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INFANTS AND CHILDREN: LOCAL AUTHORITY'S LIABILITY FOR NEGLIGENCE IN CONTROLLING PLAYGROUND.

IN our last issue, we considered in detail the judgment of Somervell, L.J. (as he then was), and that of Birkett, L.J., in *Bates* v. *Stone Parish Council*, [1954] 3 All E.R. 38.

Lord Justice Romer, before reverting to the evidence, gave consideration to the legal principle itself which the defendant sought to invoke and to utilize as a defence in these proceedings :

> The question was considered by this Court in *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398, in which an infant plaintiff sought to recover damages in respect of an injury which she had sustained while playing on the land of the defendants on which they permitted children to play. This Court held that, there being neither allurement nor trap, nor invitation to the plaintiff, nor dangerous object placed on the land, the defendants were not liable. In the course of his judgment, Farwell, L.J., said at p. 407 :
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> > " I am not aware of any case that imposes any greater liability on the owner towards children than towards adults : the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian."

This last proposition would, at first sight, appear to be one of general application and unrelated to the facts of any particular case. This, however, was not, in my opinion, what the Lord Justice intended to convey. He cited three cases in support of his statement namely, *Burchell* v. *Hickisson*, (1880) 50 L.J.Q.B. 101 ; *Schofield* v. *Bolton Corporation*, (1910) 26 T.L.R. 230, and *Stevenson* v. *Glasgow Corporation*, [1908] S.C (Ct. Sess.) 1034. Of these cases the last does not warrant any such general principle as might be inferred from the proposition stated by Farwell, L.J., while in the first two the conditional nature of the licences which were in question was deduced from the particular circumstances which were established at the trial. In my opinion, the Lord Justice meant no more than that, when a landowner allows the public to come on property of his on which there is a source of potential danger to infants, then, if the circumstances reasonably permit of it, the Court would assume that, so far as infants were concerned, the licence to enter is conditional on their being accompanied by a competent guardian.

This view of what Farwell, L.J., intended is confirmed by the fact that in *Latham's* case the jury had found on the evidence that there was no invitation to the plaintiff (an infant aged between two and three years) to go on the defendant's land unaccompanied, and also assimilates the Lord Justice's statement with the observations of Hamilton, L.J., in the same case at p. 414), and which my Lord has cited in his judgment. It is plain that, in the view of Hamilton, L.J., the question whether a permission which is granted to very young children to enter on land should be regarded as being subject to the condition that they should be accompanied by some responsible person falls to be determined in accordance with the circumstances of each particular case.

Approaching the matter, then, from that standpoint Romer, L.J., could see no evidence to support the view that the licence which the defendant undoubtedly gave to children to enter on the recreation ground was qualified, so far as infants of three or four years were concerned, by the condition that they should be accompanied by a responsible person. There was no evidence that unaccompanied infants were ever turned off the recreation ground or from the children's playground itself by reason merely of their age. The evidence of the groundsmen, when taken as a whole, proved no more than that young children who were by themselves were turned off if they were seen on, or in close proximity to, the chute. On the other hand, the evidence of the chairman of the Council, Mr. Roberts, (which was laid very fairly before the jury in the summing-up) shows that children of all ages were welcomed to the recreation ground, from whence they could proceed easily enough into the playground, which was expressly provided for their entertainment. He said that no attempt was made to regulate who did or did not enter the recreation ground, that there was access from there into the children's section and that it had never been the policy of the defendant to stop anybody from going into that section. It further appeared from Mr. Roberts's evidence that in 1948 the defendant decided to earmark about one acre of the recreation ground for the use of the younger children, including quite small children of three or four years, and a notice board was put up saying, in effect, that that area was reserved for young children only. The notice board, however, eventually became rotten and was taken down. In these circumstances, and having regard also to the safeguards for small children in respect of the chute which the defendant put in hand after the accident to Mr. Rixon's child in 1934, it seemed to be clear that no case was made out on the evidence to support a case of conditional licence to children such as the infant plaintiff and that the jury could not have come to a contrary conclusion if the matter had been put to them even more specifically than it was.

With regard to the defendant's alternative point, namely, that, even if the licence to infants to enter on the recreation ground and playground was unconditional, they nevertheless had no licence to use the chute except under responsible supervision. His Lordship thought that there were two answers :

The first is that there is no evidence, in my opinion, to

warrant any such assumption. The evidence of the groundsmen, to which I have already referred, is quite insufficient for the purpose and there is no other. No notice boards were erected for the information of the parents of infants prohibiting the use of the chute by young children except under parental or other competent supervision, nor were any other steps taken to indicate that the apparatus was for the use of older children only. Moreover, as already observed, precautions were taken in 1934 to ensure the safety of small children on the chute. The second answer, which is associated with the first, is that in the absence of evidence (in which, of course, I include circumstances) leading to a contrary conclusion the Court would, in my judgment, presume that, if the owner of a children's playground unconditionally permits children of all ages to enter on it, and knows that they do so, he intends his permission to extend to the use by the children of apparatus which he has provided on the ground for their amusement; for such apparatus are "allurements" to all children old enough to use them, or to try to use them, and it is, indeed, because they are allurements that they are there at all. This view is in conformity with the decision and reasoning of this Court in *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283. In that case the defendants operated a colliery tramway which ran over their land and they permitted children to enter on the land. The infant plaintiff did so and went for a ride on one of the moving trucks. He fell off it and was injured. It was argued for the defendants that, although (as the Judge found) the plaintiff was a licensee over the whole land, he lost that status when he climbed on the truck and *eo instanti* became a trespasser. Singleton, L.J., expressed himself, at p. 1289, on that point as follows:

> "The submission of counsel for the defendants that the plaintiff became a trespasser when he got on the truck appears to me to be answered by a passage from the judgment of du Parcq, L.J., in *Holdman* v. *Hamlyn*, [1943] 2 All E.R. 137, 141, 142, where he said: 'It was indeed argued that the infant plaintiff was a trespasser. The truth is, however, that he was an invitee, at any rate down to the moment when the threshing machine proved an irresistible temptation. If the boy strayed beyond the strict limit imposed by the terms of the invitation, it was because of the failure of the defendant's agent to guard him against a dangerous allurement; and if he can properly be called a trespasser at all, the trespass was a natural and probable result of the negligence of the defendant's agent. A defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser.' An examination of the authorities leads me to the conclusion that, if an occupier allows children of tender years on his land, and if he has thereon something which is, to his knowledge, attractive to them and which is dangerous, he must take reasonable care to protect them from the danger."

Birkett, L.J., expressed a similar view on the point; and Hodson, L.J., said, at p. 1295:

> "Once the child is a licensee on the land, the question of trespassing on an object on the land does not, in my opinion, arise. The trap or concealed danger will often be an object on the land, but I cannot conceive that the licence to go on the land is to be taken to exclude the thing which, being an allurement to children, is a concealed danger for them."

Lord Justice Romer added that it appeared to him that the application of the law as so formulated by the Lords Justices to the facts and circumstances of the present case was destructive of the contention that the plaintiff became a trespasser from the moment he mounted the ladder of the chute, notwithstanding that he had previously been a licensee. He agreed with his brethren in thinking that the defendant could not be acquitted of knowing the dangerous quality of the aperture in the chute through which the plaintiff fell. The mere fact that the minutes of a Parish Council contain an entry which had been minuted for many years before does not necessarily fix the Council with knowledge of the subject-matter of the entry. In the present case, however, two gentlemen who were members of the council when the accident in 1934 occurred were still members in 1950 but neither of them gave evidence at the trial, although one of them was, it seems, in Court. Moreover, the evidence of the present clerk, who was appointed in 1946, was not made available to the jury. In these circumstances, the defendant could not, in my opinion, legitimately complain of the jury's finding that the defendant knew of the danger, nor was there any ground for impeaching the Judge's summing-up on the point.

It is of great interest to local authorities who control playgrounds for children to note that His Lordship concluded his judgment by saying that, had it not been for the accident to Donald Rixon in 1934 and the defendant's knowledge, or presumed knowledge of it, the plaintiff would, in his judgment, have had no ground of action. The evidence showed that the possibility of an accident happening such as that which unfortunately did occur would not have presented itself to the mind of any reasonably prudent person who was unaware of the previous mishap. He said:

> It would, in the long run, be disadvantageous in the extreme to the public and to children in general if such a person, or body of persons, were to be held liable for an accident of so improbable and unforeseeable a nature as that which befell the plaintiff; for the prospect of being sued for heavy damages (insurable, perhaps, but only at considerable cost) would in all probability result in the disappearance altogether of amenities which many local authorities and private persons voluntarily provide for the entertainment and amusement of children. In *Latham's* case (*supra*), Farwell, L.J., said, at p. 407:
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> > "It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to all children and others all over the country."

Lord Justice Romer added that that which Farwell, L.J., envisaged as disastrous in 1913 would, at least, be equally so today when the dangers of the streets, which in many cases would become the substitutes for playgrounds, considerably exceed such perils as exist in chutes and swings.

On the question of the damages awarded, £17,500, all the members of the Court were agreed that the sum was excessive, and, that that part of the verdict should be set aside. It had been agreed by counsel that if the Court of Appeal should come to the conclusion that a new trial should be ordered on that ground, their Lordships themselves should assess the damages. They thought that the proper figure was £9,000.

II.

What then is the duty of a local authority to persons who have the free use of its recreation grounds, which may take the form of bowling-greens, golf-courses, or children's playgrounds?

It would appear from the authorities that the local authority's duty to persons having the free use of the amenities provided in such recreation grounds will, in general, be that of a licensor. The standard of care they owe to these mere licensees extends only to concealed dangers or traps actually known to it, but not known to the licensee; and such duty is confined to giving warning of the existence of dangers of this limited class. The authorities (as the English Law Reform Committee recently said) seem to make a knowledge of potential danger equivalent to actual knowledge for the purposes of the duty of licensor to licensee, and to go a good way towards eliminating the

distinction between danger of which actual knowledge is to be imputed to a licensor and that of which an invitor knows or ought to know: *Pearson* v. *Lambeth Borough Council*, [1950] 2 K.B. 353, (removal of a grill at the entrance of a public convenience), and *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212, (broken glass in a paddling pool in a public park). The effect of the authorities on this point was summarized by Pearson, J., in *Hawkins* v. *Coulsdon and Purley Urban District Council*, [1953] 2 All E.R. 364, 372 (aff. on app. [1954] 1 All E.R. 97), where His Lordship expressed what has come to be known as "the objective test," as follows:

> The licensor is not liable if, through lack of adequate inspection, he has failed to ascertain the existence of the physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved.

The objective test has been applied by the House of Lords in "children's cases" from *Mersey Docks and Harbour Board* v. *Proctor*, [1923] A.C. 253, onwards: per Somervell, L.J., in *Hawkins's* case (*supra*), at p. 102.

It is a matter of common knowledge that most of the accidents which occur in public recreation grounds involve injuries to children.

Apart from the dictum of Hamilton, L.J., as he then was, in *Latham* v. *R. Johnston and Nephew, Ltd.*, [1913] 1 K.B. 398, 415—

> In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation.

Bates v. *Stone Parish Council* (*supra*) shows that the nature of the duty of the local authority can depend on the category of the person using its recreation grounds, and even on the age group of a particular child.

If a child is the licensee, the local authority (on the footing that it knows, or ought to know, that, pursuant to its implied licence, children are accustomed to frequent its play-areas) must, over and above the ordinary duty of care it owes to its licensees generally, have regard to the physical powers of the class of licensees, which, when it gave the licence, it knew or ought to have known those licensees possessed: *Cooke* v. *Midland and Great Western Railway Co.*, [1909] A.C. 229, 238, per Lord Atkinson. Thus, the playground, in terms of a general licence to children to use it, may be used by a child too young to be capable of contributory negligence; and, the consequence of the child's immaturity of mind may involve the local authority in a greater degree of liability than in the case of an older person.

The burden of liability imposed on local authorities owning children's playgrounds in respect of very young children is relieved to some extent, according to the circumstances of the case, by the qualification which is placed on that liability by the decision in *Burchell* v. *Hickisson* (*supra*), which is fully considered in the *Stone* case by all their Lordships. This condition may be said to apply where an injured infant was too young to guard against a danger to him, which would be reasonably obvious to an older person. The logical way of considering that position was taken to be this: the local authority had never given a licence to such a young and immature child to enjoy the amenities it provided, unless he was in the care of a person of maturer years; and, if he was in such charge or guardianship, then there was no concealed danger. This principle is not of general application. It depends on the facts of each particular case. To use Lord Sumner's words in *Latham's* case (*supra*),—

> The circumstances may evidence the attachment of a condition to the licence or permission to enter—namely, that so young a child shall only enter if accompanied by a person in charge who is capable of seeing and avoiding the obvious perils, and thus of placing both himself and his charge in the position of an ordinary licensee, both able and bound to look after himself.*

No such limitation could, however, be inferred in the *Stone* case, because there was no evidence that any child had been excluded from the Council's playground because of his age; and, although there had been a previous accident to a child of exactly the same nature, the Council had not given any notice or erected any warning against the entry of young children into the particular playground or to the chute where the previous accident had occurred. (The principle enunciated in *Burchell's* case was also rejected by the House of Lords in *Glasgow Corporation* v. *Taylor*, [1922] 1 A.C. 44, where a seven-year-old child died from eating the berries of a poisonous shrub in a public park, as the Corporation knew the poisonous nature of the berries, and that they were a temptation to children, but had taken no precautions to warn children or to prevent them from picking the berries.)

Since the implied condition or limitation could not be inferred from the facts before the Court in the *Stone* case, the local authority had to be tested by the standard of the duty imposed on licensees generally. As we indicated, in order to make a licensee liable for injury, knowledge of a potential danger is equivalent to actual knowledge of a concealed danger. Such knowledge was to be imputed to the Stone Parish Council because of its knowledge of the earlier accident to a young child in similar circumstances, and because of the fact that it had then taken measures to prevent such an accident happening again to a young child using its chute and had let those measures fall into disuse—otherwise, as Romer, L.J., said, if it had not been for the Council's knowledge or presumed knowledge of the earlier accident, the plaintiff would have had no ground of action. In other words, the gap in the rails of the platform would not have constituted a danger against which the Council was under a duty to guard, if it had not been for its knowledge of the previous accident.

The defendant Council had recorded the previous accident in its minutes. The chairman and two members of the Council, who were all in office when the earlier accident occurred, were still members of the Council when the later accident happened. The combination of the minute-book and these other facts were held to be sufficient to impute the knowledge which carried the licensor's liability, although both Somervell, L.J., and Romer, L.J., expressly refrained from enunciating a principle that a local authority must always be taken to know all the past contents of its minute-book.

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* The reason for this is, again in Lord Sumner's words, in *Mersey Docks and Harbour Board* v. *Proctor*, [1923] A.C. 253, 274: "If the danger is obvious, the licensee must look after himself: if it is one to be expected, he must expect it, and take his own precautions."

SUMMARY OF RECENT LAW.

CARRIERS.

Conditions Affecting Passenger Travel. *98 Solicitors' Journal*, 877.

Taxi-cab Proprietor—Claim for Damage to Perambulator owned by Passenger—Taxi-proprietor not Common Carrier—Perambulator, Personal Luggage — Negligence not proved. An owner of a taxi-cab carrying passengers and their personal luggage is not a common carrier. (*Hudston* v. *Midland Railway Co.*, (1869) L.R. 4 Q.B. 366, and *Bateson* v. *Oddy*, (1874) 43 L.J.M.C. 131, applied.) (*Hodge* v. *Wellington City Corporation*, (1944) 39 M.C.R. 12, *McCormick* v. *Peninsula Motor Service, Ltd.*, (1947) 5 M.C.D. 363, distinguished.) *Harwood* v. *Watt.* (Christchurch. September 9, 1954. Ritchie, S.M.)

CUSTOMS ACTS.

Import Control Regulations—Seizure of Goods—Goods seized after Expiry of One Year after Cause of Forfeiture arisen—Seizure invalid—Powers of Minister of Customs to modify Import Licences—No Power to Modify Licence after Its Ceasing to have Effective Existence—Customs Act, 1913, s. 252 (4)—Import Control Regulations, 1938, (Serial No. 1938:161), Reg. 12 Amendment No. 2 (Serial No. 1950/30), Reg. 2. While Reg. 12 of the Import Control Regulations. 1938, (as made by Reg. 2 of Amendment No. 2) gives the Minister of Customs wide powers of modifying import licences, he cannot modify the conditions of a licence which has ceased to have an effective existence. As s. 252 (4) of the Customs Act, 1913, prohibits the seizure of goods except within one year after the cause of forfeiture has arisen (in this case within one year after August 6, 1952), a seizure on January 5, 1954, was too late; and was therefore invalid. *In re Wilkerson.* (S.C. Wellington. November 29, 1954. Turner, J.).

DIVORCE AND MATRIMONIAL CAUSES.

"Delay" in Divorce Proceedings. *105 Law Journal*, 51.

DIVORCE AND MATRIMONIAL CAUSES.

Appeal—Jurisdiction—Application for Re-hearing—Discovery after Date of Hearing of Alleged Adultery by other Spouse—Appeal to Court of Appeal on ground of "error of the Court at the hearing"—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 36 (1), (2). (Cf. s. 58 of the Divorce and Matrimonial Causes Act, 1928.) By the Matrimonial Causes Rules, 1950, r. 36: "(1) An application for re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court . . . (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal." The wife presented a petition dated June 22, 1953, for divorce on the ground of the husband's cruelty. The husband denied the allegations of cruelty and the suit came on for hearing before a commissioner on July 26, 1954. On July 28, 1954, the commissioner found that the husband had been guilty of cruelty and granted a decree *nisi* in favour of the wife. On September 7, 1954, the husband filed (i) a notice of appeal to the Court of Appeal for an order that the decree *nisi* be set aside and the petition dismissed, or, alternatively, that there should be a new trial and (ii) a notice of motion to the Divisional Court, under the Matrimonial Causes Rules, 1950, r. 36 (1), for a re-hearing on the ground that since the autumn of 1949 the wife had frequently committed adultery with a certain man, a fact which was unknown to the husband at the date of the hearing. The correctness of the commissioner's judgment was thus being challenged in the Court of Appeal, but the ground of application to the Divisional Court, viz., the discovery of the adultery alleged, did not impute any error in the decision of the commissioner. The husband being unwilling to abandon the grounds on which the notice of appeal to the Court of Appeal might be supported, *Held*, Regard should be had to the case as a whole, and as, if so regarded, the case was one in which error of the Court at the hearing was being alleged, the appeal should be dealt with by the Court of Appeal under r. 36 (2). (*Prince* v. *Prince*, [1950] 2 All E.R. 375, applied.) *Wells-King* v. *Wells-King*, [1955] 1 All E.R. 585 (P.) D. & A.

Matrimonial Causes Rules 1943, Amendment No. 4 (Serial No. 1955/31).—Under R. 54 of the Matrimonial Causes Rules 1943, where a party to proceedings is charged with adultery with a named person who is not made a respondent in the suit, that person may apply for the leave of the Court to intervene in the proceedings. The effect of the amendments, which come into force on April 7, 1955, is that the person so named may intervene, without first obtaining leave, by filing and serving an election to intervene or an answer. Rules 3 and 4 of these rules are consequential on the making of new Court of Appeal Rules and on amendments made to the Code of Civil Procedure. They substitute correct references in RR. 56 and 74 for the existing references to rules that now have new numbers.

ESTOPPEL.

Estoppel in Pais—Boundary—Building Plots— Understanding between Owners of Two Adjoining Plots that Wall of Garage on Southern Plot should be their Boundary—Garage built by Owner of One Plot for owner of other Plot—Encroachment—Claim by Subsequent Purchaser for Trespass. See *Vendor and Purchaser*, post, p. 86.

LIMITATION OF ACTION.

Action in Respect of Bodily Injuries—Intended Defendant notified within Three Months of Accident of Intention to claim Damages—Circumstances of Accident then investigated on behalf of Indemnifiers of Intended Defendant—Leave to bring Action Sought over Four Years after Accident—Leave granted on Terms—Limitation Act, 1950, s. 4 (7). On September 11, 1951, on the main highway at Waikouaiti the intended plaintiff, a pedestrain, after suffering bodily injury through being struck by a motor-car owned by the intended defendant, was in hospital for various periods up to October 20, 1953. It was not suggested that he was not in a position to attend to business affairs for the greater part of this period, although the extent of his injuries and the disability likely to be suffered could not be accurately determined during that period. On December 14, 1951, the intended plaintiff's solicitors notified the defendant of the plaintiff's intention to claim damages in respect of the injuries sustained in the accident. Shortly afterwards, the circumstances of the accident were investigated on behalf of the indemnifiers of the intended defendant. The driver of the intended defendant's car, in accordance with an earlier intention, left to reside in England, and, even if the action had been prosecuted without undue delay, her evidence would have had to be taken in England. The intended defendant, as recently as December, 1953, had left Otago to reside in Auckland. On an application, under s. 7 (4) of the Limitation Act, 1950, for leave to bring an action in respect of bodily injuries after the expiration of two years from the date on which the cause of action arose, *Held*, 1. That, as the defendant's indemnifier had an opportunity of investigating the circumstances of the accident shortly after it had occurred, the intended defendant, with the exceptions mentioned above in relation to the giving of evidence had not been prejudiced in his defence. (*Moeller* v. *New Plymouth Harbour Board*, [1955] N.Z.L.R. 151, *Thomas* v. *Nelson Harbour Board*, [1955] N.Z.L.R. 154, and *Madders* v. *Wellington Technical School Board of Managers*, [1955] N.Z.L.R. 157, applied.) 2. That leave to bring the action should be granted subject to special conditions: first, that the action be commenced within fourteen days of the delivery of this judgment; and secondly, that the expense incurred by the intended defendant, either in taking his evidence on commission in Auckland or in his attending the trial at Dunedin, be paid by the intended plaintiff in any event. *Watt* v. *Greenwood.* (S.C. Dunedin. March 18, 1955. McGregor, J.)

NEGLIGENCE.

Driving of Motor-vehicle—Stationary Vehicle on Highway hit in Daylight by Agricultural Tractor and Baler—Narrow margin of space for passing—Onus on driver of moving vehicle to disprove Negligence—Trespass—Nuisance—Motor-car parked by Plaintiff on Highway leading only to Defendant's Farm—Plaintiff, in person, trespassing on Farm—Whether Trespasser also on Highway in respect of Car. At about 7 p.m. on August 3, 1953, the plaintiff drew up his motor-car in a country lane, which was a public highway but led only to a farm of which the defendant was the tenant, the fields adjoining the lane being part of the farm property. After parking the car as close to the nearside of the lane as possible, the plaintiff went into one of the fields, while his wife and another passenger remained in the car. The lane was about fifteen feet wide at this spot, and the plaintiff's car was about five feet six inches wide. While the car was stationary, the defendant, driving a tractor, came out of a field and turned into the lane in the direction of the plaintiff's car. The tractor was towing a baler which was nine feet wide. On approaching the car the defendant slowed down. Then, thinking that the car was unattended, and acting on the advice of a

LEGAL ANNOUNCEMENTS.

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EXPERIENCED PRACTITIONER (60) will act as Locum for limited period—preferably near Auckland. Reply with particulars to :— "CONVEYANCE,"
C/o P.O. Box 472, WELLINGTON.

LEGAL PARTNERSHIP.

H. M. A. MAJOR and S. V. GOODING heretofore practising at Carterton under the name of Major, Tucker & Gooding, have admitted to partnership their Managing Clerk, IAN PHILIP WOLLERMAN, as from the 1st day of April, 1955, and henceforth the practice will be carried on at High Street, Carterton, under the name of MAJOR, GOODING & WOLLERMAN with Mr. Wollerman as resident partner.
H. M. A. MAJOR. S. V. GOODING.

servant, who was sitting at the back of the baler, the defendant attempted to pass the car, and, in doing so, damaged it. The plaintiff having claimed damages against the defendant for negligent driving, the defendant denied negligence and pleaded that the plaintiff was a trespasser. *Held*, 1. Where there was a collision between a moving vehicle and a stationary vehicle which was plainly visible, the onus was on the driver of the moving vehicle to show that he had taken all reasonable care, and, on the facts the defendant had failed to show that he had taken all the steps which reasonably ought to have been taken in the circumstances; accordingly, the defendant was negligent. 2. The mere fact that the plaintiff was trespassing in the defendant's field at the time when the accident occurred did not justify the conclusion that the plaintiff was also a trespasser on the highway in respect of the motor-car (*Hickman* v. *Maisey*, [1900] 1 Q.B. 752, distinguished), or that he was committing a nuisance on the highway by leaving his car there, and, therefore, the defence based on trespass failed. Appeal allowed. *Randall* v. *Tarrant*, [1955] 1 All E.R. 600 (C.A.)

PRACTICE.

Court of Appeal Rules, 1955 (*Serial No. 1955/30*). These rules consolidate with amendments, having effect from April 7, 1955, the rules of procedure of the Court of Appeal in civil cases and in cases stated for the opinion of that Court under the Crimes Act, 1908. (They do not apply to proceedings under the Criminal Appeal Act, 1945.)

Speedier Trial: Some New Suggestions. *98 Solicitor's Journal*, 831.

Supreme Court Amendment Rules, 1955 (*Serial No. 1955/29*). These rules amend the Code of Civil Procedure of the Supreme Court as from April 7, 1955. A new Rule 187 is substituted for RRs. 187 and 189 of the Code, and it provides (as the former rules do) that an affidavit may be sworn in New Zealand before a solicitor qualified to take it, or before a Registrar or Deputy Registrar. The new provision is that the affidavit may be sworn before a Justice of the Peace if there is no qualified solicitor, and no Registrar or Deputy Registrar, available at his office within five miles of the place where it is desired to swear the affidavit. The former R. 187 allowed a Justice to take an affidavit only if there was no qualified solicitor and no such Registrar resident within five miles. Paragraph 36 of Table C. in the Third Schedule is replaced by a new R. 36, relating to disbursements for witnesses' and interpreters' fees and expenses, and the scales in Table E of the Third Schedule to the Code are revoked and the new scales set out in the Witnesses and Interpreters Fees Regulations, 1954, are substituted.

PRINCIPAL AND AGENT.

Vicarious Liability for Fraudulent Misrepresentation. *105 Law Journal*, 37.

PUBLIC REVENUE—INCOME TAX.

Altered Assessments—Onus of Proof of Commissioner's Right to make Such Assessment upon Commissioner—Duty of Commissioner to begin at Hearing—Income Tax Act, 1923, s. 16. The onus of proving that amended assessments of income tax were lawfully made under s. 16 of the Land and Income Tax Act, 1923, is upon the Commissioner of Inland Revenue, and, on that issue, it is his duty to begin at the hearing of a Case Stated under s. 23 relating to objections to the Commissioners' assessments. (*Hines* v. *Federal Commissioner of Taxation*, (1952) 5 A.I.T.R. 305, approving *McEvoy* v. *Federal Commissioner of Taxation*, (1950) 5 A.I.T.R. 1, applied.) *Kriletich* v. *Commissioner of Inland Revenue*. (Auckland. January 19, 1955. Astley, S.M.)

SHIPPING.

Charterparty — Construction — "Weather working days." A charterparty provided: "Lay days for loading to begin at the next working period according to the custom of the port after captain reports ship ready to receive cargo . . ." "Lay days at the average rate of [specified numbers of bags at ports indicated] provided vessel can receive at those rates per weather working day . . .". "If longer detained, demurrage to be paid at the rate of $1,000 per day, or in proportion for any part of a day . . . Such time lost or saved is to be calculated separately for each loading port and in accordance with the custom of the port." On an arbitration on a claim for demurrage, the umpire found that the normal working periods at the two ports called at were eight hours per day and four hours on Saturday, and, in calculating the time lost when the ship was on demurrage, he took eight hours as a working day and deducted from this time for each day the time when work was suspended owing to the weather. *Held*: this was the correct method of computation since the period of time described as a "working day" was the number of hours customarily worked on the day in the port and not a day of twenty-four hours (dictum of Lord Esher, M.R., in *Nielsen* v. *Wait*, (1885) 16 Q.B.D. 72, followed); and expression "weather working day" meant a period of time so computed from which, however, the number of hours during which work was suspended owing to the weather was deducted (*Branckelow S.S. Co.* v. *Lamport and Holt*,[1897] 1 Q.B. 570, approved as regards the meaning of weather working day but disapproved as regards method of computation). Decision of McNair, J., [1954] 3 All E.R. 324, affirmed.) *Alvion Steamship Corporation of Panama* v. *Galban Lobo Trading Co. S.A. of Havana*, [1955] 1 All E.R. 457 (C.A.)

TENANCY—URBAN PROPERTY.

Dwellinghouse with three-and-a-half Acres, used for grazing Stock and Poultry for Household Purposes—Land "urban property"—Claim for Possession of Three Acres—Area not "in excess of the reasonable requirements of the Tenant"—Tenancy Act, 1948, s. 24 (1) (e). W., with his wife and family, since the lease was originally granted, lived continuously in a property consisting of a house and land, 3½ acres in area, were used for grazing two cows and their progeny, and for poultry. The food products were used solely for household use. W. had outside employment, and it provided his whole income. In an action claiming possession of three acres, part of the demised land, on the ground, under s. 24 (1) (*e*), that that part of the premises was in excess of the reasonable requirements of the tenant. *Held*, 1. That it was implicit from the lease and from the other circumstances, that the property was not let as a "dwellinghouse" within the meaning of the Tenancy Act, 1948, and the property was, accordingly, "urban property." (*Houston* v. *Poingdestre*, [1950] N.Z.L.R. 966; [1950] G.L.R. 449, applied. 2. That the three acres of which the plaintiff sought possession were not "in excess of the reasonable requirements of the tenant" within the meaning of s. 24 (1) (*e*) of the Tenancy Act, 1948. (*Pocock* v. *Barry*, [1954] N.Z.L.R. 228, followed.). (*John Fuller and Sons, Ltd.* v. *Auckland Meat Co., Ltd.*, [1954] N.Z.L.R. 136, applied.) 3. That the landlord had not proved any real hardship, while the tenant had proved some hardship if an order for possession were to be made, and that the Court's discretion, under s. 24 (2) should be exercised in the tenant's favour, and the order for possession was refused. *Saunders* v. *Wilkes*. (Invercargill. September 23, 1954. Dobbie, S.M.)

TRADE MARK.

Infringement—Directory of Trade Marks—Ownership of Plaintiffs' Trade Mark attributed to Another Company—Mistake by Publishers—Publication of inaccurate statement not a "use" of the trade mark—Trade Marks Act, 1938 (1 & 2 Geo. 6 c. 22), s. 4 (1), s. 68 (2). (Trade Marks Act, 1953, s. 2 (2). The plaintiffs were the registered owners of the trade mark "Weatherite", registered in the register of trade marks in relation to waterproof clothing. The defendants published a directory of trade marks in which they inserted, in error, a statement that the trade mark "Weatherite" in relation to those goods belonged to A., Ltd. The plaintiffs brought an action against the defendants for infringement of the plaintiffs' trade mark. *Held*, The publication of the inaccurate statement was not a "use" of the trade mark by the defendants, within s. 4 (1) of the Trade Marks Act, 1938, as it was not a use in the course of trade in the goods in question, and, therefore, the publication did not constitute an infringement of the plaintiffs' trade mark. *M. Ravok (Weatherwear) Ltd.* v. *National Trade Press, Ltd.* [1955] 1 All E.R. 621 (Q.B.)

TRANSPORT.

Concession Ticket—Such Ticket a Contract to provide Twelve Rides on Board's Transport on Payment of Specified Amount—Board purporting to Cancel such Ticket on Raising of Fares—Power to revoke Existing Charges not operating to revoke Existing Concession Ticket for which Charge paid—Fare Order ultra vires in purporting to cancel Such Ticket——Transport Act, 1949, s. 125 (8)—Transport Amendment Act, 1950, s. 6. Before January 30, 1954, the defendant purchased for 3s. a ticket from the Auckland Transport Board. Known as a "concession ticket," it evidenced that for 3s. the holder was entitled to twelve separate one-section rides on the Board's transport. It fixed no time limit for performance, and had a short statement of conditions printed on it, and was "issued subject to the Board's By-laws, Regulations and Fare Orders." On March 2, 1954, the defendant boarded

one of the Board's trams intending to travel inside one section, and tendered to the conductor a 3s. concession ticket. The conductor informed him that it was out of date, explained a change which had been made in fare rates, and asked for payment of a fare. The defendant claimed that he had given value for his ride, and refused to pay any other fare. The reason for the conductor's refusal to accept the ticket, was that, on January 30, 1954, the Board had purported to cancel that kind of ticket, and to replace it with one costing 3s. 3d. On being asked to call at the Board's office, the defendant wrote to the Board enclosing 3½d. in stamps being ½d. in excess of the calculated rate for twelve rides for 3s. 3d. On an information charging him with attempting " to use a ticket when such a ticket was not available contrary to the provisions of By-law No. 1, s. 6, subs. 6 of the Auckland Transport Board. *Held*, 1. That, as the concession ticket represented a contract at common law between the Transport Board and the purchaser, whereunder for a cash payment, the purchaser was entitled to twelve defined rides on the Board's transport vehicles, the power conferred on the Board by s. 125 (8) of the Transport Act, 1949, (as enacted by s. 6 of the Transport Amendment Act, 1950) to revoke an existing charge " in such manner as it thinks fit " did not operate to revoke the contract represented by the concession ticket. (*Greig* v. *Collins*, (1949) 6 M.C.D. 130, followed.) 2. That the Board's Fare Order, purporting to cancel the concession tickets already sold, was, to that extent, *ultra vires* the Transport Act, 1949; and the ticket remained a valid one. *Auckland Transport Board* v. *Moncur*. (Auckland. August 26, 1954. Astley, S.M.)

Dangerous and Negligent Driving. *105 Law Journal*, 52.

Offences—Failure to Notify Accident—Women Passenger Tripping on Step while alighting from Stationary Motor-omnibus, and suffering Injury—No Negligence on Driver's Part—Duty of Driver to report Accident at Nearest Police-Station or to Constable—Transport Act, 1949, s. 47 (2). The driver of a motor-omnibus stopped it for passengers to alight, and, while it was stationary, a passenger tripped on the bottom step as she commenced to alight, fell on the ground, and was injured. The driver immediately called a doctor, and assisted the injured passenger. He reported the accident to his employers, but did not inform the Police. He was charged with not having reported the accident in person at the nearest Police-station or to a constable, in breach of s. 47 (2) of the Transport Act, 1949. *Held*, That the accident to the passenger arose " directly or indirectly from the use of a motor-vehicle," and, though the driver was not in any way negligent and the motor-vehicle was stationary at the time of the accident, the driver had not performed the obligation imposed on him by s. 47 (2) of the Transport Act, 1949, in not reporting the accident as required by that subsection. (*R.* v. *Bowden*, [1938] N.Z.L.R. 247; [1938] G.L.R. 156, applied.) (*Jones* v. *Prothero*, [1952] 1 All E.R. 434, referred to.) *Police* v. *Wyatt*. (Auckland. March 18, 1955. Kealy, S.M.)

Taxi-cab Fares—Waiting-time—Stoppages on Journey—Taxi-driver's Election to Charge for Waiting-times on Continuous Time-basis—Notice of Election not required. Schedule B of the Taxi Fare Schedule for Auckland City. The Schedule is divided into Parts A, B, C, and D, headed respectively: A. Hirings by Distance; B. Hirings by Time; C. Hirings for trips beyond the Auckland Transport District; and D. General. Each of these Parts is divided into numbered paragraphs. The relevant paragraphs in issue were as follows: " A 4. Waiting-time shall be charged at the rate of 6d. for every 5 minutes provided that after 30 minutes of waiting the driver must inquire and ascertain that the hirer desires him to continue waiting." " D 2. Where the waiting-time during any journey exceeds 30 minutes, the taxi-cab driver may determine whether the charge shall be by distance or by time." The informant engaged the defendant in his taxi-cab and drove a distance of 12½ miles, during which the informant required him to make three stops of approximately fifteen minutes each, so that the total time of hiring was one hour twenty-five minutes. That where the waiting-time exceeds thirty minutes in one continuous period then para. A 4 applies or the driver may elect to charge on a time-basis under D 2, and also where the total waiting-time of a series of stoppages in any one journey exceed thirty minutes in all, then the taxi-driver again has an election to charge either under Parts A or B of the Schedule. In neither of these cases is any notice required by the Schedule. The defendant properly exercised his election under para. D 2, and the prosecution is accordingly dismissed. On an information charging the defendant with demanding more than the exact amount of fare payable under his licence for hiring, *Held*, 1. That, where the waiting-time exceeds thirty minutes in one continuous period, para. A 4 applies, or the driver may elect to charge on a time-basis under para. D 2; but, where the total waiting-time of a series of stoppages in any one journey exceeds thirty minutes in all, the taxi-driver has an election to charge either under paras. A or B of the Schedule; and that in neither of these cases is any notice required by the Schedule. 2. That the defendant had properly exercised his election under para. D 2. *Bland* v *Purdy*. (Auckland. February 4, 1955. Wily, S.M.)

VENDOR AND PURCHASER.

Sale of Land—Description of Parcels—Building Plots—Boundary between Two Plots not stated—Subsequent Conveyances with Similar Parcels—Boundary deemed straight—Building operations on one plot before ultimate conveyance of other plot—Building encroached—Effect of ultimate conveyance of plot encroached on—Licence—Mutual Licences—Drainage to and from Adjoining Properties—Whether Licence revocable by One Owner while retaining Benefit of the Licence of the Other Owner. On June 22, 1932, two adjoining plots of land on a building estate were conveyed to the same purchaser by separate conveyances. The conveyances were, *mutatis mutandis*, un similar terms, and, in each case, the measurements of three sides of the plot were given, but the measurement of the boundary between the two plots was not given. The description of the property conveyed ended in each case with the words " and for the purpose of facilitating identification only is delineated and shown by the pink colour on the plan drawn on these presents ". There was nothing on the land to mark the boundary between the two plots, but on the plans, which were small, the line between the plots was to all appearance straight. The plots were conveyed subsequently by separate conveyances to a purchaser who, by separate conveyances dated June 18, 1949, conveyed the south plot to the defendant and the north plot to a company. In or about 1951 the company built for the defendant on his plot a bungalow and garage, the company agreeing with the defendant the plans and position of the buildings and intending the north wall of the garage to be part of the boundary between the two plots. A low wall was built to connect the front corner of the garage to a brick post which divided the two properties on the road side and a wire fence was erected from the rear corner of the garage to the rear boundaries of the plots. The visible boundary between the two plots thus created was not a single straight line, but two straight lines at an obtuse angle. The garage projected slightly over the boundary which would have separated the two plots if it had been a straight line. At about the same time, pursuant to an agreement between the company and the defendant, the company installed a manhole on its own plot and a pipe was connected to the manhole to carry off the rainwater from buildings on the defendant's land. The outflow pipe from the manhole was brought back through the defendant's land and connected with the main sewer in the road. On April 29, 1952, the company sold the north plot to L. and on November 18, 1952, L. sold it to the plaintiff. In all conveyances the descriptions of the north and south plots were in all material respects the same as in the conveyances of the same properties in 1932. The plaintiff, intending to build on the north plot, discovered that part of the defendant's garage and the brick wall were on the north plot and learned of the existence therein of the manhole and of the drain leading to it from the south plot. For the purpose of building, the manhole was moved to a more suitable point on the north plot and the drains leading from and to the defendant's land were re-connected to the manhole. The plaintiff sued the defendant for trespass in respect of the garage and of the manhole and drain from the defendant's land. *Held*, 1. (By Jenkins and Morris, L.JJ.; Sir Raymond Evershed, M.R., not concurring) the conveyances of the plots not having shown the measurements of the boundary between the plots, the boundary must be taken to be a straight line, and, the parcels in all the conveyances of the north plot being substantially similar, the conveyance to the plaintiff, on its true construction, conveyed the land of the north plot up to the same straight line, and accordingly the defendant's garage encroached on the plaintiff's land; but (by the Court) on the facts the company had been estopped from asserting against the defendant that the boundary between the north and south plots was other than that shown on the land by the garage wall and the fence, and the plaintiff, as successor in title of the company, was in no better position and therefore was not entitled to any relief in respect of the encroachment. (Dicta of Mansfield, C. J., in *Taylor* v. *Needham*, (1810) 2 Taunt. 282, applied.) 2. The arrangement in regard to the manhole and drains was in the nature of grants of mutual dependent licences and the plaintiff could not revoke the licence on his part to the defendant to discharge water into the manhole while retaining the benefit of the defendant's licence to him to discharge water from the manhole through a drain which ran in and under the defendant's land. Appeal dismissed; cross-appeal allowed. *Hopgood* v. *Brown*, [1955] 1 All E.R. 550 (C.A.)

SOME GLIMPSES OF THE LAW AND LAWYERS OF EARLY TARANAKI.

By LEONARD C. HUGHES.*

The Taranaki District Law Society was formed and gazetted on March 6, 1879. It is one of thirteen District Law Societies in New Zealand—the members of the Councils of which are elected annually. The Taranaki Society enjoys the distinction of being older than both the Auckland and the Wellington Societies. The Auckland Society was formed 22 days later than Taranaki and the Wellington Society some five months later. Of the thirteen Societies in New Zealand, only two are older than the Taranaki Society: Canterbury and Westland.

EARLY TARANAKI PRACTITIONERS.

One of the earliest names associated with the law in Taranaki was that of Halse. William Halse came here in that very-much-publicised ship, *Amelia Thomson*, in 1841. He was resident agent for the New Zealand Company in New Plymouth. In 1851, he was acting Commissioner of Crown Lands. He died in 1882. His brother, Henry, came with him on the same ship; and he, in 1858, was Commissioner of Native Reserves, then a Magistrate, and in 1875 a Judge of the Native Land Court.

Arthur Standish who was born in 1838, studied law in Auckland, and then commenced practice in New Plymouth as a solicitor, in 1861. Two years later he was appointed Crown Solicitor; and, in 1876, he was the first Mayor of New Plymouth and also a member of the first New Plymouth Harbour Board. He was the father of Arthur Russell (or "Bus") Standish who was practising in New Plymouth as a solicitor from 1903 up to a few years ago, being the senior partner in the firm of Standish, Anderson, Brokenshire, and Howell. Arthur Standish, Sen., died in 1915.

Shortly after Arthur Standish commenced practice, Robert Clinton Hughes in 1870 commenced, and these two were later associated in a partnership. Robert Clinton Hughes, in 1875, was appointed a member of the Provincial Council of Taranaki. In those days, each Province had its own separate sort of Parliament and made and amended its own laws. Each Provincial Council comprised a Superintendent, nine Councillors and a Speaker, as authorized by the New Zealand Constitution Act, 1852. The laws made by the Provincial Councils were called "Ordinances" and, similarly to our present day statutes, they constituted the effective law of the country, with, of course, local application to each particular Province.

PROVINCIAL COUNCIL DAYS.

From an old tome entitled *Taranaki Ordinances*, owned by the late R. C. Hughes, we get glimpses of some of the primitive early laws of this district as passed by the Taranaki Provincial Council. We find what is described as, "The Harbour Trust Ordinance", passed in 1866 in the Twenty-ninth Year of the reign of Her Majesty Queen Victoria, and described as "An Ordinance to alter the Specific Purpose for which Certain Public Reserves are held in the Town of New Plymouth." This is referred to as being "part of the original planning for a Harbour at the Sugar Loaves." Other references to the laws of nearly a century ago in Taranaki, are found under such titles as "The Sale of Liquors Ordinance, 1866", wherein, in s. 27, it provides:

> Every house for which a general License shall be granted shall contain, over and above the apartments used and occupied by the holder of the License or his family, at least one moderate sized sitting room (the simple predecessor, no doubt, of our modern lounge and cats' bar) and four sleeping rooms constantly ready and fit for public accommodation and shall also be provided with stabling—sufficient for four horses—and with a sufficient supply of wholesome and usual provender for the same.

Further on in the same Ordinance, in s. 31, we find,

> Every holder of a General License shall keep a lamp affixed over the principal entrance door of his house which lamp shall be kept burning the whole of each and every night from sunset to sunrise and such lamp shall, as to size of the flame and all other particulars, be subject to the approval of the Chief Officer of Police.

From an "Appropriation Ordinance", over the footnote, "Passed by the Provincial Council this 26th day of October one thousand eight hundred and fifty-three", we get a glimpse of the cost of living of yesteryear. We find items in this Appropriation Account such as Harbour Master's Salary (for the year) £120. Six permanent boatmen at £65 each per annum; boatshed, capstan rope, outhaul rope small rope, house for Native boatmen, paint etc. £220; Gaoler (also Inspector of Weights and Measures and Inspector of Slaughter House), £91 10. 0; rations for prisoners, £30. I don't know whether the smallness of this item suggests a scarcity of prisoners or a very lean ration per head. An excusable inference might even be that the slaughterhouse was in some way related to the paucity of prisoners.

From this historical reference of 1853 to the political subject of the cost of living, we pass to what may well be the origin of the modern political claim that the pound of today is not what it used to be.

Under an Act of the Taranaki Provincial Council entitled, "An Ordinance to Authorise and Regulate the Impounding of Cattle", we find the following provision:

> As soon as conveniently may be after the passing of this Ordinance the Superintendent shall, by notice, published in the Government Gazette of the Province, *appoint public pounds* and shall in like manner from time to time as may appear necessary *or convenient, substitute new pounds*, appoint *additional pounds* and *suppress pounds* not found requisite."

In 1855, the Provincial Council passed a "Public Works Ordinance". This marked the commencement of Government building of roads and bridges in New Plymouth. It also originated our present rating system on the unimproved value of property.

In 1857 was passed, what to New Plymouth solicitors was a very important enactment—viz., what was defined as "An Ordinance to provide for the Registration of Deeds and Instruments affecting Real Property."

An interesting reference to the Maori Wars is recorded in "The Town of New Plymouth Consolidation Ordinance, 1860." Portion of the Preamble to this Act reads "Whereas owing to the Interruption of General Business during the Maori Insurrection in the Province of Taranaki, Certain Transactions begun under 'The

* An Address to the New Plymouth Historical Society.

Town of New Plymouth Consolidation Ordinance, 1859' have not been completed"—and then it goes on to provide for the completion of the consolidation of certain Public Reserves.

As the hallmark of its authority, the Taranaki Provincial Council has added to and had bound in the volume containing its first Ordinances—a copy of the New Zealand Constitution Act, 1852. This is a very important Act in the historical development of New Zealand. It is described as "An Act to grant a Representative Constitution to the Colony of New Zealand." It makes an interesting reference to the early control of New Zealand *by New South Wales.* Then it goes on to establish the following Provinces in New Zealand, viz., Auckland, Taranaki, Wellington, Nelson, Canterbury, and Otago and to authorize for each such Province the appointment of a Superintendent and a Provincial Council.

From those provisions of that Act of Constitution, emerged our present democratic system of elections.

It was while a Member of the Taranaki Provincial Council that R. C. Hughes was instrumental in introducing, and having passed, an Ordinance to set aside Government land for the purposes of a Park at New Plymouth. This was the genesis of our present Pukekura Park.

Perhaps I may, at this point be pardoned for mentioning that it might be of some little historical interest to record that the office site in Brougham Street where Robert Clinton Hughes practised law, has now been in the name of Hughes for over one hundred years, it having been purchased first by R. C. Hughes's father when he came to New Plymouth in 1850. Here, too, when speaking of early land titles, is another old deed—of particular interest to Methodist Church people. It is the title deed to the home in New Plymouth where lived the Rev. John Whiteley before he was killed by Natives at the White Cliffs on February 13, 1869. The parchment deed is dated June 10, 1865. It is signed by Sir George Grey, K.C.B., who is described as the "Governor and Commander-in-Chief in and over the Colony of New Zealand" and it is expressed as being a Grant to Thomas Smith of Blackpool, Lancashire, England "in fulfilment of a contract by the New Zealand Company." There is then a conveyance from Thomas Smith to "The Reverend John Whiteley," on which the signature of John Whiteley can be seen.

More Pioneers.

Robert Clinton Hughes died in 1935, and, up to such date, he was the oldest practising solicitor in New Zealand.

One of the most colourful legal characters of those early days was undoubtedly Oliver Samuel. He was born in Jersey in 1849—a son of a Doctor of Divinity—and came to New Zealand in 1855. He was practising law in New Plymouth in 1878, and was later chosen by the Government to assist in the prosecution of the great Maori Chiefs and prophets, Te Whiti and Tohu, at the Parihaka State Sedition Trials in 1881. Mr. Arthur Standish, Sen., was also engaged in this trial.

Oliver Samuel also prosecuted the murderer, Hiroki, who was arrested at the same time. Another prominent Native prosecution in which he was engaged was the trial of Mahi Koi for murder committed in Pukekura Park. In his civil practice, one of his outstanding cases was what became known as the Harbour Board Sinking Fund case. The Harbour Board was, at the time, practically at the end of its resources, and the prospect of the ratepayers agreeing to a further loan seemed hopeless, when Oliver Samuel discovered that in years gone by, the Board had paid to its Sinking Fund Commissioners large sums beyond what it was bound by law to pay. He advised the Board therefore to have the question tested in the Supreme Court, which ultimately ruled that the Sinking Fund Commissioners should refund to the Harbour Board a sum of over £20,000 which enabled the erection of a wharf to be put in hand (and saved the situation).

In 1884 he was elected to Parliament. In 1907 he was appointed to the Legislative Council. In 1920 he was made a K.C.

He always had a keen desire to see the oil resources of New Plymouth explored and developed and spent many thousands of pounds to this end. Oliver Samuel died in January, 1925.

Another well-known and highly-regarded legal association with Taranaki, had its beginnings in the arrival at New Plymouth, in the ship *Mariner*, of Thomas Shailer Weston. He was born in 1836, and became a barrister and solicitor in 1861. He practised for only a few years in New Plymouth and then at Invercargill and at Auckland—until, in 1873, he was appointed a District Judge at Napier. He retired from that position in 1880, and practised law again in Christchurch. He died in 1912. His son, also Thomas Shailer Weston was born in 1868, and was at one time practising law in New Plymouth. He was on the Council of the Taranaki District Law Society in 1910, but spent most of his legal career in Wellington. He died in 1931.

The member of this family with whom we were more familiar in New Plymouth was Claude Horace Weston. His genial nature and kindly courtesy endeared him, not only to his fellow-practitioners, but also to that large body of men who in the 1914-18 War knew him as Colonel Weston. He was a soldier, an author, and a lawyer of distinction, acting for many years as Crown Solicitor in New Plymouth, and finally practising in Wellington where he "took silk."

One of the earliest King's Counsel to have appeared in our New Plymouth Supreme Court was the Hon. Sir Francis Henry Dillon Bell, K.C.M.G., K.C., of Wellington who was admitted to the Bar at the Middle Temple in 1874 and to the New Zealand Bar in 1875.

Other eminent King's Counsel from Wellington, who have appeared in our local Court have been Sir John Findlay, K.C., and a Doctor of Laws, Mr. C. P. Skerrett, K.C., (later Sir Charles Skerrett, and Chief Justice), and Michael Myers, K.C., who was later appointed Chief Justice, was knighted, and became a Privy Counsellor. It was he, who, in his earlier years of practice, appeared as an advocate before the Judicial Committee of the Privy Council, and in four cases triumphed over England's celebrated barrister, Sir John Simon.

Other names prominent in the earlier history of the legal profession in Taranaki, are, Clement W. Govett, a son of Archdeacon Govett who, amongst his many eventful clerical experiences in New Plymouth, can number the occasion, on November 8, 1860, when he conducted, in Maori, the burial service of the Natives killed in the historic battle of Mahoetahi just out of

New Plymouth. This burial service was conducted in the north-western corner of the present grounds of St. Mary's Vicarage—where may be seen, today, a granite tablet commorating the event. Clement Govett practised law for many years in New Plymouth, in partnership with the founder of another distinguished legal family, James Henry Quilliam. The latter, who was admitted to the Bar in 1897, was a forceful and an able advocate. He was elevated to the Judiciary, as a temporary Supreme Court Judge, on his retirement from active practice in New Plymouth. He outlived, by thirty-five years, C. W. Govett who had died in 1914. Today, both a son and a grandson of James Henry Quilliam are practising law in New Plymouth. The third partner in this old-established firm was David Hutchen, who had been practising on his own account in New Plymouth for many years after his admission as a solicitor in 1886. He was the author of a very useful book, *The Land Transfer Act*, and he was for many years on the Council of the Taranaki District Law Society. It was during one of his periods as President of the Society, in 1915, that a letter was received from Mr. Philip Hopkins asking on behalf of the general body of Law Clerks in New Plymouth, for the earlier closing of offices on Saturday. Nothing was done (I am ashamed to say). In 1910, the weekly half-holiday for legal offices in New Plymouth had been changed from Thursday to Saturday (closing at 1 p.m.).

The Middle Period.

Some of the early officers of the Taranaki District Law Society were W. A. Banks, as Secretary, in 1905, and J. Terry, as Secretary, in 1909. He was the father of John Terry, a one-time head boy of the New Plymouth Boys' High School and now a practising lawyer in Auckland. In that year, 1909, William Kerr, who was later appointed a Magistrate (and who since 1903, had been a partner in the firm of Standish and Kerr) was the President of the Society. The other members of the Council of the Society in 1909 were J. E. Wilson, A. H. Johnstone, J. B. Roy, C. H. Weston, and David Hutchen.

I have an old photograph of some of these early practitioners, taken in wig and gown at the New Plymouth Courthouse. In it are shown W. Kerr, C. W. Govett, Oliver Samuel, J. H. Quilliam, J. B. Roy, D. Hutchen, T. C. Fookes, W. L. Fitzherbert, and A. J. Edmunds. The late Mr. Justice Edwards, is in the centre and on each side of him the then Registrar, R. I. Stanford, and the Sheriff, W. A. Banks. An inscription on the bottom of the photograph explains that it was taken on the occasion of Mr. Justice Edwards taking his seat for the first time, at New Plymouth, as Judge of the Northern Judicial District, on September 30, 1903. J. E. Wilson, a member of the 1909 Council, commenced practice on his own account in New Plymouth and subsequently entered into partnership with George Grey, the father of Philip Grey, who is at present practising in New Plymouth. In 1902, the firm name was Wilson and Grey and later, Grey and Grey. J. E. Wilson was, for a time, Mayor of New Plymouth and it was he who presided at the ceremony of laying the first of the tram-rails in New Plymouth. From practice here, he was appointed to the Magistracy and later held the office of Chief Justice of Samoa.

A. H. Johnstone, another member of that Law Society Council, in 1909, practised with distinction at the Bar both in New Plymouth and later in Auckland, where he was appointed King's Counsel. As Sir Alexander Johnstone, Q.C., he is still in practice there. In 1913, at New Plymouth, he was President of the Taranaki District Law Society.

Sir Alexander Johnstone, Q.C., is one of the distinguished men of whom Taranaki can be justly proud. His is one of the names which the New Zealand legal profession esteems and highly respects.

In 1914, the genial and popular Frank Wilson was President of the Society and a practising lawyer here. He had, in 1903, joined J. B. Roy in partnership. He was head of the firm later known as Wilson and Freeman. Frank Wilson was Mayor of New Plymouth from 1920 to 1927—in which latter year he died. W. H. Freeman, his partner, was later appointed a Magistrate, and is still in office as such in the Thames–Tauranga district.

Taranaki can claim several other appointments from the ranks of its practising solicitors to the Magistracy. Names which come to mind are William Kerr of New Plymouth, to whom I have previously referred; Alfred Coleman of Stratford, who also has been the Chairman of several Government Commissions, Jack Willis of New Plymouth, who, in addition to being a Magistrate, is an author of several legal works; and the late Jim Hessell, who, before he was appointed to the Magistracy, was practising law at Eltham. The emoluments attaching to this Magisterial office have been improved in recent years but it is interesting to record, that as far back as 1920, when Mr. H. R. Billing was President of the Taranaki Law Society and Mr. T. A. Baily was the Resident Magistrate here, the Society supported a recommendation for "improvement of the status and remuneration of Magistrates."

In 1921 the Council of the Law Society for Taranaki comprised such well-known contemporary names as John Connal Nicholson, who was President and had been a member of the firm of Roy and Nicholson since 1908, R. H. Quilliam (our present Crown Prosecutor and a Prosecutor at the Tokio War Trials), T. P. Anderson (a one-time Chairman of the Mortgagors Adjustment Commission), H. R. Billing, Chairman of the Board of Governors of the High Schools), Cyril Henry Croker (sometime Member of the Legislative Council) and Austin Bewley—the three latter all having been admitted as solicitors in the same year, 1909.

In 1922, the year of J. B. Roy's retirement from practice, when Claude H. Weston (to whom reference has earlier been made) was President of the Society, it is amusing, in the light of present-day international alignments, to find that a letter was received, by the Taranaki Society, from "The Society of Russian Barristers in Constantinople," asking for aid. This would doubtless be from a faction of those disinherited exiles who had been supporters of the Czarist regime prior to its overthrow by the Revolution. Again, no action was taken!

In 1923, Mr. T. P. Anderson, as President of the Society, had associated with him, as Secretary, L. Etherington, a practising solicitor who, over the pen-name of "John Doe", used regularly to contribute, to the *Taranaki Herald*, a column on topical events.

Other Taranaki Practitioners.

There have been, and are today, many eminent and well-known solicitors in other parts of Taranaki whose names have not been mentioned, but who are assured

of a well-deserved place in any complete history of the Taranaki legal profession. Available records, and personal information, have, of necessity, focussed attention more on New Plymouth practitioners than on those in other parts of the Province. Without doing full justice to their place in this review, we can however readily call to mind such early names as D. G. Smart, H. D. Caplen, and G. H. Ryan of Hawera. From that town also come such eminent men as A. K. North (now on the Supreme Court Bench), F. C. Spratt, a leader of the Bar in Wellington, and the late Paddy O'Dea, a one-time schoolmaster but later a barrister remembered for his Irish eloquence and forceful personality.

Bernard McCarthy, lawyer and sportsman, E. Beechey, later a Native Land Court Judge, R. D. Welsh, Arthur Coleman, L. A. Taylor, and John Houston (the latter an authority on Maori history and legend), are all names which are associated with the practice of the law in Hawera.

In Stratford, one of the early practitioners was Cecil Wright, who was joined in partnership by H. E. Lawrence—a man of tireless energy who was to be found playing tennis at the age of seventy and still practising law at eighty. Some of the other practitioners in Stratford have been T. C. Fookes, who has a son now practising in New Plymouth and a nephew practising at Inglewood, Sinclair Macalister, the late partner of Alfred Coleman (now a Magistrate), and E. S. Rutherfurd. The latter is still in practice at Stratford, as are also, E. H. Young, a one-time Chairman of the Mortgages Adjustment Commission; Percy Thompson, a former Mayor of Stratford, and N. H. Moss, the present Mayor and also Chairman of the New Zealand Municipal Corporations Association. It is interesting to note also that Sir Alexander Johnstone, Q.C., now of Auckland, was at one time in practice in Stratford as a member of the well-known firm of Malone, Anderson, and Johnstone. In 1914, A. H. Johnstone came to New Plymouth and Truby King took his place in Stratford.

T. B. Crump, Andrew Chrystal, and A. A. Stewart were early practitioners in Eltham. At Inglewood, we recall the names of A. Paterson, Harold Thompson, William Armstrong, and Ian Grant. It was Harold Thompson who assisted in the capture and arrest of New Plymouth's early highwayman, Bob Wallath.

Ivor Prichard, who commenced practice thirty years ago in Waitara, is now a Judge of the Maori Land Court for the North Auckland District. New Plymouth, for Maori purposes, is included in the Aotea Maori Land District and is served by the Aotea Maori Land Board, which has its headquarters at Wanganui. From there to New Plymouth, in the earlier years, for the Native Land Court Sessions, frequently came Judge Browne, who was then President of the Aotea Maori Land Board.

Judges and Magistrates.

Early Magistrates in New Plymouth were, first, Thomas King, and then, in 1852, Josiah Flight. They were probably the first Resident Magistrates. Later, we find the names of William Kerr, M. Crook, T. A. Bailey, A. M. Mowlem, R. W. Tate, and H. H. Woodward.

Registrars of the Supreme Court within recent memory have been H. Gilmore-Smith and L. W. Louisson.

The Hon. Harold Brocket Gibson, M.L.C., of Fiji, who is now practising law at Labasa, was, in 1919, a member of the Taranaki District Law Society.

Judges of the Supreme Court have visited New Plymouth on circuit for the quarterly sessions for many years past. In this connection it is interesting to note that in being no respecter of persons, the law has extended its challenge even to one of these Judges, Mr. Justice Edwards, who in the early part of this century, was described as the Judge of the Northern District, and as such, the regular Judge presiding at our Taranaki Supreme Court Session, was, in May, 1891, the defendant in a case reported as the *Attorney-General* v. *Worley Bassett Edwards*. The late Mr. Justice Edwards had been appointed by the government of the day as an additional Judge of the Supreme Court. There were then only five Judges—Chief Justice, the late Sir James Prendergast, and the late Justices Richmond, Williams, Denniston, and Conolly.

The appointment of Mr. Justice Edwards as a sixth Judge had been challenged by the Opposition party of the day on the grounds that it was illegal. Sir Robert Stout, later Chief Justice, but, at that time, a practising barrister in Wellington, was interviewed by a reporter of the *Evening Post* on March 17, 1890, Sir Robert Stout, in answer to a request for his views on the appointment, said: "I have no objection to Mr. Edward's qualifications. He will be a conscientious Judge, I have no doubt, and he is a good lawyer. I exceedingly regret his appointment nevertheless, for I believe it to be illegal, unconstitutional, and destructive of the independence and dignity of the Supreme Court Bench; and I feel very vexed it should have been made."

The appointment of this temporary Judge had been approved by Governor Onslow with what then appeared to be all the necessary formalities. It therefore had to be attacked by legal processes. The Attorney-General took action, and briefed Sir Robert Stout to appear with him. The case was heard by the full Court of Appeal, Mr. Justice Edwards being called upon to show cause why his Commission should not be cancelled on grounds of illegality. By a majority judgment, the Court decided in favour of the defendant. The Crown, however, appealed from this decision and the case then went to the Privy Council. On May 23, 1892, the Judicial Committee of the Privy Council gave its decision. It reversed the judgment of the New Zealand Court of Appeal, and declared the appointment illegal. The crucial point was that no provision had been made at the time of the appointment for a fixed salary for the new Judge. The Judge was left dependent on the Ministry of the day for payment of any salary. No prior provision had been made by Parliament in its Budget or Civil List Act of that year for the salary of a sixth Judge.

The decision of the Privy Council in thus invalidating the appointment of Judge Edwards was later overcome by the passing in New Zealand of a special Act of Parliament increasing the number of permanent Supreme Court Judges to six, and providing, in advance, in the Civil List, for salaries for six, instead of five, Judges. Thus was the constitutional principle of the independence of the Judiciary especially safe-guarded in our Statute Law. Shortly afterwards there was a change of Government. *The Times* (London) of July 12, 1892, in a leader on the terms and effect of the Privy Council judgment said:

> That was the contention of the present Government and its legal advisers from the first. When in opposition, they stood out against the appointment for the very reasons given

in the judgment of the Privy Council. In office, they urged their reasons in our Court of Appeal and having failed to convince three out of five Judges, they took the case to the highest authority in the Empire, and obtained a verdict almost in the very words used to place their case before the Court of Appeal. They have performed a signal service to the Colony which has brought them great credit for devotion to constitutional principle, and for moral courage. Throughout this lamentable business they did the right thing, and in the right way.

And so, for many years afterwards, with his appointment legalised, Mr. Justice Edwards continued to visit, on circuit, our Supreme Court at New Plymouth. There are now twelve Supreme Court Judges of whom one holds the rank of Chief Justice. Grouped into two Divisions, they constitute the Court of Appeal, which holds sittings three times a year in Wellington. Appeals from a single Judge, therefore, are determined by his brethren, sitting three or more together. "And so," said the late Sir John Salmond on his own elevation to the Bench, "Judges in New Zealand have still left to them one enjoyment in life, the melancholy pleasure of reversing each other's decisions."

The Early Days—And Now.

The lot of the lawyer in the early days in Taranaki, like that of the policeman of Gilbert and Sullivan, was not a very happy one. It was certainly not an easy one. We move along today perhaps unaware of the difficulties of the pioneer practitioners, and unconscious of the improvements which have been effected for our benefit. At a gathering of Taranaki lawyers held on February 3, 1922, in New Plymouth in honour of two of the oldest practitioners, J. B. Roy and R. C. Hughes, it was there said by one of the guests: "Things were very different in New Zealand in the early years of practice. There were then no telegraphs, practically no trains, tracks through bush, where are now asphalt roads; no Land Transfer Act to give clients quick and reasonable service. Settlers lived in fear of the Natives. Life was harder than today." That those conditions were experienced by the Judges as well as by the lawyers is borne out by the following incident. On August 11, 1927, portraits of two distinguished Judges, Mr. Justice Henry Samuel Chapman and his son, the Hon. Sir Frederick Revans Chapman, were unveiled in the New Plymouth Supreme Court. Mr. H. R. Billing, who, in 1927, was President of the Taranaki Law Society, spoke of the valuable service rendered by this father and son on the Supreme Court Bench from 1843 to 1852 and from 1903 to 1924, respectively. Mr. Justice Chapman (Sen.) met Sir William Martin (the Chief Justice) in New Plymouth in 1844 and drew up Rules for the Supreme Court. The Chief Justice walked overland from Auckland, and Mr. Justice Chapman (Sen.) came by boat from Wellington, but was landed at Kawhia and had to walk the rest of the journey to New Plymouth and also back to Wellington. Incredible—but true!

"A few years ago," said Mr. Billing in 1927, "Sir Frederick Chapman gave us a very interesting lecture in New Plymouth describing his father's experiences on that memorable occasion."

Amongst the eighteen objects of the Rules of the Taranaki District Law Society, are two, which read, "Generaliy to protect the interests of the legal profession and the interests of the public in relation to legal matters" and "to give its aid and countenance to law reforms and to represent the views, interests, and wishes of the profession."

Those practitioners of whom we have heard mention, and indeed many others unmentioned, have done much to contribute towards the fulfilment of the above two objects of the Society. Sir Edward Creasy, an English historian, says:

> He who has studied our Constitution the most deeply, will venerate it the most; and while he vigorously extirpates abuses and steadily works out its vital law of growth and development, he will religiously guard its primary institutions from the experiments of the conceited theorist and the assaults of the disloyal destroyer. It is however due to our present law reformers, to bear witness to their honourable activity in sweeping away absurd technicalities, tedious processes, irrational subtleties and other abuses of our legal system which for ages have defied the great constitutional maxim: that Justice and Right shall be sold, denied or deferred, to no man. In this field of reform 'much has been done, but more remains to do.'

May I conclude with the words of H. G. Wells: "What man has done, the little triumphs of his present state, and all this history we have told, form but the prelude to the things that man has yet to do."

CORRESPONDENCE.

Place for Settlement of Land Transfer Transaction and Incidence of Exchange on Purchase Moneys.

The Editor,
New Zealand Law Journal,
Wellington.

Dear Sir,

Referring to the answer to Question No. 3 (*ante* p. 16), is not the answer to the portion of the question relating to exchange on purchase-moneys incorrect? Is not the only place for settlement of the sale of Land Transfer land the Registry where the title to that land is registered, and is not the vendor entitled to receive the full amount of the purchase moneys as stated in the transfer at that Registry Office?

The writer had occasion to obtain a ruling on the point many years ago from the Auckland Law Society, and it was to that effect.

From that ruling the practice has grown up in Northland as follows:—

(*a*) Settlement when vendor resides in Auckland, and purchaser elsewhere: exchange paid on Auckland.

(*b*) Settlement when both parties reside in same town: no exchange added.

(*c*) Settlement when both parties reside in a different town outside Auckland: purchaser pays exchange, as vendor could insist on settlement in Auckland, when exchange would be added as in (*a*) above.

The foregoing method of dealing with the exchange question has worked smoothly for a long period, and it is suggested that it is worthy of general adoption.

Yours, etc.,

Country Practitioner.

[The last sentence in the Practical Point to which exception is taken should have read: "In the instant case, therefore, the purchaser must pay the exchange. The vendor was entitled to the full purchase-money free of exchange."

The question asked was not clearly expressed, and apparently misled "X" who answered it. Our correspondent is, of course, right.—Ed.]

LAND TRANSFER: THE REGISTRATION OF LEASES.

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

(*Concluded from page 75.*)

LEASES AND EASEMENTS.

An easement ancillary to a lease may be created in the memorandum of that lease. For example, an actual lease of a definite parcel of land together with a right of way over another portion: in such a case the right of way is actually appurtenant to the lease itself and would cease with the lease itself.

But, if the leading object of the instrument is the creation of an easement or *profit a prendre*—(*i.e.*, if the person taking under the instrument is not to have the right of exclusive possession) then the instrument must be in the form of a memorandum of transfer (Form B 2nd Schedule) and not of a lease (Form K): s. 90 of the Land Transfer Act, 1952, *McKenzie* v. *Waimumu Queen Gold-Dredging Co., Ltd.*, (1901) 21 N.Z.L.R. 231; *Barber* v. *Mayor, etc., of Petone*, (1908) 28 N.Z.L.R. 609; 11 G.L.R. 148.

LEASES AND LICENCES.

An essential element of a lease is the right of the lessee to exclusive *possession* of the land. But this does not mean that certain rights over the land leased may not be reserved to the lessor or granted to a third person. For example, A may lease to B, reserving to himself an easement—(*e.g.*, a right of way) over the land leased, or a *profit a prendre*.

Thus, in *Glenwood Lumber Company* v. *Phillips*, [1904] A.C. 405, the licence granted to the respondent "licensed" to him a certain parcel of land to hold (for the purpose of cutting timber, etc.) for the term of twenty-one years with a proviso that other persons might travel over the ground, that certain persons could take timber for public works, and that persons settled by lawful authority within the ground licensed should not be interrupted in clearing and cultivation. It was held that this gave the licensee an exclusive right of occupation and in effect amounted to a lease.

The same view was taken in *Taranaki County Council* v. *Mack*, [1931] N.Z.L.R. 476, where it was held that, notwithstanding the large reservations in favour of the licensor, the licensee had exclusive occupation and was either a licensee or lessee.

If an instrument is not a lease because it does not confer the right to exclusive possession (as in *Waimiha Sawmilling Co., Ltd. (In Liqdn.)* v. *Waione Timber Co., Ltd.*, [1923] N.Z.L.R. 1137; [1923] G.L.R. 353), it may be at law an easement or a *profit a prendre* (both of which are registrable under s. 90 of the Land Transfer Act, 1952) or a licence. A licence (within the meaning of the general law) is not registrable under the Land Transfer Act, (certain so-called licences are registrable under the Land Transfer Act by virtue of other statutes such as the Land Act, and s. 24 of the Finance Act, 1950, (dealing with the sale of state houses) but these are something more than licences as known to the general law). A "licence" (as that term is understood under the general law) is a right to enter upon the land of the licensor for some purpose agreed upon or to be or do some act in relation to the licensor's land which would otherwise be unlawful, the right not amounting to a legal easement or profit. In determining into what category an instrument comes, the substance of the transaction must be looked at.

As to the difference between a lease and a licence, see (1951) 27 NEW ZEALAND LAW JOURNAL, 253.

Examples of licences are:—

(*a*) The grant of the full and exclusive use of all the refreshment rooms of a theatre for the purpose only of the supply to and the accommodation of the visitors to the theatre and for no other purpose whatsoever.

(*b*) The grant by a railway company for a defined period of the sole exclusive licence and privilege of selling books and other publications at the company's stations and of using the bookstalls thereat.

(*c*) The exclusive right of supplying refreshment to the patrons of a theatre together with the right of using a stall in the foyer of the theatre: *John Fuller and Sons, Ltd.* v. *Brooks*, [1950] N.Z.L.R. 94; [1949] G.L.R. 534.

In all the above examples, the cardinal feature is the right to provide amenities, and the right of occupation of any premises concerned is merely incidental and collateral to the exercise of that right. On the other hand where the creation of a right to occupy property is the real purpose and intention of the parties a tenancy will be created—*e.g.*, *Joel* v. *International Circus and Christmas Fair*, (1920) 144 L.T. 459, an agreement to allot to a person specified spaces in an exhibition for the duration of the exhibition.

There may also be a licence subject to a condition—*e.g.*, a man may give his neighbour permission to walk over his field provided he does not go with a dog. Although this is not a contract but a revocable licence, the condition is binding on the licensee: *Wilkie* v. *London Passenger Transport Board*, [1947] 1 All E.R. 258; 63 T.L.R. 115.

SUB-LEASES.

There may be a lease of a lease, which is usually called a sub-lease. The term of the sub-lease should be less than that of the head lease. If it is for the whole of the residue of the term of the head lease, it acts as an assignment of the head lease. The following extract from *Baalman and Wells's Practice of the Land Titles Office*, 3rd Ed. 246, appears applicable also to New Zealand:

> An underlease for a term extending beyond that of the head lease will not be registered even though the head lease contains an option of renewal which has been exercised.
>
> An underlease for the residue of the term created by the head lease is open to objection on the ground that it is, in effect, an assignment (see *Lewin* v. *Baker*) the appropriate form for which, under the R.P. Act, is a memorandum of Transfer. Where it is intended to assign the term but still retain the effect of a sub-tenancy it is customary to demise for "the residue of the term less the last three days thereof".

A sub-lease for "the residue of the term less the last day thereof" would also be acceptable in New Zealand.

As to sub-leases generally, see *Garrow's Real Property in New Zealand*, 4th Ed. 643, *et seq.*

Form of Sub-Lease.

The ordinary memorandum in the Form K, of the Second Schedule to the Land Transfer Act is used. The form could commence: I, A. B., being registered as proprietor of an estate of leasehold, as lessee under Memorandum of Lease No. subject, however, etc.

Dealings with Sub-Leases.

So far as registration under the Land Transfer Act is concerned a sub-lease may be transferred, mortgaged, and surrendered exactly in the same manner as the ordinary memorandum of lease: Sections 97, 101, 120 of the Land Transfer Act, 1952. The memorial of a sub-lease is endorsed on:

(*a*) The Register Book;

(*b*) The lessee's duplicate of the head-lease, *i.e.*, the one which has been stamped with *ad valorem* lease duty by the Stamp Duties Office;

(*c*) The Land Transfer (or office) duplicate of the head-lease.

The production of the outstanding certificate of title for the fee-simple is not required and the memorial of the sub-lease is not endorsed on such certificate of title. The memorial is not endorsed on the counterpart or triplicate copy, if any, of the lease.

Sub-Leases Protected from Forfeiture.

There are special provisions in the Property Law Act, 1952, protecting a sub-lease from forfeiture: s. 119, and see *Garrow's Real Property in New Zealand*, 4th Ed. 624 *et seq.*

Leases in Futuro.

As a general rule a lease may be granted to commence at any time in the future: *Mann* v. *Registrar of Land Registry*, [1918] 1 Ch. 202. That is to say there is no objection (apart from special provisions in certain statutes) to a lease being expressed to commence at a future date *after* the date of the lease. But a lease expressed to commence on an uncertain date which may never happen, (*e.g.*, upon the completion of the proposed Auckland Harbour Bridge) would offend the rule against remoteness of vesting or perpetuities and will not be accepted for registration. The following are examples of statutory exceptions to the general rule that a lease may be granted to commence at any time in the future:—

(*a*) *Section 91 (4) of the Property Law Act, 1952*, leases by mortgagees in possession.

All leases must take effect in possession not later than six months after its date.

(*b*) Every lease of Maori land must take effect in possession within one year from the date of the first execution thereof by any party thereto: s. 235 (2) of the Maori Affairs Act, 1953.

(*c*) *Section 9 of the Public Bodies Leases Act, 1908.*

Every lease granted in pursuance of that Act takes effect in possession within six months after the granting thereof.

(*d*) *Section 153* (b) *Municipal Corporations Act, 1954*

Every lease takes effect in possession within six months from its date.

Lease Purporting to Commence Before Date of Execution.

There is no objection to this. "Nor is there any objection to a lease in which the term is expressed to have commenced at a past date": *Baalman and Wells's Land Titles Office Practice*, 3rd Ed. 235, citing *York House Proprietary, Ltd.*, (1930) 43 C.L.R. 427, 438. In *Garrow's Real Property in New Zealand*, 4th Ed. 557, the position is put as follows:—

> Where in a lease executed on a certain date there is a grant of the demised premises to be held by the lessee from a date prior to the date of execution, the grant operates from the date of execution, the date in the habendum merely marking the point of time from which the duration of the term is to be reckoned.

Registration: Existing and Subsisting Registered Lease.

It is stated in *Baalman and Wells's Land Titles Office Practice*, 3rd Ed. 236, that a lease will be registered notwithstanding the existence of a prior registered lease of the same land, provided it is:—

(*a*) expressed to commence on or after the determination of the prior lease, *or*

(*b*) the prior lease is noted in the memorandum of encumbrance.

The practice is similar in New Zealand.

Registration of Lease when Term Expired.

A lease cannot be registered, if the term thereof has expired before it is presented for registration. This applies whether or not the lease contains a compulsory purchasing clause or a renewal clause. Similarly, instruments cannot be registered against expired leases.

Lease of Mortgaged Land.

Section 119 of the Land Transfer Act, 1952, provides that no lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto.

Although the consent of the mortgagee may be effectual, if obtained after the registration of the lease, and may be even implied, the careful conveyancer will endeavour to get the mortgagee's consent endorsed on the lease before it is registered. If this is not done, there is a real risk, that, if the mortgagee exercises his power of sale, the registration of the lease will be extinguished.

Reservation of Rent.

The following paragraph from *Baalman and Wells's Practice of Land Titles Office*, 3rd Ed. 236, is also relevant to our New Zealand practice:

> Rent is not an essential constituent of a lease: *Knight's* case, (1588) 5 Co. Rep. 54b, 77 E.R. 137, *1 Platt on Leases*, p. 9; but if a rent is reserved it must be certain or ascertainable. A fluctuating rent is not an objection to registration provided that the contingencies upon which it is expressed

to vary are ascertainable.

The reservation of rent to a stranger to the title is void: *Co. Litt.* 143b, 213b. Rent need not, however, be expressly reserved to the lessor, but may be reserved generally without stating to whom it should be paid, even when there are co-lessors of whom one is a fiduciary. For the rent will devolve with the reversion according to law and be apportioned in respect of any undivided shares or successive interests: see *Foa*, 6th Ed. 126; *Henare Tamoana* v. *Ormond*, (1878) 3, N.Z. Jur. (N.S.) S.C. 86.

A rent may be a rack-rent, or merely nominal, or what is known as a peppercorn one. A few years ago, an English Judge disapproved of the practice of reserving a rental of one peppercorn, if demanded; but a peppercorn rental is expressly mentioned in certain Acts of the New Zealand Parliament. Sometimes land may be leased at a rack-rent only, *e.g.*, s. 10 of the Public Bodies Leases Act, 1908; and a District Land Registrar would not register any lease in contravention of any such statutory provision.

Term of Lease.

At common law, there appears to be no limit to the term of a lease. There are, however, several statutory limits with which conveyancers should make themselves conversant. In *Baalman and Wells's Practice of Land Titles Office*, 3rd Ed. 239, there appears the following relevant passage:—

> The question often arises as to whether the period for which a lease may be "renewed" in pursuance of an option, should be taken into consideration for the purpose of determining whether or not the lease exceeds a prescribed maximum. In the absence of any comprehensive authority on the subject it appears that each case should be decided in the light of any context in the statute or other instrument which makes the term a relevant feature: see *e.g.*, *Llangattock* v. *Watney Combe Reid and Co., Ltd.*, [1910] 1 K.B. 236; [1910] A.C. 394.

In many New Zealand statutes the right of any renewal is expressly made a relevant factor, *e.g.*, s. 235 of the Maori Affairs Act, 1953, ss. 125-128 of the Public Works Act, 1908; s. 2 of the Land Subdivision in Counties Act, 1946 (definition of "Sale").

Section 235 of the Maori Affairs Act, 1953, provides that, except as may be otherwise expressly provided in any Act, no alienation of "Maori" freehold land by way of lease shall be for a longer term than 50 years (including any term or terms of renewal to which the lessee may be entitled). The extended definition of lease for the purposes of Part XX of that Act, reads as follows:—

> "Lease," in relation to any Maori freehold land, includes, in addition to its ordinary meaning, any licence, grant, or other alienation conferring upon any person a right at law or in equity to the use or occupation of the land for any purpose, or a right to enter thereon for the purpose of removing therefrom timber, minerals, flax, or any other valuable thing attached to or forming part thereof, whether that alienation confers a right of exclusive possession or not; and the terms "lessor," "lessee," and "rent" shall be construed accordingly."

Limitations as to the term of leases will also be found in such Acts as the Settled Land Act, 1908; Public Bodies Leases Act, 1908; Municipal Corporation Act, 1954; Reserves and Domains Act, 1953; National Parks Act, 1952; Land Act, 1948; and in many Acts authorising corporations created by statute to lease land. Care must always be taken by a conveyancer to see that a corporation created by statute does not exceed its statutory powers of alienation; and any such lease *ultra vires* of the corporation would be refused registration by the District Land Registrar.

Memorandum of Extension of Term of Lease.

This is provided for by s. 116 of the Land Transfer Act, 1952, which enables the term of any registered lease to be extended by a short form.

The principal point to be observed is that the memorandum of extension must be in the Form L in the Second Schedule, Land Transfer Act, 1952; and that it must be registered *before* the expiry of the current term of the lease. It must be signed by both the lessor and lessee. If the covenants of the original lease are varied, the variations will, as a general rule not concern very much the Registrar: and the comments made previously in this article under the subheading "Contents of Lease" apply equally to s. 116 of the Land Transfer Act, 1952, also.

As an extension of a lease is in essence a new lease, constituting a new contract between the lessor and the lessee, it will be liable to *ad valorem* duty under Part VI of the Stamp Duties Act, 1954, unless specially exempted therefrom.

On the registration of the memorandum of extension the estate of the lessee is deemed to be subject to all encumbrances, liens, and interests to which the lease is subject at the time of the registration of the memorandum of extension.

But, if the fee is mortgaged, the memorandum of extension will not be binding on the mortgagee *unless he has consented thereto in writing on the memorandum.*

This condition should be particularly noticed by the conveyancer; it differs from s. 119.

Precedents for memorandum of extension of leases will be found in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 433-436, and in *Supplement No. 2* to the *New Zealand Supplement of Encyclopaedia of Forms and Precedents*, 118-120.

Memorandum of Variation of Covenants in a Lease.

Subsection 4 of s. 116 of the Land Transfer Act, 1952, provides that, notwithstanding that the term of the lease is not extended, the covenants, conditions, and restrictions contained or implied in any lease may be *expressly* varied, negatived, or added to by a memorandum of variation in Form L in the Second Schedule to the Act (with the necessary modifications), signed by the lessor and the lessee for the time being, and registered before the expiry of the then current term of the lease. The District Land Registrar will not, as a general rule, be concerned very much with the *variation* of covenants except as pointed out in the preceding paragraphs.

Again, if the fee is mortgaged, the memorandum of extension will not be binding on the mortgagee, *unless he has consented thereto in writing on the memorandum.*

As to the question of stamp duty: the memorandum will not be liable to *ad valorem* duty under Part VI of the Stamp Duties Act, 1954, unless the rent is increased. It appears that the normal memorandum of variation of a lease will be liable to a duty of 15s., under s. 151, as a deed not otherwise charged. If it contains no new covenants, it might possibly be stamped at 1s. 3d., under s. 140, as a simple agreement not by deed.

A precedent for a memorandum of variation of the covenants in a lease will be found in (1954) 30 New Zealand Law Journal, 328.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

That Snail Again.—An inveterate reader of Practice Notes (of all things) has drawn attention to some observations of Jenkins, L.J., in *Adler* v. *Dickson*, [1954] 3 W.L.R. 1482, in which he says that the House of Lords heard the preliminary issue in *Donoghue* v. *Stevenson*, [1932] A.C. 562, and when the trial was finally heard there was no snail in the bottle at all. Scriblex himself heard rumours of this heresy and was somewhat disturbed as Mrs. Donoghue's snail has in legal literature much the same mysticism as the *Marie Celeste* has in the literature of the sea. He has always ranged himself with the views of a speaker at the Dunedin Conference of 1951, who, in reflecting upon the principle of the case, remarked :

> In Scotland, both shell-bearing and shell-less land molluscs are known as "snails", and form part of 125 different varieties that are to be found in the British Isles. It is a reasonable assumption—at least, if ultimate events are taken into account—that this particular specimen was a "snail-slug" belonging to the well-known class *testacella*. At all events, it was not one of the species recognized by conchologists as *Paludestrina jenkinski*, which has the habit, when safely ensconed and hidden from public view, of reproducing itself profusely and parthenogenetically, without any fertilization at all.

Coincidence, however, has come to the rescue upon the elevation to the office of Lord Advocate of the former Solicitor-General for Scotland, Mr. W. R. Milligan, Q.C. He took part in the argument in *Donoghue* v. *Stevenson* ; and, on being recently taxed with the statement that there was never any snail in the ginger-beer bottle, pronounced it as being inaccurate since the case was settled before it went to proof, and the truth has thus never been known. Perhaps the best summation of the situation is that of Richard Roe in the *Solicitors' Journal* (22/1/55) who contends that " we must accordingly relegate the intrusive gasterpod to that twilight region, half fact, half fiction, and entirely suspended judgment, where it has the Loch Ness Monster for congenial company." There is, of course, the compromise school of thought, which vehemently maintains that the lower half of the snail was left in the bottle, the upper half having been consumed in the delectable mush of ginger-beer and ice cream which the pursuer partly consumed at the time of her purchase.

Hanging Note.—In 1928, Charles Duff, a barrister-at-law in the Foreign Office, wrote a satirical little book, *A Handbook on Hanging*, which many years later was extensively quoted before the Royal Commission, in England, that inquired into the abolition of capital punishment against which he directed his shaft in Swiftian fashion. He has now brought it up to date with further technical information, although he continues to praise nineteenth-century hangman James Berry for his " brilliant and widely-used equation," calculated to break the prisoner's neck without pulling his head off. For students in this macabre field, it is thus given :

$$\frac{412}{\text{weight of the body in stones}} = \text{length of drop in feet}$$

The latest edition, entitled *A New Handbook on Hanging*. can be recommended, as can two other wittily-written sociological studies of Duff, *Ireland and the Irish* and *England and the English*, published last year.

Writers to the Signet.—The writer of a recent article in this Journal on the legal system of Scotland, (*ante*, p. 24) made no reference to Writers to the Signet, and an inquiry has been made as to their status. They comprise the senior Society of Solicitors in Scotland, and the possessors of one of the great law libraries there. In the past, they have done a great part of the legal business in Edinburgh, where common-law litigation is largely concentrated, and have in addition to their work as conveyancers and property agents, constituted the principal body of law agents before the superior Courts. They are usually designated " W.S.", but in the case of several of the older firms the right to use " C.S." (Clerks to the Signet) is still maintained. Before the Administration of Justice (Scotland) Act, 1933, the " will " or essential part of a summons issued for hearing in the Court of Session was required to be signed by a Writer to the Signet, and the summons itself still requires to be sealed at the Signet Office before service.

The Ideal Soporific.—Scriblex notes that Mr. Justice Botein, of the Supreme Court of New York, in a semi-autobiographical book, *Trial Judge* (Simon & Schuster, New York), maintains that he has found a new and practical use for law reviews—namely, as soporifics (pp. 322, 329). This may well be the situation off the Bench, but in the Court itself no better soporific has ever been devised than argument by counsel, on a warm day, in an involved building dispute, with masses of estimates, quantities, and figures. In these circumstances, the scales of Justice fall only too often into the arms of Morpheus.

From my Notebook (Miscellaneous Division).

" What I have said has demonstrated that it is very difficult to find an answer to that question, but if I were pressed for an answer I would say that, as far as we can see, taking one time within another, and taking the average of Departments, it is probable that there would not be found to be very much in it either way."—Sir Thomas Padmore in his evidence to the Royal Commission on the Civil Service.

" It was a very human touch the other day when the Italian Government, pleading for more truthful returns, said that it would take returns which owned up to half the real income and would consider them truthful and correct ; but that it would really not be content with anything less than half."—Douglas Woodruff in *Walrus Talk* (Hollis and Carter, 1954).

" It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them, but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying and taking the partner of the marriage 'for better, for worse.' The course of conduct—the factum—must be grave and convincing."——Lord Porter in delivering the judgment of the Judicial Commitee of the Privy Council in *Lang* v. *Lang*, [1945] 3 All E.R. 571, 573.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Vendor's Lien; Ownership and Delivery.—In *Grice* v. *Richardson* (1877) 3 App. Cas. 319, an appeal from Victoria brought up an interesting question of vendor's lien. Certain tea had been imported by the appellants, who stored it, and issued warehouse certificates. These certificates were negotiated, ultimately to a firm named Webster. When most of the tea had been delivered to him, Webster became insolvent, and respondent was appointed trustee. Appellant, being unpaid, sought to exercise rights of lien over the undelivered portion of the tea. It was clear that if appellant held possession as unpaid vendor, the normal rules would apply, and their Lordships (at p. 324) approved and adopted the words of Bayley, J., in *Bloxam* v. *Sanders*, (1825) 4 B. & C. 941, 948; 107 E.R. 1309, 1311:

> "The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, but until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him. But his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to enquire, because this is a case of insolvency, and in cases of insolvency the point seems to be perfectly clear".

However, there was still the difficulty that the appellants "filled the double capacity of vendors and warehousemen", and there was the question whether an arrangement that Webster pay warehouse rent was equivalent to actual delivery. Again their Lordships referred to Bayley, J., this time from *Miles* v. *Gorton*, (1834) Cr. & M. 504, 510; 149 E.R. 860, 863:

> "The goods remained in the possession and control of the vendor. Where the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee, instead of the vendor, and it may then well be said that the warehouse is the warehouse of the vendee as between him and the vendor. I do not think that the payment of warehouse rent has the effect of a constructive delivery of the whole in a case where the goods remained in the possession of the vendor".

Accordingly, their Lordships were of opinion that as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchasers, the vendor's lien "revived upon the insolvency of the vendees."

Chain of Causation.—"One pit shaft in this mine was blocked by an admitted accident; a dislocation of the working arrangements ensued; the men had to be sent by another shaft under circumstances which exposed them to severe chill; this chill in one unfortunate workman's case brought on pneumonia, and of that the workman died. It appears to me both legally and philosophically incorrect to say that this should not be treated as a chain of causation—with the accident at the one end as cause, and death at the other end as effect. Wherever a chain of causation is alleged to exist, it is possible to say that it is broken at a certain point, and to attribute the effect to a fresh and intervening factor. The sheriff, as the judge of the facts, did not find that the chain of causation was broken in this way. And I see not ground for saying that he erred." Lord Shaw of Dunfermline in *Brown* v. *John Watson, Ltd.*, [1915] A.C. 1, 11. His Lordship continued, at p. 15, with a passage of considerable value in sifting such cases:

> "The truth is, my Lords, that the difference between all such cases is not one of principle. It is one of the things which occur, and may prove difficult, in the region of evidence. But whenever the causal connection between occurrence and result be established the principle to be applied is, as it ought to be, the same. The difficulty of establishing the causal connection may be, of course, much greater in the one case than in the other, and Courts of law are justified in demanding in all cases, and especially where external signs are wanting, that the relation of cause and effect be sufficiently established."

Crime and "Penal" Action.—Respondent, with others, as officers of a company incorporated and trading in New York State, certified that the whole capital stock had been paid up in cash. The Supreme Court of the State later found that the certificate was false, and ordered respondent to pay to appellant, a creditor, the sum of $100,240. Having failed to recover payment, the appellant brought an action upon his decree in Ontario, where respondent resided. The only plea stated in defence was that the judgment sued on was for a penalty inflicted by the Supreme Court of New York, and that the action, being one of a penal character, ought not to be entertained by the Courts of a foreign State. Lord Watson delivered the judgment of the Privy Council, *Huntington* v. *Attrill*, [1893] A.C. 150, granting the appeal, and said (p. 156):

> "Their Lordships have already indicated that, in their opinion, the phrase 'penal actions', which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation the word 'penal' may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the criminal rule."

His Lordship then quoted with approval a judgment of the Supreme Court of the United States, delivered by Mr. Justice Gray, in *Wisconsin* v. *Pelican Insurance Company*, (1888) 127 U.S. 265, in which it was said,

> "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection fo its revenue or other municipal laws, and to all judgments for such penalties,',

and then proposed, in the following words, a test that commended itself to the Board (p. 157):

> "A proceeding in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents."

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