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LIMITATION OF ACTION: LEAVE TO COMMENCE ACTION OUT OF TIME.

SECTION 23 of the Limitation Act 1950, so far as is relevant, is as follows:

23. (1) No action shall be brought against any person (including the Crown) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless—

(*a*) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action; and

(*b*) The action is commenced before the expiration of one year from the date on which the cause of action accrued: . . .

(2) Notwithstanding the foregoing provisions of this section, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice has been given to the intended defendant under the last preceding subsection; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay.

Since the enactment of that section, there have been a number of judgments dealing with the nature of the proof required of the intending plaintiff before the Court will grant him leave to bring his intended action. But, in *Brewer* v. *Auckland Hospital Board* [1957] N.Z.L.R. 951, the Court of Appeal appears to have given a definitive judgment on this topic; and the proper approach has been stated in a later judgment of North J., based on *Brewer's* case.

The facts in *Brewer's* case are not of any assistance. The learned trial Judge, Stanton J., dismissed the intending plaintiff's application for leave to commence an action for alleged negligence. No notice of her intention to claim damages was given for two years and eight months after the accident, and the application for leave under s. 23 (2) was not filed until a month after three years had elapsed since the accrual of the cause of action.

On the intending plaintiff's appeal from the dismissal of her application by Stanton J., the principal judgment, given by Shorland J., was concurred in by F. B. Adams J. and McGregor J.

Mr. Justice Shorland first considered the nature of the jurisdiction conferred by subs. (2) upon the Court, and sought to determine the onus upon an applicant who seeks the indulgence of the Court to bring action notwithstanding:

(a) Failure to give notice in writing in terms of subs. (1) as soon as practicable; and

(b) Failure to bring action within one year of the accrual of the cause of action.

His Honour cited the dictum of Streatfeild J. in *R. B. Policies at Lloyds* v. *Butler* [1950] 1 K.B. 761; 81, [1949] 2 All E.R. 266, 229:

> . . . it is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the Courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands.

It necessarily follows, His Honour thought, that those who seek to invoke a provision of such an Act which enables the Court (subject to discretion) to excuse a failure to give prompt notice and/or a failure to bring the action within the time limit fixed on certain specified grounds, must bring themselves fairly and squarely within one or more of the specified grounds in order to obtain the indulgence provided for. In other words, the onus is upon an applicant to carry the mind of the Court to the conclusion that it considers that the failure to give the notice and/or the delay in bringing the action (as the case may be) was:

(a) "occasioned by mistake or by any other reasonable cause"; or,

(b) that "the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay."

If this onus is discharged, then subject to the discretion expressed by the words—

> the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose—

leave may be granted.

It is true that in *Haywood* v. *Westleigh Colliery Company Limited* [1915] A.C. 540, 546, which dealt with a provision of the Workmen's Compensation Act 1906 (Gt. Brit.), conferring jurisdiction to excuse failure to give notice in writing of an accident as soon as practicable, in terms similar to s. 23 (2) of the Limitation Act 1950, Lord Atkinson said:

> The statute requires that notice should be served and if it is not served the party who should have served it is in default;

he must excuse that default, and I think the burden of proof in the first instance rests upon him. But if he gives evidence from which it may be reasonably inferred that the employer has not been prejudiced, I think then the burden of proof is shifted from his shoulders on to the shoulders of his employer and if the employer is in a position to prove notwithstanding this evidence that he is prejudiced in some particular matters, he is bound to do so.

These observations have been referred to in a number of cases on s. 23, viz., *Moeller* v. *New Plymouth Harbour Board* [1955] N.Z.L.R. 151, *Trainor* v. *William Cable Ltd.* [1956] N.Z.L.R. 610, (in the Supreme Court), and *McLeod* v. *Napier Woollen Mills* [1957] N.Z.L.R. 147. Shorland J continued :

Indeed, counsel for the appellant quoted from the judgment of Turner J. in the last-mentioned case in support of a submission that the initial onus upon the applicant was a light one. It is to be observed, however, that the ratio decidendi of the judgment of Turner J. in *McLeod's* case (refusing leave) is to be found in the following words from his judgment (at p. 150) :

I have now given deliberate consideration to the matter and have not found reason to alter the opinion which I formed after hearing counsel—namely that the plaintiff has not discharged the onus of proof lying upon her and has not shown that the defendant company will not be prejudiced by the delay after October 30, 1955, and before June 21, 1956.

No doubt when sufficient evidence is adduced by a party upon whom the onus rests to discharge that onus, Shorland J. said, it then shifts and remains discharged until or unless it is moved back upon the shoulders of the applicant by evidence from the other party, which is sufficient to shift the onus back upon the shoulders of the applicant. The fact that an onus may be shifted during the progress of a hearing by evidence which is sufficient to discharge that onus in no way lessens the onus, and there is nothing in Lord Atkinson's statement in *Haywood* v. *Westleigh Colliery Co. Ltd.* [1915] A.C. 540, 546, dealing with the fact that an onus may be shifted during the progress of a hearing, which would suggest that the onus resting upon the applicant is thereby lessened. Indeed, in that very case, both Lord Loreburn and Lord Sumner make it clear that the final question to the Court must always be : Has the applicant on the whole case carried the mind of the Court to that point where it considers that the applicant has established that the failure to give the notice or the delay in bringing the action was occasioned by mistake or other reasonable cause, or that the defendant was not materially prejudiced in his defence or otherwise ? Lord Loreburn, at p. 544, said :

My Lords, I think the statute really means that looking at all the matters before him, the Arbitrator must find that the employer was not prejudiced by want of notice. I do not think it means there is to be a presumption one way or another but simply if upon all the facts before him the Arbitrator is not satisfied that there was no prejudice, then the applicant fails.

Lord Sumner said, at p. 547, on this point :

The finding that has to be arrived at is, of course, a finding upon all the facts proved. I do not think those facts include the mere matter of observation that the defendant does not give evidence or does not call certain witnesses whose absence is not accounted for. The learned Arbitrator has to take the facts as they have been proved before him and if it be a case in which facts are proved on both sides, he has to take the totality of the facts as he finds them and then come to his conclusion.

The evidence relied upon to establish mistake or other reasonable cause was confined to para. 10 of the appellant's affidavit which read as follows :

" That I did not take any steps to bring any proceedings for damages as a result of the injuries suffered by me in my accident as I thought that I could do nothing about this matter until my treatment was completed and I was in a position again to resume work. I was in fact paid workers' compensation by the Auckland Hospital Board up until the time that I commenced work in November of 1956, and I thought that there was nothing that I need do about any further claim so long as these compensation moneys were paid to me. I left the matter entirely in the hands of the Auckland Hospital Board which arranged for the payment of compensation to me. It was only towards the end of October 1956, when the State Fire Insurance Office approached me to accept a lump sum of £700 in settlement of any claim I might have against the Auckland Hospital Board, that I realized that I should consult a solicitor."

His Honour said he was quite unable to find on this evidence either such a " mistake " or " other reasonable cause " as would justify the granting of the leave sought.

Before turning to the claim of the appellant that the respondent had not been prejudiced in its defence or otherwise by the failure to give the requisite notice or the delay in bringing action, the learned Judge considered the purpose and policy of the Legislature in requiring prompt notice in writing to be given. He said :

When the requirement of s. 23 that the notice shall, inter alia, contain " reasonable information of the circumstances upon which the proposed action will be based " is considered and contrasted with the requirements of s. 52 of the Workers' Compensation Act 1956, that the notice required to be given thereunder shall " state in ordinary language the cause of the injury " it becomes manifest, in my view, that the purpose of s. 23 (1) (*a*) is that the public authority shall have prompt notice in writing not merely of the mishap or accident, or merely of the manner in which it occurred, but also of the fact that it is asserted by the claimant that certain attendant circumstances therein specified constitute negligence towards or breach of duty owed to the claimant by the public authority.

Those responsible for the administration of a public authority cannot be expected to have personal knowledge of the circumstances attending accidents and mishaps arising out of its activities. The effects of the passage of time in respect of changes of personnel comprising staff and upon human recollection are such that unless a public authority has early opportunity of investigating allegations of negligence intended to be made against it and of briefing or recording the evidence relevant thereto, it is likely to be prejudiced in dealing with the matter at a later date.

The value of notice in writing is, first, that it speaks for itself as to what in truth it is notice of ; and, secondly, that from its very nature it is likely to find its way promptly to the particular officer of the public authority responsible for the handling of such matters

Mr. Justice F. B. Adams concurred fully in the judgment of Shorland J. He added some general observations on matters which to some extent influenced his own decision. He said :

Section 23 (2) of he Limitation Act 1950 confers upon the Court a jurisdiction to grant leave, but only where the Court considers " (that is to say, is satisfied) that the delay " was occasioned by mistake or by any other reasonable cause ", or that the defendant " was not materially prejudiced in his defence or otherwise by the failure or delay ". There are thus, in effect, two alternative conditions precedent to the jurisdiction. But it does not follow from the fact that the intending plaintiff is able to satisfy the Court that one or other of those two conditions is fulfilled that he is automatically entitled to relief. Unless one or other is fulfilled, the Court can go no further ; but, if this initial barrier be surmounted, there always remains the question whether the Court will, in the exercise of its discretion, deem it just to grant the desired leave.

There is perhaps a danger that the conditions precedent may attract so much attention as to cause the existence of the discretion to be overlooked. The dominant words of the section are, however, those which state that " the Court may, if it thinks it is just to do so, grant leave accordingly ", and those words are clear and unambiguous. In some contexts, the permissive and discretionary word " may " has been construed as equivalent to " shall ". But, even if " shall " were substituted for " may " in s. 23 (2), the jurisdiction would still be one exercisable only " if the Court thinks it just to do so."

Accordingly, the intending plaintiff who has succeeded in satisfying one or other of the two preliminary conditions has still to persuade the Court that it is just to grant the desired leave, and that the discretion of the Court should be exercised in his favour. In my opinion, all the circumstances of the case are relevant at that stage, even including such as may also have come under review in connection with the conditions precedent. The Court has to make its final decision upon the whole of the material before it (*cf.* the quotations made by my brother Shorland from the speeches of Lords Loreburn and Sumner in *Haywood* v. *Westleigh Colliery Co. Ltd.* [1915] A.C. 540. To hold otherwise might mean that leave would have to be granted in circumstances in which the Court would deem it most unjust to do so.

In the recent decision of this Court in *William Cable Ltd.* v. *Trainor* [1957] N.Z.L.R. 337, it was held that delay which had occurred during the statutory period of limitation was not to be taken into account, for the purposes of s. 4 (7) of the Act, determining whether the defendant has been prejudiced in his defence, the delay that is relevant in that connection being only the delay since the expiration of the statutory period. The decision seems clearly to be applicable also to s. 23 (2) in so far as that subsection is concerned with delay in bringing the action. In that case, however, the Court was concerned only with the question of construction (*ibid.*, 347). and, indeed, only with the construction of that part of the subsection which contains what I have described as the conditions precedent. The question of the exercise of the general discretion whether in all the circumstances the Court considered it was just to grant leave to bring the action was not considered, nor in the circumstances of that case did it have to be there considered.

In my opinion, before the Court can hold that it is just to grant leave, it must pay due regard to every factor in the case, including in particular all factors, at whatever point of time they may have arisen, which may point to the conclusion that injustice may arise because the defendant may be prejudiced in his defence of the stale claim.

Another matter to which His Honour referred was the fact that Statutes of Limitation were not to be looked at askance. They were "Acts of peace" (*A'Court* v *Cross* (1825 3 Bing, 329, 332; 130 E.R. 540, 541 quoted by Streatfeild J. in *R. B. Policies at Lloyds* v. *Butler* [1950] 1 K.B. 76, 81; [1949] 2 All E.R. 226, 229 and they embodied a policy of the Legislature which had always been regarded as beneficial: *20 Halsbury's Laws of England*, 2nd ed., 596, their purpose being to promote justice by protecting litigants from the prejudices and dangers inherent in stale claims. The intending litigant who allowed his claim to become statute-barred, but who was permitted nevertheless to apply for indulgence had upon his shoulders the burden of satisfying the Court that in his particular case it was just to depart from the general policy of the statute. Some degree of prejudice to the defendant was almost inevitable where a claim was long delayed, if for no other reasons than that the memories of witnesses would have become dulled, and that an element of suspicion attached itself even to the evidence of witnesses who did in fact remember clearly. On the other hand, proof of actual prejudice was difficult, and it was dangerously easy to conclude that there was none, merely because the matters in regard to which prejudice must arise could not be specifically pointed out or foreseen. No defendant possessed of a good defence would willingly have his case heard long after the event. His Honour continued:

Still another difficulty in these cases is that the Court when asked for leave under a provision such as we are concerned with here, is in effect called upon to decide in advance whether the defendant will or will not be prejudiced by the delay. The proper time for such an inquiry would seem rather to be after the event, and a defendant who has been unable to prove prejudice in advance might well be in a position, after trial, to show that he had in fact been gravely prejudiced. Had we felt it our duty to grant the desired leave in the present case, I should have wished to consider whether some form of condition ought not to be imposed which would enable the Court to review the question of prejudice after the event.

His Honour concurred fully in the view, expressed by Shorland J., that the burden of satisfying the Court in a case such as this rested throughout on the applicant, and was not to be discharged by raising prima facie presumptions supposed to throw the final burden on to the defendant. He added:

In regard to any argument based on an alleged failure on the part of a defendant to prove some matter that might be expected to be within his knowledge, or to prove any particular matter by clear evidence, it needs to be borne in mind that a defendant may be gravely embarrassed as to the extent of the disclosure he should make of the evidence in his possession. To reveal either the extent of his knowledge or the extent of his ignorance, may furnish the intending plaintiff with information which will assist him materially in the subsequent conduct of the case if leave should be granted. It may, indeed, be of great importance to the defendant to refrain from letting the plaintiff know before the actual trial what witnesses the defendant may be in a position to produce, or what inquiries were made or could have been made at the time when the cause of action first arose, or the adequacy or otherwise of the information gathered at the time, or the nature of the evidence which he can or cannot adduce, or the fact that any witness has forgotten or become confused in his memory of the relevant events. In many a case there might be few things that could be more detrimental to the defendant than a disclosure which would enable the intending plaintiff to become aware in advance of the strength or weakness of the case which the defendant hopes to present at the trial. This is an important consideration; and, in my opinion the intending plaintiff should in general be required to rely solely on the strength of his own evidence in support of his application. To require the defendant to explain precisely where and how he has been prejudiced might well be tantamount to insisting on an unwise disclosure of his case. The position would be quite different in this respect if, as in cases under the Workers' Compensation Acts, the question of prejudice were being dealt with after the available witnesses had given their evidence at the trial.

In a later application by an intending plaintiff pursuant to s. 23 (2) to bring an action for damages for bodily injuries, which was out of time, *Tett* v. *Attorney-General* [1957] N.Z.L.R. 1063, North J., after considering the submissions of counsel, observed that, when the submissions were made, neither counsel was aware that many of the matters discussed in argument had recently been considered in *Brewer* v. *Auckland Hospital Board* (*supra*). His Honour said:

With respect, I think there is force in the observations of F. B. Adams J. [in *Brewer's* case], that there may have been a danger that the conditions may have attracted so much attention as to cause the existence of the discretion to be overlooked. At all events, little reference was made in some of the cases to the question of discretion, and it seems to be clear from the argument presented to me in *Kohey* v. *Attorney-General* (unreported: Auckland, February, 1956), and the argument again advanced by counsel for the applicant in this case, that rightly or wrongly the legal profession may have been encouraged to think that, so long as one or other of the conditions precedent was established by the applicant, an order would follow as of course. It is now clear that this is not so.

Aided as I am by the judgment of the Court of Appeal in *Brewer's* case, I venture to suggest that the true approach in a case like this may be summarized in these terms:

(i) In applications under s. 23 (2) of the Limitation Act 1950, the onus is on the applicant to show that "the delay" was occasioned either by mistake or by any other reasonable cause, or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.

(i) In either case the burden of satisfying the Court rests throughout on the applicant and is not discharged "by raising prima facie presumptions supposed to throw the final burden on the defendant."

(iii) The Court, in the absence of evidence to the contrary, will not assume against the applicant that there may be particular or specific grounds of prejudice, but it will require to be reasonably satisfied by evidence called by the

applicant that there is no ground for supposing that the defendant will be materially prejudiced by the delay.

(iv) The longer the delay, and the more the essential facts are in dispute, the heavier is the burden lying on the shoulders of an applicant seeking the indulgence.

(v) In cases coming within s. 23 (2) the Court is required to consider the question of the effect of the failure to give the stipulated notice, and is not limited to matters of prejudice occurring after the statutory period of one year has expired.

(vi) Unless the defendant wished to raise particular matters of prejudice, he is entitled (if he wishes) to resist the application on the grounds of general prejudice without filing any answering affidavits; and, if he elects to take that course, it will not be assumed against him that no prejudice exists, merely because he does not think it expedient to disclose in advance of the trial the strength or weakness of his case.

(vii) An overriding requirement is that the Court is required to exercise a discretion and should not grant leave unless it thinks it is "just" to do so. It does not necessarily follow that an order will be made granting leave once the applicant has established one or other of the conditions to the exercise of the discretion. At this stage of the inquiry all the facts of the case, at whatever point of time they may have arisen, are relevant. Consequently, if the applicant quite inexcusably has "gone to sleep" on his rights for a long time, the Court will be slow to conclude that the defendant has not been prejudiced in his defence or otherwise by the failure or delay.

The application before His Honour was dismissed, the learned Judge observing that he was sorry to be obliged to take this view seeing that the plaintiff received a grave and permanent injury, but he had only himself to blame; and as His Honour had said in *Kohey's* case, to grant relief after such a long delay, in his opinion, would be to make nonsense of a section which was intended to protect public bodies and the Crown from stale claims.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Arson—Owner setting Fire to House owned by Him—Property subject to Mortgage—Existence of Mortgage detracting from Totality of His "interest"—"Total" Interest—"Partial" Interest—Crimes Act 1908, s. 328 (3), 329. The existence of a mortgage on a property of which a person charged with arson was registered as proprietor subtracted from the totality of his interest so as to make his interest only "partial," and not "total" within the meaning of those words in s. 328 (3) of the Crimes Act 1908; and, accordingly the existence of his interest being partial, did not prevent his act from being the crime of arson. (*Heloise* v. *The King* (1917) 19 W.A.L.R. 84; and *R.* v. *Ammenhauser* [1934] Q.W.N. 44, distinguished.) *So held* by the Court of Appeal (Barrowclough C.J. and McGregor J., F. B. Adams J. dissenting) dismissing an appeal from a conviction on a charge of arson. *The Queen* v. *Evans*. (C.A. Wellington. 1957. June 27, 28; September 19. Barrowclough C.J. Adams J. McGregor J.).

Appeal against Sentence—Magistrate's Certificate on Committal Defective—Court of Appeal's Power to remit Proceedings to Supreme Court to call for Effective Certificate and then act appropriately—Subsequent Endorsement of Certificate by Magistrate Valid—Jurisdiction of Supreme Court to impose later Sentence—Criminal Appeal Act 1945, s. 4 (3)—Criminal Justice Act 1954, s. 24 (3). On December 21, 1956, the prisoner was convicted in the Magistrates' Court of twenty-two offences, amongst which were included five offences of breaking and entering and nine charges of false pretences. He already possessed a very bad record of over fifty convictions and had been warned of his liability to be sentenced to preventive detention. The presiding Magistrate committed him to the Supreme Court for sentence pursuant to s. 24 (3) of the Criminal Justice Act 1954, and thereupon endorsed the informations with a certificate intended to comply with the requirements of that subsection. The prisoner was sentenced in the Supreme Court to preventive detention on nineteen of the charges, and he was referred back to the Magistrate on the three remaining charges. From this sentence he appealed to the Court of Appeal, which, holding that the certificate endorsed on the informations by the Magistrate was defective, quashed the sentence and ordered that the proceedings be remitted to the Supreme Court for that Court to call for a new and effective certificate and thereafter to deal with the case as might be appropriate. That course was followed by the Supreme Court, and on May 29 the Magistrate endorsed the informations with a new certificate in these terms: "Pursuant to s. 24 (3) of the Criminal Justice Act 1954, I certify that the within named defendant David George Sutherland is liable to preventive detention and I further certify that I have this day convicted him of the offence set out in the within information and committed him to the Supreme Court for sentence. Dated at Whangarei this 29th day of May, 1957." (Although the Magistrate's certificate speaks of the prisoner having "this day" (May 29) been convicted and committed to the Supreme Court, he had, in fact, been so convicted and committed on December 21, 1956). The prisoner came before the Supreme Court again on July 5, when it was submitted that, the sentence of February 21 having been quashed, the Supreme Court had no jurisdiction to impose a later sentence. The learned Judge (T. A. Gresson J.) took the view that the desirable course was to sentence the prisoner again to preventive detention, and to leave it to the Court of Appeal to decide the questions of law involved. The prisoner appealed for the second time, and the validity of the sentence imposed on July 5 was raised for determination. *Held*, 1. That the endorsement by the Magistrate of a certificate on the information, in pursuance of s. 24 (3) of the Criminal Justice Act 1954, was something that the Magistrate was required to do subsequently to committal to the Supreme Court for sentence, and was not a necessary part of the act of committal. 2. That, in directing the remission of the proceedings to the Supreme Court, the Court of Appeal was doing no more than returning the record of those proceedings to that Court out of whose hands the prisoner had never validly been removed and where he must be considered to have remained awaiting sentence; that, such direction was, on a strict view, unnecessary, for, without it, the record would have been returned to the Supreme Court as a matter of course: and that, in such circumstances, s. 4 (3) of the Criminal Appeal Act 1945 did not apply, since its application is to instances where there was jurisdiction in the Supreme Court to pass sentence and that jurisdiction was exercised. *R.* v. *Sutherland*. (C.A. Wellington. October 7, 1957. Finlay, J. Hutchison J. North J. Henry J. McCarthy J.)

Practice—Trial—Accomplice pleading Guilty, and then called as Witness for Crown on Trial of Other Party to Same Offence—Proper for Accomplice to be sentenced before being called as Witness. An accomplice who pleads guilty should be sentenced there and then before he gives evidence for the Crown in the trial of a party to the same offence, so that there can be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence. (*R.* v. *Payne* [1950] 1 All E.R. 102, followed.) *R.* v. *Collins*. (C.A. We lington. October 7, 1957. Finlay J. Hutchison J. Turner J. Henry J. McCarthy J.)

Trial—No Direction to Jury as to distinguishing between evidence on Different Counts in Indictment—Part not strictly Admissible on Every Count relatively Unimportant—No Miscarriage of Justice—Accused not giving Evidence—No Reference to Accused's not having given Evidence on oath—Comment that Evidence suggested as available to Defence not given—No Breach of Rule as to Comment on Accused's not giving Evidence—Crimes Act 1908, s. 423. Where no real distinction could have been made between the evidence on any one count in a particular group and the evidence on any other count in that group, and by far the greater part of the evidence as a whole was admissible on each of thirty-five counts and formed part of the evidence supporting each count, that part of it which was not strictly admissible on each and every count may be so relatively unimportant that the failure to tell the jury that one particular piece of evidence though relevant on this or that count was not relevant on another or others, could not possibly result in any miscarriage of justice. The extent of the direction called for in this connection must always depend on the facts

of each particular case. A comment that the defence has called no evidence on a matter which the defence has raised as a matter of some importance is in all essentials something entirely different from a comment that the accused has refrained from giving evidence. There is no breach of s. 423 of the Crimes Act 1908, if the material which it is suggested that the accused might have placed before the jury could have been so placed in some way other than by the accused's going into the box as a witness, and if no reference is made, either expressly or by necessary implication, to the fact that the accused has not given evidence on oath. Observations as to the possibility that a comment which involves no breach of the letter of the statute being nevertheless contrary to its spirit. (*R.* v. *Barker and Bailey* (1913) 32 N.Z.L.R. 912; 15 G.L.R. 634, followed. *R.* v. *Brown and McCann* (1909) 29 N.Z.L.R. 846; 12 G.L.R. 401, referred to.) Crimes Act 1908, s. 423: Where a person charged with an offence refrains from giving evidence, or from calling his wife or her husband, as the case may be, as a witness, no comment adverse to the person charged shall be allowed to be made thereon. *R.* v. *Dallard.* (C.A. Wellington. August 23, 1957. Barrowclough C.J. F. B. Adams J. McGregor J.)

CROWN PROCEEDINGS.

Members of the New Zealand Armed Forces—Whether Servants of the Crown—Crown Proceedings Act 1950, ss. 2, 6 (3), 9, 10. The members of the New Zealand Armed Forces are intended to be included in the expression "servants or agents" of the Crown in the Crown Proceedings Act 1950 as appears from the definition of "Officer" in s. 2 and the provisions of ss. 9 and 10 and probably s. 6 (3) and other sections relating to "Officers." *Ebbett* v. *Attorney-General.* (S.C. Hamilton. August 30, 1957. Stanton, J. (1957/369).)

DEATHS BY ACCIDENTS COMPENSATION.

Widow's Personal Earnings at death of Deceased—Such Earnings Irrelevant in Assessment of her Pecuniary Loss—Death by Accidents Compensation Act 1952 s. 7. Practice—Trial—Misdirection—Party aggrieved thereby—No Complaint by Counsel at Trial—Circumstances wherein Party may lose Rights to Compensation—New Trial if Counsel's Failure to Object gave rise to Risk of Injustice. The earnings of the deceased's widow at the time of her husband's death, and her future earning capacity, have no relevance in the assessment of her pecuniary loss under the Deaths by Accidents Compensation Act 1952. The question is: what actual financial loss has the widow sustained through the death of her husband, disregarding her earning of wages or their quantum. (*Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601; (1942) 1 All E.R. 657, and *Redpath* v. *Belfast and County Down Railway* [1947] N.I. 167, 172, followed. *Shiels* v. *Cruickshank* 1951 S.C. (Ct. Sess.) 741 aff. on app; [1953] 1 W.L.R. 533; [1953] 1 All E.R. 874, applied.) In certain circumstances a party may lose his right to complain of misdirection by the view of the case which his counsel took at the trial, but a new trial should be granted if to refuse it on the grounds of counsel's failure to object to the misdirection would be to risk injustice. (*Connor* v. *McKay* (1883) N.Z.L.R. 1 C.A. 193, applied. *Seaton* v. *Burnand* [1900] A.C. 135 and *Frank M. Winstone (Merchants) Ltd.* v. *Petrie* [1949] N.Z.L.R. 886; [1949] G.L.R. 210, referred to.) *So held* by the Court of Appeal, granting a new trial limited to the question of damages. The case is reported on these points only. Other matters considered in the judgment are the principles guiding an appellate Court when invited to hold that the award of damages was too small or to reverse the verdict of a jury as being against the weight of evidence, and as to the permitted limits of a Judge's comment to the jury on the facts. (*Donaldson* v. *Waikohu County* [1952] N.Z.L.R. 731; [1952] G.L.R. 373; *Bocock* v. *Enfield Rolling Mills Ltd.* [1954] 1 W.L.R. 1303; [1954] 3 All E.R. 94; *Benson* v. *Kwong Chong* (1932) N.Z. P.C.C. 456; *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin and Austin Motor Co. Ltd.* [1935] A.C. 346: *Stewart* v. *Hancock* [1940] N.Z.L.R. 424; [1940] G.L.R. 309; and *Frank M. Winstone (Merchants) Ltd.* v. *Petrie* [1949] N.Z.L.R. 886; [1949] G.L.R. 210, followed.) *Jamieson* v. *Green.* (C.A. Wellington. 1957. June 26; September 18. Gresson J., Shorland J., T. A. Gresson J.)

FISHERIES.

Offences—Allowing Sawdust to flow into River—Flood taking Sawdust from Dump—Sawdust left in Locality where in Flood Conditions, likely to be carried into River—Absolute Prohibition against Sawdust being allowed to pollute River—Necessity for mens rea excluded—Freshwater Fisheries Regulations 1951 (S.R. 1951/15), Reg. 103. Mens rea is not an ingredient of the offence of allowing sawdust to flow into a river, created by Reg. 103 of the Freshwater Fisheries Regulations 1931. *Otago Acclimatisation Society* v. *Gorton Bros. Limited.* (Dunedin. August 19, September 2, September 16. Willis, S.M.)

JUSTICES OF THE PEACE.

Costs—Information by Noxious Weeds Inspector—Summons not Served on Defendant—Defendant convicted and fined by Magistrate—Conviction quashed in Supreme Court—Cost awarded against Inspector. A Noxious Weeds Inspector for a county council commenced a prosecution against H. The summons issued against H. was not served. When the information came before the Court, the Magistrate was not informed that H. had not been served and he dealt with the case as he ordinarily would have dealt with it in the case of a person who had been served but had not attended. The Magistrate convicted H., fined him the maximum fine, and ordered him to pay costs. On a motion that the information be quashed, or, alternatively, that a writ of certiorari be issued by the Supreme Court addressed to the Magistrate for the purpose of removing the conviction into that Court in order that it might there be quashed, *Held,* quashing the conviction, That, in the circumstances of this case, no order for costs should be made against the Magistrate; but that an order for costs be made against the informant, the Noxious Weeds Inspector. *Hoe* v. *Preston and Another.* (S.C. Wanganui. 1957. May 3. Hutchison J.)

LANDLORD AND TENANT.

Relief against Forfeiture—Covenant by Lessee to regrass Ten Acres in Each Year—Lessee not complying with Covenant—Refusal by Lessors of Renewal in Terms of Lease—Exercise of Court's Discretion—Relief granted on Terms—Property Law Act 1952, s. 120. A covenant in a lease, which gave the lessee a right to renewal of the lease for a further term of five years, was as follows: 1 (*m*) To plough and regrass in good English grasses to the satisfaction of the lessors at least 10 acres in each year during the continuance of these presents of the heavier land hereby demised and at present in pasture. The heavier land comprised 80 acres. No area of the heavier land had been regrassed, and the lessors refused the lessee a renewal of the lease on the ground that he had failed to comply with the covenant. On an application under s. 120 of the Property Law Act 1952 by the lessee for an order granting him relief against the lessors to grant him a renewal of the lease. *Held,* 1. That the lessee had failed to comply with the covenant set out above. 2. That, bearing in mind the expenditure incurred by the lessee and the recognition that it could not be expected that this would be recouped except during the renewed term, it would be unfair to require the lessee to vacate the property despite the breach of the covenant in the lease. (*In re a Lease, Kennedy to Kennedy* [1935] N.Z.L.R. 564; [1935] G.L.R. 539, applied.) 3. That there should be a covenant in the new lease to the same effect as the covenant set out above, except that the area to be ploughed, cropped, and regrassed would be 16 acres in lieu of 10 acres. The judgment is reported on this point only. *Carter* v. *Te Aotonga Rangiheuea and Others.* (S.C. Palmerston North. September 24, 1957. McGregor J.)

MINING.

Common Law Liability for Explosives in Mines. *107 Law Journal,* 439.

PRACTICE.

Trial—Jury—Competence of Jury, where Technical Knowledge and Experience not required, to draw Inferences from Undisputed Facts.—Negligence—Inference of Negligence from Undisputed Facts—Technical Knowledge and Experience not required—Jury entitled to infer Negligence. In a simple matter not requiring technical knowledge and experience, a jury is entitled to infer negligence from undisputed facts. (*Bressington* v. *Commissioner for Railways* (1947) 75 C.L.R. 339 and *Power* v. *Snowy Mountains Authority* (1957) S.R. (N.S.W.) 9, applied.) H., while engaged as a member of a gang of waterside workers unloading one of the defendant company's ships, was injured when a piece of dunnage (consisting of planks forming a floor) spanning a gap of one foot between two oil drums broke in two, and H. was injured. After the accident, it was found that at the point where the plank broke there was a knot, an inch in diameter, which extended through the plank so as to be visible on both sides of it. The evidence on these points was uncontradicted. There was no evidence to show that rejection of such a plank was a usual practice on laying dunnage, and no expert evidence was called to show the effect of a knot on the strength of a 6 in. by

1 in. plank. In an action by H. claiming damages, it was contended for H. that those responsible for laying the dunnage where the ship was being loaded ought to have been aware that the plank was weakened by the existence of the knot and ought to have foreseen that it might give way under a man's weight and they ought, therefore, to have rejected and not used the plank. The jury found that the defendant company was negligent in using as dunnage the plank which gave way under H.'s weight. On cross-motions for judgment *Held*, 1. That there being no evidence of any detectable weakness in the plank, it was a question of law whether from the proved facts an inference of negligence could legitimately be drawn. (*Metropolitan Railway Co.* v. *Jackson* (1877) 3 App. Cas. 193, followed.) 2. That it was open to the jury on the basis of its own knowledge and experience, to form an opinion whether a reasonable and prudent man ought to have appreciated whether there was any risk in using such a plank for such a purpose. 3. That, as the laying of the dunnage as a floor over a tier of drums was not a matter requiring technical knowledge and experience, it was within the competence of the jury to drawn an inference from the undisputed facts that the use of the plank with a knot in it to bear a man's weight was negligent. *Hand* v. *Union Steam Ship Co. of New Zealand Ltd.* (S.C. Wellington. September 19, 1957. Barrowclough C.J.)

PUBLIC WORKS.

Compensation—Claim for Injurious Affection—Onus on Claimant to prove Damage—Onus on Local Authority to prove Betterment—Claimant Entitled to succeed for Amount of Difference—Public Works Act 1928, s. 42. G. purchased his property, a rectangular building section, in 1950 for £350. There was then, running across the section some distance back from the street, a drain or stream about 8 ft. wide at bank level and 4 ft. deep. G. knew that the drain was liable to flood, both in the vicinity of his property and along its lower course through Heretaunga Square district; and, after acquiring his property, G. had experience of flooding on a number of occasions, averaging about four times a year, the worst flood recorded being 18 ins. deep at his road frontage, and extending at lesser depths for some 80 ft. into his property, while extending also for a considerable distance in its vicinity. G. and others were persistent in pressing the Borough to remove this flood danger; and he knew of and had expressed his approval of the Council's plans to widen and deepen the drain. The Council first widened the drain, starting at the downstream end, and then deepened it, so as to increase its dimensions to a width of 20 ft. and a depth of 8 ft., and to increase its capacity from about 250 to 800 cubic feet per second. This drain appeared to be sufficient to relieve G.'s property from any substantial risk of flooding. He alleged that the work had damaged or depreciated the value of his property to the extent of £555. The Borough disputed the extent of the damage (if any), and claimed that it had been more than fully offset by "betterment" resulting from the removal of flood-risk. The Borough did not dispute G.'s right to compensation if damage could be proved; and G. did not question the right of the Borough; and he did not question the right of the Borough to offset any betterment resulting from its work. On an appeal by G. from a Land Valuation Committee's disallowance of his claim for compensation, *Held*, 1. That the onus was on the appellant to prove the damage alleged and upon the Borough to prove the betterment, and, if the damage exceeded the betterment, the appellant was entitled to succeed for the amount of the difference. 2. That the appellant was entitled to compensation for the loss of a strip of land as a result of the widening of the drain, the added cost of a more substantial bridge, the cost of fencing the drain, and damage to the appearance of the property. 3. That the appellant's loss and damage was not entirely offset by betterment, and there was a balance in his favour, which was assessed at £125. *Gibson* v. *Upper Hutt Borough.* (L.V. Ct. Wellington. 1957. September 3, 4, 5, 17. Archer J. (1957/404).)

TENANCY.

Possession—Business Premises of Company—Rent in Arrears—Receiver under Debenture in Control of Company—Receiver not liable for Rent, Current Rent or Arrears—"Hardship" to Landlord—Tenancy Act 1955, s. 36 (a), 37 (1). A receiver (as such) is not liable for rent, and if he pays rent as the agent of the company, such payment does not make him (as receiver) tenant by estoppel. (*Hay* v. *Swedish and Norwegian Railway Co.* (1892) 8 T.L.R. 775 and *Justice* v. *James* (1899) 15 T.L.R. 181 and *R J. W. Abbott & Co.* (1913) 30 T.L.R. 13, followed.) It is, therefore, a hardship of supreme importance in a claim for possession of business premises (not merely another relevant matter to be considered in deciding the question of discretion whether an order for possession should be made or refused) that the tenant company is subject to the control of a receiver, who can take all it possesses and all it may in future earn without applying any money to the payment of the rent which the company under his control incurs but cannot pay. Consequently, where a receiver would give no promise or undertaking that current rent, or arrears, would be paid if an order for possession were refused, the Court made an order for possession on the ground of the hardship that would be imposed on the landlord "or any other person" by denial of payment of arrears of rent and future rent of its premises, in order that a debenture-holder might use them for some indefinite period in the hope that it might earn sufficient to repay a loan, the security for which had largely disappeared. *Rangatira Pty. Ltd.* v. *Viola Hallam Ltd.* (S.C. Auckland. September 30, 1957. Shorland J.)

TRANSPORT.

Offences—Negligent Driving—Overtaking on Left at Intersection—Collision with Car crossing from Right and Obscured by Stationary Vehicle on Defendant's Right—Duty to Traffic on Intersection in Disobedience to Lights—"Can be made with safety"—Transport Act 1949, s. 40—Traffic Regulations 1956 (S.R. 1956:138), Reg. 10 (1) (d). On April 11, 1957, about 7.30 p.m. Q., driving a motor-car on an easterly course, approached a light-controlled intersection with the lights red against him. Two lanes of traffic were stationary at his side of the intersection. The left lane nearest the kerb was vacant and he drove into that lane even though intending to proceed straight ahead. He entered the intersection and collided heavily with the front left of a motor-car crossing the intersection on a northerly course. This car was thus on Q.'s right in the intersection and was partly obscured by the stationary vehicles on defendant's right. The learned Magistrate found as a fact that Q.'s speed was not excessive; that he had anticipated the change to green, and had entered the intersection on the green light; and that the other motor-car involved had entered the intersection on a late portion of the three second amber phase in contravention of Reg. 18 (3) (c) of the Traffic Regulations 1956. On a charge of negligent driving in breach of s. 40 of the Transport Act 1949, *Held*, 1. That Q. in overtaking on the left the stationary vehicles waiting at his part of the intersection was not a breach of Reg. 10 (1) (d) of the Traffic Regulations 1956, as the words "can be made with safety" used therein imposed no duty on Q. in relation to traffic entering the intersection in disobedience to the lights beyond a duty that, if he in fact saw such traffic, he ought to take all reasonable steps to avoid a collision. 2. That Q. was not guilty of negligent driving in terms of s. 40 of the Transport Act 1949, as his acts did not per se constitute negligence; and the proved fact that he could not, as it happened, enter the intersection with safety, did not in itself create an act of negligence against a person to whom he owed no legal duty. (*Joseph Eva Ltd.* v. *Reeves* [1938] 2 All E.R. 115 applied.) *Police.* v. *Quintal.* (Auckland. 1957. August 15; 26. Wily, S.M.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of Employment—Carbon Monoxide Poisoning—Effects of Such Poisoning—Allegation of Suicide—Onus of Proof of Suicide on Defendant—Standard of Proof required—Locality Risk—Attribution of Accident thereto in Absence of Evidence of Accident being due to Worker's Action outside Scope of Employment—Workers' Compensation Act 1956, s. 3 (1). Where suicide of the worker is alleged by the defendant, there is a presumption in favour of death being attributed to an accident arising out of the employment; and the onus is on the defendant to show it was suicide. The standard of proof of suicide is such that, while it need not be proved with the same degree of certainty as would be demanded in a criminal case, the defendant must do more than establish a mere balance of probabilities in his favour. (*Moser* v. *Norwich Union Life Insurance Society* [1932] G.L.R. 164, applied.) Where evidence establishes that in the course of his employment a worker is properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is open to the Judge, if, in his judgment upon all facts he thinks right, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk; but any inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the worker outside the scope of his employment. (*Simpson* v. *London, Midland and Scottish Railway Co.* [1931] A.C. 351; 24 B.W.C.C. 1, and *Rosen* v. *S.S. Quercus (Owners)* [1933] A.C. 494; 26 B.W.C.C. 286, followed.) Observations, based on expert evidence, on the effects of carbon monoxide poisoning on persons who inhale it in varying concentrations. *Atkinson* v. *Wanganui City Corporation.* (Comp. Ct. July 22, 1957. Dalglish J.)

THE WORKERS' COMPENSATION ACT 1956.

Compensation Payable.

(*Continued from p. 302.*)

The workers' compensation legislation was originally designed to provide compensation for workers in respect of loss of earnings due to industrial injuries, or, if a worker died as a result of an industrial accident, to provide compensation for his dependants. Such compensation was related to the worker's pre-accident earnings.

Over the years additional benefits, such as payments towards the cost of artificial limbs, have been provided and these are extended by the Workers' Compensation Act 1956. The present Act also makes a major change in the method of calculating lump sum payments and for the first time makes special provision for the payment of dependants' allowances over and above ordinary weekly compensation payments.

Following the practice which was first adopted under the Workers' Compensation Amendment Act 1953, the amounts of the various payments are prescribed by Order in Council. As, however, the amount payable on death and the maximum amount payable on incapacity are related to weekly payments for specified numbers of weeks, it is no longer necessary in the Order in Council to prescribe maximum sums payable on death or incapacity; those sums will automatically change with every change of the maximum weekly payment. The first Order in Council under the new Act is the Workers' Compensation Order 1957 (S.R. 1957/56) and the amounts referred to hereunder are specified in or based on that Order.

It is proposed to deal first with the compensation payable on death or for incapacity, and then later to refer in detail to the dependants' allowances and other payments of a miscellaneous nature for expenses etc. to which workers or their dependants are entitled.

Compensation for Death.

The method of calculating the compensation where the death of the worker results from the injury is prescribed by s. 11 and is as follows:

(a) If he leaves total dependants, the amount of compensation (subject to para. (c) hereunder) is a sum equal to 274 times £9 9s. (the maximum weekly compensation) i.e. £2,589 6s.

(b) If he does not leave any total dependants but leaves partial dependants, the amount of compensation (subject to para. (c) hereunder) shall be a sum that is reasonable and proportionate to the injury to those dependants, but not exceeding the amount that would have been payable if there were total dependants, i.e. £2,589 6s.

(c) If weekly compensation had already been paid to the worker in respect of the accident that caused his death in excess of the aggregate of maximum weekly compensation for 39 weeks (i.e. £368 11s.) the amount of compensation payable under para. (a) or para. (b) is to be reduced by the amount of that excess.

It is to be noted that the foregoing provisions as to amount payable on death apply in every case where the death of the worker occurs after the commencement of the Act as the result of an accident happening on or after September 17, 1953 (s. 11 (2)).

It is to be noted further that additional moneys are payable under s. 20 (relating to dependants' allowances) and under s. 22 (relating to medical and funeral expenses), but these will be dealt with later. Apportionment of compensation between dependants will also be dealt with when procedural provisions are being discussed.

Compensation for Incapacity.

Where a worker's total or partial incapacity results from the injury the compensation payable shall, in default of agreement, be, in the discretion of the Court, either a lump sum or a weekly payment during his incapacity (s. 12).

Section 13 provides that, where a lump sum is awarded instead of a weekly payment, it shall be a sum equal to the aggregate of the weekly payments of compensation and weekly allowances (if any) which would probably become payable to the worker during the period of his incapacity if compensation by way of a weekly payment were then awarded instead of a lump sum. The calculation of the present value of weekly payments to arrive at a lump sum is now abolished in respect of compensation for accidents happening after the commencement of the Act.

Section 14 provides that during total incapacity weekly compensation shall be an amount equal to 80 per cent. of the worker's weekly earnings, with a minimum of £2 7s. per week and a maximum of £9 9s. per week. This provision applies with respect to compensation payable after the commencement of the Act, whether the accident happened before or after the commencement of the Act.

During any period of partial incapacity the weekly payment of compensation shall be an amount equal to 80 per cent. of the workers' loss of earnings, with a maximum of £9 9s. (s. 14 (3)). This, however, is subject to s. 17 which relates to compensation for schedule injuries and other permanent physical injuries (hitherto often loosely referred to as quasi-schedule injuries).

Weekly payments of compensation shall in no case extend over a longer aggregate period than six years (s. 14 (4)). No maximum total amount is now prescribed. Under previous legislation a maximum was prescribed which could be reached before the expiry of six years.

Permanent Physical Injuries.

As indicated above, the provisions of s. 14 as to compensation for partial incapacity are subject to the special provisions of s. 17 as to compensation payable for injuries specified in the First Schedule to the Act and for other permanent physical injuries. It is to be noted that under s. 17 compensation is payable in respect of "injuries" and not in respect of "incapacity" to earn. Compensation is therefore payable under s. 17 irrespective of the amount of loss of earnings (if any) suffered by the worker as a result of his injury.

Schedule Injuries: Under the First Schedule of the Act various percentages are set out in respect of the "loss" (which includes "permanent loss of the use") of various parts of the body. These include eyes, hands, feet, fingers, joints of fingers, toes, etc. Where a worker has suffered an injury coming within this Schedule, he is entitled to compensation irrespective of whether he has lost any wages or not. It is a pure calculation made on a percentage basis, and has nothing whatever to do with loss or wages, nor is it in any way connected with pain or suffering. It is purely a sum, fixed on a percentage basis, to compensate a worker for a loss which the Legislature assumed he would incur in the labour market.

Section 17 provides that compensation for an injury specified in the Schedule is to be assessed at the appropriate percentage of the aggregate of weekly payments of compensation at the maximum rate (£9 9s. per week) for six years. Any period of total incapacity caused by the accident during which the worker receives compensation on the basis of total incapacity is to be deducted from the period of six years in respect of which the scheduled percentage is payable. The effect of this provision is that if a worker, for example, suffers an accident as a result of which he loses the sight of an eye and he is totally incapacitated for twelve weeks, he will receive full weekly compensation for 12 weeks and the appropriate percentage (50 per cent) of the aggregate of maximum weekly compensation (£9 9s.) for the remaining 301 weeks of the six-year period. From the reference in s. 17 (1) to the "aggregate of weekly payments" it appears that a lump sum is now payable in every case of a Schedule injury. In arriving at the lump sum no calculation of the present value is involved; the lump sum to be paid is the appropriate percentage of the aggregate of weekly payments at the maximum rate for what is left of the six-year period. Thus in the example given above compensation for total incapacity, with weekly allowances (if any), will be paid for 12 weeks at the appropriate weekly rate and the amount of the lump sum to be paid for the Schedule injury would be 50 per cent. of £9 9s. multiplied by 301, i.e. £1,422 4s. 6d.

Non-Schedule permanent physical injuries: Section 17 (6) provides that where a worker suffers a permanent physical injury not specified in the First Schedule which in the opinion of the Court or a medical referee or approved medical practitioner, having regard to the percentages in the Schedule, is equal to not less than five per cent. of total incapacity, compensation is payable on the same basis as if it were an injury in the Schedule with the percentage fixed by the Court or the medical referee or the approved medical practitioner, as the case may be.

This provision alters the law. Under s. 41 (3) of the Workers' Compensation Amendment Act 1947, which this provision replaces, the Court did not have jurisdiction to fix a percentage.

Furthermore, it has been held that the worker had a right to have an assessment of his injury made and then elect whether he would claim compensation under s. 41 (3) or on the basis of loss of earnings. The present provision does away with the worker's option in this matter. There is, however, a new provision contained in s. 17 (7) which is designed to allow the Court to make an award on the basis of loss of earnings in a proper case.

Provision against hardship on a worker: Section 17 (7) allows the Court to award compensation on the basis of loss of earnings notwithstanding that the injury is a scheduled injury or a permanent physical injury coming under s. 17 (6) if it appears to the Court that the amount of compensation on a Schedule or quasi-Schedule basis would be substantially less and that it would be inadequate because of the circumstances of the worker, including (without limiting the generality of this provision) the nature of his injury in relation to the nature of his former usual employment.

Weekly Earnings.

Under s. 15 weekly earnings for the purposes of the assessment of compensation are as follows:

(a) In the case of the ordinary worker, a full working-week's earnings at the ordinary rate of pay, exclusive of overtime and exclusive of payments to cover special expenses imposed by the nature of the work, notwithstanding that he may not have actually worked the full week. (A full working-week is determined under the provisions of any award or industrial agreement in force, or according to what is the generally recognized full working-week in the industry, or, in any other case, it is a week of forty hours where employment is by the hour or five days where employment is by the day.)

(b) In the case of piece-workers and certain contractors who are regarded as "workers", the largest of the following amounts—namely,

(i) Weekly earnings ascertained under (a).

(ii) The amount he would have received as a full week's earnings, exclusive of overtime, at the ruling rate of wages payable for the same class of work in the district.

(iii) The minimum wage for an adult worker under the Minimum Wage Act 1945.

(c) In other cases, e.g. sharemilkers, the minimum rate of wages for an adult worker under the Minimum Wage Act 1945.

(d) Notwithstanding the above, if the "weekly earnings" are less than the "average weekly earnings" then the "weekly earnings" shall be taken to be the "average weekly earnings".

In practice, therefore, it will sometimes be necessary to ascertain both the "weekly earnings" as above and the "average weekly earnings" as set out hereunder, and then to take the higher of the two. It will generally be found that, in the case of a worker on annual salary or weekly wages with no overtime, the "weekly earnings" will be under (a). For shift workers employed by the hour who work any overtime and in all other doubtful cases the two calculations should be made.

In ascertaining "average weekly earnings", the following rules apply (the leading case is *Blenkiron* v. *Westport-Stockton Coal Co. Ltd.* [1934] N.Z.L.R. 474):

(i) Ascertain the gross amount paid to the worker (including overtime and dirt money) during the twelve months preceding the accident, if he was employed by the same employer for as long as that, or during the whole period of his employment, if less than twelve months.

(ii) If the employment has been in existence twelve months or more, then take the number of weeks as fifty-two; but, if the employment has been in force less than twelve months, then ascertain the number of weeks.

(iii) Ascertain the days or parts of days during the period when the worker was absent from work, whether for holidays, sickness, accident, or other reason, and add together these days, divide by five, and the result will be in weeks and fifths of weeks. (In cases of work by the hour, it may be necessary to calculate hours as fortieths of a week.)

(iv) Deduct the answer to (iii) from the answer to (ii), the result then being the number of weeks the worker actually did work.

(v) Deduct from the gross earnings any payments for holidays or accident, when no work was done.

(vi) Divide the amount of money in the answer to (v) by the number of weeks in the answer to (iv).

(vii) The answer to (vi) is "average weekly earnings".

Where there is no question of payment of dependants' allowances the maximum amount of weekly compensation (£9 9s.) will be payable during total incapacity in every case where the weekly earnings amount to £11 16s. 3d. or more.

It will, however, be necessary to take the utmost care in ascertaining correctly the "average weekly earnings" in the following cases:

(a) Where they are below £11 16s. 3d. per week; and

(b) Where there is total incapacity and there are any dependants.

Where any increase or decrease occurs in ordinary rates of pay, ruling rates of pay, or minimum rates of wages, adjustment must be made to the weekly earnings or average weekly earnings as provided in s. 15 (7): see *Mc Kenna* v. *British Shoes Ltd.* [1955] N.Z.L.R. 620.

LOSS OF EARNINGS.

"Loss of earnings", for the purposes of assessing compensation in cases of partial incapacity, is defined, by s. 14 (4), as the amount by which the worker's weekly earnings exceed the weekly amount that he is earning after the accident in any employment or business, or is able to earn in some suitable employment provided or found for him after the accident by the employer. Before the 1952 Amendment Act loss of earnings was the difference between the pre-accident and the post-accident earnings, and every time there was a wage increase the loss of earnings automatically diminished and compensation also diminished proportionately. By the 1952 Amendment Act the reference to earnings "before the accident" was dropped and the weekly earnings from which the calculations were to be made were made adjustable so that any general wage increase no longer had the effect of reducing compensation. The corresponding present provision is s. 15 (7).

It should be noted that the employment "provided or found" for the worker must be "suitable" employment: *Boyle* v. *Petrous Tile Co. Ltd.* [1955] N.Z.L.R. 492. Furthermore, on calculation of a lump sum, it would seem that ability to earn is the test to be applied: *Lammas* v. *Manawatu County* [1946] N.Z.L.R. 232, 237.

Special provision is made by s. 16 to cover the case of permanent incapacity of a worker who is under twenty-one or who is an apprentice or improver or who is undergoing training for some occupation.

(*To be continued.*)

SEPARATION AND DIVORCE.

English Interest in New Zealand Legislation.

The law in New Zealand with respect to the relationship between separation agreements and divorce is the subject of particular comment by Mr L. J. Blom-Cooper LL.B. (London), Dr Jur. ((Amsterdam), of the Middle Temple, in the Special Family Law Number of the *Modern Law Review* (Vol. 19, No. 6), which deals in extenso with various aspects of the *Report of the Royal Commission on Marriage and Divorce*, published in March, 1956. The Commission's chairman was Lord Morton of Henryton.

In a discussion of consensual separation (s. 4 of the Divorce and Matrimonial Causes Amendment Act 1920) or judicial separation (written into the 1920 Act, but now s. 10 (*f*) of the 1928 Act), and de facto separation (s. 7 (11) of the Divorce and Matrimonial Causes Act 1953) Mr Blom-Cooper emphasizes an interesting social effect of the New Zealand legislation which he says "appears to have gone unnoticed by the Royal Commission". The reference is to the law relating to children, and the writer regards its omission from the Report as all the more inexplicable because that document expressed grave concern for the children of divorced parents.

Evidence on the point was heard by the Commission from Mr Justice Finlay and Mr W. E. Leicester (Wellinton). In answer to a question whether the interests of children in New Zealand were "more amicably and reasonably settled" (*Minutes of Evidence*, 40th Day, Q9383 p. 966), His Honour said:

> "When the case comes to Court three years later, that arrangement [i.e. custody of children]—well considered or ill-advised as it may be—is an existing arrangement. It is a status quo. To that extent it does make a settlement of the custody question easy because the parties are agreed, but I doubt very much if one could get that agreement if it were not for the fact that concessions were made in order to get the separation."

Mr Leicester put it in another way when he remarked (*ibid.*, 39th Day, Q9292, p. 957):

> "I have found that when the ground for divorce is separation, the parties have remained on good terms after the separation and the children have derived inestimable benefit when it comes to the divorce from this fact, that the period during which their parents have been apart has not widened their differences."

These two statements drew the following comment from Mr Blom-Cooper:

> "This absence in New Zealand law both of any artificiality in the proceedings for divorce such as exist in the present law in this country, and of the allegation and proof of a matrimonial offence, is of sufficient merit to warrant closer study. The removal of acrimonious disputes which are presently waged between spouses in the guise of both parties asserting their rights to the custody of the children is deserving of encouragement even if it is only for the benefit of the children and not the state of matrimony generally. More still, since the grounds for divorce are devoid of reportable incidents, publicity is negligible."

TOWN AND COUNTRY PLANNING APPEALS.

Dean *v.* Hamilton City Corporation.

Town and Country Planning Appeal Board. Hamilton. 1956. November 26.

Club Meeting-rooms—Special Residential Area—Proposed Structure not necessarily detracting from Amenities of Residential Area—Having Regard to Close Proximity of Twelve Residences, Detraction in Such Circumstances from Amenities of Particular Pocket of Residences—Permit refused—Town and Country Planning Act 1953, s. 38 (8).

Appeal by W. D. Dean, on behalf of the Hamilton Radio Club, made under s. 38 (8) of the Town and Country Planning Act 1953 against the Hamilton City Council's refusal to permit the erection of proposed new Club meeting-rooms on Lot 25, State Housing Block, Pinfold Avenue, Hamilton, in an area zoned in the undisclosed district scheme as a Special Residential area equivalent to a Residential A Zone.

Grounds for the appeal were that there was no district scheme in force in respect of the area in which the proposed new club rooms were to be built, and that the proposed club rooms would not be in contravention of any proposed district scheme or the town-and-country-planning principles likely to be embodied in any scheme for the area.

Grounds for refusal were that the proposed structure would detract from the amenities of the neighbourhood to be provided or preserved under the undisclosed district scheme; that the City Council was entitled to refuse its consent because places of assembly are a "conditional use" in a Residential A Zone and it had taken into account the objections received from adjoining occupiers.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds:

1. That the status of the Club and its objects indicate that, in general terms, the establishment of such a Club would not of necessity be a detrimental work in a residential area. The Club at present has very limited membership, twenty in all, all of whom would appear to be responsible people. The Club's social activities are very limited and at present at least they meet twice a week for lectures and instruction, the average attendance on these occasions being six to seven. They have a fuller monthly meeting and four or five times a year pictures are shown to members.
2. The property under consideration is a rear section in the centre of a group of State houses. Access to it is by a 12ft. carriageway from Pinfold Avenue at one end, and a 6ft. footpath from Watts Crescent at the other end. The properties of the objectors either abut on to or are closely adjacent to it.
3. The case of the objectors, broadly stated, stands on two grounds:
   (a) Traffic hazard by reason of cars going on to an coming from the property and of parking in the nearby streets.
   (b) The noise and disturbance to the quiet enjoyment of their properties which would arise from the Club's activities.
4. The Board is not prepared to attach very much weight to either of these objections individually, but their cumulative effect must be given consideration.
5. The erection of Club premises such as this is only a conditional use in a residential area and, generally speaking, Club premises in residential areas are required to be placed considerably further away from adjoining properties than would be possible in this case.
6. The Board is fully aware of and appreciative of the aims and objects of this Club. It is its opinion, however, that the Club is not likely, once it acquires premises of its own, to continue with its present limited membership. Once the Club becomes established in its own premises, it is a reasonable anticipation that its activities will extend, that is to say that it can be anticipated that more members would be attending lectures, monthly meetings and picture shows. This in turn would involve more coming and going and, however careful the executive of the Club might be, would of necessity increase the volume of noise.

After full and careful consideration of all the factors, the Board has, with some reluctance, come to the conclusion that this appeal must be disallowed. The erection of Club premises for a Club of this nature would not of necessity detract from the amenities of a residential area, but in this particular case, having regard to the close proximity of twelve residences to the property under review, there would be a detraction from the amenities of this particular pocket of residences.

No order as to costs.

Appeal dismissed.

Heathcote County *v.* Minister of Lands.

Town and Country Planning Appeal Board. Christchurch. 1957. January 30.

Subdivision—Approval by Minister of Lands of Scheme Plan for Subdivision—Isolated Pocket of Residential Subdivision inadequately supplied with Suitable Services—Board entitled to examine Recognized Principles applicable to General Situation of Scheme under Consideration—Residential Development to progress outward from Established Perimeter of Residential Areas—Appeal against Minister's Approval allowed—Town and Country Planning Act 1953, s. 3 (5) (d), 3 (7).

Appeal by the Heathcote County Council under s. 3 (7) of the Land Subdivision in Counties Act 1946 against the approval by the Minister of Lands of a scheme plan for the subdivision of an area of land adjoining Dyers Pass Road in the county.

Grounds for the appeal were that the subdivision is some 20 to 30 chains away from all main services and on the boundary of the metropolitan urban development contemplated in the regional planning proposals for Christchurch. This establishment of small pockets of development is contrary to planning principles, would be the commencement of ribbon development and would prove costly to ratepayers for the maintenance of services, etc.

The approval of the Minister of Lands was given on the grounds that he considered the subdivision could be the nucleus of a future development area which might be self-supporting, that the subdivision itself was not contrary to accepted town-planning principles, and that cognizance of town-and-country-planning principles could not be taken outside the purview of the plan as such.

The judgment of the Board was delivered by

REID S.M. (Chairman). It was submitted by counsel for the respondent that in an appeal under this Act the Board cannot take cognizance of town-and-country-planning principles outside the purview of the actual plan as such.

He referred to and relied on an observation by the Land Subdivision in Counties Appeal Board (as formerly constituted) in the case of *Patton* v. *Minister of Lands* (1951) 7 M.C.D. 444, 447, and to the words: "In para. (*d*) 'the proposed subdivision does not conform to recognized principles of town-planning' would appear to relate to the internal formation and lay-out of the subdivision".

Patton's case is clearly distinguishable from this case. In that case the Minister of Lands relied on s. 3 (5) (*a*) in refusing his approval of a subdivision; that is to say, he based his decision on the ground of "public interest". In this case s. 3 (5) (*a*) does not call for consideration. Here the respondent's reply, put shortly, amounts to this: that as the scheme plan viewed as a separate entity complies with all the requirements of the Regulations under the Land Subdivision in Counties Act 1946, and provides for suitable access to the rear lots from the main highway by means of reciprocal rights of way, that is the end of the matter, and this Board cannot go outside the boundaries of the scheme-plan in considering any town-planning principles that might be involved.

Patton's case is not binding on this Board, and, in reviewing that decision in so far as it may be applicable to this case, one important distinction emerges: as appears from a perusal of the decision, the Appeal Board there took the view that there was a clash of jurisdiction as between the Town Planning Board and the Appeal Board. No such clash arises here as this Board is the only appellate authority under both the Town and Country Planning Act 1953 and the Land Subdivision in Counties Act 1946.

Under the Land Subdivision in Counties Regulations 1954 (S.R. 1954-54) "every appeal . . . shall be made heard and determined by that Board [this Board] in the manner prescribed by the Town and Country Planning Act 1953 and the regulations under that Act".

This Board is not prepared to accept the narrow construction of s. 3 (5) (*d*) that the respondent suggests it should adopt. It takes the view that it is entitled to examine "recognized town-planning principles", not only in so far as they relate to "the internal formation and lay-out of the subdivision" but also to examine the town-and-country-planning principles that may be applicable to the general situation of the scheme under consideration.

In this particular case, the Board takes the view that practical consideration must be given to the general nature of the Heathcote County's district as it is now constituted. In the main, it is a closely settled residential area of a high standard; it can aptly be described as a residential borough bounded in part by a comparatively narrow strip of grazing land.

It is in fact an integral part of Greater Christchurch; and, when considering it in relation to town-planning principles, it must be regarded as predominantly urban in character.

In his evidence the Chief Surveyor said in cross-examination "We don't consider water supply a factor . . . sewerage is not a factor so long as the area of each section complies with the regulations. . . . We do have regard to town-planning principles on a very broad basis . . . Amenities provided in boroughs or cities are not required in counties in general".

The Board agrees that such an approach to consideration of subdivisions in counties may well be appropriate in many cases where subdivisions are proposed in predominantly rural areas where the amenities looked for and demanded in cities and boroughs are not available but considers that when, as is the case here, a proposed subdivision is immediately adjacent to a closely settled residential area a more exacting examination must be made.

A good deal of the evidence led by the appellant was directed to a criticism of the suggested access by means of mutual rights-of-way.

Whilst the Board is in the main in accord with the views expressed as to the desirability of avoiding this means of access wherever possible, nevertheless such access is legal and the scheme cannot be rejected on that ground.

After hearing the submissions of counsel and the evidence adduced the Board finds:

1. That the proposed subdivision is located some 20 to 30 chains distant from the termini of water supply, sewerage service, electricity, and regular public transport: the main highway on to which it fronts is not kerbed or channelled and is predominantly used by vehicular traffic If houses were erected adjacent to this highway, then the use of it by pedestrian traffic, in particular by children, would create a traffic hazard and a consequential demand for the provision of footpaths and channelling. Although the owner is prepared to establish some form of private water supply this would be inadequate for fire protection purposes.
2. That there was no substantial evidence to support the claim that septic tanks would supply adequate sewerage. The experience of the appellant County in other localities having similar steep hillsides indicates that this form of sewerage is not suitable.
3. That it is a recognized town-and-country-planning principle that residential development should progress outwards from the established perimeter of residential areas and that the creation of isolated pockets of residential subdivisions that cannot be adequately supplied with the services appropriate to a residential area except at a disproportionate cost should be avoided.

No order as to costs.

Appeal allowed.

Caldwell Farms, Ltd. *v.* Waitemata County.

Town and Country Planning Appeal Board. Auckland. 1956. September 18; October 20.

Subdivision into Residential Sites—Area in County zoned as "rural"—Provision made under Undisclosed District Scheme adequate for Residential Purposes—Orderly Development of Area zoned as "residential" likely to be impeded—Town and Country Planning Act 1953, s. 38 (8), (10).

Appeal under s. 38 (8) or (10) of the Town and Country Planning Act 1953 against the decision of the Waitemata County Council refusing to permit the subdivision into twenty-eight residential lots of the appellant's land, situated three miles from Henderson.

The grounds for appeal were that the land fronted on a well-formed metal road; that there was a direct transport service to Auckland three days a week; that the site was well elevated and the soil was of a nature fully suitable for drainage with septic tanks; that Henderson is a quickly growing area and building sections are in considerable demand; and that a portion of the same farm wherein was situated the proposed subdivision was recently subdivided and all sections offered to the public had been sold.

The Council replied that the area in question was intended to be zoned as "rural" in the Council's undisclosed district scheme and the proposed subdivision would be a "detrimental work" under that scheme.

Under that undisclosed district scheme the proposed subdivision would be in an area zoned as "rural". It would be distant at its nearest point at least one mile from the proposed "residential" area.

The judgment of the Board was delivered by

REID S.M. (Chairman.) The respondent Council's undisclosed district scheme has already been considered by the Board in two earlier appeals; *West Lynn Farms, Ltd.* v. *Waitemata County*, ante p. 14 254, and *B. J. & N. I. Hailes* v. *Waitemata County*, ante p. 20. Both these appeals were against prohibition of subdivisions into residential sites of land in an area zoned as "rural". Both appeals were disallowed, and in its decision in the *West Lynn Farms, Ltd.* appeal the Board expressed the view that the respondent Council under its undisclosed district scheme had made ample provision for the foreseeable residential needs of this area for many years.

(1) That nothing was advanced by way of evidence or submission that would induce the Board to alter its view referred to above as to the adequacy of the provision made under the Council's undisclosed scheme for residential purposes.
(2) That to approve of the proposed subdivision would be tantamount to approving of the creation of small pockets of urban development in rural areas.

This would be contrary to town-and-country-planning principles and would tend to impede the orderly development of the area zoned as "residential".

The appeal is disallowed. No order as to costs.

Appeal dismissed.

McLatchie *v.* Waitaki County.

Town and Country Planning Appeal Board. Wellington. 1957. April 8.

Subdivision—Part Section to be used for Erection of Tractor Showroom, Store, and Repair Shop—Area zoned "Residential"—Proposed Use "Industrial"—Proposed Use Not Predominant or Conditional Use in Residential Zone—Town and Country Planning Act 1953, s. 38.

Appeal, under s. 38 of the Town and Country Planning Act, against the refusal of the council to permit a subdivision of land in Waitaki County.

The proposed subdivision was for a single section of approximately three-quarters of an acre adjoining the Timaru-Dunedin State Highway to be sold for the purpose of erecting a showroom, machinery store, and repair shop and for the sale and servicing of tractors.

The grounds for the refusal of permission to subdivide the land were that the area was used for residential purposes, poultry farming, small farms and other agricultural purposes, and that the area was zoned "residential" in the council's undisclosed district scheme; that the proposed change of use to "industrial" would be a detrimental work and not in conformity with the town-and-country-planning principles likely to be embodied in the undisclosed district scheme; and that this would detract from the amenities of the neighbourhood.

The judgment of the Board was delivered by

REID S.M. (Chairman). At the hearing, evidence was given that the land under consideration is in an area which on April 1, 1957, is to be incorporated in the Borough of Oamaru; and, under the Oamaru Borough Council's undisclosed district scheme, it is proposed to zone this area as "residential." The purpose for which the proposed purchaser intends to use the land in question is an "industrial use" and such a use is not a "predominant" or a conditional use in a residential zone.

No order as to costs.

Appeal dismissed.

NEW ZEALAND LAW SOCIETY.

Annual Meeting.

At the Annual Meeting of the Council of the New Zealand Law Society:

The following societies were represented:

Auckland, Messrs D. L. Bone, B. C. Haggitt, S. W. W. Tong and H. R. A. Vialoux; Canterbury, Messrs R. A. Young and G. C. Weston; Gisborne, Mr K. A. Woodward; Hamilton, Mr H. C. M. Norris; Hawke's Bay, Mr J. Tattersall; Marlborough, Mr F. Noble-Adams; Nelson, Mr H. G. Brodie; Otago, Messrs J. E. K. Mirams and W. G. Aitken; Southland, Mr R. P. H. Hewat; Taranaki, Mr J. H. Sheat; Wanganui, Mr D. G. Young (Proxy); Westland, Mr A. M. Jamieson; and Wellington, Messrs A. B. Buxton, E. T. E. Hogg (Proxy), R. L. A. Cresswell, and I. H. Macarthur.

The President (Mr T. P. Cleary) occupied the Chair.

The Treasurer (Mr D. Perry) was also present.

The President welcomed new delegates attending the Council meeting for the first time. Apologies for absence were received from Messrs C. N. Armstrong and W. R. Birks.

Election of Officers:

President: Mr T. P. Cleary was re-elected.

Vice-President: Mr A. B. Buxton was re-elected.

The President referred to the retirement from office of Dr Haslam and Mr H. R. A. Vialoux. He spoke in eulogistic terms of the valuable assistance given by Dr Haslam over the years in which he had held office, and expressed the loss suffered by the Council as a result of Dr Haslam's retirement.

The President also paid tribute to the great interest taken by Mr Vialoux during the ten years he had regularly attended the meetings as a member of the Council and latterly as Vice-President (acclamation). The resignation of Mr Vialoux, dated as from the day of the meeting, was accepted with much regret. Mr Vialoux, in expressing his thanks, said it had been a source of pleasure to have acted as a delegate from Auckland and said that he had derived considerable pleasure in his association with the members of the New Zealand Council.

Hon. Treasurer: Mr D. Perry was re-elected.

Management Committee of the Solicitors Fidelity Guarantee Fund: Messrs D. Perry, E. T. E. Hogg, G. C. Phillips, and D. R. Richmond were re-elected.

Disciplinary Committee: Messrs J. B. Johnston, L. P. Leary Q.C., H. R. Biss (since deceased), M. R. Grant, A. N. Haggitt, W. E. Leicester, A. C. Perry, and Sir William Cunningham were re-appointed.

Conveyancing Committee: Messrs S. J. Castle, J. R. E Bennett, and G. C. Phillips, were re-elected.

Costs Committee: Messrs E. T. E. Hogg, D. R. Richmond, and D. W. Virtue, were re-elected.

Finance Committee: Messrs D. Perry, E. T. E. Hogg, G. C. Phillips, D. R. Richmond, and A. T. Young were re-elected.

Joint Audit Committee: The suggestion that this committee be increased to three instead of two members as at present was approved, the Society of Accountants to be asked to appoint a third member also. Messrs J. R. E. Bennett, F. B. Anyon, and F. L. Parkin were elected.

Judges' Library Committee: Messrs F. C. Spratt, and I. H. Macarthur were re-elected.

New Zealand Council of Law Reporting: Messrs A. M. Cousins and L. P. Leary Q.C., were appointed for a further term expiring March, 1961.

Law Revision Committee: Sir Wilfrid Sim Q.C., and Mr H. J. Butler were re-elected.

Legal Education Committee: The President reported that Mr Wild, on his appointment as Solicitor-General had resigned from the chairmanship of this committee. So that current matters receiving consideration of the Council of Legal Education could be dealt with without delay, the Standing Committee had appointed Mr I. H. Macarthur a member of this committee. Messrs A. C. Perry, K. Tanner, and N. Wilson were also re-elected. It was resolved that the appreciation of the Council of the valuable services given by Mr Wild during his tenure of office on this committee be recorded.

Dominion Legal Conference:

The President said that it was not intended to deal with matters arising out of the Conference until the next meeting of the Council. He, however, desired to express appreciation of the immense amount of work done by the Canterbury District Law Society to ensure the success of the Conference.

International Bar Association:

The following letter was received:

"The beginning of a new year is traditionally a time for self-examination and for taking inventory—and the International Bar Association is fortunate to be in a position to look back on the substantial accomplishments of the past year. There is no question but that the I.B.A. is a stronger organization as a result of the Oslo Conference held last July.

It is interesting to the officers, when considering the work of our biennial conferences, to observe that it is usually not possible to judge with certainty the relative importance of the various topics until a conference has ended. Invariably, one subject discussed at each conference stands out in the years that follow beyond all the rest. From the recent Oslo Conference, this topic would appear to be 'International Shipbuilding Contracts'. Our limited supply of papers (from nearly all of the major shipbuilding countries of the world) is already exhausted. However, a publication is now on the press in Oslo which will include the Rapporteur's Report and all of the shipbuilding papers.

Another achievement at Oslo, the adoption by the I.B.A. of an international code of ethics for the legal profession, has received wide notice. Recently the German Bundesrechtsanwaltskammer officially adopted the I.B.A. Code as a standard for the German legal profession in its relations with foreign attorneys.

We have cited but two examples of our work. As member organizations are aware, there are many other fields in which the Association is active as a result of work begun at Oslo and at previous conferences. The 'Oslo Conference Report', the manuscript for which will shortly be forwarded to the printer, will bring the records of our members up to date.

The recent constitutional amendments making the I.B.A. more truly a 'federation' of national bar associations, place greater responsibility upon our member organizations. Their full participation and co-operation are of vital importance. The place, time, and programme for the 1958 Conference will be determined by the Council at its next meeting, which is scheduled for Lisbon, Portugal, on March 23-24, 1957. Prompt notification will be given of the details. In the coming months, as the Secretary-General advises members of plans for the 1958 Conference and of the work to be accomplished, we seek your full and prompt co-operation.

A more effective programme requires greater effort on the part of all—the officers, our member organizations, and the members of the legal profession who contribute their time and talents. As the effectiveness of the I.B.A. increases and our members participate more fully, our expenses necessarily also grow. Members are urged to continue their full financial support of the I.B.A."

Charges Where Premium or Goodwill Paid On Grant of Lease:

The following letter was received from the Auckland Society:

"My Council has considered the report set out under the above heading in the minutes of the meeting of your Council held on the November 23 last.

In the opinion of members the view of the minority of the Costs Committee was more realistic. That view was that the premium was merely rent in another form, and that for income tax purposes the premium was deemed to be spread over the term of the lease. The lessor's solicitor, for the purpose of providing for the payment of the premium merely inserts in the lease a clause to the effect that a certain premium is to be paid. He does not assume or undertake any of the responsibility which is undertaken by a solicitor acting for a purchaser. No question of title is involved nor does he undertake any other of the responsibility assumed by a purchaser's solicitor.

It seems to my Council, therefore, more realistic that the premium should be treated for the purposes of costs as additional rent spread over the term of the Lease, and for this reason the Council is of the opinion that the minority view of the Costs Committee should be adopted."

After some discussion, it was resolved that the present basis of the charge where a premium is paid should be abandoned and that the premium should be treated for the purposes of costs as additional rent spread over the term of the lease. The Costs Committee is to formulate the necessary alterations to the scale.

Estate and Gift Duties Act 1955, s. 5 (i) (j).—The following letter had been sent to the Minister of Finance in connection with the above provision:

"The Council of the New Zealand Law Society has had representations made to it as to the desirability of amending s. 5 (i), (j) of the above Act consequent on the decision of the Privy Council in *Ward* v. *Commissioner of Inland Revenue* [1956] N.Z.L.R. 367. The Council has also had the benefit of a discussion with Officers of the Department of Inland Revenue. Notwithstanding the considerations advanced by the Department, the Council is of opinion that the statutory provision should be amended to meet cases where full or partial consideration has been given by the purchaser from the deceased, even although that consideration has been in the form of an annuity or other periodical payment.

The Council accordingly suggests that an amendment be considered whereby paragraph (j) should not apply to transactions under which full consideration has been given by the purchaser, and whereby credit should be allowed by way of deduction in transactions under which partial consideration has been given by the purchaser. The Council draws attention to s. 54 (2) of the Act of 1955, which was introduced by way of amendment in 1952 and suggests that similar provisions relating to an annuity or other periodical payment as are therein contained might apply to the amendment which the Council is now representing should be made to paragraph (j).

I have been instructed to add that the Council's view on this matter was arrived at after the question had been submitted to District Law Societies. The opinion of the Council is based on the view that the Act should not require a purchaser who has already paid full or partial consideration in one form, to pay in the form of tax what amounts to further consideration for the same property."

The Minister replied as follows:

"This is to acknowledge your letter of March 19, in which you refer to the Estate and Gift Duties Act 1955 and representations about amending the law, consequent on the decision of the Privy Council in *Ward* v. *Commissioner of Inland Revenue*.

Your Society's representations are being examined and in due course you will be further advised."

It was resolved that the letter be received.

Scale of Bankruptcy Costs.—To enable district societies to consider further the report made by Mr Birks, the matter had been deferred for consideration to this meeting. It was resolved that the report be adopted and that representations be made accordingly to the Department of Justice.

Chattels Transfer Registration.—The following letter was received from the Wellington Society:

"The Council of my society desires to draw the attention of your society to the following matter received from a member of this society and asks that the matter be given consideration:

'Under the Chattels Transfer Act an instrument by way of security must be registered in the Supreme Court office within twenty-one days of the date of execution. Similarly under the Companies Act debentures require registration within a like period. It has become a custom that the legal holidays at Christmas exceed twenty-one days and accordingly considerable inconvenience arises when an instrument or a debenture is executed right at closing time before Christmas.

Would you be good enough to suggest to your Council that the time limit under both these Acts might be extended to say twenty-eight days or one month to overcome this inconvenience."

It was resolved that no action be taken.

Supreme Court Offices: Hours During Vacation:

The Hamilton Society wrote as follows:

"The Council of this society has asked me to write to you asking for consideration by the New Zealand Law Society of the question of altering the period during which Supreme Court offices close at one o'clock in the afternoon.

Under Rule 602 of the Code of Civil Procedure, provision is made that during the vacation—namely, from the 20th December to the 31st January, Supreme Court offices should close at that time. This Council asks that representation be made for an amendment so that this early closing operates only from the 25th December to the 20th January inclusive."

It was resolved to make representations to the Rules Committee for an amendment to the appropriate Rule.

Solicitor Acting as Agent:

The Auckland, Wellington, Otago, Taranaki, and Marlborough Societies had expressed the view that no ruling should be made as to solicitors acting as agents for building societies. Mr Norris said that the resolution passed by his society at its annual meeting to disapprove the practice, was by no means unanimous and was passed by a small majority only. The Nelson, Canterbury, Southland, Westland, and Hawke's Bay Societies reported their Societies disapproved of the practice. A lengthy discussion took place and finally, although not unanimous, the following resolution was carried:

"While expressing no approval of the practice and while insisting upon its earlier ruling (No. 38) that in the view of the Council it is unprofessional for a practising solicitor to carry on, or hold himself out as carrying on any other calling or profession, in view of the usage which exists in many districts in New Zealand, this Council sees no sufficient reason to interfere with the practice of solicitors acting as agents for building societies."

Legal Vacations.—The Gisborne Society wrote suggesting that a uniform period be fixed throughout New Zealand for the legal vacation at Christmas.

It was resolved that no action be taken.

Rehabilitation Scale:

It was resolved that the present scale for rehabilitation loans should continue in force.

A Great Judge.—The distinctive quality of Brandeis is that with immense resourcefulness he found ways to build the ancient ideas we profess into the structure of twentieth-century America. His power derived from a fusion of three traditions: the Biblical tradition, with the moral law of responsibility at the core; the classical tradition, with its stress on the inner check, the law of restraint, proportion, and order, achieved by working against a resisting medium; and not least, the common-law tradition which he learned in this university (Harvard), teaching that the life of the law is response to human needs, that through knowledge and understanding and immersion in the realities of life law can be made, in Mansfield's phrase, to work itself pure. This harmonious fusion of traditions accounts for the essential simplicity beneath the manifold expressions of his gifts. It explains, too, why his real significance on this centennial anniversary goes beyond this or that measure identified with his name. Like all great teaching, as has been said of history itself, his meaning is not to make us clever for another time, but wise for always. (Paul A. Freund, "Mr Justice Brandeis: A Centennial Memoir (1957)," 70 Harv. L. Rev. 769, at pp. 791-792).

OBITUARY.

Mr George J. Weston (Christchurch).

Mr. George Thorngate Weston, who died on September 19, 1957, was born at Hokitika on October 21, 1876, the son of Mr Thomas S. Weston, the then District Court Judge for Westland.

He was educated at the Cathedral Grammar School, Christ's College and Canterbury University College, where he graduated B.A. in 1897 and LL.B. in 1898.

He was admitted by Conolly, J., on s.s. *Penguin* at New Plymouth in 1898 on the motion of his brother, Mr T. Shailer Weston. He became a member of his father's firm in 1899 (T. S. Weston and Son, Christchurch), Judge Weston having gone into private practice again there in 1883.

Mr Weston was the sole law lecturer at Canterbury College, including Honours subjects, from 1902 to 1906, and was an examiner in law subjects for some years afterwards. He represented Canterbury at cricket in 1903 and 1904, and was a member of the New Zealand Cricket Council for forty-five years, from 1904 to 1949. He was a one-time president of the Canterbury District Law Society, and was a foundation member of the International Law Association.

He enlisted in the ranks and served in the 1st N.Z.E.F., 1916-18, finally holding the appointment of Brigade intelligence officer, and being Mentioned in Despatches. He was a member of the Board of Governors of Canterbury College in 1907-1916 and in 1919-1925, a Fellow of Christ's College, 1919-1957, and Sub-Warden from 1950 to 1957. He was a club captain and an honorary life member of the Christchurch Golf Club, and president of the Christ's College Old Boys' Association in 1924. From 1930 to 1933, he was Grand Registrar of the Grand Lodge of New Zealand.

During the years 1939-1946 Mr Weston, holding the rank of major, was Judge Advocate for the Southern Military District. He retired from the firm of Weston, Ward, and Lascelles in 1956, but continued attending his office up to the day of his death.

Three of Mr Weston's brothers were lawyers: Mr Henry W. Weston (died 1894); Mr T. Shailer Weston (died 1931); and Mr Claude H. Weston K.C. (died 1946). His twin brother, Mr Walter C. Weston, of New Plymouth, is chairman of directors of the *Taranaki Herald*.

In 1923 Mr Weston married Miss Maude Cargill, a great-granddaughter of Captain William Cargill, the first Superintendent of the Province of Otago.

Mr Weston's father was admitted in 1861 and father and son thus covered a span of ninety-six years of legal practice.

LEGAL LITERATURE.

Mazengarb's Negligence on the Highway, 3rd ed. By O. C. Mazengarb Q.C., M.A., LL.D. Wellington: Butterworth & Co. (Aus.) Ltd. Pp. 447 + lxiv. Price 76s. 6d., post free.

It is now five years since the Second Edition of this well-known work appeared (reviewed (1952) N.Z.L.J. 256) and the new edition will be welcomed by a wide variety of readers. As is stated by the learned author in the Preface, the arrangement of the Second Edition has been maintained, but a number of new paragraphs are added to the text, a quantity of cases are inserted (by the perhaps unhappy device of sub-titling footnote references 10a, etc., their insertion is more readily noticeable) and a new chapter, "Death Claims", is added.

The book is a mine of information, incorporating as it does, extensive considerations of negligence and contributory negligence; guides as to practice, procedure, and parties; precedents of pleadings; and, as if that were not sufficient, in Chapters 17 and 18, a potted "Guide to Advocates." It finishes with Chapters on "Criminal Liability" and "Insurance" in the former of which, incidentally, one finds the statement:

> "It is therefore important that the only ones who should be charged are those who deserve punishment or in whose case it can be said that punishment would tend to keep themselves and their organisation up to the mark."

This paraphrase of portion of the judgment of Parker J. in *James and Son Ltd.* v. *Smee* [1955] 1 Q.B. 78, 93, gives an unfortunate impression of introducing a new element into the criminal law.

Although the author frankly admits (see Preface) that the task of a text-writer is not to advocate reform, he is too forceful an advocate himself to miss the opportunity of suggesting further reform. The *Romford Ice* case is dealt with at some length in a section which concludes with the cryptic statement, "as this aspect of the law may shortly engage the attention of the Legislature (p. 156)". The Law Reform Acts in reference to tortfeasors are also the target of suggestions for further reform. In the latter connection, it is surprising to find no reference to the reform effected by s. 3 of the Law Reform Amendment Act 1955 (N.Z.), which could perhaps have found a word of mention on p. 171 or p. 151. The author retains his partiality for degrees of negligence (p. 24), and one is left with the overall impression that Dr. Mazengarb does not think much of the law in its present state relating to negligence and contributory negligence: could that be because he views contributory negligence as "not now a defence but something which goes in mitigation of damages" (p. 136) Or could there be a trace of author's nostalgia at the diminishing quantity of finer points of argument on negligence and causation consequent upon the passing of the Contributory Negligence Act.

For the legal practitioner in New Zealand it should be noted that the Precedents section relating to Motions and Orders requires amendment having regard to Forms 33E, 33F, and 33G of the First Schedule to the Code of Civil Procedure.

Over the wide field covered by this work, practitioners and others concerned with liability for negligence on the highway will find in *Mazengarb* a fund of ready reference and guidance. For the more intricate arguments on finer points, reference will certainly have to be made to more detailed works specializing in a particular field: this book, incorporating many aspects of highway negligence in the one volume, will continue to fill a need as a day-to-day "tool-of-trade."

Family Protection in New Zealand. By A. C. Stephens LL.M. Second Edition. Pp. xvii + 184. Wellington: Butterworth & Co. (Australia) Ltd. Price: 51s. 6d. (post free).

This recently published book should prove of great benefit and assistance to every practising barrister and solicitor in New Zealand: it deals with an important part of our family law of inheritance, theoretically and historically, in a most interesting manner, and from a practical point of view, most effectively, by stating general principles succinctly, supported by the citation of the relevant statutory provisions, and the leading cases thereon. The method of treatment and lay-out by the learned author, is such that counsel, advising whether a case should or should not be taken or defended under the Family Protection Act, or the busy solicitor, warning his client about to make his will of the dangers of claims being made under the Act, will in most instances be able to look up and ascertain the relevant law *instanter*.

The work has three main divisions. Part I deals historically and comparatively with the power of testamentary disposition, Part II is devoted to a general discussion of a testator's family maintenance, which is a subject of universal interest; here, it is treated on its ethical, economic, and sociological aspects, In Part III there is a "statement" of the Law of Family Protection as it exists in New Zealand today (with references to Australian, Canadian, and English cases on certain points). In fact, Part III contains a far more detailed exposition of the relevant law and cardinal principles than this "statement" would suggest.

The author draws particular attention to (a) the many changes made in the law by the Family Protection Act 1955, which together with the family maintenance statutes of New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania, is set out in the Appendix to book; (b) the retrospective aspect of the 1955 Act; (c) the extension of time in which applications may be made under the Act, and the lessening of the time limit which must elapse before it is safe for an executor or administrator to distribute the estate.

As if for good measure, there is a very handy chapter on Practice and Procedure, the Index is excellent, and the format of the book most convenient.

E. C. A.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Matrimonial Note.—In an address in July at the Tenth Legal Convention of the Law Council of Australia (attended by Barrowclough C.J.), Lord Morton of Henryton, Lord of Appeal in Ordinary, speaking of laws affecting conjugal and family life, referred to a will in which the husband said: "In recognition of my dear wife's devotion to me for over fifty years of married life, I give and bequeath to her the silver candlesticks which her Aunt Emma gave to her on our marriage.", As Chairman of the Royal Commission on Marriage and Divorce, one general observation he made is of especial interest: "On every occasion when the grounds for divorce have been considered in England, whether in Parliament or by a Royal Commission, the advocates of easier divorce have made some progress. In 1937 they made very considerable progress. The changes have no doubt relieved many cases of real hardship, but I am inclined to think that on balance, and regarding these changes as a whole, they have done more harm than good to England, and in particular to that family life which is so vital to the community. I think it is time to call a halt in England." He does not conceal in discussion that he holds no high opinion of separation as a ground for divorce. He calls it "divorce by consent"—a rather narrow interpretation of s. 10, it is respectfully submitted. And, incidentally, he drew the attention of his audience to the striking fact that divorce for desertion was unknown in England until 1937, but in Scotland divorce for desertion had existed since 1573. The English may always win the last battle, but it often takes them a long time to catch up.

The Value of Compensation.—According to Lord Allenby, Viscount Samuel was the best politician during the First World War. He formed this opinion, says John Bowle (*Viscount Samuel*, Gollancz, 1957) because when his (Allenby's) false teeth were lost in the post during the time that Samuel was Postmaster-General, Lord Samuel reversed a departmental decision and insisted upon compensation being paid to the General.

Judicial Comment.—One of the unusual features of the legal system of the United States is a refresher seminar of a fortnight attended by Justices of the State Supreme Courts and members of the Federal Circuit Courts of Appeal, and intended, by discussions on a dozen or so subjects, to brush up their law. A reporter from the *New Yorker* interviewed Judge A. C. Snyder, Chief Justice of the Supreme Court of Puerto Rico who, it seems, had skipped the classes this year and was concentrating only on the cocktail party. The conversation turned to Judge Frederick G. Hamley, of the United States Court of Appeals, Ninth Circuit, who sits in San Francisco. "We learned that Judge Hamley had achieved immortality since we last saw him, because for the first time in his career one of his decisions had been cited in a footnote to an opinion issued by a United States Supreme Court Justice, albeit a dissenting opinion. 'Footnote Hamley', we call him," said Judge Snyder ebulliently. "Judge Hamley said: 'Well, in some ways it's better than getting into the body of the opinion—especially if you find yourself being referred to there as 'the learned judge'". "You said it!" exclaimed Judge Snyder. "When you've got a Supreme Court Justice referring to you in his opinion as 'the learned judge', you know you're *dead*. He's going to reverse you, sure as anything."

Hush-hush Notice.—In a circular drawing attention to the merits of Luxford's *Liquor Laws in New Zealand*, 2nd ed. (with supplement, 1957), the publishers say: "This work is right up to date and the publishers *confidentially* recommend this edition to legal practitioners, Police officers, and all who are interested directly or indirectly, in the administration of the Licensing Acts or the sale of intoxicating liquors". Legal practitioners can be trusted to respect the confidence, but Scriblex is doubtful about the police who always seem to have a lot to say about the licensing laws.

Know Your Law.—An absolute discharge was recently given to a pedestrian who appeared at a Magistrates' Court in answer to a summons alleging that he had failed to comply with a traffic direction given by a police constable, contrary to s. 14 of the Road Traffic Act 1956. He pleaded that he was serving a sentence of imprisonment when the statute was passed, and that he was unaware of the provision in question. The *Law Times* has the following comment to make: "There is, of course, a widespread impression that every person is presumed to know the law. This view, strangely enough, is expressed in the M'Naghten Rules, which were laid down by the Judges in 1843. The law, they said, is administered upon the principle that everyone must be taken ordinarily to know it, without proof that he does know it. The fact is, as Lord Atkin pointed out in *Evans* v. *Bartlam* [1937] A.C. 473, there is not, and never has been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse—a maxim of very different scope and application."

A Layman's Entry.—Following his paper on "*Tax Practice and the Legal Profession*," this story was related to the Convention by Willard H. Pedrick, Professor of Law, Northwestern University, Chicago, Illinois, U.S.A., and Fulbright Professor, University of Western Australia 1956-57. A layman was unhappily haled into Court without counsel—a most unfortunate situation. When the case was called, he stepped up to the Bench and said: "Sir, Your Honour, may it please the Court, I would like to enter my disappearance."

The Incendiary Debtor.—A familiar note is struck by a correspondent to the *News of the World*. He seems to have a real grievance. "A writ for a debt", he writes, "was served on me, and as I did not owe the money I put the writ on the fire, trusting the law to see this wrong claim was thrown out. Now the bailiffs have arrived to sell up my home. Where can I get justice?" There is, of course, always the Member for his district.

PRACTICAL POINTS.

Land Transfer—Unregistered Lease of Land Transfer Land for Term of less than Three Years—Covenant by Lessee to keep Farm clear of Noxious Weeds—Transfer of Reversion by Lessor's Executors—Right of Present Proprietors to sue Lessee for Breach of Covenant.

QUESTION: A, the registered proprietor, executed in 1954, in favour of B, an unregistrable lease of a farm for a term of three years less one day. A died during the currency of the lease and his executors have sold the freehold of the farm to C, who is now the registered proprietor of the freehold of the farm. B the tenant has failed to perform the terms of the lease in respect of keeping the farm clear of noxious weeds. Has C a good title, as owner of the freehold, by virtue of the transfer of the same from A's executors, to sue B the tenant for damages for breach of the terms of the lease without obtaining from A's executors an assignment of A's rights and powers as lessor under the above-mentioned unregistrable lease?

ANSWER: The answer to the question is in the affirmative. There does not appear to be any need to obtain an assignment from A's executors, although, if such an assignment can be obtained without much difficulty, it might be as well to obtain it, to prevent the possible citation of certain old cases in opposition.

The fact that the lease is not registered makes no difference: Land Transfer Act 1952, s. 15; *Domb* v. *Owler*, [1942] N.Z.L.R. 539.

The covenant runs with the land: Land Transfer Act 1952, s. 239; *White* v. *Akroyd*, [1919] N.Z.L.R. 813, cf. *Hutchison* v. *Rijeka Te Peehi*, [1919] N.Z.L.R. 373. The covenant touches and concerns the land itself.

As to the right of C to sue, see *Turner* v. *Walsh*, (1909) 2 K.B. 484, and s. 112 of the Property Law Act 1952; and, as to the right to damages for breach of such a covenant, see *Smith* v. *Barnitt*, (1894) 12 N.Z.L.R. 449, *Reihaua Terekuku* v. *Kidd*, (1886) N.Z.L.R. 4 S.C. 140. X2.

CORRESPONDENCE.

The Romford Case: Further Reflections.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Sir,

I read with interest the "reflections" of Professor A. G. Davis on *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* Incidentally, I had also read your own observations on the case in the JOURNAL. I am not concerned to discuss whether the decision is capable, to use Professor Davis's phrase, of criticism from "the juridical aspect"; their Lordships have spoken. On "the juridical aspect" this is enough for me. Since, however, Professor Davis has strayed into the realms of social morality—a less exact science than jurisprudence—and considers the decision has created "a social wrong", I feel emboldened to offer a few counter "reflections" on the morality of the attitude adopted.

Having cited a passage from the much used, and often misused, speech of the late Lord Atkin in *Donoghue* v. *Stevenson*—Professor Davis concludes with the assertion that "there is something ill with our jurisprudence when it gives a legal remedy which it is submitted obviously creates a social wrong." What, I respectfully inquire, is the "obvious social wrong" involved in the principle that any citizen *sui juris*, who by his negligent acts or omissions is the sole cause of injury and loss to a fellow-citizen, shall be responsible therefor?

Let the proposition be stated the other way round. It it a social "right" that any citizen *sui juris* should be free from all responsibility when his wrongful act or wrongful omission has been the sole cause of injury and loss to a fellow citizen? I stand amazed at the assertion—particularly coming from a professorial height—which, nakedly expressed, involves that a selected class of citizen—an employee—should as a social right be absolved from all the consequences of his negligent acts because another citizen—an employer—morally blameless, has insured himself against the consequences of his employees' wrongdoing. If our moral standards are to be abased in such a manner, let it be done by statute not by any specious appeals to social justice. Two eminent Judges, Romer L.J. and Finnemore J. have expressed themselves in no uncertain terms on the moral position. In *Semtex Ltd.* v. *Gladstone* [1954] 2 All E.R. 206, Finnemore J., at p. 212, said:

> "That an employee who is negligent and causes grave damage to his employers should be heard successfully to say that he should not make any contribution to the resulting damage is a proposition which does not in the least commend itself to me, and I do not see why it should be so. Justice, as we conceive justice in these Courts, requires that the person who caused the damage is the person who must in law be called on to pay the damages arising therefrom.

In *Lister's* case in the Court of Appeal [1955] 3 All E.R. 460, 480, Romer L.J. said:—

> It is not, in my opinion, in the public interest that workmen should assume that whoever else may be called upon to compensate the victims of their wrongdoing they themselves will be immune. I say this for two reasons. First, it is not in accord with contemporary thought that any section of the public should be free from any liability to which the public as a whole are subject. Secondly, such freedom would tend still further to diminish that sense of responsibility which all should feel towards one another but which can scarcely be regarded as an outstanding characteristic of modern life.

As against this, all that Professor Davis can cull from English judicial opinion is Lord Somervell's statement that employers and employees alike who drive motor-cars in breach of the *criminal* law (and I underline "criminal") are subject to sanctions. The learned and noble Lord then adds "the driver [i.e., the employee] has a further sanction in that accidents causing damage are "likely to hinder his advancement." Professor Davis characterizes these words as "a reply" to the observations of Romer L.J. With deep respect, can they be so treated? If so, they involve that, short of criminal conduct, no sanction should be put upon the sole author of the injury save "the likelihood of his advancement being hindered"—a terrifying sanction indeed in this country of over full employment!

Finally, as Professor Davis concluded his "reflections" with a paragraph from Lord Atkin's speech in *Donoghue* v. *Stevenson*, may I do likewise My quotation, unlike Professor Davis's, is, I think, directed to the actual matter in issue. At p. 581 Lord Atkin, after citing with approval A. L. Smith L.J. in *Le Lievre* v. *Gould* [1893] 1 Q.B., 504, as follows—

> a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other—:

added:

> I think this sufficiently states the truth if proximity be not confined to mere physical proximity but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

Is it to be supposed that Lord Atkin so carefully defined a duty only to hold that it would be a "social wrong" to impose a sanction for its breach?

I am, etc.,
H. SALTER NICHOLS,
Barrister-at-Law (Middle Temple).

Auckland.