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

WE continue our consideration of the more recent of the decisions, commencing with *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572, in which it has been held that the distinction between the duties of an occupier to invitees and licensees has virtually been abolished.

In *Slade* v. *Battersea and Putney Group Hospital Management Committee*, [1955] 1 All E.R. 429, it appeared that the plaintiff's husband had been ill for some two and a half years in a hospital managed and controlled by the defendants. In October, 1953, he was put on the danger list and the plaintiff was notified and was given permission by the hospital authorities to visit him at any time. She visited him one morning and after being with him for about half an hour she decided to leave. On her way out of the ward, which had a highly polished floor, she slipped on a part of the floor where polish had recently been applied. The polish had been spread over the floor, but had not yet been polished off, and rendered the floor slippery and dangerous. She was given no warning of the presence of the polish on this occasion, though she had been warned on previous occasions. It was a rule of the hospital that people should be warned when polishing was in progress. The learned Judge found that the plaintiff did not know that there was polish on the floor, and that she was not guilty of contributory negligence. For the purpose of the question of liability of the defendants to the plaintiff as an invitee, he found that the part of the floor on which the polish was spread was a danger of which the defendants knew, and was an unusual danger.

Finnemore J. said in the course of his judgment, at p. 431 :

> There is a final point which, I confess, appeals to me because it seems to be common sense ; and that is one which was indicated very plainly indeed by Denning L.J., in *Dunster* v. *Abbott* [supra], and, I think, indicated by Somervell L.J., also. After all, does it matter what the plaintiff was ? Everybody agrees that she was properly in the ward. She had asked permission, indeed, to go in. We need not bother ourselves with what might be the position of a trespasser. After she has gone into the ward, taking the premises as she finds them as a licensee must, whilst she is there a wholly extraneous danger, which is no part of the property itself or of the structure, is introduced into the ward on the floor. The simple question seems to me to be, was that the negligence ?, that is to say, was it negligent to leave that polish on the floor when someone comes walking along without giving that person a warning ? In *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572 (which, it has always to be remembered, was decided in favour of the defendant on appeal), Denning L.J. said, at p. 1574 :
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> > " 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."
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> I think, with perhaps certain qualifications, that is right to be applied to the present case. Denning L.J. continued, at p. 1574 :
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> > " 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."
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> It was held in that case that, while there was no complaint about the premises, what the occupier had actually done in regard to providing light was to act with reasonable care, and there, of course, the defendant succeeded and the plaintiff failed.

Finnemore J. concluded by saying that, there, the position was that the defendants, through their servants, did not act with reasonable care, which, he thought, required a warning to be given to the plaintiff that, as she walked towards the door, there was this polish in the way. He did not think this was a case where nobody had been negligent. Many slips happen without any negligence ; but here there was an obvious cause for the slipping. Further, he thought it was not a case of contributory negligence. The plaintiff was not negligent in the way she walked along the floor, or negligent in failing to see the unpolished liquid still on the floor.

Next, we come to *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625, which is notable for the unanimity of the members of the Court of Appeal as to the disappearance of the distinction between invitee and licensee.

The facts were that the plaintiff was walking through one of the tunnels of the defendants' private railway line, which was 2½ miles in length, from Crich to Ambergate in Derbyshire, when she suddenly realized that a train was coming up behind her. She sought what safety she could, but the train ran over one of her legs and cut it off. She claimed damages against the railway company. There was nothing to show that the owners of the railway resented its use by the

villagers, who had used it as a short cut for years (cf. *Matheson* v. *Attorney-General*, [1956] N.Z.L.R. 849). The trial Judge, Ashworth J., found that the plaintiff was a licensee, and, in giving judgment against the defendants, apportioned sixty per cent. of responsibility for the accident to them. They appealed.

In delivering the principal judgment in the Court of Appeal, Denning L.J. (with whom Birkett and Parker L.JJ. concurred) said :

> If she [the plaintiff] were a trespasser on this railway, she would, of course, have no cause of action ; but she says that the defendants had acquiesced for years in the villagers of Crich walking along this railway down to Ambergate and back. It was a short cut for them. The defendants had done nothing at all to show that they resented the villagers usng it, and the villagers had in fact used it for years. The Judge has found, and I think there can be no doubt, that she was what we call in law a licensee—not a trespasser who was unlawfully there, but a person who was permitted and allowed by the owners to be there—not for any matter in which they had an interest, but only for her own purposes. . . .
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> Counsel for the defendants stressed the fact that the plaintiff was only a licensee and urged that this was of special significance. I do not think so. The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished, *but this result has already been virtually attained by the decisions of the courts. The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to vanishing point.**
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> The decision of this Court in *Hawkins* v. *Coulsdon and Purley Urban District Council*, [1954] 1 All E.R. 97, shows that a licensor too, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger. The local authority did not know that it was a danger, but they ought to have known it, and they were held liable.
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> *The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them : and it makes no difference whether they are invitees or licensees.* At any rate, the distinction has no relevance to cases such as the present, where current operations are being carried out on the land. If a landowner is driving his car down his private drive and meets some one lawfully walking on it, then he is under a duty to take reasonable care so as not to injure the walker ; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift.
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> That is made clear by the decision of this Court in *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572, which was applied by Finnemore J. very recently in *Slade* v. *Battersea and Putney Group Hospital Management Committee*, [1955] 1 All E.R. 429. So, here, it seems to me that the defendants, in carrying on their operations, were under a duty to take reasonable care not to injure anybody lawfully walking on the railway, and they failed in that duty. As the learned Judge said :
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> > " I, therefore, hold that the defendants' servants were guilty of negligence in exposing the plaintiff to a risk which the defendants, their servants, and agents were well aware of, putting her in a position of great danger and failing to take the necessary reasonable precautions to prevent such danger arising."

The appeal was dismissed.

It will have been noted that, in *Slater's* case, Denning L.J., while rejecting the relevance of any distinction between invitees and licensees, did not say that the distinction between those categories and trespassers was equally irrelevant. He said of the plaintiff in that case : " If she were a trespasser on this railway, she would, of course, have no cause of action ".

* * * *

So, after an interval of just on fifty years, after a variety of expositions of the duty of an occupier to an invitee or to a licensee, the Court of Appeal in England has come to a conclusion very similar to the view reached by Sir John Salmond in the first edition of his *Law of Torts*.

This conclusion may make it possible to express the relevant rules of law in a manner even more simple than Sir John Salmond's statement quoted at the beginning of this article. It may now be possible to omit the qualifications to which he alluded at the beginning of his statement,† and to say :

> . . . 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 [as in *Hawkins's* case] or to the nature of the operations that are being carried on there [while the visitor is present, as in *Slater's* case, or that have been carried on there before the entry of the visitor, as in *Riden's* case, *infra*].

With the exception of the words in brackets, which have been added to illustrate the effect of recent English Court of Appeal decisions, the above passage is in Sir John Salmond's own words.

And Sir John Salmond's concept of the duty of occupiers is very close indeed to " the common duty of care " owed by an occupier to all visitors (not being trespassers), which is defined in the Occupiers Liability Bill as being " to take such care as is reasonable to see that the visitor will be reasonably safe in using the premises".

Postscript.

Since the above was in type, we find that, in *Riden* v. *A.C. Billings and Sons, Ltd.*, [1956] 3 All E.R. 357, Denning L.J. has elaborated the opinion he expressed in *Slater's* case and, in doing so, has incidentally indicated that in some circumstances the occupier may owe a duty of care to trespassers. His judgment and that of Birkett L.J. are also of interest in their rejection of the view that the principle of *Donoghue* v. *Stevenson*, [1932] A.C. 562, has created a new duty of care applicable to contractors and occupiers who do work on land, as they make it clear that such a duty existed long before the *Donoghue* v. *Stevenson* case, and that it continues after it.

Preparatory to restoring a concrete footpath to steps up to a house (No. 25) used as offices, occupied by the second and third defendants, building contractors (the first defendants) broke up part of a sloping paved ramp constructed over the original footpath and steps leading up to the door, removed the railings on each side of the remainder of the ramp over the steps, and barricaded one side only of that part from the adjoining forecourt and basement area. There was a back entrance to the house which was locked at five o'clock each evening. The contractors gave no warning of any danger, but their foreman advised the wife of the office caretaker, who was living in a flat on the premises to get into the house by walking over the forecourt of the next door house (No. 26) and climbing up the unbarricaded side of the remainder of the ramp, and this advice was passed on to the plaintiff, then aged seventy-one, who adopted it when visiting the flat after dark. When leaving the house later the same evening, by the same way and being at the moment

* The italics are ours.

† As to visitors entering under a contract, see *Bell* v. *Travco Hotels, Ltd.*, [1953] 1 Q.B. 473 ; [1953] 1 All E.R. 638.

of the accident on the premises of No. 26, the plaintiff fell into the basement area of No. 26 and was injured. She had taken no precaution, when leaving No. 25, in view of the route which she was using. In an action for damages for negligence brought against the occupiers and the contractors, it was found that it would have been unreasonable to have expected the plaintiff to use the back door and that the accident would not have occurred but for the action of the contractors in destroying the normal means of access to the house. Her action was dismissed on the ground that there was no concealed danger of which the occupiers owed a duty to warn the plaintiff, and that the contractors owed no duty to provide an alternative means of access.

On appeal against the contractors only, it was held by the Court of Appeal, Denning and Birkett L.JJ. (Roxburgh J. dissenting) that the plaintiff was entitled to recover damages for negligence (reduced by one half on account of her own negligence) for the reasons: (i) the contractors, having created a dangerous state of things, owed a duty of care to prevent injury to persons whom they might reasonably expect to be affected by their work (of whom the plaintiff was one). (In so holding, the majority of their Lordships followed *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625, and *Haseldine* v. *Daw & Son, Ltd.*, [1941] 2 K.B. 343; [1941] 3 All E.R. 156). (ii) Although the plaintiff had used the route when going to the house, she had not fully appreciated its danger and her knowledge of the danger was not such as to render the accident solely her fault (thus following *Clayards* v. *Dethick & Davis*, (1848) 12 Q.B. 439; 116 E.R. 932.

In the course of his judgment, Denning L.J. said that, though the plaintiff had brought her action against the contractors, the first defendants, and the occupiers, the Ministry of Works, and the Commissioners of Customs and Excise, the second and third defendants, and the trial Judge had dismissed her claim against all the defendants, the plaintiff did not appeal against his decision so far as the occupiers (the second and third defendants) were concerned because she realized that they entrusted the work to independent contractors. He continued:

> The occupiers did not know of the danger nor ought they to have known of it, and they ought not to be held liable. The plaintiff's advisers thus recognize, quite rightly, I think, the authority of *Haseldine* v. *Daw & Son, Ltd.*, [1941] 2 K.B. 343; [1941] 3 All E.R. 156. I see nothing inconsistent with it in *Thomson* v. *Cremin*, [1953] 2 All E.R. 1185, which was decided by the House of Lords later that year. But the plaintiff does appeal against the decision in favour of the contractors, the first defendants, on the ground that they created a dangerous state of things and are liable for the consequences.

The learned trial Judge, Hallett J., had found that the workmen, when they were knocking off work at 4.30 p.m. on November 17, must have contemplated that there might have been people who would want to leave the house or to go to it, and that good workmen would have provided a substituted means of access. He also found that

> but for the action of the first defendants in destroying the pre-existing normal and safe means of access and substituting no other means of access for it, this accident would never have occurred.

He found:

> The situation which led to all these people approaching the premises by the fourth route was caused by the first defendants.

Nevertheless, he found that the first defendants owed no duty to the plaintiff in respect of it. The learned Judge felt "a great deal of sympathy with the plaintiff", but, nevertheless, "with very considerable regret", held that her claim against the contractors was not established.

The first question for consideration by the Court of Appeal was whether the trial Judge was right in holding that the first defendants were under no duty to the plaintiff. On this point, Denning L.J. said:

> At the outset I desire to stress that we are concerned here, not with the liability of an occupier of land, but with the liability of a contractor who is doing work on land. There are many authorities which show that the contractor's duty is not confined to his duty under the contract to his employer. He is under a general duty imposed by law to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work.
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> Let me first consider the cases which show there is such a duty. *They do not spring from Donoghue* v. *Stevenson*, [1932] A.C. 562, *but start long before it and continue after it.* As far back as 1848 a contractor, in order to make a sewer, dug a trench in a private passage leading to a mews. He negligently failed to fence the opening. Whilst a cab-owner was leading out his horse, it fell into the trench and was killed. The contractor was held liable for negligence: see *Clayards* v. *Dethick & Davis*, (1848) 12 Q.B. 439; 116 E.R. 932. In 1856, a building contractor placed a pile of slates on a private road leading to a lunatic asylum, and left them unlighted at night. A visitor ran into them in the dark. The contractor was held liable for negligence: *Corby* v. *Hill*, (1858) 4 C.B.N.S. 556; 140 E.R. 1209. In 1918, a gas company, when putting gas into a private house, made a hole in the floor and failed to warn a visitor of the danger. They were held liable for the injury which resulted: see *Kimber* v. *Gas Light & Coke Co.*, [1918] 1 K.B. 439. *Those cases were all before Donoghue* v. *Stevenson.* The later cases are reinforced by the authority of that decision. Thus, in 1941, a firm of engineers repaired a lift, but they did it so negligently that when a visitor used it next day, the lift fell and injured him. The engineers were held liable: see *Haseldine* v. *Daw & Son, Ltd.* (*supra*). In 1954, a local authority, when making up the private way to a house, left a protruding piece of metal and a visitor fell over it and was injured. They were held liable: see *Mooney* v. *Lanarkshire County Council*, [1954] S.C. (Ct. Sess.) 245.
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> All the cases which I have mentioned were decisions of appellate Courts. There are many cases at first instance to the same effect. A good illustration is *Brown* v. *Cotterill*, (1934) 51 T.L.R. 21, where a monumental mason put up a tombstone so negligently that it fell and injured a child. Lawrence J. held the mason liable.
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> *The cases show, moreover, that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his work, whatever the capacity in which they come, whether as invitees or licensees or as other contractors*† *: Clelland* v. *Edward Lloyd, Ltd.*, [1938] 1 K.B. 272; [1937] 2 All E.R. 605, per Goddard J.; *Simmons* v. *Bovis*, [1956] 1 All E.R. 736, per Barry J.; *or even, in some cases, as children trespassing*; see *Buckland* v. *Guildford Gas Light & Coke Co.*, [1949] 1 K.B. 410; [1948] 2 All E.R. 1086, per Morris J.; *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.*, [1954] 1 All E.R. 578, per Ormerod J.; *Creed* v. *John McGeogh & Sons, Ltd.*, [1955] 3 All E.R. 123, per Ashworth J.
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> *The duty of care of which I have spoken is not confined to contractors. It is a duty which rests on anyone who does work on the land, including the occupier himself.* If the occupier does work on his own land, he is under the same duty as a contractor. *The reason is because the duty arises, not out of the fact of occupation, but out of the fact that he is doing work which he knows or ought to know may bring danger to others: and that gives rise to a duty of care;* see *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572; *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625.

It is of interest to note that, although the learned Lord Justice has thus expressly envisaged the duty as being owed by contractors, he nevertheless went on to equate it to the duty of the occupier who does work on his own land, and cited *Slater's* case in support.

† *The italics, here and elsewhere in this article, are ours.*

On the findings of the trial Judge, it seemed to Denning L.J. quite clear that the contractors did not take reasonable care to prevent damage. They knew or ought to have known that people would want to come in and out of No. 25 and should have made a safe route on No. 25 (as they said they did, and were not believed) or they should have made the " fourth route " (which they advised) reasonably safe. They did neither. They did not even give any warning of danger. They were, therefore, in breach of their duty.

The next argument of counsel for the first defendants was that the duty on the first contractors was at most a duty to warn the visitors of any danger on the route, and it was superfluous to warn the plaintiff, since she must be taken to have known of the danger. She had got into the premises by the " fourth route " and must have known the state of it. Counsel for the first defendants particularly relied on some words used by Denning L.J., in *Hawkins* v. *Coulsdon and Purley Urban District Council*, [1954] 1 Q.B. 319, 334 ; [1954] 1 All E.R. 97, 105 :

> A licensee can never complain of dangers which are obvious or known to him.

In relation to that dictum, Denning L.J. observed :

> I must explain that those words only apply where the visitor has full knowledge of the nature and extent of the danger—full appreciation of it—and is entirely free to avoid it, but nevertheless voluntarily goes on and is injured. In those circumstances he cannot complain, for the simple reason that the accident is then solely his own fault ; but, short of that, he can complain.

His Lordship went on to discuss *Clayards* v. *Dethick & Davis*, (1848) 12 Q.B. 439 ; 116 E.R. 932, which is the earliest case in which that point was distinctly raised and decided. He explained that the cab-owner knew that it was dangerous to try to take his horse out of the mews, past the trench, but he was not free to avoid the danger. It was the only way out. He could not be expected to refrain altogether from coming out of the mews merely because the contractors had made the passage in some degree dangerous. Despite his knowledge of the danger, he was held to be entitled to recover. Lord Bramwell criticized the decision in one or two cases and also in an appendix to *Smith on Negligence*, 2nd Ed. (1884), 275. Lord Bramwell wished to hold that knowledge of the danger was a bar to a person complaining of it ; for instance, that it was a bar to a servant suing his master for an unsafe system of work ; and was also a bar to a passenger by train, injured in alighting, from suing the railway company. There are innumerable cases which show that Lord Bramwell was wrong. His views were decisively rejected by the House of Lords in *Smith* v. *Baker & Sons*, [1891] A.C. 325, in spite of the fact that he presented them there in person.

Lord Justice Denning added that the decision in *Clayards* v. *Dethick & Davis* is now unimpeachable. The effect of it was well stated in *Smith on Negligence*, 2nd Ed., 235 :

> The defendant is not excused merely because the plaintiff, knowing of a danger created by the defendant, voluntarily incurs the danger ; for the defendant may have so acted as to induce the plaintiff, as a reasonable man, to incur the danger.

The authority of *Clayards* v. *Dethick & Davis* is further enhanced by the approval given to it by Sir Frederick Pollock. He said that " principle is for it and no accepted authority against it". Sir Frederick Pollock, in his *Torts*, 15th Ed., 369, summarized the decision succinctly in these words :

> Whether the plaintiff had suffered by the defendants' negligence, or by his own rash action, was a matter of fact and of degree properly left to the jury.

His Lordship continued :

> Such was the position before the Law Reform (Contributory Negligence) Act 1945 [our Contributory Negligence Act 1947]. Since the Act the same principle applies, subject to apportionment. I stated it in *Slater* v. *Clay Cross Co.* in these words, to which I adhere, [1956] 2 All E.R. 625, 628 :
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> > " . . . knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault . . . where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only ground for reducing the damages."
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> This principle has the merit that it is in complete accord with the recommendations of the Law Reform Committee in regard to occupiers. Contractors should be in no different position.

Applying that principle to the present case, Denning L.J. thought it plain that the plaintiff did not fully appreciate the danger of the " fourth route". She said " I thought it was safe". She did not realize how close the basement area was. She said " I could not say how far it would be". Even if she had fully appreciated the danger, His Lordship did not think she was entirely free to avoid it. She could not reasonably be expected to stay in the house all night. She could have asked for the back door to have been opened, but, as the Judge said, it was hardly negligent of her not to do so. In the opinion of Denning L.J., therefore, her knowledge was not such as to be a bar to the action, but was only a ground for reducing the damages. He added :

> It is to be noticed that at the time the Judge decided this case, *Slater* v. *Clay Cross Co.* had not been decided or reported. If it had been, I feel sure that the Judge would have followed it, and would not have felt bound regretfully to dismiss the claim.

Lord Justice Birkett in his judgment said that a great number of cases were cited to the learned Judge and were cited to the Court of Appeal relating to the liability of occupiers and contractors. Many of them were cases where the contractor had created a danger and had allowed persons with no knowledge of the danger to be injured, as in *Corby* v. *Hill*, (1858) 4 C.B.N.S 556 ; 140 E.R. 1209, and *Kimber* v. *Gas Light & Coke Co.*, [1918] 1 K.B. 439. Counsel for the first defendants both discussed at some length *Donoghue* v. *Stevenson*, [1932] A.C. 562, and the recent case in the Court of Appeal of *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625, in which the judgment of Ashworth J. was upheld.

His Lordship went on to say that, with great respect to Hallett J., he had come to the conclusion that he was wrong in holding that the first defendants were under no duty to the plaintiff in the circumstances of this case. In the judgment of the learned Lord Justice, the first defendants were under a duty to use reasonable care to see that in the situation they themselves had created, no harm should come to persons who might reasonably be expected to enter or leave the premises by the front door. Knowing as they did that persons would wish to use the front entrance, and that they had destroyed the only safe way, they did nothing to fulfil the duty which I think rested on them, and are in consequence in breach of their duty to the plaintiff. He continued :

> But the case is far from ending there. I have found the position of the plaintiff to be one of great difficulty, and for my part I think it to be the chief problem in the case. That the first defendants owed a duty to her in the circumstances

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I do not doubt; but whether she disabled herself from recovering from the first defendants by her own behaviour is a most difficult question indeed. Counsel for the first defendants naturally relied on *Hawkins* v. *Coulsdon & Purley Urban District Council*, [1954] 1 Q.B. 319, 334; [1954] 1 All E.R. 97, 105, where the words of Denning L.J. were both plain and strong:

> "A licensee can never complain of dangers which are obvious or known to him."

Counsel for the first defendants had said that the plaintiff was certainly in no better position than a licensee; the dangers of the route to the house which she had taken were both obvious and known to her, for she had travelled that very route once before that very day she met with her accident, and had seen the place for herself, and had negotiated its dangers and difficulties. He also said that, if the duty of the first defendants was to warn, the breach of that duty was not the cause of the accident, for she knew as much as any form of warning would have told her. To this argument, Birkett L.J. replied:

> On the other hand, there is the important case of *Clayards* v. *Dethick & Davis*, (1848) 12 Q.B. 439; 116 E.R. 932. That case is now a hundred years old and its bearing on the present case is, I think, important and perhaps decisive. The danger in that case was an open trench in a private road, made by a contractor and left unfenced. The private road led to the stables where the plaintiff kept his horses for use in his business as a cab proprietor. It was the only way from the stables to the road. The plaintiff knew of the danger, and the evidence is striking.

In that case, the plaintiff's horse having been injured and killed, it was held that the plaintiff was not debarred from recovering damages from the defendants in all the circumstances of the case. It should be remembered, of course, that that was a jury case, and the question for the jury was whether the plaintiff's loss was due to his own fault, or to the negligence of the defendants. In the view of Birkett L.J. the difficult question in the present case was to be resolved in the same way. Was the plaintiff the victim of her own rash action? Was her damage due solely to her own fault? Did the knowledge she had bar her from recovering against the first defendants? Or was her conduct a ground for reducing the damages she could recover? He continued:

> In my judgment, she was not debarred from recovering damages from the first defendants. One of the remarkable features of the case is that, although the plaintiff had travelled this route on which she met with her accident some hours before when she entered the house, and must therefore have known how awkward and inconvenient the journey was, yet, when she came to make the return journey in darkness, apart from waiting a moment or two to allow her eyes to become accustomed to the change from the lighted house to the darkness outside, she took no precautionary steps of any kind. The question of going out of the back door was apparently never considered by anybody; she asked for no torch; she sought no companion; she betrayed no nervousness or fear of the journey; and she said in evidence that she thought the route was safe for her to travel. The words that she employed about that were quite clear when she was asked expressly about what she considered of the way, and she thought the way was quite safe.
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> Eliminating, therefore, from consideration, as I do, the question of the back door, on the express finding of the learned Judge, I think that there was only one way out from the front door that night, and that was the way the plaintiff went. It is true that she was not absolutely forced to go home that night, but the owner of the horse in *Clayards* v. *Dethick & Davis* was not absolutely forced to bring his horse out of the stable when the trench was in the private road. But if the plaintiff was to go home that night, and it was eminently reasonable that she should want to do so, the only way that she could go was by the route by which she did go, and which had been recommended to her; and I am not prepared to say that, because she did so, she is completely barred from any remedy . . . .
>
> In my judgment, the first defendants owed a duty to the plaintiff, they failed in their duty towards her and she is entitled to recover; but as she herself was guilty of contributory negligence in taking no reasonable care for her own safety, she must bear a proportion of the blame.

The plaintiff and the first defendants were found equally to blame; and the appeal was allowed, and judgment was given for the plaintiff accordingly.

In view of the conflicting views taken by the higher Courts of the nature of the duty of occupiers, it is somewhat heartening to know that the Court of Appeal granted leave, on terms, to the unsuccessful defendant to appeal to the House of Lords.

SUMMARY OF RECENT LAW.

LANDLORD AND TENANT.

Landlord's Covenant to keep Exterior of Building in Weatherproof Condition—Proviso that Landlord not liable until after Receipt of Notice by Tenant—Rain entering Building owing to Structural Defects in Roof and Its Accessories—Damage to Stock of Tenant on Ground Floor—Landlord liable under Covenant—No Want of Repair of which Tenant could have given Notice—"Roof and outer walls"—"Keep and maintain in weatherproof condition". On December 10, 1954, while the plaintiff was the occupier of a lock-up shop on the ground floor of a property owned by the defendant, a rain storm damaged the plaintiff's stock owing to the rose at the top of a downpipe being partially or substantially blocked by pigeon debris, the water thus backing up on the roof and finding an escape over the flashing of the roof-guttering. The water then flowed down inside walls to the plaintiff's premises. Clause 2 (3) of the lease referred to destruction or damages to the premises by fire. The covenant in the plaintiff's lease in regard to repair was as follows: "3. The owner hereby undertakes with the tenant as follows: (*a*) Subject to provisions of clause 2 subclause 3 that the owner will keep and maintain in good and tenantable weatherproof wear and condition the roof and outer walls of the said shop premises on the said premises not caused by the act or default of the tenant provided that the owner shall not be liable for any damage caused by any failure to so keep and maintain in good and tenantable repair until after the expiry of one month from the date or respective dates on which the tenant shall have given notice to the owner of any such want of repair to the owner." The roof of the building, the guttering, downpipe and exterior walls were in the possession and control of the defendant. In an action claiming damages in respect of damage to stock-in-trade due to the flooding of the shop premises in the occupation of the plaintiff, *Held*, 1. That, in the covenant, the word "roof", used in conjunction with the term "outer walls", showed that the landlord was assuming responsibility for the maintenance of the exterior of the building, and the words "roof and outer walls" included ordinary accessories thereto (the roof-guttering forming part of the roof, the rainhead, and downpipe); and, accordingly, at the material date, the roof was not in a "weatherproof" condition as it was not impervious to the weather. 2. That the damage was caused by defect in the design of the rainhead, in that no overflow provision had been made therein in the original construction, coupled with the blocking or partial blocking of the rose; and that, in such circumstances, the landlord had failed to "keep and maintain" the roof and outer walls, as required by the covenant, in good weatherproof condition. (*Payne* v. *Haine*, (1847) 16 M. & W. 541; 153 E.R. 1304, and *Proudfoot* v. *Hart*, (1890) 25 Q.B.D. 42, followed.) 3. That the defendant was not protected by the proviso in the covenant, and was liable for failure to observe the absolute requirements of the substantive portion of the covenant as there was no "want of repair" of which the tenant could have given notice to the landlord. (*Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K.B. 716, applied.) *Finco* v. *Masterton Licensing Trust*. (S.C. Wellington. August 27, 1956. McGregor J.)

LIMITATION OF ACTION.

Actions surviving Death of Tortfeasor—Twelve-months Period after taking out of Representation expired before Enactment of Amendment Act giving Jurisdiction to grant Leave to bring Action within Six Years after Cause of Action arose—Action barred under Principal Act—Amendment Act not operating to enable intending Plaintiff to apply for Leave—Law Reform Act 1936, s. 3 (3) (b), *3 (3A)—(Law Reform Amendment Act 1955, s. 2).* Section 3 (3A) of the Law Reform Act 1936 (added by s. 2 of the Law Reform Amendment Act 1955) does not operate so as to enable an intending plaintiff to apply for leave to bring proceedings against the estate of a deceased person where the time limited by s. 3 (3) had expired before the passing of the Law Reform Amendment Act 1955. (*Lauri* v. *Renad*, [1892] 3 Ch. 402; *Fairey* v. *Southampton County Council*, [1956] 2 All E.R. 843, and *Reid* v. *Reid*, (1886) 31 Ch. D. 402, applied.) *Rodgers* v. *Public Trustee.* (S.C. (In Chambers). New Plymouth. September 10, 1956. Barrowclough C.J.)

Claim against Crown—Notice in Writing not given until Eight Months after Accident—Defence of Lack of Notice raised on Morning of Trial of Action alleging Negligence—Such Issue left to Court for Determination after Trial—Award of Damages by Jury—No Reasonable Excuse for Delay in giving Notice and Defendant thereby prejudiced in His Defence—Judgment for Defendant—Defendant not debarred by Late Raising of Question of Delayed Notice—Costs—Differentiation between Claim for Employer's Negligence and Claim for Compensation—"As soon as practicable after the accrual of the cause of action"—Limitation Act 1950, s. 23 (1) (a), *(2).* There is an essential difference between claims for workers' compensation and common-law claims for negligence on the part of employers, and the claimant must make a prompt decision if he proposes to allege negligence, and give the earliest practicable notice of his intention to his employer, together with the other particulars required by s. 23 (1) (*a*) of the Limitation Act 1950. (*Thomas* v. *Nelson Harbour Board*, [1955] N.Z.L.R. 154, followed.) On July 13, 1954, the plaintiff was injured while employed by the Ministry of Works. Until March 22, 1955, no written notice in writing, as required by s. 23 (1) (*a*) of the Limitation Act 1950, was given. He commenced an action in which he claimed damages against the Crown. No leave to commence the action had been sought. On the morning of the hearing before a Judge and jury, the Crown, in an amended statement of defence, pleaded that notice of action had not been given as soon as practicable after the happening of the accident. The trial proceeded, and the jury awarded the plaintiff damages. On the issue of the plaintiff's failure to give the required written notice as soon as practicable after the happening of the accident, which had been left to the Court to deal with after the trial, *Held*, That there was no reasonable excuse for the delay until eight months after the happening of the plaintiff's accident in giving the notice required by s. 23 (1) (*a*) of the Limitation Act 1950; that the circumstances (as set out in the judgment) were such that the defendant was prejudiced in his defence by that delay; and, that, consequently, the plaintiff's action failed. (*Moeller* v. *New Plymouth Harbour Board*, [1955] N.Z.L.R. 151, followed.) The defendant's delay in raising the question of delay in giving the written notice until the morning of the hearing did not debar him from raising it, but it could, and should, affect the question of costs. *McCullough* v. *Attorney-General.* (S.C. Hamilton. August 24, 1956. Stanton J.)

PUBLIC WORKS.

Erection of Stopbank partly on Unformed Road without Local Authority's Consent—Breach of Statutory Provision—Such Encroachment on Road not giving Right of Action against Person so encroaching or against Local Authority—Public Works Act 1928, s. 168 (1) (a). *See Waters and Watercourses*, infra.

SHIPPING AND SEAMEN.

Shipping Casualty—Appeal from Court of Inquiry—Suspension of Certificate—Duty of Superintendent of Mercantile Marine to assist Such Court—Costs on Successful Appeal—Shipping and Seamen Act 1952, ss. 325, 326 (3)—Shipping Casualty Rules 1937 (S.R. 1937/221), R. 22 (j). The Supreme Court, in exercise of the discretionary powers conferred on it, on an appeal under s. 326 (3) of the Shipping and Seamen Act 1952, by R. 22 (*j*) of the Shipping Casualty Rules 1937, may order the Superintendent of Mercantile Marine to pay the costs of the successful appellant, on the ground that the Superintendent should have assisted in the Court of Inquiry by intimating whether in his opinion on the evidence the appellant's certificate should be dealt with. (*The Famenoth*, (1882) 7 P.D. 207, applied. *The Carlisle*, [1906] P. 301, referred to.) *The Turihaua.* (S.C. Auckland. August 15, 1956. Stanton J.)

SOIL CONSERVATION AND RIVERS CONTROL.

Non-observance by Party of Statutory Provisions—No Right of Action against Such Party given to Persons suffering Loss thereby—Soil Conservation and Rivers Control Act 1941, s. 155 (1). See Waters and Watercourses, infra.

TENANCY.

Premium for Grant of Lease—Premises containing Shop and Living Accommodation occupied by Tenant—Such Premises a "dwellinghouse"—Amount paid in Consideration of Grant of New Lease thereof recoverable—Tenancy Act 1948, ss. 19 (2), 21. A shop and dwelling, comprising a dairy and milk-bar, lounge, kitchen and washhouse on the ground floor, and three bedrooms, toilet and bathroom on the upper floor, was leased to the plaintiffs for three years by the defendant's predecessor in title. In March, 1954, the plaintiffs purchased this lease and the business carried on in the shop, and, in March, 1955, sold out to one P. and his wife. The plaintiff arranged that the defendant would grant a new lease to P. and his wife for five years, but subject to payment to the defendant of a lump sum of £200, which, under pressure, the plaintiffs agreed to do. The transaction was carried out by the plaintiffs' surrendering the old lease in consideration of £200, and the new lease was then completed. The plaintiffs claimed that sum from the defendant as a premium or consideration for granting the lease of a dwellinghouse, contrary to the provisions of s. 19 (2) of the Tenancy Act 1948. *Held*, 1. That the property was a "dwellinghouse" within the meaning of that word as used in s. 19 (2) of the Tenancy Act 1948; and the defendant received the sum of £200 in contravention of s. 19; and, in accordance with s. 21, was liable to repay it to the plaintiffs. (*Whitely* v. *Wilson*, [1953] 1 Q.B. 77; [1952] 2 All E.R. 940, applied. *Chun Wah Trading Co.* v. *Guy On and Sun Chung On*, [1954] N.Z.L.R. 670, distinguished.) *Mi-Land Ltd.* v. *Gordon et Ux.* (S.C. Auckland. August 26, 1956. Stanton J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

Petrol and Oil used to supply Motive Power for Contractor's Vehicles and Plant not "materials"—Servicing and Repair of Contractor's Vehicles and Plant not "part of the work"—Wages Protection and Contractors' Liens Act 1939, ss. 20 (1), 21 (1). The word "materials", as used in para. (c) of the definition of "work" in s. 20 (1) of the Wages Protection and Contractors' Liens Act 1939, means some substance, which, in one form or another, is incorporated in the work, and does not include substances like petrol and oil which would merely be used by the contractor in the course of the work to supply the motive power for his vehicles and plant; and the servicing and repair of such vehicles and plant, when not sufficiently direct, is not a "part of the work" as that term is used in s. 21 (1). (*In re Williams, Ex parte Official Assignee*, (1899) 17 N.Z.L.R. 712, followed, and *Ball* v. *Scott Timber Co., Ltd.*, [1929] N.Z.L.R. 570; [1929] G.L.R. 338, followed. *Kanieri Electric, Ltd.* v. *Hansford and Mills Construction Co., Ltd.*, [1931] G.L.R. 446, doubted.) *Motor Rebuilds, Ltd.* v. *Bollard and Others.* (S.C. Auckland. September 21, 1956. North J.)

WATERS AND WATERCOURSES.

Stopbank erected by Defendants to divert Water overflowing from Drainage Board Drain on to His Property—Such Water flooding Plaintiff's Land—Defendants not doing Anything Unlawful in erecting Stopbank—Foreign Water not "floodwater" and Nothing in Nature of Channel in which that Water was accustomed to run. The Waihou River was liable, in times of heavy rain, to overflow its banks and flood the properties in its vicinity, until the Crown, about the year 1926, erected a stopbank, which, on the western side, extended beyond the length of the plaintiff's farm which was near the western bank of the river though not actually adjoining it and the length of the defendants' farm which extended to the river bank. While this stopbank was effective in confining floodwaters in the river, it also interfered with the drainage of surface water from the adjoining lands into the river. The Drainage Board constructed and began to control a main drain, the Ahikope Drain, which was on the drainage reserve running along the northern boundary of the plaintiff's farm, and which extended for some four or five miles, beyond the properties of the parties. This drain had an outlet to the river through the stopbank, and, in dry weather, efficiently discharged into the river. When the river was in flood, it was necessary to prevent the floodwaters from coming up the drain on to the surrounding properties, and floodgates were placed at the outlet, which, when in good working order, effectually excluded the floodwaters. At the same time, the water coming down the drain was prevented from escaping into the river, and it spilled out over the lands outside the stop-

bank. To cope with this condition, the Drainage Board installed a pump to lift the water from the drain over the stopbank into the river. In times of heavy rain, the pump could not deal with the quantity of water coming down the drain, and the properties of both parties were flooded for considerable periods. The general slope of the land in the area was towards the river, and, as between the properties of the parties, it was from the plaintiff's land towards the defendants'. After the commencement of pumping operations, the defendants constructed a low stopbank, partly on an adjoining unformed road, and partly on their own land, and extended it to the river stopbank. The effect was to block the escape of water spilling out of the drain on to the defendants' property and beyond, until the water rose to the top of the new stopbank and flooded the plaintiff's land to an extent appreciably greater in area and longer in time. The plaintiff claimed that the erection of the stopbank erected by the defendants, in the manner and in the circumstances described in the judgment, was in contravention of his rights. He sought an injunction compelling the defendants to remove the stopbank, and damages for the loss he had already suffered. *Held*, 1. That the plaintiff could not compel the defendants to allow water to flow on to, and to flood, the defendants' land, as a vast quantity of water, which was brought by the Ahikope Main Drain to the vicinity of the defendants' property, would not have found its way there but for the artificial diversion of this foreign water by the system of stopbanks and drains extending for miles and bringing to their boundary water which otherwise would not reach there. (*Gibbons* v. *Lenfestey*, (1915) 113 L.T. 55, applied. *Wilsher* v. *Corban*, [1955] N.Z.L.R. 478, referred to.) 2. That the defendants, in erecting their stopbank to divert the water from their land, had not done anything unlawful, as the foreign waters were not "floodwaters" in the proper sense of that word, and there was nothing in the nature of a channel or alveus in which the floodwaters were accustomed to run. (*Gerrard* v. *Crowe*, [1921] 1 A.C. 395, applied. *Davies* v. *New Zealand Government Railways*, [1945] G.L.R. 97, and *Merry* v. *Canterbury College*, (1914) 16 G.L.R. 688, distinguished.) 3. That s. 155 (1) of the Soil Conservation and Rivers Control Act 1941 protects the Catchment Board in its operations, and does not give a right of action to a person who may suffer loss through non-observance of its provisions by others. 4. That, if a breach of s. 168 (1) (*a*) of the Public Works Act 1928 were established in respect of the defendants' erection of their stopbank partly on the unformed road without the consent of the local authority, that would not give the plaintiff a right of action against the defendants or against the local authority. *Strange* v. *Andrews and Others*. (S.C. Hamilton. September 7, 1956. Stanton J.)

WILL.

Construction—Home-made Will on Printed Form—Devise and Gift to Wife of Property—In event of Wife's Remarriage, all Property to Son—Subsequent Clause giving all Property to Wife "absolutely"—Wife taking Vested Interest in Whole Estate, subject to divesting in Event of Her Remarriage—In Such Event, Whole Estate to Son. The dispositive clauses in the testator's will, made by him on a printed form (as indicated), were as follows: "3. *I bequeath unto* My Wife Freda Lydia Hughes all property including House Land & Business, all personal belongings. & Live stock including horses, & Races Horses. including Brood mare's. in the event of my wife remarring The property is to be Transferred to my Son. Joseph John and. all. Horses to be sold. & moneys to be paid into P.O. Savings Bank for him, if Joseph is under. the age. of 21 years of age. when or. if his mother remarries the property is to be leased. & all. revenue to be paid into his P.O. saving account until he. becomes the age of 21 years and. then he shall decided what he is going to do with it for himself. 4. *I give devise and bequeath all my real and personal property of whatever kind and wherever situated unto* my wife Freda. Lydia *absolutely*" (The words in italics were printed on the will form.) On an originating summons to determine questions arising out of the will, *Held*, 1. That the two clauses were not repugnant; and the proper inference was not that the testator felt bound to repeat in cl. 4 what he had already said in cl. 3, but that he thought it would be sufficient if he repeated it in shortened form; and that when he filled in the words "my wife Freda Lydia" in cl. 4, he meant only that the property was to go to her as already indicated in cl. 3 and with the qualification already indicated in the clause. 2. That the widow took a vested interest subject to divestment in the event of her remarriage; and, in the event of her remarriage, the whole of the estate passed to the testator's son. (*Madill* v. *Madill*, (1907) 26 N.Z.L.R. 737; 9 G.L.R. 478, and *In re Watkins, Powdrell* v. *Watkins*, [1947] N.Z.L.R. 79; [1946] G.L.R. 381, referred to.) *Quaere*, Whether, where there is a possible future interest divesting a preceding interest under a will, the beneficiary under the preceding interest need give security for the return of the whole property upon the happening of the divesting. (*In re Watkins, Powdrell* v. *Watkins*, [1947] N.Z.L.R. 79; [1946] G.L.R. 381, considered. *Madill* v. *Madill*, (1907) 26 N.Z.L.R. 737; 9 G.L.R. 478, and *McLean* v. *McMorran*, (1892) 11 N.Z.L.R. 1, discussed.) *In re Hughes* (*deceased*), *Howell* v. *Hughes*. (S.C. Palmerston North. June 29, 1956. Barrowclough C.J.)

WORKERS' COMPENSATION.

Action commenced Six Months after Payment of Compensation—Dermatitis—Compensation paid for Period of Incapacity—Worker suffering Loss of Earnings—Claim for Same made after Expiry of Six Months after Payment of Compensation—Employer neither admitting nor denying Liability—Worker's Solicitors in Correspondence with Employer as to Amount of Loss of Wages—Delay reasonable in Circumstances—Workers' Compensation Act 1922, s. 27 (2). On February 8, 1955, the plaintiff, when in the employ of the Ministry of Works, suffered an incapacity due to dermatitis, and was off work for three days, and, on February 21, 1955, he was paid compensation in respect of that period; thereafter, he had medical advice that he must not work with cement. He obtained work elsewhere, but the wages were less than the amount he had received from the Ministry of Works. On October 14, the plaintiff commenced an action claiming compensation in respect of loss of earnings and of earning capacity due to a contact dermatitis. The action was commenced approximately two months after the expiry of the six-months' period after the payment of compensation to him. The plaintiff's solicitors corresponded with the Ministry of Works with regard to a settlement. On October 14, the Ministry of Works informed the plaintiff's solicitors of the plaintiff's average weekly earnings. It neither denied nor admitted liability. *Held*, That the action was not barred by s. 27 of the Workers' Compensation Act 1922, since, there being no denial of liability, the plaintiff's advisers were entitled to assume that the Ministry of Works admitted that the contact dermatitis was attributable to the employment and it appeared that the only question on which there would be any difference between the parties was the question of the amount of loss of wages suffered by the plaintiff from which the compensation would be calculated, and the inquiries of the plaintiff's advisers were directed towards obtaining that information; and they had acted reasonably in not issuing a writ immediately on receiving their instructions. *Davis* v. *Attorney-General*. (Compensation Court. Hamilton. July 5, 1956. Dalglish J.)

Hernia—Duty to report Condition to Employer within Seventy-two Hours after Occurrence of Strain—Such Period ending on Sunday—Next Day a Holiday—Duty to Report fulfilled by reporting on the Tuesday—"Ceased work"—Worker not required to cease Work at Time of Strain and not to recommence Work before Reporting Condition—Workers' Compensation Amendment Act 1943, s. 6 (1)—Acts Interpretation Act 1924, s. 25 (a). On Thursday, June 2, 1955, B., a fitter, employed by the defendant company, was helping to lift a pump into position when he felt pain in his right groin. He rested for about five minutes. He then assisted in placing the pump in position, and did not feel well afterwards. He then rested for a further period of half an hour. He did not report to his foreman as he was unable to find him on that afternoon. On the following day, he failed to report the incident to his foreman. During the week-end, a lump became apparent. Monday was the Queen's Birthday holiday. On the Tuesday, he reported the incident to his foreman and signed a notice of accident form. He saw a doctor and was told he had a hernia. Later, he entered hospital for an operation. *Held*, 1. That the hernia was not a recent hernia but "an aggravation . . . of a pre-existent hernia" within the meaning of s. 6 (1) (*a*) of the Workers' Compensation Amendment Act 1943, caused by the strain of lifting the pump on June 2; and, as it resulted in immediate pain and disablement, the requirements of s. 6 (1) (*a*) and (*b*) were satisfied. 2. That, although B. made no report to his employer until some 116 hours after the strain, his reporting of his condition to his employers on Tuesday, June 7, being the first day after Sunday, June 5, which was not a holiday, was a compliance with the requirements of s. 6 (1) (*c*) as to the time for reporting. 3. That the expression "ceased work" as used in s. 6 (1) (*c*) does not mean the worker is required to cease work at the time of the strain and not recommence work before reporting to the employer within 72 hours; and that, in the present case, the "cessation of work" was for a long enough time to enable the Court to hold that B. had "ceased work at the time of the strain or other accident" within the meaning of s. 6 (1) (c). *Boyd* v. *New Zealand Refrigerating Co., Ltd.* (Compensation Court. Christchurch. August 17, 1956. Dalglish J.)

JUDICIAL PRECEDENT.

The Authority of the House of Lords.

By A. G. Davis.

Probably one of the most quoted and, at the same time, one of the most authoritative statements on the doctrine of judicial precedent is to be found in the words of Parke J., in *Mirehouse* v. *Rennell* :[1]

> Our Common Law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise. . . . It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

New Zealand being a country to which the Common Law system applies, it is submitted that the dictum quoted above was sufficient justification for the Court of Appeal in *Smith* v. *Wellington Woollen Co., Ltd.*[2] to follow the decision of the House of Lords in *British Transport Commission* v. *Gourley*[3] and consequently not to follow its own previous decision in *Union Steam Ship Co., Ltd.* v. *Ramstad.*[4] This submission is made on the assumption that principles of law laid down by the House of Lords are laid down by the highest tribunal having authority to lay down those principles.

This assumption the writer sought to prove to be correct in an article in this Journal last year.[5] But as the correctness of that assumption has been challenged by Dr R. B. Cooke in a recent issue of this Journal,[6] it is necessary to revert to the question; not for the purpose of restating the submissions previously made, but to reply to Dr Cooke's arguments.

After referring to the dictum of Lord Dunedin in *Robins* v. *National Trust Co.*[7] to the effect that a Colonial Court which is bound by English law is bound to follow the House of Lords, Dr Cooke stresses the point that that decision was given in 1927, since when there has been a great evolution in Commonwealth constitutional relations. He cites the Statute of Westminster 1931 and the Declaration of London 1949. The immediate relevance of the Statute and the Declaration are not appreciated because they dealt with the constitutional relations of members of the Commonwealth in broad outline with no reference to such questions as the doctrine of judicial precedent. Even so, the Imperial Conference had, in 1926, resolved that Great Britain and the Dominions were "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs. . . ." Lord Dunedin was surely not ignorant of that resolution and of its terms. Again, the stress in the Declaration of London 1949 was not on the phrase "free and equal members of the Commonwealth of Nations", but on the fact that the members "remain united". Remaining united was the essential factor when India became a republic.

It is conceded that the Statute of Westminster paved the way for any of the Dominions to dissociate itself from the judicial system theretofore in existence and, by abolishing appeals to the Privy Council, create its own final court of appeal which would not, thereafter, be bound by any decision of the House of Lords, though doubtless any such decision would remain of strong persuasive authority. This is what Canada has done. The validity of its legislation abolishing appeals to the Privy Council and conferring on the Supreme Court of Canada "exclusive ultimate appellate civil and criminal jurisdiction within and for Canada" was upheld by the Privy Council in the second decision to which Dr Cooke refers: *Attorney-General for Ontario* v. *Attorney-General for Canada.*[8] As the judgment says:[9] "It appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of Appeal having jurisdiction both ultimate and exclusive of any other member."

Canada has set up a Supreme Court of Appeal. New Zealand has not. The position of the two Dominions is, therefore, hardly comparable. On that ground it is submitted that even if the attention of the Court of Appeal had been drawn, in *Smith's* case (*supra*) to *Kerr* v. *Kerr*[10]—a decision of the Manitoba Court of Appeal to which Dr Cooke refers—it would not have affected the Court of Appeal decision in *Smith's* case. Moreover, even if *Kerr* v. *Kerr* were relevant, it is hardly a strong authority in support of the proposition that the New Zealand Court of Appeal was not bound to follow a decision of the House of Lords. Five judges sat in the Manitoba Court of Appeal. McPherson C.J.M. did follow the decision of the House of Lords in *Preston-Jones* v. *Preston-Jones.*[11] Coyne J.A. said, simply, without any reference: "We are not, of course, bound by English cases." Dysart J.A. said: "I venture to express my opinion that Canadian Courts should follow Canadian precedents rather than decisions of English Courts, which are not binding upon us." Adamson J.A. made no reference to the point and Montague J.A. did not deliver a separate judgment, but concurred with Coyne and Dysart JJ.A.

Even if the decisions of the Canadian Courts are to be cited as precedents, it is submitted that better authority is to be found in what those Courts do than in what they say. Probably there is no better example of what the Canadian Courts do than the recent case of *Brewer* v. *McCauley*,[12] in which, without examining the question whether it was bound to follow a decision of the House of Lords, the Supreme Court of Canada did, in fact, do so.

The issue involved was the same as that in *Chichester*

[1] (1833), 1 Cl. & F. 527, 546.
[2] [1956] N.Z.L.R. 491.
[3] [1955] 3 All E.R. 796.
[4] [1950] N.Z.L.R. 716.
[5] (1955), 31 N.Z.L.J. 42.
[6] *Ante*, p. 233.
[7] [1927] A.C. 515, 519.
[8] [1947] A.C. 127; [1947] 1 All E.R. 137.
[9] At p. 153; 145.
[10] [1952] 4 D.L.R. 578.
[11] [1951] A.C. 391; [1951] 1 All E.R. 124.
[12] [1955] 1 D.L.R. 415.

NEW LEGAL PUBLICATIONS.

Diocesan Fund v. *Simpson*,[13] namely, whether a bequest of the residue of an estate to be applied "for charitable, religious, educational or philanthropic purposes" was void for uncertainty. The Supreme Court of Canada, following *Simpson's* case (*supra*) held that the gift was void. Kellock J. said: "In my view the case at bar is governed by the principle of the decision in *Chichester Diocesan Fund* v. *Simpson*" (*supra*).

The appeal was brought by the executors and by the Attorney-General for New Brunswick. Separate counsel appeared for each of the appellants and both strenuously contended that, whether *Simpson's* case (*supra*) was rightly or wrongly decided, the Supreme Court was not bound by it.

As counsel for the Attorney-General said in his submissions:[14] "Canadian Courts have not invariably considered themselves bound by decisions of English Courts of higher jurisdiction. That is now especially true since the Supreme Court of Canada is the Court of last resort in Canada." Counsel for the executors made his submissions on this point in more detail. He said: "It is further submitted that, since the abolition of appeals from Canadian Courts to the Judicial Committee the decisions of the House of Lords are no longer binding on this Honourable Court. They are of strong persuasive value but they are only persuasive, not binding. . . . It is true that in the *Robins* case, [1927] A.C. 515, it was said that decisions of the House of Lords were binding on Colonial Courts. That case, however, was decided before the decision in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1947] A.C. 127, and before the abolition of appeals to the Judicial Committee. It can no longer be said that this Honourable Court is in any sense a 'Colonial Court'."

It is a matter for regret that the Judges in the Supreme Court of Canada did not advert to these submissions in their judgments and did not say whether they regarded *Simpson's* case as a binding or merely a persuasive authority. The fact is that they did follow it.

It is submitted that, if Canada's ultimate Court of Appeal, which is no longer linked with the English judicial system through the Judicial Committee, sees fit to follow decisions of the House of Lords, then the New Zealand Court of Appeal, which is not the ultimate appellate tribunal and which remains linked to the English system through the Judicial Committee, should a fortiori follow those decisions.

It is not desired to lengthen this note by entering into a discussion concerning the "unsatisfactory" decisions of the House of Lords referred to by Dr Cooke. But when he writes of "decisions which are regarded by the weight of professional and academic opinion in England itself as manifestly unsatisfactory or inconsistent with highly valued principles of the common law", he should at least suggest how this weight of professional and academic opinion is to be determined. One can, without difficulty, determine the weight of the opinion of five Judges in the House of Lords or even of three Judges of that tribunal against a dissenting two. But however much extra-judicial opinion may affect the decision of a court which is not bound by its own decisions or by those of a superior tribunal, such opinion is not, in itself, decisive. To make it so would be to destroy any hope of certainty and uniformity.

In the interests of accuracy of language, attention should be drawn to the fact that the headnote in *In re Rayner*[15] does not correctly state the opinion of the majority of the Court of Appeal as stated by Finlay J.[16] Dr Cooke says that the "Court of Appeal [in *Smith's* case] professes to follow *In re Rayner* (1947) where a majority of both Divisions of the Court sitting together held, as is stated in the headnote:

> The Court of Appeal is free to overrule a judgment of that Court which is contrary to the current of New Zealand authority theretofore existing, or which, though not expressly overruled is, in principle, in conflict with a decision of the House of Lords . . . *or*[17] inconsistent with a judgment of the High Court of Australia.

He continues:

> It will be noticed that the decision was that the Court was free to overrule a previous judgment in the circumstances mentioned, not that it was bound to do so.

But what the Court of Appeal in *Smith's* case (*supra*) did was to follow the principle expressed by Finlay J. in *Rayner's* case (*supra*) as follows:

> Viewing the whole position broadly, it is inconceivable that a judgment of the Court of Appeal of New Zealand inconsistent with a decision, or the spirit of a decision, of the House of Lords, *and*[17] inconsistent with a considered judgment of the High Court of Australia, should have to be perpetuated by this Court.

No mention is made of freedom to overrule a previous judgment or compulsion to follow it, but the words of Finlay J. do suggest a rule of policy or of law on which the Court of Appeal based its decision in *Smith's* case.

Whether in following the decision of the House of Lords in *British Transport Commission* v. *Gourley* (*supra*), the Court of Appeal in *Smith's* case (*supra*) has followed a rule of policy or a rule of law, it has taken a decisive step along the path leading to uniformity, consistency and certainty which Parke J. advocated in *Mirehouse* v. *Rennell*.[18] For that reason, if for no other, the decision in *Smith's* case (*supra*) is welcome.

[13] [1944] A.C. 341; [1944] 2 All E.R. 60.
[14] The submissions of counsel do not appear in the report, but they are dealt with at length in an article by Professor G. D. Kennedy in (1955), *33 Canadian Bar Rev.*, 340.
[15] [1948] N.Z.L.R. 455.
[16] At p. 508.
[17] The writer's italics.
[18] (1833), 1 Cl. & F. 527.

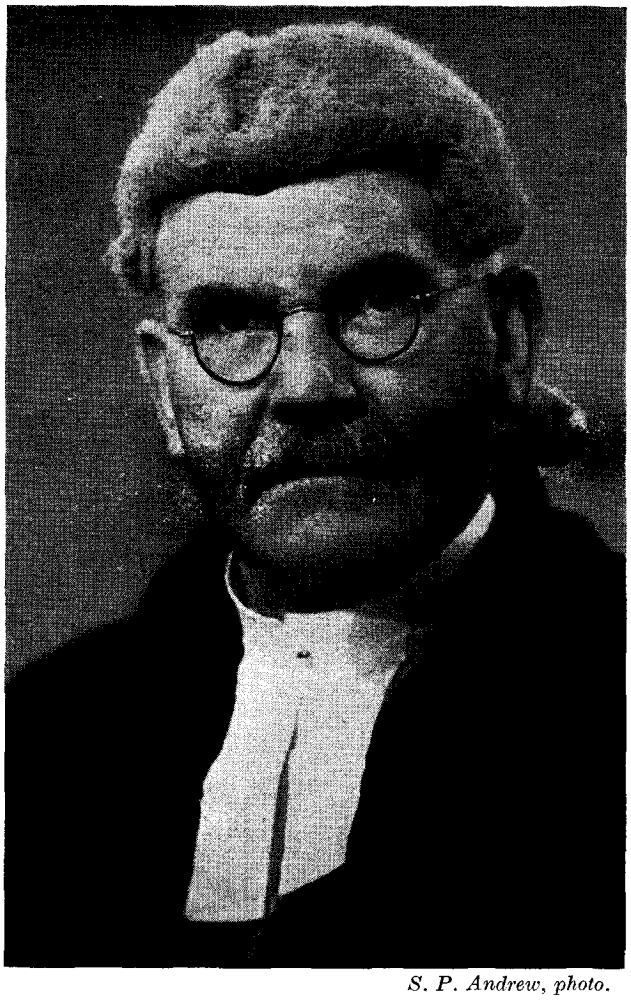
The M'Naghten Rules.—What is the meaning of the words "disease of the mind" in the M'Naghten Rules that require of an accused that he must show that he "is labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act"? In *R.* v. *Kemp*, [1956] 3 All E.R. 244, the medical evidence showed that the accused was suffering from arteriosclerosis which is a hardening of the arteries but which is also capable of affecting the mind. It was contended for the Crown that the words "disease of the mind" were to be construed in order to distinguish between disease of the mind and diseases of the body, as having a mental as distinct from a physical origin. Devlin J. declined to uphold this argument and held that the reference to disease of the mind was directed to limiting the effect of the words "defect of reason". In his view, in order to satisfy the M'Naghten Rules, it would be sufficient if the disease in fact induced a defect of reason under which the accused suffered at the time of the act.

LEGAL PORTRAITS.

I. Patrick Joseph O'Regan.

At a great meeting in the Auckland Town Hall, towards the end of the nineteen thirties, a man of magnificent physique began an eloquent address with the words: "I was born in the primeval forest of Westland, seventy years ago". It seemed incredible. He looked like a man in the prime of life. He was Judge O'Regan of the Court of Arbitration.

He was born at Charleston, then an important gold-mining centre, and soon after his parents took up a bush farm. There was no school within reach, and it was not till he was fifteen that he received any formal education, when for nine months he was a pupil in the Ahaura Academy kept by Father Rolland, a French priest. After spending two years in Taranaki he returned to the West Coast, and in addition to his farm work he undertook road contracts, cut bush tracks, prospected for gold, and continued his studies, reading widely in history and biography. When he was twenty-two, he became editor of the Reefton *Guardian* and later of the *Inangahua Times*.



S. P. Andrew, photo.

The Late Judge O'Regan.

His interests at this time were political, and he seemed destined for public life. He was a Radical, a disciple of Henry George, the advocate of Single Tax, who visited New Zealand. He was a believer in proportional representation and rating on unimproved values. In 1893, the member for Inangahua resigned and O'Regan announced himself as a candidate. It then appeared that Sir Robert Stout, temporarily out of politics, had agreed to nomination on condition that he would not have to address any meetings. O'Regan was not dismayed and continued his campaign, walking from end to end of the electorate, meeting and talking with the settlers. Sir Robert thought it expedient to visit the district after all, and addressed several meetings. He was elected, but soon after decided to contest the Wellington City Seat, and O'Regan was elected member for Inangahua. He was then not twenty-five years of age. Three years later, on a change of boundaries, he was elected for Buller, defeating Mr James Colvin. At the next election, however, he was the defeated candidate.

He was now without occupation, a married man with a young family, and thirty-one years of age. He took the courageous step of removing to Wellington in order to study for admission to the legal profession. There he earned a living by journalism and attended classes at Victoria University College. In due course he passed the examinations and was admitted as a barrister and solicitor. Once again his magnificent energy of mind and body had triumphed.

Legal work came to him and extended. His office was close to the Courts and he was his own clerk. There was then a vacant section covered with long grass adjoining the Magistrates' Court, but a track appeared across it. Dr McArthur, the Magistrate, looking out from his window, observed that the track was made by P. J. O'Regan, coming from his office to file documents. He had grown up in places where there were no footpaths and few roads, and always went by the shortest way. His interest in political life had not abated and he twice contested Wellington seats, but without success. By that time his practice had grown to such an extent that he found it necessary to devote his whole time to it.

With his practical knowledge of labour conditions it was natural that he should specialize in Industrial Law; and Workers' Compensation for Accidents and negligence in relation to accidents became his special field. He constantly appeared before the Arbitration Court and the Supreme Court in such cases, travelling from end to end of New Zealand. Only a man gifted with his splendid physique could have done it and kept it up year after year. On one occasion there was an accident in the tunnel at Lake Coleridge, in the back country nearly a hundred miles from Christchurch where men were engaged on the hydro-electric works, and a number were killed. The Coroner was informed that a Wellington lawyer would represent the dependants of some of them, but the time for the inquest had arrived and no one from Wellington was present. The Christchurch lawyers, standing outside the little Court House, looked out across the plain and at length

saw a car approaching at speed. Mr P. J. O'Regan had arrived, and nearly on time.

For over thirty years this strenuous life proceeded, and he became an authority on the class of cases to which he devoted himself. Perhaps the occasion of his greatest satisfaction was when his opinion that the Workers' Compensation Act applied to victims of the Napier Earthquake who were engaged on their work at the time of the catastrophe, was upheld on appeal to the Privy Council.

In 1937, he was appointed Judge of the Court of Arbitration. He was sixty-eight years of age; and, as Judges must retire at seventy-two, it could hardly be expected that his tenure of judicial office would be long. However, several extensions of time were granted, and he continued to serve for nearly ten years.

But in the Arbitration Court his health and strength were tried to the utmost. The new legislation which followed the accession to power of the Labour Government in 1936 resulted in greatly increased work for that Court, which fell seriously into arrears. The Second Court was set up for a year, and in spite of somd difficulties of its own during the latter months, die succeed in correcting the position. But the work piled up again and several times the Judge had to go into hospital. On one occasion he continued sitting for a week while suffering from influenza and bronchitis, and then collapsed and was taken to hospital. On the setting up of a separate Court for Workers' Compensation cases he was appointed its Judge, and on retiring from that office a member of the Legislative Council. There he immediately gave notice of his intention to introduce a Bill designed to declare void conditions on tickets for travel by land, sea, or air when damage is caused to the persons or goods of passengers by negligence. On the second reading, he gave instances of the wrecks of ships on the New Zealand coast, which, he said, were caused by negligence of the masters, and rescued passengers had no remedy but to seek public assistance. He was applauded by Members as he resumed his seat.

During one of his illnesses, I visited him in hospital. He said: "I am much worse than I thought and will have to be here for some time yet". We talked of Arbitration Court matters and he then told me of some of his experiences in Parliament fifty years earlier. One story he told me may be worth repeating. John McKenzie was Minister of Lands. George Hutchison, addressing the House, said: "William Rolleston was a land reformer when the present Minister was dagging sheep". "What's that you say?" said McKenzie. "I said, Mr Speaker, that William Rolleston was a land reformer when the present Minister was dagging sheep—a useful, sanitary, but not exalted occupation." "Well", said McKenzie, "seeing that the Almighty called David from the sheepfolds to become King of Israel, it may be not unfitting that a man who has been a shepherd should be a Member of this Hoose".

In his practice as an advocate O'Regan was completely candid, both with the Court and his fellow practitioners. He worked out what he thought was a fair claim and never rejected a reasonable settlement. When his cases went to Court, he fought vigorously, but with fairness and good humour. Tolerant and kindly, he was a man of transparent honesty in public, professional, and private life.

It fell to O'Regan during his life to make three great resolutions and to carry them into effect. The first was to enter political life. Conscious of physical strength as he grew to manhood greater than that of his fellows, he was aware too, of powers of thought and speech also beyond theirs. He turned naturally to political life as his vocation and this was the end before him in his studies, pursued at the end of the working day, and of his editing of provincial newspapers. His courage and ability were shown when his illustrious opponent, the former Premier and leading advocate, found that, against his wishes, it was desirable to campaign actively against this stripling. Defeated once, he tried again, was elected, spent a few years in Parliament, only to be again defeated. Then he made his second resolution—to take his family to Wellington, where there was a University College, and study law. This again had to be done in addition to earning his bread. He succeeded, developed a large practice in his special fields, and at the age of sixty-eight was offered the judicial position for which he was so eminently fitted. But, if he accepted it, his practice would be scattered, and he could expect to retire in three years without pension or recompense. He did accept it, and for nearly ten years travelled New Zealand from end to end, sitting in Court by day, working at his various problems by night. This, his third important resolution, was, in fact, only the further expression of that courage, supported by hard work, which had characterized him all his life, but it took toll of his health and strength.

He died in April, 1947. He was seventy-eight years of age.

W. J. HUNTER.

The Coat Tails of the State.—In this day and generation our most essential pre-occupation surely should be to keep right in front of our minds every hour of every day the lesson which history has plainly taught, that of all the tyrannies of man over man the tyranny of Government is the easiest to create and the hardest to destroy; that while we must guard ourselves, and can guard ourselves, against enemies from without whom we can identify and meet, we must also guard with equal zeal against the well-meaning, misguided person living right among us who would lead us into dependence on the paternalistic State—the paternalistic State which is always ready to gather us in ever-increasing debility and stagnancy under its lordly wings. (From an address by the Rt. Hon. Arthur Meighen, "The Welfare State", to the British Columbia Bar Convention at Victoria, B.C.)

Mortgagee as Trustee.—The Lord Chancellor (the Earl of Eldon) said that a mortgagee was only in a certain qualified sense a trustee, since a mortgagee in possession, keeping no account and receiving the rents for twenty years without account, would become the owner of the estate. The mortgagor would be barred by the lapse of time; that it had been held in a cause at the Cockpit [Privy Council Chamber], where Lord Kenyon assisted, that such a case stated in a pleading would leave it open to demurrer: *Cholmondeley* v. *Clinton*, (1821) 4 Bligh 1, 23; 4 E.R. 721, 730.

THE NEW COMPANIES ACT 1955.

Recent Cases on Table A.

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

(*Concluded from p. 288.*)

DISMISSAL OF MANAGING DIRECTOR.

Article 107 of Table A of the Companies Act 1955 reads as follows:

> 107. The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit, and subject to the terms of any agreement entered into in any particular case, may revoke any such appointment. A director so appointed shall not, while holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment shall be automatically determined if he ceases from any cause to be a director.

Now, the case of *Read* v. *Astoria Garage* (*Streatham*), *Ltd.*, [1952] Ch. 637; [1952] 2 All E.R. 292, was one under Art. 68 of Table A of Schedule 1 to the Companies Act, 1929 (U.K.), which read somewhat differently:

> The directors may from time to time appoint one or more of their body to the office of managing director—but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director . . . be determined.

It was held that the appointment of a managing director of a company which has adopted Art. 68 of Table A may be terminated by the company in general meeting at any time without any notice.

From this case there may be deduced, I think, the following rule:

A director, who is appointed managing director pursuant to Art. 107 of Table A of the Companies Act 1955, will, in the absence of any special agreement to the contrary, have no redress, if his appointment is revoked by the directors with or without notice of the termination of his employment.

In the course of his judgment in the Court of Appeal, Jenkins L.J. distinguished the House of Lords case, *Southern Foundries (1926) Ltd.* v. *Shirlaw*, [1940] A.C. 701; [1940] 2 All E.R. 445, another case dealing with the dismissal of a managing director. He said:

> We were also referred to the case in the House of Lords of *Southern Foundries (1926) Ltd.* v. *Shirlaw*, in which the majority of their Lordships held the managing director concerned to be entitled to damages. That is, however, an entirely different case from the present case, for two reasons. In the first place, there was a contract of service between the company and the managing director *dehors* the articles of association; and in the second place, the contract was sought to be determined by a power not present in the articles of association of the company as they stood at the date of the contract, but was inserted in the articles by subsequent alteration. In my view, therefore, the case was wholly different from the present case, and it does not seem to me that any assistance can be obtained from it for the present purpose.

LIMITATION OF MANAGING DIRECTORS' FUNCTIONS.

Articles 107, 108, and 109 of Table A of the Companies Act 1955 are all under the heading of *Managing Director* and are identical with Arts. 107, 108, and 109 of Table A of the Companies Act, 1948 (U.K.). These three articles were examined in the House of Lords by Viscount Kilmuir L.C., in *Harold Holdsworth and Co.* (*Wakefield*), *Ltd.* v. *Caddies*, [1955] 1 W.L.R. 352, 356; [1955] 1 All E.R. 725, 729, as follows:

> Paragraph 107, the first dealing with a managing director, is as follows—[His Lordship quoted the article and then continued:] That paragraph states specifically that the board can fix such terms as they think fit, while the director so appointed gets the advantage of not being subject to retirement by rotation. Paragraph 108 gives the directors the right to determine remuneration. Paragraph 109 gives the directors a complete discretion to entrust to, and confer on a managing director any of their own powers. I cite with approval the summary in *Halsbury's Laws of England*, 3rd Ed. Vol. VI, p. 297, where it is stated: "A managing director may either be merely a director with additional functions and additional remuneration, or else he may be a person holding two distinct positions, that of a director and that of a manager." I cannot find, either in the statute or in the cases in which the matter has been considered, anything to prevent a board of directors appointing a managing director and limiting his duties according to their own wishes.

The facts were that, by an agreement between the appellant company and the respondent, it was provided that for a term of five years he was appointed

> a managing director of the company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses . . . of its existing subsidiary companies— . . . which may from time to time be assigned to or vested in him by the board of directors of the company.

Subsequently, the board resolved that he should confine his attentions to one of the subsidiaries only. The managing director brought an action against the company for damages for breach of contract. It was held by the House of Lords that there was nothing in the Companies Act 1948 (U.K.) which prevented his managerial duties being limited to such activities as the board might select; and that the resolution of the company did not amount to a breach of contract. Of course the contract contemplated, as pointed out by Lord Reid, that any duties assigned to the managing director must be of a managerial character; it would have been a breach of contract by the company had the manager been assigned duties of a wholly subordinate character.

SIGNING OF CHEQUES ON BEHALF OF A COMPANY.

In *Commercial Bank of Australia, Ltd.* v. *Furey and Associates, Ltd.* (*in Liqdn.*), [1954] N.Z.L.R. 851, the question in issue was whether Art. 23 of that company's articles so overrode Article 67 of Table A of the Companies Act 1933 as to prevent the directors from authorizing the directors to resolve that one person should sign cheques on behalf of the company. Section 41 of the Companies Act 1933 provided that a bill of exchange or promissory note should be deemed to have been made, accepted, or endorsed in the name of or by or on behalf or on account of, the company by any person acting under its authority. This section is s. 43 in the Companies Act 1955, and the wording of both sections is identical. The article reads:

> The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company, as are not, by the Act, or by these articles, required to be exercised by the company in general meeting,

subject, nevertheless, to any regulation of these articles, to the provisions of the Act, and to such regulation, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

With two slight verbal alterations which are not material, Art. 80 of Table A of the 1955 Act is identical. Therefore, *Commercial Bank of Australia, Ltd.* v. *Furey and Associates, Ltd.* (*in Liqdn.*) will remain authoritative when the 1955 Act comes into force. Article 23 of this company read as follows:

> Instruments to which the seal of the company is affixed and all cheques bills of exchange promissory notes and other assurances and instruments shall be sufficiently executed on behalf of the company if signed by the Chairman alone or by any Directors of the Company or by one Director and the Secretary and clause 71 of Table A shall not apply.

Now Art. 71 of Table A of the 1933 Act reads as follows:

> The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of a director and of the secretary or such other person as the directors may appoint for the purpose; and that director and the secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Shortly after its incorporation, the directors of the company passed a resolution authorizing a certain person to operate on its bank account with the Commercial Bank.

Mr Justice Hutchison held that this person had authority to operate on the company's bank account with the Commercial Bank. In the course of his judgment, His Honour said:

> *Prima facie*, Art. 23 is not restrictive. It appears to me, as regards the use of the seal of the company, to be intended mainly to do away with the requirement of a resolution of directors contained in Art. 71 of Table A. In my opinion, as regards the affixing of the company's seal Art. 23 is enabling or declaratory. The difference between a restrictive article and an enabling or declaratory article is exemplified, as it seems to me, by the contrasting wording of Art. 71 of Table A, "shall not be affixed to any instrument except . . ." and of Art. 23 of the company's articles "shall be sufficiently executed . . . if . . .". . . . Cheques and the like do not normally require to be executed under seal, but in this particular article they are referred to along with instruments under seal. Cheques may be signed on behalf of or on account of a company by any person acting under its authority: see s. 41 of the Companies Act, 1933. The question is whether the article is, as regards cheques, to be read so as to restrict the persons who may be authorized to sign them to those named in the article. This is a pure question of construction, and, in my opinion, the article is not to be so read, but is to be read, with cheques, as well as with instruments under seal, as declaratory.

Table A not Applicable to a Co-operative Dairy Company.

Finally, it may be pointed out that Table A does not apply to a co-operative dairy company registered under the Co-operative Dairy Companies Act 1949, which has its own set of model articles set out in a Schedule to that Act. Some of these special articles are compulsory, others are optional; many of them resemble articles in Table A which obviously was largely drawn on by the draftsman of the Co-operative Dairy Companies Act 1949. As this article is being written there is before Parliament a Bill amending the Co-operative Dairy Companies Act 1949, the main purpose of which is to reconcile the provisions of the Companies Act 1955 with dairy-company law and practice; for example, the provisions of the Companies Act 1955 expressly authorizing advocates to appear at meetings of a company and to speak on behalf of a member are totally alien to dairy-company practice; and as there are special provisions laid down by Regulations as to the form of dairy-company accounts, ss. 153-161 of the Companies Act 1955 (which relate to the contents and form of accounts, group accounts, and auditors' and directors' reports) will not apply to co-operative dairy companies.

Donatio Mortis Causa.—"No Court of Equity will compel a completion of [voluntary conveyances], and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed; but I think that is a misapprehension, because nothing can be more clear than that this *donatio mortis causa* must be a gift made by a donor in contemplation of the conceived approach of death, that the title is not complete until he is actually dead, and that the question therefore never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causa* can call upon the representatives, real or personal, of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personalty, the executor, and in respect of realty, the heir-at-law, are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causa*, whether after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether on the other hand, if it be a gift affecting the real interest—and I distinguish now between a security upon land and the land itself—whether it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do, but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor": The Earl of Eldon, in *Duffield* v. *Elwes*, (1827) 1 Bligh N.S. 497, 530; 4 E.R. 959, 971.

Old Age Pension Statute.—"The case has been argued with very great force, ability, and ingenuity, but the task that was set before the learned counsel who argued the appeal was an extremely difficult one, and it would really require the Act of Parliament to be drafted differently to give force to many of their contentions. . . . Would it not be absurd to say that a previous section had compelled the pension authorities to go on paying with one hand while the State would have the right to intervene and to compel that hand to disgorge without delay?" Lord Ashbourne, in *Murphy* v. *The King*, [1911] A.C. 401, 407.

INTERNATIONAL BAR ASSOCIATION.

Conference Held at Oslo.

Representing the New Zealand Law Society at the Sixth Conference of the International Bar Association held in Oslo, Norway, in July, 1956, were the Hon. Mr Justice Hutchison and Mr N. R. Bain, both of whom were accompanied by their wives. Other members of the New Zealand Bar attended as conferees.

The Den Norske Sakforerforening (the Norwegian Bar Association) was the host. Member Associations comprising the National Bar organizations of a large part of the world sent delegations to the Conference. Forty countries were represented by 464 members of the legal profession, accompanied by 251 guests. The Opening Session was held at the University of Oslo and was attended by His Royal Highness Crown Prince Olav. The working sessions were held at the Oslo Commercial Association, and the closing banquet at the Hotel Bristol.

Thirty-five Member Organizations of the IBA appointed official delegates to the General Meeting (formerly known as the House of Deputies) which met on July 25. The General Meeting approved the recommendations of the Committee on Organization and Procedure, headed by Rolf Christophersen of Norway, and adopted substantial amendments to the Constitution and By-Laws of the Association, designed to simplify and improve procedures and to make the IBA more responsive to its Member Organizations.

The Association also approved a proposed International Code of Ethics for the Legal Profession which had been discussed at several earlier conferences. Formulated as a statement of principles for the guidance of lawyers handling cases of international character, the Code is " in no way intended to supersede existing national or local rules of legal ethics or those which may from time to time be adopted".

The General Meeting on July 25 elected the following Officers of the International Bar Association: Loyd Wright, Chairman (formerly Speaker of the House of Deputies); Gerald J. McMahon, Secretary General; and Thomas G. Lund, Treasurer. The following were elected to the Council to serve for a period of two years—*Elected by the General Meeting*: Rolf Christophersen (Norway), Roberto Reyes Morales (Spain), T. P. Cleary (New Zealand), Manuel G. Escobedo (Mexico), Bernt Hjejle (Denmark), and J. R. Voute (Netherlands). *Elected by the Council*: Arturo A. Alafriz (Philippines) and Mahmoud El Hennawi (Egypt).

The terms of the following Councillors previously elected will also expire in two years, at which time, pursuant to revisions in the Constitution, the Council will be reconstituted and a fixed system of rotation established for the election of Councillors: Mohammed Adham (Iraq), Sureyya Agaoglu (Turkey), Zafer Kassimy (Syria), Pierre Lepaulle (France), Hans L. F. Meyer (Switzerland), S. S. Nehru (India), Walter Oppenhoff (Germany), Richard O'Sullivan, Q.C. (U.K.), M. Siddiq (Pakistan), and Robert G. Storey (U.S.A.).

The following topics were discussed by conferees in Plenary Session and Symposia:

International Ship-Building Contracts: Particularly Legal Problems in Connection with Finance and Security.
Chairman: D. Park Jamieson (Canada).
Rapporteur: Sjur Brawkhus (Norway).

The Legal Profession: The Work of the Organized Bar in Furthering the Legal Profession and its Public Services.
Chairman: Ralf Risk (Scotland).
Rapporteur: Charles S. Rhyne (U.S.A.).

Administration of Foreign Estates: Problems of Executors and Possible Solutions.
Chairman: Bernt Hjejle (Denmark).
Co-Rapporteurs: Philippe Gastambide (France) and Douglas L. Edmonds (U.S.A.).

Suggestions for Alleviating Hardships Arising from Sovereign Immunity in Tort and Contract.
Chairman: Manuel Escobedo (Spain).
Rapporteur: Mario Matteucci (Italy).

Suggestions for Improvement of International Treaties to Avoid Double Taxation.
Chairman: Lutfi Sav (Turkey).
Co-Rapporteurs: J. van Hoorn, Jr. (Netherlands) and Raoul Lenz (Switzerland).

Foreign Divorces—Problems Arising and Possible Solutions.
Chairman: Hon. Mr. Justice Hutchison (New Zealand).
Rapporteur: P. L. Burgin (England).

In addition, Meetings of Committees were held to consider the following:

Human Rights.
Acting Chairman: Manuel G. Escobedo (Mexico).
Rapporteur: J. C. S. Warendorf (Netherlands).

International Economic Co-operation.
Acting Chairman: John D. Randall (U.S.A.).
Rapporteur: M. H. Ramirez (Puerto Rico).

Immigration and Naturalization.
Chairman: E. J. Bruno Weil (U.S.A.).

Ways and Means of Improving Facilities for Legal Aid for Foreign Nationals, whether Resident or Non-Resident.
Acting Chairman: Orison S. Marden (U.S.A.).

International Judicial Co-operation:
(*a*) Difficulties Arising in Connection with Taking Evidence Abroad.
(*b*) Serving Judicial Documents Abroad.
Vice Chairman: Phillip W. Amram (U.S.A.).

Proposals for an International Code Regulating the Handling of Property of Enemy Nationals and Residents in Enemy-Occupied Territory.
Acting Chairman: Eli Whitney Debevoise (U.S.A.).

More than fifty papers on Conference topics were presented by outstanding members of the legal profession appointed by their respective national Bar

(*Concluded on p. 304.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Sparse Judgments.—A correspondent who has been pleased to find himself within " a very pleasant clearing in the jungle of forensic verbiage " has drawn the attention of Scriblex to two short recent judgments of Danckwerts J.—the first of eighteen lines (*Esdaile* v. *Lewis*, [1956] 2 All E.R. 357) containing the passage :

> " But it seems to me that ' No sub-letting allowed ' is a perfectly plain expression which means, if the other members of the court will forgive me, exactly what it says, that there is to be no sub-letting whatever, and that therefore there must be no sub-letting of a part of the premises any more than of the whole premises. There simply must be no sub-letting, and, therefore, I should be in favour of allowing the appeal."

In the second of twenty-two lines (*Levermore* v. *Jobey*, [1956] 2 All E.R. 362) Danckwerts J. observes :

> " It seems to me that it would be useless and quite wrong to construe a lease without reference to the nature of the premises with which the lease was dealing. A lease is not intended to be either a mental exercise or an essay in literature ; it is a practical document dealing with a practical situation. Therefore it is right to look and see what is the property with which the document is dealing."

It is not improper to assume that every judge reaches the Bench with the avowed desire to state his views concisely and in a minimum of space, but judicial life and practice does not seem to work out that way. One exception was the late Mr Justice MacGregor (1922-1934), who rarely runs beyond three pages of the *Reports*, and who worked upon the Euclidean principle of stating the premises in a couple of paragraphs and his conclusion in an extra sentence or two.

Lord of Appeal in Ordinary.—" The situation of a Lord of Appeal in Ordinary is the least glamorous of all the judicial offices. He is neither quite a judge, nor (in the full traditional hereditary sense) quite a peer. He wears no magnificent robes to inspire awe and trepidation in common litigants and criminals. He sits either in a remote and inaccessible committee room or lost in the rows of empty benches in a chamber designed for a great and crowded assembly. He is deprived of the assistance of an industrious and devoted clerk. During the argument of an appeal he probably has only a share in any volume referred to, since the library at his disposal does not provide enough copies to go round. Linked with four noble and learned friends, he can never be certain that any opinion which he delivers, however brilliantly conceived, will not be deprived of the greater part of its force and effect because they, or some of them, reach the same conclusion by a different route. No, the lot of a Lord of Appeal is not an enviable one."—Richard Roe in the *Solicitors' Journal* (14/7/56).

Advice, Spiritual and Temporal.—Among Jehovah's Witnesses every person baptised into the sect is a minister regardless of sex, age, education or any other qualification. In *Walsh* v. *Lord Advocate*, [1956] 1 W.L.R. 1002 ; [1956] 3 All E.R. 129, Walsh held the offices of " pioneer publisher " and " congregation servant ", the former requiring him to be in charge of a congregation of not less than ten persons, while the latter involved him in ministering to persons in an assigned territory, preaching from house to house, conducting Bible services and giving spiritual advice. In his judgment, Lord Goddard delivered some temporal advice of a distinctly forthright character. " A pioneer publisher in this persuasion ", he said, " is no more than a colporteur of tracts and other of its literature, and a congregation servant appears to me to be no more than an organizer or secretary, perhaps honorary at that, of a group of adherents be it large or insignificant. True, he has a duty to preach, but so have all the other members to anyone whom they can persuade to listen. To put the pursuer, even though he is both a pioneer publisher and a congregation servant, on a level with a clerk in holy orders, the pastor of one of the great nonconformist congregations or a Jewish Rabbi, would, to my mind, be fantastic. There have been several attempts in the courts to get young men of this connexion exempted from their obligation of military service : they have all failed, and now that the matter has been before your Lordships' House I hope this case will be the last." (Cf. *James* v. *Smith*, [1954] N.Z.L.R. 707)

A Question of Evidence.—The jurisdiction exercised by the Privy Council in criminal cases is a very narrow one. " Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice. An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses." In *Subramaniam* v. *Public Prosecutor*, [1956] 1 W.L.R. 965, the appellant was found in a wounded condition in the Rengam District in the State of Johore by members of the security forces operating against terrorists. He was tried on a charge of being in possession of ammunition contrary to Reg. 4 (1) (*b*) of the Emergency Regulations 1951, of the Federation of Malaya, and put forward the defence, inter alia, that he had been captured by terrorists and that at all material times he was acting under duress. He sought to give evidence, in describing his capture, of what the terrorists said to him ; but the trial Judge ruled that evidence of the conversation with the terrorists was not admissible unless they were called. The Judge said that he could find no evidence of duress, and in the result the appellant was convicted of the offence charged and sentenced to death. An appeal was allowed by the Privy Council which held that the Judge was in error in ruling out peremptorily the evidence of conversation between the terrorists and the appellant. He had not been allowed to give relevant and admissible evidence, and it could not be held with any confidence that had the excluded evidence, which went to the very root of the defence of duress, been admitted, the result of the trial would probably have been the same. It is of interest to note the personnel of the Board : Lord Radcliffe, Lord Tucker, and Mr L. M. D. de Silva.

Tailpiece.

The ambulance flies at a furious rate
That registers utter defiance of Fate
As clanging through traffic quite agile and supple,
It picks up one person and knocks down a couple.

—Margaret Fishback : *One to a Customer.*

INTERNATIONAL BAR ASSOCIATION.

(*Concluded from p. 302.*)

Associations. Rapporteurs appointed by the Council of the I.B.A. had prepared outlines of the topics, and authors based their papers on these outlines, thus pinpointing the subject-matter under consideration. The major portion of Conference papers had been mailed in advance to registered conferees. The quality of the papers submitted and the interesting discussions which resulted demonstrated the value of advance preparation.

In addition to the professional accomplishments, participants in the Oslo Conference enjoyed the charms of the city of Oslo, built around the end of Oslo Fjord, sixty miles from the sea with the mountains rising up behind it—a city where in summer the sun scarcely sets before it rises again. They enjoyed the warm friendliness of the Norwegian "man in the street", and the gracious hospitality of the members of the legal profession and officials of Norway.

The courtesies extended by the Royal Family to the International Bar Association were deeply appreciated. The General Meeting instructed the Officers of the Association to send greetings and expressions of appreciation to His Majesty King Haakon VII and to His Royal Highness Crown Prince Olav.

After the arrival of His Royal Highness Crown Prince Olav at the University of Oslo on the morning of July 23, President Finn Arnesen welcomed the conferees and their guests; Loyd Wright, Speaker of the House of Deputies (now Chairman), responded on behalf of the I.B.A.; Mahmood Sarshar (Iran) spoke on behalf of delegates from the Near East, due to the late arrival of conferees from the continent of Africa; M. Siddiq, Secretary General of the Pakistan Bar Association, responded on behalf of the continent of Asia; Charles Hart Bright responded on behalf of Australia and New Zealand; Philippe Gastambide (France) responded on behalf of the continent of Europe, as proxy for Marcel Remond, President of the Association Nationale des Avocats; E. Smythe Gambrell (U.S.A.), President of the American Bar Association, responded on behalf of the continent of North America; and Esteban Agudo Freytes (Venezuela), President of the Colegio de Abogados del Distrito Federal, responded on behalf of the continent of South America.

On Monday evening, a reception was held for conferees and their guests in the Town Hall (Radhuset) by the Mayor of Oslo. His Honour the Mayor delighted his guests by extending greetings on this occasion in all three of the official languages of the I.B.A. The grandeur of the great hall, in which almost eight hundred conferees and guests were seated for the buffet supper with space still left in the centre for dancing, impressed even the veteran conferees; but the climax of the evening came when the orchestra led the participants through the halls to admire the great works of art and the architecture of the Town Hall.

On Tuesday evening the Norwegian Bar Association entertained conferees and their guests at a cocktail party at the Masonic Hall, following which many conferees were invited to Norwegian homes for dinner. The friendships thus formed are lasting reminders of the Oslo Conference.

On Wednesday evening, the Minister of Justice invited conferees and their guests to a Soirée Dansante at the Yacht Club (Restaurant Dronningen, Bygdy) on Oslo Fjord. From the bus-ride around the Fjord to Dronningen—the evening included buffet, music, and dancing—to the ferry-boat trip across the Fjord to Oslo, the evening was one which will long be remembered.

An excursion was arranged for conferees and their guests on Thursday afternoon which included visits to the Viking Ships, the Kon-Tiki Raft, the Holmenkollen Ski Jump, and Frognerseteren. Other enjoyable excursions and luncheons were arranged for guests during the Conference sessions.

The closing banquet on Friday evening at the Hotel Bristol was a fitting climax to the Conference. The Norwegian Bar Association had graciously arranged for a Norwegian host at each table. After the dinner, the halls were cleared for dancing.

The success of the Oslo Conference was due in large measure to efficient advance preparation and to the organizational skills of the Norwegian Bar Association under the leadership of its President, Mr Finn Arnesen; its Secretary General, Mr Rolf Christophersen; its Conference Committee composed of Messrs Oscar Smith, Sven Arntzen, Leif Nagell Erichsen, Eiliv Fougner, Jens P. Heyerdahl Jr., Sjur Lindebraekke and Niels Aars-Nicolaysen; and its Committee of Ladies. As President of the Host Organization, Mr Finn Arnesen also served as President of the I.B.A.

OBITUARY.

Mr T. H. Dawson (Auckland).

A well-known and very popular member of the profession, Lieutenant-Colonel Thomas Henry Dawson, C.M.G., C.B.E., E.D., died in Auckland recently, aged seventy-eight.

In his younger days he was a keen athlete. He won the senior athletic championship at King's College, winning six events from 100 yards to one mile in one day. He was a good Rugby player, and became a member of the management committee of the Auckland Rugby Union.

Always a keen soldier, he joined the College Rifles when the unit was formed in 1897. When a law clerk, he went to South Africa with the Fourth Contingent as a sergeant-major, receiving a commission with the Border Regiment during the campaign. He received the Queen's Medal with three clasps and the King's Medal with two clasps. He returned to England with his regiment, then resigned his commission. He completed his law studies in New Zealand and was admitted to practice in May, 1906; and, except for his periods of military service in two world wars, he continued in practice until shortly before his death.

On the outbreak of World War I, he immediately volunteered, although ill with pneumonia, and was appointed to command the 3rd Company of the Auckland Regiment with the rank of major. He sailed with the Main Body and was seriously wounded on Gallipoli, where he commanded 150 Australians and New Zealanders who held an important post for two days until reinforcements arrived. He held a staff appointment for the rest of the war.

He was made a C.M.G. in 1917 and C.B.E. in 1919. In 1927 he was appointed to command the 1st Battalion, Auckland Regiment (Countess of Ranfurly's Own).

He volunteered again on the outbreak of World War II and was appointed to command Guards on Vital Points in the Northern Military District which he soon welded into a very efficient unit.

He was a Freemason, and a past master of his lodge. He is survived by his wife.