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SENTENCES: THE QUANTUM OF THE PENALTY.

THE question of punishment for offence is one in which the public takes a lot of interest. There is, of course, good reason for this interest, though individual members of the public do not necessarily advert to it when they are criticizing sentences imposed by the Courts. It is this: A court imposing penalties is the servant of the community. In the treatment of offenders, there are two paramount interests to be considered: the interest of the offender himself, and the interest of the community in which he lives.

While the importance of a Court's function in determining the quantum of punishment to be imposed needs no emphasis, the reconciliation of the interests of the offender himself and the interest of the community at large is always a most difficult task.

When members of the public are critical—and then they show very often that they are woefully uninformed—they refer to individual sentences with which they do not see eye to eye. They do not appreciate the fact that a Court, in studying the interests of the offender, does so always, and only, because he is a constituent part of the society which the Courts exist to serve.

We suggest that critics of the sentences imposed by the Courts should study with some care a recent judgment of Mr Justice Finlay, *Fleming* v. *Commissioner of Transport* (and other appeals) [1958] N.Z.L.R. 101.

As a preliminary to consideration of several appeals against sentences imposed by a Magistrate for traffic and motoring offences, His Honour had some wise things to say on the nature of punishment and the duty imposed on Courts when imposing it. This judgment should go a long way in explaining to the critical part of the public the principles which the Courts apply when imposing sentences.

Each appellant contended that the penalty imposed upon him was excessive and out of harmony with the penalties imposed by all other Magistrates in similar, if not identical, circumstances.

At the outset, His Honour said:

> Two initial features in respect of appeals based upon such a contention immediately obtrude themselves for consideration. The first is that cases vary infinitely in their circumstances, so that it is seldom possible to drae a complete analogy between any two given cases and so never possible to say that a penalty imposed in any one case, or even in any series of cases, is other than a very tentative indication of what the penalty should be in any other.
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> The second is that, subject to all proper exceptions, the independence of judgment of every Magistrate must be sustained. Any appellate Court which attempted to whittle away the right of a Magistrate to form an independent judgment would be doing bad service to the administration of the law and so to society. That the enforcement of that principle will result in some degree of variation in the conclusions reached by different judicial officers is inevitable and well recognized. No less an authority than Lord Atkin referred to that in *Ambard* v. *Attorney-General of Trinidad* [1936] A.C. 322; [1936] 1 All E.R. 704. There, referring to the fact that sentences vary in apparently similar circumstances with the habit of mind of particular Judges, he said: "It is quite inevitable. Some very conscientious Judges have thought it their duty to visit particular crimes with exemplary sentences; others equally conscientious have thought it their duty to view the same crimes with leniency" (*ibid.*, 336; 709).

Mr Justice Finlay went on to say that this variable aspect caused by the personal characteristics of particular Judges found some explanation in the speech of Lord Wright in *British Fame* (*Owners*) v. *MacGregor* (*Owners*) [1943] A.C. 197, 201; [1943] 1 All E.R. 33, 35, where the learned Law Lord commented, in respect of degrees of blame, that they differed in essence from findings of fact in the ordinary sense. It was, he said, not a question of principle, or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involved an individual choice or discretion as to which there might well be differences of opinion in different minds.

The same feature was emphasized by Lord Reid in *Jamieson* v. *Jamieson* [1952] A.C. 525, 549; [1952] 1 All E.R. 875, 887, where he said:

> Human nature being what it is, different Judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions.

His Honour, referring to the appeals before him, said that they had to be considered, then, with due recognition of the fact that there might well and properly be disharmony between penalties imposed in similar cases by different Magistrates, and that every Magistrate was entitled to the exercise of an independent judgment. He continued:

> It seems pertinent to add that it must be a controlled judgment. Despite their character and potency, these features do not invite a timorous approach by an appellate tribunal, for such an approach might well cloak excesses due to unreasonable or unjudicial prejudices, and might well result in an insupportable disharmony in penalties—a disharmony attributable solely to the presence of a particular Magistrate in the locality in which the penalty was imposed.

His Honour went on to say that such appeals as those under notice invited, too, some consideration of the purposes of punishment and a consideration of the

features which entered into the determination of its quantum. He proceeded :

> Any previous theory of the moral justification of punishment which has found a place in the philosophical thought of the past has now surrendered to the conception that its moral justification lies in the necessary self-defence of society against the wrong-doer. Any conception of retribution has disappeared, as has any belief in the utilitarian function of punishment by providing a safety valve for the feelings of moral indignation of the community. On the other hand, there has evolved the conception that the primary purpose of punishment is deterrence ; that is, deterrence of the individual, and deterrence of all others who might be prompted by inadequacy of penalty to offend similarly. It is unnecessary to advert to any question of reformation because any such question is foreign to the type of offences involved in these appeals.
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> In considering the penalty from the point of view of deterrence, however, a proper appreciation of its application demands recognition of the historical fact that cruel penalties have proved inefficacious. Certainty of conviction and of punishment has been demonstrated to be of much more importance than severity, as the Italian penologist, Peccaria, commented many years ago. Then, too, it has become accepted that the Benthamite view is right—that only the minimum penalty which will operate as a deterrent is justified and that any excess is, if not cruel, then certainly unjustified. This is the fundamental principle upon which, as I conceive it, all penal sentences are today imposed. What evolves is that, in the reformed view of today, the least penalty that will operate as a deterrent is the proper penalty. Such a conception operates as a restraint upon excess.

That these principles were subject to modification to some degree by other considerations was, His Honour added, undeniable, but the principles remained fundamental and extended to every penalty imposed by way of punishment. They assumed that every judicial officer would act not only with impartiality, but with detachment and without feeling. They excluded, therefore, every use by a judicial officer of his office as a means of giving effect to his own personal views and conceptions. In other words, no judicial officer should ever be actuated by an emotional or missionary spirit. Then too, it was desirable, even necessary, that there should be some uniformity in the penalties imposed in respect of similar offences.

On this question of uniformity of penalties, Mr. Justice Finlay had this to say :

> It is wrong that an offender punished in one Court should be subjected to a heavy penalty, while others, convicted in adjacent Courts of similar offences and in not very dissimilar circumstances, should be subject to penalties only a third as heavy. Such a condition of affairs provokes suspicion that justice is not being done, and that purely personal purposes are finding expression. However wide a scope may be allowed to judicial independence, it cannot properly extend to the creation of a disharmonious condition such as that. As North J. said in the case of one, Davies, at Hamilton on February 20 last :
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> > "As little as possible should depend on the particular Judge or Magistrate before whom an offender comes."
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> He clearly meant by that to insist that the personal policies of a Magistrate should not be given play in the fixation of penalties. For that, no authority is needed.
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> It follows that a Magistrate should take notice of, and be influenced by, the penalties imposed by his brethren in cases of a similar or almost similar character. That is not only good sense but good law, for the Courts have always striven to secure uniformity of administration. The Court of Criminal Appeal was established to achieve such a purpose, among others. There is ample authority for it too in other branches of the law. As Lord Davey said in *Lawrence & Bullen Ltd.* v. *Aflalo* [1904] A.C. 17, 24 : "No doubt one may gain some assistance from the way in which a similar set of facts has been regarded in other cases", while in *Rushton* v. *National Coal Board* [1953] 1 Q.B. 495 ; [1953] 1 All E.R. 314, the necessity to have some regard to the general run of damage assessments made by the Court over a substantial time in comparable cases was stressed : see, too, *Waldon* v. *War Office* [1956] 1 W.L.R. 51 ; [1956] 1 All E.R.108.

His Honour said that the fact that some regard—all other considerations apart—should be paid to the penalties imposed by other Magistrates found its justification in principle from the point of view that if the minimum required to act as a deterrent was to be fixed, then what other Magistrates in the same district and, a fortiori, what all other Magistrates in New Zealand thought was sufficient for that purpose was a good, if not the best, indication of what that minimum was. For a Magistrate to assert by his penalties that he was right in imposing onerous penalties as a deterrent, and that all other Magistrates were wrong in imposing more lenient sentences for the same purpose, raised the fear that the penalties of the dissenter did not reflect a judicial approach. It was, as His Honour saw it, upon the additional footing that the penalties imposed by other Magistrates found relevance.

The adoption by some Magistrates of formulae in sentencing drew the following comment from the learned Judge :

> That from an analysis of the penalties imposed a standard may be evolved may well be a merely statistical incident. To act upon such an analysis in any particular case without consideration of other circumstances would be to err. Such a method allows nothing for particular circumstances of either mitigation or aggravation, and allows nothing for the interplay of the personal factors which affect the offender.
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> While, therefore, there may be such a thing as an intellectual norm, as it was called in the argument before me, there is, as I see it, no justification for the adoption of that norm, merely as such, in the imposition of penalties. Much less is there any justification for the adoption of a rigid standard which, I am told, has been adopted upon occasion, such as a fine based upon £15 per ton on the overload. Such a standard has no justification in principle and is wrong. The circumstances pertaining to each case, and to each offender, should alone determine the quantum of the penalty.

Applying the foregoing principles to the several appeals before him, the learned Judge, in most of the cases, after taking the whole of the circumstances into consideration, quashed the sentence imposed by the Magistrate and substituted fines of smaller amounts, and, in some of the cases, he reduced the period for which the Magistrate had suspended the appellant's driving licence.

In one case, His Honour compared the fine of £20, imposed for exceeding the speed of 30 miles an hour with a heavy motor-vehicle, with fines by other Magistrates for similar offences in and adjacent to the Waikato district. He said :

> There was nothing exceptional in the case and it is one of a type which appears to be common enough everywhere. There is a grave disparity between the fine imposed and the fines imposed by other Magistrates. Numerous traffic inspectors—to whose integrity and impartiality I feel constrained to pay a tribute—were called to give evidence of the fines imposed by other Magistrates in other centres adjacent to Huntly. As counsel contended, the fines imposed by the particular Magistrate here concerned appear to follow a formula based on speed, with a minimum of £12 10s.
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> A former senior Magistrate of the district in similar cases where the speed was gross appears to have imposed fines of £10, particularly where the vehicle was carrying a weighty load. The present senior Magistrate does not impose such heavy penalties. For instance, the driver of a heavy truck loaded with 1,500 gallons of petrol, which was found travelling at 50 miles an hour, was fined £5, while a fine of £3 10s. was imposed in a case where a heavy vehicle carrying 1,500 bricks was found travelling at 40 miles an hour. These cases, and the case now under appeal, all arose in the same district.
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> Further to the north, and in the vicinity of the City of Auckland where the urban influence is marked—as it is not where the present appellant offended—the fines seem to have been remarkably lower. One city Magistrate at Papakura fined the driver of an unladen vehicle travelling at 45 miles an hour £2. The same Magistrate in another case imposed

a fine of £2 10s. Another experienced Magistrate at Auckland imposed a fine of £6 upon a driver travelling at 50 miles an hour with a fully loaded vehicle weighing 10 tons in all; and still another shortly afterwards fined a driver £4 for driving an unladen vehicle at 43 miles an hour. Still another Auckland Magistrate fined the driver of an unladen vehicle £4 for travelling at 45 miles an hour. The same Magistrate imposed a fine of £7 10s. on a driver travelling at 50 miles an hour who overtook a long line of traffic. The vehicle was unladen. Another Magistrate imposed a fine of £3 10s. on a driver travelling at 45 miles an hour with an unladen vehicle. Still another Auckland Magistrate imposed a fine of £6 on a driver travelling at 45 miles per hour with a load of 86 lambs, making a gross weight of 7½ tons. Another Magistrate in a country circuit, in which there are numerous populous centres, seems to have a maximum of £4 when the speed is 50 miles an hour.

From the evidence and the records made available, it appears that the present senior Magistrate at Hamilton has never imposed a fine in excess of £10, or less than £3 10s., and that in the ordinary case he imposes a penalty of about £5. The Auckland city Magistrates in respect of their country Courts seem never to have imposed a fine exceeding £7 10s., and that only in circumstances of some aggravation. The Magistrate in another adjoining country area seems to have a maximum of £4.

There is too great disparity between the fine imposed in this case and these fines. It means that an offender is very unfortunate if he happens to be charged in a particular Court rather than in any one of a number of more or less adjacent Courts, for his fine will be very appreciably heavier. That is a very undesirable state of affairs; and I think that, however resolute the determination of the Magistrate might be to suppress the practice of drivers of heavy vehicles exceeding 30 miles an hour, he is concerned to take note of the fact that other Magistrates find, in practice, that fines of a much lesser amount act as a sufficient deterrent.

Having regard to the circumstances of this case, it seemed to His Honour that a reasonable and proper fine would be £7 10s. and the sentence was quashed and a fine of £7 10s. imposed. The appellant had to pay costs in the amount fixed by the Magistrate.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Evidence—Sexual Offence—Corroboration—Evidence of Young Child—Duty of Judge to warn Jury of Danger of Accepting Such Evidence and to define what is meant by "Corroboration"—Function of Jury to determine whether Corroboration sufficient. Criminal Law—Evidence—Admissibility—Statement made in Accused's Presence—Inadmissible unless Accused's Answer to Statement acknowledged Its Truth. Where the accused is charged with a sexual offence against a young child, the proper course for the trial Judge to take is to warn the Jury as to the danger of convicting upon the uncorroborated evidence of the child, and he should then define what is meant in law by "corroboration." The jury must first understand the corroboration rule before it can safely be left to determine whether it should regard the evidence under scrutiny as sufficient to constitute corroboration. (*R.* v. *Mountain* [1945] N.Z.L.R. 319, referred to.) Consequently, a jury has not received adequate assistance on questions of law unless the trial Judge has told it in clear terms the nature of the evidence which the law requires before it can properly be said that there is corroborative material upon which the jury may act if it thinks right to do so. *Quaere*, Whether one child can corroborate the evidence of another child. (*R.* v. *Campbell* (1956) 40 Cr. App. R. 95; [1956] 2 All E.R. 272 referred to.) The contents of a statement alleged to have been made in the presence of an accused person is inadmissible unless by his answer to the statement, whether made in words or by conduct, he acknowledged it was true. (*R.* v. *Norton* [1910] 2 K.B. 496, as explained in *R.* v. *Christie* [1914] A.C. 545, *R.* v. *Adams* (1923) 17 Cr. App. R. 77 followed.) *The Queen* v. *Spring* (C.A. Wellington. 1958. March 7. Gresson P., North, Cleary JJ.)

Trial—Jury—After Jury Empanelled Trial Judge discharging Two Jurors on their alleging Lacc of Impartiality—Two new Jurors empanelled and taking Their Places with Other Ten—Mistrial—Juries Act 1908, s. 103. B. was tried at Gisborne on the second count of an indictment that, while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, he was in charge of a motor-vehicle and by an act or omission in relation thereto did cause death. After the twelve jurymen had taken their places in the jury box, and before they had been asked to select their foreman, the trial Judge addressed the jury thus: "The case which you have to try today arises out of a fatal collision which took place on May 18 last, between a truck driven by Ian Dunsterville Bell, of the Maori Affairs Department, and a child cyclist, Raewyn Hunter,aged 11. It occurs to me that in a comparatively small city such as Gisborne, some of you may know the persons involved or have some prior connection with Mr Bell or the Hunter family, or some business connection with either of them, which would make it embarrassing, and indeed, improper for you to take part in the trial. Would any juryman who, for any good reason, considers he is disqualified from trying this case impartially, please speak up now before waiting jurors are discharged." Thereupon, one juryman stated he had known B.'s family for many years and had had business dealings in the furniture and nursery trade with B.'s father, and, in answer to a question from the learned Judge, intimated that he considered himself embarrassed to a point that would prevent him dealing fairly with the case. Another juryman stated he had known B. overseas though he did not claim to be a close personal friend. He, too, when asked by the Judge, intimated that he considered himself prevented from dealing impartially with the case. These two jurymen were allowed to retire, and four additional names were then called; the Crown stood one man aside and counsel for the accused challenged another, thus exhausting his remaining challenge. The two jurymen selected then took their places with the other ten jurymen; the trial proceeded, and a verdict of guilty was returned. B. appealed from his conviction on the ground that the course taken by the learned trial Judge in connection with the empanelling of the jury was not warranted in law and accordingly vitiated the conviction. *Held*, by the Court of Appeal, That the substitution of two other jurors for two of the twelve who had been balloted and had taken their places in the jury box was in contravention of s. 103 of the Juries Act 1908, as the empanelling of the jury had been completed as soon as the twelfth man had taken his seat, and that, thereafter, there could not be any substitution of another juror for any one of the twelve so empanelled. (*R.* v. *Greening* [1957] N.Z.L.R. 906, distinguished.) *Semble*, The discovery that a man may not be impartial or indifferent may be such an emergency as is contemplated by s. 431 of the Crimes Act 1908; and, in such a case, a discharge of the whole jury without verdict might be warranted. (*R.* v. *Binley and Walsh* (1912) 31 N.Z.L.R. 939; 15 G.L.R. 42; and *R.* v. *Buscke* [1922] G.L.R. 579, referred to.) The conviction was quashed and a new trial was ordered. *The Queen* v. *Bell.* (C.A. Wellington. 1958. March 7. Gresson P., North, Cleary JJ.)

DIVORCE AND MATRIMONIAL CAUSES.

Domicil—Husband not domiciled in New Zealand—Wife required to Show Substantially Continuous Residence in New Zealand for Three Years or More—Divorce and Matrimonial Causes Act 1928, s. 12 (4)—(Divorce and Matrimonial Causes Amendment Act 1953, s. 9 (2)). Subsection 4 of s. 12 of the Divorce and Matrimonial Causes Act 1928 (as enacted by s. 9 (2) of the Divorce and Matrimonial Causes Amendment Act 1953) has application only to cases where the wife can show to the Court a period of residence in New Zealand substantially continuous extending over three years or more. The respondent husband had never resided in New Zealand. The petitioner came to New Zealand for the first time in 1948, stayed for three years, and went to Australia, where she married and lived with her husband for two years and three months. After the husband had deserted the petitioner she left the matrimonial home, but she continued to live in Australia for a further eighteen months. Her total absence from New Zealand was three years and nine months. She returned to New Zealand in February 1955. She petitioned for divorce on the ground of her husband's constructive desertion. *Held*, That the petitioner's second period of residence in New Zealand, if taken by itself,

was insufficient to bring her within s. 12 (4) of the Divorce and Matrimonial Causes Act 1928 (as enacted by s. 9 (2) if the Divorce and Matrimonial Causes Amendment Act 1953) as it was less than three years; and that she could not add the intervening period of three years and nine months,which showed none of the characteristics of a temporary absence. *Boorman* v. *Boorman*. (S.C. Auckland. 1957. December 18 1958. February 4. Turner J.)

FAMILY PROTECTION.

Children—Testator divorced and Children of Marriage in Former Wife's Custody—Clause in Testator's Will divesting Children's Conditional Share in the Estate if Children Adopted—Testator's Moral Obligation ceasing on Such Adoption—Discretionary Trust to Second Wife to make Advances for Such Children's Maintenance, Education, or Advancement—Public Trustee appointed Trustee of Children's Fund—Family Protection Act 1955, s. 3 (b). The insertion in the will of a divorced father of two children in the custody of his first wife of a divesting provision in relation to the children's shares in his estate to take effect if and when they should be adopted does not amount to a failure on the part of the father to observe his moral obligation to his children: (*Bosch* v. *Perpetual Trustee Co.* [1938] A.C. 463; [1938] 2 All E.R. 14; *Dillon* v. *Public Trustee* [1941] N.Z.L.R. 557; [1941] G.L.R. 227; *In re C. K., M.* v. *L.* [1950] G.L.R. 296, applied.) The testator made his second wife his sole executrix and trustee. He gave to her upon trust £500 for his two children of his first marriage who were in the custody of their mother and lived with her and her second husband, provided that if either survived the testator and attained the age of twenty-one years or should be adopted by any person or persons then for the other of them absolutely. The testator also provided: That during the suspense of absolute vesting of the share of any person interested contingently presumptively or otherwise under this my will who may be a minor my trustee may so apply the whole of the income and such part not exceeding one-half as she shall think fit of the capital of such share for or towards the maintenance education or advancement in life of such minor and may either so apply the same or may pay the same to the guardian or guardians for the time being of such minor without herself seeing to the application thereof. *Held*, That, in the existing family circumstances, the children's fund should be transferred to the Public Trustee to be administered in terms of the will. *In re McDowell* (*deceased*), *McDowell and Another* v. *McDowell* (S.C. Wellington. 1958. March 7. McGregor J.)

Daughters—Large Estate—Adequate Provision for Married Daughter in Her Own Right—Family Protection Act 1955, s. 4 (1). The duty of the Court, when considering an application for further provision under the Family Protection Act 1955, is to make adequate provision for the proper maintenance and support of a testator's daughter; and, while it is right that the financial position of a husband should be considered, the, Court must in a proper case concern itself to see that a daughter receives a proper provision in her own right. The testator who left an estate valued for death-duty purposes at £360,000, the net estate for distribution being over £200,000, gave a son (S.) farm lands and stock (valued at £50,000), a son (F.) a half share (valued at £53,000) in farm lands and stock and a son (H.) a half share in the same lands and stock. The residue undisposed of consisted of assets worth about £50,000. The testator directed his trustees to let or lease his Foxton town freehold property and to apply the net rents in paying to each of his three daughters and his housekeeper £6 a week (or one-fourth of the net amount of rent or revenue) during their respective lives. Subject thereto, the net rents of that property were to form part of the residue. The residue was bequeathed to the three sons. On an application by the daughters, McGregor J. made provision for them from the testator's estate, cumulatively upon the life annuity of £6 per week, as follows: to Mrs W., a lump sum of £10,000, to Mrs G., a lump sum of £10,000, and to Mrs D., a lump sum of £6,000, such amounts to be paid from the residue, exclusive of the Foxton town property, and, if this should leave insufficient, any deficiency was to be a charge upon the benefits receivable by the sons. From that determination, Mrs G. and Mrs D. appealed on the grounds that the awards made in their favour were too small. The sons cross-appealed. *Held*, by the Court of Appeal, 1. That the unusually large estate fell within the second class mentioned by Salmond J. in *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218, 222; [1921] G.L.R. 613, 614, in which the function of the Court is defined as that of "determining the absolute scope and limit of the moral duty of a wealthy . . . father to make testamentary provision for the maintenance of his . . . children". In this class of case the Court has to judge, not between the competing claims of different dependants, but merely between the claim of a dependant to be maintained by the testator and the claim of the testator himself to do as he pleases with his own. 2. That the order made in favour of Mrs D. should be increased from £6,000 to £7,500, and that the order would be varied accordingly: and in all other respects the order should stand. *In re Easton* (*deceased*), *Gavin and Another* v. *Easton and Others*. (S.C. Palmerston North. 1957. May 31; June 17. McGregor J. C.A. Wellington. 1957. October 3; November 18. Hutchison J. North J. Turner J.)

LAND AGENT.

Appointment—Written Acknowledgment of Appointment——Writing required to Evidence Appointment, as agreed, for Particular Service or Work in Respect of which Commission claimed—Other Terms of Agreement between Principal and Land Agent not required to be in Writing—Land Agents Act 1953, s. 25. Section 25 of the Land Agents Act 1953 refers to the right of a land agent to recover a commission "in respect of any service or work performed by him as a land agent," and provides that "his appointment to act as agent or perform that service or work", in respect of which commission is claimed, must be in writing. The writing must evidence an appointment as agreed for the particular service or work in respect of which commission is claimed. Written evidence having reference to a more general appointment would be insufficient. (*J. M. Samson and Co. Ltd.* v. *Mitchell* [1927] G.L.R. 427, followed.) On May 1, 1956, the solicitors of a land agent wrote to the owner of a commercial building claiming a sum as commission "in connection with the fixing of rentals and arranging for leases of your building." Correspondence passed between the solicitors for the parties, and, on June 29, 1956, the solicitors for the owner of the building wrote to the land agent's solicitors, a letter which in part, was as follows: "Our client says that [the land agent] agreed to do the work for which he now seeks payment in consideration of our client withdrawing his offer to purchase from the Lower Hutt City Council section adjoining Brunette's Building. Our client withdraw (sic) his tender and the section was sold to your client." The claim of the land agent for commission for negotiating leases of various parts of the building was allowed by a Magistrate on appeal from that determination. *Held*, 1. That in the connected correspondence there was sufficient description of the property authorized to be let, and this was incorporated in the letter of June 29, 1956, written by the building owner's solicitors by the reference therein to "the work" which had been defined in the earlier letters. 2. That it is unnecessary that the whole terms of an agreement between principal and agent should be in writing; and that all that is required is a written acknowledgement of the appointment. (*Thornes* v. *Eyre* (1915) 34 N.Z.L.R. 651; 17 G.L.R. 499, and *Campbell* v. *Lindsay* [1933] N.Z.L.R. 588; [1933] G.L.R. 554, followed. *R. H. Rothbury Ltd.* v. *Gibbs* [1957] N.Z.L.R. 590, distinguished.) 3. That the letter of June 29, 1956, was a definite written acknowledgement that an appointment was made, and the mere fact that a different basis of payment for the service or work was alleged therein is not a denial of appointment, and such written evidence of appointment was sufficient, irrespective of other matters raised which might be a defence in other respects to the agent's claim. *Brunette* v. *Simpson*. (S.C. Wellington. 1957. October 27, 1958. January 22. McGregor J.)

LANDLORD AND TENANT.

Notices to Quit. *107 Law Journal*, 755.

LAW PRACTITIONERS.

Price of An Hour's Work. *101 Solicitors' Journal*, 766.

Public Relations of the Legal Profession, 35 *Canadian Bar Review*, 889.

LICENSING.

Offences—Keeping Liquor for Sale on Unlicensed Premises—Exception—Sale by Club at a "Social gathering"—Onus of Proof on Person claiming Benefit of Exception—Licensing Act 1908, s. 195—Licensing Amendment Act 1953, s. 108. Section 108 of the Licensing Amendment Act 1953 operates by way of exception to s. 195 of the Licensing Act 1908, entitling persons to do certain things which would otherwise be prohibited; and it rests upon a defendant claiming the benefit of s. 108 to bring himself within it. (*Robertson* v. *Police* [1957] N.Z.L.R. 1193, referred to.) A football club did not possess a licence authorizing the sale of beer. Its objects, as specified in its rules were as

follows, " (*a*) To play Rugby football under the rules laid down by the Canterbury Rugby Union. (*b*) To provide suitable club-rooms for the members, and such amusement and means of recreation and improvements as the members may think fit, and to provide social and genial intercourse among the members." The club's premises included a large room on the ground floor suitable for use as a social room and gymnasium, in which there was a bar. The club held, on three nights a week, so-called " social gatherings " normally attended by from forty to seventy members. Beer was provided at the bar, and the price of a served supper, as well as of the beer, was included in a reasonable admission charge. A resolution passed by the club committee on April 24, 1957, as follows: " Finance was discussed for payment of jerseys and the Jubilee celebrations and it was decided to continue with the social evenings, admittance 4s. unless members were not participating." The club was charged, under s. 195 of the Licensing Act 1908 with keeping liquor (to wit, beer) for sale on its premises when not duly licensed to keep liquor on such premises, and also with selling liquor when not duly licensed to sell liquor. The informations were dismissed by a Magistrate. On appeal from that determination, *Held*, allowing the appeal, 1., That the use in s. 108 of the Licensing Amendment Act 1953, of the expression " any social gathering," to which it is difficult to attach a precise meaning, creates an ambiguity in s. 108 (1), which is not a penal enactment as it operates by way of exception or exemption to s. 195 of the Licensing Act 1908, in conferring a liberty rather than in imposing a restriction; and that it is the duty of the Court, if it reasonably can, to refrain from attaching to the words " any social gathering " a meaning which obviously goes beyond the intention of the Legislature. 2. That, for the reasons given in the judgment, the above-described functions conducted by the club were not " social gatherings " within the meaning of the Act. 3. That the club had not discharged the burden of proof to the extent of showing that the condition specified in s. 108 (1) of the Licensing Amendment Act 1948 had been complied with. *Police* v. *Merivale Football Club Incorporated.* (S.C. Christchurch. 1957. December 18. F. B. Adams J.)

Sale of Liquor to Persons not Lawfully Entitled during Closing Hours—Sale to Lodger's Guest—Question of Evidence whether Person is bona fide Guest of Lodger—Liquor on Shelves in Bar as seen through Slide—Not Exposure of Liquor for Sale—Licensing Act 1908, s. 190. During closing hours, five men in the company of a lodger and introduced as his guests were sold liquor by the licensee at an open slide communicating with the private bar, on the request and at the expense of a lodger. The licensee had not seen the lodger's meeting with the men and he did not know whether he knew them well or was only slightly acquainted with them or not acquainted at all. *Held*, 1. That it is a question of evidence whether or not a person is a bona fide guest of a lodger, and, in the present case, there was nothing in the situation so far as it appeared to the licensee to alert him or require him to be sceptical or to investigate the position, and there was nothing to put the licensee upon inquiry, and he could not be convicted of the offence, under s. 190 of the Licensing Act 1908, of selling liquor to persons not lawfully entitled during closing hours. (*Cogswell* v. *Walker* [1936] N.Z.L.R. 311; [1936] G.L.R. 319, referred to.) *Aliter*, of the lodger's alleged guests had previously sought to obtain drinks and had been ordered to leave the premises. 2. That, the exposure to view of liquor on the shelves of the bar as seen through the open slide, at which five men in the company of a lodger and served as his guests, was not an opening of the premises for the sale of liquor or an exposing of liquor for sale within the meaning of s. 190 of theLicensing Act 1908. (*Greenfield* v. *Cruden* [1955] N.Z.L.R. 822, applied.) *Davies and Others* v. *Pratt* (S.C. Wanganui. 1957. August 19. Gresson J.)

Offences—Permitting Drunkenness—Simple Carelessness or Negligence on Licensee's Part not justifying Conviction—Licensing Act 1908, s. 181. Licensing—Offences—Selling Liquor to Intoxicated Person—Prohibition Absolute—Proof of Actual Knowledge of Barman unnecessary—Licensing Act 1908, s. 181. If it is proved that a licensee, charged under s. 181 of the Licensing Act 1908, with permitting drunkenness has turned his back upon what he knew or suspected was going on, he should be convicted by reason of his connivance; but simple carelessness or negligence on his part, or on the part of his servants, does not justify conviction. (*Bailey* v. *Pratt* (1902) 20 N.Z.L.R. 758, 4 G.L.R. 195, and *Agnew* v. *Matthew* (1913) 33 N.Z.L.R. 225, 16 G.L.R., followed.) The licensee is responsible for the acts of his barmen and is affected by their knowledge when he is charged under s. 181 with selling liquor to a person already in a state of intoxication, and, as the section is absolute in its prohibition, it is unnecessary for the prosecution to establish actual knowledge on the part of the particular barman " serving " the liquor, which does not, in all circumstances necessarily involve a sale for consideration. (*Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207, *McVeigh* v. *Eccles* (1899) 18 N.Z.L.R. 44; 2 G.L.R. 77, and *Harvey* v. *Whitehead* (1911) 30 N.Z.L.R. 795; 14 G.L.R. 151 followed.) In the present case, although it was admitted by the barman that he had only " served " the person already in a state of intoxication the Court, having regard to the presumption raised by s. 206, and having regard to the evidence, held that a sale had taken place. *Glennie* v. *McGlynn.* (S.C. Wanganui. 1957. December 4; 20. McCarthy J.)

NEGLIGENCE.

Notes on An Occupier's Liability. *102 Solicitors' Journal* 77, 97.

PRACTICE.

Appeals to Privy Council—Action for Damages—Jury Finding for Plaintiff and Awarding Damages—Motion for Judgment or New Trial—Court of Appeal dismissing Appeal in Respect of Motion for Judgment—Later, after Argument and Judgment in Respect of New Trial, Court of Appeal allowing Appeal therefrom and ordering New Trial save as to Damages—Application for Leave to Appeal to Her Majesty in Council against First of Court of Appeal Judgments—Both Judgments to be treated as Together forming One Judgment—Question involved not of " great general or public importance, or otherwise "—Leave to Appeal also refused on Grounds of Convenience and Justice, and on Ground that Defendant was seeking to pursue Application for Judgment while retaining Order for New Trial—Privy Council Appeal Rules 1910, R. 2 (b). In her statement of claim, the plaintiff alleged negligence against the defendant. The jury found that the defendant was guilty of negligence causing an accident to the plaintiff and awarded damages. The defendant moved (1) for judgment upon the grounds: (a) that it had not been established that the stairway upon which the accident happened was under the occupation or control of the defendant, and (b) that there was no evidence on which the jury could properly find that the defendant failed to exercise reasonable care to keep the stairway safe; and (2) alternatively, for a judgment of nonsuit upon certain stated grounds; and, alternatively, for an order that the verdict be set aside and a new trial be had. Cooke J. entered judgment for the defendant upon the first ground stated (namely, ground 1 (a), above), and forbore to deal with the other matters comprehended in the motion. The plaintiff appealed. On July 8, 1955, the Court of Appeal allowed the appeal and remitted the action to the Supreme Court for determination of the questions raised in the defendant's motion other than the question raised in Ground 1 (a) above: [1955] N.Z.L.R. 1097. Thereafter those questions were argued before Cooke J. who dismissed the defendant's motion for judgment or judgment of nonsuit, or alternatively for an order that the verdict of the jury at the trial be set aside and that a new trial be had between the parties. The defendant appealed against that judgment. On December 6, 1957, the Court of Appeal allowed the appeal, and ordered a new trial upon all questions save quantum of damages. On motion by the defendant for conditional leave to appeal to Her Majesty in Council against the first judgment of the Court of Appeal delivered on July 8, 1955, dismissing her motion for judgment. *Held*, by the Court of Appeal, 1. That, although the two branches of the defendant's application for judgment or alternatively for a new trial became several for the purposes of argument, the two judgments of the Court of Appeal should be treated as together forming one judgment in which the defendant's motion for judgment had been dismissed and her alternative motion for a new trial had been granted: in substance, the position was the same as if there were one judgment only, and the circumstance that there were two judgments of the Court of Appeal could not enlarge the defendant's rights as to the appeal. (*Black and White Cabs Ltd.* v. *Anson* [1928] N.Z.L.R. 321; [1928] G.L.R. 240, applied.) 2. That the question involved in the appeal did not satisfy the requirements of R. 2 (b) of the Privy Council Rules, as the question involved was not one which "by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council." 3. That, furthermore, leave to appeal should be refused on the ground of convenience and justice, and also on the ground that the defendant was seeking to pursue her application for judgment while still retaining her order for a new trial. (*Biggs* v. *Woodhead* (*No. 2*) [1940] N.Z.L.R. 276; [1940] G.L.R. 202, followed.) *Lyons* v. *Nicholls* (*No. 2*) (C.A. Wellington. 1958. March 7. Gresson P. North. Cleary JJ.)

Question of Law before Trial—Damages—Court asked to determine whether Damages received should be Gross Loss of Income or Net Loss of Income after deduction of Social Security Charge and Income Tax—Commissioner of Inland Revenue not Party to Action—Parties unwilling to join Him as another Third Party—Absence of Commissioner preventing Question being asked or answered—Code of Civil Procedure R. 95 (c), 154. In an action, the plaintiff claimed damages (including damages for a loss of profit). The plaintiff desired to argue before trial the recovered by the plaintiff represent loss of income, should such damages be the gross loss of income or the net loss of income after the deduction of social security charge and income tax ?" It was argued that, before directing the jury, the trial Judge had to come to the conclusion whether the decision in *British Transport Commission* v. *Gourley* [1956] A.C. 185; [1955] 3 A.E.R. 796, was applicable to the damages claimed, and that he could not come to such a conclusion without answering the above-stated question. *Held*, 1. That if the damages were taxable, the question whether the moneys were assessable for tax in the hands of the plaintiff could not be decided in the absence of the Commissioner of Inland Revenue 2. That the Commissioner was unwilling, at this stage, to make any pronouncement on his attitude on the question of taxation except that it was possible that he might regard the amount as assessable; and it was not proposed by the parties to bring the Commissioner before the Court. 3. That the question could not be asked or the answer given in the absence of the Commissioner, and, as the parties were unwilling to invite him to join them before the Court, the application must be refused. *George Court & Sons Limited* v. *Mair & Company (Importers) Limited (Westco Products Limited, Third Party).* (S.C. Auckland. 1958. March 10. Turner J.)

Sale of Goods—Implied Condition Reasonable Fitness for Purpose for which Goods required—Frock fitted on Buyer by Seller's Servant—After Purchase, Buyer finding, on Delivery, Zip Fastene defective—Buyer's Right to repudiate Contract—Sale of Goods Act 1908, s. 16 (a). M. was fitted with a frock on the seller's business premises. M. had nothing to do with the fastening or unfastening of the zip fastener on the back of the frock before it was wrapped and delivered to her, when she found the zip fastener defective. She claimed a refund of the purchase price, but this was refused. In an action claiming the amount of the purchase money from the seller. *Held*, 1. That, on the facts, the frock was of a description supplied in the course of the seller's business, and in purchasing the frock and impliedly making known to the seller the purpose for which it was required, M. relied on the seller's skill and judgment as to the condition and effective working of the zip fastener. 2. That, in pursuance of s. 16 (a) of the Sale of Goods Act 1908, there was imported into the contract between the parties an implied condition that the frock, and specifically the zip fastener which formed an essential part of it, were reasonably fit for the purpose for which M. required them. 3. That M. was entitled to reject the frock for breach of the implied condition, and to a return of the price she had paid for it. (*Taylor* v. *Combined Buyers Ltd.* [1924] N.Z.L.R. 627.) *Maxwell* v. *Nova Models Limited* (Wellington. 1957. September 20. Carson S.M.)

PUBLIC REVENUE.

Income Tax—Trading Stock—Land, when purchased, planted with Tomato Plants—Crop almost ready for picking and marketing—Crop passing to Purchaser with the Land Itself—Such Crop not "trading stock"—Land and Income Tax Amendment Act 1939, ss. 14 (1) (a), 16—Land and Income Tax Act 1954, ss. 91(1) (a), 98. A growing crop of tomatoes, bought with the land on which it was growing, is not a "trade fixture" as defined in s. 98 (1) of the Land and Income Tax Act 1954, as the growing plants with their unsevered fruit, both at the time of the contract of sale and purchase and at the date of completion, in the absence of express stipulation in the contract between the vendor and the taxpayer as purchaser, formed part of the land and passed with the land itself; and, as land is excluded from the definition of "trading stock," in s. 98 (1), the taxpayer cannot claim the purchase price of the stock as a deduction from his assessable income under s. 98 of the statute. (*Latham* v. *Atwood* (1638) Cro. Car. 515; 79 E.R. 1045. and *Saunders* v. *Pilcher* [1949] 2 All E.R. 1097, applied.) Alternatively, the gross proceeds of the tomato crop have to be treated as assessable income subject only to deductible items permitted by the statute; and, unless the purchaser of a growing crop of tomatoes can show a purchase of "trading stock" as such and as other than a capital asset, and its cost price, there is no provision in the statute by which a deduction can be claimed. *Pasley* v. *Commissioner of Inland Revenue.* (S.C. Christchurch. 1957. October 17; December 9. McGregor J.)

—— *Returns of Income Fraudulent or Wilfully Misleading—Nature of Onus of Proof—"Wilfully misleading"—Land and Income Tax Act 1923, s. 16 (Land and Income Tax Act 1954, s. 24.* Section 16 of the Land and Income Tax Act 1923 (as amended by s. 5 of the Land and Income Tax Amendment Act 1939) imposed on the Commissioner of Inland Revenue the onus of proving that the returns made were in fact fraudulent or wilfully misleading. Having regard to the consequence of proof and to the nature of the allegation, though the onus may possibly be identical with that involved in the proof of a criminal charge, the distinction between the two standards of proof can be but slight. A taxpayer makes returns which are "wilfully misleading" within the meaning of s. 16 of the Land and Income Tax Act 1923 (as amended) when he knows what he is doing and intends to do what he is doing. If the taxpayer is merely inadvertent or if he entertains an honest belief that the amount which he is omitting is not income, his act or omission is not wilfully negligent unless he knows that he is committing and intends to commit a breach of his duty or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty. The matter must be considered on the totality of the evidence. (*In re City Equitable Fire Insurance and Co. Ltd.* [1925] Ch. 407, and *Jackson* v. *Butterworth* (1947) 3 A.I.T.R. 294, followed.) *Babington* v. *Commissioner of Inland Revenue (No. 2).* (S.C. Auckland. 1957. October 16; November 29. Turner J.)

WILL.

Construction—Rule against Perpetuities—Trust for Such Children of Testator's Son "as shall attain the age of thirty years"—Testator's Son "life in being"—Vesting of His Children's Shares not certain, at Testator's Death, to occur within Lesser Period than Thirty Years from Death of Life in Being—No Member of Class who had attained Thirty Years at Testator's Death—Discretionary Power of Maintenance not vesting Property in Son's Children at His Death—Trust in Favour of Such Children void as infringing Rule. The testatrix, who died on June 3, 1942, before the coming into operation of s. 6 of the Law Reform Act 1944 (re-enacted as s. 25 of the Property Law Act 1952) made gifts of income to named beneficiaries, L. and R., for life or until alienation by act or default or operation of law, and thereupon or upon the death of the named beneficiary there was created a trust for such of the children of the named beneficiary in each instance as should attain the age of thirty years (the issue of deceased children taking per stirpes). At the date of the death of the testatrix, on June 3, 1942, L. (since deceased), was living and had two children aged respectively eleven years and seventeen years; but at that date it was possible that he might have further children. R. survived the testatrix, but died on August 7, 1949. He had four children, three of whom were born before the testatrix's death, the eldest child being seven and a half years old when the testatrix died. The will gave a discretionary power to the trustees to maintain any beneficiary out of the income of an expectant or contingent share. On originating summons to determine whether or not the provisions in favour of the children of the named beneficiaries were void as infringing the rule against perpetuities, and, if either or both provisions were void, then whether or not there was an intestacy in respect of the share or interest comprised in the provision, *Held*, 1. That, in respect of the share of the children of L., (*a*) As L. was the "life in being" for the purposes of the rule against perpetuities, and vesting of the share of his children was not at the date of the death of the testatrix certain to occur within a lesser period than thirty years (plus the period of gestation) from the death of the life in being, prima facie the bequest infringed that rule. (*b*) The rule in *Andrews* v. *Partington* (1791) 3 Bro. C.C. 402; 29 E.R. 610, could not be applied on the date of the death of the testatrix, as there was then no member of the class who had attained the age of thirty years. Accordingly, it could not on that date be postulated that the gift to the children of L. must vest within twenty-one years from his death. (*Picken* v. *Matthews* (1878) 10 Ch. D. 264, distinguished.) (*c*) The discretionary power of maintenance did not vest the property in L's children upon his death. (*In re Hume, Public Trustee* v. *Mabey* [1912] 1 Ch. 693, followed. *Fox* v. *Fox* (1875) L.R. 19 Eq. 286, distinguished.) (*d*) The trust in favour of L.'s children was accordingly void as infringing the rule against perpetuities. 2. That the trust in respect of the shares of R.'s children also failed (for the reasons given in 1 (*a*), (*c*) and (*d*) above, mutatis mutandis). 3. That, upon the failure of these trusts, intestacy as to the affected portion of the estate of the testatrix arose. *In re Michaels (Deceased), Michaels* v. *Guardian Trust and Executors Company of New Zealand Ltd. and Another.* (S.C. Auckland. 1957. September 17; November 1. Shorland J.)

LIABILITY FOR ESCAPE OF FIRE.

By K. T. C. SUTTON, B.A., LL.M. (N.Z.), PH.D. (Melb.)

The liability of an occupier of land for damage caused by fire escaping from that land and injuring the property of others is clear-cut where the occupier has been guilty of negligence, or the circumstances show that the fire is a nuisance at Common Law. In either case the occupier must pay for the resultant damage even though the fire was of unknown origin.[1] But his liability where the escape of fire has occurred without negligence on his part and the fire does not amount to a nuisance is not quite so clear.

At Common Law, the liability of an occupier of land for damage done to the property of another by the escape of fire appears to have been strict, the only defences being that the escape has been caused by the act of the plaintiff, the act of a stranger, or Act of God.[2] A possible further defence was where the fire was of unknown origin—see *Pollock on Torts*, 18th ed. 387, and cf. *Hunter* v. *Walker* (1888) N.Z.L.R. 6 S.C. 690—although the presumption was that a fire originating on a person's premises was kindled by the occupier or his servants, i.e., was *his* fire : *Becquet* v. *MacCarthy* (1831) 2 B. & Ad. 951, 958 ; 109 E.R. 1396.

Thus, after an exhaustive review of the authorities and the opinions of text writers, Buchanan T.J. concluded in *Young* v. *Tilley* [1913] S.A.L.R. 87, 94, that " the sounder the view would appear to be that at Common Law the person who lights a fire does so at his peril, and must answer for the consequences unless he can show the damage was caused by the act of a stranger, or by vis major, or the act of God." The High Court of Australia in *Hazelwood* v. *Webber* (1934) 52 C.L.R. 268, 274-5, held that the Common Law imposed on the occupier of land who used fire on it a prima facie liability which was independent of negligence for any harm suffered by his neighbour, but that this liability was subject to certain excuses or exceptions. This view was endorsed by Sir John Latham C.J. in *Wise Bros. Pty. Ltd.* v. *Railway Commissioner* (1947) 75 C.L.R. 59, 67-8.

The New Zealand authorities appear to take the view that at Common Law there was strict liability for damage due to the escape of fire : see *Dougherty* v. *Smith* (1887) N.Z.L.R. 5 S.C. 374, 379 ; *Hunter* v. *Walker* (1888) 6 N.Z.L.R. 690, 693-5 ; *Threlkeld* v. *White* (1890) 8 N.Z.L.R. 513, 518, 520 ; and *Kelly* v. *Hayes* (1902) 22 N.Z.L.R. 429, 431-2.

On the other hand the learned editor of *Salmond on Torts*, 11th Ed. 641, takes the stand that there is no sufficient authority for the doctrine that at Common Law an occupier was absolutely liable for damage done by fire independently of any negligence and he regards *Turberville* v. *Stampe* (1697) 1 Ld. Raym. 264 ; 91 E.R. 1072, as contrary to this doctrine.[3] He refers to the argument of Winfield in " The Myth of Absolute Liability " in (1926) 42 L.Q.R. 46 that modern jurists have exaggerated the strictness of the Common Law in this regard, but it is submitted with respect that Winfield is only pointing out that the liability for fire could not be regarded as " absolute " at Common Law when in fact there were certain defences available, such as the act of a stranger.[4] This seems to be the view of Sir Frederick Jordan C.J. in *Railway Commissioner* v. *Wise Bros. Pty. Ltd.* (1947) 47 S.R. (N.S.W.) 233, 238, while Davidson J. in the same case appears to adopt the view that there was a presumption at Common Law that a fire had a negligent origin.

Be that as it may, the Common Law position was modified in 1707 by the Act 6 Anne c. 31, s. 6 of which provided that no action should be maintained against any person in whose house any fire should *accidentally* begin, any law usage or custom to the contrary notwithstanding. This provision was extended by the Fires Prevention (Metropolis) Act 1774, (14 Geo. 3, c. 75) (*13 Halsbury's Laws of England*, 2nd Ed. 9) s. 86 of which declared that no action should be maintained " against any person in whose house, chamber, stable, barn, or other building or on whose estate any fire shall accidentally begin." This section is in force in New Zealand : see *Hunter* v. *Walker* (1888) 6 N.Z.L.R. 690, 695, and *Gwynne* v. *Wilson* [1941] N.Z.L.R. 1, 2.

Difficulty arises with the construction to be put on the words " shall accidentally begin " in this " very ill-drawn enactment."[5] For instance, does a fire accidentally begin if its origin is unknown and it spreads through negligence ? Or if it is begun intentionally and spreads without negligence to a neighbouring property ? It was held by the Court of Queen's Bench in *Filliter* v. *Phippard* (1847) 11 Q.B. 347 ; 116 E.R. 506, that s. 86 was restricted in its application to fires produced by mere chance, or incapable of being traced to any cause, and did not protect an occupier who had been negligent or who had knowingly lit a fire.[6] This view, that the section did not apply to fires intentionally lit but accidentally spreading to adjoining property without negligence has not been accepted without

[1] See e.g. *Boatswain* v. *Crawford* [1943] N.Z.L.R. 109 ; [1943] G.L.R. 112 ; *Cranwell* v. *Kernott* (1947) 5 M.C.D. 119 ; and *Rutherford* v. *Landon* [1951] N.Z.L.R. 975 ; [1951] G.L.R. 519.

[2] See *Holdsworth History of English Law* Vol. XI 606, 608, n. 5 ; Lewis in (1935) 8 A.L.J. 399, 400 ; *2 Pollock and Maitland History of English Law* 528 n. 1 ; *Charlesworth on Negligence* 3rd ed. 1956 pp. 293-4 ; *Turberville* v. *Stampe* (1697) 1 Ld. Raym. 264 ; 91 E.R. 1072 (the allegation of negligence by the plaintiff being apparently considered irrelevant by the Court) ; Lord Lyndhurst L.C. in *Viscount Canterbury* v. *Attorney-General* (1843) 1 Ph. 306, 316-8 ; Lord Denman C.J. in *Filliter* v. *Phippard* (1847) 11 Q.B. 347, 354 ; 116 E.R. 506 ; Bankes L.J. in *Musgrove* v. *Pandelis* [1919] 2 K.B. 43, 46 ; Duff J. in *Port Coquitlam* v. *Wilson* (1923) 2 D.L.R. 194, 199 ; Lord Wright in *Collingwood* v. *Home and Colonial Stores* [1936] 3 All E.R. 200, 203 ; Asquith J. in *Mulholland and Tedd Ltd.* v. *Baker* [1939] 3 All E.R. 253, 255 ; Finlay J. in *Boulcott Golf Club* v. *Engelbrecht* [1945] N.Z.L.R. 556, 558 ; [1945] G.L.R. 200 ; semble *Balfour* v. *Barty-King* [1957] 1 All E.R. 156.

[3] In *Becquet* v. *Mac Carthy* (1831) 2 B. & Ad. 951, 958, Lord Tenterden C.J. said that at Common Law there was a presumption of negligence by the occupier from whose premises the fire had escaped. This was cited with approval by Sir Samuel Way C.J. in *Havelberg* v. *Brown* [1905] S.A.L.R. 1, 9. His Honour went on to say that there was no absolute consensus of authority that negligence could be denied or had to be proved, but the authorities agreed that the defendant was only liable in the case of negligence. However, in *Young* v. *Tilley* [1913] S.A.L.R. 87, 104 the learned Chief Justice retreated from his former position saying that his dictum was not to be taken as holding that there was no liability in the absence of no negligence (sic).

[4] Cf. *Holdsworth's History of English Law* Vol. XI p. 606 n. 3 and p. 608 n. 5.

[5] *Salmond on Torts* 11th ed., 639.

question. Thus Holdsworth op. cit. Vol. XI p. 608 n. 2 regards the remarks of Lord Denman C.J. supporting such a view as obiter, and considers such an interpretation would restrict the operation of the Act to a small compass, while *Salmond on Torts*, 11th ed., 642, condemns the decision as unsound. But, as Buchanan T.J. has pointed out in *Young* v. *Tilley* [1913] S.A.L.R. 87, the decision in *Filliter* v. *Phippard* (*supra*) was a considered deliverance by the Court of Queen's Bench which has not been questioned or overruled and is not to be got rid of by the mere suggestion that it was unsound. Both in that case and in the the earlier decision of *MacDonald* v. *Dickson* (1868) 2 S.A.L.R. 32 the Supreme Court of South Australia took the view that s. 86 afforded no relief to the defendant where the fire had been intentionally lit by him as the fire could not be said to begin " accidentally."

Middleton J. A. in *McAuliffe* v. *Hubbell* (1931) 1 D.L.R. 835 regarded it as the universally accepted view of the section that it applied only to fires produced by mere chance, while, in *Port Coquitlam* v. *Wilson* (1923) 2 D.L.R. 194, 200, Duff J. said that " it may be taken to be the law that fires intentionally lighted and fires arising through negligence are outside the statute and that responsibility in respect of them is governed by the Common Law." In *Curtis* v. *Lutes* (1953) 4 D.L.R. 188, the Ontario Court of Appeal held that the Accidental Fires Act R.S.O. 1950 c. 3 (which substantially re-enacted s. 86 of the 1774 Act) did not avail the occupier of land where fire had escaped from a burning-pit maintained on the land for the purpose of the occupier's business. This decision was followed by the same Court in *Elder* v. *Kingston* (1954) 3 D.L.R. 369, *McAuliffe* v. *Hubbell* (*supra*) being cited for the view that the Act as a defence was limited to fires produced by mere chance.

On the other hand, Sir Samuel Griffith C.J. in *Whinfield* v. *Lands Purchase and Management Board of Victoria and State Rivers and Water Supply Commission* (1914) 18 C.L.R. 606, 614-5, thought that a fire might be accidental in the ordinary meaning of the word if it arose from a fire intentionally lighted being unintentionally and unexpectedly communicated to inflammable material near it. And Asquith J., in *Mulholland & Tedd Ltd.* v. *Baker* [1939] 3 All E.R. 253, 255, appeared to consider that the matter had not been finally settled[7]. As Sir Michael Myers C.J. pointed out in *Gwynne* v. *Wilson* [1941] N.Z.L.R. 1, 2-3, conflicting dicta on the point are to be found in other English authorities. The Chief Justice said that there was no express decision on the point but this statement, with respect, appears to overlook the judgment in *Filliter* v. *Phippard* (1847) 11 Q.B. 347; 116 E.R. 506, and the fact that this judgment has been expressly approved by the Court of Appeal in New Zealand.[8]

Indeed, the balance of authority in New Zealand would appear to support unequivocally the interpretation of the 1774 Act taken by the Court of Queen's Bench in that case. In *Dougherty* v. *Smith* (1887) N.Z.L.R. 5 S.C. 374, Sir James Prendergast C.J. held a defendant liable where he had intentionally set fire to felled bush to clear his land and without negligence on his part the fire escaped on to adjoining land and did damage. The Fires Prevention (Metropolis) Act 1774 was not referred to in the judgment or during argument, although counsel cited *Filliter* v. *Phippard* (1847) 11 Q.B. 347; 116 E.R. 506, but His Honour said: " I must conclude therefore that the plaintiff is entitled to recover, as the defendant did light the fire intentionally and did cause the destruction of property . . . ." In *Hunter* v. *Walker* (1888) 6 N.Z.L.R. 690, the origin of the fire was doubtful and Richmond J. held that it had begun accidentally within the meaning of the Act and the defendant was not liable. But in the course of his judgment, His Honour remarked that

> there is nothing to show that the fire was caused by the act or neglect of the defendant or of any person for whom he is answerable. The fire therefore should be regarded, quoad the defendant, as beginning accidentally . . . . In *Dougherty* v. *Smith* (1887) N.Z.L.R. 5 S.C. 374 and in the Australian cases *Sheehan* v. *Park* (1882) 8 V.L.R. (L.) 25, and *Cottrell* v. *Allen* (1882) 16 S.A.L.R. 122, the defendant had himself lighted the fire—which distinguishes all these cases.

The inference is that, if the defendant had been proved to have lit the fire, he would have been liable, as was the defendant in the cases referred to by His Honour.

This view of the law received weighty support when the Court of Appeal, following *Filliter* v. *Phippard* (*supra*), held in *Threlkeld* v. *White* (1890) 8 N.Z.L.R. 513, albeit in an obiter dictum, that the protection afforded by the Fires Prevention (Metropolis) Act 1774 did not extend to fires purposely kindled by the landowner but which escaped without negligence on his part and did mischief.[9]

The position in New Zealand would therefore appear to be that s. 86 of the Act will relieve an occupier for the consequences of an escape of fire only if the fire was accidental in the sense that it began by mere chance or its origin was incapable of being traced to any cause.[10] The section will afford no relief if the fire was intentionally lighted by the occupier and escaped

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[6] As thus interpreted, the legislation, it is said, did not modify the Common Law in any way but was merely declaratory of it, for the Common Law would not have imposed liability on an occupier for a fire the origin of which was incapable of being traced to any cause: see Salmond op. cit. p. 640; Sir Frederick Jordan C.J. in *Railways Commissioner* v. *Wise Bros.* [1947] 47 S.R. (N.S.W.) 233, 239. It is of course simply a question of whether liability at Common Law was strict or not. The view put forward by *1 Beven on Negligence* 625-6 is that the legislation changed the onus of proof so that whereas before the statute liability was presumed, after the Act liability was negatived until an inference of negligence could be made out.

[7] His Lordship's remark that the word " accidentally " in the Act meant " without negligence," a view which was endorsed by Finnemore J. in *Williams* v. *Owen* [1955] 1 W.L.R. 1293, 1298, appears to be equivocal. In *Balfour* v. *Barty-King* [1957] 1 All E.R. 156, 159, the Court of Appeal said: "The precise meaning to be attached to ' accidentally ' has not been determined. . . ."

[8] But in *Sochacki* v. *Sas* [1947] 1 All E.R. 344, Lord Goddard C.J. refused to impose liability where, in the absence of any negligence, the ordinary domestic fire of a lodger spread from the fireplace in his room and damaged the house. No mention was made of the 1774 Act, but *Filliter* v. *Phippard* (1847) 11 Q.B. 347; 116 E.R. 506 was referred to in the course of argument. His Lordship, however, was mainly concerned with whether the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, was applicable—as to which see infra.

[9] The actual decision concerned the liability of a landowner for the negligence of an independent contractor in the use of fire to clear his land. On this point, see the judgment of the Judicial Committee in *Black* v. *Christchurch Finance Co. Ltd.* (1893) N.Z.P.C.C. 448 and see *McInnes* v. *Wardle* (1931) 45 C.L.R. 548 and *Balfour* v. *Barty-King* [1957] 1 All E.R. 156.

[10] But it has been held that even a " strong probability " that a fire was caused by the defective electrical wiring system of the premises will not prevent the section from applying: see *Collingwood* v. *Home and Colonial Stores Ltd.* [1936] 3 All E.R. 200 and *Solomons* v. *R. Gertgenstein Ltd.* [1954] 1 Q.B. 565; [1954] 1 All E.R. 1008.

without negligence on his part. In such an event the Common Law rules still apply.[11]

The formulation of the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 in the latter half of the nineteenth century had a considerable effect on the Common Law rules as to the liability for the escape of fire, and soon after that decision it was generally accepted that fire was to be included amongst " things likely to do mischief if they escape." As a result, liability for fire tended to become merged into the doctrine of law propounded in *Rylands* v. *Fletcher*: see the cases referred to in *Winfield on Torts* (6th ed. 1954, 609 note (b).) And in *Boulcott Golf Club* v. *Engelbrecht* [1945] N.Z.L.R. 556, 557 ; [1945] G.L.R. 200 Finlay J. said that it was beyond question that liability for fire was now founded upon the rule in *Rylands* v. *Fletcher* (*supra*) and he referred with approval to the observation in *Charlesworth on Negligence* that liability for fire was based on *Rylands* v. *Fletcher*, and accordingly, except where the 1774 Act applied, it was not necessary to prove negligence. On the other hand, as Winfield has pointed out—op. cit. p. 609—it is doubtful whether the absorption of the Common Law rules in the rule in *Rylands* v. *Fletcher* has been entirely complete.

Be that as it may, there are many decisions holding the defendant liable without proof of negligence, on the principle of *Rylands* v. *Fletcher*, for damage done by the escape of fire. Thus, in *Threlkeld* v. *White* (1890) 8 N.Z.L.R. 513, the New Zealand Court of Appeal held that fire was an agent which a man must employ at his peril, saving only vis major or Act of God, and this view was followed by the same Court in *Piper* v. *Geary* (1899) 17 N.Z.L.R. 357 and by Williams J. in *Corporation of Dunedin* v. *Booth* (1908) 11 G.L.R. 116. Again, in *Kelly* v. *Hayes* (1902) 22 N.Z.L.R. 429, the Court of Appeal agreed with the view expressed by Sir Robert Stout C.J. in the lower Court that the law in New Zealand was that if a person lit a fire on his own land he must at his peril prevent it spreading to neighbouring land.

The only other relevant New Zealand authority appears to be the decision of the Judicial Committee of the Privy Council in *Black* v. *Christchurch Finance Co. Ltd.* (1893) N.Z.P.C.C. 448, a case dealing with the liability of a landowner for the negligence of an independent contractor. In the course of delivering the judgment of the Board, Lord Shand made remarks which seemed to indicate that the liability of an occupier for damage done where a fire lit by him spread to adjoining property was based on negligence. A person who lit a fire where it might readily spread to adjoining property must, said their Lordships, use all reasonable precautions to prevent the fire so spreading.[12] It is submitted with respect that an occupier's duty to keep his fire within bounds is a stricter one than that.

In Australia there are many reported cases of an occupier being held liable on the principle in *Rylands* v. *Fletcher* for damage done by a fire intentionally lit by him when it spread to adjoining land without negligence on his part: see *Craig* v. *Parker* (1906) 8 W.A.L.R. 161, followed in *Baker* v. *Durack* (1924) 27 W.A.L.R. 32 (affirmed by the High Court: 35 C.L.R. 595); *Prout* v. *Stacey* (1922) 25 W.A.L.R. 20 ; *Sheehan* v. *Park* (1882) 8 V.L.R. (L) 25 ; *Cottrell* v. *Allen* (1882) 16 S.A.L.R. 122 ; *Mitchellmore* v. *Salmon* (1905) 1 Tas.L.R. 109.[13]

With the emphasis by the Judical Committee in *Rickards* v. *Lothian* [1913] A.C. 263 that liability under the rule in *Rylands* v. *Fletcher* applied only if there had been a non-natural user of land, the way was open for some relaxation in the attitude adopted by the Courts. The argument had previously been advanced without success that " burning-off " was a natural and necessary process of husbandry for the consequences of which the defendant should not be held liable.[14] But in *Whinfield* v. *Land Purchase and Management Board of Victoria and State Rivers and Water Supply Commission* (1914) 18 C.L.R. 606, a case of a camp-fire getting out of control, both Sir Samuel Griffith C.J. and Isaacs J. took the view that the rule in *Rylands* v. *Fletcher* did not apply where fire was lawfully lighted for domestic purposes or other ordinary purposes of occupation of land and accidentally spread to adjoining land without negligence. There must be a non-natural use of the land before liability attached. A fire lit for the purpose of cooking food or supplying bodily warmth, that is, fire for the maintenance or ordinary comfort of life was a necessary adjunct of civilised existence and an elemental purpose of the use of land by the human race and could not be regarded as other than an ordinary use of land.[15]

Sir William Irvine C.J. cited this case in *Pett* v. *Sims Paving and Road Construction Co. Pty. Ltd.* [1928] V.L.R. 247, 258, where he expressed the view, albeit in an obiter dictum, that it would be a serious bar to the natural use of grazing land in Australia if landowners could not burn fire breaks on their land without becoming liable as insurers to all other owners should the fire spread in spite of every practicable precaution being taken.[16] However, in *McInnes* v. *Wardle* (1931)

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[11] It is to be noted too that the section will afford no relief where what may be termed " a *Rylands* v. *Fletcher* object " is brought on to the premises and the fire results through the presence of this object: see *Musgrove* v. *Pandelis* [1919] 2 K.B. 43 (motor-car, since criticized); *Mulholland & Tedd Ltd.* v. *Baker* [1939] 3 All E.R. 253 (drum of paraffin); *Balfour* v. *Barty-King* [1956] 2 All E.R. 555 (blow lamp.) In the last-named case, Havers J. acceded to the proposition that as the section was no defence, the onus was not on the plaintiff to prove that the fire was not accidental.

[12] At p. 448. The Judicial Committee did not refer to *Threlkeld* v. *White*, but in the Court of Appeal that case was cited with approval, the members of the Court however taking the view that on the facts the person who lit the fire was not under any contract or other relation with the defendant: see (1892) 10 N.Z.L.R.238.

[13] There is no reference in any of these cases either in argument or in the judgments to the Act of 1774. However, as mentioned above, the effect of the Act had been considered in *MacDonald* v. *Dickson* (1868) S.A.L.R. 32, and in *Young* v. *Tilley* (1913) S.A.L.R. 87, where the Court held the defendant liable either on the principle of *Rylands* v. *Fletcher* or on a principle of the Common Law analogous thereto. Similarly, in the Canadian cases of *Curtis* v. *Lutes* (1953) 4 D.L.R. 188, and *Elder* v. *Kingston* (1954) 3 D.L.R. 369, the Court held the Act inapplicable and the defendant liable on the principle in *Rylands* v. *Fletcher*—although in fact there was a finding of negligence by defendant.

[14] See e.g. *Piper* v. *Geary* (1898) 17 N.Z.L.R. 357, 361.

[15] Per Isaacs J. at p. 619. The decision of Lord Goddard C.J. in *Sochacki* v. *Sas* [1947] 1 All E.R. 344 is to the same effect.

[16] That case concerned the liability of a contractor for fire arising during the construction of a tar-sealed drive to a suburban residence. The Chief Justice held that the rule in *Rylands* v. *Fletcher* had no application as the contractor was not in occupation of the land, but went on to say that if this view was wrong, the defendant was still not liable as the tar-sealing had not been shown to be a non-natural user of land. In the absence of evidence on this point and of any finding of the jury, such an operation could not be assumed to be a non-natural user of land. This dictum in effect appears to put the onus of proof of non-natural user on the plaintiff. Indeed, at p. 255 of his judgment, the Chief Justice expressly says so.

45 C.L.R. 548, 551, Dixon J. thought that to clear land in December by burning introduced an exceptional danger and was not an incident natural or proper in the use of land in an ordinary manner. And this view was endorsed in *Hazelwood* v. *Webber* (1934) 52 C.L.R. 268.[17]

There, a fire was lit in February to remove stubble and it was shown that it was an ordinary and usual farm operation. Five days later, a smouldering stump caught alight and a high wind caused the fire to spread to the plaintiff's land. Negligence was negatived. The High Court of Australia held that, on these facts, "burning-off" was not a natural user of land. In considering whether such an operation was "an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier," benefit to the farmer and frequency of the practice were not so important as degree of hazard to others, extensiveness of damage the fire was likely to do, and the difficulty of controlling it. These depended on climate, character of the country, and natural conditions. The question was not one to be decided by a jury on each occasion as a question of fact, but involved consideration of the experience, conceptions and standards of the community. "In Australia and New Zealand" the Court said "burning vegetation in the open in midsummer has never been held a natural use of land." Much the same point had been made by Sir Frederick Jordan C.J. in the lower Court where the Chief Justice drew a distinction between damage done from fire of such a size and used for such purposes and under such conditions that no substantial risk existed that it would get out of hand—such as fire to burn rubbish stumps or carcasses—for which there was no liability in the absence of negligence; and fire in such a case as this, lit over an area of nearly 100 acres.

Indeed, it would seem that the test comes down, in the final analysis, to one of negligence. The mere lighting of a fire which involves a substantial risk of causing damage to neighbouring occupiers is something which a reasonable man would not do.[18] If that is so, then, as Jenkins L.J. said in another connection in *Perry* v. *Kendricks Transport Ltd.* [1956] 1 W.L.R. 85, 91, "one reaches the point where the claim based on *Rylands* v. *Fletcher* merges into the claim in negligence."[19]

As has been said many times[20], the question whether or not any particular user of land is to be regarded as a natural user, remains a question of fact in each case. Regard must be had to "all the circumstances of the time and place and practice of mankind."[21] Thus, the keeping of a portable boiler in a flour mill to provide steam[22], the ordinary domestic installation of electric wiring[23], and the use of a gas producer to provide motive power for vehicles on the highways,[24] have been held to be natural user. But not so the use under the particular circumstances of a blow lamp to thaw out a frozen water pipe in a house.[25]

With natural user well established as a defence to any action based on *Rylands* v. *Fletcher*, attempts were made to circumvent the difficulties in the path of the plaintiff thus raised by relying on the old Common-Law rule. It was argued that the old rule of absolute liability, to which the defence of natural user was unknown, still applied. Such a contention was first advanced in *Bugge* v. *Brown* (1919) 26 C.L.R. 110, but was ruled against by the High Court during argument.[26] On the basis of this ruling, Sir William Irvine C.J. rejected a similar contention in *Pett* v. *Sims Paving and Road Construction Pty. Co. Ltd.* [1928] V.L.R. 247, as did Starke J. in *Wise Bros.* v. *Railways Commissioner* (*N.S.W.*) (1947) 75 C.L.R. 59. The point does not appear to have arisen in either England or New Zealand, but Bankes L.J., in setting out the heads of liability at Common Law for damage done by fire in *Musgrove* v. *Pandelis* [1919] 2 K.B. 43, 46-7, did not regard the principle of *Rylands* v. *Fletcher* as having absorbed any of the other heads of liability. And his remarks have been cited with approval from time to time.[27] His Lordship said that liability arose (1) for the mere escape of fire; (2) if the fire was caused by the negligence of the defendant or his servants, or by his own wilful act; (3) upon the principle of *Rylands* v. *Fletcher* (which principle existed long before *Rylands* v. *Fletcher* was decided). The Fires Prevention (Metropolis) Act 1774 gave protection in cases falling under (1), but did not affect the other two heads of liability.

To sum up the position, it would seem that if a fire has spread from an occupier's land to that of adjoining owners and caused damage under such circumstances that there is no negligence on the occupier's part, nor do the facts support a claim in nuisance, then:

(*a*) Assuming that the ancient Common-Law rule still applies, the plaintiff to succeed has to show that the fire was not accidental i.e. that it was lighted wilfully or deliberately by the defendant. The effect of the Fires Prevention (Metropolis) Act 1774 is to cast this onus on him—see *Gray* v. *Fisher* [1922] S.A.S.R. 246, followed in *How* v. *Jones* [1953] S.A.S.R. 82.

(*b*) If the plaintiff could not discharge this onus, then, at least where the spreading fire had its origin in something which was itself a *Rylands* v. *Fletcher* object, if he could prove that the fire had spread from the defendant's land and could also satisfy the Court that the fire had resulted from a non-natural user of his land by the defendant, he could still succeed—subject of

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[17] And see *Eastern Asia Navigation Co. Ltd.* v. *Fremantle Harbour Trust Commissioners and the Commonwealth of Australia* (1951) 83 C.L.R. 353.

[18] See McMillan J. in *Craig* v. *Parker* (1906) 8 W.A.L.R. 161. 163-4; Davidson J. in *Railway Commissioner* v. *Wise Bros.* (1947) 47 S.R. (N.S.W.) 243: cf. the principle applied in Ontario as far back as 1846 and also recognised in Manitoba that where fire is used for a necessary purpose of husbandry, such as clearing land for cultivatiou, it must be established for the person starting such a fire to be liable for damage done to the property of others, that because of the state of the weather or wind or other exceptional circumstance, the act of lighting such a fire was one which a reasonable or prudent man would not have done. *Curtis* v. *Lutes* (1953) 4 D.L.R. 188, 193; *Gogo* v. *Eureka Sawmills* (1944) 4 D.L.R. 689, 697.

[19] Cf. 72 L.Q.R. 185-6.

[20] E.g. by Isaacs J. in *Whinfield's* case (1914) 18 C.L.R. 620.

[21] Lord Porter in *Read* v. *Lyons* [1947] A.C. 156, 176.

[22] *Railways Commissioner* v. *Wise Bros.* (1947) 47 S.R. (N.S.W.) 243.

[23] *Collingwood* v. *Home & Colonial Stores Ltd.* [1936] 3 All E.R. 200.

[24] *Tolmer* v. *Darling* [1943] S.A.S.R. 81.

[25] *Balfour* v. *Barty-King* [1957] 1 All E.R. 156.

[26] See the judgment of Isaacs J. at p. 115.

[27] See e.g. Havers J. in *Balfour* v. *Barty-King* [1956] 2 All E.R. 555, 559.

course to the defences available to a claim under the rule in *Rylands* v. *Fletcher* : see *Balfour* v. *Barty-King* [1956] 2 All E.R. 555.

(*c*) If the true position be that the ancient Common-Law rule has been modified by subsequent decisions based on the rule in *Rylands* v. Fletcher, then, even if the plaintiff proved that the fire was lighted wilfully or deliberately, he still had to show that the damage done resulted from a non-natural user by the defendant of his land : See *Pett* v. *Sims Paving and Road Construction Pty. Co. Ltd.* (1928) V.L.R. 247 ; *Gray* v *Fisher* (*supra*) and *How* v. *Jones* (*supra*).

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

Conveyancing Precedent.

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

(*Concluded from p. 75.*)

PART II.

II. PUMP-HOUSE.

WHEREAS : (1) THERE is a pump, pump-house or pump station with appurtenant intake (including the stream leading thereto), outlet and other works, plant and installations situated at the point marked " pump house " on the plan drawn hereon and also on Deposited Plan Number.....(some parts of such installations being situate on William's land and extending over the stream shown on such plan to Jones's land :

(2) IT is essential for the adequate drainage of the various lands affected by these presents that such pump-house or pump-station including any pump house or pump station substituted therefor (hereinafter called " the pump house " which term shall include all appurtenant intake, outlet pump and other works, plant and installations) shall be worked and operated whenever necessary for the removal of water and shall at all times be kept and maintained in efficient working order and repair :

NOW THEREFORE William and THE JONES PROPRIETORS and each of them DOTH AND DO HEREBY COVENANT with each other and with each of the other registered proprietors of the lands affected by these presents that he and they will at all times permit the pump-house to remain on its present site and will not at any time permit the pump-house site to be used for any purpose other than as the pump-house site and William and THE JONES PROPRIETORS and each of them DOTH AND DO HEREBY GRANT unto each other and each and every one of the other registered proprietors of the lands affected by these presents 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 working and operating the said pump house and the pumps and machinery therein or connected therewith and for the purpose of maintaining, repairing or dismantling the machinery or installing new machinery in the pump house and keeping the same in good and efficient working order and repair, and for the purpose of repairing, renewing or rebuilding the pump-house and for any other purpose connected with the pump-house and deemed necessary by such other registered proprietors for its continued efficient functioning as an integral part of the drainage scheme envisaged by these presents AND IT IS DECLARED that the cost or working, operating, maintaining and repairing the pump-house and of performing any other work in connection therewith or incidental thereto authorised by the preceding provisions of this clause shall be borne by the following registered proprietors for the time being in the following shares :

By the registered proprietors of Jones's land	.. one-fourth
By the registered proprietor of William's land	.. one-fourth
By the registered proprietor of Richard's land	.. one-fourth
By the registered proprietor of John's land	.. one-fourth

IT IS FURTHER DECLARED that the pump and other works, plant and installations hereinbefore referred to belong to the parties hereto in the following shares :

The registered proprietors of Jones's land	.. one-fourth share
The registered proprietor of William's land	one-fourth share
The registered proprietor of Richard's land	one-fourth share
The registered proprietor of John's land	.. one-fourth share

PART III

III. STOP BANK

WHEREAS : (1) As incidental to the drainage scheme envisaged by these presents a stopbank has been erected on parts of the lands affected by these presents :

(2) THE site and position of such stop bank is shown by dotted lines on the plan endorsed hereon :

(3) IT is essential for the adequate drainage of the various lands affected by these presents that such stop bank shall at all times be maintained in good order and repair as a stop bank for the purposes aforesaid :

NOW THEREFORE WILLIAM, RICHARD, JOHN and THE JONES PROPRIETORS DO EACH AND EVERY ONE OF THEM COVENANT with each and every one of the other parties to these presents that he will at all times keep and maintain that portion of the stop bank situate on his own land in an efficient state of repair order and condition and in the event of any covenantor under this covenant failing or neglecting to carry out or perform the terms of this covenant it shall be lawful for the registered proprietors of the other lands affected by these presents 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 proprietors concerned, including the defaulting registered proprietor, the full cost of such work or the proportion of such cost as the case may be in accordance with the provisions hereinafter set out.

AND for the purposes aforesaid THE JONES' PROPRIETORS, WILLIAM, RICHARD, and JOHN DO and each one of them DOTH GRANT unto each one of the others 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 purposes of maintaining and keeping in an efficient condition and state of repair the said stop bank AND IT IS DECLARED that the cost of maintaining and repairing the said stop bank shall be borne by the registered proprietors of the following lands in the following shares :

By the registered proprietors of Jones's land	.. one-fourth
By the registered proprietor of William's land	.. one-fourth
By the registered proprietor of Richard's land	.. one-fourth
By the registered proprietor of John's land	.. one-fourth

AND each registered proprietor of the lands affected by these presents DOTH COVENANT with each and every one of the other registered proprietors of such lands that he will not at any time permit or allow any stock whether owned by himself or any other person to graze or remain on the stop bank AND THE JONES PROPRIETORS, WILLIAM, RICHARD, and JOHN DO SEPARATELY COVENANT with each and every one of the others that he will not at any time dig or permit on his land any drain excavation or other work in such close proximity to the stop bank as to weaken or endanger it or do or cause to be done or permit on his land any other act likely to have that effect and in the event of his committing a breach of this covenant he will at his own sole expense take and perform all practicable remedial acts and measures, and the provisions hereinbefore contained

in this clause providing for the apportionment of the cost of maintaining and repairing the said stop bank shall be read subject to the special provisions of this covenant.

PART IV

IV. WATER RIGHTS

WHEREAS: (1) SITUATE on Jack's land there is a bore and pressure pump and leading therefrom a water pipe line thence passing through Jack's land thence through John's land to Richard's land and thence it is proposed to take it in two places through Richard's land to William's land.

(2) THE said water pipe line including the said proposed extensions is shown on Deposited Plan Number and marked " Pipe Line Easement ".

(3) THE said bore and pressure pump are situate at the eastern extremity of the said water pipe line:

(4) JACK, John and Richard have been using water pumped by the said pressure pump but no grant of water rights in respect thereof has ever been executed. William may use such water in future.

(5) FOR the mutual benefit of their respective lands the parties hereto have mutually agreed to enter into these presents: NOW THIS TRANSFER WITNESSETH that pursuant to the said agreement and in consideration of the premises IT IS COVENANTED AGREED AND DECLARED by and between the parties hereto as follows:

1. JACK DOTH TRANSFER AND GRANT unto JOHN, RICHARD and WILLIAM and each and every one of them and the registered proprietor for the time being of John's land, Richard's land and William's land his and their tenants and licensees (in common with Jack and the registered proprietor for the time being of Jack's land his tenants and licensees) the full free and uninterrupted right of using water from the said bore and pressure pump (or from any bore or pressure pump substituted therefor) for the purpose of supplying water to John's land, Richard's land and to the buildings now or hereafter situated thereon and also a free and uninterrupted flow and passage at all times of water from the said bore and pressure pump through and along the said pipe line marked "pipe line" on the said Deposited Plan Number.....not exceeding two inches in diameter, or any pipe line substituted therefor.

2. IN amplication of and as ancillary to the grant evidenced by clause 1 hereof JACK DOTH TRANSFER AND GRANT unto JOHN, RICHARD, and WILLIAM and each and every one of them the further right from time to time by himself or themselves or by his or their servants, agents or workmen to enter upon his, Jack's land for the purpose of repairing and/or renewing the said pipe line or any part thereof and/or the said bore and/or pressure pump and inspecting, cleansing and maintaining the same in good and satisfactory order PROVIDED ALWAYS that in exercising his or their rights conferred by this clause the grantee or grantees will cause as little damage as possible to the surface of the grantor's land and will restore the said surface as nearly as possible to its former condition or state.

3. JOHN DOTH TRANSFER AND GRANT unto RICHARD and WILLIAM and each one of them and the registered proprietor for the time being of Richard's land and William's land, his and their tenants and licensees the full free and uninterrupted right to lead water to his or their respective lands through and over John's land by means of the said pipe line hereinbefore referred to or by means of any pipe line substituted therefor.

4. IN amplification of and as ancillary to the grant evidenced by clause 3 hereof JOHN DOTH TRANSFER AND GRANT unto RICHARD and WILLIAM and each one of them the further right from time to time by himself or themselves or by his or their servants, agents or workmen to enter upon his, John's land for the purpose of repairing and/or renewing the said pipe line or any part thereof and inspecting, cleansing and maintaining the same in good and satisfactory order PROVIDED ALWAYS that in exercising his or their rights conferred by this clause the grantee or grantees will cause as little damage as possible to the surface of the grantor's land and will restore the said surface as nearly as possible to its former condition or state.

5. RICHARD DOTH TRANSFER AND GRANT unto WILLIAM and the registered proprietor for the time being of William's land his tenants and licensees the full free and uninterrupted right to lead water to his, William's land through and over Richard's land by means of the said pipe line hereinbefore referred to or by means of any pipe line substituted therefor.

6. IN amplication of and as ancillary to the grant evidenced by clause 5 hereof RICHARD DOTH TRANSFER AND GRANT unto William the further right from time to time by himself or by his or their servants, agents and workmen to enter upon his, Richard's, land for the purpose of repairing and/or renewing the said pipe line or any part thereof and inspecting, cleansing and maintaining the same in good and satisfactory order PROVIDED ALWAYS that in exercising his right conferred by this clause the grantee will cause as little damage as possible to the surface of the grantor's land and will restore the said surface as nearly as possible to its former condition or state.

7. THAT the easements hereby created shall be for ever appurtenant to the respective lands affected by these presents.

8. THAT the cost of maintaining and/or renewing the said bore and pressure pump or any bore or pressure pump substituted therefor shall be borne in equal shares by the respective registered proprietors for the time being of Jack's land, of John's land, of Richard's land and of William's land.

9. THAT the cost of maintaining and/or renewing the said pipe line as to that part thereof from the said pressure pump to the boundary of John's land shall be borne in equal shares by the respective registered proprietors for the time beibg of Jack's land, of John's land, of Richard's land and of William's land.

10. THAT the cost of maintaining and/or renewing the said pipe line as to that part thereof running through John's land shall be borne in equal shares by the respective registered proprietors for the time being of John's land, of Richard's land and of William's land.

11. THAT the cost of maintaining and/or renewing the said pipe line as to those parts thereof running through Richard's land shall be borne in equal shares by the respective registered proprietors for the time being of Richard's land and of William's land, but the original cost of installation shall be borne by William only if and when he shall decide to install the same.

IN WITNESS whereof these presents have been executed this day of One thousand nine hundred and fifty-eight.

THE FIRST SCHEDULE

[*Set out here the official description of William's land.*]

THE SECOND SCHEDULE

[*Set out here the official description of Richard's land.*]

THE THIRD SCHEDULE

[*Set out here the official description of John's land.*]

THE FOURTH SCHEDULE

[*Set out here the official description of Jack's land.*]

THE FIFTH SCHEDULE

[*Set out here the official description of Jones's land.*]

" Sell " and " Dispose of ".—". . . it was put that a sufficient meaning could be attributed to the words 'disposed of', as distinct from 'sold', by assuming that they are confined to some transaction—which, though not a sale, is analogous to a sale, such as a barter or other dealing involving some consideration. The answer to this contention appears to me to be that the natural meaning of the words 'dispose of' includes any handing over of the possession by one person to another with the intention of changing the property in the things handed over. It may possibly also include other physical dealings with the thing in question not involving either a change of possession or ownership; but with that we have nothing to do, as in this case there is no doubt that there was a change both of possession and ownership. Is there anything in the Act limiting this natural meaning to the handing over possession and ownership for money or other consideration? I think not. This particular argument would exempt from the provisions of the section the gratuitous disposal of liquor in the bar by the licensee or his servants; but I can find nothing in the Act indicating an intention that such a transaction, however rare, was not to fall within the prohibition."—Sir William Irvine C.J. in *Martin* v. *Whittle* [1922] V.L.R. 207, 210.

TOWN AND COUNTRY PLANNING APPEALS.

Seymour *v.* Ellerslie Borough.

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

Building—Butcher's Shop—Area zoned as "Commercial"—Refusal of Building Permit not justified where Permit is for Use in Accordance with Local Authority's Town-planning Scheme—Town and Country Planning Act 1953, s. 38.

Appeal under s. 38 of the Town and Country Planning Act 1953, against the refusal of the Council to permit the erection of a butcher's shop in Michael's Avenue, Ellerslie, on land owned by the appellant.

The grounds for the appeal were that the area was zoned "commercial" in the Council's undisclosed district scheme and a grocer's shop had already been erected in the area; that the erection of the proposed shop did not affect the undisclosed district scheme; that s. 38 of the Town and Country Planning Act 1953 did not afford the respondent grounds for refusal; and that principles of town planning and the preservation of amenities were not involved in this appeal.

The respondent's refusal was based on the grounds that the erection of the proposed building would be in contravention of the provisions of the undisclosed district scheme in that it was a "detrimental work", as defined by s. 38 of the Act; that the use to which the land might be put might not be in conformity with the use for which the land would be zoned in the scheme when final approval was given to it; that principles of town planning and the preservation of amenities were involved in the appeal; that the potential shopping of the area had been materially affected by the failure of the Government to proceed with the development of the Crown housing block nearby; and that the construction of shops in Michael's Avenue could have an adverse effect upon the value of the residential properties in that vicinity.

The judgment of the Board was delivered by

REID S.M. (Chairman). Pursuant to the Town-planning Act 1926 the respondent Council prepared a town-planning scheme under which the appellant's land was zoned as "residential", but on October 13, 1953, this zoning was altered and the land was zoned for shopping purposes and the scheme altered accordingly.

On April 6, 1955, the appellant was granted a building permit for the erection of a shop on one of the lots in the property, and a grocer's shop has been erected thereon. On July 5, 1955, the respondent, acting under s. 21 (4) of the Act, passed a resolution recommending its planning scheme to the Minister of Works for his consideration. Under that scheme the land under consideration was zoned as "commercial A". The Minister has not yet approved the plan so that at present it is an undisclosed district scheme under the Act. On September 17, 1956, the appellant applied for a permit to erect a butcher's shop on part of his land.

The respondent Council, acting on a suggestion from the Director of the Regional Planning Authority, gave public notice of the date on which it proposed to hear the appellant's application, and invited interested parties wishing to support or oppose this application to attend the meeting.

The meeting was held on November 13, 1956, and, after hearing the objectors and the appellant, the respondent on November 26, 1956, notified the appellant that his application was declined, the reason given being that "the council had taken into account the apparent need in the district for additional shopping and the opinion was expressed that the needs of the district appeared to be met and the Council was not prepared to grant additional shopping facilities in Michael's Avenue".

The Town and Country Planning Act 1953 makes no provision for the convening of such a meeting; and, although a local body is at liberty to convene such a meeting and get expressions of opinion from its ratepayers, this Board is in no way bound by or required to give consideration to what may transpire at such a meeting.

The appellant then lodged this appeal, and, in its reply, the respondent Council claimed thati ts refusal of the permit was based on the grounds that the proposed building would be in contravention of the provisions of its undisclosed district scheme and that it would be a "detrimental work" as defined by s. 38 (1) (*a*) and (1) (*b*) of the Act. Subsection (1) (*b*) thus calls for consideration, and it must be established that the building is a structure that detracts from the amenities of the neighbourhood which are likely to be provided or preserved by or under the undisclosed district scheme.

Under that scheme the land in question is zoned as "commercial A", and, therefore, it can be used only for commercial purposes. The use to which the appellant seeks to put this land is a predominant use in a "commercial A" zone. He cannot use it for any other purpose, as, for example, residential or light industry.

The respondent Council seeks to justify its action by submitting that, at some future date before the plan becomes operative, the zoning might be altered; but it has, by its resolution of July 5, 1955, recommended the scheme in its present form, and it concedes that the use to which the appellant wishes to put his land is the only permitted use under that scheme, and that the land cannot be used for any purpose other than commercial.

The Board agrees with Mr Wheaton's submission that s. 38 of the Act does not authorize or justify the refusal of a building permit where the permit sought is for a use which accords with the town-planning scheme of the local authority from whom the permit is sought.

The appeal is allowed. The respondent Council is directed to issue a building permit to the appellant, provided that the plans and specifications for the proposed shop comply in all respects with the Council's by-law.

The Board orders that the respondent Council pay the appellant twelve guineas costs.

Appeal allowed.

Cavanagh & Co. Ltd. *v.* Auckland City Corporation.

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

Building—Permit to Repair—Coachbuilding and Motor-spring Manufacturing Business carried on for Thirty-three Years—Area zoned "Residential"—No Sales of Residential Properties in Area—Only Non-conforming Business Such Area—Owner's Activities detracting from Amenities of Residential Area—Town and Country Planning Act 1953, s. 38.

Appeal against the refusal of the council to permit the repairing of their property at 10 and 12 St. Martin's Lane, Auckland, made under s. 38 of the Town and Country Planning Act 1953.

The grounds for the appeal were that the business had been carried on in the premises for thirty-three years, and, even when the floor above ground-level was destroyed by fire, business was continued in the floor below ground-level; that there was a maintenance and service station opposite the company's building; that there had been no sales of properties for residential use in St Martin's Lane for many years; and that the building was capable of being repaired without rebuilding.

The council replied that the proposed alterations to the premises would detract from the amenities of the neighbourhood, which were likely to be provided or preserved by the council's undisclosed district scheme; that in the undisclosed district scheme the land was zoned "residential D" and the present use of the land was a non-conforming use and the granting of the permit would prolong this use; and that the council did not admit the appellant's allegations.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board does not propose to comment on or review the events and happenings leading up to this appeal. After hearing the evidence adduced and the submissions of counsel and having inspected the company's premises and also the surrounding locality, the Board finds:

1. That the company's property is in an area zoned under the council's undisclosed district scheme as "residential D". The company's business is therefore a "non-conforming" one and could not be permitted even as a conditional use though the company can continue to carry on its business on the below-kerb-level floor so long as it is usable.
2. That the area zoned as "residential D" is predominantly residential in character and the company's premises and a nearby garage and workshop are the only "non-conforming" businesses in the area.
3. That the evidence of the objectors viewed against the background of inspection supports their claim that the company's activities detract from the amenities of the residential zone.
4. That if the permit sought were granted the life of the reconstructed building on the expert evidence tendered would be from fifty to a hundred years. This would delay the effective operation of the council's scheme and detrimentally affect the amenities likely to be preserved by the council's undisclosed district scheme.

The Board allows the respondent twenty guineas costs on the appeal.

Appeal dismissed.

Industrial Metals Ltd. *v.* Heathcote County Council.

Town and Country Planning Appeal Board. Christchurch. October 31.

Building—Extensions—Area Zoned as "heavy industrial" when Building erected—Permits later given for Office and Amenities Buildings—Permit required for Storage Building—Area then re-zoned as "Industrial B"—Local Complaints of Applicants' Activities as Scrap-metal Dealers—Permit to issue for Open Storage Building—Town and Country Planning Act 1953, s. 38 (1) (b)—Town and Country Planning Amendment Act 1957, s. 21.

Appeal by the owner of a property situate at 360 Port Hills Road, Heathcote, containing an area of 4 ac. 3 ro. 38.6 pp. being Lot 16 on Deposited Plan 15293. It purchased this property in 1955 but before completing the purchase it inquired of the respondent Council as to the zoning of the land. The former Christchurch Metropolitan Town Planning Committee had some years ago zoned the area as "heavy industrial". In reply to the appellant's inquiry the Council replied to the effect that it intended to zone the area as heavy industrial but that local objections might upset that intention.

The company purchased the land and by a letter dated July 12, 1956, the Council intimated that it had zoned the land as "heavy industrial" and it was prepared to issue building permits. On November 1, 1956, the Council issued a building permit to the appellant for the erection of an office. On March 20, 1957, the Council issued a further building permit for the erection of an amenities building. The company had also applied for a permit to erect a building for storage purposes.

On June 5, 1957, the Council informed the appellant that it was proposed to rezone the area in which the appellant's land is situate as "industrial B" and that accordingly it was not prepared to issue a permit for the proposed storage building as the nature of the appellant's business was such that it was permitted only in an "industrial C" zone.

The appellant accordingly appealed.

The judgment of the Board was delivered by

REID S.M. (Chairman). Although not specifically so stated in the reply the Council's refusal of a building permit must be deemed to have been made under s. 38 (1) (b) of the Act on the grounds that the proposed building would be a structure that detracts from the amenities of the neighbourhood likely to be provided or preserved by or under its undisclosed district scheme.

Adjoining the eastern boundary of the appellant's land there is on Currie's Road a residential subdivision. There is also a residential subdivision opposite the appellant's property in Port Hill's Road, two sections of which overlook the appellant company's property. The owners of some of these residential properties appeared and gave evidence exercising their rights under s. 42 of the Act.

The company's main activity is that of scrap-metal dealers, and virtually ever since it commenced operations in this area, the owners of residences in the vicinity have been complaining to the respondent Council about the company's activities. It is a reasonable inference that the Council in rezoning the appellant's property was yielding to the pressure being put on it by the owners. The main grounds of complaint were about noise arising from the company's operations and the unsightly appearance of the heaps of scrap metal on the property.

At the hearing evidence was given by the owners on this aspect. The Board does not propose to review that evidence. It accepts the submission that the company's activities are a source of annoyance to the owners. Whether in law these activities constitute a nuisance is not a matter the Board is called on to decide.

It was suggested on behalf of the owners that an industrial use had been wrongly established in a residential area. It would appear that the converse is the case, viz. that in the past the creation of a residential pocket in an area zoned for industrial purposes was permitted.

It was correctly conceded by the Council that, in whatever category the appellant's land is ultimately zoned, it can carry on its business if need be as a "non-conforming" use.

It is admitted by the Council that it has refused a building permit in the hope that by so doing it may so hamper the appellant's operations that it may ultimately be forced to move elsewhere.

The only question for the Board to determine is whether the erection of an open-faced storage building is likely to detract from the amenities of the neighbourhood. Even if it is conceded that the appellant company's operations do detract from the amenities of the neighbourhood, will the erection of this building tend to increase that detraction? The Board is of the opinion that it will not do so but on the contrary it may help to alleviate the situation at least in so far as some of the residents of Currie's Road are concerned by cutting off a substantial part of the yard from their view. It was also submitted that the proposed building would create a drainage problem for the owners of adjoining residences on the eastern side of Currie's Road.

It would appear that they already have a drainage problem arising from the nature of their sections and the low-lying area in which their houses were built. There was no real evidence that the building in question would aggravate that problem.

The appeal is allowed. A permit is to be issued to the appellant company for the erection of an open-storage building, such building to be erected in accordance with the Councils building by-laws.

The Board directs the attention of all parties to the provisions of s. 21 of the Town and Country Planning Amendment Act 1957.

No order as to costs.

Appeal allowed.

Knudsen *v.* One-Tree Hill Borough.

Town and Country Planning Appeal Board. Auckland. 1957. October 22.

Building—Area zoned as "Commercial"—Eight-roomed House—Application for Permit to convert into Three Self-contained Single Bedrooms Flats—Minimum Area of Forty-two Perches required for Same—Area Twenty-seven and a Half Perches—Area too far below Minimum Area required for Three-unit Building—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal by the owners of a house property at No. 92 Manukau Road, Auckland.

The property had an area of 27.5 pp. and had erected on it an eight-roomed house. It was on the eastern side of Manukau Road on the western boundary of the One-Tree Hill Borough. Properties on the western side of the road were within the boundaries of Auckland City. The area on the eastern side of the road was predominantly residential in character and under the Borough Council's proposed district scheme it was zoned as "residential B".

The western side of the road was predominantly "commercial" in character and had been zoned as "commercial" by the Auckland City Council. The appellants wished to convert their house into three self-contained single bedroom flats. They had a plan prepared and submitted this plan to the respondent Council for its approval. Approval was refused on the grounds that the Council's Code of Ordinances under its proposed district scheme requires a minimum area of 42 pp. to be provided for three household units in one building and that as the appellants' property comprised only 27.5 pp. it was 14.5 pp. below the area required by the Ordinance.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. That the burden of establishing that the respondent Borough Council's district scheme and its Code of Ordinances in relation to the area under consideration are unreasonable and not in accordance with town-and-country planning principles falls on the appellants. They have failed to discharge that burden.

2. That as part of the appellants' case the submission was made that in the immediate locality there are already in existence two blocks of flats that do not conform to the standards required by the Code of Ordinances. The Board considers that the respondent successfully answers this submission by showing that these flats were erected long before any town-planning scheme was required. They are "non-conforming" units and their re-erection would not be permitted.

3. That although the Board might have been prepared to give favourable consideration to a proposal for the conversion of the appellants' house into two-unit flats it must hold that the area of the appellants' property is too far below the minimum area required for a three-unit building.

The appeal is disallowed. No order as to costs.

Appeal dismissed.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

No Half Measure.—In these days of international incidence, sputniks and quick-changing history, nothing is wholly surprising, but a recent female petitioner in divorce may well have felt bewildered at the grave implications in her request for a concession from the Court. Spurred on by an order shortening the time for filing an answer from twenty-one days to fourteen days, her counsel on the decree nisi being granted bravely sought under the 1953 Amendment a shortening of the time for the decree absolute to six weeks. He fortified his client's request by advancing as a reason that if the decree absolute was accelerated she would be enabled to marry an American sailor in New Zealand, and, as a result, obtain the assistance of the United States Government towards the cost of her passage from New Zealand to the States. The Chief Justice was unmoved by any such sentimentality. "I do not think," he said in an oral judgment, "it is in accordance with the comity of nations that this Court, without hearing the United States Government, should make an order that will have the effect apparently of requiring the United States Government to pay the passage of the petitioner and so enable her to go to the United States without expense to herself or to this country. It seems to me that is rather a reason against shortening the time than supporting it." He declined to depart from the usual period.

Clips and Quips.—A note in this Journal (*ante*, p. 63) on "Clip Analysis" has drawn from the Crown Law Department a memorandum of muffled indignation expressed in verse:

Your quips and cracks, and verbal snacks
Excite our admiration,
But when you chip at Crown Law chaps
You risk your reputation—
Though poorer, p'raps, in fees and costs,
Than some in the profession,
In station'ry, at least, we've lost
That overheads depression.
We choose the best of forms and writs
With nice discrimination;
Untwistable, the paper clips,
In our administration.
You may regret that we thus get
Judicial approbation
Unworried, we—the stuff's all free—
Presented by the Nation.

The author who modestly signs himself "Anon" describes his *apologia pro suum departmentem* as an appalling jingle. This is too harsh a self-criticism, although Scriblex is bound to say that the effort displays insufficient evidence of the emergence from the Civil Service of a poet of major stature.

Youth Must be Served.—The story is told of an application made to Sir Frederick Faulkiner, Recorder of Dublin, for a licence for a public-house. The applicant was only twenty-five years of age and the police objected on account of his youth. "He is very young for such a responsible position," observed Sir Frederick. "My Lord," said his counsel, Dr. Webb, "Alexander the Great, at twenty-two years of age, had crushed the Illyrians, and razed the City of Thebes to the ground, had crossed the Hellespont, at the head of his army, had conquered Darius, with a force of a million in the defiles of Issus, and brought the great Persian Empire under his sway. At twenty-three, Rene Descartes evolved a new system of philosophy. At twenty-four, Pitt was Prime Minister of the British Empire, on whose Dominions the sun never sets. At twenty-four, Napoleon overthrew the enemies of the Republic with a whiff of grape-shot in the streets of Paris, and is it now to be judicially decided that, at twenty-five, my client, Peter Mulligan, is too young to manage a public-house in Capel Street?" The Recorder agreed, and the application was granted.

The Australian Adjective.—One of the older generation of practitioners in Nelson has a comment to make upon the paragraph in the issue of February 4 upon the "great Australian adjective." "I well remember," he says "the late Mr. Ashcroft, Coroner in the early 1900's, reciting to an appreciative audience in an old horse tram a verse in which he had hit off the protest of the wife of a striking slaughterman to this effect:

The butcher plies his bloody trade,
His bloody hands aflame.
That he should get so poor a wage
His wife proclaims a ditto shame."

The correspondent deprecates the promiscuous use of the word, but he acknowledges that it has its place.

Consent to Speed.—An interesting decision whether a plea of *volenti non fit injuria* was a good defence to claim for damages was recently considered by McNair J. at the Liverpool Assizes. The point arose from a fatal accident to a passenger in a car driven at an excessive speed with the passenger's consent. It seems that the driver and the passenger were experienced racing motorists, and on the day of the accident intended to try out a new fast racing car. Before the trial, the driver took the passenger's wife and the passenger took each of his children for a trip of five to ten minutes, when the car was driven at high speeds. While no assumption could be made of the intention to carry out a real speed test, the Judge found that both the driver and the passenger had in mind a speed not less than that of the trips with the children and that the passenger tacitly assented to the driver driving at such a speed as he considered fit, even though it turned out subsequently to be a speed which, viewed objectively, was dangerous. The car overturned and both its occupants were killed. Apart from the speed, there was no evidence of negligence. The Court held following *Dann* v. *Hamilton* [1939] 1 All E.R. 59, that the defence did not apply because by voluntarily riding in the car with the knowledge that, the driver was intending to drive at high speeds on roads subject to a speed limit, the passenger was not *volens* to future negligent acts of the driver. The plaintiffs as executors, were found entitled to succeed. (*Davies* v. *Jones*, decided 4/11/57).

COST OF RELEASE OF MORTGAGE.

ADVOCATUS RURALIS.

Advocatus is now merely the " & Co." of a reconstructed firm and the No Longer Junior Partner (hereinafter referred to as " the N.L.J.P.") seems to think that Advocatus should be kept busy answering legal questions for the N.L.J.P. This week the question of costs on Releases of Mortgage came up in two different ways.

In the first case a returned soldier of the first German war had died, and, in tidying up his estate, it was found that there was a registered mortgage dated 1921 to a Patriotic Association which association was no longer in existence.

We wrote to the solicitors of the association asking for the release. They in turn wrote back saying that, when the mortgage was repaid, the mortgagor had been written to saying that the mortgage would be released at his expense if he gave instructions to that effect. We replied pointing out that there was nothing in the form of mortgage, nor in the schedule to the Land Transfer Act, authorizing this action. According to the schedule, on repayment of the mortgage it was the duty of the mortgagee to hand over the mortgage with a Memorandum of Discharge annexed thereto. No mention of costs is made in the schedule, nor in this particular form of mortgage.

Having delivered this blow, Advocatus's next step was to read a long section in the Property Law Act dealing with releases of a similar nature, but the wording did not quite cover our case. (It never does). Apparently it was possible to get the Court or the Public Trustee (for whom as in duty bound . . .) to execute a release ; but a cynical friend assumed the standard of proof would be higher if the Public Trustee signed as he would have to pay for any mistake. We accordingly again took the matter up with the solicitors of (to ?) the defunct association who informed us that a search having been made it was found that, before the association's going into liquidation, all releases had been executed and were apparently held in escrow pending payment of costs. Our obvious answer was " Quite ! "

This question of costs had taken us a long way.

We read the opinions given over the years to the Law Society—one of which had been given by one of our examiners of forty-five years ago. With all due respect to surviving counsel, some at least of the opinions appear to have been given ex cathedra.

Advocatus's precedent (dated 1883) of a conveyance by way of mortgage reserving the equity of redemption had a clause stating that the mortgagor should pay for the reconveyance. (Incidentally, both the mortgage and the reconveyance (three pages) were written on parchment.) The judgment in *Re Ommaney* 10 L.R. Ch. 315, on which the legal opinions . . . . given to the Law Society are based, starts off by saying " The mortgagee is not by law bound to take any step to avert the legal consequences of the mortgage." Under the schedule to our Land Transfer Act, the mortgagee is bound to take steps.

Mr Ball in his *Law of Mortgages*, 281, points the finger at the weakness of the mortgage without a covenant for payment of costs of releases. It is surprising how often the covenant is omitted.

Further when the necessity for the reconveyance was replaced in England by a statutory receipt the makers of the Law of Property Act 1925 (England) saw fit to qualify the mortgagee's responsibility by requiring payment of costs of release by the mortgagor (s. 117 (2) (2).

Advocatus wonders sometimes how the decisions given to the Law Society are arrived at. A good committee is set up consisting of YZ, the well-known K.C., GH (now Mr Justice GH), and AB, a White Wig on the threshold of his career. AB goes into the matter thoroughly. The committee meets. As in Courts-Martial, the Junior Officer is asked for his opinion. With much trepidation he gives it. GH says " Quite ! " YZ says : " You'd better put it in writing." He does. His typist reduces it to standard English—the society's secretary attends to the punctuation—and so at the outset of his career White Wig, AB, creates a rule which will bind his brethren for the next forty years. We must admit that the chances are it is quite correct.

Our next release was of a contributory mortgage thirty years old, originally to A and B, for both of whom Advocatus had acted. A had died, and his four sons were the executors. The affairs of B, by Process of Law, had been handed over to a well known Corporation Sole.

Advocatus held the mortgage, so he obtained the first four signatures and then called on the Corporation Sole to execute on behalf of B. We pointed out we expected the Corporation Sole to look to its principal's estate for reimbursement : *23 Halsbury's Laws of England*, 2nd ed., p. 510, para. 759 (a).

This request was followed by a three-day silence, after which the Corporation Sole said that, in the circumstances, it had decided to waive its claim to costs. We then unkindly asked on what ground it would have asked for costs (hoping thereby to get some confirmation of our researches) ; but so far we have not received a reply.

It is surprising what by-roads we tread when we are engaged on research. Advocatus feels sure that some at least of the profession will be pleased to learn from our reading that it is not possible to pray a tales unless there is all ready a quales. If the quales is missing, the proper procedure, of course, would be *venire de novo*.*

Older practitioners will be surprised to learn that the N.L.J.P. did not know what a quales was !

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* *R.* v. *Solomon* [1957] 3 All E.R. 497.