New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXXII TUESDAY, MAY 22, 1956 No. 9

MASTER AND SERVANT: EMPLOYER'S CLAIM AGAINST NEGLIGENT EMPLOYEE.

SOME fundamental principles governing the relationship of master and servant were discussed in the Court of Appeal in England in the recent case of *Romford Ice and Cold Storage Co., Ltd.* v. *Lister*, [1955] 3 All E.R. 460, which, as Birkett L. J. said, raised some questions of great interest and great difficulty.

The defendant and his father were employed by the plaintiffs to collect waste and take it to the plaintiffs' factory. For some years the defendant had been employed by the plaintiffs as a lorry-driver. While backing his lorry in the yard of a slaughter-house to which he had been sent, the defendant negligently ran into his father and injured him. The father brought an action for damages for negligence against the plaintiffs. On January 29, 1953, he obtained judgment. McNair J. held that the father was one-third and the plaintiffs were two-thirds to blame, assessed the damages for injuries at £2,400, and gave judgment for the father for £1,600 and costs.

The plaintiffs were insured against this liability and the insurers paid the father the £1,600 and costs. The insurers sought to recover that sum from the son, the defendant. To do this, they had brought an action in the name of the plaintiffs against him, on January 23, 1953. The Romford Ice and Cold Storage Co., Ltd., were only nominal plaintiffs. The managing director of the plaintiff company went to the Court and gave evidence. He said that the plaintiffs were not consulted about this action. The insurers brought it under their right of subrogation or under the clause in the policy authorizing them to use the name of the company.

The plaintiffs' insurers, in the plaintiffs' name claimed an indemnity or contribution from the defendant for any damages which the plaintiffs might have to pay because of the defendant's negligence. They pleaded that it was an implied term of his contract of employment that the defendant should carry out his duties with reasonable care and skill, and that they had suffered damage by reason of his failure so to do, and, in the alternative, they claimed damages for negligence or breach of contract.

The defendant contended that the action was premature, in that it was commenced before any liability of the plaintiffs to the defendant's father had been established; and that the plaintiffs were precluded from bringing the action by implied terms in the contract of service that they would insure the defendant against any liability arising out of his negligence and would not sue him in respect thereof if recovering from the insurers, and that they would insure the defendant against the accident, which it was alleged arose out of the use of the lorry on a road, as required under the Road Traffic Act 1930. They submitted further that the damages were too remote and that the defendant should be granted exemption from liability for contribution in the Court's discretion under the Law Reform (Married Women and Tortfeasors) Act 1935 (s. 17 of our Law Reform Act 1936).

On February 18, 1955, Ormerod J. gave judgment for the plaintiffs. The defendant appealed.

A number of questions were considered by the Court of Appeal. Those which we intend to discuss here are as follows:

(1) Was the defendant in breach of an implied term of his contract of employment that he would act with due care and skill?

(2) Was the defendant in breach of a duty of care owed to his employers, the plaintiffs, independent of contract?

(3) Was it an implied term of contract of service that the employers would either insure the defendant against any liability arising from his negligent driving, or would insure themselves against it and would not sue him in respect thereof if they recovered from the insurers?

At the outset, counsel for the defendant took a preliminary objection to the proceedings. He pointed out that, when the plaintiffs were sued by the father, if they wished to claim indemnity from the defendant, the appropriate way for them to do it would have been to issue a third-party notice against the defendant. The Judge could then in the one action have assessed the share of responsibility which attached to the father, the defendant, and the plaintiffs respectively. Instead of issuing a third-party notice, the plaintiffs proceeded by means of a separate writ against the defendant; and they issued this writ, it is said, a week too soon. They issued it before the action against them was tried and before they were found liable themselves. They issued their writ against the defendant on January 23, 1953, but they were not found liable to the father until January 29, 1953. Counsel argued that on this account the action was premature. The plaintiffs, he said, ought to have waited until they had actually been found liable to the father, and then to have brought their action against the defendant.

At the hearing before the Court of Appeal, every one agreed that it was undesirable that the substantive claim should go off on a technical point of this kind. Their Lordships, therefore, gave leave for a second action to be brought and consolidated with the first action, the pleadings and evidence in the first action to stand as if they had taken place in the second action. This was done, and their Lordships were able to deal with the merits of the case. Nevertheless they still had to decide the preliminary point.

In order to decide this point, and indeed the other points in the case, it was necessary to decide what is the true basis of an action like this by a master against his servant. Is it an action of contract, or of tort, or is it only given by statute ?

Birkett L.J. began his judgment by quoting condition 2 of the employers' liability policy, whereby the underwriters were allowed to

> prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise, and shall have full discretion in the conduct of any proceedings, and in the settlement of any claim, and the assured shall give all such information and assistance as the underwriters may require.

His Lordship said that, by virtue of that clause, a writ was issued, some six days before the trial of the defendant's father's action, claiming a contribution or indemnity from the defendant for any damages the plaintiffs might have to pay to the father because of the defendant's negligence. His Lordship continued that the writ was issued without consultation with the plaintiffs, but he did not think that contributed anything to the solution of the legal problems in the appeal. He went on to say :

> By entering into a policy of the kind we are considering, containing the condition which I have recited, the master delivers himself into the hands of the underwriters completely. His servant may have been in his employment for many years and rendered him loyal and devoted service : yet, if he were to be found guilty of negligence, for which the master was in law responsible, and the underwriters had paid the damages under the master's policy, the underwriters could sue the servant in the master's name, although the master himself would never have dreamt of doing so ; and the underwriters could recover damages which might conceivably ruin the servant completely. The underwriters would then have received the premium on the policy from the master, and the damages which they had paid on the master's behalf from the servant. I cannot but think that, when the premium on the policy was fixed, it was fixed without any thought of obtaining damages from the servant. This view receives some support from the fact that until recently no such action as the present one appears in the law reports.

In *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206, 207, Finnemore J. dealt with the case of a servant being sued by his master and referred to the earlier case of *Digby* v. *General Accident and Life Assurance Corporation, Ltd.*, [1943] A.C. 121 ; [1942] 2 All E.R. 319, where Miss Merle Oberon, the actress, sued her own chauffeur and recovered £5,000 damages against him. The House of Lords decided in that case that the policy of insurance taken out by Miss Oberon protected the chauffeur also ; but the right of the master to sue the servant was not doubted. In *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206, 207, Finnemore J. said :

> " The next question is whether the master can sue the servant if the servant has not directly injured the master, or his property, but has injured other people in such a way that the master is called on, as being responsible for the torts of the servant, to pay large sums of money. The principle, which I believe to be the true principle, is summarized in *Salmond on the Law of Torts*, 11th Ed., 92 : ' It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity. That this is generally so cannot be doubted, provided that the negligence of the employer himself or one of his other servants has not contributed to the damage.' "

It was common ground that, when the first writ was issued and served, the underwriters had paid nothing under the policy. It was submitted that that fact disabled them from exercising their rights of subrogation ; but Birkett L.J. considered that condition 2 of the policy (*cit. supra*) gave to the underwriters a contractual right as there set out, and in those circumstances the underwriters did not need to rely on their rights, other than the contractual rights under the policy. He continued that, in so far as the claim was made under the Law Reform (Married Women and Tortfeasors) Act 1935 [Part V of our Law Reform Act 1936], *Littlewood* v. *George Wimpey and Co., Ltd.*, [1953] 2 Q.B. 501 ; [1953] 2 All E.R. 915, decided that the claim of the plaintiffs under that Act could not arise until they had either admitted their liability or been found liable. In view of that decision in *Wimpey's* case, the writ in the first action was premature in so far as the writ was based on the Act of 1935.

But the most important question in the case was whether the claim of the plaintiffs as set out in the statement of claim could be sustained : a claim for damages for breach of contract based on the implied term in the contract of service made between the plaintiffs and the defendant that the defendant would drive the plaintiffs' lorries with reasonable care and skill.

If that claim could be sustained, then the claim could not be dismissed as premature, because the breach of contract alleged took place on January 26, 1949. His Lordship went on to determine whether the claim could be sustained.

It was submitted that the plaintiffs and the defendant were to be regarded as joint tortfeasors in law, and, apart from statute, there could be no contribution between joint tortfeasors. In *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206, 208, Finnemore J. said :

> For some reason which I have never been quite able to understand, the master who is vicariously responsible for his servant is referred to, and, apparently, treated, as a joint tortfeasor . . . I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tortfeasor, which should mean a person who took some part in the tort which is the subject of the action.

In *The Koursk*, [1924] P. 140, 155, Scrutton L.J. said :

> The substantial question in the present case is : What is meant by " joint tortfeasors " ? and one way of answering it is : " Is the cause of action against them the same ? " Certain classes of persons seem clearly to be " joint tortfeasors " : The agent who commits a tort within the scope of his employment for his principal, and the principal ; the servant who commits a tort in the course of his employment, and his master . . . These seem clearly joint tortfeasors ; there is one tort committed by one of them on behalf of, or in concert with, another.

In the same case, Sargant L.J., at p. 159, said :

> And the discussion in *Salmond on Torts*, 5th Ed., p. 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads : agency, vicarious liability and common action.

Lord Justice Birkett pointed out that in *Salmond on the Law of Torts*, 11th Ed., 92, there is a difference not only from the fifth edition, but also from the tenth edition as quoted by Singleton L.J. in *Jones* v. *Manchester Corporation*, [1952] 2 Q.B. 852, 865 ; [1952] 2 All E.R. 125, 130.

In the pleadings in the present action, the plaintiffs, in paras. 8 and 9 of the statement of claim, pleaded that it was an implied term of the contract between the plaintiffs and the defendant that the defendant should carry out his duties with reasonable care and skill and that he did not do so, and, in consequence, the plaintiffs suffered damage; and in the alternative they claimed damages from the defendant for negligence or breach of contract. This was the ground which appealed to Hodson L.J. in *Jones* v. *Manchester Corporation* and to Finnemore J. in *Semtex, Ltd.* v. *Gladstone*. The damages would be the £1,600 and the costs the plaintiffs had been ordered to pay to the father, and this would in fact be an indemnity paid by one joint tortfeasor to another, whatever name was given to it. The question was: Is that permissible?

After considering *Merryweather* v. *Nixan*, (1799) 8 Term Rep. 186; 101 E.R. 1337, and the observations thereon by Lord Herschell L.C. in *Palmer* v. *Pulteneytown Steam Shipping Co., Ltd.*, [1894] A.C. 318, 324, Birkett L.J. quoted the words of Warrington L.J. in *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520, 536, namely:

> . . . it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty. But in such a case the right of action against the master and his legal liability themselves result from the servant's negligent act, and but for that act would not have existed.

In the opinion of Birkett L.J., the plaintiffs were not precluded from maintaining their action in this case against the defendant merely because in law they were regarded as joint tortfeasors, so that the third party could sue them as being vicariously responsible for the acts of their servant.

His Lordship said, on the question whether it was competent to the plaintiffs to bring an action founded in contract that he had had the advantage of reading the judgment of Romer L.J. on this point and had considered the cases cited by him in his judgment. He agreed that it was perfectly competent to the plaintiffs to sue their servant for breach of the contract of service.

Birkett L.J. found it impossible to hold that there was an implied term in the contract of service between the plaintiffs and the defendant to the effect that, if the master was fully insured and recovered the amount that he had had to pay because of the servant's negligence, the master would not seek to recover from the servant. He did not think that any such consideration entered their minds. The action was brought by Lloyd's Underwriters in the name of the plaintiffs, who, because of condition 2 in the policy, had no say whatever in the matter. Had it been left to them, the action would never have been brought.

Lord Justice Romer began his judgment by saying that the plaintiffs by their statement pleaded alternatively that it was an implied term of the defendant's contract of service with the plaintiffs that he should carry out his duties with reasonable care and skill and that they had suffered damage by reason of his failure to do so in the matter of running down his father. If this plea be true in fact and sustainable in law, the action was not, in His Lordship's opinion, brought prematurely, because the breach of contract arising out of the negligence of the defendant had already occurred. In his judgment, there was little doubt but that the legal implication suggested by the plea was fully warranted. He continued:

> In *Harmer* v. *Cornelius*, (1858) 5 C.B.N.S. 236, 240; 141 E.R. 94, 96, Willes J., in delivering the judgment of the Court, said:
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> "When a skilled labourer, artizan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—Spondet peritiam artis. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts . . . An express promise or express representation in the particular case is not necessary. (See also *Jenkins* v. *Betham*, (1855) 15 C.B. 168; and *Cuckson* v. *Stones*, (1858) 1 E. & E. 248, 257)."
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> In my judgment, the principle enunciated by Willes J. is clearly applicable to the defendant in the present case; for a man who is employed to undertake the responsible work of driving his employers' lorries impliedly promises, in my opinion, as part of his contract of service, that he will drive them with reasonable care and skill.
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> Did, then, the defendant commit a breach of this implied promise? Inasmuch as the learned Judge has found, on ample material, that the accident to the defendant's father was as to two-thirds due to the negligence of the defendant, this question can, in my judgment, only be answered in the affirmative. Prima facie, therefore, it would seem to me that the plaintiffs are entitled to recover damages from the defendant for breach of contract; and the amount of the damages would normally be the totality of damages and costs which they had to pay to the defendant's father under the judgment which he obtained against them.

His Lordship then referred to the dissenting judgment of Denning L.J. He said that it had been suggested (and the suggestion had found favour with Denning L.J., whose judgment he had had the advantage of reading), that the plaintiffs could not sue the defendant for damages in respect of his breach of contract, and that their only remedy (if any) was to sue him in tort for negligence. He continued:

> For myself (and I differ from my Lord with natural regret and diffidence) I feel a considerable difficulty in accepting this view. If A makes an agreement (whether express or implied) with B and breaks it, then normally A can be sued by B for such damages as have naturally flowed from the breach; and I can see no reason why B should be deprived of this remedy either on the ground that A is his servant or on the ground that A's promise is of a particular character, namely, to perform his work with reasonable care and skill. In *Harmer* v. *Cornelius*, (1858) 5 C.B.N.S. 236, 247; 141 E.R. 94, 98, Willes J. said:
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> "Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct."
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> The "legal duty" to which Willes J. was there referring is in my judgment referable to, or at all events includes, the contractual obligation with which the learned Judge had been dealing in the earlier part of his judgment, and which was indeed the essence of the judgment. So also in *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520, 536, Warrington L.J. said:
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> "Again it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty."
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> In my opinion, the Lord Justice had in mind and was referring to the duty which the servant owed to his master under his contract of service and not to some duty which the common law imposed on him. In the recent case of *Jones* v. *Manchester Corporation*, Hodson L.J. founded his judgment on the view that a master can recover damages from a servant for breach of the servant's implied contract to perform his work with reasonable care and skill. I respectfully concur in this view, which commended itself also to Finnemore J. in *Semtex, Ltd.* v. *Gladstone*. It may well be that in most cases, if not in all, the master could alternatively sue his servant for negligence; but for myself I can see no sufficient ground for depriving him of a promisee's ordinary remedy of an action for damages

for breach of contract. I cannot but think that to recognize the existence of a contract but to exclude an action founded on its breach is to introduce an anomaly into our law which is both unwarranted and confusing. It is, of course, true that many a breach of the servant's implied warranty to exercise care and skill would either cause no damage to the master at all or so little damage that the master would overlook it. These considerations, however, are not confined to contracts of service, but are common to most agreements, and they cannot, as I think, displace the right of the master to sue if the servant's breach occasions him material damage. Subject, therefore, to the point which I will next consider, the plaintiffs were, in my judgment, entitled to found their claim for damages against the defendant in the first action on his breach of contract.

It was further submitted, however, that, even so, the plaintiffs' claim could not succeed because the plaintiffs were co-tortfeasors with the defendant, and tortfeasors cannot have redress or contribution from one another. His Lordship said that the first question which arose on this was whether the plaintiffs ought properly to be regarded as joint tortfeasors with the defendant in the act which resulted in injury to the defendant's father. In *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206, 208, Finnemore J. said :

> " I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tortfeasor, which should mean a person who took some part in the tort which is the subject of the action."

If this question were free of authority, Romer L.J. said he should be glad to adopt that view, which certainly had some appeal to common sense. His Lordship continued :

> It has been authoritatively stated more than once, however (see, e.g., the judgment of Scrutton L.J. in *The Koursk*, [1924] P. 140, 155), that a servant who commits a tort within the scope of his employment and the master who employs him are joint tortfeasors in law and I think, therefore, that it must follow that both the plaintiffs and the defendant must be treated as joint tortfeasors in the present case.
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> Does it follow, however, that the plaintiffs are precluded by this consideration from suing the defendant for damages ? The general principle which the defendant invokes is certainly supported by venerable authority (see, e.g., *Merryweather* v. *Nixan*, but it is not, in my judgment, a rule of universal application and I confess that, for myself, I feel great difficulty in applying it to the circumstances of the present case. Although the plaintiffs were liable in damages to the defendant's father for the accident which befell him, they themselves were morally blameless in the matter and their liability to the father arose solely from the fact that they were answerable for the negligence of the defendant himself. In these circumstances it would, in my opinion, be a flaw in our law, and against natural justice, to permit the defendant to rely on his own wrongful act as a defence to proceedings for breach of contract. I would only accept such a defence as valid under the guidance of compelling authority, but it appears to me that the current of such authority as was brought to our attention on the point is distinctly the other way.
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> It seems plain from the passage which I have already cited from the judgment of Warrington L.J. in *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520, 536, that the Lord Justice thought that a master who had to pay damages to a third party for an injury resulting from his servant's negligence could recover the amount from the servant, and a similar view has been taken in other cases (see, e.g., *Green* v. *New River Co.*, (1792) 4 Term Rep. 589 ; 100 E.R. 1192 ; *Semtex, Ltd.* v. *Gladstone*, and the judgments of Singleton and Hodson L.JJ. in *Jones* v. *Manchester Corporation*, [1952] 2 Q.B. 852 ; [1952] 2 All E.R. 125. The statement of the law in *Salmond on the Law of Torts*, 11th Ed., p. 92, also supports the view that employers can sue for damages caused to them by their servants' negligence notwithstanding their own vicarious liability to the person whom the servant injured. Moreover, Best C.J., in delivering the judgment of the Court in *Adamson* v. *Jarvis*, (1827) 4 Bing 66, 72 ; 130 E.R. 693, 695, said :
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> > ". . . from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act ",
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> which certainly cannot be presumed of the plaintiffs in the present case in relation to the running down of the defendant's father. I have accordingly come to the conclusion that the plaintiffs' action in the present case, based on breach of contract, is not defeated by the suggested principle that there can be no contribution between joint tortfeasors.

It was alternatively argued that, in any case, it was an implied term of the defendant's contract of service with the plaintiffs that they should insure him against liability for injuring a fellow servant, even if no such insurance were required by law. This seemed to both Birkett L.J. and Romer L.J. to be an untenable proposition, for it would result in imposing on employers an obligation to provide insurance cover for their servants in respect of any negligence by the servants in their work which results in injury to third parties. No authority was cited to support so extensive a proposition, and it could not, in His Lordship's judgment, be accepted. Romer L.J. continued :

> If I am right in the conclusions which I have so far expressed, what defences remain open to the claim for damages against the defendant for breach of contract ? It was said that the damages claimed were too remote. I do not think they were, for they flowed directly from the defendant's breach of his obligation to carry out his duties with reasonable care and skill. It was alternatively contended that it was an implied term of the defendant's employment that he should not be sued by the plaintiffs for damage arising from his negligence if they were insured in respect of such damage. There is no question but that a man can sue a servant who, by his negligence, causes damage to the master.
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> > ". . . an employee is generally as much liable to his employer if he causes his employer damage by negligence as is anyone else . . . "
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> (per Lord Wright in *Digby* v. *General Accident Fire and Life Assurance Corporation*, [1943] A.C. 121, 141 ; [1942] 2 All E.R. 319, 329). I cannot think that, although this liability exists in general, it is excluded by implication if the employer is insured. I do not know whether it is suggested that it would still be excluded even if the servant was himself insured. In my opinion, the liability to which Lord Wright referred exists whether the master is insured or not.

On the question generally as to the reluctance with which (so it was suggested) the Courts should entertain an action by a master against his servant in respect of damage caused to the employer by the negligence of the servant in relation to third parties, Romer L.J. observed :

> In the accident which led eventually to *Digby's* case, Miss Merle Oberon suffered injuries from the negligent driving of her car by her chauffeur, in respect of which she recovered no less than £5,000 damages against him ; and I can see no reason in logic why the law should give an employer redress if the damage which he suffers from his servant's negligence is physical but deny it if the damage is financial.
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> Further, I would again cite a passage from the judgment of Finnemore J. in *Semtex, Ltd.* v. *Gladstone*, [1954] 2 All E.R. 206, 212, and respectfully adopt it as my own. He said :
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> > " That an employee who is negligent and causes grave damage to his employers should be heard successfully to say that he should not make any contribution to the resulting damage is a proposition which does not, in the least, commend itself to me, and I do not see why it should be so. Justice, as we conceive justice in these Courts, requires that the person who caused the damage is the person who must in law be called on to pay damages arising therefrom."
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> For myself, I agree with these observations of the learned Judge. It is not, in my opinion, in the public interest that workmen should assume that, whoever else may be called on to compensate the victims of their wrongdoing, they themselves will be immune. I say this for two reasons. First, it is not in accord with contemporary thought that any section of the public should be free from any liability to which the

people as a whole are subject. Secondly, such freedom would tend still further to diminish that sense of responsibility which all should feel towards one another, but which can scarcely be regarded as an outstanding characteristic of modern life.

To summarize the judgment on the points of law with which we are here concerned :

It was held by Birkett and Romer L.JJ. (Denning L.J. dissenting) that in the first action, though the claim to contribution under what corresponds with s. 17 of our Law Reform Act 1936 was premature, in that it could not arise until the liability in damages of the nominal plaintiffs to the father had been established, the breach of the alleged implied term that the defendant should use due skill and care in his work for his employers had occurred before the issue of the writ, so that the first action was maintainable on the latter issue.

The claim in damages for breach of contract was established, because :

(*a*) There was an implied term in the defendant's contract of service that he would carry out his duties with reasonable skill and care, and the nominal plaintiffs had suffered damage by his failure to do so.

(*b*) The claim was not defeated by the fact that the nominal plaintiffs were joint tortfeasors, since they were only vicariously liable for their servant's negligence.

(*c*) No term could be implied in the defendant's contract of service that the nominal plaintiffs, although insured, would not seek to recover from him any damages which they might have to pay by reason of his negligence.

(*d*) There was no implied term in the defendant's contract of service imposing on the nominal plaintiffs the duty of insuring him against liability for injuries caused to his fellow-servants.

Apart from the preliminary point, the learned trial Judge had acted rightly in granting a full indemnity to the nominal plaintiffs under the subsection corresponding with s. 17 (2) of our Law Reform Act 1936 ; so that the nominal plaintiffs were entitled in the first action to damages for breach of contract, and in the second action to such damages and to an indemnity under the statute.

SUMMARY OF RECENT LAW.

ACTS PASSED 1956.

1. Imprest Supply Act 1956. (May 10, 1956.)
2. Imprest Supply Act (No. 2) 1956. (May 10, 1956.)
3. Gisborne High School Amendment Act 1956. (May 10, 1956.)
4. Social Security (Reciprocity with the United Kingdom) Act 1956. (April 1, 1956.)
5. Wildlife Amendment Act 1956. (May 10, 1956.)
6. Noxious Animals Act 1956. (April 1, 1956.)
7. Land Drainage Amendment Act 1956. (May 10, 1956.)
8. River Boards Amendment Act 1956. (May 10, 1956.)
9. Counties Amendment Act 1956. (May 10, 1956.)
10. Republic of Pakistan Act 1956. (March 23, 1956.)
11. Samoa Amendment Act 1956. (Commencement date to be appointed by Proclamation.)
12. New Zealand Loans Amendment Act 1956. (May 10, 1956.)

CONTRACT.

Building Contract—Delay not due to Fault of Either Party—Scarcity of Labour—Frustration—Buildings ultimately completed—Whether Contractors entitled to Sum in Eccess of Contract Price on quantum meruit—In March, 1946, the appellants tendered for a contract with the respondents to build seventy-eight houses within a period of eight months. The tender was accompanied by a letter which stated that the tender was " subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified ". In July, 1946, after further negotiations, a formal contract was entered into between the parties and this incorporated a number of preliminary documents ; these were listed in a clause of the contract and, although the tender was specified to be one of them, the letter was not so specified. The contract was to build the houses at a fixed price subject to certain adjustments. For various reasons, the chief of which was the lack of skilled labour, the work took twenty-two months to complete instead of eight months. The appellants were paid the contract price together with stipulated increases and adjustments but they claimed that they were entitled to a greater sum on the basis of a quantum meruit. They contended that the contract price was not binding because either (a) the contract had been subject to an express overriding condition (contained in the letter of March, 1946) that there should be adequate supplies of material and labour, or (b) that owing to the long delay due to the scarcity of labour the contract had been frustrated. *Held*, the appellants were not entitled to be paid on the basis of a quantum meruit because (i) the appellants' letter of March, 1946, and the condition stated therein were not incorporated into the final contract of July, 1946. (ii) The fact that both parties to the contract expected that it would be possible to complete the work within eight months did not result in the contract being frustrated when, as events happened, these expectations were not realized with the consequence that the contract became more onerous than the parties had contemplated. (*Bush* v. *Whitehaven Port & Town Trustees* (1888) 2 Hudson's B.C., 4th Ed., 122, criticized.) Basis of the doctrine of frustration considered. Decision of the Court of Appeal, [1955] 1 All E.R. 275, affirmed on the second point but overruled on the first point. *Davis Contractors, Ltd.* v. *Fareham Urban District Council.* [1956] 2 All E.R. 145 (H.L.)

CONVEYANCING.

Insurance in Aid of Conveyancing. *100 Solicitors' Journal*, 139, 157.

Sale of Flats : Parts in Common. *221 Law Times*, 135.

CRIMINAL LAW.

Appeal against Conviction—Notice of Appeal—Variation of Grounds in Notice of Appeal, or Addition thereto—Application for Leave to be lodged (with Notice to Crown) at least Seven Days before Date of Hearing—Criminal Appeal Act 1945, s. 7 (2)—Criminal Law—Trial—Circumstantial Evidence—Trial Judge's Direction thereon—Good Character as Defence—Extent of Judge's Direction in Relation thereto. While an application, under s. 7 (2) of the Criminal Appeal Act 1945, may be made to vary or to add to the grounds stated in the notice of appeal, an applicant desiring out of time to add to the grounds stated in the notice of appeal or to restate those grounds must file an application in writing (at the same time giving notice to the Crown) not less than seven days before the date set down for hearing of the appeal. This rule will be insisted upon, save in the most exceptional cases. While the giving of a warning upon the matter of circumstantial evidence in terms of the direction given by Alderson B. in *Hodge's Case*, (1838) 2 Lew. 227 ; 168 E.R. 1136, is proper in certain circumstances, the direction to the jury does not require to be given in identical terms. There is no authority which requires the giving of such a warning ; and, in the present case, the absence of such a specific warning, having regard to what was said by the trial Judge to the jury, did not constitute a misdirection. Where good character is relied upon in defence, the trial Judge's direction is sufficient if the good character is submitted to the jury with the other facts and circumstances of the case. (*R.* v. *Broadhurst, Meanley, and Hill*, (1918) 13 Cr. App. R. 125, followed.) The appeal is reported on these points only. *The Queen* v. *Hedge.* (C.A. Wellington. April 24, 1956. Gresson J. Stanton J. Shorland J.)

Appeal against Conviction—Verdict of " Guilty "—Proper Warning given as to Danger of convicting on Uncorroborated Evidence of Young Girl—Court of Appeal only in Exceptional Cases setting-aside Such Verdict—Criminal Appeal Act 1945, s. 4 (1) —Criminal Law—Evidence—Cross-examination on Previous Con-

victions—Accused charged with Indecent Assault—Evidence of Accused denying Material Part of Girl's Evidence—Trial Judge exercising Discretion to allow Cross-examination of Accused as to Previous Convictions for Dishonesty—Credibility of Accused as Witness in Issue—Discretion properly exercised—Evidence Act 1908, s. 5 (2) (d). Where the jury has been given the proper warning of the danger of convicting on the uncorroborated evidence of a young girl in an indecent assault case and in cases of a similar nature, and, notwithstanding that warning, the jury has convicted, the Court of Appeal will not ordinarily interfere. (*R.* v. *Dent*, [1943] 2 All E.R. 596, followed.) It is only in an exceptional case that the Court of Appeal is justified in taking the exceptional course of setting aside a verdict of "guilty" found by the jury, although the terms of s. 4 (1) of the Criminal Appeal Act 1945 contain a direction to the Court of Appeal to allow an appeal if, inter alia, it comes to the conclusion that the verdict was unreasonable or that it cannot be supported by the evidence. (*R.* v. *Dent*, [1943] 2 All E.R. 596, and *R.* v. *Sutherland*, [1953] N.Z.L.R. 676, followed.) In the present case, the trial Judge did not wrongly exercise his discretion in giving leave to cross-examine the accused (who was charged with indecent assault on a six-year-old girl) as to previous convictions for dishonesty, as the accused had denied in evidence the material part of the girl's story, so that his credibility as a witness was in issue, and the previous convictions for dishonesty were relevant thereto. *The Queen* v. *Johnston*. (C.A. Wellington. April 24, 1956. Gresson J. F. B. Adams J. Shorland J.)

Housebreaking—Custody or Possession of "any implement of housebreaking"—"Implement of housebreaking" inclusive of All Implements capable of Use for Breaking into or out of All Types of Buildings—Gelignite, Fuse, and Detonators among such "implements"—Police Offences Act 1927, s. 52 (1) (f). Gelignite, fuse, and detonators are within the meaning of the words "implement of housebreaking", as used in s. 52 (1) (*f*) of the Police Offences Act 1927, as those words comprehend implements which are capable of being used for the purposes of "breaking" into or out of all types of buildings. *R.* v. *Oldham*, (1852) 21 L.J.M.C. 134, followed; *R.* v. *Allingham*, *R.* v. *Bandy*, [1954] N.Z.L.R. 1223, applied. *Grant* v. *Langston*, [1900] A.C. 383, and *B. Aerodrome, Ltd.* v. *Dell*, [1917] 2 K.B. 380, referred to.) *The Queen* v. *Dyer*. (C.A. Wellington. April 24, 1956. Stanton J. McGregor J. Shorland J.)

Housebreaking—Custody or Possession of "any implement of housebreaking"—Meaning of "custody or possession"—Police Offences Act 1927, s. 52 (1) (f). The words "custody or possession" in s. 52 (1) (*f*) of the Police Offences Act 1927 include not only the having an implement of housebreaking by the accused in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwellinghouse or other building, lodging, apartment, field or other place, open or enclosed, whether belonging to or occupied by the accused himself or not, and whether such implement of housebreaking shall be so had for his own use or benefit or for that of any other person; and constructive possession, in appropriate circumstances, can be sufficient to maintain a charge under s. 52 (1) (*f*). (*R.* v. *Harris*, (1924) 18 Cr. App. R. 157, distinguished. *R.* v. *Lewis*, (1910) 4 Cr. App. R. 96, referred to.) *The Queen* v. *Rollo*. (C.A. Wellington. April 24, 1956. Stanton J. McGregor J. Shorland J.)

DAMAGES.

Loss of Earnings in Actions in Respect of Personal Injuries—Income Tax and Social Security Charge—Measure of Damages—Damages to be assessed with Allowance for Plaintiff's Tax Liability—Compensation to be awarded for Net Loss of Earnings. In assessing damages for loss of earnings in an action claiming damages for personal injuries, allowance must be made for the plaintiff's liability for income tax and social security charge. The plaintiff is entitled to be compensated in respect of his net loss only. (*British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796, followed. *Union Steam Ship Co. of New Zealand, Ltd.*, v. *Ramstad*, [1950] N.Z.L.R. 716; [1950] G.L.R. 311, not followed.) *Smith* v. *Wellington Woollen Manufacturing Co., Ltd.* (C.A. Wellington. April 24, 1956. Barrowclough C.J., Stanton, McGregor JJ.)

EASEMENT.

A Modern View of Easements. *106 Law Journal*, 119.

POWER OF APPOINTMENT.

Unascertained Class of Objects—Uncertainty—Validity of Power. By a settlement dated June 1, 1936, and made in consideration of his first marriage, the husband gave the trust fund to his trustee in trust to pay the income thereof to the husband for life, or until some act or event should be done or happen whereby the income should become vested in some other person, and after his death to his widow for life with power to appoint by will a life interest to his wife for the time being, and subject thereto to the children or remoter issue of the marriage and if there were no children then to the husband absolutely. Clause 6 provided: "During the parts (if any) of the life of the husband during which he shall not be entitled to receive the income of the trust fund or during such shorter period (either continuous or discontinuous) as the [trustee] shall in its absolute discretion think fit the [trustee] shall pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others of the following persons namely [a] the husband and his wife . . . for the time being and his children and remoter issue for the time being in existence . . . and [b] any persons in whose house or apartments or in whose company or under whose care or control or by or with whom the husband may from time to time be employed or residing . . ." On a summons to determine whether that clause was valid or void for uncertainty, it was conceded that although in terms it was imperative, the clause conferred on the trustee a mere power which it was not bound to exercise. *Held*, The collateral power conferred by cl. 6 of the settlement was one power to benefit a category of people and was not a series of different powers; since part of that category, viz., the persons described by the words following "[b]" above, were defined with insufficient certainty, so that the trustee could not postulate of any living person whether he was or was not within the description, the whole power was affected by the vice of uncertainty and was invalid. (*Re Gestetner*, [1953] 1 All E.R. 1150, and *Re Coates*, [1955] 1 All E.R. 26, distinguished.) *Re Gresham's Settlement*: *Lloyds Bank, Ltd.* v. *Gresham and Others*. [1956] 2 All E.R. 193 (Ch.D.)

PRACTICE.

Appeal — Reference by Home Secretary — Consideration of Fresh Evidence — Criminal Appeal Act 1907 (7 Edw. 7 c. 23), s. 19 (a)*—Criminal Appeal Act 1945 (N.Z.), s. 17* (a). In 1952 the appellant was convicted on two counts, one of conspiracy between March and November, 1950, to break and enter a dwelling-house and steal, and the other of housebreaking and larceny on November 4, 1950. He appealed against conviction and his appeal was dismissed in July, 1952. Under s. 19 (*a*) of the Criminal Appeal Act 1907 [s. 17 (*a*) of the Criminal Appeal Act 1945 (N.Z.)], the Home Secretary referred to the Court a petition by the appellant, dated August 27, 1955, alleging that he had been wrongly convicted. The principal prosecution witness, one M., who gave evidence at the appellant's trial, had been an accomplice. The appellant claimed that his passport, which he adduced in support of his petition, showed that he had been out of the country between July 13 and October 19, 1950, and that if his passport had been produced at his trial the jury might well have doubted the reliability of M.'s evidence, since M. had stated that the appellant had met him at a time when the appellant, as the entries in his passport showed, was out of the country. M.'s evidence at the trial had included not only evidence of meetings with the appellant at times thought by the witness to be in September or early October, 1950, but also a statement of a meeting six days before November 4, 1950, between one B., the appellant and M. at which arrangements for the theft had been made. The appellant's explanation why he did not give evidence at his trial that he was out of the country between dates in July and October, 1950, and why he did not then produce his passport, which was available, was that he forgot. The Crown objected to the appellant's passport being received now by the Court in evidence on the ground that the practice (the position of the petitioner on the reference being that of an appellant on an appeal) was for the Court not to receive fresh evidence unless it were shown that the evidence could not have been produced at the trial or that some point, which could not have been foreseen and on which the evidence would have been material, arose at the trial. *Held*, The Court would not, on such a reference, hold itself bound by the rule of practice not to receive evidence available at the trial except in the special circumstances indicated above, if there were reason to think that to do so might lead to injustice or the appearance of injustice; each case must be decided on its merits and in the circumstances of the present case the Court would look at the schedule of entries in the appellant's passport concerning his absences from the United Kingdom. (*R.* v. *McGrath*, [1949] 2 All E.R. 495, considered.) *R.* v. *Sparkes*. [1956] 2 All E.R. 245 (C.C.A.)

(*Continued on p. 144.*)

LIABILITY FOR DANGEROUS PREMISES.

What are "Premises"?

By A. G. DAVIS.

In the standard text-books on the law of torts, a separate chapter is devoted to the liability of an occupier of premises to persons who enter on those premises and suffer injury by reason of the dangerous nature of the premises.[1]

Some of the writers referred to seek to give a meaning to the term "premises". For example, Salmond says:[2]

> The principles which follow apply not only to landed property but also to appliances upon it such as ladders of which the plaintiff has been invited or allowed to make use.

Likewise, the English Law Reform Committee says:[3]

> This Report is expressed in terms primarily applicable to land and buildings. But it should be borne in mind that the first question put to us[4] extends also to movable structures such as ships, gangways, and scaffolding.

The Committee cites no authorities in support of this statement.

It is submitted, however, that the legal principles involved could be stated with greater clarity if a careful distinction were made between immovable property such as open land, houses, railway stations and bridges, on the one hand, and things on such land such as vehicles,[5] merry-go-rounds [6] and houses in the course of demolition,[7] on the other. Whether the judicial authorities make this distinction clearly is a matter which needs consideration. But the submission is made that, in respect of immovable property of the nature referred to, the liability of the occupier—a term capable of more or less exact definition when applied to such property—should be determined by reference to the rules relating to dangerous premises with its well-known gradations of liability to invitees, licensees and trespassers; while in respect of movable property of the nature referred to, the liability of the person in control—generally, but ambiguously, known as the occupier—should be determined in accordance with the rule in *Donoghue* v. *Stevenson*.[8] In short, it is submitted that the eminent text-writers referred to are in error in placing the different forms of property referred to by them under the one rubric "Dangerous Premises".

In support of the statement by Salmond quoted above, extending the principles involved to movable property, the learned author cites four cases: *Woodman* v. *Richardson and Concrete, Ltd.*[9] (ladder); *Oliver* v. *Sadler and Co.*[10] (slings); *Haseldine* v. *Daw*[11] (lift); and *Pratt* v. *Richards* [12] (scaffolding).

In *Woodman* v. *Richardson and Concrete, Ltd.* (*supra*), the chattel, defects in which caused the plaintiff's injury, was a ladder, some of the rungs of which were missing. This ladder was used, in conjunction with scaffolding, in the erection of a cinema. Greer L.J. (at p. 868) speaks of "the scaffolding and the ladders *fixed* [13] for the men to ascend and descend". MacKinnon L.J. says:

> When the plaintiff was on the defendant's scaffolding, and upon any ladder provided by the defendant for use with that scaffolding, he was in the position of an invitee of the defendant (*ibid.*, 871).

Later, the same learned Judge speaks of "the ladder as part of the premises". The Court of Appeal held (MacKinnon L.J. dissenting) that the plaintiff could not succeed because he did not prove that the defective ladder, which had some time before the accident been discarded and placed on a rubbish dump, had been placed in position by the defendant or his servants. But all the learned Lords Justices appear to have regarded the ladder as part of the structure in course of erection and not as a separate chattel. In fact, pro tempore, it was part of the realty.

With respect, it is difficult to understand on what ground the learned author refers to *Oliver* v. *Sadler and Co.* (*supra*) in support of his general proposition. That case, as is so clearly stated in Lord Dunedin's judgment [14] dealt with the liability of the defendants for a defective chattel, viz., a sling used to hold together sacks of maize being unloaded from a ship. Nowhere in argument or in any of the judgments is reference made to the liability of the occupier of dangerous premises, nor are any of the well-known cases beginning with *Indermaur* v. *Dames* [15] mentioned. The case dealt simply with the liability of the defendant to see that the sling, a chattel, was in a fit condition to take the weight of the load entrusted to it.

Haseldine v. *Daw* (*supra*) concerned the liability of the occupier of a block of flats for a defective lift in the flats and of the repairers of the lift for the negligence of their workmen in effecting the repairs. It is hardly an authority for the proposition that the rules relating to dangerous premises extend also to certain chattels. To attempt to treat a lift in a block of flats as a separate chattel is surely flying in the face of facts. It is as much a part of the structure as a staircase. Indeed as Goddard L.J. (as he then was) said: [16]

> For this purpose I can see no distinction between a staircase and a lift, which are merely alternative methods of access.

Likewise, Scott L.J. spoke [17] of the landlord of a block of flats as occupier of the lifts. The liability of the

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[1] See *Salmond on Torts*, 11th Ed., Ch. 14; *Winfield on Torts*, 6th Ed., Ch. 22; *Clerk and Lindsell on Torts*, 11th Ed., Ch. 18, sect. 3.

[2] *Op. cit.*, p. 547.

[3] Third Report (Occupiers' Liability to Invitees, Licensees and Trespassers), (Cmd. 9305), para. 42.

[4] I.e., "Whether any, and if so what, improvement, elucidation or simplification is needed in the law relating to the liability of occupiers of land or other property to invitees, licensees and trespassers."

[5] *Creed* v. *John McGeoch and Sons, Ltd.*, [1955] 3 All E.R. 123.

[6] *Napier* v. *Ryan*, [1954] N.Z.L.R. 1234.

[7] *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*, [1954] 1 All E.R. 578.

[8] [1932] A.C. 562.

[9] [1937] 3 All E.R. 866.

[10] [1929] A.C. 584.

[11] [1941] 2 K.B. 343; [1941] 3 All E.R. 156.

[12] [1951] 2 K.B. 208; [1951] 1 All E.R. 90*n*.

[13] Writer's italics.

[14] At p. 599.

[15] (1867) L.R. 1 C.P. 274.

[16] At p. 372.

[17] At p. 356.

landlord was treated, properly it is submitted, under the head of liability for dangerous structures, not of liability for dangerous chattels.

Pratt v. *Richards* (*supra*) was another case in which the accident, which resulted in the death of the plaintiff's husband, was caused by defective scaffolding. This scaffolding was, under a contract between the builders of certain houses and sub-contractors who did the tiling, to be erected and maintained by the builders. The facts of the case show that, on the morning of the accident, " the necessary scaffolding had long since been erected by the builders ". The plaintiff's deceased husband was employed by the defendant, Richards, who had contracted with the suppliers of the tiles to lay the tiles and fix the battens and felts.

Dealing with the legal relationship between the deceased workman and the builders, Barry J. said : [18]

> They [the builders] were the erectors and occupiers of the scaffolding, and the relationship between them and the deceased workman was that of invitor and invitee.

This, it is respectfully submitted, is a correct statement of the position. The scaffolding, like the ladder in *Woodman* v. *Richardson* (*supra*) had, pro tempore, become part of the structure and was not an independent chattel.

Winfield, like Salmond, tends to confuse what might properly be called structures, with chattels. He says : [19]

> The rules now to be discussed are not limited to immovable property like open land, houses, railway stations and bridges but have been extended to movables like taxicabs, omnibuses, railway carriages, gangways and scaffolding.

In support of this statement he cites *Francis* v. *Cockrell* [20] which concerned a grandstand on a racecourse, which can properly be called a " structure " ; *Maclenan* v. *Segar*,[21] in which case the defective premises were a hotel ; and *Haseldine* v. *Daw* and *Pratt* v. *Richards*, which have already been dealt with. Winfield's authorities hardly seem to support the statement in the text because they all dealt with what, for this purpose, might properly be called immovables.

Moreover, in all the cases referred to, the principal thing, e.g., the land or the building, and the subsidiary thing, e.g., the grandstand or the scaffolding, were under the control of the same person, the defendant. It may well be that the Courts, in those cases, assimilated the subsidiary thing with the principal thing and for that reason applied the restricted principles relating to dangerous land and structures and not the wider principle of liability for negligence under the rule in *Donoghue* v. *Stevenson*.

In 1953, the High Court of Australia made a clear distinction between liability under the two principles in *Thompson* v. *the Council of the Municipality of Bankstown*.[22] The plaintiff, a boy of thirteen, noticed a bird's nest, some eight to ten feet from the ground, in a decayed portion of a pole erected by the council for the purpose of carrying high-tension electric wires. Using his bicycle, which he propped against the pole, for support, the boy attempted to reach the nest. In so doing he grasped hold of a vertical earth-wire charged with electricity and received an electric shock which resulted in severe injuries. A majority of the High Court held the defendant corporation liable on the ground that it owed a duty of care to those persons whom it could reasonably foresee might be injured by any failure on its part to act reasonably in the circumstances. There was ample evidence that the boy was such a person and that his injury was caused by the defendant's failure to perform the duty it owed him.

The judgment of Sir Owen Dixon C.J. and Williams J. begins thus : [23]

> The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other. One category concerns the duties of an occupier of a structure with respect to the safety of those who come upon it or within the area of the control exercised or exercisable by the occupier. The other category forms part of the general law of negligence and relates to the duty of exercising a high standard of care falling upon those controlling an extremely dangerous agency, such as electricity of a lethal voltage.

Later in the same judgment, it was said : [24]

> After full consideration we have come to the conclusion that this is not a case to be dealt with as depending upon the duties of a person in control or occupation of a " structure " or " premises " towards a person coming upon them. The law which, in our opinion, should be applied to such a case as this is that which imposes a duty of care upon those carrying on . . . an undertaking involving the employment of a highly dangerous agency. No doubt the question still is whether the plaintiff qualified as a person entitled to recover for the consequences to him of a failure to take proper care in the use and control of the dangerous agency and this may depend upon the definition of the duty, or of the measure of care. But the distinction upon which we think this case turns does not for that reason lose importance. The point is that the defendant's responsibility to the plaintiff does not depend on the defendant's control or " occupation " of the pole or the character the plaintiff assumed in reference to the pole when he placed the bicycle against it, leant his body upon it and put his arms round it or, if that be what he did, when he grasped the wire. It is a mistake to treat the question as if it was : did the plaintiff's touching of the post, his propping the bicycle and leaning his body upon it, putting his arms against it, constitute a " trespass " so that if he had damaged the pole, he might have been liable for the damage ? . . . It appears to us to be an artificial and unreal view of the situation in the present case to treat it as depending on the extent of the defendant's duty arising from the possession of the pole.

For present purposes, it is unnecessary to consider the evidence upon which the Court decided that the defendant owed a duty to the plaintiff and had been guilty of a breach of that duty. It is sufficient to note that the decision was based on the question : was the defendant negligent ; not, what was the liability of the defendant, as the occupier of a structure, to a trespasser.

In this case, both the land on which the thing which caused the damage stood, i.e., the highway, and the thing itself, i.e., the pole, were in the possession or under the control of the defendant corporation—in so far as a power pole can be said to be under the control of anybody.

Buckland v. *Guildford Gas, Light and Coke Co.*[25] was a case in which the possession or control was divided. Here again, liability was imposed on the defendants in accordance with the *Donoghue* v. *Stevenson* principle. A schoolgirl, while traversing a public path across a field in the occupation of a farmer, left the path and went to a nearby tree and climbed it. About two feet

[18] At p. 212.
[19] *Op. cit.*, p. 667.
[20] (1870) L.R. 5 Q.B. 501.
[21] [1917] 2 K.B. 325.
[22] (1953) 87 C.L.R. 619.
[23] At p. 623.
[24] At p. 628.
[25] [1949] 1 K.B. 410 ; [1948] 2 All E.R. 1086.

above the tree, and hidden by the foliage of the tree, were overhead electric wires which formed part of the defendant company's installation. The girl came into contact with the wires and was electrocuted. Her parents successfully claimed damages against the defendants. The defendants' principal defence was that the girl was a trespasser on that part of the field where the tree stood and that therefore they owed no duty to her. Morris J. held that even if the girl had been a trespasser vis-à-vis the farmer who occupied the field, she would still remain, in the circumstances of the case, a "neighbour" from the point of view of the defendants. He said : [26]

> The group of those who must be regarded as "neighbours" from the point of view of the defendants is, however, not of rigid necessity the same as the group of those who must be regarded as invitees or licensees from the point of view of the occupier of the land.

This decision was followed by Ormerod J. in *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*[27] The defendants were carrying out the demolition of certain bomb-damaged houses under a contract with the owners of the site. When the defendants' workmen left the site at the end of a working week, only one house remained to be demolished and this had been taken down to the level of the first-floor ceiling. Behind the house was an open cleared site where children were accustomed to play. One Sunday afternoon the plaintiff, a boy of twelve, came on the site with some companions. The plaintiff picked up a length of gas piping from the premises and the other boys acquired similar implements. They all began to pull away some loose bricks round a window opening in the rear wall of the house. After they had been doing this for some time the wall fell. One boy was killed and the plaintiff was injured. He was held entitled to recover damages, the learned Judge applying the *Donoghue* v. *Stevenson* principle. The defendants had been negligent in failing to take precautions to prevent injury being suffered owing to the unsafe condition of the wall.

Implicit in his judgment is the fact that while the owners of the land were in possession of the site generally, the defendants had control of the partially demolished house. The liability of the defendants was not, therefore, to be determined on the basis of the liability of those in the occupation of land and structures to persons who enter on the land and structures and there suffer damage.

Ormerod J. said : [28]

> If the defendants were occupiers and the plaintiff a trespasser, then, in view of the decision in *R. Addie and Sons (Collieries)* v. *Dumbreck*,[29] the plaintiff would have no cause of action . . . But the plaintiff here argues in this way. The defendants not being the occupiers of the site, the duty as between the plaintiff and the defendants was different from what it would have been if the defendants had been occupiers.

After quoting from the judgment of Morris J. in *Buckland's* case (*supra*) he said : [30]

> . . . I have to ask myself: Are the defendants in the same position vis-à-vis the plaintiff as they would be if they were occupiers of the land in question ? Do they owe no other duty to the plaintiff than the occupier of the land would owe to a trespasser, or are they, in the circumstances of the present case, in such a position in relation to the plaintiff that, in spite of the fact that he was a trespasser, they owe him a duty to take care so far as this building was concerned ?

Ormerod J. did not directly answer those questions. What he did say was :

> I think any decision which puts a defendant who is not in the occupation of land in a different position from the occupier of the land is one which must be considered with very great care and caution.

But, in view of his other remarks and of his decision, the learned Judge, had he answered the questions directly, would have said "No" to the first and to the second : "The defendants are in such a position in relation to the plaintiff that, in spite of the fact that he was a trespasser, they owe him a duty to take care."

In Creed v. *John McGeoch and Sons, Ltd.*[31] a similar issue arose. The defendants were contractors engaged in the construction of roads and sewers and the levelling of land. They left a trailer used for carrying kerbstones on land adjoining a nearly completed portion of road at a point some ten feet from the kerbside. The plaintiff, a child of five years, while walking along the road with some other children, saw the trailer. They went on the adjoining land, which was not in occupation or possession of the defendants and used the trailer to play "see-saw". In the course of the game the plaintiff was injured. The defendants were held liable on the *Donoghue* v. *Stevenson* principle, in that they were negligent in not taking steps to prevent the injury which occurred.

On the question whether the defendants' liability, if any, depended on the application of the principles relating to dangerous land and structures or on the *Donoghue* v. *Stevenson* principle, Ashworth J. said : [32]

> Much of the argument before me was directed to the question whether the defendants were in occupation of the ground on which the trailer rested. A somewhat unusual feature of this case is that the defendants seek to establish that they were in occupation and owed no higher duty to the plaintiff than that imposed on occupiers in respect of infant trespassers ; on the other hand, the plaintiff contends that whether or not she was a trespasser vis-à-vis the true occupiers, the defendants were not in occupation and owed a higher duty of the type illustrated in *Donoghue* v. *Stevenson* ([1932] A.C. 562) and more recently in *Buckland* v. *Guildford Gas, Light and Coke Co.* . . .
>
> It may appear surprising . . . that the measure of the defendants' obligation to the plaintiff should depend on the answer to the question whether they were in occupation of the land. . . . It seems to me, however, that there is no escape from the conclusion that, as the authorities stand, the distinction . . . does exist.

It is against the background of these decisions that one may consider the New Zealand case of *Napier* v. *Ryan*.[33]

The plaintiff was a boy of fourteen years. The defendants, so far as is material to the present discussion, were the Hutt Valley R.S.A. and one Ryan. One of the attractions forming part of a fair conducted by the R.S.A. was a merry-go-round owned by the defendant, Ryan, and erected on the fair ground. By an agreement between Ryan and the R.S.A., 60 per cent. of the takings for rides on the machine were to go to Ryan and 40 per cent. to the R.S.A. The fair was held on a Saturday and on the following Monday. At the conclusion of the activities on the Saturday, Ryan had taken certain steps to secure the merry-go-round against interference by unauthorized persons. On the Sunday morning Ryan

[26] At p. 420.
[27] [1954] 1 All E.R. 578.
[28] At p. 579.
[29] [1929] A.C. 358.
[30] At p. 580.
[31] [1955] 3 All E.R. 123.
[32] At p. 125.
[33] [1954] N.Z.L.R. 1234.

discovered that unauthorized persons had nullified his efforts by cutting a rope securing the brake of the machine, by removing an iron bar which had been placed through some wheels of the mechanism and by cutting the driving-belt which, because of the compression of the engine, itself acted as a brake. Ryan re-secured the machine as best he could and left the grounds. Shortly afterwards, the wire and the rope were again cut and children in the locality played on the machine. Although the children were at times ordered off the machine by members of the R.S.A. committee, they kept on returning to it. While the plaintiff was playing on the merry-go-round, his foot was caught in the cogs of the crown-wheel and pinion when the machine was put in motion by other children. For the injuries he thus sustained, he claimed damages against the defendants.

The plaintiff's claim was based on two separate causes of action. The first alleged that the defendants were occupiers of the machine; that he was either an invitee or a licensee thereon and that the defendants had failed to fulfil the duty which they as occupiers owed to him. The second cause of action alleged a breach of the duty which the defendants owed to the plaintiff under the rule in *Donoghue* v. *Stevenson*.

Issues were put to the jury by the learned Chief Justice although counsel for the plaintiff did not feel at liberty to agree to those issues. Counsel for the R.S.A., though favouring the issues as suggested by counsel for the plaintiff, was not prepared to dissent from the issues as drawn by the learned Judge.

Answering the questions on the issues, the jury said that the plaintiff did not enter the premises within the ambit of the merry-go-round with the tacit permission of Ryan, but did enter them with the tacit permission of the R.S.A.; and that the said premises were at the time of the accident occupied by both Ryan and the R.S.A. The jury, "for some reason that was not disclosed", did not answer Issue No. 3 which asked: "Were the said premises at the time of the accident under the control of—(*a*) the defendant Ryan? (*b*) the defendant R.S.A.?" The learned Chief Justice, pursuant to his agreed power to determine any question of fact not covered by the findings of the jury, said that the control of the premises at the time of the accident was vested in Ryan and the R.S.A. jointly.

With the other issues put to the jury arising from the question of "occupancy of the premises" we are not, for present purposes, concerned.

Further issues dealt with what might be called the *Donoghue* v. *Stevenson* principle. The jury found that reasonable steps were not taken to safeguard the plaintiff against injury due to the setting in motion of the crown-wheel and pinion, but that reasonable steps were taken to lock or secure the mechanism; that both Ryan and the R.S.A. ought to have foreseen the possibility of injury to such a person as the plaintiff from the unauthorized setting of the gears in motion, and that neither of them used ordinary skill and care to prevent such injury.

After hearing motions by all parties for judgment and motions for a new trial by the defendants, the learned Chief Justice gave judgment in favour of the defendants.

In his judgment, His Honour carefully dealt with the authorities concerning the question whether the plaintiff was a licensee or a trespasser and reached the conclusion that the plaintiff was a trespasser—or, in any event, not a licensee. He then considered the question whether the defendants were "occupiers of the land upon which the merry-go-round was erected". It is to be noted, however, that in the issue put to the jury the reference was to "premises within the ambit of the merry-go-round". The learned Chief Justice was of the opinion that the finding of the jury that both defendants were the occupiers of the premises could not be challenged. The defendants being occupiers, His Honour said the case was distinguishable from *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.* and from *Buckland* v. *Guildford Gas, Light and Coke Co.*

With that conclusion one respectfully agrees. But, with equal respect, it is submitted that, on the facts, the issue whether or not the defendants were occupiers so as to place the plaintiff in the category of licensee, or trespasser, or invitee, did not arise and should not have been put to the jury. The simple issue, on the facts and on the authorities was, it is submitted: "Ought the defendants or the one of them who, had the jury answered all the issues, was found to have control of the machine, have foreseen the possibility of injury to such a person as the plaintiff by the setting of the machine in motion? If so, did the defendants use ordinary care and skill to prevent such injury?"

In short, it is submitted, with great respect, that the legal principle which should have been applied was that based on the rule in *Donoghue* v. *Stevenson*, and not on the rules relating to the liability of occupiers to persons who come upon land.

A large share of the responsibility for the issues being put to the jury in the form they were must rest with counsel for the plaintiff who based his claim on two separate causes of action; one that the defendants were occupiers of the machine and as such owed to the plaintiff as invitee or licensee a duty of care; the other that the defendants were not occupiers of the machine but nevertheless owed a duty of care to the plaintiff on the *Donoghue* v. *Stevenson* principle. These causes of action are, it is submitted, not alternatives but are mutually exclusive.

The defendants were either "occupiers" of the machine or they were not "occupiers" of it. Once it was found that they were occupiers, then the appropriate legal principle to be applied was that relating to the duty of an occupier to those entering upon the premises; the *Donoghue* v. *Stevenson* principle has no application.

Counsel for the plaintiff appears to have appreciated this fact during legal argument. As His Honour said,[34]

> When the matter was before the jury, the contest was not so much a question as to whether the defendants were or were not occupiers, but rather a question as to which of them was the occupier. The plaintiff submitted as his first cause of action, that both were occupiers, but, when the matter came before the Court again on motions for judgment, new trial, etc., the plaintiff argued that neither defendant was an occupier.

It is submitted that a merry-go-round, in any event one temporarily erected for the purposes of a two-day fair, does not, on the authorities, constitute "premises" or a "structure" so as to invoke the rule relating to the duty of an occupier of premises to those entering upon those premises. It is, rather, a chattel, in the

[34] At p. 1242.

control of which those having such control (and in the instant case the jury did not answer the question of control) owe a general duty of care to their " neighbours ".

In short, it is submitted, with great respect, that the learned Chief Justice should have disregarded the dangerous premises principles and framed the issues and directed the jury with reference solely to the *Donoghue* v. *Stevenson* principle as did the learned Judge in *Creed's* case (*supra*).

It is submitted that much of the confusion which surrounds this topic has been caused by the fact that, hitherto, whenever an action has resulted from injury to the person suffered on private property as the result of the allegedly defective condition of some thing on the private property, e.g., defective stairs (*Fairman* v. *Perpetual Investment Building Society* [35]) or machinery (*R. Addie and Sons (Collieries)* v. *Dumbreck* [36]), the Courts have almost exclusively applied the principles relating to dangerous land and structures, classifying the plaintiff, for this purpose, as an invitee, licensee, trespasser, or one who enters under a contract. Only in recent years has the *Donoghue* v. *Stevenson* principle been applied, involving as it does, a consideration solely of the question : was the plaintiff a " neighbour " to the defendant ? And, if so, had the defendant been guilty of a breach of duty to him ?

When the latter principle has been applied, normally the land and the defective thing, the condition of which caused the injury, have been in the occupation and control of different persons; although, as the High Court of Australia showed in *Thompson* v. *The Council of the Municipality of Bankstown* (*supra*), this is not an essential element for the invocation of the rule.

It is submitted that when a Judge is confronted with an action involving injury resulting from the defective condition of some thing on land be it a railway turntable or a vicious horse, he should decide, first of all, whether the legal principle he will apply is that relating to dangerous land and structures or that contained in the rule in *Donoghue* v. *Stevenson*.

It is submitted, with respect, that to reach a decision on this point, he should consider the following question :

What was the nature of the defective thing ? Was it part of a main structure, e.g., a staircase, a lift, or scaffolding ; or was it something in the nature of a separate chattel, such as a trailer or a merry-go-round ? This is a question of law. The jury could properly find, in appropriate circumstances, what degree of attachment there was to the soil or to the main structure ; but, in the ultimate, it would be for the Judge to decide its nature as a chattel or as part of the realty.

If it were decided that the defective thing was in the nature of a chattel then, prima facie, the legal principle applicable would be the rule in *Donoghue* v. *Stevenson*. If, on the other hand, it were decided that the defective thing was part of the land or of a main structure, then, prima facie, the legal principle applicable would be that relating to dangerous land and structures.

Some further guidance as to the principle applicable might be obtained from finding whether the same person was in control of the defective thing as was in control—or, to employ the usual term, in " occupation " —of the main structure or of the land. For, if different persons are in control of the defective thing and of the main structure or of the land, then it would seem to be obvious that, as against the person in control of the defective thing—e.g., the Gas, Light and Coke Co. in *Buckland* v. *Guildford Gas, Light and Coke Co.*; the demolition contractors in *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*, and the road contractors in *Creed* v. *John McGeoch and Sons, Ltd.*,—the rule in *Donoghue* v. *Stevenson* should apply.

In these circumstances, the classification of the plaintiff as a trespasser, an invitee, a licensee or a person entering under a contract has no relevance, because he is in one of those categories only vis-à-vis the occupier of the main structure or of the land who, normally, will not be a defendant in the action.

The application of the appropriate rule is, admittedly, a difficult matter, to be determined having regard to all the circumstances of the case. To repeat what Ormerod J. said in *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*:[37]

> I think any decision which puts a defendant who is not in the occupation of land in a different position from the occupier of the land is one which must be considered with very great care and caution.

In many cases, the result will be the same whichever rule is applied. For example, in accordance with the submissions made above, the House of Lords in *Lowery* v. *Walker* [38]—the case of the savage horse belonging to a farmer and grazing in his field—should, if the case had been decided after the decision in *Donoghue* v. *Stevenson* in 1932, have applied the rule laid down in that case. But, it is submitted, the decision would have been the same ; for the plaintiff and other persons whom the defendant had tacitly permitted to cross his field were the defendant's " neighbours ". They were " persons who were so closely and directly affected by his act that he ought reasonably to have them in contemplation when he was directing his mind to the acts or omissions which are called in question."

But, in other cases, particularly those in which occupation of the land and structures and control of some dangerous thing on the land is divided, the question is : what is the nature of the defective thing ? Is it part of the land or is it in the nature of a separate chattel ? If the former, then the principle relating to dangerous land and premises should be applied. If the latter, then the rule in *Donoghue* v. *Stevenson* should be applied.

[35] [1923] A.C. 74.
[36] [1929] A.C. 358.
[37] [1954] 1 All E.R. 578 at p. 580.
[38] [1911] A.C. 10.

Carriage above us.—Time moves quickly and the whole of modern aviation is still, seen in proportion, a new thing. Particularly is it so to English lawyers, most of whom seldom have cause to fly from case to case. So the mounting volume of air passenger traffic passes us by, a roar and a flurry overhead, which affects us little except, if we are unfortunately placed, to turn our thoughts temporarily to the law of nuisance. Yet the growth of the new transport is great. On the other hand, the total of cases reported on the law of carriage by air in England in 1955 was (we think) nil, and in 1956 is one (*Preston* v. *Hunting Air Transport, Ltd.*, [1956] 1 All E.R. 443). In that one case, the Court followed an American decision. It looks as if the vast development in our air transport will remain a thing remote from the lawyer, leaving him to research among the relics of disputes over common carriers and horse-drawn transport, and to wonder mildly, when his meditations are interrupted by the noise overhead, what is done with the time that is saved.—*Law Journal* (London).

SIR LESLIE MUNRO AT HARVARD.

High Tribute Paid to Ambassador by Law School. *

By Desmond Stone
(N.Z. Associate Nieman Fellow, 1955-56).

At Harvard Law School this month, New Zealand's Ambassador to the United States (Sir Leslie Munro) put aside his diplomatic duties and entered the mythical kingdom of Ames, a forty-ninth State of the United States.

Appropriately gowned, he sat for three hours on the Bench in the distinguished company of a Justice of the United States Supreme Court and an Appeal Court Justice.

Before an audience of five hundred students, faculty members, and well-performed lawyers, he listened to the intricacies of argument about unfair competition in the manufacture and marketing of an electric and an atmospheric clock.

This hardly sounds like serious business for an ambassador. In fact, Sir Leslie's visit to the Law School added another distinction to an already long list and provided a measure of the regard in which he is held in this country. Some understanding of the honour he was paid will follow when it is explained that Harvard Law School has a reputation for legal education second to none. No other American school of legal training carries more prestige than Harvard.

The Ames competition for which Sir Leslie Munro was invited to be one of the judges this year is among the most important of the Law School's annual activities, and Harvard paid New Zealand's ambassador a high tribute when, for the first time in the history of the competition, it chose a man from outside the United States to assist in the judging.

It has become a tradition for a Justice of the Supreme Court of the United States to preside at the final argument, assisted by two Judges invited from the State bench.

The Supreme Court choice this year was Justice John Marshall Harlan, and he was flanked by Henry W. Edgerton, Chief Judge of the U.S. Court of Appeals for the District of Columbia, and by Sir Leslie.

The Ames Competition.

It should be explained that the Ames competition is a moot-court argument planned as part of the educational programme of the school, although extra to the curriculum. The first-round cases in the first year are laid in the Supreme Court of the mythical common-law jurisdiction of Ames, where every case is one of first impression.

Many qualifying rounds are held, and, from the quarter-finals on, each of the competing club teams of eight is represented in oral argument by two members, and all members on the brief. Briefs and records are printed at the school's expense, and judges are invited from the State and Federal bench and bar.

The semi-final and final rounds in the third year are organized in the same manner, but with courts usually composed of more eminent judges. Participation in the competition offers the finest of legal training, and any young man who becomes an Ames finalist almost automatically goes on to higher honours.

The Ames competition is a court trial in all but the fact, and when Sir Leslie walked into Austin Hall to hear this year's final he must have been taken back some years to the time when he was Dean of the Law School of Auckland University College.

Although his legal background was an indispensable condition of his selection as an associate judge for the occasion, he was not set an easy task. The case chosen for the final was technically tough.

The facts were borrowed from an unfair competition case recently decided in the Second Circuit, but rewritten to include a jurisdictional issue and a problem of anticipatory pleading.

Action was by a firm for a declaratory judgment that it had not engaged in unfair competition with another firm through the manufacture and marketing of an electric clock with a face design practically identical with that of an atmospheric clock selling at a higher price.

Many complex issues were involved, and Sir Leslie's digestion of the case was made difficult because some of the law under argument has no place in New Zealand law. But his question from the bench to the student attornies showed that he had made himself thoroughly familiar with the issues by the time the case was opened.

With most court-room proprieties observed for the competition, the atmosphere in Austin Hall on the night of the final argument might have been that of almost any of the higher courts.

The only notable difference was that the audience of students, faculty, and Boston and out-of-town lawyers knew a great deal more about law than ordinary court-room audiences. Their critical concentration was a challenge both to the finalists and to the judges, and it drew an outstanding intellectual response.

A Unique Distinction.

Sir Leslie's participation in the Ames final was a unique distinction. And his visit generally showed how extraordinarily wide in its scope is the work of a present-day diplomat.

Any surviving notions that an ambassador rides in a gilded carriage and leads the life of a leisured class ought to be tossed out the window.

Combining as they do the work of ambassador and of chief United Nations delegate, Sir Leslie's duties are endless and are limited only by the time he has available. Although there is no apparent conflict in the twin tasks he performs so enthusiastically and so capably, travel to and from Washington and New York must often be fatiguing. And there are many other parts of the United States he must visit from time to time.

Sir Leslie's two-day visit to Harvard offers a good example of the multiplicity of duties that confronts an ambassador, whether he is in or out of Washington.

* With acknowledgments to *The Christchurch Star-Sun*, where the article first appeared.

His first full day at the university began with morning discussions with Law School faculty and a midday coffee hour address on New Zealand constitutional law. The Ames competition at night was preceded by a dinner and followed by a party.

After a day so arduous, a little relaxation would have been in order. But precisely at nine the next morning, Sir Leslie was ready to walk to the lecture room in Harvard College where the newly-introduced course on Australian and New Zealand history is being conducted.

At the lecturer's invitation, he spoke for an hour on New Zealand, beginning with an amusing account of Boswell's meeting with Captain Cook. He emphasized mainly the development of responsible self-government and the treatment of the Maori.

And he was at pains to explain the kind of social welfare that has developed in New Zealand. This was a wise insistence, for American students not unnaturally find it hard to understand how a country so dominated by the central government can be anything but violently socialistic.

Sir Leslie anticipated some of the students' questions by pointing out that New Zealanders have little philosophic concept of socialism but are fundamentally pragmatic people advancing by whatever steps seem the best at the time. It was a solid, able address, and the students were appreciative.

After the lecture, there were more discussions with Law School faculty members, notably with Professor Milton Katz, director of the International Legal Studies and formerly one of the Marshall Plan ambassadors to Europe. At midday, Sir Leslie was cornered again and marched over to the Harvard Faculty Club to address informally the Harvard Nieman Fellows, a group of American, Commonwealth, and Asian newspapermen.

The Law School claimed him again in the afternoon and his two-day visit concluded with a small select dinner party at night.

Here again the company was a testimony to the regard in which New Zealand's ambassador is held. Among those present were the Dean of the Law School and his wife (Dean and Mrs Griswold), Dean David F. Cavers, assistant Dean, and Professor Arthur E. Sutherland, an expert in constitutional law.

On all these occasions, Sir Leslie showed himself as an ambassador of whom New Zealand has every reason to be proud. Good humoured and eminently approachable, he put himself completely at the Law School's disposal.

And in both formal address and informal discussion, he spoke with a knowledge and authority that carried conviction. His experience in United Nations and elsewhere has made him a worthy opponent in any debate.

But, like a good diplomat, he knows which questions to answer and which to leave alone.

For a country that has long had the reputation of being ungenerous to talent, New Zealand has been well served by its overseas representatives; and it appears to be particularly fortunate in its present ambassador to the United States.

LEASE OF ROOMS IN A BUILDING.

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

Explanatory Note.

The following precedent requires but little explanation. It is in the form of a deed, and therefore not registrable under the Land Transfer Act. Nevertheless, as the term is for less than three years, it will constitute a legal lease, even if the land is under the Land Transfer Act, as in all probability it will be: s. 115 of the Land Transfer Act 1952. Subsection 2 of that section provides that a memorandum of lease may be registered notwithstanding that the term thereof is less than three years, but no lease for a less period than three years shall be void by reason only of such memorandum not having been registered. The only meaning that can be properly given to this *special* provision (to which the general provisions of s. 41 of the Act must be read subject) is that a lease for less than three years of land under the Land Transfer Act may be validly created in the same manner as if the land was not under the Land Transfer Act; and that a lease so granted shall confer upon the lessee the same *legal* estate, as if the land was not under that Act: *Domb* v. *Owler*, [1924] N.Z.L.R. 532; [1924] G.L.R. 97, a decision of the late Sir John Salmond. But there is this point to be noted: such an unregistered lease is liable to be superseded by the registration of an adverse instrument later in date: *Tonkin* v. *Dyer*, [1923] G.L.R. 720, *Domb* v. *Owler* (*supra*). Such an unregistered lease of course, would support a caveat: *Wellington City Corporation* v. *Public Trustee*, [1922] N.Z.L.R. 293; [1921] G.L.R. 512.

The clauses in the following precedent are all in common form and usually employed in practice.

The lease will be liable to *ad valorem* lease duty in accordance with Part VI of the Stamp Duties Act 1954.

Precedent.

Short-term Lease of a Floor in a Building.

This Deed made the day of One thousand nine hundred and fifty-six (1956) Between Limited a company duly incorporated having its registered office in the City of Wellington (hereinafter with its successors and assigns referred to as "the Lessor") of the one part And Limited a duly incorporated company having its registered office in the City of Wellington (hereinafter with its successors and permitted assigns referred to as "the Lessee") of the other part Whereby it is hereby agreed and declared as follows:

1. The Lessor shall lease to the Lessee the premises situate on the ground floor of the building known as "City Buildings" , Wellington at present occupied by the Lessee, which said premises are shown on the plan endorsed hereon and marked in outline blue together with a full and free use of the lavatories and the passages leading thereto in common with other tenants of the Lessor in the said building for the term of two (2) years from the 10th day of June, 1956, at a rental of Four hundred and twenty-five pounds (£425) per annum such rental to be payable by equal calendar monthly payments amounting to Thirty-five pounds eight shillings and four pence (£35 8s. 4d.),

the first of such payments to be made on the 10th day of July 1956.

2. The Lessee hereby covenants with the Lessor as follows:

(a) That the Lessee will pay promptly and punctually all charges demanded or assessed for electric light or current or gas consumed on the premises hereby demised throughout the said term or water used in excess of the amount supplied in consideration of the payment of rates.

(b) That the Lessee will pay to the Lessor in the manner hereinbefore provided the rental aforesaid without any deduction or abatement whatever.

(c) That the Lessee will not commence or carry on or permit to be carried on in or upon the said premises any noxious noisy offensive or immoral trade manufacture calling or purpose or create any nuisance thereon or do or suffer to be done any act matter or thing which shall or may be or may grow to the annoyance or disturbance of the owners tenants or occupiers of the adjoining lands and premises or of any other part of the said building and if any reasonable complaint shall be made by any other tenant or tenants of the mode in which the business of the Lessee is being conducted the Lessee will upon receipt of a written notice from the Lessor forthwith discontinue the matter so complained of.

(d) That the Lessee will not allow any person or persons or children under its control to loiter or play in the passages landing or staircases of the said building nor obstruct or suffer the same to be obstructed by any boxes parcels refuse or rubbish or permanently damage the same by the carrying of coals or other articles or use the same in any way except for ingress and egress for the purpose of conveying the Lessee's goods to and from the said premises.

(e) That the Lessee will from time to time and at all times throughout the said term uphold and maintain in good and tenantable repair the interior of the premises hereby demised and the windows doors locks and fastenings thereof the gas water and electrical installations therein and all the Lessor's fittings and fixtures in connection therewith and all interior taps drains sinks cisterns pipes and appurtenances to the said premises belonging (damage by fire earthquake tempest inevitable accident and reasonable wear and tear alone excepted) and will at the expiry or sooner determination of the said term deliver up to the Lessor the said premises in good and tenantable repair save only as aforesaid:

PROVIDED that the Lessee shall not be responsible for any damage to any common drain unless such damage is occasioned by the negligence or default of the Lessee.

(f) That the Lessee will at its own expense carry out any minor repairs or replacements to general fittings and electrical equipment and apparatus situate in the said premises which are rendered necessary by the use by the Lessee of such fittings and equipment.

(g) That the Lessee will permit any agent of the Lessor at any reasonable time upon giving twenty-four hours previous notice in writing to enter the said premises for the purpose of viewing their state and condition as to the repair cleanliness or otherwise and all defects not repairable by the Lessor which upon any such view shall be found and for the amendment of which a notice in writing shall be left at the said premises the Lessee will within seven days after such notice well and sufficiently repair and make good.

(h) That the Lessee will permit any agents servants or workmen of the Lessor at any reasonable time to enter the said premises for the purpose of executing any repairs to the exterior thereof which the Lessor may desire to make on its own accord:

PROVIDED that the Lessee shall not be disturbed in its occupation of the said premises by reason of the carrying out of such repairs and if the Lessee is so disturbed then it shall be entitled to a reduction in rent as provided in Clause 4 (b) hereof.

(i) That the Lessee will not without the written consent of the Lessor pull down alter or in any manner interfere with the construction or arrangement of the said premises the fittings and installations thereof or in any manner deface or disfigure the walls or ceilings thereof or incur any debt or liability whatsoever for repairs on behalf of the Lessor without the consent of the Lessor in writing being first had and obtained:

PROVIDED that the consent of the Lessor to any alterations shall not be arbitrarily or unreasonably withheld.

(j) That the Lessee will not assign or sublet mortgage or part with the possession of the said premises or any part thereof without the consent in writing of the Lessor first had and obtained PROVIDED THAT such consent shall not be arbitrarily or unreasonably withheld to a solvent and respectable proposed assignee or sub-tenant [but no such consent shall be given to any assignment subletting mortgaging or parting with the use or occupation of the said premises to any Asiatic, Indian, Chinese or Japanese or to any Fishmonger or butcher]. (*Omit the words in brackets, if not considered desirable.*)

(k) That the Lessee will not place or paint out upon any part of the said demised premises any sign or trade notice unless the same shall have been first approved by the Lessor and upon the expiration or sooner determination of the said term the Lessee will at its own expense remove paint out or clean off as the case may require all signs sign-plates sign-boards names placards or notices which may during the said term have been placed on or affixed to any part of the buildings upon the said premises.

(l) That the Lessee will not without the previous consent in writing of the Lessor do or suffer to be done any act or thing in or relating to the said premises whereby the insurance rate is increased or the insurance risk is in any manner invalidated or increased.

(m) That the Lessee will comply in all respects with the provisions of the Health Act 1920 and any regulations thereunder in so far as the same relate to the said premises PROVIDED that the Lessee shall not by reason of this clause be required to make any structural alterations or additions to the said premises.

(n) That the Lessee will except during business hours keep the windows of the said premises closed and securely fastened and will securely close and lock all the doors of the said premises opening from the street, after business hours.

(o) The Lessee will at its own expense carry out such interior painting and decoration as is necessary to make the demised premises suitable for use by the Lessee and during the continuance of this term hereby created shall not call upon the Lessor to bear the expense of maintaining any such interior painting and decoration.

(p) Not to throw or permit to be thrown any sweepings rubbish rags ashes or other substances or things out of the windows or doors or down any wellhole light-area or passage or through any skylights or into any water closet or other water supply apparatus of the said building.

3. The Lessor hereby covenants with the Lessee:

(a) That the Lessor will at all times during the said term pay all rates taxes charges assessments and outgoings whatsoever payable in respect of the said lands.

(b) That the Lessor (but subject however to the provisions of Clause 2 (e) (f) and (o) hereof) will keep in good and tenantable repair and condition the building of which the demised premises form part so that the Lessee shall have the full and free use and benefit of the portion thereof hereby demised.

(c) That the Lessor will during the currency of this lease insure the buildings of which the demised premises form part against damage by fire and earthquake.

4. (a) If the rent hereby reserved or any part thereof shall be in arrear for the space of twenty-one days after any of the days hereinbefore appointed for payment thereof whether the same shall have been legally demanded or not or if the Lessee shall make default in the observance or performance of any of the covenants agreements or conditions herein expressed or implied and on the Lessee's part to be observed or performed then and in any such case it shall be lawful for the Lessor into and upon the premises hereby leased to re-enter and determine the estate and interest of the Lessee therein and that without releasing the Lessee from any liability for rent in arrear or rent accrued or breach of covenant.

(b) In case the building of which the demised premises form part or any part thereof shall at any time during the said term be destroyed or damaged by fire earthquake tempest or inevitable accident so that the demised premises may be

(*Concluded on p. 144.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Law and Philosophy.—In *Romford Ice and Cold Storage Co. Ltd.* v. *Lister*, [1955] 3 All E.R. 460, Denning L.J. differed from his brethren, Birkett and Romer L.JJ., on all the points considered ; and a commentator in a recent issue of an English legal periodical had this to say :

> It is a particularly stimulating decision because it divided the Court of Appeal in circumstances that called for a more explicit consideration of social welfare and justice than is usual. Social scientists and moral philosophers have not as yet provided the solution to many questions that come before the Courts concerning their respective spheres. Natural modesty, no doubt, restrains the lawyer from expressing conclusions where they are silent. He prefers to rely on logic to deduce legal propositions from authorities. Since a relevant legal proposition may not always be thus deduced from authority, a conclusion may only be arrived at in such cases by faulty logic which in fact conceals some social or ethical assumption. Today, however, there is a greater awareness of these concealed premises, and both the absence of authority and the division of opinion in the present case have resulted in a more explicit reliance on policy and principle than is often the case. It is submitted that this is most desirable, and makes clear that the decision of the Court may depend, not on the application of established legal principles, but on the social and moral philosophy of its members.

A local critic who has discussed the matter with Scriblex says that he considers he could add the following passage to Boswell : " Sir," said Dr Johnson, " this is cant, and not very intelligent cant either. A Judge is sworn to obey the law, let him obey it, and keep his social and his moral philosophy in his pocket, at least until he can say what he means by each of those phrases." He agrees that the learned Doctor did not actually say this, but he maintains vehemently that you can see and hear him, and he contends that he certainly would have been right.

An Elastic Touch.—" I am aware that counsel are disposed to look upon this Act (the Family Protection Act) as elastic ; I am also aware that some of my brother Judges are disposed to regard it as very elastic ; but, for my part, I consider that the limits of its elasticity have been reached."—Per Gresson J., at Wellington, recently.

Idle Speculation.—From *Walden* v. *Mc Kendrick*, a judgment of Mr Grant S.M., delivered a month or two ago, comes a passage that may well find its way into text-books on insurance as well as those on tort. " Memory recalls that not quite thirty years ago a trotting horse (Peterwah) bolted from the same track and careered along adjacent highways : no harm came to this animal or to others who might have been concerned : after its recapture it distinguished itself by a winning performance : the probability of consequential similarities are matters of pure conjecture. The non-disclosure of the name of this horse precludes idle and probably profitless speculation as to whether history will repeat itself."

Tax Note.—Published by H.M. Stationery Office (at a gift price of 2/6) on behalf of the General Office of Information, a booklet of forty-five pages on the British System of Taxation describes what it refers to as " the astonishing growth " of the yield of taxation in the United Kingdom from £114 million in 1900 to £4,492 million in 1954-55, and providing 97 per cent. of the English Government's ordinary revenues. The time may yet come when Inland Revenue Inspectors, those valuable adjuncts to the Welfare State, are rewarded for their services by a much higher ranking in the Honours List than mayors, treasury officials, or even sportsmen of the year.

The Individual's Rights.—It is an odd thing how deeply stirred the conscience of mankind can be by an unfair trial. Hundreds of men can be brutally murdered without giving rise to any international protests, but an unjust conviction will live in men's memories for generations. Perhaps this can best be explained on the ground that such a trial violates the ideal of justice which all men hold, even if they themselves may be lax in practising it.—Professor A. L. Goodhart, " Tolerance and the Law " (Robert Waley Cohen Memorial Lecture, 1955.)

The Feminine Approach :—

Counsel to female defendant : " How do you account for the fact that in broad daylight you ran into the back of the plaintiff's car ? "

Female defendant : " It suddenly appeared before me, almost from nowhere. I put out my right hand to warn those behind and put my left hand on the handbrake. I looked down at the wheel and I saw that I had no hand on it. I was so surprised that I fainted."

From My Notebook (Animal Division).

" It is true that the rabbit is graminivorous and, in gratifying this appetite, does not distinguish between *meum* and *tuum* ; and, when the present question is sifted, this will be the real ground upon which the defender proposes to class him with vermin."—*Lord Advocate* v. *Young*, (1898) 25 R. (Ct. Sess.) 778, 783.

" I think there is an extravagant case put somewhere by Lord Bramwell. He says : ' Suppose you were asked to lend a mutton chop to a ravenous dog, upon what terms would you lend it ? ' "—*Jackson* v. *Price*, (1909) 26 T.L.R. 106, 108.

" I am forced to the conclusion that a gate-crashing, stair-climbing, floor-busting, tap-turning cow is something *sui generis*, for whose depredations the law affords no remedy unless there was foreknowledge of some such propensities."—*Cameron* v. *Hamilton's Auction Marts, Ltd.*, [1955] S.L.T. 78.

LEASE OF ROOMS IN A BUILDING.

(*Concluded from p. 142.*)

partially or totally unfit for occupation and use and the policy or policies effected by the Lessor shall not have been invalidated or payment of the policy moneys refused in consequence of some act or default of the Lessee the rent hereby reserved or a fair and just proportion thereof according to the nature and extent of the actual damage done shall be suspended until the said premises shall be again rendered fit for occupation and use. In case the demised premises or any part thereof shall at any time during the said term be destroyed or damaged by fire earthquake tempest or inevitable accident and shall not be rebuilt or restored to their previous state and condition by the Lessor as soon as reasonably may be in view of the damage suffered then and in any such case at the expiration of a reasonable period the said term hereby created shall absolutely cease and determine.

(*c*) That in case of dispute as to the extent of damage incurred as aforesaid or as to the proportion or period of abatement or suspension of rent or as to what is a reasonable time for the said reinstatement or repairing the same shall be referred to two arbitrators and an umpire pursuant to the provisions of the Arbitration Act 1908 or any statutory amendment re-enactment or modification thereof and this shall be construed as a submission under the said Act.

(*d*) That except as the same are herein expressly modified or negatived all powers provisos conditions and agreements implied in leases by the Land Transfer Act 1952 and the Property Law Act 1952 shall be herein implied.

(*e*) That the Lessee shall bear and pay the costs of the preparation and stamping of these presents.

(*f*) That should any dispute or disagreement whatsoever arise between the parties hereto touching any matter under or relating to these presents any such dispute or disagreement shall be submitted to arbitration in accordance with the provisions of the Arbitration Act 1908 and the finding of the Arbitrators or Umpire as the case may be shall be final and binding upon the parties hereto.

(*g*) The Lessor shall in no case be liable to the Lessee for any loss or damage due to the escape of water or any other deleterious substance or for any other damage caused by the negligent act or omission of any other tenant of the Lessor nor for any damage due to the negligent act or omission of any servant agent client customer or invitee of the Lessor or of any such tenant or of any trespasser.

(*h*) The Lessor shall not be responsible to the Lessee for any damage loss or inconvenience that may be caused to the Lessee directly or indirectly by or through the breaking down or failure from whatever cause of any elevator or any lavatory or wire pipe conduit or apparatus for the supply of water gas or electric current or by any blockage or obstruction of any common passage or stairway not due to the wilful act or omission of the Lessor.

5. The Lessor hereby covenants with the Lessee, that on receipt of a notice from the Lessee not less than one month before the termination of the term of this lease that it desires a renewal of this lease, it shall provided the Lessee has faithfully carried out the covenants terms and conditions of this lease, lease the demised premises for a further term of Two (2) years at a rental to be agreed on between the parties hereto or failing agreement at a rental to be determined in accordance with the Arbitration Act 1908 such lease, subject to the necessary alteration in the amount of rent payable, to contain the same covenants terms and conditions as this lease except this present covenant for renewal.

IN WITNESS whereof these presents have been executed the day and year first hereinbefore written.

THE COMMON SEAL of
LIMITED was hereunto
affixed in the presence of:

Director
Secretary

THE COMMON SEAL of
LIMITED was hereunto
affixed in the presence of:

Director
Secretary

[DIAGRAM]

N.B. Sometimes a restrictive covenant by the Lessee as to user is insisted on; e.g., "Not to use or permit or suffer the demised premises to be used for any purpose other than that of a shop for the sale of women's clothing [or other than that of a beauty parlour]."

SUMMARY OF RECENT LAW.

(*Concluded from p. 134.*)

PROBATE AND ADMINISTRATION.

Probate—Practice—Testator's Body not recoverable—Leave to Swear Death necessary—Nature of Evidence required—Coroner's Affidavit containing Statement as to His Finding of Death—Properly Authenticated Proof of Such Finding—Coroners Act 1951, s. 8—Code of Civil Procedure, RR. 518, 531 CC. Where a testator's body is not recoverable, a statement by the Coroner as to his finding of death in his affidavit in support of an application for leave to swear death, is properly authenticated proof of his finding. On an application for leave to swear death, in the case of a testator whose body is not recoverable, a summary of the evidence given at an inquest, without any indication of how much of the evidence was accepted by the Coroner, falls short of the evidence which is essential to satisfy the Court, that death was a practical or moral certainty in the sense that no other reasonable probability is open. (*In re Moss*, [1955] N.Z.L.R. 1140, followed.) *In re McKay (Deceased).* (S.C. Wellington. May 4, 1956. Barrowclough C.J.)

WORKERS' COMPENSATION—ASSESSMENT OF COMPENSATION.

1. *Permanent Non-schedule Injury—Compensation payable in Respect of Injury and not of Loss of Earning Capacity—Second Injury suffered to Same Part of Body—Compensation payable in Respect of Aggravation caused by Second Injury—Method of computing Same—Workers' Compensation Amendment Act 1947, s. 41 (3).* The compensation payable under s. 41 (3) of the Workers' Compensation Amendment Act 1947, which relates to permanent physical non-schedule injuries, is payable in respect of the injury suffered as a result of an accident, and not in respect of the loss of earning capacity suffered. In a claim for compensation payable under s. 41 (3), where an accident has caused permanent physical non-schedule injury to a part of the body the functional efficiency of which was reduced by a previous injury, compensation for the second injury should be assessed as to the extent to which the second accident has increased the degree of disability. The extent of the first injury should be assessed with regard to the percentages allotted to the injuries mentioned in the Second Schedule. The extent of the total present injury should be similarly assessed. The difference between the two percentages so assessed is the extent of the aggravation caused by the second accident. That aggravation is the injury in respect of which compensation is payable under s. 41 (3). (*Boutherway* v. *Levels County*, [1917] N.Z.L.R. 241; [1917] G.L.R. 99, and *Minister of Justice* v. *Griffiths*, (1936) 39 W.A.L.R. 30, distinguished.) *Earnshaw* v. *Attorney-General.* (Comp. Ct. Wellington. December 5, 1955. Dalglish J.)

2. *Worker voluntarily paid Full Wages for Period immediately following Accident—Compensation at Appropriate Rate for Such Period to be treated as Payment on Account of Compensation—Workers Compensation Act 1922, s. 5 (9).* Where wages have been voluntarily paid to a worker by his employer for a period following an accident, regard must be had to such payment when assessing workers' compensation. An amount equal to the rate of compensation for the period during which the wages were paid immediately after the accident should be treated as having been paid on account of weekly compensation. *Forrest* v. *Attorney-General.* (Comp. Ct. Auckland. December 12, 1955. Dalglish J.)