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FAMILY PROTECTION: SOME RECENT JUDGMENTS.

THIS is another instalment of recent Family Protection judgments. We have already given a selection of claims of children and grandchildren (*ante*, p. 209) and claims by daughters (*ante*, p. 225).

WIDOWS.

In a judgment delivered on August 17, in *In re Peacock*, Henry J. referred to the judgment he delivered on December 22, 1958 (see *ante*, p. 17) which had not yet been perfected by the sealing of an order. Under the testator's will, the plaintiff widow was given an annuity of £500 per annum, which annuity was increased by the Court to £1,000, such increase to take effect as from date of the testator's death. The plaintiff had had to resort to her own capital, so it was clear that the Court should either ante-date the increased allowance or order a lump sum in lieu thereof. The former method was chosen. Since the testator had died on January 20, 1954, a sum of £2,500 had to be found by January 20, 1959, to bring the increased annuity up to date.

At the hearing, counsel for the plaintiff sought an increased annuity up to the extent of the net income of the whole estate. Counsel asked generally that the annuity should be charged on capital but gave no specific reason for the making of such an order. It was stated that the estate would produce £1,559 net per annum. It was generally conceded that a safe basis for calculation was £1,500 per annum. The attention of the Court was not drawn to any factor which would make it appear that an annuity at the rate of £1,000 per annum as from date of death would encroach on capital.

The learned Judge said:

> The accounts had not been prepared on a yearly basis and still have not been so prepared. Counsel for the parties claim that this has embarrassed them. If so, steps should have been taken to prepare sufficient accounts. It is clear from the figures now placed before the Court that the trustee has insufficient funds to pay the current annuity and the arrears. There is a sum of £2,373 outstanding. For various reasons, the estate has been involved in payment of large sums for litigation. No doubt these have affected the cash position.
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> Since there are no competing claims on the testator's bounty, it was made clear in the original judgment that the plaintiff's needs were paramount. Her needs were assessed at £1,000 per annum. At the time, so far as the Court was informed, there was no necessity for charging the capital to ensure such an annual payment. The judgment said:
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> "There does not appear to be any necessity to grant the request of the plaintiff's counsel that the annuity should be charged on capital. If the position so changes that such a charge is necessary, further application may be made in the light of circumstances then prevailing."
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> It is clear that it was incorrect to state that there was no necessity for an order charging capital, but that appeared to be the position so far as the Court was then advised. However, it was the intention of the Court to provide an annual income of £1,000 for the plaintiff and that intention ought to, if it can, be implemented.
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> The proper course is for the Court to recall its first order and to make a fresh order in the same terms but adding to it a further term that the corpus be charged with payment of the said annuity. The Court has jurisdiction to do this by virtue of the principles laid down and discussed in *In re Harrison's Share Under a Settlement* [1955] 1 Ch. 260. No order is made as to costs on this application.

In *In re Blyth* (Wellington, O.S. 24/56), Haslam J. had to consider the claim of the widow of W. I. J. Blyth, late of Wellington, managing director, deceased, who died on September 22, 1956, without having altered or revoked his last will dated December 14, 1951.

At the time of his death, the deceased was sixty-eight years of age and had been twice married. There was no issue of the second marriage, but there were two children of the first marriage—namely, the defendant beneficiaries, J. W. Blyth and Mrs Innes. The plaintiff was the second wife of the deceased, and married him in the year 1951, when she was aged forty-one years.

By his will, the deceased devised his house property at Paraparaumu upon trust to permit the plaintiff to have "the use and occupation and enjoyment thereof during her widowhood, free of rates, taxes, and outgoings, except fire and insurance premiums". There was power for the trustees, at the plaintiff's request, to sell this house and to purchase a substitute residence, or to invest the proceeds of sale and pay her the income therefrom. After her death or remarriage, the house property would fall into residue. The residue of the estate was charged with the payment to the plaintiff of an annuity of £416 per annum during widowhood. Subject to the annuity, the residue was bequeathed as to three-quarters to the defendant J. W. Blyth, and as to one-quarter to the other defendant, Mrs Innes. There was power to postpone conversion, to retain the shares in Adams and Blyth Ltd. (being the company of which the deceased was the chief shareholder) as authorized investments, and to take up new shares therein, or in any company with which it should be amalgamated. There was also power to the trustees (one of whom was the testator's son, J. W. Blyth) to employ J. W. Blyth as managing director of the company.

After payment of testamentary expenses, including duties and debts, the trustees had in their hands shares in Adams and Blyth Ltd., and the house at Paraparaumu and the furniture therein, leaving a net estate of £20,143 7s. 11d. It was stated at the Bar that, without admitting the plaintiff's claim to relief, the trustees, with the authority of the beneficiaries, were prepared to confirm her ownership of the estate furniture, valued at £386 2s. 6d. (as stated in the affidavit of J. W. Blyth), and henceforth to pay her the annuity free of any taxation for the time being thereon. In addition, at the absolute discretion of the executors and trustees, they were prepared to continue, as before, to maintain the garden on which the house stood.

The house property had come to the deceased from his first wife. He had become, at the time of his death, the controlling shareholder of Adams and Blyth Ltd., a business engaged as customs and carrying agents. It was a private company with a nominal capital of £7,000. The deceased owned 5,500 of the shares therein, the remainder being held by the defendants, Mrs Innes and J. W. Blyth, and an employee of the company. The affidavits disclosed that the estate of the deceased was built up over a period of years, and that his first wife contributed considerably to his success in that respect by frugality of living and good management of the household. The second defendants claimed that they were entitled to special consideration as inheritors of the fruits of their late mother's efforts. The conduct of the second wife during her marriage was not criticized by the defendant beneficiaries, but they strongly maintained that she had no claim to relief.

The defendant J. W. Blyth was managing director of Adams and Blyth Ltd., and received a salary from the company. The company had paid dividends of varying amounts from the year 1952; but, according to the affidavit of one of the trustees, Mr W. G. Smith, the profit for the year ended March 31, 1959, was not likely to exceed £700. The drop in income for that period was attributed to import restrictions, to additional petrol tax, and to increased costs of operation.

For the plaintiff, the Court was asked for an increased allowance by way of income, a cash payment of £500, and the absolute vesting in her of the house property. Later, the plaintiff's counsel retracted the last request, and the learned Judge thought he was well advised to do so. The widow was forty-eight years of age and in good health, and there was no acceptable evidence that she could not assume some form of employment if she wished to augment her income.

The learned Judge said that in the general scheme of his will, the testator had indicated a desire to ensure that the family business was carried on by his son. The assets of the concern were in a healthy condition. By consent, the valuation of Mr Nathan was handed to His Honour, showing that, in his opinion, the estate realty was worth £9,000 and not the book value of £3,000. Nevertheless, the increased figure was presumably reflected in the net balance of £20,000 above referred to. The company had other assets such as liquid cash (which was necessary for that form of enterprise) and motor-vehicles.

The widow's counsel claimed that his client was entitled to be maintained on the footing that the business be notionally realized and the proceeds invested. The learned Judge said he could not accept that view without qualification. He said:

> The widow is entitled to prior consideration, but the other interests under the will are conferred on persons who have real, if smaller, moral claims on the bounty of the deceased. It is reasonable that the deceased, who had spent a working lifetime in building up the concern, should wish his business to continue, and that his son should not only be identified with its management but obtain an income therefrom. The children have at least some merit in including the past efforts of their mother to strengthen their resistance to this claim.
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> I cannot see any justification for a request for a capital payment. The widow has two children by her first marriage, and her husband has been careful to limit his benefits to her to the period of her widowhood. There is no reason why his assets should now be diverted in a way which may ultimately benefit strangers to his family. The cautious attitude to be adopted when requests are made for capital payments is too well established to require reiteration. In this case there are no exceptional circumstances justifying a departure from well-established principles.

Haslam J. said that the sole question, therefore, was whether the testator had failed in his moral duty in not giving a more liberal income provision to his widow. He continued:

> This is not a case where she can claim to have assisted in the building up of his estate, although this comment is not made by way of criticism of her conduct. I think, however, that if her claim be examined as at the date of death, the testator must be regarded as having left a widow aged forty-six years who was capable of supplementing her income if she chose to do so and might reasonably be expected to take employment. If she felt unwilling to go out to work, even on a part-time basis, she has a free home (which may for periods be let at high rentals) and £8 per week which, by consent, will now be free of tax. I am unable to see that she has any need for relief. While it may be agreed that the testator should have reviewed his will between the year 1951 and the date of death, being a time during which his income apparently rose considerably, he possibly realized from long experience that businesses of the nature of Adams and Blyth Ltd. depend heavily on the efforts of the persons in control, and are affected by fluctuations in the economy of the country. Whether or not the business produces a profit, the trustees must pay the widow her annuity and provide her with a free home. If the scheme of the will be upset and the assets in the hands of the executors realized and invested, there would possibly be a sum of £16,000 available. The remaindermen would be without the benefit now derived by the son from his position as managing director, or by the daughter from her dividends. To provide at least the present annuity after paying the taxation, the sum of at least £10,000 would be required. The testator may or may not have been over-generous to his widow, but I am unable to agree that he has failed in his moral duty. As I do not find that the plaintiff has made out her case, I need not consider the respective financial positions of the second defendants.

The claim was accordingly dismissed, without costs to or against the plaintiff. If any counsel (other than for the plaintiff) wished their costs to be fixed, they could make application through the Registrar with suggestions about quantum, and could have a formal order for payment out of the estate.

In *In re Francis* (Hamilton, No. G.R. 3759), the widow claimed against the estate of her late husband, William Knapp Francis, late of Taupo, retired estate agent (hereinafter referred to as "the testator"), who died on July 14, 1957, aged seventy-eight years. He had been twice married and was survived by his widow, the present plaintiff, aged sixty-five years, to whom he had been married for fourteen years, and also by three adult sons and two married daughters by his first marriage. The children were all stated to be in good health and in a reasonably good financial position.

At the time of the marriage in August, 1943, the testator was already a partial invalid, suffering from

osteoarthritis and recurrent attacks of bronchitis and pneumonia, and, over the last few years of his life, when he was also suffering from cancer, the plaintiff nursed him with unremitting care and devotion. The plaintiff's own health was no longer robust. Notwithstanding his ill health, the testator was apparently an able business man and in recent years speculated with marked success in property at Taupo. He was generous to his wife in his lifetime and bought considerable property in their joint names, and on occasions solely in his wife's name. His Honour said it was not unreasonable to assume that these were deliberate actions on the part of the testator, designed to reduce duty and to provide for the plaintiff upon his death.

By his will dated July 25, 1952, the testator bequeathed the plaintiff his motor-car, valued at £775, and the sum of £5 per week during her lifetime or until re-marriage; and, subject thereto, he divided his estate equally among his five children.

The testator left a gross estate of approximately £23,000. After making an allowance of £5,953 for duty, debts, etc. and the car, the learned Judge was invited by counsel to proceed on the basis that the net estate was worth, in round figures, £17,000, but, owing to its present state of investment, it was earning an income of under £500 a year. His Honour said:

> At first blush, the testamentary provision made for the plaintiff seems inadequate; but when her capital resources, which she acquired from the testator during his lifetime, are examined, the need for further maintenance in my view evaporates. The plaintiff has assets worth over £10,000, including over £1,000 in cash. Her real property at Taupo is also increasing steadily in value. In addition, she receives an income, inclusive of the £5 per week bequeathed her by the testator, of £8 per week, and this figure could be appreciably improved by a rearrangement of her investments. Over the next twelve months, her universal superannuation will also increase from £3 to approximately £4 a week.
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> It is, of course, settled law that under the Family Protection Act the Court is not free to do the fair thing or correct oversights or injustices as such. The Act can be invoked only where the Court is satisfied that the will in question fails to make adequate provision for the proper maintenance and support of a claimant. "Adequacy" alone is not the test and "propriety" and all the surrounding circumstances must be taken into account: *Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 463, 476. Even in cases where the Court comes to a decision that the will is unjust from the moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be: "What is the need for maintenance and support?"; and the second: "What property has the testator left?". *In re Allardice, Allardice* v. *Allardice* (1910) 29 N.Z.L.R. 959; 15 G.L.R. 753; *In re Goodwin, Goodwin* v. *Wilding* [1958] N.Z.L.R. 320, 327. A testator's will-making power is open to review only to the extent that there is inadequate provision for proper maintenance: *In re Blakey, Blakey* v. *Public Trustee* [1957] N.Z.L.R. 875, 877, per North J.
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> Having regard to the size of the estate and his wife's dutiful service to him, the testator might well have increased the income which he gave her, particularly as this need not have prejudiced the eventual gift of capital to his children; but, after full consideration of all the circumstances, I feel unable to say that there has been any breach of moral duty in this regard. Subject to the prudent management of her resources, which, having heard her give evidence, I have no doubt the plaintiff will achieve, her financial future appears to me to be assured. It must also not be overlooked that when she married the testator she had no financial assets whatever.

The application was accordingly dismissed. His Honour allowed the plaintiff her costs out of the estate, which he fixed at forty-five guineas, and disbursements. In addition, she was entitled to the sum of fifteen guineas against the trustees personally, pursuant to the order made by Shorland J. when granting an adjournment on November 20 last. The defendant trustees were entitled to debit their costs, apart from the fifteen guineas previously referred to, against the estate, and counsel for the remaindermen would receive forty-five guineas and disbursements.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Borstal Training—Jurisdiction—No Appeal Against Sentence of Borstal Training imposed by Children's Court—Summary Proceedings Act 1957, s. 8 (c), 115, 209—Child Welfare Act 1925. The Supreme Court has no jurisdiction to entertain an appeal against a sentence of borstal training imposed by a Children's Court, created and defined in the Child Welfare Act 1925, as s. 209 of that statute precludes a person convicted in the Children's Court for a criminal offence from appealing under s. 115 of the Summary Proceedings Act 1957. (*Re M., G., J., and W.* [1952] N.Z.L.R. 947; [1952] G.L.R. 475, distinguished.) *Ayers* v. *The Queen.* (S.C. Christchurch. 1959. April 24. July 14. Haslam J.)

EXECUTORS AND ADMINISTRATORS.

Letters of Administration—Non-Trust Company as Administrator—Letters of Administration with Will annexed granted to Syndics of Company Limited until Further Representation be granted—with Usual Sureties—Trustee Act 1956, s. 48. Where a company other than a trust company (as defined in s. 2 of the Trustee Act 1956) is appointed as executor and is empowered by its memorandum so to act, the proviso to s. 48 (1) of that statute does not prohibit the Court from granting letters of administration with will annexed to syndics duly appointed by the company, even though such administration is for the use and benefit of the non-trust company. (*In re Levin and Co. Ltd.* [1936] N.Z.L.R. 558, referred to.) In each of the two cases before the Court, where application was made for letters of administration with will annexed, the grant was made to syndics of the company and limited until further representation be granted, with the usual requirement of two sureties. In the third case, an application for probate, where the testatrix appointed such two directors of the non-trust company as might be nominated by resolution of the company and the husband of the testatrix, probate was granted to two directors so appointed and the widower. *In re Rayment ((deceased)*; *In re Boyle (deceased)*; *In re Duke (deceased).* (F.C. Wellington. 1959. July 1. August 7. Hutchison A.C.J. and McCarthy J.)

INDUSTRIAL CONCILIATION AND ARBITRATION.

Jurisdiction—Alleged Lockout—Workers seeking Supreme Court Declaration that Notices of Dismissal null and void—Jurisdiction declined—Acts of Employer Constituting Lockout Actionable only in Magistrates' Court, and on appeal, in Court of Arbitration—Industrial Conciliation and Arbitration Act 1954, ss. 190, 192 (2), 194. Practice—Injunction—Master and Servant—Injunction sought to compel Employer to reinstate Dismissed Workers—Injunction, if granted, having Effect of Decree of Specific Performance of Contract for Personal Services—Such Injunction not granted at Suit of Either Master or Servant. The Supreme Court has no jurisdiction to embark on an inquiry as to the facts or to answer the question whether any given acts by an employer did or did not amount to a "lockout" as that term is defined in s. 190 of the Industrial Conciliation and Arbitration Act 1954. There is no remedy outside that statute for what an employer has done in such circumstances: it is actionable only by virtue of that statute, which creates the wrong and prescribes its consequences and entrusts the remedy to the exclusive jurisdiction of the Magistrates' Court and, on appeal, to the Court of Arbitration. *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 348, *Barrowclough* v. *Brown* [1897] A.C. 615, and *Mechanical Performers Protection Association Ltd.* v. *British International Pictures Ltd.* (1930) 46

T.L.R. 485, applied.) In such a case, the Court will not grant an injunction the effect of which would be to decree specific performance, at the suit of either party, of a contract for personal service. (*Davis* v. *Foreman* [1894] 3 Ch. 654, followed.) Consequently, a declaration, the effect of which, if granted, would have been to declare null and void certain notices of dismissal given by the company to employees, was refused, and an injunction to compel the employer to reinstate dismissed employees, was refused. *New Zealand Dairy Factories and Related Trades Employees' Industrial Union of Workers* v. *Chaplin and Others.* (S.C. Auckland. 1959. June 10. Turner J.)

LAND AGENT.

Commission—Land Agent appointed "to effectuate such sale"—Sale and Purchase Agreement executed by Parties—Purchaser failing to complete—Land Agent disentitled to Commission as Purchaser unable to complete Purchase. It was stated in an agreement for the sale and purchase of a property that the vendor had appointed a firm of land agents "to effectuate such sale". The purchasers, who paid a deposit to those agents, failed to complete their purchase. On a claim by the intended vendor against the land agents for payment of the deposit to him without any deduction for land agents' commission. *Held*, That, in order to entitle the land agents to commission, they were required to find a purchaser, ready and willing to purchase, in the sense of a purchaser able to purchase and able to complete as well. (*James* v. *Smith* [1931] 2 K.B. 317, followed. *Dennis Reed Ltd.* v. *Nicholls* [1948] 2 All E.R. 914, distinguished. *Latter* v. *Parsons* (1906) 8 G.L.R. 596; *Bellingham* v. *Bly* (1915) 34 N.Z.L.R. 538, and *Nigro* v. *Wilson* (1924) G.L.R. 537, not followed. *Boots* v. *E. Christopher & Co.* [1951] 2 All E.R. 1045, and *Pettigrew* v. *Klumpp and Klumpp* [1942] St.R.Qd. 131, referred.) *Stocks* v. *Foley, Foley and Nola.* (1959. July 16. August 13. Kealy S.M. Auckland.)

LICENSING.

Licensing Control Commission—Direction to Build New Licensed Premises—Such Direction Ultra Vires the Commission—Commission intending to Exercise Powers of Licensing Committee to direct Rebuilding of Licensed Premises—Notice of Meeting of Commission and Intention to consider Such Matter to be given to Licensee and Owner—Licensing Amendment Act 1948, ss. 15 (1) (2), 58 (Licensing Amendment Act 1952, s. 11 (2)). Section 15 (1) of the Licensing Amendment Act 1948 empowers the Licensing Control Commission to fix standards of accommodation, services, and other facilities for the public and for lodgers, guests, and employees in licensed premises. Such standards of general applicability or standards of a general nature applicable to licensed premises generally or to licensed premises of a particular nature. Section 15 must be read in conformity with the general functions of the Commission as set out in s. 13, which relates to licensed premises as defined in s. 4 of the Licensing Act 1908, which refers to existing premises. Consequently, it is ultra vires the powers of the Commission to make an order, which, while imposing certain standards in respect of required new premises, goes beyond the fixation of standards of accommodation, services, and other facilities, and directs that entirely new premises should be erected. Such an order is also ultra vires the powers given the Commission by s. 15 (2), which empowers the prescription of a standard in respect of a specified licensed house, since it is an order which goes beyond the requirement of standards in respect of that house and orders a new house to be built. If the Commission intends at a meeting to exercise any of the powers of a Licensing Committee under s. 58 of the Licensing Amendment Act 1948 (which includes the power to direct the holder of a licence to cause the rebuilding of the premises), it is under the same obligation as the Committee to give the required notice to the licensee and the owner of the particular premises of the matters to be considered at the meeting, required by the proviso to s. 58 (enacted by s. 11 (2) of the Licensing Amendment Act 1952). *Morgan and Another* v. *Licensing Control Commission, Morgan and Another* v. *Hutt Licensing Committee.* (S.C. Wellington. 1959. July 23. McGregor J.)

NEGLIGENCE.

Licensor and Licensee—Cricket Match in Progress on Corporation Ground—Spectator injured by Cricket Ball on Path Outside Tea Shop—Jury's Finding that No Unusual Danger known to Defendant—Plaintiff debarred from Recovery of Damages due to Unsafe Condition of Premises—No Operative Negligence on Defendant's Part. The defendant corporation owned, occupied and administered a public reserve in Wellington, known as Kelburn Park. On February 15, 1958, the Park was being used for four cricket matches which were taking place with the approval and permission of the defendant on the grass oval. There was a public path on the western side of the cricket oval. About 3 p.m., the plaintiff, having watched the cricket, walked along the western path in a southerly direction to a tea shop or kiosk immediately adjacent to the western path. He was standing on the path outside the shop when he was hit in the chest by a cricket ball from the playing area, and he was injured. The plaintiff alleged his injuries were caused by the negligence of the defendant corporation. The jury found, inter alia, in answers to issues submitted to them: (5) there was not existing in the park a concealed danger known to the defendant. The general damages were assessed at £375, with £48 16s. 8d. special damages. The jury added the following rider: "In delivering the foregoing verdict we wish to make it quite clear that we consider that the plaintiff at the time of his accident was not a spectator at cricket but was engaged in doing business at a public shop adjacent to a public path". On motion by the plaintiff for judgment for the damages assessed by the jury, and on motion by the defendant for nonsuit, or, alternatively, for judgment for the defendant, upon the grounds that there was no evidence or no sufficient evidence of any breach of duty owed by the defendant to the plaintiff, and upon the further ground that in accordance with the jury's finding on Issue No. 5 it was proper that judgment be entered for the defendant. *Held*, 1. That the jury's answers had to be considered in conjunction with the rider when they took the view that the plaintiff at the time of the accident was not a spectator at cricket, but was engaged on doing business at a shop adjacent to a public path. 2. That the relationship of the parties was that of licensor and licensee; the plaintiff was voluntarily on premises provided by a local authority for the use of the public without charge. (*Ellis* v. *Fulham Borough Council* [1938] 1 K.B. 212; [1937] 3 All E.R. 454; *Sutton* v. *Bootle Corporation* [1947] 1 K.B. 359; [1947] 1 E.R. 92; *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353; [1950] 1 All E.R. 682; *Bates* v. *Stone Parish Council* [1954] 3 All E.R. 38; *Perkowski* v. *Wellington City Corporation* [1957] N.Z.L.R. 39; [1959] N.Z.L.R. 1, followed. *Plank* v. *Stirling Magistrates* 1956 S.C. (Ct. Sess.) 92, not followed. *Aitken* v. *Kingborough Corporation* (1939) 62 C.L.R. 214, 219, referred to.) 3. That the jury's finding that there was unusual danger had to be viewed in the light whether danger from a cricket ball is an unusual danger to patrons of a shop adjacent to a public path surrounding a cricket field, and not in the light whether a hit from a cricket ball is a usual or unusual danger to spectators at a game of cricket. (*London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737; [1951] 2 All E.R. 1, followed.) 4. That, as the plaintiff was a licensee, the jury's answer to Issue No. 5 debarred the plaintiff from recovering damages for any injury arising from the unsafe condition of the premises. 5. That, while there was a danger to the plaintiff due to the current operations which the occupier defendant permitted to be carried on on the premises—the danger almost inherent from the playing of a game of cricket—it was a danger which arose from the unfitness of the ground in the vicinity of the tea-shop as an adjunct to the playing area, a matter relating to the static condition of the premises; which had been present at all times since the ground was used for cricket, and, consequently, the plaintiff could not succeed on a breach of the general duty of care. (*Dunster* v. *Abbott* [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572, and the statement of Cleary J. in *Percival* v. *Hope Gibbons* [1959] N.Z.L.R. 642, 672.) *Spittal* v. *Wellington City Corporation.* (S.C. Wellington. 1959. April 17. McGregor J.)

PRACTICE.

Production of Documents—Letters in Defendant's Possession not "documents relating to any matter in question in the action"—Order for Inspection refused—"Documents"—Code of Civil Procedure, R. 163. To entitle a party to an order for the inspection of letters in the opposite party's possession, it must be shown that the letters "relate to any matter in question in the action" within the meaning of R. 163 of the Code of Civil Procedure. The test is whether they contain information which may, either directly or indirectly, enable the party seeking inspection either to advance his own case or to damage the case of his adversary. If such letters are not "documents relating to any matter in question in the action", they are merely chattels of which possession is claimed; and the fact that they are chattels consisting of words and figures written on

paper does not of itself constitute them as " documents " for the purposes of R. 163. (*Compagnie Financiere du Pacifique* v. *Peruvian Guana Co.* (1882) 11 Q.B.D. 55, followed. *Tourist Motor Co. Ltd.* v. *United Insurance Co. Ltd.* [1932] N.Z.L.R. 1361; [1932] G.L.R. 474, applied.) *McKendrick Bros. Ltd.* v. *Barclay.* (S.C. Auckland. 1958. September 30. Turner J.)

New Trial—Affidavit on Motion for New Trial—Restriction of Attempts to Overtake Errors in Failing to Collect All Available Evidence at Trial—Code of Civil Procedure, RR. 276, 283. Rule 283 of the Code of Civil Procedure is aimed at restricting attempts after an action has been tried to overtake errors in failing to collect all available evidence, to submit the witnesses thereto to cross-examination and present all relevant testimony in the conventional manner. The Rule applies to any motion under R. 276. Rule 283 is to be construed as it reads. The concluding sentence can be treated as, in effect, in the nature of a proviso, enabling an affidavit " to be received from a material witness, showing that he made a serious mistake in giving his testimony ". *Rowland* v. *Chung.* (S.C. Wellington. 1959. July 16. Haslam J.)

New Trial—Improper Rejection of Evidence—Before New Trial is Sought, Court to have Definite Information as to what Evidence would have been—Code of Civil Procedure, R. 277—See DEFAMATION (*ante*, p. 230).

SOCIAL SECURITY.

Deserted Wife's Benefit—Social Security Commission's Right to apply for Variation of Maintenance Order—Husband's Personal Rights Not Affected—Social Security Act 1938, s. 22 (2) (a)—Social Security Amendment Act 1950, s. 21 (1) (b)—See DESTITUTE PERSONS (*ante*, p. 230).

STATUTE.

Interpretation—" Word "—Term " Word " including Words and Figures—Motor-drivers Regulations 1940 (S.R. 1940-73), Reg. 14 (2). In a statutory enactment, the term " word " is apt to include both words and figures, unless the context makes it clear that figures are excluded. *Police* v. *Thomas.* (1959. June 5. July 1. Ferner S.M. Christchurch.)

TRUSTS AND TRUSTEES.

Distribution of Shares of Beneficiaries—Notice as to Barring of Possible Claims of Known Claimants—Application for Order with Conditions Authorizing Trustee to distribute Estate—Effect of Statute—Jurisdiction to make Order when Possible Claimants Known—" Enforce his claim "—Trustee Act 1956, ss. 75, 76 (5). Section 76 of the Trustee Act 1956 provides the machinery for ascertaining the existence or whereabouts of unknown or missing claimants. Section 75 provides the machinery for barring the claims of known claimants. If advertising under s. 76 fails to produce any claimant, then distribution may be authorized under that section; but, if any claim is sent in pursuant to the advertisement, or is otherwise known to the trustee and upon rejection by the trustee is not prosecuted, resort must be had to s. 75 to enable distribution in disregard of that claim. The operation of s. 76 (5) is limited to persons who have not sent in claims, whether pursuant to advertisement or otherwise. Accordingly, s. 76 provides a procedure for the protection of the trustee against possible claimants who remain unknown or unfound at the time of distribution despite advertisement and due inquiries, but not against claimants who are then known to the trustee as the result of advertisement or otherwise. For protection against them, the trustee must invoke the provision of s. 75. It follows that the words " enforce his claim " in s. 76 (5) have reference to a possible claimant whose existence is known to the trustee but from whom no claim has yet been received. *So held,* by the Court of Appeal. The Public Trustee applied under s. 76 of the Trustee Act 1956 for leave to distribute the estate of a person who had died intestate, as if two maternal aunts and any paternal uncles and aunts of the deceased and their respective issue had died before the death of the deceased. The order previously sought was an unconditional one. As an alternative, however, it was suggested that the order might contain conditions designed to ensure that some of the many claimants would know of its provisions and have an opportunity to commence proceedings to establish their claims. The motion was removed into the Court of Appeal. *Held,* by the Court of Appeal that s. 76 did not confer jurisdiction to make such an order. *In re Sheridan (D ceased).* (C.A. Wellington. 1959. June 15. Gresson P. North J. Cleary J.)

DOMINION LEGAL CONFERENCE 1960.

All practitioners will have received, or will shortly receive, a circular concerning the Eleventh Dominion Legal Conference, together with a questionnaire to be completed by those who wish to attend the Conference. The Conference Committee is anxious to have the questionnaires returned by the date mentioned on the circular—namely, October 9. This is important from the point of view of arranging hotel accommodation.

Some practitioners may feel that it is difficult to answer questions relating to arrival times and mode of travel at this stage. The Committee, however, would like all visitors to make a serious attempt to answer these questions, because, as has already been explained, a number of functions will be held in the Hutt Valley and transport presents a very real problem; also the Committee would like to see that visitors are met on arrival in Wellington and settled into their hotels as soon as possible.

Most of the subjects for papers to be delivered at the Conference have been settled, and the list of speakers will shortly be completed. Practitioners will be interested to know that the last afternoon of the business sessions will be devoted to an " Open Forum ". In the first part of the forum, selected speakers will introduce a number of practical topics for short discussion. The second half of the forum will be devoted to a discussion on the Fidelity Fund. This discussion will be in committee.

At least one American visitor will be attending the Conference. The Committee has had advice from Australia that a number of Australian practitioners are also likely to attend. It is hoped that visitors from other parts of the Commonwealth may also be present. It is probable that at least one distinguished jurist from Australia or England will be present at the Conference.

Probate and Administration—Probate—Non-Trust Company—Will appointing as Executors " Such Two Directors of Company as may be nominated by resolution of the directors " and the Husband—Probate granted to Two Directors and Testatrix's Husband—Trustee Act 1956, s. 48—See EXECUTORS AND ADMINISTRATORS (*supra*).

PUBLIC REVENUE.

Death Duties—Interest Payable on Amount of Deduction of Duty paid in Respect of Duty on Estate in England—Death Duties Act 1921, ss. 26, 32. Where death duties became payable both in New Zealand and in England in respect of property situated in England and when the English duty was paid more than three months after the death of the deceased: The right to a deduction from the New Zealand duties given by s. 32 of the Death Duties Act 1921 did not include any right to a corresponding reduction in the interest payable on the New Zealand duties (without taking such deduction into account) for the period from three months after the deceased's death up to the date when the payment of English duty giving rise to the deduction was made. Interest payable under s. 26 (2) of the Death Duties Act 1921 on death duties was deemed to be duty only for the purpose of the charging and recovery thereof. Such interest was accordingly not to be taken into account in computing for the purpose of s. 32 the New Zealand duties payable in respect of property situated in another country. *Public Trustee* v. *Commissioner of Inland Revenue.* (S.C. Wellington. 1959. June 25. July 20. Haslam J.)

MORTGAGE: NOTICE BY MORTGAGEE.

Under s. 92 of the Property Law Act 1952.

By G. CAIN.

Section 92 of the Property Law Act 1952, requiring a mortgagee to serve a month's notice on his mortgagor before exercising certain of his rights, first appeared in 1939, and, almost unnoticed, it made a substantial inroad on private contracts and effected a significant change in the law: not because of the modest requirement of the notice, but because of the provision that the mortgagee could not proceed to exercise his powers if the default were remedied before the date of expiry of the notice. This provision was presumably made to change the common-law principle applied, e.g., in the decision of Sir Michael Myers C.J. in *McDuff* v. *Rea* [1937] N.Z.L.R. 922.

The rule was that once default had occurred, the mortgagee, if then entitled by his instrument to exercise his powers, could proceed to do so despite payment or tender of the arrears. Mortgages in normal form entitle the mortgagee to exercise powers on default of the mortgagor, and most mortgages render the whole principal sum due on default in payment of, e.g., interest or instalments.

Clause 8 of the Fourth Schedule of the Property Law Act itself provides for this. The effect of s. 92, however, is to make this provision unenforceable if the mortgagor remedies the default before expiry of the notice.

The common-law rule, however, presumably resumes operation upon expiry of the notice. Payment or tender of arrears after that need not hinder the mortgagee in proceeding to exercise power of sale.

Another aspect of this section is that a difficult mortgagor can cause much trouble to his mortgagee by continually defaulting but remedying his default during the currency of the s. 92 notice related to that default. This may involve the mortgagee in a succession of notices following successive defaults. A landlord suing a persistently defaulting tenant is in a better position if the Tenancy Act 1955 applies to the tenancy, for by s. 37 (3) of that Act the Court may on application of the landlord declare that s. 32 (3) of the Magistrates' Courts Act 1947 shall not apply. This provides that an action for possession based on non-payment of rent (as opposed to termination of tenancy by notice) must cease upon payment of the arrears and costs. There is room for similar provision for a mortgagee where he can satisfy the Court that his mortgagor is a persistent defaulter who pays only following service of Property Law Act notice.

SERVICE OF THE NOTICE.

Section 152 deals with service of notices generally, including notices required to be served under s. 92.

The oddity here, it is submitted, is subs. (7) of s. 152, which says that the section applies only so far as a contrary intention is not expressed in the instrument, and the section has effect subject to the instrument.

Now s. 92 is a compulsory section for mortgagees, and the mortgagor cannot by subs. (7) contract out of the benefit it confers on him. Section 118 is another obligatory notice section; (notice by lessor intending to forfeit a lease). The method of service of such notices is, however, governed first by the instrument itself, and, if no contrary directions are given in it for service of notices, then by s. 152.

What if a mortgage were to provide that service of any notice on the mortgagor was good if it were attached to the mortgagee's solicitor's file? Does the instrument still prevail, and so deprive the mortgagor of the benefit of s. 92? The example is facetious but there can plainly be more practical instances. Mortgages often provide that service *on the land* is adequate. By contract, therefore, the mortgagee can affix his notice to the land, although he may be perfectly aware that the notice cannot possibly come to the knowledge of the mortgagor.

In *Joblin* v. *Reed* [1954] N.Z.L.R. 667, Finlay J. held that a mortgagee, who apparently had no special contractual provisions on the point, had adequately served notice by utilizing the second leg of s. 152 (1), i.e. by posting by registered letter. The mortgagor had refrained from taking the letter and could not take advantage of his own evasion. Here, the mortgagor was aware of the likelihood of the notice having been sent. But what if he is absent, or overseas, or has abandoned the security, or disappeared?

By s. 152 (7) the mortgagee is perfectly in order in serving in terms of his instrument. May he not thus substantially evade s. 92?

It is suggested that, while s. 152 should rightly be optional for notices which the parties themselves have agreed upon, the ability to contract out of the service requirements of s. 152 where the Act itself has chosen to make service obligatory should be removed. The point calls for clarification; a prudent mortgagee may feel obliged to seek directions for service in doubtful cases and so obtain the benefit of the Court's ruling; other mortgagees may rely on what appear to be their statutory rights and thus perhaps render the protection of s. 92 illusory. If there is reasonable doubt about a notice coming to the knowledge of the person served, the directions of the Court could be made necessary.

A mortgagee may, of course, apply for directions under s. 152, although his mortgage may entitle him to serve in a manner which he knows will be ineffective. An interesting point of jurisdiction arises, however. If, as by the statute, the instrument prevails, is an order of Court giving directions at variance with it valid? Could the mortgagor later successfully allege that notice was not served in terms of the instrument but in terms of an order of the Court which had no jurisdiction to make it? Perhaps the above-mentioned prudent mortgagee should serve two notices; one in terms of his mortgage and the other in terms of the Court order!

When amendments to the Property Law Act come up for consideration, these points could be borne in mind by our legislators.

THE CHARACTER OF THE LAW.

By Lord Shawcross Q.C.

The English have a strong sense of law and order, but no respect for abstract legal principles as distinct from rules which have been applied in concrete cases. For the most part, their law, like the constitution of their country, is unwritten, the result of a thousand years of growth and called the Common Law of England because it was based upon what was the universally accepted custom of the realm, broadened down from precedent to precedent, by the decisions of Judges in particular cases.

Yet, despite this major element of Judge-made law, the number of legally-qualified Judges in England and Wales is scarcely more than 100. There are only 20,000 practising lawyers in the whole country. Add to this that the police force is neither armed nor numerous, and it is fair to conclude that the English do have a certain instinct for the law. And in spite of its lack of any theoretical foundation, in spite of its lack of form and system, English Law has succeeded in dividing with Roman Law the empire of the greater part of the civilized world.

Inspiration of Kings.

The course of English Law has been profoundly affected by the development, at an exceptionally early stage of her political evolution, of a strong central administration in the hands of a succession of able and masterful kings. One of the chief characteristics of judicial administration from a very early date was the itinerant Judges progressing from the Central Courts in London throughout the counties of England, administering Justice.

Today, the whole English legal system is pivoted on the Judges in London, a score or so of men who try cases in the High Court and at periodical intervals travel round the country administering justice at Assize Towns in a system which is substantially the same now as when it was fixed in the reign of Henry II. Under them, distributed throughout the country are about 60 County Court Judges who deal with civil claims of limited amount with appeal to the High Court, and the Stipendiary Magistrates and lay (and unpaid) Justices of the Peace, the last of whom try by far the largest number of criminal cases.

It was largely this centralization of the Judges in London which has led to English Law being forensic and strictly professional in origin, whereas Roman Law and many systems deriving from it are scholastic. The Judges always have been, and still are, selected from the ranks of practising barristers. They are not, as in some continental systems, a profession apart from the profession of practising lawyers, and their career and training have been in no way influenced by the State except when they come to be selected and appointed as Judges.

As to this, there is no system of election, nor is there any question of the State examining and selecting a candidate. The men who have come to the top of their profession, who are highly thought of by their colleagues and by existing Judges, are appointed, regardless of political considerations, on the advice of the Lord Chancellor, himself the head of the Judiciary. And once appointed, they are entirely free of State control, for a Judge cannot be dismissed except on an express resolution of both Houses of Parliament, a thing which has not happened in 100 years.

"The Reasonable Man."

Until comparatively recent years the process of keeping the law in touch with the changing needs of society was essentially a practical one, accomplished by the Judges in each particular case. This has given the English Common Law the incalculable advantage that the Judges, while indeed professing no law-making powers, could by a process of "interpretation" adapt it to the needs of new circumstances perpetually recurring. Thus the whole concept of the law of negligence is the Common Law response to the realization of social responsibilities unthought of in the 18th century. The vehicle by which this development has been effected is "the reasonable man". The Common Law enforces a standard of conduct such as might be expected from the reasonably prudent and careful man. This "reasonable man" is a reflection of contemporary habits and conduct, constantly changing as society progresses.

All this is not to say that in more recent years deliberate legislation has not become an important source of law in England. Yet, in spite of the rapidly growing mass of legislated enactments—a necessary characteristic of the modern state—the Common Law and the Judges, whose task it is to interpret and apply Parliamentary statutes, continue to exercise a dominating influence on the administration of the law.

Equality of All.

This supremacy of the Judges in the administration of the law has resulted in another notable characteristic of the English system, the equality of all before the law. The Crown and Government, the Executive and its officials, are subject to exactly the same laws administered in exactly the same Courts as the most humble citizen. Although in the recent development of the so-called Welfare State and planned economy, there has been a tendency to allot the decision of certain matters arising in the course of Government administration to special Tribunals, there is no established system of administrative law or administrative tribunals. The Government and its officials derive such powers as they possess from the ordinary law.

If a citizen complains that those powers have been abused or exceeded, the complaint is dealt with by the ordinary Courts. Only the Sovereign herself is personally immune from suit. But the orders of no man, not even of the Sovereign, provide any excuse in law for the doing of an illegal act.

Axiomatic Freedoms.

The English Constitution being itself unwritten it follows that there are no guarantees of the personal freedoms. Yet these freedoms are axiomatic and a person who is arrested has a right at once to be brought before a public Court and to be tried for his alleged

offence. No one can be forbidden in advance from saying what he likes, unless a Court in public trial has decided that what he says constitutes a wrong, for example, a libel—actionable at the suit of some third party injuriously affected—or has involved a breach of the criminal laws, which are themselves traditionally favourable to the free expression of opinion.

English procedure, especially in the criminal Courts, is accusatorial rather than inquisitorial. The complainant must prove his case. Before trial and at trial, an accused person is stringently protected against any kind of inquisitorial procedure. It is not for the Judge to probe into the matter. He acts with complete impartiality as an umpire between the contestants and decides according to the evidence as presented to him. And, the evidence itself is strictly limited. Only the sworn testimony of witnesses, subject to cross-examination, can be heard. There must be no hearsay, no evidence on previous offences or bad character. The trial must take place in the full limelight of press publicity.

Free Aid and Advice.

Nor are these rights of the subject under the law, the right to equality and to personal freedom, illusory cases. The old reproach that the Courts, like the Ritz Hotel, are open to rich and poor alike, no longer has any validity in England. And, at one time, there was truth in this criticism. But, shortly after World War II, a scheme of Legal Aid and Advice, subsidized by the State but administered with complete independence by the legal profession itself, was introduced. This enables those who are unable to meet the costs of litigation themselves, to obtain legal aid or advice either entirely free or subject to a contribution scaled according to their means.

Reference has been made to the small number of legally-qualified Judges. This is due to the large part played by laymen in the administration of justice. The great mass of criminal cases concerning comparatively minor offences, are tried by unpaid Magistrates called Justices of the Peace. And this participation of laymen is important in another connection. All serious criminal cases have to be tried by a Judge and jury of twelve ordinary citizens. And, in several classes of civil litigation, such as fraud or defamation of character, a party can, if he desires it, insist upon a jury.

Where cases are tried with a jury, it is they, and not the Judge, who are the sole judges of fact. The Judge decides questions of law; he sums up the facts to the jury. But, the ultimate decision on the evidence rests with them. The jury is the representative of the "reasonable man" who has done so much to temper the administration of the law to the changing circumstances of the times.

And so the Law of England continues to develop.

Rating, Separate Assessments.—Premises with respect to which the question was whether they had been "so let out as to be capable of separate assessment" included in particular bookstalls and kiosks or small shops apparently resting on the floor of a railway station by their own weight, but connected by pipes and the electrical connection provided by the company with parts of the station. Concerning a contention that as they were merely resting on the ground by their own weight and in no way permanently attached to it, they were chattels and not part of the hereditament. Lord Wright M.R. said: "On the description of the facts and the agreement in reference to W. H. Smith & Son's bookstalls which I have given earlier in this opinion, I think that on principle they are so let out as to be capable of separate assessment and ought to be excluded from the roll as not being railway hereditaments. They are premises of considerable size, occupying definite areas which they have occupied for a long time without being moved. It is true that the Railway Company reserve power to change the sites, but the evidence is that they do not ever, or only at very rare intervals, exercise that power. while the stalls remain in a particular site, the site is occupied by W. H. Smith & Son. In *Electric Telegraph Co.* v. *Overseers of Salford* (1855) 11 Ex. 181, where the subject of assessment consisted of telegraph posts of which the landowners could direct removal at will, it was held that there was exclusive occupation of the soil by the posts so long as they were not required to be moved. There was sufficient permanence to constitute rateability. That principle applies in my opinion to the bookstalls. They and the sites on which they stand are in fact beneficially occupied, like any of the other shops or premises in the station: it would be unfair that they should escape being rated while the other premises are." *Westminster Corporation* v. *Southern Railway Company* [1936] A.C. 511, 559.

"Cruelty".—"The Lord President, I think, reaches the crux of the case when he says that 'where the cruelty is of the type conveniently described as mental cruelty, the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim'. . . . I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant, and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I, therefore, agree that the action should go to proof. My Lords, it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage is not just the sum of a number of incidents, and in this case it has been overlooked that all the incidents averred are said to have been inspired by the respondent's intention to impose his will on his wife without consideration of her feelings or health."—Lord Normand in *Jamieson* v. *Jamieson* [1952] A.C. 525, 535.

CHARITIES AND DEATH DUTY.

By M. I. THOMPSON, LL.B., A.P.A.N.Z.

Wealthy New Zealanders have often been criticized for their lack of philanthropy compared with, say, Americans. Wealthy Americans were said to regard part, at least, of their estates as being held for the benefit of the community and they made their wills accordingly, whereas only in exceptional cases did wealthy New Zealanders recognize any such obligation.

That criticism may have been valid once when death duties were comparatively low. It was possible for a wealthy man to provide for his family and still have something worthwhile to leave to charity after payment of death duties. Death duties comprised estate duty and succession duty; and charities which were for the benefit of persons or objects in New Zealand were exempt from succession duty.

Today there is no succession duty, but the rates of estate duty are so high as to be confiscatory. The wealthy man is very much on the defensive. He is preoccupied with the problem of providing for his family; with the problem of avoiding the sale of the farm or the family business to pay estate duty on his death. These problems can be solved, given time, resolution, and the right advice; but, whether or not the problem is tackled, it is unlikely that anything substantial will be left to charities. Charity begins at home, and, even if there was once a moral obligation to leave something to the community, it must be very slight in these days of the Welfare State and estate duty designed to disinherit.

This would apply more particularly to charities for the relief of poverty, the advancement of education, or for other public purposes. The Welfare State has assumed responsibility in these spheres, but as Mr I. L. M. Richardson has pointed out in his articles on *Religion and the Law* (*ante*, pp. 69, 90), the State does not provide financial assistance for religious groups or religious programmes, except for auxiliary enterprises such as hospitals and schools.

There must be many people who would like to leave money for the advancement of religion, but who are prevented from making more than a token provision because of their liability for estate duty.

Representations were recently made to the Minister of Finance for the restoration of the concession previously allowed in respect of money left to charities, but, as he pointed out, there is nothing to restore. Charities were exempt from succession duty. They are still exempt. The reply was logical, but unsympathetic. It makes no allowance for the fact that, when succession duty was abolished, the rates of estate duty were correspondingly increased. The relief to be given would have to take the form of a rebate or exemption from estate duty, but it might lead to the restoration of some form of succession duty and that would be a retrograde step.

Those with the interests of religious and other charities at heart should examine the present position and make sure their appeals and advice to possible benefactors are practical and do not conflict too strenuously with family responsibilities. In my opinion, the advertisements by religious bodies in this JOURNAL asking for bequests are out of touch with reality. They may result in token bequests. Even if in exceptional cases persons without dependants are prevailed upon to leave everything to a charity, the State will take about half of a large estate in estate duty.

Take the following example:

A has a dutiable estate worth, say, £40,000. His estate-duty liability is £15,000 and, ignoring testamentary expenses, this would leave £25,000 to provide for his family and any bequests to charities. If A's chief asset is a farm or a family business, it is obvious that there would be great difficulty in retaining these assets in the family and paying anything but trifling bequests to charities. It is unreasonable to expect A's solicitor to advise A to leave money to charities.

Supposing A had no dependants, should he leave his estate to charities? A man died recently in New Zealand leaving an estate of £80,000 for the advancement of religion. Estate duty came to £39,000, leaving a net amount of less than £41,000 for the religious body. That man knew for two years that he was incurably ill, that he must die within two or three years. His wants were not large. An amount of £5,000 would have provided for him for over five years. He should have given £75,000 to the religious body while he was alive. He could have had the satisfaction of seeing the money used, and the religious body would have received about £35,000 more than it actually did receive.

Let us go back to A. Suppose he decides to give £5,000 to charity. His family will be left with less than £20,000. If he gave £10,000 to charity while he was alive, he would leave an estate of £30,000. After payment of £9,000 estate duty there would be £21,000 for his family. In other words, his family would be £1,000 better off if he gave away £10,000 while he was alive than if he leaves £5,000 to charity by will. Surely it would be better for religious bodies and other charities to alter their appeals for bequests by pointing out that, although bequests are most welcome and will be appreciated, gifts during the donor's lifetime would be far less expensive to him and his family and could provide added satisfaction for the donor in that he could see his money being spent.

Many prospective donors would like to make gifts, but their assets are not in a form suitable for giving effectively for estate-duty purposes. They should be informed that there are many ways for overcoming this difficulty. For example, a donor can sell his assets to a company taking, inter alia, redeemable preference shares which he can easily give away while remaining in control of the company and drawing director's fees.

Until now, I have assumed that gifts will be made from unselfish motives. There is, however, a type of case where a large gift to charity is the only solution for keeping a farm in the family or retaining control of a company in a family. Take the case of Mr X. He is a wealthy sheepfarmer, eighty years old, in failing health; and he realizes that he is unlikely to live for another three years. For many years his solicitor has been urging him to reduce his estate by making

gifts to a family trust, but he is one of those people who cannot force themselves to part with their property. Now, when it is almost too late, he is prepared to do anything to enable his family, particularly his grandsons, to carry on the sheep station which is unsuitable for subdivision:

Mr X's assets are as follows:

Land at Government valuation ..	£50,000
Live and dead stock	30,000
Life insurance	15,000
Personal and other assets ..	5,000
	£100,000

Estate duty on £100,000 amounts to £51,000 and it is obvious to Mr X that this amount could not be raised by his executors without selling the land. It is probable also that, if they do have to sell the land, they will not get Government value as it is very difficult to find a buyer for large sheep stations. The position looks hopeless, but this is what Mr X can do.

He should have a company incorporated with a nominal capital of £50,000 divided into 1,000 ordinary shares of £1 each having one vote per share and £49,000 two per cent. redeemable non-cumulative preference shares of £1 each having no voting power. He should sell his land to the company for £50,000, which he should pay back to the company to make the shares fully paid. He should give the 49,000 preference shares to a charity. If he died the next day, his dutiable estate would be £51,000 on which estate duty would amount to £21,000. The executors would be able to raise this amount and the land would not have to be sold. The preference shares could be redeemed over the years.

This type of arrangement is common in the United States. The Ford Foundation is a notable example.

There are many ways in which wealthy men can benefit charities in New Zealand. The most expensive way is to leave money by will.

TRUSTEES: PURCHASE BY A TRUSTEE OF TRUST PROPERTY.

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

Explanatory Note.

The purchase of trust property by a trustee is always a delicate matter, unless expressly authorized by the trust instrument. The trustee must tread warily. In no case perhaps is this rule better illustrated than in the New Zealand case of *Wright* v. *Morgan*, which ended in the Privy Council (1926) N.Z.P.C.C. 678.

By his will, the testator gave his son H., whom he had appointed a trustee, the option of buying two landed estates, on certain conditions as to valuation. After the testator's death, D. W. who was also a son of the testator and trustee of the will, acquired H.'s share under the will, including the right to exercise the option of purchase. D. W. exercised this option in 1907. Seventeen years later the purchase was attacked by one of the three daughters of the deceased (whose share had been settled), and her infant children, acting by their guardian. They asked the Court that the sale should be set aside, and accounts taken of the profits made, so that these might be restored to the trust estate.

It was argued on behalf of D. W. that the right to purchase was property in the person of H. who was a *cestui que trust*, and that it was well settled that a trust may purchase the interest of a *cestui que trust*. But their Lordships of the Privy Council held that, as the option transferred to D. W. only gave to D. W. a right to ask from the trustees a contract of sale, that contract of sale was *ex rei necessitate* a contract between the trustees and himself as a trustee, and must be set aside, *as a conflict arose between his duty and his interest*, particularly in respect of the fixing of the moment of the sale and the terms of payment, although the conditions fixed by the testator had been complied with.

In a transaction of this nature the trustee can sometimes successfully plead laches: it will be observed that in *Wright's* case the attack on the sale was not launched until seventeen years after the sale. Their Lordships briefly dealt with this point as follows:

> Their Lordships, therefore, come to the conclusion that this case falls within the general rule, and that the sale being as carried out, a sale of trust property to a trustee, cannot be allowed to stand, as in a question with infant beneficiaries who cannot be affected as the daughter might have been affected, by the lapse of time since the transaction was effected to her knowledge but not to theirs (*ibid.*, 686).

A case on the other side of the line is also a New Zealand one which went to the Privy Council: *McCaul* v. *Fraser* (1917) N.Z.P.C.C. 152. The testator died in 1879 and gave a life interest of the house and furniture and an annuity to his wife. Donald Fraser, a son, was his trustee, to whom he gave, subject to the said bequests to his wife, the following unusual power over the trust property:

> Upon trust within two years after the decease of my said wife to pay and divide all my real and personal estate and effects whatsoever and wheresoever unto and among such of my children and in such proportions and in such manner as he in his discretion shall think fit.

The widow died in 1893, and in 1894 Donald Fraser came to a family arrangement with his brothers and sisters all of whom were *sui juris*. They all agreed that the farm and home where Donald had lived since 1852 and which he by his efforts had brought into production, should not be sold but should be retained by him. The others received other benefits from the estate. This family arrangement was ultimately evidenced by a deed which was executed by all parties in 1901. More than ten years later, an action was brought in the Supreme Court by one (who claimed from one of the daughters who had signed the deed) to have the deed of 1901 set aside. But this, the Supreme Court, the Court of Appeal, and the Privy Council declined to do. The arrangement evidenced by the deed was entirely within the scope of the trust, and the communication of the trustee's decision to the beneficiaries and their approval, as established by the evidence, afforded at once sufficient evidence of the exercise of the power, and also, although this was not

strictly necessary, of the assent of all interested parties to the fairness of the division. And there was no evidence whatever of bad faith or unfair dealing.

There is, however, no absolute rule preventing a trustee from purchasing the beneficial interests of the beneficiaries, if they are sui juris : in purchases by a trustee from his *cestui que trust* an act is done which, though open to inquiry, puts an end in form to the relation between them. If the purchase stands he is no longer a trustee, since the *cestui que trust* has permitted him to become the beneficial owner. If the transaction is sought to be set aside *within a reasonable time* it is laid down in *33 Halsbury's Laws of England*, 2nd ed., 282 that the trustee must show : (1) that there has been no fraud or concealment or advantage taken by him of information acquired by him in the character of trustee, (2) that the trustee had independent advice (although apparently independent legal advice is not absolutely necessary), and every kind of protection and the fullest information with respect to the property, and (3) that the consideration was adequate.

In the foregoing explanatory note three types of cases are really dealt with. First, *Wright's* case was a purchase by a trustee of the trust property : there appear to have been unborn beneficiaries, and the purchase conflicted with his duties as trustee. In the second type there is a genuine family arrangement, such as is described in *17 Halsbury's Laws of England*, 3rd ed. p. 223, para. 370 :

> The Court will support as a family arrangement any transaction between members of the same family which is generally for the benefit of the family estate or of all the parties concernod.

The third type is a purchase by a trustee of the beneficial interest of the beneficiaries. The difference between the second and third type of case is pointed out by Sim J. in delivering the judgment of the Court of Appeal in *McCaul's* case (1915) 34 N.Z.L.R. 680 ; 17 G.L.R. 633, where it was held that a trustee may take a benefit under a deed of family arrangement.

In the following precedent, which authorizes a trustee to purchase any part of the farm lands, stock, and plant owned by the deceased's estate, all the pitfalls incident to such a transaction appear to have been avoided. Needless to say all the parties to the deed are sui juris ; if they were not, the sanction of the Supreme Court to the deed would be necessary.

PRECEDENT.

DEED CONSENTING TO A TRUSTEE PURCHASING TRUST PROPERTY

THIS DEED is made the day of 1959 BETWEEN A. B. of Cambridge Widow (hereinafter called "the Annuitant") of the first part C. D. of Hamilton Farmer, E. F. of Hamilton Farmer G. H. of Te Awamutu Farmer and H. J. of Morrinsville Farmer (hereinafter called "the residuary beneficiaries") of the second part and the said E. F. and .....LIMITED (hereinafter called "the Trustees") of the third part

WHEREAS G. H. late of Hamilton in the Dominion of New Zealand Farmer (hereinafter called "the Testator") by his Will (hereinafter called "the Will") dated the 5th day of November 1953 appointed the Trustees to be the Executors and Trustees thereof and after directing payment of his funeral and testamentary expenses duties and debts directed his Trustees to stand possessed of all his estate upon the Trusts in the Will declared in favour of the Annuitant and the residuary beneficiaries

AND WHEREAS the Testator died on the 3rd day of August 1958 and the Will was proved by the Trustees on the 9th day of October 1958 in the Supreme Court of New Zealand at Hamilton

AND WHEREAS the Testator left him surviving his widow the Annuitant and four children namely the residuary beneficiaries and no more all of whom have attained the age of twenty-one years and are under no legal disability

AND WHEREAS since the date of death of the Testator the Trustees have carried on the farming business of the Estate of the Testator in pursuance of the powers contained in the Will and a copy of the last Balance Sheet and Statement of Accounts in the said Estate as at the 31st day of March 1959 is annexed hereto

AND WHEREAS pursuant to the provisions of the Will of the Testator the Annuitant is entitled to receive from the Estate of the Testator an annuity of four hundred pounds (£400/-/-) during her life

AND WHEREAS by his Will the Testator charged all his farm lands with payment of the said annuity to the Annuitant during her life in exoneration of the rest of his Estate.

AND WHEREAS the Testator by his Will directed the Trustees to hold all his Estate (subject to the said annuity charged on all his farm lands) upon trust for all his children in equal shares

AND WHEREAS the residuary beneficiaries being all the children of the Testator are thus entitled in equal shares to the whole Estate of the Testator absolutely subject to the said annuity

AND WHEREAS the Annuitant and the residuary beneficiaries desire the Estate of the Testator to be realised and to that end wish the Trustees to sell all the freehold and leasehold land and live stock and farm plant belonging to the Estate

AND WHEREAS the residuary beneficiaries have agreed that out of the proceeds of such sale and out of the ready moneys in the Estate the sum of twelve thousand pounds (£12,000/-/-) shall be set aside and invested for the maintenance and benefit of the Annuitant

AND WHEREAS the Annuitant has agreed to release the farm lands of the Estate of the Testator from the said charge thereon in respect of her annuity in consideration of the provision made for her out of the Estate as hereinafter set out

AND WHEREAS the Annuitant and the residuary beneficiaries have each agreed that the said E. F. shall be entitled to purchase any part of the Estate freehold or leasehold land and stock and plant notwithstanding that he is a Trustee of the Will of the Testator

AND WHEREAS the Annuitant and the residuary beneficiaries have each been separately advised by an independent Solicitor as to the several matters authorised by this Deed and have requested the Trustees to execute these presents and any other instruments necessary or expedient for carrying the same into effect

AND WHEREAS the Trustees have agreed to execute these presents and to sell the Estate freehold and leasehold lands stock and plant as hereby authorised upon the Annuitant and the residuary beneficiaries executing the indemnity hereinafter contained.

NOW THEREFORE THIS DEED WITNESSETH and by way of family arrangement it is hereby mutually agreed as follows that is to say :

1. IN pursuance and in consideration of the premises the Annuitant and the residuary beneficiaries do and each of them doth hereby AUTHORISE AND REQUEST the Trustees to cause the whole of the freehold farm estate lands to be subdivided into four lots and sell the same and also all the Estate leasehold land at such time and in such manner as the Trustees in their discretion think fit

AND ALSO to sell at such time and in such manner as aforesaid all live stock farm plant machinery and chattels used in connection therwith or belonging to the Estate of the Testator

2. OUT of the net proceeds arising from such sale and out of the other ready money in the Estate of the Testator the Trustees shall appropriate and set aside the sum of twelve thousand pounds (£12,000/-/-) and shall hold such sum (hereinafter called "the annuity fund") UPON TRUST to invest the same in any of the investments authorised by the Will or by the Trustee Act 1956 and to pay and apply the net income arising therefrom FIRSTLY in payment to the Annuitant of the said annuity of four hundred pounds (£400/-/-) during her life SECONDLY for the further benefit of the Annuitant as may in the opinion of the Trustees from time to time be necessary during her life and after her death UPON TRUST as to both capital and income of the annuity fund for the residuary beneficiaries as tenants in common in equal shares PROVIDED ALWAYS that if in any year the said net income of the annuity fund shall be insufficient to provide such annuity and such further benfit of the Annuitant in any such case the Trustees shall at their

unfettered discretion have recourse to the capital of the annuity fund to make up the deficiency

3. IN consideration of the said agreement and of the provision herein made for her out of the Estate the Annuitant DOTH HEREBY RELEASE AND DISCHARGE all the farm lands belonging to the Estate of the Testator from the charge against the same in the Will contained in respect of the said annuity.

4. THE Annuitant and the residuary beneficiaries (other than the said E. F.) do and each of them doth hereby consent to the said E. F. notwithstanding that he is a Trustee of the Will of the Testator purchasing the whole or any part of the farm lands stock and plant belonging to the Estate of the Testator in all respects in the same manner as he would be entitled so to do were he not a Trustee of the Will.

5. THE costs of all parties of and incidental to the preparation completion and stamping of this Deed shall be borne by and paid out of the capital of the Estate of the Testator.

6. AFTER providing for the payment of all liabilities of the Estate of the Testator and the annuity fund and all costs charges commissions fees and expenses of and incidental to the realisation of the said Estate the residue shall be held by the Trustees UPON TRUST to pay and divide the same equally between the residuary beneficiaries as provided by the said Will.

7. IN further pursuance of the said agreements and in consideration of the premises the Annuitant and the residuary beneficiaries hereby jointly and severally covenant with the Trustees and each of them that they and such of them will at all times hereafter effectually keep indemnified the Trustees and each of them and their respective successors and personal representatives of each of them against all actions proceedings accounts claims and demands in the part of any person or persons whomsoever and against all costs damages liability and expenses to be incurred or sustained by reason of the Trustees having done any of the acts authorised by this Deed.

IN WITNESS etc.

SIGNED etc.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Servant's Duty of Care.—"I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this, the negligence of a servant in performance of his duty is a clear example."—Viscount Simonds L.C. in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] A.C. 555, 573.

Statutory Powers of Public Authority.—In *Westminster Corporation* v. *London and North Western Railway* [1905] A.C. 426, the principle involved was stated by Lord Macnaghten at p. 430 as follows: "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second if not in the first." On the other hand, it was said by Lord Lindley at p. 439: "Matters of detail, of taste, and of expense in executing works authorized by statute are left to the constructing authority; and their decision on such matters is not open to review in an action for an injunction unless the Court is of opinion that the statutory authority is a mere cloak to screen a really unauthorized work." This was a case where the respondent (unsuccessfully) contended that the appellant had used statutory powers excessively by constructing an underground public convenience in the centre of a street in order, by the access provided from both sides of the street, to create a subway that could not lawfully be otherwise made.

Abusing Statutory Powers.—"Now the appellant says that the reason for an exception being made in her case lies in the fact that, as her writ shows, she intends to establish that the compulsory purchase order in question was made and confirmed 'in bad faith'; and that, when such a plea is raised, it is the duty of a court of law so to interpret the apparently general words used by Parliament as not to apply them to legal proceedings that are designed to determine that issue. It is because I do not think that the law either requires or entitles us to adopt such a method of construing an Act of Parliament that, in my opinion, the appellant's action must be stopped. Of course, it is well known that courts of law have always exercised a certain authority to restrain the abuse of statutory powers. Such powers are not conferred for the private advantage of their holders. They are given for certain limited purposes, which the holders are not entitled to depart from: and, if the authority that confers them prescribes, explicitly or by implication, certain conditions as to their exercise, those conditions ought to be adhered to. It is, or may be, an abuse of power not to observe the conditions. It is certainly an abuse of power to seek to exercise it when the statute relied on does not truly confer it, and the invalidity of the act does not depend in any way on the question whether the person concerned knows or does not know that he is acting ultra vires. It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorized purpose. Probably most of the recognized grounds of invalidity could be brought under this head: the introduction of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill-will. However that may be, an exercise of power in bad faith does not seem to me to have any special pre-eminence of its own among the causes that make for invalidity. It is one of several instances of abuse of power and it may, or may not, be involved in several of the recognized grounds that I have mentioned. Indeed, I think it plain that the courts have often been content to allow such circumstances, if established, to speak for themselves, rather than press the issue to a finding that the group of persons responsible for the exercise of the power have actually proceeded in bad faith."—Lord Radcliffe in *Smith* v. *East Elloe Rural District Council* [1956] A.C. 736, 767.

TOWN AND COUNTRY PLANNING APPEALS.

Jewell and Others *v.* Christchurch City Corporation.

Town and Country Planning Appeal Board. Christchurch. 1959. April 14.

Airport—Buffer Zone around Airport—Application to have Such Area Zoned as "Rural"—Controlling Authority of Airport requiring County Council to prohibit Subdivisions under Five Acres in Such Buffer Zone—Area of Such Zone restricted by Appeal Board—Town and Country Planning Act 1953, s. 38 (15).

Appeals against a requirement issued by the Christchurch City Council pursuant to s. 38 (15) of the Town and Country Planning Act 1953 whereby the Christchurch City Council as the local authority controlling the Christchurch Airport required the Waimairi County Council to prohibit subdivisions of under five acres in area of certain lands in the vicinity of the airport. This decision related to seven of a group of eight appeals lodged.

Each of the appellants had had residential subdivisions recommended by the County Council for approval, but, upon service of notice of the City Corporation requirement, the County Council was compelled to prohibit the subdivisions.

By agreement between the Board and the various counsel appearing for the appellants it was arranged in order to avoid unnecessary repetition of expert evidence, that all evidence of a general nature common to all the appeals was called at the hearing of the first appeal, McMillan and others, all counsel concerned having the right to cross-examine as they so desired and the factual evidence relating to each individual appeal was heard separately.

This decision therefore was deemed to relate to and be read as part of the decision on each individual appeal with the exception of an appeal by Annie Grant, decided on different grounds, and in respect of which a separate decision was issued.

The judgment of the Board was delivered by

REID, S.M. (Chairman). At the commencement of the hearing Mr Perry on behalf of all appellants made submissions on a preliminary point of law to the effect that the prohibition or requirement of the respondent Corporation in respect of each appeal was invalid in that it could not be given under s. 38 (15). He submitted that s. 8 of the Public Works Amendment Act 1956 (which re-enacts in slightly altered form the provisions of s. 4 of the Public Works Amendment Act 1935) read in conjunction with s. 2 of the 1935 Amendment Act provides a code of law for the control of land surrounding aerodromes and that as there is a statutory code dealing with the control of aerodromes it is in effect a special enactment. He went on to submit that applying the maxim *Generalia specialibus non derogant* (see *Maxwell on the Interpretation of Statutes* 10th ed. 176, 177) the Town and Country Planning Act 1953, being an Act of general application, cannot be invoked but must be construed as excluding any application to the particular matter dealt with by the special enactment viz. control of land surrounding aerodromes. The Board finds itself unable to accept that submission.

The Public Works Amendment Act 1935 (as amended by the Public Works Amendment Act 1956) is designed for the purpose of making aerodromes safe for aviation purposes, and, by virtue of its provisions, the local authority may with the consent of the Minister (s. 4 (1) (c)) "specify lands in the vicinity of the aerodrome which may be used only for such purposes as are specified in the notice in respect of those lands."

The Public Works Amendment Act 1956 came into force on October 25, 1956, but, by the Town and Country Planning Act 1957 (which came into force on November 1, 1957) the Legislature saw fit to empower the local authority maintaining a public work "which would or might be adversely affected . . . by any proposed subdivision of land" to prohibit that subdivision. Section 4 1 (c) of the Public Works Amendment Act 1935 gives power with the consent of the appropriate Minister to control the use of land.

The Town and Country Planning Amendment Act 1957 gives power to prohibit subdivision. In the view of the Board, these are two different matters. It holds that the Corporation could validly issue the requirements to prohibit subdivision which is under consideration in these appeals.

These appeals all come under s. 38 (15) Town and Country Planning Act 1953, and this is the first occasion on which this subsection has been invoked. The Board desires at the outset to make it quite clear that the question falling for determination in respect of the subdivisions in these appeals is not whether these subdivisions are desirable or necessary in relation to the town-planning of a greater Christchurch area, but whether or not they would or might adversely affect the operation of the Harewood Airport. Whether residential subdivisions in this locality as part of the urban development of Christchurch are desirable is not under consideration.

GENERAL: The respondent is the controlling authority of of the Harewood Airport and as such it is the local authority maintaining a public work within the meaning of subs. (15).

The object of the prohibition appealed against is to establish what has been described as a "buffer" zone around the airport and there is no doubt that such a zone is not only desirable, it is an imperative necessity. The Corporation acted properly and prudently in seeking to protect the aerodrome from encroachment by residential, commercial and industrial developments. With this object in view the Corporation seeks to have the area surrounding the airport zoned as rural, which means that subdivisions into areas of less than five acres are not permitted.

A very considerable volume of evidence, expert and otherwise, was led by the parties, the hearing of the evidence alone occupying over two days. It is not the intention of the Board to attempt to review that evidence in detail, but it is abundantly clear that a "buffer" zone is, as already indicated, a necessary provision.

Of necessity, a good deal of evidence was led in regard to what has happened overseas where uncontrolled residential development in the vicinity of and around airports had led to pressure being brought to bear to restrict the activities of airports, and, in some cases, compel their virtual closure and establishment elsewhere.

SITUATION: Harewood Airport comprises in all an area of approximately 1,000 acres. It provides a main runway having an effective length of 7,600 feet and a subsidiary runway. The administrative offices, stores, technical and engineering workshops are established approximately in the *south-eastern corner* of the area. The main runway is the one receiving the most use. The subsidiary runway is used when nor'west winds of any strength are encountered, but the evidence establishes that approximately three per cent only of the 52,376 movements of aircraft in and out of the airport during 1958 were made from this subsidiary runway. That does not mean an even day to day spread over the year. Under certain conditions of nor'west weather the subsidiary runway might be in use almost to the exclusion of the main runway, but there would also be long periods when the main runway would be the only one in use. However, with the development of modern aircraft demanding longer runways in the future there is ample room to extend these runways in a northerly or westerly direction. Considerable emphasis was laid by the witnesses for the respondent on the necessity to prevent encirclement or fencing in of the aerodrome by residential occupation, but the factual position is that there appears to be no danger of any such encroachment ever taking place, because to the north and west, and to a great extent to the east, there is already sufficient open space to provide an adequate "buffer" zone, and all this land is zoned as rural, so that although the question at issue is one of great importance, it falls topographically into a comparatively small compass and can be regarded as relating to the south-eastern corner of the aerodrome and the south-eastern end of the subsidiary runway. It is opposite these points where the proposed subdivisions in the main are situated.

The Board considers that the main points falling for consideration come under three headings:

(1) Protection of the aircraft approach or take-off flight path of the subsidiary runway.
(2) Safety.
    (a) Required standard of safety for aircraft and aircraft personnel, i.e. passengers and crew, and
    (b) Ground safety—that is to say, the protection of persons and property on the ground from any damage resulting from an aircraft crashing, or anything falling from an aircraft in flight.
(3) Nuisance by way of noise and vibration from aircraft and from the maintenance and testing of aircraft engines on the ground.

Dealing with these seriatim:

SAFETY: As far as safety zoning is concerned, this is largely controlled by and is the business of Civil Aviation Adminis-

tration under the Civil Aviation Act of 1948, which is concerned with the standards of the aerodrome itself and with the related take-off and approach paths. Beyond the topographical confines of the aerodrome itself the operational safety concern is to keep defined take-off and approach paths cleared of obstructions, and approach lighting, protected and visible, within defined limits. The maintenance of obstruction clearance within approach fans of itself requires no taking of land below the approach path, nor restriction of its use, so long as it does not involve obstruction in the defined fan. On the evidence the Board must find that the areas already zoned as part of the " buffer " zone are adequate to meet all the requirements of efficient and safe movement of aircraft in and out of Harewood Airport as at present constituted, with one exception: that is to say that some parts of the land under consideration here, if handed over to residential occupancy, might adversely affect the approach and flight paths at the south-eastern end of the subsidiary runway. Though it cannot hold that subdivision *would* adversely affect that part of the aerodrome it is possible that it *might* adversely affect it.

In 1957 the Corporation approached the Minister of Civil Aviation to obtain his consent in terms s. 8 of the Public Works Amendment Act 1956 to the Corporation restricting the use of land in the vicinity of the airport. The then Minister indicated by letter dated August 23, 1957, that he would give his consent to the zoning of a certain area as defined on the plan, the reference to which is quoted as being A.L.:4892. This consent did not go as far as the Corporation wished to go and no action was then taken. The Corporation again took the matter up in February of 1958 and the views of the present Minister of Civil Aviation are set out in a letter dated April 24, 1958 in which it was stated: " The Civil Aviation Administration, whose interests pertain largely to the efficient and safe movement of aircraft from Harewood. is satisfied that these areas are adequate to meet the requirements." The areas referred to there are the same areas defined by the plan A.L.:4892. In effect, the views expressed by the present Minister are exactly the same as those expressed in 1957 by his predecessor.

It follows, therefore, that from the angle of safety in so far as it affects the movement of aircraft and the safety of passengers and air crew, the provisions suggested by the Civil Aviation Administration appear to be adequate. The risk of a crash is estimated by expert evidence as one in four million movements, which is practically negligible.

As to the possibility of danger to persons and property on the ground, this also appears to be negligible, and provided that all Civil Aviation Administration height and clearance requirements are complied with on the approach fan there is no necessity in the interests only of safety to persons and property on the ground for this land to be zoned.

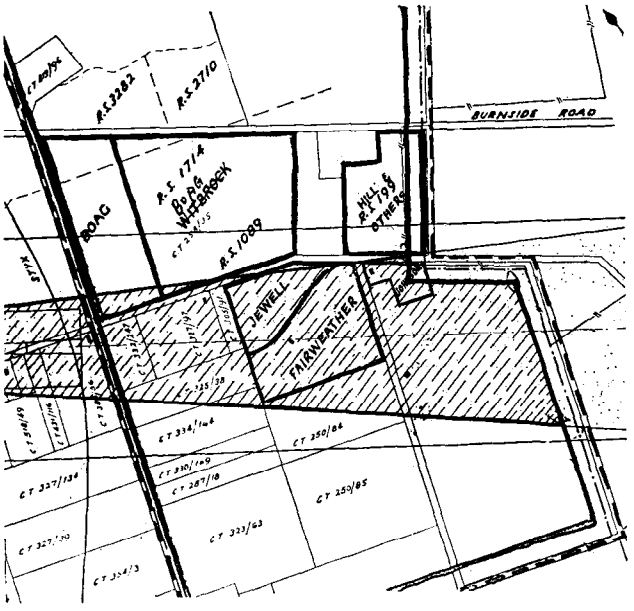
NUISANCE FROM NOISE: On the available evidence and information it is apparent that in some parts of the United States complaints from persons resident in close proximity to aerodromes have reached a volume that has resulted in political pressure leading to restriction on operations in some aerodromes. The important difference to be noted between aerodromes overseas where this has happened and the Harewood Airport lies in the fact that so far as can be ascertained, the aerodromes overseas that have been so affected have been more or less completely encircled by close residential and industrial occupation, but that, as has already been pointed out, is not the factual position in so far as the Harewood Airport is concerned, nor is there any possibility of such a position arising, because there is no substantial residential occupancy in being or contemplated inside the limits of what are regarded as appropriate spaces for a " buffer " zone, again with the possible exception of the proposed subdivisions in proximity to the subsidiary runway.

There can be no doubt that there is a strong probability that the aircraft of the future will be larger, more powerful, and, in all probability, noisier than they are at the present time, but the fact that noise in some form or another is part of our daily lives cannot be ignored and probably the amount of noise encountered in any of the larger cities in New Zealand, apart altogether from the operations of aircraft, would have been regarded as intolerable by our forefathers of, say, fifty years ago, but people have become accustomed to those noises and cease to notice them, and it may well be that human beings will adjust themselves to living in still noisier conditions in the future.

Under the provisions of the Civil Aviation Act 1948, s. 5 and the Regulations made under s. 2 (Civil Aviation Regulations 1953 and 1959/3) no claim for damages or injunction relating to noise or vibration resulting from the normal operation of aircraft to and from an airport or on the surface of an airport can be the subject of litigation, that is to say that the common-law right to seek those remedies no longer exists. The only noise nuisance that could be subject of any legal action would have to be demonstrated as being unreasonable, and avoidable.

It is claimed by the Corporation that if residential subdivisions are permitted in the area under consideration there would be in the course of time sufficient people living in that area who might by comment, criticism and complaint, compel the authorities either to close the aerodrome or at least restrict its operations. When that submission falls for consideration it must be examined in the light of the words of subs. 15, that is to say, that the operation of the aerodrome might be adversely affected by such complaints. The Board considers that the word " might " must be regarded as having some limitation of construction placed on it. It cannot be construed as meaning something which, by a wide stretch of imagination or by venturing into the realms of fantasy, might come about. There must be a reasonable possibility of such an event happening. It might be remote but it would still have to be tinged with possibility.

In considering the possibility of this event coming to pass it must be borne in mind that this is not a case of an airport being imposed upon a residential area. If these subdivisions



—or any of them—are permitted, then persons going to live in the locality do so with their eyes open to the fact that they would be living in close proximity to a busy airport from which noise can be expected to emanate both by day and night. The source of those noises will come in the main from aircraft taking off and landing or in circuit prior to landing, and from the running of aircraft engines on the ground during overhaul and testing conditions.

The evidence of experts in acoustics was called by both parties. These gentlemen deposed to various tests which they had carried out at various points in the area under consideration. It is not proposed to review that evidence in detail. The Board is satisfied that to anyone residing within approximately half a mile of the airport there will be a certain slight disturbance from the operations of the airport. The results from the tests carried out by the two experts did not vary in any marked degree. They both can be held to have arrived at the same general conclusion, namely, that an increase of noise can be expected about the perimeter of the airport, but the breaking down of the noise waves by intervening buildings, trees, walls of houses, would tend to contribute to a reduction of noise level either by reflection or by absorption.

On a consideration of that expert evidence the Board considers that although there will unquestionably be adverse comments and probably complaints from some of the residents, the test that must be applied is the test suggested by counsel for the appellants, that is to say, the reaction of that hypothetical legal person, the reasonable man. In zoning around

(*Concluded on p. 256.*)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

He Who Walks Alone.—"The Chief" by Robert Jackson (Harrap, 1959) is one of the best legal biographies of recent years. It deals with the life of Gordon Hewart, Lord Chief Justice of England from 1922 to 1940. Scriblex hopes in these columns to make further reference to this entertaining book, but contents himself in the meantime with one incident, as related by the author, for the ironical implications it contains. Hewart had just announced the dismissal of the appeals of Browne and Kennedy, convicted of the brutal murder of Constable Gutteridge. The proceedings had lasted three hours, and when the Court rose, Hewart joined his friends, Avory J. and Lord Justice Slesser, at lunch. Avory was in good spirits, and was in no way put off his food by the news that Browne and Kennedy were to hang. "Look at this, Gordon", said Avory, producing a letter from his pocket. "You didn't think when you dismissed the appeals that you had signed my death warrant, did you?" The letter was anonymous; it was short and to the point. If the appeal was not allowed, it said, Avory, as the Judge who had sentenced the men to death, would pay with his life; he would be shot by the writer. Hewart looked at the letter and returned it without a word. "Another for my scrapbook", said Avory light-heartedly. For obvious reasons, Avory received more threatening letters than any other Judge, but he did not allow them to worry him. He regarded the letters as a joke, and carefully preserved them in a scrapbook, which on occasions he would produce with jocular comment. At two o'clock, Avory pushed back his chair. "Are you walking back to the Courts now?", he said to Hewart. "Not for the moment", replied Hewart. "I want to have a word with Slesser." Hewart watched Avory stride off. "Let him go on alone", said Hewart in a low voice to Slesser. "On these occasions *they nearly always shoot the wrong man*!"

Negligence Note.—Our tendency to regard proof of negligent driving as applying equally to its criminal as to its civil aspects receives no support from the decision of McNair J. in *Gaynor* v. *Allen* [1959] 2 All E.R. 644, in which the plaintiff, while crossing the northern carriageway of the Great West Road, at Hammersmith (a dual carriageway, each carriageway being some thirty feet wide), was knocked down and injured by a motor-cycle driven by one A., who was killed; the accident occurred at about 7.20 p.m., in March, twenty minutes after lighting-up time. A. was a police constable who, at the time of the accident, was riding at a speed of some sixty m.p.h. in pursuance of police duties. The speed limit was forty m.p.h. Section 3 of the Road Traffic Act 1934, provided, so far as relevant, that the speed limit on motor-vehicles should not apply to any vehicle when used for police purposes. The Court considered that any immunity which the deceased constable enjoyed under s. 3 did not in any way affect his civil liability. "In my judgment, the deceased, the driver of this police motor-cycle, on this occasion, as regards civil liability, must be judged in exactly the same way as any other driver of a motor-cycle on that occasion. He, like any other driver of a motor-vehicle, on that occasion owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger." The plaintiff, a nurse, was off full work for a year as the result of the accident, in hospital for six weeks and her right leg in plaster for three months. She suffered a transverse fracture of the mid-shaft of the right tibia and fibula, a fracture of the middle of the right clavicle (collar bone), a fracture of the right scapula (the shoulder blade) and certain abrasions. The Court awarded her £750 general damages reduced by one-third for failing to see the swift-moving motor-cyclist.

The Disobedient Drunk.—"Here is a man whose wife had deliberately deprived him of the means of driving because he might get drunk. Because he was drunk he insisted on trying to drive notwithstanding her having done this, and for the moment he was just as dangerous a driver as any other who is drunk. In fact he searched for the keys, complained that they were lost or taken, and would undoubtedly have driven if he could. In the Magistrate's view, as I interpret it, he is a man who, in the interests of the public, must be kept off the road for the full period because that is the sort of thing he will do under the influence of liquor. The disqualification is to protect the public for the future from the sort of man the appellant is shown to be—the menace who insists on driving when drunk. It is he who really disqualifies himself; the law merely attaches to him the label he has elected to affix to his personality and temperament: it is he who must wear the cap because it fits."—Hardie Boys J. in *Foti Wadi* v. *Police*.

Compassion and Justice.—"Some of the questions may give you trouble by virtue of their very nature and their complexity; but the real difficulty you will find, I feel reasonably sure, will be to suppress your very natural feelings of sympathy and compassion and to view the case objectively and intellectually, as you must. There are few of us who can face the sight of a man injured to the degree to which this plaintiff has been injured and, at the same time, not feel an overwhelming sense of compassion. It is very good that we are so made, but when we sit in the seats of judgment, you and I, we must put aside such feelings and view the case dispassionately on the evidence. Only if we do that, do we do justice. If we allow sympathy and compassion to take command of our faculties, reason, logic, and judgment depart and emotion takes their place. It is important that we who act as Judges and jurymen in the Courts keep that forever in our minds. Compassion and sympathy are very great qualities; but in matters such as this, justice is even greater."—From a summing-up by McCarthy J. in *McLaughlan* v. *International Contractors and Hickey*. The jury awarded £16,500 general and £4,938 7s. special damages to a plaintiff of 19, rendered a hopeless cripple as the result of a motor-accident.

Lord Erskine.—

Lord Erskine, at women presuming to rail,
Calls his wife "a tin canister tied to one's tail";
And fair Lady Anne, while the subject he carries on,
Seems hurt at his Lordship's degrading comparison.
—*Richard Brinsley Sheridan.*

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 254.*)

the airport the Board considers that the Corporation is not called upon to protect the interests of anyone other than the ordinary reasonable man, and it is not concerned to protect the unduly sensitive or neurotic individual who could be expected to complain of noise emanating from any source anywhere.

CONCLUSION: After a full and careful consideration of all the evidence and the submissions of counsel the Board considers that the area to be zoned as part of the "buffer" zone in the locality under consideration should be that part of the area defined by Civil Aviation Administration in plan A.L.:4892 indicated by the plan attached hereto and hatched thereon. It follows, therefore, that some of the appellants will succeed outright in their appeals, some of them will succeed in part only. [The Board's decision in respect of each of these appeals was set out in the form of a schedule to this decision].

It may be that the application of this decision to some at least of the properties under consideration may create some questions of boundary adjustments but it is considered that those will be minor matters which should be readily adjustable between the parties themselves.

If, however, any question of alignment of boundaries cannot be adjusted by the parties then leave is reserved to apply to this Board for direction.

Appeal No. 113/58, L. S. Jewell, disallowed; 114/58, G. W. Fairweather, disallowed; 120/58, Francis and Hill. allowed; 121/58, W. J. McMillan and others, allowed in part; 124/58, R. A. Witbrock and others, allowed; 132/58, C. R. Witty and R. C. Witty, allowed; 6/59, A. W. Johnson, allowed in part.

Orders accordingly.

In Re Mount Maunganui Borough.

Town and Country Planning Appeal Board. Mount Maunganui. 1959. April 27.

Skating rink—Building Permit—Area zoned "residential"—Onus on Local Authority to prove proposed Skating Rink not detracting from Amenities of Neighbourhood—Failure to discharge Onus—Duty of Council wishing to provide Additional Recreational Facility to take Action to alter its Operative District Scheme.

Application relating to a property in the Borough of Mount Maunganui being Lot 13 Deposited Plan 3986 known as No. 4 The Mall. It was in an area zoned as "Residential" under the Council's operative district scheme. The owner applied for permission to erect a skating rink on the property. This application, if granted would create a "non-conforming" use in a residential area as skating rinks are neither a predominant nor a conditional use in such an area.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Council advertised its intention of considering the application, and received various objections from owners and occupiers in the vicinity objecting to the grant of a permit. The Council did not hoar the objectors but lodged this application being, as it naively stated in evidence, content to leave the decision to this Board.

It is the opinion of the Board that the proper course for the Council to have followed was to have heard the objectors and given its own decision leaving the owner or the objectors to appeal according to where the decision fell.

After hearing the evidence adduced and the submissions of counsel, the Board finds:

1. That as a general principle of town-planning it must be held that skating rinks detract from the amenities of a residential area.
2. That the onus of proving in this particular case that a skating rink on this property will not detract from from the amenities of the neighbourhood lies on the Council.
3. That on the evidence submitted the Council has failed to discharge that onus.
4. That if the Council wishes to provide additional recreational facilities for visitors, holiday-makers and residents in this area then it should take the necessary action to alter its operative district scheme.

Application dismissed.

Watson *v.* Tawa Flat Borough

Town and Country Planning Appeal Board. Wellington. 1959. February 17.

Zoning—Land zoned as "Industrial B"—Objections to Such Zoning—Permit given in 1943 to Timber Company to Erect Buildings—Objections on Ground of Smoke Nuisance—Council's Powers to abate any Nuisance arising from Company's Operations—Town and Country Planning Act 1953, ss. 26, 34A.

Appeal under s. 26 of the Town and Country Planning Act 1953, relating to a property owned by Armstrong Timber Co. Ltd. at Tawa Flat containing approximately 5 acres being Lot 1 on Deposited Plan 12753 bounded by the Porirua Stream on the west and the Railway yards appurtenant to the Tawa Flat Railway Station on the east. Under the respondent Council's proposed district scheme as publicly notified in pursuance of s. 22 of the Act, this land was zoned as "Industrial B" and some seventy-two residents in the district lodged an objection to this zoning claiming that the land should be zoned as "residential". The objections were duly heard by the Council and disallowed. 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 and having inspected the property under consideration and the locality, the Board finds:

1. The Armstrong Timber Co. Ltd. carries on the business of timber merchants on the property. It has erected substantial buildings including timber drying kilns, a boiler house to provide steam for kiln drying and other appurtenant buildings, including nine dwellings for employees, and a timber treatment plant to the value of approximately £48,000.
2. In 1943, the Makara County Council, the then controlling authority, granted a permit to the company's predecessors to erect buildings for the purpose of its business. The business has continued in active operation ever since and the original buildings have been added to from time to time.
3. In 1949, the land was zoned under the Extra Urban Planning Scheme of the Makara County Council as "residential". On April 20, 1950, the then owners of the property appealed against this zoning and the Town Planning Board after a hearing disallowed the appeal and the land remained zoned as "residential" down to February 1958 when the present Council rezoned it as "Industrial B".
4. It is clear that in the past smoke from the company's factory chimney, saw-dust, smuts and cinders emanating from the factory have detracted from the amenities of the immediate residential neighbourhood but the Council's view, and its contention, is that if the company's operations do create a nuisance in future the position can be controlled by having recourse to the provisions of s. 34A of the Act.
5. Some at least of the objectors who live in the immediate vicinity either bought or erected their homes after the factory had been well established, but the property was then zoned as "residential" and it is a reasonable assumption that these objectors thought the factory would not be permitted to operate indefinitely.
6. The real grounds of objection are not that the company's land per se is better suited for residential rather than industrial use but that the company's present activities constitute a nuisance and a detraction from the amenities of the neighbourhood.

If the appeal were allowed the company could continue to carry on its business as a "non-conforming use" and having regard to the substantial nature of its main buildings it would undoubtedly carry on for a long time.

Having regard to the situation of this property abutting as it does to the east on to the Railway Station and yards and being bounded on the west by the Porirua Stream the Board considers it better suited to light industrial use rather than residential.

The Council has ample powers under its Code of Ordinances and under s. 34A of the Act to control and require the abatement of any nuisance that might arise in future from the company's operations.

The appeal is disallowed.

Appeal dismissed.