because the wife had left the matrimonial home and then instituted proceedings which had led to a prolonged hearing, and secondly, that she had not gone far enough in the attempts made to effect a reconciliation.

White J. allowed the appeal from the Magistrate's decision indicating that undue weight had been given to the conduct of the wife, and insufficient weight to the concept of matrimonial breakdown. On appeal reference to the Domestic Proceedings Act, Woodhouse J., who delivered the judgment of the Court, said that, 479, "its object is to define existing situations and so the issue is not the isolation of responsibility for the causes of domestic trouble but an estimation of their effects." He continued to state that a Magistrate does not have an unfettered discretion to refuse a separation order when the statutory grounds have been established:

> The jurisdiction to make an order under para. (a) does not arise at all until there has been consideration and proof of such intangibles as 'serious disharmony', the unreasonableness of requiring a resumption of cohabitation, and the improbability of reconciliation. Each element necessarily involves some initial exercise of discretion. But once an affirmative assessment has been made concerning each of those criteria and the jurisdiction to make an order has thereby been established then the area left within which the residual discretion might operate will have largely disappeared and the cases where it could or should be exercised against the application will be exceptional (479).

Naturally enough Woodhouse J. refused to specify or categorise any factors which would be taken into account in exercising the discretion, as each case will involve "individual considerations". But he was satisfied that the Magistrate had been influenced by wrong considerations.

D. M. Shirley

LAND LAW

Natural rights of support

The question as to whether or not a natural right of support extends to things placed upon the land came before the Court of Appeal in the case of *Bognuda* v. *Upton and Shearer Ltd.* [1972] N.Z.L.R. 741. The facts of that case were that the appellant had a wall on the boundary of his land. Excavation was done on the adjoining land, adjacent to the wall. This excavation caused a subsidence in the appellant's land and damage to the wall.

The Court of Appeal upheld Quilliam J's ruling that there was no right of support for the structure artificially placed upon the land, where without the weight of such a structure there would have been no subsidence. However it was established that the respondents had been negligent in the way in which they excavated. The Court of Appeal unanimously decided that although the appellant had no right of action with regard to damage to the wall, under the action for withdrawal of support, an action did lie against the respondents in negligence.

The Court held that the duty of care principle laid down by Atkin L. J. in *Donoghue* v. *Stevenson* [1932] A.C. 562, applied in the case

of excavations by adjoining landowners. It adopted the approach of the House of Lords in *Dorset Yacht Co.* v. *Home Office* [1970] A.C. 1004 that in cases where negligence is alleged an action in negligence should not be barred by the existence of some other cause of action, or in Lord Reid's words "the time has come when we can or should say that [*Donoghue* v. *Stevenson*] ought to apply unless there is some justification or valid explanation for its exclusion". This approach, it is fair to say, has been adopted by the judiciary in New Zealand. *Bognuda's* case is also notable in that the Court of Appeal did not feel bound to follow the House of Lord's decision in *Dalton* v. *Angus* (1881) 6 A.C. 740. This is the first occasion that the New Zealand Court of Appeal has exercised the freedom with regard to decisions of the House of Lords which the High Court of Australia first adopted some years ago.

Encroachments—remedy and damages

The question of relief under s. 129 Property Law Act 1952 and the measure of compensation for encroachment was discussed in the case of *Collins* v. *Kennedy* [1972] N.Z.L.R. 939. The parties to this action were adjoining landowners and the defendants had without negligence built a garage encroaching on the plaintiffs' land by 16 inches for a distance of 50 feet. The plaintiffs asked the court for an order for removal and the defendant sought relief under s. 129 Property Law Act 1952. The court chose to exercise its discretion in favour of the defendants by vesting the disputed land in them, because of the great expense necessary for removal.

However the measure of compensation raised another issue. The defendants claimed that this should be assessed on a proportional basis, i.e. a proportion of what the whole property was worth, related to the amount of encroachment with respect to the whole area of the property. Henry J. took the view that this would be inadequate because of the loss of amenities to the plaintiffs, namely the loss of frontage to their property and the resultant restrictions which might be placed upon the building on the plaintiffs' property, and he assessed damages accordingly.

Mortgage—clog on equity of redemption

In the case of *Bannerman, Brydone, Folster & Co.* v. *Murray* [1972] N.Z.L.R. 411 the effect of an option to purchase as a condition of a mortgage was discussed by the Court of Appeal. The previous line of authority on this subject was reaffirmed by the Court in unanimously holding this to be a clog on the equity of redemption. The facts of the case were relatively simple, in that the mortgage and option to purchase were included in the one agreement and thus the reasoning applied in *Reeve* v. *Lisle* [1902] A.C. 461 did not apply, viz. that where the mortgage and option to purchase are included in two separate agreements the option to purchase may be valid.

There arose in this case an additional issue, that the respondent's solicitors had been negligent in not getting the consent of the court to the option under the Land Settlement Promotion Act 1952. However, the Court of Appeal decided that since the option to purchase was void as a clog on the equity of redemption (applying *Harper* v. *Joblin* [1916] N.Z.L.R. 895) this was of little importance as the court would not have consented to this arrangement. Thus only nominal damages

could be awarded against the solicitors for failing to apply for this consent.

Licence or tenancy and its effect on a third party

Whether a court can look further than the words of an agreement to create a "tenancy" in order to see what is the true nature of the "tenant's" right to immediate possession of that land was discussed in the English case of *Binions* v. *Evans* [1972] 2 W.L.R. 729. Once the court could determine this, they could determine the rights of the "tenant" against the subsequent purchasers of the freehold to the property.

The Tredegar Estates, the previous owners of the land in question, had granted Mrs Evans an interest described in the grant as "tenancy at will", determinable only by her, rent and rate free, to provide her with a temporary home, and allowing her to stay for the rest of her life if she so pleased, but without any power for her to assign her interest. Mr and Mrs Binions later bought the property subject to the defendant's interest, which was safeguarded by the former owners by a clause in the agreement of sale. Accordingly, a reduction was made in the purchase price paid by the Binions. Six months after the sale the plaintiffs served a notice to quit on the defendant.

In considering the nature of the interest held by the defendant the Court looked at the original grant and its conflicting terms. It decided that the defendant's interest was not a tenancy at will or a lease as the agreement purported to be, because both parties could not revoke the tenancy. Nor was it an agreement for a term of years. The majority held that it created a tenancy for life under the Settled Land Act 1925 but Lord Denning considered that it created a contractual licence as it was in effect personal and not an interest in land.

Lord Denning then had to decide whether or not the existence of the licence was binding on third parties. In *National Provincial Bank* v. *Ainsworth* [1965] A.C. 1175 the effect of a contractual licence with regard to third parties had been discussed obiter and the question left open. From the tenor of the remarks of some of their lordships it appeared likely that the only remedy would lie in damages for breach of contract, as in *King* v. *David Allen and Sons, Billposting Ltd.* [1916] 2 A.C. 54. Lord Denning circumvented this problem by deciding that since the plaintiffs had purchased the property with notice of the licence, and expressly agreed to its subsistence, they held subject to a constructive trust, which the court would uphold, and which would bind the plaintiffs. Thus Mrs Evans's interest was protected. Lord Denning also stated obiter that a constructive trust could be imposed by the court where any purchaser took title impliedly subject to another's occupation. The other two members of the Court did not find it necessary to come to any firm conclusion on these points. Lord Denning's judgment provides a way of circumventing the difficulties suggested in *Ainsworth's* case, and although a contractual licence may not form the basis of an interest in land *stricto sensu*, it can in this way be protected by the courts despite its merely personal nature and can bind third parties. It remains to be seen whether this new approach of Lord Denning finds acceptance.

Landlord and tenant

Similar leniency and readiness to grant relief against forfeiture of a lease for breach of covenant was shown by the court in the case of

Central Estates (Belgravia) Ltd. v. *Woolgar* [1972] 1 W.L.R. 1048. In the lease granted by the plaintiffs to the defendants there was a covenant not to create any nuisance on the premises. Woolgar had subsequently kept a brothel on the premises, and a notice of forfeiture was duly given to the defendant in the required form. Later, due to an administrative error, a demand was made for rent, which was promptly paid. Despite the clear intention to the contrary on the plaintiff's behalf, the court showed its willingness to grant relief against forfeiture by construing the later acceptance of rent to be a waiver of the plaintiff's right to forfeit. On the question of the breach being incapable of remedy since it cast a stigma on the property, as in *Rugby School's Board of Governors* v. *Tannahill* [1935] 1 K.B. 87 and *Egerton* v. *Esplanade Hotels* [1947] 2 All. E.R. 88, the courts in the present case took a liberal approach, using a subjective test as to whether or not its discretion in granting relief against forfeiture in the defendant's favour should be exercised. As was held in *Glass* v. *Kencakes* [1964] 3 All. E.R. 807, the onus is on the landlord to prove that this stigma has caused a fall in the value of the property and in the instant case there was no evidence of this. Another factor taken into account was that the defendant was ill and aged. Accordingly the court exercised its discretion in the defendant's favour.

M. G. Menzies

PLANNING LAW

Appeal—objections—onus of proof

In *Wellington Club Inc.* v. *Wellington City* [1972] N.Z.L.R. 698 Woodhouse J. distinguished the objection procedure provided for by the Town and Country Planning Act from the usual type of procedure in which the adversary technique is used. He held that the Appeal Board in considering an objection *de novo* should be looking for solutions based on inquiry, rather than making decisions in favour of successful contestants. Therefore, there is no presumption in favour of either the policies or the announced planning or the detailed zoning or the subsequent decisions upon objection of a Council during the progress of its proposed district scheme towards the point at which it will become operative. The Board should determine the most appropriate zoning for the land without giving the policies of the administrator a procedural head start. However, Woodhouse J. held that an appeal relating to the application of a scheme after it had been made operative would involve a different procedural approach; at that stage it would be for the applicant to show that his proposal should succeed, notwithstanding the Corporation's general planning policy.

District scheme—requirements by local authority

In *Timaru City Council* v. *South Canterbury Electric Power Board* [1972] 4 N.Z.T.P.A. 213 the Council appealed against certain require-