N.Z.L.R. 283. This case concerned an application under s. 5 of the Matrimonial Property Act 1963 to the effect that a deceased wife's estate be adjudged beneficially entitled to a half share of the couple's joint holdings in a flat-owning company. The wife had died four days before her husband and the issue between their respective estates was whether the couple's joint interest in that company amounted to an expressed common intention such as would, by s. 6 (2) of the Act, exclude the operation of the Magistrate's discretionary powers under s. 5 (3). Tompkins J. held that s. 6 (2) does not apply unless the common intention is applicable to the circumstances existing when the Court is required to exercise its discretion. He did not think the parties' expressed intention in putting the flat shares in their joint names was applicable to the situation where they had both died nearly at the same time, and so he gave judgment for the applicant.

Maintenance Orders

In *Hagglow* v. *Hagglow* [1969] N.Z.L.R. 339, Richmond J., in dismissing an appeal from a decision of the Magistrate's Court made under s. 39 of the Destitute Persons Act 1910, said that the jurisdiction of that Court to vary a maintenance order depends on a change of circumstances having been established. Any variation which the Magistrate makes must be justified with reference to that change in circumstances. In this case, while the greater cost of living justified an increase in maintenance, the Court had also to take into account the fact that the payments were being made not by the husband but by his parents. As it was apparent that the Magistrate had made his varying order with reference to these circumstances, His Honour was not prepared to alter that order.

I. A. Muir

LAND LAW

Caveat

"The need for a change in the law, tentatively referred to by Richmond J. at 357, is surely clear and compelling. The registered proprietor should, it is submitted, have that protection of the caveat procedure which he has hitherto been thought to have." (F. M. Brookfield (1969) 3 N.Z.U.L.R. 454).

The comment relates to *Re an Application by Liquidator of Haupiri Courts Limited (No. 2)* [1969] N.Z.L.R. 353, which resolved the doubt expressed *per curiam* in *Re an Application by Liquidator of Haupiri Courts Limited* [1969] N.Z.L.R. 348, whether section 137 of the Land Transfer Act 1952 created a right in the registered proprietor to caveat his own interest.

In *Re an Application by Liquidator of Haupiri Courts Limited* (*supra*), in which the Supreme Court held that a liquidator of a company as such has no caveatable interest in his company's land until it is vested in him by the court, Richmond J. referred to the view expressed by E. C. Adams in *The Land Transfer Act 1952* (1958) 298 that a registered proprietor may caveat his own interest under section 137 of the Land Transfer Act 1952. He stated that the general purposes of the section as described by the Privy Council in *Miller* v. *Minister*

of Mines [1963] N.Z.L.R. 560, 569, rather suggested that the section should be interpreted as conferring a caveatable interest only upon persons who wished to put forward some claim which was not already registered: "If the registered proprietor did have such a right however a further question arises as to how far he is obliged to set out in the caveat the circumstances giving rise to apprehension on his part that some irregular dealing with his title may eventuate."

The doubt was resolved against the registered proprietor in *Re an Application by Haupiri Courts Limited No. 2* (*supra*) in which it was held that a registered proprietor could not lodge a caveat against dealings under the Land Transfer Act 1952 merely because he is the registered proprietor. He must go further and establish some set of circumstances over and above his status as registered proprietor, which affirmatively give rise to a distinct interest in the land. Thus where a registered proprietor alleges a series of invalid acts by a registered mortagagee, he is doing so by virtue of his existing ownership and not by some new interest in the land, brought into existence by the act of the mortgagee. The registered proprietor in these circumstances is not entitled to lodge a caveat to prevent the mortgagee from so proceeding. (*Re Grand Trunk Pacific Development Co. Ltd.* (1912) 7 D.L.R. 611, 613.)

It has been pointed out by F. M. Brookfield that this decision in effect withdraws "a convenient and (in the light of *Frazer* v. *Walker* [1967] N.Z.L.R. 1069 J.C.) even essential protection to which registered proprietors had been widely thought entitled". Even though it is true that the registered proprietor may be able to persuade the District Land Registrar to lodge a caveat under s. 211 (d) of the Land Transfer Act "for the prevention of any fraud or improper dealing" or he may obtain an interim injunction against the person seeking to register (see for example *Haupiri Courts Limited* v. *Piako Construction Ltd.* [1969] N.Z.L.R. 401), nevertheless "neither of these measures may in the particular circumstances of the case be able to protect him from an impending registration of which he may have only the shortest notice and which if effected in good faith will generally cure the defects in the improper dealing and confer an indefeasible title: *Frazer* v. *Walker* (*supra*) and *Mardon* v. *Holloway* [1967] N.Z.L.R. 372."

The case of *Fleming* v. *District Land Registrar for Canterbury and Another* [1969] N.Z.L.R. 430 also questioned the right to caveat under the Land Transfer Act 1952: whether the District Land Registrar could sustain a caveat entered against the land of the applicant "to prevent registration of improper dealings . . . in contravention of s. 38 of the Town and Country Planning Act 1953."

The applicant's solicitors requested the Registrar to remove the caveat or to state the grounds for his refusal pursuant to s. 216 of the Land Transfer Act. The Registrar declined to remove the caveat on the grounds that he had official notice from the Council that the proposed subdivisions of the applicant were "detrimental works" within the meaning of the Town and Country Planning Act 1953 and that according to the decision in the recent case of *Paparua County* v. *District Land Registrar* [1968] N.Z.L.R. 1017 he was under a duty to enter and maintain the caveat.

The Court held that in considering whether a subdivision of land was a detrimental work, the Council must have regard to the permitted uses of the land in accordance with its district scheme. If the land when

subdivided conformed to such uses, then the Council could not prohibit the subdivision on the ground that it was contrary to the provisions of the district scheme. It was held further than the Council had no right to prohibit the subdivision as the subdivision did not require its approval either by statute or by some provision of the Council's scheme. Accordingly the District Land Registrar's caveat entered against the land, could not be sustained and should be removed.

Indefeasibility of Title

A further development concerning the Land Transfer Act 1952 is to be found in *McCrae* v. *Wheeler* [1969] N.Z.L.R. 333. The facts are as follows: A purchaser of land under the Land Transfer Act with knowledge of an unregistered grant of right of way over the land binding the vendor, his heirs and assigns so conducted his negotiations that with the consent of the vendor and the grantee of the right of way, he procured registration of the transfer of the property to himself without any reservation of the right of way, but on the understanding that he would take the necessary steps to secure it to the grantee. On registration of the transfer he repudiated his undertakings and claimed that he had an indefeasible title to the land freed from the right of way.

Woodhouse J. rejected entirely McCrae's assertion that when he asked Wheeler what access Wheeler had, the latter replied that he did not have an access. Woodhouse J. continued: "The purpose of the Land Transfer Act is not to destroy conscientious obligations entered into with respect to land, but to simplify and facilitate dealings with land, by the rule that in general a title established by the Act is indefeasible . . . The easement so created binds not only the original grantors, but their heirs and assigns (*Wellington City Corporation v. Public Trustee* [1921] N.Z.L.R. 1086, 1096-7)".

The issue therefore was whether the indefeasible principle could be relied upon by McCrae to release him from the obligations created in the old deed and his undertakings when he got title. McCrae relied upon s. 182 of the Land Transfer Act which makes it plain that fraud is not to be imputed by reason merely of knowledge of an unregistered interest. However it was well settled that fraud within the meaning of s. 182 means actual moral fraud amounting in the circumstances to dishonest dealing (*Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1926] A.C. 101, 106-7; N.Z.P.C.C. 267, 272) and the evidence established conclusively that McCrae's attitude towards, and knowledge of, the rights claimed by Wheeler went far beyond bare knowledge of an unregistered easement. Woodhouse J. relied on the statement of Prendergast C.J. in *Merrie* v. *McKay* (1897) 16 N.Z.L.R. 124 (which statement received approval by the Court of Appeal in *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* (*supra*)) "If the defendant acquired the title intending to carry out the agreement with the plaintiff there was no fraud then; the fraud is in now repudiating the agreement and in endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights under the agreement . . . "

Rights of Way

The case of *C. Hunton Ltd.* v. *Swire and Another* [1969] N.Z.L.R. 232 which dealt with an application under the Property Law Act 1952 for the extinguishing of rights of way over Land Transfer land in the adverse possession of the plaintiffs, has given rise to recent criticism.

The plaintiffs in the case relied on two separate grounds based on s. 127 (1) (a) of the Property Law Act 1952.

> (i) That by reason of any change in the user of any land to which the easements are annexed, the easements ought to be deemed obsolete; and
> (ii) That the continued existence of the easements would impede the reasonable user of the servient tenement without securing periodical benefit to the persons entitled to the easements.

Wilson J. held for the plaintiffs on the first ground. He considered that in the context of s. 127 (1) (a) "obsolete" meant no longer relevant to the circumstances presently obtaining and that in the present case the rights of way had in fact become obsolete in this sense; and in terms of s. 127 (1) (a) "ought to be deemed obsolete" by reason of a change of user of the dominant tenements against the time when the rights of way were created (1859) and the time of hearing the application.

One commentator, F. M. Brookfield, has suggested that "it is difficult to see why the test of change of user should relate to the user *contemplated* (by the subdivider apparently) in respect of the individual seven dominant lots instead of the original *actual* user of the two lots . . . for it was only in respect of these two lots that the matter was in issue and it is surely a change in the *actual* user of them with which s. 127 (1) (a) is concerned." If this is correct then the relevant evidence before the Judge seems to have been slight indeed. (The plaintiffs might well have succeeded on the second ground relied upon and not considered by Wilson J.).

Fencing Act 1908

The Supreme Court decision of *Williams* v. *Murdoch* [1968] N.Z.L.R. 1191 has given rise to recent criticism. Section 26A of the Fencing Act 1908 empowers Magistrates to order the removal or trimming of trees injuriously affecting the use of neighbouring land used for residential purposes. McCarthy S.M. in *West* v. *Michael* (1960) 10 M.C.D. 51 concluded that the lack of remedy for intereference with a view was one of the mischiefs at which the section was aimed. He considered s. 26A to be but an extension of the old legal maxim *sic utere tuo ut alienum non laedas.*

The Supreme Court in *Williams* v. *Murdoch* (*supra*) (on appeal from a Magistrate who had made an order for removal of trees obstructing a view) has now narrowed the wide angle view of *West* v. *Michael* (*supra*). The primary question on appeal was whether the trees caused undue interference with the reasonable enjoyment of the land used for residential purposes, so that the interference could be said to be an annoyance to the respondent. Henry J. stated that the sole task was to determine whether or not the proved facts came within the words of the statute and concluded that it was not a view or prospect which was the subject-matter of the legislation at all. If it had been, he averred, wider legislation than that specifying only trees could have been expected, as a view does not depend solely on the presence or absence or height of trees.

It has been doubted (see comment in [1969] N.Z.L.J. 54) that the existence or absence of view does not interfere with the enjoyment of premises in respect of their residential purposes. The writer submits that the meaning of the term 'residential purposes' may not be quite so narrow as to support the severance of the notion of 'view' from the

notion of 'reasonable enjoyment' of a building used for 'residential purposes', where all the expressions have to be construed together. The Town and Country Planning law affords no clue as to the wider meaning of residential purposes and the phrase 'reasonable enjoyment' has never been satisfactorily defined.

One further case which deals with comparatively minor issues is *Payne* v. *Payne* [1969] N.Z.L.R. 509. This case raised the question of the liabilities of adjoining owners to share the cost of fencing under s. 11 (1) and (2) of the Fencing Act 1908. Macarthur J. held that where the notice served related to the whole length of the common boundary, but the fence erected was not, as far as practicable, continuous throughout its length, the adjoining occupier was not liable to contribute. It was held also that where no cross notice is given within the prescribed time, a statutory contract to fence in terms of the notice arises (*Beale* v. *Pearce* (1910) 29 N.Z.L.R. 414) and no liability arises unless these terms are performed. "Where eight chains of fence out of a total of sixty-two chains do not conform, it cannot be said that this is a trifling variation and that the contract has been substantially performed." (*ibid.*, 512.)

Legislation

Recent developments in legislation relate to amendments of the existing law. The Water and Soil Conservation Amendment Act 1969 amends the principal Act by providing (s. 24A) for the transfer of any right in respect of natural water granted or authorised under ss. 21 or 23, subject to any terms and conditions specified in the right, by the holder of the right, or his executor or administrator, to any succeeding owner or occupier of land in respect of which the right is granted or authorised. Section 24A (2) provides for notice in writing of any such transfer without which the transfer shall have no effect.

The Maori Purposes Act 1969 provides amendments to both the Maori Trustee Act 1953 and the Maori Affairs Act 1953. The Act makes allowance under s. 49 (2) of the Maori Trustee Act 1953 for a memorial of charge to be registered against the title to land by the District Land Registrar or Registrar of Deeds, and when so registered, the memorial of charge shall have the same force and effect as if it were a valid mortgage to the Maori Trustee of all the land therein described to secure the repayment of the principal moneys and the payment of interest; and the power of sale and all other powers expressed by the Land Transfer Act 1952 and the Property Law Act 1952 as the case may be, in respect of mortgages shall be implied in the memorial. The main amendment to the Maori Affairs Amendment Act 1967 appears to be the providing for leases of Maori land not to exceed 42 years instead of 50 years.

A further development has been the Land Settlement Promotion and Land Acquisition Amendment Act 1969 which came into force on 1 November 1969 and amends Part II A of the 1968 Amendment Act by in effect extending the class of transactions to which Part II A applies, to land of one acre or over which is not included in any proposed or operative district scheme; any land being or forming part of any island (except the North Island and the South Island) which is less than 100 miles from the nearest part of the coast of the North Island or the South Island; any land forming part of any island of the Chatham Islands. Land under s. 35H (3) (a) of the principal Act,

which deals with the provisos to be considered where the purchaser or lessee is not a New Zealand citizen or is an overseas corporation, is similarly extended.

L. J. Turner

TORTS

Negligence

(1) *Duty of Care*

In *Dorset Yacht Co. Ltd.* v. *Home Office* [1969] 2 W.L.R. 1024 the English Court of Appeal held that the Home Office owed a general duty of care to neighbouring persons which on proof of negligence gave rise to liability for damages. Accordingly the defendant was held liable for damage done by the inmates of an open borstal who escaped.

The same court in *Grange Motors Ltd.* v. *Spencer* [1969] 1 W.L.R. 53 held that a road user who acts upon a signal given by some other road user or bystander has a duty to do so with reasonable care. Likewise the person giving the signal owes a duty of care to those persons who may act upon it.

In *Driver* v. *William Willett (Contractors) Ltd.* [1969] 2 All E.R. 665 Ross J. held that safety consultants owe a duty of care to that class of persons whom the consultants must reasonably foresee may be injured as a result of their failure to give proper advice.

In *Ross* v. *McCarthy* [1969] N.Z.L.R. 691 Richmond J. applied *Searle* v. *Wallbank* [1947] A.C. 341 in holding that there is no duty owed by a land owner to users of the highway to take reasonable care to prevent his animals not known to be dangerous from straying on to the highway.

In *Richards* v. *State of Victoria* [1969] V.R. 136 the Full Court of Victoria held that a teacher is under "a duty to take reasonable care to protect a pupil from reasonably foreseeable risk of injury". The court however stressed that this duty of care is not dependant upon the test of foreseeability of harm set out in *Donaghue* v. *Stevenson* [1932] A.C. 562 but exists prior to and independent of foreseeability in this sense and stems from the teacher-pupil relationship itself.

In *British Celenese Ltd.* v. *A. H. Hunt Ltd.* [1969] 1 W.L.R. 959 Lawton J. considered the following events: metal foil stored on the defendant's land blew on to an electricity substation, and the resultant failure in the supply of power to the plaintiff's factory 150 yards away caused delays in production and loss of profits. On these facts the judge held the defendant owed a duty of care to prevent the metal foil being blown about in such a way as to foul the substation.

(2) *Remoteness of Damage*

In *British Celanese Ltd.* v. *A. H. Hunt Ltd.* (*supra*) it was argued that the losses sustained by the plaintiff were indirect and as such not susceptible to liability in damages. *Weller v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569 cited in support of this proposition was distinguished by Lawton J. on the grounds that the concept of directness of damage as applied in that case meant not merely "immediate damage" but damage resulting from "the operation of the laws of nature without human intervention".