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NEGLIGENCE: A DOCTOR'S DUTY TO HIS PATIENT.

LORD Macmillan said that the categories of negligence are never closed. This dictum is called to mind by the recent judgment of the learned Chief Justice in *Furniss* v. *Fitchett* (to be reported), a case which deals with the duty of care owed by a doctor to his patient.

The facts, put briefly, were that on May 21, 1956, and for some time previously the doctor had been the regular medical attendant of the patient, who was the plaintiff in the action, and of her husband. On that date, when relations between the patient and her husband were extremely strained, the patient's husband said to the doctor: "You must do something for me—give me a report for my lawyer". The doctor then gave to the patient's husband a document which summarized his observations as to the wife's mental condition, and concluded:

> On the basis of the above I consider she exhibits symptoms of paranoia and she should be given treatment for same if possible. An examination by a psychiatrist would be needed to fully diagnose her case and its requirements.

The patient continued to see the doctor professionally down to the month of April, 1957. She took proceedings for separation and maintenance orders. On May 29, 1957, during the hearing of her complaint in the Magistrates' Court, and in the course of her cross-examination, her husband's solicitor produced to her the document of May 21, 1956. It was common ground that as a result the patient suffered shock. The patient then brought an action against the doctor, claiming damages. It proceeded on the footing that it was a claim in tort. The jury found for her, and awarded her £250 damages. The doctor then moved for judgment *non obstante veredicto*, or, alternatively, for an order setting aside the verdict and judgment, and for a new trial.

In the course of his judgment, the learned Chief Justice said that he was told at the Bar that the question in issue had never been judicially considered in England or in New Zealand. This, he added, was confirmed by his own researches, as he had found no comparable Australian or Canadian case. The question is not even adverted to in *Taylor's Medical Jurisprudence*. In *Eddy on Professional Negligence*, it is stated, as a duty owed by a doctor to his patient at common law, that he should not disclose voluntarily, without the consent of his patient, information which he has obtained in the course of his professional relationship with the patient. His Honour went on to say that no authority was given for that proposition, and he had to regard the case before him as raising questions of law which were completely new and not hitherto decided. The effect of His Honour's judgment was to uphold the verdict of the jury.

It is, accordingly, natural that this case caused considerable interest here and overseas. A lot of uninformed comment followed; and it is as well that the reasons for the judgment should be clearly stated, and the application to the particular facts of the general principles of the law of negligence properly understood.

It was, in fact, submitted by counsel for the doctor that the mere novelty of the claim raised a presumption against its validity.

The learned Chief Justice said:

> He was right, I think, in not carrying his argument on the subject of novelty any further than that; for novelty alone is not, in my view, a defence: see *Clerk & Lindsell on Torts*, 11th ed., 73-76. But the novelty of this claim should make me hesitate long before "stating a new principle of liability save by way of rationalizing, though thereby extending, a number of analogous instances in which a claim has been sustained" (*ibid.*, p. 76, para. 113). I shall seek first an existing principle of liability and not a new one; but before doing so, I desire to remind myself of some of the peculiar aspects of this claim which distinguish it from other claims, which might arise in somewhat similar but not identical circumstances.
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> In the first place, because of the way this action was conducted, I am not concerned with any duty which might have been owed by the doctor if he stood in any contractual relationship to his patient. Even though it be obiter, I feel justified in expressing my view that there was here a contractual relationship, and I can scarcely doubt that, if it had been put to it, the jury would have found on the evidence that in that contract, there was an implied term of confidentiality, and that there had been a breach of it. No doubt, Mr Gazley elected to base his claim in tort rather than in contract, for the reason that he hoped to recover exemplary damages, and I do not criticize his tactics in the least. I am concerned, however, not with contractual obligations, but with an inquiry whether the common law places a doctor under some such duty as was alleged on behalf of the plaintiff.
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> Secondly, it is to be remembered that his is not a case in which there has been given a report or certificate which is deliberately false. Such cases may give rise to an action of deceit. Nor is it a case in which an untrue or incorrect certificate has been given as the result of want of sufficient inquiry or by blameworthy mistake. No suggestion has been made that the certificate or report given by Dr Fitchett on May 21, 1956, was untrue or incorrect. The facts are not similar to those in, for example, *Le Lievre* v. *Gould* [1893] 1 Q.B. 491 or in *De Freville* v. *Dill* (1927) 96 L.J.K.B. 1056. If Dr Fitchett was negligent at all, he was negligent only because of the manner in which he released the report, and in not foreseeing that at some stage, Mrs Furniss might be confronted with it in circumstances which might injure her.
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> Next, I am to remember that any duty which may be owed by the doctor at common law is not the duty which is imposed

on him by the Hippocratic Oath, or by any code of professional ethics which may be prescribed by the British Medical Association of which he is a member. Finally, I should add that I am not in this case concerned with what the doctor might be compelled to disclose if he were a witness giving evidence in a court of law. The well-known observation of Lord Mansfield in *The Duchess of Kingston's Case* (1776) 20 State Tr. 355, 573, has no bearing here.

Remembering all these matters, I turn again to inquire whether there is any existing principle of tortious liability to guide me.

The learned Chief Justice went on to say that well-known torts do not have their origin in any all-embracing principle of tortious liability. There are many references in the books to the difficulty of laying down such a principle. Nevertheless, in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580, Lord Atkin said :

. . . in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.

Lord Atkin's statement of that concept, His Honour observed, was known to every lawyer and was much wider than was indicated by the headnote to the report of the case in the *Law Reports*. It had been applied, with some amplification of what he said, by the highest authority. Nevertheless, the doctrine as stated by him had some exceptions ; or perhaps he should say it had some limits to its application.

These exceptions are referred to in *Salmond on Torts*, 11th ed., 498, 501. In particular, it seems that the duty to take care to avoid causing injury to others is restricted to physical injury, either to person or property. The learned author, at p. 694, also said :

The refusal to grant a remedy for negligent invasion of financial or pecuniary interests is long-standing, deep-rooted and not unreasonable.

His Honour continued :

But apart from the limitation of the doctrine to physical injury to person or property, and apart from the other exceptions mentioned in *Salmond on Torts*, 11th ed., 498, I know of no authority which precludes me in the present case from resorting to Lord Atkin's " general concept of relations giving rise to a duty of care ", and I think, it is applicable to the facts of the present case. It is true that the principle is limited to physical injury ; but I do not understand the word " physical " in that context as excluding shock. The distinction is between " physical " and " financial," and " shock ", I think, is a physical injury in the presently relevant sense. Accordingly, I think, I am justified in the present case in applying to its facts the general concept of tortious liability which Lord Atkin described.

The relationship between the plaintiff and the defendant was that of doctor and patient. The doctor knew—he admitted that he knew—that the disclosure to his patient of his opinion as to her mental condition would be harmful to her. He was careful not to tell her directly what that opinion was. Nevertheless, he wrote out and gave to Mrs Furniss's husband a certificate, expressing that opinion. If he ought reasonably to have had in contemplation that Mrs Furniss might be injured physically, though not financially, as the result of his giving that certificate—and that on the evidence is beyond dispute—then it seems clear that he should have regarded her as " his neighbour " in Lord Atkin's phrase. If she was his neighbour in that sense, he was under a duty to take care to avoid an act which he could reasonably foresee would be likely to injure her—again physically though not financially. Whether Mrs Furniss was to be regarded as his neighbour for that purpose, and whether he ought reasonably to have foreseen that the giving of a certificate, though true and correct, might nevertheless injure her, are questions of fact which would ultimately be for decision by the jury ; but on the preliminary question whether a cause of action is disclosed—the question I am now considering—they must be decided by the Judge, for it is for the Judge to determine whether a duty exists in law : see *Nova Mink Ltd.* v. *Trans-Canadian Airlines* [1951] 2 D.L.R. 241, 254, per MacDonald J. Though it is a question of law, it is essentially a jury question, and the Court should approach it as if it were a jury : per Lord Thankerton in *Glasgow Corporation* v. *Muir* [1943] A.C. 448, 454 ; [1943] 2 All E.R. 44, 47. " The issue of duty or not duty is, indeed, a question for the Court ; but it depends on the view taken of the facts " : per Lord Wright, in *Bourhill* v. *Young* [1943] A.C. 92, 111 ; [1942] 2 All E.R. 396, 406.

On the facts, it was clear that if the patient were to be confronted by this certificate, it was likely to do her harm. The certificate was handed to her husband, who was then living with his wife. Their relations were extremely strained. She regarded him as mentally unsound and as intent on doping or poisoning her. She had not hesitated to make these accusations against him, and it was because of her accusations that he had been brought to the distraught condition in which he found himself when he begged the doctor to give him a certificate. In these circumstances, it seemed to the learned Judge not only likely, but extremely likely, that when the husband was charged by his wife with mental instability, he would be goaded into a " tu quoque " retort, and that he would disclose to her either the certificate or at all events its contents. That he apparently did not disclose it, and that the certificate remained hidden from the patient for a whole year, spoke volumes for the husband's restraint. It was also to be noted that, in giving the certificate to her husband, the doctor placed no restrictions on its use. It was not even marked " confidential ". On that evidence, the learned Chief Justice could only conclude that the doctor ought reasonably to have foreseen that the contents of his certificate were likely to come to his patient's knowledge, and he knew that if they did, they would be likely to injure her in her health.

He did not hold that the doctor ought to have foreseen the precise manner in which the contents of his certificate did in fact come to the patient's knowledge ; though, he thought that, in the circumstances disclosed by the evidence, he ought to have foreseen that the certificate could be expected to be used in some legal proceedings, in which his patient would be concerned, and thus come to her knowledge. His Honour concluded :

It is sufficient to say that in my view of the evidence in the special circumstances of this case, Dr Fitchett should have foreseen that his patient would be likely to be injured as the result of his action in giving to her husband such a certificate as he did give, and in giving it to him without placing any restriction on its use. In these circumstances, I am of opinion that, on the principle of *Donoghue* v. *Stevenson* [1932] A.C. 562, there arose a duty of care on his part. I have not forgotten that the certificate was true and accurate, but I see no reason for limiting the duty to one of care in seeing that it is accurate. The duty must extend also to the exercise of care in deciding whether it should be put in circulation in such a way that it is likely to cause harm to another.

He also said that the decision of their Lordships in *Nocton* v. *Ashburton* [1914] A.C. 932, which took note of the fiduciary relationship between a solicitor and his client, was in line with, though not a direct authority for, the conclusion at which he had arrived on the basis of Lord Atkin's statement of the law in *Donoghue* v. *Stevenson* [1932] A.C. 562. He added :

On this branch of the motion, therefore, and limiting my remarks to the particular circumstances of the present case, I find that the defendant doctor was aware that the opinion which he expressed in the certificate of May 21, 1956, would, if it should come to the knowledge of his patient, be likely to injure her in her health. I find also that in the circumstances in which he issued that certificate—handing it to the patient's husband to be given to his solicitor, knowing that husband and wife were then estranged, and without

marking it as confidential or otherwise restricting its use—he ought reasonably to have foreseen that the certificate or its contents would be likely to come to the knowledge of his patient. I conclude, therefore, that, in the circumstances to which I have referred, the doctor owed to his patient at common law a duty to take reasonable care to ensure that no expression of his opinion as to her mental condition should come to her knowledge. The doctor did not take any precautions in that respect, and, in my opinion, a cause of action was thus disclosed in the statement of claim and in the evidence adduced in support of it.

His Honour concluded this part of his judgment by saying: The motion for judgment for the defendant, therefore, failed.

Before leaving that topic, I would point out that the duty which I have held the doctor to owe to his patient in this case is far less extensive than the duty which is laid on a medical practitioner by the Hippocratic Oath and by the Code of Ethics of the British Medical Association. In some future case it may be necessary to determine whether, subject to some exceptions such as those adverted to in my summing-up and others that readily suggest themselves, the duty to preserve a patient's secrets, may not be much more extensive than the duty I have here held to exist, and approximate very closely to the duty described in the British Medical Association's Code of Ethics. I venture to express the hope, and the belief, that such is, indeed, the law; but it is unnecessary in the present case for me to decide whether my belief is justified. Sitting, as I am, as a Judge of first instance, I ought not unnecessarily to express any concluded opinion on that point.

In considering the second part of the defendant's motion for judgment asking that the verdict of the jury be set aside and that a new trial be ordered on the ground of misdirection on the part of the trial Judge, and on other grounds not related to the Judge's summing-up to the jury, His Honour dealt with the submission for the defendant doctor that in certain circumstances, a doctor was justified in departing from the strict rules laid down by the British Medical Association, and that they were subject to exceptions in certain cases.

It was His Honour's view, and that was not disputed during the argument on the motion, that the ethical code of the British Medical Association could not create new common-law duties, and he had told the jury quite distinctly that

"the British Medical Association ruling on the matter could not be conclusive, for the British Medical Association cannot lay down the law in regard to it".

Nevertheless, he thought at the trial, and still thought, that the British Medical Association's Code of Ethics was evidence of the general professional standards to which a reasonably careful, skilled, and informed practitioner would conform. It was admissible for that purpose, and it, therefore, became necessary to decide whether the law, as distinct from the ethical code of the British Medical Association, permitted any departure from those standards on the topic. He said:

I have already held in dealing with the first part of the motion that a doctor's duty of care to his patient includes a duty not to give to a third party a certificate as to his patient's condition, if he can reasonably foresee that the certificate might come to the patient's knowledge, and if he can reasonably foresee that that would be likely to cause his patient physical harm. But I cannot think that that duty is so absolute as to permit, in law, not the slightest departure from it. Take the case of a doctor who discovers that his patient entertains delusions in respect of another, and in his disordered state of mind is liable at any moment to cause death or grievous bodily harm to that other. Can it be doubted for one moment that the public interest requires him to report that finding to some one? Take the case of a patient of very tender years or of unsound mind. Common sense and reason demand that some report on such a patient should be made to the patient's parent or other person having control of him. But public interest requires that care should be exercised in deciding what shall be reported and to whom. Publication or communication of the report to other than appropriate persons could still be a breach of the duty owed by the doctor if the patient thereby suffers unnecessary physical harm.

That which will justify a departure from the general rule must depend on what is reasonable professional conduct in the circumstances under consideration in the particular case, and as such is a question for the jury.

In the present case, His Honour said, the doctor was under a general duty to take care that the certificate which he issued, would not cause physical harm to his patient. Nevertheless, he thought that in certain circumstances, the issue of a certificate might have resulted to the benefit of the patient. Indeed, that was the doctor's own contention. He thought that as a result of it, his patient would not be committed to a mental institution without previous examination by a specialist in psychiatry. The doctor thought that committal would not be in his patient's interest. Accordingly, His Honour did not think that in this respect there was any misdirection of the jury. It was told, in effect, that it could find for the plaintiff if it came to the conclusion that, by reason of the particular manner of the disclosure in this case, the doctor's action did not conform with reasonable and accepted standards of professional conduct. He had put to the jury, as strongly as it was proper for him to put it, that which was the doctor's own answer—namely, that what he had done, was in his patient's interest as it would ensure (as he contended) that she would not be committed without previous specialist examination. He was not surprised that the jury did not share the doctor's view as to the only result that was likely to follow his action in issuing this certificate without taking care to see that it would not circulate too far.

If there was a breach only of the duty owed by the doctor to the British Medical Association, the present action would not be maintainable; but His Honour had already held that, at common law, the doctor owed a duty to his patient which was quite independent of any duty owed to the British Medical Association. The question of duty or no duty was a question for the Judge: whether there had been a breach of that duty was a question for the jury.

The fourth criticism of the summing-up was that it was a misdirection to tell the jury that it was for them

to decide whether the defendant ought to have realized that the report he wrote might be used in Court if negotiations for a separation failed and might cause a shock to the plaintiff (whereas contrary to such direction the foreseeability of the act in question is a question of law and not of fact).

No authority was cited for the proposition that the foreseeability of the act in question was not a question of fact, and the doctor's counsel did little more than state that he did rely on that ground, though this argument was founded mainly on the first part of his motion—an argument which His Honour had been unable to accept. His Honour continued:

Nevertheless, there is authority for the proposition that the question whether the defendant does owe a legal duty to take reasonable care to avoid causing physical harm to the plaintiff, is a question of law for the Judge. I have already cited *Nova Mink Ltd.* v. *Trans-Canadian Airlines* [1951] 2 D.L.R. 241; *Glasgow Corporation* v. *Muir* [1943] A.C. 448; [1943] 2 All E.R. 44, and *Bourhill* v. *Young* [1943] A.C. 92; [1943] 2 All E.R. 44, in that connection. But, as I read those cases, they go no further than this: that the Judge must determine as a preliminary matter whether there is evidence that the act in question is reasonably foreseeable. For that purpose, the Judge decides what "in the circumstances of the particular case the reasonable

man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen ": per Lord Macmillan, in *Glasgow Corporation* v. *Muir* [1943] A.C. 448, 457; [1943] 2 All E.R. 44, 48. In discharging this function, the Judge determines, as a jury would determine, what should be in contemplation and what accordingly ought to have been foreseen; but in doing so, he does not assess the weight to be given to the evidence of the relevant circumstances. If there is no evidence of such circumstances, there is, of course, no basis for finding a duty. If there is evidence of such circumstances, the Judge must accept it as true and on that basis he determines whether or not there is a duty. It is not his function to determine whether any particular witness is or is not to be believed. If he finds the duty to exist, he does so on the ground that there is evidence which, if believed, would show that such a duty exists. There is sufficient evidence upon which the case may go to the jury.

In the result, none of the complaints regarding the summing-up was substantiated.

To summarize His Honour's judgment: In the particular circumstances of this case, the doctor should reasonably have foreseen that the contents of his certificate were likely to come to his patient's knowledge, and that his patient would be likely to be injured as the result of his action in giving to her husband such a certificate as he gave, knowing that at the time his patient and her husband were estranged and in giving it to him without placing any restriction on its use. In such circumstances, there arose a duty of care on his part, notwithstanding that the certificate was true and accurate; and that duty extended also to the exercise of care in deciding whether it should be put in circulation in such a way that it was likely to cause physical harm to his patient. The showing of the certificate to the patient by her husband's solicitor was foreseeable by the doctor and was the very thing which the law required him to take care to avoid; and the damages resulting from the production of the certificate to the patient were not too remote, even though their immediate cause was the act of the husband's solicitor and not of the doctor.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Oppression of Minorities. *107 Law Journal*, 823.

CRIMINAL LAW.

Manslaughter By Negligent Act or Omission. *31 Australian Law Journal*, 630.

Annual Negligence in Motor Driving. *225 Law Times*, 226.

DIVORCE AND MATRIMONIAL CAUSES.

Practice—Appeal—Power of Court of Appeal to Excuse Non-compliance with Rules as to Service of Notice of Appeal and to Enlarge Time for Service—Court of Appeal Rules, R. 69.—Divorce and Matrimonial Causes—Practice—Appeal—Hearing in Camera—Power of Court of Appeal to Make Order forbidding Publication of Any Matter relating to Appeal—Divorce and Matrimonial Causes Act 1928, s. 55—Court of Appeal Rules, R. 42. Rule 69 of the Court of Appeal Rules is wide enough to empower the Court to excuse non-compliance with the Rules of that Court as to service of a notice of appeal from an order dismissing a petition under the Divorce and Matrimonial Causes Act 1928 and, consequently, to enlarge the time for such services. The Court of Appeal, on an application made on that behalf, may make an interim order under s. 55 of the Divorce and Matrimonial Causes Act 1928 and R. 42 of the Court of Appeal Rules forbidding the publication of any matter relating to an appeal from an order made on a divorce petition. *M.* v. *M.* (C.A. 1958. February 20. Gresson P. North and Cleary JJ.)

GIFT.

The Borderline Between Gift and Bargain. *102 Solicitors' Journal*, 4.

INTERNATIONAL LAW.

International Commission of Jurists. *25 Canadian Bar Review*, 898.

LICENCE.

Daughter of Deceased Owner in Occupation of Deceased's Dwellinghouse—Agreement with Executors to remain in Occupation while She endeavoured to arrange Finance to Purchase Premises, She paying Rent in the meantime—Such Agreement not Tenancy but Contract for Licence for Temporary Occupation—Magistrates' Courts Act 1947, s. 31 (1) (d). Before the death of her deceased father, on October 13, 1952, by agreement with him, B. with her husband and two children lived in the dwellinghouse owned by him. She paid no rent, but cared for him and looked after the premises. After her father's death, B. with her family remained in occupation of the premises. In connection with the winding up of the father's estate, B. decided to endeavour to purchase the freehold for cash. On November 13, 1952, the executors agreed to her proposal and also agreed that she could in the meantime remain in occupation on payment of £1 10s. a week. She was unable to raise the money to complete the purchase of the freehold. On July 15, 1957, the executors gave her notice purporting to terminate her licence to occupy the premises and requiring her to deliver up possession. She remained in occupation. In an action under s. 31 (1) (*d*) of the Magistrates' Courts Act 1947 claiming possession on the ground that B. was in possession of the premises without right, title or licence. *Held*, 1. That the intention of the parties, as shown by the agreement of November 13, 1952, was that B. should occupy the premises for such a reasonable time as would enable her in her then known circumstances to try all available sources of financial assistance to enable her to purchase the property. 2. That, accordingly, the agreement did not create a tenancy between the parties; but was a contract for a licence for temporary occupation of the premises. (*Marcroft Wagner Ltd.* v. *Smith* [1951] 2 K.B. 496; [1951] 2 All E.R. 271, applied, *Errington* v. *Errington* [1952] 1 K.B. 290; [1952] 1 All E.R. 149 and *Donald* v. *Baldwyn* [1953] N.Z.L.R. 313, referred to.). 3. That at the point of time when B. had failed to arrange finance for the purchase of the freehold, she became an occupier without right, title, or interest in the property. *Soames and Another* v. *Barnett* (1958. Before Astley S.M. at Auckland).

MAORIS AND MAORI LAND.

Succession on Intestacy—Maori Land Sold for Cash Consideration—Vendor's Trustees purchasing Other Maori Land for Cash Consideration in Trust for Purchaser—Transactions not an "Exchange" of Maori Land—Latter Land in Sole Ownership of Purchaser until His Death—Succession thereto determined as if Land were European Land—"Exchange"—Maori Affairs Act 1953, ss. 2 (2) (c), 117 (2) (c) (d), 187. In 1914, W.N., aged fifteen years, was the sole owner of 35 acres of Maori Land which he had inherited from his father in accordance with Maori custom. His trustees, in consideration of £210, conveyed the land by deed to E. On the same day the trustees acquired from P., for £150, a one-half undivided interest in 100 acres of Maori freehold land in trust for W.N. The Maori Land Board confirmed both alienations. W.N. remained sole owner until he died intestate in 1954. In a Case Stated by the Maori Appellate Court for the opinion of the Supreme Court on the question: "Whether the persons entitled to succeed to the interest of Wiremu Ngawhare deceased, in Lot 241A, Parish of Whangamarino, should be determined in accordance with Maori custom under s. 116 of the Maori Affairs Act 1953, or as if the land were European land under the provisions of s. 117 (2) (c) of that Act." *Held*, 1. That the two transactions were not an exchange of Maori Land for Maori Land, but were independent, the second land being acquired by purchase by the trustees for a pecuniary consideration from P. who was not a party to the first transaction; and, after the completion of the second transaction, W.N.'s trustees held Maori Land on W.N.'s behalf purchased with the proceeds of the first sale. 2. That the persons entitled to succeed to W.N.'s interest should be determined as if the land were European land, pursuant to the provisions of s. 117 (2) (c) of the Maori Affairs Act 1953. *In re Wiremu Ngawhare (Deceased), Hopkins* v. *Raupatu Te Kaponga.* (S.C. Auckland. 1958. February 26. T.A. Gresson J.)

NEGLIGENCE.

Assumption of Risk and Negligence. *25 Canadian Bar Review*, 950.

Invitee—Repairs by Occupier—Subdelegation to Contractor—If Occupier without Technical Skill, Duty of care requiring Him to obtain and follow Good Technical Advice—Jury to determine whether Occupier used Such Reasonable Care as could be expected of Laymen in Selection of Contractor, in supervising work and in inspecting Completed Work—Relevant Facts for Jury's Determination to be made Subjects of Separate Issues. Practice—New Trial—Issues—Relevant Facts for Jury's Determination not made Subject of Issues put at Trial—Denial of Such Issues to Defendant not cured by Summing-up—Substantial Miscarriage of Justice—New Trial Ordered on All Issues except Issue of Damages. Where there is a state of affairs in which the work entrusted by the occupier to an independent contractor was of a technical nature, and which for that reason could not properly have been undertaken by the occupier or his servants, an occupier can be exonerated when injury is suffered by an invitee or licensee, if he shows that he delegated to a competent contractor his duty "to use reasonable care to prevent damage from unusual danger which he knows or ought to know" (*Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274. *Haseldine* v. *C. A. Daw & Son Ltd.* [1941] 2 K.B. 343; [1941] 3 All E.R. 156, followed.) *Thomson* v. *Cremin* [1953] 2 All E.R. 1183, considered. *Riden* v. *A.C. Billings and Sons Ltd.* [1957] 1 Q.B. 46; [1956] 3 All E.R. 357 referred to.) If there has been such a delegation, and if the contractor is careless in the performance of the work delegated to him, he may be directly liable to compensate the injured party. (*Donoghue* v. *Stevenson* [1932] A.C. 562, followed.) The defendant was the owner of a building of two floors. There were two flats on the upper floor. The plaintiff was the tenant of one such flat, and, from the back of a common passage or landing, a wooden external staircase led down to a yard which she was entitled to cross in order to gain access to a washhouse and a garage. On two occasions it had been necessary to repair the staircase, and the defendant had seen to the repairs. Within three weeks of the second occasion, the plaintiff proceeded in broad daylight to descend the stairs, and saw one of the treads had fallen from its place. Instead of returning to safety, she elected to step on to the next lower tread, and was precipitated to the ground. She claimed general damages from the plaintiff. The action was brought before Cooke J. and a jury. The defendant requested submission to the jury of certain issues relevant to the question of subdelegation by the defendant to a contractor to repair the staircase, but these were disallowed by the trial Judge, who put to the jury, as Issue No. 1, the question whether the defendant had failed to take reasonable care to keep the outside staircase safe at the time of the accident. On that issue, the jury found that the defendant had failed to take reasonable car to keep the outside stairway safe, and that the plaintiff was not guilty of contributory negligence. It awarded the plaintiff damages. On a motion for judgment for the defendant, the trial Judge, on the first ground stated in the motion, held that the external staircase was not in the possession and control of the defendant, and gave judgment for the defendant. The Court of Appeal, by a majority, held that the staircase was in the possession and control of the defendant, reversed the trial Judge, and remitted the case to the Supreme Court for determination of other questions raised by the motion: [1955] N.Z.L.R. 1097. The trial Judge then held that there was evidence to go to the jury that the defendant had failed to exercise reasonable care to keep the staircase safe. He also held that there was no misdirection, and that the jury's verdict was not against the weight of evidence. He dismissed the defendant's motion for a new trial, and entered judgment for the respondent. On appeal from that judgment, *Held*, by the Court of Appeal (Barrowclough C.J. and F. B. Adams J., McGregor J. dissenting), That the judgment of the trial Judge should be set aside and that there should be a new trial on all the issues, except the issue of damages. For the reasons, per Barrowclough C.J. (with whom F. B. Adams J. expressed himself as being in general agreement): 1. That, if the defendant had no technical skill of her own, then her duty of care required her to obtain and follow good technical advice; but it was a question of fact for the jury to determine whether, for the repair of the outside staircase, she required technical advice, and that was an issue which should have been submitted to the jury; and that, without a determination of that fact by the jury on an issue put to it, it was impossible for an appellate Court to say that the present case did not fall within the principle of *Haseldine* v. *C. A. Daw and Son Ltd.*, expressed above. 2. That the other relevant facts in this case which fell to be determined by the jury, and which were not made the subject of separate issues, although the defendant had sought to have them submitted, were: (i) whether the defendant used reasonable care in the selection of the contractor; (ii) whether she exercised such reasonable care as could be expected on the part of a layman supervising the work; and (iii) whether she used such reasonable care as could be expected of a layman in inspecting the work after it was completed, with a view to ascertaining whether it was competently done. 3. That the denial of those four issues to the defendant was not cured by the summing-up by the trial Judge; and a substantial miscarriage of justice had resulted, and, looking at the matter solely as one lying within the law of torts, a new trial should be granted. (*Braddock* v. *Bevins* [1948] 1 K.B. 580; [1948] 1 All E.R. 450, *Bray* v. *Ford* [1896] A.C. 44, and *Benson* v. *Kwong Chong* [1931] N.Z.L.R. 31; [1930] G.L.R. 567, referred to.) 4. That the plaintiff could not support the judgment in her favour by relying on the proposition that there existed a contractual obligation owed to her by the defendant as lessor. (*Dunster* v. *Hollis* [1918] 1 K.B. 795, not followed.) Per F. B. Adams J. (with whom Barrowclough C.J. expressed himself as being in complete agreement.) 1. That the duty of the defendant as landlord in respect of a common staircase retained by her in her own possession and control subject to the rights of user granted to her tenants was governed by the general law governing the liability in tort of an occupier to his invitee—that is, that the occupier must exercise reasonable care in respect of dangers of which he knew or ought to have known and which were unknown to the invitee. (*Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, aff. on app. (1867) L.R. 2 C.P. 211, and *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737, followed. *Thomson* v. *Cremin* [1953] 2 All E.R. 1183, explained. *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74, applied.) 2. That, here, the only question which arose was one of liability in damages for personal injuries caused by the state of the staircase; and as the common-law rule as to occupier and invitee was applicable and provided a remedy, there was no ground for replacing such remedy by an implied contract as to safety; and, consequently, Issue No. 1 did not represent the ground on which the true basis of liability might be based, and that the true basis of liability was never put to the jury. (*Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218; [1955] 3 All E.R. 864, distinguished.) *Lyons* v. *Nicholls* (S.C. Wellington. 1956. February 6. Cooke J. Court of Appeal. Wellington. 1957. December 6. 1958. March 3. BarrowcloughC.J. F. B. Adams, McGregor JJ.)

PRACTICE.

Appeals to the Court of Appeal—Application for Leave to Appeal from Judgment of Supreme Court on appeal from Magistrates' Court—Judge not called upon to form any Opinion as to Soundness of Supreme Court Judgment—Inadvertence in failing to make Point open to Applicant not Ground for granting Leave—Case involving No Interest beyond Direct Subject-matter—Judicature Act 1908, s. 67. A Judge, who is hearing an application under s. 67 of the Judicature Act 1908 for leave to appeal to the Court of Appeal against a determination of the Supreme Court or appeal from the Magistrates' Court, is not called upon to form any opinion, final or provisional, as to the soundness, in law or in fact, of the judgment which it is sought to carry to the Court of Appeal. The merits of the case are relevant only to the extent that the Court must be satisfied that the appeal will raise some question of law or fact which is capable of *bona fide* and serious argument; but that of itself is not enough as a ground for granting the application. (*Rutherfurd* v. *Waite* (1923) G.L.R. 34, followed.) Section 67 does not provide a *locus poenitentiae* for a party who, through inadvertence has failed in the Supreme Court to make a point that might have been open to him. Where the case involves no interest beyond its direct subject-matter, the litigation should not be allowed to proceed beyond the Supreme Court. (*P.* v. *P.* [1957] N.Z.L.R. 854, referred to.) *P.* v. *P.* (*No. 2*). (S.C. Palmerston North. 1957. November 21; December 18. Barrowclough C.J.)

Appeals to Court of Appeal—Security for Costs—Security dispensed with only in Exceptional Circumstances—Court of Appeal Rules 1955, R. 34 (1). Security for costs of appeal should not be dispensed with under R. 34 (1) of the Court of Appeal Rules 1955, except in exceptional circumstances. (*Russell* v. *Stainton & Co.* [1922] G.L.R. 422 and *Hellyar* v. *Morrison* [1932] N.Z.L.R. 321; [1931] G.L.R. 661, followed. *Hamilton* v. *Bank of New Zealand* (1903) 23 N.Z.L.R. 550; 7 G.L.R. 276, and *Official Assignee* v. *Harding* (1914) 33 N.Z.L.R. 1551; 16 G.L.R. 597, referred to.) On a motion, under R. 34 (1) of the Court of Appeal Rules 1955, for an order

that leave be granted to the applicant to appeal to the Court of Appeal without giving security for costs, the grounds were, (a) that the applicant was acting in a representative capacity (representing himself and all other persons who would have been such persons as should by the law of intestacy in New Zealand be entitled to a certain estate) and further that he represented a class of persons which had not yet been fully determined; and (b) that, if the appeal should be dismissed with costs, it was unlikely that the Court of Appeal would burden the applicant, as appellant, with costs and it was likely that the costs of the parties would be paid out of the settled fund. *Held*, That neither of the circumstances relied on in the motion was of such an exceptional nature as to warrant a relaxation of the general rule that an appellant must give security for costs in the Court of Appeal. *In re Donner (deceased), Public Trustee* v. *Donner and Others.* (S.C. (In Chambers). Wellington. 1957. October 4; November 20. Barrowclough C.J.)

SHIPPING.

Limitation of Shipowners' Liability. *225 Law Times*, 29.

TENANCY.

Shop Premises—Assignment of Lease—Tenant assigning Lease with Lessor's Consent—No written Consent by Lessor to Continuance of Protective Statutory Provisions—Assignment not bringing into Existence New or Different Tenancy—Lessor Entitled to Possession on Expiry of Term of Lease—"Tenant"—Tenancy Act 1955, s. 14 (1). By an agreement entered into in 1952, W. agreed to lease a lock-up shop to B. for a term of four years and B. agreed, inter alia, that she would not assign the demised premises without the consent of the lessor and that, before assigning to a company, she would procure and deliver to the lessor a deed of covenant by the controlling shareholders, containing elaborate provisions. In 1954, by deed of assignment, B. assigned the premises for the residue of the term to a company. As a condition of consenting to the assignment, the tween the shareholders of the first part, the company of the second part, and the lessor of the third part. The shareholders thereby covenanted, inter alia, to pay the rent and to keep, observe, and perform all the other provisions of the lessee; and the company covenanted that any breach of the shareholders' covenants should constitute default by the company as lessee under the lease. These covenants by the shareholders and the company were not required by the original agreement to lease. The company entered into possession, and rent was paid by it and accepted by the lessor. Upon the expiration of the term of four years, the lessor claimed possession of the premises from the company, in reliance on s. 14 (1) of the Tenancy Act 1955, as, before the transfer, he had not consented in writing to the continued application of Part IV of that Act. *Held*, by the Court of Appeal, for the reasons given in the several judgments, That the assignment to the company of the interest which B held was not done in such a way or attended by such circumstances as to bring into existence a new or different tenancy; and that the lessor was accordingly entitled to possession. Per Gresson J. The term "tenancy" as used in the Tenancy Act 1955 is not confined to an estate recognized in law as such, but is to be interpreted in a much wider or larger sense to include any right of occupation whether derived from a legal or equitable title. Appeal from the judgment of Stanton J. [1957] N.Z.L.R. 504, dismissed. *De Luxe Confectionery Limited* v. *Waddington.* (C.A. Wellington. 1957. July 1; October 25. Gresson J. McGregor J. Shorland J.)

TRADE MARKS.

Some Recent Trade Mark Cases. *108 Law Journal*, 6.

TRANSPORT.

Juries and Compulsory Automobile Insurance Legislation *31 Australian Law Journal*, 638.

Offences—Driving Motor-Vehicle "at such a speed that he is unable to stop his vehicle within half the length of clear roadway visible ahead"—Offence consisting solely of Exceeding Limit of Speed—No Jurisdiction to order Endorsement of Licence for First or Second Offence—Transport Act 1949, s. 31 (1)—Traffic Regulations 1956 (S.R. 1956-217), Reg. 26 (2). Regulation 26 (2) of the Traffic Regulations 1956 which is in part as follows: "(2) No person shall on any road drive any motor vehicle at such a speed that he is unable to stop his vehicle within half the length of clear roadway that to the driver is visible immediately in front of the vehicle . . ." creates an offence consisting solely of exceeding (a) limit of speed", within the meaning of s. 31 (1) of the Transport Act 1949. Consequently, where any person is convicted of an offence under Reg. 26 (2) of the Traffic Regulations 1956, and it is his first or second offence, the Court has no jurisdiction to order the endorsement of his motor-driver's licence. *Huthnance* v. *Johnston.* (S.C. Wellington. 1957. November 22; December 4. McGregor J.)

TRUSTEES.

Duties of Trustees—Will—Construction—Rule in Howe v. *Dartmouth—Trusts Estate consisting of Farm and Company Shares—Trustees without Power to carry on Farm or Continue Existing Investment in Company Shares—Order made authorizing Trustees to carry on Farming Business and to maintain Investment in Shares—Trust to hold "the residue as well corpus as income" and to pay the income "arising therefrom" to Widow—Rule to apply from date of Testator's Death to date of Order respecting Income derived from Personalty.* Assets in an estate included a farm, with a farming business and shares in a limited company, which owned farm lands adjoining and complementary to the farm. The will of the deceased, who died in 1951, contained no power to carry on the business or continue the existing investments. In the circumstances, the Court, being satisfied that the returns derived from farming showed a much greater return than could be expected to be derived from trustee investments, made an order under s. 32 of the Trustee Act 1956, authorizing the trustees to carry on the farming business on the farm for five years or until a further order. An order under s. 64 was also made authorizing the concurrent maintaining of the investment in the company's shares. Under s. 73, the trustees were granted relief from personal liability for having carried on the farming business and for having maintained the investment in the company's shares. Under the will, the trustees were to hold all residue, as well corpus as income, upon trust: (*a*) to pay the income "arising therefrom" to the deceased's widow until death or remarriage whichever shall first happen and thereafter (*b*) to "pay and transfer the residue as well corpus as income" to a named beneficiary with executory gift over to issue (if more then one in equal shares) in the event of the death of the named beneficiary during the lifetime of the deceased or of the widow. Upon the question whether or not the life tenant was entitled to payment of the whole of the net income of the estate during her lifetime, as s. 85, of the Trustee Act 1956 had no application to the will. *Held*, 1. That the rule in *Howe* v. *Dartmouth* (1802) 7 Ves. 137; 32 E.R. 56, must be applied, because (*a*) The initial gift was to trustees upon trust, and not to the tenant for life; and the will must be construed as requiring the trustees to convert unauthorized investments. (*Collins* v. *Collins* (1838) 2 My. & K. 703; 39 E.R. 1113; and *In re Barratt* [1925] 1 Ch. 550, distinguished.) (*b*) The words "the residue as well corpus as income" were appropriate to designate the residue in capital and income left in the fund established by conversion at the appropriate time. (*c*) If the property in question were intended to be enjoyed in specie, then in so far as it was in substance a business, power to retain existing investments and power to carry on the business must have been given. The fact that the parties found it necessary to seek such powers from the Court rejected any possibility of implying such powers in the will. (*d*) A substantial part of the land farmed was owned by the company, and the estate owned shares in the company, not in the land. (*In re Mountain* [1934] N.Z.L.R. 399; [1934] G.L.R. 490, distinguished.) 2. That, from the moment of the making of the orders above referred to, regularizing an irregular situation, the will must be construed as though it contained a power authorizing the trustees not merely to postpone conversion, but authorizing them to invest in the present investments. (*In re Mier, Richards* v. *Doxat* [1935] 1 Ch. 562, followed. *In re Chaytor* [1905] 1 Ch. 233, referred to). 3. That the rule in *Howe* v. *Dartmouth* did not apply from the date of the order sanctioning the carrying on of the farming business and the investment in the company's shares; but it applied from the date of the testator's death to the date of the order in respect of income derived from personalty. (*In re Parry* [1947] Ch. 23; [1946] 2 All E.R. 412, followed.) 4. That the rate of interest payable in terms of the Rule was six per cent. (*McCrostie* v. *Quinn* [1927] G.L.R. 37, followed.) *In re Irving (Deceased), Wilson and Another* v. *Irving and Another.* (S.C. Auckland. 1957. December 3. Shorland J.)

EARLY LAW TUITION IN CANTERBURY.

By the late G. T. WESTON.*

In 1902 I was appointed Lecturer in Law and Jurisprudence at Canterbury College, in succession to the late Mr William Izard, M.A., LL.M. (Cantab.), who had held the position for many years, and began the task in 1902. My appointment was annually renewed until the end of 1906, when an increasing practice led me not to seek reappointment. My salary as lecturer during the period was £200 per annum.

Mr Izard was a sound lawyer in active practice, able lucidly to answer all questions put to him. He took a personal interest in the individual progress of his students, but was a bridge player and had found that his work as a lecturer occupied so much time that his bridge suffered! He was a great admirer of the *Law Quarterly Review*, and many subscribers in New Zealand to that invaluable work are indebted to him for their introduction to it. I had attended his lectures for three years and knowing his methods was to some extent prepared for the work.

The duties entailed in each week of the two terms a lecture in Jurisprudence for both pass and honours students and seven other lectures during which we had to cover Roman Law, International Law, Private International Law or Conflict of Laws, and the professional law subjects, for examination purposes, were grouped as follows: Contracts, Criminal Law and Torts, Real and Personal Property, Equity, Practice and Procedure, Evidence.

In the five years of my term, I had only two students in Honours Jurisprudence; but these were with me for two and three years respectively, and this fact involved a tremendous amount of preparation and the accumulation of a small library to avoid repetition of lectures.

The terms—two in those days—were too short to allow of the professional subjects being properly covered and at the end of the second term lectures on those subjects were (with the help of Amos, the College porter!) carried on until the University examinations commenced some three or four weeks later.

During the period of my appointment, the library books available were inadequate. At my request I was supplied with a copy of the *New Zealand Statutes* and the *New Zealand Law Reports;* but, otherwise, there were only a few old books, such as Sir Henry Maine's works and *Wheaton's International Law*, in the College Library, which was housed in the College Hall and was under little or no supervision. The text-books in Jurisprudence were *Austin's Jurisprudence* and *Holland's Jurisprudence* and for Private International Law, Westlake's work on that subject. Austin's book was long-winded, while the first six chapters of Holland's work were extremely difficult for a student embarking on a legal career. In those times, Jurisprudence was taken at the beginning of the LL.B. course, instead of at a later stage, as is now possible. On the whole, I think this subject should be taken at the beginning rather than later. It provides a dictionary of legal terms, but more important, gives a student a broad and philosophical outlook on law and some general knowledge of the development of legal systems, particularly our own.

Hall's International Law was, as it still is, a valuable and useful work for students, but the other works mentioned were difficult. All readers appreciate logical arrangement, lucid style, and as much simplicity of language as possible.

For the professional subjects, there were, of course, the recognized text-books; but, with one or two exceptions, no New Zealand text-books, and the lecturer had to deal with New Zealand law, when it differed from English law, by reference to the *New Zealand Statutes* and cases reported in the *New Zealand Law Reports*. We were then, of course, without the information and guidance of works like *Halsbury's Laws of England*—a shining milestone on the long but level roadway of the law.

Towards the end of my term, practitioners in New Zealand, especially those with legal education in the Crown Departments, began to specialize in the law of their chosen subjects and published the results of their work. Of the earlier New Zealand works *Salmond's Jurisprudence*, *Martin's Conveyancing*, and *Hutchen's Land Transfer Act* were of the greatest assistance to the students and to the lecturer. One should not here fail to say, how useful we found *Stout and Sim's Supreme Court Practice*. It was one of the earliest text-books and, like the others, was and is, under the revising hand of W. J. Sim Q.C., a son of one of the original authors, a great help to practitioners as well as to students.

Westlake's Private International Law was a rather abstruse and involved book. When *Dicey's Conflict of Laws* was first published copies in New Zealand were scarce and expensive. I compiled a precis of its contents for the use of my students as an aid to the understanding of Westlake.

The subject of Conflict of Laws was taken before the Professional Law subjects, and students, who had little experience of, or instruction in, their own or any other law, found it extremely difficult to follow the rules governing the selection and application of the proper law to cases and circumstances which involved conflict. It seems to me this subject is better taken after the student has learnt the law of his own country.

The students were without exception keen; some were schoolmasters on the way to a change of profession, others were law clerks, while some were taking the course—as we continue to say *ex abundanti cautela*—in case at any time their then occupation should fail or become wearisome.

I was fortunate in numbering among my students O. T. J. Alpers and F. V. Frazer, who rose to judicial eminence, and W. R. McKean and James Miller who were subsequently appointed Magistrates. F. A. Kitchingham and C. R. Fell who became Crown Prosecutors in their home towns, were also some of those who came to the lectures. Both F. A. Kitchingham and Dr. J. W. McIlraith—whose success was some reward to a hard-worked lecturer—were Senior Scholars and took their M.A. Degree with First Class Honours in Political Science.

* These notes were written in November, 1949, by the late Mr G. T. Weston, at the suggestion of Mr A. C. Brassington, and they are now published with the consent of Mr Weston's family.

As I have said, the books available for students were limited and not always sufficiently identified with the New Zealand Law. The Canterbury District Law Society, however, assisted us all and made its library available for the students, which privilege was, of course, a great help to them, especially in those days when books were expensive, and, even though the pound was worth its weight in gold, salaries and earnings of the younger men were low.

The work, though strenuous, was interesting: in a sense, I was a student among students. On one occasion, I was asked, whether I taught them all I knew and, on my saying that I had certainly done so, my inquirer said that such a course was not wise in my own interests. I could not convince him that his view was not quite an honest one, but continued thereafter to make sure that the students received all I had to give. One endeavoured by question and answer to make the students teach themselves; and, by discussions which they to a large extent carried on themselves, to provoke an exchange of wits which encouraged the slower ones to think and to acquire some facility of expression. I concentrated on the statement and explanation of broad principles, and by question and answer endeavoured to teach the students how to apply the principle and to understand the reasons why the principle should or should not apply to the case before them. With an understanding of the main principle, the students could then understand how and why the text-book writers had, as it were, elaborated a set of sub-rules to the main rule. This of course is really what we learn from *Smith's Leading Cases*.

Some of the lessons of my experience were:—

(*a*) The desirability of opening a course of lectures with a conspectus or general background of the subject.

(*b*) The value of discussion and periodical tests to maintain keenness, stimulate thought, and encourage facility of expression.

(*c*) The importance of reading law with the special object of learning first principles first.

(*d*) The importance of a spirit of helpfulness in lecturers.

(*e*) The importance of assessing the capacity of students so that the indolent may be made to work harder, the duller encouraged and developed and the conscientious and brilliant kept from overstrain.

While not intending to encourage slackness, it may well be that in courses today there is a tendency to work students too hard and too long in adolescent, adventurous, and vital years. We may yet, in subjects like Practice and Procedure, follow the military custom of permitting the use of the appropriate text-book in the examination room.

May I conclude by saying that, although the work of a lecturer was hard, it was altogether pleasant and satisfying.

THE NEW JUDICIAL COMMITTEE RULES.

Some Alterations in Practice on Appeals.

The Judicial Committee Rules 1957, which received the approval of Her Majesty in Council on December 20, 1957, and came into force on February 1, 1958, revoke and replace the Judicial Committee Rules 1925. They deal, as did the Rules which they replace, exclusively with regulating the practice on appeals.

The new Rules affect only the practice to be followed in England after the arrival of the Record, and do not affect the steps to be taken in the Court appealed from. The same numbering of the Rules has been retained.

The main alterations are as follows (particular attention is drawn to RR. 8, 12, 43, and 44.):

Rule 4. Provision has now been made that at least six copies of the petition for special leave to appeal shall be lodged in place of five copies, and, in addition, six copies of the judgment from which leave to appeal is sought.

Rule 8. The figure of "£100" has been substituted for the figure of "£25"; in this Rule which deals with petitions for special leave to appeal *in forma pauperis*, a petitioner has now to swear that "he is not worth £100 in the world excepting his wearing-apparel and his interest in the subject-matter of the intended appeal."

Rule 12. This Rule now provides that where the copies of the Record are to be made in England they shall be reproduced by type process, unless the parties agree to printing. Where copies of the Record are made abroad they must, as heretofore, be printed.

Rules 22, 29, and 34. In the 1925 Rules, it was laid down that definite steps in the prosecution of an appeal had to be taken, in the case of appeals from certain countries, within two months and in the case of appeals from other countries (set out in Schedule B of the 1925 Rules), including New Zealand, within a period of four months. It has now been decided to abolish the four months period and retain only the two months period.

Rule 22. The figure "40" has been substituted for the figure "50" in the last line of this Rule in the phrase "and shall also engage to pay, at such price as shall be fixed by the Registrar of the Privy Council the cost of printing at least *forty* copies thereof).

Rule 44. The figure "£100" has been substituted for the figure "£25." The Rule relates to a respondent defending an appeal *in forma pauperis*: see R. 12, *supra*.

Rule 52. Words have been added giving the Registrar of the Privy Council power to refuse a petition which fails to comply with the provisions of *Rule 3*, which deals with the form in which a petition for special leave is to be presented.

Rule 61. This Rule now provides for the duplication of cases instead of printing.

Council Office Fees. These have been increased generally by 25 per cent. and the taxing fee is now sixpence for each £ allowed, regardless of the amount of the bill.

Schedule B of the 1925 Rules is no longer required and Schedule C in those Rules has now become Schedule B.

EASEMENTS: DRAINAGE, DRAINAGE PUMP, STOP BANK, AND WATER SUPPLY.

Conveyancing Precedent.

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

EXPLANATORY NOTE.

The distinctive features of the following rather long precedents are :

(i) The several types of easements involved.

(ii) The rather novel nature of two of the types, the drainage pump and the stop bank easements.

(iii) The definition clauses set out in the part headed " General." These definitions tend to conciseness.

The fact that several types of easements are involved will not increase the amount of stamp duty or registration fee payable. Parts One to Three of these easements are suitable for adjoining farms situated on land of a swampy nature.

In lieu of cl. G in subheading " General " the following clauses could be substituted but many conveyancers would consider these substitutionary clauses as being too drastic, as interfering too much with the registered proprietors' rights of alienation.

(*a*) That if any party hereto shall at any time sell or lease or otherwise dispose or part with the possession or occupation of his lands aforesaid or any part thereof such party will obtain from the purchaser lessee or other person in possession or occupation on such disposition the execution by such purchaser lessee or other person as aforesaid of a deed of covenant in the like terms *mutatis mutandis* in every respect as is provided for by this Deed by the purchaser lessee or other person as aforesaid his executors and administrators with the other parties hereto and their assigns and with the provisions that should such purchaser lessee or other person as aforesaid in turn sell lease or otherwise dispose of or part with the possession or occupation of his lands or any part thereof he will procure a similar deed of covenant from his purchaser lessee or other person as aforesaid and so toties quoties every such deed of covenant to be prepared by the solicitors for the party hereto entitled to call for such deed of covenant at the cost in all respects of the other party or other persons who shall be primarily liable to procure the deed of covenant in question.

(*b*) That no party hereto will mortgage or otherwise charge his estate and interest in his respective lands aforesaid or any part thereof without giving to the mortgagee or incumbrancee previous notice of this Deed and of the contents thereof.

PRECEDENT.

MEMORANDUM OF TRANSFER AND GRANT OF EASEMENTS.

WHEREAS : (1) William A. of Wanganui, Farmer (hereinafter called " William ") is registered as the proprietor of an estate in fee simple subject however to such encumbrances, liens, and interests as are notified by memoranda underwritten or endorsed hereon, in all that parcel of land situated in the Provincial District of Wellington more particularly described in the First Schedule hereunder written (and hereinafter called " William's land ") :

(2) Richard A. of Wanganui, Farmer (hereinafter called " Richard ") is registered as proprietor of an estate in fee simple subject similarly as aforesaid in all those parcels of land situated in the Provincial District of Wellington more particularly described in the Second Schedule hereunder written (and hereinafter called " Richard's land ") :

(3) John A. of Wanganui, Farmer (hereinafter called " John ") is registered as proprietor of an estate in fee simple subject similarly as aforesaid in all that parcel of land situated in the Provincial District of Wellington more particularly described in the Third Schedule hereunder written (and hereinafter called " John's land ") :

(4) Jack A. of Wanganui, Farmer (hereinafter called " Jack ") is registered as proprietor of an estate in fee simple subject similarly as aforesaid in all those parecels of land situated in the Provincial District of Wellington more particularly described in the Fourth Schedule hereunder written (and hereinafter called " Jack's land ") :

(5) A. Jones of Wanganui, Sheepfarmer and B. Jones of Wanganui, Sheepfarmer (hereinafter referred to as " the Jones proprietors ") are registered as proprietors of an estate in fee simple subject similarly as aforesaid in all that parcel of land situated in the Provincial District of Wellington more particularly described in the Fifth Schedule hereunder written (and hereinafter called " Jones's land ") :

(6) THE parties hereto are desirous of granting the respective rights and easements and of entering into the respective covenants hereinafter set forth :

NOW THEREFORE in pursuance ofthe premises and in consideration of the several covenants on the respective parts of the parties hereto hereinafter contained (as is hereby acknowledged) THIS TRANSFER WITNESSETH as follows :

GENERAL.

The following provisions shall apply to these presents and to the easements and rights created thereby :

A. WORDS importing the singular number (for example, " registered proprietor ") include the plural number, and words importing the masculine gender (for example, " he ") include females.

B. IN these presents :

" *No. 1 drain* " means the open drain already constructed on Richard's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured yellow and marked thereon " No. 1."

" *No. 2 drain* " means the open drain already constructed on Richard's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured green and marked thereon " No. 2."

" *No. 3 drain* " means the open drain already constructed on John's land, Richard's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured red and marked thereon " No. 3."

" *No. 4 drain* " means the open drain already constructed on Jones's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured burnt sienna and marked thereon " No. 4."

" *No. 4A drain* " means the open drain already constructed on John's land, Richard's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured green and marked thereon " No. 4A."

" *No. 4B drain* " means the open drain already constructed on Richard's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured red and marked thereon " No. 4B."

" *No. 4C drain* " means the open drain already constructed on Richard's land and William's land, the centre-line of which is delineated on the plan endorsed hereon and coloured red and marked thereon " No. 4C."

" *No. 5 drain* " means the open drain already constructed on Jack's land, William's land, Richard's land and John's land, the centre-line of which is delineated on the plan endorsed hereon and coloured blue and marked thereon " No. 5H."

" *No. 5A drain* " means the open drain already constructed on John's land and extending to the boundary between John's

land and Jack's land, the centre-line of which is delineated on the plan endorsed hereon and coloured burnt sienna and marked thereon " No. 5A."

" *No. 6 drain* " means the open drain already constructed on Jones's land, Jack's land and Richard's land, the centre-line of which is delineated on the plan endorsed hereon and coloured violet and marked thereon " No. 6."

C. IN each case of a grant of a " drainage easement " such shall be interpreted as meaning that the grantor of such easement transfers and grants to the grantee as and in the nature of an easement appurtenant to the grantee's land as therein specified the full free and uninterrupted right, liberty, privilege and authority for all times hereafter to drain and discharge water whether rain, tempest, spring, soakage or seepage water in any quantities from the grantee's said land (either directly or after the same has passed through any intervening land as the case may be) over and across the land of the grantor and through the open drain specified in such grant, and the full free and uninterrupted right, liberty, privilege and authority for all times hereafter to use the open drain so specified for the purpose of more effectively draining the said land of the grantee.

D. IN each case of a grant of " drain maintenance easement " such shall be interpreted as meaning that the grantor of such easement transfers and grants to the grantee, his surveyors, engineers, workmen, agents and servants, with or without horses, carts or other vehicles and machinery as and in the nature of an easement appurtenant to the grantee's land as therein specified from time to time and at all times the right to enter, proceed over and remain upon such portions of the grantor's land as shall be necessary for the purpose of maintaining, repairing, and/or cleansing the open drain specified in any such grant. AND IT IS HEREBY DECLARED that a drain maintenance easement as herein defined shall be ancillary to a drainage easement as herein defined.

E. SECTION 239 of " The Land Transfer Act, 1952 " shall apply to these presents.

F. THE several easements, rights, obligations and covenants hereby created or expressed shall so far as the rules of law or equity permit enure to the benefit of and shall bind the appropriate party hereto and his respective heirs, executors, administrators, assigns, and successors in title. Nothing herein contained in this clause shall prejudice the immediately following cl. G hereof.

G. IF any party to these presents shall at any time sell or transfer his land aforesaid or any part thereof he shall obtain from the purchaser or transferee the execution by such purchaser or transferee of a deed of covenant between such purchaser or transferee and the registered proprietors of the other lands affected hereby to the effect that he the purchaser or transferee his executors, administrators and assigns and successors in title will faithfully observe and promptly perform all covenants conditions and terms expressed or implied in these presents to be binding on the registered proprietor of the land so acquired by him with a provision that should such purchaser or transferee in turn sell or transfer his land or any part thereof such purchaser or transferee will procure a similar deed of covenant from his purchaser or transferee and so on as often as such occasion shall arise every such deed of covenant to be prepared by the solicitors for the parties entitled to call for such deed of covenant at the cost in all respects of the other party or other persons who shall be primarily liable to procure the deed of covenant in question.

H. ALL differences and disputes which shall arise between the parties hereto or any of them or between one or more of them and the personal representatives of another or others of them or between the respective personal representatives of any of them touching or concerning the provisions of these presents or any matter arising thereout or any act or thing to be done suffered or omitted in pursuance hereof or touching or concerning the construction of these presents shall be referred to arbitration in accordance with the Arbitration Act 1908 or any amendment thereto or re-enactment thereof for the time being in force. The matters covered by this clause shall include arrangements for the overseeing and operating of the pump hereinafter mentioned and all incidental matters and also all questions relating to the deepening of any of the drains hereinafter mentioned and the construction of new drains and also relating to the strengthening or heightening of the stop-banks or the re-location thereof and also all other matters in anyway relating to or arising out of the arrangements provided for in these presents and the giving of effect to the intention of these presents in providing for the efficient drainage, stop-banking, pumping and water supply.

PART I.

I. GRANTS OF DRAINAGE EASEMENTS AND DRAIN MAINTENANCE EASEMENTS.

No. 1 drain—

No. 2 drain—: WILLIAM DOTH GRANT unto RICHARD a drainage easement through No. 1 drain and through No. 2 drain over and across William's land AND IT IS DECLARED that it is the intention of these presents that such No. 1 drain and No. 2 drain shall be common drains for the purpose of draining William's land and Richard's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole or any part of such drains, whether on William's land or Richard's land, shall be borne in equal shares by the registered proprietors for the time being of William's land and Richard's land and William and Richard DO EACH GRANT unto the other a drain maintenance easement in respect of such drains.

No. 3 drain : WILLIAM DOTH GRANT unto each of them RICHARD and JOHN a drainage easement through No. 3 drain over and across William's land ; AND RICHARD DOTH GRANT unto JOHN a drainage easement through No. 3 drain over and across Richard's land ;

AND IT IS DECLARED that it is the intention of these presents that such No. 3 drain shall be a common drain for the purposes of draining William's land, Richard's land and John's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole or any part of such drains, whether on William's land, Richard's land or John's land, shall be borne in equal shares by the registered proprietors for the time being of William's land, Richard's land and John's land and William, Richard and John DO EACH GRANT unto the other and others of them a drain maintenance easement in respect of such drain.

No. 4 drain : THE JONES PROPRIETORS DO GRANT unto each of them, William, Richard and John, a drainage easement through No. 4 drain over and across Jones's land ;

AND WILLIAM DOTH GRANT unto each of them THE JONES' PROPRIETORS, RICHARD and JOHN a drainage easement through No. 4 drain over and across William's land :

AND IT IS DECLARED that it is the intention of these presents that such No. 4 drain shall be a common drain for the purposes of draining Jones's land, William's land, Richard's land and John's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole of any part of such drain whether on Jones's land or William's land shall be borne by the following registered proprietors for the time being in the following shares :

By the registered proprietors of Jones's land .. four-sixteenths
By the registered proprietor of William's land.. seven-sixteenths
By the registered proprietor of Richard's land four-sixteenths
By the registered proprietor of John's land .. one-sixteenth

and the Jones Proprietors, William, Richard, and John DO EACH GRANT unto the other and others of them a drain maintenance easement in respect of such drain.

No. 4A drain : WILLIAM DOTH GRANT unto each of them Richard and John a drainage easement through No. 4A drain over and across William's land : AND RICHARD DOTH GRANT unto JOHN a drainage easement through No. 4A drain over across Richard's land ;

AND IT IS DECLARED that it is the intention of these presents that such No. 4A drain shall be a common drain for the purpose of draining Williams' land, Richard's land and John's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole or any part of such drain, whether on William's land, Richard's land or John's land shall be borne by the following registered proprietors for the time being in the following shares :

By the registered proprietor of William's land .. four-tenths
By the registered proprietor of Richard's land .. four-tenths
By the registeredproprietor of John's land .. two-tenths

and William, Richard and John DO EACH GRANT unto the other and others of them a drain maintenance easement in respect of such drain.

No. 4B drain :

No. 4C drain : WILLIAM DOTH GRANT unto RICHARD a drainage easement through No. 4B drain and through No 4C drain over and across William's land AND IR IS DECLARED that it is the intention of these presents that such No. 4B drain and No. 4C drain shall be common drains for the purpose of draining William's land and Richard's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole or any part of such drains whether on William's land or Richard's land shall be borne in equal shares

by the registered proprietors for the time being of William's land and Richard's land and William and Richard DO EACH GRANT unto the other a drain maintenance asement in respect of such drains.

No. 5 drain: JOHN DOTH GRANT unto each of them RICHARD, WILLIAM and JACK a drainage easement through No. 5 drain over and across John's land; AND RICHARD DOTH GRANT unto each of them WILLIAM and JACK a drainage easement through No. 5 drain over and across Richard's land; AND IT IS DECLARED that it is the intention of these presents that such No. 5 drain shall be a common drain for the purpose of draining John's land, Richard's land, William's land and Jack's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole or any part of such drain whether on John's land, Richard's land, William's land or Jack's land shall be borne by the following registered proprietors for the time being in the following shares:

By the registered proprietor of John's land .. two-eighths
By the registered proprietor of Richard's land .. two-eighths
By the registered proprietor of William's land .. one-eighth
By the registered proprietor of Jack's land .. three-eighths

and John, Richard, William, and Jack DO EACH GRANT unto the other and others of them a drain maintenance easement in respect of such drain.

No. 5A drain: JOHN DOTH GRANT unto Jack a drainage easement through No. 5A drain over and across John's land AND IT IS DECLARED that it is the intention of these presents that such No. 5A drain shall be a common drain for the purpose of draining John's land and Jack's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing the whole or any part of the said drain on John's land shall be borne by the following registered proprietors for the time being in the following shares:

By the registered proprietor of John's land .. one-third
By the registered proprietor of Jack's land .. two-thirds

and John DOTH GRANT unto Jack a drain maintenance easement in respect of such land.

No. 6 drain: THE JONES PROPRIETORS DO GRANT unto each of them RICHARD and JACK a drainage easement through No. 6 drain over and across Jones's land; AND RICHARD DOTH GRANT unto JACK a drainage easement through No. 6 drain over and across Richard's land;

AND IT IS DECLARED that it is the intention of these presents that such No. 6 drain shall be a common drain for the purpose of draining Jones's land, Richard's land and Jack's land AND IT IS DECLARED that the costs of maintaining, repairing and/or cleansing any part of the said No. 6 drain which is on Richard's land or Jack's land shall be borne by the following registered proprietors for the time being in the following shares:

By the registered proprietor of Richard's land.. one-fourth
By the registered proprietor of Jack's land .. three-fourths

and Richard and Jack DO EACH GRANT unto the other a drain maintenance easement in respect of such drain

AND IT IS DECLARED by the parties hereto as a general provision relating to the foregoing easements that the registered proprietors of the land through which any drain (in connection with which rights are granted by these presents) passes, shall be responsible in the first instance for the performance of all necessary work involved in the adequate maintenance, repair and cleansing of any such drain but nothing in this clause shall be construed as in any way modifying or altering the foregoing provisions of these presents providing for the apportionment of the cost of maintaining repairing and cleansing any drain affected by these presents AND IT IS FURTHER DECLARED that in the event of any registered proprietor as aforesaid failing or neglecting adequately to maintain, repair or cleanse any such drain passing through his land it shall be lawful for the registered proprietors of the other lands affected thereby and to whom a drain maintenance easement has been granted by these presents in respect of such drain or any one or more of them to enter on the land of any such defaulting registered proprietor and perform the work which such defaulting registered proprietor should have performed and in any such event the registered proprietor or proprietors performing such work shall be entitled to recover from each of the other registered proprietor/s concerned including the defaulting registered proprietor the cost of such work, or the proportion of such cost as the case may be in accordance with the provisions hereinbefore set out AND for the purposes aforesaid each registered proprietor of the lands affected by these presents DOTH HEREBY GRANT (but without in any way derogating from the preceding provisions of these presents) to each and every one of the other registered proprietors of such lands aforesaid, his or their surveyors, engineers, workmen, agents and servants with or without horses carts and other vehicles and machinery from time to time and at all times the right to enter and remain upon such portion of his land as shall be necessary for the purpose of maintaining, repairing and/or cleansing any such drain.

(To be continued.)

Circumstantial Evidence.— "It is true that the evidence on this aspect of the case is circumstantial. But juries are often invited as a matter of course to act on circumstantial evidence of this kind. A factory is found to have been broken and entered. A police patrol, promptly summoned, surrounds it and closes in. Behind some bushes in a yard at the back two men are found hiding. They are asked what they are doing there, and they refuse to give any explanation or give an inherently improbable explanation. There is not the slightest direct evidence that they did the breaking and entering. But clearly there is a case to go to a jury against them. The jury is invited to draw an inference, which is a perfectly rational inference, from circumstantial evidence. They may disbelieve the police evidence, or they may refuse to draw the inference, or they may feel a reasonable doubt about either believing the evidence or drawing the inference. But these things are for them. In cases of the present type it can only be in rare instances that the vital evidence will be other than circumstantial. Perhaps it does not happen 'once in a thousand times' (per Erle J. in *R.* v. *Duffield (h)*). (1851) 5 Cox. 404" —Fullagar J. in *In re Alstergren and Nosworthy* [1947] V.L.R. 24, 42.

"Public" Access.—"I think that, when the statute speaks of 'the public' in this connection, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways. I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed—that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor"—Lord Clyde in *Harrison* v. *Hill* 1932 S.C. (J.) 13, 16.

TOWN AND COUNTRY PLANNING APPEALS.

Cropper *v.* Auckland City Corporation.

Town and Country Planning Appeal Board. Auckland. 1957. October 23.

Jurisdiction—Permit—Area zoned as "Commercial B"—Permit Sought for Building comprising Shops and Dancing Academy—Neighbouring Residents' Objection praying Order prohibiting issue of Building Permit—Views of objectors not Matters to which Council required to give Consideration—No Jurisdiction on Matter calling for Decision—"For the proper application of this Act"—Town and Country Planning Act 1953, ss. 2 (3), 10, 21 (4), 23 (2), 38.

Application under s. 2 (3) of the Act. It related to a property at the corner of Remuera Road and Vincent Avenue, known as 417 Remuera Road.

This property was in an area zoned under the Auckland City Council's undisclosed district scheme as "Commercial B".

The applicant and others residing in the immediate neighbourhood became aware that the owner had applied to the Council for a building permit to erect a building comprising shops and a dancing academy. Such a use was a "predominant" use in a "commercial" zone. The applicant lodged this application praying for an order prohibiting the Council from issuing a building permit.

The judgment of the Board was delivered by

REID S.M. (Chairman). The first question calling for determination is whether the Board has jurisdiction under the Act to consider and determine the difference of opinion between the parties. At the hearing, the Board heard the submissions of counsel on this preliminary question and reserved its decision thereon.

If the Act does not give the Board the requisite jurisdiction that is the end of the matter. The Board has no equitable jurisdiction.

It follows that s. 2 (3), being the only section in the Act which might give the Board jurisdiction, must be examined and if possible interpreted. All counsel were agreed that this subsection is obscurely worded, a view that is shared by the Board.

In construing the Act, the Board must look at the general purport of the Act and must endeavour to interpret it according to the law on interpretation of statutes. "Every Act . . . shall accordingly receive such fair large and liberal construction as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent meaning and spirit": Acts Interpretation Act 1924 s. 5 (j).

The Board does not propose to attempt a general interpretation of s. 2 (3). It is concerned only with its application (if any) to the circumstances of this particular case. Counsel for the appellant submits correctly that the matters mentioned in the subsection are disjunctive and that in this application the matters to be considered are:

(1) Appropriateness of zoning.
(2) Principles of town-and-country planning.
(3) Likelihood of the zoning of this area remaining as it is at present.

He admits that the "appropriateness" of the zoning is the foundation stone of the application.

The difficulties of construction arise from the words "and the question requires decision for the proper application of the Act. In other words, is a decision for the proper application of the Act. In other words, is a decision on the appropriateness of the zoning at the present stage of the Council's district scheme, viz.; "an undisclosed district scheme" required for the proper application of the Act.

Part II of the Act (s. 18 et seq.) lays down the obligations of a Council in preparing schemes.

During the period when a scheme is in process of preparation, i.e., is an "undisclosed district scheme", the Act gives no right of objection or appeal to anyone save as set out in s. 21 (4).

It may well be that the intention of the Legislature was that councils should be free during the embryonic stages of planning to "get on with the job" and be protected from attack at any time at the hands of amateur planners or disgruntled owners.

Some colour is lent to this view by the provisions of s. 38 of the Act which confers permissive powers on councils to prohibit "detrimental" works.

The exercise of those powers lies in the discretion of the Council; it is not subject to direction by this Board save on appeal brought by any "owner or occupier" under s. 38 (8) against a refusal by the Council or by "any person injuriously affected" by any other refusal or prohibition of a Council *under this section:* s. 38 (10).

It follows that at no time during the preliminary stages of the preparation of a scheme is a Council required by the Act to give consideration to the views of any authority, body or person save as required by s. 21, subss. 3 to 6 inclusive.

The views of the applicant as to the appropriateness of the zoning contemplated by the Council are not matters to which the Council is required to give consideration at this stage of its planning and the fact that their views on this question are at variance is not a matter calling for decision "for the proper application of this Act", i.e., the discharge by the Council of the duties and obligations imposed on it. The Board holds that it has no jurisdiction to consider the application.

If the Board is wrong in its interpretation of this difficult section, it would then fall to it to consider the merits of the application.

It is conceded by counsel for the applicant that the foundation stone of the application is the appropriateness of the zoning.

The Board has already indicated in previous decisions that it will not alter any tentative or prospective zoning under an undisclosed district scheme because to do so might well prejudice the rights of owners and occupiers of property affected to object under s. 23 when the scheme has been publicly notified as a proposed district scheme or the rights of any persons to object to objections: s. 23 (2).

Counsel for the respondent Council indicated that his client Council would welcome an expression of opinion by the Board on the "likelihood" of the present zoning remaining permanent, but any such expression of opinion would not be binding.

As counsel for the owner submits such an expression of opinion is not something requiring the Board's decision to enable the Act to operate.

The applicant in her application asks that the Board prohibit the granting of a permit pursuant to s. 38 of the Act.

As previously indicated s. 38 is a "permissive" section and the Board has no jurisdiction on an application such as this to direct the Council how it should exercise the discretionary powers it has under that section. The Board declines jurisdiction, and makes no order as to costs.

Jurisdiction declined.

Giddens and Churcher *v.* Feilding Borough.

Town and Country Planning Appeal Board. Feilding. 1957. December 18.

Building—Extensions—Area Zoned as "residential"—Building used as Factory for Five Years—Residents in Immediate Vicinity considering Factory Operations not detracting from Amenities of Neighbourhood—Future Development of Residential Area considered—Permit for Extensions refused—Town and Country Planning Act 1953, ss. 2 (1), 38 (1) (b).

Appeal by the occupiers of a property in North Street, Feilding, against a decision of the Council refusing the issue of a building permit for extensions and alterations to an existing building used and occupied by them as a factory. This appeal was partially heard on March 18, 1957, but when it transpired that the appellants who are not the owners were not "occupiers" as defined by s. 2 (1) of the Act the Board ruled that it could not deal with the matter.

At the request of counsel the appeal was adjourned sine die.

The appellants in the meantime acquired the legal status of "occupiers" and the appeal was heard.

The property in question was in an area that had been zoned as "residential" under the Council's "undisclosed district scheme". The appellants' business came within the designation of "industrial" and as such was not a permitted use within a residential area.

The Council refused a building permit on the grounds that the proposed alterations and additions would constitute a "detrimental work" under s. 38 (1) (b) of the Act.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, and having inspected the pro-

perty in question and the surrounding locality the Board finds:

1. That the appellants have carried on business in their present premises for four to five years.
2. That the evidence of residents in the immediate vicinity indicates that the appellants' operations as at present carried out do not detract from the amenities of the immediate neighbourhood in the sense of disturbance from noise, smoke or from traffic problems.
3. That the appellants' business is expanding beyond the capacity of the existing buildings and it is a reasonable assumption that it will continue to expand.
4. That the area in which the property is situated is predominantly residential in character and a substantial residential development can be expected in the immediate future.
5. That in considering the application of town-and-country-planning principles both local authorities and the Board must endeavour to consider the future rather than the immediate present so that although the appellants' present activities may not materially detract from the amenities of the immediate neighbourhood, nevertheless the expansion of their business is likely to detract from the amenities likely to be provided in a closely settled residential area such as this area can be reasonably expected to become.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

Thompson *v.* Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1957. October 23.

Building—Permit—Area zoned as "Residential"—Property, when bought by Newspaper Vendor, comprising Dwellinghouse and Four Small Outbuildings (756 square feet in all)—Owner Demolishing Buildings and Erecting Building for Newspaper Storage (722 square feet)—Owner convicted of erecting Building without Permit—Permit sought and refused—Building not detracting from Amenities of Neighbourhood—Permit given for Building for Use for Domestic and Storage Purposes only—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal by the owner of a house property at 35 King's Road, Panmure, containing 37.9 pp. more or less, being Lot 1 on a plan deposited in the Lands Registry Office at Auckland under No. 41709 being the whole of the land comprised in Certificate of Title Volume 1113 Folio 257.

The appellant purchased this property in 1954 and at the time he purchased it there were on it a dwelling house and four small buildings comprising a bach, a garage, and two sheds. These small buildings occupied a total of 756 square feet and were scattered round a small back yard. The Board accepts the appellant's evidence that these were dilapidated and untidy.

The appellant is a newspaper vendor by occupation and as such he requires some form of shelter in which to keep the newspapers under cover before and during their distribution to the runners who deliver them.

With the dual object of providing some such shelter and doing away with the existing untidy outbuildings the appellant took these buildings down and with some of the material from them and some new material he erected one building measuring 38 feet by 19 feet with a total floor space of 722 square feet.

Believing that this work was in the nature of a reconstruction he did not apply for a building permit. He was subsequently charged with erecting a building without a permit, convicted, and fined.

He then applied to the Council for a building permit to regularize the position. The Council refused to grant a permit indicating that it would not permit the erection of any building having a greater area than 400 square feet.

The appellant appealed against that decision.

The judgment of the Board was delivered by

REID S.M. (Chairman). The property under consideration is in an area zoned as "Residential" under the respondent Council's undisclosed district scheme and under the Code of Ordinances adopted by the Council in relation to that scheme outbuildings in a "residential" zone are limited to 400 square feet. The object of this restriction is to preserve the amenities of a residential area and prevent the establishment therein of "back yard" industries or business.

After considering the evidence adduced and the submissions of counsel the Board holds:

1. That the Council acted consistently and properly in refusing the permit.
2. That in the circumstances of this particular case consideration must be given to two factors:
   (a) That when the appellant purchased the property there was already an "existing use" of 756 square feet of back-yard outbuildings. There is now a rearranged use of 722 square feet under one roof. The Council concedes that the present arrangement from an aesthetic angle is a substantial improvement on former conditions.
   (b) That the building is used principally for domestic purposes and the "business use" affects part only of the building for a very limited period of less than one hour between 4.15 p.m. and 5 p.m. on six weed days.
3. That this particular building and the use to which it is put by the appellant will not detract from the amenities of the neighbourhood likely to be provided or preserved under the Council's undisclosed district scheme.

The appeal is allowed. This decision must not be construed as being of general application, nor as approving the use of the building under consideration for any other purpose except domestic than it is at present being used. It was suggested by counsel for the appellant that consideration might be given to imposing conditions.

The Board has considered this question, but takes the view that the Council will have sufficient powers, under the recent amendment to the Act, to control any purported change of use.

No order as to costs.

Appeal allowed.

Copper, Son, and Compton Ltd. *v.* Wairoa Borough.

Town and Country Planning Appeal Board. Wairoa. 1957. December 16.

Building—Extensions—Area Zoned as "Residential"—Manufacture of Concrete Products—Non-conforming Industrial Use—Permit refused—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal by the company-owner of a property situated in Campbell Street, Wairoa, containing 1 ac. 2 ro. 1.05 pp., being Lot 2 on Deposited Plan 7504. On part of this property it had erected a reinforced concrete building in which it carried on business as manufacturers of concrete products. The existing building had a floor space of 3,518 square feet.

The appellant applied to the Council for a building permit for the erection in permanent materials of extensions to this building to provide an additional floor space of 4,532 square feet. The Council refused a permit and, in so doing, it must be deemed to have acted under s. 38 (1) (b) of the Act and to have held that the proposed extensions would be a "detrimental work" within the meaning of that section.

The Council had a proposed district scheme which had been publicly notified though the time for lodging objections had not yet expired.

Under that scheme the property in question was in the centre of an area zoned as "residential".

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds:

1. That the company's business is the only industry situated in this area which is correctly described as a desirable "residential" area within easy distance of the main shopping and commercial area; its character as such is likely to be preserved in the Council's proposed district scheme.
2. That the company's business falls into the category of "Industrial C" and, under no circumstances, would it be permitted to operate in other than an "industrial" zone, although the company can continue its operations in its present building as a "non-conforming" use.
3. That to grant the permit sought would more than double the size of the present factory and would undoubtedly tend to perpetuate the company's operations on its present site.
4. That to facilitate the substantial expansion of a non-conforming industrial use in a residential area is contrary to town-and-country-planning principles.

The Board holds that the Council acted properly and consistently in refusing the permit, and the appeal is disallowed.

No order as to costs.

Appeal dismissed.

THE LAWYER IN AMERICA.

By WILLIAM T. HUME.

Assuredly in no other modern country do lawyers play such a vital part in the community as in the United States of America. The amazingly complex structure of the American legal system containing multitudinous and sometimes conflicting Federal, State, and local city laws ensures that no ordinarily prudent citizen embarks on any major activity without consulting his lawyer. The harassed business man has to consider his taxation liabilities not only to the Federal Government, but also to his State Government and to his local city authority which may impose a variety of taxes besides the ordinary rates on land to which we are accustomed in New Zealand.

During a recent visit to the United States, I had the opportunity of meeting a number of American attorneys. This brought to mind forceably the extent a highly organized modern industrial nation depends upon its lawyers.

America is, of course, the home of that peculiar institution known as "corporation lawyers," a huge legal firm with a hundred or more qualified lawyers among its partners, associates, and staff. There are over a dozen of these huge firms in the country. Most are in New York, but there are one or two in each of the other large cities such as Chicago, Philadelphia, Washington, and Los Angles. The size of these gigantic firms is dictated by the sheer physical manpower needed to handle some of the cases that arise in the Courts, especially under the anti-trust legislation. A case such as the recent one in which the Du Pont Company was ordered to give up its large shareholding in the General Motors Company might easily require the services of twenty lawyers for a three-year period in preparing the case for trial.

The complexity of Government also, of course, makes for large legal staffs in both Federal and State Governments. Each federal and state department as a rule has its own legal staff and the Federal Department of Justice tops all with over 5,000 qualified lawyers on its staff. Even the F.B.I. insists that, if possible, its gun-toting operatives should be qualified lawyers!

I visited a number of American Courts and found them on the whole not unlike our own. Although judges and counsel are not robed, the superior Courts tend to be more formal than an equivalent English Court. I was fortunate to visit the United States Supreme Court when an appeal was being taken before the full court of nine Judges. Counsel read their submissions from a lectern placed before the Judges' Bench, with very much the atmosphere of a preacher delivering the sermon at church on a Sunday evening. The appeal was concerned with the basic right of courts to imprison for contempt, and a surprising number of references were made to early English law in the 16th and 17th centuries. Counsel and Judges discussed in detail English law as to outlawry and attainder, quoting a number of early English decisions; and it was emphasized that United States law still derives its basis from the ancient English common law. But Judges in any Court are much alike. The slight little figure of Mr Justice Frankfurter with his humorous, yet very pertinent, interjections reminded me very strongly of our own much respected Judge, the late Mr. Justice Callan.

The atmosphere in the local and municipal courts was very much freer and easier than in the superior Courts. Counsel sat about in a semi-circle and often cross-examined while sitting down. I heard one case in which a defendant was charged with being a rogue and a vagabond and consorting with known narcotic users. His counsel could find little to say in his favour and despairingly ended with the plea that at least his client was a well-known Democrat. The Judge, obviously also a Democrat, smilingly replied that it wasn't much good telling him that as he was not intending to stand for re-election that year!

One of my most interesting evenings was spent in meeting three of the counsel for the N.A.A.C.P., the National Association for the Advancement of Coloured People. Much of the spectacular recent advancement in the status of Negroes has been due to the work of a small band of devoted Negro lawyers who have successively established in the Federal Courts the right of Negro citizens to participate as equals in various spheres of community life, culminating in the recent successful school integration cases. I met Dr. M. Johnson, the Dean of the Law Faculty at Howard University, a Negro university at which most of the N.A.A.C.P. lawyers have trained, including Thurgood Marshall, the famous Negro lawyer who was senior counsel in the school integration cases. The history of these Negro cases in United States shows that free access by all citizens to impartial Courts continues to be the basic foundation of American and British freedom.

Perhaps the most important example one learns from the American scene is that a legal training provides a background for entry into many different spheres of life, and does not confine a person only to the narrow practice of law as a profession. Nearly half the members of State and Federal Legislatures in United States appear to have trained as lawyers, and many heads of large companies and corporations have had a legal background. The United States has recognized that the basic legal training in marshalling and evaluating a number of different facts and making a considered decision upon those facts fits a person not only for work in the professional sphere of law, but for many responsible positions in government and industry.

"**Divorce and Domicil.**"—"In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable"—Mr Justice Frankfurter in *Williams* v. *North Carolina* (1945) 325 U.S. 226, 232.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Where Girls Go Wrong.—A conscientious firm of solicitors decided recently to send its stenographer into Court to record the argument of counsel briefed by it. On receiving her report, members of the firm were surprised to find a transcript which included the words "Lord Wright, at p. 1197, on the subject of *regiposelockmeter*", and "the knowledge of the defendant is an essential element within the liability under the principle of *intermandamus* when it is being applied." Upon further inquiry into the possible enrichment of the language, it transpired that the first word was simply a bulldozed edition of our old familiar friend *res ipsa loquitur*. Students of extraordinary remedies will note that the second word was not a Scots version of mandamus, but that leading authority on the law of invitor and invitee, *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274.

Common Employment.—In 1939, Lord Atkin in *Radcliffe* v. *Ribble Motor Services Ltd.* (1939) 55 T.L.R. 459, 460, said: "At the present time this doctrine is looked at askance by Judges and text-book writers. 'There are none to praise, and very few to love.'" This doctrine disappeared in New Zealand in 1922' largely as the result of years of agitation by the late P. J. O'Regan, but it survived in England for another nine years after Lord Atkin's pronouncement. In America it gave rise to a powerful piece of verse called "'Butch' Weldy":—

After I got religion and steadied down
They gave me a job in the canning works,
And every morning I had to fill
The tank in the yard with gasoline,
That fed the blow-fires in the sheds
To heat the soldering irons.
And I mounted a rickety ladder to do it,
Carrying buckets full of the stuff.
One morning, as I stood there pouring,
The air grew still and seemed to heave,
And I shot up as the tank exploded,
And down I came with both legs broken,
And my eyes burned crisp as a couple of eggs.
For someone left a blow-fire going,
And something sucked the flame in the tank.
The Circuit Judge said whoever did it
Was a fellow-servant of mine, and so
Old Rhodes' son didn't have to pay me.
And I sat on the witness stand as blind
As Jack the Fiddler, saying over and over,
"I didn't know him at all."

Its author was Edgar Lee Masters, the first of America's naturalistic poets, who in *Spoon River Anthology*, wrote in verse the imaginary lives of some two-hundred-and-sixty individuals in a small community.

An Ex-wife's tenancy.—In *Ruapekapeka Sawmill Company Limited* v. *Yeatts and Anor.* [1958] N.Z.L.R. 265—an originating summons to determine the remedy available to a mortgagee to evict from a flat a wife claiming possession "under or through" her former husband mortgagor—one looks in vain for some gem of philosophical content that throws light upon the difficult age in which we live. This is at least surprising since the Judge (Haslam J.) is a Doctor of Philosophy of Oxford University, while counsel (G. E. Barton and R. B. Cooke) are both Doctors of Philosophy of Cambridge University. "Women have all the liberty they should wish to have," says Dr. Johnson. "We have all the labour and the danger and women have all the advantage." Such dicta, however, would not apparently have weighed with the Court. Judgment was for the plaintiff.

Storm or Calm —With no sense of disrespect to the members of the Permanent Court of Appeal, Scriblex cites from "Richard Roe's" column in the *Solicitor's Journal* (11/1/58) a tribute to the late Mr. Justice Lynskey: "How fortunate, therefore, that Mr. Justice Lynskey should have resisted all attempts to elevate him to the Court of Appeal, even though his ultimate destination might well have been the House of Lords. He was generally reckoned the soundest of all the Queen's Bench puisnes with a deadly, though unspectacular, talent for finding a short infallible way to shoot down those ingenious but bad points in which clever counsel delight. In a man with such a remarkable bent for law it was a very endearing characteristic that he never fell in love with mere legal pedantry, and preferred the human contacts of witnesses, juries, and assize courts to the arid, though more honorific destiny of sitting in those tribunals where one tortuous legal argument succeeds another in interminable procession." Everyone to his taste, no doubt; but the comment would have drawn a sympathetic chuckle from many of our past puisne Judges.

From My Notebook.—"Insubordination means a refusal to subordinate oneself to authority, and it does not follow that a mere failure to obey an order amounts to insubordination."—*R.* v. *Grant* [1957] 1 W.L.R. 906, per Lord Goddard C.J.

"Benevolence in operation, although it may mitigate the effect, cannot remove the evil of tyranny"—*Kores Manufacturing Co. Ltd.* v. *Kolak Manufacturing Co. Ltd.* [1957] 1 W.L.R. 1012, per Lloyd-Jacob J.

"It is reasonable and proper that streets should be free from what is offensive and injurious, and made tolerable for the ordinary citizen. The problem the Government will have to consider will be the probable result of carrying out the committee's recommendations in regard to prostitution in view of the admitted danger that, if effective, they would 'sweep the dirt under the carpet.'"—Lord Kilmuir L.C. speaking on the Wolfenden Committee Report in the House of Lords.

"I should have thought the word 'fattened' would have conveyed what counsel for the respondent says the Minister intended it to convey to anybody; but we have to construe the phrase 'fed for slaughter' and, like my Lord, I am unable to see why if the bird is given food to prevent it getting thinner that is not just as much 'fed for slaughter' as giving food to fatten it and increase its weight."—Devlin J. in *Wernick* v. *Green* [1958] 1 All E.R. 59, 61.

AQUA SAXUM CADENDO CAVAT.

The Second Round.

By Advocatus Ruralis.

One of the penalties of near old age is that we are inclined to talk a language of our own with the result that the generation referred to by Matthew xii, 38 et seq, seek after a sign. Arising out of a recent article, we were shocked to find that a generation had arisen that knew neither Dados nor Latin.

Dados was an institution in the First World War that gathered clothing. In our area there is a survivor from this institution, and every Anzac Day we examine his sox. The object of Dados during our war was frustration. If a second-lieutenant was inclined to get above himself, he was sent to tell Dados that Dados had made a mistake. Dados quickly reduced him to pulp. On the other hand, a lieutenant who, from overwork, was tired and fed up and needed invigorating was given a job to get say, some new gas masks, from Dados. Even if he didn't get the gas masks he came back prepared to fight anybody.

And now a legal firm from Dunedin full of LL.B.'s asks us to translate *Aqua saxum cadendo cavat*: for which, see *ante*, p. 16.

Latin was an institution started by a man named Caesar (*Gallia est omnis divisa in partes tres*—that one). He started Latin for the benefit of later generations of schoolboys and it has since been used for mottos by schools—*Vitai Lampada* (or is that Greek ?), for pure swank by Judges, *Curia adversari vult*, and as an abreviation by bailiffs (N.B.) In the last-named case the B is not the B that you know.

It is also useful among the partially educated—say the Shirley Temple era. If you wish to make an impression you murmur *arma virumque cano* and then stop. It is wise to stop here, otherwise you will be thinking wasn't there something about virum being an exception in the genitive plural which would then require *armorum*. You'd probably be wrong, so to vary Punch's advice to those about to marry—Stop.

Our own trip along the *Via Latina* took place over fifty years ago, and matriculation was made easy (sez you !) by the kindly, courteous guidance of Fritz Martyn Renner O.B.E., the well-known author of the *Nought Nexus*. We may say we were fellow-travellers on this road with those two great Latin scholars, Leary Q.C. and Watson G. G. G. They took scholarships; we took football.

Facilis descensus Averno—fifty years ago Otago had some fame for its learning. Its classical classes were known as the Pride of the University—or is our memory failing us ?

When we found that four LL.B.'s from the southern seat of learning were unable to translate *Aqua saxum cadendo cavat*, we felt that we should refer the question with sorrow to Mr. Renner, the great authority, who fifty years ago accomplished for us the near impossible. We enclose his reply.

Advocate ruralis
Doctissime reverendeque.

Salve !

'Tis indeed a parlous state of the times that in a city the founders whereof were nurtured, even from infancy, upon the Classics there should be found any graduates in Law who stumble and falter (yea ! even *express* their inability in the matter) in the translation of so simple an adage to wit: *Aqua saxum cadendo cavat.*

Forsooth the reason for such inability eludes one: unless perchance they the aforesaid graduates are a product of this later age that decries the subject of Latin as a prerequisite for entrance to their profession. In so doing they toss aside lightly, and esteem of no value the mental and intellectual discipline which is the fruit that burgeoneth and springeth from the study of the Classics. In like manner do they forget that to study the Latin tongue is to study English Law, English History, and the Norman stature of the arts and sciences.

" O ! Tempora O ! Mores "—That I who once played the role of Gamaliel * in expounding to thee the intricacies of Latin Syntax and the niceties of distinction in the uses of the Gerund and the Gerundive should have lived to see this day !

" Yet 'tis true 'tis pity
And pity 'tis, 'tis true."

Therefore, fair sir, you will find me no *laggard* in championing the cause that you espouse. So give me the advocate that hath scaled the heights of knowledge with Latin as his staff; the man who, in his profession will know (being Latinwise) to fit the word unto the occasion, to speak of the simple " cow with the crumpled horn " as "the bovine fierce with horn corniculate " should he, in cross-examination or questioning, seek to overawe and impress both Judge and jury alike.

And now to the heart of the matter—the exposition, to wit, of this simple proverb. Listen, therefore, my masters, and perpend. Where we, in the English manner, would say, " Water, by constant dripping, wears away the stone," so the Romans have it, in transliteration,

" Water by falling hollows out the rock."

Ave atque Vale !
Nought Nexus.

* Gamaliel—Mainlanders are referred to the Acts of the Apostles xxii, 3.

Autrefois Convict.—" It may be also that the applicant might have put in what is equivalent to—and what is sometimes in cases before Courts of summary jurisdiction inaccurately called—a plea of autrefois convict. I believe that that ought strictly speaking to be confined to an indictment; but at any rate, it is quite clear that a Magistrate cannot convict twice for the same offence and that a perfectly good objection can be taken. Whether or not it is accurately called autrefois convict does not matter. Those, as I say, were matters of defence "—Lord Goddard C.J. in *R.* v. *Campbell, ex parte Nomikos* [1956] 1 W.L.R. 622, 626; [1956] 2 All E.R. 280, 283.

Schoolmaster's Duty of Care.—Lord Esher M.R. in an action by a boy against a schoolmaster for an injury alleged to have been caused by his negligence in leaving a bottle of phosphorus about, said: '. . . as to the law on the subject there could be no doubt; and it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster"—*Williams* v. *Eady* (1893) 10 T.L.R. 41, 42.