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OCCUPIERS' LIABILITY: URGENT NEED FOR LEGISLATION.

ON another page, Mr R. B. Cooke discusses in an unedited article the legal implications of the recent judgment of the Court of Appeal, *Percival* v. *Hope Gibbons Ltd.* (to be reported).

We do not propose here to consider that judgment. We merely refer to it in drawing attention to the urgent need for the New Zealand Legislature to enact an Occupiers' Liability Act on the lines of the Occupiers' Liability Act which was passed by the Parliament of the United Kingdom in 1957.

But, before we reproduce the observations of their Honours of the Court of Appeal in *Percival's* case as to that need, we go back to the first edition of *Salmond on Torts* where the learned author expressed his misgivings as to the distinctions made with regard to the occupier of premises, between invitees, licensees, and trespassers. He said (and his words are reproduced in the 10th edition, at p. 571):

> The law on the whole subject is still in a confused state. The delimitation between the different categories is far from settled; nor is it possible to state with certainty the duties owed to persons falling under those categories. Had it been earlier and more generally recognized that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into a strait-jacket to fit the character in which the plaintiff comes on to the premises, and the law would then have been freed of some needless refinements and profitless distinctions.

Then, in 1928, Atkin L.J. (as he then was) in *Colehill* v. *Manchester Corporation* [1928] 1 K.B. 776, 791, observed:

> It is no doubt unfortunate that the law as to the obligation of owners of property towards those who come upon it compels distinctions to be drawn which are subtle and apt to be confused.

In *Dunster* v. *Abbott* [1953] 1 W.L.R. 58, 62; [1953] 2 All E.R. 1572, 1574, Denning L.J. (as Lord Denning then was) had this to say of the law of the occupier's liability:

> A canvasser who comes without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him it seems rather strange that your duty to him should be different when he comes up to the door than when he goes away. And what is the position when you come to discuss business with him, and it comes to nothing?

And he adds:

> Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.

The foregoing judicial pronouncements have direct application to our submission that the law as to the duties of occupiers to persons who come upon their premises needs restating here, as has been done by the Occupiers' Liability Act 1957 of the United Kingdom.

The learned Chief Justice in his judgment in *Napier* v. *Ryan* [1954] N.Z.L.R. 1234, 1243, ll. 44 et seq., when dealing with the liability of an occupier of land towards a trespasser, suggested that there was a case for the amendment of the law in this country.

In *Perkowski* v. *Wellington City Corporation* [1957] N.Z.L.R. 39, 64, F. B. Adams J. stated the law as it is today in New Zealand:

> The liability of an occupier of dangerous premises is regulated by long-established rules, and, in general, varies according to the category in which the claimant stands, whether invitee, licensee or trespasser. Towards an invitee exercising reasonable care, the occupier owes a duty of care in respect of unusual dangers of which he knows or ought to know. The duty owed to a licensee is the narrower one of warning him of concealed dangers (or traps) known to the occupier. The duty owed to a trespasser is on a still lower scale, but need not be stated. In all three cases the liability is for negligence on the part of an occupier of dangerous premises. Where the rules apply, they are not only the measure of the claimant's right but also the measure of the occupier's duty, prescribing the conditions upon which the occupier will be liable and without which he will not be liable.

In the same case, at p. 63 l. 54, the learned Chief Justice said:

> The law as to the duties of occupiers towards those who come upon their premises needs restating, though I should doubt the wisdom of restating it along the lines that appear to have been suggested in some of the more recent cases. Just how it should be restated in this Dominion is not a matter for this Court but for the New Zealand Legislature; and we have no right to determine the present case in accordance with our own views as to what the law should be or in accordance with our forecast of what the law may be when Parliament decides to amend it.

In *Percival* v. *Hope Gibbons Ltd.*, the main question for the decision of the Court of Appeal was whether the plaintiff was an invitee or a licensee. He was the employee of a firm which occupied part of a building as tenant of the owner, which also occupied part of it. The plaintiff slipped on a mat at the entrance of the building which was in the occupation and control of the owner. He was injured in the fall and he sued the owner of the building and claimed damages. The jury found in his favour.

The learned trial Judge, Haslam J., in considering

motions for judgment, referred to the issues which dealt with the alternative possibilities of the plaintiff being an invitee or a licensee. He continued :

> As he [the plaintiff] was an employee of the defendant's tenant, there may still be room for debate in law about his particular status in the hierarchy of entrants. The balance of authority appears to place him in the latter class, and I am prepared for the moment to assume in the defendant's favour that the plaintiff was a licensee.

His Honour accepted the jury's verdict that the mat and step constituted a concealed danger or trap of which the defendant knew, and held that there was evidence to support their verdict, but he pointed out that they were not unmindful of the plaintiff's prior knowledge of the possible hazard and assessed his contributory negligence at five per cent. of total responsibility.

On appeal from His Honour's judgment, the majority of the Court of Appeal (Gresson P. and Cleary J.) held that an employee of a tenant who makes use of the means of access which are in the occupation and control of the landlord, is, in relation to the landlord, a licensee. They went on to say that, even if the plaintiff was an invitee, the degree of his knowledge and appreciation of the dangerous or potentially dangerous condition of the step and mat disentitled him to recover damages.

North J., in his dissenting judgment, found that the landlord of a large commercial building has a common interest in seeing that the employees of his tenant reach with safety their place of business ; and, consequently, in relation to the owner of the premises, he considered that the plaintiff, an employee of the tenant, was, in relation to the owner of the premises, an invitee.

In concluding his judgment, Gresson P. said :

> I express the hope that, as in England there has been an attempt in the Occupiers' Liability Act 1957 to produce order out of chaos by abolishing the common-law distinction between invitees, licensees, and contractual visitors, in New Zealand there may also be legislation with the same object. It would be welcome.

Cleary J. said :

> I have made reference earlier to the Occupiers' Liability Act 1957, which came into operation in England on January 1, 1958. If that Act were to be adopted in New Zealand then, as I have already mentioned, the distinction between what has been called the "activity duty" of an occupier and the occupier's duty, as usually understood and as defined by *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274 ; aff. on app. (1867) L.R. 2 C.P. 311, would cease to have practical effect. Moreover, the categories of invitee and licensee, which have given rise to anomalous distinctions and attracted much pungent criticism, would likewise cease to exist.

The "benumbing influence" (as one textbook writer has it) of the distinction at common law between invitees and licensees, and the difficulties in New Zealand which *Percival's* case has made clear, could not have arisen if there had been enacted here a statute in terms similar to those used in the Occupiers' Liability Act 1957 (U.K.), s. 5 (1) of which is as follows :

> Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

This applies a recommendation of the Law Revision Committee in its Report to the Lord Chancellor (Cmd. 9305) :

> The majority of the Committee propose the abolition of the distinction between invitees and licensees and the adoption of the "common duty of care", as defined above, which should be owed by an occupier to every person coming upon his premises at his invitation or by his permission, express or implied ; but this common duty of care should be capable of modification by attaching a condition to the invitation or permission of the occupier.
>
> Similarly, a landlord who remains in occupation of the means of access to the demised premises should owe this "common duty of care" to any third party lawfully using the means of access, unless a more onerous duty is imposed on the landlord by the tenancy agreement ; and, where a landlord is bound contractually or by statute to keep demised premises in repair, and, owing to a breach of this obligation, a member of the tenant's family or a person residing with him, or lawfully visiting him, sustains injury, then the person injured should, in the view of the Committee, have the same right of action against the landlord as he would have had if he himself had been the tenant, without projudice to any other right of action he might have.

The knowledge of the danger by a plaintiff, either in the category of licensee or invitee, in the opinion of the majority of the Court of Appeal in *Percival's* case, is an answer to the claim. (This was also the view of F. B. Adams J. in *Perkowski's* case (*supra*) at p. 69 ll. 20-24.) But North J. was of the view that contributory negligence on the part of an invitee is not a bar to his claim since the passing of the Contributory Negligence Act 1947.

If the Occupiers' Liability Act 1957 (U.K.) were adopted here, the applicability of the Contributory Negligence Act 1947 would be certain.

We are informed that our Law Revision Committee has under consideration the recommendation of legislation comparable to the Occupiers' Liability Act 1957 of the United Kingdom.

It would be of advantage, for the sake of uniformity both of enactment and decision, if the United Kingdom statute, mutatis mutandis, were to be enacted in New Zealand. It is to be hoped that, fortified by a mass of judicial opinion expressing dissatisfaction with the continuance in this country of common-law rules which have been so decisively displaced in Great Britain by legislation, the Law Revision Committee will speed up a recommendation that the present unsatisfactory position here be brought to an early end by similar legislation.

Lodger or Tenant —"I doubt whether any guiding principle can be discovered from the cases more specific than this : that a tenancy of a room or rooms in a dwelling-house will be shown to exist where the occupier has not only the sole right to occupy the room or rooms but has the right to exclude the landlord therefrom. This is sometimes expressed by saying that if the landlord retains control of the rooms in question the occupier is a lodger and not a tenant. Where the landlord himself lives on the premises, that has been said to raise a presumption that he intended to retain control of the premises—*Burnett* v. *Guice* [1946] V.L.R. 257. But this presumption is one of fact only, which may operate where otherwise the evidence is insufficient to lead to a conclusion either way. It cannot prevail where there is sufficient evidence to enable the Court to determine the question—*Helman* v. *Horsham and Worthing Assessment Committee* [1949] 2 K.B. 335, 349."—Coppel A.J. in *Torrisi* v. *Oliver* [1951] V.L.R. 380, 385.

SUMMARY OF RECENT LAW.

CONTROL OF PRICES.

Weights and Measures—Price Order specifying Maximum Price for Beer sold—Eight-and-a-half Fluid Ounces as Net Measure—Order not Repugnant to Regulation Exempting Sellers of Alcoholic Liquor from Any Requirement to sell by Net Measure—Such Regulation made after Coming into Operation of Control of Prices Act 1947—Price Order not invalid by Reason of Part or Multiple of a Fluid Ounce as Required Measure—Control of Prices Act 1947, s. 15—Weights and Measures Act 1925, ss. 14 (1), 16, 18—Weights and Measures Regulations 1926, Amendment No. 7 (S.R. 1948/93), Reg. 2—Price Order No. 1745 (1958) New Zealand Gazette, Cls. 6 (1) (a), 8. On July 4, 1958, the Price Tribunal made a Price Order which purported to fix the retail price of beer and spirits. Clause 6 stated the maximum prices to be paid or received for beer consumed on licensed premises, as follows: 6. (1) . . . (a) 8d. for 8½ oz. provided that such price may be increased by 1d. for each ounce in excess of 8½ oz. Clause 8 provided: 6. Unless the purchaser specifically requests less than 8½ oz. of beer he shall be served with not less than 8½ oz. except where the beer is served in the lounge or dining room, or is beer served from its original bottle, or is beer sold by the holder of a conditional licence under the authority of that licence. The appellant was convicted and fined for an offence in contravention of cl. 8 in serving, in the public bar of the hotel of which he was the licensee, two glasses of beer each containing less than 8½ oz. of beer when the customer had not specifically requested less than that amount. He was fined £20. On appeal from that conviction and sentence, *Held*, 1. That cl. 8 of the Price Order was not repugnant to an amending regulation (S.R. 1948/93) made on June 16, 1948, under the Weights and Measures Act 1925, exempting the sellers of alcoholic liquors from any requirement of s. 18 of that statute to sell by net measure; because the Price Order imposed a form of measurement in respect of which the Weights and Measures Act 1925 was silent when the Control of Prices Act 1947 was passed. 2. That cl. 8 of the Price Order was not invalid on the ground that s. 16 of the Weights and Measures Act 1925, requires that all goods sold by measure of capacity should be sold by some measure authorized by that Act, and that half a fluid ounce is not a measure so authorized; because s. 14 (1) of the Weights and Measures Act 1925, does not merely prohibit certain actions, but also, by implication, confers authority for the use, in sales and other transactions, of a part or multiple of any of the denominations described in the First Schedule to that statute. (*Powell* v. *May* [1946] K.B. 330, applied.) *Robins* v. *Coster*. (S.C. Wellington. 1959. April 16. McCarthy J.)

DESTITUTE PERSONS.

Maintenance—Reasonable Cause for Wife's Refusal or Failure to live with Her Husband—Test referable only to Wife's Position in Home—"Reasonable Cause"—Destitute Persons Act 1910, s. 17 (7). By s. 17 (1) of the Destitute Persons Act 1910, a summons may be issued against a husband claiming a maintenance order in favour of his wife, inter alia, on the ground that the husband has failed or intends to fail to provide her with adequate maintenance. By subs. (3), a Magistrate hearing the complaint, on being satisfied of the truth thereof, may if he thinks fit, having regard to all the circumstances of the case, make a maintenance order against the husband. By subs. (7), it is further provided: Where the husband and wife are living apart from one another, and the wife has, in the opinion of the Magistrate, reasonable cause for refusing or failing to live with her husband, the husband shall not be deemed to have provided her with adequate maintenance merely by reason of the fact that he is willing and ready to support her if and so long as she lives with him. It may be wrong to substitute the phrase "grave and weighty", or other similar terms, for the words "reasonable cause", in s. 17 (7), as the terms are not necessarily the same. (*Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, considered.) The matter for the opinion of the Magistrate is whether or not "the wife has . . . reasonable cause", and this makes the test referable to the wife's position in the home, and so eliminates any inquiry into the intention of the husband in his conduct towards his wife. That is, the Court is to embark on the factum of the husband's conduct towards his wife and its effect on her, but is not called upon to consider or apply the tests required to satisfy the Court that the husband has the animus deserendi essential to constructive desertion. (Statement of Lord Evershed M.R. in *Allen* v. *Allen* quoted in *Simpson* v. *Simpson* [1951] P. 320, 327, applied. *Holborn* v. *Holborn* [1947] 1 All E.R. 32, referred to.) Where an order for maintenance is sought under s. 17 (1), there is no locus poenitentiae as there is between the period of separation and the hearing of the complaint, as s. 17 (7) requires "reasonable cause" only, without requiring any proof of any element of wilfulness. (*Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, distinguished.) *So held*, by Henry J. on an appeal by a husband against a maintenance order made by a Magistrate in favour of a wife who, with her two children, had left the matrimonial home. *Fodie* v. *Fodie*. (S.C. Dunedin. 1959. March 10. Henry J.)

EVIDENCE.

Admissibility—Public Revenue—Income Tax—Statement prepared by Taxpayer's Accountant and Letter Containing Admissions written by Accountant to Commissioner of Inland Revenue during Negotiations relating to Assessment of Tax—Such Statements produced at Hearing of Charges of Wilfully making False Returns—Accountant Taxpayer's Agent authorized to interview Tax Inspector—No Proof that Admissions on Taxpayer's behalf within Scope of Accountant's Authority—Strict Proof only receivable in Evidence against Taxpayer—Statement and Letter inadmissible. On an appeal from M.'s conviction of wilfully making false returns of income under the Land and Income Tax Act 1923, the Supreme Court held that the evidence given by an inspector of the Inland Revenue Department was inadmissible, in so far as it consisted of statements made to the inspector by bank officials it was hearsay, and in so far as it consisted of the information gathered from an inspection of documents, secondary evidence of such documents where the non-existence of the documents not having been established and none of the steps necessary to justify secondary evidence had been taken. He also held that s. 18 of the Land and Income Tax Act 1923 (s. 26 of the Land and Income Tax Act 1954) could not be invoked in a criminal proceeding. McCarthy J. further held that proof of a statement prepared by S., who was the taxpayer's accountant, to the Commissioner of Inland Revenue and a letter written by S. to the Commissioner in the course of negotiations in connection with the assessments made by the Commissioner were admissible on the ground that S. was the taxpayer's agent and he had not challenged the accuracy of the figures compiled by the Department's inspector, and, on that ground, the trial Judge dismissed the appeal. From that dismissal, the taxpayer appealed to the Court of Appeal, by leave, under s. 144 of the Summary Proceedings Act 1957. *Held*, by the Court of Appeal, 1. That it had been established that S. was the taxpayer's agent to interview the inspector, but there was no evidence of express authority by the taxpayer to S. to make admissions on his behalf. 2. That the evidence objected to was not admissible for the reasons that it was not possible to determine with any certainty what was the scope of S.'s authority, and the Court was not entitled to draw any inferences from the fact of S.'s appointment as there was no evidence available to show what is usual or customary when an accountant is employed to act for a client in income-tax matters; and that strict proof of authority is necessary before admissions made by S. were receivable as evidence against the taxpayer. (*Wagstaff* v. *Wilson* (1832) 4 B. & Ad. 339; 110 E.R. 483, and *R.* v. *Downer* (1880) 15 Cox C. C. 486, referred to.) 3. That, even if S. had implied authority to make the admissions, it had not been shown that he did in fact admit the correctness of the figures relating to the stock in hand; so that a necessary part of the basis of the respondent's case remained unproved. Appeal from part of the judgment of McCarthy J. allowed, and the convictions quashed. *Maxwell* v. *Commissioner of Inland Revenue*. (S.C. Wellington. 1958. September 23. McCarthy J. C.A. Wellington. 1959. April 10. Gresson P. North J. Cleary J.)

PROBATE AND ADMINISTRATION—PRACTICE.

Letters of Administration—Recall of Grant—Discovery of Will after Grant sealed—Application for Recall to be made by Originating Summons—Code of Civil Procedure, R. 531T. An application for recall of grant of letters of administration in common form, where a will has been subsequently discovered, must be made by originating summons. (*In re Milling* (*No. 2*) [1916] N.Z.L.R. 1180, and *In re Matthew Thomas Muir* [1919] N.Z.L.R. 632; [1919] G.L.R. 499, distinguished.) Thus, where a will was found after grant of letters of administration to the widow had been sealed, and there were infant

children of the deceased, the originating summons had to be served upon counsel appointed to represent the infants. *In re Goggin (deceased).* (S.C. Wellington. 1958. October 14. McCarthy J.)

PUBLIC REVENUE.

Income Tax—Commissioner's Assessment—Provision that Assessment deemed Correct—Such Provision not to be invoked in Criminal Proceeding—Land and Income Tax Act 1923, s. 18—Land and Income Tax Act 1954, s. 26—See EVIDENCE *(ante)—Maxwell* v. *Commissioner of Inland Revenue.* (S.C. Wellington. 1958. September 23. McCarthy J. C.A. Wellington. 1959. April 10. Gresson P. North J. Cleary J.)

TENANCY.

Fair Rent—Assessment—Shops forming only Part of Landlord's Whole Area—Proper Method of Fixing Fair Rent of Rent-producing Part of Whole Property—Tenancy Act 1955, s. 21 (1)—Tenancy Regulations 1956 (S.R. 1958/187), Reg. 2. The proper method of fixing the fair rent under s. 21 (1) of the Tenancy Act 1955, and Reg. 2 of the Tenancy Regulations 1956, in respect of a part of a building let in parts as business premises, while the remaining part of the area of the section on which the building stood would not be rent-producing unless and until it was developed, is to ascertain the capital value of the whole area, which includes all buildings and other things which pass with it, and then, under and in pursuance of the general discretion given to the Magistrate under s. 21 (1) to make some allowance for the value of the unoccupied and non-income producing portion of the area. Upon the resulting figure, the maximum allowance under s. 21 (4) should be based. In the present case, where shops which were the only rent-producing part occupied four-elevenths of the whole area, the remainder being not in a fit condition for habitation or for any useful purpose, the Magistrate, in fixing the fair rent of the shops failed to make a deduction from the capital value of the whole area for the seven-elevenths not occupied by the tenants; and he had consequently not fixed the fair rent in a fair and equitable manner, as he had exceeded the maximum assessment he was entitled under s. 21 (4) to allow as being a percentage on the capital value. *Dainty Inn Ltd.* v. *Southland Land and Building Co. Ltd.* (S.C. Invercargill. 1959. April 9. Henry J.)

TRANSPORT.

Licensing—Goods-service Licence—Route "available" notwithstanding it involves Deviation in Any Direction—Circumstances for Consideration—Direction of Deviation immaterial—Transport Act 1949, ss. 2 (1), 95 (1)—(Transport Amendment Act 1955, s. 14 (1))—Transport Amendment Act (No. 2) 1958, s. 8. A route which includes a railway is "available" within the meaning of s. 95 (1) of the Transport Act 1949, notwithstanding that it involves a deviation in any direction, if the circumstances are such that reasonable men, with minds uninfluenced by comparative costs and desirous of using the railway if they reasonably can, might be expected to use the railway. The foregoing is subject to all statutory exceptions, in particular the right to use the road if, by using the railway, the distance would be increased by more than one-third. No difference in principle arises whether the deviation has reference to the commencement of the transit by rail, or has refereecn to its termination. The direction of the deviation is, in general, immaterial. (*Hanna* v. *Garland* [1954] N.Z.L.R. 945, and *Tuakau Transport Ltd.* v. *Donovan* [1958] N.Z.L.R. 908, followed. *Gordon* v. *Coldicutt* [1956] N.Z.L.R. 837, not followed). *Loper* v. *Transport (N.C.) Limited.* (S.C. Greymouth. 1959. April 15. F. B. Adams J.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Assault by Fellow-worker—Injury caused to Worker—No special Risk of Assault incident to Performance of Work or from Fellow-worker's Past Behaviour—Accident not arising "out of . . . the employment"—Workers' Compensation Act 1956, s. 3 (1). The plaintiff and M., surfacemen in the New Zealand Government Railways Department, were working in the same gang. On January 14, 1957, when the afternoon smoko occurred, the plaintiff reached the shed in which the afternoon tea was made and was already sitting down when M. came into the shed and accussed him of carrying tales to the boss. The plaintiff replied to the effect that he was not doing that, but was just telling the truth. M. grabbed the plaintiff around the throat and hit him on the left-hand side of the mouth with his right hand, then grabbed the plaintiff more firmly around the throat, and punched him in the left eye. On a claim by the plaintiff for compensation in respect of injury to his left eye suffered as a result of M's assault, *Held*, That, as there was no special risk from M. by reason of M.'s past behaviour, and there was no general risk of being assaulted arising out of the employment, there was no risk of assault necessarily incident to the performance of the work on which the plaintiff was engaged on the day in question; and, consequently, the plaintiff had failed to establish that his injury "arose out of" his employment. (*Lawrence* v. *George Matthews (1924) Ltd.* [1929] 1 K.B. 1; 21 B.W.C.C. 345, followed. *Reid* v. *British and Irish Steam Packet Co. Ltd.* [1921] 2 K.B. 319; 14 B.W.C.C. 20 distinguished). *Moorby* v. *Attorney-General.* (Comp. Ct. Wellington. 1959. February 10. Dalglish J.)

THE DECLARATION OF DELHI*.

This International Congress of Jurists, consisting of 185 Judges, practising lawyers and teachers of law from 53 countries, assembled in New Delhi in January, 1959, under the aegis of the International Commission of Jurists, having discussed freely and frankly the Rule of Law and the administration of justice throughout the world, and having reached conclusions regarding the legislative, the executive, the criminal process, the judiciary and the legal profession, which conclusions are annexed to this Declaration,

NOW SOLEMNLY

Reaffirms the principles expressed in the Act of Athens adopted by the International Congress of Jurists in June, 1955, particularly that an independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice;

Recognizes that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized;

Calls on the jurists in all countries to give effect in their own communities to the principles expressed in the conclusions of the Congress; and finally

Requests the International Commission of Jurists

1. To employ its full resources to give practical effect throughout the world to the principles expressed in the conclusions of the Congress.
2. To give special attention and assistance to countries now in the process of establishing, reorganizing or consolidating their political and legal institutions.
3. To encourage law students and the junior members of the legal profession to support the Rule of Law.
4. To communicate this Declaration and the annexed conclusions to governments, to interested international organizations, and to associations of lawyers throughout the world.

This Declaration shall be known as the Declaration of Delhi.

Done at Delhi this 10th day of January, 1959.

* This is the full text of the Declaration of Delhi, which is referred to in the article "International Commission of Jurists: Congress at New Delhi on the Rule of Law" by D. R. Wood (*ante*, p. 41). It has now been released for general information.

LEGAL ANNOUNCEMENTS.

Continued from p. i.

CHARLES C. MUNRO, LL.B., wishes to announce that he has been joined in partnership as from the first day of April 1959 by ERNEST N. BROUGH, LL.B., who has been associated with the firm for the past twelve months. The practice, previously carried on under the name of MASON & MUNRO, will, as from the above date, be continued by Mr Munro and Mr Brough under the name and style of MASON, MUNRO & BROUGH, at 23 Bowen Street, WAIUKU.

DANGEROUS PREMISES: COURT OF APPEAL DECISIONS.

In the first fifteen months of its work the reconstituted Court of Appeal of New Zealand disposed of some ninety-three cases, civil and criminal (including appeals against sentence only), and in every case the result reached was unanimous, while only in one or two was there even any difference in the reasoning of the members of the Court. This is indeed a remarkable and perhaps unique record. Nothing less uncertain, arbitrary and provoking than the law relating to occupier's liability was capable of disturbing such judicial solidarity. However, unsettled problems in negligence are notoriously apt to produce differences of opinion, bordering almost at times on clashes of emotion, for the solution of problems in this field may involve, if not actually articulating, at any rate giving more open effect than usual to the individual scale of values and the individual attitude to the function of the courts in deciding questions of common law. Thus Lord Macmillan, whose affirmative vote as junior Law Lord carried the day in *Donoghue* v. *Stevenson*, says of that case in his autobiography, *A Man of Law's Tale*, " It was soon evident that there was going to be a division of judicial opinion. When we came to write our judgments Lord Buckmaster employed all his mastery of argument in a vigorous, almost violent, demolition of the appellant Mrs Donoghue's contention which he declared to be unsupportable by any common-law proposition . . . Lord Atkin took the contrary view which he announced with no less confidence."

The case which has the distinction of being the first to divide the new Court of Appeal is *Hope Gibbons Ltd.* v. *Percival* (to be reported). The plaintiff, respondent in the Court of Appeal, was an elderly man employed as a storeman by a company which was tenant of rooms in the defendant company's office building. In the usual way the defendant company retained possession and control of the common entrances, stairways and the like. The main entrance used by the tenants was from a narrow but busy street on which the footpath was not yet formed. At the entrance there was an unfixed wooden step, projecting partly over the line of the footpath and covered by an unfixed and overlapping rubber mat. Lorries and other traffic periodically displaced this mat. The secretary of the company employing the plaintiff had complained to the defendant company's directors that " someone would break their neck on the mat " ; but no action had been taken on this complaint. There was evidence of an accident suffered by another user of the mat on a date before that of the plaintiff's accident. The plaintiff tripped over the outside edge of the mat when he was leaving the building one evening. He had straightened the mat on coming in only half-an-hour previously, but it was considered likely at the trial that the mat had become twisted in the meantime, through being run over by a vehicle or otherwise moved.

On those facts it might be thought that a civilized legal system would hold the occupiers largely answerable for the plaintiff's injuries. The jury evidently thought so. They found that the step and mat rendered the portion of the highway outside the entrance to the building dangerous ; that the defendant company was negligent in failing to remove the step and mat ; that the step and mat constituted both an unusual danger and a concealed danger of which the defendant company actually knew ; and that the plaintiff was only five per cent to blame for failing to keep a proper lookout. The trial Judge, Haslam J., entered judgment for the plaintiff accordingly. But a majority of the Court of Appeal, Gresson P., and Cleary J., North J. dissenting, have set aside this judgment, holding that under the law of New Zealand the occupiers escape liability altogether.

The Status of the Plaintiff

All three members of the Court of Appeal take the view that there was no evidence to justify the jury's finding of a concealed danger, because the plaintiff's knowledge that the mat could be dangerous and the jury's finding that he was guilty of contributory negligence, although only to the extent that his damages should be reduced by five per cent., showed that if he had exercised reasonable care for his own safety the mat would not have been a trap for him. On this view the plaintiff had no chance of holding his judgment on the basis of occupier's liability unless he was an invitee ; and invitee or licensee is the main issue discussed in the Court of Appeal judgments. Whether the plaintiff had a cause of action as a user of the highway, having regard to the fact that the part of the mat on which he tripped was over the highway, is a question more briefly dealt with and answered in the negative by all members of the Court.

Landlord and Tenant

On the invitee or licensee issue, an account of the background of case law may begin by mentioning the decision of Lush J. in *Dunster* v. *Hollis* [1918] 2 K.B. 795, where a tenant was injured on steps of which the landlord remained in occupation and which gave access to the demised premises. Lush J. held that the landlord in such a situation is under an implied contractual obligation to the tenant to take reasonable care to keep the steps reasonably safe. That decision appears never to have been judicially criticized in England. It seems unlikely to be overruled there now, since to expect a landlord to be reasonably careful is hardly to impose too exacting a standard on him, and under the Occupiers' Liability Act 1957 substantially the same standard would apply even if his duty were governed by the law of tort rather than contract.

But on this point the common law of New Zealand is different from the common law of England, the landlord's duty here being lower than a duty of reasonable care, for in *Lyons* v. *Nicholls* [1958] N.Z.L.R. 409, a majority of the Court of Appeal (Barrowclough C.J. and F. B. Adams J., McGregor J. dissenting) declined to follows *Dunster* v. *Hollis*. The main reason given was that in such cases the landlord is undoubtedly the occupier of the staircase, the tenants entitled to use the staircase are undoubtedly and necessarily his invitees, and the common-law duty to the tenants as invitees is " adequate " and leaves no room for an implied contractual term. Adams J., who delivered the principal judgment on this part of the case, added an obiter dictum to the effect that *Fairman* v. *Perpetual Building Society* [1923] A.C. 74

shows that persons other than the tenants are at the most licensees; but this dictum can hardly have been meant to apply to all other persons, even those who come on business with the landlord; nor is there any reason to suppose that the learned Judge had servants of tenants in mind. As to tenants, Adams J. also said that, since the grant of an easement of way does not of itself impose any duty to keep the way in repair, and since there is no such implied obligation as regards the demised premises themselves, it would be a legal oddity to hold that there is any implied contract by the landlord in respect of the safety of the access way. On the other hand McGregor J., in his dissenting judgment, did not think it unreasonable that, where a common stairway is retained in the occupation and control of the landlord for the use of a person with whom he has contracted, there should be implied in the contract a term that the person in occupation and control should keep the stairway reasonably safe.

Another reason given in *Lyons* v. *Nicholls* for rejecting *Dunster* v. *Hollis* was that, "Even in cases where a landlord has covenanted to repair the demised premises, it is trite law that he will incur no liability in damages except upon notice of a want of repair. It may be interesting to consider whether the plaintiff's position in the present case can be stronger than it would have been if the landlord had expressly covenanted to keep the staircase in repair, whether as part of the demised premises or as an ancillary convenience": [1958] N.Z.L.R. at p. 432, per F. B. Adams J. But the requirement of notice springs from the special knowledge which the tenant's occupancy of the premises is presumed to give him, coupled with the state of ignorance in which the absence of occupancy is presumed to leave the landlord. Therefore the requirement does not apply to an undertaking by a landlord to keep in repair portion of the premises which he retains in his occupation: *Melles* v. *Holme* [1918] 2 K.B. 100; *Murphy* v. *Hurly* [1922] 1 A.C. 369; *Bishop* v. *Consolidated London Properties Limited* (1933) 102 L.J.K.B. 25.

Curiously enough the English decision perhaps most helpful to the majority view in *Lyons* v. *Nicholls* was not mentioned in the judgments*. In *Hart* v. *Liverpool Corporation* (1949) 65 T.L.R. 677, where a tenant of one of a block of flats fell into a hole in a service road controlled by the landlords, the Court of Appeal held that in using the road as an access to her flat the tenant was the landlord's invitee. As Jenkins L.J. put it at p. 679:

> It seems to me reasonably plain that, where a landlord lets to a tenant a flat in a block such as the plaintiff's flat in the present case, he must be regarded as inviting the prospective tenant, in the event of the tenancy being granted, to use the necessary means of access to and from the flat. That is a matter in which both landlord and tenant have a common interest, for it is obvious that without these rights of access the flat would never be let at all.

In *Hart's* case it was enough for the plaintiff to show that her rights were at least higher than those of a licensee. Apparently her counsel were chiefly concerned to answer an argument for the defendant that she was defeated by *Fairman's* case, where the House of Lords held a tenant's lodger, injured on the common staircase, to be merely the landlord's licensee. The Court of Appeal did refuse to extend the decision in *Fairman's* case to the tenant herself. *Dunster* v. *Hollis* and contractual duty were not considered. No doubt that is why *Hart's* case was not admitted to either the Law Reports or the All England Reports. In this state of the case law it can at least be said with certainty that, with regard to premises which remain in the landlord's control but over which it is necessary to go in order to reach the demised premises, no court, either in England or in New Zealand, has countenanced the idea that the tenant's rights against the landlord are less than those of an invitee.

The Tenant's Servants

Should the rights of the tenant's servants be less in New Zealand than those of their employer? If the question were perfectly free of authority and had to be answered on principle there could be little doubt of the answer, and indeed *Hope Gibbons Ltd.* v. *Percival* would have been differently decided on this point, as one of the majority in the Court of Appeal, Cleary J., said that he would have preferred to be able to say that the plaintiff was an invitee. The reasoning whereby the English Court of Appeal in *Hart* v. *Liverpool Corporation* and the New Zealand Court of Appeal in *Lyons* v. *Nicholls* held that the tenant was an invitee is equally applicable to the tenants' servants, especially where premises are let for the purpose of a business in which a number of persons will necessarily be employed.

In such a case it would seem that the landlord must surely be regarded as inviting the prospective tenant's employees, in the event of the tenancy being granted, to use the necessary means of access to and from the demised premises. That is a matter on which both the landlord and the employees have a common interest, for it is obvious that without rights of access for the tenant's employees the premises would never be let at all. It is true that these rights are not directly granted to the employees by the landlord. The lease, frequently in express terms but otherwise no doubt by necessary implication, gives the tenant a contractual right in the matter against the landlord: the landlord promises the tenant that the latter's servants shall have access to the premises. Even assuming that a servant, as a stranger to the contract, could not sue on it, the landlord could not deny him access without incurring a liability to damages and possibly an injunction at the suit of the tenant. This is one of the respects in which the landlord has bargained away his legal freedom of action in consideration of the rent. A bare licensee or guest is one who, in the classic words of Willes J. in *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 285, "is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude so long as there is no design to injure him." If a man who uses an entrance because the occupier of it is bound by contract with his employer not to prevent him, and because he himself is bound by contract with his employer to use it, is to be treated merely as the beneficiary of an act of grace on the part of the landlord, the law has lost touch at once with its origins and with reality.

Cases regarding the Tenant's Servants

It might be expected that compelling direct authority would alone suffice to produce such a depressing result. In fact there appears to be no reported decision directly on the point. There are several reported cases where

* The decision was cited in the argument for the landlord, but the submission of counsel for the landlord was that it was too late to vary the settled rule formulated in *Dunster* v. *Hollis*, which must be recognized as having been accepted conveyancing practice for many years: [1958] N.Z.L.R. at p. 417.

servants of tenants or of contractors employed by tenants have been injured when using part of the premises in the landlord's possession, but for one reason or another none of these is very helpful and none is cited in the Court of Appeal judgments (in which respect they share the fate of *Lyons* v. *Nicholls* and *Hart* v. *Liverpool Corporation*).

In *Huggett* v. *Miers* [1908] 2 K.B. 278, a servant employed by the tenant of a floor in an office building suffered a fall caused by the common staircase being unlit at night. The agreements for the letting of the various offices contained no provision about the lighting of the staircase. Outside the entrances to their respective offices the tenants had lights which were supplied with gas from their own meters. The light outside the entrance to the premises occupied by the plaintiff's employers had been extinguished by a fellow servant who had left earlier that evening. In an action by the plaintiff against the landlord, the Court of Appeal held that in the particular circumstances the landlord was under no obligation to the tenants to light the staircase, and the Court was content to say that the plaintiff could be in no better position than his employers. The terms invitee and licensee are not even mentioned in the judgments. It may be added that there is more recent English authority, at first instance, to the effect that the landlord's duty to the tenant in respect of the safety of the common staircase does not extend to the matter of lighting: *Devine* v. *London Housing Society Ltd.* [1950] 2 All E.R. 1173.

In *Sutcliffe* v. *Clients Investment Company* [1924] 2 K.B. 746, the plaintiff was the foreman of a firm of builders employed by a tenant to repair the demised premises. The firm's advertisement board was fixed to a balcony which remained in the landlord's possession. When the work was finished, the plaintiff went to remove the board and the balcony collapsed. The jury found that the landlord ought to have known that the balcony was dangerous. It was held that vis-a-vis the landlord, the plaintiff was a licensee with an interest (i.e. an invitee) and was therefore entitled to recover. This decision would plainly be closely in point but for the fact that the landlord had agreed to contribute to the cost of the repairs; and, of the two Lords Justices who delivered reasoned judgments on this branch of the case, Bankes L.J. emphasized that fact, although Scrutton L.J. attached no special significance to it, saying simply that the workman "was allowed by the tenant to be upon the premises for the purpose of doing repairs, and so far as access to the balcony was necessary for that purpose he was there with the consent of the landlord. He was a licensee with an interest."

In *Rochman* v. *J. & E. Hall Ltd.* [1947] 1 All E.R. 895, a lift accident case, the plaintiff was a partner and the foreman manager in a firm which carried on business on a floor leased from the defendants by another of the partners. There was a clause in the lease to the effect that the landlords were not to be liable for any accident to any person using the lift. Counsel for the plaintiff conceded that the position was that of licensor and licensee, and Birkett J. therefore refrained from going into the point.

The latest English case of broadly similar facts appears to be *Ashdown* v. *Samuel Williams and Sons Ltd.* [1957] 1 Q.B. 409. The plaintiff was employed by a company to whose premises access could be obtained only across land retained and occupied by the landlords. The lease granted a right of way over part of this land and in addition the landlords had acquiesced for many years in the use by the tenant company's employees of a shorter route. The plaintiff was run over by a truck which was negligently shunted by employees of the landlords on railway lines over which the shorter route lay. The landlords were ultimately held in the Court of Appeal to be relieved of liability by the terms of a notice erected by them for that purpose, which stated that it applied to "every person, whether an invitee or otherwise, whilst on the said property." The plaintiff was treated by the Court of Appeal as a licensee when using the shorter route, but her status when using the right of way was not in issue, and indeed the case is perhaps not one of occupier's liability at all, as it may be regarded as not concerned with the static condition of the premises.

Ashdown's case is useful, however, for its recognition that the duty of employers to take reasonable care to see that their workpeople are not subjected to unnecessary risk may extend to taking steps as regards access ways in the possession of the employers' landlords. On the facts in that case the Court of Appeal held that the employers had provided a reasonably safe route to the place of work, namely the right-of-way, and even if they owed a duty to warn the plaintiff of the dangers of the shorter route as well, their failure to give her such a warning had not contributed to the accident. In this connection it should be mentioned that in *Hope Gibbons Ltd.* v. *Percival* the employers had not been sued, so the question of fact whether they did enough by complaining to the landlords was not investigated. There is of course a practical limit to what the tenant can do to remedy a danger existing on premises not under his control; and if the landlords know or ought to know of the danger it would seem that, at any rate as between them and the tenant, the primary responsibility should be theirs: cf. the apportionment of liability in *Smith* v. *Austin Lifts Ltd.* [1959] 1 All E.R. 81.

American and Canadian Authority

The English cases being so inconclusive, it may be worth while looking further afield before returning to the judgments in *Hope Gibbons Ltd.* v. *Percival.* In the United States the tenant's servant would be regarded as the landlord's business visitor or invitee when using the common entrance. But then American Courts appear to regard some of the modern English decisions on occupier's liability (or, more accurately, its absence) as sources of surprise rather than guidance. The reasonableness of the principles recognized in the United States is shown by a passage in the volume on Negligence in the *Restatement of the Law of Torts*, s. 332 (h):

> A person may be a business visitor of a lessor of land although he is merely a gratuitous licensee of the lessee. Thus, a lessor of an apartment in an apartment house or of an office in an office building, who retains the control of the halls, stairways and other approaches to the apartment or office, has a business interest in the use of these facilities by any person whom his lessee may choose to admit, irrespective of whether the visit of such a person is for his own or the lessee's business purpose or whether he comes as a mere social guest or other gratuitous licensee of the tenant.

Several Canadian cases should be mentioned, although to the uninitiated the citation of relevant decisions in Canadian Courts seems sometimes rather haphazard, so that when it is difficult to reconcile Canadian and English authorities one cannot always be sure whether

the English authorities have been rejected or only overlooked.

Perhaps the most authoritative Canadian case is *Greisman* v. *Gillingham* [1934] 3 D.L.R. 472, a unanimous decision of the Supreme Court of Canada affirming decisions in the Ontario Courts. This was another case of an accident in a common lift. The plaintiff was at the time employed by a tenant of a floor in an office building to remove debris from the demised premises. It was the last day of the tenant's term and the work was being carried out because the lease contained a covenant by the tenant not to allow any refuse, garbage, or other loose or objectionable matter to accumulate in the demised premises, and at all times to keep the premises in a clean and wholesome condition. On these facts the Supreme Court held that the landlord had an interest in the plaintiff's use of the lift which rendered him a licensee with an interest (or invitee). The conclusion seems so natural that it is hard to imagine any Court deciding otherwise. Yet in *Hope Gibbons Ltd.* v. *Percival*, Gresson P. says :

> There does not appear to be any justification for regarding the plaintiff in this case as an invitee. The occupier of the building—the defendant—cannot be said to have any real interest in the daily attendance of the tenant's employees at their work. The plaintiff did not go upon the premises of which the defendant was the occupier for the purpose of any work or business in which the defendant was interested. The ingress and egress of employees of tenants in the building was not a matter in which the landlord had any sort of interest. The comings and goings of the plaintiff were not on business which in any way concerned the defendant. It may be that the successful conduct of the tenant's business would be conducive to the payment to the landlord of the rent, but this circumstance is too remote to constitute "a common interest".

If the decisions of the highest Courts in Canada and New Zealand can stand together, it seems to follow that the manager of a tenant's business, whose services are essential to enable the tenant to perform his covenant to pay the rent, uses the common parts of the office building as the landlord's licensee, but the tenant's charwoman does so as the landlord's invitee —at all events if the tenant is bound to keep the premises clean, as he often is.

Amongst other Canadian decisions reference should be made to *Gordon* v. *Canadian Bank of Commerce* [1931] 4 D.L.R. 635, also a lift accident case, where the plaintiff shared with a friend an office which the latter leased. The plaintiff paid the friend half the rent and they gave each other mutual assistance in their businesses. The Court of Appeal of British Columbia held by a majority that the plaintiff was the landlord's invitee in the lift, distinguishing *Fairman's* case (supra) on the grounds that the plaintiff in the instant case used the building for business purposes and helped to pay the rent, and that in letting the offices the landlord must have contemplated that such arrangements would be made. Other Canadian decisions seem to be flatly at variance with English decisions. For instance, *Wallich* v. *Great Western Construction Co.* (1914) 20 D.L.R. 553 treats a tenant's guest in the landlord's hallway not as a licensee but as entitled to the same protection as the tenant. That decision was before *Fairman's* case, but the same view was taken in *Lewis* v. *Toronto General Trusts Corporation* [1941] 2 W.W.R. 65 (E. & E. Digest Third Cumulative Supplement) where it was crisply said that the visitor is an invitee because he is exercising a right for which the tenant pays. And *Mazur* v. *Sontowski* [1952] 3 D.L.R. 333, a case of an accident on the common stairway of a residential building, contains a robust ruling that there was no reason, either in common sense or on the authorities, for not holding that the wife of the tenant was an invitee of the landlord. The editorial note to the report of this case comments that there is no compulsion to follow the House of Lords.

Extending the Illogical

It will be seen that the cases in England and Canada which might have directly raised the issue of the status of a tenant's servant, when using an entrance under the landlord's control, do not clearly decide the point. Indeed they are not referred to by the Court of Appeal and presumably were not cited in argument. At first sight therefore the way would seem unimpeded to deciding, as a matter of principle, common sense and justice, that the servant is an invitee. But Cleary J., who indicated that he would have so decided but for compulsory authority, regarded *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74 and *Jacobs* v. *London County Council* [1950] A.C. 361 as unsurmountable obstacles, although these House of Lords cases were not concerned with the point now at issue.

The ratio decidendi of *Fairman's* case had been the subject of judicial differences of opinion until the *Jacobs* case. In the *Jacobs* case it was decided that *Fairman's* case had decided inter alia that the tenant's lodger in the circumstances there obtaining was a licensee on the landlord's steps. In the *Jacobs* case it was further decided that the decision in *Fairman's* case, so interpreted, bound the House of Lords to hold that a prospective customer of a tenant's shop, when using a forecourt between the shop and the highway, which remained in the landlords' control, was only a licensee of the landlords. Lord Simonds, in whose speech the other members of the House concurred, said that if there was any distinction between the two cases it was to the disadvantage of Mrs Jacobs, inasmuch as the forecourt on which she walked and fell was apparently, though not dedicated as a highway, open to the public at large, whether or not they were intending to enter the shop or even to gaze into its windows. "I do not think that she had a higher right than any other member of the public, of whom it would be impossible to predicate that he had any common interest with the respondents in the forecourt." Lord Simonds explained that he used the expression common interest because Lord Sumner had stated that to be the leading distinction between invitees and licensees in *Mersey Docks and Harbour Board* v. *Procter* [1923] A.C. 253, 272. Lord Simonds thought that on a future occasion the House might have to examine the meaning of this expression, but that this was unnecessary in the *Jacobs* case because Lord Sumner when holding three months before the hearing of *Procter's* case that Mrs Fairman was a licensee, must have meant that she had no common interest with the landlords. "*A fortiori*, as I think," Lord Simonds said, "there is no common interest here."

On this approach, as is pointed out in *Salmond on Torts*, 12th ed. 493, it was unnecessary for the House of Lords in the *Jacobs* case to consider the principles on which a distinction may be drawn between an invitee and a licensee and the problem still awaited an authoritative review. Cleary J., however, holds that the decisions in the cases of *Jacobs* and *Fairman* must govern the

Hope Gibbons case, as, in his view, there is no material distinction between employees, customers and lodgers.

> The question then is whether I am free in the present case to make a distinction between the employee of a tenant on the one hand, and the customer or lodger of the tenant on the other hand. The only possible ground of distinction is if the landlord has a more direct interest in the employees of his tenant obtaining access to the demised premises than he has in the customer of the tenant doing so. I do not see how this can be said. In fact the tenant must ordinarily have both employees and customers, and without them the landlord's premises would remain unlet. Each class is equally important to the tenant but I do not see how either class can be of greater concern to the landlord than the other.

Another way of putting this reasoning would appear to be as follows: the House of Lords has decided, albeit illogically, that it is of no real interest to the landlord whether or not his tenant's customers or lodgers have access to the premises; once the law has taken an illogical course the illogicality must be extended to other cases to which it should logically apply; therefore the Court must hold that it is of no real interest to the landlord whether or not his tenant's servants have access to the premises.

Whether in such a case this is the only mode of reasoning consistent with our doctrine of precedent may be debatable. Where the Court giving the illogical decision has avowedly acted on precedent alone and has disclaimed any intention of enunciating principle, it may not be unreasonable to treat the decision as confined to its own particular facts and those of the precedent case. Rejecting that as a facile suggestion, what is the relevant principle established by the *Jacobs* case and *Fairman's* case which must be followed at all costs? Stated in its widest possible form, it is evidently that the prosperity or otherwise of the tenant's business does not concern the landlord or does not concern him enough to form the ground of an invitor-invitee relationship. Even if, emulating the Light Brigade, we in New Zealand accept this on the authority of the House of Lords, it is not a proposition which goes so far as to assert that the landlord is not interested in whether a business is started in the demised premises or not. Where premises in a building are let for business purposes, and the business contemplated necessarily involves the employment of servants, it is difficult to think of any reason why the landlord should not be regarded as inviting the tenant's servants to use the entrances to the building. All questions of economics aside, it is not physically practical to establish or carry on the business without employees. By a refined process of thought it seems to be possible to reach the conclusion that it does not matter to a landlord whether such tenants as a solicitor or a restaurant are able to attract any business. Even so, it does not seem extravagant or unorthodox to suggest that the landlord is at least interested in seeing, as far as he can, that a business tenant is physically able to provide on the premises an organization capable of dealing with business if any happens to come.

The Dissenting Judgment

In his dissenting judgment in *Hope Gibbons Ltd.* v. *Percival*, North J. says that he is not perfectly sure that the *Jacobs* case has gone the length of holding that all lodgers and all customer of tenants, whatever the circumstances, are to be treated as licensees; but that he does not need to pursue this matter further, for the plaintiff in this case was neither a lodger nor a customer. He points out that Willes J., in defining invitees in *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 278, spoke not of business with the occupier but of business which concerned the occupier. The dock cases, such as *Procter's* case (*supra*) in the House of Lords, show that persons having business on board ships in dock are, when using gangways and other means of access provided by the proprietors of the dock, invitees of the latter.

> By parity of reasoning it seems to me that it would be a surprising result if the landlord of a large commercial building were not likewise held to have a common interest in seeing that employees of the tenant reached with safety their place of business. . . . The dock company needs ships and the owner of such a building needs business tenants, and both ships and business tenants alike require staff. To my mind it is unthinkable that landlords in the position of the appellant are entitled, in law, to put a person like the respondent into a category which gives him no more protection than the right not to be subjected to a trap or concealed danger which the landlord knows of, and which is unknown to him, and that the law should in effect say that such a person as the respondent is not to be allowed to look a gift horse in the mouth.

Among other points made by North J. is one to which no answer is given in the majority judgments. The tenant in the *Hope Gibbons* case was a limited liability company. Were all the employees of the company, even the managing director, only licensees? North J. sees "a real and substantial difference between a customer wishing to enter a shop and the employees of a business tenant who are obliged—as the landlord well knows—to enter the premises by day in the course of their duties. Customers are an indeterminate class of people; that cannot be said of the employees of a tenant occupying business premises, for after all if the tenant be a company it is merely a legal abstraction, and it is the people who work for the company who require protection, and it is some one or more of them who made the arrangement to lease the premises".

When the tenant is a body corporate a problem arises in New Zealand even if the *Jacobs* and *Fairman* cases are extended to the servants of individual tenants. *Lyons* v. *Nicholls* decides here, as has been seen, that in such cases the tenant's rights as against the landlord are not contractual but those of an invitee. What is the meaning of this proposition when applied to an incorporated company? Is the invitation confined to the disembodied legal entity? In that event it is pointless since, whether we adopt the fiction or the realist theory of corporate personality, the corporation cannot break its leg. Is the invitation confined to the directors? In that event they may safely come and go to their occasional meetings while those who carry on the company's business are denied the same protection by the law. Or is the more obvious view also the right one, that the invitation certainly extends to everyone working for the company? It is curious that *Nicholls* v. *Lyons* is nowhere mentioned in the Court of Appeal judgments in *Hope Gibbons Ltd.* v. *Percival*. That litigation can hardly have been absent from the minds of the Court of Appeal, because four times its path led to that Court, and on two of these occasions the Court was constituted as at present: see [1955] N.Z.L.R. 1097; [1958] N.Z.L.R. 409, 460 and 755. If counsel did not see fit to cite the case, this would not have mattered, in view of the established practice of the New Zealand Court of Appeal to found reasoning on authorities and points not mentioned in argument.

The Plaintiff's State of Mind

On the footing that the plaintiff in *Hope Gibbons Ltd.* v. *Percival* was the landlord's invitee, it had still to be considered whether he had full appreciation of the danger. If he did, the occupier could invoke as a ground for escaping liability the decision of the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737. No issue had been put to the jury as to the plaintiff's knowledge. The parties had agreed that the trial Judge should decide any questions of fact not covered by the jury's answers, but Haslam J. was not asked to decide this question. North J., holding that the test to be applied is in some respects at all events a subjective test applicable to the particular man concerned, did not think that the Court of Appeal would be justified in saying that the plaintiff did have full knowledge and appreciation of the risk he ran at the time he was injured. North J.'s view as to the right test is strikingly confirmed by opinions delivered in the House of Lords in *Smith* v. *Austin Lifts Ltd.* [1959] 1 All E.R. 81, the report of which came to hand in time for references to it to be added to the Court of Appeal judgments. Lord Reid and Lord Denning specifically hold that the test established by *Horton's* case is a subjective one, and the other members of the House at least do not expressly dissent from this view. Apparently the more obtuse an invitee has been, the better his chances of recovering damages, subject, of course, to deduction for contributory negligence. However, there will doubtless be general applause for any attempt to narrow the scope of *Horton's* case, perhaps the most unpopular judgment ever delivered by the House of Lords.

On the view taken by Gresson P. and Cleary J. it was unnecessary to decide whether, if the plaintiff was an invitee, his knowledge would have been fatal to his action, but both learned Judges discuss the question. In the body of his judgment Gresson P. appears to indicate the opinion that the plaintiff would have failed even if an invitee, but, when referring to *Smith* v. *Austin Lifts Ltd.* at the end of his judgment, the President appears to distinguish that case mainly on the ground that it concerned an invitee. He also indicates that Lord Reid dissented on the relevant branch of the case; but, since Lord Reid concluded that the plaintiff did not fully appreciate the risk and accordingly held in his favour against the occupiers (though not against the employers), this part of the President's judgment may be per incuriam.

Cleary J. takes the view that, notwithstanding the absence of a finding by the jury or the trial Judge, and notwithstanding *Smith* v. *Austin Lifts Ltd.*, the Court of Appeal should find that the plaintiff had, no less on the day of the accident than previously, full knowledge of the insecurity of the mat and its liability to become displaced. As the exact cause of the accident is unknown, it being merely a surmise that the edge of the mat had been turned up by some agency in the half hour after the plaintiff straightened it, it seems rather odd to conclude that the plaintiff had full appreciation of the danger.

Public Nuisance

The only judgment in which the alternative claim based on nuisance is discussed at any length is that of the President. The claim is rejected on the ground that the accident did not arise out of any use of the highway. "... the plaintiff met with the accident not while walking along the footpath but while he was leaving the premises; he suffered his hurt upon premises in the occupation of the defendant with no more than a foot at most across the line of roadway."

It is respectfully suggested that this aspect of the case may warrant more attention. In a sense the plaintiff was injured by a defect in the defendant's premises, but the peccant part of the "premises" was the edge of a moveable mat on a moveable step which was resting on the highway and was found by the jury to render the highway dangerous. The situation is the converse of the *Jacobs* case (*supra*), for the plaintiff was intending to use the highway and had actually, although possibly unknown to himself, already crossed the boundary when he fell. If Mrs Jacobs could not base her claim on nuisance because she had deliberately but unknowingly stepped two feet from the highway on to the forecourt, should not this plaintiff be able to pray a similar refinement in aid?

Privy Council and House of Lords

Unless the Privy Council should reverse it—and presumably the cost involved may preclude an appeal—the decision of the majority of the Court of Appeal of course settles the law in New Zealand. The majority judgments, particularly that of the President, in effect ask the legislature to enact a statute similar to the Occupiers' Liability Act of the United Kingdom Parliament. Sooner or later the legislature will have to come to the rescue here in the field of occupiers' liability, as was done in England, to remedy the injustices created by the decisions of the Courts.

In this field the primary responsibility for the unsatisfactory state of the law rests with the House of Lords and its decisions in such cases as *Horton*, *Jacobs*, *Fairman* and *Addie* v. *Dumbreck* [1929] A.C. 358. The judgments in *Hope Gibbons Ltd.* v. *Percival* contain no discussion of the question of the authority of the House of Lords in New Zealand. There is, however, an interesting observation in the judgment of Cleary J. in connection with the decision of the Privy Council in *Letang* v. *Ottawa Electric Railway Co.* [1926] A.C. 725. Cleary J., after explaining that the Privy Council decision was addressed to a different issue from that raised in *Horton's* case, says:

> In these circumstances, I do not think that the decision in *Letang's* case in any way prevents *Horton's* case from being accepted in New Zealand as deciding that proof that the plaintiff had full knowledge of the danger frees the defendant from liability as an invitor and constitutes a bar to the recovery of the damages by the invitee.

This statement seems to recognize that, if there is an inconsistency between Privy Council and House of Lords decisions, the former may prevail in New Zealand, a view which perhaps coincides with the opinion of most members of the profession at the present time. On the other hand, although to a layman it might seem surprising that decisions of the House of Lords should still be treated as absolutely binding here, opinion in the profession is perhaps not yet ready for the Court of Appeal to take the logical step of declaring that, as the House of Lords is not part of the New Zealand judicial hierarchy, its decisions have no more than high persuasive authority in this country. All three members of the Court of Appeal apparently assume in *Hope Gibbons Ltd.* v. *Percival* that decisions

of the House of Lords automatically settle our law, at any rate if no Privy Council decision stands in the way. In fifty years' time, if all arguments have not then been ended by a bomb, this assumption will no doubt seem as obsolete as would an assumption at the present day that New Zealand is a colony. But at least it cannot be charged that the Court of Appeal has succumbed to the temptations of premature liberalism.

R. B. COOKE

DEED POSTPONING PRIORITY OF A DEBENTURE.

In Favour of Subsequent Land Transfer Mortgage.

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

EXPLANATORY NOTE

I think that it is the general practice of solicitors in New Zealand, when acting for clients proposing to lend moneys to a company registered under the Companies Act 1955, to search not only the Land Transfer Register (if the security is to be secured against land) but in all cases the Register of Charges in the office of the District Registrar of Companies where the company is registered.

That appears to be a safe practice and in accordance with ideas of commercial morality; but, whether it is necessary, if the only asset to be charged is land under the Land Transfer Act, is another matter.

However, when, in accordance with usual practice, the Register of Charges in the Companies Office is searched and the charge is also searched, it would not be safe for the new mortgagee to advance the money on the strength of the Land Transfer Register without first obtaining from the existing chargee a deed of priority in the nature of or to the effect of the following precedent, for, if the new mortgagee did go ahead, and register his mortgage without obtaining the first chargee's consent, he would run a grave risk of his mortgage being held by the Court fraudulent as against the first chargee.

It is quite a common practice in New Zealand for a debenture in the form recited in the following precedent or in the form in *Dempsey* v. *Traders' Finance Corporation Ltd.* [1933] N.Z.L.R. 1258; [1933] G.L.R. 850, to be registered in the Companies Office and to affect Land Transfer land, but for no collateral memorandum of mortgage to be registered under the Land Transfer. The effect is that the debenture, in so far as regards the land under the Land Transfer Act, is an *equitable* charge, which would support a caveat: *Wellington City Corporation* v. *Public Trustee* [1921] N.Z.L.R. 1086; [1922] G.L.R. 84. But it is the exception rather than the rule to enter a caveat in these circumstances. Why this should be the practice, I have never been able to understand, for the failure to lodge a caveat to protect an equitable estate, where a caveat is permissible, may result in that equitable estate being postponed to a subsequent equitable estate: *Abigail* v. *Lapin* [1934] A.C. 49. He who contracts on the strength of the Land Transfer Register Book is entitled, in the absence of actual fraud, to rely on the state of the Register. As a general rule, such a person is not affected by *constructive notice* of an opposing estate or interest: s. 182 of the Land Transfer Act 1952 which provides, *inter alia*, that knowledge of any trust or unregistered interest is in existence shall not of itself be imputed as fraud, and these words must not be whittled down: *Waimiha Sawmilling Co.* v. *Waione Timber Co.*(1925) N.Z.P.C.C. 267.

It was held in *In re Kaihu Valley Railway Co. and Owen* (1890) 8 N.Z.L.R. 522, that the District Land Registrar, before registering an instrument executed by a company, cannot inquire whether or not the company has by its memorandum of association power to execute the instrument proffered for registration. Even if the instrument is *ultra vires* the company, registration under the Land Transfer Act in the absence of fraud (i.e. in the absence of actual dishonesty of some sort) will confer on the mortgagee an indefeasible title: *Boyd* v. *Mayor, etc., of Wellington* [1924] N.Z.L.R. 1174. How does that fit in with the Companies Act itself? The answer will be found in *Dempsey* v. *Traders' Finance Corporation Ltd.*, (*supra.*)

Section 102 (12) of the Companies Act 1955 provides that except as provided in subsection two of section four of the Chattels Transfer Act 1924, registration of any instrument under Part IV of the Act (the part dealing with registration of charges) shall not in itself constitute notice to any person of the contents of that instrument. But it was held in *Dempsey's* case ([1933] N.Z.L.R 1258, 1292; [1933 G.L.R. 859) that registration under the Companies Act 1955 was notice of the existence of the instrument. Section 4 (2) of the Chattels Transfer Act 1924 does not affect land: it affects chattels only. In *Dempsey's* case the crucial provision in the registered debenture was:

> This Debenture is the First Debenture issued by the Company and is a first charge on the property hereby charged. Such charge is to be a floating security but so that the Company is not to be at liberty to create any mortgage or charge in priority to or ranking *pari passu* with this Debenture or to sell or otherwise dispose of any property except merchandise and that only in the ordinary course of business.

The debenture was therefore a floating charge with a restrictive qualification preventing the company from creating any mortgage or charge in priority to or ranking *pari passu* with the debenture. The Court held that the general effect of such a qualification is to postpone a subsequent specific charge to the rights of the debenture-holder *unless the subsequent charge is taken without notice of the qualification.* Registration under the Companies Act 1955 is not notice of such a qualification except with regard to property affected by s. 4 (2) of the Chattels Transfer Act 1924, which, as previously noted does not apply

to land. Therefore, registration under the Companies Act 1955, of a debenture of the type in *Dempsey's* case or of the type set out in the first recital of the following precedent, is not *per se* notice of that qualification to any person proposing to contract on the strength of the Land Transfer Act. Consequently, in this respect, the two statutes harmonize: the doctrine of constructive notice does not apply to either.

DEED POSTPONING PRIORITY OF A DEBENTURE IN FAVOUR OF SUBSEQUENT LAND TRANSFER MORTGAGE.

THIS DEED is made the.....day of.....1959 BETWEEN THE BANK OF.....(hereinafter called "the Bank") of the first part A. B. of Wellington Trader (hereinafter called "the mortgagee") of the second part AND C. D. LIMITED (hereinafter called "the Company") of the third part WHEREAS by a certain Mortgage Debenture bearing date 1st day of April 1959 made between the Company and the Bank the Company did for the consideration therein referred with the payment of the moneys therein referred to its undertaking and all its assets whatsoever and wheresoever situate both present and future including its uncalled capital (such sharge being a specific charge as regards the Company's land plant patents trade names goodwill unpaid capital and uncalled capital and being a floating charge as regards the Company's other assets) AND WHEREAS the Company desires to borrow further moneys from the mortgagee on the security of a first mortgage over the land in Certificate of Title Volume..... folio.....(Wellington Registry) and has requested the Company to obtain a deed of priority from the Bank as hereinafter set out NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

1. The Bank notwithstanding Clause 4 of its said Debenture hereby consents to the Company in favour of the mortgagee creating, giving and registering a first mortgage over the land in said Certificate of Title to secure the principal sum of..... pounds at the rate of.....per centum per annum (reducible to.....per centum per annum) the terms of such mortgage to be.....years from the date thereof.

2. The Bank hereby covenants with the mortgagee that all moneys which now or hereafter be or become due or owing to the mortgagee under or secured by the said mortgage to the mortgagee shall HAVE AND TAKE priority over any claim for principal interest or other moneys whatever which the Bank may or at any time hereafter have under the said Debenture to the Bank or under any other security whatsoever collateral with such Debenture in the same manner as if such mortgage had been made, created or given by the Company or such moneys had become due or owing by the Company to the mortgagee before the Company had executed the said debenture to the Bank or any said collateral security AND FURTHER that the mortgagee's Mortgage shall to the extent of the moneys from time to time secured rank in all respects in priority to the moneys secured under the said debenture to the Bank PROVIDED HOWEVER that the precedence and priority to which the mortgagee shall be entitled under this present Deed shall not apply to moneys borrowed or owing by the Company from the mortgagee in excess of the said sum of.....pounds and interest and incidental moneys as secured thereby.

IN WITNESS WHEREOF these presents have been executed the day and year first above-written.

THE COMMON SEAL of THE BANK OF.....was hereunto affixed pursuant to an Order of the Board of Directors in the presence of:

.....Director

.....General Manager

SIGNED by the said A. B. in the presence of: A. B.

WITNESS .....

OCCUPATION .....

ADDRESS .....

THE COMMON SEAL of C. D. LIMITED was hereunto affixed in the presence of:

.....Director

.....Director

THE DOMINION LEGAL CONFERENCE, 1960.

The Conference Committee has made good progress in making the preliminary arrangements for the Conference which will be held from Tuesday, April 19, until Friday, April 22, 1960. The committee has secured a large number of hotel bookings, and people proposing to attend the Conference will in due course be advised of the procedure for booking hotel accommodation.

The committee has decided on a number of the venues and the Conference will differ from those previously held in Wellington in that a number of functions will take place in the Hutt Valley.

The cocktail party on the Tuesday evening, the official opening and the business sessions will all be held in the Wellington Town Hall block. The ball, however, will be held in the new Horticultural Hall at Lower Hutt, and the dinner in the comparatively new Town Hall at Lower Hutt. Readers may be interested to know that in the opinion of experienced caterers the facilities at Lower Hutt are unsurpassed in New Zealand for functions of this nature.

Another event that will take place in the Hutt Valley is the golf which will be played at Heretaunga, and the other sporting events will probably also be held in the Hutt Valley. Visitors to Wellington will no doubt be interested to see the tremendous civic development that has taken place in Lower Hutt in recent years.

The committee is under the chairmanship of the Solicitor-General, Mr H. R. C. Wild Q.C., who was one of the joint secretaries at the 1947 Conference in Wellington. The other joint secretary of that Conference. Mr J. C. White, is also on the 1960 Committee and is the convener of the Papers and Remits Sub-Committee. Mrs Wild has convened a Ladies' Committee which is at present engaged in planning activities for the wives of the visiting practitioners.

All in all there is every prospect of another successful Conference. The committee hopes that it will be made successful by the attendance of a large number of visitors.

Circulars containing detailed information will be forwarded to practitioners later in the year. Finally, readers will no doubt be interested to know that adequate refreshments have already been secured.

"A BABBLE OF GREEN FIELDS."

ADVOCATUS RURALIS.

It is fifty years this month since Advocatus first entered a law office, and we hope that the Editor will permit us for a while to shoulder our crutch and tell how fields were won.

Looking backwards we realize that fifty-one years ago we had reached the zenith of our career. We had been a prefect, a member of XV, and a member of the XI, and the fall from those heights to a "Hey, You" in a law office was definitely *descensus Averno*. Although for the first seven months we were unpaid, we were not the most junior as there was a menial below us, who, for a weekly emolument of 12s. 6d. pressed and indexed the letters and bills, posted letters, watched the counter, answered the 'phone and ran all messages. This menial was standard throughout New Zealand; but, even in those days, Bells (being Bells) had two of them one at 17s. 6d. and one at 15s. The question of seniority between these boys was a matter of importance. The story was told that one day Mr E. D. sighted a lad in the corridor and called "Boy." The lad marched on—the call was repeated without response. Mr E. D. driven to the vernacular called, "Hey you." This stopped the lad in full flight. He reported immediately and said "I'm sorry, Sir, did you think I was the Boy?" Mr E. D. thoroughly enjoyed the reproof.

In our office, there were three bosses and nine others. The accountant, of course, did practically nothing; and he was assisted in this by a male typist who was continually employed shorthanding diaries and carrying them forward into a sort of ledger, after which nothing ever happened to them. There were two full-time typists—the bosses, then, as now, had mostly outside interests, so the clerks had a very busy time paying the rent. We were, however, given a certain amount of training, and we were not expected in our second year to do work which should be given to a fifth-year man.

Those were the days when conveyances were engrossed on parchment—one man at 6d. per folio of 72 words doing most of the legal engrossing for the city—and the client had to pay 3s. 6d. a sheet for the parchment. We remember that when our Magistrates' Court clerk got his LL.B. his salary was raised to £2 10s. per week. Degree lectures were from five to eight in the evening; and it was possible to buy from the first Mrs Brooks a cup of tea and sandwich for 4d. Should we therefore wish to cut a dash by taking the current *her* to tea at Kirk's (6d. a head), this could be accomplished by missing three teas. This statement will, we feel sure, be confirmed by at least one dashing ex-cavalry officer who has occupied the same legal chambers on the corner of Featherston and Panama Streets for the last fifty years.

New Zealand was then a small place, and, if one attended University tournaments one established friendships which carried on down the corridors of time. In those days Auckland was not on the athletic map; but Christchurch with Ron Opie, Charlie Thomas, and Les Dougall, and Victoria, with Goodbehere, Ashley Duncan, Frank Reid (S.M.), and others, rather took the headlines.

We remember, however, that, in 1911, Otago with a team of seven, "done us wrong" by winning the Athletic Shield at Auckland when Geoff Millard from Otago (nowadays N.Z.R.U.) put up the still unbeaten record for the long jump, and then won the 440 hurdles.

In that period also, a well-known Auckland Q.C., then a student at Victoria, built a dragon and staged Victoria's first Capping Procession. A certain amount of research might find a photograph of this procession showing the present Chancellor of the University, dressed either as the Rev. J. J. North or Arthur Law, while Professor Burbidge was a very fetching nurse.

The students were a smaller body then; but, when we hear criticism of the present youthful and unregenerate generation, we remember that when the first territorial system came in (1911) the Socialist Party was against it. This caused a certain amount of extra-mural activity among the students, which culminated one Sunday night in a visit to a Socialist meeting. One of the consequences was that for an hour or so it was not possible to get trams along Manners Street or Cuba Street. Among those present in the front row were people who later included a District Land Registrar, a Judge Advocate-General or some such military rank, a Magistrate, and various leaders of the legal profession, *et al.* Perhaps it is well to remember these things when we criticize our rock-and-rollers.

It was our generation that set the fashion of spending a year or two at the current war, followed by a longer or shorter period in a war hospital. Though we lost something we gained much from these experiences which taught us that the world was not really so large, and that we had certain duties in it. We remember a particularly quiet and retiring student who attended tournaments in most centres. He has told us that as a result of these attendances, whatever town he visited in New Zealand, somebody came up and said, "Good day, Jerry." He admitted, however, that he was surprised when he went to Paris on leave. Less than two minutes after leaving the train, a young lady whom he could not recall having met previously came up and said, "*Bon jour, cheri,*" which, of course, was French for "Good day, Jerry." They became friends at once.

To prove that we were a hardy generation, Advocatus remembers that a comparatively young man, whom we regarded as a good friend, and with whom we had played football, was elevated to the Supreme Court Bench. We met him by accident some six months later, and, *coram populo*, said, "By Jove, Bob, we were just talking about you." We have survived this now for thirty years, but at the moment it did remind us of Passchendaele, where, though badly damaged, we were the only officer of the company to come out alive.

In that post-war period, when we were all younger and poorer, if there was, say, a University Ball, it was usual for the authorities to hire a midnight tram. We remember standing next to one young student who was taking home, possibly for the first time, a very nice girl friend complete with chaperon, when he realized that the conductor was approaching him, and was asking one shilling a head, instead of the usual threepence. He had about ten seconds to make up his mind

whether to throw the chaperon off the tram, or to jump off himself. His look of horror touched our heart, so we pressed the necessary into his hand and whispered our address. To show that bread cast on the water is not necessarily a dead loss, the student worked in the Stamp Office, and, while we hesitate to suggest that the Stamp Office lost anything through our action, we felt that we were, in due course, fully repaid. Moreover, we find ourselves still welcome in at least one office in the Lower Hutt.

Between the wars we had a full appreciation of our worth, and we were perhaps prone to patronize or criticize those who had not had the advantages and experiences that we felt that we had enjoyed; but, in 1940, Advocatus's generation stood to attention while we watched with pride, and perhaps some little humility, those youths, whom we had criticized, as they marched down Lambton Quay on their way to become the best soldiers in the world.

MEDICAL EVIDENCE IN TRAFFIC CASES.

Production of Medical Certificates.

In *Shaw* v. *Police*, heard at Timaru, a recent appeal against a conviction for driving a motor-vehicle while under the influence of drink to such an extent as to be incapable of having proper control of such vehicle, Mr Justice Henry had this to say about the practice of producing medical certificates in support of the prosecution's case:

> Strictly speaking, such a certificate should not be produced in evidence, even when the medical practitioner who gave it is called. Since appeals are now heard upon the notes of evidence, the testimony should be led and not proved by means of a produced document. Notes taken at the time of examination, or certificates later given may, in proper circumstances, be referred to for the purpose of refreshing the memory of the witness. Counsel cross-examining may also call for their production, and they may subsequently be put in as part of the case either for the prosecution or defence as may be proper according to the law of evidence. It is, I think, important that documents of this nature should be admitted strictly in accordance with the rules of evidence, and that a proper record of the purpose of their production should be made so that this Court on hearing an appeal can rightly assess the weight and effect of the document produced, as well as the reason for its admission. The importance of insisting upon the observance of a proper basis for the admission of documents is exemplified in this case.

At the hearing before the learned Magistrate, three documents were tendered by Dr Brookfield, one on the familiar printed form supplied by the Police Department, one recording the tests made, and one containing a summary of the findings of the doctor. The first document merely recorded an opinion and was otherwise blank except for the name and address of the appellant and the time of examination. The only reference in the notes of the evidence given by the doctor was that the witness produced it. It was not clear how the second document came into the case, but the third appeared to be in pursuance of a note in the evidence-in-chief where the witness purported to produce his "opinion as the result of examination". Just previously, the notes of evidence recorded the matters set out in this document. The notes of evidence read as follows:

> Summary—showed signs confirmatory to having taken alcohol recently. Defendant's evidence of impaired muscle control. Evidence of impairment of mental activity. No evidence of other disease or drugs to cause above signs.

Nowhere in the notes of evidence did Dr Brookfield give his sworn opinion on the fitness of the appellant as a driver of a motor-vehicle, although his opinion as stated on the printed form and on the second-mentioned document quite clearly said that the appellant was unfit to drive.

When counsel for the appellant was called upon to open his case, there was the following note as to the submissions made and the result—namely:

> Mr Stevens raises objection to doctor's notes made at time of examination being admitted.
>
> He admits doctor referred to them to refresh his memory and that Mr Stevens cross-examined on them—also that he addressed Court on question of handwriting and that notes on file are doctor's notes.
>
> Rules: Admissible because
>
> 1. Doctor referred to them.
> 2. Was cross-examined on them.
> 3. Court addressed on them.

His Honour went on to say:

> Counsel for the respondent in this Court pressed, without objection, many matters appearing on the document secondly mentioned, although there were no passages in the notes of evidence to show that those matters were deposed to by the witness.
>
> This Court is not criticizing the learned Magistrate who took a careful note and who, no doubt, had a clear view and made proper use of only admissible evidence. The point is mentioned merely to ensure that the record clearly shows the true position when the matter comes before this Court. Lord Goddard L.C.J. in *Hill* v. *Baxter* [1958] 1 All E.R. 193, 194, said:
>
> > "There is no evidence for the defence other than that of the respondent himself, but it seems that as the prosecution did not object the Justices allowed two letters from a doctor who had examined the respondent to be put in. This was quite irregular; agreed medical reports so often used in civil actions have no place in criminal Courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence, as, for instance, under s. 41 of the Criminal Justice Act 1948. The Justices have referred to these letters in the case so we have looked at them."
>
> In all the circumstances, this Court does not feel that it can safely adjudicate upon the appeal except upon the recorded notes of evidence which, I think, clearly show that Dr Brookfield swore to the opinion which is expressed as follows:
>
> > "I am of the opinion (1) that this man has recently consumed alcohol; (2) that in his present state he is not fit to be in charge of a motor-vehicle; (3) that his present state is due to alcoholic intoxication and not to any other pathological condition."

His Honour's observations are of importance in all prosecutions where motor-drivers are charged with offences under the Transport Act 1949 in which the influence of drink or drugs is an ingredient.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"**Fair Wear and Tear.**"—Following the decision of the Court of Appeal in *Taylor* v. *Webb* [1937] 2 K.B. 283; [1937] 1 All E.R. 590, the view was widely accepted that a covenant requiring a tenant to repair was of little value if the lease also contained the "reasonable wear and tear" exception. Later, the position became somewhat confused by the decision of the same Court in *Brown* v. *Davies* [1957] 3 All E.R. 401, in which it did not follow the earlier case and rejected the concept that the inclusion of the exception relieved the tenant from an obligation to repair. While stating that it was unnecessary for him to attempt any exposition as to the scope of the exception, Lord Evershed M.R. said:

> I am satisfied, to put it no higher than that, if proof is given that the tenant is not keeping the premises in fair and tenantable manner . . . then at the very least the tenant must establish that the matters complained ought to be attributed to dilapidation or damage, resulting from reasonable wear and tear and nothing else.

The issue may now be regarded as settled by the House of Lords in *Regis Property Co. Ltd.* v. *Dudley* [1958] 3 All E.R. 491, in which the tenant of a flat had covenanted to keep the interior "in good and substantial repair and in clean sanitary condition (fair wear and tear and damage by accidental fire excepted)". Lord Simonds considered that the exception of want of repair due to wear and tear must be limited as to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear producing others which wear and tear would not directly produce. In the result, speaking in terms of text-books, the House of Lords has given its approval to the view expressed in *Woodfall on Landlord and Tenant* that *Taylor* v. *Webb* should be regarded as a decision on its own particular facts. The authors of *Foa's General Law of Landlord and Tenant*, 8th ed. 212, and *Hill and Redman's Law of Landlord and Tenant*, 12th ed 207, appear to have ridden the wrong horse and will have to rewrite their opinions for their next editions.

Bookmaker's Sentence.—A Press Association message from New Plymouth last month was in the following terms:

> "Donald Godfrey King, 59, a billiard-saloon manager who was sentenced to four months' jail when he appeared in the Magistrates' Court earlier this month on a charge of bookmaking, had the sentence varied to one of three months on appeal to the Supreme Court at New Plymouth today. Reaching this decision, Mr Justice Turner held that the Magistrate had misdirected himself in law in imposing the original sentence."

Like many compressed reports, this one is not notable for its clarity, but it may well be assumed that the prisoner prefers a result that gives him one in four off rather than four to one on.

Authorized and Unauthorized Acts.—One of the recurring problems for the common-law lawyer is whether an act which is unauthorized is so connected with acts that have been authorized that it may be regarded as one mode (albeit an improper one) of doing the authorized act, or whether the unauthorized act is a distinct and independent act for which the employer is not responsible. The line between the two is often very thin. In *Century Insurance Co.* v. *Northern Ireland Transport Board* [1942] A.C. 509, the employer was held liable for the prohibited act of smoking on the part of its employee delivering petrol to the bowser. In the most recent case of illegal smoking, the employers escaped liability. A number of miners were injured by an explosion of fire-damp in a coal-mine, the explosion having been caused by the lighting of a cigarette in the "waste" to which one of the miners had gone on the temporary stoppage of the conveyor belt. It was unsuccessfully argued that the ignition of the fire-damp had occurred during a legitimate break, and that during such breaks the course of employment was not interrupted. Lord Clyde held that there was no evidence to suggest that in going into the waste the man was doing anything in any way connected with the work he was employed to do. Further, it was established that he had gone in there from his working place for his own pleasure in order to smoke the cigarette. "His conduct in such circumstances", says Lord Clyde, "I cannot regard as an unauthorized mode of doing the work he was employed to do: it seems to me to be clearly something that took him outside the scope of his employment, and the defenders are not responsible for the consequences of his act".—*Kirkby* v. *National Coal Board* 1959 S.L.T. 7.

Libel and Roses.—Horticulturally-inclined members who belong to Rose Societies should be grateful to "Richard Roe" of the *Solicitors' Journal* (6:3:59) for drawing attention to *Marlborough* v. *Gorringe's Travel and News Service Ltd.*, a case of libel heard in 1937. The plaintiff was a duchess highly indignant at a cartoon that appeared in a transatlantic magazine whose proprietors lived in America. To avoid procedural difficulties she sued the distributor. The picture was of a gardener gazing at two intertwined rose bushes. The caption read: "I guess that we shouldn't have planted the Duchess of Marlborough and the Rev. H. Robertson Page in the same bed".

A Counsel of Perfection.—"It is recorded of an eminent counsellor, of the North family, who, being one of the ablest practitioners at the Bar, was overloaded with business, that sometimes choosing to retire a while from hurry and perplexity, he would say to his clerk: 'Tell the people I do not practise this term'".—*The Connoisseur* (August 12, 1956), quoted by J. R. Yorke-Radleigh in "A New Plan for Studying the Law".

Tailpiece.—It seems that yarn-spinners can now be brought under the Restrictive Practices Act: *Re The Yarn Spinners Agreement* [1959] 1 All E.R. 299. This will be regarded as a welcome sign by those practitioners who seek to concentrate in Supreme Court Libraries during the late afternoons upon the work in hand.

TOWN AND COUNTRY PLANNING APPEALS.

McKendrick Bros. Ltd. *v.* Gisborne City Corporation.

Town and Country Planning Appeal Board. Gisborne. 1958. November 27.

Permit for Installation of New Plant—Wool-processing Company desiring to instal Dag-crushing Plant—Such Operation an "Offensive trade"—Area zoned "Residential"—Business "non-conforming" but entitled to be carried on—Installation of Plant not involving Any Increase in Detraction from Existing Amenities of Neighbourhood—New Use of Building of "the same character as that which immediately preceded it"—Town Town and Country Planning Act 1953, ss. 2 (4), 38 (1) (d), 38A.

Appeal by a company carrying on the business of classing, resorting, blending and packing wool, the trimming, sorting and treating of dry sheepskins for resale and the drying and packing of dags for resale. This business was carried on in premises situate at No. 4 Mill Road in the city of Gisborne. Some part of its activities came within the definition of "offensive trades" under the Health Act 1920 and the company was registered under that Act.

In connection with its operations the appellant company wished to install a dag-crushing plant to be used in processing dag wool by separating the actual wool from the dags by mechanical means.

It applied to the Council for a permit to install the requisite plant but a permit was refused and this appeal followed.

The respondent Council in refusing a permit purported to act under ss. 38 (1) (d) and 38A of the Act.

The company had carried on industrial business on these premises since 1953. The premises were in an area zoned as "residential" under the Council's undisclosed district scheme and accordingly the appellants business was a "non-conforming" one but by reason of having an existing use the appellant was entitled to carry on.

The judgment of the Board was delivered by

REID S.M. (Chairman). The question at issue here calls for a consideration of s. 38A of the Town and Country Planning Act 1953 (added by s. 26 of the Town and Country Planning Amendment Act 1957).

It was contended by the Council that the processing of dags by mechanical means constitutes a use "that is not of the same character as that which immediately preceded it" and that such a use detracts or is likely to detract from the amenities of the neighbourhood.

1. The area under consideration is predominantly residential in character and the appellant's business is the only industrial one existing in the area.

   From the town-planning angle any industrial use, particularly one coming into the category of "offensive trades", in a residential area must be deemed to detract from the amenities of the neighbourhood, but in this case the amenities of the neighbourhood must be looked at as they exist now not as the residents of the neighbourhood would like them to be.

   The test to be applied is: will the installation of this plant create a further or additional detraction from the amenities as they now are; or, in other words, will it worsen an already existing and lawful state of affairs?

2. The installation of the plant will not involve any additional building or structural alteration to the existing building and the Board considers that the extraction of wool from dags by mechanical means is a use of the building of "the same character as that which immediately preceded it". It is something ancillary or allied in nature to the company's existing business not something different.

3. Section 2 (4) of the Act provides that the term "Character" in relation to the use of any land or buildings shall be construed with regard to the effect of that use upon the amenities of the neighbourhood. In this case the amenities must be considered as they now are.

Several of the witnesses called by the respondent admitted in cross-examination that they did not anticipate any increase in detraction from amenities if this plant were installed. The Board shares that view. The existing business does detract from the amenities of the neighbourhood but the operation of the plant under consideration will not constitute an additional detraction.

Appeal allowed.

Friedlander *v.* Howick Borough.

Town and Country Planning Appeal Board. Auckland. 1958. November 27.

District Scheme—Objection to Siting of Proposed Service Lane—Proposal to provide Twenty-foot Wide Service Lane as Part of Plan for Development of Commercial Centre—Principles as to Siting of Service Lanes—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953.

The appellant was the owner of a property being Lot 1 on Deposited Plan 35134 part of Allotment 1 Village of Howick fronting on to Picton Street.

The respondent Council's proposed district scheme, as publicly notified, made provision for the development, as a commercial centre, of a block of land situate in the centre of the Borough bounded by Picton Street, Wellington Street, Moore Street and a proposed new street running from Wellington Street to Moore Street parallel to Picton Street. This proposed new street would facilitate the opening up of the back land of properties at present having frontages only to Picton Street.

The plan provided for a service lane having entrances from the proposed new street and then returning parallel to Picton Street so giving service land access to the rear of properties fronting on to Picton Street and the proposed new street.

The provision of this service land would involve taking land from the owners of the properties to be served, including the appellant, but it would enable those owners, by acquiring land from the Borough, to extend their existing back boundaries so as to have frontages on to the proposed new street.

The appellant lodged an objection to the siting of the proposed service land on the grounds that as proposed the lane would reduce the frontage that could be expected to become available to him when the proposed new street came into existence, because the entrance to the lane at the western or Wellington Street end would return along the western boundary of his property.

This objection was disallowed, and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). At the hearing of the objection, and as part of his case on appeal as filed, the appellant put forward three alternative proposals for the re-siting of the service lane, but at this hearing he abandoned those proposals and put forward another alternative proposal which envisaged siting the service land with an inclined entrance from Wellington Street to the western boundary of the appellant's land, thence in a straight line parallel to Picton Street, returning at right angles at the eastern end to the proposed new street.

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

1. That the proposal to provide a twenty-foot wide service lane as part of a plan for the full development of the commercial centre is sound and in accordance with town-and-country-planning principles.

2. That, in general, service lanes should be sited so as to run in a straight line, but this is not always practical. In this particular case, the appellant's proposal would provide a service lane running almost in a direct line from an entrance in Wellington Street, but if it were so sited the result would be to sever the land owned by the Borough on the corner of Wellington and Picton Streets, which is the site of the existing fire station and might prevent the erection thereon of an adequate fire station in the future.

3. That, wherever possible, it is preferable for service lanes to have exits and entrances on to subsidiary roads not on to principal streets carrying substantial volumes of traffic. In this case, the appellant's proposal would result in a service lane having an entrance direct on to a principal street, viz., Wellington Street, whereas the respondent's plan provides for entrances on a subsidiary road.

The Board has given careful consideration to the question at issue here. While it does not consider the respondent's proposal to be ideal, it does consider it to be on the whole preferable to that of the appellant.

Appeal dismissed.