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INVITEES AND LICENSEES: OCCUPIER'S COMMON DUTY OF CARE.

IN *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572, 1574, Denning L.J. referred to "the morass into which the law has floundered in trying to distinguish between licensees and invitees."

To remedy that state of the law, the Occupiers' Liability Bill, at present before the Parliament of Westminster, accepts the recommendations of the Law Reform Committee in its Third Report (Cmd. 9305) and abolishes any remaining distinction. The Bill is concerned with lawful visitors only, and the duty to trespassers thus remains unaltered. The position of invitees and licensees is equated with that of contractual visitors, but the common law rules will still determine who is the occupier and to whom the duty of care is owed.

The "common duty of care" which an occupier owes to all visitors is, in the words of the Bill, to take such care "as is reasonable to see that the visitor will be reasonably safe in using the premises"; the duty may, however, be modified or rescinded by agreement or otherwise. Where an occupier is bound by contract to permit other parties to enter his premises, he cannot restrict or exclude the common duty of care so far as they are concerned, and he will be bound by any higher duty which the contract may impose on him in relation to such third parties.

In recent years, most of the text-books on the law of tort have set out the differing duties to be applied when visitors enter premises lawfully but without any contract with the occupier, and have stated the duty owed to those known to the law as invitees as higher than the duty owed to those known as licensees. And the authors of such text-books illustrate the distinction with cases which sometimes do not appear to be entirely consistent with one another.

In view of the complications and difficulties in the treatment of this matter in modern text-books, it is of interest to turn back to the first edition of Sir John Salmond's *Law of Torts* (1907), and to see the simplicity of his exposition of the law. In Chapter XII (p. 346), dealing with injuries suffered by persons who enter on premises and there come to harm, he does not use the term "invitee" at all. The learned author defines the occupier's duty as follows:

> Subject to certain qualifications which we shall consider later,* the duty of an occupier towards a person who lawfully enters upon the premises is a duty to use reasonable care for the safety of that person. He is bound to use reasonable care in ascertaining any dangers which exist on the premises and to guard sufficiently against damage accruing therefrom. This duty extends to all dangers which exist there, whether due to the nature of the premises or to the nature of the operations that are being carried on there.

There is little difference between the foregoing (to which we shall return later) and "the common duty of care", which, under the inspiration of the Law Reform Committee, is the standard set by the Occupiers' Liability Bill for the duty owed by occupiers to *all* lawful visitors.

In *Coleshill* v. *Manchester Company*, [1928] 1 K.B. 776, 781, Atkin J. (as he then was) said that it was no doubt unfortunate that the law as to the obligations of owners of property to those who come upon it "compels distinctions to be drawn which are subtle and apt to be confused." The following passages from the Third Report of the Law Revision Committee show the Committee's view as to the extent of those distinctions in relation to invitees and licensees at the time of the writing of the Report (October, 1954). We quote from p. 9:

> 12. The standard of care required of an occupier towards invitees is defined in the well-known judgment of Willes J. in *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274 at p. 288:
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> > And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.
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> 13. The standard of care required of an occupier towards mere licensees is less exacting, for it is limited to warning the licensee of any concealed danger (or trap) of which the occupier knows. This is the definition of the duty given in *Winfield on Tort*, p. 579, and it is substantially borne out by the authorities. The reference to a "trap" and the requirement of actual knowledge on the part of the occupier appear to derive from the passage from the judgment of Willes J. in *Gautret* v. *Egerton*, (1867) L.R. 2 C.P. 371, where, in equating the position of a mere licensee to that of the recipient of a gift, he said at p. 375:
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> > The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable.

* The qualification refers to the rule in *Francis* v. *Cockrell*, (1870) L.R. 5 Q.B. 184, 501 (the liability of an occupier under a warrant of safety), and the rule in *Gautret* v. *Egerton*, (1867) L.R. 2 C.P. 371 (the liability of an occupier to bare licensees—the duty to give warning of any concealed dangers of which he actually knows).

The extent of the occupier's duty towards a mere licensee was thus described by Lord Sumner in *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253 at p. 274:

> A licensee takes premises which he is merely permitted to enter just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions.

There are many other judicial pronouncements to a substantially similar effect, and reference should in particular be made to *Fairman* v. *Perpetual Investment Building Society*, [1950] A.C. 361. The occupier's duty to warn against traps of which he knows clearly extends to traps the existence of which comes to his knowledge during the currency of the of the license, whensoever and by whomsoever created (see *Corby* v. *Hill*, (1858) 4 C.B. (N.S.) 556; *Callagher* v. *Humphrey*, (1862) 6 L.T. (N.S.) 684; *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212).

In the opinion of the majority of the House of Lords in *London Graving Dock Co., Ltd.* v. *Horton*, [1951] A.C. 737 ; [1951] 2 All E.R. 1, the duty of an invitor to an invitee is to provide reasonably safe premises or else show that the invitee had full knowledge of the nature and extent of the risk which he ran. On this view, where it is found as a fact that the invitee has been adequately warned of an unusual danger on the premises, he cannot maintain an action against the invitor for any damages caused to him by the danger. The Law Reform Committee felt, however, that knowledge and appreciation of the nature and extent of the risk operating as an absolute bar to any action by an injured invitee was liable to work injustice—as, indeed, it did in *Horton's* case—and they proposed, therefore, that the fact that a visitor has knowledge of some particular danger should not *in itself* discharge the occupier from liability to the visitor for any damage arising from that danger. This recommendation corresponds with the opinion as to the existing law held by Lords MacDermott and Reid, who were in the minority in the House of Lords in *Horton's* case, and also expressed by Sir John Salmond in the first edition of his *Law of Torts*, at pp. 348-349. Effect is being given to the recommendation in the Occupiers' Liability Bill.

In supporting the Occupiers' Liability Bill in the House of Lords on June 21 of this year, the Lord Chancellor, Viscount Kilmuir, said that the classification of visitors, to whom varying duties of care were owed by occupiers, had, by the decisions of the Courts, hardened into rigid categories, which no longer represented the needs of the present day and had led to endless refinements and distinctions of little merit. He went on to say that there were lawyers, including a distinguished member of the Court of Appeal, who considered that the Courts had already by their decisions practically abolished the distinction between invitees and licensees.

It may be observed that, shortly after His Lordship's speech, the matter was taken a step further in the Courts. In *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625 (which appeared on June 28), the Court of Appeal held, *per curiam*, that the distinction between the duties of an occupier to invitees and licensees has virtually been abolished by the decisions of the Courts.

The more recent of these decisions began with *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572. This was an appeal from an order by Ormerod J. and the judgments in both Courts show the difficulties arising from a rigid classification of visitors in relation to a proper assessment of the occupier's duty towards such visitors.

The plaintiff was employed as a canvasser to sell advertising space in certain publications. The defendant was the owner and occupier of premises, which comprised a dwellinghouse and a builder's yard where the defendant carried on his business as a builder. The only means of access to the premises from the road which was unlighted during the hours of darkness, was a concrete bridge across a ditch and a drive leading to the dwellinghouse, both bridge and drive being bordered on either side by a low concrete wall. There were no railings between the defendant's hedge and that side of the ditch nearest the dwellinghouse. The plaintiff, wishing to sell to the defendant advertising space on the covers of certain telephone directories, visited the defendant's house and was asked by the defendant's wife to call later in the day. The plaintiff entered the premises after dark to keep the appointment, his way up the drive being partly illuminated by a light placed at the corner of the garage which adjoined the house. Having seen the defendant, who did not wish to do business with him, the plaintiff left the house. The light at the corner of the garage was still on ; but, before the plaintiff had reached the roadway and as he was approaching the bridge over the ditch, the defendant switched off the light, and the plaintiff tripped and fell into the ditch, thereby suffering injuries.

In an action by the plaintiff for damages for personal injuries, Ormerod J. came to the conclusion, although he did not regard it as material to his decision, that the plaintiff was an invitee. He regarded the bridge over the ditch as an unusual danger, and held that the defendant was negligent in that he failed to leave the light on for a length of time sufficient to prevent the plaintiff falling into danger. He awarded the plaintiff £469 damages, and judgment was entered accordingly. The defendant appealed.

In the course of his judgment in the Court of Appeal, Somervell L.J. said that there was a debate in the Court below and in the Court of Appeal whether the plaintiff was an invitee or a licensee. The learned Judge, Ormerod J., did not consider that that question was very material, but he came to the conclusion that he was an invitee.

In *Pearson* v. *Lambeth Borough Council*, [1950] 1 All E.R. 682, 688, Asquith L.J. had said :

> It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest . . .

Somervell L.J. did not think that, when the plaintiff came on the defendant's premises, the plaintiff and the defendant had a common interest. He no doubt hoped, wrongly as it transpired, that a common interest might result, but they had not at that time a common interest. His Lordship continued :

> Here was a man who was hoping that he might find the defendant to be interested in this advertisement and I think that he was a licensee. If he were a licensee, taking words from a judgment of Hamilton L. J., in *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398, 411:
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> The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril.
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> I do not think this case raises what may be a difficult question as to the effect of darkness on unusual dangers because I do not think this was an unusual danger. I think that this was an ordinary means of access to a house over a ditch which is an extremely common feature of roads in the

country and that there was no unusual or concealed source of danger in respect of which the occupier was under any duty.

His Lordship, continuing, said :

> Counsel for the plaintiff, having developed his proposition that the plaintiff was an invitee, to my mind, rather withdrew it because he based his main argument on the proposition that, the plaintiff having come with the defendant's knowledge and without objection on to his premises, the defendant was guilty of ordinary negligence in a failure to take reasonable care in relation to his exit from those premises. On that basis, I do not think it would matter whether he was an invitee or a licensee.
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> The learned Judge, holding that the plaintiff was an invitee and regarding the bridge as a dangerous situation of unusual danger—that, with respect, is where I differ from him—also said:
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> He [the defendant] did not in the circumstances take reasonable care, by leaving the light on for a sufficiently long time, to prevent the plaintiff from falling into danger.

His Lordship considered the evidence of both sides as to the light, and decided that the defendant was not negligent in switching it off when he thought that the plaintiff had reached the road, and concluded that the facts showed an accident which the plaintiff had brought entirely on himself. He had not taken a torch with him ; and anyone who went about on a dark unlighted road in a country district without a torch was asking for trouble, or, at any rate, if he found himself in that position, His Lordship thought he must proceed with very great care.

Denning L.J. began his judgment with a passage that has already become a classic. He said :

> A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away. Does he change his colour in the middle of the conversation ? What is the position when you discuss business with him and it comes to nothing ? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.

His Lordship went on to say that in the present case the canvasser, the plaintiff, came to the door ; the householder, the defendant, asked him in ; the plaintiff stated his business ; the defendant was not interested ; and the plaintiff left. On those facts, His Lordship was clearly of opinion that the plaintiff was not an invitee, but only a licensee, because he was there on his own business and not on any matter in which the defendant had an interest. A guest whom a householder invites to dinner is only a licensee, even though the householder has an ulterior business motive in asking him. It would be strange, he added, if a householder owed a higher duty to a canvasser who comes unasked than he does to a guest who comes on his express invitation. His Lordship continued :

> In this case, however, it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else. The instance was put by Somervell L. J., in argument of the driving of a vehicle, but many others can be imagined. In regard to current operations the duty of the occupier—or of the person conducting the operations—is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities, and it is the same whether the person injured is an invitee or a licensee, a volunteer, or a guest. Negligence causing damage gives a cause of action, and it is not proper nowadays in this regard to draw any distinction between negligent acts of commission and negligent omissions. Bearing this in mind, it is tolerably plain that the static condition of these premises was a danger to anyone who used reasonable care for his own safety. The bridge over the ditch was not an unusual danger, nor was it concealed danger, either by day or night. No matter whether the plaintiff was an invitee or licensee, the defendant was in no breach of duty in regard to it.

His Lordship concluded by saying that the case for the plaintiff depended, therefore, entirely on the action of the defendant in putting out the light. That was a contemporaneous activity, a current operation, on his part in respect of which his duty to the plaintiff was simply to use reasonable care. The trial Judge seemed to have thought that the householder was negligent in turning the light off too soon ; but Denning L.J. could not agree with that view. The appeal was allowed.

The facts in *Hawkins* v. *Coulsdon and Purley Urban District Council*, [1954] 1 Q.B. 319 ; [1954] 1 All E.R. 97, were these. In August, 1946, a house, belonging to a Mrs Reddish, was requisitioned by the defendant Council, under the Defence (General) Regulations 1939, for housing persons who were inadequately housed, a schedule of condition being prepared by an independent architect on behalf of the defendants, and signed by the defendants' surveyor and by Mrs Reddish as owner. The schedule referred, inter alia, to the fact that the three stone steps of the front porch were worn and that one of them was broken at the corner. Between 1946 and 1951, the house was re-decorated and minor alterations and repairs were carried out in accordance with standards of repair laid down by the Ministry of Health, but nothing was done to the steps. No complaints were made to the defendants by the occupiers of the house about the condition of the steps. On October 1, 1951, although the property was still requisitioned, the defendants allowed Mrs Reddish to enter into occupation of the upper floor of the house. On the evening of October 5, 1951, the plaintiff went to visit Mrs Reddish. She had visited the house before the war, but not since the conclusion of hostilities. She left the house at about 8 p.m., when it was dark. As she was coming down the steps from the front door, she put her foot on the broken step which gave way beneath her and she fell and broke her leg. On the pavement outside the house there was a street lamp, but, between the lamp and the front door there was a fir tree, and on the night in question it was very dark and misty so that the lamp was not effectively lighting the doorway.

The plaintiff claimed damages from the defendants, contending that by virtue of the requisition they were in occupation and/or control of the porchway steps and approaches to the house ; that she used them on the evening in question as the defendants' licensee, being on a visit to the person occupying the upper floor of the house under an agreement with the defendants ; that the defendants owed her a duty to take reasonable care to prevent her from suffering damage on the occasion of that visit from any hidden danger or trap in the porchway, steps or approaches of which they were aware ; and that these, severally or together, constituted at all material times a hidden danger or trap ; that, as the defendants knew, they were unlit,

the surface was worn, and a large portion of the lowermost step had been previously broken off and was missing; and in breach of their duty or negligently, the defendants had failed to take reasonable care to prevent injury to persons using the steps. The defendants denied the allegations and contended that the plaintiff used the steps with full knowledge of their condition, without keeping a proper look-out, and without due care for her own safety.

Pearson J. finding that the defect was not obvious to the plaintiff and was not reasonably to be expected by her, held that a licensee moving in the dark did not in all cases take the risk of any danger which in daylight would be obvious. He held further that to entitle the plaintiff to succeed it was enough for her to show that the defendants knew the facts constituting the danger; that a reasonable man, having that knowledge, would have appreciated the risk involved; and that she need not show that the defendants, in fact, appreciated that risk. Holding that the plaintiff had discharged the burden which was on her, he gave judgment in her favour. The defendant appealed.

In his judgment in the Court of Appeal, Denning L.J., after a detailed consideration of the relevant authorities, said at p. 106:

> It seems to me that nowadays, in the case of an unusual danger which is not obvious or known to the visitor, it can fairly be said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage. The duty is not to invitees as a class, nor to licensees as a class, but to the very person himself who is lawfully there. What is reasonable care in regard to him depends on all the circumstances of the case. The relevant considerations include all those facts which could affect the conduct of a reasonable man and his decision on the precautions to be taken: see *Paris* v. *Stepney Borough Council*, [1951] A.C. 367; [1951] 1 All E.R. 42.

After citing authority, His Lordship continued:

> People who lawfully use a recognized way, whether as invitees or licensees, are entitled to be warned of any unusual danger which is not obvious or known to them, but of which the occupier knows or ought to know: see *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74, 86, 96, per Lord Atkinson and Lord Wrenbury.

His Lordship then came to the facts of the case. He said:

> This broken step was, I think, an unusual danger which was unknown to the plaintiff. It was not obvious in the dark. The danger was not, in fact, known to the defendants, but they ought to have known of it. They knew that the step was broken, and a reasonable man in their place would have realised that it was a danger. They were, therefore, under a duty to her to use reasonable care to prevent damage from it. The question is: Did they use reasonable care? Test the position by supposing that the defendants in this case, instead of being a council, had been a householder occupying this house. Would he have mended the step? I am not sure that he would have done so. But I am quite sure that, if he had invited a lady guest to the house and was seeing her out at night, he would have warned her about the broken step and told her to keep to the safe side of it. The defendants, being an Urban District Council, were, of course, not the householder and could not be on the spot to warn visitors of the danger, but that does not rid them of their responsibility. It only means that, being unable to warn, they ought to have mended the step. They cannot shift their responsibility on to the occupants of the house, for the simple reason that they retained the possession and control, and are responsible in law. They cannot get rid of their responsibility by the plea that they are only a requisitioning authority. They ought to do whatever a reasonable man in their position would do, and that is, mend the step. It seems to me, therefore, that the defendants did not use reasonable care.

The appeal was dismissed.

The effect of their Lordships' judgments is that the members of the Court (Somervell, Denning, and Romer L.JJ.) agreed that a licensor as well as an invitor is liable for unusual dangers to a visitor of which the occupier knew, or ought to have known.

The later cases will be discussed in our next issue.

SUMMARY OF RECENT LAW.

COMPANY LAW.

A Case on Prospectuses. *100 Solicitors' Journal*, 595.

CONTRACT.

Construction—Electric-power Board's Agreement with Borough for Supply of Electricity—Alteration of Charges and Graduated Scale by Department supplying Electricity to Board—Calculation of Increased Charges to Borough in Accordance with Agreement—Charges to be "correspondingly increased or diminished"—New Charges to be paid by Borough to stand in Same Relationship to New Price paid as Original Price fixed under Agreement bore to Price or Rate then being paid by Electric-power Board. In each of the two agreements (one between the Thames Borough and the defendant Board and the other between the Te Aroha Borough and that Board, to each of which Boroughs the defendant Board supplied electricity), cl. 9 (a) imposed upon each plaintiff a graduated scale of charges payable to the defendant Board, which, both in graduations and in the charge made in respect of each graduation, reproduced the identical charges imposed by the State Hydro-electric Department upon the defendant Board. The agreements of each of the plaintiffs added to this basic charge prescribed by subcl. (a) a fixed charge and a percentage calculated upon the sum-total of the other charges. In the agreement with the Thames Borough, there was an additional subclause providing for the defendant Board's charges during the term of the agreement from the time when the supply was given from the new substation. This was as follows: "(d) A fixed charge per annum of proportion of the standard quarterly additional charge to the Board by the Department for the use of the said new Substation, such proportion to be in direct ratio to the respective maximum demands of the Council and the Board for electricity as registered by meter per quarter at the said new Substation." Clause 13 of each agreement provided: "13. Should the present charges for electricity imposed upon the Board by the State Hydro-electric Department (hereinafter called the Department) be increased or diminished during the currency of this Agreement, the charges under article 9 (a) hereof being based upon such present charges shall without notice correspondingly be increased, or diminished as may be agreed upon or as shall be fixed by arbitration." The State Hydro-electric Department increased the charges and altered the graduation scale imposed on the defendant Board, which, in turn, under the provisions of cl. 13 of its Agreement with each of the plaintiff Boroughs, altered the charges for the supply of electricity to it. On originating summons for interpretation of cl. 13, *Held*, 1. That the purpose and construction of cl. 13 was to require that, in the event of any amendment of the charges made by the Department, the prices fixed under cl. 9 (a) should be amended to stand in the same relationship to the new price or rate which would, in fact, be paid by the defendant Board to the Department, as the original price fixed under cl. 9 (a) bore to the price or rate then actually being paid by the defendant Board. 2. That cl. 13 manifested an intention on the part of the parties, that any alteration in the State Hydro-electric Department's charges made after the agreement had been entered into should not result in any additional loss or profit to either party on the basic charge fixed by cl. 9 (a), but that such adjustment should be made as would keep the parties in the same relative position so far as the rate

for basic charge under cl. 9 (a) was concerned. 3. That, accordingly, on its true construction, cl. 13 of each of the agreements required that, upon the State Hydro-electric Department amending its charge to the defendant Board for electricity, the charges fixed by cl. 9 (a) in the agreement between the Borough of Te Aroha and the defendant Board, and the charges fixed by cls. 9 (a) and 9 (d) in the agreement between the Borough of Thames and the defendant Board, were to be amended so that the prices to be paid by each Borough would, in each case, bear the same relationship to the rate or price which the defendant Board then actually paid to the Department as the original prices fixed bore to the rate or price which the defendant Board actually paid before the amendment; and that the ascertainment and fixing of the amended price was to be arrived at by agreement between the parties, but, in default of agreement, the amended price was to be fixed by arbitration. *Thames Borough and Te Aroha Borough* v. *Thames Valley Electric-power Board.* (S.C. Auckland. September 11, 1956. Shorland J.)

CROWN LAND.

Area in Borough delineated on Early Survey Maps—No Crown Grant thereof issued—No Evidence that Land formed or dedicated as a Street or treated as a Street by the Crown, the Borough, or the Public—Land not vested in Borough by Operation of Statute Law or by Dedication—Such Land vested in Crown. The onus of proving that land is laid out and marked on the survey maps as a road over waste lands of the Crown at the time of the constitution of the borough in which that land is situated rests upon the Crown. Certain land (herein termed "the land"), comprising 2 ac. 23 pp., and irregular in shape, was situated in the Borough of Onehunga, and within a rectangle formed by four streets. It formed part of an undivided area of land forming a reserve shown on an early Crown Grant plan, prepared on an actual survey made about 1850, contained in the records of the Lands and Survey Department. The original reserve was Crown Land in respect of which no alienation by Crown Grant had ever been made. Crown Grants of properties with boundaries contiguous with the land severally referred to it as a "road" or as a "line" or as a "water reserve". On an old plan known as City Street No. 15 the area was marked "reserve". There had never been any instrument of dedication or alienation of the land by the Crown. In an action to determine questions as to the status of the land, and, in particular, whether the land was a public street vested in the Borough of Onehunga or was land vested in the Crown, it was contended for the Crown, inter alia, that the land was vested in the Borough as a public street by operation of law. *Held*, 1. That there was no evidence that the land in question was a "road" within the meaning of the Public Works Act 1876 at the date of the constitution of the Borough of Onehunga and vested in the Borough pursuant to s. 185 of the Municipal Corporations Act 1876, as it was not "laid out" (on the ground) and "marked on the survey maps as a street"; and it was not proved that the land had come within the definition of a "road" or of a "street" in subsequent relevant legislation. (*Wellington City Corporation* v. *McRea*, [1936] N.Z.L.R. 921; [1936] G.L.R. 639, referred to.) 2. That there was no evidence that the land had ever been formed as a street, used by the public as a street or right-of-way, or recognized or treated as a street by the Crown, the Borough, or the public. 3. That, accordingly the land had not at any time vested in the Borough by operation of statute law or by dedication by the Crown as a road and acceptance thereof by the Borough of Onehunga or by the public, but was land vested in the Crown. *Palmer* v. *Onehunga Borough and Attorney-General.* (S.C. Auckland. September 4, 1956. Shorland J.)

FAMILY PROTECTION.

Time for making Application—Executor's Assent given—Whole Estate, including Share in Another Estate, given by Testator to His Executrix—Executrix, having paid All Debts, Death Duties, and Administration Expenses, treating Estate as Her Own and personally receiving Income from Other Estate—Such Acts constituting Assent to Gift in Testator's Will—Testator's Estate distributed—Application for Further Relief thereafter barred—Extension of Time not permissible—"Distribution"—"Other trustees"—Family Protection Act 1955, s. 2 (2)—Statutes Amendment Act 1939, s. 23. The word "distribution" in the proviso in s. 2 (2) of the Family Protection Act 1955 means the distribution of the testator's estate, and not the distribution of any other estate in which the testator might have been interested. The words "other trustees", as used in s. 23 of the Statutes Amendment Act 1939, are the trustees of the testator and not of some other person. The testator, who died on December 21, 1952, gave the whole of his estate to his niece, T., and she was appointed executrix. No trust of any kind was declared in the will. She used the cash and chattels towards payment of the debts, and out of her own moneys paid the balance of the debts, death duties, and administration expenses. The other assets included a one-fifth interest in the estate of the testator's sister, F., who predeceased him and appointed a trustee company her trustee. On October 7, 1954, T. caused probate of the testator's will to be produced to F.'s trustee, and she had received the income from the F. estate since that time. She treated the income as her own, and not as income from the testator's estate. On an application by the testator's daughter, his only child, for an extension of time for claiming further provision out of the testator's estate, T. contended that distribution had taken place, and that s. 2 (2) of the Family Protection Act 1955 was a bar to any claim. *Held*, 1. That T.'s acts in dealing with F.'s trustee on the basis that she was the person entitled to the testator's share, and her acts in treating all payments received as her own property, and her act in ceasing to treat the testator's estate as having any separate existence since October 31, 1954, constituted an assent to the gift in the testator's will so that it became her sole property; and that, accordingly, there was a distribution of the estate of the testator before the application was made under the Family Protection Act 1955. (*Public Trustee* v. *Kidd*, [1931] N.Z.L.R. 1; sub. nom. *In re Kidd*, [1930] G.L.R. 595, and *In re Donohue, Donohue* v. *Public Trustee*, [1933] N.Z.L.R. 477; [1933] G.L.R. 415, followed.) 2. That s. 23 of the Statutes Amendment Act 1939 did not operate to permit an extension of time to be granted, as the interest of the testator in F.'s estate was not held upon trusts created by the testator or by operation of law in respect of the testator's estate as such; and, as there was no property held upon trust "in the estate" of the testator, an extension of time could not be granted. *In re Annett (deceased), Annett* v. *Taylor.* (S.C. Timaru. September 10, 1956. Henry J.)

TENANCY.

Possession—Hall let to Tenant—Tenant subletting Hall for Nights when not in use by Him—Subletting—Normal and Usual Way of Carrying on Owner's Business—Greater Hardship to deprive Owner of Opportunity for His Hall-letting Business than to deprive Tenant of Profit from His Subletting Activities. In 1954, H. purchased a property, which included a hall and some additional rooms and was let to the tenant organization. The tenant used the hall for only one or two nights a week, and for other nights sublet it to others, and, in this way, it obtained enough to pay almost the whole of the rent and was thus enabled to build up a fund with which it hoped ultimately to acquire a property of its own. H., in seeking possession, did not desire to oust the tenant on those nights on which it desired to use the hall, or to deprive it of the use of the subsidiary rooms. On appeal from an order by a Magistrate giving H. possession of the hall, subject to a condition enabling the tenant to make arrangements with the landlord, *Held*, 1. That, while H. did not require the property for his own use and occupation, the use of a hall for subletting was the normal and usual way for a hall-owner to carry on his business. (*Armagh Apartments, Ltd.* v. *Friedlander*, [1954] N.Z.L.R. 1180, applied.) 2. That it would be a greater hardship to deprive the landlord of the opportunity to run his own hall-letting business and so to receive the normal profit from it, than to deprive the tenant of an adventitious profit on its subletting activities. *Kerry* v. *Hughes.* (S.C. Auckland. August 24, 1956. Stanton J.)

Urban Property—Possession—Landlord seeking Possession on Ground of Requirement of Premises for "his own occupation"—Landlord's Intention to demolish Buildings not Bar to His obtaining Possession on Such Ground—"Premises"—Tenancy Act 1948, s. 24 (1) (h), (m). A landlord requires premises "for his . . . own occupation", within the meaning of s. 24 (1) (*h*) of the Tenancy Act 1948, although he intends, for the purposes of his occupation, to make substantial alterations or put up a wholly new building. Section 24 (1) (*m*) applies only when the landlord requires the premises for demolition or reconstruction with a view to letting or selling them, or making some use of them other than his own occupation. (Dicta of Williams J. in *Burling* v. *Chas. Steele and Co. Pty., Ltd.*, (1948) 76 C.L.R. 485, 490, applied.) Both in para. (*h*) and in para. (*m*), the word "premises" means the subject-matter of the lease. *So held* by the Judicial Committee of Her Majesty's Privy Council in dismissing an appeal from the judgment of the Court of Appeal, *McKenna* v. *Porter Motors, Ltd.*, [1955] N.Z.L.R. 832. *McKenna and Another* v. *Porter Motors, Ltd.* (Judicial Committee. July 26, 1956. Viscount Simonds, Lord Oaksey, Lord Tucker, Lord Cohen, and Lord Somervell of Harrow.)

TORT.

Status and Tort. *30 Australian Law Journal*, 183.

THE RIGHT OF ASSEMBLY.

By Ivor L. M. Richardson,
LL.B. (N.Z.), LL.M., S.J.D. (Mich.).

(*Concluded from p. 267.*)

Sanctions After the Event.

Because of the view which they take of the "right of public assembly", New Zealand courts have not required a public meeting to be a clear and present danger to the peace before it can be considered unlawful.[27] All that is necessary is to prove the particular offence charged, e.g., disorderly conduct, breach of the peace, unlawful assembly, or, what is most common, obstructing any constable in the execution of his duty.[28] The Police have very wide powers in this connection. If a constable has a reasonable belief that there will be a breach of the peace if a meeting is held, any attempt to hold the meeting contrary to his prohibition constitutes the offence of unlawfully obstructing a constable in the execution of his duty. This is so whether or not any of the persons present at the meeting committed a breach of the peace or incited others to do so.

In the first place, the statutory definition of unlawful assembly[29] makes any assembly unlawful if it causes other persons in the neighbourhood to fear on reasonable grounds that the persons assembled either will themselves disturb the peace or will provoke other persons to do so. But, the important point is that the Court of Appeal has held, in *Goodall* v. *Te Kooti*,[30] that it makes no difference that the "other persons" would not be justified in disturbing the peace. Denniston J.'s rationale for this proposition was:

> I think the proposition of the respondent, that any number of men may assemble to do any act that is not unlawful, irrespective of the consequences, is pushing the doctrine of individualism and of the obligations to individuals to the body politic to an irrational extent.[31]

Clearly then, it is no defence to a charge of unlawful assembly that the assembly is for a lawful purpose and is well behaved if, because of it, other persons break the peace.

In the second place, the case of *Beatty* v. *Gillbanks*,[32] which is so frequently cited both by American and by English writers, is not a true indication of either New Zealand or English law on the point. There the appellants, members of the Salvation Army, were leading a procession which was eventually due to return to the Salvation Army Hall where a meeting was to be held. Their assembly was for a legal purpose and they had no intention of carrying it out unlawfully. However, they knew it would be opposed by a rival organization styled the Skeleton Army and they had good reasons to suppose that a breach of the peace would be committed by those who opposed it. The appellants were arrested while the procession was in motion and charged with the offence of unlawful assembly. The Court of Queens Bench found in their favour and Field J. pointed out[33] that otherwise persons could be convicted for doing a lawful act if they knew that doing it might cause another to do an unlawful act.

Writers have hailed this case as deciding that persons cannot be convicted for doing an unlawful act if they know that their doing it might cause another to do an unlawful act. This is simply not correct. The case is now in conflict with *Wise* v. *Dunning*,[34] and in two Scottish decisions;[35] and in the New Zealand case of *Goodall* v. *Te Kooti*[36] it was trenchantly criticized by the Court of Appeal. But *Duncan* v. *Jones*,[37] in the United Kingdom, and *Burton* v. *Power*,[38] in New Zealand, sounded the death-knell to the principle supposedly applied in *Beatty* v. *Gillbanks*.

In *Duncan* v. *Jones*, the appellant was about to address a number of people in the street when a Police officer, who apprehended that a breach of the peace would occur if the meeting were held, forbade her to do so at that particular spot. However, he offered her another place at which to speak one hundred and seventy-five yards away. The appellant persisted in trying to hold the meeting and obstructed the Police officer in his attempts to prevent her doing so. Neither the appellant nor any of the persons present at the meeting committed, incited, or provoked a breach of the peace; but, fourteen months previously the appellant had caused a disturbance when speaking at the same place. It was found as a fact that the respondent reasonably apprehended a breach of the peace; and the Court held that, as is the duty of a Police officer to prevent breaches of the peace which he reasonably apprehends, the appellant was guilty of wilfully obstructing the officer in the execution of his duty.

The Supreme Court of New Zealand followed the decision of *Duncan* v. *Jones* in *Burton* v. *Power*[39] and

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[27] Compare the view of United States law that the right of assembly is an essential aspect of freedom of speech and consequently can be abridged by the Legislature or local body only in certain circumstances. The difficulty which the American courts always face is to balance the conflicting claims of the public in the maintenance of order on the one hand and in the dissemination of ideas on the other since speakers with unorthodox views naturally arouse the feelings of audiences. Generally speaking, a public meeting will be lawful unless it is shown that it constitutes a clear and present danger to the maintenance of peace and order. See generally, *Abernathy*, "Assemblies in the Public Streets", (1953) *58 S. Car. L. Rev.* 384.

[28] Police Offences Act 1927, s. 77. Under s. 3 (*ee*) of the same Act, it is an offence to behave in a "riotous, offensive, threatening, insulting, or disorderly manner" or to use any "threatening, abusive, or insulting words" in a public place.

[29] Crimes Act 1908, s. 101.

[30] (1890) 9 N.Z.L.R. 26.

[31] *Ibid.*, 58.

[32] (1882) 9 Q.B.D. 308. Incidentally, this was actually a "procession" case rather than the case of a street meeting.

[33] *Ibid.*, 314.

[34] [1902] 1 K.B. 167.

[35] *Deakin* v. *Milne*, (1882) 5 Coup. 174; *Whitchurch* v. *Millar*, (1895) 33 S.L.R. 33.

[36] *Supra* (n. 25).

[37] [1936] 1 K.B. 218. Humphreys J., at p. 223, simply said: "It does not require authority to emphasize the statement that it is the duty of a Police officer to prevent apprehended breaches of the peace. Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then, as is rightly expressed in the case, became his duty to prevent anything which in his view would cause that breach of the peace. While he was taking steps so to do he was wilfully obstructed by the appellant. I can conceive no clearer case within the statute than that."

[38] [1940] N.Z.L.R. 305.

[39] *Ibid.*

Lyttle v. *Maskell.* In the latter case, which is not reported, the facts were substantially similar to those in the former and the Court applied the same reasoning to them. In *Burton* v. *Power*, six months before the beginning of the Second World War, the appellant, who was a member of the Pacifist Society, held a meeting on a public reserve in Wellington and persisted in addressing the meeting after the respondent, a Police officer, had forbidden him to do so. Sir Michael Myers C.J. held that, in view of incidents which had occurred at previous meetings of the Society, the Police had reasonable cause to apprehend a breach of the peace, and that it was unnecessary to prove that the appellant or any of the persons present at the meeting committed, incited, or provoked a breach of the peace. He said :

> This is not a charge against the appellant for being a pacifist or for holding opinions on any particular subject nor does the case involve the law of unlawful assembly or any question of freedom of speech in any fair sense of the term . . . it is the duty of every citizen, especially in times when susceptibilities and passions are likely to be aroused, with the likelihood of resultant breaches of the peace, to refrain from conduct calculated to produce that kind of disruption within the country.[40]

In view of these decisions, the legal position in New Zealand appears to be as follows. If a constable has a reasonable belief—based upon his consideration of existing circumstances at the time and place of the meeting—that there will be a breach of the peace if a meeting is held in a street or other public place, the attempt to hold it contrary to his prohibition constitutes the offence of wilfully obstructing a constable in the execution of his duty. It is not necessary to show that the accused or anybody present at the meeting committed a breach of the peace or incited others to do so. All that is necessary is that the Court be satisfied that the constable had a reasonable apprehension that a breach of the peace would occur and that it be shown that the accused attempted to address the meeting after being ordered to refrain from doing so.

It may be noted in passing that, since a street meeting is prima facie an obstruction and so a public nuisance, a Police officer may disperse such a meeting simply on that ground. Policemen are using this power when, as often happens, they ask people who are standing chatting on the footpath to " move along, please ", so as to prevent congestion in crowded shopping areas.

It is submitted then that not only is there no right to hold a meeting in a public place in New Zealand, but also that anyone who attempts to do so is embarking on a hazardous course. First, if there is a municipal law prohibiting meetings then he may clearly be punished if he attempts to hold one. Secondly, if a municipal law requires a permit to hold a meeting he is at the mercy of the official entrusted with the power of issuing permits. Thirdly, if there is no applicable municipal law and he fails to obtain Police approval in advance he commits an offence, no matter how lawful his purpose and how orderly the meeting, if he attempts to hold the meeting after being prohibited to do so by a constable who has a reasonable belief that a breach of the peace will occur. Fourthly, if there is no applicable municipal law and if no breach of the peace is apprehended, but he fails to obtain Police approval in advance, his meeting may be dispersed by a Police officer on the grounds that it causes an obstruction by interfering with the ordinary use of the highway.

As New Zealand law fails to recognize a necessary nexus between the right of free speech and the locus of its exercise, it has never felt obliged to afford it any special protection. So, generally speaking, local authorities have full power to restrict or prohibit meetings in public places under their control and the Police have a very broad discretionary control over all types of assemblies in public places. It is, however, entirely undesirable that the Police should have discretion to waive the strict requirements of the law as is the practice in New Zealand. In the words of Jennings,[41] either the law should be enforced or it should be altered.

Public Processions.

There are two ways of regarding a public procession. First, it may be considered as a " public meeting " in motion so that, just as there is no right under New Zealand law to hold meetings in the streets, so there is no right to hold processions there. Secondly, it may be regarded from the standpoint of the individuals taking part in the procession—as the participants are severally entitled to pass and repass on the highway, processions as distinct from meetings are prima facie lawful provided that no obstruction is thereby caused.

It is arguable that, whereas a public meeting on the highway is a nuisance if it causes (as it must) any obstruction at all, a public procession is not if in all the circumstances and notwithstanding some degree of obstruction the user of the highway is reasonable.[42] There are no English cases in which this problem has been examined but the Irish case of *Lowdens* v. *Keaveney*[43] does support Professor Goodhart's claim[44] that the test of lawfulness of a particular procession is whether in all the circumstances it is a reasonable user of the highway, and not merely whether it causes an obstruction. In that case Gibson J. said :

> No body of men has the right to appropriate the highway and exclude other citizens from using it. The question whether the user is reasonable or not is a question of fact to be determined by common sense, with regard to ordinary experience. Occasion, duration of the user, place, and hour must be considered ; and we must ask was the obstruction trivial, casual, temporary, and without wrongful intent. The matter is very much one of degree and the whole circumstances must be kept in view before coming to a decision.[45]

Now, Professor Goodhart's argument is :

> As A, B, and C have each separately the right to pass and repass on the highway, there is nothing illegal in their doing so in concert, unless their procession is illegal on some other ground.[46]

This, though ingenious, is diametrically opposed to the view of Richmond J. who said in an early New Zealand case :[47]

> The supposed right in any body of persons to pass in procession through the streets of a town is something entirely different from the separate and individual right of passage of the same persons as private citizens without preconcerted

[40] *Ibid.*, 306-308.

[41] " Public Order ", *8 Pol. Quarterly* (1937), 7, 17.

[42] See *Dicey's Law of the Constitution*, 9th Ed., (1939). In the Appendix, at p. 506, the editor of the volume, E. C. Wade, briefly considers the question without arriving at any conclusion. See also Goodhart's article on " Public Meetings and Processions " in (1937) *6 Cambridge L.J.*, 161, 169 ff.

[43] [1903] 2 I.R. 82.

[44] *Supra* (n. 42).

[45] *Supra* (n. 43), 90, 91.

[46] *Supra* (n. 42), 169.

[47] *McGill* v. *Garbutt*, (1886) N.Z.L.R. 5 S.C. 73, 75.

> arrangement and mutual understanding. . . . A compact body of men moving along a thoroughfare, more especially if attended by the rabble which is frequently attracted has an obvious tendency to obstruct traffic.

But, whether or not a procession moving along the highway in a peacable manner is prima facie a nuisance, the restrictions imposed on the holding of street parades are just as extensive as those imposed on the holding of street meetings. First, by virtue of its power to "regulate" the use of streets under its control, a municipality may prohibit all processions. In *McGill* v. *Garbutt*,[48] the Napier Borough Council had passed by-laws prohibiting processions other than those of "Volunteers, Fire Brigades, funerals, and school processions" except with the consent of the Council. The defendants, who were members of the Salvation Army, took part in a procession beating drums and blowing musical instruments whereby a crowd was collected and traffic impeded. Richmond J. considered that the by-laws were reasonable and valid, and he said:

> It is not to the purpose to say that no mischief, has been hitherto occasioned by a particular practice if it be one from which mischief may be reasonably apprehended. This disposes of the argument that the processions of the Salvation Army have not hitherto proved to be a nuisance, because granted what is asserted, if the practice of such processions may in reason be expected in the future to cause public annoyance it may be restrained . . . it is undeniable that large and organized assemblages in the streets of a city for any particular purpose tend to excite to a violent opposition persons to whom the object of the assemblage is obnoxious or distasteful. . . . On the whole, therefore, it appears to me almost too plain for argument that a by-law restricting such processions is perfectly valid.[49]

On the basis of the decision in *McGill* v. *Garbutt* it is clear, then, that local bodies have what amounts to unrestricted powers of controlling all processions on streets under their control.

Again, in the same way as with meetings in public places, a Police officer may prevent or disperse any procession which he reasonably apprehends will cause a breach of the peace to be committed. So, just as in the case of meetings on the highway, promoters of processions have to contend with both the appropriate local body and with the Police before they can be sure that the holding of the procession, no matter how lawful its purpose and how orderly its conduct, will be permissible.

[48] *Ibid.* It is interesting to note that, at p. 78, the Judge considered the decision in *Beatty* v. *Gillbanks* (*supra*, n. 32) was "scarcely consistent with the definition of an unlawful assembly as given in the proposed new Criminal Code". The definition of unlawful assembly in s. 101 of the Crimes Act 1908 follows exactly the definition in the Criminal Code (1893) to which Richmond J. referred.

[49] *Supra* (n. 47), 75, 76.

THE MEANING OF "POUND".

In Respect of Obligations to be Discharged Abroad.

By E. J. Haughey, M.A., LL.M., B.Com.

(*Concluded from p. 269.*)

III.

It was this question which arose for consideration in the *National Mutual* case, [1954] N.Z.L.R. 754, although, as will be seen later, the Privy Council ultimately disposed of the proceedings on an incidental issue.

In formulating its claim against the New Zealand Government the plaintiff Association relied on these three recent Australian cases but especially on the following passage from the judgment of the Privy Council in *Bonython's* case:

> It is not inconceivable that the legislature of a self-governing colony should authorize the raising of a loan in terms of a currency other than its own, but where it uses terms which are apt to describe its own lawful money, it must require the strongest evidence to the contrary to suppose that it intended some other money. . . . The Government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms are apt to refer to another system also. It may be possible to displace that presumption, but, unless it is displaced, it prevails, and, if it prevails, then it follows that the obligation to pay will be satisfied by payment of whatever currency is by the law of Queensland valid tender for the discharge of the nominal amount of the debt. ([1951] A.C. 201, 222)

In answer to the Association's claim the Crown contended that the case was distinguishable on the facts from those in *Bonython's* case, where there was an option as to several places of payment; and that the proper inference to be drawn from the contracts relating to the securities was that the parties themselves had expressly stipulated that the obligations thereunder should be measured in the money of account of Australia. In particular the following submissions were made on behalf of the Crown:

(1) The fundamental issue in dispute between the parties was what money of account was applicable for the purpose of measuring the obligations assumed by the Government under the securities:

(2) This issue was a question of construction:

(3) This question of construction was determinable by the proper law of the contract:

(4) The proper law of the contract was the law of New Zealand:

(5) At all material times New Zealand and Australia had had separate moneys of account:

(6) According to the proper law of the contract, i.e., New Zealand (municipal) law (which followed English (municipal) law in this respect) the money of the place of payment, and not that of the proper law of the contract, was the money of account meant by the parties unless the circumstances indicated a different intention on their part (cf. Mann, *The Legal Aspect of Money*, 2nd Ed., 204, and Dicey, *The Conflict of Laws*, 6th Ed., 734):

(7) The history of the securities, and the documents in respect thereof, showed quite clearly that the place of payment specified by the parties was Melbourne and there were no circumstances which would indicate

any intention on their part that the money of account of any other place should be applicable.

As already mentioned, in the Supreme Court, Fair, Hay and North JJ. upheld the Crown viewpoint while Gresson and Stanton JJ. found for the plaintiff.

Fair J. was of opinion that even where the borrower was a Government with a local currency, and the prima facie presumption was that it contracted in units of its own currency, the place of performance might well be a decisive factor displacing the inference to be drawn from that fact, and especially the place of performance was an important factor where only one place was specified. The following circumstances strongly indicated to him that the currency of obligation was intended to be that of Australia :

(i) That Melbourne was the place specified for payment of interest and repayment of principal ;

(ii) That all the moneys came from foreign investors and part of them was supplied in and from foreign currency ;

(iii) That the certificates of title in respect of the stock were held in the Association's custody in Australia, though the Association carried on business in New Zealand and had its principal place of business in New Zealand at Wellington ;

(iv) That other moneys similarly raised were directed to be paid in the equivalent of dollars calculated by reference to the United Kingdom pound, and that this involved the abandonment of the New Zealand pound as the basis of the contract ;

(v) That the expression " free of exchange " meant " free of any deduction for banking costs of transmission " and that the Association did not at the hearing contend for any wider meaning, such as possible difference of currency ;

(vi) That the stipulation as to only one place of payment (Australia) in all the circumstances seemed definitely to indicate Australian currency as the measure of the obligation.

Fair J. also considered that the cases of *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122 (as explained in *Mount Albert Borough* v. *Australasian Temperance and General Mutual Life Assurance Society*, [1937] N.Z.L.R. 1124, 1132 ; [1938] A.C. 224, 241) and *Auckland City Corporation* v. *Alliance Assurance Co., Ltd.*, [1937] N.Z.L.R. 142 ; [1937] A.C. 587, directly supported the submissions of the Crown, and, in their application to the case before him contained nothing which had been affected by the later decisions in the *Bonython* and *National Bank* cases.

Hay J. took the view that the reasoning of the judgment in the *Bonython* case did not lead to the conclusion that any greater weight was to be attached to one as against the other of the two presumptions—namely, that arising from the place of payment and that arising from the fact that the securities were issued by the Government on the authority of New Zealand statutes, and secured on the public revenues of New Zealand. There was, in his opinion, nothing in the *Bonython* case to compel the Court to hold that it must govern the present case. In the *Bonython* case there were the folling distinguishing features : (i) payment in London was only one of four alternative modes of performance, and as the substance of the obligation must be deemed to have been in every case the same, the fact that London might be chosen as the place of payment became a factor of little or no weight ; and (ii) no details of the transaction had been given, and the history and fate of the debentures issued in London were not revealed.

He was also of opinion that at the time of the making of the contracts in the present case, both parties must be deemed to have had in mind the possibility of a divergence of currencies in the future. The plaintiff Association had been careful in its negotiations to stipulate for repayment in Melbourne, and that provision appeared to be a dominant feature of the contracts going far beyond the choice of a place of payment merely as a matter of convenience, and showing an intention of being assured of repayment in Australian currency, without taking the risk of possible fluctuations in the currency of New Zealand.

The references to the *Auckland* case in the *Bonython* and *National Bank* cases did not appear to Hay J. to impair the validity of the *Auckland* decision, or of the principles applied by Lord Wright in reaching it.

North J. expressed the following views in respect of four particular matters discussed during the hearing :

(1) The subsequent conduct of the plaintiff Association was of no importance in interpreting the contract, and in any case it was not sufficiently clear and unambiguous to permit the Court to draw any inference that it " understood the debt to be expressed in Australian pounds".

(2) Nor could there be rightly used against the plaintiff Association the circumstance that in most instances it paid its contributions to the loan in Australian pounds and began to receive interest from the time that the money was paid into the Bank of New Zealand at Melbourne.

(3) The Court should not be influenced by the fact that other parts of the loan contained options to the holder to require payment at London, New York, or Wellington, though the linking of dollars with English sterling was rather significant.

(4) In 1925-1926 the expression " free of exchange " was not used as referring to the difference, or rate of difference, in values between the two currencies. He had understood both counsel to agree to this. Even if it had been permissible to interpret those words as referring to that difference, the question remained whether " free of " did not mean " independent of the difference in values between the New Zealand pound and the Australian pound".

On the main question as to competing presumptions it appeared to North J. that their Lordships in the *Bonython* case had intended to leave open the question of the effect of providing only one place of payment. In that case, unlike the present case, the record did not include any details of the history of the loan and therefore their Lordships found no countervailing features to displace the presumption that, where the legislature of a country uses terms which are apt to describe its own lawful money, it must require the strongest evidence to the contrary to suppose that it intended some other money. That presumption was, however, displaced in the present case by the following considerations :

(1) That s. 5 of the New Zealand Loans Act 1908 expressly authorized the Minister to raise loans outside

New Zealand and to prescribe the mode, conditions, times, and places of repayment of such loans, and that there was no reference in the section to New Zealand money as such :

(2) That in view of the close association between Australia and New Zealand, there was nothing incongruous in the idea of the Government of New Zealand undertaking to repay Australian investors so many " pounds " expressed in Australian currency :

(3) Where a Government deliberately undertakes in the course of negotiations to repay a loan in the country of the lender and uses terms apt to describe the legal money of that country, it is more consonant with the probable intentions of the parties to hold that the lender was stipulating for repayment to be made in the currency of his own country without regard to rises or falls in value of the currency of the borrower.

Referring to the existing state of the authorities, North J. ([1954] N.Z.L.R. 754, 820, 821) expressed the following opinion :

> . . . it may be open to question whether this Court is justified in departing from the principles laid down in the *Adelaide* case, adopted three years later in the *Auckland* case, and referred to with approval in the later cases. . . . I think I am bound to regard the *Auckland* case as still being authoritative apart from the options question, and, if this be the position, I can find nothing in the facts of this case to encourage me to conclude that it can be distinguished from the *Auckland* case, with the one exception that here we are concerned with a loan raised by a Government pursuant to express statutory authority, whereas there the Judicial Committee were concerned with a local body which also had raised its loan moneys pursuant to statutory authority. . . . I feel that, if, after all these years, there is to be a new approach to this problem and a distinction drawn between the acts of a Government and the acts of a local body, itself a creature of statute, it is for their Lordships in the Privy Council to say so and not for this Court.

Gresson J. based his dissenting judgment on two grounds. In the first place he held that the phrase " free of exchange " negatived the adoption of Australian currency as the money of account for if the debt had been a stated number of Australian pounds there could have been no question of exchange ; and that this was the situation whether the phrase meant (i) " free of cost of transmission " or (ii) " free from, that is to say, unaffected by any difference in value there might be between the New Zealand pound and the Australian pound " (cf. *Thompson* v. *Wylie*, (1938) 38 N.S.W.S.R. 328, 335). His Honour said ([1954] N.Z.L.R. 754, 798) :

> In either case, the provision is incompatible with the obligation sounding in Australian pounds. If Australian currency was to be the money of account as well as the money of payment, no exchange operation could arise.

This expression " free of exchange " had, however, been used in the very first of the currency cases mentioned above, viz., the *Broken Hill* case, and had been commented on by Maugham J., [1933] Ch. 373, 394, as follows :

> . . . it is accepted on both sides that the statement that interest will be payable " free of exchange " refers to what may be called bankers' charges on the remission of a sum of money from one State to another, a charge such as is, or used to be, made for cashing a cheque on a Scottish bank in London, and that these provisions do not afford any solution of the question [whether payment could be made as well in London as in Melbourne or elsewhere in Australasia, in terms of Australian currency, or whether, if made in London, the payment must be made in English currency].

Nevertheless, as will be seen later, it was on the use of these words in respect of the inscribed stock in the *National Mutual* case that the Privy Council were to found their judgment in favour of the Crown.

If he was wrong in respect of the ground already referred to, Gresson J. went on to say that he was of opinion that the plaintiff Association was still entitled to judgment since he considered that the *Adelaide* and *Auckland* cases, which were relied upon by the Crown, were distinguishable on the basis, inter alia, that they were founded on a misapprehension of fact—namely, an assumption that the two currencies involved were not separate and distinct, whereas in fact they were, and had since been recognized as separate and distinct in the *Bonython* and *National Bank* cases ; that the present case must consequently be dealt with on the basis that currency of New Zealand was different and distinct from that of Australia ; and that the proper implication arising from all the circumstances of the transaction was that the parties had based it on the monetary system of New Zealand.

Stanton J. considered that although their Lordships in the *Bonython* case (where there was an option as to the place of payment) did not say that the result would have been the same if there had been only one place of payment, and that particular case was left open, their judgment should be read as moving the emphasis from the place of payment to the circumstances of issue, and particularly to the fact that the issuing body was the Government of a self-governing country acting under the statutory authority of that country, and charging its revenues ; and that the fact of there being only one place of payment was not a " countervailing feature " sufficient to displace "the presumption arising from the special circumstances of issue".

In the course of his judgment ([1954] N.Z.L.R. 754, 806), Stanton J. also said :

> Regarding the matter for the moment apart from authority, one would think it logical and natural that the words " sums of money " in s. 18 [of the State Advances Act 1913] referred to money that was legal tender in New Zealand, that is New Zealand money, and that the word " pounds " meant New Zealand pounds, and consequently the section contemplated the issue of securities in pounds only and consequently in New Zealand pounds only. It would be a startling proposition to say that the securities could be expressed, for example, in dollars, although it seems clear that moneys might be borrowed under the Act in Canada or the United States and made repayable there. Logically, it would seem to follow that securities could not be issued in Australian pounds and that, if it had been suggested that the securities in the instant case should be expressed as for so many Australian pounds, the New Zealand Government would have felt itself unable to agree and one can hardly imagine any Crown Law Officer advising the Government that it could properly or safely do so.

Any doubts which it may have been previously possible to entertain as to the authority of the New Zealand Government to borrow in terms of a foreign currency have now been finally put to rest by the enactment of the New Zealand Loans Amendment Act 1956. By s. 61A of the New Zealand Loans Act 1953 (as enacted by s. 2 of the Amendment Act of 1956) it is provided as follows :

> The authority to borrow any money and to issue any securities conferred by this Act, or by any Act repealed by this Act, or by any other Act at any time previously in force relating to the raising of loans by the Government of New Zealand, shall be deemed to include, and to have always included, authority—

(*a*) To borrow money in such currency or money of account as the Minister thinks fit, whether that of New Zealand or that of any other country :

(*b*) To issue securities in which the principal or any interest or other money thereby secured is expressed to be measured by, or to be repayable or payable in, such currency or money of account as the Minister thinks fit, whether that of New Zealand or of any other country, and whether or not that in which the money thereby secured was originally borrowed.

IV.

The Privy Council ([1956] N.Z.L.R. 422 ; [1956] A.C. 369) approached the *National Mutual* case along rather different lines from those followed in the majority judgments in the Supreme Court.

After discussing the effect of the decisions in the *Bonython*, *Adelaide* and *National Bank* cases, their Lordships said :

> . . . the condition attaching to this Stock is not merely that payments shall be made at Melbourne : it is " principal and interest payable at Melbourne free of exchange ". It is, therefore, necessary to find what are the possible meanings of this condition (*ibid.*, 429 ; 387).

The submissions of the parties on this aspect of the case were as follows :

(1) It was first argued for the Association that the obligation was to hand over New Zealand pounds to the stockholder in Melbourne either (i) in the form of New Zealand legal tender or (ii) in the form of a cheque or draft on the Government's bank in New Zealand expressed in New Zealand pounds.

(2) Alternatively it was argued for the Association that the substance of the obligation was to pay New Zealand pounds ; that the condition related only to the mode of performance ; and that it meant that there should be paid in Melbourne such a sum in Australian currency as was at the time of payment of the same value as the New Zealand pounds comprised in the obligation. On this view, " free of exchange " would mean only that any banker's charges were to be borne by the Government.

(3) On the other hand the Crown contended that the obligation was to pay in Australian pounds the face value of the interest or stock and that "free of exchange " was inserted to show that no question of exchange was to be brought into the matter. The New Zealand Government was not to be entitled to say that the transmission of funds to Melbourne had cost it a certain sum, or that its currency had depreciated and that by reason of exchange it could not pay in Australian pounds the face value of its obligation.

Their Lordships pointed out that that argument (1) could " hardly be reconciled with ' free of exchange ',' because the first thing the recipient in Melbourne would have to do would be to exchange the notes or cheque for Australian currency, and nothing in the nature of exchange would have been done by the Government : it would simply have posted or otherwise sent to its agent in Melbourne or to the stockholder the necessary notes or cheque (*ibid.*, 429 ; 388). They accordingly rejected that argument and it therefore became a question of choosing between (2) and (3).

Before proceeding to deal with this issue, the Board made the following observations with regard to the meaning of the expression " free of exchange " :

> There is no evidence that " free of exchange " had any technical meaning in 1925, nor is there any evidence as to how exchange operated then or is operated now. There is only the Agreed Fact, already quoted, that, in 1948, the official exchange rates diverged, and thereafter, subject to banking fluctuations, £125 Australian currency has been the equivalent of £100 New Zealand currency (*ibid.*, 429 ; 388).

In the passage appearing hereunder the Board then formulated the reasoning which led them to resolve the issue in favour of the Crown :

> . . . it must be assumed that it was known in 1925 that there could be a rate of exchange other than at par between the two currencies of New Zealand and Australia, even at a time when the two currencies were equivalent in value. Their Lordships have already stated that, in their judgment, all payments which had to be made in Melbourne must be made in Australian currency ; and, in their judgment, the stipulation that the payments were to be made there " free of exchange " must have meant from the beginning that the rate of exchange between the two currencies at the time when any payment became due was to be disregarded in determining the amount of Australian currency payable. So a stockholder owning, say, £1,000 of the 5½ per cent. Inscribed Stock to which this stipulation applied, was entitled to be paid in Melbourne, as interest, in 1926 and each subsequent year, £55 in Australian currency, because that is the necessary result if the rate of exchange had to be disregarded.
>
> During the period when the two currencies remained equivalent in value, the rate of exchange could not depart far from parity ; and the effect of the stipulation that payments must be made free of exchange must have been small. But the meaning of the stipulation could not change when the values of the currencies diverged, and it applied to repayment of principal as well as to payment of interest. Their Lordships must, therefore, hold that the obligation of the New Zealand Government is to repay in Melbourne in Australian currency a number of pounds equal to the face value of the Stock (*ibid.*, 430 ; 389).

With regard to the argument that " free of exchange " was an appropriate expression if the stockholder was being protected against some deduction but was not an appropriate expression to deprive him of an advantage, the Board said :

> . . . " free of " can well mean " independent of ". It may be that the primary purpose of this condition was to protect Australian stockholders in the event of the New Zealand pound being worth less in Australia than the Australian pound, but the condition cannot be interpreted so as to be in favour of Australian stockholders in that event and also to be in their favour when the New Zealand pound is worth more than the Australian pound. If they were entitled to be paid in Australian pounds in the one event, they could not be entitled to be paid in the equivalent of New Zealand pounds in the other event (*ibid.*, 430 ; 390).

The Privy Council dealt in the following terms with the view expressed by Gresson J. that the phrase " free of exchange " negatived the adoption of Australian currency as the money of account since it implied that an exchange operation would arise :

> Their Lordships recognize that there is force in this argument, but are of opinion that the purpose and meaning of the phrase is that no exchange operation is to be performed in determining the number of pounds to be paid and that any payment must be in Australian pounds. Without the words " free of exchange " it might have been said that an exchange operation was necessary if the New Zealand Government was to pay in Australian pounds, but these words indicate that, if the New Zealand Government have to perform an exchange operation in order to make payment at Melbourne, that operation shall not be taken into account in determining the amount of Australian currency which has to be paid (*ibid.*, 430 ; 390).

As the debentures did not contain the words " free of exchange " the basis on which their Lordships found for the Crown in respect of these securities must remain a matter of speculation, since they themselves have not adverted to this question. It is true that in view of their history it would have been difficult from a practical

standpoint to have found any grounds for differentiating between the debentures and the inscribed stock. But even in the case of the inscribed stock the Board was not, in the circumstances, prepared to consider extrinsic evidence relating to the history of the stock and the circumstances in which it was issued; and it would therefore appear that a fortiori this attitude was applicable in respect of the debentures, because, whether they were regarded qua negotiable instruments or qua specialty contracts, the rights and liabilities of the parties thereunder would depend on the terms set out therein and would be unaffected by any agreements or arrangements dehors the debentures themselves: *Auckland City Corporation* v. *Alliance Assurance Co., Ltd.*, [1937] N.Z.L.R. 142, 146; [1937] A.C. 587, 597; *Canada Permanent Mortgage Corporation* v. *City of Toronto*, [1954] 4 D.L.R. 529, 533; and *Anson on Contracts*, 20th Ed., 293, 358.

In the *National Mutual* case the Privy Council did not settle the question of the competing presumptions. After referring to the passage in their judgment in the *Bonython* case ([1951] A.C. 201, 220-221), in which the *Adelaide* case had been distinguished, the Board said:

> Their Lordships accept [the observations contained in that passage] as recognizing that, if there is only one place of payment, that is an important, but not a decisive, factor in determining whether the currency of the Government which issued the stock or the currency of the place of payment is the measure of the obligation. Nor is the measure of the obligation conclusively determined by finding what is the proper law of the contract. It is possible for parties contracting under the law of New Zealand to make the Australian pound the measure of the obligation. . . .
>
> It was argued for the respondent that the mere fact that the only place of payment is in Australia is sufficient to overcome any inference arising from the fact that the borrower is the Government of another country. That is a question which their Lordships do not find it necessary to decide in this case. . . . ([1956] N.Z.L.R. 422, 428, 429; [1956] A.C. 369, 387).

In the future, questions of this nature will no doubt be obviated by the parties making express provision in clear and unambiguous terms specifying the particular currency by which the obligation is to be measured.

THE NEW COMPANIES ACT 1955.

Recent Cases on Table A.

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

New Table A authorizes Capitalization of Profits.—It would be impracticable in the course of this short article to set out at length all the new articles in the new Table A, but attention may be drawn to Articles 128 and 129 authorizing the capitalization of profits: the modern tendency is to give a company in general meeting this power, and express provision to that effect is now the general rule. In this and other respects too the new Table A conforms more to modern practice and ideas than did the corresponding Tables of previous Acts: this, of course, is only to be expected. The law must change with the times.

New Table A will not apply to Companies previously Incorporated.—Finally, it may be pointed out that companies registered under former Acts and in existence on the coming into operation of the Companies Act 1955 will continue to be governed by the regulations governing them at the commencement of the Act, with certain special exceptions (to be hereinafter noticed in the course of these articles). To many companies, for instance, Table A of the 1908 Act or the 1933 Act will, as the case may be, continue to apply: *Morison's Company Law*, 2nd Ed., 29; s. 474 (10) of the Companies Act 1955. To put it in another way, Table A of the 1955 Act will not be retrospective, and a registered company's relationship to Table A depends on what particular Table A was in force at the date of its incorporation.

As pointed out in my previous article, Table A in the various Companies Acts which have been from time to time in force in New Zealand play a most important part in our company law. In recent years there have been several decisions on Table A.

Transfers Not in Accordance with Articles.

Articles 22 to 27 of Table A contain provisions dealing with the formalities of instruments of transfer of shares. By Art. 24 the directors may decline to register the transfer of a share (not being a fully-paid share) to a person of whom they do not approve; and they may also decline to register the transfer of a share on which the company has a lien. Article 26 provides that, if the directors refuse to register a transfer, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal *and return the transfer to the transferee*. The words in italics are new.

In *Hawks* v. *Mc Arthur*, [1951] 1 All E.R. 22, there were also additional articles not uncommon in small private companies—no share could be transferred until all rights of pre-emption had been exhausted, and another article contained an elaborate scheme for dealing with shares which were to be transferred or which it was proposed to transfer—namely, they were to be offered to the members, at prices to be agreed or in default of agreement to be fixed by the auditors. A judgment creditor obtained a charging order *nisi* on October 4, 1949, on 500 ordinary shares, which the judgment debtor held in the company. The order was made absolute on October 17, 1949. Before those dates, however, the judgment debtor for *valuable consideration* transferred the shares to other people, in disregard of the procedural and restrictive provisions of the Articles, and, moreover, the transfers had not been registered. Mr Justice Vaisey who heard the case refused to treat the transfers as complete nullities, but held, on the contrary, that the transferees obtained equitable rights therein, which being prior in time took priority over the charging order. This case is cited in *6 Halsbury's Laws of England*, 3rd Ed., 252, as authority for the proposition that a transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares therein comprised. In more general terms it could be described as an authority on the effect of disregard of procedure prescribed by articles in relation to transfer of shares.

(Continued on p. 288.)

TOWN AND COUNTRY PLANNING APPEALS.

Aitcheson *v.* Horowhenua County.

Town and Country Planning Appeal Board. Levin. 1955. November 25; December 1.

Subdivision—Long Narrow Strip in Rural Area—One and a Half Miles from Borough—Land available in Borough for Building Purposes—Pocket of Urban Development in Rural Area—Avoidance of Ribbon Development—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Horowhenua County Council refusing the appellant permission to subdivide his property of approximately seven and three-quarter acres situated about three-quarters of a mile south of the Borough of Levin, and having a frontage of 48 ch. to Arapaepae Road with a depth varying from 1½ ch. to 2 ch.

The grounds for appeal were that the refusal was unjust and inequitable so far as it affected the appellant and his property; that the best and fullest use of the property would be made by the proposed subdivision; that the land was uneconomic and of poor farming soil and if the subdivision were not permitted might fall into disuse.

The Council replied that the proposed subdivision was not in conformity with the town-and-country-planning principles likely to be embodied in the County's undisclosed district scheme; that if the land were unsuitable for farming because of poor soil it was questionable if it would make a desirable residential area; that the proposed subdivision would create a demand for additional services which would be much more costly than if the subdivision were reasonably compact; that no other applications for subdivisions in the area have been received by the Council, indicating that there is no demand for residential subdivisions in the locality, and that the whole area in the vicinity is exclusively rural and given over to sheep and dairy farming.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. The property in question lies to the south-east of the Borough of Levin and at its nearest point is approximately one and a half miles by road from the southern boundary of the Borough. It is light land inclined to be stony, but quite suitable as pastoral land for dairy cattle or sheep. It is in a rural area entirely given over to farming purposes.

2. No demand has been made on the Council for housing sections to be made available in this locality other than the Appellant's application.

3. The Borough of Levin has shown a very marked increase in population. Over the last ten years the population has increased by approximately 1,500 with a further population estimated at about 900 living outside the Borough boundaries many of whom are engaged in urban occupations.

4. To cope with this increased population the residential areas have expanded but the trend of that expansion has been towards the north and north-east of the Borough with some expansion towards the west.

5. The south-eastern portion of the Borough is to be zoned as "light industrial" and any further expansion for "light industrial" purposes in the future can reasonably be expected to be in a south-easterly direction.

6. In spite of the comparatively rapid expansion of Levin there is still approximately 200 acres of land available within the Borough for subdivision.

7. The proposed subdivision is not in conformity with town-and-country-planning principles in at least two respects: (*a*) It would create a pocket of urban development in a predominantly rural area and so be an encroachment of urban land into land having an actual and potential value for food production purposes; and (*b*) it would be marked by all the most undesirable features of ribbon development and the avoidance of such development is one of the cardinal principles of town-and-country planning.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Mullinder *v.* Hawkes Bay County.
Wheadon *v.* Hawkes Bay County.

Town and Country Planning Appeal Board. Napier. 1955. November 22; December 1.

Subdivision—Area zoned as Rural—No Active or Pressing Demand for Building Sections—Inadequate Drainage—Possibility of Alteration in Zoning when Adequate Drainage System available—Town and Country Planning Act 1953, s. 38.

Both appeals were made under s. 38 of the Town and Country Planning Act 1953 against the decisions of the Hawkes Bay County Council refusing permission to subdivide the respective properties adjacent to the Borough of Hastings.

The grounds for the appeals were that the land was adjacent to the Borough, that it had no real value as rural land, that several parcels of land in the same vicinity and more remote from the Borough had already been subdivided and built upon as residential areas, that the appellants' properties were residential in character and were not used for farming, and that the prohibitions had not been notified to the appellants by the Council as by law provided.

The Council replied that both properties were in the area zoned as rural in the Council's Extra-Urban Plan, that in the Soil Survey Report of the Department of Scientific and Industrial Research the land was catalogued as "Good grass seed, cropping or grazing ground", and that the area had little drainage potential".

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. Under existing conditions, the present zoning as "rural" is appropriate. The land is good quality land and has a present and potential value for food-production purposes.

2. There is no evidence of any active or pressing demand for building sections in the locality, and inspection shows that what building has taken place is sporadic.

3. The locality is at present inadequately drained. The drainage system cannot always cope with the load imposed on it during rainy periods, and it will obviously be some years before this particular area will have a drainage system suitable for the needs of an urban population. When an adequate drainage system is available it may well be that this locality could be appropriately zoned as "residential" but that time has not yet arrived.

The appeals are disallowed. No order as to costs.

Appeals dismissed.

Uren *v.* Napier City Corporation.

Town and Country Planning Appeal Board. Napier. 1955. November 23; December 1.

Shopping Area—Residential District with established Shopping-area—Electrical Equipment Showroom on Residential Property—Detraction from General Character of Area outside Shopping Centre—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Napier City Council refusing the appellant a permit for the erection of an electrical equipment showroom on his property in Kennedy Road, Napier.

The grounds for appeal were that Kennedy Road was the natural outlet to new developing suburbs and was centrally situated; that there were already seventeen businesses in the area of the proposed showroom; that the area was in fact a semi-commercial area; that the showroom would not interfere with, but on the contrary, would increase the amenities of the neighbourhood; and that a grocery business in the area had recently completed extensive alterations for which a permit would have to be obtained from the Council.

The Council replied that Kennedy Road should be preserved for residential purposes with the exception of a shopping area some distance to the west of the appellant's property; that

the proposed showroom would be neither a predominant nor a conditional use of land in either a residential A or a residential B Zone and would be a conditional use only in a commercial A Zone; that the proposed showroom would constitute a structure abutting the highway and would detract from the general character of the area, and that the alterations to the grocery business referred to in the appeal involved no structural alteration and no permit from the Council was given or required.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. The area under consideration is predominantly residential in character. There are shops and businesses already established in Kennedy Road in the neighbourhood of the appellant's property but these have been established as such for a long time and the evidence is that no permits have been issued for the erection of new buildings for shops or businesses in this area for many years.

2. The question falling for determination in this appeal is really whether under the Council's undisclosed district scheme this area is likely to be zoned as "residential" or "commercial". If it is to be zoned as "residential" then the erection of further shops or business premises in the area would detract from its residential amenities.

3. The Council has declared its intention of zoning the area as "residential" and that being the case its refusal to grant a permit for the erection of a shop in the area is justified.

The appeal is disallowed. The Board points out that, when the Council's scheme is ripe for public notification under s. 22 of the Act, it will still be open for the appellant or anyone else to lodge an objection to the zoning of this locality as "residential". No order as to costs.

Appeal dismissed.

McLean Institute *v.* Christchurch City Corporation.

Town and Country Planning Appeal Board. Christchurch. 1955. November 1, 30.

Building—Office Accommodation in City Street—Permit subject to setting-back Building 7ft. from Existing Building line—Minimum Width of 15ft. in City Footpaths in Main Shopping Street—Such Width in Accordance with Established Town-planning Principle—Town and Country Planning Act 1953, s. 38 (1) (a) (ii).

Appeal by the McLean Institute made under s. 38 of the Town and Country Planning Act 1953 against the decision of the Christchurch City Council refusing a permit for the erection of a building on premises situated at the corner of Colombo Street and Oxford Terrace (or Chester Street) Christchurch. The Council informed the appellant that a permit would not be issued unless the new building were set back seven feet from the present Colombo Street frontage of the property.

The grounds for appeal were: (*a*) that valuable land for building purposes would be lost by setting back; (*b*) that it was not necessary to make provision for the widening of the present roadway or footpaths in Colombo Street in this vicinity because: (i) there were buildings on one side of Colombo Street only, the other side being occupied by a reserve or open space known as Victoria Square, and (ii) the volume of pedestrian traffic on the Colombo Street footpath north of Armagh Street was not and was not likely to require a wider footpath; and (*c*) that extensions had recently been completed to the Oxford Hotel which was on the same side of Colombo Street as the appellant's property and immediately north of it, but across Oxford Terrace, and no setting-back had been done.

The Council replied that the proposed structure would constitute a "detrimental work" within the meaning of s. 38 (1) (*a*) (ii) of the Act and refused its consent accordingly.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). 1. Under the respondent Council's undisclosed district scheme provision is to be made for the widening of Colombo Street from Moorhouse Avenue to the bridge over the Avon River so as to provide an 80ft. street as against the existing 66ft. street, so as to give 46ft. of carriage way with 17ft. footpaths on each side as against the existing 10ft. footpaths. This will include the setting-back of the present building line by 7ft. on each side of the street.

2. The evidence establishes that under present conditions that portion of Colombo Street between Armagh Street and the bridge carries a much lower volume of pedestrian traffic than the portion between Armagh Street and the Square. It appears probable that the position is not likely to alter greatly within the next ten years. Had this appeal to be considered only in the light of present-day conditions it might well have succeeded.

3. In compiling its district scheme, the respondent must of necessity endeavour to look far into the future and to plan for the needs of a city carrying a much greater population than it at present has.

4. It is an established town-planning principle that wide footpaths for pedestrian traffic are a necessity in main shopping streets. Fifteen feet is regarded as the minimum, and, where shopping streets carry public passenger-vehicles, wider footpaths are needed. In seeking to make provision for this in the Colombo Street of the future the Council is acting in accordance with the town-and-country-planning principles likely to be embodied in its undisclosed district scheme.

The appeal is disallowed. Leave is reserved to the appellant to apply for an order under s. 47 of the Town and Country Planning Act 1953 if it so desires.

Appeal dismissed.

Gardiner and Others *v.* Taupo Borough.

Town and Country Planning Appeal Board. Taupo. 1955. June 9.

Zoning—Objection to Zoning of Area in Borough as "Rural"—Proposed Subdivision into Residential Sites—Area adjacent to "residential" Zone—Borough desiring to Consolidate Future Development in Stages into Areas already subdivided to Residential Density—Such Policy economically Sound and in Accordance with Town-and-country-planning Principles—Reconsideration dependent on Future Development—Town and Country Planning Act 1953, s. 26.

Appeal by T. H. R. Gardiner and others, under s. 26 of the Town and Country Planning Act 1953 against the decision of the Taupo Borough Council, disallowing the appellants' objections to the zoning as a "rural district" of an area within the Borough containing approximately fifty-eight acres of a property owned by the appellants as trustees on Tahārepa Road, Taupo.

The appellants desired to subdivide thirteen acres of this land into residential sites and sell them as such, and accordingly they appealed against the zoning of their land as "rural". The appellants' grounds for appeal were, inter alia, that the land was adjacent to land already zoned as "residential"; and that there was a substantial demand for residential sites in this part of the Borough.

The Council replied that the objection to the zoning of this area as "rural" was disallowed because it desired to consolidate future development into areas within the Borough already subdivided to residential density, but not yet built upon; that the policy was instituted in order to minimize the economic problems created by the provision of services in residential areas widely dispersed and as yet sparsely populated; and that the Council proposed to review from time to time the position regarding outlying areas within the borough at present zoned as "rural".

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). Over recent years Taupo has expanded considerably, but, in relation to the area of the Borough, its residential occupancy is widely dispersed; and the provision of the usual services appropriate to residential areas presents a considerable economic problem. The respondent Council's policy of consolidating future development as far as possible in stages into areas already subdivided to residential density, but not yet built upon, is economically sound, and in accordance with town-and-country-planning principles. There are 1802 unoccupied sections within the Borough at present. The present zoning of the area under consideration as "rural" is sound, and in accordance with town-and-country-planning principles, though future development may justify a reconsideration of that zoning. No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

A Touch of Decorum.—International law conferences seem to be in season. Mr Justice Hutchison is our official representative at one in Norway about which more no doubt will be heard later. Scriblex notices that Sir Frank Soskice, Q.C., has represented the English profession at one in Paris where three hundred lawyers, from twenty-six countries, have assembled. Of this latter conference, Richard Roe, in the "Solicitors' Journal", refers to some interesting sidelights as to the position of women advocates in the Courts of Turkey as provided by a female representative from Istanbul. It seems that one in seven of the 2,000 practising lawyers is a woman who is expected to observe strict decorum. "It would be an affront to the Court to sit with one's legs crossed or with folded arms." Some years ago, as the older generation of Dunedin practitioners can testify, a similar idea crept into the Court there.

Easements and Servitudes.—A slight set-back to modern theorists who contend the law has now emerged from feudalism is provided by *Ferguson's Scale of Conveyancing Charges*, 4th Ed., p. 44, where, listed at 10/-, is "clerk's attendance serfing document". It is thought that this may have some allusion to the slave-like devotion of the law clerk to this part of his duties, particularly during the period each year from October to December.

The Court's Labours.—The staid *Times* seems to have upset some of the members of the English Court of Appeal by its recent pronouncement that the Court was not fully employed. On the day of its publication Singleton L.J. took exception to it and said: "I should like anyone who has been in this court this term to consider whether we have been fully employed. Our work, particularly in revenue cases in which judgments have been reserved, has involved many hours of duty out of court and at week-ends. I think we have been fully employed." The matter was taken up on the following day by Lord Evershed M.R., who expressed his desire to make it quite clear that, as Singleton L.J. had said, there was not justification for the view that the Court of Appeal was not fully occupied. Moreover, he was unaware of any day, or the likelihood of any day, when there would not be cases ready for hearing in the court. It was only on rare occasions that the court had been able to take time off for writing reserved judgments. That had to be done in spare time. It is also pointed out the work of the Court of Appeal is likely to increase as the result of more appeals from County Courts following the increase effected in the jurisdiction by the County Courts Act 1955. At one time, as Fortescue C.J. observed to his pupil, the Prince of Wales, "the judges of England do not sit in the King's Courts above three hours a day, that is from eight in the morning until eleven." After that, the judges were free to "spend the rest of the day in the study of laws, reading of the Holy Scriptures, and other innocent amusements at their pleasure."

The Small Gamester.—If the play takes place at other than refreshment houses or licensed premises, and if the player does not make more than one payment, and if that payment is not more than five shillings, and if there is not more than one distribution of prizes in respect of all the games at the entertainment, and if the total value of prizes does not exceed twenty pounds, and if the balance after payment of prizes and expenses is applied for purposes other than private gain, then the player is exempt from prosecution under s. 4 of the Small Lotteries and Gaming Act 1956, a measure in England that has probably allayed the mind of the nervous euchre player and spared him the horror of imagining a policeman lurking in every corner of the building.

William Noy.—Mr attorney-general Noy was a great lawyer and a great humorist. There is world of merry stories of him. He would play at spanne-counter with the taverne-barre-boy. A countrey clowne asked for a good inne, and he bids him ride into Lincolne's Inne, and asked if his horse went to hay or to grasse. He caused the breeches of a bencher of Lincolne's Inne to be taken-in by a tayler and made him beleeve that he had the dropsie. One time he mett accidentally with Butler, the famous physitian of Cambridge, at the earle of Suffolke's (Lord Treasurer). They were strangers to each other, and both walking in the gallerie. Noy was wearied, and would be gonne. Butler would know his name. Noy had him to the Peacock Taverne in Thames Street, and fudled all that day. Another time Noy and Pine of Lincolne's Inne went afoot to Barnet with clubbes in their hands, like countrey-fellowes. They went to the Red Lyon inne; the people of the house were afrayed to trust them, fearing they might not pay. —*John Aubrey* (1626-1697) "Brief Lives."

From My Notebook (Juries Division).

"I believe that trial by jury is of great importance. It secures that the intellectual atmosphere of the Court shall be on the level of the common man. Counsel have in their speeches to keep such a person in view, and so has the Judge. Only so will they convince the jury; and to achieve that object they must avoid unfair argument, and, particularly, reliance on over-technical reasoning. These are in legal proceedings some of the worst enemies of justice, and trial by jury is a safeguard against them."—Lord Robert Cecil K.C.

"I cannot bring myself to believe that there are any persons other than the inmates of a lunatic asylum who would vote in favour of the abolition of trial by jury in serious criminal cases. To me the idea is quite unthinkable unless and until some alternative method is put forward for consideration, and any such alternative would have to be backed by the experience of a civilized English-speaking country."—The Rt. Hon. Sir Travers Humphreys.

"The disappearance of grand juries from the scene in England and Wales does not appear to have created any posthumous difficulties, and it is difficult to see the justification for retaining in Northern Ireland, albeit in a limited sphere, the last vestiges of the feudal notion that the maintenance of law and order is the peculiar prerogative of leading members of society."—J. Ll. J. Edwards, Lecturer in Law in the Queen's University of Belfast.

THE NEW COMPANIES ACT 1955.

(*Continued from p. 284.*)

Directors Declining Transfer.

As pointed out above, Art. 24 of Table A provides that the directors may decline to register the transfer of a share (not being a fully-paid share) to a person of whom they do not approve, etc.

In *Moodie* v. *Shepherd* (*Bookbinders*), *Ltd.*, [1949] 2 All E.R. 1044 (which went to the House of Lords), an article read :

> It shall be in the absolute discretion of the directors to refuse to register any transfer of shares of which they do not approve.

It was held that the directors could exercise their right to decline registration under this article only by passing a resolution to that effect : mere failure to pass a resolution to that effect was not a formal exercise of the right to decline ; and, therefore, as the right had not been exercised, the executors were entitled to be registered as members of the company.

Right of Bankrupt Member to Vote.

Article 29 of Table A provides that any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as thereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy, as the case may be.

It was held in *Morgan* v. *Gray*, [1953] Ch. 83 ; [1953] 1 All E.R. 213, that, subject to any regulations in the articles to the contrary, a bankrupt is entitled to vote so long as the shares remain registered in his name ; but he must exercise his votes in accordance with the directions of the persons beneficially entitled to his shares, which, in New Zealand, presumably would be the Official Assignee in Bankruptcy : a bankrupt member also has the same right to tender a proxy at meetings of the company.

Quorum at a Meeting.

Article 54 of Table A of the Companies Act 1955 provides that no business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business ; save as therein otherwise provided, three members in person shall be a quorum.

In re Hartley Baird, Ltd., [1955] Ch. 143 ; [1954] 3 All E.R. 695, the relevant article read :

> No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business.

It was held that, if there is a quorum present at the beginning of a meeting when it proceeds to business, the subsequent departure of a member reducing the meeting below the number required for a quorum does not invalidate the proceedings of the meeting after his departure. In that case, the quorum required by the relevant article for a meeting to alter the rights of a class of shareholders was present at the beginning of the meeting and also when it proceeded to consider the business for which it was called ; but it was reduced below the number required for a quorum before the vote was taken on the resolution, because one member, who was opposed to the resolution, left the meeting before the vote was taken. It was held that the relevant article had been complied with and the resolution passed was a valid class resolution.

Constructive Notice of Company's Registered Documents.

It may be convenient here to deal very briefly with the doctrine of constructive notice of a company's *registered* documents, such as its memorandum of association, articles of association, and special resolutions. In 1952, Slade J. gave a very long judgment on this topic ; and I venture the opinion that the last has not been heard of this branch of company law : *Rama Corporation, Ltd.* v. *Proved Tin and General Investments, Ltd.*, [1952] 2 Q.B. 147 ; [1952] 1 All E.R. 554.

As stated in *6 Halsbury's Laws of England*, 3rd Ed., p. 430, para. 833, persons contracting with the company, whether they are shareholders or not, are bound to know, or are precluded from denying that they know, the constitution of the company and its powers as given by statute, and the memorandum and articles. They cannot complain that a contract which is *ultra vires* is void and cannot be enforced or that the company may be restrained from carrying it out. *This doctrine of constructive notice of a company's registered documents is a purely negative one which does not operate against a company but only in its favour.* The words which I have italicized state briefly the kernel of Slade J.'s judgment. The learned Judge held that a person (including of course a corporation) who, at the time of entering into a contract with a registered company has no knowledge of the company's articles of association, cannot rely on those articles as conferring ostensible or apparent authority on the agent of the company with whom he dealt. In the course of his judgment Slade J. said :

> Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, and indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients : (i) a representation, (ii) a reliance on a representation and (iii) an alteration of your position resulting from such reliance.

This topic is dealt with in *Morison's Company Law in New Zealand*, 2nd Ed., 171, and it would appear that the learned editor of that work is on the side of Slade J.

Legal Effect of Table A.

Before ending this article (which has dealt mainly with Table A) it may be useful to dwell for a minute on the legal effect of the Articles comprising Table A. Table A is contained in a Schedule to the Act, and a schedule to an Act is just as much a part of that Act as the rest of the Act. Consequently, a provision in any special article of a company which is in accord with any in Table A, is valid : *Lock* v. *Queensland Investment and Land Mortgage Co.*, [1896] A.C. 461. But a provision in Table A, which was adopted by a mining company (as defined in the Companies Act), was held invalid, as being inconsistent with the express provisions of that Part of the Act dealing with mining companies—now Part XIV of the Companies Act 1955 : *King Gold Mining Co., Ltd.* v. *Cock*, (1912) 31 N.Z.L.R. 1166. The Act in fact prescribes Table A as a model set of articles for a company formed under the Act ; and, provided that the terms of the Act have been complied with in the adoption of any article, the provisions of such article (except in exceptional cases such as described in the immediately preceding sentence) cannot be said to be *ultra vires* the company : *New Balkis Eersteling, Ltd.* v. *Randt Gold Mining Co.*, [1904] A.C. 165, 167.

(*To be continued.*)