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MAGISTRATES' COURTS: EQUITABLE JURISDICTION.

A judgment of particular interest in New Zealand was recently given by the Court of Appeal in England (Sir Raymond Evershed, M.R., Somervell and Asquith, L.JJ.) in *Bourne* v. *McDonald*, [1950] 2 All E.R. 183, because it interprets several sections of the Magistrates' Courts Act, 1947, which have been directly " lifted " from the County Courts Act, 1934 (Eng.), and those sections were before their Lordships for consideration.

In effect, the judgment (translated into terms of our Magistrates' Courts Act, 1947) holds that, in an action based on a breach of contract, which is covered by s. 29 of the Magistrates' Courts Act, 1947, a Magistrate can, under s. 41 of that statute, give any remedy which a Judge of the Supreme Court can give in a similar action. Therefore, he can grant a mandatory injunction, which would have the same effect as an order for specific performance, whether or not that remedy is claimed. It further holds that s. 34 (of our Act) is directed, not to particular remedies, but to particular types of remedies which are well-known and definable in the Chancery Courts. Section 34 (1) (*b*), by giving jurisdiction to grant specific performance of agreements for the sale, purchase, or lease of any property, does not limit the right of a Magistrate under s. 41, which gives him general ancillary jurisdiction, to grant any remedy that justice might require in an action for breach of contract where there is a claim for specific performance which is not in regard to an agreement for the sale, purchase, or lease of property, provided that the case is within the jurisdiction given to Magistrates by s. 29.

It is important, in view of the foregoing, to examine the manner in which the Court of Appeal, in a judgment delivered by the learned Master of the Rolls in which both the Lords Justices concurred without further comment, arrived at the construction they put on the relevant sections in the County Courts Act, 1934 (Eng.), which are reproduced in our Magistrates' Courts Act, 1947, with little, if any, alteration.

This was an appeal from an order of Judge Tucker of the County Court, in an action claiming specific performance of an agreement by the defendant to erect a fence. The agreement had been entered into by the parties as a result of previous proceedings between them. The plaintiffs, on the one hand, and the defendant, on the other, were neighbours in Emery Avenue, Stoke-on-Trent, and they had involved themselves in a dispute about the boundaries between their respective plots. It was alleged by the plaintiffs that the defendant had encroached on their land, which was the more serious, according to counsel for the plaintiffs, because it left the approach to the garage of the plaintiffs' premises too narrow for the passage of their motor-car. The result was that proceedings began in the local County Court between the plaintiffs and the defendant and another person of the name of Frost (who had since dropped out of the case, and to whom it is unnecessary further to refer) to establish where the boundary lay. Shortly before the first action came on for trial, the parties settled their differences. That settlement was achieved by the solicitors to the parties.

On January 3, 1950, Mr. Rees T. C. Jones, solicitor for the defendant, wrote a letter to the plaintiffs' solicitor which begins, " Pursuant to our telephone conversation of even date, we would confirm the terms of the settlement arrived at herein," and then the body of the letter provides for two things—namely, (i) the erection by the defendant in a new position (to satisfy the requirements of the plaintiffs) of the boundary fence at his cost, and (ii) payment to the plaintiffs of a sum of £30, an agreed figure to cover the plaintiffs' costs of that action. Unhappily, the pacific sentiments of the solicitors were not entirely reflected by their clients, and very shortly afterwards the defendant stated that he regarded himself as not bound by this arrangement. The result was the commencement of a second action—namely, the action in respect of which the appeal lay. The particulars of claim, after referring to the letter to which allusion has been made, state, as is the fact, that the plaintiffs, in performance of the bargain made, discontinued their then existing proceedings, but it was alleged that the defendant declined to carry out his part of the bargain. The prayer was as follows:

> By reason of the premises the plaintiffs have suffered damage. And the plaintiffs claim (i) specific performance of the said agreement; (ii) the said sum of £30; (iii) damages limited to £10.

The learned Master of the Rolls observed that the second head of claim, " the said sum of £30," was really covered by the first, because the payment of £30 was part of the bargain, and its recovery would amount in ordinary language to a specific carrying out by the defendant of that part of the bargain. No difficulty appears to have been entertained as regards that part of the claim, but at the hearing the Judge came to the conclusion that he was unable to grant the specific relief claimed in the first part of the prayer—*i.e.*, that

he could not order the defendant to carry out the agreement by erecting a fence—because, the claim being one *ipsissimis verbis* for specific performance, the County Court Judge's jurisdiction was limited by the County Courts Act, 1934, s. 52 (1) (*d*) [s. 34 (1) (*b*) of our Act], which, admittedly, did not cover the case.

His Lordship then referred briefly to the judgment, because, he thought, it made plain the view of the County Court Judge that, apart from the jurisdiction point, he would have thought it right, in the exercise of his equitable jurisdiction, to grant the remedy which the plaintiffs sought. The County Court Judge stated it in this form :

> I considered carefully the evidence before me and the submissions made to me on both sides, and I was satisfied and found that on January 3, 1950, the plaintiffs' solicitor and the solicitor then acting for the defendant, on behalf of their respective clients, entered into the agreement alleged by the plaintiffs, and that it was confirmed by letter from the defendant's then solicitor to the plaintiffs' solicitor dated January 3, 1950, and that in pursuance of the said agreement the plaintiffs' solicitor took steps at once to withdraw the previous action. I was also of opinion and found that in making the said agreement on behalf of the defendant the solicitor then acting for the defendant had the defendant's authority to make such agreement, and was acting in accordance with his instructions, and that it was a binding agreement.

Although the County Court Judge did not in terms say so, the learned Master of the Rolls thought that it was reasonably clear from what the Court of Appeal had been told that the Judge would have thought it a proper case in which to grant relief in the nature of specific performance if he had the jurisdiction to do so. The third item of claim, " damages limited to £10," was fixed on the footing that specific performance of the bargain to rebuild could be decreed, so that £10 represented only the damage suffered by the plaintiffs through delay. When it appeared to the plaintiffs that this point about jurisdiction was likely to be a serious stumbling-block in their way, the plaintiffs, by their counsel, asked to amend the statement of claim by adding a separate prayer for damages at common law for breach of the agreement or by claiming damages in lieu of specific performance. The Judge in the exercise of his discretion thought it was too late to allow such an amendment. He thought that it would not be just to give an entirely new cause of action to the plaintiffs after the case had for practical purposes been heard and tried out. Counsel for the plaintiffs suggested that, alternatively, the Court of Appeal might give him leave, even at that stage, to amend, but it seemed to their Lordships that that was a matter in the discretion of the learned County Court Judge and they ought not to interfere.

It therefore remained a case in which the sole question is : Was the Judge right in his conclusion that he had no jurisdiction to grant the relief which was sought ?

The learned Master of the Rolls said that, in posing that question, he had tried to be a little careful in his use of words. The prayer was for " specific performance of the said agreement." It had been pointed out by counsel for the plaintiffs during the argument that precisely the same result might well have been achieved under another name if the order asked for had been a mandatory order—or, as it is now commonly called, a mandatory injunction—on the defendant to re-erect the wall in accordance with the terms of the contract. In truth, an injunction in that form would have been specific performance of the contract, if by that phrase is meant a command of the Court on the defendant to carry out specifically according to its terms the bargain that was made. His Lordship thought that important, because, to his mind, there was, or might be, a distinction in the sense in which that common term " specific performance " was used.

His Lordship then turned to the three relevant sections of the County Courts Act, 1934 (Eng.). He took first, because it came first, s. 40 [our s. 29], which gives general jurisdiction in an ordinary action to a County Court. Its cross-heading is " Actions of Contract and Tort " [as in our Act], and, strictly, the word " action " is appropriate only to an action at law. Section 40 (1) (as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 19 (1), and Second Schedule) [our s. 29 (1)] provides that the County Court has jurisdiction :

> to hear and determine any action founded on contract or on tort where the debt, demand or damage claimed is not more than £200.

[Our limitation is £500, but otherwise the wording is the same.] Then there is in the English statute a proviso that the County Court is not to have jurisdiction in certain classes of cases, which include, save as provided elsewhere in the Act, actions in which the title to land is in issue, actions for the recovery of land, and also actions for libel, slander, seduction, or breach of promise of marriage, which are wholly excluded from the jurisdiction of the County Court.* Because of that method of defining the jurisdiction, a plaintiff, who desires as the chief remedy to obtain an injunction, must, nevertheless, frame his action as an action for damages, and must make it clear that the sum claimed is such as to give jurisdiction to the County Court.

It is next necessary to turn to s. 52 [our s. 34 (1) (*a*)–(*d*)]. The cross-heading there, by way of contrast with " Actions of Contract and Tort," is " Equity Proceedings " [as in our Act], and the purpose of the section is to give to the County Court again a limited jurisdiction in equity proceedings, but the limit is defined, and necessarily defined, in a different way. The beginning of s. 52 (1) is :

> A County Court shall have all the jurisdiction of the High Court to hear and determine any of the following proceedings . . .†

Then there follow paragraphs, all beginning with the words " proceedings for," or corresponding words. The relevant paragraph here is para. (*d*) [our s. 34 (1) (*b*)], which is as follows :

> Proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where, in the case

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* The proviso does not appear in our s. 29 (1) in the same terms. It is as follows :

> Provided that the Courts shall not, except as in this Act provided, have jurisdiction to hear and determine—
> (*a*) Any action for the recovery of land ; or
> (*b*) Any action in which the title to any franchise is in question.

In the Magistrates' Courts Act, 1928, now repealed, actions for false imprisonment or illegal arrest, for seduction, or for breach of promise were excluded from a Magistrate's jurisdiction ; but those exceptions do not appear in the Magistrates' Courts Act, 1947.

† Our s. 34 (1) begins as follows :

> The Courts shall have jurisdiction to hear and determine any of the following proceedings, that is to say,—

of a sale or purchase, the purchase money, or, in the case of a lease, the value of the property, does not exceed the sum of £500.

The learned Master of the Rolls, at p. 182, said :

> It is to be observed that the general term " property " is there included. It is not confined to real property. The argument is that the provision in this paragraph (which extends, as I have just stated, to proceedings other than in relation to transactions in real estate) is confined precisely to contracts for sale or lease and is an exhaustive code defining the jurisdiction of the County Court in any proceedings which can be properly described as proceedings for specific performance. Counsel for the defendant points out that the present proceedings are, in truth, proceedings for specific performance, but, not being proceedings for the specific performance of an agreement for the sale, purchase, or lease of any property, he argues that they are, therefore, outside the jurisdiction of the County Court. That would, I venture to think, have a somewhat strange result. It would appear capricious that, by giving a jurisdiction, and it may be a wide jurisdiction, in some cases to grant specific performance of some types of contract, the Legislature is thereby preventing the County Court Judge from ordering the specific performance of any other type of contract. What I have said as regards specific performance will, of course, apply equally to rectification. Thus, if this argument is right, it would not be possible to obtain in the County Court the rectification of a commercial agreement which did not comprehend, or would not be properly described as an agreement for, the " sale, purchase or lease of any property," even though the claim in damages in a suit on the contract, as rectified or not rectified, was within the ambit of s. 40 [our s. 29].

Section 52 (2), which does not appear in our Magistrates' Courts Act, 1947, provides :

> In all such proceedings as aforesaid the Judge shall, in addition to any other powers and authorities possessed by him, have all the powers and authorities for the purposes of this Act of a Judge of the Chancery Division of the High Court.

His Lordship observed that that subsection gives the County Court Judge, in specific performance proceedings, the same right under Lord Cairns's Act, for example, as a Chancery Judge would have in a proceeding in the Chancery Courts.

The third section to which His Lordship referred is s. 71 [our s. 41], which, as in our statute, comes under the cross-heading " Exercise of Jurisdiction and Ancillary Jurisdiction "—*i.e.*, it appears to be directed to the way in which the jurisdiction already conferred can be exercised, and to giving ancillary jurisdiction. The section reads thus :

> Every County Court, as regards any cause of action for the time being within its jurisdiction, shall ‡ in any proceedings before it (*a*) grant such relief, redress, or remedy, or combination of remedies, either absolute or conditional . . . as ought to be granted or given in the like case by the High Court and in as full and ample a manner.

Paragraph (*b*) deals with defences and counterclaims. [The wording of our s. 41 (*b*) is the same.] It seemed to the learned Master of the Rolls that the apparently capricious result that might arise if s. 52 [our s. 34] stood alone and were not followed by s. 71 [our s. 41], and if it had as a consequence to be construed in the way which counsel for the defendant suggested, is avoided by reading s. 71 [our s. 41] together with those which precede it. He added :

> It is, for example, by virtue of this section that a Court, if asked in an action for breach of contract in the ordinary way to grant an injunction against, it may be, repeated breaches, is empowered to do so. It, therefore, seems to me that, in any case in which the cause of action is brought within s. 40 [our s. 29], then *prima facie* the Court can, under s. 71 [our s. 41], give any remedy that a High Court Judge could give in a similar action. It seems to me, further, that, if it can grant an ordinary injunction, the Court can also make a mandatory order.

The learned Master of the Rolls said that the making of a mandatory order on a party to do a particular act which he had contracted to do was, in ordinary language and in the common sense of it, " specific performance " as it was prayed in this action. He continued :

> The possible conflict with s. 52 (1) (*d*) [our s. 34 (1) (*b*)] which that statement creates is, to my mind, resolved by having regard to the fact that s. 52 (1) is directed, not to particular remedies, but to particular types of proceedings which are well-known and definable in the Chancery Courts—*viz.*, proceedings for . . . the specific performance of contracts for sale or lease. For some reason mortgages are not referred to, but I pass that over. " Proceedings for . . . the sale . . . of any property " in this context, I think, is clearly intended to relate to the type of proceeding, familiar in the old Equity Court, which gave rise to the old, and, it is true, somewhat complex, specific performance decree. Since that type of case is one in which, *ex hypothesi*, there would be no sum of damages claimed, it becomes necessary to provide a different means of defining the jurisdiction. It is for that purpose that reference is made to specific performance proceedings in s. 52 (1) (*d*) [our s. 34 (1) (*b*)]. Though there may be overlap, it leaves the general proposition that, if you have an action for breach of contract, in the ordinary way, not being a specific performance proceeding of the kind I have mentioned, then there is nothing which limits the right of the Court under s. 71 [our s. 41], provided the case is within the jurisdiction by virtue of s. 40 [our s. 29], to grant any other kind of remedy that justice may require, including injunctions, whether such relief is sought in that form or by use of the term " specific performance."

His Lordship concluded by saying that he had tried to explain the way in which it seemed to him those sections fit in together ; and, for the reasons he had stated, he thought that the learned County Court Judge had the jurisdiction which the latter thought he had not got. Reading the judgment of the County Court Judge, as His Lordship did, as indicating that, in the exercise of the former's discretion, though the act to be performed was that of doing a certain type of work, he would have granted the necessary order, had he the jurisdiction to do so, His Lordship thought that the appeal should succeed and the necessary order should be made.

The conclusion to be drawn from the judgment of the Court of Appeal is that, where, in an action based on a breach of contract, a Magistrate has jurisdiction under s. 29 of the Magistrates' Courts Act, 1947, he can, under his general ancillary jurisdiction, conferred on him by s. 41, give to the plaintiff any remedy which a Supreme Court Judge can give in a similar action, and, therefore, he can grant a mandatory injunction, which has the same effect as an order for specific performance of the contract, if that is the remedy which the plaintiff has claimed. Moreover, he is not limited by the provisions of s. 34 in granting any remedy that justice might require in the proceedings mentioned in that section, for example, in an action for breach of a contract which is not an agreement for the sale, purchase, or lease of property. He is limited, in such a case, only by the provisions defining his general jurisdiction that appear in s. 29.

‡ Our s. 41 interpolates here the words "(subject to the provisions of section fifty-nine of this Act)." Section 59 is the " equity and good conscience " section.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Liability of Infants to Bankruptcy Proceedings. *100 Law Journal*, 341.

CLUB.

Members' Club—Member injured through Faulty Construction of Club Premises—Liability of Management Committee for Breach of Warranty. During an entertainment on club premises, the plaintiff, a member of the club, was struck by a brick which had become dislodged from the roof, and sustained personal injuries. The club was a members' club, and the plaintiff brought an action against the second and other defendants, the management committee of the club, for breach of warranty. She alleged that the contract of membership between the defendants and herself contained an implied warranty that the club premises were and would be as safe for the purpose for which she was admitted as reasonable care and skill could make them, that the building, in fact, was not in the state of safety and repair required by the contract, and, accordingly, that she was entitled to damages. *Held*, That the contract entered by the parties when the plaintiff paid her subscription to the secretary of the club and he accepted it on behalf of the members was merely a contract that she should be admitted to membership of the club on the terms of its rules, and the warranty alleged could not be read into it. (*MacLenan* v. *Segar*, [1917] 2 K.B. 325, and *Hall* v. *Brooklands Auto-Racing Club*, [1933] 1 K.B. 205, distinguished.) Per *Jenkins*, L.J., If this had been a proprietary club and the proprietors had admitted the plaintiff to membership for reward, it may well be that the principle stated in *MacLenan* v. *Segar* (*supra*) would have applied and the plaintiff would have been entitled to succeed. *Shore* v. *Ministry of Works and Others*, [1950] 2 All E.R. 228 (C.A.).

As to Rights and Liabilities of Clubs and Members, see *4 Halsbury's Laws of England*, 2nd Ed. 498-505, paras. 921-934; and for Cases, see *8 E. and E. Digest*, 515-520, Nos. *63-103*.

COMPANY LAW.

Points in Practice. *100 Law Journal*, 355.

Winding-up Petitions: My Money or Your Life. *100 Law Journal*, 325.

CONFLICT OF LAWS.

Points in Practice. *100 Law Journal*, 340.

CONVEYANCING.

Exercise by Will of Special Powers of Appointment. *100 Law Journal*, 354.

CROWN SUITS.

The Meaning of "Government Department." *100 Law Journal*, 297.

DEATHS BY ACCIDENTS COMPENSATION.

Assessment of Damages. *100 Law Journal*, 312, 327.

Death of Passenger in Aircraft Disaster—Claim by Dependants against National Airways Corporation—Claim Limited by Regulation to £5,000—Regulation validly made—Such Claim to be made in One Action on behalf of All Dependants of Deceased Passenger—New Zealand National Airways Act, 1945, ss. 17, 33, 34 (1)—New Zealand National Airways Amendment Act, 1948, s. 13 (2)—New Zealand National Airways Regulations, 1947 (Serial No. 1947/18), Reg. 3 (2). The New Zealand National Airways Regulations, 1947, were validly made under the first limb of s. 34 (1) of the New Zealand National Airways Act, 1945, and Reg. 3 (1) falls within the purpose for which those Regulations were contemplated; and s. 13 (2) of the New Zealand National Airways Amendment Act, 1948, supports that conclusion. (*Carroll* v. *Attorney-General*, [1933] N.Z.L.R. 1461, and *Attorney-General* v. *Clarkson*, [1900] 1 Q.B. 156, followed.) (Dictum of *Callan*, J., in *F. E. Jackson and Co., Ltd.* v. *Collector of Customs*, [1939] N.Z.L.R. 682, 721, l. 1, approved.) (*Chester* v. *Bateson*, [1920] 1 K.B. 829, *Attorney-General* v. *Horner*, (1884) 14 Q.B.D. 245, *Newcastle Breweries, Ltd.* v. *The King*, [1920] 1 K.B. 854, and *Attorney-General for Victoria* v. *Melbourne Corporation*, [1907] A.C. 469, referred to.) The limitation of liability to £5,000 imposed by Reg. 3 (2) on a claim made for damages in respect of the death of a passenger by, or for the benefit of, the person or persons specified therein, having regard to the terms of the Deaths by Accidents Compensation Act, 1908, applies to the claim made in one action in the name of the executor, or other person authorized by s. 10 of that statute, on behalf of all dependants of the deceased passenger for whose benefit an action may be brought. (*Public Trustee* v. *Heffron*, [1946] N.Z.L.R. 683, applied.) *So held* by the Court of Appeal, dismissing an appeal from the judgment of *Sir Humphrey O'Leary*, C.J., *sub nom. Stephens and Another* v. *New Zealand National Airways Corporation*, [1950] N.Z.L.R. 168. *Jeune* v. *New Zealand National Airways Corporation*. (C.A. Wellington. June 9, 1950. Northcroft, Finlay, Hutchison, JJ.)

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Defence—Insanity. While suffering from disease of the mind, the husband killed the child of the marriage and attempted suicide. At his trial, he was found guilty of murder but insane, and was ordered to be detained during His Majesty's pleasure. The wife petitioned for divorce on the ground of his cruelty in committing those acts, and by his guardian *ad litem* he set up the defence that at the material time he knew neither the nature nor the quality of his acts, that he did not know they were wrong, and that he was not responsible for them. *Held*, That in petitions based on cruelty the duty of the Court to interfere was intended, not to punish the husband for the past, but to protect the wife for the future, and to withdraw from consideration intolerable conduct which was due to insanity would render the Court powerless in cases where help was most needed; the defence of insanity was not open to the husband; and the wife was entitled to a decree. (Reasoning of *Denning*, L.J., in *White* v. *White*, [1949] 2 All E.R. 350, applied.) *Lissack* v. *Lissack*, [1950] 2 All E.R. 233.

As to Insanity as a Bar to Divorce, see *10 Halsbury's Laws of England*, 2nd Ed. 669, 670, para. 989; and for Cases, see *27 E. and E. Digest* 323, 324, Nos. *3020-3025*, and Digest Supp.

Points in Practice. *100 Law Journal*, 298.

Practice and Procedure in Discretion Cases. *209 Law Times*, 279.

HUSBAND AND WIFE.

Wilful Neglect to Maintain. *100 Law Journal*, 339.

INCOME-TAX.

Profits from Betting Transactions—Betting on Personal Skill not Taxpayer's Vocation—Such Profits not assessable for Income-tax—Land and Income Tax Act, 1923, s. 79 (1). Where the evidence shows that a person acquired money during an income year as winnings from investments on horse-racing, and that he was not associated in any way with bookmaking or with racing as an owner, trainer, or jockey, his profits from betting are not assessable for income-tax, even if the betting transactions extended over a period of years, unless he kept clear records of his betting transactions and there were other circumstances showing his state of mind to be otherwise. (*Graham* v. *Green*, (1925) 9 Tax Cas. 309, and *Trautwein* v. *Federal Commissioner of Taxation*, (1936) 56 C.L.R. 63, followed.) (*Partridge* v. *Mallandaine*, (1886) 18 Q.B.D. 276; 2 Tax Cas. 179, *Knight* v. *Commissioner of Taxation*, (1928) 28 N.S.W. S.R. 523, *Holt* v. *Federal Commissioner of Taxation*, (1929) 3 A.L.J. 68, *Vandenberg* v. *Commissioner of Taxation* (*N.S.W.*), (1933) 2 A.T.D. 343, qnd *Z.* v. *Commissioner of Taxes*, (1948) 5 M.C.D. 652, distinguished.) *A.* v. *Commissioner of Taxes*. (Wellington. June 30, 1950. Thompson, S.M.)

INSPECTION OF MACHINERY.

Guarding Moving Parts of Machinery—Absolute Duty—"Adequate protection"—Inspection of Machinery Act, 1928, s. 16 (1)—Factories—Fencing off Dangerous Parts of Machinery—"Efficient safeguards"—Duty of Occupier. The duty imposed by s. 16 (1) of the Inspection of Machinery Act, 1928—which is as follows: "The moving parts of all machinery shall be so guarded as to afford adequate protection to all persons working the machinery or in connection therewith or who may be in the vicinity thereof"—is an absolute duty to provide the degree of protection which is adequate when tested as a question of fact. (*Rothery* v. *Grey*, [1936] N.Z.L.R. s. 97, referred to.) (*Schwalb* v. *H. Fass and Son, Ltd.*, (1946) 175 L.T. 345, and

Lyon v. *Don Bros., Buist and Co., Ltd.*, [1948] S.C. (J.) 1, distinguished.) What is a "sufficient safeguard" within the meaning of s. 41 (4) of the Factories Act, 1946, is similarly a question of fact and of degree. *Hiroa Mariu* v. *Hutt Timber and Hardware Co., Ltd. (No. 2)*. (S.C. Wellington. May 25, 1950. Smith, J.)

JUDICIAL CHANGES.

The Hon. Hubert Lister Parker has been appointed a Justice of the High Court of Justice (King's Bench Division) in the place of the late Mr. Justice Lewis.

F. W. Kitto, K.C., has been appointed a Justice of the High Court of Australia.

His Honour Judge C. A. Collingwood and Mr. William Gorman, K.C., have been appointed to the High Court of Justice. The former will be assigned to the King's Bench Division and the latter to the Probate, Divorce, and Admiralty Division, from which Mr. Justice Ormerod will be transferred to the King's Bench Division.

JURISPRUDENCE.

Law and Justice in Contemporary Society. (E. R. Griswold.) *28 Canadian Bar Review*, 120.

LAND SALES.

Rural Land—Valuation—Basic Value—Considerations for Court when Sale by Crown to Discharged Serviceman—Method of Valuation of Uneconomic Unit—Servicemen's Settlement and Land Sales Act, 1943, s. 53—Land Act, 1948, s. 159. The Land Valuation Court, under s. 159 of the Land Act, 1948, must determine the basic value of the farm land in question as at the date of the sale by the Crown to the discharged serviceman, and in the same manner as if, for the purpose of such sale, it were necessary to determine a basic value under s. 53 of the Servicemen's Settlement and Land Sales Act, 1943. In fixing a basic value, the Court is not entitled to give weight to factors which would not be present had the sale been between civilians; but it is relevant that the land was sold with the intention of rehabilitating a serviceman and was bought in the belief that it would provide him with a reasonable livelihood. Where, as in the present case, the farm land is not an economic unit, and as its value as ascertained by the budgetary method would be found less than its real or "fair" value, a valuation by reference to the "sight" or "market" value, without direct regard to production, and without the preparation of a budget, is a proper procedure. The foregoing procedure is appropriate, however, only where the circumstances are such that it is clear in advance that the productive value as ascertained from a budget will not be a fair value, and that the budget will be of no assistance in the determination of a fair value. Where a productive value is likely to be of assistance in determining the fair value of land, the method specifically provided in s. 53 of the Servicemen's Settlement and Land Sales Act, 1943, should be followed. *In re An Application by McCloughen.* (L.V. Ct. Hamilton. June 23, 1950. Archer, J.)

LANDLORD AND TENANT.

Covenant to Deliver up in Repair: Measure of Damages. *209 Law Times*, 264.

MASTER AND SERVANT.

Duty of Master—Proper System of Working—Extent of Master's Duty—Need to give Instructions—Question for Decision. Apart from statute, an employer is under certain obligations to his servants to provide for their safety. He may delegate the carrying-out of such obligations, but he cannot delegate or avoid his own responsibility for their proper performance. So, if the person left to carry out such an obligation is negligent in carrying it out and that negligence causes injury to a fellow-servant, the employer is liable in damages and cannot rely on the rule of common employment. One of these obligations is to provide a safe system of working. A system of working normally implies that the work consists of a series of similar or somewhat similar operations, and the conception of a system of working is not easily applied to a case where only a single act of a particular kind is to be performed. The duty to provide a safe system of working is not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. That duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying-out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case. It is always a question whether the negligence complained of is the failure of the employer to inaugurate and maintain a safe system or the casual departure from that system as the result of the negligence of an individual fellow-workman. The difference is between a case where sufficient and adequate provisions have been made, which will, if carried out, protect the workman unless one of his fellows does not use proper care in carrying out the system, and a case where the system itself makes no such provision. The duty of the employer is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. Where the system or mode of operation is complicated or highly dangerous or prolonged, or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple, and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foremen or workmen on the spot. The giving of proper instructions may well be a part of a proper system of working, and the omission to give them may constitute a defect in the system of working, or, alternatively, a breach of the employer's obligation to take reasonable steps for the safety of those employed on the task. *Winter* v. *Cardiff Rural District Council*, (1950) 114 J.P. 233.

PERPETUITIES.

Settlement—Limitation dependent on Void Limitation—Accord with Previous Valid Limitations—"Issue." By a deed of declaration of trust, a settlor settled certain investments (called "the trust fund") on trust to pay one half of the annual income thereof to his wife during her life and the other half thereof to his daughter during her life, and to pay the whole of the said income to the survivor of his wife and his said daughter. On the death of the survivor, the trustees were directed to stand possessed of the trust fund in trust in equal shares for all or any the children of his said daughter then living who attained the age of twenty-one years or being female married under that age, and to hold each such child's share on trust to pay the income thereof to such child for his or her life. The settlor further provided: "6. After the death of each of such children the capital and income of the share of such child shall be held in trust for all or any one or more exclusively of the others or other of the issue of such child (whether children or remoter descendants) at such time and if more than one in such shares with such provisions for maintenance education advancement and otherwise at the discretion of any persons and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as such child shall by deed revocable or irrevocable or by will or codicil appoint but so that under any appointment a child of the appointor shall not (otherwise than by way of advancement) take a vested interest except upon attaining the age of twenty-one years or upon marriage And in default of and until and subject to any such appointment in trust for all or any the children or child of such child who attains the age of twenty-one years or being female marry under that age and if more than one in equal shares. . . . 8. Upon the death of the survivor of the wife and the said daughter and in the event of the said daughter dying without leaving issue who attains a vested interest the trustees shall sell and convert into money such part of the trust fund as does not consist of money and shall distribute the proceeds in manner following . . ."; and the settlor gave certain sums of money to various charities and directed that the balance of the trust fund be distributed amongst certain named persons. On May 11, 1939, the settlor died. On November 10, 1948, the settlor's daughter died, having married, but without there having been issue of her marriage. The settlor's widow survived the daughter. *Held*, (i) That, on the construction of the deed, the word "issue" in cl. 8 was referable exclusively to cl. 6, and was not intended to include children of the daughter; as cl. 6 was admittedly void for perpetuity, cl. 8 was limited to operate on the failure of a class which, had it come into being, would have been precluded from taking; and, therefore, cl. 8, which did not accord with previous valid limitations, was also void. (*Monypenny* v. *Dering*, (1852) 22 L.J. Ch. 313, and *Re Thatcher's Trusts*, (1859) 26 Beav. 365, applied.) (ii) That, although the gift of income to the survivor of the widow and the daughter was not expressly limited to endure only for her life, having regard to the other provisions of the deed, such a limitation should be implied, and, in the circumstances, the corpus

of the trust fund would, on the widow's death, result to settlor's estate. *Re Mill's Declaration of Trust, Midland Bank Executor and Trustee Co., Ltd.* v. *Mill and Others*, [1950] 1 All E.R. 789.

As to Application of Rule against Perpetuities to Alternative Limitations, see *25 Halsbury's Laws of England*, 2nd Ed. 143-145, paras. 240-243; and for Cases, see *37 E. and E. Digest*, 102-106, Nos. *374-398*.

POLICE FORCE.

Police Force Regulations, 1950 (Serial No. 1950/107).

PRIZE LAW.

Condemnation—Ship—Enemy Flag—Duress—Ship built in Germany by German Subsidiary of Dutch Company under Agreement with and subsidized by German Government. N.V., a Dutch corporation, was, through its Dutch and German subsidiaries, the sole shareholder in a German company, Verkaufs, which had its own board of directors, but was controlled by N.V. from Rotterdam. In 1931, as a result of decrees by the German Government affecting remittances from Germany, debts (amounting to about £7,500,000) due from N.V.'s subsidiary companies in Germany to N.V. and its subsidiaries in Holland were "frozen" and became "blocked marks," and trading profits of the German subsidiaries ceased to be transferable to N.V. or its Dutch subsidiaries and were classified as "inland marks." In order to extract some of the blocked marks from Germany, N.V., with the consent of the German authorities, arranged to place contracts in German shipyards for the building of ships for sale to foreign purchasers. In 1935, N.V. was asked by the German Government to build a whaling fleet in Germany for operation under the German flag. At first it refused to do so, but in 1936, under the threat of economic pressure and under the threat that its assets in Germany would be confiscated or rendered valueless, it agreed. The conditions were that the fleet, when built, should be chartered to a new company, in which N.V. would not have more than a 50 per cent. interest, and that the fleet should not be transferred from the German flag without the consent of the German Government. A subsidy towards its construction was granted by the German Government. In September, 1937, the Unitas, a whaling factory ship, and the chief unit of the fleet, was completed and delivered to Verkaufs and registered at Bremen as a German ship, and in 1938 she performed a whaling voyage. After the outbreak of the second world war, but while Holland was still neutral, N.V. did nothing to dissociate itself from the activities of its subsidiaries in Germany. The Unitas was captured by the Allied invading forces in the port of Wilhelmshaven in June, 1945, and was seized in prize. At the date of capture, she was flying the German flag, and no change had been made at any time in her registration. N.V. and its Dutch subsidiaries claimed the release of the vessel, on the ground, *inter alia*, that she was placed under the German flag involuntarily and under duress because she was built only as a result of pressure by the German Government. *Held*, That, although the threat by the German Government to the economic interests of N.V. and its subsidiaries was of a serious character, the building of the whaling fleet and its German registration and chartering to a German company were not involuntary in the sense of being unintentional, but were the result of a deliberate choice on the part of N.V. between two distasteful alternatives, and of a choice which was probably followed by considerable profit for them; the fact that the Unitas was built as a result of German pressure, because a worse fate might have befallen N.V. if they did not give way, was a totally inadequate reason for avoiding the natural consequence of flying the German flag; and, as N.V. had failed to show that they were not within the general rule that the flying of an enemy flag in war time was conclusive of the nationality of a ship, the Unitas was rightly seized and condemned. (Decision of *Lord Merriman*, P., [1948] 1 All E.R. 421, affirmed.) *The Unitas*, [1950] 2 All E.R. 219 (P.C.).

As to Enemy Character of Ship, see *26 Halsbury's Laws of England*, 2nd Ed. 216, para. 489; and for Cases, see *37 E. and E. Digest*, 577-580, Nos. *87-128*.

PUBLIC RESERVES.

Land vested in Municipal Corporation "in trust for municipal purposes"—Such Land not "Public reserve"—"Public purposes"—Public Reserves, Domains, and National Parks Act, 1928, s. 2—Municipal Corporations Act, 1933, s. 156. A certificate of title to certain land in the Borough of Cromwell was issued on October 31, 1884, and the land was vested in the Borough "in trust for municipal purposes." The Borough wished to sell this land in exercise of the powers conferred by s. 156 of the Municipal Corporations Act, 1933, and to receive the money. In a summons under s. 152 of the Land Transfer Act, 1915, for the removal of a caveat by the Minister of Lands, who claimed that the Borough had no power to sell the land, alleging that it was a public reserve, *Held*, 1. That the trust "for municipal purposes" was not limited to purposes appearing in Class I of the Second Schedule to the Public Reserves and Domains Act, 1908. 2. That the land was not a "public reserve" as defined by s. 2 of the Public Reserves, Domains, and National Parks Act, 1928, since it was not land set apart for "public purposes" within the meaning of that section, as the words "use, benefit, and enjoyment of . . . the inhabitants" in that definition are not used therein in the widest sense as covering any advantage or benefit, however remote and indirect. (*Auckland City Corporation* v. *The King*, [1941] N.Z.L.R. 659, followed.) *Cromwell Borough* v. *Skinner*. (S.C. Dunedin. May 26, 1950. Kennedy, J.)

TENANCY.

Business Premises—Possession—Relative Hardship—Landlord and Tenant both Companies—Term "any other person" including Shareholders associated with One or Other Company in Interest in obtaining or retaining Possession—Rent paid by Tenant less than Market Value—Not an Element of Hardship—Tenancy Act, 1948, ss. 24, 25. The plaintiff, which sought an order for possession of the shop premises occupied by the defendant company as tenant, was a Wellington company, carrying on business in Wellington and Auckland as mercers, merchant-servicemen outfitters, and clothiers. The Auckland branch was opened in 1911; and, in 1927, the property in question was acquired and a two-story building was erected on it. The ground floor was subdivided into three shops, of which the plaintiff occupied one, the defendant company one, while the third was occupied by another firm. The plaintiff sought to obtain possession of the shop occupied by the defendant and to convert two shops into one, thereby doubling its available area, and it proposed to move the other firm to the premises now occupied by the plaintiff, which would then occupy the amalgamated area of the defendant and that firm. It was not shown that there was alternative accommodation available for the defendant. All the Auckland shareholders of the plaintiff company, apart from the estate of an original shareholder, were employees in full-time employment, and all Auckland employees of over a year's service were shareholders. The defendant, which carried on business as shoe retailers, was a company with a capital of £10,000, divided into 10,000 £1 shares, of which 9,950 were held by C., an accountant, who was in employment, and was not wholly dependent on the income from his shares, and the remaining fifty by the company's managing director. An order was made by *Stanton*, J., for possession to be given on March 1, 1950. On appeal from that order, *Held*, *per totam curiam*, That the preponderating hardship if an order for possession were not made lay with the respondent company. Per *Northcroft*, J., That the effect of ss. 24 and 25 of the Tenancy Act, 1948, is to cast upon a landlord the onus of showing that he requires the premises for his own use, and that the hardship to himself or to other persons who would benefit by an order is greater than that to the tenant or other persons who would be prejudiced by an order; whereupon, if no other relevant matters turn the scale against him, the landlord is entitled to have the discretion of the Court exercised in his favour. Per *Finlay* and *Hutchison*, JJ., 1. That the phrase "any other person," where used in s. 24 (2) and in s. 25 (1) (*b*) of the Tenancy Act, 1948, means a person or persons, other than the landlord and the tenant, associated with one or other of them in interest in respect of the matters involved in the application; and, since the constitution and characteristics of a company are relevant matters within the meaning of s. 24 (2), the phrase "any other person" includes shareholders, and it is justifiable to consider the effect on them of granting or withholding an order. (*Fisher* v. *Eastbourne Amusements, Ltd.*, [1949] N.Z.L.R. 134, and *Paeroa Theatre Buildings, Ltd.* v. *Te Aroha Amusements, Ltd.*, [1949] N.Z.L.R. 141, approved.) (*Salomon* v. *Salomon and Co., Ltd.*, [1897] A.C. 22, and *Jewellers' Chambers, Ltd.* v. *Thomson*, [1948] N.Z.L.R. 200, referred to.) 2. That the Court is entitled to have regard to the nature and character of the respective companies which are in the relationship of landlord and tenant, and, in its consideration of the question of hardship to one or other of them, it is entitled to take into account the interests of the respective shareholders in each. 3. That undue prominence was given by the learned Judge in the Court below to the fact that the rent paid by the appellants for the premises in question had for some years past been less than the market value; and, while this consideration was a "relevant matter" within the meaning of that term as used in s. 24 (2), it could not be elevated to the position of an element of hardship under s. 25 (1) (*b*), as it related to the past only. Per *Finlay*, J., That, as the date for the giving of posses-

sion under the order made by *Stanton*, J., had expired, a further period of three months would not be unreasonable for the vacating of the premises. Per *Hutchison*, J., That the circumstance that the respondent company was not compelled by any particular business circumstance to require the extra accommodation afforded by the premises rented by the appellant company, but that the need had arisen purely from the respondent company's increase in business, is not one that, as between commercial companies, should be given weight as a relevant circumstance. Judgment of *Stanton*, J., affirmed; but, per *Finlay* and *Hutchison*, JJ., for reasons other than those given by the learned Judge in the Court below. *Offers (Auckland), Ltd.* v. *Keans, Ltd.* (S.C. Auckland. September 12, 1950. Stanton, J. C.A. Wellington. May 9, 1950. Northcroft, Finlay, Hutchison, JJ.)

Dwellinghouse—Possession—Husband Tenant—Subsequent Desertion by Husband—Wife remaining in Occupation—Separate Actions against Husband and Wife—No Statutory Ground pleaded by Landlord—Husband's Consent to Possession—Practice—Separate Actions for Possession against Husband and Wife—Consolidating Actions—Joinder of Parties in One Action. A landlord claimed possession of a dwellinghouse, to which the Rent Restrictions Acts, 1920 to 1949, applied, from the tenant merely on the ground that the contractual tenancy had come to an end, and not on any ground specified by the Acts. A second action for possession of the same premises was brought against the tenant's wife, on the ground that she was a trespasser. The tenant, who had deserted his wife and left her in the house (which was the matrimonial home) with some of his furniture, admitted the landlord's claim for possession, and offered to give possession forthwith. At the hearing of the first action, the wife's application to be joined as a defendant was refused. An order for possession against the husband was made, and, when the second action against the wife was heard, an order was also made against her. The Court of Appeal allowed the wife's application to be joined as a party in the action against the tenant, and gave her leave to appeal. *Held*, (i) That, where a husband had deserted his wife, and the wife remained in the matrimonial home, she was lawfully there, and the husband remained in occupation by her; possession of a dwellinghouse to which the Rent Restrictions Acts applied could be ordered only on one of the grounds specified in the Acts, and a tenant could not by agreement waive the statutory protection afforded by the Acts; and, therefore, the orders for possession were wrongly made. (*Brown* v. *Draper*, [1944] 1 All E.R. 246, and *Old Gate Estates, Ltd.* v. *Alexander*, [1949] 2 All E.R. 822, applied.) (ii) That, where it was brought to the attention of a Court that there were separate actions for possession against a husband and his wife, *prima facie* either those actions ought to be consolidated or the two parties should be made parties in one action, so that the whole matter could be tried at the same time. *Middleton* v. *Baldock*, [1950] 1 All E.R. 708 (C.A.).

As to Statutory Tenants, see *20 Halsbury's Laws of England*, 2nd Ed. 333, para. 400; and for Cases, see *31 E. and E. Digest*, 575-578, Nos. *7226-7289*, and Digest Supp. and Second Digest Supp.

Dwellinghouse — Possession — Tenant occupying House and supplying Landlord with Board and Lodging and Domestic Services —Consideration for which Occupancy given to Tenant within Definition of "Rent"—Exclusive Occupation by Tenant not necessary to create a Letting—"Dwellinghouse"—"Rent"—Tenancy Act, 1948, ss. 2, 4 (4). S. made an arrangement with O. whereby O. was to occupy S.'s house and to supply S. with board and lodging, on the understanding that O.'s wife would keep the room to be occupied by S. clean and tidy, cook his meals, do his washing up, and attend to his laundry, and O. was to pay the electric-lighting charges. In an action by S. for possession, it was contended that the arrangement between the parties did not create a tenancy, but was a service occupancy; and that the premises did not fall within the Tenancy Act, 1948. *Held*, 1. That the definition of "rent" in s. 2 of the Tenancy Act, 1948, included the consideration for which occupancy was given to the defendant. (*Luckens* v. *Gunn et Ux.*, (1944) 3 M.C.D. 371, distinguished.) 2. That s. 4 (4) of the Tenancy Act, 1948, has extended the application of the statute to such a degree that lack of exclusive occupation by the tenant does not prevent the creation of a letting as contemplated in the definition of "dwellinghouse" in s. 2 of that statute. (*Macann* v. *Annett*, [1948] N.Z.L.R. 116, distinguished.) *Smith* v. *Olliver*. (Masterton. March 16, 1950. Herd, S.M.)

SALES BY TRUSTEES.

Duty to Sell at Highest Available Price.

It is the duty of a trustee to administer the trust property according to the standard of diligence and discretion approved by the Court for the conduct of trustees. It is, however, difficult to define the standard of diligence required of a trustee. One of the best attempts at such a definition is that of Lord Blackburn in *In re Speight*, *Speight* v. *Gaunt*, (1883) 9 App. Cas. 1, 19, where he said it is the standard "of an ordinary prudent man of business . . . in managing similar affairs of his own." This definition was substantially adopted by Lord Watson in *In re Whiteley*, *Learoyd* v. *Whiteley*, (1887) 12 App. Cas. 727, 733.

In some cases, it is of moment when the sale should take place. Thus, in *Wright* v. *Morgan*, (1926) N.Z.P.C.C. 678, 685, their Lordships said that, in that case, the best moment for the trustees to sell was the moment when prices generally were high. So, also, as to the terms of payment: the best term for the trust was cash down; the best term for the purchaser was some easier arrangement. "The criterion is not what was done in respect of a sale by trustees, but what might be done" (*ibid.*, 686).

In view of the fact that the degree of prudence which a particular trustee uses in the management of his own affairs is not a proper standard (and there is plenty of high authority for that proposition), what is the position when a trustee is faced with having to make a choice between what he feels to be his moral duty as an individual and his legal duty as a trustee? An answer to that question is found in a recent judgment of Mr. Justice Wynn-Parry in *Buttle* v. *Saunders*, [1950] 2 All E.R. 193.

The defendants were the trustees of premises in the County of London, which they held on the statutory trusts for sale under the provisions of the Law of Property Act, 1925 (Eng.). The action was brought by some of the beneficiaries interested in those trusts, claiming, *inter alia*, an injunction preventing the trustees from selling that property for the sum of £6,142 (which was the amount offered by a Mrs. Simpson), or for any sum less than £6,500, which the first plaintiff, Canon Buttle, had been willing, at all material times, and since, to pay for the premises.

The facts, which must be given in detail, were that in the summer of 1949 Mrs. Simpson, who was acquiring the leasehold interest in the property, the term of which was due to expire in 1956, heard that there might be a possibility of acquiring the freehold reversion, and instructed her solicitors to negotiate for it. The negotiations proceeded smoothly up to the point when the purchase price was agreed at £6,000. A draft contract was prepared and passed to Mrs. Simpson's solicitors, and Mrs. Simpson and her solicitors were agreeable to all the terms except cl. 13, which provided that she should pay the vendors' costs. On October 7, 1949, the trustees' solicitors, Messrs. Pedley, May, and Fletcher, wrote to the beneficiaries, informing them of the proposed sale to Mrs. Simpson. On October 19, Canon Buttle, one of the beneficiaries, called on Mr. Raisen, a partner in the firm of Messrs.

Pedley, May, and Fletcher, and told him that he was interested, on behalf of a charity, in acquiring the premises in question. He was informed of the exact stage of the negotiations with Mrs. Simpson, and was told that the only difficulty was in regard to cl. 13 of the draft agreement dealing with the vendors' costs. Canon Buttle pressed Mr. Raisen to sell the property to him instead of to Mrs. Simpson, and, in the upshot, Mr. Raisen gave Canon Buttle a letter, which read as follows :

> With reference to your call on us this afternoon, we confirm that we have received an application for the purchase of this house at the price of £6,000. If we receive an offer from you of £6,142 within forty-eight hours, we will advise our clients to accept it.

On October 20, Mrs. Simpson's solicitors telephoned to Messrs. Pedley, May, and Fletcher, saying that their client had now agreed to pay the vendors' costs. Later the same morning, Canon Buttle called on Mr. Raisen, who informed him of that fact, and expressed the view that the trustees could not very well withdraw from the negotiations with Mrs. Simpson, particularly as the amounts offered were equal and she had been first in the field. Canon Buttle made no suggestion at that meeting that he should offer any more for the property, although he continued to press that the house should be sold to him, and Mr. Raisen agreed to refer the matter to the trustees. On October 26, Messrs. Pedley, May, and Fletcher wrote to Canon Buttle informing him of the trustees' final decision in the matter—*viz.*, that they had decided to sell the property to Mrs. Simpson. Immediately on receiving that letter on October 27, Canon Buttle telephoned to Mr. Raisen and offered £6,500 for the property. By that time, the negotiations with Mrs. Simpson's solicitors had progressed up to the point where the contract and the counterpart were being engrossed. Mrs. Simpson had signed her part, and one trustee had signed the other part. The matter was almost ready for completion. In those circumstances, Mr. Raisen and the trustees felt in a position of great embarrassment. They felt in honour bound to proceed with the proposed sale to Mrs. Simpson, and no other motive appears to have actuated them. They communicated the increased offer that had been made to them to Mrs. Simpson's solicitors in a letter, dated October 27, in which they expressed their own feelings in these terms :

> We ourselves feel that the matter has gone too far with your client for us to turn down her offer.

They then suggested that, in view of Canon Buttle's desire to acquire the property, Mrs. Simpson might perhaps be willing to abandon the idea of purchasing and some compensation might be paid to her. Legal proceedings against the trustees were threatened by Canon Buttle's solicitors in a letter dated October 27, and, in a letter dated October 28, Messrs. Pedley, May, and Fletcher said :

> Although contracts have not been exchanged with Mrs. Simpson, as the draft contract has been agreed and engrossed for signature we do not feel that the sale to Mrs. Simpson can be properly cancelled.

That sentence is a reiteration of the view, which they had expressed previously, that they were in honour bound, and they felt that all considerations of commercial morality required that they should proceed with the contract. They then said :

> We have no objection, and we imagine that our clients will have no objection, to your making an application to the Court, if you so desire, for the Court's direction as to what should be done, but this would have to be at your client's expense.

The learned Judge did not set any weight on the phrase as to the incidence of costs, because the writer of that letter was, in effect, assuming the burden which is placed on the Court to decide how the costs should be borne ; but what His Lordship did extract from that paragraph was an intimation that the trustees could have no objection to the Court's direction being sought. It was, however, taken as a threat, and the writ was issued on November 1, 1949.

The first claim in the statement of claim was for a declaration that the trustees were not entitled to sell the premises except for the best price reasonably obtainable. It was admitted by counsel for the trustees that that declaration, taken by itself, does no more than express the law, and it was not disputed that that is the duty cast on the trustees. The second claim was for a declaration that the trustees were bound to keep the plaintiffs informed of all offers to purchase the premises, and the third claim was for the injunction to which reference has been made. The trustees, by their defence, set out in some detail the events which have been referred to, and by para. 7 of their defence they said that they " do not now intend to sell the Montpelier premises except in such manner as the Court may authorize." By their counterclaim they asked, in effect, for the directions of the Court.

Mr. Justice Wynn-Parry, in his judgment, said that it had been argued on behalf of the trustees that they were justified, in the circumstances, in not pursuing the offer made by Canon Buttle, and in deciding to go forward with the transaction with Mrs. Simpson. His Lordship continued :

> It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb : " A bird in the hand is worth two in the bush." I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts. In regard to the case now before me, my view is that the trustees and their solicitors acted on an incorrect principle.

His Lordship said that the only consideration which was present to their minds was that they had gone so far in the negotiations with Mrs. Simpson that they could not properly, from the point of view of commercial morality, resile from those negotiations. That being so, they did not, to any extent, probe Canon Buttle's offer as, in His Lordship's view, they should have done. It was urged on His Lordship that, by pausing to probe Canon Buttle's offer, they ran the risk of losing the contract with Mrs. Simpson. On the view of the facts which he took, His Honour did not consider that that was much of a risk. Mrs. Simpson had bought the leasehold term, which was nearing its end, and she was a very anxious purchaser. Equally, Canon Buttle had demonstrated beyond a peradventure that he was a very anxious buyer, and, as it

seemed to His Lordship, the least the trustees should have done would have been to have said to Canon Buttle: "You have come on the scene at a late stage. You have made this offer well past the eleventh hour. We have advanced negotiations with Mrs. Simpson which can be concluded within a matter of hours. If you are really serious in your offer, you must submit in the circumstances to somewhat stringent terms, and you must be prepared to bind yourself at once to purchase the property for the sum of £6,500 on the terms, so far as applicable, of the draft contract which otherwise would be entered into with Mrs. Simpson."

The learned Judge said that he had not the slightest doubt but that, in the circumstances, Canon Buttle would have agreed to those stringent terms, and that the matter would have been carried out. The trustees, however, perfectly *bona fide*, maintained their attitude, qualified to this very important extent—that, if the Canon decided to take the matter to the Court, they would have no objection to having the Court's directions.

As the counterclaim asked that directions should be given by the Court to the trustees, and that appeared to His Lordship to be the proper way of dealing with the difficulty which had arisen, he did not propose to make any order in the action under para. 1, para. 2, or para. 3 of the claim; although he expressed the view that the plaintiffs were entitled to start proceedings to arrest the further progress of the transaction with Mrs. Simpson. It followed that, as they were entitled to do that, they were entitled to have their costs provided for. Therefore, it appeared to him that the fair order to make in this somewhat tangled matter was that the trustees should pay the plaintiffs' costs of the action, and they were entitled to be indemnified, as regards both their own costs and the costs ordered to be paid to the plaintiffs, out of the proceeds of the sale of the property.

The principle emerges from this interesting and unusual judgment that, although, in the circumstances of this case, the trustees had such a discretion as would allow them to act with prudence, and it would redound to the credit of an ordinary vendor to close the deal with the original purchaser notwithstanding the receipt of a higher offer, trustees are not vested with such freedom. They have an overriding duty to obtain the best price for their beneficiaries.

LIABILITY TO AN INVITEE-WORKMAN.

Recently, in England, the Court of Appeal's judgments in *Horton* v. *London Graving Dock Co., Ltd.*, [1950] 1 All E.R. 180, raised several questions of wide interest. The facts were as follow. A vessel was undergoing certain alterations, and the defendants, the main contractors, were in occupation of the vessel. The plaintiff was a workman employed by the sub-contractors responsible for electric welding. In the hold, the defendants had erected staging, which consisted (on each side of the hold) of planks resting fore and aft on an angle-iron, with a gap of 5 ft. between the two, so that workmen moving to and fro had to cross the angle-iron. The workmen had complained about the absence of planks over this gap. It became necessary for the plaintiff to hand a heavy tool-box over the gap, for which purpose he placed one foot on the angle-iron, and, in trying to get back into position, he slipped and injured himself. Lynskey, J., held that the defendants were not liable, on the ground that the danger was not an "unusual" one, as the plaintiff knew about it. In the Court of Appeal, this decision was reversed. The arguments for the defence (which were based, in one way or another, on the fact that the plaintiff knew of the danger) appear from the discussion below of the various points of law which were raised.

"*Unusual danger.*"—It is well-established law that the duty of an invitor arises only in the case of an "unusual danger." This expression has not been analysed in any detail in the earlier case-law, no doubt because it would be left to the jury as a question of fact whether any given danger was unusual. "Unusual" in the natural sense of the word means something which is not usual, something which is not encountered every day. The distinction made here must not be confused with the distinction between a danger that is obvious and one that is concealed, which is the criterion of liability where a *licensee* is concerned. In relation to an invitee, a danger may well be "unusual" though it is also "obvious"—*e.g.*, an unfenced gangway beside a vat of boiling liquid.

At all events, Lynskey, J., said in the Court below ([1949] 2 All E.R. 169), at pp. 170, 171:

> In my view, "unusual danger" means a danger unusual from the point of view of the particular invitee . . . It must be, from his point of view, unexpected in the particular circumstances.

It followed from this view that the plaintiff could not succeed in his action, the danger being known to him. The Court of Appeal, however, did not accept the interpretation of the law adopted by the learned Judge. Singleton, L.J., said, at p. 184:

> With respect, I do not regard this as the test . . . "Unusual" may be defined as: "Not usual: uncommon: exceptional." It indicates the kind of thing which would not normally be expected. The danger created by the staging was through its being insufficient, and the danger was an unusual one in that it was of a kind not usually encountered . . . A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident.

This passage makes it clear that the test of what is an unusual danger is an objective one, not varying with individual knowledge and idiosyncrasies: such an approach is in conformity with common-law principles.

The Extent of the Duty.—There has been a barren controversy among text-book writers for some years about the alleged ambiguity in the law on liability to an invitee. Is the duty (they say) to take care to make the structure safe, or is it fulfilled by giving a warning? In an article in *206 Law Times Journal*, 181, it was said:

> Discussions . . . on whether the duty is to make the premises reasonably safe, or merely to give warning or take some other lesser precaution, seem to be beside the point. Granted that an unusual danger exists, the duty of the occupier is to take reasonable care to protect the invitee against injury. Whether reasonable care necessitates removal of the danger, or something less stringent, is a question of fact in each case.

This seems to be exactly the view which has been taken by the Court of Appeal in *Horton's* case. The defendants argued that they were under no duty to make the planking safe : so long as the plaintiff knew of the danger, that was enough. The Court held that, on the facts of the case, the defendants, by failing to make the planking safe, had not taken reasonable care for the plaintiff's safety. Singleton, L.J., referred to the alleged ambiguity in the law and said he was not sure that there was any. He emphasized that negligence is a question of fact, and that in some cases the defendant might have discharged his duty by giving notice while in other cases more would be required. Tucker, L.J., leaned more to the view that the duty is to make the premises reasonably safe, but added, at p. 188, that the duty must " cover all the infinite variations of facts and circumstances." The difference between the two learned Lords Justices seems to be one of formulation rather than of substance. Jenkins, L.J., did not consider this question of principle at length, but agreed that, on the facts of the case, the duty of care could only be satisfied by positive measures to make the scaffolding safe.

In principle, once it is accepted that the duty to an invitee is a duty to take care (which cannot be seriously questioned since the speech of Lord Wright in *Glasgow Corporation* v. *Muir*, [1943] A.C. 448 ; [1943] 2 All E.R. 44, it is meaningless to ask whether in every case the occupier is bound to make the premises safe, or whether in every case it is enough to give a warning, just as it would be meaningless to ask whether the duty of a motorist is to avoid running into people, or only to blow his horn. In both cases, there is a duty to take care to avoid injury to the invitee or the user of the road, as the case may be, and it is a question of fact whether proper care has been taken. In most cases, something more than a warning, or the blowing of a horn, will be necessary, but one cannot generalize on a question of fact.

Larger Duty to Invitee-workman.—The case enters a wider field with the view expressed (in particular by Singleton, L.J.) that, where an invitee enters premises to carry out work with the aid of gear provided by the occupier, a broader duty is owed to him. Where the occupier is the actual employer of the workman, it is, of course, clear that he has a duty to use reasonable care for the safety of the premises and the plant provided, but an employer is not liable, it seems, for premises or plant provided by a third party, and it has generally been assumed that the third party is not liable except as an invitor.

Singleton, L.J., expressed the view that, where the occupier allows workmen to make use of his premises or plant, though the workmen are employed by a sub-contractor, it is his duty to use reasonable care for the safety of the premises or plant (without, it seems, the necessity to prove that the danger was " unusual "). A similar view was expressed, rather more briefly, by Tucker and Jenkins, L.JJ., and *Heaven* v. *Pender*, (1883) 11 Q.B.D. 503, and *Oliver* v. *Saddler and Co.*, [1929] A.C. 584, were quoted in support. If the Courts follow this line of reasoning, a gap in employer's-liability law will have been filled in, and workmen employed away from their master's premises will have a similar remedy against the occupier of the premises where they are working (their indirect employer) to the remedy which they would have against their own employer if working on his premises. This has particular importance in ship-repairing cases, where many sub-contractors are engaged.

A workman has to move about the premises more than an ordinary caller, and get on with his work. In his absorption in his work, he may forget to safeguard himself against dangers of which he has been informed. There is some practical justification, therefore, for putting an invitee-workman in a better position than that of an ordinary invitee. Lest it should be thought, however, that such a distinction blurs the accepted sharp lines between invitee, licensee, and trespasser, it must be pointed out that the wider duty (if it is to be accepted as part of our law) devolves on the occupier, not in his capacity as occupier, but in his capacity as indirect employer, and is in principle an extension of employer's-liability law. *Heaven* v. *Pender* and *Oliver* v. *Saddler and Co.* did not go as far as this : in effect, they extended the law governing invitor and invitee to the use of scaffoldings, slings, and similar chattels, as distinct from the structure of a building.

INSTRUMENTS OF FAMILY PARTNERSHIP.

By E. C. Adams, LL.M.

When the financial head of a family takes his or her spouse or any of his children into partnership, it is always prudent to have an instrument of partnership executed, for, on the death of the creator of the partnership, it may be difficult, in the absence of a partnership instrument, to prove to the satisfaction of the Revenue officials the existence of the partnership and the terms and conditions thereof. In other words, the whole of the assets comprising the alleged partnership may be assessed for death duty, instead of only that proportion thereof which the creator intended to retain as his own.

The draftsman of an instrument of family partnership, however, must bear in mind that it may be so drafted as to be liable to gift duty as a gift from the head of the family to his spouse or to his children, and may be liable, as to the whole of the property comprised therein, to death duty, on his death, under s. 5 (1) (*j*) and s. 16 (1) (*g*) of the Death Duties Act, 1921.

This ever-present peril is strikingly illustrated by the leading case of *Riddiford* v. *Commissioner of Stamp Duties*, (1913) 32 N.Z.L.R. 929. The deceased more than three years before his death entered into a partnership with his children. He brought into the partnership lands, livestock, and chattels to a considerable value. It was provided that upon those lands, and with those livestock and chattels, the business of sheep-farming should be carried on *during the deceased's life*, or, at all events, for a period of twenty years *determinable with his life*. He provided that, upon his death, those lands and livestock and chattels should be divided in their unrealized condition among his sons, subject to the payment of a large sum to his executors. During the continuance of the partner-

ship, each of the sons was entitled to receive in each year a sum of £500 and one-fortieth of the net profits. The deceased was to receive nine-tenths of the net profits. The value of the land at the date of the deceased's death had, in the meantime, considerably increased. The Full Court held that all the partnership's assets were liable to death duty, and that duty was leviable according to their value as at the date of the deceased's death. Gift duty was paid on all the partnership assets as they existed, and according to their value, as at the date of the deed. For there was an element of gift, and whatever valuable consideration the father was to receive was in the nature of a *future* benefit; in short, so far as liability to gift duty was concerned, the deed was caught by the statutory provisions now represented by ss. 38 and 49 of the Death Duties Act, 1921.

The draftsman, therefore, should see that the instrument of family partnership does not disclose any element of gift from the creator of the partnership. But this is not all. A *family* transaction may be caught by s. 5 (1) (*j*) and s. 16 (1) (*g*), although there is no element of gift present: *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, and *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550. A deed of family partnership may be caught as a settlement by these sections, which, however, do not operate unless the settlor has reserved to *himself* the right to reclaim the settlement property or the proceeds thereof, or has reserved to *himself* some sort of benefit for his life or determinable on his death, or some sort of benefit for the term of the life of any other person or determinable by reference to the death of any other person.

The draftsman of the following precedent (which has been adapted from one recommended for use in Australia) appears to have avoided all these pitfalls. The deed does not appear to disclose any element of gift, it being assumed that the capital of the partnership mentioned in cl. 3 is equal to the sum which A.B. (the father) has paid for the business which he has just purchased. Clause 4 provides for interest at current rates to be paid to A.B. in respect of the sum he has contributed. Clause 10 provides that, on the dissolution of the partnership, each partner shall be entitled to the whole amount of his capital contribution, and, after payment of that sum in full, the assets of the partnership shall be divided equally. Clauses 6 and 7 provide that the net profits shall be divided equally, and that each partner shall devote the whole of his time to the partnership. The creator has not reserved to himself any life benefits of the nature previously explained.

Another advantage of this form of deed is that, if there is any enhancement of the assets, it is only the deceased's proportionate share thereof which is taxable, and not the whole of the enhanced assets, as in *Riddiford's* case (*supra*).

PRECEDENT.

DEED OF PARTNERSHIP BETWEEN HUSBAND AND WIFE.

THIS DEED made the day of 1950 BETWEEN A.B. of Wellington grocer of the one part and C.B. wife of the said A.B. of Wellington of the other part WHEREAS the said A.B. has purchased a certain (*grocery business*) situate at (*No. Lambton Quay Wellington*) AND WHEREAS the said A.B. has entered into a tenancy agreement of the premises at (*No. Lambton Quay Wellington*) aforesaid AND WHEREAS the parties hereto have agreed to carry on the said business in partnership as hereinafter appears NOW THIS DEED WITNESSETH:

1. The parties hereto shall carry on in partnership under the name of (*set out here name of partnership*) the business of grocers as from the first day of April 1950.

2. The partnership shall be carried on at (*No. Lambton Quay Wellington*) aforesaid and at such other places as the parties may from time to time determine.

3. The capital of the partnership shall be (£) provided by the said A.B. and any additional capital required shall be provided in equal shares by the partners unless otherwise agreed from time to time.

4. Before the net profits of the business are ascertained for any one year there shall be credited to each partner a sum equal to interest at the rate of (*five per centum*) per annum on the total amount of the capital provided by him for the firm.

5. The accounts of the firm shall be kept by a public accountant and he shall prepare as soon as may be after the thirty-first day of March in each year a profit and loss account of the partnership's trading during the year expired on thirty-first day of March and a balance sheet showing the assets and liabilities as at thirty-first day of March.

6. The partners shall be entitled in equal shares to the net profits of the partnership and the net profits for each year shall be distributed accordingly and each partner shall be entitled to be paid his or her share of any year's net profits at any time after the preparation of the balance sheet for that year less any amount to be paid by him or her as capital or for a prior loss. Losses shall be borne equally by the partners.

7. Each partner shall devote the whole of his or her time to the conduct of the business of the partnership during ordinary business hours subject to the right of each partner to a vacation each year not exceeding three weeks in duration.

8. The moneys of the partnership shall be banked regularly in accordance with the usual best practice in a bank to be agreed upon by the partners. Cheques may be drawn by either partner or both as may from time to time be agreed upon.

9. The partners shall be entitled to draw equal or other weekly sums to be agreed upon on account of their respective share of the net profits accruing for the current year. Any such drawings shall be debited against the respective partner's share of net profits in the accounts of the partnership.

10. The partnership may be dissolved by either partner at any time by three months' prior notice in writing given to the other partner. In the event of a dissolution from whatever cause each partner shall be entitled to the whole amount of his capital contribution to the partnership and after payment to each of them of that amount in full the assets of the partnership shall be divided equally between the partners.

11. The said A.B. shall permit the partnership to use for the purposes of the partnership business the said premises (*No. Lambton Quay Wellington*) aforesaid and the partnership shall be liable for the rent of the premises and shall pay the amount thereof to the said A.B. during the continuance of the partnership.

12. Neither partner shall sell or charge or permit to be sold or charged his or her share of the partnership business without the consent in writing first had and obtained of the other partner.

13. All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or their respective legal personal representatives touching this deed or the construction or application thereof or in any way relating to the partnership business arising between the partners shall be referred to arbitration in accordance with the Arbitration Act 1908.

IN WITNESS WHEREOF &C.

SIGNED by the said A.B. in the presence of:— } A.B.

E.F.,
Solicitor,
Wellington.

SIGNED by the said C.B. in the presence of:— } C.B.

E.F.,
Solicitor,
Wellington.

EARTHQUAKE INSURANCE CONTRACTS*.

The Average and Excess Clauses.

By J. L. INKSTER.

At the time of the Napier earthquake, practically all earthquake policies or fire policies extended by endorsement to cover earthquake fire and/or earthquake shock risk were subject to the 100 per cent. Average Clause and Excess Clause. Subsequently, in line with United States earthquake insurance practice, the Average Clause was modified to provide for 70 per cent., 80 per cent., and 90 per cent. Average. To-day, the percentage Average Clauses have been dropped, and earthquake insurance is underwritten by the attachment to fire policies of an endorsement which we will call (A), to be used when the fire policy is subject to Average, or (B), to be used when the fire policy is not subject to Average. The interpretation of Endorsement (A) has always been the most contentious to students, and I propose to deal with that first.

Earthquake Insurance Endorsement (A) reads as follows:

1. (To be used when fire policy is subject to Average Clause)—In consideration of the payment by the insured of the sum of £ additional premium, the company agrees, notwithstanding what is stated in the printed conditions of this policy to the contrary, that this insurance covers loss or damage by fire to any of the property insured by this policy occasioned by through or in consequence of earthquake and/or loss or damage to any of the property insured directly caused by earthquake.

2. *It is declared and agreed that in the event of loss or damage to the property insured directly caused by earthquake, this company shall be liable to pay or contribute in respect of such loss or damage its proportion only of the amount by which such loss or damage shall exceed £50 during any period of forty-eight consecutive hours, but this condition does not apply to loss or damage by fire caused by earthquake.* The £50 above referred to shall apply to any one building or group of buildings or contents in the same ownership located in one situation whether insured with one or more insurers.

Provided further that this insurance shall be subject to terms, provisions and conditions of this policy so far as they are applicable. (Condition of Average applies.)

3. The Average Clause reads:

If the property hereby insured shall at the breaking out of any fire be collectively of greater value than the sum insured thereon then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable proportion of the loss accordingly. Every item, if more than one, of the policy shall be separately subject to this condition.

The difference in phraseology between the Earthquake Clauses at the time of the Napier earthquake and those in force to-day does not alter the basic principle of settlement. There is, however, in the writer's view, a weakness in the manner of application of the Average Clause as applied to earthquake contracts to-day, which will be explained later in this article.

My first objective is to explain the meaning of the above Clauses, and, to this end, I propose to divide the Clauses into three categories—paras. 1 and 2 as above, and para. 3 (the Average Clause).

The first proviso stipulates that, in consideration of the payment of additional premium, and notwithstanding what is stated in the printed conditions of the policy to the contrary, the insurance covers loss or damage by fire to any of the property occasioned by, through, or in consequence of earthquake and/or loss or damage to any of the property insured directly caused by earthquake.

Clauses attached to the policy carry greater weight than do the words in the policy itself. The phraseology used might give the impression that the contract is altered from a fire contract to an earthquake shock and/or earthquake fire contract. The intention is, of course, that the payment of the extra premium *extends* the contract to cover the earthquake risk, which is an excepted peril in the fire policy conditions.

In the Australian Earthquake Clauses which are attached to fire policies on payment of the additional premium, the insurance is *extended* to cover earthquake shock and/or earthquake fire. The Earthquake Damage Assumption Endorsements used for attachment to policies covering loss by fire in the United States contain, in the first proviso, the words:

> In consideration of dollars . . . additional premium this policy . . . is *extended* to cover any direct loss or damage by earthquake . . . *not exceeding the amount named in this policy* . . .

The second proviso of the present Earthquake Clauses is correctly described as the Excess Clause. In the United States, the Clause is called "the Deductible." The deductible franchise or excess is quite well known in marine insurance.

A *franchise* is a *relief to the insurer*, and is used where the insured can make *no* claim if the loss does not exceed a stated sum. If it does exceed such sum, the insurance company pays the whole of the loss.

An *excess* is used where the *insurer* pays only the amount by which the loss exceeds a stated sum, and is thus also a *relief to the insurer*, the effect being that the insured has to bear a definite amount of each and every loss after it has been finally assessed and settled.

The Excess Clause provides that the company shall be liable to pay or contribute its proportion only of the amount by which the loss or damage shall exceed £50 during any period of forty-eight consecutive hours. (This does not apply to loss by fire caused by earthquake.)

This Clause is a definite statement of the insurer's liability. The company is liable, which means legally bound to pay the excess of £50 each and every assessed loss within the limits of the sum insured, and certainly not the difference between £50 and the actual full loss sustained.

In the original Lloyd's earthquake policy form, the phraseology used was as follows: "This insurance only to pay the excess of £50; each and every loss."

The deduction of £50 from the actual full loss sustained would be tantamount to an admission on the part of the insurer that he is liable for the whole loss less £50, which, of course, is not the case. All the insurer is concerned with is his actual liability under the contract—nothing more and nothing less. In the absence of the Excess and Average Clause or the Apportionment of Loss Clause, the insurer's liability

* Other than those under the Earthquake and War Damage Act, 1944.

would be limited to the actual value at time of loss up to the sum insured. If Average or the Apportionment of Loss Clause is embodied in the contract, it is only by application of these Clauses that the insurer is able to determine the amount of his liability (the actual sum insured by the earthquake policy), which, after all, is all that he is concerned with. Experience of earthquake claims has made it necessary to impose an excess to eliminate the many claims that would otherwise arise for damage to chimneys, &c., and it is quite clear that the compulsory Excess in earthquake contracts is warranted. It may be maintained that it is only logical to say that the *insured* should share in the relief that the Excess gives. If the Excess Clause said so, then such a contention would be understandable; but the Excess Clause does not say so in any earthquake contracts.

Doubt has frequently been expressed as to the meaning of the expression "such loss or damage" in the Excess Clause—whether it means the whole loss or damage sustained, or only loss or damage for which the company is liable. The latter view is correct, as the statement in this Clause "that the company "shall be liable to pay or contribute in respect of such "loss or damage its proportion only of the amount "by which such loss or damage shall exceed £50," &c., clearly establishes the relationship of the expression "such loss or damage" to the contract, as the words are qualified by the words "shall be liable to pay," &c.

In any case, any doubt should be resolved by reference to the definition of a contract of earthquake insurance. A contract of earthquake insurance is a contract whereby the insurer, in return for the payment of the required premium, agrees to indemnify the insured against *loss or damage* by earthquake shock and/or earthquake fire up to the amount insured, subject to certain terms and conditions.

I have mentioned that Clauses added to a policy carry greater weight than the words in the policy itself, but this observation does not overlook the important fact that the whole policy, including Clauses added to the policy, must necessarily be construed as a whole; it is one document, and it is only by reference to the whole of that document that the intention and meaning of the parties to the contract can be made plain.

I think that this is often overlooked when interpretations are being sought regarding Clauses attached to a policy. Careful study by students of the preamble of the insurance policy is most essential. In a typical fire policy, it is stated that:

> THE COMPANY SHALL BE subject and LIABLE TO PAY, reinstate or make good to the said insured SUCH LOSS OR DAMAGE as shall be occasioned by fire or lightning to the property hereby insured BUT NOT EXCEEDING in each case THE SUM OR SUMS hereinbefore severally specified and STATED AGAINST SUCH PROPERTY.

Compare the words in capitals above with the Excess Clause, and we have the following:

(i) *The company shall be liable to pay such loss or damage, but not exceeding the sum or sums stated against such property—i.e., the sum insured.*

(ii) *This company shall be liable to pay* (or contribute its proportion—in cases of co-insurance) *the amount by which such loss or damage shall exceed £50.*

The insurer is legally bound to pay the excess of £50, and the effect of the Earthquake Endorsement is certainly not to provide for indemnity in excess of the amount insured. If a property is insured for £2,050 (its full value), and a total loss occurs, £50 is deducted, leaving £2,000 payable to the insured.

If, however, another insured under Apportionment of Loss Clause conditions had deliberately underinsured for £1,050, and the damage was £2,050 (full value), the excess of £50 would be deducted from £1,050, leaving £1,000 payable to the insured. It would be unreasonable for the first insured, because he had insured to full value, to suffer a £50 deduction, and for the second, who had underinsured, to suffer no deduction at all. There must be equal treatment for all.

The effect of deducting £50 before Average is applied is that the insured does not, as he should, bear the full amount of the excess of £50 at all. The actual amount he would bear would be governed by the application of the Average Clause.

We now turn to the third proviso, the Average Clause. This Clause reads:

> If the property hereby insured shall at the breaking out of any fire be collectively of greater value than the sum insured thereon then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable proportion of the loss accordingly. Every item, if more than one, of the policy shall be separately subject to this condition.

In effect, the Average Clause is actually a co-insurance clause which is operative immediately on the happening of the insured peril, and defines the liability of the insurer and the insured. The insured to the extent of his underinsurance on the risk is a co-insurer with the insurer for his proportion of the loss. Thus the position of the insured and his insurer at the *outbreak* of the insured peril is exactly the same as if there were two insurance companies insuring in the aggregate the full value of the risk at the time of the loss.

The Average Clause operates immediately at the commencement of any destruction, and the liabilities of the insurer and the insured *from that moment* are based on their respective proportions *of the loss.*

It cannot be argued that a deduction of £50 should be made from the amount insured, or from the value of the property in calculating the respective liabilities of the insurer and the insured under the Average Clause. The rateable proportion to be borne by each party to the contract is the rateable proportion *of the loss.*

The question arises as to what the words "the loss" actually mean. Do they mean the whole loss sustained or the loss less £50?

If it was intended that the liabilities of each party were to be determined on the basis of the loss less £50 then the Average Clause would say so. The words "the loss" mean the actual loss suffered—nothing more and nothing less. In the 80 per cent. Average Clause appear the words "this company shall be liable for no greater proportion of *any* loss," &c. In any case, as the clause operates on the immediate happening of the event, no one would know at that stage whatt he actual amount of the loss or damage would amount to, and, therefore, no consideration can be taken into account of any deduction of £50 in the Average Clause from the loss sustained. The Contribution Clause in policies stipulates that contribution is assessed at the time of *any* loss between office and office, while the

Average Clause provides for contribution at the time of any loss between insurer and insured; consequently, all that concerns the insurer is the determination of his liability under the policy. In the absence of the Average Clause, the insurer is liable up to the amount insured (less £50 for shock damage), and, with Average, his liability is restricted to his rateable proportion of the loss.

We have now arrived at the following conclusions respecting the liability of the insurer under earthquake contracts:

(i) The contract is to pay up to the amount insured.

(ii) The £50 excess is deducted from the amount insured. (This does not apply to fire arising from earthquake.) The amount insured by the insurer is his liability under Average.

(iii) The Average Clause operates immediately on the *commencement* of any destruction or damage, when each party's liability attaches.

Example "A."—Assuming property at the time of the earthquake is valued at £1,000, is insured for £750, and sustains earthquake shock damage to the extent of £500: Average Clause is first applied to determine insurer's liability, and the loss is assessed in the following manner:

750/1,000	of £500	= £375
	Less £50 excess	50
		£325

If £50 is deducted from the loss of £500 and the Average Clause is then applied, the insured is bearing only the excess of £37 10s., and not £50.

Example "B."—If the loss or damage sustained is £1,000, the amount insured is £600, and the value of property before the earthquake shock is £1,000, the Average Clause is inoperative in the event of total loss, so that the correct settlement is:

Amount of loss ..	£600
Less excess £50 ..	50
	£550

Example "C."—Assuming the value of the property before the earthquake shock damage is £1,000, it is insured for £1,000, and the damage is £1,000, the correct settlement is:

Amount of loss ..	£1,000
Less excess	50
	£950

(To be concluded.)

OBITUARY.

Mr. James Robertson (Invercargill).

The death occurred on July 9 of Mr. James Robertson, who had been for many years in practice in Invercargill, and latterly was City Solicitor.

Mr. Robertson, who was sixty-seven years of age, was born at Waikaia, Southland. He was a son of the late Mr. Colin Robertson, a well-known farmer of that district, and for very many years Member for the Waikaia Riding on the Southland County Council. He was educated at the Waikaia School and the Southland Boys' High School. After leaving school, he worked for the National Bank at Waikaia. Later, he joined the Lands Registry Office at Invercargill. He studied law, and eventually commenced practice with the late Mr. C. S. Longuet. Mr. Longuet was City Solicitor, and Mr. Robertson succeeded him. As City Solicitor, he gave valuable service to the Corporation by reason of his extensive knowledge of local-body law.

He was particularly well-known amongst anglers throughout Southland, not only for his skill in, and devotion to, the sport, but also for his untiring efforts over many years to promote the interests of angling by adopting the proper methods of conserving fish in the Province's rivers.

Mr. Robertson had a long association with the Southland Acclimatization Society. Except for a period of a few years when another member occupied the position, he was President of the Society for the past twenty years, and was the oldest serving member on the Society's Council. He was also President of the Council of South Island Acclimatization Societies, and was a member of the Fisheries Advisory Council of the Marine Department.

On the morning of July 11, there was a full attendance of Invercargill practitioners at a special sitting of the Magistrates' Court to honour the memory of the deceased.

The President of the Southland District Law Society, Mr. G. C. Broughton, addressing Mr. W. A. Harlow, S.M., who presided, said that the late Mr. Robertson was admitted to the profession in 1911, and had practised with them in Invercargill ever since. In that time, his brother-practitioners had come to know him well, and to admire his character and personality. He had been President of the Southland District Law Society in 1919. He was a skilled lawyer, and had earned a reputation for his knowledge of the law, his ability, and his sound judgment. For many years he was the City Solicitor, and in the field of local-body law his experience was very wide and his store of knowledge considerable. By nature, he was a kindly man, and had a disposition which was never ruffled. In his presence, any petty squabbles were always quickly made to appear in their true perspective. In everything he did, he was calm and serene, and all would miss his familiar figure. They knew that Mr. Robertson had been in poor health, but they had had high hopes for his recovery. As he had recently taken Mr. Roy and Mr. Scholefield into partnership, his brother-practitioners had hoped that he would continue in practice for many years, relieved of much detail and perhaps at reduced pressure, a relief which he had well earned. In conclusion, the President said that all present regretted that they had lost a wise counsellor. They extended to the late Mr. Robertson's family sincere sympathy in their bereavement, and hoped that they would derive comfort from the knowledge that he bore an honoured name in the profession, and that over a long period he rendered loyal and valuable service to his clients and to the city.

A letter from Mr. Justice Kennedy was read by Mr. Broughton. His Honour had written: "I have heard with great regret of the death of Mr. Robertson. I have, of course, known him ever since I have been a Judge, and I have also shared with him one of his great interests which has brought him close to me. With you, I shall miss his genial presence and those demonstrations of an unfailing kindness which we have all experienced. He was a practitioner of rare quality and all his modesty and genuine kindness did not effectually conceal from any of us who met him in affairs . . . his great ability. He was, in every way, a fine gentleman."

Mr. S. M. Macalister said that he wished to express his own sense of personal loss of a friend of nearly forty years' standing. Mr. Macalister also referred to the service given by Mr. Robertson to the Southland Acclimatization Society, and, through the Society, to sport in the district. In acclimatization he had found a good deal of his life's work. Mr. Robertson had not only been a student of his profession; he had also been a student of acclimatization, and had been recognized as such.

"I join with you in mourning the loss of one of your members," said the Magistrate. "Mr. Robertson was a faithful advocate, a sound lawyer, and a courteous and kindly gentleman. The sympathy of the Court is extended to his wife and family."

The Court adjourned for half an hour as a mark of respect to the deceased.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Problems of Possession.—Admirers of that radio classic "I'm my own grandpa" might well be reminded of it by the facts in *Parmee* v. *Mitchell*, [1950] 1 All E.R. 872, where the defendant, originally the tenant of the whole of a house, sublet the upper portion to the plaintiff. He, in turn, purchased the reversion of the defendant's tenancy, thereupon becoming at the one time the defendant's landlord of the whole house as well as his sub-tenant of portion of it. Tiring of the indignity of the lesser role, the plaintiff decided that he preferred his occupation of the upper part of the house to be that of owner rather than sub-tenant, and gave the defendant notice to quit the whole house for which he sought an order for possession. As alternative accommodation, he offered the defendant the lower part which he already occupied. In the unanimous view of the Court of Appeal, as the lower portion was suitable, it could properly be regarded as alternative accommodation, although in this case the other "alternative" was presumably the danger of being ejected. The Court considered that the appropriate form of the order was one for possession, subject to the proviso that the defendant should be entitled to remain in occupation of that part of the house which he in fact occupied.

In Scotland, a landlord claimed possession on the ground that the premises were reasonably required for his son, who was neurotic and unable to occupy a bedroom with his wife and child. On the other hand, the tenant was senile and required constant attention. On an appeal against the discretion of the Sheriff-Substitute, who favoured neuroses to senility, the Sheriff-Principal held that the consequences of ejection would be calamitous to the tenant, and, in any event, it was wrong to prefer the claim of youth with a future to old age without one, since, in cases of relative hardship, the Court was more concerned with the present or immediate than with the problematical future: *Dryburgh* v. *Stenhouse*, (1949) S.L.T. (Sh. Ct.) 35.

The Gregarious Touch.—At one of the sessions of the Licensing Control Commission, a town-planning consultant, giving evidence as an expert witness, deposed to the layout of the town into certain specified districts. "I presume the industrial area," asked counsel, "is meant to contain the wage-earning rather than the professional classes?" The Chairman interposed to ask whether solicitors might not come into the wage-earning category. "Definitely not," replied the witness. "We classify solicitors with herd-testers."

Medical Patents.—Using penicillin as an instance, a special committee of the British Medical Association has advised doctors to end the traditional rule against patenting new medical discoveries, on the ground that a foreign patentee can rob a British worker of the rewards of his labour, and possibly even of the right to use his discovery. In the case of penicillin, discovered in Britain by Sir Alexander Fleming, the deplorable position has arisen that the British consumer now pays royalties to American firms for penicillin manufactured in the United Kingdom. The basis of the British practice of not patenting medical discoveries is to discourage members of the medical profession from obtaining protection for any discovery that has for its object the alleviation of human suffering—for instance, a patent has been refused in respect of a process for extracting metals from living bodies, and particularly for extracting lead from persons suffering from lead poisoning: *Re C. and W.'s Application*, (1914) 31 R.P.C. 235. The issue was raised in the Court of Appeal in *Maeder* v. "*Ronda*" *Ladies' Hairdressing Salon*, [1943] N.Z.L.R. 122, when the alleged infringement of a hair-waving process was under consideration. It was contended that, even if there was an invention, it was not patentable, for the reason that, at p. 131:

> it described and claimed a process and arrangement of means working or being carried out in conjunction with the human body—namely, the hair of the latter—so that part of the human body is defectively claimed as an integral part of the alleged invention and novelty thereof.

Myers, C.J., found this part of the case of considerable difficulty, but considered that the process did not produce a vendible article of commerce, and was, therefore, not patentable (p. 178). To those sufficiently interested, the reading of the eighty pages of this case is recommended as a relief from detective stories during a long winter's evening.

NEW ZEALAND CONSTITUTION.

A Written Constitution for the Dominion of New Zealand has been suggested.

The Editor will welcome the views of Practitioners in contributed articles or in letters for publication.

Medical Experts.—It is suggested that medical witnesses might well be excluded from the category of "experts," (i) because they never dwell sufficiently long upon any phase of their testimony for the moulding process to set in; (ii) because, the more they know upon a particular topic, the more difficult they find it to impart their knowledge to the tribunal; and (iii) because, when sufficiently cajoled by Judge and counsel, their evidence is given in words of such longitude that, by the time the harassed associate has taken down the gist of it, their mercurial minds have rolled on to something else. The most expert witness of whom Scriblex has heard was neither medical nor mechanical. This witness was a child of twelve, whose father was plaintiff in an action in the Supreme Court for damages for breach of warranty. Asked to testify as to a conversation between seller and buyer alleged to have taken place in the parlour of her home, she said: "Father said to the defendant when he accepted the goods that he insisted upon its being an express term of the contract that the breach of any condition on the part of the seller should be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated." "Good gracious, child!" said the Judge, "the very words of the Act." "Precisely, your Honour," replied the child, "section 13, subsection 3."