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A REPLY TO SIR WILFRID SIM Q.C.

Mr. Justice Wilson, author of this reply, is a member of the sub-committee of the Rules Committee now considering a draft code.

Generations of New Zealand lawyers have come to rely on *Stout and Sim* and, more recently, *Sim,* when any question of civil procedure in the Supreme Court arises and it is generally conceded today that no one is more learned in this branch of the law than Sir Wilfrid Sim Q.C. who, for more decades than I care to remember, has been responsible for this invaluable commentary on the Code. For that reason any criticism by him of the proposals for reform of Supreme Court civil procedure carries very great weight and will, no doubt, receive the anxious consideration of the sub-committee of the Rules Committee entrusted with the task of preparing a draft Code suited to conditions as they are now and are likely to be in the foreseeable future.

As a member of that sub-committee I have given that consideration to Sir Wilfrid's comments on pp. 50-54 of the Law Journal. What follows is my personal reaction to his criticisms —the sub-committee has not yet met to consider them officially.

I rise to the bait dangled by Sir Wilfrid in what he has described as a "purposely provocative" article "with a view to stimulating thought," in the same spirit as it was written and I trust that I do not do him an injustice when I suspect that some of his comments are made more for the purpose of provoking discussion than from personal conviction.

To begin with, the Committee has never, to my knowledge, described its proposals as "revolutionary" and does not consider them to be so. It has tried to make it plain, in the explanatory memorandum accompanying the first part of its proposals, that it has unbounded admiration for the achievement of the original draftsmen of our Code in producing a procedural system which was so far ahead of the rest of the world then and which for a hundred years with modifications from time to time, has (as Sir Wilfrid says) worked pretty well. The Committee hopes that it is inspired by the same basic aim—to devise a Code that will enable justice to be truly done, that will ensure that justice is not thwarted by technicalities and that the tool (procedure) will not be allowed to become more important than that which it is intended to fashion. To vary the metaphor, what the sub-committee seeks is a more efficient and more easily applied lubricant to the wheels of justice. If this result is achieved it may well be that those who have grown up under and are familiar with the present Code will feel a little lost for a while and will deplore the passing of a system which gave special value to their skill and experience in this sphere — but so did the "special pleaders" of a by-gone age when procedural reforms of the 19th century did away with that nightmare of litigation. I have no doubt that the younger generation of lawyers will welcome greater simplicity in procedure and will rejoice in the thought that the many, and sometimes confusing, doors to justice, will be replaced by a single door. I refer, of course, to the proposal to adopt a single mode for the commencement of proceedings, namely, a statement of claim.

Sir Wilfrid has doubts regarding the suitability of this procedure in all cases, and it

must be remembered that the proposal is that it apply not only to civil proceedings now governed by the Code but to *all* civil proceedings in the Supreme Court, including those commenced under special statutes. Thus the statement of claim is intended to replace not only the initial affidavits on an originating summons or motion but also the petition for divorce or for the winding-up of a company or to adjudicate a person bankrupt. Perhaps Sir Wilfrid and the more timorous souls will draw assurance from the fact that last year the practicability and convenience of the proposal in relation to these proceedings were examined by a sub-committee of the Council of the Auckland District Law Society, and that sub-committee reported favourably. It may also be pertinent to note that the sub-committee of the Rules Committee which has put forward these proposals is not comprised of theorists but of two Judges and two practitioners, all of whom have had wide practical experience in Supreme Court proceedings in all jurisdictions.

A cogent criticism by Sir Wilfrid is that so far the sub-committee has not published an overall plan to which its proposals can be related. That is, indeed, a most pertinent and valid criticism. There is, of course, a plan, and that follows the logical course of proceedings. The next part to be promulgated in draft for criticism and comment deals with interlocutory matters, beginning with general rules for the forms and practice in such matters, dealing with particular applications (such as discovery of documents, interrogatories etc.), and concluding with a suggested pre-trial procedure by which it is hoped to shorten and simplify trials. In matters of discovery of documents and interrogatories the latest practice overseas indicates the possibility of great simplification in practice though with some loss of brevity in the rules themselves. In this part the confusing amalgam of interlocutory and originating applications introduced in 1954 will disappear.

The rules for the trial of proceedings are to follow the part dealing with interlocutory matters. No substantial alterations to these rules are contemplated but the interesting suggestion has been put forward that the defendant (respondent) might be given the option of making his opening address immediately after the plaintiff's and before the plaintiff calls evidence. Judgments and their enforcement (including execution) will naturally form the subject of the part of the new rules following that relating to trials. Finally, miscellaneous matters (such as probate and administration), for which special rules are necessary, will be dealt with. It is obvious, also, that there will need to be detailed and careful consideration of existing separate procedural codes for the Administrative Division and for divorce, company, bankruptcy and (perhaps) Admiralty proceedings, to determine how far special rules relating thereto will require to be preserved.

Sir Wilfrid is unhappy about the introduction of miscellaneous rules about time, costs etc. into Part I of the proposed Code. The reason for this is simple. When examined they will be seen to apply very generally, but some of them are hard to find in the existing Code. It was therefore thought logical to collect them and to introduce them, along with definitions of terms, at the outset.

Another fear expressed by Sir Wilfrid is that matters of substantive law which have found their way into the Code (for example, those relating to extraordinary remedies) may be omitted, either by inadvertence or design, from the new Code. This has not been overlooked by the sub-committee, but no decision on this point has been taken. It is arguable, however, that the Code is concerned with procedure, that it would be impossible to include *all* relevant substantive rules of law in a code of procedure and that substantive law properly belongs to, and should be left in, the statute or common law from which it is derived.

Sir Wilfrid's article has given the sub-committee much food for thought. It is to be hoped that practitioners generally will regard it in the same light.

A Devilish Deed—The vicar, the Rev. R. H. P. King, and several workmen escaped injury from flying chunks of wood as they sheltered from the rain in the church porch. The vicar said his church was insured against acts of God and that builders would be inspecting the damage later today: *Brighton Evening Argus.*

Duty—"When a stupid man is doing something he is ashamed of, he always declares it is his duty."—GEORGE BERNARD SHAW, *Caesar & Cleopatra.*

What price an opinion?—The British Legal Association is to debate the fees of Commissioners for Oaths, which, the motion for substantial increase claims, is too low "having regard to . . . the opinions expressed by many people swearing documents."

SUMMARY OF RECENT LAW

AGRICULTURE AND FARMING—NOXIOUS WEEDS

Failure to comply with notice—Notice sent by registered post to proper address but returned undelivered—Notice not served—Noxious Weeds Act 1950, ss. 5 (1), 28 (1) and (3). This was an appeal from the Magistrate's Court dismissing an information charging the respondent with failure to comply with a notice under s. 5 (1) of the Noxious Weeds Act 1950 on the ground that the notice was not served. In reliance on the provisions of s. 28 (1) the notice was sent by registered post but the registered envelope in which it was contained was returned, unclaimed, to the informant. *Held,* 1. What is "deemed" by s. 28 (3) of the Noxious Weeds Act 1950 is not the *fact* of delivery but the *time* at which the notice would have been delivered. *(Kowhai County Council* v. *Henderson* [1967] N.Z.L.R. 766, 767-768, referred to.) 2. Where a notice is sent pursuant to s. 28 (1) of the Noxious Weeds Act 1950 "by post in a registered letter addressed to [the ocupier], and it is proved that the letter was not delivered, then the occupier has not been served. The Magistrate's decision to dismiss the information was not erroneous. *Fawcett* v. *Graham* (Supreme Court, Christchurch. 13, 16 November, 1972. Wilson J.).

APPEALS TO SUPREME COURT FROM MAGISTRATES' COURT (CIVIL JURISDICTION)

Practice—Notice of motion of appeal from Magistrate's Court—Duplicate of Notice not served on respondent's solicitor until 9 months after filing—Appeal not "brought"—Magistrates' Courts Act 1947, ss. 72 (1), (3) and (6), 73 (1). This was a motion to dismiss a notice of motion of appeal. The appeal from the Magistrate's Court was filed within the prescribed time pursuant to s. 72 (1) but a duplicate of the notice was not served on the respondent's solicitor until more than 9 months later. *Held,* 1. An appeal is not "brought" until the requirements of subss. (1), (3) and (6) of s. 72 of the Magistrates' Courts Act 1947 have been fulfilled. 2. The time within which the discretion conferred on the Court by s. 73 (1) may be exercised is mandatory and cannot be exercised after the time prescribed therein. *(Darroch* v. *Carroll* [1955] N.Z.L.R. 131, referred to.) *Clouston* v. *Motor Sales (Dunedin) Limited* (Supreme Court, Dunedin. 10 October; 1 November 1972. Quilliam J.).

CRIMINAL LAW—EVIDENCE AND PROOF

Relevant facts admissibility of evidence—Acts of accused—Statement by accused as to method used by him in committing the crime with which accused charged made to induce a witness to join in committing another crime—Evidence Act 1908, *s.* 5 (2) (*d*). The appellant was accused of breaking and entering the Bank of New South Wales at Auckland and gave evidence in his own defence. The prosecution was granted leave by the Judge to ask the appellant questions concerning another burglary of another Bank at Masterton and whether he had not proposed to H., a Crown witness that H. should be a party to the Masterton burglary, and further whether they had not actually committed such burglary together and had pleaded guilty thereto and been convicted. H. had testified to a conversation between himself and the appellant in which the latter had described in detail the method he had used to break into the Bank at Auckland. These details harmonised with the police evidence. H. had been prepared to say, had he been asked, that the reason why the appellant had described such method was to convince H. that the plan to break into the Bank at Masterton was feasible. As H. had been returned to Wellington, by agreement part of H.'s deposition containing the latter fact was read. The appellant denied the testimony of H. concerning the conversation and also that part of H.'s deposition which was read, but admitted that they had pleaded guilty and been convicted of the Masterton burglary. *Held,* 1. In cases in which leave is sought to cross-examine an accused as to credit, the Court in exercising the discretion conferred by s. 5 (2) (d) of the Evidence Act 1908 will *in general* (but not necessarily in every case) follow the principles laid down in the English decisions. 2. When the evidence sought to be adduced in cross-examination of the accused is evidence relevant to some matter in issue in the trial, then the English practice will not furnish a bar to such questions. In such a case, the Court in exercising its discretion considers only whether it is fair in the circumstances of the particular trial that the questions should be asked. The appeal was dismissed. *R* v. *Fox* (Court of Appeal, Wellington. 2 August; 1 September 1972. Turner P., McCarthy and Richmond JJ.).

CRIMINAL LAW—OFFENCES AGAINST THE GOVERNMENT AND THE PUBLIC

Inciting disorder—Procession displaying no violence or lawlessness—Police Offences Act 1927, *s.* 34. This case was an appeal from the Magistrate's Court against a conviction under s 34. of the Police Offences Act 1927, the relevant words of which are as follows—"Every person commits an offence . . . who incites, encourages, or procures disorder, violence or lawlessness". The appellant was one of the leaders of a procession that marched down Queen Street, Auckland. On the return march up Queen Street when the marchers reached the Victoria Street intersection the accused through a loud hailer said to the marchers in effect—"Sit down—spread out into a wider circle and block the whole street off". This the marchers effectively did. The demonstrators did not display any violence and after about 15 minutes dispersed peaceably. *Held,* Section 34 of the Police Offences Act 1927 should be interpreted in the light of the maxim "*noscitur a sociis*", and that to justify a conviction any disorder that is the subject of incitement by a defendant must at least be coloured with the elements of violence or lawlessness. Appeal allowed and the conviction quashed. *Police* v. *Lee* (Supreme Court, Auckland. 2 October; 1 November 1972. Moller J.).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Order for maintenance of wife—No jurisdiction to make nominal order Domestic Proceedings Act 1968, *s.* 26 (1)—*Supreme Court power to adjourn proceedings for maintenance order* sine die—*Domestic Proceedings Act, s.* 124 (3). This was an appeal against a nominal order for maintenance of 10 cents per week. The respondent had worked throughout the marriage and at the time of the application was earning $40 per week.

Held, 1. The Court has no jurisdiction to make a nominal order for maintenance. 2. The application for maintenance was adjourned *sine die* by virtue of the provisions of s. 124 (3) of the Domestic Proceedings Act 1968, s. 121 (6) of the Summary Proceedings Act 1957, r. 40 of the Domestic Proceedings Rules 1969 and r. 146 of the Magistrates' Courts Rules 1948. *Malaquin* v. *Malaquin* (Supreme Court, Christchurch. 6, 9 November 1972. Wilson J.).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Orders for maintenance of wife and of child—Husband not father of the child—Husband not step-parent or foster-father of child. Domestic Proceedings Act 1968, s. 35 (3). Infants and children — Illegitimate children — Husband not father of child —Presumption that child born to wife during the marriage is child of husband rebuttable — Status of Children Act 1969, s. 5. This was an appeal against maintenance orders made against the husband in favour of the wife and a child 18 months of age. It was admitted that the appellant was not the father of the child and that the respondent wife could have maintained herself by regular employment had there been no necessity to care for the child. The Magistrate made the orders under s. 35 (3) of the Domestic Proceedings Act 1968 on the ground that the appellant was either the step-father or foster-father of the child. *Held,* 1. "Step-parent" in s. 35 (3) of the Domestic Proceedings Act 1968 means a spouse by a subsequent marriage of the child's parent. 2. The appellant could not be the foster-father of the child since the respondent was not the foster-mother of the child. 3. The presumption in s. 5 of the Status of Children Act 1969 is that a child born to a mother during marriage is the child of her husband in the absence of evidence to the contrary, but if there is such evidence the issue must be determined on a balance of probabilities pursuant to s. 115 of the Domestic Proceedings Act. *D.* v. *D.* (Supreme Court, Hamilton, 31 October; 3 November 1972. Mahon J.).

HUSBAND AND WIFE—MATRIMONIAL PROCEEDINGS (SUPREME COURT)

Proceedings after decree — Maintenance order — Jurisdiction to grant — Application made in husband's lifetime — Proceedings not heard during husband's lifetime — Trustee of estate substituted for husband more than 12 months after husband's death — Proceedings not invalidated. Matrimonial Proceedings Act 1963, ss. 40, 41, 42. This case raises the question of jurisdiction under the Matrimonial Proceedings Act 1963 where the wife had made an application for permanent maintenance under s. 40 and the husband had filed an affidavit in opposition and then became ill and died on 25 November 1970 before the proceedings were heard. The trustee of the husband's estate was substituted as petitioner in lieu of the husband. The application had been filed on 3 April 1969 and the trustee was substituted by an order dated 8 September 1972. Applications were pending against the estate under the Family Protection Act 1955 and also under the Law Reform (Testamentary Promises) Act 1949. *Held,* 1. Section 42 of the Matrimonial Proceedings Act 1963 which limits the bringing of an application under ss. 40 or 41 against a personal representative is not a bar to making an order for the wife where the outstanding claim has been made against the husband in his lifetime. 2. There is no jurisdiction to make an interim order. *The Guardian Trust and Executors Company of New Zealand Limited* v. *Radley* (Supreme Court, Auckland. 14, 22 November 1972. McMullin J.).

INCOME TAX—ASSESSABLE INCOME

Profits from dealing in land — Taxpayer farming leasehold property acquired freehold for farming having long-term subdivisional propensity — Subdivisional propensity accelerated by construction of causeway — Profits or gains from the sale of sections by taxpayer not assessable for income tax — Taxpayer on giving notice under s. 122 (3) of the Land Act 1948 to purchase freehold "acquired" the property — Land and Income Tax Act 1954, s. 84 (1) (c). Real property and chattels real — Land Acts — Leaseholder giving notice to obtain freehold from Crown — Date of "acquisition" of freehold — Land Act 1948 ss. 116, 122. On 1 December 1940 the objector was granted two leases for a period of 21 years with a perpetual right of renewal by the Native Trustee under the Public Bodies Lease Act 1908. The property had previously been farmed by the objector in partnership, but some time before the grant of the lease the objector had farmed the land on his own behalf. Subsequently the freehold became vested in the Crown. On 8 May 1953 the objector gave notice of his intention to exercise his right to purchase the fee simple. The objector elected to purchase on a deferred payment licence. In 1957 the objector elected to pay off the balance and thereafter in due course the objector became the registered proprietor of the fee simple. When the land was revalued in 1952 the unimproved value was increased sevenfold on the basis of its subdivisional potentiality. On appeal to the Land Valuation Court it was held on 27 March 1953 that the unimproved value should be assessed on the basis of farming land with a reasonable addition for potential value for subdivisional purposes. In 1959 by reason of the building of a causeway the subdivisional potentiality markedly increased, the farming of the land became increasingly difficult and the objector commenced to sell off sections. In 1958 it first became evident that there would be considerably more building in the area. The first plans for the purpose of subdivision were lodged in July/August 1958. The Commissioner of Inland Revenue assessed the objector for income tax under s. 88 1 (c) on the ground that he had acquired the property for the purpose of selling or otherwise disposing of it, and that he had carried on or carried out a scheme which he entered into or devised for the purpose of making a profit. *Held,* 1. The objector having given a valid notice under subs (3) of s. 122 of the Land Act 1948, pursuant to subs (4) a contract was constituted between the objector and the Crown for the purchase and sale of the land. 2. Section 116 of the Land Act 1948 is mere machinery for assurance to a purchaser that he will become the registered proprietor in fee simple under the provisions of the Land Transfer Act 1952. 3. When the objector gave notice on 8 May 1953 pursuant to s. 122 (3) of the Land Act 1948 he obtained an interest in fee simple. *(Howard* v. *Miller* [1915] A.C. 318, 326, referred to.) 4. The objector "acquired" the property within the meaning of s. 88 1 (c) of the Land and Income Tax Act 1954 on 8 May 1953 by virtue of the binding contract to purchase. 5. The objector's purpose at the time of acquisition was to obtain the freehold for farming. *Commissioner of Inland Revenue* v. *Walker* [1963] N.Z.L.R. 339,

referred to. 6. Any gain or profit made by the objector from the sale of sections was not taxable. *Beetham* v. *Commissioner of Inland Revenue* (Supreme Court, Auckland. 13, 14, 17 November 1972. Henry J.).

INCOME TAX—ASSESSABLE INCOME

Trading stock—Sale of farm land, live and dead stock for global sum—Value of stock fixed in agreement by parties—Commissioner's power to attribute value to live stock—Land and Income Tax Act 1954, *ss.* 98, 101, 102. This was an appeal to the Privy Council which affirmed the decision of the Court of Appeal reported [1972] N.Z.L.R. 193 where the facts are set out in the headnote. *Held*, 1. The Commissioner could exercise his powers under s. 101 of the Land and Income Tax Act 1954 even if the price for the land and stock were not a global price, provided always that the stock was *sold together* with other assets. 2. Section 101 was wide enough in its terms to cover the case of a sale of livestock along with other assets where the price is apportioned in terms of sale. 3. Their Lordships made some observations *obiter dicta* on the scaling down method employed by Woodhouse J. in the Supreme Court, which method is referred to in a note [1972] N.Z.L.R. 193, 194. The judgment of the Court of Appeal affirmed. *Hansen and Others* v. *Commissioner of Inland Revenue* (Judicial Committee. 17, 18, 19 July; 23 October 1972. Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilborne, Lord Simon of Glaisdale and Lord Kilbrandon).

INCOME TAX—OBJECTIONS TO ASSESSMENT

Objector assigning to his family trust for more than 7 years income arising from moneys loaned by him to his professional partnership—Objector assessed for tax in respect of assigned income—Section 108 can avoid transaction notwithstanding the provisions of s. 105—Court of Appeal may find facts itself if necessary where Supreme Court has stopped short in lieu of remitting to Supreme Court—Land and Income Tax Act 1954, ss. 105, 108. This was an appeal from the decision of Wild C. J., reported [1972] N.Z.L.R. 723. The decision was unanimously upheld but the grounds upon which the decision was based were varied. The facts are set out in the head note of the report in the Court below. It is important to add that in the 1967 transaction the objector loaned $12,000 to the partnership at 10 percent for a period of 10 years in an attempt to bring the transaction, in which he assigned the income arising therefrom to the trustees of the family trust, within s. 105 of the Land and Income Tax Act 1954, which in effect provides that where the owner of a capital asset assigns the income thereof to another person for a period of less than 7 years for the purposes of income tax the income so assigned shall be deemed to be income of the owner of the capital. *Held*, 1. Although the lending of money at 10 percent interest by a partner to the partnership to provide partnership capital was an ordinary business transaction, the lending of money by a trustee of a family trust to the partnership, such money having been previously loaned by a partner to the trustee as part of the arrangement, was not explainable by ordinary business or family dealing. 2. The "implementation" of the 1966 transaction was only a comparatively minor factor in reaching the conclusion that it was caught by s. 108 of the Land and Income Tax Act 1954. *(Newton* v. *Commissioner of Taxation of the Commonwealth of Australia* [1958] A.C. 450; [1958] 2 All E.R. 759, discussed.) 3. Where in a tax appeal the Supreme Court judgment has stopped short of finding facts which the Court of Appeal considers necessary to be found to answer the questions, it may be convenient for the Court of Appeal itself to find the facts without remitting the case to the Court below. *(Levin and Co. Ltd.* v. *Commissioner of Inland Revenue* [1963] N.Z.L.R. 801, referred to.) 4. Section 105 of the Land and Income Tax Act 1954 does not provide that if the owner of capital assigns the income therefrom for a period in excess of 7 years he will be entitled to be assessed as if he had not derived that assigned income. 5. Section 105 does not prevent the Commissioner *in a proper case* from applying the provisions of s. 108. 6. A gift of income only, reserving the capital to the assignor, is different in its nature from a gift of capital, even if the two gifts are approximately equal in value. *(Mangin* v. *C.I.R.* [1971] N.Z.L.R. 591; [1971] A.C. 739, followed.) 7. If transactions prove to be a scheme devised for the sole or at least the principal purpose of bringing about that the taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived, the transactions are void as against the Commissioner under s. 108 of the Land and Income Tax Act 1954. *(Mangin* v. *C.I.R.* (supra) at p. 751, applied.) Judgment of Wild C. J. affirmed. *McKay* v. *Commissioner of Inland Revenue* (Court of Appeal, Wellington. 19, 20, 24 October; 22 November 1972. Turner P., Richmond and Speight JJ.).

MONEY AND MONEYLENDING—MONEYLENDING

Who is a moneylender—Building material supplied to builders on credit—Interest added at the rate of 1 percent per month on accounts 3 months overdue —Transaction sale and purchase not a loan. In this case the plaintiff had supplied building material to a company carrying on the business of a building contractor. After a time the plaintiff became concerned at the extent to which it was being expected to carry outstanding accounts. In April 1967 the plaintiff sent a circular to its customers that in future payments for materials supplied were required to be made on the 20th of the following month, that if paid on or before that date a cash discount of 2½ percent would be allowed, and that interest would be charged at the rate of 1 percent per month upon any accounts which were 3 months or more overdue. The defendant, so the Court held, had guaranteed to pay for any materials purchased from the plaintiff by Fahey Construction Co. Ltd. The latter company had been supplied with materials and had been charged with interest on overdue accounts and by May 1971 its indebtedness to the plaintiff for materials and interest amounted to approximately $16,000. The plaintiff made demands upon the company and the defendant for payment thereof. The company went into liquidation and paid a first dividend, thereby reducing the debt to $11,853.43. The plaintiff sued the defendant on his guarantee for that sum. The defendant unsuccessfully raised three defences and this report deals only with the fourth defence—viz. "That the provisions of the Moneylenders Act 1908 are a bar to the plaintiff obtaining judgment." *Held*, The nature of the transaction was no more than a sale and purchase and the fact that the vendor stipulated for and received interest on the outstanding purchase price did not alter the transaction so as to make it a loan, and accordingly the Moneylenders Act 1908 had no application. *(Rabone* v. *Deane* (1915), 20 C.L.R.

636, 640, and *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* [1962] A.C. 209, 216-217; [1961] 3 All E.R. 1163, 1167, referred to.)

M.S.D. Spiers Ltd. v. *Fahey* (Supreme Court, Wellington. 25 October; 14 November 1972. Quilliam J.).

PRACTICE—JOINDER OF PARTIES

Action for defamation against local resident—Libel published only outside New Zealand—Leave to join foreign defendants. Code of Civil Procedure R. 48 (h). This was an application under R. 48 (h) of the Code of Civil Procedure for leave to serve a writ out of the jurisdiction. The plaintiffs had not issued a writ but filed a copy of their proposed statement of claim. The plaintiffs claimed that the first defendant wrote in New Zealand a defamatory dispatch which he sent to the second and third defendants. The second and third defendants published the dispatch in their newspapers in South Africa but it was not alleged that the dispatch was published in New Zealand. *Held*, 1. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, (a) the wrong must be such that it would have been actionable if committed in England and (b) the act must not have been justifiable by the law of the place where it was done. *(Phillips* v. *Eyre* (1870) L.R.6, Q.B.1, applied.) 2. The plaintiffs could "properly" bring their action against the intended first defendant in New Zealand although the tort complained of was committed in South Africa. *(Chaplin* v. *Boys* [1971] A.C. 356, applied. *Anderson* v. *Eric Anderson Radio & T.V. Ltd.* (1965) 114 C.L.R. 20; and *Koop* v. *Bebb* (1951) 84 CLR 629, referred to.). 3. Being an *ex parte* application the Court was entitled to rely on counsel's assurance that the alleged libel would be actionable between the litigants in South Africa. 4. In deciding whether the overseas companies were "necessary or proper parties" to the action under R. 48 (h) of the Code of Civil Procedure the Court must scrutinise the cause of action brought against the local defendant and its chance of success, and subject the claim against the foreign defendants to the same scrutiny. *(Pratt* v. *Rural Aviation (1963) Ltd.* [1969] N.Z.L.R. 46, followed.) 5. The Court's discretion to make an order under R. 48 (h) must be cautiously exercised. *(Societe Generale de Paris* v. *Dreyfus Bros.* [1885] 29 Ch. D. 239, 242; and *Johnson* v. *Taylor Brothers & Co. Ltd.* [1920] A.C. 144, 160, applied.)

6. Although the plaintiffs had brought themselves within the formal words of R. 48 (h), the Court in exercise of its discretion declined to make the order sought. *Re an intended action: Richards and Others* v. *McLean and Others* (Supreme Court, Auckland—8 November 1972. Mahon J.)

SALE OF LAND—CONTRACT SUBJECT TO CONDITIONS

Difference between conditional offer and contract subject to conditions. This case draws a distinction between a conditional offer and a contract subject to a condition. The respondent made an offer to purchase the appellant's property. The appellant accepted the offer but added two provisoes, thereby making it a counter-offer, and added after his signature—"This acceptance is subject to final approval by my solicitors," which he initialled. The respondent wrote below "I agree" and signed it. Before any approval was given by the appellant's solicitors the respondent withdrew. The appellant claimed the difference in purchase price on a re-sale. *Held*, 1. A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party's notification of assent. *(Financings Ltd.* v. *Stimson* [1962] 1 WLR 1184; [1962] 3 All E.R. 386, referred to.) 2. An offer subject to a condition is not made until the condition is fulfilled. 3. A contract subject to a condition precedent is a concluded contract which cannot take effect until the condition is fulfilled. 4. A party cannot withdraw from a contract subject to a condition precedent while the condition precedent remains unfulfilled. *(Smallman* v. *Smallman* [1972] Fam. 25; [1971] 3 All E.R. 717, referred to.) *Buhrer* v. *Tweedie* (Supreme Court, Christchurch. 20, 29 November 1972. Wilson J.).

SHIPPING AND NAVIGATION—MARITIME LIENS

Material and necessities supplied to ship—Claim for cost of repairs to ship's refrigerating plant carried out in foreign port not claim for "necessaries"—Ship unlawfully arrested. Admiralty—Jurisdiction of the Supreme Court—Jurisdiction "in rem" *and* "in personam" *— Ship arrested for cost of repairs carried out in foreign port — Claim for repairs is not a claim* "in rem" *—Plaintiff bound by claim in writ upon which ship arrested — Payment into Court under protest to release ship not a payment in satisfaction of claim — Admiralty Courts Rules 1883, RR. 48 (a), 79, 80.* The plaintiff was the charterer of a ship registered in Norway and paid the cost of repairing the refrigerating machinery of the ship at Tema in Ghana. The plaintiff issued a writ out of the Supreme Court at Auckland against the ship claiming the cost of repairs and equipping the ship at Tema and interest thereon. The ship was arrested at Auckland and was not released until, pursuant to R. 48 (a) of the Admiralty Court Rules 1883, the amount claimed together with interest thereon was paid into Court under protest by the defendant bank, the mortgagee of the ship. Motions were filed respectively by the plaintiff and the defendant for payment out of the moneys in Court. The plaintiff's affidavit splits its claim into payment for repairs and payment of electricity for the said repairs. The question was whether there was any jurisdiction in New Zealand to arrest the ship in Admiralty proceedings. *Held*, 1. The jurisdiction of the Supreme Court in Admiralty cases is confined by the state of Admiralty Law in England as at 1 July 1891 and by the Admiralty Courts Rules 1883. *(The Yuri Maru* [1927] A.C. 906, referred to.) 2. (a) No right of action *in rem* was conferred by s. 4 of the Admiralty Court Act 1861 for equipping or repairing a ship. (b) A statutory right of action *in rem* lay in respect of necessaries supplied to a foreign ship by virtue of the Admiralty Court Act 1840. *(The Two Ellens* (1872) L.R. 4, P.C. 161, 166, applied.) 3. No jurisdiction was conferred by s. 6 of the Admiralty Court Act 1840 for the cost of repairs: the expression "services rendered" therein is restricted to services by way of salvage and towage. 4. The cost of repairs to the refrigerating machinery was not a claim for "necessaries" within s. 6 of the Admiralty Court Act 1840 but a claim for repairs. *(The Mogileff* [1921] P. 236; and *The Riga* (1872) L.R. 3, All E.R. 516, 522, discussed and not followed. *The Cella* (1883) 13 P.D. 82, and *Webster* v. *Seekamp* (1821), 4 B. & Ald. 352, 354; 106 E.R 966, 967, referred to.) 5. The ship having been arrested on the basis of the writ, the plaintiff was bound by the writ and could not later split its claim into two and claim for the cost of

supply of electricity. 6. Rule 48 (a) does not by its terms preclude a payment into Court under protest. *(The Bulgaria* [1964] 2 Lloyd's Rep. 524, referred to.) 7. The ship was unlawfully arrested and the defendant had not submitted to the jurisdiction by payment into Court. *The Lorena* (Supreme Court. Admiralty Jurisdiction. Auckland. 24, 25 July; 30 October 1972. Mahon J.).

TOWN AND COUNTRY PLANNING—DISTRICT SCHEMES

Conditional use — Council consenting to use of property in residential zone as a child care centre in application for conditional use — Child care centre not a "boardinghouse" as defined in ordinance — Council's consent void—Conditions attached to consent agreed to at hearing but not embodied in council's resolution unenforceable — Town and Country Planning Act 1953, s. 28c. Estoppel — Estoppel by representation — Promissory estoppel — Effective as a shield but not as a sword. The plaintiff in a relator action sought an injunction restraining the first defendants from using their property situated in a residential A zone as a child care centre or alternatively restricting the number of children being cared for therein to ten. The plaintiff also sought a declaration that the consent granted by the second defendant on the application of the first defendants to the use of the property for a child care centre as a conditional use provided the first defendants complied with the Child Care Centre Regulations 1960, was void. At the hearing of the application one of the first defendants had stated that they would not be caring for more than ten children in any one day. None of the relators had appealed against the granting of the consent. Subsequently the licence granted to the first defendants by the Child Welfare Department authorised the keeping of a maximum of 35 children. The first defendants thereafter, on an average, cared for about 30 children each day. This resulted in the relators being subjected to noise from the children and from vehicles taking children to and from the centre. A child care centre was neither a predominant nor a conditional use in a residential A zone, but "boardinghouses" were included in the list of conditional uses in that zone. Ordinance 2 of the code of ordinances defined "boardinghouse" as "a residential building in which board and lodging or lodging is provided" etc. Ordinance 4 provided in terms that where any use was not expressly provided for within the scheme the council could determine in which zone such use might be permitted and whether as a predominant or conditional use. *Held,* 1. A child care centre was not within the definition of boardinghouse in ord. 2, nor is it included in the common understanding of that term. 2. Without deciding whether ord. 4 was ultra vires or not, the council in this case could not validate a land use which was not within the prescribed class of uses by invoking the provisions of ord. 4. 3. Permission to use the property as a child care centre could not be the subject matter of a conditional use and the purported grant was invalid. 4. The purported consent being void the plaintiff was entitled to the injunction and the declaration sought. *(A-G* v. *Bastow* [1957] 1 Q.B. 514; *A-G* v. *Smith* [1958] 2 Q.B. 173, applied.) 5. A planning consent cannot be altered or qualified by extrinsic evidence and as the council's consent made no reference to the number of children to be cared for the first defendants were not restricted to caring for ten children. *(Slough Estates Ltd.* v. *Slouth B.C.* [1970] 2 W.L.R. 1187, 1190, 1195; and *Ryde Municipal Council* v. *The Royal Ryde Homes & Anor.* 19 L.G.R.A. 321, 323, applied.) 6. The doctrine of promisory estoppel could not be invoked by the plaintiff as it can only be used as a shield not a sword. *(Bessly* v. *Hallwood Estates Ltd.* [1960] 2 All E.R. 314, 324, applied.) *Attorney-General Ex Relatione Hing and Others* v. *Codner and Others* (Supreme Court, Auckland. 10 October; 3 November 1972. McMullin J.).

TOWN AND COUNTRY PLANNING—DISTRICT SCHEMES

Proposed District Scheme—Change of use — Excavation of headland — Local amenity — No application under s. 38A (1) — Application for injunction by local residents association — Statute did not confine type of redress available — Town and Country Planning Act 1953, s. 38A. Action — Parties to an action — Representative capacity not confined to persons having a common beneficial proprietary interest —Code of Civil Procedure, r. 79. This was a motion to rescind an interim injunction restraining the defendants from excavating for a site for a block of flats a headland of Mahina Bay which, if completed, would have demolished entirely its original contour. The plaintiffs were the chairman and secretary of the Mahina Bay Residents Association, an unincorporated body representing 35 households and totalling 119 persons residing in the small area known as Mahina Bay, who purported to be representative of the majority of the residents in Mahina Bay. The first defendant was the owner of the land to be excavated, which was zoned residential A under the council's proposed district scheme. There was no operative district scheme in the locality and no application had been made to the council under s. 38A (1) of the Town and Country Planning Act 1953. A few more hours work excavating would have permanently altered the headland and the maintenance of the status quo was vital to the plaintiffs. *Held,* 1. On the facts of the case the commencement of the excavation, to be continued with the erection of a block of flats, was the commencement of a "use" which would alter in character the form of enjoyment of the site within s. 38A (1) of the Town and Country Planning Act 1953. 2. The excavation of material which was to be used as filling in another place was analogous to the extractive industry of quarrying, and when commenced introduced a change of use. 3. The Act was designed *(inter alia)* to protect the citizens against certain forms of detriment of an intangible kind and to emphasise the importance of keeping in mind the preservation of aesthetic values. 4. The Legislature created in s. 38A (3) a right to be heard by the council in every person who claims to be affected by the use for which consent is sought, and in so doing did not confine the available types of redress to the various classes of statutory remedy. 5. The right to sue in a representative capacity under R. 79 of the Code of Civil Procedure was not confined to representing persons having a common beneficial proprietary interest. The residents of Mahina Bay prima facie had a common interest and a common grievance. *(Duke of Bedford* v. *Ellis* [1901] A.C. 1, 8, applied.) *Mundy and Another* v. *Cunningham and Another* (Supreme Court, Wellington. 5, 15 October 1972. Haslam J.).

TOWN AND COUNTRY PLANNING—DISTRICT SCHEMES—RIGHT OF OBJECTION AND APPEAL

To whom available — "Public interest" does not found claim to be a "person affected" — Town and Country Planning Act 1953, ss. 23 (1), 26 (1). In this case the appellants sought a writ of mandamus directing the Special Town and Country Planning Appeal Board to hear their appeals objecting to a proposed amendment to the operative district planning scheme for Hamilton City, and injunctions against the Hamilton City Corporation preventing it from giving effect to the proposal. The question was raised before the City council at the hearing of the appellants objections that none of them had any *locus standi*. The council decided to hear the objectors. When the objectors appealed from the council to the Appeal Board the Board ruled the appellants had no *locus standi* but invited them to express their views as witnesses for other persons. *Held*, 1. Pursuant to s. 26 (1) the appellants having had their objection disallowed by the council *prima facie* had *locus standi* before the Appeal Board but only if their objection was a valid one in the first instance. 2. Successive revising Courts had jurisdiction to review the *locus standi* of the appellants. *(The Queen* v. *Commissioners for Special Purposes of Income Tax* (1888), 21 Q.B.D. 313, distinguished. *Strongman Electric Co. Ltd.* v. *Thames Valley Electric Power Board* [1964] N.Z.L.R. 592, *Bethune* v. *Bydder* [1938] N.Z.L.R. 1; [1937] G.L.R. 665, *R.* v. *Nat. Bell Liquors Ltd.* [1922] 2 A.C. 128, *R.* v. *Yaldwin* (1899) Q.L.J. 242, and *R.* v. *Blakeley ex p. Association of Architects* (1950) 82, C.L.R. 54, referred to.) 3. An objector must show that his property was one "appreciably affected" by the proposal and a matter of public interest is not a ground for objection. *(Evans* v. *Town and Country Planning Appeal Board* [1963] N.Z.L.R. 244, approved.) Judgment of Woodhouse J. (unreported) affirmed. *Rogers and Others* v. *Special Town and Country Planning Appeal Board and Another* (Court of Appeal, Wellington. 7, 8 September; 9 November 1972. Wild C. J., Turner P. and Richmond J.).

TRADE NAMES AND TRADE MARKS—RECTIFICATION OF REGISTER

Grounds for rectification — Manufacturer owner of common law trade mark by usage — Distributor registered manufacturer's trade mark — Common law trade mark assignable only with goodwill of business in which it is used — No concurrent user of trade mark — Trade mark not registrable by distributor—Trade Marks Act 1953,, ss. 2, 16, 41. In 1951 a partnership was formed for the manufacture of soft toys and adopted a trade mark "Lul-a-bye" which was used on a label and affixed to its products. In November 1952 an agreement was made between the partners and the respondent that as from 1 January 1953 the respondent should be the sole distributor of the partnership toys for a period of 12 months. During 1953 the partnership was dissolved; one partner bought out the other partner and then incorporated the applicant. The applicant continued to supply toys to the respondent in accordance with the previous arrangement made between the partners and the respondent. This arrangement appeared to have been renewed each year until 1971. Late in 1969 the applicant discovered that the respondent was distributing toys made by another manufacturer. Throughout the years the respondent at its own cost had promoted the sales of the applicant's toys. The respondent cancelled its order for toys from the applicant and warned the applicant against selling its toys under the name "Lul-a-bye" the respondent having registered "Lullaby" as its own trade mark under the Trade Marks Act 1953. The applicant sought an order rectifying the register by removing the registered trade-mark on the grounds *inter alia* that the applicant by devising and using the trade mark had become the owner of a common law trade mark in the name of "Lul-a-bye" and that the registration of the mark was "without sufficient cause" in terms of s. 41 of the Trade Marks Act 1953. *Held*, 1. A person may become the owner of a common law trade mark by usage. *(General Electric Co.* v. *The General Electric Co. Ltd.* [1972] 2 All E.R. 507; *Kenrick and Jefferson Ltd.* [1909] 26 R.P.C. 641 at p. 649; *Hall* v. *Barrows* (1863) L. J. Rep. (N.S.) 548 at p. 551, referred to.) 2. A common law trade mark is assignable but only with the goodwill of the business in which it is used. *(General Electric Co.* (supra) at p. 519; *Pinto* v. *Badman* [1891] 8 R.P.C. 181, 194; and *De Meric Ltd.* v. *Lysol Ltd.* [1926] N.Z.L.R. 221, applied.) 3. The respondent had not become the owner of the trade mark by user of the trade mark as distributor. *(Re Diehl K.G.'s Application* [1969] 3 All E.R. 338, discussed and distinguished.) 4. An entry is made "without sufficient cause" if it can be shown the mark ought not to have been accepted. The principles applicable to rectification of the register on the basis that the mark was not properly registrable are the same as those applicable to an application to register. *(re Gestetner's Trade Mark* [1908] 1 Ch. 513, 521, applied.) 5. To obtain registration of a trade mark an applicant must be able to claim that he is the proprietor thereof. *Re Vitamins Ltd.'s Application* [1956] R.P.C. 9, 12, applied. 6. The prohibition against registering "any matter the use of which would be likely to deceive or cause confusion" contained in s. 16, applies if the result of registration will be that a number of persons will be caused to wonder whether it might not be the case that the two products come from the same source but the Court must be satisfied that there is a real tangible danger of confusion and not merely a possibility of confusion. *(Berlei (U.K.) Ltd.* v. *Bali Brassiere Co. Inc.* [1969] 2 All E.R. 812, 827, applied.) The Court ordered the trade mark to be removed from the register. *North Shore Toy Company Limited* v. *Charles L. Stevenson Limited* (Supreme Court, Auckland 16 August; 6 November 1972. McMullin J.).

TRANSPORT AND TRANSPORT LICENSING—ROAD TRANSPORT SERVICES

"Available route"—No facilities provided by railways department for particular goods at departure station—Consignor having own suitable equipment—Railway "capable of use in fact"—Transport Act 1962, s. 109 (1). In this case the respondent, which was successful in the Court below, contended that pursuant to s. 109 (1) of the Transport Act 1962, there was no available railway route for the carriage of goods, being concrete blocks on pallets, between Lorneville and Tuatapere, a distance of 51.5 miles, which included 50 miles 58 chains of railway. There were no permanent facilities for lifting goods at Lorneville but the respondent with its own equipment was able to load the pallets weighing approximately two tons. At Tuatapere there was a crane capable of lifting the pallets and a forklift available for hire. *Held*,

1. The word "available" in s. 109 (1) of the Transport Act 1962 means "capable of use in fact or open and usable". (*Hanna* v. *Garland* [1954] N.Z.L.R. 945, 946, applied.) 2. No weight should be given to considerations of convenience, efficiency and operative cost, nor should the requirements of particular consignors or consignees be taken especially into consideration. (*Donovan* v. *Knight and Dickey Ltd.* [1965] N.Z.L.R. 99, 105, applied.) 3. "Availability" is in each case always a question of fact. *Per* Turner P. 1. The Railway Department is not necessarily responsible for loading goods on to railway trucks and may require its customers to do so. 2. Being a question of fact in every case, economic considerations might in a given case accumulate to the point where it could be that the route is no longer available as a practical proposition. *Per* Richmond J. The absence of any available means whatsoever of loading goods on to railway trucks might prevent the route from being available. Appeal allowed. *Transport Ministry* v. *Vibrapac (Southland) Limited* (Court of Appeal, Wellington. 29 September; 1 November 1972. Wild C. J., Turner P. and Richmond J.).

BILLS BEFORE PARLIAMENT

Admiralty
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Companies Amendment
Crimes Amendment
Department of Social Welfare Amendment
Domestic Purposes Benefit
Explosives Amendment
Maori Purposes
Marine Pollution
Ministry of Transport Amendment
Municipal Corporations Amendment
National Roads Amendment
New Zealand Day
New Zealand Export-Import Corporation
Niue Amendment
Overseas Investment
Rates Rebate
Recreation and Sport
Rent Appeal
Sales Tax Bill
Social Security Amendment
Summary Proceedings Amendment
Syndicates
University of Albany Amendment
Wool Marketing Corporation Amendment

STATUTES ENACTED

Moneylenders Amendment
Post Office Amendment
Trade and Industry Amendment
Trustee Savings Banks Amendment

REGULATIONS

Regulations Gaz tted 27 March to 31 May 1973 are as follows:

Accident Compensation Act Commencement Order 1973 (S.R. 1973/128)
Accident Compensation Motor Vehicle Levies Order 1973 (S.R. 1973/141)
Accident Compensation Motor Vehicle Levies Regulations 1973 (S.R. 1973/142)
Chatham Islands Dues Regulations 1951, Amendment No. 10 (S.R. 1973/125)
Civil Aviation Charges Regulations 1965, Amendment No. 8 (S.R. 1973/126)
Consumer Information (Quantity) Notice 1973 (S.R. 1973/139)
Customs Tariff Amendment Order (No. 3) 1973 (S.R. 1973/132)
Customs Tariff Amendment Order (No. 13) 1973 (S.R. 1973/133)
Dairy Board (Means of Determining Prices) Order 1973 (S.R. 1973/138)
Dairy Produce Levy Regulations 1973 (S.R. 1973/143)
Dairy Produce Superannuation Levy Regulations 1973 (S.R. 1973/144)
Diplomatic Privileges (South Pacific Bureau for Economic Cooperation) Order 1973 (S.R. 1973/134)
Game (Packing and Export) Regulations 1967, Amendment No. 2 (S.R. 1973/116)
Meat Levy Regulations 1973 (S.R. 1973/117)
Meat Regulations 1969, Amendment No. 3 (S.R. 1973/118)
Milk Production and Supply Regulations 1973 (S.R. 1973/145)
Minimum Wage Order 1973 (S.R. 1973/119)
Motor Vehicles Insurance (Third-Party Risks) Regulations 1963, Amendment No. 11 (S.R. 1973/140)
Price Freeze Regulations (No. 2) 1973, Amendment No. 2 (S.R. 1973/127)
Price Freeze Regulations (No. 3) 1973 (S.R. 1973/136)
Rock Lobster Regulations 1969, Amendment No. 4 (S.R. 1973/131)
Sale of Liquor Regulations 1963, Amendment No. 4 (S.R. 1973/120)
Shipping (Manning of Fishing Boats) Notice 1973 (S.R. 1973/124)
Shipping (Manning of Fishing Boats) Notice 1973, Amendment No. 1 (S.R. 1973/135)
Stabilisation of Prices Regulations 1972, Amendment No. 3 (S.R. 1973/137)
State Services Salary Order (No. 4) 1973 (S.R. 1973/121)
Submarine Cables and Pipelines Protection Order 1973 (S.R. 1973/146)
Timber Industry Training Centre Advisory Committee Regulations 1966, Amendment No. 1 (S.R. 1973/129)
Town and Country Planning Regulations 1960 (Reprint) (S.R. 1973/123)
Traffic Regulations 1956, Amendment No. 25 (S.R. 1973/130)
Workers' Compensation Order 1969, Amendment No. 4 (S.R. 1973/122)

FRENCH NUCLEAR TESTS AND THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT

Previous to the June 1972 United Nations Stockholm Conference on the Human Environment the major international legal provision relating to and affecting the conduct of the testing of nuclear devices in the atmosphere and elsewhere was the Nuclear Test Ban Treaty whose signatories include all the relevant nuclear powers apart from France and China both of whom continue to carry out the testing of nuclear devices in the atmosphere, such being prohibited by the Treaty.

At Stockholm several resolutions were passed which were later adopted by the General Assembly of the United Nations in November 1972. These directly or otherwise condemned and circumscribed the ability to perform such tests.

During the proceedings of the Conference's Third Committee concerned with the Identification and Control of Pollutants of Broad International Significance, France and China were specifically condemned in a Joint Statement initiated by seven Pacific nations including Japan, Canada, New Zealand and Peru. "Believing that all exposure to radiation should be kept to the minimum possible," the Statement called upon "those States intending to carry out nuclear weapons tests which may lead to further contamination of the environment to abandon their plans to carry out such tests." (A/Conf. 48/C.3/CRP.27). As those two States were about to explode devices in the atmosphere, the Statement was clearly intended to restrain them. However, the Statment was joined by a stronger Peruvian Resolution which related existing U.N. treaties (e.g. that prohibiting the emplacement of nuclear weapons on the sea bed) and described the dangerous increase in radio-active contamination from military tests which carried no corresponding benefit for mankind. This Resolution condemned military nuclear testing in the atmosphere and urged all Member States to 'struggle for the outright prohibition of atomic weapons'—strong words for a nation which had recently received a large multi-million dollar grant of aid from the French Government. This Resolution was then joined to the Recommendations to the General Assembly by Committee in a slightly modified form which "believed that all exposures of mankind to radiation . . . should be justified by benefits that would otherwise not be obtained." This "benefits principle" was echoed by D. MacIntyre for New Zealand at the Plenary Session when he said:

> "My Government believes that it is time the principles guiding national policies in activities such as operations of nuclear power stations were applied internationally and that all activities such as nuclear testing which increase the radiation dose experienced by the world's population should be justified in terms of the benefits they bring to the population." He continued by reiterating the imperialist nature of the French tests saying especially:
>
> "All New Zealanders deeply resent the fact that the South Pacific should continue to be exploited as a testing ground for a European Power . . . (or should) tolerate an assault on the genuine concern of . . . the region by further nuclear fireworks on Mururoa Atoll."

Moreover, but less specifically, the Conference resolved to improve international machinery for environmental concern by resolutions making it all the less legitimate for member States such as France to proceed with its tests. Foremost amongst these is the Declaration on the Human Environment, which holds equal rank with the Human Rights Declaration of the United Nations. Article 21 is the most important part of the entire Declaration as it recognises for the first time at international law the duty of nation states to "ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." Such a concept has long existed within many States' internal legal systems as a restriction on one's rights of property. The French nuclear tests could not be a better example of the type of national activity envisaged as being outlawed by this restraint. The Declaration continues (Article 22) by demanding that 'states shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environment damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction'.

Secondly, *a propos* the colonial nature of the area the French activities cover, Article 11 clearly requires that "the environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries . . ." Little is known or publicised of the disruptive economic and cultural aspects of the French tests in the Tahiti area let alone the very colonial presence with its lack of appreciation of the needs and aspirations of such underdeveloped lower income areas.

Finally, the Draft's important Article 20 was unfortunately not adopted in its original form which required that "relevant information must be supplied by states on activities within their jurisdiction or under their control whenever they believe . . . that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction." This, had it survived, would have helped New Zealand demand from the French details in advance of e.g. the size of the proposed tests and the date of their being carried out. The fact that this country is not even informed of those elementary facts makes the contravention of Article 21 so much harder to police and renders the Article meaningless in such cases. This most important Draft Article 20 was so controversial at Stockholm that it was singled out for referral direct to the General Assembly for its consideration. Again, the Draft Article 21 that "Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction, etc." was likewise referred to the Plenary for action to include reference to biological and chemical weapons and other means of mass destruction. Such a clause was later included in the final Declaration — unlike the unsuccessful Draft Article 20.

During the course of the 27th General Assembly of the U.N. which followed Stockholm, Principle 20 (as Draft Article 20 became) was confirmed instead by a formal resolution emphasizing that States "must not produce significant harmful effects in zones situated outside their national jurisdiction" and recognising that such co-operation to implement principles 21 and 22 of the Declaration would only be achieved "if official and public knowledge is provided of the technical data relating to the work to be carried out by the (State within its own) national jurisdiction with a view to avoiding significant harm that may occur in the human environment of the adjacent area." The history of the one-sided flow of information from New Zealand to the French of the result of monitored assessments of the tests shows up sadly the almost insulting refusal of the French to even provide official or other notification of the fact of the tests, let alone the exchange of information as required by Principle 20 of the General Assembly of the United Nations. This Principle was later considered by the Assembly's emphasising that States must not produce significant harmful effects in zones situated outside their national jurisdiction (A/C.2/L. 1227). The Assembly recognised co-operation for the implementation of Principles 21 and 22 of the Declaration would be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdiction with a view to avoiding signficant harm which may occur in the human environment of the adjacent area, such data to be given and received in the "best spirit of co-operation and good neighbourliness without also thereby enabling each State to delay or impede programmes and projects of exploration, exploitation and development of the natural resources of the States in whose territories such programmes and projects are carried out. Interestingly enough, the Assembly saw New Zealand help promote a resolution (A/C. 2/L.1240) recalling that Principles 21 and 22 laid down the basic rules governing this matter and declaring that no resolution adopted at this 27th session of the Assembly would "affect" Principles 21 and 22 of the Declaration. Why New Zealand introduced this would be of interest to know as it may have either been attempting to enhance those Principles or conversely to denigrate from them by refusing to allow a proposal by which would have added some meat to the skinny bones of the Principles by insisting on the exchange of information as sought in the original pre-Stockholm draft.

Before leaving the Declaration, it is worth noting that elsewhere (Principle 1 in particular) policies "promoting or perpetuating . . . colonial and other forms of oppression and foreign domination stand condemned and must be eliminated." Furthermore Principle 18 insisted that "science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind." Consequently, if the MacIntyre etc. "common benefit" tests were to be used in an argument against the proposed nuclear tests, this Principle at least gives it

official help as a statement of the raison d'etre of science and technology and their need to act and exist solely in and for the public interest.

Returning to recommendations of the above Third Committee of the Stockholm Conference, we find that identification and control of atmospheric pollutants was uppermost in the Committee's mind . . .

Furthermore, the Environment Fund which was pushed heavily by the developed nations for use as a pay-cheque for assessment of physical environmental degradation (as opposed to use in development programmes of agriculture etc.) is intended to be used to set up monitoring stations around the world to identify pollutants of broad international significance.

It should be evident from the intense internation activity centred around United Nation's resolutions that French ambitions in the Pacific are by no means condoned or wished by the majority of nations belonging to that international body.

SIMON REEVES

POLICY IN THE LAW AND NEGLIGENT ACTS CAUSING PURE FINANCIAL LOSS

The English Court of Appeal has recently had occasion to examine the question of what damages a plaintiff may recover when the negligent act of the defendant causes pure financial loss (*a*). The Court of Appeal, by a majority (*b*), rejected the plaintiff's claim for pure financial loss and in so doing reaffirmed a principle of the common law which has existed for almost one hundred years (*c*). However, it is not so much the fact that an old principle was applied, but the manner in which the Court applied it, that makes the case worthy of comment.

It is trite law that the test for determining the the duty issue in negligence cases is the reasonable foreseeability criterion. (*d*) But the reasonable foreseeability principle does not operate in isolation: it is accompanied at every point by the element of social policy. (*e*) The important role of social policy as a secondary element in determining questions of liability for damages in negligence cases has often been overlooked by the Courts. This led one Judge to declare that: "there is always a large element of judicial policy and social expediency involved in the determination of the duty problem, however much it may be obscured by the traditional formula." (*f*)

In the field of negligent acts causing pure financial loss the Courts have embraced a rule which excludes the possibility of recovery. Thus it has been held that even though it was foreseeable that pure financial loss would be suffered, nevertheless the plaintiffs could not recover, because it was not the type of loss for which the law would allow recovery (*g*). However, there has been a noticeable reluctance to articulate the policy reasons behind this exclusionary rule. The Judges have merely looked to the legal rule itself when refusing to allow plaintiffs to recover in respect of purely financial losses.

In *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.* (*h*) the plaintiffs also failed to recover damages of this kind. But the majority, rather than hiding their reasons for judgment behind "traditional formulae", came out in the open and analysed some of the policy factors which dictated the negative answer to the plaintiff's claim. Lord Denning even went so far as to say that the tests which had been hitherto applied (namely whether there was a duty and whether the damage was too remote) were too "elusive". He added: "It seems to me better to consider the relationship in hand and see whether or not, as a matter of policy, economic loss should be recoverable." (*i*)

Briefly, the factual situation which gave rise to the plaintiff's claim was as follows. The defendants' employees were digging up a road when they negligently damaged the cable which sup-

(*a*) See *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.* [1972] 3 W.L.R. 502.

(*b*) Denning M.R. and Lawton L.J., Edmund Davies L.J., dissented.

(*c*) The Court of Appeal applied *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453.

(*d*) See *Donoghue* v. *Stevenson* [1932] A.C. 562, per Lord Atkin (at p. 580).

(*e*) See Julius Stone, *Province and Function at Law* (1946) 182; and *Legal System and Lawyers' Reasonings* (1946) 260.

(*f*) *Nova Mink Ltd.* v. *Trans-Canada Airlines* [1951] 2 D.L.R. 241, per McDonald J., at pp 254-255.

(*g*) See *Weller & Co.* v. *Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569.

(*h*) [1972] 3 W.L.R. 502.

plied electricity to the plaintiff's works. The electricity board had to shut off the power to the factory until the cable was repaired. This took some 14½ hours and forced the plaintiffs to pour molten metal out of their furnace to prevent the metal solidifying and so damaging the furnace. As a result, the metal could not be kept at the correct temperature, the "melt" could not be completed and the value of the metal depreciated by £368. Also a £400 loss of profit occurred since the plaintiffs were unable to sell the metal from that melt. During the 14½ hours further melts were lost and the loss of profits from these was £1,767. The plaintiffs claimed damages for the property damage to the metal and for the loss of profits truly consequential upon this property damage. They also claimed damages for the pure financial loss arising from failure to carry out the other four melts. At first instance, Faulks J., held that the plaintiffs could recover damages under each of the three heads.

The defendants appealed and the Court of Appeal allowed the appeal in respect of the pure financial loss suffered on account of the cancellation of the four later melts. It was clear that the plaintiffs could recover damages for (a) the property damages to the melt and (b) the loss of profits "truly consequent" upon such property damage (*j*). However, the majority held that the remaining financial losses were irrecoverable. The plaintiffs' claim was, in many respects, similar to claims in a long line of recent cases, all of which have been rejected (*k*). Indeed, it would be interesting to learn what authority Faulks J., relied on when allowing the plaintiffs' claim at first instance.

However this may be, it is clear that the majority in the Court of Appeal preferred to rely on the rule of non-liability outlined in *Cattle* v. *Stockton Waterworks Co.* (*l*) and followed in recent times in the *Weller & Co.* case (*m*). It is true that certain exceptions have been admitted to this rule, such as in the field of general average contributions by cargo owners (*n*), and the rule outlined in *Simpson* v. *Thomson* (*o*) whereby a plaintiff may recover where he was either (a) in possession of the injured chattel or (b) had a proprietary interest in the chattel, *and* suffered consequential financial losses. But generally, the rule of non-liability outlined in *Cattle* applies to preclude recovery of pure financial loss (*p*).

When one begins to look behind this rule of non-liability, one can see that it is supported by a number of distinct, yet interwoven, policy factors. It is possible to isolate at least four policy arguments which were considered by the Court of Appeal in the *Spartan Steel* case:

(a) Factors relating to the administration of the law.
(b) The value of the plaintiff's interest.
(c) The ability of the defendant to bear the loss.
(d) The role of insurance in determining the liability issue.

These will be considered in turn.

(a) Administration of the law. When talking about factors of administration of the law, the Court is concerned about the "workability" of a rule (*q*). The problem may be broken down further to give rise to such questions as:

(i) the actual size or amount of claims:
(ii) the effect on society of allowing too great an extension of liability;
(iii) the ability of the Courts to handle any increase in litigation.

In most recent cases, where the Judges have been pressed for an extension of liability in this

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(*i*) [1972] 3 W.L.R. 502, at p. 508.

(*j*) See *S.C.M. (United Kingdom) Ltd.* v. *W. J. Whittall & Son Ltd.* [1971] 1 Q.B. 337 (C.A.).

(*k*) For example, *Elliott* v. *Sir Robert McAlpine & Sons Ltd.* [1966] 2 Ll. L. Rep. 482 (loss of profits when telephone cable cut); *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205 (loss of profits when water supply interrupted); *British Celanese Ltd.* v. *A. H. Hunt Ltd.* [1969] 1 W.L.R. 959 (loss of profits when electricity supply cut). See also: *S.C.M. (United Kingdom) Ltd.* v. *W. J. Whittall & Son Ltd. supra*; *Dynamco Ltd.* v. *Holland & Harman & Cubitts (Scotland) Ltd.* 1971 S.L.T. (Notes) 20; and *Dominion Tape of Canada Ltd.* v. *L. R. McDonald & Sons Ltd.* [1971] 3 O.R. 627.

(*l*) (1875) L.R. 10 Q.B. 453.

(*m*) [1966] 1 Q.B. 569.

(*n*) *Morrison S.S. Co. Ltd.* v. *Greystoke Castle (Cargo Owners)* [1947] A.C. 265. This was a majority judgment of the House of Lords and it is doubtful whether it has any application beyond the field of maritime law. But compare the *dictum* of Lord Roche (at p. 280) outlining the possibility of a wider scope for this exception.

(*o*) (1877) 3 App. Cas. 279, per Lord Penzance (at pp. 279-280). Clear policy reasons can be adduced to support this exception, but a detailed analysis is beyond the scope of this note. However, it is interesting to note that these were alluded to by Lord Denning in the *Spartan Steel* case itself (at p. 510).

(*p*) A closely related common law rule denies recovery for pecuniary losses arising from physical injury to, or the death of a third party. See *Baker* v. *Bolton* (1808) 1 Camp. 493. Here again, there are a number of exceptions which need not be considered here.

(*q*) See Leon Green, "The Duty Problem in Negligence Cases", (1928) 28 Col. L.R. 1014.

area, they have expressed concern about the implications of such an extension. Widgery J., in the *Weller & Co.* case (*r*) considered that "the world of commerce would come to a halt and ordinary life would become intolerable if the law imposed a duty on all persons at all times to refrain from any conduct which might foreseeably cause detriment to another." (*s*) The fear is that there may be grave dangers if the floodgates are opened, and hence public convenience and interest demand that the right of action must stop short (*t*).

Lord Denning canvassed this argument in *Spartan Steel*. He said that: "if claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false. . . . It would be well-night impossible to check the claims" (*u*). However, the "floodgates" argument was also considered by the dissenting Judge. He reached the opposite conclusion, finding that the Courts would not have any difficulty in regulating claims.

The cornerstone of the dissenting judgment of Edmund Davies L.J., is that the damage must be both foreseeable and direct. "My conclusion . . . is that an action lies in negligence for damages in respect of purely economic loss, provided that it was a reasonably foreseeable and direct consequence of the failure in a duty of care (*v*)." The Judge admits that such a rule can "undoubtedly give rise to difficulties in certain sets of circumstances", but his answer to this is that similar difficulties exist with the exception outlined in *Simpson* v. *Thomson* (*w*) where financial loss was truly consequent upon physical damage. One is left to ponder whether this is a satisfactory answer. Surely it is no justification for an inadequacy in one area of the law to say that inadequacies exist in another, albeit related, area of the law.

Edmund Davies L.J., also claimed that he was not concerned to inquire what the position would be if the element of "directness" is lacking. All he would say was that he was not attempting to revive the distinction between direct and indirect consequences which was generally thought to have been laid at rest by the decision in *The Wagon Mound* (*x*). Furthermore, it appears that on the question of a regulator, the dissenting Judge envisaged the retention of some rule of remoteness (*y*). It is in this portion of his judgment that the dissenting Judge is least convincing. What does he mean by "remoteness" in this context? How will a test of "directness" operate? If these tests are to be used together, how will the Courts treat them? Also, if a "directness" test is used, does this not automatically raise notions of indirectness where the test is not met? The only answer proffered by Edmund Davies L.J. to all these questions is to suggest that they can be resolved by "the virtues of good sense and of fairness . . . the line has to be drawn where in the particular case the good sense of the Judge decides (*z*)."

It would seem that, so long as Edmund Davies L.J. leaves us in doubt at to the validity and effectiveness of his proposed regulator, then the force of the "floodgates" argument remains unanswered. What is more, even the introduction of a satisfactory regulator would not answer all aspects of the argument against extending liability on account of difficulties in the administration of the law (*a*).

(b) The value of the plaintiff's interest. This issue is canvassed in the dissenting judgment where it is noted that, in relation to the law of negligence, it was formerly possible to postulate that "the reluctance to grant a remedy for the careless invasion of financial or pecuniary interests is long standing, deep-rooted and not unreasonable (*b*)." But after referring to *Cattle* v. *Stockton Waterworks Co.* (*c*). Edmund Davies L.J. outlines the view that that case should not be regarded as sound authority on which to base a rule of non-liability. The damage in that case was not recoverable, merely because it was too remote, and not because it was a kind of damage for which the law would not permit recovery.

It is clear that Edmund Davies L.J. believes that there is nothing inherent in financial interests which render them inviolate from rules imposing liability. And in support of this view he cites the developments in the law relating to negligent mis-statements causing pure financial loss. Like Denning L.J. in *Candler* v. *Crane Christmas & Co.* (*d*) he could not think that liability depended on the nature of the damage. However, it should be noted that this

(*r*) [1966] 1 Q.B. 569.
(*s*) Ibid., at p. 585.
(*t*) See *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205, per Geoffrey Lane J., (at p. 208).
(*u*) [1972] 3 W.L.R. at p. 570.
(*v*) Ibid., at p. 515.
(*w*) (1877) 3 App. Cas. 279. See text at note (*o*), *supra*.
(*x*) [1961] A.C. 388.
(*y*) [1972] 3 W.L.R. at p. 516.
(*z*) Ibid., at p. 516.
(*a*) See, for example, the points discussed in the text, *supra*, note (*q*).
(*b*) Citing *Salmond on Torts*, 15th ed. (1969), at p. 262.
(*c*) (1875) L.R. 10 Q.B. 453.
(*d*) [1951] 2 K.B. 164.

view was expressed in the narrow context of negligent *words*. Indeed, it had been argued that the developments outlined in the *Hedley Byrne* decision (*e*), allowing actions for pure financial loss when the circumstances revealed a "special relationship" between the parties, should be applied to negligent *acts*, but this was firmly rejected by the Courts (*f*)

Furthermore, the suggested reversal of the bias against allowing recovery for pure financial losses, does not take into consideration two arguments which have influenced the development of the law in the opposite direction. First, the argument that the law of torts should not "trench upon the sphere of contract and its basic philosophy that a claim to economic advantage must trace its source to a promise made for consideration (*g*)." Secondly, the law of negligence has not intruded into the field of pure financial loss because it would involve placing a burden on business enterprise.

(c) Closely associated with these policy factors, is the third aspect considered by the Court of Appeal—the ability of the defenhant to bear the loss. Lord Denning pointed out that: "The risk of economic loss should be suffered by the whole community who suffer the losses—usually many but comparatively small losses—rather than on the one pair of shoulders, that is on the contractor on whom the total of them, all added together, might be very heavy (*h*)."

The same argument might be advanced in the case of a motorist who damages an electricity supply line, causing a cut in power to a group of factories who in turn suffer financial losses. Should the motorist have to shoulder this burden, or the cost of insuring against such losses? The negative answer which the law presently gives is reinforced when one considers the fact that whenever financial losses, such as loss of prospective economic advantage, occur, they are normally suffered by persons who are in a position to be able to insure against the possibility of such losses by means of loss insurance.

(d) This leads to the forth point discussed by the Court—the incidence of insurance. While the law refuses to impose liability on defendants, a plaintiff who wishes to protect himself must take out loss insurance (*i*). This has been what has happened in industry. As Lord Denning pointed out: "Some there are who install a stand-by system. Others seek refuge by taking out an insurance policy against breakdown in the supply. But most people are content to take the risk on themselves (*j*)." On the other hand, the rule of non-liability has meant that prospective defendants (*k*) have not had to take out what would be relatively expensive insurance to cover themselves against "open-ended" liability. Lawton L.J. indicated that: "For nearly a 100 years now contractors and insurers have negotiated policies and premiums have been calculated on the assumption that the judgment of Blackburn J. [in the *Cattle* case] is a correct statement of the law (*l*)."

One cannot but agree that so long as it remains possible for prospective plaintiffs to protect themselves against losses of this nature (*m*), then there is much to be said for a rule of non-liability. For this is precisely the position which has been reached in the field of personal injuries. We have now come full circle from the pre-*Donoghue* v. *Stevenson* rule of non-liability in respect of negligence causing physical injuries, through the stage where liability was imposed and liability insurance operated to protect defendants, to the stage where all injuries are to be covered by schemes of loss-oriented social insurance (*n*). The only difference between that position and the one now obtaining with pure financial losses, is that under the latter, there is no question of compulsory insurance. Those who are in the position of being likely to suffer loss from interruption to power, gas or water supplies *may* insure, or they may opt to act as their own insurers.

It is suggested that there is much sense in retaining the current approach rather than setting out on a system of fault-based compensation, under which prospective defendants would have to take out liability insurance. The notion of fault as a basis for compensating victims of negligence has now been rejected in cases of personal injuries (*o*) and there does not

(*e*) [1964] A.C. 465.

(*f*) See *The World Harmony, Konstantinidis* v. *World Tankers Corporation Inc.* [1967] P. 341; and *Weller & Co.* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569.

(*g*) See J. Fleming, *The Law of Torts*, 4th ed. (1971), at p. 164.

(*h*) [1972] 3 W.L.R. at p. 510.

(*i*) Compare liability insurance, which protects prospective defendants against the consequences of tort liability being imposed as a result of negligence.

(*j*) [1972] 3 W.L.R. at p. 510.

(*k*) Such as small contractors, or motorists.

(*l*) [1972] 3 W.L.R. at p. 518.

(*m*) And it would seem that loss insurances of this variety are easily obtainable: see D. Riley, *Consequential Loss Insurances and Claims*, 3rd ed. (1967).

(*n*) This is now the position under the Accident Compensation Act 1972.

(*o*) See the approach of the "Woodhouse Report": also see T. G. Ison, *The Forensic Lottery* (1967); and P. S. Atiyah, *Accidents, Compensation and the Law* (1971).

seem to be a strong case for introducing it in the field of negligent acts causing pure financial loss.

The majority decision in the *Spartan Steel* case comes as a timely reminder of this. It would seem that for more compelling grounds of policy would need to exist before the rule in *Cattle* v. *Stockton Waterworks Co.* was reversed. However, we should not lose sight of the fact that we are dealing with the tort of negligence. Negligence, as it is at present constituted, is an extremely flexible tort and so long as it is possible to refer to considerations of policy as part of the dual measuring process, the Judges will be able to insure that the law is kept in touch with the needs of the community.

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VAT '73

Dr Richard Lawson writes again from Britain.

Apart from putting beef into the luxury class, Britain's entry into the European Economic Community has appeared to have two main results.

One has been to rouse every Englishman's latent insularity which has now surfaced in a blaze of what are called, and not without reason, "bigot jokes." Thus, a dope ring is now defined as twelve Belgians standing in a circle. More viciously, a gross of Italians is said to be that which has an I.Q. of 144.

The other, more prosaic, consequence of our joining the European venture has been the harmonisation of British taxes with those of her co-members. In particular, on April 1 (which, for some strange reason, was also Mother's Day and All Fool's Day), Britain ridded itself of Purchase Tax and went over to what is known everywhere as "Vat".

Now "Vat" is an acronym for Value Added Tax. At each stage of its construction, an article is increased in value and is taxed on its added value. The beauty of this tax is that it is easy to administer, and is rebateable on exports. Hence, it aids the export drive.

In his budget speech, the Chancellor struck the rate of Value Added Tax at 10 percent. Some items, such as food and children's clothes, were exempted to save an increase in price.

But most items, including services, were not exempt. So their price went either up or down depending on whether the pre-existing rate of purchase tax had been greater, or less, than 10 percent. Unlike Vat, purchase tax had had a variable rate.

Before Vat was officially introduced, the Government launched a massive advertising campaign to ensure that the public knew just what was going up in price, and what was going down.

Yet the shopper's experience is that prices which were to go up have done so than by more than the permitted 10 percent, while items which should have been reduced in price have remained constant, or even gone up. The *Sunday Times* reports that one in five items which ought to have been reduced are still being retailed at their original, or higher, prices.

What makes this particularly hard to bear is that it comes at a time when part of the Government's pay and price freeze, enshrined in the Counter-Inflation Act 1973, appears to be working well. Attempts by the gasworkers, hospital workers and miners to get pay increases in excess of the £1 + 4 percent norm have been defeated by a resolute Conservative Government.

But prices continue to edge inexorably upwards. Fresh food was exempt from the freeze and is increasing in price at an annual rate of 24 percent. Manufactured goods continue to cost more because of "unavoidable world trends." Add to this the impact of Vat and spiralling mortgage rates, and it becomes clear that the current industrial calm is very much a deceptive time of peace.

I cannot forbear from observing on the reception accorded Bevin Congdon and his men in the English press. The *Observer* noted that they looked "clean-living like all New Zealanders." The *Times,* after a news conference, spoke of Mr Congdon as "obviously an upright man." This came as welcome relief to those of us who feared he would make it only on all fours.

THE IMPORTANT ROLE OF TOWN AND COUNTRY PLANNING APPEAL BOARDS

At the outset, one may confidently aver that some lawyers and most laymen are unaware of the nature and extent of the jurisdiction conferred upon Appeal Boards under the Town and Country Planning Act 1953, and the effect which many of their decisions play upon the environment and our daily life.

Often the questions at stake before the Boards are of far greater import than those that confront the ordinary Courts. Consider why for a moment. First, this is so because of the widespread effect Appeal Board decisions can have on people generally in addition to the parties actually represented in cases. Secondly, it is so because of the large sums of money that occasionally hang in the balance indirectly, for instance through the allocation or otherwise of a certain type of zoning under a proposed scheme, or perhaps in the outcome of an application for a specified departure from an operative scheme to permit a major building development.

Hence, consider s. 42 of the Act which deals with the Boards' powers in determining appeals. Section 42 (3) provides:

> "3. On the hearing of any appeal, the Board may direct what amendments shall be made to the district scheme or the regional planning scheme, or may amend or cancel any decision or determination to which the appeal relates, or may confirm both or either of those schemes or any such decision or determination, and may make any such order either absolutely or subject to such conditions, restrictions, prohibitions, and modifications as the Board thinks just; and the decision of the Board shall, subject to Section 42A of this Act, be final and conclusive."

Here it may be observed, that except as regards questions of law, (see s. 42A), the Boards' decisions are final.

In *Attorney-General* v. *Kennard, Oamaru Borough and Others* [1971] N.Z.L.R. 995, 1001, Speight J. had this to say about s. 42:

> ". . . the more common thing for an Appeal Board to do is to consider alterations to such matters as conditional uses and specific departures, or alterations to the classification within a designated type of zoning. Nevertheless, there may doubtless be occasions when it is thought necessary to alter from one class of zoning to another and in my view a liberal interpretation of this section is called for."

The general purpose of a district planning scheme is described in the oft-quoted s. 18 of the Act, as "the development of the area to which it relates, (including, where necessary, the replanning and reconstruction of any area therein that has already been subdivided and built on), in such a way as will most effectively tend to promote and safeguard the health safety, and convienence, and the economic and general welfare of its inhabitants, and the amenities of every part of the area."

So it may be said that the broad function of the Boards in their decisions, is to safeguard and promote the interests of the people affected directly and indirectly thereby.

But what is the actual nature and form of an Appeal Board hearing? Woodhouse J. recently made some interesting observations on this topic in *Wellington Club Incorporated* v. *Carson, Wellington City and Others* [1972] N.Z.L.R. 698, 701, where he said:

> "The jurisdiction of the Board on an appeal is outlined in ss. 40 and 42 of the Act and they clearly contemplate a hearing *de novo*. The parties and others have a right to call evidence; and the Board itself has a power to call expert witnesses before it. Moreover, in suitable cases appeals may be heard together. In addition there is now no obligation upon a council (as there was under earlier regulations) to take a record of the substance of evidence and argument before it or transmit the record to the Appeal Board in anticipation of the hearing on appeal. So the Board must begin anew. And it may be thought that the fact is statutory recognition of the clear need that this should be so.
>
> "The earlier consideration of objections by a local authority has necessarily followed a somewhat informal course. In every case, the issue before the local authority is whether its own proposals should be rejected modified or confirmed. . . . Those who hear and dispose of objections at the local level usually have had little if any training or qualification for the disposal of the sort of issues that can arise before them. Indeed it needs to be recognised that the first real hearing in any conventional sense is the hearing before the Board. The

Board is described as an Appeal Board and there is a widely held misconception by the lay public that the so-called appeal which comes before it is actually a second step in some sort of judicial process; but in truth it is not."

It must not be supposed that because the Appeal Board hearing is the first (and usually the final) hearing in any conventional sense (to adopt his Honour's phrase) the presumptions and burdens that influence the outcome of decisions of the ordinary Courts necessarily apply before the Boards, for the learned Judge went on to say (at p. 702):

"At each stage of the process the statute is looking to solutions based upon inquiry rather than to decisions in favour of successful contestants."

And later (at p. 703):

"I am unable to find any statutory intention that presumptions should run in favour of either the policies or the announced planning or the detailed zoning or the subsequent decisions upon objections of a Council during the progress of its proposed district scheme towards the point at which it will become operative."

The judgment goes on to declare (ibid.) that it is not

". . . necessary or desirable that the point of view of the administrator should be given a procedural head start that might never be overtaken simply because the influence of adversary techniques seem to have introduced the need to recognise a burden of proof. Certainly that situation is not contemplated by the Act. Different considerations probably apply to some belated attempt to upset a broad zoning proposal already approved by a Board in earlier appeals. For other reasons, an appeal relating to the application of a scheme after it had been made operative would obviously involve a different procedural approach. By then planning proposals have been considered by all concerned and given formal blessing."

His Honour's concluding remarks draw attention to cases where a burden may be cast upon an appellant to show justification for what he seeks in the face of provisions of an operative scheme governing the district.

Now because planning inevitably affects individual property rights, wide rights of objection, cross-objection and originating application to local authorities, and subsequent resort to the Boards, are accorded persons affected. The outcome of an Appeal Board hearing reflects the planning and administrative experience of Board members, enabling them properly to assess the evidence adduced (the extent and quality of which varies from case to case), and to foresee the overall effect of a planning decision beyond the bounds that the individual may conceive as owner of the land under consideration. What may seem illogical to the individual appellant, may be quite logical in terms of wider planning concepts and experience.

Hence, because the "sound principles of planning" are incapable of exhaustive exposition, as they are in essence no more than matters of enlightened opinion; because their classification must continually change as the requirements of society change; and because an admixture of some may be relevant in one case and not in another, the need for the procedural flexibility and wide powers of discretion with which the Boards have been endowed by the Act, is apparent.

Some strength may be gathered for these sentiments, from *Turner and Others* v. *Allison and Others* [1971] N.Z.L.R. 833, 843, where Wild C.J. delivering the leading judgment of the Court of Appeal said:

"In my opinion the position of a tribunal such as the Town and Country Planning Appeal Board is somewhat different from that of a judicial officer acting in the normal run of his duties. By the very nature of their work in a special field the members of such a Board must acquire opinions. (if they do not hold them before appointment), about the type of question they deal with. Planning problems all over New Zealand must have a certain similarity, and decisions reached in one part of a city must inevitably have an influence on the solution of contested issues in another. Moreover, because town planning can so drastically affect private property rights it is a field in which strong feelings are aroused and bitter resentments persist."

This statement underlines what may be described as the Boards' most difficult problem in fulfilling their function. It is this. By the very nature of planning, the opinions arising from evidence adduced in a prior appeal, or more often, a number of prior appeals, relating to certain land or lands, may lead to a particular planning policy or approach being established, which may have a significant effect upon the result of a subsequent appeal, concerned with other land, say, in the neighbourhood. As Turner J. pointed out in the same case (at p. 849):

"In a sense it is predetermination, *but it is a*

kind of determination peculiarly characteristic of decisions of this kind". (The emphasis is the writer's.)

The problem is that subsequent appellants often have little idea of what has gone before, so that it is not unnatural for them sometimes to complain of having promoted inconsequential causes at needless expense, when eventually apprised of the Board's reasons for decision. It must be noted, however, that in practice the Appeal Boards usually wait until they have heard a whole series of inter-related appeals before issuing any decisions. This policy helps to obviate the appearance of "predetermination" to a large degree, but can lead to yet a further difficulty in instances where planning needs cannot await the due course of Board procedure. For example, in rapidly changing or expanding districts, local authorities may find it necessary to introduce variations to a proposed scheme while decisions on the original scheme remain outstanding. Some people may have their original appeals met by the terms of variation: others may desire to appeal on fresh grounds; others may be prepared to regard a variation as a compromise—not affording them quite what they seek, but nevertheless sufficient to permit them to withdraw from the planning arena without incurring further expense

One further difficulty warrants mentioning. Regrettably, planning schemes are not always promoted by those responsible with the degree of expertise and cohesion that is ideally required. This situation seems to arise partly through the multiplicity of local authorities in main urban centres; partly through reluctance or financial inability in some quarters to employ town planners sufficiently qualified to serve local body needs; partly through lack of knowledge and experience of councillors themselves; and partly through the incapacity to go beyond the interests or confines of the particular borough or district concerned.

One can imagine that all this renders the Boards' overall task a trifle awkward and perhaps even frustrating. For, it is submitted, an Appeal Board is not permitted by the Act to implement changes to a scheme beyond the scope of the issues raised in the specific cases brought before it. To do otherwise would mean exceeding the jurisdiction conferred by the Act, by virtually re-writing a scheme instead of merely amending it.

Yet, despite all, the significance of the role of the Appeal Boards in statutory planning cannot be stressed too highly. In particular, their judgments are a constant authoritative guide to local authorities and others associated with planning in this country. It is to be hoped, therefore, that more and more competent lawyers will be encouraged to enter this hitherto rather exclusive field, to ensure that the general standard of presentation of Appeal Board cases is commensurate with the status of these important tribunals.

R. J. BOLLARD.

THE NECESSITY OF SIMPLICITY

The annual Kennedy Elliott Memorial Lecture was delivered to the Medico-Legal Society of Wellington by Professor A. J. Alldred, Professor of Orthopaedic Surgery at the University of Otago.

Some of us whose practice of medicine has been in a field where there is much contact with the legal profession have been forced to come to grips with the practice of law in a superficial and rather limited way, without the advantage of getting the overall picture that results from a formal legal education. In the same way, the young lawyer practising in the field of accidents and compensation must have some knowledge of medical terms to be effective, especially their meaning and implications—again, without the advantage of a formal medical education. Certain types of medicine, for example forensic medicine, are a combination of law and medicine, and in my time there was in the medical course the subject of medical jurisprudence. This gave me an insight into how the law could affect us as doctors and spelled out clearly the legal rights under which we practise, but it gave no training in expressing ourselves clearly or in communication with the legal profession. The barrister, on the other hand, having had formal training in the taking and presentation of evidence, has an advantage. The young doctor placed in the unfamiliar surroundings of the Court has great difficulty with evidence, floundering in his own verbosity and technical jargonese and proving easy meat for the skilled barrister—largely, I

might say, because he fails to make himself clearly understood. My early experience in Court began when I found myself as a junior house surgeon taken into the Supreme Court as an expert witness. A man had hired a taxi and when taken to his destination did not have sufficient funds to pay his fare. An altercation developed, ending in the driver hitting the passenger over the head with the starting handle. I had been called out of bed to restore the anatomy of the fare's skull, and in due course had to make a statement to the police which led to my appearance in Court. Here I was cross-examined by the late J. P. Ward, who you will remember was murdered when he opend a parcel containing a time bomb. Among other things I had said in my statement that the man had received moderately severe head injuries, but when asked to define this I realised for the first time my failure to communicate. I had used words which looked important in a typed document and sounded well when the statement was read back to me, but which in fact conveyed no clarity to the Court as there was no yardstick by which to judge it. A sparrow's egg and a penguin's egg look very much the same when photographed, until one puts a ruler in the picture.

People have sometimes asked me what was my most humorous experience in the Court. I think it was during the hearing of the case of a man who as the result of an accident had some real physical disability but who in an attempt to convince me that there was something wrong with him was clearly exaggerating his physical state. The barrister cross-examining me had only to ask me did I think that the man was exaggerating at all and I would have answered "Yes". Instead he said, did I think there was an element of traumatic neurasthenia? Now I am a great believer in sticking to my own field and my answer was that I could not express any opinion about this. This was because I felt that what I understood the words to mean and what he believed them to mean might be different. He then said, "But surely, Mr Alldred, you are familiar with this textbook—it's written by So-and-so", and he handed me the book and to my discomfiture I had never heard of it, and I said so. He said, warming to his task, "But surely you have heard of this book? After all, it is used by all medical students". And I replied that it certainly had not been used by myself as a student and I asked (thinking that it must be very recent) when it was published. He said "See for yourself", handing me the book. To my amazement it was published in 1910 or thereabouts and I was able to say, much to the amusement of his Honour and opposing counsel, that in my opinion views about such matters had drastically changed since the Boer War.

I have much admired the patience of our Judges who after a period of clumsy questioning by a poorly prepared barrister, or a period of evasive replies by an even more poorly prepared doctor, have with a few words of kindness and a clear and carefully thought question or two achieved more than was contained in five pages of evidence. My experience in Court has taught me that to be a good witness—and that is a witness who is helpful to the Court—one must be well prepared. I have written reports, taking great pains to express myself in simple terms, only to find that in preparation and discussion with the barrister who called me there are many ways of interpreting words, and that without discussion to reach real understanding we would have been at cross purposes in the Court and he would not really have known my true feelings, which cannot be completely expressed in the written word. To take a common example, the words "degenerative changes": these words are frequently used in medical reports, and I have often been asked in Court "Will this lead to degenerative changes?" Are we indulging in a form of intellectual snobbery to convince the jury that we understand each other? Am I, the doctor, on the one hand pretending that the complicated physico-chemical processes which go on in a joint causing it to hurt and to lose movement are the same as the seizing process in an internal combustion engine running with a cracked piston and losing oil? It is true that we often use this simile to convince the patient that we really understand the process for no patient would have faith in a doctor who didn't understand it. Or are you, the lawyer, using this phrase like a conditioned reflex knowing that when thrown at a doctor in Court he is unlikely to react vigorously? If he doesn't really understand it himself, and after years of discussion hasn't got you to understand it, he is not likely to try to explain it to the Court but to answer "Yes", which you have found leads to more compensation for your client. If these words are no more specific than the term "motor accident" should we use them? If we do, should we qualify them? On the one hand they could mean the natural process of ageing so that we could say of a joint that it will wear out a little faster, getting a few grey hairs and causing discomfort, but at the same time accepting its limitations and adjusting to them. On the other, they could mean that the patient has a hip joint which rapidly becomes so painful, stiff and deformed that the

patient becomes crippled, unable to work and in constant pain day or night. Even the word "pain" is difficult to interpret. Does it mean that agonising physical thing which one feels with the dentist's drill or the obstructed intestine, or that searing of the soul which accompanies guilt or shame, or the sense of impending doom which goes with a massive coronary attack?

We as doctors have a special responsibility to use simple terms. One of my former chiefs once said that there were only two technical terms which could not be replaced in medical reports: "right" and "left". In my view the simpler the terms the clearer is the meaning and the more convincing is the document. On the other hand, without a Court hearing with the advantages of discussion and preparation, the legal profession has a special responsibility to see that it does not interpret documents wrongly from misunderstanding of words.

In a recent speech to the Combined Australian and New Zealand Orthopaedic Associations at Queenstown Sir Richard Wild, in his capacity as Administrator of New Zealand, spoke of the qualities which impressed him as a Judge in interpreting witnesses. The Court has, of course, the opportunity of using many yardsticks by which to judge: appearance, bearing, speech, simplicity or otherwise of language, and particularly answers to questions. Some people write convincingly and well and give the clear impression that there can be no tenable alternative to their own view, yet the same person when seen and cross-examined may be very unconvincing. It is my hope that the important decisions which will have to be made by those administering the Accident Compensation legislation will not be made on documents alone, but that every opportunity will be taken to hear evidence and thus ensure understanding.

In many cases the important issue will be the patient's future outlook—that informed guessing game that doctors call "prognosis." If one follows cases up one soon learns the vagaries of this business. How different can be the outcome of the same physical situation in two patients of differing outlook. Here, I am much more convinced by the man who says he does not know, and is prepared to discuss possibilities and probabilities rather than certainties. In some ways I will be sorry to see the era of the Courts go. I will miss the cut and thrust of the witness box, the gentlemanliness, the spontaneous quip, the reference to literature; the humanity, tolerance and good humour which the legal profession has taught me. On the other hand I shall not miss the time-wasting delay in hearing cases, the on-again off-again system of hearings which seems to have developed in recent years; the cold draughty buildings with inadequate facilities for comfort; the discomfort of hearing oneself dredge up the gory details of an accident, knowing that it is medically bad for the patient but without which the monetary reward for that patient is inadequate. These in spite of the very great consideration that I have personally been granted by the Courts. I trust that the facilities of modern science—the tape recorder, the videotape and photography—will ease our task and make the administration of justice smoother and speedier through better understanding.

If you visit the beautiful island of Formosa you will hear the old Chinese proverb, "Keep the mountain green". They are saying new blood is needed for all life, but tempered with the old. Let us not neglect the new but at the same time not discard the good of the old simply because it is old. Only thus will we find the truth, and truth is justice. It is justice for the patient or client who is often not in a position to seek it for himself that led men like Kennedy Elliott to interest himself in the law. Anything that we can do to better our communication and understanding honours his memory.

Looking back—Motorists whose over-indulgence during the Christmas festivities brought them into unlooked for conversation with traffic officers might take some comfort from a sense of history.

The following article appeared in "The Press" (Christchurch) 70 years ago:

"The motorist is ubiquitous; so are his enemies. In England the motorist is the victim of the country policeman; in Morocco the populace stone him, declaring that conveyances good enough for the Sultan's father and grandfather should be good enough for the Sultan and all visitors to Morocco."

"In Philadelphia, according to 'Motoring Illustrated', they have a new form of police terror. A special brand of automobile policeman has been told off to trap motorists.

"Their costume consists of blue knickerbockers and blouse, grey woollen stockings, and light flannel shirts. The men are mounted on bicycles and armed with stop watches. M. Lepine, the Prefect of the Paris police, has told off a sergeant for automobile duty.

"The sergeant will be provided with an automobile, and it is his duty to give chase to anyone who is driving a car at an excessive rate of speed. The automobile for this duty is a very large one, and is capable of attaining a speed of 50 m.p.h."

CORRESPONDENCE

Probate and Administration

Sir,

Mr Boock makes well-founded criticism of the compulsory common form of affidavit in support of the motion for probate. A further point that could be considered is whether it makes any sense to speak, as paragraph 3 requires, of the Registry nearest to the place where the deceased 'was resident *or was domiciled*'. Would not his domicile be New Zealand, Queensland, Idaho, or some other state? If it is necessary, the question of domicile could be dealt with in a separate paragraph, but it does not seem to be of any assistance on the choice of Registry.

It is clearly of benefit in the administration of probate, and other matters, if applications are uniform. They become easier to check, and can be dealt with more rapidly. However, it seems unfair that solicitors, deponents, and counsel should be forced to use such indifferent forms of expression.

Perhaps the *Journal* could publish again the address of the relevant committee to which practitioners could send suggestions for the improvement of these mandatory forms.

Yours faithfully,
ANTHONY P. MOLLOY, Auckland.

[It has been suggested to us that the usual procedure of making a suggestion to the Rules Committee through the practitioner's District Law Society be followed rather than an *ad hoc* direct approach.—Ed.]

Exchange of Medical Reports

Sir,

Mr R. A. Houston by his article "Exchange of Medical Reports" [1973] N.Z.L.J. 131, in suggesting that medical reports in personal injury claims should normally be exchanged to aid the reaching of agreement, says "it should equally be the duty of both counsel . . . to ensure that the plaintiff receives the fair and just compensation to which his injuries entitle him."

The duty of counsel is nothing of the kind. Counsel for the plaintiff should do his best to obtain the most compensation which he can, well above that which is "fair and just," while counsel for the defendant must keep the damages as low as possible. If the exchange of medical reports will not assist either counsel in his task he should not co-operate in such an exchange. Surely s. 100 of the Judicature Act 1908 is enacted solely to cover cases where the Plaintiff refuses to permit himself to be examined. I suggest that it cannot be construed to force some modification upon the longstanding traditions of the Bar to put the interests of the client first above all. There is too much talk about one's duty to the Court — I doubt whether there is any duty to the Court except not to mislead it and not to be rude to it.

Mr Houston on more than one occasion in his article is careful to exclude the issue of liability from his general theses that everything should be done to bring about agreement. But why exclude liability? If medical reports are to be exchanged, why not briefs of evidence? The measure of damages is surely as important an issue as that of liability in any personal injury claim and to depart from the adversary rules in one respect only is illogical. Mr Houston's thesis would be eminently reasonable under an investigative system of justice but until we have such a system whether or not we agree to exchange medical reports should surely be decided simply upon the basis of whether or not such an exchange will be to the good of our own client.

Yours faithfully,
JOHN BURN, Christchurch.

re Rhodes v. Rhodes

Sir,

In view of the importance and practical impact of the judgment of Mr Justice Wilson in *Rhodes* v. *Rhodes* (as reported in [1973] N.Z.L.J. 76) I thought your readers may be interested in another judgment upon the same topic. I need not set out in full the text of the report but under the heading Husband and Wife — Matrimonial Proceeding, Supreme Court, Mr Justice Wilson is reported as having decided in *Rhodes* v. *Rhodes* that orders for capital sum, for permanent maintenance, and for security for such maintenance under ss. 40, 41 and 45 of the Matrimonial Proceedings Act 1963 could not be made earlier than the making of the Decree Absolute in Divorce.

As I have already indicated this is a judgment which could affect a great number of applicants in matrimonial matters.

This same argument was earlier advanced in an unreported case *Hebditch* v. *Hebditch* which was heard before The Chief Justice, in the Hamilton Supreme Court on the 6th day of September 1967. The Chief Justice rejected such submissions and I reproduce below the relevant portion of his oral judgment.

"At the beginning of his submissions counsel for the respondent husband took the preliminary point that, whereas the decree made was one of separation, the jurisdiction of the Court under s. 40 arises only 'on or at any time after the making of any decree of divorce' and, under s. 41, only 'or at any time after any decree of divorce'. While not overlooking the provision of s. 48 of the Act, Mr Houston pointed to s. 39 which empowers the Court 'at any time before the making of a decree absolute' to order interim maintenance. His point therefore was that, when ss. 39, 40 and 41 are read together, it follows that it is only interim maintenance that a wife is entitled to have before a decree absolute or, putting that another way, that the orders sought in this case for permanent maintenance and a capital sum can only be made at or after the marriage is brought to an end by a decree absolute. The contention thus was that the Court has no jurisdiction here where the marriage is still subsisting to make the orders that are sought. After the luncheon adjournment Mr Houston has said that he does not press that submission because it is the desire of both parties that the Court should determine this dispute. However, because I did have an opportunity of considering the point myself during the luncheon adjournment and have reached a view upon it, I will express that view. I think that the point taken is unsound because it does not give proper weight to the provisions of s. 48 which are as follows:

" 'The provisions of this part of this Act, as far as they are applicable and with any necessary modifications, shall apply with respect to a petition for and decree of nullity separation, restitution of conjugal rights, and dissolution of a voidable marriage, as they apply with respect to a petition for and a decree of divorce'.

"Now in my opinion, for the reason that there is nothing in either s. 40 or s. 41 expressly to originate the Court's jurisdiction only on the making of the decree absolute, there is nothing in either of those sections that makes s. 48 inapplicable. I therefore think s. 48 does apply to enable the Court to exercise the powers in both s. 40 and s. 41 on or after a decree of separation just as on or after a decree of divorce."

Hebditch v. *Hebditch* was a case where capital sum, permanent maintenance and security for maintenance were sought subsequent to a decree of separation but no divorce proceedings were pending.

It appears that in view of these two conflicting judgments upon this important practical point that it will now require resolution either by intervention of the Legislature or the coercive authority of the Court of Appeal.

Yours faithfully,

R. A. HOUSTON, Hamilton.

THE BABBACOMBE MURDER

It seems that the pop world, 87 years after the event, is cashing in on the queer case of John Lee of Babbacombe, "the man they could not hang", and a group is serving up his strange story in folksy style on record. To whet your appetite here is the crucial moment of the drama

"My feet are on the trapdoor
I answer 'Drop away'.
The trapdoor hardly moved at all;
I hear the hangman say:
'It's funny. I tried it yesterday' ".

In 1884 Lee, then twenty years old, was butler, footman, handyman, to a spinster lady Miss Emma Ann Keyse, aged sixty-eight, who lived in a house near the beach at Babbacombe. His pay was half-a-crown a week. There were also two maids, sisters, Jane and Elizabeth Neck, who had been in the lady's service for over thirty-five years. The cook, a young woman called Elizabeth Harris, was Lee's half-sister. Miss Keyse, a deeply religious woman, had in her youth been a maid of honour to Queen Victoria.

Lee was engaged to a Torquay girl, but on his pay saw little prospect of getting married. Nor did he get on particularly well with his mistress. Things he said rashly about her were to tell

heavily against him later on. When he told the cook he might leave and she said she doubted whether their mistress would give him a good character, he replied: "If she doesn't, I'll leave the place in ashes". When his wages were reduced to two shillings a week he wept and said he would have his revenge. He said she was always complaining and, if he found her on the cliff top when no one else was by, he would push her over.

Miss Keyse used to sit up late. On 14 November, the day closed with family prayers at 11 p.m. At twenty to one she was still reading in the dining room when Jane Neck went to bed. Later she herself went to her room, partly undressed, put on a dressing gown and drank some cocoa which had been left for her.

Between three and four the cook was awakened by a smell of fire. Smoke was everywhere. Rousing the two maids, she rushed downstairs. Lee, partly dressed was emerging from the pantry, where he slept. In the hall was a pool of blood. In the dining room, which was on fire, was the corpse of Miss Keyse with her throat cut and her head battered. Round her was a great deal of paper soaked with paraffin.

The circumstantial evidence against Lee was strong. On his clothes were bloodstains and paraffin. In his pantry were found a blood-stained gardening knife and an empty paraffin can which had been full the previous day. There was also blood on a chopper, which he had kept in an outhouse.

Committed for trial on a coroner's warrant, he entered the dock at the Exeter Assizes on 2 February 1885. The hearing, during which his half-sister was the most formidable witness against him, lasted three days. Lee himself remained extraordinarily calm and detached.

No Hanging

In the end the jury retired for only half an hour before announcing a verdict of guilty. In passing sentence Mr Justice Manisty said that the evidence was so clear that he could entertain no doubt. Commenting on Lee's calmness he said: "So collected a demeanour is not impossible to a man who has committed so terrible a crime". Discarding his self-control for a moment, the prisoner clutched the dock rail and cried in a half-choked voice: "Please, my Lord, the reason I am so calm is because I have trusted to my God, and my God knows I am innocent".

The day fixed for the execution was 23 February. The day before, Berry, the executioner tested the drop, and a sack of sand of 140 lb. weight, corresponding to Lee's, duly crashed through the opening platform when the lever was pulled. On the 21st and 22nd there was heavy rain but the morning of the 23rd was dry and cold.

Just before 8 o'clock Lee was conducted to the scaffold, pale but walking with complete firmness and toed the chalk mark on the platform. The white cap was put over his head; the rope was adjusted; Berry pulled the lever. Nothing moved. The warders stamped on the platform but still it remained fixed. Eventually Lee was removed to a far part of the scaffold while Berry and his assistants overhauled the mechanism. Again the prisoner was placed in position. Again there was a failure, and more stamping failed to shift the drop. This time Lee, now walking with the face of a dead man, was taken to a waiting room while further tests and adjustments were made. A third time Lee was placed on the drop. Yet again it failed to work. The execution was adjourned and he was taken back to his cell.

The Reason Why

The Under Sheriff caught the first train to London for an urgent conference with Sir William Harcourt, the Home Secretary, who in the circumstances advised the Queen to grant a reprieve. The sentence was commuted to life imprisonment but Lee was finally released in 1907. He married, had two children, emigrated to America and died there in the early nineteen thirties. He protested his innocence to the last.

There remained the puzzle why the drop had three times refused to work. Some attributed it to Divine intervention. Indeed, although public opinion had been vociferously against Lee up to and after his trial, many now veered to his side. Lee himself said that on the night before the day fixed he had dreamt that he would not die at the scaffold.

The most generally accepted theory was that the rain had warped the new timber of the drop and that Lee's weight had jammed the edges. A sarcastic correspondent to *The Times* suggested that it should be announced in future that executions would take place "weather permitting".

A more subtle explanation of the affair was that the prison carpenter, who believed Lee innocent, had bevelled the top edge of one of the flaps of the drop and managed to convey a message to him to step on the left flap first and keep his weight there. Thus the left flap slid below the other and the bevel held it in position. It is just possible. PATRICK PURPOOLE in the *New Law Journal.*

Victory—In Britain, the Government has decided to abolish the Public Trustee's Office.