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NEGLIGENCE: SAFE SYSTEM OF WORK: "THE DUNEDIN FORMULA."

THE House of Lords, in a recent case involving the consideration whether or not an employer had adopted a safe system of work (*Cavanagh* v. *Ulster Weaving Co. Ltd.* [1959] 2 All E.R. 745), have brought this class of case back into the sphere of ordinary negligence; and they have stated that the test in such a case is the test of the conduct and judgment of an ordinary and reasonable man. The fundamental principle that an employer is bound to take reasonable care for the safety of his workmen prevails in every case of the kind, and, in the words of Lord Keith of Avonholm, "all other rules or formulas must be taken subject to this principle".

Their Lordships had, in the course of their speeches, to consider "the Dunedin formula" (as it was called) in *Morton* v. *William Dixon Ltd.* 1909 S.C. (Ct. Sess.) 807, 809, and as it had been discussed in *Paris* v. *Stepney Borough Council* [1951] A.C. 367; [1951] 1 All E.R. 42, in *Gallagher* v. *Balfour Beattie & Co. Ltd.* 1951 S.C. (Ct. Sess.) 712, and in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* [1956] A.C. 552; [1956] 1 All E.R. 385. This dictum of Lord Dunedin was used with reference to an alleged act of omission in providing a safe system of work. It is in the following words:

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.

Before considering the views of their Lordships in the *Ulster Weaving* case, we refer to discussions of "the Dunedin formula" in recent judgments of our Court of Appeal, in which, it will appear, our Judges have to some extent anticipated the comments of their Lordships, and reached the same view of its inadequacy in safe-system-of-work cases—namely, that Lord Dunedin's dictum was intended to apply only where the system or practice was clearly proved and where the circumstances covered by the practice were precisely similar to those in which the accident in the *Morton* case happened.

Fair A.C.J. (as he then was), in the course of his dissenting judgment in *Donohue* v. *Union Steam Ship Co. of New Zealand* [1951] N.Z.L.R. 862 considered the then very recent decision of the majority of the House of Lords in *Paris* v. *Stepney Borough Council* [1951] A.C. 367; [1951] 1 All E.R. 42, said:

> The decision of the majority of the House of Lords in *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42 provides a recent and authoritative illustration of the power of a Court, in deciding a question of fact, to draw an inference from the circumstances, contrary to the trade practice, as to what an ordinarily prudent man would do in such circumstances. In that case, there was an "overwhelming" body of evidence that for more than thirty years none of the employers in a wide range of industry had provided goggles for workmen doing the type of work the plaintiff was doing when he met with his accident. This was relied on as showing that there was involved in such work no appreciable risk of injury to the eyes which required to be guarded against in this way. Despite this universal practice, the learned trial Judge decided that it was negligence of the plaintiff's employer not to provide a worker who had lost the sight of one eye with goggles for this class of work. In the House of Lords, the majority held he was entitled so to find. Although there was a preliminary question of law to be decided, and upon this the House was not in disagreement, it divided on the question whether, upon the evidence, such an inference of duty and negligence could reasonably be drawn in that specific case. It is to be noted, too, that Lord Simonds (dissenting) said:
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> > The question, therefore, is not of a contrast between damage in the case of one man trivial and in the case of another very grave, but rather of an accident so serious in its consequence to any man whether one-eyed or two-eyed, that, if the risk of it was appreciable, it would be the clear duty of the employer to provide and enforce the use of proper precautions against it (*ibid.*, 46).
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> Lord MacDermott, who was one of the majority that gave the decision, inclined to the view that the omission to provide goggles for such work for men with the sight of both eyes might have been negligence. The other members of the majority did not express a definite view upon this point.
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> In arriving at his decision, Lord Normand (*ibid.*, 50) applied the test of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.* 1909 S.C. (Ct. of Sess.) 807, 809 "whether the precaution is . . . so obvious that it was folly to omit it" [1951] 1 All E.R. 42, 50. He held, despite the practice over the years in the trade and the failure of the workers to complain, that the learned trial Judge was entitled to find it was negligence not to provide goggles for a man with only one eye. Lord Oaksey and Lord MacDermott, who agreed with his conclusions, did not adopt the language of Lord Dunedin as the test for negligence. It may well be that Lord Normand did so in order to make it clear that, upon the test which was adopted by Lord Morton of Henryton (one of the dissenting Judges), he thought the finding should be supported.
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> With the greatest respect for any statement on the high authority of Lord Dunedin, it seems unfortunate that his language in *Morton's* case, 1909 S.C. (Ct. of Sess.) 807, 809, should have been adopted by Lord Normand in *Paris's* case [1951] 1 All E.R. 42, 49, 50, as expressing the standard by which the duty of an employer should be judged. I am not aware of any text-book in which this statement is

referred to as a usual test, and the case itself does not seem to be referred to in any discussions as to the law of negligence before these judgments. The usual definition is that adopted by Lord Oaksey, where he says: " The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances " (*ibid.*, 50).

An ordinarily prudent employer does not provide only against obvious dangers. If he is an employer, particularly if he is the employer of a large business with intricate technical processes, or extensive and varied operations, it is his duty to take thought for the safety of his workmen, and take such precautions as reasonable consideration of the probable dangers would suggest. It is not only the obvious he has to guard against. Nor has it been generally stated that he is to be judged by the standard of what it would be foolish not to do. In my view, the word " foolish " understates his duty. The standard stated by Lord Oaksey (*ibid.*, 50) and that of " reasonable care " cited by Lord MacDermott (*ibid.*, 54) in the extracts from Lord Herschell's judgment in *Smith* v. *Charles Baker and Sons* [1891] A.C. 325, 362 and Lord Wright's judgment in *Wilsons and Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57, 84; [1937] 3 All E.R. 628 644 have been adopted in innumerable cases, and, with respect, any variation from such generally accepted definitions is to be deprecated (*ibid.*,. 878).

In the course of his judgment, Gresson J. (as he then was), with the concurrence of Turner J., at pp. 883 and 884, founded his judgment on the standard of care which an ordinarily prudent employer would take, following *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42.

Again, in *C. E. Daniell Ltd.* v. *Velekou* [1955] N.Z.L.R. 645, " the Dunedin formula " again was considered by our Court of Appeal. This was another safe-system-of-work case, in which the jury had affirmatively answered the issue: " Was it negligent of the defendant company to fail to provide a safe footing on the surface of the bench ? "

In his judgment, Finlay J., at p. 655, l. 39, said:

This definition of the degree of evidentiary proof necessary to establish liability was approved, in effect, by Lord Simonds in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 377; [1951] 1 All E.R. 42, 46, and expressly by Lord Normand in the same case (*ibid.*, 382; 49). Lord Normand adverted again to the same topic in *Barkway* v. *South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392.

That no qualification of what was said in these cases has been suggested, is shown by the opinions expressed in the House of Lords in *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180; [1952] 2 All E.R. 1110. The alleged fault of omission related here—as it did in *Morton* v. *Wm. Dixon Ltd.* 1909 S.C. (Ct. Sess.) 807—to an alleged failure to provide properly equipped plant. It is, however, not without interest to note that the same position pertains in respect of a system of work. In this respect, Lord Reid in *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180; [1952] 2 All E.R. 1110, said: " A plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade undertakes a heavy onus: if he is right it means that all, or practically all, the numerous employers in the trade have been habitually neglecting their duty to their men " (*ibid.*, 192; 1116). A similar view is implicit in the speech of Lord Tucker in the same case (*ibid.*, 195-198; 1117-1119).

After citing other authority, the learned Judge, at p. 657, l. 18, said:

In such a state of affairs, it cannot be said that the plaintiff discharged the burden of proving negligence unless the jury could properly hold that the provision of a safe footing on the bench was so obviously necessary that it was negligent of the appellant company to fail to provide it: see the speech of Lord Normand in *Barkway* v. *South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392, 402; also the judgments of Gresson and Stanton JJ. in *Donohue* v. *Union Steam Ship Co. of N.Z. Ltd.* [1951] N.Z.L.R. 862; [1951] G.L.R. 435. There again, some slight difference in standard may be involved between Lord Dunedin and Gresson and Stanton JJ., but any such difference is here immaterial: see, also, *Drummond* v. *British Building Cleaners Ltd.* [1954] 1 W.L.R. 501.

In his judgment in *C. E. Daniell Ltd.* v. *Velekou* [1955] N.Z.L.R. 645, Cooke J., with whose judgment Turner J. concurred, said at p. 662, l. 50:

It was said for the defendant that the only evidence as to the accident itself is that of the plaintiff who said that his foot slipped and that " if your foot is on steel part you slip any time " and that he knew it was slippery; and it was contended that this evidence was insufficient because, so it was said, the plaintiff had to show that the provision of this platform or bench with a slippery surface was negligence on the part of the defendant. I think the principle to be applied is that adopted by Gresson J. and concurred in by Stanton J. in this Court in *Donohue* v. *Union Steam Ship Co. of N.Z. Ltd.* [1951] N.Z.L.R. 862, 883; [1951] G.L.R. 435, 444—namely, that where the negligence of the employer consists in a fault of omission it is necessary that proof of that fault should either show that the thing he did not do was a thing commonly done by other persons in like circumstances, or was a thing that a reasonable and prudent employer would think it unwise to omit. That statement was based on the passage from Lord Dunedin's judgment in the Court of Session in *Morton* v. *Wm. Dixon Ltd.* 1909 S.C. (Ct. Sess.) 807, 809 that was cited with approval by Lord Normand in *Barkway* v. *South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392, 402 and in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 All E.R. 42, 49: but it is to be observed that, whereas Lord Dunedin spoke of things that it would be " folly in anyone to neglect to provide ", Gresson J. and Stanton J. apparently preferred to speak of things that " a reasonable and prudent employer" would think " it unwise to omit ". I respectfully prefer the latter way of putting the matter, although I very much doubt whether Lord Dunedin meant anything different from that. Indeed, in *Paris* v. *Stepney Borough Council*, Lord Normand himself was careful to point out that what Lord Dunedin said does not detract from the test of the conduct and judgment of the reasonable and prudent man. Lord Dunedin's words, and Lord Normand's comments thereon, have recently been applied by Pilcher J. in *Drummond* v. *British Building Cleaners Ltd.* [1954] 1 W.L.R. 501, 507.

The value of *Cavanagh* v. *Ulster Weaving Co. Ltd.* [1959] 2 All E.R. 745, lies in the fact that their Lordships have narrowed the ambit of the Dunedin formula by applying to the case before them the dicta of Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 All E.R. 42, 50, and of Lord Cohen in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* [1956] A.C. 552, 579; [1956] 1 All E.R. 385.

Briefly, the facts were these:

The appellant, a labourer employed by the weaving company, was carrying a bucket of cement weighing some forty-two pounds down a roof ladder laid flat against the slated aspect of a slanting roof. He put the bucket down on a plank before starting to descend the ladder facing forwards. Having placed his feet in a position on the second or third rung of the ladder from the top, he had to turn to pick up the bucket and in so doing he slipped and fell about six feet against a sloping glass roof opposite him and injured himself. There was no handrail with which he could support himself with one hand as he descended the ladder with the bucket in the other hand, and there was no protection to save him from the glass in the opposite roof if he should slip. He was wearing rubber boots which had been provided by the company in view of an accumulation of water in the gully between the slanting roofs along which he had to proceed after descending the ladder.

In an action by the appellant against the company for damages for personal injuries (including the amputation of his right arm above the elbow), there was evidence that the rubber boots were two sizes larger

than they should have been for a man with feet the size of the appellant's. An expert witness for the company was asked in relation to the system adopted for the carrying of cement on the roof, how far "this set-up" was in accord with good practice. He testified that it was perfectly in accord with good practice. His evidence was uncontradicted. A submission on behalf of the company that there was no evidence of negligence to go to the jury was disallowed. The jury found that the company had been negligent. The Court of Appeal in Northern Ireland set aside the judgment, and directed judgment to be entered for the respondents. The House of Lords allowed the appeal from that determination and confirmed the award of damages assessed by the jury of £6,520 (reduced to £5,868, by reason of the appellant's contributory negligence).

Viscount Simonds said he did not think that the learned Judges of the Court of Appeal were justified in concluding that reasonable men might not find the verdict which this jury found. He added:

> If I may respectfully say so, I think that the error of the majority of the Court lay in treating as conclusive evidence which is not conclusive however great its weight, particularly where it has to be weighed against other evidence. But that does not mean that the familiar words of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.* 1909 S.C. (Ct. Sess.) 807, 809 which have been so often quoted both in Scottish and English cases are not to be regarded as of great authority in determining what is, in all the circumstances, reasonable care. It would, I think, be unfortunate if an employer who has adopted a practice, system or set up, call it what you will, which has been widely used without complaint, could not rely on it as at least a prima facie defence to an action for negligence, and I would say with the greatest respect to those who think otherwise that it would put too great a burden on him to require him to prove that the circumstances of his own case were "precisely" similar to those of the general practice that I have assumed. But these are not questions that arise on the present appeal, and I am content to move that the appeal be allowed with costs here and below.

Lord Tucker, with whose opinion Viscount Simonds, Lord Keith of Avonholm, and Lord Jenkins concurred, referred to what he called the more important part of the case—namely, the evidence as to practice and the views of the majority of the Court of Appeal as to the effect of this evidence. The appellant in his statement of claim had not alleged that the respondents were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. The respondents called as an expert a civil engineer who was asked this question: "How far does this set-up accord with good practice?" He answered: "For the type of access to building work, I would say that it is perfectly in accord with good practice. I have had very considerable experience of such work on roofs for over twenty years".

Lord Tucker drew attention to the fact that the words "this set-up" came from counsel and it was never explained precisely what constituted "the set-up" and, in particular, whether the practice which he described as "good" included the use of rubber boots such as those produced in evidence. It was said that this evidence stood unchallenged; but, as His Lordship read the note of the cross-examination, it looked as if it might have been directed, in part at any rate, to stress the use of the rubber boots as a feature peculiar to the present case to distinguish it from general practice.

Lord Tucker continued:

> However this may be, and whatever is the proper view of the effect of Lord Dunedin's well-known words in *Morton* v. *William Dixon Ltd.* 1909 S.C. (Ct. Sess.) 807, 809, it was for the jury to assess the value to be attached to such sketchy evidence as this given without any explanation as to what was covered by the word "set-up". They may well have considered it insufficient, more especially if they attached importance to the use of wet rubber boots on a ladder of this kind. Assuming, however, that the practice spoken to should be read as including the use of wet rubber boots on this ladder, what is the bearing of such evidence on the ultimate decision of Judge or jury?

His Lordship went on to say:

> My Lords, I have already expressed my views on the value of this kind of evidence in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* [1956] 1 All E.R. 385, 400, which I need not repeat; but it was not necessary for me in that case to refer to the language of Lord Dunedin in *Morton* v. *William Dixon Ltd.* I would, however, desire to express my agreement with what was said by my noble and learned friend, Lord Cohen, in *Morris's* case where, after reviewing what had been said on this subject in *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42, and considering the language used by Parker L.J. in the case under consideration, he said [1956] 1 All E.R. 385, 402:
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> > I think that the effect of their Lordships' observations is that, when the Court finds a clearly established practice "in like circumstances", the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one.
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> Later, he equates the word "folly" as used by Lord Dunedin and Lord Normand to "unreasonable or imprudent", thereby emphasizing that Lord Dunedin could not have been intending to extend the employer's common-law liability beyond that which had been laid down in *Smith* v. *Baker & Sons* [1891] A.C. 325 and many subsequent cases in this House. To give to the word "folly" any other meaning would necessarily have this result. This is made plain by the submission of the respondents' counsel in the present case to the effect that, even if the evidence might otherwise warrant a finding of want of reasonable care, the case should have been withdrawn from the jury on the ground that, as a matter of law, it could not, in view of the evidence of practice, be held to amount to "folly".
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> My Lords, I would respectfully accept the statement of the law on this subject in the present case by the Lord Chief Justice (Lord MacDermott) who, it may be observed, was a party to the decision in *Paris* v. *Stepney Borough Council* in your Lordships' House.

Lord Keith of Avonholm, in the course of his speech, said he would add, a few words on "the Dunedin formula", as it was called, in *Morton* v. *William Dixon Ltd.* 1909 S.C. (Ct. Sess.) 807, 809, particularly as His Lordship himself was a member of the Court which had occasion to consider that formula in *Gallagher* v. *Balfour, Beatty & Co. Ltd.* 1951 S.C. (Ct. Sess.) 712. He said:

> The dictum of Lord Dunedin was used with reference to an alleged act of omission in providing a safe system of work. In the sphere of negligence, in the relation hip of master and servant, I find the borderline between acts of omission and acts of commission very fine. It might be said to be an act of commission to put an employee to work in a place which was obviously unsafe. In the present case, it might be that giving the appellant rubber boots for his work could have been neutralized by providing some countervailing precaution which would exclude any charge of negligence and so it might be suggested that the cause of the appellant's injury was an act of omission rather than of commission. The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle.
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> All that Lord Dunedin meant, in my opinion, was that, if a plaintiff was complaining of a particular act of omission as constituting negligence, there were two ways in which he might endeavour to show this, by proving that the omission complained of was a precaution commonly undertaken by others in like circumstances, or was so obvious "that it would be folly in anyone to neglect to provide it". It is

on the second alternative that discussion has generally turned. But I see no particular difficulty. There is no magic in the word " folly ". It gives the formula the characteristic that was described by Lord Normand in *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42, 49 as " trenchant ". But the language could be phrased otherwise without any loss of meaning. Lord Dunedin might equally have said : " It would be stupid not to provide it ", or " that no sensible man would fail to provide it ", or " that commonsense would dictate that it should be provided ". Lord Cooper himself, who was particularly averse from watering down Lord Dunedin's language, on three separate occasions in his judgment in *Gallagher's* case used " inexcusable " as the equivalent of " folly ".

With this may be read the passage from Lord Normand's judgment in *Paris* v. *Stepney Borough Council* that the formula " does not detract from the test of the conduct and judgment of the reasonable and prudent man ".

In *General Cleaning Contractors Ltd.* v. *Christmas* [1952] 2 All E.R. 1110, my noble and learned friend, Lord Tucker, said (*ibid.*, 1120) : " It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject ".

In *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* [1956] 1 All E.R. 385, Lord Cohen said (*ibid.*, 401) that he agreed with Parker L.J. that " folly " was not to be read as " ridiculous " and did not think that that was the sense in which Lord Dunedin used it. I refrain from quoting observations in a similar sense from others of their Lordships in the cases cited.

Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle Judge or jury to say that there has, or has not, been a failure to exercise such reasonable care. It is immaterial, in my opinion, whether the alleged failure in duty is in respect of an act of omission or an act of commission. But where it is an act of omission that is alleged, I think it will be found, in the absence of evidence of practice, that the circumstances will rarely, if ever, lead Judge or jury to hold that there was negligence unless the precaution which it is suggested should have been taken is one of a relatively simple nature which can readily be understood and commends itself to common intelligence as something to be required. Lord Dunedin was laying down, I think, no principle of law but stating the factual framework within which the law would fall to be applied.

Lord Somervell of Harrow, with whose opinion Lord Tucker agreed, said in the course of his speech :

Now that common employment has been abolished those distinctions need no longer be drawn. I suggest with all respect that Courts of first instance, whether Judge and jury or Judge alone, will proceed more satisfactorily if what I have called the normal formula—that is reasonable care in all the circumstances—is applied whatever the circumstances. Lord Dunedin's observation (1909 S.C. (Ct. Sess.) 807, 809) was, in its context, clearly only intended to apply where the practice proved was clearly proved and where the circumstances covered by the practice were precisely similar to those in which the accident happened. There may be many cases in which, although the circumstances are not precisely similar, evidence of practice should be given some, though less, weight. In any case, the formula seems to suggest, though this cannot have been intended, that, if a plaintiff calls no evidence of practice, he must establish folly in order to make out a prima facie case. In my view, it would be unfortunate if Courts had to consider what amounted to folly. I do not pretend to have considered every gloss on " reasonable care " which may from time to time have been cited as helpful but, speaking for myself, I think the fewer the formulae the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another.

A general principle appears to emerge from the judgments in our Court of Appeal and from the speeches in the House of Lords (severally cited above). In a master-and-servant case, in which negligence is alleged in relation to the system of work, it appears to be this :

The question always is whether an employee's injury has resulted in some failure on the part of the employer to take reasonable care for the safety of the former, according to the conduct and judgment of the ordinary and reasonable man. Such failure may be established by showing that the performance of his work by an employee has exposed him to risk of injury which might reasonably have been foreseen by his employer and avoided, or, subject to the foregoing, in an appropriate case, by establishing that that want of care has been due to a failure to observe commonly-recognized precautions or safeguards within the factual framework of the particular case.

In fine, to repeat the words of Lord Somervell in the *Ulster Weaving* case, Courts of first instance, whether Judge and jury or Judge alone, will proceed more satisfactorily if the formula of " reasonable care in all the circumstances " is applied, whatever the circumstances.

SUMMARY OF RECENT LAW.

INSURANCE.

Commercial Motor-Vehicle Policy—Exclusion Clause with Exceptions—Construction of Exclusion and Exceptions. The natural meaning of an exclusion clause in an insurance policy cannot be enlarged because of what is contained in an exception to it. (*Burger* v. *Indemnity Mutual Marine Assurance Co.* [1900] 2 Q.B. 348, followed.) If there is ambiguity in an exception to an exclusion in an insurance policy even though the exception is for the purpose of bringing back within the cover certain specified happenings which are within a class of specified happenings which have been excluded by the exclusion, the exception is to be construed *contra proferentem*. (Statement of Warrington L.J. in *Rowett Leaky* v. *Scottish Provident Institution* [1927] 1 Ch. 55, 69, referred to.) A " Karrier " truck, fitted with an hydraulically operated tip tray, was insured by its owner under a Commercial Motor-vehicle Policy, which contained the following " exclusion " from cover by the policy : " Provided further and it is hereby declared that the insurance covered by this policy shall not extend to : (d) Mechanical breakdown or defects, electrical breakdown failures or breakages ; but loss of or damage to the said motor-vehicle or radio set by fire, collision with any object, or overturning resulting from mechanical breakdown or defects or electrical breakdown failure or breakages is not excluded hereunder." On February 26, 1958, while the driver of the truck was operating the tipping mechanism for the purpose of discharging a load of spoil, he heard " a crack ", whereupon the tray of the truck " tipped on to its right-hand side ". The tray was pivoted to the rear end of the truck chassis. Two hydraulic rams, attached to the chassis side by side (but spaced some little distance apart) at a point somewhat forward of the pivot point, tipped the tray by raising the forward end sufficiently above the level of the rear-pivot point as to cause the contents of the tray to slide out over the rear end of the tray. When the driver left his cab to inspect what had happened, he found that the elevating rams had pulled completely out of their respective sockets, thereby severing the connection between tray and chassis normally afforded by the rams ; and that the tray for its entire length was resting on its side upon the roadway. The pivot between the rear end of the chassis and the tray was intact. The rear end of the chassis had gone with the tray, lifting the right rear wheels well above the roadway, the rear axle approaching a near vertical plane. The chassis had twisted, however, so as to leave the front wheels both upon the roadway, and the driving cab in its normal position. The truck-owner's claim under his policy was resisted by the insurer on the ground that the damage to the truck was not of the kind to which the insurance affected by the policy extended, alleging that the damage was caused by " mechanical breakdown or defects ", which were excluded from the policy by para. (d) of the exclusion clause. In particular, the insurers resisted the claim upon

the basis that the "mechanical breakdown or defect" was the sudden failure of one of the sealing devices in one of the rams. *Held*, 1. That it was the actual mechanical breakdown or defect, or the actual electrical breakdown failure, or breakage which was excluded from cover. 2. That the consequences resulting from mechanical breakdown or defect or from electrical breakdown, failure, or breakage came within the exception to the exclusion; and, accordingly the plaintiffs claim fell within the cover of the policy, save for the defect in the hydraulic ram which set the mishap in motion. 3. That, alternatively, construing the exception *contra proferentem*, the vehicle had been subjected to "overturning" as that word is used in the exception to the exclusion from cover. *Dryden Construction Co. Ltd.* v. *New Zealand Insurance Co. Ltd.* (S.C. Auckland. 1959. June 12. Shorland J.)

LICENSING.

Offences—"Second Offender"—Offence committed after Previous Conviction notwithstanding Conviction on Same Day of Several Offences—Licensing Act 1908, ss. 195 (2) (b), 252—Summary Proceedings Act 1957, s. 69 (1) (c). The term "second offence" in s. 195 (2) (b) of the Licensing Act 1908, means an offence committed after a previous conviction for an offence under s. 195. (*R.* v. *South Shields Licensing Justices* [1911] 2 K.B. 1, and *R.* v. *Ryan* (Unreported: Auckland. April 28, 1947. Callan J.), followed.) The defendant was charged with three offences of selling liquor without a licence on June 15,, and 19, 1959, and with one charge of keeping liquor for sale on June 19, 1959. She was convicted on all charges. As she had been previously convicted of more than three offences it appeared that, under s. 195 (2) (c) of the Licensing Act 1908, she was entitled to elect to be tried by a jury. Under s. 69 (1) (c) of the Summary Proceedings Act 1957, she was given the right to elect, and she elected to be tried by a jury on those charges. Section 252 of the Licensing Act 1908 provides that a conviction for any offence against the Licensing Acts shall not, after five years from the date of such conviction, be receivable in evidence against any person for the purposes of subjecting him to an increased penalty or to any forfeiture. The list of previous convictions imposed upon the defendant showed that within that period of five years before September 18, 1959, the defendant was convicted on only one occasion—namely, on June 19, 1955, of two offences, one keeping liquor for sale and one of selling without licence, both charges arising from the same facts and both being in breach of s. 195 (1) of the Licensing Act 1908. The question at issue in the present case was into what class of offender under s. 195 (2) the defendant fell so as to determine whether she was to be dealt with summarily or was entitled to the right to elect trial by jury. *Held*, That, limiting the previous convictions of the defendant to those entered against her on June 10, 1955, she was a second offender in relation to the four charges against her, and the maximum penalty to which she was liable was that stated in s. 195 (2) (b) of the Licensing Act 1908 under which she should be dealt with summarily; and that, accordingly, she was not entitled to an election for trial by jury. *Police* v. *Phillips*. (1959. September 18, Astley S.M. Auckland.)

LIMITATION OF ACTION.

Action for Damages arising from Sale of Defective Roofing Material—Such Material Disintegrating over a Period after Use in Roof—Cause of Action not arising when Contract of Sale made but when Ingredients for Commencement of Action for Damages became Evident during Intervening Period—Claim not Statute-barred—Limitation Act 1950, s. 4 (1). In October, 1951, W. bought from the defendant company corrugated aluminium roofing material, warranted to be of merchantable quality and believed by both parties to be superior in durability to galvanised iron for use as roofing. Over six years after the date of purchase, W. discovered that the material, then the roof of a dwelling, had in large measure become useless by reason of its chemical decomposition and disintegration to an advanced stage. He claimed damages from the company. Two other parties were joined as defendants. The fourth party raised the preliminary point of law that, by virtue of s. 4 (1) of the Limitation Act 1950, W. was debarred from seeking any remedy or relief for the alleged breach of contract by all or any of the parties in opposition to his claim. *Held*, That the fourth party could not successfully plead the Limitation Act 1950 in the circumstances of this case, as the cause of action did not arise when the contract was made but arose only when all the ingredients for the commencement or prosecution of an action were in evidence, and that date, whatever it might have been, was at such later time as to prevent the fourth party from pleading the statute in bar to the action so as to deprive W. of such rights as he possessed. *White* v. *Taupo Totara Timber Co. Ltd.* (*Neill Cropper and Co. Ltd., Fourth Party*). (1959. October 5, Hardy S.M. Putaruru.)

MAORIS AND MAORI LAND.

Death Duty—Maori Succession Duty—Income Tax—Maori Testator dying before Commencement of Maori Affairs Act 1953—Interest of Deceased Maori in Land Vested in Body Corporate constituted pursuant to Maori Land Legislation—Interest of Deceased in Property of Body Corporate other than Land—Interest in Property (other than Land) vested in Body Corporate—Such Other Property passing with Interest in Land as Part of Deceased's Dutiable Estate available for Payment of Estate and Succession Duty, but available for Accrued Income Tax only to Extent of Liability for Payment of Unsecured Debts—Protection of Debts of Deceased Maoris—Normal Means of Attachment and Process unavailable—Resort to Part IV of Administration Act 1952 open to Creditors—"Land or interest"—"Rates or taxes"—Maori Affairs Act 1953, ss. 131, 133, 134, 136, 276 (2)—Death Duties Act 1921, s. 83. The deceased, a Maori, died on a date before the passing of the Maori Affairs Act 1953 and its coming into force on April 1, 1954. His principal asset was a substantial interest in the body corporate known as "The Proprietors of the Mangatu Nos. 1, 3, and 4 Blocks Incorporated". The assets of the body corporate comprised both land and other property, principally livestock and other farming assets. By his will the deceased, after giving his interest in certain Maori land and stock thereon to his wife, devised the residue of his interests in Maori lands (which included his interest in the land of the body corporate) to his two children, and he bequeathed all his personal estate to his wife. His liabilities amounted to £2,273, of which £1,791 was owing for income tax. Estate and succession duty were assessed, under the Death Duties Act 1921, at £3,894 12s. 9d. Questions arose as to the effect, if any, of s. 276 of the Maori Affairs Act 1953 on a vesting order made pursuant to s. 136 of that Act, vesting the deceased's interest in the land of the body corporate in his two children; and also as to the liability of the Maori Trustee, as administrator of the estate with will annexed, to estate and succession duty and to payment of the arrears of income tax. On an originating summons taken out by the Maori Trustee, *Held*, 1. That the interest of the deceased in the property of the body corporate other than land formed part of his dutiable estate. (*Awarau* v. *Commissioner of Inland Revenue* [1958] N.Z.L.R. 1162, followed.) 2. That the interest of the deceased in "other property" (i.e. his interest in the property of the body corporate other than land) was available for payment of the estate and succession duty assessed in the estate. 3. That the expression "rates or taxes" in s. 132 (1) of the Maori Affairs Act 1953 means rates and taxes levied on the land and does not include income tax. 4. That the interest of the deceased in such "other property" is liable for payment of income tax owing at the date of death only to the same extent as it is liable for payment of other unsecured debts. 5. That s. 276 of the Maori Affairs Act 1953 operated to prevent a disposition of the "other property" of the body corporate except by the same instrument of disposition as disposed of the land interest. The protection afforded the land by the Maori land legislation must necessarily prevent the adoption of normal means of attachment and processes, such as a writ of sale, but resort to Part IV of the Administration Act 1952 would prevent the estate from evasion of its just debts. Observations as to the kinds of questions that may be asked under the Declaratory Judgments Act 1908, and as to the general nature of the interests of a Maori in a body corporate under s. 276 of the Maori Affairs Act 1953. *In re Rutene (deceased), Maori Trustee* v. *Commissioner of Inland Revenue and Others*. (S.C. Gisborne. 1959. September 3. Hardie Boys J.)

PRACTICE.

Declaratory Order—Questions in Originating Summons to be confined to those actually arising, including Interpretation of Statutory Provisions calling for Interpretation in Circumstances of Application—Declaratory Judgments Act 1908, s. 3—See MAORIS AND MAORI LAND *(supra).*

Income Tax—Offences—Negligently Making a False Return—Solicitor preparing Client's Income Tax Return—Onus on Commissioner to Establish Solicitor's Mental State of Indifference with Respect to Taxpayer's Conduct and Its Consequences—Solicitor carrying out Instructions—Appearance of Completeness in Client's Records and Information—No Proof of Solicitor's Mental Indifference with Respect to Client's Conduct and Its Consequences—Informations Dismissed—Land and Income Tax Act 1954, ss. 16, 228 (1). A solicitor, who is instructed to

prepare income-tax returns for a client, may be guilty of an offence under s. 149 (b) of the Land and Income Tax Act 1923, or under s. 228 (1) (b) of the Land and Income Tax Act 1954 if he negligently makes any false return, or gives any false information, or misleads or attempts to mislead the Commissioner or any other officer in relation to any matter or thing affecting his client's liability to taxation. The purpose of s. 16 of the Land and Income Tax Act 1954 (s. 12 of the 1923 Act) is to attach liability to the taxpayer in cases where he employs an agent or other person to make the return for him. It does not absolve from liability the person making the return. It is of importance to ascertain the mind of the solicitor in so far as it relates to his attitude in carrying out his instructions. The onus is on the Commissioner to establish a mental state of indifference with respect to the taxpayer's conduct and its consequences. The question for the Court is: Did the solicitor know or should he have known when making any of his client's returns that proper records had not been kept by his client? (*Commissioner of Taxes* v. *B. & B.* (1949) 7 M.C.D. 82, applied.) Where, therefore, as in this case, the solicitor carried out the instructions given him by his client, and the records and information supplied to him by his client had the appearance of completeness and there was a lack of evidence to establish that the solicitor had reason to expect otherwise, and the Court was not satisfied that the solicitor made the return in a mental state of indifference in respect to the taxpayer's conduct and its consequences, the charges were dismissed. *Commissioner of Inland Revenue* v. *P.* (1959. May 13, Sinclair S.M. Palmerston North.)

RATES AND RATING.

Urban Farm Land Rating—Benefit of Such Rating not available to Purchaser of Part of Property on Farm-land Roll—Urban Farm Land Rating Act 1932, s. 26. The benefits of s. 26 (2) of the Urban Farm Land Rating Act 1932 are confined to the owner and occupier of a particular property, and to persons with an interest in that property, at the time when the rateable value is increased; and s. 26 cannot be afterwards invoked by the purchasers of any part of the property. Thus, on the present case, the purchaser of part of an urban farm-land property was correctly rated by reference to its ordinary value appearing in the valuation roll for the Borough. *White* v. *Howick Borough.* (S.C. Auckland. 1959. September 7. T. A. Gresson J.)

RESERVES AND DOMAINS.

Domain Board—By-law—Borough By-law having No Force or Effect as Domain Board By-law unless approved by Minister of Lands—Public Reserves the Property of the Crown—No Borough By-law applicable thereto—Reserves and Domains Act 1953, ss. 43, 94 (1)—Municipal Corporations Act 1954, s. 412 (1). A Borough by-law has no force and effect as a by-law of a Domain Board unless the Board has obtained the approval of the Minister of Lands thereto, as required by s. 94 (1) of the Reserves and Domains Act 1953. Furthermore, s. 412 (1) of the Municipal Corporations Act 1954 provides that nothing in any by-law made under that statute applies to any Crown property; and, by virtue of s. 43 of the Reserves and Domains Act 1953, public domains are the property of the Crown. *Cunningham* v. *Veitch.* 1959. July 16. Donne S.M. Tauranga.)

SALE OF LAND.

Land Settlement Promotion—Consent of Court not obtained—Transaction of No Effect—Contract of Sale Ineffectual and Unlawful—Deposit paid recoverable—"Unlawful and of no effect"—Land Settlement Promotion Act 1952, ss. 24, 25—See CONTRACT (*ante,* 291-292).

TORT.

Assault—Wilfulness or Intention a Necessary Element to found Action—Onus of Proof. To succeed in a claim for damages for personal injury founded on assault, there must be proof of intentional aggression or negligent default on the part of the defendant. The onus of proof of intent lies on the plaintiff. (*Morriss* v. *Marsden* [1952] 1 All E.R. 926 and *Fowler* v. *Lanning* [1959] 1 All E.R. 290, followed. *Walmsley* v. *Humenick* [1954] 2 D.L.R. 238, and *Joyce* v. *Bartlett* [1955] D.L.R. 615, referred to.) Consequently, an action claiming damages for assault does not lie if the injury to the plaintiff, although the direct consequences of the act of the defendant, was caused unintentionally and without negligence on the defendant's part. *Beals* v. *Hayward.* (S.C. Palmerston North. 1959. September 24. McGregor J.)

TRADE MARK.

Eligibility of Word "Mannequins" for Registration as Trade Mark—Word lacking Quality of "distinctiveness"—Traders not to be permitted by Registration to monopolize Words in General use in Commerce—Duty of Commissioner of Trade Marks to preserve such Words—Exercise of Commissioner's Discretion—Trade Marks Act 1953, s. 14. In order to fulfil the requirement of s. 14 (3) (d) of the Trade Marks Act 1953, the trade mark must be adapted to distinguish the goods. This is an indication of a practical standard to which the Commissioner of Trade Marks is bound to conform. (*George Banham & Co.* v. *Reddaway & Co.* [1927] A.C. 406, followed.) The whole basis of the Act is that the word or words to be registered must be distinctive, and it would be wrong to allow any one man a monopoly of ordinary words, commonly used in the trade, and simply descriptive of the nature or colour or laudatory of the quality of the goods. (*In re Joseph Crosfield & Sons Ltd.* [1910] 1 Ch. 130, applied.) The Commissioner has a duty to preserve for common use words in general currency in a particular trade, and to prevent any individual trader from monopolizing such word. The onus is upon the applicant to justify the registration which he seeks. While the statutory discretion of the Commissioner must be exercised reasonably and not capriciously, there is, in any case, no absolute right to registration conferred by the Act. (*George Banham and Co.* v. *Reddaway and Co.* [1927] A.C. 406, 413, followed.) The appellant applied for registration in Part A of the Trade Marks Register of the word "Mannequins" as a trade mark of girls' and women's shoes. The Commissioner of Trade Marks refused registration on the grounds, inter alia, that feminine footwear were fashion goods frequently displayed by mannequins to the public and to retailers; that the mark "Mannequins" lacked the fundamental quality of distinctiveness for such goods and could not distinguish the feminine footwear of any one manufacturer or trader from such goods of another manufacturer or trader; and that "mannequins" was a word which inherently was neither adapted to distinguish nor capable of distinguishing fashion goods of any description. On appeal from that decision, *Held,* 1. That the Commissioner, in a practical approach, having decided to refuse registration, the Court, although it must exercise its own discretion, should be slow to differ from the Commissioner whose constant duty it is to protect the interests of the public; unless the Commissioner has gone clearly wrong, his decision ought not to be interfered with. (*Yorkshire Copper Works Ltd.* v. *Registrar of Trade Marks* [1954] 1 All E.R. 570 at 572, followed.) 2. That as there was no evidence submitted to the Commissioner that the word "Mannequins" was adapted to distinguish the appellant's footwear from that of others in the trade, this was not a case where, by use, a word had already acquired in fact a secondary meaning denoting only the goods of the appellant, while the remainder of the trade were proved to use a different term for the identical facet of description as in the case of the trade mark "Sheen". (*In re an Application by J. & P. Coats Ltd.* [1936] 53 R.P.C. 355, referred to.) 3. That there was no reason to disagree with the Commissioner that the term "Mannequins" in relation to feminine footwear was a term in ordinary use in the retail trade, and the appropriation of the word as an adjective in conjunction with feminine footwear was directly descriptive of the character of those articles as indicating their suitability for display, and for the same reason, might be regarded as laudatory of their quality, as suggesting their worthiness for advertising by medium of mannequins. The appeal was accordingly dismissed. *Duckworth, Turner and Co. Ltd.* v. *Commissioner of Trade Marks.* (S.C. Wellington. 1959. August 24. Haslam J.)

TRANSPORT.

Offences—Failing to render All Practicable Assistance—Proof of Accused's Knowledge of Occurrence of Injury Necessary—Transport Act 1949, s. 47 (1). Three duties are imposed on motor-drivers by subs. (1) of s. 47 of the Transport Act 1949: first that he shall stop, secondly, that he shall *also* ascertain whether he has injured any person; and, thirdly, where there is injury to some other person, he must render all practicable assistance to that person. The duty to render all practicable assistance arises only "in the event" of injury occurring, and not in the event of the driver ascertaining that injury has occurred. Consequently, before there can be conviction on the charge of failing to render all practicable assistance there must be proof that the accused knew that there had been an accident in which injury had in fact occurred. (*R.* v. *Bowden* [1938] N.Z.L.R. 247; [1938] G.L.R. 156, applied.) *Waddington* v. *Boyd.* (S.C. Christchurch. 1959. September 25. Henry J.)

TRUSTS AND TRUSTEES.

Creation of Trust—Deed Entered into in 1957 declaring existence of Trust since 1948—Formal Language not necessary to create Trust—Inference of Creation of Trust from Conduct—Contemporaneous and Subsequent Acts of Settlor looked at—Evidence establishing Existence of Trust from Earlier Date. The Commissioner of Taxes assessed to the appellant additional income tax for the years 1948 to 1956 inclusive, and, in doing so, assessed the appellant's income from the sale and purchase of sheep which the appellant claimed he had received as a trustee for his infant children under a trust which he had set up. On May 22, 1957, he had entered into a formal trust deed, in which he declared the trust which, he claimed, had existed since February 1, 1948. On appeal from the decision of a Magistrate confirming the assessment, *Held*, 1. That the intention to create a trust need not be couched in any formal language: a declaration of trust may even be inferred from conduct which may be taken into account with such words as there may be, so that in cases of doubt the contemporaneous and subsequent acts of the person creating the trust may be looked at. (*Bentley* v. *Mackay* (1851) 15 Beav. 12; 51 E.R. 440, and *Gee* v. *Liddell* (*No. I*) (1866) 35 Beav. 621; 55 E.R. 1038, followed.) 2. That, upon a consideration of the evidence which established the necessary elements to create a valid trust and pointed to the fact that the declaration had been an irrevocable or imperative one, the creation and operation of the trust since February 1, 1948, had been proved; and there should be a declaration that the appellant was not liable to pay the additional tax assessed to him. 3. That, if the appellant should be liable as a trustee, under s. 155 of the Land and Income Tax Act 1954 or under the corresponding section in the Land and Income Tax Act 1923, to pay some tax on the profits made by the trust over the years in question, this decision was without prejudice to any claim for that tax. *Belton* v. *Commissioner of Inland Revenue*. (S.C. Wanganui. 1959. September 29. Hutchison A.C.J.)

Dealings with Trust Property—Non-trustee Investment—Principles whereon Court will Authorize Same—Trust Instrument Silent as to any "Contrary Intention"—Meaning of "Expedient"—Trustee Act 1956, s. 64. Section 64 of the Trustee Act 1956 extends to the authorization of a non-trustee investment, such as, for instance, the purchase of a house to be occupied by a beneficiary or beneficiaries, or (as in the present case) the lending of money on a second mortgage. An investment which would normally be beyond the powers of a trustee may be authorized, if the requirements of the section are duly met in other respects. If the "trust instrument", within the meaning given to that term by s. 2 (4) and (5) of the Trustee Act 1956, is silent as to any contrary intention as to the investment of trust funds on statutory trusts, as in the case of the estate of an intestate, where the trust instrument is the Administration Act 1952, there is no ground for suggesting that that statute contains any expression of a "contrary intention". The word "expedient", as used in s. 64 (1) does not require the Court to be satisfied that the transaction is expedient or advantageous in the interests of each and every beneficiary considered separately. The Court must take into consideration the interests of all the beneficiaries, and, upon a broad and commonsense view of the matter, must be able to conclude that the proposed transaction can fairly be said to be expedient for the trust as a whole. In this case, the Public Trustee as administrator of an intestate estate, applied for authority to lend a sum of £400 to the widow of the deceased out of moneys held in trust for her infant daughter and only child, six years of age. The daughter's share (£719 5s. 9d.) was invested in the Common Fund of the Public Trust Office, earning interest at 4 per cent. per annum, and was held on the statutory trusts set forth in s. 57 of the Administration Act 1952. Thus, in addition to the daughter herself, the widow and the parents of the intestate had contingent interests in the fund. The widow bought a section for £650 and built thereon a house costing £4,000. She provided £1,100 out of her own moneys, mortgaged the property to the State Advances Corporation for £2,420 (net £2,250), and borrowed £250 from a relative. The proposed loan of £400 was intended to be applied in repaying the loan of £250 and providing furnishings for the home, and was to be secured by way of second mortgage on the property, with a provision enabling the Public Trustee to set off the daughter's maintenance against the interest. *Held*, 1. That the proposed loan would be adequately secured and any possible detriment to contingent beneficiaries was so remote and unlikely that it could properly be ignored. 2. That, in the circumstances, the transaction could be regarded as being "expedient" in terms of s. 64 (1) of the Trustee Act 1956, and, as there was nothing unreasonable in exposing the contingent beneficiaries to a negligible risk for the sake of giving some necessary assistance in the provision of a home for the daughter, an order should be made authorizing the proposed loan. *In re Dawson (deceased)*. (S.C. Christchurch. 1959. September 24. F. B. Adams J.)

WORKERS' COMPENSATION.

Assessment of Compensation—Compensation paid but Worker claiming Incapacity occurred Earlier than Date from which Compensation calculated—Evidence showing Pain felt at Earlier Date—Compensation payable for Total Incapacity from Date when Worker ceased work with Defendant until He began Work with New Employer and on Quasi-Schedule Basis thereafter—Workers' Compensation Act 1956, ss. 14, 30. Liability for Compensation—Penal Compensation—Worker on resuming Work, given Notice on His Refusal to give Employer complete Discharge—Employer's Intention to continue Worker in Employment as restricted by Medical Certificate—Worker "actually returned to work"—Penal Compensation not payable—Workers' Compensation Act 1956, s. 30 (5). On or about August 9, 1957, M. suffered an accident to his back but continued working though the pain did not completely disappear. While working on October 31, 1957, on similar work, the pain became severe and he told his employer about it. On November 2, he sought medical advice, and then ceased work. He did not recommence until January 13, 1958. The defendant paid M. weekly compensation (as in respect of an accident occurring on October 31, 1957) from the time when he went off work on November 2, 1957, until he resumed work on January 13, 1958. When M. refused later to give the defendant a receipt in full settlement of all claims arising out of the accident on October 31, 1957, M. gave him notice and paid him a week's wages to February 5, 1958, in lieu of notice. The defendant alleged that no accident causing M.'s disability had occurred on August 9, 1957. M. claimed compensation from the defendant as from August 9, 1957, and a further sum by way of penalty under s. 30 (5) of the Workers' Compensation Act 1956. *Held*, 1. That, while it was open to the employer to deny the happening of the accident on August 9, 1957, although he had paid compensation to M., the evidence showed that the incident on that date deposed to by M. did occur and the pain he then felt continued until October 31 when there was an exacerbation of the pain due to the nature of his work. 2. That M.'s permanent incapacity for work from November 2 resulted in part from the accident of August 9 and the exacerbation of pain caused at work on October 31, and it was in part due to the progressive nature of the condition affecting his back, and he was entitled to compensation. 3. That M. was entitled to receive compensation for total incapacity for the period between February 5, 1958, and July 14, 1958, when he began work with his new employer. 4. That M., in respect of his permanent disability, should receive compensation as from the time of commencement of work on July 14, 1958, in a lump-sum payment on a quasi-schedule basis of 15 per cent. of total incapacity, and not on a loss-of-earnings basis. 5. That, on January 13, 1958, M. "actually returned to work" within the meaning of that phrase in s. 30 (1) (a) of the Workers' Compensation Act 1956; and it was then the defendant's intention to continue M. in employment throughout the period of two months during which his ambit of employment was restricted under his medical certificate; and that, consequently, the claim under s. 30 (5) failed. (*McDougal* v. *Singer Manufacturing Co. Ltd.* 1931 S.C. (Ct. Sess.) 47; 23 B.W.C.C. 616, referred to.) *Marshall* v. *Duffield*. (Comp. Ct. Christchurch. 1959. August 10. Dalglish J.)

Accident arising out of and in the Course of the Employment—Hernia—Statutory Conditions for Compensation—Hernia such as to cause, at the Time of the Injury, Disability immediately rendering Worker incapable of performing Normal Work—Workers' Compensation Act 1956, s. 18 (1). In a case of a clinical hernia appearing to have occurred for the first time which is not a case of aggravation of a pre-existent hernia, there must be proof that the hernia is of a disabling character. To come within s. 18 (1) (a) of the Workers' Compensation Act 1956, the hernia must be such as to cause, at the time when the injury occurs, disability immediately rendering the worker incapable of performing his normal work. (*Tompkins* v. *Port Line Ltd.* [1954] N.Z.L.R. 471, followed. *Crosbie* v. *Empire Rubber Mills Ltd.* [1952] N.Z.L.R. 332, referred to.) In the present case, it was held that, as the worker continued working without interruption for about half-an-hour after the time of the strain, the cessation of work at that time was not evidence of disablement caused by the occurrence of a hernia half-an-hour earlier, and that, therefore, the statutory conditions had not been satisfied. *Kellerman* v. *Huljich and Milot*. (Comp. Ct. Auckland. 1959. July 30. Dalglish J.)

BROADCASTING OF PARLIAMENT.

The Prime Minister's Powers.

By A. G. DAVIS.

On at least two occasions during the latter end of the session of Parliament recently concluded, the question of the authority of the Prime Minister over the broadcasting of proceedings of the House has been raised. On the first occasion,[1] the normal hour for the cessation of broadcasts, viz., 10.30 p.m., having arrived, the senior Opposition Whip, the member for Ashburton, noting that the proceedings were still being broadcast, rose to a point of order and said he would like to know why the House was being kept on the air after 10.30 p.m. The Prime Minister replied: "It was my special order that the broadcast be continued because of the importance of the debate". After a request by the Leader of the Opposition that the Prime Minister would reverse his order, Mr Nash continued: "It is a standard procedure of this House that the Prime Minister is in charge of the time in which the proceedings of the House shall be broadcast. . . . The House will continue on the air until a different instruction is given in accordance with ordinary practice".

On the second occasion[2] at about 10.20 p.m. the Leader of the Opposition asked if the Prime Minister would have the broadcasting time extended in view of the importance of the debate (on the Police Offences Amendment Bill). The Prime Minister replied that he would determine what to do "when it is time". After 10.30 p.m., though no announcement had been made, proceedings of the House were still being broadcast.

The broadcasting of parliamentary proceedings in New Zealand is something which just happened, with little regard to the constitutional and legal questions raised thereby.

Broadcasting of proceedings of the House of Representatives began in March, 1936. During the election campaign of 1935, the Labour Party declared that, if it was returned to power, it would make provision for the people to hear discussions in Parliament on national questions. The Labour Party, having been returned to power, carried out its promise by equipping the House of Representatives for broadcasting in the interval between the election in November, 1935, and the assembling of Parliament in March, 1935.[3]

There does not appear to be any official—or indeed, unofficial—record of the person by whose authority the necessary work of wiring the chamber, installing the microphones and in general arranging for the broadcasting was done. It may well have been that Mr Speaker, by virtue of the authority vested in him by Standing Order No. 399[4] gave the necessary authority for the work to be done. If so, there is no official record of any such authority having been given. In any event, it is doubtful whether that Standing Order would apply to the particular circumstances. Not only was the House not in Session between November 1935, and March, 1936. It had been dissolved and the then Speaker, Sir Charles Statham, had not sought re-election in 1935. Certainly, by reason of the provisions of s. 16 (2) of the Civil List Act 1920, the Speaker at the time of the dissolution was deemed to be Speaker until the first meeting of the next Parliament, but that provision was stated to be "for all purposes of this section". The section referred only to the salary of the Speaker and did not extend the authority of the Speaker to such questions as are envisaged in the Standing Order mentioned.

The only official reference to the fact that proceedings of the House of Representatives are broadcast is to be found in Standing Order No. 394 (1), which reads: "If at any sitting of the House . . . any Member shall move that strangers be ordered to withdraw, such Motion . . . shall be put forthwith without amendment or debate allowed, and upon the carrying thereof all strangers shall be ordered to withdraw. In such case the broadcasting of proceedings shall be discontinued during the period for which strangers are excluded".

In the absence of any authoritative statement of the position, the claim of the Prime Minister to be the sole arbiter of when proceedings of the House shall be broadcast can be examined from three angles: first, the general principles applicable; secondly, previous practice in New Zealand; and thirdly, proceedings in other Commonwealth Legislatures.

The first general principle to be borne in mind is that, in essence, the House of Representatives is a meeting of certain selected persons. Like every other group of persons meeting together, it has the power to choose its own procedure and, to a very large extent, it has chosen its own procedure. There results the body of rules known as Standing Orders which the House is free to amend at any time. From this it follows that if there is some aspect of procedure not governed by some rule or another it is for the House as a whole, by a majority vote of course, to decide what procedure shall be followed.

Another general principle which is applicable relates to the law of defamation. Some years ago the present writer had occasion to consider the effect on the law of defamation of the broadcasting of proceedings in Parliament.[5] The conclusion reached was that it was a matter of doubt whether a member of Parliament whose speech was broadcast enjoyed the absolute privilege which, by virtue of the Bill of Rights, attaches to his words when they are heard only within the chamber. Similarly, he was of the opinion that the broadcasting authority did not enjoy absolute privilege

[1] *New Zealand Herald*, October 15, 1959.

[2] *New Zealand Herald*, October 22, 1959.

[3] See T. D. H. Hall, "Broadcasting Proceedings in the New Zealand Parliament", in *5 Journal of the Society of Clerks-at-the-Table in Empire Parliaments* (1936),. 80.

[4] S.O. No. 399 reads: "Subject to the right of the Government to control expenditure with respect to the Legislative Department and the Estimates relating thereto, and to the provisions of any Act of Parliament, the control and administration of the whole of the Parliamentary Grounds and other erections thereon . . . shall be vested in Mr Speaker on behalf of the House, whether the House be in Session or otherwise".

[5] "Parliamentary Broadcasting and the Law of Defamation" (1948), *7 University of Toronto Law Journal*, 385.

in respect of any defamatory statement made by a member, which was broadcast. These conclusions depend largely on the question whether the broadcasting of proceedings has been authorized by the House itself.

Section 18 of the Defamation Act 1954 provides that any person who is a defendant in any civil or criminal proceeding commenced or prosecuted in respect of the publication of any report, paper, votes or proceedings by that person, or by his servant, *by or under the authority of the House of Representatives*,[6] may bring before the Court . . . a certificate under the hand of the Speaker of the House stating that the report . . . was published . . . under the authority of the House of Representatives.

The Court shall thereupon immediately stay the proceeding, and the proceeding shall be deemed to be finally determined.

In other words, the section gives to a defendant an absolute privilege in respect of the publication of its proceedings if that publication has been authorized by the House.

The word "publication" is not defined in the Defamation Act. At common law, for the purposes of the law of defamation, it has been stated to be: "The making known of the defamatory matter after it has been written to some person other than the person of whom it is written ".[7] This refers, of course, to the case of defamation in writing. Gatley[8] says: "Publication is effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated ". Furthermore, the English Defamation Act 1952 provides: "For the purposes of the law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form ". There is no corresponding provision in the New Zealand statute because, in this country, the distinction between libel and slander has, for civil purposes, been abolished.

In the light of the foregoing authorities, it can hardly be doubted that the broadcasting of parliamentary proceedings does constitute publication. That publication enjoys absolute privilege only if it is done by or under the authority of the House of Representatives. The authority of the Speaker or of the Prime Minister is not sufficient. To give the Broadcasting Service the necessary immunity, quite apart from any privilege accorded to members of Parliament, nothing short of a resolution of the House is required.

It is somewhat difficult to determine, from previous practice in New Zealand, whether the hours during which Parliament is broadcast is a question to be decided by the Prime Minister, whether it is a matter for the Speaker or whether it is a resolution of the House which is needed.

When parliamentary broadcasting was first introduced in 1936, it was limited to certain portions of the proceedings. The then Prime Minister announced to the House that it was proposed to broadcast speeches on legislative proposals of considerable importance.[9] Thereafter, on each occasion during the Session when the debate on any Bill was to be broadcast, the Speaker announced that fact to the House.[10]

It would appear that during the following Session the whole of the proceedings of the House were broadcast as one reads of a complaint by the Prime Minister that the Opposition, with its fewer numbers, got proportionately more time on the air than the Government with its majority.

During the 1938 Session, the question of privilege had occurred to at least one member. The member for Stratford asked the Prime Minister whether, in view of the wide publicity given over the air to parliamentary debates, he would consider an amendment of the Standing Orders or an alteration of the law of libel so as to protect persons from being subjected to slanderous or defamatory criticism of their conduct and reputation when those persons had no opportunity of replying over the air. The Prime Minister (Mr Savage), after referring to freedom of speech in the House as being a hard-won liberty, replied that it might be desirable to consider the matter when Standing Orders were under review.[11]

During World War II, certain difficulties arose by reason of the fact that it was appreciated that remarks by members might be of use to the enemy. The Speaker appears to have taken it upon himself to decide what should be broadcast and said: "All I can do is to decide what shall be broadcast ".[12] But the acting Prime Minister said, in reply to a question, that it was not proposed to interfere with the recognized procedure of broadcasting proceedings of Parliament.

The House was, however, consulted on the question whether a debate on the war situation should not be broadcast. On March 19, 1942, the Prime Minister moved that the debate on the motion for the adjournment in order to discuss the war situation be conducted off the air. The motion was agreed to.[13]

In the following year, a discussion arose on the time when the evening adjournment should be taken. It was desired that the adjournment should be taken at the same time as the newly-instituted broadcasts to the Pacific. The Prime Minister said he left it to the Speaker to make arrangements regarding the time of adjournment so that the broadcasts to the Pacific would not be interfered with by the broadcasting of proceedings in Parliament.[14]

In the same year, interruptions to the electric-power supply raised the question of Parliament sitting during the peak hours. On this occasion the Minister of Industries and Commerce consulted the House, which agreed to adjourn at an hour which would coincide with peak-loading.[15]

In 1945, the Prime Minister suggested to the House that certain proceedings should not be broadcast. The House agreed to this course.[16]

After the publication of the writer's article mentioned above,[17] several members raised the question of the extent of parliamentary privilege when proceedings

[6] The writer's italics.

[7] Per Lord Esher M.R., in *Pullman* v. *Hill* [1891] 1 Q.B. at p. 527.

[8] *Gatley on Libel and Slander*, 4th ed. 85.

[9] See *Hansard*, 1936, Vol. 244, 56.

[10] See, for example, the debate on the Broadcasting Bill. *Hansard*, 1936, Vol. 245, 731.

[11] *Hansard*, 1938, Vol. 253, 389.

[12] *Hansard*, 1941, Vol. 259, 732.

[13] *Hansard*, 1942, Vol. 261, 88.

[14] *Hansard*, 1943, Vol. 262, 516.

[15] *Hansard*, 1943, Vol. 262, 777.

[16] *Hansard*, 1945, Vol. 268, 823.

were broadcast. The Prime Minister said that the Government would bring down legislation to deal with the matter. He said that some amendment to Standing Orders might be necessary and that the whole question of the broadcasting of Parliament might have to be reviewed.[18] Nothing, however, was done.

A possible clue as to the authority under which broadcasts were continued after the normal hours is to be found in a question in July, 1948, by a member of the Opposition who inquired why proceedings were being broadcast after 10.30 p.m. He directed attention to the fact that the Prime Minister was speaking at the time. The answer was given by the Minister in Charge of Broadcasting who said that the broadcast had been continued through a misunderstanding. He added: "When the House is to sit beyond 10.30 p.m. the Broadcasting Service Officer takes the precaution of warning the authorities that unless special instructions are received, the broadcast will cease at 10.30 p.m.". He did not say, however, who gave the special instructions.[19]

Two later happenings in the House do hint at the possibility of the authority being that of the Prime Minister alone, but the precedents are by no means clear.

During the debate on the Police Force Amendment Bill in May, 1955, the Leader of the Opposition asked the Prime Minister, when the House re-assembled in the evening, whether he (the Prime Minister) would continue the broadcast of proceedings until midnight. The Prime Minister at that stage replied that he would have to look into the precedents. He understood that programme arrangements had been made for the period after 10.30 p.m. Later in the evening, the Prime Minister said that he had arranged with the Minister of Broadcasting for the hours to be extended until 11.30 p.m.[20]

This answer would suggest that the Prime Minister was more concerned with the technical difficulties of extending the broadcasting hours than with any prerogative powers he might have had to extend them.

When the National Service Registration Bill was being debated in September, 1958, the Prime Minister said: "I should like to announce that I have instructed that the radio shall go on until midnight and that the House will adjourn without any urgency being taken". Mr Speaker then said: "Is it the pleasure of the House that this course should be followed? There would appear to be no objection".[21]

The Speaker's question is equivocal. It is not clear whether he was seeking the pleasure of the House on the question of the extension of broadcasting hours or on the question of the adjournment or on both. On the not unreasonable assumption that the Speaker was taking the pleasure of the House on the question of the extension of the broadcasting hours, it can be said that this is a precedent for the question of broadcasting hours or broadcast or no broadcast being one for the House as a whole and not for the Prime Minister alone, though the Prime Minister might be reasonably certain that, as he commands a majority in the House, any proposal he made for the extension of broadcasting hours would receive the approval of the House.

The constitutional position regarding broadcasting of parliamentary proceedings in New Zealand is by no means clear. It cannot be said, as the Prime Minister has claimed, that it lies within his sole authority to say to what hour the broadcasting of proceedings shall continue after 10.30 p.m. The established practice being to broadcast the proceedings from the time of assembly until 10.30 p.m. or 5.30 p.m. on Fridays, it would appear to be necessary for the House itself to decide whether, on any occasion during those hours, the proceedings should not be broadcast. It is submitted that the House itself should similarly decide whether broadcasting should be continued after 10.30 p.m.

When the broadcasting of parliamentary proceedings was introduced into the Australian Commonwealth Parliament in 1946, questions which have been left to chance in New Zealand were authoritatively settled by the Parliamentary Proceedings Broadcasting Act 1946. Constitutionally, the most important section of the Act provides that no proceeding, civil or criminal, shall lie against any person for broadcasting or re-broadcasting any portion of the proceedings. The law of defamation cannot apply to those persons.

But details, left to chance in New Zealand, are also provided for. As proceedings of the two chambers, the Senate and the House of Representatives, are broadcast, the Act provides for the appointment of a Parliamentary Joint Committee on the Broadcasting of Parliamentary Proceedings. It consists of the President of the Senate, the Speaker of the House of Representatives, two senators and five members of the House of Representatives. The Committee, which is re-appointed at the commencement of the First Session of every Parliament, is empowered to consider and specify, in a report presented to each House, the general principles for determining the days and periods for broadcasting the proceedings of the Senate and the House of Representatives. Upon adoption of the report by each House, the Committee, or a sub-committee to which it may delegate the power, then determines such days and periods.

Both Houses have adopted reports of the Committee which has laid down, as one general principle, that the broadcast shall cease when the adjournment is moved by a Minister in the House being broadcast or at 11.30 p.m. whichever is the earlier.[22] Thus no question of extension of time can arise.

Australia drew, to some extent, on New Zealand experience when it decided to introduce the broadcasting of Parliament. New Zealand might, at this stage, return the compliment and, following the Australian pattern, determine, once and for all, questions on the topic which are now a matter of doubt.

[17] See footnote 5, *supra*.

[18] *Hansard*, 1948, Vol. 280, 268.

[19] *Hansard*, 1948, Vol. 280, 576.

[20] *Hansard*, 1955, Vol. 305, 771.

[21] *Hansard*, 1958, Vol. 318, 1827.

[22] See A. G. Turner, "The Australian Parliament on the Air", in *15 Journal of the Society of Clerks-at-the-Table in Empire Parliaments* (1946), 182.

FREEDOM OF THE BRITISH PRESS.

A Treasured Heritage of Great Traditions.

By Sir Linton Andrews.*

How free is the Press in Britain? Is its historic freedom abused to any large extent? Or does the British Press deserve to be described, as it has been so often described and still is, as a most faithful watch-dog of the rights of the people?

Questions like these inevitably arise over a freedom that has become traditional. An author of Yorkshire blood who made his reputation in India, no less a person than Rudyard Kipling, gave us a timely reminder:

"All we have of freedom—all we use or know—
This our fathers bought for us, long and long ago."

This is certainly true of the freedom of the Press. Censorship was relaxed in Britain after the Revolution of 1688 and abandoned in 1693. By the time of Junius, who wrote the famous letters in the Public Advertiser from 1769 to 1772, a leading thought of his was probably that of a multitude of intelligent men: "Let it be impressed upon your minds, let it be instilled into your children, that the liberty of the Press is the palladium of all the civil, political and religious rights."

Founders' Sacrifices.

But after many generations, when the glory of one generation has become routine in another, we are apt to take for granted, like the air we breathe, the rewards for the battles fought by our forefathers. Though we are great newspaper readers in Britain, it is rarely that we reflect upon the heroism, the sacrifices, the sufferings by which our forefathers established the rights now enjoyed by our newspaper proprietors and journalists. If the freedom of the Press is mentioned it is as often as not in a complaint that some newspaper has misused it.

That in itself is a tribute to this freedom long enjoyed, an implication that it ought to be regarded as a sacred trust. Sir Winston Churchill, in his "History of the English-Speaking Peoples", referred to the freedom of the Press as one of the great principles with a distinctively English character. There it was, ranked in an eloquent preface with Parliament, trial by jury and local government by local citizens. Much as we honour these institutions, they are never free from criticism. Parliament and local government live and thrive in the very atmosphere of altercation, both within and from without. There are critics who are far from certain that trial by jury always works as well as we think. So we need not be surprised, and we British journalists ought not to be incensed, if our professional freedom is from time to time called in question and re-examined.

Let us define our terms. The freedom of the Press means the right to print books, newspapers, pamphlets or any other printed matter without getting Government permission first. Ours is not a controlled Press. A newspaper is not told by the ruling authority what line to take about the Royal family, the Government, Parliament, the local authority, Mr. Nehru, the Panchen Lama, Chou En-lai, Krushchev or anybody else. An editor may say what he pleases on these and any other subject as long as he obeys the laws of the land, which include the laws of defamation, blasphemy, contempt of court, copyright and official secrets.

It is sometimes thought that journalists have special privileges that ordinary people do not possess. The idea has arisen perhaps from different meanings of the same word. Newspapers are allowed to print fair reports of public meetings, Parliamentary proceedings and proceedings in the law courts (with certain exceptions) without exposing themselves to the risk of damages for libel if they report defamatory statements used on those occasions.

Respect for Truth and Justice.

The legal term for this protection is privilege. It does not mean that the journalist has some exceptional advantage for his own sake, a privilege in the common non-legal sense. The freedom of the Press is an aspect of the freedom of the subject, the freedom of everybody. Permission to report public meetings, law court proceedings and so forth is intended to benefit all. It arises out of a respect for truth and justice and the need of the community that on certain occasions people shall be able to speak and write with freedom unhampered by the slightest fear, real or imagined, that they may be called to answer at some future date in an action for defamation because of what they have said.

Some of our politicians complain that the legal or technical meaning of the freedom of the Press is too narrow for controversy on the subject and that we ought to think of this freedom as including immense exploratory powers in public and private and immense opinion-forming powers. But all such arise from independence of Government control.

Long before Carlyle hailed every able editor as a ruler of the world, "being a persuader of it", our elders had learned to take for granted the rich blessing of a free Press. It became a widely held belief that you had only to know the facts, utter them boldly, base them on a reasonable policy, and sooner or later fair-minded men would all give you their support. Some of our statesmen spoke of the moral self-possession of the electorate. The underlying theory was that if people knew the truth they would decide rightly. In the light of this doctrine even a letter to "The Times", if it were fair and factual, was expected to work wonders. Sometimes it did.

The Press was hailed as the Fourth Estate. Carlyle termed it the "stupendous Fourth Estate". But the long-established authorities could not repress their jealousy of this addition to the recognized powers of the land. Among the Lords Spiritual, the Lords Temporal and the Commons many bitter questions arose. Why should upstart journalists, mere scribblers of Grub Street, imagine they could understand public problems quite as well as politicians did? What

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right had they to contradict and reprimand their governors and superiors? Why should the reader be encouraged to pay more attention to the printed opinions of some scurrilous hack than to what a statesman said in a long speech which was, alas, not always fully reported, and, if it was, did not always grip the attention of the reader? Many politicians thought the Press must be put in its place and stamped on. Some politicians still think so.

Political rulers and other powerful interests are often tempted to let the public know only what they think it is good for the public to know. They may not wish to exercise an evil power over thought, but they are prompted in the nature of things to suppress some facts and to colour others. Truth is still not to everyone all-powerful. Not every country has even the semblance of freedom. Propaganda did not die out entirely with the end of the Second World War, and it remains as true as ever that eternal vigilance is the price of liberty.

Still the Watchdogs.

So the watchdog of the Press still has plenty of barking and biting to do. I do not say that the dangers to be fought are all monstrous in their effect or that they all arise from evil design. Some of them arise from innocent misinformation and poor thinking. Men who are entrusted with the spending of great amounts of public money may develop a megalomania in its use in the hope of adding grandeur to their state or city. It is in checking undue secrecy and scandalous misuse of power and in the frankest examination of political problems that the freedom of the Press is most conspicuously vindicated.

But then the question arises: Granted that we need the watchdog of the Press, who is to watch the watchdog? How are we to prevent the freedom of the Press from being an empty phrase, a pretext for selfish and callous kinds of money-making? Where you have freedom you are almost certain to have some people abusing it. A free Press develops a powerful influence, and not all newspaper owners and journalists will act at all times from the noblest motives. There may be unscrupulous methods of news-getting, perhaps intrusion into the private life of innocent citizens. Private profit may be put before public spirit. Serious mistakes may be made in the rush of reporting.

Value of the Press Council.

Some of the checks on the British Press have already been mentioned, notably the laws of libel and contempt of court. Grave injury done unfairly to a man's reputation may be heavily punished. So may publication of news which, though true, might tend to prevent a man charged with an offence from receiving a fair trial.

Lesser offences can be brought before the Press Council. This quasi-judicial body cannot impose any penalty except reprimands issued in its Press communiques and the Council's annual reports. Such reprimands are not taken lightly. No one in the newspaper world likes to be pilloried for failing in the public spirit and decency which a journalist should possess.

The suggestion that the Press has too powerful, too authoritarian an influence over our thinking draws no support from the wide contrast of opinions expressed in editorial columns. The British Press does not dictate opinion, but persuades as best it can amid continuous and intense discussion. Controversialists fight it out in the arena of debate, spoken and written, before the gaze of millions. And, as the saying has it, in the multitude of counsellors there is safety.

My belief after a very long journalistic career is that on balance a free Press deserves its reputation as the Fourth Estate, and is of incalculable benefit to the people. It has its blemishes and blunders, but for any mistake it makes it gets a thousand things right, and its dominating characteristic is public spirit.

"Public Company."—"[There are] two sorts of corporations: a body corporate (by which is meant a chartered company, a statutory company, a body corporate at common law) and a public company, which term appears to have been intended to be a company incorporated by some public Act. Any company that is incorporated under the provisions of the Companies Act is a public company for this purpose, although there may be species of public companies, that is to say, companies incorporated under the Companies Act which rank as private companies and have certain rights and privileges. In *In re Lysaght* [1898] 1 Ch. 115, Lord Lindlay, M.R., said, 'I desire to add one word as to what is a public company. I thought that the meaning of a public company was settled as long ago as *Macintyre* v. *Connell* (1851) 1 Sim. N.S. 225, and I take it that any company registered under the Companies Act 1862, is a public company within the meaning of that expression in the Apportionment Act'." I cannot see why, if it is a public company for the purposes of the Apportionment Act, it is not a company for the purposes of the Larcency Act." Lord Goddard, C.J., in *R.* v. *Davies* [1955] 1 Q.B. 71, 76.

Proceedings, Judicial or Executive.—"The mere fact that there is a dispute and that witnesses may be called and heard does not of itself show that the proceeding is judicial or that there is a lis between the parties. One has also to consider, as well as those matters, what the tribunal is actually doing. In this case it is deciding whether meat is fit for human consumption, a matter to be dealt with by inspection, assisted in some cases by evidence which the party objecting requires to be called. In my opinion, that is not a judicial process but an executive act, and the justice in deciding it is really an agent of the executive and not a person exercising judicial office, although he has to bring qualities of impartiality and fairness to bear on the problem." Donovan J., in *R.* v. *Cornwall Quarter Sessions* [1956] 2 All E.R. 872, 875.

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TOWN AND COUNTRY PLANNING APPEALS.

Hewitt *v.* Takapuna Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 12.

Extension of Building—Area Zoned "Residential A"—Boarding-house Building "Conditional Use"—Owner Using Same for Catering for Receptions on Premises—Non-conforming Use—Permit Sought for Dining-room Additions—Objections by Adjoining Owner—Building Permit approved under Conditions—Town and Country Planning Act 1953, s. 38.

The appellant was the lessee of a property comprising 3 ro. 25.8 pp. situate in Salt Lawn Road, Takapuna, known as Beach House on which was erected a large two-story house, four semi-detached flats and one cottage.

For at least twenty-five years these premises had been conducted as a boardinghouse catering for regular guests and holiday makers.

In addition the appellant from time to time catered on the premises for wedding receptions, bridge competitions, Rotary Club functions and once a month for a Junior Chamber of Commerce dinner.

The property was in an area zoned under the Council's undisclosed district scheme as "Residential A". Under the relevant proposed Code of Ordinances, boardinghouses were "conditional uses" in such a zone and "places of assembly" were a "non-conforming use".

It followed that the appellant was in effect carrying on two types of business on the premises; a boardinghouse being "a conditional use", while the catering for and providing facilities for wedding receptions and other functions was a commercial use and therefore non-conforming.

The dining-room had an estimated floor space of 853 feet and the appellant applied to the Council for a building permit to make additions to the dining-room bringing the floor space up to approximately 1,233 feet.

This permit was refused on the grounds that the proposed alterations would detract from the amenities of the neighbourhood likely to be provided or preserved by or under the respondent's undisclosed district scheme and that the granting of the permit would extend the non-conforming use of the premises as an Assembly Hall.

This appeal followed.

The judgment of the Board was delivered by

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

1. The appellant can continue to carry on both forms of business on the present premises as "existing uses" for as long as she wishes.
2. There is no evidence that her present activities detract from the amenities of the neighbourhood as a whole but the owner and occupier of a house closely adjacent to the western boundary of the appellant's property does from time to time suffer some inconvenience and disturbance by way of noise emanating from the appellant's property on some of the occasions when functions are being held. This disturbance does not arise from the every-day use of the premises as a boarding house but only at times from its use for functions. The owner of the adjoining property bought it when the house thereon was in course of erection and he was well aware that the house was very close to the boundary and only some 16 feet distant from the dining-room wall of the appellant's property. The Board accepts his statement that when he bought he was aware of the fact that the premises were used as a boarding-house but he was not aware that functions were catered for as well.
3. It is a reasonable assumption that the additional dining-room space sought by the appellant if permitted would allow of her catering at functions for more guests than she can at present accommodate. The maximum number of guests she can cater for at present is estimated to be eighty. The additional floor space asked for added to the existing space would probably provide room for one hundred-and-twenty but the Board accepts her evidence that even with the additional floor space the other facilities available to her would not permit of her catering for more than one hundred. While the appellant could, if she had more space, cater for more guests than at present, it does not necessarily follow that the number of actual functions will increase.

In coming to a determination on the question at issue the Board cannot disregard the fact that even if the appeal were disallowed the appellant can continue to carry on her existing business as it is at present being carried on and consequently a decision adverse to the appellant can do nothing to abate any existing detraction from the amenities of the adjoining property.

If the appeal is allowed unconditionally there is a probability that there will be some further detraction from the amenities as they now are enjoyed by the adjoining owner, but it is considered that noise which is the main ground of complaint can be minimized by imposing conditions.

The Board allows the appeal and directs that the building permit applied for is to be issued to the appellant subject to the following conditions:

1. The appellant shall provide and maintain off-street car-parking facilities for thirty cars.
2. The appellant shall provide for insulation against noise along the western side of the existing dining-room and any permitted extension thereof.

Both conditions to be complied with to the satisfaction of the Council's borough engineer.

Appeal allowed on terms.

Gasparini *v.* Horowhenua County.

Town and Country Planning Appeal Board. Wellington. 1959. June 15, 19.

Zoning—Objection—Area Zoned "Residential"—Objector with Large Shed on Property formerly used for Terrazo factory—Zoning of Objector's Section as "Industrial" disallowed—Town and Country Planning Act 1953, s. 35.

Appeal by the owner of a property comprising Lots 24 and 25 on Deposited Plan 2298, each lot containing an area of 1 ro. 0.3 pp. This property fronted on to the State Highway, and it was in the area zoned "residential" under the respondent Council's proposed district scheme for the Waikanae area. The appellant acquired the property eight years ago. On one of the sections there was a large shed formerly operated by the appellant as a terrazo factory and his residence was on the adjoining section. The appellant carried on this business until 1956 when ill-health compelled him to cease operations. When the Council's proposed district scheme was publicly advertised, the appellant lodged an objection to the zoning of his property as "residential" and requested that it be zoned as "industrial". His objection was heard by the Council and disallowed. This appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman).

1. In evidence it was admitted by the appellant that his purpose in seeking to have this property rezoned for industrial use was not to enable him to carry on his former business but to allow of his selling it as an "industrial" site, he being of the opinion that it would command a higher value if it could be sold as an "industrial" site rather than a "residential" site.
2. The area in which this property is situated has been in the main subdivided into residential allotments. It is suitable for further residential development, and there is already a considerable amount of residential occupancy in this area, and the zoning as "residential" would be appropriate. To permit the creation of a small industrial spot zone in a residential area is contrary to town-and-country-planning principles.

In this case also having regard to the fact that the property fronts onto the State Highway zoning for industrial use would be also contrary to the town-and-country-planning principles that industrial sites should not so far as possible be sited fronting onto State or Main Highways. The appeal is disallowed.

Appeal dismissed.

Murton *v.* Horowhenua County.

Town and Country Planning Appeal Board. Wellington. 1959. June 15, 19.

Zoning—Area Zoned "Residential"—Two Sections with Residence and Garage Business thereon—Application for Same to be zoned "Commercial B" or "Industrial A"—Business not detracting from Amenities of Neighbourhood—Grant of Application likely to result in Future Carrying on Industrial or Commercial Business on Property detracting from Amenities of Neighbourhood—Town and Country Planning Act 1953, s. 23.

Appeal by the owner of a property comprising two sections fronting on to Te Moana Road, Waikanae Beach, on one of which was erected his residence and on the other a motor-repair garage. This property was in an area zoned as "residential" under the respondent Council's proposed district scheme. The appellant objected to this zoning, claiming that his property should be zoned either as "commercial B" or "industrial A". If it were zoned as "industrial A", the appellant could carry on his garage business as a predominant use. If it were zoned "commercial B" the business could be carried on as a conditional use. By virtue of the provisions of s. 36 of the Act, he could carry on and continue his business as it was then constituted as an existing use, but he wished to be free to expand his existing business or dispose of his property for either "industrial" or "commercial" uses.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The property is situated in an area predominantly residential both in character and occupancy. A residential zoning appears to be appropriate.

2. The Board is prepared to accept that the appellant's business, having regard to the construction and siting of the existing garage, does not at present unduly detract from the amenities of the neighbourhood but if the zoning were changed either to "industrial" or "commercial", the result would be that in future either the appellant, or any successor in title, would be entitled to carry on an "industrial" or "commercial" business on the property, and many commercial uses, and most industrial uses, would undoubtedly detract from the amenities of the neighbourhood.

The appeal is disallowed.

Appeal dismissed.

In re Boland.

Town and Country Planning Appeal Board. Napier. 1959. August 19.

Subdivision—Area zoned "Rural"—Proposed Subdivision into Building Sites—Land adjacent to Isolated Pocket of Residential Development—Undesirable Urban Development—Town and Country Planning Regulations 1954, Reg. 35.

Application under s. 35 of the Act for consent to a specific departure from the provisions of the Hawke's Bay County Council's Operative District Scheme (No. 1).

The applicant was the owner of a property comprising 1 ac. 1 ro. 3.9 pp. more or less situate on Wharerangi Road near Napier, being all the land comprised in Certificates of Title, volume 99, folio 186, and volume 115, folio 159 (Hawke's Bay Registry). This property was in an area zoned as "rural" under the Council's operative district scheme. He applied for consent to the subdiv sion of this land into three residential sites.

Pursuant to the provisions of Reg. 35 of the Town and Country Planning Regulations 1954 he gave notice of his application to the Council which gave notice of its objection thereto.

The judgment of the Board was delivered by

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

1. The property under consideration is adjacent to an isolated pocket of residential development comprising some twenty-five dwellings, which came into being before the Council's scheme became operative.

   This type of development is contrary to town-and-country-planning principles. There are no shopping facilities, and no public water supply or sewerage are available. The settlement straddles a main highway in a rural area and is an example of undesirable urban development.

2. To grant the consent asked for would be tantamount to approving an extension of the existing undesirable development. Furthermore, on the evidence, the subsoil of the property under consideration is not suitable for septic-tank drainage on small areas.

The Board declines to consent to the application.

Consent refused.

Watkins *v.* Hastings City Corporation.

Town and Country Planning Appeal Board. Napier. 1959. June 24.

Subdivision—Area zoned "Residential"—Existing Use of Part Land for Haulage Business—Non-conforming Use—Application for Approval of Plan giving Access by Mutual Rights of Way to Land at Rear of Section to be subdivided for Residential Use—Plan approved—Town and Country Planning Act 1953, s. 38.

The appellant was the owner of a property within the City of Hastings having frontages to Ikanui Road and Frimley Avenue. This property was subdivided into four allotments, being part Lots 28, 29, and 30, Deposited Plan 3373, being part of the Heretaunga Block. This property was originally in the Hawke's Bay County but was absorbed into Hastings City consequent upon a change in boundaries. At the time that this change of boundaries took place, the land under consideration was part of an area covered by the Hawke's Bay County Council's operative district scheme. The Hastings City Council had at that time only an undisclosed district scheme. By virtue of the provisions of s. 20 (4) (a) of the Act, the Hawke's Bay County's operative district scheme was still in operation in regard to the appellant's property, and it was that scheme and not the respondent Council's undisclosed district scheme that must be looked to in relation to this appeal. Under that scheme the land was in an area zoned as "residential".

On part of the property the appellant had his residence fronting on to Ikanui Road, the land at the rear was used by him in connection with his business as a haulage contractor, and he housed trucks and plant on this land. This was a "non-conforming use", but the appellant was at liberty to carry it on as an "existing use". The appellant submitted to the Council for approval a plan for the subdivision of part of his property, Lot 30, which had a frontage on to Frimley Avenue, so as to provide access by way of mutual rights of way to the rest of his back land. He already had access to that back land by virtue of his ownership of that part of his land under consideration in this appeal. The Council refused to approve the plan of subdivision on the grounds that it would have the effect of prolonging the non-conforming use. The appellant appealed against this decision.

The judgment of the Board was delivered by

REID S.M. (Chairman). In view of the fact that this land is the subject of an operative district scheme there does not appear to be any way by which this appeal can be deemed to come under s. 38 of the Act—with the consent of counsel—and in order to dispose of the matter the Board proposes to deal with it as if it were an application under s. 35 of the Act—for a specific departure from the provisions of an operative district scheme.

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

1. The proposed subdivision is clearly the most effective means by which access can be given to rear lands zoned for residential use. In fact, this is conceded by the Council.
2. In view of the fact that whether this subdivisional plan is approved or not, the appellant can continue to gain access to his rear land either by way of the existing right of way over that portion of his land fronting on to Frimley Avenue, or by simply exercising his right of free passage over any part of that land.
3. It appears inevitable that in course of time the appellant will, on economic grounds alone, have to move his business to an industrial area because of the increasing value of his vacant land for residential use. The Board regards the subdivisional plan now under consideration as the first step in the ultimate development of the back land for its proper use as residential, and it can see no reason why the plan should not be approved. The appeal is allowed.

Appeal allowed.

(*Concluded on p. 336*).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Copyright Note.—In dismissing the motion of Randolph Churchill for injunction to restrain the Labour Party from infringing copyright of his book, *The Rise and Fall of Sir Anthony Eden*, by reproducing, publishing or distributing without his consent any substantial part of it in their pamphlet, *The Tory Swindle*, 1951-1959, until the trial of the action, Winn J. said he was not at all satisfied that the harm Mr Churchill suffered was of any kind other than injury to his feelings and possibly subjection to ridicule; for this reason, primarily, interlocutory relief would be refused: *Churchill* v. *Morgan Phillips* (10/9/59). Readers will recall that the plaintiff in October, 1956, took an action for libel against the editor and owners of *The People*, a Sunday paper with a circulation of between four and five millions, and succeeded in obtaining a verdict for £5,000. The newspaper had described him as "a paid hack, paid to write biased articles". Some years ago, he brought libel proceedings against several New Zealand papers, but his action was abandoned. A book, *What I Said about the Press*, containing a transcript of *The People* case was published in 1957 by the firm of Weidenfield & Nicholson, which has now published Nabokov's *Lolita*—a book, Scriblex understands, dealing with a different topic altogether.

Voters' Trifles.—The action of Sir Thomas Maltby, elected to represent Geelong in the Legislative Assembly of Victoria, in authorizing the giving of a number of boxes of matches, each containing about twenty, and each having an exhortation upon it to vote for the candidate, has been held not to amount to the giving of "any meat, drink, entertainment or provisions" or to statutory bribery within s. 244 (1) of the Constitution Act Amendment 1956. For the latter offence to be made out, it is necessary to show that there was (a) an intention to induce voting for the candidate, or to induce approval or gratitude towards the candidate, and thereby to influence electors to vote for him or to refrain from voting against him, and (b) an intention to produce those results by means of the gift as distinct from the advertisement on it. In view of the fact that the articles were of extremely small value, it was credible that the candidate's mind was directed only to the effect of the message and to the fact that the particular vehicle would be of such a nature as to cause the message to be retained and read on a number of occasions and perhaps shown to other people: *Woodward* v. *Maltby* [1959] V.R. 794. The nearest approach to this situation in respect of an election petition is probably the Eden Petition of 1923 when Sir James Parr took no exception to the ladies of his electorate consuming strawberries and cream in his spacious garden decked with party flags for the delectable occasion. He held his seat, as Mr Richard McCallum did some ten years earlier when, on the Wairau Petition, objectors considered that beer flowed rather to freely, and the candidate's brother had "shouted" electors rather more freely and noisily than usual. Less fortunate was Mr Richard Masters at Stratford in 1920 when his election was declared void because the evening before the General Elections his address at the local cinema was followed by free music and a picture show. The report does not say whether the entertainment was provided by Charlie Chaplin, Rudolph Valentino, or Shirley Temple; but it is clear that the candidate would have been better off had he been as silent as the film.

The Angry Cross-examiner.—The spectacle recently of an angry young man (provoked by an unfavourable reply from a witness) indulging in an unimpressive display of histrionics reminded Scriblex of the incident when Sir James Scarlett (afterwards Lord Abinger) lost his temper with one Tom Cooke, actor and musician, who had been called as an expert witness. "Now, pray sir", he said, "don't beat about the bush, but explain to his Lordship, and the jury, who are expected to know nothing about music, the meaning of what you call accent". Cooke replied: "Accent in music is a certain stress laid upon a particular note in the same way that you would lay a stress upon a particular word for the purpose of being better understood". Thus, if I were to say, "You are an *ass*", the accent rests on "ass"; but if I were to say, "*You* are an ass", it rests on *you*, Sir James. The laughter was loud, the counsel defeated.

The Doctor Regrets.—Scene: The hearing by the Trade Practices Commission of an inquiry into the Grocery Industry. Dr R. G. Hampton, Assistant Commissioner of Trade Practices and Prices, under cross-examination by Mr. Barker, secretary of the Master Grocers' Association: "Did you hear Mrs Baker say the public were more interested in services than in saving ½d. on a can of beans or some similar commodity?" "I will always regret that that was the one occasion during this hearing when I was absent." "I regret it, too. It was a momentous occasion in the hearing."

From My Notebook:

The *Law Society's Gazette* for September states that the Council of the English Law Society has decided that, where he has acted for a testator in drawing up a will which has become the subject of a dispute after the testator's death, a solicitor should make available a statement of his evidence regarding the execution of the will, and the circumstances surrounding it, to anyone who asks him for such a statement, whether or not the solicitor acts for those propounding the will.

In a report of *The Times* of September 4, Lord Parker L.C.J. is stated to have told his audience that he was expressing only private views and not speaking for the Judiciary; and, after referring to the ridiculous state of the law on capital punishment to have added, "Rather than permit this sort of confusion, I would rather see the death sentence abolished entirely". Incidentally, as the law now stands in England, a man who shoots a woman can be hanged but not if he kills her by stabbing.

Tailpiece:

According to Peterborough in the *Daily Telegraph*, the following is a question on a form sent by an insurance company to a Yorkshire doctor: "From what date was the patient confined to bed and totally incapacitated by your instructions?".

TOWN AND COUNTRY PLANNING APPEALS.

(*Concluded from p. 334.*)

Joyce *v.* Mount Albert Borough.

Town and Country Planning Appeal Board. Auckland. 1959. August 19.

Zoning—Area zoned "Residential"—Objection that Land owned by objector should be zoned "Industrial B"—Land Unsuitable for Residential Use—Area re-zoned "Industrial B (1)" Subject to imposition of Conditions—Town and Country Planning Act 1953, s. 23 (1).

Appeal by the owner of a parcel of land situated at the corner of Gordon and Sainsbury Roads in the Borough of Mt. Albert containing 2 ac. 3 ro. 11.57 pp. more or less, being parts of Lots 94, 95, 96, and 97 on the Deposited Plan 384 and parts Lots 3, 4, 5, and 6 on Deposited Plan 4880, being parts of Allotments 169 and 170 of Section 10 of the suburbs of Auckland. This property was in an area zoned as "residential" under the respondent Council's proposed district scheme. The appellant lodged an objection to this scheme claiming that his land should be zoned as "industrial B". This objection was disallowed and his appeal followed.

This property had already been considered by the Board in an appeal No. 34-56, which was lodged in October, 1956, against the refusal of the Council to zone this land for light industrial purposes. This appeal was partly heard by the Board on February 20, 1957, and was adjourned sine die. The Board intimated in an interim decision as follows:

1. That it would not, as a matter of principle, direct a re-zoning of land while the town-planning scheme was still undisclosed.
2. That had the appeal been by way of appeal against refusal of the Council to grant a building permit, the appeal would, in all probability, have been allowed.
3. That in view of the information before it the Board considered that the land was unsuitable for residential purposes and would be more appropriately used for light industrial purposes subject to such restrictions as the Council might impose as to the type of building to be erected and the user thereof.

At this point of time the appellant had a prospective purchaser of the land who wished to carry on a light industrial undertaking on it. It appeared, however, that this prospective sale fell through and accordingly, no final decision by the Board on that appeal was asked for.

The judgment of the Board was delivered by

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

1. On the evidence adduced on the hearing of the previous appeal and on inspection made at that time and the evidence adduced at the hearing of this present appeal, the Board sees no grounds for departing from its previous view that the land in question is unsuitable for residential use and would be more appropriately used for light industrial purposes, subject to appropriate conditions and restrictions.
2. It is not prepared to consider zoning this land as either "industrial A" or "industrial B", as to do so would permit of its use for a wide range of industries that could detract from the amenities of the neighbourhood. It is correct that this property is surrounded by residential properties, but, by nature of its situation and configuration, it is not suitable for residential development and the question at issue narrows down to the proposition of whether this land should remain idle and unoccupied or whether, on economic grounds, it would not be better to permit of its use for some appropriate form of light industry. The respondent Borough's proposed scheme makes provision for an "industrial B (1)" zoning, which is a conditional use only. The Board takes the view that "industrial B (1)" zoning would be appropriate for this particular property because such zoning would permit of the Council imposing conditions both as to the type of building that should be permitted to be erected and the type of industry that should be permitted. The Board is satisfied that the Council would, in imposing conditions, ensure that such conditions would prohibit any class of industry which would tend to detract from the amenities of the neighbourhood.

The appeal is allowed in part. The property in question is to be re-zoned as "industrial B (1)".

Appeal allowed in part.

In re Buchanan's (Flour Mills) Ltd.

Town and Country Planning Appeal Board. Ashburton. 1959. July 20.

Extension of Buildings—Flour Mill—Existing Buildings "Conditional Use" in Area Zoned "Industrial B"—Increase of Coverage Sought Four per cent. bringing Total Coverage to Twenty-two per cent.—Specified Departure from Operative District Scheme allowed Under Conditions—Town and Country Planning Act 1953, s. 35.

The applicant was the owner of a property situate on the corner of Kermode Street and West Street in the Borough of Ashburton and it had carried on the business of flour milling on this site for over fifty years. This property was in an area zoned "Industrial B". Under the standard code of ordinances flour milling was a predominant use in "Industrial C" zones only.

Following on an objection by the applicant when the Council's district scheme was publicly notified as to the zoning of its property, the Council, in order to meet the factual situation, created by the existence of the company's long-established business, amended its Code of Ordinances by providing for a special "conditional use" in its "Industrial B" zone limited to the applicant company's property and business.

The applicant applied to the Council for permission to erect an extension to its existing building so as to provide for office accommodation and staff amenities.

This proposed extension was to be a one-story brick building extending beyond the existing foundation lines on the north-eastern and south-eastern corners.

Under the Council's Code of Ordinances "Ordinance No. 9 Industrial B Zones—Bulk Location Requirements" the permitted building coverage was seventy-five per cent. of the site. The applicant's existing building covered 88.3 per cent. of the site and to grant the permit sought would increase the coverage by a further four per cent., making a total coverage of 92.3 per cent.

The respondent Council declined to grant a permit, but indicated that it would approve the erection of office accommodation subject to the building not extending beyond the extremities of the north-eastern and south-eastern existing foundation lines.

The applicant was not prepared to accept this proposal, and this appeal followed.

The judgment of the Board was delivered by

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

1. It is apparent that the applicant is urgently in need of extra office and staff-amenity space.
2. It was admitted in cross-examination by one of the company's witnesses that it would be possible to erect a two-storied block on that part of the site proposed by the Council but it was claimed that a two-storied building would not be so convenient to operate as a one-story building.

The Board considers that having regard to the already substantial excess of site coverage any increase of that coverage should be restricted so far as possible so as to preserve the already limited open-space area and the limited off-street loading space on the Kermode Street frontage.

The Board consents to a specific departure from the provisions of the respondent Council's operative district scheme by permitting the applicant to erect a two-storied brick building subject to the foundation line not extending beyond the extremities of the north-eastern and south-eastern existing foundation lines.

Appeal allowed.