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SUBDIVISIONS IN BOROUGHS, CITIES, AND COUNTIES: THE AMENDED LEGISLATION.

IN a recent issue, *ante*, p. 193, we considered at some length the effect of the judgment of the Court of Appeal in *Griffiths* v. *Ellis*, since reported [1958] N.Z.L.R. 840. It was there held that all the consequences of illegality attached to an agreement for sale and purchase of land in a subdivision in a borough at the moment of its execution, if that execution, though after the approval by the Borough Council of the subdivisional plan, was before such plan had been "duly deposited under the Land Transfer Act 1952". This judgment rendered illegal any agreement for sale and purchase of land in a subdivision in a borough, unless the disposition of that land (as by such an agreement) was in accordance with an already approved plan and unless the plan had already been duly deposited. This was the result of the Court of Appeal's interpretation of s. 350 (2) (a) and s. 351 (8) of the Municipal Corporations Act 1954 (or the similarly-worded corresponding provisions of the now-repealed Municipal Corporations Act 1933).

I.—Subdivisions In Boroughs.

In our article, we said that the judgment in *Griffiths* v. *Ellis* affected the legality of some hundreds of sale-and-purchase agreements then in existence. Conveyancers thereupon told us that this was an understatement: those agreements numbered thousands. Be that as it may, we urged that the Legislature should, this year, amend the relevant sections of the Municipal Corporations Act 1954, so that all such agreements should have legal force and effect as from the time of their respective execution, even though, at that time, the deposited plan of the relevant subdivision had not then "been duly deposited under the Land Transfer Act".

Earlier, the Law Revision Committee, in supporting the suggested amendment, had gone further and recommended, in addition, a clarification of the position of leases of parts of a building in a borough, since, in the absence of judicial authority, opinion in the profession was divided on the question whether a lease or an agreement to lease part of a building came within the provision of s. 350 (2) (a), with the consequences attached to it by the terms of s. 351 (8).

With the active assistance of the Attorney-General, the Hon. H. G. R. Mason Q.C., who had the advice of the Standing Committee of the New Zealand Law Society, the passing of the Municipal Corporations Amendment Act 1958 (which became law on October 2) validates all agreements affecting the sale of land in subdivisions in boroughs, and all leases of buildings in boroughs for a term of up to fourteen years, without requiring the prior deposit of an approved plan in the Land Transfer Office. Leases of parts of a building in a borough are freed from the requirement of an approved plan and its deposit. Properly, as we think, the prior approval by the local authority of a subdivisional plan of land within its borough is retained. This requirement is a safeguard in the public interest as well as in the interest of the purchaser. But an amendment provides that the execution of any agreement to sell, lease (for a term, including the term of any renewal, of fourteen years or more), or otherwise dispose of any land before the approval of the relative subdivisional plan does not invalidate the agreement, even if entered into before October 2, 1958; but there is to be implied in each such agreement a condition that the approval of the plan will be obtained.

As the result of the legislative action to which we have referred, the law today is stated as follows (the amendments being shown in brackets).

Section 350 (2) (a) of the Municipal Corporations Act 1954 is now as follows:

> 350. (2) For the purposes of this Part of this Act any land in a district shall be deemed to be subdivided if,
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> (a) Being land subject to the Land Transfer Act 1952, and comprised in one certificate of title, the owner thereof, by way of sale of lease [for any term (including the term of any renewal or renewals to which the lessee is entitled) of not less than fourteen years], or otherwise howsoever, disposes of any specified part thereof less than the whole, or advertises or offers for disposition any such part, or makes application to a District Land Registrar for the issue of a certificate of title for any part thereof; or
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> (b) Being a continuous area of land not subject to the Land Transfer Act 1952, the owner thereof disposes in any manner as aforesaid of any specified part thereof less than the whole, or advertises or offers any such part for disposition in any manner; or

(c) Being land subject to the Land Transfer Act 1952 and comprised in one certificate of title, or being a continuous area of land not subject to that Act, the personal representative of the former deceased owner disposes of any specified part thereof less than the whole to any person pursuant to a devise of that part under the will of the former deceased owner :

Provided that nothing in this Part of this Act shall affect the equitable interest of the devisee in the land.

[(3) Notwithstanding anything in subsection two of this section, land shall not be deemed to be subdivided for the purposes of this Part of this Act by reason solely of the fact that the owner grants a lease of, or advertises or offers for disposition by way of lease, any part of a building existing on the land, or which will exist on the land, at the commencement of the lease.]

Section 351, subss. (1) to (7) of which remain unaltered, is amended to read as follows :

(8) Every person commits an offence who subdivides any land otherwise than in accordance with a plan of subdivision approved by the Council, or, in case of an appeal, in accordance with a plan of subdivision approved by the Town and Country Planning Appeal Board under this section . . . and is liable to a fine not exceeding one hundred pounds :

(The following words are omitted :

" and before the plan of the subdivision has been duly deposited under the Land Transfer Act 1952 or any former Land Transfer Act or in the Deeds Register Office ".)

Provided that no person, being the owner of any land shall be deemed to commit an offence against this subsection by reason merely of the fact that he makes application for the issue to him of a separate certificate of title for any part of the land :

(The following proviso has been repealed :

" Provided further that the owner of the land shall not be deemed to commit an offence against this section by reason merely of the fact that he grants a lease for any term (including renewals under the lease) of less than three years of any allotment on a plan of subdivision that has been duly approved under the provisions of this section".)

[(9) Nothing in this section shall be deemed to render any agreement to sell, lease, or otherwise dispose of any land illegal or void by reason only that it is entered into before a plan of subdivision has been approved under this section, but the agreement shall be deemed to be made subject to a condition that approval of a plan of the subdivision will be obtained under this section.

(10) A contravention of any provision of this section shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to any land.]

Section 3 of the Municipal Corporations Amendment Act 1958 (which applies to all the amendments made, as above, to ss. 350 and 351 as the Municipal Corporations Act 1954) provides as follows :

(5) The provisions of this section shall apply and be deemed always to have applied with respect to every lease or agreement granted or entered into before the passing of this Act, as if this section had been in force when the lease was granted or the agreement was entered into :

Provided that nothing in this section shall affect the rights of the parties under any judgment given in any Court before the passing of this Act, or under any judgment given on appeal from any such judgment, whether the appeal is commenced before or after the passing of this Act.

II.—Subdivisions in Counties.

So that uniformity with the Municipal Corporations Act 1954 (as above amended) can be an accepted thing when conveyancers are dealing with leases or sales of parts of subdivisions in counties, the Land Subdivision in Counties Amendment Act 1958 (which came into operation on October 2), by ss. 2 and 3, makes the necessary amendments to achieve that uniformity.

Section 2 (1) of the Land Subdivision in Counties Act 1946, now, in part, reads as follows (the amendments being shown in brackets) :

" Sale " includes exchange, gift, devise, or other disposition affecting the fee-simple, and lease for any term (including renewals under the lease) of not less than [fourteen] years ; and also includes any disposition affecting the leasehold interest under any such lease as aforesaid :

The following subsection is added :

[(2A) Notwithstanding anything in this Act, land shall not be deemed to be subdivided for the purposes of this Act by reason solely of the fact that the owner grants a lease of any part of a building existing on the land, or which will exist on the land, at the commencement of the lease.]

Section 3 of the Land Subdivision in Counties Act 1946 is unamended except for the insertion of the following new subsections after subs. (2) :

[(2A) Nothing in this section shall be deemed to render any agreement to sell any land illegal or void by reason only that it is entered into before a scheme plan has been approved under this section, but the agreement shall be deemed to be made subject to a condition that approval of a scheme plan of the subdivision will be obtained under this section.

(2B) A contravention of any provision of this section shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to any land.]

The scope and extent of the amendment of s. 3 of the principal Act (as above) are stated in s. 3 (2) of the Amendment Act 1958, as follows :

(2) The provisions of this section shall apply and be deemed to always have applied with respect to every agreement entered into before the passing of this Act, as if this section had been in force when the agreement was entered into :

Provided that nothing in this section shall affect the rights of the parties under any judgment given in any Court before the passing of this Act, or under any judgment given on appeal, from any such judgment, whether the appeal is commenced before or after the passing of this Act.

Something really worthwhile has been achieved by the above-stated amendments to the Municipal Corporations Act 1954 and to the Land Subdivision in

Counties Act 1946. The menace to sale-and-purchase agreements affecting land in subdivisions, brought about by a sometimes inevitable contravention of the law, illustrated by *Griffiths* v. *Ellis*, is now a thing of the past. The Attorney-General is to be congratulated on his efforts to bring about the prompt legislative remedy dispensed by this year's legislation.

Conveyancers, however, cannot overlook the implications of the new subs. (9) of s. 350 of the Municipal Corporations Act 1954, which, in dealing with subdivisions in boroughs, declares, in effect, that any agreement to sell, lease, or otherwise dispose of land, entered into before or after October 2, 1958, before the subdivisional plan has been approved by the local authority,

" shall be deemed to be made subject to a condition that approval of a plan of the subdivision will be obtained under this section ".

So, too, by virtue of the new s. 3 (2A) of the Land Subdivision in Counties Act 1946, any such agreement respecting a sale of land subdivision of land in a county entered into before the approval of a scheme plan by the local authority,

" shall be deemed to be made subject to a condition that the approval of a scheme plan of the subdivision will be obtained under this section ".

Such an implied condition is designed for the protection of the purchaser, who can assert by an action the non-fulfilment of the condition where it occurs through the default of the vendor: cf. *Barber* v. *Crickett* [1958] N.Z.L.R. 1057.

SUMMARY OF RECENT LAW.

ACTS PASSED 1958.

Apiaries Amendment Act 1958, No. 12.
Primary Products Marketing Regulations Confirmation Act 1958, No. 13.
Agriculture (Emergency Regulations Confirmation) Act 1958, No. 14.
Mental Health Amendment Act 1958, No. 15.
Indecent Publications Amendment Act 1958, No. 16.
Evidence Amendment Act 1958, No. 17.
Wills Amendment Act 1958, No. 18.
General Conventions Act 1958, No. 19.
Stock Amendment Act 1958, No. 20.
Arms Act 1958, No. 21.
Navy Amendment Act 1958, No. 22.
Companies Special Investigations Act, No. 23.
State Supply of Electrical Energy Amendment Act 1958, No. 24.
Electric Power Boards Amendment Act 1958, No. 25.
Auckland Electric Power Board Amendment Act 1958, No. 26.
National Roads Amendment Act 1958, No. 27.
Public Works Amendment Act 1958, No. 28.
Auckland Harbour Bridge Amendment Act 1958, No. 29.
Divorce and Matrimonial Causes Amendment Act 1958, No. 30.
Electricity Amendment Act 1958, No. 31.
National Service Registration Act 1958, No. 32.
Customs Acts Amendment Act 1958, No. 33.
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Motor Spirits Distribution Amendment Act 1958, No. 36.
Simultaneous Deaths Act 1958, No. 37.
Finance Act 1958, No. 38.
Distillation Amendment Act 1958, No. 39.
Judicature Amendment Act 1958, No. 40.
Maori Purposes Amendment Act 1958, No. 41.
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Gas Industry Act 1958, No. 43.
Air Services Licensing Amendment Act 1958, No. 44.
War Pensions Amendment Act 1958, No. 45.
Social Security Amendment Act 1958, No. 46.
Cook Islands Amendment Act 1958, No. 47.
Local Elections and Polls Amendment Act 1958, No. 48.
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Kawerau Borough Act 1958, No. 50.
Technicians Certification Act 1958, No. 51.
Child Welfare Amendment Act 1958, No. 52.
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Education Amendment Act 1958, No. 54.
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Canterbury Agricultural College Amendment Act 1958, No. 56.
Civil Aviation Amendment Act 1958, No. 57.
Commissions of Inquiry Amendment Act 1958, No. 58.
Control of Prices Amendment Act 1958, No. 59.
Counties Amendment Act 1958, No. 60.
Crown Proceedings Amendment Act 1958, No. 61.
Dairy Board Amendment Act 1958, No. 62.
Defamation Amendment Act 1958, No. 63.
Electoral Amendment Act 1958, No. 64.
Electrical Supply Authorities Association Amendment Act 1958, No. 65.
Explosives Amendment Act 1958, No. 66.
Fire Services Amendment Act 1958, No. 67.
Health Amendment Act 1958, No. 68.
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Industrial Conciliation and Arbitration Amendment Act 1958, No. 70.
Insurance Companies Deposits Amendment Act 1958, No. 71.
Land Amendment Act 1958, No. 72.
Land Drainage Amendment Act 1958, No. 73.
Land Subdivision in Counties Amendment Act 1958, No. 74.
Land Transfer Amendment Act 1958, No. 75.
Licensing Amendment Act 1958, No. 76.
Life Insurance Amendment Act 1958, No. 77.
Marginal Lands Amendment Act 1958, No. 78.
Massey Agricultural College Amendment Act 1958, No. 79.
Milk Amendment Act 1958, No. 80.
Municipal Corporations Amendment Act 1958, No. 81.
National Art Gallery and Dominion Museum Amendment Act 1958, No. 82.
National Parks Amendment Act 1958, No. 83.
New Zealand Bank Amendment Act 1958, No. 84.
New Zealand National Airways Amendment Act 1958, No. 85.
New Zealand University Amendment Act 1958, No. 86.
Police Offences Amendment Act 1958, No. 87.
Public Revenues Amendment Act 1958, No. 88.
Rabbits Amendment Act 1958, No. 89.
Reserves and Domains Amendment Act 1958, No. 90.
River Boards Amendment Act 1958, No. 91.
Scientific and Industrial Research Amendment Act 1958, No. 92.
Soil Conservation and Rivers Control Amendment Act 1958, No. 93.
Superannuation Amendment Act 1958, No. 94.
Tenancy Amendment Act 1958, No. 95.
Timaru High School Amendment Act 1958, No. 96.
Trustee Savings Banks Amendment Act 1958, No. 97.
Tuberculosis Amendment Act 1958, No. 98.
Unclaimed Moneys Amendment Act 1958, No. 99.
Wages Protection and Contractors' Liens Amendment Act 1958, No. 100.
Waihou and Ohinemuri Rivers Improvement Amendment Act 1958, No. 101.
Waitangi National Trust Board Amendment Act 1958, No. 102.
Waterfront Industry Amendment Act 1958, No. 103.
Workers' Compensation Amendment Act 1958, No. 104.
National Provident Fund Amendment Act 1958, No. 105.
Family Benefits (Home Ownership) Act 1958, No. 106.
Local Legislation Act 1958, No. 107.
Reserves and Other Lands Disposal Act 1958, No. 108.
Police Act 1958, No. 109.
Trade Practices Act 1958, No. 110.
Dairy Products Marketing Commission Amendment Act 1958, No. 111.
Motor-Vehicles Dealers Act 1958, No. 112.

CONVEYANCING.

Advancement by Way of Settlement, *226 Law Times*, 32, 58.

Discharge of Restrictive Covenants, *226 Law Times*, 58.

Terminating a Settlement, *102 Solicitors' Journal*, 571.

CRIMINAL LAW.

Substituted Verdict on Appeal, *226 Law Times*, 59.

DAMAGES.

Loss of Future Earning Power: Gourley's Case, *108 Law Journal*, 484.

DESTITUTE PERSONS.

Maintenance—Separation Agreement providing that Wife would not Institute Proceedings for Maintenance—No Maintenance Payable to Wife thereunder—Wife, as "destitute person" entitled to apply for and obtain Maintenance Order—Destitute Persons Act 1910, ss. 17 (7), 24. One of the terms of a separation agreement was that neither the husband nor the wife at any time after the execution thereof, on October 6, 1952, was to require the other to live with him or her, or "so long as the terms of this agreement are complied with, institute any legal proceedings or take any steps whatever for any maintenance order, separation order, or decree for restitution of conjugal rights". No payments were to be made to the wife by the husband for the maintenance of herself or the child. On December 21, 1956, the wife filed a complaint, in which she alleged that her husband had wilfully and without reasonable cause failed to provide her and her infant child with adequate maintenance, and she accordingly sought orders for maintenance. It was common ground that, owing to illness, the wife had become a "destitute person" within the meaning of the Destitute Persons Act 1910. A Magistrate granted her a maintenance order for the support of herself and her child. On the husband's appeal from that order, *Held*, 1. That even if, in seeking maintenance, the wife committed a breach of the agreement, it was not a breach of such proportions and character as to justify her husband in treating the agreement as repudiated by her, since the fundamental purpose of the agreement was to record that the two spouses had mutually agreed thereafter to live separate and apart, and the husband was deemed to have known from the commencement that the promise by his wife not to seek maintenance would cease to be effective if she became a destitute person. 2. That as s. 24 of the Destitute Persons Act 1910 declares that no agreement between a husband and wife shall be effective to take away the right of a destitute spouse to seek a maintenance order, the husband could not use the wife's act in seeking a maintenance order as a breach of contract entitling him to treat the whole agreement as at an end; and, this being so, the agreement for separation provided "reasonable cause" within the meaning of s. 17 (7) for the wife refusing to live with her husband. (*Bigwood* v. *Bigwood* (1946) 5 M.C.D. 26, considered. *Baker* v. *Baker*. (S.C. Auckland. 1958. August 19. North J.)

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance—Jurisdiction to make Order for Maintenance before Decree Absolute—Such Maintenance to run from Date of Decree Absolute—"On"—Divorce and Matrimonial Causes Act 1928, s. 33. The Court has jurisdiction, under s. 33 (1) of the Divorce and Matrimonial Causes Act 1928, after the decree nisi has been made and before the making of the decree absolute to make an order for maintenance, provided that the order is not to take effect so far as any payment thereunder is concerned until after the decree absolute. The Judge making such an order for maintenance should satisfy himself that a decree absolute will be sought within a reasonable time, and he should decline to make the order if not so satisfied. (*Fox* v. *Fox* [1925] P. 159, followed.) *Leitch* v. *Leitch*. (C.A. Wellington. 1958. September 12. Gresson P. North J. Cleary J.)

FAMILY PROTECTION.

Testatrix leaving Estate to Trustee for Sale and Conversion—Residue to be held for Son and His Daughters—Son and Family living in House being Substantial Asset in Estate—Son asking for Postponement of Sale until Younger Daughter attained Twenty one Years—Son not needing Maintenance or Support—No Jurisdiction to make Order Sought—Family Protection Act 1955, s. 3. The testatrix, by her will, bequeathed the whole of her estate to the Public Trustee upon trust for sale and conversion, and after payment of debts and death duty, directed him to hold the residue for her son and his two daughters, aged seventeen and fifteen years respectively. The son and his family had lived in a house property, which was the substantial asset in the estate. The son sought an order that the sale of the house property should be postponed until the younger daughter attained the age of twenty-one years, on condition that he maintained the property and paid the usual outgoings. *Held*, That there was no jurisdiction under the Family Protection Act 1955 to make the order sought, as there was no legal duty on the mother to provide a home for an able-bodied son or his daughters during their minority; and, in the absence of need for maintenance and support, the statute could not be used obliquely to modify inconvenient testamentary provisions or to import a power of postponement into a will in which the testatrix had deliberately directed sale and conversion. (*In re Valintine, Valintine* v. *Watson* [1943] G.L.R. 2, referred to.) *In re Willis (deceased), Willis* v. *Public Trustee*. (S.C. Auckland. M. 133-57. 1958. September 5. T. A. Gresson J.)

INFANTS AND CHILDREN.

Practice—Appeal—Custody and Access—Application—Procedure on Appeal—Rehearing of Evidence—Summary Proceedings Act 1957, s. 119. There should be a complete rehearing of the evidence on an appeal in respect of an application for the custody of, or access to, children, as the nature of such an application places it in a class where, as a general rule, it comes within the exception provided in s. 119 of the Summary Proceedings Act 1957. *Pine* v. *Pine*. (S.C. Auckland. 1958. September 5. Turner J.)

LANDLORD AND TENANT.

Structural Repairs of a Substantial Nature, *102 Solicitors' Journal*, 556.

LIMITATION OF ACTION.

Action in respect of Bodily Injury—Application for Leave to Bring Action out of time—Draft Statement of Claim to accompany Application—Necessity to plead in Clear and Abundant Detail Circumstances Surrounding Cause of Action—Delay due to Mistake of Law not occasioned by "mistake or any other reasonable cause"—Principles on which Court acts in considering Grant or Refusal of Leave—"Defendant not materially prejudiced in his defence or otherwise by the delay"—Limitation Act 1950, ss. 4 (7), 23 (2). Where an application is made by an intending plaintiff for leave of the Court to commence an action notwithstanding the lapse of a period of limitation prescribed by the Limitation Act 1950, the intending plaintiff must submit with his application a draft statement of claim, by which he will be bound in the contemplated proceedings. Such draft statement of claim (which the intending plaintiff will not be allowed to amend except in a very special case) should plead with great clarity and in abundant detail the circumstances surrounding the cause of action. Where it is shown that the intending plaintiff's failure to bring his action within a time prescribed by the Limitation Act 1950 is due to a mistake of law, his ignorance of his legal position (unless it has been induced by the intended defendant) is not a "mistake or other reasonable cause" within the meaning of the statute. (*Wilson* v. *Gannaway* [1932] B.Z.L.R. 843; *Silvius* v. *Feilding Borough* [1957] N.Z.L.R. 713, followed.) *Semble*, There may be cases where, in considering whether the intended defendant was prejudiced in his defence by the intending plaintiff's delay in bringing is action, the difficulty or impossibility of obtaining medical evidence rebutting the intending plaintiff's contention that his injuries were in fact caused by the accident can be of considerable importance, as, for instance, where a present diagnosis and prognosis rests in some important respect upon a fact observable only in the period which has elapsed (*Wharehinga* v. *N. Cole Ltd.* (Hamilton. December 13, 1957. Shorland J., unreported), referred to.) In cases under s. 4 (7) of the Limitation Act 1950, where the Court is of opinion that the intending plaintiff has shown either that "the delay" is due to mistake or any other reasonable cause, or that the intended defendant was not materially prejudiced in his defence or otherwise thereby, there remains still a residuary judicial discretion which is to be exercised in each case as justice may require. (Statement of North J. in *Tett* v. *Attorney-General* [1957] N.Z.L.R. 1063, 1066 l. 29, followed.) *Spain* v. *D. T. Street Construction Company Limited*. (S.C. Hamilton. 1958. July 11; August 20. Turner J.)

Actions Against Public and Local Authorities—Jurisdiction—Extent of Jurisdiction—Onus of Proof—Limitation Act 1950, s. 23 (2). On an application under s. 23 (2) of the Limitation Act 1950, the jurisdiction conferred by that subsection is to be exercised, after one or both of the alternative conditions precedent have been established, if the Court thinks it just to exercise it. Once evidence is led in support of the affirmative propositions which the intending plaintiff must prove, then it is the duty of the Court to weigh that evidence and come to a conclusion. The onus as a determining factor will operate only if the matter is left in balance. It then remains for the

Court to consider whether or not, on an overall consideration of all the circumstances, it is just for the leave sought to be granted. (*Robins* v. *National Trust Co.* [1927] A.C. 515, applied. Dictum of Lord Wright in *Evans* v. *Bartlam* [1937] A.C. 473, 488; [1937] 2 All E.R. 646, 658, referred to.) *Sullivan* v. *Waitaki Electric Power Board.* (S.C. Dunedin. 1958. August 18. Henry J.)

NEGLIGENCE.

Bricks and Barrels, *102 Solicitors' Journal*, 553.

Do-It-Yourself: Standard of Care, *102 Solicitors' Journal*, 573.

Employers' Liability at Common Law, *226 Law Times*, 57.

PRACTICE.

Joinder of Parties—Commorientes—Husband and Wife dying in House Fire—All Beneficiaries under Husband's Will deceased—Action by Wife's Administrator against Husband's Administrator claiming Husband's Estate—Husband's Next-of-Kin joined as Defendants. A husband with his wife and their two children died in a fire which destroyed their home. Under the husband's will his estate was given upon trust to pay the income thereof to his wife during widowhood, and, subject thereto, to hold the capital for such of his children as should attain the age of twenty-four years, with a substitutionary gift over for grandchildren if either of the testator's children died in the testator's lifetime or before attaining the age of twenty-four years. When they died, both children were under the age of twenty-four years and they left no children. In the result, the testator's estate, on his intestacy, would go to his widow if she survived him or to his brothers and sisters if she predeceased him. If the wife survived him, it would go to her and become part of her estate, of which the Public Trustee was the administrator. The Public Trustee began an action to assert his right, as the administrator of the wife's estate, to receive the estate left by the husband. On a motion by the executor of the husband's will to join the testator's sister and two brothers as parties, *Held*, That the husband's sister and brothers should be joined in the action as defendants, so that they could take whatever steps they might think necessary to support their claim in opposition to the claim of the persons represented by the Public Trustee. *In re Stone-Wigg (deceased), Public Trustee* v. *Guardian Trust and Executors Company of New Zealand Limited.* (S.C. Wellington. 1958. September 4. Barrowclough C.J.)

Pleadings—Amendment—Statement of Claim for Specific Performance of Agreement and Damages for Breach—No Claim made for Value of Services Rendered on Quantum Meruit—Evidence not called for Defendant—Amendment to include Claim on Quantum Meruit refused—Judgment for Defendant without Prejudice to Plaintiff's Right to bring New Action claiming Further Relief—Defendant entitled to conduct case and confine evidence in Reliance on Pleadings—Exercise of Discretion in refusing Amendment not interfered with—Position met by Order dismissing Action without Prejudice to Plaintiff's Right to bring New Action—Code of Civil Procedure, RR. 270, 271, 555. The plaintiff sought specific performance of an alleged oral agreement, and both general and special damages for breach of contract. There was nothing in the pleadings that would draw the attention of the defendant to the possibility that a claim would be advanced for the value of services rendered on a quantum meruit. The defendant elected not to call any evidence. As the pleadings stood, the defendant's counsel may well have decided that it was unnecessary to call the defendant in view of the admissions of the plaintiff that there were still terms of the oral contract yet undetermined. An application to amend the pleadings so as to include a claim for quantum meruit was made and refused after the case had been closed, and after the trial Judge had orally given his decision on the claim as disclosed in the pleadings. On appeal from that refusal and against the judgment for the defendant, *Held*, by the Court of Appeal. 1. That the defendant was entitled to conduct his case and confine his evidence in reliance on the pleadings; and the plaintiff could not recover on a quantum meruit without amendment, as he had not sued in the alternative. (*London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332; [1942] 1 All E.R. 97, and *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218; [1955] 3 All E.R. 864, followed. *Renner* v. *Fraser* (1911) 31 N.Z.L.R. 205; 14 G.L.R. 297, and *Lane* v. *Lovelock* (1914) 33 N.Z.L.R. 826; 16 G.L.R. 493, and *James* v. *Thomas H. Kent & Co.* [1951] 1 K.B. 551; [1950] 2 All E.R. 1099, distinguished.) 2. That the Court could not interfere with the exercise of the learned Judge's discretion in refusing to grant an amendment of the pleadings as, if leave had been given, considerable addition would have had to have been made, and leave would have had to be given to the defendant to call evidence in reply; and this position had been sufficiently met by the inclusion in the judgment of an order that the dismissal of the action was to be without prejudice to the plaintiff's right to bring a new action seeking further relief. (*Steward* v. *North Metropolitan Tramways Co.* (1886) 16 Q.B.D. 556 and *Halsey* v. *Brotherhood* (1880) 15 Ch.D. 514, aff. on app. (1881) 19 Ch.D. 386, followed.) *Berryman* v. *Toup-Nicolas.* (C.A. Wellington. 1958. August 14. Gresson P. North J. Cleary J.)

PROBATE AND ADMINISTRATION.

Administration—Bond—Next-of-kin resident in Australia—Attorneys applying for Letters of Administration for Benefit of Next-of-kin and limited until Application by Next-of-kin for Grant by Them—Administration Bond to be in Usual Form—Administration Act 1952, s. 27—Code of Civil Procedure, R. 531F. The next-of-kin of an intestate were two brothers resident in Australia, and the applicants, as their attorneys, applied for a grant of letters of administration and satisfied the Court that they were entitled to a grant for the use and benefit of the two brothers and limited until they or either of them should apply for and obtain a grant. On the question of the proper form of the administration bond, *Held*, 1. That s. 27 of the Administration Act 1952 had no application, as the brothers of the intestate were not duly constituted legal personal representatives, and it is in that sense that the words "executor or administrator" are used in that section. (*In re Tancred* (1913) 32 N.Z.L.R. 991; 15 G.L.R. 653, distinguished. *In re Rendell* [1901] 1 Ch. 230, and *In re Achillopoulos* [1928] 1 Ch. 433, referred to.) 2. That the administration bond must be in the usual form; and, on the filing of an oath in the usual form, a grant, limited as above, would be made. *In re Chamberlain (Deceased).* (S.C. Christchurch. 1958. September 19. F. B. Adams J.)

PUBLIC REVENUE.

Income Tax—Production of Documents by any Officer of Inland Revenue Department—Prohibition of Production in Any Court Admitting of No Exceptions—Inland Revenue Department Act 1952, s. 12 (2). The unqualified prohibition in s. 12 (2) of the Inland Revenue Department Act 1952 of the production in any Court of documents in the custody of the Inland Revenue Department admits of no exception, even in a criminal proceeding, so that a taxpayer cannot waive any question of privilege or consent to the production of a document affecting him alone or to the disclosure of any information supplied by him to the Department. (*Rowell* v. *Pratt* [1938] A.C. 101; [1937] 3 All E.R. 660, applied.) *R.* v. *Saint-Merat.* (S.C. Christchurch. 1958. July 30. F. B. Adams J.)

SALE OF GOODS.

Innocent Misrepresentation, *108 Law Journal*, 451.

TENANCY.

Apartment House—Garage Converted into Two Flats in 1958—Flats attached to House and Under Same Roof—Construction and Letting of Those Flats a "conversion" Exempting Them from Provisions of Statute—"Converted"—Tenancy Act 1955, s. 6 (3). A property was let in apartments with common use of kitchen, conveniences etc. and for which fair rents had been fixed. In 1957 and early 1958, the owner converted the double garage belonging to the property into two new wholly self-contained flats as additions to the former building, and also converted one of the apartments in the building into a self-contained flat. The flats constructed in the garage were attached to the house, and electric and sewerage connections were made with those in the house. The whole building was then under one roof. Thus, the completed work now comprised one building, which contained three self-contained flats and four apartments not self-contained. Both the applicant tenants were new tenants subsequent to the completion of the above work, and one occupied an apartment in the original building. On an application to the Rents Officer to fix a fair rent of the two flats, it was contended that the whole building was no longer subject to the Tenancy Act 1955. *Held*, 1. That the construction of the three self-contained flats after the relevant date (November 12, 1953), and the letting of them to new tenants subsequently to their completion, amounted to a "conversion" of the building within the meaning of s. 6 (3) of the Tenancy Act 1955, and they were exempt from the provisions of the statute. 2. That the exemption from the provisions of the statute contained in s. 6 (3) of the Tenancy Act 1955 on the "completion" (as defined by s. 6 (4) (a)) of the act of converting

into two or more self-contained flats, applies only to that part of the building that is so converted. 3. That the remaining, apartments in the building, as separate "dwellinghouses", were still subject to the provisions of the statute. *Semble*, The whole of a building may be "converted" into self-contained flats and so become entirely excluded from the provisions of the statute. *Scott* v. *Pulutoni and Atuuna.* (M.C. Auckland. 1958. August 1, 7, Wily S.M.)

Rent Restriction—Contractual Tenancy determined by Notice—Landlord entitled thereafter to recover Fair Rent as duly fixed—"Conditions"—Tenancy Act 1955, s. 42 (1) ( ). Section 42 (7) of the Tenancy Act 1955 is not a bar to the landlord's seeking to recover the fair rent of the tenement duly fixed in the prescribed manner after determination of the contractual tenancy. (*Phillips* v. *Copping* [1935] 1 K.B. 15 and *Regional Properties Ltd.* v. *Oxley* [1945] A.C. 347; [1945] 2 All E.R. 418, applied.) *Mooney* v. *Fisher.* (S.C. Wellington. 1958. September 17. North J.)

TRANSPORT.

Appeal against Term of Suspension of Licence—Evidence—Appellant entitled to adduce Evidence that Period of Suspension out of Harmony with Normally-imposed Periods of Suspension of Licences—Transport Act 1949, ss. 31 (4), 40—Summary Proceedings Act 1957, s. 119 (3). An appellant against a sentence of suspension of his licence on a charge under s. 40 of the Transport Act 1949, may, on the hearing of his appeal, adduce evidence to such extent that such evidence has weight on such appeal, to show that the period of suspension imposed on him was out of harmony with what is normally imposed by other Magistrates in other places for like offences involving similar facts. (*Fleming* v. *Commissioner of Transport* [1958] N.Z.L.R. 101, referred to.) *Barke* v. *Police: Pevreal* v. *Police.* (S.C. Hamilton. 1958. September 24. Hardie Boys J.)

VENDOR AND PURCHASER.

Sale of Land—Sale and Purchase Agreement "conditional on the purchaser arranging the necessary mortgage finance to purchase the property"—Purchaser entitled to assert non-fulfilment of condition only where it occurs without Default on His Part. Where a contract for the sale and purchase of land is conditional on the purchaser "arranging the necessary mortgage finance to purchase the property" (which is a condition for the purchaser's benefit and protection), the purchaser can assert the non-fulfilment of the condition only where it occurs without default on his part. Before he can say that the contract is at an end, he must show that he has failed to obtain the mortgage finance, and that such failure has occurred notwithstanding reasonable efforts on his part. (*New Zealand Shipping Co. Ltd.* v. *Societe des Ateliers et Chantiers de France* [1919] A.C. 1; *Suttor* v. *Gundowda Pty. Ltd.* (1950) 81 C.L.R. 418, and *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.* [1952] 2 All E.R. 497, applied. *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston* [1941] A.C. 251; [1941] 1 All E.R. 14, distinguished. *In re Sandwell Park Colliery Co. Field* v. *The Company* [1929] 1 Ch. 277, and *Carmody* v. *Irvine.* (Auckland. February 2, 1953, Stanton J., unreported), referred to.) *Barber* v. *Crickett.* (S.C. Auckland. 1958. August 14. Cleary J.)

WORKERS' COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

1. "Locality Risk"—No Special Risk of Assault—Worker assaulted by Fellow-worker thrown over Side of Hatch and falling into Hold—Worker's own Misconduct not Cause of Assault—Compensation Payable—Workers' Compensation Act 1956, s. 3. Even where there is no special risk of assault, a worker injured in the course of his employment by an accident following an assault by a fellow-worker may still recover compensation if his injury is due to what is known as a "locality risk" which is incidental to his employment, provided the assault was not brought about by his own misconduct, or was not due to an added peril of his own making, such as by the use of insulting words. (*Bank* v. *Port Hills-Akaroa Summit Road Public Trust* [1934] N.Z.L.R. s. 78, and *Swaney* v. *Blackwell Motors Ltd.* [1954] N.Z.L.R. 948, applied.) Two factors are of considerable, though not necessarily exclusive, importance in determining whether a worker's conduct is such as to amount to misconduct which will disqualify him from receiving compensation for an accident alleged to have resulted therefrom: (*a*) whether the real cause of the conduct complained of was connected with or outside the duty of the worker to his employer; and (*b*) whether or not there was any material interruption by the worker in the carrying out of his proper duties. The extent or degree of misconduct is also a relevant factor. The plaintiff's course of conduct must be considered as a whole. (*Treller* v. *London & North Eastern Railway Co.* (1942) 35 B.W.C.C. 96, and *Bank* v. *Port Hills-Akaroa Summit Road Public Trust* [1934] N.Z.L.R. s. 78, followed.) In the present case the use by the plaintiff of words, which were in common use on the waterfront and would not necessarily be regarded as insulting there, was not such an interruption in his work as to take the incident, together with his subsequent accident and injury, in falling into the hold of the ship on which he was working as a hatchman, outside the scope of his employment; and his conduct, as a whole, was directed to the furtherance of his employer's interests. *Samuel* v. *Pacific Stevedoring and Agency Company Ltd.* (Comp. Ct. Wellington. 1958. August 27. Archer J.)

2. Prolapsed Intervertebral Disc—Prolapse due to, or aggravated by, Strain or Succession of Strains in Course of Employment within Reasonable Time of Final Stage of Condition—Compensation payable—Workers' Compensation Act 1956, ss. 3, 19. K., who was 51 years of age, had been employed by the company for about five years, and for about three-and-a-half years before June, 1957, his work was connected with the installation of new machinery. This frequently involved the removal of parts of a concrete floor, and the laying of new concrete. He was frequently required to break up concrete with a pneumatic drill, and to load the debris into trucks for removal. He also assisted with the boxing and pouring of new concrete, and with rough carpentering. K. was fully able to undertake the work, including a considerable amount of overtime, and had no trouble with his back. About three months before June 10, 1957, he began to feel tired when constantly working, and felt acute pain about two weeks before he ceased work. After giving up work, he had medical treatment, and was found to have suffered from a prolapsed intervertebral disc. He was totally incapacitated by reason of this condition until January 9, 1958, when he was able to go back to light work. The evidence showed that the degeneration of K.'s back advanced more speedily from the time when he experienced tiredness at his work, and the protrusion of the disc material which constituted the final stage of the condition took place at or about the time when he first felt acute pain some two weeks before January 10, 1957. There was at that time a change in his physical condition, in that, while before that time he had no more than a degenerating spine which might at some future time lead to a prolapsed disc, he had from that time onward a prolapsed disc, being one from which the protrusion of disc material was in progress, if not indeed complete. *Held*, 1. That, on the evidence, the injury causing the incapacity to K. was the disc protrusion, and he did not suffer from a prolapsed intervertebral disc until a protrusion of disc material into the spinal column had in fact occurred; the protrusion occurred on or about the time when K. first felt acute pain some two weeks before June 10, 1957, and the probabilities were that the protrusion occurred during his work, and that its occurrence at the time when it occurred, was due in part to the heavy strain of the work. 2. That compensation should be allowed, whether the prolapse of K.'s intervertebral disc was due to or was aggravated by, a single strain in the course of employment, or to a succession of such strains within a reasonable period of time; and, having regard to the physical change which occurred at the time of prolapse, the case could not be regarded as one of natural process in which the work had no material causative effect. (*Roberts* v. *Dorothea Slate Quarries Ltd.* [1948] 2 All E.R. 201; 41 B.W.C.C. 141, and *Hughes* v. *Lancaster Steam Collieries Ltd.* [1947] 2 All E.R. 556, followed. *Chambers* v. *Matheson Minster Ltd.* [1954] N.Z.L.R. 475, and *Fife Coal Co. Ltd.* v. *William Young* [1940] A.C. 479; [1940] 2 All E.R. 85, referred to.) *Quaere*, Whether K.'s condition might properly have been regarded as a "disease" and whether, if so, he might have been entitled to succeed under s. 19 of the Workers' Compensation Act 1956. *Katsos* v. *General Motors (New Zealand) Ltd.* (Comp. Ct. Wellington. 1958. August 7; September 2. Archer J.)

WORKERS' COMPENSATION—GENERAL.

Damage to Workers' Spectacles—Damage recoverable only if Incidental to Personal Injury for which Compensation payable—Workers' Compensation Act 1956, s. 24 (c). Under s. 24 of the Workers' Compensation Act 1956, damage to a worker's spectacles by an accident arising out of and in the course of his employment can be recovered only where the damage is incidental to a personal injury for which compensation is payable. *Chandler* v. *Port Line Limited.* (Comp. Ct. Auckland. 1958. April 16. Archer J.)

WHEN IS THE COURT NOT THE COURT?

A Jurisdictional Riddle.

By P. B. A. Sim, LL.M.

It has been said that "in the seventeenth and eighteenth centuries the justices of the peace were the judicial 'maids of all work', but today the County Court Judges have as good a claim to the title."[1] The County Courts have not only a general jurisdiction (though limited by the value of the claim) in contract, tort, and other ordinary matters, but they have also been given jurisdiction in a wide variety of special matters arising under particular statutes, many of them of a type often called "social" or "collectivist."[2] This description of the English County Courts is apt in relation to the Magistrates' Courts of New Zealand.[3] Apart from their "ordinary" jurisdiction, Magistrates' Courts and Magistrates have been empowered to deal with a wide variety of questions arising under statutes dealing with topics ranging from adoption and land agency to floating timber and underground water.[4] Many of these special jurisdictions are in their nature remote from the ordinary forms of litigation and involve the making of a variety of special kinds of orders. They may or may not involve two or more parties. But in every such case, when a Magistrate's Court gives a decision in exercise of one of these special jurisdictions, the question whether an appeal will lie may arise.[5] This was the question which fell for decision in *New Zealand Shop Assistants Industrial Association of Workers* v. *Lake Alice Stores Ltd.*[6]

This case concerned an order made by a Magistrate under the Shops and Offices Act 1955, s. 10. Under this section orders may be made exempting particular shops from observing the closing hours established by the Shops and Offices Act, or established by any industrial award. The occupier of a shop may apply to the Magistrate's Court for total or partial exemption from closing at the specified hours, and the Court may grant such exemption. The Inspector of Factories and the appropriate unions of employers and employees must be served with notice of the application. It must also be advertised, and occupiers of other shops, unions, and other organisations which may be affected have the right to appear and be heard. The proceedings in the *Shop Assistants'* case took the form of an appeal by the affected workers' union against orders made under s. 10 granting exemptions (subject to certain conditions) from the closing provisions of the Shops and Offices Act itself and of the Retail Grocers' and Drivers' Award. The first question was whether there was a right of appeal from such orders. Hutchison J. held that there was not.

Although the common law developed means of controlling inferior courts and tribunals by the prerogative writs of certiorari, prohibition, and mandamus, it never developed of itself a system of rights of appeal stricto sensu. There is no such thing as a common law right of appeal, and all rights of appeal are the creation of statute.[7] The Magistrates' Courts Act 1947, s. 71, provides for appeals from the Magistrate's Court to the Supreme Court "against any nonsuit or final determination or direction of the Magistrate's Court." This section governs appeals in all "ordinary" proceedings. But when a new special jurisdiction is given to the Court, and a question of appeal arises from an order made pursuant to that jurisdiction, the rights of appeal under s. 71 may or may not apply.

Prima facie, an appeal would appear to lie under the section in every case. This follows from the wide definitions contained in the Magistrates' Courts Act 1947. An appeal lies by virtue of s. 71 in respect of any "proceeding." In the Act, "proceeding" is defined as including both "actions" and "matter"; a "matter" is defined as every proceeding in a Court which may be commenced as prescribed otherwise than by plaint.[8] These wide definitions prima facie bring within the appeal section any matter whatever which comes before a Magistrate's Court in its civil jurisdiction, and the apparent result would be to include within the ambit of s. 71 all the special jurisdictions which are given to that Court, unless the special Act which creates the jurisdiction itself contains some express provision concerning appeals. But, in relation to any particular order made under a special jurisdiction vested in the Court, it may, nevertheless, be questionable whether there is a right of appeal under s. 71. It is questionable, because whatever the appearances may be, the jurisdiction in question must really be vested in "the Magistrate's Court" before s. 71 will apply. The decision in the *Shop Assistants'* case accepts the position that, where a special jurisdiction is, in terms of the Act creating it, vested in a "Magistrate's Court," this may not mean the Magistrate's Court at all, in the ordinary sense; what may be meant is, in effect, a new, separate, and special tribunal, outwardly the same but legally entirely distinct. And to this new tribunal, which appears to be the Magistrate's Court but in fact is not, the general provision for appeals made by the Magistrates' Courts Act 1947, s. 71, will have no application. If s. 71 does not apply to the tribunal, there will be no right of appeal from its determinations unless such a right is expressly or impliedly given by the statute creating it or by some other statute.

The provisions concerning appeals contained in the statutes giving special jurisdictions to the Court may be classified into the following types:

(1) *Appeal specifically provided for.* In these cases no difficulty arises because the statute creating the

[1] Radcliffe & Cross, *The English Legal System*, 1st ed. p. 277.

[2] R. M. Jackson, *The Machinery of Justice in England*, 2nd ed. p. 26.

[3] The New Zealand Magistrate's Courts have a stronger claim to the title of "maids of all work" for they exercise criminal as well as civil jurisdiction.

[4] For a list of some of these statutes, see *Wily's Magistrates' Courts Practice*, 4th ed., 32-34; cf. *County Court Practice* (1957). 1002 *et seq.*

[5] The same question may occasionally arise in relation to other Courts in which "special jurisdictions" have been vested, but the Magistrate's Courts provide the most frequent instances.

[6] [1957] N.Z.L.R. 882; referred to hereafter for the sake of brevity as "the *Shop Assistants'* case."

[7] *Attorney-General* v. *Sillem* (1864), 10 H.L.C. 704; 11 E.R. 1200. For a recent statement of this principle, see *Healey* v. *Minister of Health*, [1955] 1 Q.B. 221; [1954] 3 All E.R. 449.

[8] Magistrates' Courts Act 1947, s. 2.

special jurisdiction expressly provides for a right of appeal.[9]

(2) *Appeal impliedly provided for.* Some statutes, while not expressly providing for appeal, contain some reference to retention of rights of appeal. For example, the Joint Family Homes Act 1950, s. 10, empowers an inferior court to settle questions arising between husband and wife affecting a joint family home when the amount in dispute is within the limits of that Court's jurisdiction. By subs. 2 of that section, it is provided that nothing in the section shall prevent any appeal against an order made under it. As there is not express provision for appeals in the Act itself, the right of appeal contemplated must be the right under general provisions of the Magistrates' Courts Act 1947, s. 71.[10] Again, an appeal section which appears inappropriate to the particular proceeding may be shown to be applicable by other statutory provisions which indirectly suggest that a right of appeal exists.[11]

(3) *Appeal expressly excluded.* Conversely, a statute creating a special jurisdiction may exclude appeals by the adoption of some such formula as "no appeal shall lie,"[12] or "the decision of the Court shall be final."[13] Formulae of this kind effectively prevent appeals.[14] They do not, however, completely exclude review by the superior courts by means of the prerogative writs. At least preliminary and collateral matters may be reviewed in spite of the use of such formulae.[15] We are not here concerned with such judicial review, but only with appeals stricto sensu. It should, however, be pointed out in passing that many modern statutes contain provisions no tonly ex cluding appeal but also referring to other forms of review. A typical example is the Tenancy Act 1955, s. 29, which provides that (except as expressly provided) no appeal shall lie and adds further that "no such decision, determination, or order shall be liable to be challenged, reviewed, quashed, or called in question in any Court on any ground except lack of jurisdiction."[16]

(4) *Jurisdiction ancillary to or in derogation of existing jurisdiction.* In some cases a statute vests a particular jurisdiction in the Court which merely has the effect of giving a new power to the Court in relation to some matter over which it already has jurisdiction. For example, the Court has jurisdiction in matters of contract. Where a contract is one of hire purchase the Court has an additional power under the Hire Purchase Agreements Act 1939 to reopen unconscionable transactions.[17] This is simply a new jurisdiction ancillary to the Court's ordinary jurisdiction in contract. Again, a special cause of action for compensation is created by the Timber Floating Act 1954, s. 14, and vested in the Magistrate's Court. This might be regarded as a new cause of action arising within the Court's general jurisdiction in tort or perhaps would be within the jurisdiction of the Court under the Magistrates' Courts Act 1947, s. 30. Similarly, an existing jurisdiction may be qualified. For example, the Court's jurisdiction in actions for recovery of land is limited by the Tenancy Act 1955. In all such cases the general appeal provisions would, it is submitted, be unaffected by the additional power added to or by the qualification attached to, the exercise of existing powers.[18] That is to say that the powers in such cases are vested in the "Magistrate's Court" and not in a new special tribunal created for the purpose.

When the cases falling within one or other of these four categories are put on one side, there remain those statutes such as that which was examined in the *Shop Assistants'* case[19] by which an essentially new jurisdiction is given, and the statute creating it is silent as to appeals.[20] The existence of a right of appeal will then depend upon the answer to the following question posed in relation to the Supreme Court of Western Australia, and quoted by Hutchison J. in the *Shop Assistants'* case:

> Did it [the Legislature] merely create a new civil right to be administered by the Supreme Court with the ordinary incidents of litigation, including the consequent right of appeal, or did it in substance create a new and separate tribunal, consisting of a Judge of the Supreme Court as a persona designata.[21]

In both *Holmes* v. *Angwin*, the case from which this quotation is taken, and in the *Shop Assistants'* case, the Court held, that, on the true construction of the statutes, the jurisdiction was exercised not by the "Court" but by a Judge and a Magistrate respectively as "*persona designata*," i.e., by a new and separate tribunal.[22] The facts in the *Shop Assistants'* case have already been referred to. In *Holmes* v. *Angwin* the facts were that petitions relating to disputed elections were,

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[9] For example, Married Women's Property Act 1952, s. 19 (settlement of disputes between husband and wife as to property); Adoption Act 1955, s. 20 (variation or discharge of adoption orders); Guardianship of Infants Act 1926, s. 7 (2) (guardianship orders, etc.); Wages Protection and Contractors' Liens Act 1939, s. 35 (2) (declarations as to liens and charges).

[10] Cf. Land Settlement Promotion Act 1952, s. 11 (which refers to the Land Valuation Court and not the Magistrate's Court).

[11] As was the case, for instance, in *Aitken* v. *Smedley* [1921] N.Z.L.R. 236.

[12] E.g., Tenancy Act 1955, s. 29.

[13] E.g., Friendly Societies Act 1909, s. 72 (4); Stock Remedies Act 1934, s. 6A, added by the Stock Remedies Act 1954, s. 2; Shops and Offices Act 1955, s. 26.

[14] See *Westminister Corporation* v. *Gordon Hotels, Ltd.* [1908] *Hall* v. *Arnold* [1950] 2 K.B. 543; cf. *Simmons* v. *Commissioner of Stamp Duties* [1942] N.Z.L.R. 330; [1942] G.L.R. 253. But note also *Barker* v. *Edgar* [1898] A.C. 748 in which, on the construction of the relevant Maori Land legislation, it was held that a finality provision referred to finality only after the statutory rights of rehearing had been exhausted.

[15] See *Manawatu-Oroua River Board* v. *Barber* [1953] N.Z.L.R. 1010; and, for the effect of such provisions generally, de Smith, *Statutory Restriction of Judicial Review*, 18 M.L.R. (1955), 571.

[16] Cf. Building Societies Act 1908, s. 40; Local Election and Polls Act 1953, s. 75. As to the effect of such provisions see *Manawatu-Oroua River Board* v. *Barber* (*supra*); *Bethune* v. *Bydder* [1938] N.Z.L.R. 1; [1937] G.L.R. 665; *New Zealand Waterside Workers' Federation* v. *Frazer* [1924] N.Z.L.R. 689; [1924] G.L.R. 139; *Re Otago Clerical Workers' Award*, [1937] N.Z.L.R. 578; *sub. nom. Otago and Southland Stock and Station Agents Clerical Union of Workers* v. *Judge and Members of the Arbitration Court and Others* [1937] G.L.R. 388; and, in general, de Smith (*cit. supra*).

[17] Hire Purchase Agreements Act 1939, s. 8. Cf. Money-Lenders Act 1908, s. 3.

[18] As to appeals under the Tenancy Act 1955, see *Wily's Tenancy Act*, 4th ed., 62. Orders reopening unconscionable transactions under the United Kingdom Money-Lenders Act 1900 have been the subject of appeal: see *Samuel* v. *Newbold* [1906] A.C. 461.

[19] *Supra.*

[20] A few such provisions are Dogs Registration Act 1955, s. 22; Land Agents Act 1953, s. 8; Legitimation Act 1939, s. 5; Fencing Act 1908, s. 26A (added by the Fencing Amendment Act 1955, s. 2); Impounding Act 1955, s. 30; Joint Family Homes Act 1950, s. 11 as amended by the Joint Family Homes Amendment Act 1951, s. 11; Property Law Act 1952, s. 143 (2); Counties Act 1956, s. 317.

[21] The quotation appears on p. 884 of the Report and is from the judgment of Sir Samuel Griffith C.J., in *Holmes* v. *Angwin* (1906) 4 C.L.R. 297, 304.

[22] A somewhat similar position was held to obtain in *Theberge* v. *Laudry* (1876), 2 App. Cas. 102 (P.C.)

under the Electoral Act 1904 (Western Australia), to be heard and determined by the "Supreme Court." The Chief Justice of Western Australia, sitting as the Court under the Act, declared an election void. The High Court of Australia held that the "Supreme Court" referred to in the electoral legislation was not the Supreme Court in the ordinary sense, but was a special tribunal to which the provisions governing appeals from the Supreme Court did not apply. There was therefore no right of appeal from the Chief Justice's decision upon the election petition. A case which fell on the other side of the line was *The Great Fingall Consolidated Ltd.* v. *Sheehan*.[23] In that case, powers of determining liability and fixing compensation had been given to a court under a statute dealing with workers' compensation. The High Court of Australia held, in effect, that, on the construction of the relevant statutory provisions, the Court was exercising a jurisdiction additional to its ordinary jurisdiction but "subject to all the incidents attendant upon the exercise of ordinary jurisdiction of the Court according to its constitution, except so far as expressly altered."[24] It was still "the Court" and not a new tribunal and consequently the ordinary appeal provisions applied.

Given the distinction between the Court and a specially created tribunal disguised as the Court, it remains to consider the principles upon which one can be distinguished from the other when a question of appeal arises (in the absence of specific provision for appeals in the particular matter). The authorities are somewhat sparse, and it is curious that no assistance is to be gained from decisions relating to the English County Courts. The distinction does not appear to have arisen in connection with those Courts.[25]

Each case will, of course, depend upon the construction of the particular statutory provisions in question, and it may seem unprofitable to attempt to formulate principles which are general enough to be of assistance over a range of widely differing provisions. It can be submitted, however, that, on the existing authorities, the following principles will apply in all cases:

(1) The verbal description of the tribunal is not conclusive. In some cases the jurisdiction is given to "the Magistrate's Court,"[27] in others to "a Magistrate."[26] It would be convenient if the adoption of one or other form of wording was conclusive for or against appeals under the general provisions of the Magistrates' Courts Act, but this is not so. The use of the word "Court" does not prevent the tribunal being held to be in law not the Court but persona designata.[28] On the other hand, it may be that the vesting of the jurisdiction in "a Magistrate" would now be interpreted in all cases as necessarily meaning that the jurisdiction is not vested in the Court and that therefore the provisions as to appeals from "the Court" are inapplicable in such cases.[29] But there are, nevertheless, cases in which appeals were brought where the jurisdiction was expressly vested in "a Magistrate" and not in the Court, for example, *Lower Hutt Borough Council* v. *Loughnan*.[30]

(2) As the words used to describe the tribunal are not conclusive, the substantial nature of the proceedings will be examined. As Sir Samuel Griffith C.J., said in *Holmes* v. *Angwin*[31] "regard must be had to the substance and not the mere verbiage of the statute." Hutchison J. in the *Shop Assistants'* case examined the nature of the jurisdiction being exercised and held that though the Magistrate had to act "judicially," his functions were not judicial but legislative.[32] This finding in itself was not treated as the sole ground of the decision that no appeal lay under the ordinary provisions of the Magistrates' Courts Act. The nature of the proceedings is, however, obviously an important factor to be taken into account in determining the intention of the Legislature with regard to the presence or absence of the right of appeal. Although the nature of the functions being exercised were not apparently treated as conclusive for or against the existence of an appeal in the *Shop Assistants'* case, it may be noted that it has several times been held in England that where justices were sitting to perform functions held to be purely administrative, they did not constitute a "Court of summary jurisdiction" within the Summary Jurisdiction Act 1879 and could not therefore state a case under s. 33 of that Act. The *ratio decidendi* of these cases appears to be solely that the functions concerned were administrative in their nature, a fact which in itself was treated as sufficient to lead to the conclusion that the justices exercising the particular jurisdiction were not a "court of summary jurisdiction within the meaning of the Act.[33] The same distinction has been drawn in New Zealand between the Wardens Court and the Warden acting administratively. When acting administratively the Warden was held not to be an "inferior court" within the meaning of the Judicature Act 1908, s. 67.[34] Conversely, it may be noted that the fact that a body must act judicially does not have the consequence that the person or body concerned is a Court.[35] Much less would the fact that the tribunal was exercising judicial functions necessarily mean that it is "the Court" in the context here being discussed. It would, however, be going too far to assert, on the authority of the *Shop Assistants'* case, that there can never be an appeal under s. 71 of the Magistrates' Courts Act 1947 in any case in which the functions being exercised can be

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[23] (1905) 3 C.L.R. 176. See also *In re Karuotewhenua Block* (1909) 29 N.Z.L.R. 217; 11 G.L.R. 413.

[24] *The Great Fingall Consolidated Ltd.* v. *Sheehan* (*supra*) at p. 185, per Sir Samuel Griffith C.J. See also *In re Karuotewhenua Block* (1909) 29 N.Z.L.R. 217; 11 G.L.R. 413.

[25] The *County Court Practice* (1957), 1012, appears to assume that appeals lie under the general provisions of the County Courts Act 1934 in all cases of special jurisdiction. But see, as to Justices, *Huish* v. *Justices of Liverpool* [1914] 1 K.B. 109, and other cases cited in note 33, *infra*.

[26] E.g., Shops and Offices Act 1955, s. 10.

[27] E.g., Land Agents Act 1953, s. 8.

[28] *New Zealand Shop Assistants Industrial Association of Workers* v. *Lake Alice Stores, Ltd.* (*supra*); *Holmes* v. *Angwin* (*supra*).

[29] Cf. *New Zealand Shop Assistants Industrial Association of Workers* v. *Lake Alice Stores, Ltd.* at p. 885.

[30] [1937] G.L.R. 180. See also *Acton-Adams* v. *Shirtcliff* (1912) 14 G.L.R. 499; *Rhodes* v. *Beckett* (1909) 29 N.Z.L.R. 361; 12 G.L.R. 441.

[31] Supra at p. 304.

[32] With respect, the classification as legislative rather than administrative is difficult to reconcile with the classification of somewhat similar provisions in *Hookings* v. *Director of Civil Aviation* [1957] N.Z.L.R. 929; cf. the differing views of the Judges in *New Zealand United Licensed Victuallers' Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 167.

[33] *Huish* v. *Justices of Liverpool* [1914] 1 K.B. 109; *Boulter* v. *Kent Justices* [1897] A.C. 556; *Reg.* v. *Bird* (1898) 62 J.P. 309; *Hagmaier* v. *Willesden Overseas* [1904] 2 K.B. 316. It appears that functions such as those there in issue would now be treated as judicial: see *R.* v. *Brighton Justices, ex parte Jarvis* [1954] 1 All E.R. 197.

[34] *George* v. *Hore & Brown* (*No. 2*) [1952] N.Z.L.R. 50; [1952] G.L.R. 33.

classified as legislative or administrative rather than judicial. The question in all cases is to determine what was the intention of the Legislature as expressed in the words of the statute concerned. There seems no reason in principle why the Legislature should not intend to give to a Court functions which are classified as legislative or administrative but which, nevertheless, are to be subject to appeal.[36] If, however, the function is administrative or legislative, this may be at least a strong indication that the body is not "the Court," and that therefore the general provisions governing appeals from the Court are inapplicable. But each case must be looked at in the light of the particular statutory provisions applicable.

(3) The fact that some special procedure is provided does not prevent the Court remaining the Court; the provision of special procedure, that is, will not necessarily prevent the application of the ordinary appeal provisions. Thus, in *The Great Fingall Consolidated Ltd.* v. *Sheehan*,[37] assessors were to sit with the Magistrate when exercising the special jurisdiction. The presence of the assessors did not mean that there was a new tribunal. The jurisdiction was vested in "the Court" in the ordinary sense in spite of the presence of assessors.

(4) Where the decision is to be given as an exercise of discretion, this fact may help to tilt the scales in favour of the "persona designata" interpretation.[38] Conversely, where difficult questions of law are likely to arise, this may add weight to a construction in favour of the Court being meant, with the consequent right of appeal.[39]

(5) The relevant statutes must be closely examined for any indications of the intention of the Legislature. Such indications may be quite slight. Thus in *Holmes* v. *Angwin* the statute providing for the special jurisdiction vested in "the Supreme Court" provided that costs could be ordered "as if the order of the Court were a judgment of the Supreme Court." This was held to indicate that the Legislature had intended the Judge of the Supreme Court to act as persona designata and that therefore the Court in the ordinary sense was not intended.

(6) If, however, on the construction of the statute, the special jurisdiction is held to be vested in the Court in the true sense, the right of appeal will exist unless clearly taken away.[40]

Many of the matters in relation to which this problem may arise are matters which, in practice, may seldom if ever be the subject of a desire to appeal if only because the value of the interests affected may not warrant an appeal in any event. In other cases, as was no doubt the position in the *Shop Assistants'* case, the question may be one of considerable importance. With the recognition by this case of special tribunals which to all appearances are the Magistrates' Court, but which have not all the characteristics of that Court, the only way to attain certainty in the matter of rights of appeal appears to be by express provision being made to allow or prevent appeals where new jurisdictions of the kind in issue in the *Shop Assistants'* case are given to existing Courts, and the circumstances are such that doubts of this kind might arise.

[35] *9 Halsbury's Laws of England*, 3rd ed. p. 343; Report of Committee on Ministers' Powers, 1932 (Cmd. 4060) 74.

[36] Compare such "administrative" functions of the Supreme Court as arise in relation to probate, winding-up and similar matters.

[37] (1905) 3 C.L.R. 176.

[38] This was referred to in the *Shop Assistants'* case without great weight being placed upon it. In any event, appeals against discretionary decisions are closely circumscribed: see *Auckland Hospital Board* v. *Marelich* [1944] N.Z.L.R. 596; [1944] G.L.R. 308 and authorities cited in *Sim's Practice of the Supreme Court and Court of Appeal*, 9th ed., 31-32.

[39] See *The Great Fingall Consolidated Ltd.* v. *Sheehan* (1905) 3 C.L.R. 176, especially at p. 185 per Sir Samuel Griffith C.J.

[40] See *Neptune Steam Navigation Co.* v. *Sclater, The Delano* [1895] P. 40, 46; *In re Karuotewhenua Block* (1909) 29 N.Z.L.R. 217; 11 G.L.R. 413.

Public Relations.—Those who consider that The Law Society should engage to a greater extent in public relations will be interested in an account which appears in the February issue of the *American Bar Association Journal* of the Association's current programme of public relations. First, positive steps are being taken to present to the public through television and films a more accurate impression of the practising lawyer, and a closer liaison with the entertainment industries has been established to discourage distorted portrayals and to encourage greater accuracy in dramatization of lawyers and courts. Secondly, the Association has enlisted the co-operation of over 200 lawyers and judges to appear as speakers before laymen's organisations of all kinds. Thirdly, the Association is drafting an information manual for news reporters and broadcasters dealing with court procedure and is consulting with editors with a view to the publication of a series of informative and popular articles on law similar to those appearing from time to time about medicine. Fourthly, the Association is making efforts to achieve greater understanding between lawyers and doctors. Two films have already been produced, "The Medical Witness" and "The Doctor Defendant," and their showing has been the occasion for joint meetings of the two professions in cities throughout the United States. In this country, relation between the two professions are deplorably distant and, while some of the other projects of the Americans would be neither necessary nor appropriate here, we think that something could be done to bring the two professions closer together on the local level. When all is said and done, however, we agree with the President of the Association that there are "thousands of 'public relations counsellors' all over the United States who day by day, in attending to the interests of their clients and by their public services, are upholding the honour and reputation of our profession or who, by unfortunate actions, are tarnishing that profession's standing."—*102 Solicitors' Journal* (*London*), 256.

LANDLORD AND TENANT: COVENANT BY TENANT TO REPAIR.

"Reasonable Wear and Tear Excepted".

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

Covenants by a lessee to keep the leased premises in repair, "reasonable wear and tear excepted" have always been very common in New Zealand: indeed, unless expressly negatived, modified or varied, they are implied in every lease of land in New Zealand. Paragraph (b) of s. 106 of the Property Law Act, 1952, reads as follows:

> In every lease of land there shall be implied the following covenants by the lessee, for himself, his executors, administrators, and assigns: . . .
>
> (b) That he or they will, at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents and damage from fire, flood, lightning, storm, tempest, earthquake, and fair wear and tear (all without neglect or default of the lessee) excepted.

The effect of such a covenant, express or implied, has been in doubt ever since the English Court of Appeal case, *Taylor* v. *Webb* [1937] 2 K.B. 283; /1937] 1 All E.R. 590. It was suggested that *Taylor* v. *Webb* was in conflict with a decision of the New Zealand Court of Appeal, *Baker* v. *Johnston and Co. Ltd.* (1902) 21 N.Z.L.R. 268; 4 G.L.R. 270.* In fact one of our Magistrates, Mr H. J. Thompson, declined to follow *Baker* v. *Johnston* in *Clark* v. *Moore Wilson and Co. Ltd.* (1946) 5 M.C.D. 195, preferring the more recent but much debated *Taylor* v. *Webb*. The learned Magistrate, at p. 199, said:

> Though it seems very desirable that a Supreme Court decision should be obtained on the point, I have come to the conclusion that I should adopt the decision in *Taylor* v. *Webb* for the reasons:
>
> (a) That this case was decided in 1937, some thirty-five years later than our Court of Appeal case of *Baker* v. *Johnston and Co., Ltd.*
>
> (b) That this is the first occasion on which the "fair wear and tear" exception has been before the Court of Appeal in England.
>
> (c) That the English Court of Appeal has reviewed all the relevant authorities, and has now settled the law in England.
>
> (d) That our own Supreme Court or Court of Appeal, in considering the question of "reasonable wear and tear," must inevitably take into account in any future case the decision in *Taylor* v. *Webb*.

The doubt as to the proper construction and effect of the exception from the tenant's covenant to repair of "fair wear and tear" has not been confined to New Zealand. I infer from a recent article in the *Australian Law Journal* (1958) 32 A.L.J. 51), that conveyancers in Australia have also been troubled by *Taylor* v. *Webb*, and the writer of the article draws attention to the conflict between leading text books as to the effect of that case. It was held by the Court of Appeal that the exception from the covenant of "fair wear and tear" included damage to the outside walls and roof of the house caused by natural agencies such as rain, wind and decay, and also consequential damage to the interior of the house caused by the same agencies and that the sub-lessor was not liable to the sub-lessee. Some text writers took this decision as virtually extinguishing the liability of the lessee for repairs in cases in which this exception was found so that, for practical purposes, the preceding obligation to repair was negatived unless it could be shown that the state of disrepair was due to some active or wilful damage done by the tenant as a tenant. (See, e.g., *Foa's General Law of Landlord and Tenant*, 8th ed., 212; *Hill and Redman's Law of Landlord and Tenant*, 12th ed., 207.) On the other hand, some regarded the decision as laying down no general statements of principle at all. (See, e.g., *Woodfall on Landlord and Tenant*, 25th ed., 666).

The recent English Court of Appeal case, *Brown* v. *Davies* [1957] 3 All E.R. 401, will do much to allay the doubts which have existed in New Zealand, Australia, and the United Kingdom since *Taylor* v. *Webb* was reported. I shall consider what I conceive to be the crucial cases in chronological order.

First, there is the very old case of *Gutteridge* v. *Munyard* (1834) 1 Mood. & R. 334, dealing with the letting of a very old house. In that case, Tindal C.J. stated the effect of a repairing covenant containing an exception of reasonable use and wear in these words:

> What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised.

I would draw particular attention to the last portion of this ruling. The tenant is bound by *seasonable applications of labour* to keep the house as nearly as possible in the same condition as when it was demised. If the house let is old, the tenant cannot be expected to make it as good as a new house; but he cannot just sit back and allow the elements to take charge: if necessary he must do something active to prevent that: he must remove and renew that rusty nail, and, if a tile falls off the roof, he must replace it to prevent the rain from coming in. That extract from Tindal C.J. forms the very basis of the decision of the English Court of Appeal in *Brown* v. *Davies*, *supra*.

The next case I shall consider is the New Zealand Court of Appeal decision, *Baker* v. *Johnston & Co. Ltd.* (1902) 21 N.Z.L.R. 268; 4 G.L.R. 270, which many thought (erroneously as it now turns out) to be in direct conflict with *Taylor* v. *Webb*.

It is perhaps not out of place to note that the demised dremises in *Baker's* case was an hotel property. The appellant occupied hotel premises under a lease containing a covenant that the lessee would during the term keep the hotel and buildings in good and tenantable repair, and would at the end or sooner determination of the term in like repair yield and deliver up the same, *reasonable wear and tear and damage by fire alone excepted*. The Police report, presented at an annual meeting of the Licensing Committee, was to the effect

* See, for example, (1938) 14 N.Z.L.J. 76 (C. N. Armstrong).

that the roof of the building was in a very bad state and apparently leaked all over. The Licensing Committee granted a renewal of the licence conditionally on the repairs required by the Police being effected at once. By arrangement between the appellant and the respondents (the lessors) the repairs were undertaken by the respondents; the question of the liability of the parties *inter se* to be determined afterwards by a special case. The architect employed by the respondents reported that the iron on the roof was dilapidated through the operation of time and the elements, and was so far worn out to be past repairing effectively; and that he considered it necessary, in order to put the roof into proper repair, that it should be covered with new iron. This was done accordingly. The majority of the Court of Appeal held that the obligation of the appellant under the covenant was clearly not lower than that of a yearly tenant: that he was therefore bound to make the roof watertight; and that, in acquiescing in the statement of the architect that the only way to make it watertight was to put on new iron, he became liable fo what had been done.

It is not without interest to note that in the columns of this JOURNAL, six years after *Taylor* v. *Webb* had been reported (1943) 19 N.Z.L.J. 118) the late Mr C. Palmer Brown submitted that *Baker* v. *Johnston and Co. Ltd.* was still good law in New Zealand, and, in any case, was a far more common sense judgment than *Taylor* v. *Webb*. Mr Brown wrote:

> It can be said at once that the decision of our Court of Appeal is based on authority and convenience, while that of the Court of Appeal in England is based on a critical analysis of the words of the covenant. It must also be said that the majority of the Judges in our Court of Appeal preferred to base their judgments on another covenant in the same lease, but they all concurred in the construction of the repairing covenant. Despite these objections to *Baker* v. *Johnston* as an authority, it is submitted that it should be preferred.

Finally, we come to a consideration of *Brown* v. *Davies*, the recent decision of the English Court of Appeal which I think will do much to settle the law on this very important topic.

In this case, the crucial words were:

> "To use and occupy the said premises in a fair and tenantable manner and keep the interior clean and in good repair and condition and decorated except as to dilapidations or damage resulting from reasonable wear and tear, accidental fire, or the Act of God."

Another tenant's covenant also came into the picture:

> "To keep manage and cultivate the said garden in a good and husbandlike manner and free from weeds and so deliver up the same at the end or sooner determination of the tenancy."

The landlord determined the tenancy by notice to quit in June, 1952. The tenant continued in occupation as a statutory tenant protected by the Rents Acts. The tenant had failed to do any decorative repairs to the bungalow for some years, and he had entirely neglected to do anything to the garden, which had become a "jungle." The landlord claimed possession on the ground of the tenant's failure to observe and perform the above two covenants. After the service of the particulars of claim and before the hearing, the tenant did a certain amount of decorative repairs to the bungalow. He did nothing tofhe garden, and he was admittedly in breach of his covenants to manage the garden "in good and husbandlike manner." There appears to have been no dispute as to the construction and effect of the garden covenant, but linked up with the first-cited covenant was another one: upon notice by the landlord "to carry out any interior repairs and decorations necessary to put the premises in as good a state of repair and condition as the same are now in." As Romer L.J., observed, one must so far as possible effect a reconciliation between the first and last cited covenants, and no such reconciliation is achieved by depriving the first cited covenant of practically any effect at all. Or as Lord Evershed M.R. put it,

> "the duty of the Court must be to construe, so far as possible, these two sub-clauses together so as to arrive at a coherent whole."

Counsel for the tenant relied greatly on *Taylor* v. *Webb*, *supra.*, and submitted that where you find a covenant to repair and decorate, but it is qualified by excepting dilapidation or damage resulting from reasonable wear and tear, the result is that, in fact the covenantor need do nothing active in the pursuance of his obligation; in other words, provided he just sits back and allows the elements to have such effect on the premises as naturally occurs, then it cannot be said of him that he is in breach of his covenant. Consequently, the Court of Appeal subjected *Taylor* v. *Webb* to a very minute and critical examination.

In *Taylor* v. *Webb*, a *landlord* covenanted in *an under-lease* to keep the *outside walls and roofs* in tenantable repair, as he was required to do by the head-lease. The head-lease contained a lessee's covenant to keep *the premises*" in good and tenantable repair destruction or damage by fire and fair wear and tear excepted." Owing solely to the effect of wind and rain, certain roofs and skylights became defective, and, as they were not repaired, certain rooms in due course became uninhabitable. The whole of the disrepair was due to the elements, coupled with the absence of any steps by anybody to prevent further progress of the decay. It was held by the Court of Appeal that the exception from the covenant of "fair wear and tear" included damage to tfe outside walls and roof of the house caused by natural agencies as previously pointed out, and also consequential damage to the interior of the house caused by the same agencies, and accordingly that the sub-lessor was not liable to the sub-lessee.

The Court of Appeal in *Brown* v. *Davies* pointed out that the covenant by the sub-lessor in *Taylor* v. *Webb* was not an ordinary one, as the Court had to construe the words removed from their normal context of a tenant's covenant and transported into the text of a lanlord's covenant. It was no ordinary covenant: one of the Judges who decided *Taylor* v. *Webb* described it as "a topsy-turvy covenant, a hybrid." In *Taylor* v. *Webb*, the landlord was himself a lessee under a head-lease, and under that head-lease he had imposed upon him as tenant or lessee an obligation to repair and decorate the premises, to

> "keep the premises hereby demised, and the fixtures, painting, papering and decorations thereof in good and tenantable repair," "destruction or damage by fire and fair wear and tear excepted."

The lessee then, by the under-lease being transmuted into the situation of a landlord, assumed in the under-lease a more limited obligation as to repair, for it was only to keep the outside walls and roofs properly repaired. There was no general obligation to keep the dwellinghouse in good repair and condition, but only the walls and roofs, and therefore the landlord had no obligations whatever with regard to reparation.

In *Brown* v. *Davies*, Romer L.J. said :

" It seems to me that the law as laid down by Tindal C.J., in *Gutteridge* v. *Webb, supra*, is still the general law, and was not intended to be overruled by this Court in *Taylor* v. *Webb*. nor indeed was the statement of the law by Tindal C.J. brought to the attention of the Court in that case. The truth is that, in order to find out the scope and effect of a qualified covenant to repair, you have got to look at the document as a whole, and it appears to me to be going far beyond anything that was said by any of the Judges in *Taylor* v. *Webb* to say that you merely have to find an exception for reasonable wear and tear to reduce the scope of the covenant to practically nothing at all.

It appears to me that in future we shall hear less and less of *Taylor* v. *Webb* : it does not lay down any general proposition of law and in particular does not derogate from the rule laid down by Tindall C.J. in *Gutteridge* v. *Munyard*. *Taylor* v. *Webb* may still be of some significance when considering the covenants in sub-leases, which are always tricky things to draft. And we certainly have plenty of sub-leases in New Zealand to keep some of us fairly well occupied, and on the alert.

LEGAL LITERATURE.

The Land Transfer Act 1952.

The Land Transfer Act 1952 by E. C. ADAMS, I.S.O., LL.M. Pp. xxxvi + 505. Wellington : Butterworth & Co. (Australia) Ltd. Price : 97s. 6d.

The indefatigable Mr Adams has done it again. This time he has come to the aid of the practitioner who is fortunate enough to be able to devote considerable portions of his time to witnessing and signing correct transfers, mortgages, and the like. But the practitioner who frequents the Courts rather than the Land Transfer Office will also find this book, like Mr Adams's previous works, a most useful addition to his library. So, too, will the student engaged in the course of surmounting the obstacles in the path of his (or her) attaining either one or both of the foregoing categories.

The book could, perhaps, be more correctly titled " The Land Transfer System in New Zealand," as the Land Transfer Act is not the only relevant statute. The Act must be read in association with other statutes, and particularly with certain provisions of the Property Law Act 1952, a fact which the author readily recognizes by incorporating these provisions into the body of the work.

Like the learned author's previous works on Estate and Gift Duties and Stamp Duties, the present book consists mainly of detailed annotations of the relevant legislation (including the Land Transfer Regulations, which are of great practical importance). The annotation is preceded by an interesting introduction outlining the history, purpose, and other basic features of the Land Transfer system. The annotations are, as one would expect from Mr Adams, comprehensive, and one can feel reasonably certain that the book contains references to all relevant authorities. In addition, there are numerous references to incidental legislation, e.g., Public Works Act, Land Subdivision in Counties Act, etc.

There are one or two aspects of the indexing and lay-out which, one feels, could be improved. The book is indexed by references to paragraphs instead of pages, a system which conflicts with the average user's natural tendency to turn to a page reference. Again, the advantages of the interposition of relevant sections from the Property Law Act are somewhat offset by the printer's lack of emphasis on the breaks in continuity of the Land Transfer Act. The sections of each Act are printed in the same type and are distinguished merely by the name of the Act (not in bold type or capitals) above each section. This may seem adequate, but it is possible that a careless but harrassed reader may experience initial confusion on quickly opening the book to consult a section of the Land Transfer Act in its supposed numerical position only to find himself reading the section of the same number of the Property Law Act. Especially, one notices that, on p. 244, s. 116 of one Act is immediately followed by s. 116 of the other Act. Perhaps it would be sufficient for relevant sections of the Property Law Act to be briefly referred to in the notes to the main Act and printed and annotated in a separate portion of the book. However, if it is thought desirable to retain the present system in later editions, this reviewer respectfully suggests that more prominence be given to identification of the two Acts, e.g. by printing them in contrasting type or by printing the name of the Act in the margin beside each section.

It is to be regretted that it has not been possible to include in the book more than merely references to precedents. If, in the one volume, we could have relevant precedents from *Goodall* and from the author's numerous *Law Journal* articles, the conveyancer would have a heavier but even more useful book. Another welcome addition would be some of the abovementioned *Law Journal* articles. (The present volume does contain one appendix, dealing with accretion). However, we can indeed be grateful to Mr Adams for what he has given us—a comprehensive and complete analysis of the Land Transfer system and the first such work for more than thirty years.

C. B. B.

INLAND REVENUE DEPARTMENT.

Te Aroha Sub-Branch.

The Te Aroha sub-branch of the Taxes Division, Inland Revenue Department opened for public business on Wednesday, October 1, 1958.

The office will be situated in Smith's Building, Whitaker Street, and will deal with all matters relating to Ordinary Income Tax, Social Security Income Tax and Land Tax for persons residing in the counties of Coromandel, Thames, Hauraki Plains, Ohinemuri, and part of Piako county (excluding Morrinsville and aadjacent districts).

All taxation matters concerning companies will continue to be dealt with by the Hamilton Office.

TOWN AND COUNTRY PLANNING APPEALS.

Barnes *v.* East Coast Bays Borough.

Town and Country Planning Appeal Board. Auckland. 1958. February 20.

Building—Area zoned as "Residential A"—Permit sought for erection of Lodge Room in Reinforced Concrete in front of Existing Residence—Such Building detracting from Amenities of Neighbourhood—Town and Country Planning Act 1953, s. 38 (8).

Appeal by the owner of property in Hastings Road, Mairangi Bay, being Lot No. 53 on Deposited Plan 18893, Part of Allotment 194, Parish of Takapuna, containing 1 ro. 6,3 pp. The appellant and her husband resided on this property and she applied to the respondent Council for a building permit for the erection in reinforced concrete of a building to be used as a lodge room by the Outram Lodge No. 160 of the Royal Antediluvian Order of Buffaloes.

Under the Council's undisclosed district scheme, Hasting Road is an area zoned as "residential A". A lodge building can be regarded as a "place of assembly" and as such can be a "conditional use" in a residential zone, but regard must be given in considering whether conditional uses should be granted to the nature of a proposed building, its siting, and the use to which it is to be put.

The judgment of the Board was delivered by

REID S.M. (Chairman) as follows: 1. The part of Hastings Road under consideration is entirely residential in character and that character is likely to be maintained.

2. A building of the type suggested sited in the front of the appellant's property would detract from the amenities of the neighbourhood and the appeal is disallowed.

During the hearing, evidence was produced that before the hearing of this appeal the town clerk of the Council sent a circular letter to eleven residents in the immediate neighbourhood informing them of the appellant's proposal and asking them to state whether or not they were in favour of the proposal. Ten of these residents wrote in objecting to the proposal and copies of their letter of objection were produced in evidence. The letter from the town clerk was tantamount to an invitation to these property owners to object. None of them was called as a witness so that none of them could be cross-examined on his views. In these circumstances the Board wishes to make it clear that in giving its decision it has totally disregarded the views of those neighbours.

Its decision is based on town-and-country-planning principles. No order as to costs.

Appeal dismissed.

In Re Dyett.

Town and Country Planning Appeal Board. Napier. 1957. December 16.

Subdivision—Orchard with Fenced-off Section with Dwellinghouse thereon—Owner no longer able to carry on Work of Orchard—Sale of Orchard in Prospect—Subdivision not detrimentally affecting Operative District Scheme—Subdivision approved—Town and Country Planning Act 1953, s. 38 (1) (d).

The applicant was the owner of an orchard property at Clive containing 6 acs. 29 pps. being Lot 1 on Deposited Plan 1001, part Section 17, West Clive.

Part of this property, a section containing 1 ro. 5 pps. was an independent unit fenced off from the balance of the land and having a frontage to Richmond Road. A dwellinghouse erected thereon and has been occupied as such since 1949.

This dwellinghouse had an independent artesian water supply and was equipped with a septic tank. It was in no way connected with orcharding operations carried out on the balance of the land. This balance comprise 5 acs. 3 ros. 24 pps., and had for some years been operated by the applicant as an orchard; but she was no longer capable of carrying on this work and she wished to sell to another orchardist.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds:—

1. That if the subdivision is approved and the proposed sale effected, the productivity of the orchard will be substantially increased.
2. That the proposed subdivision will not detrimentally affect the respondent Council's operative district scheme.
3. That the requirements of Reg. 35 of the Town and Country Planning Regulations 1954 (as amended) have been complied with.
4. That no objections to the proposed subdivision have been received.

The Board grants the application and directs that the subdivision of the land described into two allotments containing respectively 5 acs. 3 ros. 24 pps. and 1 ro. 5 pps. be approved by the respondent Council without amendment to the operative district scheme.

Application granted.

Molloy *v.* Minister of Lands.

Town and Country Planning Appeal Board. Wellington. 1958. March 27.

Subdivision—Area zoned as "Residential"—Front Lots and Large Rear Lots served by Rights-of-way—Large Sections undesirable in Residential Areas owing to Potential Future Subdivision into Smaller Lots—Any Subdivision to make Provision for Road Access to Lots—Town and Country Planning Act 1953, s. 38 (1) (b).

The appellant was the owner of all that parcel of land situated in the town of Te Marua, Extension No. 8, containing 3 acs. 2 ros. 1 p., being subdivision of Lot 6 on Deposited Plan No. 19064 Part Section 3 Hutt District.

The appellant opened other land in the locality which had already been subdivided under approved plans. The area was zoned as residential under the County Council's undisclosed district scheme.

In September, 1956, he submitted a scheme plan to the Chief Surveyor for approval. This scheme plan provided for the subdivision of the property into nine lots, four lots having frontages on to existing roads and five rear lots served by rights-of-way. The rear lots contained areas of 1 ro. 20 pps., 1 ro. 22 pps., 1 ro. 20 pps., 1 ro. 19 pps., and 2 ros. The scheme did not provide for any internal roading.

This plan was submitted by the Chief Surveyor pursuant to s. 3 (4) of the Act to the Hutt County Council, the local authority, for its comments. That Council took the view that this type of subdivision comprising mainly rear sections with right-of-way access as undesirable. It also considered that the land was not being subdivided to the best advantage. The Council accordingly recommended that the subdivision should be declined until road access was provided for rear lots. The Chief Surveyor was in accord with the views expressed by the Council, and, on October 3, 1957, the appellant was advised that the Minister's approval to the proposed subdivision was refused.

The judgment of the Board was delivered by

REID S.M. (Chairman). The appellant claimed that his object in subdividing the land into large lots was to ensure that substantial type residences would be erected on them. The evidence of the respondent, however, indicates that experience has shown that sections of the size of the five rear lots were not desirable in residential areas because sooner or later the owners want to subdivide them into smaller allotments. In the case of the appellant's plan, such subdivision would not be possible because of the lack of road access. This is a substantial objection to the scheme as propounded and the Board is prepared to uphold it and to disallow the appeal.

During the hearing a plan was submitted by the respondent showing an alternative scheme for subdivision of this property into small allotments with provision for road access from Plateau Road. The effect of giving access by a parallel road would have the effect of reducing the number of sections having frontages leading on to the Wellington-Masterton State Highway.

The Board agrees that this is desirable.

The Board is not holding that the alternative scheme suggested by the respondent must be accepted by the appellant or that it provides the only reasonable means of subdividing this land. If the appellant wishes to maintain his object of providing larger sections, there is no reason why he should not do so, provided that these larger sections are not rear sections having access only by right of way and therefore incapable of further subdivision.

(*Concluded on p. 304.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Increase of Crime.—Observations made by the recently-retired Goddard L.C.J. at the Mansion House Dinner to the Judges will startle some of the more modern criminal reformers. "There is no use pretending", he said, "that the increase of crime is not a matter of great seriousness at the present time. A great increase not only in the number of cases, but in the number of violent cases. We hear a good deal in these days of inquiries into the causes of crime. For myself, I believe the causes are the same as in the days of the Old Testament—and you will find plenty of crime in the Old Testament! Greed, love of easy money, jealousy, lust, cruelty, always have been and always will be the causes of crime. If you ask me why some people indulge in crime and others do not, I must say I do not believe the answer is to be found, or ever will be found. It has been the same all through history. But one thing is not sufficiently recognized. The function of the criminal law is deterrence. The criminal law, as law, is not concerned with the reform of the criminal: that is a matter for persons and societies who, to their honour, are trying to do something about it. The Judge is concerned with the protection of the public, and in that must have regard to the interests of the victim as well as the criminal. One may hope that what is going on is only a passing phase; but the Courts will have to administer the criminal law fearlessly". Whether or not these views commend themselves to our Supreme Court Bench, it is becoming more and more evident that the stiffening-up of penalties is in their view necessary in order to grapple with increasing crime in this Dominion; and the view is fully shared by right-minded people in all sections of the community.

The Dean Case.—"These problems of legal professional etiquette have often been canvassed, and have elicited many diverse opinions. The present writer knows of no case which raised them in more acute form than a criminal trial which took place in Sydney, Australia, in 1895. The full narrative of it is not, so far as I know, on record in any connected form. It attracted little attention in England, partly because of its geographical remoteness, and partly because England in 1895 had enough criminal "sensations" to satisfy the most voracious appetite. At the time when George Dean was standing his trial in Sydney, the Tichborne claimant was enriching the Press with introspective reminiscences, and many other echoes of the Tichborne trial still lingered in the land; Oscar Wilde was on trial at the Old Bailey; and Jabez Balfour, of "Liberator" celebrity, was extradited from South America. These were causes celebres for the Australian as well as the English public, but could not compare with the thrills and emotions of the Dean case. Just as the Tichborne trial divided all England into two camps, so the Dean case divided all Australia into warring factions. The fiercest passions were aroused, and, as we shall see, the case, besides involving many reputations, nearly caused the downfall of a colonial government. Apart from its technical aspects, it serves as an instructive warning of the dangers of 'popular' justice and of the disasters which result from allowing legal issues to pass into the political or the sentimental sphere." The foregoing is the view of Sir Carleton Kemp Allen, Q.C., Professor of Jurisprudence at Oxford, in his recent *Aspects of Justice* (Stevens and Sons Ltd., 1958) in which he deals with this unusual and engrossing case in a chapter entitled "Conscience of Counsel." Those interested in the literature of the law will find included on this topic his Giff Edmunds Annual Memorial Lecture to the Royal Society of Literature in 1956. The title to the book covers the grammar of justice, justice and mercy, and justice in relation to expediency and liberty. His essay on cruelty, which appeared in part in the *Law Quarterly Review*, included cruelty to children, cruelty to animals, and matrimonial cruelty.

Two Swearings-in.—The swearing-in of a new Judge has become one of the most pleasant ceremonies that the main-centre lawyer has the opportunity to attend, but it lacks something of the impressiveness and splendour of that which marks the rare occasion when a Lord Chief Justice goes through this judicial process. The swearing-in of Lord Parker is thus described by the *Law Journal*. It took place on October 1. "At about 2 p.m. the doors behind the Bench of the Lord Chief Justice's Court opened, and some thirty of Her Majesty's Judges entered. Lord Parker, the new Lord Chief Justice, stood before his empty chair in the middle of the Bench. Seated on his right were Lord Kilmuir, L.C., and Lord Merriman P. On his left sat Lord Evershed M.R. and at each side, filling the Bench area, were the Lords Justices of the Court of Appeal, and the Judges of the three Divisions of the High Court. Below the Bench were the several officers of the Courts, including the Master of the Crown Office, Master King, and Mr H. W. K. Hills, Head Clerk of the Crown Office. At the Bar were the Attorney-General and the Solicitor-General. Without any delay the Oaths of Allegiance and the Judicial Oath were administered by Master King, and, having taken the Oaths, the Lord Chief Justice sat for the first time. The Attorney-General rose and begged to move that the proceedings be recorded, and this was followed by speeches of the Lord Chancellor, the Attorney-General and the Lord Chief Justice himself. The ceremony over, the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls and the President left the Court, followed by the Lords Justices and other High Court Judges. A few minutes later, the Lord Chief Justice returned to Court and took his seat with Mr Justice Hilbery, the senior Judge, on his right, and Mr Justice Cassels, the second senior Judge, on his left. Judicial business began. This consisted in the pleasant duty of swearing in a new Judge of the Queen's Bench Division, Mr Justice Thesiger, who took the Oath of Allegiance and the Judicial Oath, which were again administered by the Master of the Crown Office, and thus the business of the day was concluded."

Tailpiece.—

If ever you go to Dolgelly
Don't stay at the —— Hotel;
There's nothing to put in your belly,
And no one to answer the bell.

Thomas Hughes

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 302*).

The Board considers that any subdivision of this land should make provision for road access by way of a parallel road from Plateau Road northwards.

No order as to costs.

Appeal dismissed.

Morrison *v.* Minister of Lands and Otorohanga County.

Town and Country Planning Appeal Board. Hamilton. 1958. May 7.

Subdivision—Close Residential Subdivision—No Legal Road Access—Access along Tidal Flats at Low Water—Not Reasonable Access by Sea—No Power to waive Compliance with Statutory Provisions—Public Works Act 1928, ss. 125, 126 Land Subdivision in Counties Act 1946, s. 3.

Appeal by the owner of a farming property, comprising 950 ac. 3 ro. 27 pp., being Aotea South No. 1, 2, and 3 A Blocks. It was situated on the Aotea Harbour and access to it was gained by sea at times of high tide, otherwise by travelling a distance of approximately 2 miles across tidal flats from the Aotea Road. The appellant submitted two scheme plans to the respondent Council for its approval. One of these, No. 3401, provided for the cutting off of one residential site of 32 pp. at one point on the foreshore. The other scheme, No. 3392, provided for 17, residential lots each of 32 pp., fronting on to the foreshore, provision being made for an esplanade reserve between the frontage of the sections and the actual foreshore. The respondent Council refused to approve these plans because there was no road access to the property. The appellant requested that the plans be forwarded for the consideration of the Minister of Lands under s. 3 of the Lands Subdivision in Counties Act 1946. The Minister refused to approve the plans on the following grounds :—

1. The only access to the subdivision was across the Aotea Harbour and there was no road access.
2. The access across the Aotea Harbour was not sea access in the strict sense as the real access would be across tidal flats at low water from the nearest road.
3. There was no deep water access, nor was there any public access by sea to a jetty.
4. The scheme made no provision for road access.
5. Subsequent sale of sections would probably lead to demands on the County Council by owners for the provision of road access.

The judgment of the Board was delivered by

REID S.M. (Chairman). The appeal first came before the Board on February 21, 1957 and, after hearing the evidence then adduced, the matter was adjourned sine die in order that the parties might endeavour to reach agreement on the provision of some road access to the appellant's southern boundary.

On February 22, 1957, the Board visited the area and inspected the general locality from the point where the Aotea Road joins the foreshore of the Aotea Harbour. The Board was informed that agreement had been reached on the basis of contribution to the cost of a road giving access to the southern boundary of the appellant's property by the appellant contributing £700, another owner who would be served by the road contributing a like amount, and the County Council finding the balance from the Backblock Roading Funds. Under this arrangement, the appellant is to undertake to complete an access road through his property from the County road when the latter should be formed. The cost of the road is estimated to be £7,000 and it is doubtful whether the required amount would be forthcoming, at least for the present.

After the hearing had concluded, counsel for the appellant submitted a memorandum on certain questions of law. His submissions were mainly directed to answering a submission made by counsel for the Surveyor-General to the effect that as the strip of land between high water mark and low water mark is the property of the Crown, the public has no access as of right to this strip.

Mr Seymour's submission put shortly is that the public has such a right as a way of necessity.

The Board does not propose to determine this question of law. As will hereinafter appear it is not necessary for it to do so in order to arrive at a decision.

After considering the evidence adduced and the submissions of counsel, and having inspected the locality, the Board finds :—

1. That the present means of access used by the appellant is one that has been used for some sixty years, and there can be no doubt that it provides a practical access to the appellant's property for the purposes of that property being used as a farm, but different considerations apply when access to eighteen seaside residences calls for consideration.
2. The Minister of Lands held that there is no legal access to the proposed subdivisions in terms of ss. 125 and 126 of the Public Works Act 1928 ; and counsel for the Minister of Lands refers the Board to the case of *Jowett* v. *Mayor etc. of Birkenhead* [1927] G.L.R. 98. That was a proceeding by way of certiorari asking the Court to review a decision of the Birkenhead Borough Council in relation to the access by sea to a proposed subdivision. In that case, the local authority had ruled that there was no reasonable access by sea and the decision of the Supreme Court was that the opinion of the local authority properly formed and expressed was final and would not be interfered with by the Courts.

In this present case, the Minister and the Council have considered the matter and have held that this proposed subdivision has no reasonable access by sea and there is no legal road access.

That ruling does not of necessity determine the question at issue ; it is still open to the Board as a question of fact to hold that there is reasonable access by sea, but the Board is not prepared to so hold. It takes the view that access along tidal flats at low water is not " reasonable access by sea " to a close residential subdivision. Having so found the Board has no authority to waive the provisions of ss. 125 and 126 of the Public Works Act 1928. In these circumstances, therefore, this Board has no course open to it other than to disallow the appeal. It cannot waive compliance with statutory provisions.

No order as to costs.

Appeal disallowed.

Hannah *v.* Horowhenua County.

Town and Country Planning Appeal Board. Wellington. 1958. March 21.

Building Permit—Addition to Workshop in Connection with Garage Business—Area Zoned " Residential "—Locality suitable for Residential Development—Non-conforming Use continuing—Permit for Additions refused—Town and Country Planning Act 1953, s. 38 (1) (c).

The appellant was the owner of a property situated in Awahohonu Road. This property was within that part of the County lying immediately north of the Otaki railway area being separated from the Otaki Borough by the Main Trunk railway line and the main highway. In May, 1956, an application was lodged by the appellant's father, who was then the owner of the property for a permit to build a workshop of a total area of 600 sq. ft. There was nothing to indicate to what purpose this workshop was to be put, and the respondent Council assumed it was to be used as a domestic workshop in conjunction with the residence on the property. In fact, however, the appellant used it in connection with his business as a garage proprietor, and he was still carrying on business as such. In November, 1957, the appellant applied for a building permit to make substantial additions to this workshop by adding another 1,200 sq. ft. This permit was refused by the respondent on the grounds that the property was in an area zoned as residential under the Council's Undisclosed District Scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel the Board finds :—

1. That the area in which the appellant's property is situated is at the present time used for residential and intensive farming principally market gardening. There are at present approximately forty-seven houses in the area. The locality is suitable for residential development and further development in that direction can be anticipated in the future.
2. The appellant is entitled of course to continue his existing business as a non-conforming use but the Board agrees with the respondent Council's contention that to grant the permit sought would tend to perpetuate this non-conforming use. Garages are not a predominant or conditional use in residentiel or commercial " A " zones so that even if the residential occupancy increased and commercial premises were erected to service the residential population, a garage would not be permitted.

The appeal is disallowed. No order as to costs.

Appeal dismissed.