New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXXIII TUESDAY, AUGUST 20, 1957 No. 15

FAMILY PROTECTION: SOME RECENT CASES.

IN continuing our periodic summary of recent applications under the Family Protection Act 1955, in pursuance of the generally expressed wishes of our readers, we must draw attention to the recent judgment delivered on July 15, 1957, by North J. in *In re Blakey, Blakey* v. *Public Trustee* (to be reported), in the course of which His Honour said:

> It is true that over the last few years there has been a tendency to take a benevolent view, shall we say, of the provisions of the Family Protection Act; and, on occasions, it might be said that there was a tendency to make new wills. That is not my view of the way the Act should be administered, and I do not think it is the view of many of the Judges today. It seems to me that our own Court of Appeal years ago in *In re Allardice, Allardice* v. *Allardice* (1910) 29 N.Z.L.R. 959; 12 G L R 753 laid down the basic principle when it said:
>
> > The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support, and the second what property has the testator left (*ibid*, 970; 756).
>
> Now, in 1941, *Dillon* v. *Public Trustee* [1941] N.Z.L.R. 557; [1941] G.L.R. 227, was carried to the Privy Council and certain observations had been made in the Court of Appeal about this Act which their Lordships thought it necessary to correct. I refer here to a passage from the judgment in that case where their Lordships said:
>
> > Their Lordships cannot regard it as a correct exposition of s. 33 of the Family Protection Act to say that it imposes upon a husband the obligation to make adequate testamentary provision for the maintenance and support of his wife. The statute does not impose any duty to frame a will in any particular way, and the testator did not fail to observe any statutory obligation by making his will as he did. What the statute does is to confer upon the Court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorizes the Court to interpose and carve out of his estate what amounts to adequate provision for these relations—and these are the important words—if they are not sufficiently provided for (*ibid.*, 560; 229)."
>
> Now that, as I understand it, is the approach that ought to be adopted by the Courts in the administration of this Act.

Mr. Justice North, referring to the son's application before him, went on to say that he thought the will under notice was an unjust will. He continued:

> "What right have I to intervene in the guise of making an order under this Act? As I understand the matter, *I have no jurisdiction unless I am satisfied* (whatever my views are of the wisdom or otherwise of the testator's provisions) *that there is need for maintenance.*" (The italics are ours.)

With that warning before us, we proceed with judgments given at earlier dates.

WIDOWS' APPLICATIONS.

In *In re Smith* (Auckland, February 27, 1957, Turner J.), a widow's application for increased provision, the facts were that the testator died on January 30, 1955, aged sixty-four. The plaintiff was then fifty-seven years of age. The couple were married (each for the first time) in June, 1948, at the ages of fifty-six and forty-nine respectively. There were no children of the marriage. The testator by his last will (made only a few months after the marriage) after leaving a small pecuniary legacy, which was not the subject of attack, gave all his estate to his trustee upon trust to pay the whole net income arising therefrom to the plaintiff for her life, with no provision for divestment upon remarriage. Subject thereto, the whole residue was left to the St. John's College Trust Board in trust for King's College, Auckland. The net amount of the estate was approximately £40,000; duties were about £10,000, leaving a residue of approximately £30,000. Administration expenses would consume a further £1,500. Of the final net residue of £28,500, some £7,500 was accounted for by a building at Remuera containing two flats. One of these was let for £4 15s. per week; the plaintiff lived in the other, which before the testator's death was the matrimonial home of the parties.

A Humber Snipe car valued at £1,200 and furniture and effects totalling £372 accounted for a further £1,572 of the residue mentioned; if all these sums were placed in account, there was seen to be a net estate consisting of some £28,500 as follows: Flats, £7,500; furniture, etc., £400; car, £1,200; and invested residue, £19,400: £28,500.

The invested residue, together with the flat that was let, would, so the Court was informed, produce for the widow an income of approximately £1,000 per annum gross, from which deductions totalling £150 per annum must be made for rates, insurance, and maintenance of buildings, and administration expenses. This left a net income of £850 per annum from which social security tax and income-tax must in due course be deducted. The Court was informed that these would amount to about £134 per annum, so that the widow would be left with a free flat and some £716 per annum clear. The plaintiff herself had £1,145 invested in mortgage and local-body debentures, and £1,100 in various bank accounts; a total of some £2,250 in liquid assets.

Mr West, for the plaintiff, sought:

(a) an order vesting the Humber Snipe car and the furniture and personal effects of the deceased in the plaintiff; (b) an order that certain essential repairs to the house be effected from capital—the amount involved in these repairs was stated to be of the order of £300; and (c) a capital grant of £5,000.

In support of these claims, the following facts, it was contended, were proved on the affidavits: (a) the estate was a large one; (b) there were no competing claims from persons morally entitled; (c) the testator was said to have been about to make another will more generous to the plaintiff; (d) the plaintiff had some disability from low blood pressure; and (e) the testator and his wife were fond of travel and expected to make a trip abroad if the testator had not died.

The St. John's College Trust Board, as might be expected, deferred to the judgment of the Court, and made no active opposition to the above-mentioned submissions.

Mr Justice Turner said:

I will deal first with the claim for a lump sum of £5,000. In my opinion, there is no sufficient ground shown in this case for a lump sum of this amount, or for any lump sum. It is true this is a largish estate, and that there are no competing claims by person morally entitled; but it does not seem to me that in this case the plaintiff has proved, or can possibly prove, the likelihood of her having to "meet unusual and unexpected expenditure' for which her own resources are inadequate, such as was referred to by the Court of Appeal in *In re Crewe* [1956] N.Z.L.R. 315, 324, as the proper ground for a lump-sum grant to a widow in supplement to an annuity. In that case, the Court granted to the widow a lump sum of £500 (reducing by half the provision awarded by the learned Chief Justice at the trial) but the widow in *Crewe's* case had no liquid assets of her own, while, in the present case, she has liquid investments exceeding £2,000 in value.

I must look at the matter as a just and wise, but not necessarily generous, testator would have looked at it, and must resolutely resist the temptation to make a new will simply because the residuary beneficiary quite understandably offers no defence to the attack made upon the old one. I have considered what effect, if any, I should give to the evidence (deposed to by the plaintiff alone) that the testator intended to make a new will upon terms somewhat more generous to her than the old one. I think that I should be cautious about allowing such evidence, in this case entirely uncorroborated, to influence me decisively, or at all, for two reasons. First, of course, is the ease with which such uncorroborated evidence can be put forward. Secondly, even if I were positively convinced that this testator did, in fact, intend to revise his will in his wife's favour, this does not inevitably mean that justice required such a revision. It may be that he intended to be unnecessarily generous in his revised will. In the circumstances, I have not allowed myself to be influenced in the present case by the evidence upon this particular point.

Nor am I materially influenced by the prospects of foreign travel put forward in the affidavit. The testator and his wife had returned from a tour of England and Europe only in the year before he died, and it does not seem to me that it could be put forward as a matter of positive duty that in these circumstances this testator was bound to provide a capital sum for a further trip so soon after the last.

Looking at this matter as a just and wise, but not a generous, testator might have looked at it (and that is the way in which it must be approached), I am not convinced that this testator's moral duty to this wife, who had £2,250 of her own available, included a duty to leave her any capital sum, provided that she was left a proper annual provision to take care of her adequate maintenance. I do not say that many husbands would not have left her some amount of capital; but I cannot hold that this one was bound to do so. I feel reinforced in this negative conclusion by the fact that (as will presently be seen) I propose to accede to the plaintiff's request to vest the car and the furniture in her, and I must, therefore, assume, in deciding what was the testator's duty as to the lump sum, that he had already done what I now propose to do in this regard. The plaintiff's request for a lump sum will therefore be refused. I will consider later in this judgment whether Mr West's alternative submission for an increased income may prevail.

His Honour said he was persuaded, on the other hand, by the whole of the circumstances in this case, including the size of the net estate, the nature of its assets, the standard of living of the parties, and the lack of competing interests, to accede to Mr West's first group of requests, though on the question of the car, only after some hesitation. It was of a value of £1,200 and the learned Judge said it might be that he was being over-liberal in vesting it in the widow. There would, however, taking all the circumstances of this case into consideration, be an order vesting the furniture and personal effects of the deceased, including the Humber Snipe car, but not including the Dodge car (of lesser value and since sold) in the widow absolutely.

As to the submission for an increase in income, His Honour said:

The very considerable fall in the value of money in recent years obliges the Court to approach all cases where provision has been made by way of income with an open and liberal mind, for one must be on one's guard against being unduly restricted by figures in reported cases which have little or no application to the present cost of living. Bearing this in mind, and taking into account (as I am entitled to do on this aspect of the matter) the fact that the will was made as far back as 1948, and the absence of competing claims, I think it will not be unreasonable to hold that the testator should have directed in all the circumstances that the outgoings (whether for rates, insurance and the like, or for repairs and maintenance) of the realty at Remuera should, so long as this property is held by the estate (but, of course, only during the widowhood of the plaintiff) be paid from capital. Mr West pointed out that the benefit of such a provision would enure only while the property was so held by the trustees; but the Court has power under s. 12 of the Family Protection Act 1955 to do justice in such a case, and I will *ex abundantia cautelae* reserve leave specially for the plaintiff to apply if the property is sold.

In the result, there was an order making increased provision for the plaintiff over and above what was provided by the will as follows: (1) directing that the furniture and effects of the deceased, including the Humber Snipe car and excluding the Dodge car, vest in the plaintiff absolutely; (2) directing that all outgoings on the Remuera property whether for rates, insurance and the like, or for reasonable repairs and maintenance, should, while the same was held by the trustee, but only during the widowhood of the plaintiff, fall upon and be paid from the capital of the residue. Leave was reserved to the plaintiff to apply to the Court in the event of the Remuera property being sold.

In *In re Amlehn* (Auckland, April 8, 1957, T. A. Gresson J.), the facts were that the testator died on July 29, 1955, leaving a will dated July 28, 1954, whereby he bequeathed the whole of his estate equally between his five children as and when they attained twenty-one years of age. The testator was survived by his widow, aged fifty-one, whom he had married on October 24, 1935, and five children—namely, Paula (now Eason), born on May 30, 1937, Louis, born on July 7, 1938, Michael, born on October 17, 1940, and Fay and Jocelyn, both of whom were born on September 26, 1944. The testator and his wife had entered into a written separation agreement on July 27, 1954, and such separation was in full force and effect at the date of his death. After the separation the testator remained in his Mt. Wellington house and his wife bought a property at Grey Lynn for the sum of £2,800. For this purpose she used the sum of £1,300 which

she had received from her parents' estates, and the remaining £1,500 was borrowed on mortgage. Her financial position at the date her application was filed, was as follows: House property, £2,800; motor-car (1936 Ford V.8), £150; insurance policy on deceased's life, £200; and furniture and household, effects, £200: £3,350. There was a mortgage on the house property of £1,500.

The plaintiff was at this stage unable to work on account of ill-health and her only income was the sum of £7 10s. per week rent from a portion of the Grey Lynn property, and the child allowance in respect of the three youngest children. As at February 19, 1957, the plaintiff had sold her Grey Lynn property for the sum of £3,250, repaid the mortgage amounting to £1,500, and granted a second mortgage for £800 to the purchaser. She was now living in the property at Mt. Wellington, and, with the exception of the eldest daughter Paula, who was married on February 26, 1956, the family all lived there together. Her present assets were as follows: money in bank, £400; Ford car, £325; furniture and household effects, £200; second mortgage, £800: £1,725.

The plaintiff was working as a domestic help and earned £3 per week. Louis and Michael paid modest board; and, in addition, the plaintiff received her widow's pension of approximately £30 per month. Since the sale of her Grey Lynn property, she had helped maintain the house at Mt. Wellington and had paid the sum of £100 on account of mortgage instalments.

The net value of the testator's estate was approximately £3,076, the only substantial asset being the property at Mt. Wellington, valued for death-duty purposes at £4,350, and subject to a mortgage of approximately £1,171. The estate was not income-producing and the trustee had had to resort to capital to make certain advances and to preserve the estate property. The widow and children, other than Paula, wished to retain the Mt. Wellington property as their home, and had paid certain outgoings with this object in view. The widow sought an order giving her a life-interest in the property at Mt. Wellington, reserving power to the trustee, with her consent, to sell this property and reinvest the proceeds or part thereof in the purchase of another home to be held subject to the same trusts—namely, in trust for the widow for life with the remainder to the five children in equal shares as and when they attained twenty-one years of age. Mr D. S. Beattie, who was counsel for the infant children under Court order dated March 26, 1955, conceded that there was no evidence to support any suggestion that the widow had been the cause of the separation and, further, that she was legally entitled to apply for further provision.

The learned Judge said:

> I expressed the view at the hearing that the will was a punitive will made on the day after the separation, and that there had been a definite breach of the testator's moral duty to make proper provision for his widow. However, in view of the fact that the separation agreement contained a clause that the wife would not at any future time claim maintenance against her husband, I reserved judgment to enable me to consider the legal position. The widow's uncontradicted explanation for her failure to seek maintenance from her husband is as follows:
>
> "After the dismissal of such proceedings (complaint against the deceased for separation and maintenance orders on the grounds of his persistent cruelty) I returned to the Mt. Wellington property with the deceased and endeavoured to lead a normal married life with him, but owing to his persistent association with another woman this proved impossible. As a result of the situation which arose, my husband and I agreed to separate and to enter into a written agreement to this effect. The deceased, however, refused to pay me any maintenance and as I was able to work at that time I agreed to his terms in order to finalize matters."
>
> After perusing the judgment of Turner J. in *Re Jackson, Jackson* v. *Public Trustee* [1954] N.Z.L.R. 175; *Colquhoun* v. *Public Trustee* (1912) 31 N.Z.L.R. 1139; *Toner* v. *Lister* (1919) G.L.R. 498, and the Australian cases discussed in *Davern Wright's Testator's Family Maintenance in Australia and New Zealand*, 39, I am satisfied that the circumstances of the separation in the present case do not disentitle the widow to the provision which she seeks. There will accordingly be an order giving the widow a life life interest in the property at Mt. Wellington on the terms submitted by Mr Henry. Counsel should confer and submit a draft order for the Court's approval in these terms. The plaintiff is entitled to her costs —namely, forty-five guineas—and disbursements. Counsel for the children is also entitled to his costs, which I fix at thirty-five guineas, plus disbursements. The costs of all parties will be paid out of the estate.

Leave was reserved to any party to apply as to any matter left outstanding by the judgment.

In *In re Mc Kay* (Auckland, June 2, 1957, Stanton J.), the facts were that the testator, who died in February, 1956, left him surviving no widow and seven adult children, three sons and four daughters, the latter all married. By his will he left £100 to each son and to his youngest daughter, the plaintiff, and the balance of his estate to his other three daughters. The net value of the estate, after payment of debts, duties and costs, is approximately £5,500. Application was made by the four pecuniary legatees for additional provision out of the estate, and this was opposed by the three daughters who are residuary legatees.

It was admitted that all the testator's children worked on his farm and so contributed to the building up of the estate; but sharp conflict emerged as to the extent of the contribution made by the respective individuals. It seemed, however, to be accepted by all parties that the testator had disregarded or underestimated the deserts of the four children who received only £100 each, and an arrangement was agreed to that three of these legatees should each receive an additional amount of £300, and this arrangement those three legatees were agreeable to accept. However, on reconsideration and consultation with their legal advisers, they withdrew their consent; and, at the hearing, they suggested that the whole estate should be equally divided between the seven children, one of them, Mrs West, bringing into hotchpot a sum of £500, which the deceased had given to her shortly before his death. It was estimated that this would give each child approximately £850, that daughter receiving only £350 in addition to the gift of £500.

Mr Justice Stanton said:

> It is clear that the Court is not bound by any agreement between the beneficiaries, and in any case one son, was not a party to the agreement made. This son is an inmate of a mental hospital and is unlikely ever to recover. It was suggested that he should receive a legacy of £750. I think it is difficult to distinguish this claimant from the others, and that he should receive no more than the other claimants.

The residuary legatees did not suggest that the daughter referred to should be required to bring her gift into hotchpot, and they were apparently content that she should retain her £500 and receive an equal share with her two sisters in the residue.

The learned Judge continued:

> I think that the suggested increase of the claimants' legacies by £300 is more meagre than the circumstances justify, and that each claimant should receive an additional sum of £400, making £500 in all. This will still leave each of the residuary beneficiaries with something over £1,100, without interfering with Mrs West's gift. These amounts are to be paid within one month from the delivery of this judgment without interest; and ,if not so paid, will bear interest at 4 per cent. per annum from the date for payment. They will be free of all death duties."

In *In re Gibbons* (Hamilton, March 8, 1957, North J.) a widow, aged fifty-five years, sought further provision out of her late husband's estate. Under his will, she received a life interest in the family home, the contents of the dwellinghouse, and an annuity of £2 10s. a week during widowhood. On her death, or at the end of twenty years from his death (whichever was the longer) the estate, which at the testator's death, was of the net value of £15,104 was to be distributed among named charities. After citing from the judgment in *Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 463, 481, and *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218, 222, His Honour said that this was a case where it would be proper to award a fairly liberal amount to meet "unusual and unexpected expenditure": *In re Crewe* [1956] N.Z.L.R. 315, 324, although that case was distinguishable as, here, the widow had merely a life-interest in her home. His Honour, taking into consideration all the circumstances, awarded the widow an annuity of £520 during her widowhood.

Widower's Application.

In *In re Ponman* (Wellington, June 5, 1957, McCarthy J.), an application for further provision out of the estate of the testatrix, was brought by her widower.

The plaintiff and the deceased were married in Montreal, Canada, in 1914. There was no issue of the marriage, but the testatrix had been previously married. Of that marriage there were two children, a boy who died, and a daughter, Mrs Horrocks, now living in England.

Mr and Mrs Ponman came to New Zealand in 1921, and the plaintiff took employment with the New Zealand Railways. He continued with that Department until his retirement. He was now seventy years of age. In 1925 a residential property was acquired in Wellington. The title was put in the name of the testatrix. This property was paid for over a period of years out of the earnings of the husband and also, as to the sum of £300, by board provided by the testatrix to the plaintiff's father who lived with them for some time. The Ponmans were not people of substantial means and His Honour said that he looked upon the moneys which went into the house as being in the nature of family savings.

Early in the 1930's, the testatrix became friendly with a Mrs King who had a daughter Joyce, now Mrs Joyce Randall, one of the second defendants. The testatrix became attracted to Joyce, and the Ponmans in or about the year 1933 took the child to live with them. She was then three years of age. From then on Joyce King lived with the Ponmans until her marriage at the age of eighteen. Even after marriage, Joyce and her husband continued to live with Mr and Mrs Ponman for a period of eighteen months until they secured a home of their own. She had now four children and her husband was employed as a factory foreman earning a salary of, approximately, £800 a year.

The testatrix died in May, 1956. She was then seventy-one years of age. She left a will dated May 2, 1955, by which she left to her grandson, Thomas Horrocks, a share possessed by her in the estate of Isaac Snutch, late of Derby, England. She bequeathed a small policy of insurance to her daughter, Mrs Horrocks. She gave her husband the use, occupation, and enjoyment of the house property so long as he remained her widower, he paying the rates and other outgoings and keeping the same in a good and habitable state of repair. Subject to this devise of the use and occupation of the house to the plaintiff, she left this property and the residue of her estate to Joyce Randall.

At the date of the testatrix's death, she and the plaintiff were living in the house property. That property, her interest in the estate of Isaac Snutch, and the small insurance policy bequeathed to her daughter, appeared to be the only assets. There was no cash. The debts amounted, approximately, to £100.

It was contended for the plaintiff that there was a failure on the part of the testatrix, having regard to all the circumstances, to make adequate provision for him. Attention was directed, in particular, to the facts that the house was purchased substantially out of his earnings, that he was now of an age when he can no longer work; that his capital consists of a sum of £120; that his only source of income was the age benefit; and that Mrs Randall was a stranger in blood.

Mr Justice McCarthy said:

> In my view, I am not entitled to place too much weight on the manner in which the house was acquired: *Colquhoun* v. *Public Trustee* (1912) 31 N.Z.L.R. 1139. As I see it, the search is not as to the source of ownership but as to the "needs" of the plaintiff. No doubt, however, I can have some regard to such a matter in examining the testatrix's duty to the plaintiff to provide for his needs. Mr Rose contends that the only way in which I can adequately meet the position is to transfer the property to the plaintiff absolutely. I am not prepared to do that. In my view, that would be an unjustifiable interference with the will of the testatrix. On the other hand, I am of the opinion that the interest in the house left to the husband was not adequate provision; and I direct that he shall have, in addition, the sum of £500. I intend that this sum of money together with sufficient to meet the debts of the estate, costs of administration and the costs allowed in these proceedings, should be raised by the executor by mortgaging [the house] property. The executor should give consideration to his powers in this respect and, if necessary, I will entertain an application for leave to mortgage. I would expect from the attitude adopted by Mrs Randall throughout these proceedings that she will give all necessary consents. Pending clarification on that issue I do not propose to enter judgment, and I will adjourn the matter to enable the parties to confer and approach me at a later date. I will also ask counsel to let me have their views as to costs.

One further question arose, and that was the payment of interest on any mortgage so raised. His Honour said that would have to be met by the plaintiff during his period of use and enjoyment. No doubt he could, if necessary, let a room and thereby obtain sufficient to pay the outgoings.

In our next issue, applications by sons, daughters, and grandchildren will be considered.

SUMMARY OF RECENT LAW.

COUNTIES.

Service-lane—Council's Power to take Land for Service-lane—Power restricted to Land to provide Public with Access by Vehicular Traffic to Property which Lane intended to service—" The public " —Public Works Amendment Act 1948, s. 3 (3). Section 3 (3) of the Public Works Amendment Act 1948 (as amended by s. 17 (1) of the Public Works Amendment Act 1952)—which is as follows : " Where, for the purpose of providing the public with side or rear access for vehicular traffic to any land, any lane is laid out and constructed outside a borough or town district (in accordance with the provisions of this Part of this Act relating to service-lanes) on any land, the Governor-General may, by Order in Council, declare that lane or land to be a service-lane for the purposes of this Part of this Act "—requires that the purpose of the service-lane is to provide the public with access for vehicular traffic to the property which the service-lane is intended to service. Consequently, it is not within the power conferred by s. 3 (3) on a County Council to take land with a view to making a service-lane thereon, and so deprive its owner of that land, if the purpose of the proposed service-land is to provide some other individual landowner with access for his family and friends and for some others whose business with him is of an entirely private nature, and there is no reasonable prospect that it will be used by " the public " in the common understanding of that term. Appeal from the judgment of Archer J allowed. *Adams and Others* v. *Hutt County.* (C.A. Wellington. June 27, 1957. Barrowclough C.J. Gresson J. T. A. Greeson J.)

CRIMINAL LAW.

Breaking and Entering Shop—Partly-open Casement Window fitted with Perforated Stay to enable Window to be latched in Fixed Positions—Unlatching of Stay and opening Window sufficiently for Entry—Unlatching constituting a " breaking "—Crimes Act 1908, s. 279. P. was convicted of breaking and entering a shop with intent to commit a crime therein. There was evidence that he had gained entrance to the premises by opening a casement window hinged at the top and fitted with a casement stay which enabled the window to be latched in a number of fixed positions, ranging from closed to the maximum opening permitted by the length of the stay. The stay was perforated with several holes each of which was designed to fit over a stud fixed upon the sill, and the window was latched in pre-chosen position by slipping the appropriate hold in the stay over the fixed stud.

The case for the Crown was that the appellant had inserted his hand through the partially-opened window and unlatched the stay and then opened the window sufficiently to enable him to enter. At the time, the window was secured by the stay in a position in which it was from six inches to eight inches open at the bottom. *Held,* by the Court of Appeal, That the act of unlatching the window constituted a " breaking " within the first part of the definition of " to break " in s. 271 of the Crimes Act 1908, and, accordingly, P. was properly convicted of the crime set out in s. 279 of that statute. (*R.* v. *Robinson* (1831) 1 Mood. 327 ; 168 E.R. 1290, applied. *Halley* v. *The Crown* (1938) 40 W.A.L.R. 105, distinguished.) *R.* v. *Parry.* (C.A. Wellington. July 12, 1957. Gresson J. Shorland J. T. A. Gresson J.)

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance—Order for Maintenance during Joint Lives—After Former Husband's Death, Wife applying for Variation of Order to Extend Payments during Her Life—Jurisdiction to make Such Order for First Time after Former Husband's Death if he died domiciled in New Zealand and if His Assets situate in New Zealand under Control of Executor or Administrator empowered to act under Order of New Zealand Court—" Personal representatives "—Divorce and Matrimonial Causes Act 1928, ss. 33, 41. Section 33 of the Divorce and Matrimonial Causes Act 1928 (as amended by s. 12 of the Divorce and Matrimonial Causes Amendment Act 1953) is to be read as authorizing the enforcement against the former husband's estate of any order which, as originally made or as varied under s. 41, throws a liability on the husband's estate after his death. Section 41, which authorizes an application for variation of an order, contemplates (by the power to alter the term of an order (subs. (2) and byt he proviso to subs. (3)) the making of such an application against a deceased former husband's personal representatives. An application by a former wife, under s. 41 (3) of the Divorce and Matrimonial Causes Act 1928 (as added by s. 13 of the Divorce and Matrimonial Causes Amendment Act 1953) for variation or extension of the terms of an order for her maintenance during joint lives may be made for the first time within a year after the former husband's death against his personal representative or representatives, and can be considered on its merits, if her former husband has died domiciled in New Zealand and his assets are situated there and are under the control of an executor or administrator empowered to act by an order of a New Zealand Court. The term " personal representatives ", as used in s. 33 of the Divorce and Matrimonial Causes Act 1928, does not include the administrator of the deceased former husband's assets which are entirely subject to the control of a foreign Court and are required to be dealt with according to a foreign law. (*Tallack* v. *Tallack and Broekema* [1927] P. 211, applied.) Consequently, the Supreme Court had no jurisdiction to make an order sought by a former wife for a variation and extension of an order for her maintenance during the joint lives of husband and wife which was made under s. 33 of the Divorce and Matrimonial Causes Act 1928, when the former husband had died domiciled in Fiji where letters of administration were granted out of the Supreme Court of Fiji (and had not been resealed in New Zealand), the only asset in New Zealand was £79, and the rest of his assets of a net value of £19,000 were situated in Fiji and were administered by his personal representative who was living there. *Hollander* v. *Hollander.* (S.C. Christchurch. June 4, 1957. Stanton J.)

TENANCY.

Fixation of Fair Rent—Property—Building with Shops on Ground Frontage and Office Accommodation on Remaining Floors —Land Tax—Reasonable Provision for Landlord's Land Tax as " allowance to cover outgoings "—" Capital value of the property " —Method of Computation—Tenancy Act 1955, s. 21 (4). The Court has power to include reasonable provision for land tax among the landlord's outgoing for which an allowance may be made in fixing the fair rent of a property under s. 21 (4) of the Tenancy Act 1955. In ascertaining " the capital value of the property ", as that term is used in s. 21 (4) of the Tenancy Act 1955, the figure to be taken is that which the property might reasonably be expected to fetch if placed on the market on the basis of a reasonable proportion of its space being available for immediate occupation by the hypothetical purchaser. (*Findlay* v. *Valuer-General* [1954] N.Z.L.R. 76, applied.) *Security Buildings (Owners)* v. *Dadley's Ltd. and Others.* (Auckland. April 17, 1957. Kealy S.M.)

WILL.

Dependent Relative Revocation of Will—Deceased's Earlier Will revoked by Later Will—Earlier Will in Existence at Death but Later Will not found—Doctrine of Dependent Relative Revocation inapplicable—Letters of Administration granted to Next-of-kin. The doctrine of dependent relative revocation does not apply where the deceased made a will (which remained in existence at her death), but it was subsequently revoked by another will which could not be found. As the deceased's two daughters were beneficiaries under the earlier will of the deceased, and, they with their father, the deceased's next-of-kin, were applicants for a grant of letters of administration of the deceased's estate, it was unnecessary to cite them as parties on the application for letters of administration, which was granted. Motion for grant of letters of administration to the deceased's husband and her two daughters, who comprised her next-of-kin. During her lifetime, the deceased made two wills (*a*) one dated January 14, 1948, wherein the beneficiaries were her husband and her two daughters, which, on September 12, 1956, she handed to her then solicitor, Mr. T. L. Coles, and asked him to file it in his deeds safe on her behalf ; and (*b*) a will dated October 27, 1949, containing a clause revoking all former wills, which, on July 26, 1954, was posted to her at her request, by her then solicitor, Mr D. S. Castle, but was not returned to him. The deceased died on or about October 27, 1956, but no will or testamentary writing of hers was found other than the revoked will of January 14, 1948, which was in the custody of Mr Coles's firm. *In re Watson (deceased).* (S.C. Wellington. April 11, 1957. Barrowclough C.J.)

Revival of Wills. *107 Law Journal,* 228.

THE RULE OF LAW AMONG NATIONS.

By His Excellency Sir Leslie Munro, K.C.M.G.,
New Zealand Ambassador to the United States and
Permanent Representative to the United Nations*

It is altogether fitting—and I say this with respect—that so great and distinguished a gathering of lawyers of the United States should meet in this Assembly Hall of the United Nations before their journey to Westminster Hall and to the birthplace of the Common Law. A principal glory of the laws of England is that chief among their doctrines and their practice is the Rule of Law. We in this place are concerned to promote and maintain a rule of law among nations.

Our path is difficult. Many have preceded us and suffered grievous failures. The price of failure has been the scourge of war, because the principle of the Rule of Law among nations has been spurned by those bent upon aggression, upon subversion, and upon conquest. In the atomic age the penalty of failure could be universal destruction. The responsibility to avoid that penalty lies not alone with States and Governments. It falls squarely upon individual citizens and not least on lawyers, whose domain should extend to international as well as to private law.

It is a striking fact that a period of the most vigorous growth of the Common Law of England coincided with the development by Grotius of " a modern science of international law ". The great Lord Chief Justice of England, Sir Edward Coke, had courageously set himself to the task of proving that the Royal Prerogative was not above the law and that the new Monarch, who had come from Scotland, where things were done somewhat arbitrarily, must heed the undoubted rights of his new English subjects. I like these words of Elizabeth's godson as he watched the harsh ways of King James I :

> " I have heard our new Kinge hath hanged one man before he was tried ; 'tis strangely done : now if the wind bloweth thus, why may not a man be tried before he hath offended."

A civil war would be waged to teach a King that every man had a right to be tried by his peers in the ordinary Courts of Law and that the King's Prerogative was subject to Parliament.

Grotius, who published his great work when Coke was still alive—he had been briefly Ambassador in England :

> " saw prevailing throughout the Christian world a licence in making war, of which even the barbarous nations would have been ashamed. Recourse was had to arms for slight reason or no reason ; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint ".

These dismal happenings, which from time to time and in sundry places still afflict us, impelled Grotius to frame a system of international law which regarded States as equal, which accepted the absolute authority of the State over its subjects—a comforting doctrine to autocrats—which admitted to international law only those States having a common outlook based upon common traditions and which considered that, as a fundamental maxim, treaties must be observed. This, of course, is far from a complete definition of the conceptions of Grotius.

But you will be interested to observe that this great originator, who wrote in 1625, would certainly have accepted the principles that no international body should intervene in the domestic jurisdiction of any State and that States outside the community with which he was familiar could only be admitted within the society of those nations subject to international law when, in the words of a modern authority, " they have given evidence that they accept certain underlying standards ".

Grotius might thus have found himself, in some respects, at home in this Assembly today. I make no comment on certain of his observations.

Now, over the centuries, we in the Democracies have evolved the rule of law within our own borders. The process has been slow ; it has been painful. It has not been without failures, without setbacks. In Western Europe, only with the close of the last war were Nazism and Fascism effaced. Their doctrine was that sovereignty is not of the people but of the State ; that, in the Fascist idea, the State represented the superiority of ends and the supremacy of force.

The Democracies of the old and the new worlds—of Europe, America, and of Asia, too—have rejected these conceptions. They may differ on the means of attaining international peace, but within their frontiers they have embraced the Rule of Law ; their common aim is peace ; and if they work together they form the most powerful group in the United Nations, even though they may sometimes disagree on means, though not on ends.

How then are we progressing towards the rule of law in the realm of relations between States ?

Since the time of Grotius mankind has endured many major wars. Inherent in his doctrine, in spite of his emphasis on the sanctity of treaties, was the exaltation of " the power of the State and its rulers ". Much as he sought to mitigate the horrors of war, there is no alternative to his theories but to admit that in the long run, " war is the litigation between States ". That world conflicts were avoided between 1815 and 1914—I do not ignore major wars—is due to the vigour of that much criticized conception called the balance of power, or, if you prefer it, to the view expressed by Keeton and Schwarzenberger, that roughly up to 1914—only very roughly, I should say—the members of the international society were broadly satisfied with the territorial limits which had been assigned to them. That degree of satisfaction was abruptly and terribly terminated in 1914. It is not too much to say that from 1914 onwards there has been consistently one State or group of States unwilling to accept territorial boundaries and determined by one means or another to extend them. We are unhappily aware of this phenomenon today.

* An Address to the American Bar Association in the General Assembly Hall of the United Nations on July 14, 1957. (Later in July, the American Bar Association, 3,000 strong, held its annual meeting in London, the first time in twenty-five years that it had met outside the United States.) This was the " journey to Westminster Hall, the birthplace of the Common Law " referred to by Sir Leslie Munro in his opening remarks.

After every great conflict mankind, exhausted from its ordeals and determined to avoid their repetition, seeks some sort of international arrangement to keep the peace. Following the end of the Napoleonic wars there was the Holy Alliance—a hesitant step towards the establishment of international order and weakened by the autocratic tendencies of its leaders. Nevertheless, its performances in the achievement of peaceful settlements were at least as creditable as those of the League of Nations.

The end of the holocaust of the First World War made men more determined than ever to preserve peace and establish a new international order. Contemporaneously the upsurge of extravagant nationalism was a formidable drag on the aims and objects of the League of Nations, which in no sense created a supra-national organization. Nobody who studies the feeble attempts of the League to check Mussolini will fail to realize how far the world was in the inter-war years from the establishment of the Rule of Law among nations.

The end of the last war followed swiftly on the fall of the atomic bomb on Japan. The use of this horrendous weapon laid grim emphasis on the aphorism of Sir Anthony Eden in 1945:

> "Every succeeding scientific discovery makes greater nonsense of old time conceptions of sovereignty."

And so was born the United Nations, no supra-national organization, but another attempt by nations and men to create an instrument for the preservation of peace.

The dawn of the atomic age cannot brighten into a peaceful day for mankind unless nations and their governments are ready to observe the Rule of Law and to turn the great world organization called the United Nations to proper account. If the United Nations fails, this will not be the fault of the organization itself. It will be the fault of nations who compose it and even of individuals, if they are fearful of responsibility, who choose the governments of those nations. When you blame the United Nations for failing to solve the Hungarian problem, be very careful lest you are blaming yourself, for the United Nations can do no more than you will authorize your governments to do.

I am reminded of a speech by Mr Ernest Bevin in the House of Commons in November, 1945. Mr Bevin emphasized the slow but triumphant growth of the Rule of Law in the United Kingdom and went on to say this of the relations between States:

> "[Mr Eden] said there must be established a rule of law. The law must derive its power and observance from a definite source, and in studying this problem I am driven to ask, 'Will law be observed if it is arrived at only by treaty and promises and decisions as at present arranged?'. In all the years this has broken down so often. I trust it will not break down again, but if it is not to break down again, I think it must lead us still farther on. In other words, will the peoples feel that it is their law if that law is derived and enforced by the adoption of past methods, whether the League of Nations or the Concert of Europe, or anything of that kind?"

Mr Bevin believed that the formation of the United Nations was a great progressive step and that it must be the prelude to a further development which he envisaged as the election to an assembly, by the peoples of the world, of their representatives. I believe that we are a long way yet from that stage, particularly because hundreds of millions languish under dictatorship and, therefore, can have no free vote under Communist domination, which flouts the Rule of Law and regards the Courts as merely the instruments of a ruthless dictatorship. It may be that the Charter is not a complete answer to the problems which now confront us, but it is a first step towards their solution. Our paramount, our sacred, duty is therefore to do all in our power to strengthen this United Nations.

We have done something. We in the United Nations have established an emergency force in the Middle East, drawn from many countries, to safeguard the peace. We are assiduously, patiently, seeking disarmament. We are trying, carefully and in good faith, to escape the dangers of an atomic race whose issue might be the fall of ever more destructive bombs on the cities of the world. We have set our hands to the task of preserving peace everywhere. We dare not falter.

The years since 1945 and the founding of the United Nations have been years of turmoil, as well as years of limited achievement. For those devoted to liberty and the ways of peace, they have been years of heavy anxiety and watchfulness. They have not been static years. Nor have they been without their own rewards. They have brought, to many parts of the world, an enlargement of freedoms and the removal of historical injustices, with notable co-operation between old nations and new in the completion of immense tasks of reconstruction and human betterment.

But they have also brought tension and armed conflict, the subjugation of millions, and the dismemberment of peoples with a proud history of unity and independence. In many places, violence remains active, or is but momentarily quiescent.

I am about to quote to you some lines written in the last century by Tennyson. In them, he speaks of "the Parliament of man, the federation of the world." That is still a dream, unrealizable in present circumstances. But what he wrote, with such prescience, does connote this: the immensity of today's challenge must be matched by the resolution of our response now.

> "For I dipt into the future, far as human eye could see,
> Saw the Vision of the world and all the wonder that would be;
> Saw the heavens fill with commerce, argosies of magic sails,
> Pilots of the purple twilight, dropping down with costly bales;
> Heard the heavens fill with shouting and there rain'd a ghastly dew
> From the nations' airy navies grappling in the central blue,
> Far along the world-wide whisper of the south wind rushing warm,
> With the standards of the peoples plunging thro' the thunderstorm;
> Till the war-drum throbb'd no longer, and the battle-flags were furl'd
> In the Parliament of man, the federation of the world."

MASTER AND SERVANT: EMPLOYER'S CLAIM AGAINST NEGLIGENT EMPLOYEE.

By K. L. SANDFORD and D. W. MCMULLIN.

The decision of the House of Lords in *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] 1 All E.R. 125, was the subject of the leading article in this Law Journal, *ante*, p. 49. On the same date a report appeared in a weekly paper of wide circulation that the Attorney-General had commented on the judgment, saying that the House of Lords decision was an interpretation of the law which was contrary to established practice, and indicating that the principle involved was to be referred to the next meeting of the Law Revision Committee.

The principle is, in short, that when an employer has had to pay damages to his injured servant, A, because of the negligence of a fellow-servant, B (the employer himself not being at fault otherwise than vicariously), the employer can recover such damages from the negligent servant, B.

The newspaper report, and some of the comments in the leading article in the Law Journal, might appear to suggest that this principle is something new, and has only been enunciated by the House of Lords so that it might be immediately repudiated by benevolent legislation. With respect, we believe the position to be different, as follows :

1. The principle has long been known to exist, and there is nothing new in it.
2. The *Romford Ice* case appears to be the first occasion when the principle has been seriously challenged.
3. The strength of the challenge is mostly to be found in the dissenting judgment of Denning L.J. in the Court of Appeal [1956] 2 Q.B. 180, 186 ; [1955] 3 All E.R. 460, 463, and it required the majority of the House of Lords to point out the error in it. However, it is probably what Denning L.J. said that has led others to express the view that here is a new principle and a bad one.

Denning L.J. said that until very recently there was never a case of the kind recorded, that many a master had been made responsible for the mistakes of his servants, but never had he sought to get contribution or indemnity from them. The leading article quoted this and went on to say that a new era in industrial relations would be entered upon if insurers started suing employees in reliance on the principle, pointing out that far-reaching and serious consequences would then inevitably ensue. May we say this : that whereas Denning L.J. may have been strictly correct (we do not know) in stating that there never had been a case of the kind " recorded ", nevertheless, it has been common knowledge amongst counsel who habitually act for defendants in industrial cases or for their insurers, that the right existed, and, indeed, steps to enforce that right have not uncommonly been taken in New Zealand. We would be surprised if counsel similarly engaged in English cases had not utilized the same right on occasions, without perhaps the case reaching the stage of being " recorded ". But for the learned Lord Justice to say that never had a master sought to get contribution or indemnity from his negligent servant is, with respect, not borne out by long established practice, in this country at least.

Such force as existed in the arguments of Denning L.J. in the Court of Appeal, and in the dissenting opinions in the House of Lords, was gravely weakened, it is respectfully contended, by the apparent obsession with the insurance and sociological aspects of the matter. Surely it is a principle sufficiently old to be beyond recall that insurance of one party is a totally irrelevant matter in disputes between such parties, and the right of insurance companies to subrogation is of equal antiquity. The dissenting judgments are, it is respectfully suggested, coloured by the continuous reference to the intervention and rights of insurers.

Turning then to the suggestion that the *Romford Ice* case will inevitably provoke far-reaching and serious consequences in industrial relations if the principle is enforced at the instance of insurers, is it not indeed some measure of the forbearance and moderation of insurers and their insured that the right has in the past been so sparingly exercised, despite the wide recognition amongst their legal advisers that such right existed ?

Of course, if the matter is to be considered by the Law Revision Committee, the fundamental question is not whether the principle is old or new, or what consequences will ensue if the principle is more widely enforced, but solely whether it is a good or bad principle. Are these not pertinent considerations ? :

(a) Where is the wrong in the proposition that the person whose negligence actually causes the damage should be answerable for it ?

(b) It was, no doubt, because the right of an injured workman to sue his negligent fellow servant was so likely to be fruitless, that the principle of vicarious liability on the part of the master was introduced. But the principle of vicarious liability is no more than a legal fiction. Here we are not dealing with cases of unsafe systems of work, unsafe machines, or lack of supervision ; but under our present law the master, however innocent, must pay for the carelessness, however gross, of one of his servants who injures another. It is a most benevolent principle ; and let that not be overlooked, if sympathy is to be expressed for the grossly negligent servant who may be called upon by his innocent employer to indemnify the employer. Can there be any argument where the moral rights lie ?

(c) The experience of those whose practice takes them often into industrial accident cases is that the existence of the right to recover indemnity from the negligent servant is of marked importance in establishing the truth from witnesses, at the time when such cases are being investigated. It has often been found that the negligent workman, from natural humanitarian feelings, and also from the understandable wish to help his injured workmate, frequently tells a " story ", and is prepared to repeat it in the witness box, which helps his workmate to establish negligence.

But when such a negligent workman, who has so complacently admitted his own negligence, has been told that he is liable to be joined as a third party, and thus may eventually have to indemnify the employer for any damages paid, he has then much more readily told what really were the other, and true, facts of the case. The existence of the right is a most potent means of obtaining the truth about industrial accidents. As Viscount Simonds said in the *Romford Ice* case (P. 134 G):

> "An action for damages [against the negligent servant] has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from the action would tend to create a feeling of irresponsibility in a class of persons from whom perhaps more than any other, constant vigilance is owed to the community."

(d) Few would ever suggest altering the principle that the innocent master is vicariously liable for his servant's negligence. It has its roots in society's demand that the innocent man injured by negligence should not go without compensation. But if such a principle represents humanitarianism rounding off the sharp edges of the law, let that principle not go so far as to remove entirely from the shoulders of the person who is morally and legally accountable for the injury, the entire responsibility for his own wrongdoing.

But, despite the tolerance exercised in the past, if it be thought that hardship might be done a workman by the exercise of the right against him, consideration could be given to ameliorating provisions on these lines: that upon any claim by a master to recover from his negligent servant, the Court hearing the claim could be empowered to order the negligent servant to indemnify the employer up to such extent as, in the Court's discretion, it thought fit, having regard to such matters as the blameworthiness of the servant's conduct, his present circumstances and means, and other relevant matters. It would not be difficult. By such a system the long established legal right would be retained, with all its useful sanctions, but heed would also be paid to humanitarian principles and to (it might with respect be said) the theories of social philosophy inherent in the dissenting judgments and speeches of the *Romford Ice* case.

Since the above was written there has appeared some reflections on *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* by Professor A. G. Davis, *ante*, p. 187. Professor Davis agrees that it is difficult to criticize that part of the *Lister* decision which confirms that an employee is under a contractual obligation of care to his employer (which is the foundation for a claim to recover from the negligent employee damages that the employer has paid), but he takes the view that *Lister's* case does have far-reaching consequences, that it puts back the clock, and that the exercise of the legal remedy by the employer against the negligent employee, as confirmed by the *Lister* judgment "obviously creates a social wrong".

In considering Professor Davis's article, it may not be fair to select just one or two phrases for particular comment. But to take one such phrase—is it "a social wrong" that a negligent person, whether he be rich or poor, master or servant, should be liable to pay for his own negligence? Is it not a rather radical suggestion that the negligent person should be excused and that the search should be made for someone (be it the master, an insurance company, or perhaps an employers' federation) whose finances can more readily bear the burden? The suggestion leads to this result—that the workman who, by the grossest negligence, injures his workmate at four o'clock is to be under no liability; but the same workman who, by a moment's carelessness, knocks over an elderly lady when riding home on his bicycle at five o'clock, is to be, as now, liable in damages. Yet in this second case no one thinks it "a social wrong" that the negligent cyclist (however unfinancial he may be) has to pay damages. Consider also the thousands of over-optimistic motorists (many of them employees on modest earnings) who carry no comprehensive motor insurance. They become personally liable for property damage due to their own negligence, without anyone rushing to their financial aid or suggesting that it is "a social wrong" that a workman should be liable to pay damages. Even if the theory is acceptable, is it always true that a master is better able to pay damages than a servant? What about a young tradesman starting in business as, say, a painter or a plumber who employs one seasoned and experienced hand at above award wages? And if the search is for some wealthier body to assume the burden, should we not include trade unions? Really, the social concept of a man not being required to pay damages because he is likely to be of poor financial resources has no logic to support it, unless we decide to impose a means test on all prospective defendants in negligence claims.

Of course the difficulty that faces those who dissent from the *Lister* judgment is one of logic. Put aside, for the moment, motor-accident injury cases where particular rules apply. Take an ordinary case of industrial accident. The injured servant can, if he surprisingly chooses, sue his negligent fellow-servant direct, and there is no doubt at all that he can recover. Is that negligent servant to be excused, however, because the injured man chooses to sue the master, who in turn seeks to recover from the negligent servant

Professor Davis claims that it was certainly not justice, even if it was law, that a negligent employee may find himself confronted (as Lister junior, alleged he was) with a claim arising out of an action over which he had no control; in which he was not allowed to give evidence; and in which counsel were engaged without his consent or knowledge. But why is that unjust? We are talking about the preliminary action of the injured man against the master. Counsel acting for the master is not acting unjustly by not desiring to call as a witness the other negligent servant. In hard fact, by doing so, he would probably put his own pot on a little harder. But when the master seeks in a later action to recover the damages from the negligent employee, the latter may then give all the evidence he wishes. The negligence, and the reasonableness of the damages, all have to be proved afresh, and the actual evidence and decisions on liability arrived at in the first case are irrelevant in the second. With respect, we fail to see any injustice in the fact that the negligent employee has a say only in one case, not in both.

Finally, the article suggests that if the news of *Lister's* case reaches trade union circles certain consequences may follow. The principle was, long before *Lister's* case, far from unknown to New Zealand trade unions. Indeed, if our information is correct, one trade union was so disturbed by the number of times

its members were being joined as third parties, or sued independently, for recovery of damages, that it obtained political backing for a conference with employers which resulted, we believe, in one particularly large employer agreeing not to make use of the *Lister* principle except in cases where there was *gross* negligence on the part of the employee concerned. It would be interesting to know how this attempt to differentiate between gross and ordinary negligence (a difference which the law has so long refused to recognize) has worked out in practice. But, in a sense, it amounts to a practical application of the suggestion made above —namely, that whether or not the master should recover from the negligent servant, and if so, how much, should be determined by the blameworthiness of the negligent servant's conduct.

SUMMARY.

1. The principle is old, not new.
2. The only importance of the *Romford Ice* case is that attention was drawn to the principle by the publicity given to it.
3. Statements that the right has never been exercised are not supported by experience.
4. The right has important practical advantages to those seeking the truth in industrial claims.
5. The right has been sparingly exercised in the past, giving little cause for fear that industrial relations will be damaged in future.
6. Consideration could be given to statutory amendment of the principle to give the Court discretion as to the amount recoverable.

THE NEW COMPANIES ACT 1955.

Dissolution of a Company.

By E. C. ADAMS, I.S.O., LL.M.

The Vesting in the Crown as bona vacantia of Property of a Dissolved Company. Section 337 (1) of the Companies Act 1955, which is to the same effect as s. 283 of the Companies Act 1933, reads :

> (1) Where a company is dissolved all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the Court under section three hundred and thirty-five or section three hundred and thirty-six of this Act be deemed to be *bona vacantia*, and shall accordingly belong to the Crown, and shall vest and may be dealt with in the same manner as other *bona vacabtia* accruing to the Crown.

It is followed by two subsections which are new to New Zealand, and which do not appear in the United Kingdom Act. We shall deal first with subs. (1) which is common to the United Kingdom and to New Zealand. It will be observed that there is excepted from the operation of s. 337 (1) " property held by the company on trust by any other person ". In *In re Strathblaine Estates Ltd.* [1948] Ch. 288 ; [1948] 1 All E.R. 162 ; 64 T.L.R. 178, a company whose capital was held by three shareholders in equal shares, owned a number of freehold properties. It was agreed in 1938 that the company should go into voluntary liquidation, and the properties distributed to the shareholders in specie. This agreement was reported to a directors' meeting, and recorded in the minutes, which were signed by the chairman. On April 14, 1938, an extraordinary general meeting of the company was held, at which a special resolution was passed for a voluntary winding up, and the agreement was recorded in the minutes and signed by the chairman. The title deeds of the properties were handed over to the applicants. The company was finally dissolved on April 25, 1942, but owing to inadvertence no action was taken to convey the properties to the applicants, who were the former shareholders. As the Court held that the company had been a *trustee* for the applicants, it made vesting orders under the Trustee Act 1925 (U.K.).

It is submitted that the principle of this case would apply in New Zealand to the Companies Act 1955 and the Trustee Act 1956. In *In re J. J. Craig's Contract* [1928] N.Z.L.R. 303 ; [1928] G.L.R. 329, the facts were as follows : In 1911 a company, then in liquidation, sold through its liquidators certain lands to C., and after C.'s death, the liquidators purported to convey the lands to his trustees ; but before this was done, the company had been dissolved in accordance with s. 266 of the Companies Act 1908. On a petition being filed by the trustees for a vesting order under s. 11 of the Trustee Act 1908, the Court made the order, because it was expedient so to do.

Such a vesting order made under the Trustee Act 1956, if it affected land transfer land, would be registrable under s. 99 of the Land Transfer Act 1952.

It will be noted that in *Craig's* case at the date of the conveyance the liquidators were functus officio, the company having then been dissolved. The same principle has been followed in Canada with regard to land held under the Torrens system. A vesting order—so the Canadian case holds—may be made where it appears that the transfer of certain land in favour of the purchasers thereof cannot be located, the vendor, a limited company having been dissolved and the purchaser never having registered the transfer. The Court should be satisfied that there are no outstanding claims adverse to that of the purchaser and that the purchase price has been paid : *Re Ray* (1932) 6 W.W.R. (N.S.) 282. In New Zealand in such circumstances as prevailed in the Canadian case the Supreme Court would make the order under s. 56 of the Land Transfer Act 1952.

THE WINDING UP OF OVERSEAS COMPANIES.

Russian corporations, which were dissolved by decree of the Russian Soviet Government, but which had assets in, or were carrying on business in, the United Kingdom, have been the means of making much case law in the United Kingdom in the last twenty-five years or so. Let us take for instance the case of *Re Azoff-Don Commercial Bank* [1954] Ch. 315 ; [1954] 1 All E.R. 947. The facts were that a Russian bank (incorporated) had been dissolved in Russia by 1922. It had never had an office or

place of business in England, and was not registered under the United Kingdom Companies Act; it had, however, carried out a number of mercantile transactions in England, was a customer of and a shareholder in an English bank, and had substantial assets in England. Five Norwegian banks presented a petition for the winding up of the company. The Crown opposed the petition and claimed that the English assets of the company were bona vacantia, and that there was no jurisdiction to make a winding-up order without the Crown's consent; that the company had not carried on business in England in such a way as to found jurisdiction to make such an order; and that, if there was jurisdiction, an order should not be made at the suit of foreign creditors, but that it should be left to the Crown to get in the assets so as to make ex gratia payments to English creditors in respect of irrecoverable rouble debts. But the Court held that the Royal Prerogative in respect of bona vacantia was cut down by the provisions of the Companies Act. The highest title which the Crown could have was a defeasible title liable to be defeated by a winding-up order, which under appropriate conditions could be made without its consent. Furthermore the Court held that, as there were substantial assets in England on which a winding-up order could operate, there was jurisdiction to make an order, and that the exercise of that jurisdiction would be justified. The general principle was that assets should be distributed among the *whole* body of the creditors. It may be mentioned that it had previously been held in *Banque des Marchands de Moscou* (*Koupetchesky*) v. *Kindersley* [1951] 1 Ch. 112; [1950] 2 All E.R. 549, that in the case of an overseas corporation which had ex hypothesi, been dissolved and extinguished in the country where it had been established, it was not necessary, as a statutory condition of jurisdiction in the English Courts to wind it up, to prove that it had, before its dissolution, established in some place in England a branch or other business and that such business had ceased. Also in *In re Banque Industrielle de Moscou* [1952] Ch. 919; [1952] 2 All E.R. 532, the limited rights of the Crown to bona vacantia on the winding up of an overseas corporation were also brought to light. A winding-up order was made in respect of a Russian bank which had long been previously dissolved by Russian law. Both before and after the date of the order, the Crown asserted a claim to the assets as bona vacantia. At the hearing of a summons the question was raised whether the Treasury Solicitor was entitled, notwithstanding the winding-up order, to assert a claim to get in the outstanding assets of the company in priority to the liquidator. Wynn-Parry J. held: (1) that the right of the Crown to the assets as bona vacantia was temporarily defeated, so that (2) the Crown was entitled only to the surplus, if any, remaining after proper administration.

PRACTICE AS TO "RESURRECTION" OF A COMPANY.

"The difficulty I have", said P. O. Lawrence L.J. in *Re Sir Thomas Spencer Wells* [1953] Ch. 29, 37, "is in seeing what is the difference between the death intestate of a bastard and the dissolution of a company". His Lordship was, of course, considering the destination of the property of a company after its dissolution. One of the points of difference between a deceased intestate and the dissolution of a company which, however, might have struck his Lordship lies in the fact that, whereas it is impossible to bring back the former to life by any process known to the law, the resurrection of the latter is a matter of everyday occurrence: (1952) *102 L.J. Newsp.* 3, where the English practice is minutely stated in a most practical manner.

NEW PROVISIONS AS TO VESTING IN CROWN AS BONA VACANTIA, OF LAND OWNED BY A DEFUNCT COMPANY.

Having dealt with s. 337 (1) of the Companies Act 1955, it may now be convenient to set out the new provisions, subss. (2) and (3), which have been enacted to settle the law on a difficult point which has long disturbed a few conveyancers, and to supply a gap in a procedural step:

> (2) This section applies to companies dissolved at any time, whether before or after the commencement of this Act, and whether before or after the commencement of the Companies Act 1933.
>
> (3) Where transmission to the Crown as *bona vacantia* under this section of any land or interest in land has been registered under the Land Transfer Act 1952, the effect of any order under section three hundred and thirty-five or section three hundred and thirty-six of this Act shall not be to revest the land or interest in the company but shall be to entitle the company to compensation equal to the value of the land or interest as at the date of the registration of the transmission. Any such compensation shall be paid from the Land Settlement Account on the direction of the Minister of Lands. If the land or interest has been sold or contracted to be sold by the Crown the value of the land as at the date aforesaid shall be deemed to be the net amount received or to be received from the sale. In the event of any dispute as to the value of the land or interest in any other case the matter shall be referred to and determined by the Land Valuation Court, which for that purpose shall have jurisdiction as for a proceeding under section thirty-three of the Land Valuation Court Act 1948.

The first statutory provision in New Zealand enacting that, where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property) should be deemed to be bona vacantia and should vest in the Crown, was s. 283 of the Companies Act 1933, which came into force on April 1, 1934. It is clear from *Re Sir Thomas Spencer Wells*, that s. 283 was not retrospective. Then before January 1, 1957, in whom did land in New Zealand vest, appearing in the name of a company or other corporation which became defunct before April 1, 1934? The fact that s. 283 of the Companies Act 1933 was not retrospective is not conclusive of the point, for there may be a vesting in the Crown by Royal Prerogative as well as by statute.

In 3 *Halsbury's Statutes of England*, 2nd ed., 728, we find the following:

> "In the case of the dissolution of a company before the 1929 Act [in New Zealand the 1933 Act], freehold land held by the company reverted to the grantor and leaseholds became extinguished and merged in the reversion immediately expectant thereon: see *Hastings Corporation* v. *Letton* [1908] 1 K.B. 378."

As regards leaseholds (which are personalty) that opinion based on the *Hastings Corporation* case was clearly wrong: *Re Sir Thomas Spencer Wells*, *supra*, a decision of the English Court of Appeal, where the former case was severely criticized. And, in *Re Strathblaine Estates Limited* [1948] Ch. 228; [1948] 1 All E.R. 162, Jenkins J. thought that the *Hastings Corporation* case was also clearly wrong as applied to freeholds but his opinion was obiter.

The only New Zealand case directly in point appears to be *In re Langford* (1932) 27 M.C.R. 69. That

case dealt with a parcel of land under the Land Transfer Act standing in the name of a company which had become defunct by operation of s. 231 of the Companies Act 1908. The learned Magistrate held that the land had reverted to the Crown :

> " The title has come to an end so far as private ownership is concerned and goes back to its source—the Crown. The land is therefore ' Crown land ' for the purposes of the Mining Act."

That case, however, does not appear to possess very much efficacy as a precedent : it was an ex parte application, and it would appear that the learned Magistrate was not referred to all relevant cases.

It may be mentioned that the *Hastings Corporation* case was followed by the English Court of Appeal in *Re Woking Urban Council (Basingstoke Canal Act* 1911) [1914] 1 Ch. 300. The principle laid down in the *Hastings Corporation* case purports to have its source in *Littleton* and the blessings of *Coke*. The theory is that, although the grant of land in England operated to convey the fee simple, in the case of a grant to a corporation there is annexed an implied condition, that, if the corporation is dissolved whilst still owning the fee simple, the fee simple shall revert to the grantor or transferor. This theory has been vehemently contested, and just as vehemently supported, by academic lawyers who have made a close study of medieval land tenure, as witness the two articles by M. W. Hughes and F. E. Jarrer in (1935) 51 *Law Quarterly Review*, 347 and 361.

However, it is clear that the answer to the question posed above (Then in whom did land in New Zealand vest, appearing in the name of a company or other corporation which became defunct before April 1, 1934 ?) must now be thus : The land is vested in the Crown, unless the Crown has disclaimed under s. 338, *infra*. Land which has become the property of the Crown as bona vacantia, is " Crown land " for the purposes of the Land Act : see Land Act 1948, s. 2.

Position Where Crown Has Taken Title by Transmission to Land of a Defunct Company.

Subsection (3) of s. 337 ought to prove a very handy administrative provision. It sometimes happens that a person desires to acquire title to a parcel of land registered under the Land Transfer Act in the name of a defunct company. Such an inquiry is referred in practice to the Lands Department ; and the Commissioner of Crown Lands, on behalf of the Crown, applies by transmission and on registration thereof the statutory estate in fee simple vests in the Crown, which may effect improvements before again alienating the land. All this good work would go for nought, if any creditor or shareholder of the defunct company could afterwards set the Crown's and its alienee's title aside, by obtaining an order for the restoration of the company. The subsection does not prevent such an order being obtained, but if obtained, it does not affect the Crown's title, but the creditors or the shareholders, as the case may be, are entitled to compensation.

The right of the crown to disclaim property vesting as bona vacantia is contained in s. 338, which is as follows :

> 338. (1) Where any property vests in the Crown under section three hundred and thirty-seven of this Act, the Crown's title thereto under that section may be disclaimed by a notice signed by the Secretary to the Treasury.
>
> (2) Where a notice of disclaimer under this section is executed as respects any property that property shall be deemed not to have vested in the Crown under section three hundred and thirty-seven of this Act, and subsections two and six of section three hundred and twelve of this Act and section three hundred and thirteen thereof shall apply in relation to the property as if it had been disclaimed under subsection one of the said section three hundred and twelve immediately before the dissolution of the company.
>
> (3) The right to execute a notice of disclaimer under this section may be waived by or on behalf of the Crown either expressly or by taking possession or other act evincing that intention.
>
> (4) A notice of disclaimer under this section shall be of no effect unless it is executed within twelve months of the date on which the vesting of the property as aforesaid came to the notice of the Secretary to the Treasury, or, if an application in writing is made to him by any person interested in the property requiring him to decide whether he will or will not disclaim, within a period of three months after the receipt of the application or such further period as may be allowed by the Court.
>
> (5) A statement in a notice of disclaimer of any property under this section that the vesting of the property came to the notice of the Secretary to the Treasury on a specified date or that no such application as aforesaid was received by him with respect to the property before a specified date shall, until the contrary is proved, be sufficient evidence of the fact stated.
>
> (6) A notice of disclaimer under this section shall be delivered to the Registrar and retained and registered by him, and copies thereof shall be published in the *Gazette* and sent to any persons who have given the Secretary to the Treasury notice that they claim to be interested in the property.
>
> (7) This section shall apply to property vested in the Crown as aforesaid at the commencement of this Act, and where the vesting came to the notice of the Secretary to the Treasury more than six months before the commencement of this Act notice of disclaimer under this section may (except where an application is made to him under subsection four of this section) be executed at any time within six months after the commencement of this Act.

Section 338 is new to New Zealand and to the United Kingdom. It enables the Crown to disclaim property of a dissolved company which vests in the Crown as bona vacantia, with the same consequences as if the company had disclaimed the property under s. 312. The power of disclaimer is given to the Secretary to the Treasury. In the United Kingdom it is exercised by the Treasury Solicitor.

There appears to be a dearth of authority on this section in the United Kingdom. It will be noted that the section does not state in whom the property disclaimed will vest. Does this not bring us back to the *Hastings Corporation* case, as to the devolution of an estate in fee simple vested in a defunct company ? For example, if A transfers a fee simple to a company which is dissolved and the Crown disclaims under s. 338, will it not vest in A ? A fee simple cannot exist without an owner, and if it does not vest in A, in whom does it vest ? It is true that the Court may make a vesting order under s. 312 (6), but nobody may desire a vesting order ; the land may be as an unwanted child. It would appear that in the absence of an application being granted under s. 312 (6), the Crown could not effectively disclaim an estate in fee simple, where the dissolved company is the original grantee under the Crown grant or the certificate of title in lieu of grant, and remains the owner at the date of the dissolution.

In the case of a lease, the lease probably would revert to the lessor, unless a vesting order were made under s. 312 (6). If the Crown itself were the lessor, and nobody wanted the lease, presumably the Crown would be obliged to resume possession.

TOWN AND COUNTRY PLANNING APPEALS.

Reilly *v.* Mt. Albert Borough.

Town and Country Planning Appeal Board. Auckland. 1956. September 20; October 20.

Building Permit—Motor-garage, Workshop, and Service Station —Area zoned as "residential"—Vacant Site close to Business and Commercial Properties—Appropriateness of zoning to be considered when Council's Scheme publicly notified—Right of Appeal then available—Erection of "non-conforming" Building in Residential Area disapproved—Town and Country Planning Act 1953, ss. 22, 23.

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Mount Albert Borough Council refusing to grant a permit for the erection of a motor-garage, workshop, and service station on her property situated in Mount Albert Borough at the corner of Sandringham and Tranmere Roads.

The grounds for appeal were that the land in question was a vacant site situated adjacent to numerous business and commercial properties in Sandringham Road; that these non-conforming properties in the residential zone made the appellant's land more suitable for commercial than for residential use; that there was a scarcity of and a great demand for commercial sites in the area; that it was uneconomic for the site to continue to be idle; and that it was in the public interest to have a garage erected on the site as it would be of value to the community and would not detract from the amenities of the neighbourhood.

The Council replied that the site in question is shown as "residential" in the undisclosed district scheme for the Mount Albert Borough, that the said work would accordingly be a "detrimental work" in that it would detract from the amenities of the neighbourhood provided or preserved under the undisclosed district scheme, and that it would be contrary to town-and-country-planning principles likely to be embodied in the scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). Garages and service stations are not a permitted use or a conditional use in residential areas—they are permitted only in commercial areas, and accordingly the Council held that the proposed building would be a "detrimental work" under s. 38 (1) (*b*) of the Act.

The company at present carries on the business of motor repair and engineering work in a "back yard" site in a residential area and seeks more suitable premises.

A good deal of the appellant's case was directed to the proposition that this land is not suitable for residential purposes because immediately adjoining it on the south-western side is a two-storeyed concrete building used by a clothing manufacturing business and next to that is a grocer's shop, both of which are "non-conforming" uses in a residential area.

The Council's undisclosed district scheme provides for a commercial zone not very far from the land in question, but the north-eastern boundary of that zone stops short of Halesowen Avenue.

The corners of Halesowen Avenue and Sandringham Road are occupied by substantial residences owned and occupied by medical practitioners.

The substance of the appellant's case is really that this commercial zone should be extended up to Tranmere Road so as to embrace the appellant's land.

To uphold that contention would mean that the Board would be altering the zoning of this area whilst the Council's scheme is still "undisclosed". The rights of other owners in the vicinity would be affected without their having had any opportunity of being heard on the question. The respondent Council's scheme is about to be publicly notified under s. 22. When that happens the owners or occupiers of property affected by the scheme (including the appellant) will have the right of objection given them by s. 23 and the right of appeal if their objections are not allowed. It is only when that stage has been reached that the Board, if called upon so to do, will determine the appropriateness of zoning.

It follows, therefore, that this appeal must be considered as an appeal against the refusal by the respondent Council to issue a permit for the erection of a non-conforming building in a residential area.

The evidence indicates that the Mount Albert Borough is now almost fully built on, and no marked future growth is expected. It is predominantly residential in character and no evidence was adduced to establish that the areas zoned as commercial are inadequate for the commercial needs of the district. The Board is not prepared to approve of the erection of a new "non-conforming" building in a residential area.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Te Puni *v.* Petone Borough.

Town and Country Planning Appeal Board. Wellington. 1956. June 7, 20.

Building Permit—Re-erection of Dwellinghouse—Area zoned as "general industrial district"—No Present Demand in Locality for Land for Industrial Purposes—House in Small Residential Pocket in Industrial Area—Refusal of Consent involving Owner in Grave Financial Loss—Council's Scheme not prejudiced by Granting of Permit—Town and Country Planning Act 1953, s. 33.

The applicant was the owner of a property of 18.22 perches, being 71 Esplanade, Petone. There was a residence on this property in which the applicant resided with his wife and six children, but the dwelling was in very bad condition, and the Maori Affairs Department, to whom the applicant has applied for financial assistance, intimated that it was not prepared to give him such assistance unless the present dwelling was pulled down and a new one erected. The Petone Borough Council already had an operative district scheme; and, under that scheme, the property was in an area zoned as a "general industrial district". When the applicant applied to the Council for the requisite building permit the Council declined to issue a permit because residential buildings were not permitted in an industrial district except under special circumstances not applicable to this case.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Council acted properly and consistently in refusing to issue the permit, because, of course, it is its duty to maintain the general principles established by its district scheme.

The property in question has a frontage on to the Esplanade, has a dwellinghouse on each side of it, and at the back bounds on to the Maori cemetery. There is no suggestion that there is at the present time any demand for land in this immediate locality for industrial purposes. The position here is that the applicant's property is in a small residential pocket in an industrial area; and, after careful consideration of the evidence, the Board has come to the conclusion that to refuse consent would involve the applicant in very grave and substantial financial loss. It is further of the opinion that to allow the re-erection of a dwelling on this particular site would not materially prejudice the Council's scheme.

The Board consents to the issue of a permit to erect a dwelling on the above-mentioned property subject to the condition that the applicant, in erecting a dwelling, complies with the provisions of the Petone Borough Town Planning Scheme No. 1 pertaining to Special Residential Districts. No order as to costs.

Appeal allowed.

Prangley *v.* Manukau County.

Town and Country Planning Appeal Board. Auckland. 1955. May 6; June 8, 9; July 1.

Subdivision—Area zoned as "rural"—Sections in Subdivision in Residential Area with Usual Amenities—Other Sub-Subdivisions allowed in Area—Adequate Provision for Urban Development in Locality—Proposed Subdivision not in Conformity with town-and-country-planning Principles likely to be embodied in Undisclosed District Scheme—Town and Country Planning Act 1953, s. 38.

Appeal against the decision of the Manukau County Council under s. 38 of the Town and Country Planning Act 1953 refusing him permission to subdivide approximately 6 acres of land owned by him in the Mangere District into 19 residential sites.

The appellant's grounds for appeal were that the land was suitable for subdivision and was in a residential area with the usual amenities including water, electric power, adequate public transport and shopping facilities; that the land was unsuitable for use as a farm or market-garden; that the subsoil

of the proposed subdivision was suitable for septic tanks to be installed in each section; that it faced a formed and metalled public road, and that other subdivisions had been allowed in the area.

The Council replied that the surrounding land was zoned as "rural" so that the existing subdivision constituted a non-conforming residential area and was an isolated pocket of urban development in a predominantly rural area; and that the subdivision of the land referred to in the appeal was not in conformity with the town-and-country planning principles likely to be embodied in the Manukau County Council's undisclosed district scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). The land under consideration was in an area zoned as "rural" under the respondent Council's undisclosed district scheme and that zoning was appropriate.

Approval of that subdivision would result in adding to a non-conforming area and extend an isolated pocket of urban development in a predominantly rural area.

The respondent Council's undisclosed district scheme made provision for urban areas in Mangere Bridge, Mangere East, and Mangere Central, and the provision so made was adequate for the immediately foreseeable needs for the urban development of that part of the Council's district.

The proposed subdivision was not in conformity with the town-and-country-planning principles likely to be embodied in the respondent Council's undisclosed district scheme for the area.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Barker and Another *v.* Hutt County.

Town and Country Planning Appeal Board. Wellington. 1956. October 30; November 6.

Building Permit—Concrete Building containing Six Shops on State Highway—Area zoned "residential" in Recommended Scheme—Demand for Shops—Property not reasonably regarded as Desirable Residential Site—Use for Commercial Purposes not detracting from Amenities of Neighbourhood likely to be provided in Council's Scheme—Town and Country Planning Act 1953, ss. 38, 42 (1).

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Hutt County Council refusing permission for the erection of a concrete building containing six shops at Paraparaumu on a piece of land having a frontage to the Paekakariki-Levin State Highway.

The grounds for appeal were that there was no operative district scheme applicable to the area in question; that the said land was not suitable for other than commercial purposes and that it was in the public interest that the land should be zoned for commercial purposes; that there was little land available in the vicinity for commercial purposes having regard to the future development and growth of the population in the district; that the said land was surrounded on three sides by the existing commercial area and on the south side by farm land, and that the nearest residence was a farm house south of the appellants' land.

The Council replied that in its recommended scheme the appellants' land was shown to be zoned as "residential"; that other land of a similar nature was used satisfactorily for residential purposes; that ribbon development along a Main Highway was not desirable; and that the Council proposed to develop a more central shopping area when the motorway and aerodrome extension, with their subsidiary works, had taken shape on the ground.

The judgment of the Board was delivered by

REID S.M. (Chairman). The property in question is situate on the northern boundary of an area zoned as "residential" and on the north it adjoins the car park of the Paraparaumu Hotel. It is opposite to the railway station and Road Services Bus park; on the opposite side of the road to the north of the railway station, is a row of seven shops and business premises so that it is immediately adjacent to an established commercial area.

The land to the south is farm land, although zoned as "residential".

The evidence of the appellants indicates the existence of a demand for shops in this immediate locality. The appellants wish to modify their plan and make provision for seven shops and a bank office. They have prospective lessees ready to occupy this accommodation and have had requests for accommodation from other would-be tenants.

This particular property, having regard to its situation immediately adjoining the hotel and closely adjacent to an established commercial centre, cannot be reasonably regarded as a desirable residential site and its use for commercial purposes cannot detract from the amenities of the neighbourhood likely to be provided or preserved under the respondent Council's scheme.

The respondent Council tendered no evidence of any value in reply to the appellants' submissions. It rested its case on a general submission that no decision should be given on the question at issue until the time for lodging objections to the scheme, the hearing of those objections and of any consequential appeals arising therefrom had expired. Under s. 42 (1) of the Act the Board is enjoined to hear every appeal under the Act "as soon as practicable after the lodging of the appeal" and no sound grounds have been advanced by the respondent Council for withholding a decision in this particular case for an indefinite period.

The Board holds that the appellants have made out a strong prima facie case in support of their appeal, the respondent Council has made no adequate case in reply and the appeal is accordingly allowed.

The appeal relates only to the refusal of an application for a permit for the erection of six shops. If the appellants wish to erect eight shops they must make a new application. No order as to costs.

Appeal allowed.

McDonnell *v.* Taupo Borough.

Town and Country Planning Appeal Board. Taupo. 1955. May 10; June 9.

Zoning—Objection to zoning as "rural"—Area within worough—Proposed Subdivision into Residential Sites—Zoning of Area as "rural" in accordance with Town-and-country-planning Principles—Possibility of Future Reconsideration—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953 against the decision of the Taupo Borough Council disallowing the appellants' objection to the zoning as "rural" of an area within the Borough which contained approximately 118 acres of property owned by the appellants. The appellants wished to subdivide approximately 80 acres of this land into 297 residential sites and sell them as such.

The appellants' grounds for appeal were, inter alia, that the area in question was eminently suitable for subdivision into ¼ acre residential building sections; that there was a large unsatisfied demand from timber workers and other persons wishing to buy sections in Taupo; and that there were very few sections in Taupo available for sale for residential purposes at prices which workers could afford to pay.

The Council replied that the objection to the zoning of this area as "rural" was dismissed in pursuance of a policy of consolidating future development as far as possible into areas within the Borough already subdivided but not yet built upon. This policy was instituted to minimize the economic problems created by the provision of services.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. Over recent years Taupo has expanded considerably, but in relation to the area of the Borough its residential occupancy is widely dispersed and the provision of the usual services appropriate to residential areas presents a considerable economic problem.

2. The respondent Council's policy of consolidating future development as far as possible in stages into areas already subdivided to residential density but not yet built upon is economically sound and in accordance with town-and-country-planning principles. There are 1,802 unoccupied sections within the Borough at present.

3. The present zoning of the area under consideration as "rural" is sound and in accordance with town-and-country-planning principles though future development may justify a reconsideration of that zoning.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Viewing with the Judge.—In *Tameshwar* v. *Reginam* [1957] 2 All E.R. 683, the two prisoners were convicted in British Guiana on charges of robbery with aggravation. The jury made a request to view the scene of the robbery and asked that five witnesses should attend. The view took place in the presence of the accused, a superintendent of police, counsel for the prosecution, and counsel for one of the accused; but before leaving a warning was issued by the Judge that the jury were not to have any communication nor to engage in any discussion or argument. He did not himself attend. At the view four witnesses pointed out various places, and a further three were also present. When the trial was resumed on the following day, evidence was given of what had happened at the view, the witnesses being available for cross-examination. In allowing the appeals against conviction, the Privy Council (Earl Jowitt, Lord Tucker, and Lord Denning) used the following masterful language:

> Slow as their Lordships are to interfere, yet, if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal. Their Lordships think it plain that if a Judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case, the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the Judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the Judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked; and his summing up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Counsel for the Crown argued that the conviction should not be set aside unless the absence of the Judge was shown to have affected the result of the trial; but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass.

The Vickers Case.—Some concern has been expressed in England over the hanging of John Willson Vickers, the first for a period of two years. A man of twenty-two, he was convicted of the murder of Miss Jane Duckett, aged seventy-two, into whose shop he broke at 2 a.m. in order to get some money. He had not expected to encounter the deceased who was deaf, and he hid in the cellar when he saw her coming down the stairs. She did see him, however, and having struck her several times (according to the pathologist, moderately light blows) he ran upstairs and searched her rooms. The case against him was that he attacked her with intent to do grievous bodily harm and that her death, as a result, was murder done in the course of the furtherance of theft. At the first hearing of the appeal to the Court of Criminal Appeal, there was a difference of opinion amongst Lord Goddard L.C.J. and Byrne and Devlin JJ., but Hilbery and Slade JJ. were added to the Bench on a second appeal; and the L.C.J. delivered the judgment of a unanimous Court of five Judges, dismissing the appeal. A fiat for Vickers to appeal to the House of Lords was refused by the Attorney-General (Sir Reginald Manningham-Buller) upon the ground that the case was not one of "exceptional public importance." The disturbing feature of the matter is that, under the Homicide Act, a person without any actual intention to kill is liable to the death penalty since the intent to commit grievous bodily harm in the course of theft is still sufficient "malice aforethought" to sustain the charge of murder on the death of the victim. On the other hand, a person whose undoubted intention is to kill is not liable to the death penalty if he uses his hands, a knife, or even poison, unless he is convicted of another murder done on a different occasion. It would thus seem most unwise for a person who successfully plans to murder in the manner mentioned to make a habit of the particular method he adopts.

In Open Court.—What may be regarded as a contribution to the contemporary question of private Court hearings in specified circumstances—the matter was raised in the trial of John Bodkin Adams on a capital charge in the Eastbourne murder case and animadverted on at the Tenth Legal Conference in Christchurch at Easter—is contained in some remarks addressed by Lord Denning to the British National Association of Justices' Clerks' Assistants (*101 Solicitors' Journal* 434). "It is a fundamental principle of our law", His Lordship said, "that every proceeding in a Court of justice should be held in public, unless there is some overwhelming reason for it to be held in private. . . . It has often been said that a Judge, when he tries a case, is himself on trial to see that he behaves properly, conducts the case properly, and that his reasons, when given, justify themselves at the bar of public opinion. . . . The great principle should always be that cases should be heard in open Court when the newspaper reporters are there to represent the public, and to see that everything is rightly done. They are, indeed, in this respect the watchdogs of justice". The point had been well illustrated only three days before (May 22) in the Court of Appeal, where an application to hear in private an interlocutory appeal concerning the custody of two children was rejected. Lord Justice Hodson said: "We generally rely on the good sense of the Press in these cases unless there is something very unusual. We really are not able in this Court to hold proceedings in private".

From My Notebook.—"The only question here is whether, when A entrusts to the Post Office a postal packet for transmission overseas, a contractual tie results. Clearly the Postmaster-General is in quite a different position from a private individual. He is responsible to the Crown for running a public service and, incidentally, a monopoly. The money that is paid by the public is revenue."—Parker L.J. in *Triefus & Co. Ltd.* v. *Post Office* [1957] 2 All E.R. 387, 394 (followed by McGregor J. in *Postmaster-General* v. *W. H. Jones & Co. Ltd.* (Wellington: July 12, 1957).

AFTER THE BALL IS OVER.

By Advocatus Ruralis.

Advocatus has reached that stage where a paternal Government pays him £25 * per quarter for reasons best known to itself. As a result of this Advocatus decided that it would be proper to reduce his office time to 20 hours a week. Up till recently, when questions of law came up, Advocatus referred them to the Junior Partner, whose knowledge of detail used to comfort him.

Whether it is the result of the 20-hour week we do not know, but we find that, when Advocatus now asks a legal question, he is given a book and the latest references, and is sent back to his room. Recently, however, Advocatus had a chance to get his own back. The necessity for a Caveat arose, and the Junior Partner thought it proper to type the Caveat on a blank sheet of demy. We assured him that this was not done and that he would find Caveat forms in the cupboard in the Back Room, but he suggested that it would be quicker to write to Wellington for new ones. Somewhat nettled we repaired to the cupboard, and we must admit having had a most interesting day.

First, we found the out-of-date Land Sales Forms. In case another generation has arisen who knows not our trials and tribulations—under the Land Sales Acts, Advocatus transferred two small sections from ABC to ABC Ltd. One section was in the North Island and one in the South Island. To comply with the idiosyncrasies of the individual Registrars of Land Sales Courts, Advocatus prepared a series of documents for signature. When the minimum necessary forms had been executed, Advocatus signed his name as witness 43 times, and for this, and subsequent work, his Law Society decreed that he should receive £4 14s. 6d. Just below the Land Sales Court forms we came upon forms of objection against calling up for territorial service, circa 1940. Keeping steadily on, we came upon the various forms under the Mortgagors' and Tenants' Final Adjustments Act, and we remembered that this was the period when we prepared affidavits and typed about fifty forms, in order to get our Farmer's mortgage reduced by £1,500—and the law decreed a maximum fee of £5 (and the Farmer bought a new car).

Still on the track of the Caveat, we passed through the earlier forms of mortgage interest postponements, till we found about 1930 some of the initial forms of farmers' income tax, and we must admit this gave us some pleasure. Next we found traces of three different systems for keeping track of our debt collecting.

Back through the 1920's we found those amazing forms we used to fill in for the Commissioner of Crown Lands, Publican's Licences, application forms to bring land under the Land Transfer Act, and other forms which we could not remember.

We came upon a batch of mortgage forms for a building society that had been wound up twenty years ago. We are still mystified at one form we found called a Papakaianga certificate under, we think, the Native Land Act 1909. If this can be explained in short sentences we would be interested. We also found a batch of Government forms for Deeds of Mortgage, with the endorsed release forms dated 191–. We assumed that they sprang from some era prior to 1919. These deed forms started nostalgic memories of deeds searches and bills of costs based on the deeds scale—often added to by collateral documents under the Land Transfer Scale. Any older practitioner will remember that the Deeds Security was always the main security for reasons which may or may not be apparent now. We came upon traces of procuration fees—a system necessary in its day, but which came to be frowned upon. (Advocatus remembers some thirty years ago putting in four months hunting for £43,000 for a private mortgage and, when it was found, another firm prepared the mortgage.) We passed through the heap which marked the glamorous period of 1919-1920 when a fourth mortgage was almost normal—back through the period before mortgages were stamped, and by this time we were beginning to weaken. We remember in 1913 there was an examination question which said: What are the steps to be taken when a registered document cannot be found? One examinee started his reply by saying: "In Wellington, when a document is believed to be lost, the practice is to send a clerk to the office of A. B. If after three visits no trace is found, the clerk is then sent to the office of M. L. If there is still no trace the following steps are taken:". The examiner came from Wellington, and the paper received full marks.

Just when Advocatus was despairing, we came upon the gem of the collection. It was a record of a licensing committee of a district long defunct. There was a tradition in the office that at some time this record had been pinched from the archives before they went to the dump. It was a signed original dated 1882, when men were men and women lived in the great open spaces. It was an application by the licensee of "The Te Iwi Hotel" to sell spirituous liquors on March 17, 1882 (yes, that's right, St. Patrick's Day) at the sports meeting, and subsequently at the ball to be held in the Te Iwi Public Hall. "Granted on condition that the booth at the sports is closed at 6 p.m. and that no liquor be sold at the Public Hall after 5 a.m. in the morning of the 18th March, 1882, and that the applicant do pay a fee of 30/-." Licensing Committee, per ABC.

Believe it or not, under this document we found the Caveat form. It was a bit grubby, and it referred to the Land Transfer Act 1908, but otherwise it was in good condition. We pointed out that we used to pay a bob a form for them, but for some reason of his own the Junior Partner refused to use it.

A typist, who is a philatelist, tells us that the postage on the various envelopes would probably pay for the day's work. We are thinking of getting a dictaphone.

* Twenty-five guineas: Ed.