the date possession was given. He purported to act under s. 101 of the Land and Income Tax Act 1954 subs. (1) of which reads as follows:

> "Where any trading stock is sold together with other assets of a business, the part of the consideration attributable to the trading stock shall, for the purposes of this Act, be determined by the Commissioner, and the part of the consideration so determined shall be deemed to be the price paid for the trading stock by the purchaser."

The appellants objected on the grounds that s. 101 did not apply where the sale documents expressly provided for the apportionment of the consideration. Its purpose, they said, was to cover the case where the consideration was stated as a global, unapportioned sum. Conversely, they contended that the section does not permit the substitution of market values for a price agreed upon by the parties themselves.

In support the appellants pointed to s. 98 (8) of the Act which states that "the price specified in any contract of sale or arrangements as the price at which any trading stock is sold . . . shall be deemed for the purposes of this section to be the consideration received or receivable for the trading stock".

Woodhouse J., who dealt with the case, pointed out however that s. 98 (8) was expressed to be subject to s. 101, and his Honour remarked that if s. 101 did not apply to cases where the consideration for the stock was declared by the parties this qualification would be meaningless. He held, therefore that s. 101 applied whether or not the parties had apportioned the consideration. With respect, it is difficult to see how, reading these sections together, any other conclusion could have been reached.

Some support was to be found for his Honour's decision in *dicta* in *Edge* v. *Commissioner of Inland Revenue* [1958] N.Z.L.R. 42; 7 A.I.T.R. 140 although there the point was not directly in issue.

The appellants also challenged the correctness of the figure adopted by the Commissioner. First they said that the valuation should have been made at the date of the agreement for sale, December 1964, and not at the date of possession, June 1965. His Honour did not agree. The appellants carried on the farm until June and s. 101 contemplated that when stock was sold with other assets an approximate figure for the stock would be brought into account at the end of the trading period. The report does not show what difference adoption of this submission would have made.

With the greatest respect one must have doubts regarding this part of the decision. The terms of s. 101 do not seem to me to dictate such a construction and it would appear to be a logical extension of this principle that if in the present case the price for the stock had been based on a *bona fide* valuation of its market value made in December and the market had risen by the following June the Commissioner would have been entitled to readjust the apportionment of the consideration. Such a construction does not appear to be reasonable, particularly since, if the market prices fell in the interim, the vendors could not reduce the price for the stock.

Next it was complained that the valuation adopted by the Commissioner was based on prices paid at auction in the sale yard, and it was said that if the price had been based on the prices paid for stock when farms were sold as a going concern the valuation would have been lower. There may have been some merit in this submission had there been expert evidence to support the premise on which it was based. In the absence of any such evidence his Honour could not assure its correctness, and the submission failed.

Finally the Commissioner's assessment was attacked on the ground that it was based on a valuation made in isolation from the other assets comprised in the sale and thus did not represent the true apportionment of the total consideration of £200,000 said to be required by s. 101. His Honour accepted this submission and held that the separate values of all the assets sold should be ascertained and the consideration then apportioned *pro rata* amongst them.

His Honour accepted certain valuations of the various assets, including that adopted by the Commissioner for the livestock, and found that the purchaser had paid £200,000 for assets valued separately at £233,745. If, then, the £200,000 were apportioned amongst the assets in proportion to their value the amount attributable to the livestock became £70,713 and this figure should be adopted for the purposes of the assessment.

Australian Cases Contributed by the Faculty of Law, University of Otago

Construction of Inter-related Wills

Executor Trustee Co. v. *Warbey* [1971] S.A S.R. 225 raises a number of points of both practical and academic interest relating to the construction of wills, charitable gifts and the application of the *cy-pres* doctrine.

By her will a spinster E.E.P., who died in 1941, gave the balance of the residue of her estate "for the Church of England in the Diocese of Adelaide absolutely for the benefit of the Sunday School Council and a Diocesan Church of England Hospital in equal shares". Her sister, G.M.P. who died in 1958, by her will made in the same year gave the residue of her estate "for the Synod of the Church of England in the Diocese of Adelaide Incorporated for the fund to establish and/or maintain a Church of England Hospital absolutely". Another sister, V.M.P., died in 1963, and by her will made in 1962, gave the residue of her estate in similar terms to the gift contained in the will of her sister G.M.P.

There was no Diocesan Church of England Hospital, although a convalescent hospital, and homes for the aged which provided nursing attention for inmates of the homes, were conducted under the auspices of the Church of England.

The plaintiff, who had obtained probate of all three wills, applied to the Supreme Court for directions concerning the validity of the residuary gifts.

Bray C.J. dealt first with the question of the admissibility of extrinsic evidence. Could the three wills be read together to show some sort of common intention with regard to the establishment and/or maintenance of a Church of England Hospital in the Diocese of Adelaide? In answer, His Honour stated at p. 259:

> "In other words, no will can be construed by reference to a later will made by someone else, but I see no reason why I should not construe a will by reference to an earlier will of someone else if I find in the later will, expressly or by implication, a reference to an earlier one."

The authority cited (which is directly on point) was *Foundling Hospital & Infants' Home* v. *Trustees Executors and Agency Co. Ltd.* (1946) 19 A.L.J. 383. The application of these principles meant that no help could be obtained for the will of E.E.P. but that her will could be used as a guide to the construction of the will of G.M.P. and both wills as a guide for that of V.M.P.

His Honour considered second the various existing institutions and held that these should be excluded. The words of the wills implied something to be established, not something already established; these institutions could have been expressly referred to and in any event their objects were too restricted.

The third question was whether a gift for such a hospital or to such a fund was a good charitable gift. The answer was positive with the Judge stating at p. 262:

> "Of course, not all hospitals are charitable. Hospitals run for the purpose of private profit or restricted to too narrow a class of patients are not. But I think a gift for a hospital to be conducted under the auspices of a church is, *prima facie*, a gift for a hospital which would answer the test of charity, and that if the church were to use the money for a non-charitable hospital, the Court would intervene."

Fourth, did it make any difference that no such fund had ever been in existence? It did not and the knowledge or otherwise of the Synod of the nature of the gifts was held to be irrelevant.

The final and most important point was that of practicability. Could these trusts be carried out, and if not, was there a sufficient general charitable intention to allow the *cy-pres* doctrine to operate? Bray C.J. decided that there was not enough information available to enable him to answer these last questions and the summonses were adjourned for further consideration.

The case is important in that it emphasises the care required when drawing up a will containing a purpose trust (or indeed any trust at

all) or several inter-related wills. If the purpose trust is non-charitable, save for a few anomalous cases it will fail for lack of enforceability; if it is charitable it may not be practicable at date of death and if the *cy-pres* doctrine is not applicable a partial intestacy will occur with the possible failing too of subsequent gifts. In addition, the property in question may have doubled or halved in value. The one may cause an uneven distribution of the estate, contrary to the testator's wishes and the other cause the beneficiary to obtain the Court's assistance or even to disclaim the gift.

Also of importance are Bray C.J.'s remarks on the issue of practicability. Following Kitto J. in *Attorney-General for South Australia* v. *Bray* [1964] 111 C.L.R. 402 at p. 418 one asks, even if there was a life interest, whether the scheme is practicable as at the testator's death, and, if not, then whether at that date there was any reasonable prospect that it would be practicable at some future time.

Bray C.J. posed the question that if such inquiry was made for the will of E.E.P. and the answers were negative, what effect would that have on the will of G.M.P? Was "the fund" never in existence so that her gift would fail unless the *cy-pres* doctrine applied or would her residue create "the fund"? Could a successful piecemeal attack be mounted and, if an earlier will fell, would a later will fall also in the absence of a general charitable intention if the funds in the estate governed by the later will were insufficient for the purpose of the gift without the addition of the funds governed by the earlier will. The actual fate of these funds is not known. If the answers to the practicability questions were to be positive, the difficulties would be avoided here, but there is no denying that they exist to catch perhaps some gift in a will not yet proved.

D.E.B.

A NEW HALSBURY

Butterworths is a household name to lawyers and has been for many years. The enterprise was established early in the nineteenth century in Fleet Street at the address from which the first Folio Shakespeare was issued. Presumably publishing had been going on there for centuries. The present fame of the company dates from its acquisition by one, Charles Bond, who bought it in 1895 from the executors of the last Butterworth, Joshua, and put it in charge of his son Stanley, then aged twenty. Stanley Shaw Bond, who expanded the business as his father's manager, and ultimately became the sole proprietor, was one of the unsung geniuses of English publishing. He had an alphabetical bee—an encyclopaedia bee—in his bonnet. He thought of the Encyclopaedia of *Forms and Precedents*, which, in its various editions, has saved untold millions of hours in the lives of solicitors. Then he thought that the law of England should be codified, a la Justinian. His idea was laughed at by most legal pundits, but he pursued it undeterred right up the legal hierarchy, to the Lord Chancellor of the day, Lord Halsbury, who seized on the young man's idea, and Halsbury's Laws of England, surely the greatest legal work in the language, first appeared, volume by volume, in the decade 1907-1917. The second edition published between 1931 and 1942, was edited by Lord Hailsham, who was Lord Chancellor 1928-29, and the third by Lord Simonds, Lord Chancellor from 1951 to 1954. Now a fourth edition becomes necessary, and it is good to know that Lord Hailsham of St. Marylebone, the son of the editor of the Second Edition (whose robes he wore himself when sworn in as Lord Chancellor) is to be Editor-in-Chief. Mr Paul Niekirk is to be Publishing Editor. Publication of the new edition is expected to begin before the end of 1972. Many years ago we remember a K.C. (subsequently a Judge) saying that if he were Lord Chancellor he would introduce a Bill with two clauses: "(1) The statute and case law of England and Wales is hereby repealed. (2) The Law of England and Wales is as stated in Halsbury's Laws of England (Hailsham Edition) with the omission of the footnotes". The thing may not be as simple as that, but we wish Lord Hailsham of St. Marylebone, Mr Paul Niekirk, and Butterworths every success in their great enterprise. Editorial comment from the *Law Guardian*.

What's in a Word?

A practitioner, deploring his typist's spelling, reports that her latest perpetration was the term "Official Assassin".

SIR ALFRED NORTH RETIRES

A special sitting of the Court of Appeal was held on 17 December last, on the occasion of the retirement of the Rt. Hon. Sir Alfred North, for some years President of the Court of Appeal and the only remaining member of the original Court, established in 1958.

The occasion was marked by a large and distinguished gathering, and a number of tributes were paid to Sir Alfred's outstanding career which has stamped him as one of the foremost Judges of the entire Commonwealth.

The Acting Attorney-General, Rt. Hon. J. R. Marshall, addressed Sir Alfred in the following terms:

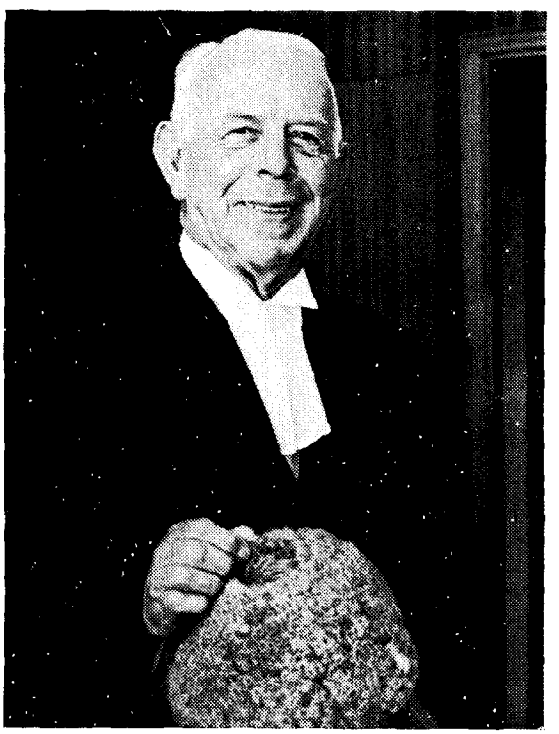
"You will, I suspect, suffer the discomfort which modest men feel on these occasions, when those who hold you in high regard assemble as we do today to pay a just tribute to your distinguished service to the law and through the law to peace, order and good government of our country.

"Today on your 71st birthday you can look back on a career at the Bar and on the Bench which in its breadth of experience and successful achievement has few parallels in our legal history. You brought to your chosen profession outstanding qualities of mind and spirit which carried you with a certain inevitability from a modest country practice which you soon outgrew to a thriving provincial centre which held you for a few years, and then predictably to our largest centre of population, where your ability and energy and thoroughness earned for you the recognition which lawyers most like to have—the confidence and the briefs of their fellow practitioners.

"No one was surprised when in 1947 you were called within the Bar and while I know that many are called and few are chosen for further elevation to the Bench, I also know—for I had a part in it as one of the lawyers in cabinet in 1951—that your eventual appointment to the Supreme Court was as certain as it was welcome.

"The establishment of the permanent Court of Appeal is a landmark in our legal history. Your Honour, as the only remaining member of the original Court, and as its President since 1963, can take much of the credit for the great authority and the high status which the Court enjoys not only in this country, where it is now universally accepted, but in England and other countries where its decisions are quoted with confidence and examined with close attention.

"As the Attorney-General at the time of your appointment to the Court of Appeal, I recall the hopes and fears we both had for the new Court, so long awaited and so carefully planned. Today I share with you a certain vicarious satisfaction in the eminence which your Court has reached.



Sir Alfred North

"I hope your Honour will not mind if I say that you are not entitled to all the credit for all that you have accomplished. Lady North has, I know from my personal observation, stood by you for better or for worse, in sickness and in health, for richer and happily not for poorer. We are delighted that she is here with some of your grandchildren to share this occasion with you and us.

"I hope, too, that your Honour will not mind my saying that you had the great good fortune to be the son of a very distinguished father and a member of a notable family with a fine reputation for service to the Church and to the legal and medical professions, a tradition which your own sons, both Rhodes Scholars, are carrying on. The fruits of this kind of inheritance are

the qualities of character, the integrity of mind and the sensitivity of spirit and the pervading humanity, which have gained for your Honour the deepest respect and warmest regard of us all.

"Your Honour may recall that on your elevation to the Bench the profession in Auckland gave a dinner. At the conclusion of your speech you said . . .

> 'If at the end of my period of office people shall say of me, "He tried to do what he thought was right and was a kindly person", I shall be content.'

"Today, 20 years later, we say that—and so much more—that you may be well content as you deserve to be."

On behalf of the New Zealand Law Society, its President, Mr F. W. W. Tong, said:

"On behalf of the whole profession throughout New Zealand whom I have the honour to represent I welcome the opportunity of appearing before you on this the last occasion you will sit in this Court where you have presided for so long. We come here today to pay tribute to the success and eminence you have attained and to express our sincere thanks for your great service to the Country and to the Profession in the administration of justice.

"From Christchurch and Ashburton where you first practised to Hawera and thence to Auckland where by sheer ability and courage you broke into what was then one of the strongest Bars in New Zealand and became one of its foremost members. Your elevation to the Supreme Court Bench inevitably followed. When the Court of Appeal was established in 1958 to the universal satisfaction of the profession you were appointed a member and later became its President. Her Majesty bestowed upon you the dignity of a Knighthood and in 1963 you were appointed to the Privy Council and to the Judicial Committee. Indeed you have sat on our ultimate Appellate Court with distinction to yourself and to the Country.

"Later you were appointed an honorary member of the benchers of Gray's Inn. A truly remarkable record for one who started in the law without any special advantages other than your own outstanding qualities.

"No Counsel could have practised before your Honour and not felt your debtor. We thank you most sincerely for your great contribution to the law to the profession and for your courtesy, patience and ever-readiness to assist younger practitioners.

"We now say good-bye to you in this Court with great regret but with gratitude for all you have done for the cause of justice with the warmest good wishes of us all to Lady North and yourself for continued good health and for a long and happy well-earned retirement. Perhaps this is your greatest achievement that you hand on to your successors the torch of judicial excellence with its flame undimmed."

On behalf of the Wellington District Law Society its President Mr L. J. Castle said:

Your Honour will recall that on the occasion of your appointment as a Judge of the Supreme Court 20 years ago this last 26 October it was then said that you were one of the few in New Zealand who excelled in all branches of the law. To all types of cases you brought not only outstanding ability but all the enthusiasm at your command—never slipshod, half-hearted or luke warm. With respect these very talents typify your Honour's service to this country on the Bench.

"*We* know that in your years at the Bar you stressed the necessity for all to cherish and respect our institutions. The quiet dignity, probity, great ability and energy that you have displayed at all times have enhanced the reputation and respect of the Courts of our land. This day marks the close of an illustrious career in and for the law over a period of something less than half a century. With respect, we salute you and wish you and Lady North a long, fruitful and carefree retirement."

In reply to the farewell addresses, Sir Alfred noted the size of the gathering and acknowledged the honour accorded him.

"I had the considerable advantage of living in a family where discussion and indeed argument was the order of the day and views were freely exchanged between my father and his four sons. So quite young I began to appreciate the advantages of the adversary system which is fundamental to our system of law.

"Then from the beginning I have loved and continued to love the law and that too makes all the difference. You, Mr President, have been kind enough to refer to my long association with the law in more than one field. That is perfectly true because at 21 although a member of a large Christchurch firm, I undertook to run a country branch at Ashburton, which I may modestly say, grew to some size during the 5-year period I was there. So I have had to handle all classes of legal work and particularly in the field of the lower Courts I had, at some times, to make quick decisions and then put them, unaided by any senior, to the test. Thus (perhaps some might say rather too young) I became self-reliant, and indeed only once after I attained the age of 26 did I seek the aid of a senior to lead me.

"As you all know, I have been associated with the permanent Court of Appeal since its inception. That it came into being in 1957 owed much to Mr Attorney who carried the legislative measure through Parliament with the enthusiastic approval of the New Zealand Law Society. It owes a great deal too to the generosity of my colleagues on the Bench in 1957 who recognised from the beginning that if the new venture was to succeed seniority could have no predominant place when it came to the selection from time to time of members of that Court. Those who are in a position to judge, know quite well that some Judges have qualities as trial Judges denied to others. Some, on the other hand, have qualities that make them more suitable for appellate work.

"The attitude of the Supreme Court Bench in 1957 was quite different from that of the Judges in earlier days. Indeed, the concept of a separate Court of Appeal was discussed and considered more than 50 years ago when there were such giants as Sir Francis Bell, Sir John Findlay, Sir Charles Skerrett and others at the Bar who had a status which rendered it unlikely that they would be prepared to accept an appointment on the Supreme Court Bench. But those difficulties were overcome with the appointment of a new body of men, many of whom while at the Bar had actively advocated the advantages of a separate Court of Appeal.

"Mr Marshall, as Minister of Justice in 1957, showed, too, a considerable degree of independence of spirit and while he recognised seniority in the wholly merited appointment of Sir Kenneth Gresson as President, when it came to the other two members he stepped down six places to select me and then took the even bolder step of appointing as the third member of the new Court, a member of the Bar, Mr Timothy Cleary (as he then was) who had gained the respect of the whole profession throughout New Zealand as a clear thinking lawyer and as well the affection of a great many lawyers, particularly those practising in Wellington, for his selfless and objective attitude to problems and his willingness at all times to put his own very considerable burdens on one side in order to help others who were in difficulty.

"So we started in February 1958 with the good will of the whole profession. Unhappily we lost my dear friend and colleague Cleary, in August 1962 but I had the great privilege and happiness of working with him for some four years. During our time, encouraged by George Barton and opposed by our present Chief Justice, Cleary and I, somewhat I may say to the dismay of our President, decided to reject the judgment of the House of Lords in *Duncan v. Cammell Laird* on the topic of Crown privilege. Some six years later, their Lordships decided they had been wrong and the law is now in line with what we stated it ought to be so much earlier!

In 1962 Mr Justice Turner was appointed in the place of Sir Timothy Cleary. A year later the time came for Sir Kenneth Gresson to retire, I was selected as President and Mr Justice McCarthy joined the Court as the third member.

"This Court has now served the community and the profession in all for fourteen years and I am happy to hear from you that it has gained the respect of the members of the Bar, and generally speaking has given satisfaction to the members of the profession. You have been good enough to refer to my services to this Court but I want to make it quite clear that whatever has been achieved has been the result of team effort. In the nature of things, by the time a Judge reaches the Court of Appeal he has demonstrated that he possesses an independent mind. Therefore the success of the Court depends in a great measure on the willingness of the individual members to listen to the views of each other. Occasionally of course as you know, there has been a dissent in this Court and that is a good thing. But if one member of the Court forever was dissenting, then inevitably the Court would lose the confidence of the public.

"With the selection of Mr Justice Richmond as the third member of the Court, I have no doubt whatever that the Court will prove a strong and competent Court and will grow in stature as the years go by. My two brethren have been goodness itself to me and I would like to acknowledge the debt I owe each of them. I also wish to pay a tribute to the helpful and generous attitude of the Chief Justice who as you all know, is an *ex officio* member of this Court and from time to time has sat with us. But substantially his duties as head of the judiciary lie in the Supreme Court and when, as is liable to happen to anyone sitting there, on rare occasions his judgments have been reviewed by this Court, he has never so much as uttered a word of complaint.

"So you will see that we stand in a somewhat isolated position for our decisions not only have to meet the criticisms of the Bar, but of all the Supreme Court Judges as well. I would like to say publicly that I am grateful to them all for the uncomplaining way they have accepted our decisions, right or wrong. No doubt from time to time they are comforted by the thought that we here too must accept the judgment of a superior Court, namely that of the judicial committee of the Privy Council.

"During my term of office, I have been jealous of the reputation of this Court and have tried to encourage good advocacy. No doubt some young barristers when they appear in this Court come here with some trepidation, but I should say at once the Court of Appeal is not the best place for them to cut their eye teeth. We are delighted when we see them, but they must be willing to accept the searching questions that come from the Bench and if on occasions they leave the Court with bloody heads, I hope they do not retire with bowed heads. I was brought up in the main under Sir Michael Myers who in the Court of Appeal did not spare me if I strayed so much as an inch away from what he considered to be the central point of the case. I have always been grateful to him for the help he gave me, even though I did not find it as pleasant as it now appears to have been in retrospect!

"I do not know just what the future relationship will be between the Courts of this country and the Privy Council. In 1960 this country, in my judgment, lost a golden opportunity of cementing the judicial relationship between our two countries when a most generous offer was made by the then Lord Chancellor. Now we are faced with the Common Market and our relationship with England is certainly not growing any closer. Moreover, our government seems quite uninterested. In Australia, the High Court Judges from time to time are sent by their Chief Justice to sit on the Privy Council as part of their judicial duties, all their expenses being paid by the Australian government. That is not the position here. Our government has made it perfectly clear to the members of the Court of Appeal that if they wish to sit on the Privy Council—and that is their affair—they must do so during their sabbatical leave and at their own expense. I should add that I was more fortunate because on the occasion I served there for three months, the English government paid my expenses, but I am told that is not likely to happen again.

"However, that seems to be the way matters are arranged here and the judiciary, notwithstanding that it is the third branch of government, must put up with it and do its best in its isolated position at the far end of the earth.

"I read the other day from the life of Lord Coleridge a jingle which you may think in a modified way could even have some application here. It is recorded thus 'Parke settles the law, Rolfe settles the Court, Alderson settles the Bar, Platt settles nothing and Pollock unsettles everything.' I hope that will never be true of our Court of Appeal whether it sits as three or as five. In concluding my reference to the work of the Court of Appeal, I would like to thank too the members of the Court staff who have served us over the years so faithfully and well.

"In conclusion, may I just add a word of wider application. It is this: I feel very conscious of the fact that all over the world today, even in New Zealand, we are witnessing a new form of tyranny. It is the tyranny of the minority endeavouring to impose arbitrarily its will on the majority. I would commend to your reading the address of Chief Justice Berger of the United States Supreme Court which appeared a short time ago in the JOURNAL. He said, speaking of course of his own country:

> 'With passing time I am developing a deep conviction as to the necessity for civility if we are to keep the jungle from closing in on us and taking over all that the hand and brain of Man has created in thousands of years, by way of rational discourse and in deliberative processes, including the trial of cases in the courts.' ([1971] N.Z.L.J. 481—Ed.)

"Nothing like this has happened in our Courts and I hope it never will, but in other spheres of life there is not the slightest doubt that people who no doubt sincerely hold certain convictions are not content to express them in a moderate way; they are not willing to be civil in what they say and do, but tend to shout and shriek and call names. When this occurs, then, as the Chief Justice Berger said, 'We witness the end of rational thought process if not the beginning of blows and combat.' The legal profession with its wide knowledge of life is well fitted to exercise a restraining influence and I very much hope that you may be willing to undertake as best you can that task."

On delays in proceedings: "In my own past experience dealing with compensation cases on the waterfront, there is a growing disquiet and distrust by the men of the whole complicated and prolonged business. From the commencement of the case until its finalisation, the long drawn out process is of marathon duration.

"The law's delays, with at times specious pleas, adjournments and appeals from one Court to the next, are seen by the average man as helping no one except of course the lawyers. The lawyer's answer to this is very often that he is awaiting a more sympathetic Magistrate or Judge. This, in a way, is giving the game away. So much for the impartiality of the law." E. E. ISBEY M.P. at Waitangi.

SNAGS REMOVED FROM SOLICITORS' LIENS

The decision of Megarry J. in *Caldwell* v. *Sumpters* (reviewed in [1971] N.Z.L.J. 403) has now been reversed by the English Court of Appeal. The accompanying article is editorial comment from the *New Law Journal*.

As a result of the decision of the Court of Appeal (Salmon and Stamp L.JJ.) in *Caldwell* v. *Sumpters* (*The Times*, December 20, 1971) an important application of comity and reciprocity between solicitors is reaffirmed, after the blow (delivered with "some hesitation") which it sustained at the hands of Megarry J. at first instance. The facts of the case were as follows:

C. proposed to sell her house and instructed Sumpters to act for her. She accordingly handed over to them the deeds. After they had carried out work for her and given undertakings in respect of their fees to other professional firms who had given their services in the course of the same transaction, C. instructed other solicitors who wrote requesting Sumpters to forward to them the deeds of C's. house. Sumpters asserted their lien on the deeds, but nevertheless sent them to the new solicitors in order that the sale of C's. house might proceed. In a covering letter, however, Sumpters stipulated that they had released the deeds "on the understanding that you [the other solicitors] will hold them to our order pending the payment of our fess and your undertaking to honour the undertakings which we have given on behalf of [C.] on her instructions" in respect of the fees, etc., due to the other professional firms involved. C's. new solicitors declined to accept the "understanding" stipulated for, or in default of doing so, to return the deeds. On Sumpter's application for an injunction to safeguard their interests and the interests of those to whom they had given undertakings on C's. behalf, Megarry J. held that because the reservation by Sumpters was unilateral and the recipients of the deeds had expressly declined to assent to it, they could not be bound by it. What caused Megarry J. to hold (notwithstanding "some hesitation") against Sumpters was that, in his view, in the absence of some trickery or wrongdoing, their lien on the deeds ran with their physical possession of them, so that when the latter was parted with, the former was lost.

In the Court of Appeal, Salmon L.J. said that in the absence of authority, the obstacles in the way of upholding that view were "insuperable". Authority may sometimes be as persuasive by its absence as by its existence, and the lack of it in the present case might well indicate how clear the rights of the matter really were. Assuming—as had not been disputed—that the appellants, Sumpters, had a lien on the deeds, they had a legal right to them which they did not lose simply by parting with physical possession of them to C's. new solicitors, especially when physical possession was given up on the clear and express understanding that the deeds were to be held "to [Sumpters'] order". Even if such a stipulation had been addressed to C. herself, Salmon L.J. said, he was not convinced that the lien would have been lost. But such a conclusion certainly could not be countenanced in a transaction between officers of the Court. The successor-solicitors genuinely believed that the duty they owed to their client, C., required them to take advantage of Sumpters' supposed mistake; but this, as we said, in commenting on Megarry J's. judgment at the time it was delivered, in our view put altogether too high a solicitor's right to override the proper interests of third parties out of regard for any duty owed to his own client. In any event, Sumpters had, Salmon L.J. held, made no mistake at all. They had asserted their lien in agreeing to part with the deeds, and the plain duty of the solicitors to whom they were sent was to hold the deeds to Sumpters' order or to return them. The principle involved was so clear that the absence of authority for it was immaterial. But now we have authority too.

Mini Magic—Mr Gert Yssel, the leader of a nation-wide campaign to ban the mini in South Africa, said the garment had dealt a severe blow to civilisation. "For defying decent dress, God has punished us with the water scarcity, the severe drought in the Cape, the continuous earthquakes in the geologically stable Western Province, the millions lost on the stock exchange by ordinary people, and the decisive international setback of South Africa on the gold question." Not content with the investment, farm and gold fields, Mr Yssel moved into the realm of sport to blame the mini-skirt for the indifferent performance of the Springbok rugby tourists in Britain. *News item.*

THE POLITICAL CONSCIENCE OF A JUDGE

It is usually admitted that American Judges have more experience in and affinity for politics than their counterparts in the Commonwealth. Sometimes this leads to difficulties. How far may a Judge go in expressing his own views on the burning public issues of the day? Strong opinions publicly expressed by a Judge, where those opinions relate to issues which can come up in litigation, may appear to foul the fountain of justice. Recently a case arose in a Federal Court in North Carolina where the United States Attorney filed a motion asking Circuit Judge Craven to disqualify himself from hearing and deciding a case involving a question under the Selective Service Law as to whether a man had been unlawfully inducted into the Army. In recent years there have been a phenomenal number of draft cases before the Federal Courts, a trend not unconnected with the Vietnam war. The objection to Circuit Judge Craven sitting on the case was that he had expressed strong views in opposition to the Vietnam war. The argument was that since the Judge was opposed to the War and since draftees may be sent to participate in the war then the Judge must also be opposed to the Selective Service Law.

Judge Craven denied that his position on the war prevented him from hearing draft cases. There can be no question but that the Judge used some very strong words on the subject of Vietnam. In a Law Day Speech to the Buncombe County Bar Association in April 1971 he said: "This is a monstrous, muddleheaded, pridefully aggressive, immorally jingoistic crime against humanity. It reminds me of the Salem witch hunts and the Spanish Inquisition, except that it is worse than both. The executioners in Massachusetts and Spain at least had the excuse that they honestly believed they were killing their victims for the sake of their immortal souls. However muddleheaded and wrong that may have been, it is on a higher plane that to kill as a matter of national interest or to protect an economic philosophy that is not even understood by either North or South Vietnamese. I dearly hope that North Carolina and Asheville will never be destroyed for "our sakes", and I think it valid to assume the Vitnamese must feel the same way.

"This war is a stench in the world's nostrils, and the aroma is finally reaching us. When the Wall Street Journal and Forbes business magazine finally agree with the college kids. it would seem to me time to quit and quit now. I am not interested in ending the war 'honourably'. It began in dishonour and must end the same way. Unfortunately one man's honour is simply another man's pride. It seems to me that there is no reason whatsoever for continuing to reign death and destruction over Indochina except national pride, and according to most Christian writers, pride is the deadliest and greatest of all the sins."

There is indeed in the United States a commitment to the idea that debate on national issues shall be free, uninhibited, robust and wide-open. But one wonders whether a Judge ought to be heard to exercise his First Amendment rights so freely. Certainly it is rare for a Judge to do so outside the area of judicial administration, even in the United States. But the most interesting feature of the dispute is the justification Judge Craven offers for his action. Although he decided that he ought not to hear the case because of a technical issue concerning the manner in which it was assigned to him, on the main issue he was adamant. He was entitled to speak out and he was qualified to hear the case. His eloquent statement follows—I doubt whether members of the New Zealand bench and bar will agree with it—but it is a powerful testament from a politically concerned Judge.

CRAVEN, Circuit Judge:

"I confess that I am embarrassed that the United States Attorney has filed a motion asking that I disqualify myself from hearing and deciding the merits of [the case]. If my oath of office includes a vow of silence on matters of public controversy, then I have simply brought it upon myself. But I believe that a federal Judge is privileged to address his local Bar Association in observance of Law Day without confining his remarks to platitudes in praise of milk and motherhood with perhaps a flat out condemnation of Hitler. I think that I have not done wrong in expressing publicly my vehement opposition to the continuation of the Vietnam War. My views about it are not new and have never been temperate. At least as long ago as October 20, 1968, my opposition to the Vietnam War was reported in the North Carolina newspapers, and I was quoted as saying the United States should 'get out of Vietnam—with or without honour'.

"I, therefore, think that my attitude toward the war has long been known to the United

States Attorneys representing the government in cases arising in the Fourth Circuit. Although I have never kept my attitude on this matter a secret, until now it has not been challenged as disqualifying me from hearing many cases involving the selective service law. I am at a loss to understand why I have been deemed qualified before and incompetent now when my publicly expressed attitude has remained the same and the war is no longer popular as it was when I first spoke against it."

"The beginning of intellectual honesty in a Judge is the recognisation that, like other men, he has his own predilections and preferences and intellectual and philosophical attitudes that colour and influence his viewpoints. Achieving it requires that he be constantly on guard against his own bias, not in pretending that there can be none. I do not believe that a Judge has a duty of loyalty to a political administration with respect to any particular policy of that administration—international or domestic. Nor do I believe that he must pretend to believe that all policies or even all laws are wise and just. But I do believe that he must read, interpret and apply laws as written without regard to whether he would like to see them changed.

"I believe that my record as a Judge for nearly 15 years, State and Federal, will show that I have in the past been able to put to one side my own personal viewpoint about the wisdom and justification for a given law and apply the law as written despite sometimes a personal reluctance to do so.

"In [one case] I expressed my contempt for the North Carolina statute making the so-called 'crime against nature' punishable by imprisonment up to 60 years. Never in my life have I wanted more to find a statute invalid, and the opinion plainly discloses my wish in that regard; but, nevertheless, I found it impossible under the law to do so, and I held it valid and enforceable.

"For more than 20 years I have publicly expressed my disbelief in capital punishment, and for almost 15 years I have, nevertheless, been able to participate in capital cases at both trial and appellate level without the slightest suggestion from any prosecutor that I did so unfairly. I doubt that a month goes by that I do not participate in a decision denying *habeas* relief to some person on death row in one of the five States within this circuit." [Discussion of the particular case is omitted.]

"It is strange that the government has allowed me to sit in cases . . . directly involving the morality of the Vietnam War to which I am and have been publicly opposed, without attempting to disqualify me and that now the government moves to disqualify me in a case which involves the Vietnam War indirectly, if at all.

"It is true that Fred Lawton [petitioner in the case] might be sent to Vietnam, but it does not appear, so far as I know, that he is opposed to going, but simply that he believes himself unlawfully inducted. If I reach the merits and should decide that Lawton is entitled to be released from the Army, I would assume that another draftee would take his place whether in Vietnam or elsewhere. Since I am not acquainted with Lawton, it is plain that I am indifferent whether he or another should possibly have to go to Vietnam. I should, however, like it if no one had to go. But there is nothing I can do as a Judge to accomplish that and very little I can do as a citizen and occasional public speaker.

"The question before me is not the constitutionality of the Vietnam War, nor whether Lawton may be required to participate in it, but simply whether Lawton's exposure to the draft may be extended beyond the normal cut-off date of April 1 following the end of a calendar year. It is purely a question of law, so relatively lacking in factual content that I have already decided it unnecessary to hear Lawton's testimony.

"The motion to disqualify does not explicitly aver that I am biased against the selective service law. The argument seems to be, however, that since I am opposed to the Vietnam War and since draftees may possibly be sent to participate in that war, then I must be opposed to the selective service law. I have never spoken publicly on this subject, nor do I recall even talking about it privately, but since the government raises the question I think it is entitled to disclosure. The Nixon Administration's proposal to convert to an entirely voluntary army is appealing, and yet I am not sure but what in a democracy the burden of a very large military establishment ought to be borne by all. So long as the nation is committed to the maintenance of enormous armies, I am inclined to think the draft is the best alternative. Unlike my attitude toward the Vietnam War, I, therefore, think I can fairly say that I am not presently opposed to the selective service law. But I would hope that someday the armed forces may be small enough that compulsory service is not needed.

"I do not believe that my strong aversion to the Vietnam War and my belief that it is the most tragic national mistake made in my lifetime will have the slightest effect or influence upon my judgment as to the time of termination

of exposure under the selective service law. It is hornbook law that attitude or feeling a Judge may entertain toward the subject-matter of a case does not disqualify him."

The Judge denied the motion to recuse. He went on to discuss the manner in which the case had been assigned to him and decided that for reasons connected with that, which are omitted here, he ought not to hear the case.

G. W. R. PALMER

EXCESSIVE USER OF A RIGHT OF WAY

On the special facts of the recent English case of *Woodhouse & Co. Ltd.* v. *Kirkland Ltd.* [1970] 2 All E.R. 587; [1970] 1 W.L.R. 1185, such a case as that could scarcely arise in New Zealand by the operation of the Land Transfer Act 1952, s. 64 of which (as amended) reads as follows: "Subject to the provisions of Part One of the Land Transfer Amendment Act 1963 after land has become subject to this Act, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor." There is now very little privately owned land in New Zealand not under the Land Transfer Act. But this case contains much material relevant in New Zealand on the topic of excessive user of a right of way, disputes on which may readily arise in this Dominion, especially in the cities.

The rights of way in the *Woodhouse* case were in the main rights which had accrued by operation of the Prescription Act, which Act is also operative in New Zealand, but to lesser extent than in England owing to s. 64 of the Land Transfer Act. The law as to excessive user of a documentary right of way, does not differ very much from that of a prescriptive right of way: the chief difference is evidential. In the one case you have an instrument to construe; in the other case you have to prove the existence of the right of way by oral evidence but in both cases evidence is admissible as to the surrounding circumstances at the date of the grant: *Bulstrode* v. *Lambert* [1953] 2 All E.R. 728.

The locality of the rights of way is at Friar Gate, which is a busy main road in the centre of Derby and the principal access to the plaintiffs' premises, is a passage leading off Friar Gate. In connection with one of the rights of way the Judge said: "There is some evidence that a right of way over the defendants' passage for the benefit of the plaintiffs, property or part of it already existed as long ago as 1924, but this evidence is inconclusive and in this action the plaintiffs rely on the prescriptive right of way based on user for twenty years prior to action brought. They say that from at any rate the year 1925 until August, 1966, when the writ in the action was issued, they and their suppliers, and to a much lesser extent their customers, used the defendants' passage with vehicles, horse drawn in the earlier days and mechanised later, and did so *nec vi, nec clam, nec precar.o.* The Judge was satisfied on the evidence and found as a fact that there was a sufficiently continuous user of the defendants' passage way during the relevant period by the plaintiffs' suppliers and in a minor degree their customers to satisfy the statutory conditions of the Prescription Act 1832 and to entitle the plaintiffs to a right of way over to defendants' passage to and from their premises for business purposes.

But that was not the main matter of dispute in the action. This centred on two matters; first, the question of the plaintiffs' customers. Does the right of way extend to the plaintiffs' customers as well as to themselves and to their suppliers? And, if so, has there been excessive user by the plaintiffs' customers? Secondly, what is the width of the right of way at the top end where the defendants' passage meets the plaintiffs' yard?

As to the first question, the plaintiffs had maintained a gate separating their yard from the defendants' passage way and until 1963 this gate was kept locked in order to exclude pilferers from the plaintiffs' yard. Anyone wanting to get into or out of the plaintiffs' yard via the defendants' passage had to get hold of the key to the gate. But in February, 1963, a new manager of the plaintiffs' business at Friar Gate was appointed, a Mr Cousins, and before long he initiated the policy of keeping the gate unlocked and open during business hours. His reason for doing this was that customers calling at the trade counter were in the habit of parking their cars or light vans in the main entrance to the plaintiffs' premises, that is to say, in the passage from Friar Gate, with the result that other vehicles could not get into or out of the yard via that passage. Mr Cousins therefore had a notice put up indicating that customers should

drive through to the yard in order to park their vehicles, and he opened the gate in the yard as a means of access for the customers when the Friar Gate entrance was blocked.

Plowman J. said: "Once the plaintiffs have established a right of way for their reasonable business purposes the identity of the persons using it for those purposes is in my judgment immaterial. It seems to me that the defendants' suggestions to the contrary might lead to absurd results. Suppose, for example, the access to a private house lay over a path in a different ownership and the evidence was that during the statutory period the path had been used as access to the house by the occupiers and the postman and trades people, could it be said that the gardener or the doctor or the builder were excluded from going to the property via the path simply because there was no evidence of user by gardeners, doctors or builders during the 20-year period? In my judgment clearly not.

"If, then, the plaintiffs' customers are entitled to use the defendants' passage, is it an objection that the number of such users considerably increased after 1963? Is this 'excessive' user, within the principle that the owner of the dominant tenement is not entitled to increase the burden on the servient tenement? Again, in my judgment, the answer is 'No'. Distinction has to be drawn between a mere increase in user and user of a different kind or for a different purpose. The former is not, in my judgment within the principle, the latter is."

His Honour illustrated his finding by copious extracts from *British Railways Board* v. *Glass* [1965] Ch. D. 538. In that case the defendant had acquired by prescription a right to use the crossing for the purposes of a caravan site, and, it having been admitted by the plaintiffs on the pleadings that the whole of the field to the north of the crossing constituted a caravan site, and no radical change having occurred in the character of the dominant tenement, the mere increase in the number of the caravans using the site and the consequent increase in the user of the crossing did not amount to an excessive user of the prescriptive right, and the Judge was therefore correct in holding that there had been no such increase in the burden of the easement as would justify the plaintiffs in seeking an injunction.

Harman L.J. said: "A right to use a way for this purpose or that has never been to my knowledge limited to a right to use the way so many times a day or for such and such a number of vehicles so long as the dominant tenement does not change its identity. If there be a radical change in the character of the dominent tenement, then the prescriptive right will not extend to it in that condition. The obvious example is a change of a small dwellinghouse to a large hotel, but there has been no change of that character according to the facts found in this case."

Davies L.J. said: "If there is a right of way to and from a particular house, it does not seem that the owner of the servient tenement could successfully complain if the number of persons living in the house was greatly increased, or if the occupier of the house chose to use the right of way much more frequently than previously. Suppose, as it was said in argument, a golf club was entitled to a right of way over adjoining land: if such a club were to double its membership, the burden on the servient tenement would be greatly increased but it is impossible to think that the owner of the servient tenement could prevent the user."

Accordingly Plowman J. held in the *Woodhouse* case that the plaintiffs had not been guilty of excessive user of their right of way. It was unnecessary to consider whether an increase in user, if very great, can ever of itself amount to excessive user, because that case was not the instant case.

The other matter in dispute was the width of the servient tenement at the top end. The subject-matter was conveyed to the plaintiffs by a conveyance dated August 26, 1965. In May 1967, however, the defendants erected two substantial rolled steel posts just within the boundary of their yard. The defendants did this deliberately in order to make it more difficult for the plaintiffs' lorries to get into and out of the plaintiffs' yard. The plaintiffs' case was that this amounted to a derogation from the grant contained in the conveyance. Plowman J. dealt with this point as follows: "I have been asked, however, in any event to express my opinion on the question whether the erection of the two posts amounts to a derogation from the grant and I will do so. In my judgment it does, in that the posts render the land comprised in the 1965 conveyance materially less fit for the purpose for which the grant was made, namely, to provide improved access to the yard. That, however, is subject to the consideration that the defendants have erected two additional posts on their land at the bottom or Curzon Street end of their passage, and have positioned those posts in the concrete strip to which I have already referred. No complaint is made of this in this action, but the result has been to prevent lorries needing the wider access at the top from getting in at the bottom, and consequently the derogation from grant is not one from which any sensible injury arises."

There was one final issue and that was the obstruction of the plaintiffs' right of way. His Honour said: "There is really no dispute about this. The defendants have from time to time locked a gate halfway down that passage which was formerly always kept open except at night and by doing so have prevented access to and egress from the plaintiffs' yard, and in addition to that they have on a number of occasions obstructed the plaintiffs' right of way with motor cars in protest against what they considered unauthorised user by the plaintiffs' customers. That was wrongful action on the defendants' part and in my judgment the plaintiffs are entitled to relief accordingly."

In *McIlwraith* v. *Grady* [1967] 3 All E.R. 625; [1967] 3 W.L.R. 1331 (C.A.) the grant of right of way was "to pass and repass through over and along" the yard of servient tenement "with or without horses carts and carriages". The owner of the servient tenement submitted that where there is only a right to pass and repass, there is no right to halt except in case of necessity, such as, for instance, if a car broke down or a horse went lame. He suggested that *Bulstrode* v. *Lambert* (*ante*) supported that proposition. But Lord Denning did not agree: "I do not think it does. Every grant must be construed in the light of the circumstances. In that case it was held that there was a right to bring goods to the auction mart and by implication a right to halt load and unload. So here. There was a narrow passage way leading into a small yard. There was necessarily imported, in addition to an actual right to pass and repass, also a right to stop for a reasonable time for the purpose of loading or unloading. I should have thought it obvious in 1901 that carts could come and unload provisions for the grocer's shop. So also now the post office vans can come and stop for ten minutes or more to load and unload the letters and parcels. An occasional oil lorry can stay a quarter of an hour. And so forth."

Stroud's Law of Easements at p. 168, lays down five rules. First, that the direct benefit of the easement must be confined to the dominant tenement. Thus, in the case of *Harris* v. *Flower* (1904) 74 L.J. 127, it was held that the servient owner is entitled to relief against the use of a right of way for the purposes of buildings erected partly on the dominant tenement and partly on adjoining land.

The second rule laid down by *Stroud* is that every easement of way must have a defined or ascertainable direction. As stated in the argument in the lead-case of *Ackroyd* v. *Smith* (1850) 10 C.B. 164; 84 E.R. 507, there must be a definite *termini a quo et ad quem*, and the latter must be in the party's own land. Or, at least, it must serve the party's own land: for there may be continuous easements over several neighbours' lands, but they must together lead into the dominant tenement.

Third rule in *Stroud* is that, although the right of way must definitely lead to, or be used for, the tenement in one direction, its use in the other direction may be limited or unlimited, according to the terms of the grant, or conditions of user. Thus where a grant was vaguely made of "ingress, egress and regress" to and from a railway approach road bounding the premises, it was construed as conferring a right of way not only across the road to the railway station, but along the whole length of it in both directions to public highways at each end: *Somerset* v. *G. W. Ry. Co.* (1882) 46 L.T. 883.

We now come to the fourth and most important rule in *Stroud*. The burden on the servient tenement must not be unduly increased; but what is the legitimate burden, and what does constitute an excess of it, must be ascertained in each case according to the intention, actual or presumed, of the parties. The case of *Selby* v. *Crystal Palace Co.* (1862) 35 Beav. 606 is frequently used as an example of the widest possible grant. The words were "in as full free complete and absolute a manner to all intents whatsoever as if the same were public roads." See also *Nichol* v. *Beaumont* (1883) 53 L.J. Ch. 853.

Finally, we arrive at the fifth and final rule in *Stroud's Law of Easements* at p. 173: "(5) On a severance of the dominant tenement, a right of way will attach to the severed portions in accordance with the rule as to easements in general, but subject to the condition that the occupants of the severed portions can bring themselves within the terms of the grant (if any) and the limits of the right as previously existing." As Talbot J. said in *Callard* v. *Beeney* [1930] 1 K.B. at p. 355: "There is no doubt that a grant of land together with a right of way over the grantor's land *simpliciter* grants the right to use the way for all purposes connected with the land granted or any part of it, subject to any question, which does not arise here, of the effect of a change in the character or mode of occupation of the dominant land."

E. C. ADAMS.

Optional Extras—A Los Angeles stonemason ran an advertisement in the *Los Angeles Times* offering five-foot plaster-of-Paris replicas of Michaelangelo's *David* for $28.85—"Fig Leaf Optional."

OBITUARY

Mr I. D. Wood

Mr Ivan Douglas Wood who was Secretary-Librarian of the Canterbury District Law Society for the past twenty-seven years, died in September 1971 on his 66th birthday.

Mr Wood graduated in law from the University of Canterbury and gained his professional experience as a solicitor with the legal firm of Raymond, Stringer, Hamilton and Donnelly. During the Second World War he served in the Pacific with the Royal New Zealand Navy (1941-46). On his return to civilian life he accepted the temporary position of Secretary-Librarian of the Canterbury District Law Society. He enjoyed this work and as he was possessed of some independent means he chose to continue in this position. The Society thus benefited by being able to leave much of its administration in the hands of one who had not only legal qualifications but also practical experience of professional life. Mr Wood continued in this position until his retirement, on account of illness, in August 1971.

Mr Wood's good nature, his patience and tact in dealing with complaints and inquiries from members of the public, and his ability to discourage gossip, coupled with his outstanding capability in organising the various social functions of the Society, gained him a special position with all who had dealings with him.

He was a member of the Canterbury Club for thirty years, serving as President in 1962-65. He was also a director of the flourmilling firm established by his grandfather.

Mr Wood worked actively for the New Zealand Foundation for the Blind, and for thirty years, until his death, was President of the Foundation's Christchurch advisory committee. His efforts for the establishment of the Fernwood Hostel for the blind were recognised by the incorporation of his name in the title of the Hostel. He also organised many fundraising events for the Christchurch Branch of the Plunket Society.

As a young man Mr Wood was an excellent tennis player, and later when he turned to golf achieved a handicap of 4. He and his wife maintained a large and beautiful garden which was well known in Chrustchurch and in other parts of New Zealand. He was a keen philatelist, and was regarded as an authority on the stamps of New Zealand.

Mr Wood served the legal profession with tact, discretion and integrity. He was good natured to a remarkable degree, and charitable in deed and thought. He is survived by his wife and two sons.

A.C.B.

John Keith Moloney

Cunninghame Graham, in writing of Conrad, said death annihilates perspective, blots out all sense of time and leaves the memory of those that we have lost, blurred in outline. It may not always be that way where personality is strong, impressions distinct and incidents are oft-recounted. These elements and circumstances all attach to John Keith Moloney.

He worked and played and fought and lived —and died—a character, a personality, a man of such enthusiasms, emotions, and infectious exuberances that he highlighted his life against early oblivion.

Everyone who met him responded to his laughter and vitality; it was impossible to feel dull in his company. When in his much be-pictured and littered study he embellished reminiscence and narrative with expansive anecdotes, he would set the table completely on a roar.

I met him first in 1914 as an undergraduate at Canterbury College, that alma mater which so fostered scholarship and sport—including his beloved "Old Maroons"—that it earned from him a lifetime affection. Then came the 1st World War and his enlistment with many University friends in The Earl of Liverpool's Own, "The Dinks", for which he held undying military affection.

He served in Egypt and France and was selected for O.T.C. Training at New College. He revelled in this emergency association with wartime Oxford, rich in scholarship and tradition and then exhibiting unusual military, sporting and social aspects.

He had a facility for acquiring friendships and would recall his conversations with William Spooner—that learned but singular warden of his College—literarily notorious for those accidental transpositions which became a vogue in humour. He talked with Rudyard Kipling and danced with Violet Lorraine and Irene Vanbrugh.

He was a brave and rugged soldier. With pleased modesty he would delight in later years to hear, on a St. Crispin evening, a veteran re-

counting the fight of "Moloneys Platoon" in a punishing night action in 1917 against a large German patrol which blundered upon it near Ploegsteert Wood. In jocular exhilaration he claimed destruction of half the Germans on the Western Front!

What a different Tartarin Alphonse Daudet could have created here!

Invalided home after Passchendaele, he soon returned to University life and then plunged into the profession of the law and criminal advocacy. How colourfully and dramatically he would plead a cause! At one moment his magisterial friend, Mr E. C. Levvey, would share the ripple of laughter; at another, almost with a tear upon his cheek, he could scarce await the grant of a liberal indulgence in penalty. Court rooms were infected by his ebullient presence. There was a jester in Court when Moloney was up! It was almost the same in the Supreme Court. On the wall of his Mansfield Avenue study was an autographed portrait of his Resident Judge with special significance. It was signed "To my friend Mr J. K. Maloney with my Best Wishes—E. H. Northcroft. April 1951".

Even the august Court of Appeal heard him with appreciation, enjoyment, and indulgence. He remained the only Counsel who, in living memory, was bold enough to cite a case from *The Readers Digest* as a persuasive precedent!

But his widest and most endearing range of activity was sport—participant, administrative, and historical. Always an ardent patriot—proud of the Empire and the heritage which its scholars, seamen and soldiers—and subjects generally—had established, he cherished the national games—Cricket and Football. Even this liveliest of temperaments was calmed by the restfulness of cricket. The pauses and breaks permitted him to reminisce or philosophise and he gave it a lifetime of adoration. Indeed was he not a scorer for the greatest innings in the Cricket History of New Zealand—the partnership which Arthur Sims helpfully shared with that illustrious prince of batsmen—Victor Trumper making his 293 at Lancaster Park?

But Rugby interested him still more. It was his second great love. With what gusto in earlier days he would urge the flying ball and, in later days, at smoke concerts, or over a social beer in his garden, recount, sometimes with nice assessment and historical exactitude—but often with customary hyperbole—the skills and performances of All Black Teams, Charlie Saxton's Kiwis, the Springboks, the Wallabies and the Lions and all those Canterbury sides which have embellished the annals he has helped with such industry to record. He was an apostle of the attack, quick to commend originality or roundly to condemn bad handling or loss of initiative.

With one or two exceptions he probably knew more of the players and the history of our National Games than anyone in the country. His visits to the Public Library (he was an omnivorous reader) were as much for the purpose of checking Rugby Records as for collecting autobiographies and reminiscences to enrich his widely acquired knowledge of world affairs. When times were tough in the Depression he gave assistance to the Metropolitan Relief Fund; when age and fitness debarred him from the Army he gave regular service to the Union Jack Club. In these later years when his time was given to compiling sporting reminiscences—unpublished as yet—and when painful ailments and failing sight so afflicted him, he exemplified Sir James Barrie's maxim: "It is not life that matters; it is the courage you bring to it."
He had an understanding and intelligent family—including a soldier son now in Vietnam—but it is fair to say that his continuing capacity to exhibit fortitude against adversity traced mostly from the unremitting, dedicated devotion of his wife to whom in the extremity of his brief final pain he uttered words short in expression but bursting with gratitude—"Goodbye Love!" She was indeed his greatest love.

I saw him 2 or 3 weeks ago sauntering slowly along the pavement in St. Albans Village where everyone knew him so well. There was a Dayan patch over his sightless eye and this time, not his Cossack hat, nor yet an Army balaclava atop an ill-shaved chin, but a hat of almost Texan proportion set aslant above a bright, reinvigorated face and borne with an air farouche!

A light has gone out in the village but all who knew him will console themselves by recollecting the maxim of Confucius: "It is better to light one small candle than curse the darkness." He lit his candle!

W. R. LASCELLES.

A Dangerous Precedent—In the Court of Chancery, where matters were being bogged down by the unnecessary prolixity of lawyers, Lord Egerton imposed sentence on one lawyer who appeared before him with a brief one hundred and twenty pages long. "Sixteen pages would've been ample," he said, as he ordered the hapless lawyer to carve a hole in his brief, put his head through it, and walk around Westminster Hall as a discouragement to long winded-ness.

(Continued from page 96)

This appears to be a less formal step than certifying and is an antecedent state of affairs prior to zoning. On *certiorari*, the Court is obliged only to examine the face of the record. Macarthur J. in *Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996, 999, made certain observations as to what would constitute the record. The onus being on the plaintiff, I have no evidence on the record as so defined that such antecedent step has not been formally taken. I would be loath to decide this case, however, on the technicality of onus of proof and indeed, Denning L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338, 353; [1952] 1 All E.R. 122, 131, suggested room for greater liberality.

Having examined, therefore, the affidavits which nobody has objected to, it is apparent that the Council must have agreed on this point at earlier dates for there were representations made to the Minister, subcommittees set up, evidence taken, reports and representations forwarded to the Minister and directions received from him as to steps required before he exercised his power. It is inherent in these numerous transactions that the Council must have decided it required the land be no longer designated. On 24 February 1969 it passed a simple resolution zoning the reserve residential.

Proper notices were given, appeals lodged under s. 33A (4) and the appeal eventually disposed of by the Appeal Board in the following terms:

> "Whereas Ina Glen and eighty-five (85) others appealed against the decision of the Oamaru Borough Council given on the twenty-fourth day of February 1969 whereby the Council resolved under s. 33A that that part of reserve C, Town of Oamaru being an area of approximately eight (8) acres (known as Awamoa Park) which is bounded by Perth, Stoke and Wansbeck Streets be zoned and included in the residential zone of the Oamaru operative district scheme and whereas the appellants and the respondent have agreed that the said part reserve C be included in the rural zone of the Oamaru operative district scheme now therefore it is ordered by consent that the said part reserve C be and is hereby included in the rural zone of the Oamaru operative district scheme provided always and it is further ordered by consent that the effect of such zoning shall be to give the said part Reserve C an underlying rural zone within the Oamaru operative district scheme.
>
> The Oamaru operative district scheme is amended accordingly.
>
> Dated at Wellington this twenty-eighth day of July 1969.
>
> 'J. W. KEALY'
> Chairman."

The plaintiff's counsel submits that s. 33A (2) as amended is inapplicable because it is said that it only can be used where prior to zoning, the land has ceased to be a public work. It is therefore said that quite clearly this reservation has not yet been lifted by the only authority who can lift it, namely the Minister of Lands, and that s. 33A (2) is inappropriate. It is claimed that the proper procedure would have been under s. 33A (1) as for an existing and continuing public work. If this latter is a correct submission then the procedure set out in s. 30A would have to be followed with different types of rights of appeal and this has not been done. Consequently it is alleged that the Council's zoning is invalid and any alteration of that zoning consequent upon the appeal to the Number One Appeal Board in July 1969 should be quashed.

I think the answer is that counsel for the plaintiff has misread the wording of s. 33A (2). The wording is not parallel to the wording for the creation of a public work or for its release from being a public work. These procedures are set out in s. 22 *et seq* of the Public Works Act 1928 as to taking, in s. 20 of the Public Works Amendment Act 1952 as to change of purpose and in s. 35 of the Public Works Act 1928 as to the release of land. Section 33A (2) speaks of the Minister, local body or Council having financial responsibility. Indeed, the Minister referred to in the Town and Country Planning Act, must be the Minister of Works and he has no power to release land from reservation under the Reserves and Domains Act. But he has a power, as do local bodies and Councils having financial responsibility, to make requirements that land be designated for public works in a town plan, (ss. 21 (6) and 21A of the Town and Country Planning Act 1953) and the words "require", "requirement" and "designated" are words particularly appropriate to the labels attached to various areas of land in a district scheme with particular reference to land set aside for public works. But to label them such for planning purposes or if I may coin a phrase, unlabel them, is relevant to the plan but does not affect the creation or dissolution of the status of being a public work. As an amendment, the 1968 Act must be deemed remedial and I attempt to read s. 33A as a whole after its amendment to see what the intended pattern of the legislation is. As is well known, town plans did not originally zone public works—they merely designated them as public works and were not given a zoning. It was apparently thought desirable that even though set aside, they have a zoning and I take it it was for this purpose that what is known as "underlying zoning" was introduced as I have mentioned, by the Amendment Act of 1961—although the type of zoning then introduced could more properly, I think, have been called "suspended zoning". Now the significance of the alteration of s. 33A when it was re-enacted in the Town and Country Planning Act 1966 and further amended as to subs. (2) in 1968, is to provide two different procedures according to whether or not the public work is to continue as such or whether it is intended to cease. If the public work is intended to continue then the provisions of s. 33A (1) are appropriate and presumably because there is no intention of urgent change, the zoning need not take place until the next five yearly review with the more leisurely and protracted modes of appeal there provided (s. 30 A). Where, however, it is known that an existing or proposed public work is not to be proceeded with, it is desirable that the matter should proceed forthwith. If there is to be a zoning where there was none before and if it is to be in respect of land which it is known will shortly cease to be a public work, then this is a factor relevant to the ascertainment of its appropriate future zone. And it is of importance that such zoning should be done this way rather than on assumption that it will continue to be designated as a continuing public work. It has apparently therefore been thought convenient to provide the different procedures under s. 33 A subs. (2) (4). Now I did not read subs. (2) as making the lifting of the classification as a public work to be a prerequisite to be completed before zoning can take place. The only prerequisite is that the appropriate authority be it Minister or local body who previously,

when the plan was prepared, was entitled to require the land to be designated, shall no longer have such a requirement. This is a less formal step than the steps necessary under the Public Works Act or, as in this case, under the Reserves and Domains Act for reversing the classification of the Land as a public work (in this case a reserve).

Now, the main point of attack made by the plaintiff is that the formality of lifting the reservation has not been gone through and therefore there was no power in the Council to zone the land. For the reasons I have endeavoured to set out above, this is not my reading of the subsection. The procedure must be given a common-sense interpretation. It will doubtless be known to whatever authority, be it Minister or local body, that the formal steps will eventually have to be taken. In this instance, the Council having financial responsibility had decided that as far as it was concerned, it would no longer wish this to be designated as a reserve in the town plan because it was in the process of requesting the Minister to lift the reservation and it received a conditional indication from the Minister of Lands of his intention to do this. There is ample correspondence from the Minister to indicate that this step would be taken in the near future. That being so, it is implicit in the way the Council acted that it no longer required its town plan to show this as a public work designation. I have not been shown any formal resolution and of course the Council could only act by resolution (Part VI of the Municipal Corporations Act 1954). But with the onus on the plaintiff, I am in effect being asked to *assume* that at no time prior to 24 February 1969 did the Council resolve that "It no longer required". I am not prepared, even looking behind the record, to supplement the non-existence of any such evidence in the affidavits with any such assumptions. Indeed, in view of the year-long negotiations with the Department, the Minister and the objectors, I think the inference is the other way. Then by a resolution which is on the record of the Council, on 24 February 1969, zoned the land in the way it thought appropriate. Proper notifications and rights of appeal were given and exercised. Not only do the steps appear to me to have conformed with the requirements of the section but also appear to have been most fairly placed before those likely to be affected by the intentions of the Council as to the future use of the land so that the merits of the zoning settled upon by the Council could be properly considered and tested on appeal.

The other point advanced, albeit somewhat faintly on behalf of the plaintiff, was that there was no power in the Number One Appeal Board to substitute rural for residential zoning—it is submitted that what was done was not to "amend" but to "cancel and substitute". In view of the wide wording of s. 42, I cannot see any validity in this point.

Certainly the more common thing for an Appeal Board to do is to consider alterations to such matters as conditional uses and specific departures, or alterations to the classification within a designated type of zoning. Nevertheless, there may doubtless be occasions when it is thought necessary to alter from one class of zoning to another and in my view a liberal interpretation of this section is called for. If that which has been created is deemed on appeal to be undesirable, then the Board should obviously have the fullest powers of substitution and in the context in which it is used here, the word "amend" appears to me to mean nothing more nor less than "alter" and a new zoning, if appropriate, cannot be inserted unless the previous one is removed.

It did appear to me in the course of the case that an interesting question may well arise, in view of this wide power, as to the circumstances and the extent to which further notice should be given to persons who may possibly be injuriously affected (s. 42 (3A)). It may well be that a future case will arise where persons will claim to be aggrieved through the Board having failed to give such notice and right of hearing. No such argument, however, was addressed to me in this instance. The plaintiff, of course, is appearing in the interests of the public at large and did not apparently feel required to advance any argument on this point. It may well be that the provisions of the ordinances as to what are conditional uses do not vary greatly as between residential and rural zones and consequently no differing points of objection arose.

As I have already found against the plaintiff, I do not need to deal with the arguments of the second and third defendants that in any event the Court should not exercise its discretion to grant *certiorari*. Had I been called upon to decide on this point, I fancy that the delay from July 1969 to September 1970 would have been such that I would not have been minded to grant the relief sought. I appreciate that delay is a matter 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. In particular here I note that the effective decision challenged is one made by consent, that the real objections of relator relate to matters more properly considered by other processes viz: the Minister of Lands, as to lifting the reservation, and the Number Two Appeal Board on the conditional use appeal and my difficulty in seeing that any different result would be achieved if the whole cumbersome and time-consuming procedures were recommenced. However, I am not required to find on these matters.

Motion dismissed.

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Solicitors for the first defendants: *Crown Solicitor* (Dunedin).

Solicitors for the second defendant: *Hislop Creagh & Mein* (Oamaru).

Solicitors for the third defendant: *Hjorring Tait & Farrell* (Oamaru).