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DAMAGES: DAMAGES IN LIEU OF SPECIFIC PERFORMANCE.

THERE is a statutory authority to award damages either in addition to or "in substitution for" specific performance of a contract: Chancery Amendment Act 1858 (21 & 22 Vict. c. 27) (known as "Lord Cairns's Act," which is in force in New Zealand, though it has been repealed and replaced in the United Kingdom). The equitable remedy of damages is discretionary. But damages cannot be awarded in a case in which specific performance would have been inadmissible ab initio: *Lavery* v. *Pursell* (1888) 39 Ch. D. 508, 519. Thus, in *Tamplin* v. *James* (1880) 15 Ch. D. 215; *Serrao* v. *Noel* (1885) 15 Q.B.D. 549; *Pearl Life Assurance Company* v. *Buttenshaw* [1893] W.N. 123, the plaintiff had an equity to specific performance at the time of the institution of the suit; and there could therefore be no doubt that damages in lieu of specific performance could be granted to the plaintiff under Lord Cairns's Act: per Edwards J. in *Dillon* v. *Macdonald* (1902) 21 N.Z.L.R. 375, 379. An award of damages may be made in equity, assessable as the Court shall direct, where damages at law may not afford a complete remedy.

The discretion conferred on the Court to award damages in substitution for a decree of specific performance has seldom been exercised in this country. However, the recent judgment of McCarthy J., *Dell* v. *Beasley* (to be reported) is interesting in that His Honour, in refusing a decree for specific performance of a contract to purchase a house property, exercised his discretion, and, in substitution for such decree, awarded damages. As the judgment is, moreover, a reminder that the discretionary power exists, it will be found a useful guide in similar circumstances.

An action for specific performance of a contract for the sale and purchase of land and buildings in Grant Road in the city of Wellington, was brought by the vendor against the purchaser.

It is necessary to consider the facts of the case in some detail.

A large wooden building of an age of about sixty years, erected on the land was, and had for some years, been utilized for commercial purposes. It was divided into a number of suites of rooms or offices. The area was occupied mainly by residences, but there were a number of commercial undertakings scattered along the road. The particular portion of Grant Road in which the property was situated, had been zoned for residential purposes by the Wellington City Council in a "proposed scheme" adopted by the Council in 1946; it had not been finally approved by the Town Planning Board.

In 1955, the defendant was interested in securing a tenancy of some premises for the purposes of a dining club or a public restaurant. A land agent then interested him in the premises in Grant Road. One suite, there were five in the building, was occupied then for business purposes and the tenant was anxious to dispose of his business. The defendant thought that the Grant Road area was suitable for him, and the land agent telephoned the plaintiff's agents and told someone in their office of the fact that that the defendant was interested in taking over the suite for a dining club or a restaurant, and asked whether the area was a commercial area. He was told that it was. The defendant, having arrived at an understanding with the tenant of the premises, then called on the plaintiff's agent. He said that it was pointed out that it was proposed to conduct a restaurant or club in the premises, that noise would probably be created in the evenings, and that they were concerned to know whether the area was "light industrial." The plaintiff's agent, he asserted, assured them that it was and that it would be all right for them to conduct a restaurant or club there. The agent had no recollection of any question being raised as to the character of the area, denied that any question bearing on zoning was raised, and said that he was not himself aware of the City Council's zoning plan and, therefore, would not have made any representations as to the character of the area from that aspect. He agreed, however, that he was told generally of the use to which the suite was proposed to be put. After considering the evidence as to this visit His Honour held that the purpose for which the premises were to be used was made clear to the agent; that he knew that the defendant required that the character of the area should be commercial or industrial to the extent of enabling him to carry on his particular business without undue difficulty; and that, although it was not established that the plaintiff's agent gave any assurance, he allowed the defendant and those with him to conclude that they need have no fear as to their being able to use the premises as a restaurant. A tenancy agreement with the plaintiff was then drawn up and signed. It contained this provision: "It is clearly understood that the premises must not be used for living purposes. . . . ."

In March, 1956, another suite in the building became vacant, and the defendant arranged with the plaintiff's

agent to take this suite also. A new tenancy agreement was drawn up in respect of the two suites, and this also contained a provision that the premises "must not be used for residential purposes." Another suite, the third, was taken over by the defendant in June, 1957. The agreement then executed also contained a provision prohibiting the use of the premises for residential purposes. Again, the question of purchase was mentioned to the defendant by the agent. He suggested that the rentals had increased to a figure which might make it worthwhile for the defendant to buy. It was really not disputed that, over the years 1956-57, the plaintiff's agent was well aware of the nature of the defendant's business and that he knew that, if the defendant did buy, it would be for the purpose of continuing and extending his operations. The defendant did not conduct a public restaurant. He was the owner of a dining club, and had some arrangement with the Wine and Food Society which resulted in that society using the premises and taking advantage of his services.

On November 15, 1957, the defendant wrote to the plaintiff's agent regardng the purchase of the Grant Road property, for which he offered £14,000. The plaintiff was willing to sell, but wanted £15,000. Then followed a meeting, on December 5, at the plaintiff's agent's office, when the matter of independent advice was referred to. There was dispute as to what was said concerning this matter. The defendant said that he said that he proposed to get advice. An offer of £14,000 was drawn up and His Honour accepted the plaintiff's agent's evidence that he went carefully through it with the defendant, explaining the terms and making it plain that the defendant would be committed if the offer were accepted. This offer provided for a deposit of £1,000, a further payment of £3,000 within one month of acceptance when possession would be given, and for the leaving of the balance of £10,000 on mortgage for five years at 6%, reducible by half-yearly instalments of £500. The defendant said that at this meeting he repeated his desire to develop the property for the purposes of his business; that he informed the agent that one of his staff had said some years before that the area was light industrial; and that the plaintiff's agent just shrugged the matter aside as if to indicate that it really was not important. The agent did not recollect any reference to a previous discussion and said emphatically that there was no mention of zoning or restrictions on use—no mention of anything of that kind. He went further and said that he was not aware of the City Council's proposed plan in so far as it affected this particular area. His Honour, in his judgment, said:

> Although it does, perhaps, appear strange that a principal of a leading firm of city land agents should be unaware of the details of the City Council's published proposals in relation to areas not far distant from the heart of the city, I accept [the plaintiff's agent] as a truthful and honest witness, and I accept that there was nothing said by him which the defendant could fairly take as conveying a belief on [his] part that there were no limitations on the commercial use of the property. On the other hand, I have no doubt whatsoever that it was clear to [him] that the defendant's object in offering to buy the property was to secure it for his own business purposes, and it is not remarkable that the defendant's confidence in his ability to use the property for those purposes was strengthened as the result of [the agent's] failure to dissent or warn against the proposals which the defendant had expressed. . . . . I consider that the offer is perfectly clear in its terms; and that the defendant, if he had been paying attention to what was said to him or had bothered to read the document before he signed it, could not have been left under any misunderstanding as to its nature.

The offer was transmitted to the plaintiff and accepted by her on December 7. Its acceptance was communicated to the defendant later over the telephone. It was then that the defendant approached an independent valuer, who inquired whether a firm offer had been made, and he was told that it had and that it had been accepted. He then made a valuation and advised the defendant that he had agreed to pay an excessive price and that, moreover, the place was zoned as "residential." He gave evidence that the Government valuation was £6,200. His own valuation on a market basis was £7,620, treating the property as residential. If, in fact, it were zoned as "light industrial," he would place a figure of £11,745 upon it. On receiving all this information from the independent valuer, the defendant refused to pay his deposit and purported to repudiate the contract on the ground of misrepresentation.

The plaintiff sought a decree for specific performance. It was opposed on a number of grounds. In his opening at the beginning of the hearing, the plaintiff's counsel asked that, if specific performance could not be had, the Court should fix damages. The statement of claim before the Court did not ask for damages in the alternative. However, after the evidence had been heard and the case adjourned for legal argument, he sought an amendment to add, in the alternative, a claim for damages in the sum of £2,500. His Honour reserved his decision upon this matter and allowed the argument to proceed upon the basis that the amendment might be granted. Later, he allowed the amendment. On this point, His Honour said:

> In my view where a plaintiff seeks specific performance the Court is entitled to award damages under Lord Cairns's Act (21 and 22 Vict. c. 27) in those cases where specific performance lies even though damages are not claimed in the pleadings: *Dillon* v. *MacDonald* (1902) 21 N.Z.L.R. 21 N.Z.L.R. 375; 4 G.L.R. 415; *Griffin* v. *Mercantile Bank* (1800) 11 N.S.W. L.R. (Eq.) 231. Therefore, the possibility of an award of damages should always be in the mind of the advisers of a defendant resisting specific performance. Moreover, Mr White's request for damages if specific performance could not be had, made at the outset of the trial, brought the matter actively to the attention of the defendant.

His Honour went on to say that the exact nature and limits of the restrictions placed upon this property as a result of the adoption of the proposed scheme by the Wellngton City Council in 1946 were, in the light of the Town and Country Planning Act 1953 and its amendments, and, in particular, ss. 38 and 38A (this latter having been added by the Town and Country planning Amendment Act 1954) matters which could call for careful consideration. The building had been used for commercial premises for some time although it was not established that it was so used in 1946, though that might not be important. Counsel were agreed, however, that, in the circumstances obtaining, while it might be possible for the City Council under the statute to prohibit a continuation or extension of the non-conforming use of the building as now constructed, that was not so probable as to amount to a serious impediment. What was accepted by both counsel as applying and as a serious restriction is a right in the Council by virtue of s. 38 to refuse a building permit for any extensive alterations or rebuilding designed for a non-conforming use. His Honour went on to say:

> Having regard to the fact that the defendant's object in purchasing the property is to continue and to extend his present activities, that restriction obviously could be a substantial one. In view of the consensus of opinion on the part of counsel on this matter, I have not felt obliged to give any real consideration as to the true extent of the restriction

imposed by the scheme and the legislation; and I do not wish it to be thought that I am pronouncing upon them. I am prepared for this case to accept that the position is as counsel put it.

Although His Honour had accepted the evidence of the plaintiff's agent to the effect that he or his firm was not aware of the restrictions imposed by the Town Planning Scheme, it was established that, in 1952, a firm of Auckland solicitors, on behalf of the plaintiff made certain inquiries of the City Engineer, Wellington, regarding this land and with a reply dated November 21, 1952, that engineer forwarded a sketch plan of the tentative zoning scheme and in it drew the attention of the solicitors to the provisions of the legislation as it then existed. The plaintiff admitted that that letter was shown to her, but it appeared to His Honour that she had not understood it, and had read it as conveying in some manner an assurance that because the building was then being used for commercial purposes it would not be interfered with. In any event, it was clear that she had not passed on to her Wellington agents the benefit of this letter.

His Honour then addressed himself to the questions of law in issue. He said:

> The effect of the making of an order for specific performance in such a case as this being to compel payment by the defendant of the balance of money owing under the contract, it might appear on the face of it that damages would be a sufficient remedy, and that the rule that, that being so, equity will not decree specific performance would apply; but it seems clear that a suit for specific performance can be sustained by a vendor of an estate in land to compel payment of the purchase money by the purchaser: *Fry* on *Specific Performance*, 6th ed., 33. *Kibblewhite* v. *Garland* [1928] N.Z.L.R. 135; [1928] G.L.R. 61.

The defendant had raised a number of matters in opposition to the decree. As to his allegation of misrepresentation, His Honour said he had accepted that it was made clear to the plaintiff's agent that the property was required for commercial purposes and that no dissent came from him. In his view, however, that was not sufficient to establish misrepresentation. He added:

> Although it is true that a representation may in certain cases be made by keeping silent, in general a vendor is under no obligation to disclose defects in the quality of the land sold as distinct from the obligation to disclose matters material to his title: Fry on *Specific Performance*, 6th ed. 300, 331; 2 *Williams* on *Vendor and Purchaser*, 4th ed. 762. Restrictive covenants affecting the land must, of course, be disclosed, for they relate to title. wut the restriction here pointed to is one which is imposed not by covenant but by the general law and relates to the area generally. Defects of title are often within the enclusive knowledge of the vendor, but where the restriction arises by reason of the general law it does not amount to a defect of title: *Manukau Beach Estates Ltd.* v. *Wathew* [1032] N.Z.L.R. 865; [1032] G.L.R. 228. Failure to disabuse a purchaser of a misconception as to a matter not going to title would amount to a misrepresentation only where there is a duty to speak, as where the misconception has been created by the vendor's conduct or the course of negotiations shows that the vendor's failure to remove the misconception amounts in effect to an adoption of its truth. but, in order that this situation should arise, it is necessary that the vendor should fail to correct something which is "erroneous within his knowledge." *23 Halsbury's Laws of England*, 2nd ed. 35. As I have held, neither [of the plaintiff's agents], the individuals to whom the defendant revealed his intentions, was, in fact, aware that those intentions could not legally be carried out in full and in those circumstances their silence cannot amount to a misrepresentation. There cannot be, I consider, a duty to speak when the falsity of the other party's understanding is not known and appreciated.

The second ground relied on by the defendant was mistake. It was said, in the first place, that the parties laboured under a common mistake that the property, the subject matter of the contract, was one in an area zoned as available for commercial purposes, whereas in fact it is in an area zoned as a residential area. His Honour said:

> This contention of common mistake is not established by the evidence. The agents for the plaintiff, as I have said, seem to have been in a state of ignorance so far as zoning was concerned and there is no evidence that Mrs. Dell had brought her mind to that matter or given any expression of opinion at a time proximate to the execution of the contract. Her general and somewhat confused understanding of the character of the area did not at any time go as far as this plea requires. Moreover, it is not every kind of common mistake which avoids at common law. There is authority for the view that the class is limited to mistake going to the existence of subject matter or ownership—see *Cheshire and Fifoot*, 4th ed. p. 175-182; but even if it is accepted that the class is wider than that and covers mistakes in "an essential and integral element" as some of the Members of the House of Lords seem to have suggested in *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161, then it appears to me that, even assuming for the moment that the mistake alleged be satisfactorily established as having occurred and as being one of fact and not merely of law, it is still not within that class. Nor is it, I am inclined to think, within that yet wider class where equity has gone beyond the common law and lent aid to a mistake of a material, but not necessarily fundamental, character, as was done in *Solle* v. *Butcher* [1950] 1 K.B. 671; [1949] 2 All E.R. 1107. However, be that as it may, as I have said I am not satisfied that as a matter of fact that common mistake existed, and I consider that such mistake as there was, was unilateral in character. Mr. Cresswell relies on that unilateral mistake in the second branch of his argument on this ground.
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> In my view, there was unilateral mistake known to the agent of the other party to exist at the time of the execution of the contract, but not appreciated by him as such, and the real question on this issue is, as I see it, whether that mistake vitiates the apparent agreement of the parties and, if not, whether it is such as equity would regard as justifying a refusal of the decree. It is apparent, on consideration, that the parties here were in agreement in the same terms on the same subject-matter, and that the mistake on the part of the defendant was one of motive only and was not mistake as to a fundamental element.
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> The defendant appreciated correctly what he was buying, a household property, 125 Grant Road, he appreciated correctly the terms as to price and payment and he was aware of the true identity of the vendor. His mistake lay in that field of matters which together form the inducement for entering into a contract and such a mistake is not one which at common law avoids: *Salmond and Williams on Contract*, 2nd ed. 217. Nor having regard to the character of the mistake can I hold that it is one where equity would necessarily refuse to enforce the contract (*Keats* v. *Wallis* [1953] N.Z.L.R. 563), but it is clear, I think, that, in cases where though the mistake is unrelated to the substance of the contract it is contributed to by the conduct of the plaintiff and in particular by a misleading manner in which the plaintiff and her agents conducted the negotiations, the Court can in the exercise of its discretion refuse the decree: *Baskcomb* v. *Beckwith* (1869) L.R. 8 Eq. 100, *Jones* v. *Rimmer* (1880) 14 Ch. D. 588, 592, *Fry on Specific Performance*, 6th ed. 358.
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> That course is the one which I feel should be taken in this case, for I accept that at the very least the defendant was assisted, albeit unintentionally, in forming his misconception as to the uses to which the property could legally be put by the conduct of the plaintiff and her agents in the matters to which I have referred earlier, and I am of the opinion that it would be a hardship on the defendant to enforce specifically a contract entered into under such a misconception: *Summers* v. *Cocks* (1927) 40 C.L.R. 321. If I thought that the misconception of the defendant was due entirely to his own carelessness, I would make the decree: *Wilson* v. *Moir* (*No. 2*) [1916] N.Z.L.R. 637; [1916] G.L.R. 441, *Keats* v. *Wallis* [1953] N.Z.L.R. 563, but that is not the true position. The defendant's carelessness no doubt was a substantial cause but not the whole cause. It follows that the decree being refused on this discretionary ground, the plaintiff is entitled to damages either under Lord Cairns's Act or at common law: *Tamplin* v. *James* (1880) 15 Ch. D. 215; *Fullers' Theatres Ltd.* v. *Musgrove* (1923) 31 C.L.R. 524, 551; *Summers* v. *Cock* (1927) 40 C.L.R. 321, *Robison* v. *Sanson* (1912) 14 G.L.R. 579, 582.

His Honour considered, too, that the high figure which the defendant had agreed to pay, and which on

the evidence available at the moment seemed substantially in excess of the market value (though he did not overlook the particular value of this property to the defendant), was a matter which, when linked with the other matters to which he had referred, assisted to justify this course. Excessive price of itself does not amount to hardship, but it is a matter which can contribute to that ground: *2 Williams on Vendor and Purchaser*, 4th ed. 830; *Robison* v. *Sanson*.

In the result, His Honour exercised his discretion to award damages in lieu of specific performance. During the hearing, the evidence led for the defendant as to the value of the property was not directed strictly to the question of damages. Consequently, His Honour adjourned the proceedings for an inquiry as to the quantum of damages. The parties could then call evidence on that aspect of the case at the adjourned hearing.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Price Tribunal—After Inquiry by Tribunal, Proposed Price Order read over to Representatives of Licensed Trade—Failure by Them to grasp Import of Changed Method of Fixing Price for Draught Beer—No Contravention of Principles of Natural Justice. Price Order 1743, made by the Price Tribunal under the Control of Prices Act 1947, fixed the maximum prices to be paid or received for beer to which the Order applied; and it compelled a change in the method of selling draught beer which previously had been in operation. After an inquiry by the Price Tribunal, at which representatives of the licensed trade were present, a printed draft of the proposed Order was read to them. Its operative part fixed the maximum price of draught beer according to fluid ounces (and not by reference to the size of the container as theretofore). No objection was raised by the trade representatives to the terms of the draft Order, which were afterwards incorporated in Price Order No. 1743. The appellant, one of the representatives of the licensed trade, had sought a writ of certiorari to quash the Order, on the ground that the representatives of the licensed trade were not given a real and effective opportunity of being heard. The writ was refused by Hutchison J. On appeal from that refusal,

Held, by the Court of Appeal, That the Tribunal acted throughout in good faith and gave the representatives of the licensed trade a fair and full hearing, and a failure by those representatives to grasp the import or implications of the proposed Order read to them, or a misunderstanding as to its contents, did not give the plaintiff a right to a writ of certiorari, as the inquiry by the Tribunal and its final Order had not contravened the principles of natural justice. (*Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 applied. *New Zealand Dairy Board* v. *Okitu Dairy Co. Ltd.* [1953] N.Z.L.R. 366, *R.* v. *Paddington and St. Marylebone Rent Tribunal* [1949] K.B. 666, and *R.* v. *Flintshire County Council Licensing Committee* [1957] 1 Q.B. 350, distinguished.) Per Gresson P. Natural justice is an elastic term which may be invoked from time to time, but it is necessary to use caution to see that it is not unduly expanded and made to apply to a case which does not fairly fall within the established principles. Per North J. The only complaint that the appellant could make was that the Price Tribunal did not correctly interpret the facts; but, to some extent, responsibility for that must be borne by the representatives of the licensed trade. A failure to ascertain the true facts is not ground for the granting of a writ of certiorari, but only a ground for appeal. The only relief the appellant could seek had to come from the Price Tribunal itself, for no appeal is provided by the Control of Prices Act 1947. Per Cleary J. It would be carrying the notion of natural justice beyond the requirement of an adequate hearing and the necessity of discovering ex parte evidential matter, where error can be corrected by certiorari, to grant a writ of certiorari because there had been a unilateral failure on the part of the Price Tribunal to make clear to the representatives of the licensed trade a proposed change in the method of fixing the price of draught beer. *Drewitt* v. *Price Tribunal*. (C.A. Wellington. 1958. October 16. Gresson P. North J. Cleary J.)

COAL-MINES.

Negligence—Damages claimed by Injured Worker or Personal Representative of Worker killed in Coal-mine—Defence of Contributory Negligence excluded in All Cases—Coal-mines Act 1925, s. 14 (2) (Coal-mines Amendment Act 1947, s. 3 (1) (a).) The effect of s. 147 (2) of the Coal-mines Act 1925, as extended by s. 3 (1) (a) of the Coal-mines Amendment Act 1947, is to exclude, as a defence, contributory negligence on the part of a person employed in or about any mine, who has been injured or killed, not only in cases which rest on breach of regulation or of statutory duty, but also in cases resting on common-law negligence. (*Dickson* v. *Kamo Collieries Ltd.* [1948] N.Z.L.R. 397, distinguished.) Consequently, in a successful action at common law, within s. 147 (2), an issue of contributory negligence must be disregarded in the assessment of damages. *Berryman* v. *Attorney-General*. (S.C. Hamilton. 1958. October 23. Turner J.)

DEATHS BY ACCIDENTS COMPENSATION.

Apportionment of Damages—Widow and Children in Receipt of Social Security Benefits—Funds to be held in Trust as Class Fund for Benefit of Widow and Children—Future Social Security Benefits disregarded—Deaths by Accidents Compensation Act 1952, s. 13—Social Security Act 1938, s. 62 (d). The widow, who was entitled on an intestacy to the whole of the deceased's estate, asked the Court to apportion the balance of the damages recovered (less £900 which she had already received). There were three children aged fourteen, twelve, and three years respectively. The widow asked for no further payment for herself. She invited the Court to direct that the whole amount be held as a class fund for the benefit of herself and the three children. The widow was receiving, under the Social Security Act 1938 and its amendments, a widow's benefit amounting to £409 10s. per annum and family benefits amounting to £78 per annum; and future increases were certain. Assuming that those benefits continued to be payable, then their present value at the date of the deceased's death was approximately £6,250. Any reduction in the Social Security benefits could come about only by reason of the widow's remarriage or death or the death of a child or children, or by the widow's acquiring an independent income. *Held*, 1. That the Court's duty was to administer the Deaths by Accidents Compensation Act 1952, and to do what seemed to be right under that statute, without regard to the consequences to the Crown under the Social Security legislation, as the widow and children should be left free to benefit by the Social Security fund to the extent permitted by the Social Security Act 1938 and its amendments, any limitations on that right being solely wthin the province of the Legislature. 2. That the widow's proposal that the whole of the unallotted damages should be devoted to a class fund had material advantages for the widow and the children, and gave all of them inalienable interests in the fund, the widow's interest in which might endure for her life. An order was made for the balance of the damages recovered to be held in trust as a class fund for the benefit of the widow and the three children of the deceased (but without power, unless authorized by further order of the Court, to provide for past maintenance or past education of any dependent or to pay or apply capital moneys for the benefit of the widow) with liberty reserved to the trustee, the widow and each child to apply. *Maskill* v. *Attorney-General*. (S.C. Greymouth. 1958. October 24. F. B. Adams J.)

NEGLIGENCE.

Licensor—Occupier's Duty to Licensee—Concealed Danger of Injury outside Occupied Area—Danger arising from Use of Part of Land not Defective in Itself—Principle applicable—Invitor—Local Authority—Duty of Local Authority to Invitee in Respect of Unusual Danger of which Authority should have known. The general principle is that the occupier of land is not under a general duty to a licensee to take all reasonable steps for his safety; but the occupier has the duty to warn the licensee of a concealed danger, of which he knows, which is in the nature of a trap. The licensee must take the land as he finds it. The fact that the concealed danger is that of injury outside the occupied area, whether in the sea or on a highway or in adjacent

property, does not prevent the application of the rule. (Statements of Farwell and Hamilton L.JJ. in *Latham* v. *R. Johnson and Nephew Ltd.* [1913] 1 K.B. 398, 415, approved. Different principles are not applicable if the danger arises from the use of part of the land not defective in itself. On the other hand, a local authority is liable in damages to an invitee or a person to whom it owes a general duty of care who is on premises provided for the use of the public by the local authority, if the danger which caused injury to him was an unusual one of which the local authority ought to have known. (*Plank* v. *Stirling Magistrates* 1956 S.C. (Ct. Sess.) 92, approved.) *So held by the* Judicial Committee of Her Majesty's Privy Council, dismissing an appeal against the judgment of the Court of Appeal reported [1957] N.Z.L.R. 39, affirming the judgment of Hutchison J. (ibid., 42). *Perkowski* v. *Wellington City Corporation.* (Judicial Committee. 1958. July 10, 14, 15, 16, 17; October 14. Viscount Simonds. Lord Morton of Henryton. Lord Keith of Avonholm. Lord Somervell of Harrow. Lord Denning.)

PRACTICE.

Appeal—New Issue raised in Appellate Court—Principles guiding Such Court—Allowance of Introduction of New Point of Law in Court's Discretion. When a question of law is raised for the first time in an appellate Court, upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. But that course ought not, in any case, be followed unless the appellate Court is satisfied that the evidence on which it is asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. In an appeal in a case tried with a jury, the appellate Court must also consider whether further questions would have been left to the jury, its answers to which remain uncertain. Apart from this principle, the matter is one of discretion for the appellate Court. (*Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, and dictum of Lord Herschell in *Tasmania* (*Freight Owners and Shipowners* v. *City of Corinth* (*Owners*), *The Tasmania* (1890) 15 App. Cas. 223, 225, followed.) Furthermore, as the efficiency and authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned Judges who have considered these matters below, to allow the raising of a new point of law in the appellate tribunal is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the Courts below. (Dictum of Lord Birkenhead L.C. in *North Staffordshire Railway Co.* v. *Edge* [1920] A.C. 254, 263, followed, subject to the qualifications stated in the speeches of Lord Atkinson (ibid., 269) and Lord Buckmaster (ibid., 270), followed.) So held, by the Judicial Committee of Her Majesty's Privy Council, dismissing an appeal against the judgment of the Court of Appeal [1957] N.Z.L.R. 39, affirming the judgment of Hutchison J. (*ibid.*, 42.) *Perkowski* v. *Wellington City Corporation* (Judicial Committee, 1958. July 10, 14, 15, 16, 17; October 14. Viscount Simonds. Lord Morton of Henryton. Lord Keith of Avonholm. Lord Somervell of Harrow. Lord Denning).

PUBLIC BODIES LEASES.

Renewable Lease—Rent for Renewal Term to be fixed by "two indifferent persons"—Lease in which Crown the Lessee—Crown appointed as Its Arbitrator a Valuer Employed in the Valuation Department—Such Person not an "indifferent person"—No Person Employed by New Zealand Government qualified as an "indifferent person" to act as Arbiiraior io fix New Rental under Lease of which Crown the Lessee—Public Bodies Leases Act 1908, First Schedule, cl. 4. The term "indifferent," in the phrase "two indifferent persons as arbitrators" in cl. 4 of the First Schedule to the Public Bodies Leases Act 1908, operates to exclude any person who may be reasonably presumed on account of his prior relationship with the party appointing him to have some bias in favour of that party. Further, it is essential in an arbitrator that he should be free to approach the matter subject to the arbitration with an open mind free from previously-formed or pronounced views or preconceived opinions in favour of his employer. Consequently, no officer employed by the Government of New Zealand in any of its various Departments can qualify as an "indifferent person" to act as an arbitrator to fix a new rental under a lease of which the Crown is the lessee. (*In re Hawke's Bay Electrical Power Board* v. *Napier Borough* [1930] N.Z.L.R. 162, applied. *Re Skene's Award* (1905) 24 N.Z.L.R. 591, distinguished.) Appeal from the order of Barrowclough C.J. [1958] N.Z.L.R. 490, dismissed.) *Attorney-General* v. *Wellington Harbour Board.* (C.A. Wellington. 1958. October 16. Gresson P. North J. Cleary J.)

Valuation—Umpire—Valuation for Rental on Renewed Lease—Nature of Duty—Qualifications required of Umpire—Public Bodies Leases Act 1908, First Schedule, cls. 5, 6, 7, 8. The true role of an umpire appointed in pursuance of cl. 5 of the First Schedule to the Public Bodies Leases Act 1908, if called upon to act, is to decide between conflicting valuations made by others; and the nature of his duty calls for judicial qualities and not for knowledge or skill in the valuing of land. (*In re a Lease, Auckland City Corporation to Grey Buildings Ltd.* [1933] N.Z.L.R. 184; [1933] G.L.R. 193, referred to.) *In re an Application by Hamilton City Corporation.* (S.C. Hamilton. 1958. September 16. Shorland J.)

SHAREMILKING AGREEMENTS.

Limitation of Action—Relevant Provisions of Limitation Act 1950 more favourable to Sharemilker than Requirements of Sharemilking Agreements Order—Such Provisions of Act to be read into Order—Oral Sharemilking Agreement—Submission to Arbitration—Provisions as to Arbitration in Sharemilking Agreements Act 1937 to be implied—Sharemilking Agreements Act 1936, ss. 3, 4—Sharemilking Agreements Order 1951 (S.R. 1951:221), Schedule, Pt. II, cl. 31. As the provisions of the Limitation Act 1950 are more favourable to the sharemilker than the limitation provisions in respect of giving notice to the farm-owner of a claim by the sharemilker in cl. 31 of Pt. II of the Schedule to the Sharemilking Agreement Order 1951, the relevant provisions of the Limitation Act 1950 are, pursuant to s. 3 of the Sharemilking Agreements Act 1937, to be read into the Sharemilking Agreement for his benefit. In a claim made by the farm-owner against the sharemilker, if the provisions of cl. 31 of Pt. II of the Schedule to the Order relaying to such a claim would operate for the benefit of the sharemilker, they are to be read into the agreement for his benefit. (*Handley* v. *Wishnowsky* [1941] N.Z.L.R. 390; [1941] G.L.R. 185, applied.) Where letters passing between the parties to a sharemilking agreement constitute a submission to arbitration within the meaning of the Arbitration Act 1908, then, by s. 3 of the Sharemilking Agreements Act 1937, the provisions contained in the Second Schedule to the Act are to be implied and included; and they contain all the machinery provisions necessary to fill out a bare agreement to submit a difference to arbitration and make it into a workable submission. *Cleaver* v. *Urlich and Others.* (S.C. Auckland. 1958. September 26. Shorland J.)

PUBLIC REVENUE.

Stamp Duties—Surrender of Lease—Harbour Board paying Lessee amount for Surrender and granting New Lease—Surrender assessed with Ad Valorem Duty—Board, with New Lease, obtaining Reversion of Greater Value and augmenting Its General Assets and Funds—Board not holding General Assets and Funds Upon Trust for Charitable Purposes—Assessment upheld—Stamp Duties Act 1954, ss. 66 (a), 69 (f)—Harbour Board's Assets and Funds not Capable of Court's Control or Administration—Functions and Duties of Board Subject to Statute—Board's Assets and Funds not "Charitable Trust"—Harbours Act 1950, ss. 2 and 232. Land owned by the Auckland Harbour Board was leased to H. & Co. In November 1955, H. & Co. surrendered to the Board by memorandum of lease endorsed on the lease, the balance of the unexpired term in consideration of the grant of a new lease. The new lease recited that the Board had paid to H. & Co. £37,000 (representing its lessee's interest in improvements) as consideration for rhe surrender. The Commissioner of Inland Revenue assessed the memorandum of surrender with ad valorem duty as in an instrument of conveyance upon the consideration of £37,000 pursuant to s. 66 (a) of the Stamp Duties Act 1954. The Board objected. On Case Stated by the Commissioner, *Held*, 1. That the Board paid £37,000 for the surrender by the lessee of the lease and bound itself to grant a fresh lease on different terms, with the result that the Board obtained a reversion of greater value, and the property represented by that increased value fell into its general asets and funds to be held and applied according to its statutory powers and duties. 2. That the Board, on the true construction of the powers and duties of a Harbour Board under the Harbours Act 1950, did not hold its assets and fund upon a trust which, in the eyes of the law, constituted a trust for charitable purposes; and, accordingly, the stamp duty of the surrender of the lease was correctly assessed. (*Morice* v. *Bishop of Durham* (1805) 10 Ves. 522; 32 E.R. 947; and *Attorney-General* v. *Bunny* (1874) 2 N.Z.C.A. 419, followed. *Commissioner for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531 referred to.) [*Auckland Harbour Board* v. *Commissioner of Inland Revenue.* (S.C. Auckland. 1958. October 30. Shorland J.)

TRENDS IN THE INTERPRETATION OF STATUTES.

By D. A. S. WARD, B.A., LL.B.*

1. SCOPE OF INVESTIGATION.

The investigation on which I have been engaged is an examination of reported judgments for the purpose of discovering—

(a) Whether there can be found any changes in the approach of the Courts to the interpretation of legislation during the past twenty or thirty years :

(b) In particular, whether there is any evidence that the social and economic changes during that period and the development of the Welfare State, have had any effect on the judicial attitude to interpretation.

As part of the general question, the investigation has included the judicial attitude towards the prerogatives and immunities of the Crown.

2. THE JUDICIAL RULES OF INTERPRETATION.

In any inquiry into possible trends in statutory interpretation there are two considerations to be borne in mind. The first is that in the process of interpretation the Courts are not applying rules of law, but canons of construction. Generally speaking, the rule of law applies where certain conditions exist, regardless of the intention of the parties ; and it is followed and extended by a logical process of development from precedent to precedent. The canon of construction is merely a guide to what the Court should do to discover the apparent or presumed intention of Parliament, or of the parties to a document, in the absence of an expressed intention or of one that is implicit in the words used.(1)

The second consideration is that the existing canons and presumptions used by the Courts appeared at different times in the development of the legal system, over a period of several hundred years. Over that period, they reflect the steady growth of Parliamentary power, and show a gradual transition from the use of discretion by the Courts in the application of legislation that was not considered to be authoritative, and was presumed not to alter the common law, to the interpretation of an authoritative statement of law by Parliament. They may also be related to the fact that the form and content of statutes developed, with the social and economic changes over that period, from a statement of simple propositions to the laying down of more or less exact formulas in legislation that has become copious, more precise, hedged about with exceptions and provisos, and full of detail and administrative machinery.

The result is that the Courts now have at their disposal a heterogeneous collection of canons and presumptions, any of which can be applied at will in any given case. Those of later origin did not replace or overrule the earlier ones. They are all collected together in the text books on statutory interpretation (which are frequently referred to in judgments) and treated as having equal validity, regardless of the legal and social conditions in which they arose.

As C. K. Allen has said, " there is scarcely a rule of statutory interpretation, however orthodox, which is not qualified by large exceptions, some of which so nearly approach flat contradictions that the rule itself seems to totter on its base."(2)

Thus in the nineteenth and twentieth centuries there has been no uniformity in the application of the canons of construction to all statutes, and frequently there has been an absence of uniformity in their application to the same statute. While one Judge may in one case apply the " mischief " (or social policy) rule laid down in *Heydon's Case* (1584) 3 Co. Rep. 7a, another Judge, or even the same Judge in another case, may apply the " literal " (or plain meaning) rule so popular in the latter part of the nineteenth century, or the older presumption that a penal Act or a taxing Act must be strictly construed. Another may apply the ancient presumption that general words in an Act are not intended to alter the common law.

Apart from the presumptions, there are three main approaches used by the Courts. These have become generally known as the " literal rule," the " golden rule," and the " mischief rule."(3)

The " literal rule " is that " if the precise words used are plain and unambiguous . . . we are bound to construe them in their ordinary sense, even though it leads . . . to an absurdity or a manifest injustice " : *Abley* v. *Dale* (1851) 11 C.B. 378, 391. Judges of course differ as to the " plain " meaning of words.

The " golden rule " is that " the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no farther " : *Grey* v. *Pearson* (1857) 6 H.L. Cas. 61, 106. The first part of this rule thus repeats the " literal rule," and suffers from the same disadvantage. The second part creates a substantial exception to the " literal rule," and that exception leaves plenty of scope for difference as to what is an " absurdity."

The " mischief rule " is that laid down in *Heydon's Case* (1584) 3 Co. Rep. 7a. Under this rule, four things are to be considered : (a) What was the common law before the making of the Act ? (b) What was the mischief and defect for which the common law did not provide ? (c) What remedy Parliament has resolved and appointed to cure the disease of the Commonwealth ; and (d) The true reason of the remedy ; " and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . . "(4). This rule was said by Coke to be laid down by all the Barons of the Exchequer " for the sure and true interpretation of

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(1) See Fry L.J. in *In re Coward* (1887) 57 L.T. 285, 291 ; Bowen L.J. in *Earl of Jersey* v. *Guardians of the Poor* (1889) 22 Q.B.D. 555, 561, 562.

(2) *Law in the Making* (5th ed.), 494.

(3) Cf. Willis, " Statute Interpretation in a Nutshell " (1938), *16 Canadian Bar Rev.* 1.

(4) See, for an example of the use if this rule, *Christie* v. *Hastie, Bull, and Pickering Ltd.* [1921] N.Z.L.R. 1.

all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law)." Thus, nearly four hundred years ago, the Courts were directed to look at the purpose and object of an Act and the reason why it was passed, and then to interpret its words in such a way as to give effect to that purpose and object. Clearly this is inconsistent with the "literal rule" and the "golden rule."

The "golden rule" is little used today (possibly because it leaves too much scope for the personal opinions of Judges). The Courts, on the whole, tend to apply the "literal rule" or the "mischief" rule. Alternatively, they may apply one of the presumptions.

It may be said at once that a careful examination of New Zealand cases does not disclose any evidence that the Judges generally tend to favour one approach rather than the others. One might expect that, as much legislation nowadays has a social purpose, the Courts would tend towards the use of the "mischief rule" (or its statutory equivalent in New Zealand) in the process of interpretation. But that is not the case. The conclusion reached by Willis in 1938, that "a Court invokes whichever of the rules produces a result that satisfies its name of justice in the case before it," seems to be equally valid in New Zealand today. Also, as he points out, a Court does not assign any reason for choosing one rule rather than the other. In fact there are cases where it is far from clear just which rule the Court has applied.

This situation is illustrated by the cases mentioned under the following headings of this report.

First, however, it is necessary to deal with the influence (if any) exercised by the Acts Interpretation Act 1924 and its predecessors.

3. The Acts Interpretation Act 1924.

This Act is of very great importance in the interpretation of legislation. It is a consolidation of the 1908 Act and its amendments, which in its turn replaced the Interpretation Act 1888 and its amendments. It applies to the interpretation of all Acts of the New Zealand Parliament, whether passed before or after 1924 (ss. 2, 3). It also applies to the interpretation of rules and regulations made under New Zealand Acts (see definition of "Act" in s. 4).

It contains much more than the equivalent Act of the United Kingdom does, though some of its provisions are based on that Act. It reverses a number of presumptions and judicial dicta, and is declaratory, in parts, of others.

It is a little startling to find that in recent years the Act has been less referred to than in the earlier decades of this country. In several recent cases, for example, the Supreme Court has failed to apply, or at least to consider the effect of, sections of the Act directly affecting the cases before it. In those cases it is obvious from the judgments that counsel had not cited the sections, and the conclusion is inescapable that neither counsel nor the Court was aware of their existence.

The first of these is *Tawhiorangi* v. *Proprietors of Mangatu Nos. 1, 3, and 4 Blocks (Incorporated)* [1955] N.Z.L.R. 324, in which the Court applied the ancient rule that when an Act or part of an Act is repealed it must be treated as if it had never existed. This is quite contrary to s. 20 of the Acts Interpretation Act 1924.(5) Another case is *Hookings* v. *Director of Civil Aviation* [1957] N.Z.L.R. 929. That case involved the much more important question whether the Governor-General in Council was prevented (by the maxim *delegatus non potest delegare*) from subdelegating to the Director of Civil Aviation any part of his power to regulate civil aviation. No mention was made of s. 2 of the Statutes Amendment Act 1945, which amends the Acts Interpretation Act and declares that no regulation is to be invalid on the ground that it confers on any person any discretionary authority.

Section 2 of the Statutes Amendment Act 1945 would also have been relevant in *Ideal Laundry Ltd.* v. *Petone Borough* [1957] N.Z.L.R. 1038. In that case the validity of a town-planning scheme was attacked on the ground that certain clauses gave to the Borough Council a discretionary power to dispense with requirements of the scheme. The Court held that the clauses were not ultra vires; but, as s. 33 (1) of the Town and Country Planning Act 1953 gives every operative scheme the force of a regulation, s. 2 of the Statutes Amendment Act would have been directly in point.

However, the most important, and the most neglected, provision of the Acts Interpretation Act 1924 is s. 5 (j), which applies "except in cases where it is otherwise specially provided." It is as follows:

> (j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

The provision is of paramount importance.(6) It applies to every kind of Act, including penal and taxing Acts. It bears such a close resemblance to the statement of "the office of all the judges" in *Heydon's Case* (as set out in section 2 of this report) that it appears to be a modern version of the mischief rule in statutory form; and it is such a positive direction to the Courts that, in spite of the frequent failure of counsel to cite it, one would expect the Courts to apply it in every case of ambiguity. It could be a potent instrument for giving effect to the social purpose of an Act. Yet it is used in a minority of cases. The Courts still turn to the English text books and the classic statements of the canons of construction in the English cases, forgetting that no such provision as our s. 5 (j) appears in the Interpretation Act of the United Kingdom.

There is a tendency to forget the blunt words of the Privy Council opinion in *Smith* v. *McArthur* [1904] A.C. 389 (on appeal from the Supreme Court of New Zealand). Lord Lindley said at p. 398:

> . . . to adhere to language so literally as to defeat the plain intention of the Legislature instead of so construing the words as to give effect to that intention is to run counter to s. 5 (7) of the Interpretation Act [now s. 5 (j) of the Acts Interpretation Act 1924] which, after all, only expresses what is meant by the old legal maxim "*Qui haeret in littera haeret in cortice.*"

(5) Discussed by D. A. S. Ward, in "Interpretation of Statutes: The Effect of a Repeal" (1955) 31 N.Z.L.J. 248.

(6) Fair J. in *United Insurance Co. Ltd.* v. *The King* [1938] N.Z.L.R. 885, 913.

However, the section is sometimes used to avoid a literal or technical construction.(7)

Another important paragraph in s. 5 of the Act relates ro rhe rights of the Crown, and that is dealt with in the following section of this report.

4. The Crown.

Any attempt made in New Zealand to hold that a statute of general application binds the Crown has been dominated by the following provision of the Acts Interpretation Act 1924 (or its predecessors):

> 5. The following provisions shall have effect in relation to every Act of the General Assembly, except in cases where it is otherwise *specially* provided:
>
> . . .
>
> (k) No provision or enactment in any Act shall in any manner affect the rights of His Majesty, his heirs or successors, unless it is *expressly* stated therein that His Majesty shall be bound thereby; . . .

(The underlining of the words "specially" and "expressly" is of course mine.)

Whenever it has been argued that an Act binds the Crown the Courts have naturally referred to this provision. This is in contrast with the numerous cases (not affecting the rights of the Crown) where the Courts have applied common law presumptions or maxims or canons of construction when they should have applied provisions of the Acts Interpretation Act (for example, s. 5 (j) with its requirements of a fair, large, and liberal construction for all enactments). The reason no doubt is that the exemption of the Crown's rights and prerogatives from the effect of legislation is an ancient one, and has been part of the common law since Parliament asserted its authority to legislate. It is firmly embedded in the minds of all lawyers and judges.

The words of the section are plain and definite and will apply in the majority of cases. Nevertheless, the Crown Proceedings Act 1950, under which the Acts Interpretation Act binds the Crown, should now be taken into account. Under s. 2 of the Acts Interpretation Act every provision of that Act applies to every other New Zealand Act "except in so far as any provision hereof is inconsistent with the intent and object of any such Act, or the interpretation that any provision hereof would give to any word, expression, or section in any such Act is inconsistent with the context."

It can therefore be argued now that if there is a clear inference to be drawn from the intent and object of an enactment, or from its context, that Parliament intended the Crown to be bound, the enactment will apply to the Crown although it does not expressly say so. Read in the light of s. 2 of the Act, s. 5 (k) appears to be declaratory of the ancient common law presumption that the legislature does not intend to deprive the Crown of any prerogative, right, or property, unless it expresses that intention explicitly or makes the inference irresistible.(8) The basis of that presumption was that statutes express the combined will of Parliament and of the Crown (which must assent to Parliament's enactments), and that the Crown must not be held to surrender any of its rights except by express words or words showing a clear intention.

However, the leading cases on the subject were decided before the Acts Interpretation Act became binding on the Crown. The argument of irresistible inference (referred to by our Courts as "necessary implication" or "reasonable or necessary intendment") was discussed, but generally not applied, in a series of cases in the nineteen-twenties. The first was *In re Buckingham* [1922] N.Z.L.R. 771, in which the real question was whether the Chattels Transfer Act 1924 bound the Crown. If it did, then a security held by the Crown would be void, on the bankruptcy of the debtor, as regards certain stock-in-trade. Chapman J. held that the Act did not bind the Crown, so that its security was not affected. However, in referring to s. 6 (j) of the Acts Interpretation Act 1908 (now s. 5 (k) of the 1924 Act) he said, at 773:

> Many Acts, such as Land Acts and Mining Acts and others, involving the alienation of property and privilege of the Crown, might be found repugnant to this provision were it construed literally. In such cases it would be more proper to construe it as declaring that such Acts are not binding on the Crown unless by reasonable intendment the Legislature has shown an intention that the Crown shall be bound.

In the following year, in *Harcourt* v. *Attorney-General* [1923] N.Z.L.R. 686, the question arose whether the Court could give a declaratory judgment under the Declaratory Judgments Act 1908 in proceedings to which the Crown was a party. That Act allows anyone to apply to the Supreme Court for a declaratory order determining (inter alia) any question as to the construction of any enactment, where the applicant has done or desires to do something the legality of which depends on the construction of the enactment. The Court's order is binding on the parties to the proceedings as if it were a judgment in an action. In the case cited the question asked was whether it was lawful under the Gaming Act 1908 for a horse-race to be run in two heats with a separate prize for each heat, and without a final heat to decide an absolute winner. The Attorney-General did not admit that the Court had jurisdiction to make an order binding the Crown, but invited the Court to decide the question asked. Reed J. held that the Crown was bound by the Declaratory Judgments Act, because s. 6 (j) of the Acts Interpretation Act 1908 did not alter the common law rule, and therefore the Crown was bound by necessary implication. His Honour held that "rights," in the section meant any part of the King's ancient prerogative, or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity, and that nothing in the Declaratory Judgments Act could be said to affect rights of that description.

Finally, in *McDougall* v. *Attorney-General* [1925] N.Z.L.R. 104, it was argued by the Attorney-General, before the Court of Appeal, that the Declaratory Judgments Act did not bind the Crown. The Court's decision was limited to the point that in proceedings involving a monetary claim against the Crown (for the proper enforcement of which the procedure was laid down in the Crown Suits Act 1908), the Crown was not bound by the Declaratory Judgments Act, and no order could be made under it. But although the Judges were unanimous on that point, the "necessary implication" rule was discussed. Stout C.J. relied on the express words of s. 6 (j) of the Acts Interpretation Act 1908; but he said that even if those words had not been there, no "necessary implication" could be found in the Dec-

(7) *Hutton* v. *Hutton* (1910) 13 G.L.R. 201; *In the Estate of Rangi Kerehoma (deceased)* [1924] N.Z.L.R. 1007; *Brown* v. *McNeil* [1930] N.Z.L.R. 511; *Dwyer* v. *Hunter* [1951] N.Z.L.R. 177, 180.

(8) *Willion* v. *Berkley* (1562) 1 Pl. Com. 223, 240.

laratory Judgments Act (at p. 110). Sim J. was of the opinion (at p. 112) that the Court was not entitled to limit the operation of s. 6 (j) of the Acts Interpretation Act 1908 by a consideration of the common law rule on the subject. Herdman J. (at p. 115) approved the "reasonable intendment" principle stated by Chapman J. in *Buckingham's* case. Reed J. elaborated on his judgment in *Harcourt's* case and strongly reiterated his general view as stated in that case. After referring to his interpretation of the word "rights" in the section of the Acts Interpretation Act, he said (at p. 119):

> It would be a curious commentary on the laws of what has been described as the most democratic part of His Majesty's Dominions to find that the prerogatives of the Crown (which here means to all intents and purposes the Executive Council) should be enlarged above that of England.

Reed J. then quoted the statement made in *Bacon's Abridgement:* "A general rule hath been laid down and established—viz., that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express words to extend to him."(9)

As Friedmann has pointed out,(10) most modern statutes would come under one or other of the categories mentioned in the first sentence of the above quotation from *Bacon's Abridgement.* But the Courts have shown no sign of developing the principle stated in it. On the contrary, they have applied the more restrictive rule stated in the second sentence,(11) and have tended to the view that s. 5 (k) of the Acts Interpretation Act 1924 (and its predecessor) replaced a presumption by a positive and more limited statement of law.

However, the New Zealand Courts have shown no tendency to extend the protection of the "shield of the Crown" to public corporations set up by statute, deriving their revenue chiefly from public money, and carrying out functions of Government.(12)

Since the coming into force of the Crown Proceedings Act 1950 (on January 1, 1952) the legislative situation has altered. By that Act the Acts Interpretation Act 1924(13) is declared to bind the Crown. That means that s. 5 (k) of the Acts Interpretation Act can now be read in the light of s. 2, and also of s. 5 (j), and it will be open to the Courts to reconsider the position of the Crown in a proper case. Moreover, Parliament has adopted a neutral attitude to the earlier division of opinion among the Judges on the question whether the "necessary implication" rule still lives. The wording of s. 5 (1) of the Crown Proceedings Act is consistent with the possibility that it does live, or may be revived. That subsection says that the Crown Proceedings Act shall not be construed so as to make any Act binding on the Crown which would not otherwise be so binding,(14) or so as to impose any liability on the Crown by virtue of any Act which is not binding on the Crown.

It is therefore possible that there may be a reconsideration of the Crown's position in future cases.

Meanwhile there is no evidence of any tendency to whittle down the rights and prerogatives of the Crown. Strong views on the practice of the Crown in embarking on trading and commercial activitives in competition with its subjects, and then claiming preferential treatment, were expressed by Alpers J. in *Tasman Fruit-Packing Association Ltd.* v. *The King* [1927] N.Z.L.R. 518, 532, 533, but they appear to have fallen on deaf ears.

(9) *Bacon's Abridgment,* 7th ed., Vol. VI, p. 462; Cf. *Case of the Ecclesiastical Persons* (1601) 5 Co. Rep. 14a; *Magdalen College Case* (1616) 11 Co. Rep. 70b; *R.* v. *Archbishop of Armagh* (1721) 1 Str. 516.

(10) *Law and Social Change in Contemporary Britain,* 267.

(11) Cf. *Andrew* v. *Rockell* [1934] N.Z.L.R. 1056.

(12) *Southland Boys' and Girls' High School Board* v. *Invercargill City Corporation* [1931] N.Z.L.R. 881; *McCallum* v. *Official Assignee of Sagar and Lusty* [1928] N.Z.L.R. 292; *Smith and Smith Ltd.* v. *Smith and State Advances Corporation* [1939] N.Z.L.R. 588.

(13) And a number of other Acts, including the Declaratory Judgments Act 1908.

(14) This part of the subsection re-enacts s. 7 of the Crown Suits Amendment Act 1910. That Act extended the kinds of claims that could be made against the Crown.

(15) Paraphrasing *Maxwell on Interpretation of Statutes* (10th ed.) 284, 285.

(To be continued.)

RECENT DEATH DUTY CASES.

II.—Interests Provided by Deceased, and Accruing on His Death. Liability to Death Duty of Life Insurance Policy on Life of Deceased but not Beneficially Owned by Him at Death.

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

In the last ten years or so, there have been several important cases both in the United Kingdom and in New Zealand on para. (g) of s. 5 (1) of the New Zealand Act or the corresponding provision in the United Kingdom Act s. 2 (1) (d) of the Finance Act 1894. The New Zealand provision reads as follows:—

> 5. (1) In calculating for the purposes of this Act the final balance of the estate of a deceased person, his estate shall be deemed, subject to the provisions of this section, to include and consist of the following classes of property (hereinafter referred to as his dutiable estate) namely:
>
> (g) Any annuity or other interest purchased or provided by the deceased, whether bejore or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

One of the leading cases on this paragraph is the House of Lords case, *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 1 All E.R. 403, which followed the Scottish case of *Lord Advocate* v. *Hamilton's Trustees* 1942 S.C. (Ct. Sess.) 426. We all thought that *D'Avigdor's* case had settled that an interest which had become indefeasibly vested in a person before the date of deceased could not possibly be caught by s. 5 (1) (g) of our Act (or by s. 2 (1) (d) of the United Kingdom Act). To be caught under these

provisions, the interest must not only have had to be provided by the deceased but on the death of the deceased some beneficial interest therein must have accrued or arisen by survivorship or otherwise in favour of some other person.

It is true, however, that some of the Law Lords in *D'Avigdor's* case did not appear to be too certain that an insurance policy had been intended by the Legislature to be caught by this paragraph. However, the Courts in the United Kingdom had over a wide period of years consistently held that the proceeds of life insurance policies were liable to death duty under this provision (any annuity *or other interest*) that it appeared to many of us that the principle of stare decisis must surely apply.

Now, in *D'Avigdor's* case, the deceased, by a marriage settlement made in 1907, settled a policy on his life effected in 1904 for £30,000 with profits. Subsequently a resettlement of the policy was made; and, on November 10, 1934, the settlor and his eldest son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property to the son *absolutely*. The settlor died in 1940 and his son received under the policy £48,765. Estate duty was claimed on this sum under s. 2 (1)(d) of the Finance Act 1894. It was held by the House of Lords that death duty was not payable, since from 1934 the policy belonged to the son and no beneficial interest in it accrued, or arose *on the death of the deceased* within the meaning of that paragraph. In *D'Avigdor's* case [1953] A.C. 347; [1953] 1 All E.R. 403, 347, Viscount Simon said:

> A life policy is a piece of property, which confers upon the owner of it the right, if certain conditions continue to be satisfied, to claim and to be paid the policy moneys on the death of the person whose life is assured. These rights, therefore, belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of those rights were not changed by the death, which was merely the occasion when the rights were realized. There was, therefore, no new or additional beneficial interest in the policy which arose on the death of the appellant's father (*ibid.*, 361; 406).

Nothing could be plainer than that passage from the speech of Viscount Simon. It was therefore with great surprise that I read, just as the third edition of my book on Estate and Gift Duties was about to be printed, that the English Court of Appeal had ruled that an indefeasibly vested life interest in a policy of life insurance was caught by para. (d) of s. 2 (1) of the Finance Act 1894, the reasoning being that, unless the life tenant survived the deceased, he would not enjoy any benefit from the policy moneys. This seemed to me to be confusing the vesting of a right with the enjoyment thereof. For instance, for the purposes of the rule against remoteness of vesting (commonly called "the rule against perpetuities"), the Courts have always drawn the distinction between the vesting of property and the right to enjoy that property. The position was clearly put by the Master of the Rolls, Sir Wilfred Greene (as he then was) in *In re Legh's Resettlement Trusts, Public Trustee* v. *Legh* [1937] 3 All E.R. 823, 825; 53 T.L.R. 1036, 1037:

> "Thus, it is said, and with truth, that in a gift in trust for A. for life and after his death for B. for life if he shall survive A., the addition of the words 'if he shall survive A., does not make the gift to B. contingent, since it merely expresses the inherent characteristic of B.'s interest—viz., that it can be enjoyed only if he survives A. The case would, of course, be quite different if the gift to B. were a gift of corpus."

The English Court of Appeal death-duty case, to which I refer, was reported sub nom. *Re Barbour's Policies of Assurance*; *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*, in [1956] Ch. 452, [1956] 1 All E.R. 627, and I was therefore not surprised when in due course the House of Lords reversed this decision of the Court of Appeal. The House of Lord's decision is reported sub nom. *Westminster Bank, Ltd.* v. *Inland Revenue Commissioners; Wrightson* v. *Same* [1958] A.C. 210; [1957] 2 All E.R. 745. *Wrightson's* case was also an appeal from the Court of Appeal whose decision is reported in (1956) 35 A.T.C. 16. The two appeals were taken together in the House of Lords, apparently for convenience sake. The leading speech was delivered by Lord Morton of Henryton, Earl Jowitt expressing his concurrence therewith.

In *Barbour's* case, the facts were that, by a settlement made in 1929, deceased had assigned to a trustee on trusts declared in a settlement two policies of assurance on his life. Both policies were fully paid up at the date of the settlement. He also paid to the trustee £12,000 in cash. The trustee out of the proceeds of the policies, was to pay all death duties leviable on the settlor's death in respect thereof, invest the residue and was to invest the £12,000 forthwith in specified investments. The trustee was to accumulate the income of the trust fund until June 30, 1942, and thereafter the trustee was to pay the income of the trust fund and the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof, however, not to be treated as income-bearing until the amounts payable in respect thereof shall have been received and invested), in the events which happened, to the settlor's nephew J. B. for life. The income of the trust fund was accordingly paid to J. B. from June 30, 1942. The settlor died in 1951, and bonds and cash amounting to £19,755 2s. having been received by the trustee in satisfaction of the policies, estate duty was claimed under s. 2 (1) (d) of the Finance Act, 1894, on the *life interest* of J. B. in that sum. Lord Morton of Henryton points out that two further facts should be mentioned. First, that the settlement contained no power for the bank to sell or surrender any of the policies. Secondly, in the year 1937, one of the Victory Bonds was drawn for redemption, so that the bank then received in respect of it the sum of £750. The bank then became bound to invest that sum; and, after the expiry of the period of accumulation in 1942, the bank became bound to pay the income of that sum and all its accumulations immediately to J. B. In his speech, Lord Morton of Henryton dealt first with the point as to whether a life insurance policy was an "annuity or other interest" within the meaning of s. 2 (1) (d) of the Act. He said:

> However, in *Attorney-General* v. *Murray* [1904] 1 K.B. 165, the Court of Appeal answered that question briefly in the affirmative. That decision has stood unquestioned for over fifty years and very many policies must have been dealt with on the footing that it was correct. Moreover, this House, in *Adamson* v. *Attorney-General* [1933] A.C. 257, gave a wide meaning to the words just quoted, though it does not appear that the trust funds included any policy of insurance. Finally, if the decision in *Murray's* case had not been in accordance with the intentions of the legislature, it is reasonable to suppose that the necessary amendment would have been made in some subsequent Finance Act. In these circumstances, I think that this is plainly a case in which the principle stare decisis should be applied, and I would therefore hold that when the settlor provided the four policies, as he undoubtedly did, he provided an "annuity or other interest" within the meaning of section 2 (1) (d). I would add that in my opinion, the settlor also "provided" the moneys which became payable to the trustees on his death and the investments representing these moneys from time to time during the continuance of the trusts declared by the settlement. All these items of property were the direct result of his bounty.

Lord Morton of Henryton then dealt with the second question—namely, whether on the death of the settlor a beneficial interest in the property provided by the settlor accrued or arose to J. B. The learned Law Lord pointed out that in *Lord Advocate* v. *Hamilton's Trustees* 1942 S.C. (Ct. Sess.) 426, the daughter took a life interest in her share. His Lordship did not think that it would be right to say that the decision in the Inner House (*Hamilton's* case was an appeal from the Court of Session) in favour of the daughter was expressly approved by the House of Lords in *D'Avigdor-Goldsmid's* case (supra), for it was never suggested in the arguments in the House of Lords that her case might have been decided differently from the case of the sons; but, in his view, the decision in *Hamilton's* case was right in every respect, and he could see no real decision between the position of the daughter in *Hamilton's* case and the position of J. B. in *Barbour's* case. He concluded his speech as follows:

> In order to ascertain what were the beneficial interests in the property provided one can only look at the settlement of March 5, 1929. The succession of beneficial interests there set out do not include any one which comes into being on the death of the settlor. Under the trusts therein declared, James Barbour was tenant for life in possession both immediately before and immediately after the death of the settlor. To quote again one sentence from the speech of Lord Porter in *D'Avigdor-Goldsmid*:—"He did not get a new interest; he obtained the fruition of the interest which he already held." I would allow the appeal, and answer in the negative the question asked by the originating summons.

In *Barbour's* case, Lord Reid said that he could see nothing to prevent a person having a *vested* right of life-rent in a subject which was not for the time being productive or capable of producing income from; and, if the trustee had conferred such a right, then it appeared to his Lordship to follow from *D'Avigdor's* case (supra) that no new right emerged on the trust fund becoming productive of income and s. 2 (1) (d) therefore had no application. In short, "beneficial interest" in s. 2 (1) (d) means a legal right and not a financial benefit.

In *Barbour's* case, Lord Keith of Avonholm put the position neatly:

> If no beneficial interest accrues or arises by survivorship on the death, then the interest provided, even if it is assumed to pass at the death, attracts no liability to duty. In short, the beneficial interest must be in the interest provided, which, in this case, in my opinion, is the policies with all the rights inherent in the holding of that particular type of asset. If there is no beneficial interest in the policies arising by survivorship on the death, there is no liability to duty. No point was taken on the words "or otherwise" in the statute so attention may be confined to the words "by survivorship.

In *Wrightson's* case, the facts, in my opinion, were more difficult; and two of the Law Lords were in favour of the Crown, three deciding in favour of the taxpayer. The facts were as follows:

By a settlement made in 1932 a settlor assigned to trustees four fully paid life assurance policies on his life, directing them, on receipt of the policy moneys, to divide them into six equal parts. Three of these were to the trustees of another settlement, the N. Hall settlement, to be held as capital moneys thereunder on the trusts affecting the N. Hall estate. (At the time of the settlor's death, his eldest son, J. G. W., was tenant for life under this settlement). Each of the other three equal parts was to be invested and the income thereof was to be applied for the benefit of the settlor's three younger sons, P. W., R. W., and O. W. respectively. The settlor died on January 7, 1950, and at that date his four sons were alive and over the age of twenty-one. The eldest son became tenant for life of the N. H. estate during his father's lifetime.

Lord Morton of Henryton was content to say that, in his opinion, there was no good ground for distinguishing that case from *Barbour's* case. Lord Keith of Avonholm said:

> I am now satisfied, however, that from the time the policies were assigned to the trustees there was a beneficial interest in the policies in the group of persons who were ultimately to take as life tenants on the death of the settlor and that this beneficial interest remained unchanged in character from the date of the settlement.

I think that the first reported New Zealand case to hold that the proceeds of a life insurance policy was caught by s. 5 (1) (g) of our statute was *Public Trustee* v. *Commissioner of Stamps* (1912) 31 N.Z.L.R. 1116; 15 G.L.R. 61. In that case, a testator, in consideration of his intended marriage, had executed a deed of settlement by which he assigned three policies of assurance on his life to trustees upon trust after the solemnization of the intended marriage, and upon his death to receive and invest his moneys payable thereunder, and to pay the income to his widow during her life *should she survive him*, and after her death for such purposes as he should by deed or will appoint, and, in default of appointment, in trust for the children of the said intended marriage. Two of the three policies had been fully paid up at the date of the execution of the deed, and the testator covenanted in the deed with respect to the third policy duly to pay the premiums as they fell due. The marriage was duly solemnized, and the testator, until the date of his death, carried out his obligations with respect to the payment of premiums on the third policy. It was correctly held that, with regard to the third policy, it was liable to death duty by virtue of para. (f) of s. 5 (1), under which liability depends upon whether or not after the date of the gift deceased kept up payments under a policy of assurance effected by deceased on his life for the benefit of a beneficiary, whether nominee or assignee. With regard to the fully-paid up policies, the Court held that the widow's life interest in the proceeds of the policies came into deceased's estate by virtue of para. (g). *Barbour's* and *Wrightson's* cases (supra) show that to that extent the decision was wrong, for the widow had a *vested* interest in the two policies before deceased's death, the words "should she survive him," merely expressing the inherent characteristics of a life interest. With regard to the remaindermen's interest in the two fully-paid up policies, the Court held that it was liable for death duty by virtue of para. (h), which drags into the death-duty net any property situated in New Zealand at the death of the deceased over, or in respect of which, he had at the time of his death a *general* power of appointment. That was undoubtedly correct; but it is respectfully submitted that the remaindermen's interest in the proceeds of the two fully-paid up policies could also have been brought in under para. (g); for, at any time up to the date of his death, deceased could have defeated the vested interests of the remaindermen by appointing either to himself or to other people; in fact, so far as para. (g) was concerned, it was a stronger case than the Houe of Lords' decision in *Attorney-General* v. *Adamson* [1933] A.C. 257, for in that case deceased had not a general power of appointment but a special one.

Another interesting New Zealand case on para. (g) is *Little* v. *Commissioner of Stamp Duties* [1923] N.Z.L.R. 773; [1923] G.L.R. 316. In that case, deceased about ten years before his death, had paid the sum of £500 to trustees, and by the deed of settlement the money was to be held by the trustees upon trust to invest the capital and during the life of the

settlor (the deceased), to accumulate and invest the interest and to apply the capital sum and interest and accumulations in such manner as the settlor should direct in and for the benefit of his niece and all or any of his children, and after his death in trust for Mrs. Reid absolutely, "*if she should survive him*," and if not, then for her children or child, if only one, and, in the event of there being no children, for the settlor absolutely. Here the words, "*if she should survive him*," are vital, for the corpus and not just the interest is being disposed of. This brings us back to the words of the Master of the Rolls previously cited from *In re Leghs's Settlement Trusts Public Trustee* v. *Legh* * "The case would, of course, be quite different, if the gift to B. were a gift of the corpus." The gift to Mrs Reid was a gift of the corpus, and it was contingent on her surviving the settlor. Adams J. had no difficulty in holding that the £500 was liable to death duty in the estate of the settlor. As he said :

> The value of the beneficial interest which accrued or arose on the death of the deceased is the full sum of £500, and there is nothing in the Act to justify any reduction on an actuarial valuation of the interest of Mrs Reid prior to vesting : *Public Trustee* v. *Commissioner of Stamps* (1912) 31 N.Z.L.R. 1116, 9 G.L.R. 492.

As a matter of fact *Adamson's* case (supra) later showed that there was something in the Act to justify a reduction on an actuarial basis ; but that was quickly put right by the Legislature in s. 27 of the Finance Act 1937 (now s. 5 (2) (d) of the Estate and Gift Duties Act 1955). The extent of any beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased must be ascertained without regard to any interest in expectancy that the beneficiary may have had therein before the death.

At pp. 93 and 94 of the Third Edition of my book on the Estate and Gift Duties Act, I give as examples of cases falling within para. (g) :

> 1. *Annuities.*—(a) A. purchases from an insurance company an annuity of £50 payable to himself for life and on his death to his widow for life. On A.'s death the value of the annuity for the widow is actuarily calculated (see Table B, 3rd Schedule), and that sum forms portion of A.'s estate for death-duty purposes. (Then I calculate the value of the annuity.)
>
> (b) Facts same as in (a) above, except that no annuity is payable until A. dies. The same amount must be brought to account, for as stated in *Dymond's Death Duties*, 4th ed.] 40, whatever the method selected for the annuity to be payable, estate duty is payable on the whole value of the benefits accruing or arising on the deceased's death.

I am afraid, however, that, in future editions I shall have to place these two in the category of, "Examples *not* falling within para. (g)." For, in *Westminster Bank Ltd.* v. *Inland Revenue Commissioners : Wrightson* v. *Same* (supra), Lord Keith of Avonholm gives the following example, and states his reasons therefor :

> For example, if a father purchased a life annuity in favour of his son, payment commencing on the son attaining the age of 50, and delivered the policy to the son, it is clear that the father has provided an interest or benefit, for his son. On the son attaining the age of 50, some 20 or 30 years later it may be, it would not seem possible to say that the nature of the benefit conferred had changed its character, or that the son has acquired a new benefit. Yet this might be said to be an interest in expectancy which has become an interest in possession. But that is merely to describe the nature of the interest given. The nature of the interest provided was fixed once and for all when it was originally conferred. The same would hold good, in my opinion, where the annuity was to commence on the death of the father. That event merely fixes the date of the maturity of the policy. . . . The beneficial interest would arise, in my opinion, not by survivorship, but by virtue of the contract made with the insurance company when the policy was taken out, fixing the commencement date of the annuity as the date of the deceased's death.

Another recent case on para. (g) is *New Zealand Insurance Co. Ltd.* v. *Commissioner of Inland Revenue* [1957] N.Z.L.R. 1197, which went to the Court of Appeal [1958] N.Z.L.R. 1077. It must now be taken as clear law that a person dealing with a policy of insurance on his life does not "purchase or provide" that policy, within the meaning of those words as used in s. 5 (1) (g), if he disposes of it for *adequate consideration* in his lifetime, although he may, as part of the bargain, undertake to pay, and does pay, the whole of the premiums on the policy ; and it is not a policy "kept up by the deceased for the benefit of a beneficiary" within the meaning of s. 5 (1) (f) of the Act, which reads as follows :

> 5 (1). In calculating for the purposes of this Act the final balance of the estate of a deceased person, his estate shall be deemed, subject to the provisions of this section, to include and consist of the following classes of property (hereinafter referred to as his dutiable estate namely : . . .
>
> (f) Any money payable under a policy of assurance effected by the deceased on his own life, whether before or after the commencement of this Act, where policy is wholly kept up for the benefit of a beneficiary (whether nominee or assignee), or a part of this money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit, if (in either case) the money so payable is property situated in New Zealand at the death of the deceased.

The facts were that the policy in question was transferred absolutely by deceased to his first wife in terms of an agreement for separation, and subsequently by a later deed it was transferred by the first wife to trustees to be held in trust :

(a) if the first wife predeceased her husband, then
  (i) if the child attained twenty-one and was alive at his mother's death for him absolutely
  (ii) if the child did not attain twenty-one, for the husband absolutely
(b) if the first wife survived her husband, then
  (i) if the child was not alive at his father's death or did not attain twenty-one, for the first wife absolutely.
  (ii) if the child was alive at his father's death and attained twenty-one, for the first wife for life and then to the child absolutely.

The first wife survived deceased, her first husband ; and, at his death, the son had attained the age of twenty-one.

Stanton J. held that deceased had received full consideration for the original assignment of the policy to his first wife : the original provision in the separation agreement was not a gift but was a disposition "for full consideration in money or money's worth." As para. (f) referred to a *beneficiary*, (which implied a gift), para. (f) could not apply. Similarly para. (g) could not apply, for a deceased person does not "purchase or provide" an interest within para. (g) if he has received full consideration for it. That followed from *Lethbridge* v. *Attorney-General* [1907] A.C. 19 and the two New Zealand cases, *Commissioner of Stamp Duties* v. *Russell* [1948] N.Z.L.R. 520 ; [1948] G.L.R. 120, and *Craven* v. *Commissioner of Stamp Duties* [1948] N.Z.L.R. 550 ; [1948] G.L.R. 357. If he, the learned Judge, was wrong in thinking that the policy had not been *provided* by deceased, he nevertheless thought that it would not be a beneficial interest accruing or arising by survivorship or otherwise on the death of deceased, for the policy became the property of the first wife after its original transfer to her : that followed from *D'Avigdor's* case (supra) and *Westminster Bank Ltd.* v. *Inland Revenue Commissioners* (suprs). The subsequent dis-

* [1937] 3 All E.R. 823, 825, 53 T.L.R. 1036, 1037.

position by the wife was the act of the wife, and the nature of that disposition would be immaterial.

In the course of his judgment, Stanton J., at p. 1104, said :

> The interest caught by para. (g) is one which accrues or arises " by survivorship or otherwise." I would think that " by survivorship " means by surviving the deceased.

There is no doubt about that : the crucial date for the purpose of para. (g) is the date of deceased's death : any interest which has become indefeasibly vested *before* deceased's death (even a minute before) is not caught by paragraph (g), even though it may have been purchased or provided by him.

In the Court of Appeal, counsel for the Crown (which appealed against the decision of Stanton J.) abandoned the submission that the policy moneys were caught by para. (g), but pursued the appeal on the ground that the first wife was a " beneficiary " for the purposes o para. (f). This narrowed down the argument to the question whether the assignment of the policy was supported by a " fully adequate consideration " in money or money's worth.

In delivering the judgment of the Court of Appeal, North J. pointed out that counsel for the appellant was not prepared to argue that *Commissioner of Stamp Duties* v. *Pearce* [1924] G.L.R. 338 was wrongly decided. In that case Sir Robert Stout C.J. was concerned with a deed of separation under which the husband had agreed to pay his wife the sum of £10,000 in lieu of annual payments, upon condition that she should not compel her husband to live with her, and that she was not to sue him for any money for her maintenance, or make him liable for debts which she might contract. The Commissioner of Stamp Duties claimed that the lump-sum payment was a gift. This argument was rejected by the Chief Justice, who said that the wealth and position of the parties in such cases had to be considered; and in all the circumstances, he concluded that the payment was made in consideration of money's-worth, because the money's-worth was the liability to maintenance and liability to become responsible for the wife's keep, according to her position in life. The judgment continued :

> We think that counsel for the appellant was right in the course he took, for *Commissioner of Stamp Duties* v. *Pearce* has stood for very many years, and was three years later cited with apparent approval by this Court in *Finch* v. *Commissioner of Stamp Duties* [1927] N.Z.L.R. 807, 816; [1927] G.L.R. 586, 591.

It is interesting to note how counsel for the appellant sought to prove his point that the assignment of the life policy by the deceased to his wife on their separation had not been supported by a " fully adequate consideration in money or money's worth." In the words of the Court :

> Counsel endeavoured to support the contention that it was not, by inviting the Court to examine separately each of the provisions of the agreement and then to attempt to place a money value against each of them. Many of the provisions, he said, did not sound in a money consideration of any sort. By this method of approach, he came to the point when he contended that the Court should regard the £50 per month, which the husband undertook to pay for his wife's present maintenance, as sufficient for that purpose. He then went on to submit that the provision whereby the policy was to be assigned should be looked at separately and construed as conferring a benefit on the wife after the husband's death; and he contended that there was, at common law at all events, no legal duty on a husband to provide for a wife after his own death.

The Court, however, was quite unable to accept the propriety of this method of approach and did not find it necessary to consider whether or not counsel's last proposition was sound, for it was satisfied *that the proper approach was to look at the agreement as a whole.* The Court continued :

> In our opinion, it is not correct to approach the matter by estimating in detail the value of the things granted and the consideration, and then to ascertain whether they exactly agree. The proper course is " to look at the nature of the transaction and consider whether what is given is a fair equivalent for what is received " : *Attorney-General* v. *Earl Sandwich* [1922] 2 K.B. 500, 517. In the present case, no attempt has been made by the appellant to inform the Court of the exact financial position of the husband at the time he entered into the agreement for separation. It would seem likely that he was a person of some wealth, for when he died some years later his actual estate amounted to nearly £50,000. We do not see in the evidence before us the slightest ground for supposing that the husband intended to make a gift to his wife, and, on the contrary, the evidence is the other way. As, then, the agreement for separation is supported by a valuable consideration, and there is no evidence of any intention to make a gift, it seems to us that the responsibility rested on the appellant to show that the consideration moving from the wife was inadequate, and this he has failed to do. It is an elementary principle of construction of taxing statutes that it is for the Crown to show that the subject is within the ambit of the statute, and not for the subject to show that he is outside it : *Lord Advocate* v. *Hamilton's Trustees*, 1942 S.C. (Ct. Sess.), 426, 440.

The Court pointed out that, in some cases, the form and nature of the transaction, or the size of the consideration, might in itself supply some evidence of a gift; but that was not the case there. The amount of the monthly payments was relatively small, and it might have suited the husband to offer the insurance policy as an inducement to secure his wife's consent to other terms of the agreement. The Court concluded :

> In our opinion, then, as the separation agreement bears every evidence of being a perfectly bona fide arrangement, there is no ground for holding that anything was left for gift or for natural love and affection : *In re Bateman* (1926) 95 L.J.K.B. 199, 201. We are accordingly of opinion that the first question must be answered against the appellant.

Therefore it was held that the proceeds of the life policy did not come in as part of deceased's dutiable estate under para. (f), and, as pointed above, counsel for the Crown had withdrawn his submission that the proceeds came in under para. (g).

The above reasoning of the Court of appeal is, I think, the most important judicial pronouncement we have had in New Zealand for a decade on death and gift duty law, for the reasoning applies in practice not only to para. (f) of s. 5 (1) but also to paras. (b), (c) and (g) of that subsection which enumerates the classes of property which become liable for death duty. The method of approach by the Court in this case to the problem presented will also set the pattern for the assessment of gift duty in the future. For, under Part IV of the Act, which deals with the imposition of gift duty, the term " gift " means any disposition of property which is made otherwise than by will, whether with or without an instrument in writing, *without fully adequate consideration in money or money's worth.* This case shows where the parties are at arm's length and come to a genuine compromise, and the question is, whether the consideration for the disposition of property which has been effected has been fully adequate or not, the matter is not just one of arithmetic or an exercise of double-entry book-keeping; it is not a question of estimating the value of the thing transferred and the consideration therefor with a view to make sure that they exactly agree. In short, the human element must be taken into consideration.

[*To be continued.*]

TOWN AND COUNTRY PLANNING APPEALS.

Bishop *v.* Rotorua County.

Town and Country Planning Appeal Board. Rotorua. 1958. April 24.

Subdivision—Area zoned as "Rural"—Undisclosed District Scheme making Ample Provision for Residential Needs of Locality—Proposed Subdivision comprising Ribbon Development on State Highway and involving Urban Development of Land used for Farming Purposes—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal by the owner of farming property fronting the Te Ngae Paengaroa State highway. He applied to the respondent Council for consent to the proposed subdivision of part of this land for residential purposes. The land in question was in the Rotorua County and that part of the County was at present the subject of an undisclosed district scheme. The County refused its consent to the proposals on the grounds that the land in question was zoned as rural and also on the grounds that approval of the proposal would lead to the creation of a pocket of urban development in a rural area; would be an encroachment of urban development on land at present used for farming purposes, that there was already sufficient land for urban development zoned as such under the Council's undisclosed district scheme and finally that the proposal would mean ribbon development on a State highway.

At the hearing the appellant withdrew his appeal in respect of land comprised in Scheme Plan 3816 so the appeal related to two proposed subdivisions under Scheme Plans No. 3810 and 3811. Under Plan 3810 the proposal was for the subdivision of 1 ac. 1 ro. 33 pp. into six residential sites. Under Plan No. 3811 the proposal was for the subdivision of 1 ac. 32 pp. into six residential sites. Both blocks fronted on to the State highway. Opposite to the land included in Plan 3811 was a small residential subdivision lying between the State highway and Lake Rotorua. This subdivision was approved some years ago.

It was submitted for the appellant that between the boundary of the Rotorua County and the appellant's property there was already considerable residential occupancy. This was correct in respect of that part of the County immediately adjoining the Borough in what was known as the Lynmore area and there was also considerable residential development in what were known as the Cunningham and the Hannah's Bay subdivisions. Both these subdivisions lay between the State highway and the lake. There was then a gap for approximately 4 miles between these properties and the appellant's property and the residential development was in the main scattered.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, and having inspected the properties under consideration and the surrounding locality, the Board finds:

1. That the Council's undisclosed district scheme appears to make ample provision for the residential needs for this part of the Rotorua County for many years to come.

2. That the appellant's proposals conflict with recognized town-and-country-planning principles on several grounds as follows:

(a) The proposals are a type of ribbon development.

(b) They constitute ribbon development of a residential nature on a State highway and as such would be unacceptable.

This is particularly the case in respect of land in Plan 3811 which is only a short distance from a pronounced bend in the highway.

(c) That approval of the proposals would involve urban development on land at present used for farming purposes.

It was submitted on behalf of the appellant that these particular blocks of land were of poor quality and of little productive value. The only comment the Board has to make on this is that paddocks immediately adjoining these sections appear to provide excellent pasture.

(d) There would appear to be ample land available for urban development in this part of the County zoned for residential purposes.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Taylor *v.* Waitemata County.

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

Subdivision—Area zoned as "Rural"—Subdivision into Two Residential Sites—Undisclosed District Scheme making Provision for Future Residential Needs—Subdivided Area undeveloped and surrounded by Area developed for Productive Purposes—Refusal of Approval—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal by the owner of a property comprising part of Lot 2 on Deposited Plan 6792 being part of Allotment 4 of the Waikomiti Parish. This property was situated in an area zoned as rural under the respondent Council's undisclosed district scheme, and the Council had refused to approve of a plan for the subdivision of this property into two residential sites.

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. The Board has already held in previous decisions that the Council's undisclosed district scheme appears to make provision for residential needs in this district for many years to come.

2. That although the appellant's land has in the main reverted to native bush and scrub it is in the centre of a rural area used for production for there are extensive commercial orchards and vineyards all around it.

3. The only difference between the appellant's property and the surrounding properties is that the surrounding land has been developed for productive purposes, whereas this property has not been so developed, though there would appear to be no reason why it could not be used for production.

The Board holds that to approve this subdivision would be contrary to the town-and-country-planning principles likely to be embodied in the Council's undisclosed district scheme. The appeal is disallowed. No order as to costs.

Appeal dismissed.

Black *v.* Waimairi County.

Town and Country Planning Appeal Board. Christchurch. 1958. February 5.

Building Permit—Shop Extensions—Area zoned as "Residential"—Permit given Earlier for Existing Shop—Conditional Use only—Balance of Land suitable for Residence or Flats—Shopping Areas in Locality provided for—Proposed Shop Additions abutting on Through Highway—Permit refused—Town and Country Planning Act 1953, s. 38 (1) (e).

Appeal by the owner of a property situated on the south-eastern corner of Ilam Road, and the former Burnside Road, now Memorial Avenue. The total area of this property was 31.1 pp., and the appellant had erected a small shop on the corner. This shop covered an area of approximately 4.7 pp. with an adjoining vacant section of approximately 26.6 pp. The appellant purchased this property in 1954 and he stated that he made inquiries at that time and was informed that under the then metropolitan planning scheme this property was zoned as "commercial". The appellant claimed that he purchased it with the idea of erecting a block of shops. He was granted a permit for the erection of the existing shop and he later applied to the respondent Council for a building permit for the erection of three additional shops fronting on to Ilam Road, but a permit was refused and this appeal followed.

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 this property is situated is zoned as "residential" under the Council's undisclosed district scheme. If that zoning is appropriate then shops are a conditional use only in such an area and are limited as to type of shop.

2. The appellant in evidence claimed that if he was not permitted to erect shops on the vacant land, this, by reason of its shape, would be quite unsuitable for residential purposes. But at the hearing evidence was given by an experienced valuer that the remaining vacant land would be

(Concluded on p. 336.)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Opinion or Fact.—In *N. Z. Truth Ltd.* v. *Avery,* heard recently in the Court of Appeal, discussion turned upon a statement in the appellant's weekly to the effect that a hillside looked "like a slaughter-yard." Counsel argued, with references from the Bible, Shakespeare, and other well-known sources, that this was a matter of opinion and not a statement of fact. The President was not impressed. "Your argument," he observed, "leaves me cold." "May I inquire," replied counsel, "whether *that* is a statement of fact or a matter of opinion?" This was—to quote from *Proverbs*—a soft answer that turneth away wrath. He might, upon reflection, have added the famous reply of Robert Clive when under cross-examination before a Parliamentary Committee upon a charge of having abused his position as Governor of Bengal: "My God, Mr President, at this moment I stand astonished at my own moderation."

Inflationary Tendencies.—In *Ingram* v. *Amalgamated Brick and Pipe Co. Ltd.*, heard in the Supreme Court at Wellington, counsel for the plaintiff widow sought to lead accountancy evidence of inflationary trends between 1945 and 1958 as affecting any award that might be made under the Deaths by Accidents Compensation Act. This was opposed by the defence and held inadmissible by the trial Judge (Haslam J.), who took his stand on *Donaldson* v. *Waikohu County* [1952] N.Z.L.R. 731. The point was reserved; but, the award of the jury proving satisfactory to both parties, it will presumably have to await some other occasion for argument. To admit this type of evidence would seem to add a further terror to the fixation of damages for economic loss in common-law claims. Scriblex, for his part, sees no reason why plaintiffs should not accept the Government's undertaking that immediately any sign of inflation appears it will be promptly arrested.

An Early Unionist.—Henry Peacham, who wrote *The Worth of a Penny* in 1647 recalls the following incident: "I remember, when I was in the Low Countries, there were three soldiers, a Dutchman, a Scot, and an Englishman, for their misdemeanours, condemned to be hanged. Yet their lives were begged by three several men. One, a Bricklayer, that he (the Dutch soldier) might help him to make bricks, and carry them to the walls. The other was a Brewer of Delft, who begged his man (the Scot) to fetch water, and do other work in the brewhouse. Now, the third was a Gardener, and desired the third man to help him to work in and dress a hop-garden. The first two accepted their offers thankfully. The Englishman told his master, in plain terms, his friends never brought him up to gather hops, but desired he might be hanged first: and so he was."

Use of Real Names.—That the *Artemus Jones* bugbear of libel actions against authors is not entirely set at rest by the new Defamation Act is highlighted by A. P. Herbert in a note to his new book, *Made for Man* (Methuen Ltd., 1958). "Long ago," he says, "in a facetious piece for Punch, I invented, I thought, a dentist called ——. A real dentist of that name (which nobly I will not now reveal) wrote indignantly to the editor and said that he would never have the paper in his waiting-room again. We gave the soft and sincere answer that the offence was accidental, but he would not have that. No, he said, it must have been deliberate, for he was the only —— in the Dental Register. So to be safe it seems we must be sure, before we call our Colonel Clive, that there is no Colonel Clive in the Army list. But shall we be safe? There may be a Colonel Clive who has retired or a Colonel Clive who is dead and has a sensitive widow. Be easy, Clives, there is no Clive or Colonel in this story. But there are Archbishops and Bishops and clergymen, an Admiral, an author or two, some actresses and actors, theatrical folk of various kinds, a great many peers of the realm, two naval officers, a butler, a solicitor, a theatrical producer, a Member of the House of Commons, an artist, two employees of the Port of London Authority, a Thames policeman, many journalists, and even a Duchess. They must all have names. Or not? I might, of course, speak of Admiral X and Archbishop Y, —'M took N in his arms and kissed her full on the lips.' Not very satisfactory—and not even safe. There would still be nothing to prevent a 'reasonable man' from testifying in Court that Admiral X throughout the book reminded him of his old friend Admiral So-and-So. So we may as well take the risk of names and do what we can about 'reasonable care'."

Sergeant Ballantine.—Sergeant Ballantine was by all accounts an extraordinary man, and he had a rather strange career. He was the son of a London police magistrate and was born in 1812. He was called by the Inner Temple, and in 1863 he was granted a patent as sergeant-at-law. Ballantine was a man of forceful character, who often dominated the Judge, the witnesses, and the jury. He was a noted cross-examiner in criminal cases, and at one period Montagu Williams almost invariably acted as his junior. Though Ballantine was of a cheerful and generous nature, he was very impulsive and reckless and he often gave free rein to a rather bitter tongue. ("Damn you, sir, am I conducting this case or are you?" he snapped at his junior, Edward Clarke, in a railway case in which the Sergeant had not mastered the facts and Clarke felt obliged to intervene more than once with some quite relevant information.) After a long and successful career he went to India to defend the Gaekwar of Baroda for a fee said to have been 10,000 guineas. On his return to England, Ballantine speculated on the Stock Exchange and lost most of his money. His absence abroad had also meant the virtual loss of his practice. So, in 1882, he wrote a book entitled *Experiences of a Barrister's Life*, gave up the Bar and went to America to give readings from his book. Though he was well received there, his visit was not a financial success. He returned home somewhat broken in spirit and mind, but he was kept in comfort for the rest of his days by some of his very good friends.—From a note in the *Law Times* on the site of Old Sergeants' Inn 1415-1910.

Tailpiece.—From a recent case in the English Court of Appeal: *Evershed M.R.* "I understand that mink is a species of rodent." *Cassells L.J.* "I have always been led to believe that it is the Rolls Royce of rats."

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 334*).

quite suitable for the erection of a house or two self-contained flats and that it would be readily saleable for residential purposes.

3. The evidence establishes that the Council has made provision in its plan for this large residential area for five shopping centres within the area, three of them being within a distance of 50 chains from the appellant's property and the others being within half a mile. It is a principle of town planning that shops should be concentrated in centres and that the location of these centres should be planned so as to provide reasonable general shopping facilities throughout a residential neighbourhood. This particular neighbourhood is predominantly residential in character and that character is likely to be maintained. It would appear that the provision made by the Council's undisclosed district scheme is adequate for the general shopping needs of the neighbourhood.

4. The appellant's proposal to erect a block of shops on this particular site is also opposed by the Council on the grounds that this property abuts on to Memorial Avenue although the shops which the appellant seeks to erect would have frontages on to Ilam Road. Memorial Avenue is a through highway which it can be anticipated will carry a considerable volume of traffic to and from the international airport at Harewood.

It is a recognized principle of town and country planning that shopping centres should not be established on or in close proximity to main highways carrying any substantial volume of traffic. In this particular case there is the added factor that Memorial Avenue, as its name suggests, is designed to have scenic features uncommon to main highways. It is not desirable for a street having this character to have shops fronting on to it or in close proximity to it.

The Board holds that the proposed shopping facilities for this area appear to be adequate and the erection of a block of shops in close proximity to a main highway is contrary to town-and-country-planning principles. The appeal is accordingly disallowed. No order as to costs.

Appeal dismissed.

Hawaikirangi *v.* Wairoa Borough.

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

Subdivision—Residential Purposes—Maori Land—Area zoned as "Rural"—Partition of Half-Acre Share of Applicant by Severance—Maori Land Court requiring Approval by Town-planning Authority before Partition Order made—Approval given in Special Circumstances—Town and Country Planning Act 1953, s. 38 (1) (d).

Appeal by one of several joint owners who held undivided shares or interests in a block of Maori-freehold land situate in the Borough of Wairoa containing 3 ac., 26 pp. known as Poutaka 15.

He estimated that he was entitled to half an acre of this land, and he wished to partition his share and dispose of it. He applied to the Maori Land Court to partition his share but that Court, when considering applications for partition, although not bound so to do, adopted the policy of having regard to the Town and Country Planning Act 1953, and to the requirements of local authorities under that Act.

It followed that policy in this case and deferred the application for a partition order until approval of the proposed subdivision was given by the respondent Council.

The appellant applied to the Council for its approval of the subdivision but this was refused, and this appeal followed.

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 Council has a proposed district scheme that has been publicly notified, but that the time for lodging objections has not yet expired.

2. That under that scheme the land in question is in an area zoned as rural.

Although there was some conflict of evidence on the question, the Board is satisfied that the land has some actual or potential value for food production by orcharding or market gardening, although no use has been made of it for many years.

3. That water, sewerage, and electric power are available to the property.

4. That the Council's proposed district scheme makes adequate provision for the foreseeable population needs of the Borough for many years in the areas already zoned as "residential" in the scheme plan, and the appellant has failed to make out any case for altering the zoning of this area from "rural" to "residential".

5. That in the special circumstances of this case the Council's proposed district scheme will not be detrimentally affected by a departure from its provisions without making any alteration in the zoning.

The Board allows the appeal in that it directs the Council to approve a plan for the subdivision of the land hereinbefore referred to, into two allotments by severing from the main block such portion thereof as the Maori Land Court may partition in favour of the appellant herein.

This decision is not to be construed as approving of any further subdivision of the land in question. No order as to costs.

Appeal allowed.

Robinson *v.* Rotorua County.

Town and Country Planning Appeal Board. Rotorua. 1958. April 24.

Subdivision—Residential Sites—Part of Farm Property—Area zoned as "Rural"—Land adjoining Residential Development Block—Avoidance of Ribbon Development and Urban Development of Farming Lands having High Present or Potential Value for Food Production—Approval refused—Town and Country Planning Act 1953, s. 38 (1) (e).

Appeal by the owner of a property in Rotorua County comprising 142 ac. 22 pp. This was used for farming purposes, particularly dairying. This property lay within approximately half a mile of the boundary between Rotorua County and the Rotorua Borough.

On September 11, 1957, the appellant submitted to the respondent Council a proposal for leave to subdivide part of his property into residential sites. On October 16, 1957, the Council refused to approve subdivision on the grounds that the property was zoned as rural under the Council's proposed district scheme.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel and having inspected the property under consideration and the general locality, the Board finds as follows:

1. That under the Council's proposed district scheme for this part of the County the area zoned for residential purposes comprises some 3,700 gross acres. This area should provide fully for the residential development of this district for many years.

2. That between the appellant's property and the Borough boundary there is a block known as the Ford Block which is being developed under the State housing scheme for residential purposes. This scheme envisages block-residential development. [It is a residential exclusion of the Rotorua Borough separated from the appellant's property by the rural one.]

3. That the appellant's proposal for the subdivision of part of his property provides for 28 residential lots fronting on to Malfroy Road and 19 residential lots fronting on to Sunset Road. These subdivisions are a typical example of ribbon development. It is true that the plan as submitted shows suggested internal roads for the further development of the whole block for residential purposes but that is no more than an indication of the appellant's intention possibly to subdivide this land for residential purposes in the future: there is no means of ensuring that that further development will in fact take place. Ribbon development must be avoided at all costs wherever possible. As stated the appellant's proposal is a clear example of ribbon development. On those grounds alone the appeal would fail.

4. That the appellant's proposal also offends against a well-established principle of town and country planning, that is to say, that the encroachment of urban development on farming lands having a high present or potential value for food production must be avoided wherever possible.

The appellant himself in evidence admitted that his property is good dairy land and it is of importance that that character should be maintained as long as possible. As the Council's proposed district scheme makes adequate provision for the foreseeable residential development of the County and the appellant's proposal offends against two well-established town-and-country-planning principles the appeal is disallowed. No order as to costs.

Appeal dismissed.