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A NEW CONCEPT IN THE LAW OF NEGLIGENCE.

I.

SINCE the judgment of the majority of the Court of Appeal (North and Cleary JJ.) in *Heard* v. *New Zealand Forest Products Ltd.* [1960] N.Z.L.R. 329 breaks new ground and, if we may say so with respect, appears to run counter to very weighty authority, it is rather unfortunate that the defendant company, having filed a motion for leave to appeal to the Privy Council, subsequently saw fit to withdraw such motion. The case is of such novelty and importance that the review of the majority decision of the Court of Appeal by the Privy Council would have been of the greatest value to the profession.

The other member of the Court, Gresson P., delivered a long and carefully reasoned judgment which in itself is worthy of the closest study by all whose professional activities bring them into contact with the law of negligence, particularly as it affects the liability of the occupier of premises to his invitees and licensees in respect of damage suffered from unusual dangers existing on the premises. A subsidiary, but nonetheless important point dealt with in this judgment is the question whether, and to what extent, a plaintiff may be allowed to depart from the case set up by his pleadings, and produce arguments setting up liability on the part of the defendant on completely different grounds.

It is proposed to discuss this case at some length, and it is therefore desirable that the facts should first be set out in full.

The plaintiff, Heard, was the secretary-manager of a sawmilling company carrying on business in the Rotorua district. Between February 22 and 26, 1954, a conference was held at Rotorua to discuss means of promoting the production and sale of radiata-pine timber both in New Zealand and Australia. The conference was attended by a number of Australian delegates as well as those from New Zealand, and the plaintiff attended as the representative of his company. The defendant company was also represented.

On the afternoon of February 23, some of the conference delegates, including the plaintiff, visited the defendant company's plant and undertaking at Kinleith. They were divided up into parties of approximately twenty each, and each party was provided with a guide to show it round. The party which the plaintiff joined in due course reached the "chipper house", and in the course of its tour of inspection was required to cross that building. In so doing it was necessary to pass under an overhead conveyor-belt. It was common ground that, in the course of the company's operations, water and chips of bark escaped from the conveyor-belt and fell on to the floor of the chipper house, so that at times the floor was wet. On the occasion of the plaintiff's visit, there was a wet patch of floor with some chips of wood of varying sizes lying on it, the largest according to the plaintiff's evidence, being about the size of a penny. While crossing the chipper house, the plaintiff was looking up at the conveyor-belt and he slipped and fell, injuring himself. Although the matter did not carry much weight at the trial, it should be mentioned for completeness that the plaintiff already had a physical disability, one of his legs being shorter than the other by three or four inches, necessitating the wearing of a special boot. He claimed that this leg gave him no trouble, and that, apart from running, he could "do most things other men could do".

In view of the subsidiary point mentioned above, it is important to traverse the pleadings fairly fully. First, the plaintiff in his statement of claim alleged facts which, if proved, would have tended to show that he entered on the defendant company's premises in the character of an invitee. He then alleged the guided tour of the premises, the condition of the floor of the chipper house, and the accident which he suffered. Then followed the allegations of negligence on the part of the defendant company in the following terms:

"(a) It allowed the floor underneath the conveyor-belt to become slippery and dangerous.

(b) It failed to sand the floor under the conveyor-belt or otherwise render it safe to walk on.

(c) It failed to warn the plaintiff of the unusual danger constituted by the presence of water and chips on the said floor.

(d) It failed to take reasonable care for the safety of the delegates, including the plaintiff."

The important parts of the statement of defence admitted that delegates to the conference were permitted to inspect the defendant company's plant and undertaking, but denied the facts tending to show that the plaintiff was an invitee. It admitted the accident, but denied the allegations as to its cause, and alleged that the accident was solely due to the plaintiff's own negligence in the following respects:

"(a) Failing to remain with the defendant's employee engaged in showing the group around the premises.

(b) Failing to observe the water and chips (if any) on the floor.

(c) Walking through the area covered by such water and chips (if any) instead of avoiding it.

(d) Walking through the area covered by such water and chips (if any) without sufficient care."

Or alternatively that the plaintiff was guilty of contributory negligence in these same respects. There was a final plea of volenti in the following terms:

"That the plaintiff, who had a physical disability, voluntarily accepted such obvious risks as there were in inspecting the defendant's plant and factory, requiring ascending and descending stairways, and passing across areas which were necessarily wet underfoot; and the defendant accordingly pleads the doctrine *volenti non fit injuria*."

The issues put to the jury were lengthy, and are set out in full at p. 330 of the report. For the purposes of this article it is sufficient to summarize the jury's findings.

First, the jury found certain facts which still left in doubt the character in which the plaintiff visited the defendant company's premises. As the case developed, this question lost its significance. Then it found that the water and chips on the floor were a danger, the detailed relevant findings as to which were as follows:

(a) The defendant company knew or ought to have known of it.

(b) It was neither an unusual nor a concealed danger.

(c) It was obvious to the plaintiff.

(d) It caused or contributed to the plaintiff's accident.

The defendant company was found to have been negligent in allowing the floor to become slippery and dangerous, in failing to sand the floor, in failing to warn the plaintiff of the danger, and in failing to take care for the plaintiff's safety. The plaintiff was found not to have been negligent in failing to observe the water and chips on the floor, but negligence on his part was found, consisting in walking through that portion of the floor affected by water and chips without taking sufficient care, and the jury assessed the plaintiff's share of the responsibility for the accident at 50 per cent. It finally found that the plaintiff freely and voluntarily incurred the risk of a fall caused by the condition of the floor.

On these findings both parties moved for judgment, the plaintiff on the ground that the condition of the floor was due to the current operations of the defendant company in respect of which its duty was to use reasonable care to prevent injury to the plaintiff as a person lawfully on the premises, whether as invitee or licensee. The plaintiff sought to get round the finding of volenti on the grounds that the jury's answer in the circumstances does not absolve the defendant company from liability for its negligence, that the finding of contributory negligence necessarily included his negligence in voluntarily incurring the danger, and that the finding was only a ground for reduction of damages. Finally the motion contained the following additional ground for the entry of judgment for the plaintiff:

(d) That the defendant so acted as to induce the plaintiff to incur the danger while in a party conducted by the defendant's guide.

The defendant's motion was shortly on the grounds that:

(a) Whether the plaintiff were an invitee or a licensee, the findings of the jury did not entitle him to recover damages from the defendant company.

(b) The negligence found against the defendant company was not negligence committed in the course of carrying out a current operation.

(c) The finding of volenti was sufficient to bar the plaintiff's claim.

The trial of the action was held before Finlay J. and a common jury. The Judge had retired before he could hear the motions for judgment, and the action was therefore removed into the Court of Appeal for argument and adjudication on the motions.

In opening his argument, counsel for the plaintiff submitted with confidence that the jury's findings established that the plaintiff was an invitee, but he conceded that the findings that the danger was obvious and unconcealed prevented him from recovering damages as either an invitee or a licensee simpliciter. He therefore relied on the duty of the defendant company to carry on its activities without injury to those lawfully on the premises. He also attacked the effect of the finding of volenti on the ground that volenti was not an absolute bar to the recovery of damages unless the knowledge and consent of the plaintiff amounted to an agreement to bear all consequences himself, and to absolve the defendant from any duty to take care. When developing this argument, the Court suggested that what counsel was trying to do was to establish that the jury's answer on the question of volenti was not supported by the evidence, and the plaintiff was allowed to amend his motion by substituting the following for the first ground quoted above:

"That the evidence does not justify the finding on Issue 14."

Issue 14 was, of course, the issue dealing with the finding of volenti.

At a later stage in the argument, and, according to the notes which we have, in the course of his reply, counsel for the plaintiff made the further submission that, when the defendant company undertook to conduct the plaintiff around the plant and premises, a duty to take reasonable care arose under the principle of *Donoghue* v. *Stevenson* [1932] A.C. 562; [1932] All E.R. Rep. 1. Gresson P. records this submission at p. 342 of the report in the following terms:

"As a result of an observation from the Bench, counsel for the plaintiff put forward the contention that the conducting of the party of visitors by one of the defendant's employees was a business activity which imposed a general duty of care upon the principle of *Donoghue* v. *Stevenson* [1932] A.C. 562; [1932] All E.R. Rep. 1; that the answers by the jury could be used to establish negligence in that respect; and that the plaintiff was entitled to a verdict upon the basis of a "current operation", i.e., a conducting negligently performed; and he went even further and submitted that when the defendant undertook to conduct the plaintiff round the plant and premises he came under a general duty of care."

We shall later discuss whether the Court should have allowed this submission to be put forward having regard first to the pleadings and secondly to the grounds set out in the plaintiff's motion.

The stage is now set for a discussion of the judgments delivered, but this must be reserved for our next issue.

SUMMARY OF RECENT LAW.

ARBITRATION.

Award—Setting aside—Delay in making application—Not in itself a bar to making order—Arbitration Act 1908, ss. 11, 12. A discretion as to time such as that which has been applied in reference to ss. 11 and 12 of the Arbitration Act 1908, should not be confined to grounds which were either accepted or rejected in previous cases. Such cases may be considered as giving a general indication of the practice of the Courts, and to that extent are persuasive but not binding precedents. Where there has been delay in moving to set aside an award, prejudice suffered by the other party may be considered as a factor in determining whether or not the delay is reasonable or unreasonable. (*Inglewood County Council* v. *Controller and Auditor-General* [1922] G.L.R. 381, dissented from.) Where an award is manifestly unjust and wrong, the Court should not refuse to set it aside on the sole ground that there was delay in making the application. *Invercargill City Corporation* v. *Dick.* (S.C. Invercargill. 1960. June 2, 14. Henry J.)

Reference and stay of proceedings—Application by plaintiff—Issue of writ in itself evidence of unwillingness to submit to arbitration—No reference where claim and counterclaim partly within and partly outside arbitration clause. Where in the action the defendant brings a counterclaim to which the plaintiff has not pleaded, it is in the discretion of the Court whether or not to order that the matters in dispute should be referred to arbitration. Where a substantial part of the claim does not fall within the arbitration clause, a reference to arbitration coupled with a stay of proceedings should not be ordered, since it is preferable for the whole case to be heard before the same tribunal. (*Moyers* v. *Soady* (1886) 18 L.R. Ir. Ex. D. 499, followed.) *D. B. Waite Ltd.* v. *V.W. Motors (New Zealand) Ltd.* (S.C. Auckland. 1960. May 20; June 1. Hardie Boys J.)

CONTRACT.

Misrepresentation—Contract partly executed and partly executory—Rescission available if substantially executory—Rescission ordered if misrepresentation material and tended to induce plaintiff to contract—Rescission—Restitutio in integrum *not completely available—Court will order rescission if it can do substantial justice between parties.* The Court in the exercise of its equitable jurisdiction will not grant rescission of an executed contract on the ground of innocent misrepresentation, but where a contract for sale and purchase includes various types of assets such as a leasehold property, plant, and stock, the passing of the property in one asset to the purchaser does not necessarily result in the contract being regarded as executed if the property in the other assets included in the contract has not passed. The question in each case is whether the contract is still substantially executory. To entitle a purchaser to rescind a contract on the ground of innocent misrepresentation, it is not necessary to prove that the representation is fundamental and goes to the root of the contract. It is sufficient if the representation is material and tended to induce the plaintiff to enter into the contract. (*Redgrave* v. *Hurd* (1881) 20 Ch.D. 1, followed. *Kennedy* v. *The Panama, New Zealand and Australian Royal Mail Co. Ltd.* (1867) L.R. 2 Q.B. 580, and *Riddiford* v. *Warren* (1901) 20 N.Z.L.R 572, distinguished.) Where the contract in question relates to the sale of a business and includes stock-in-trade the property in which has passed to the plaintiff and which has been sold by the plaintiff and replaced by other stock in the ordinary course of business, the fact that the parties cannot be restored precisely to the state they were in before the contract is no bar to rescission. The Court is still in a position to do what is substantially just by ordering the plaintiff to account for the interim profits of the business, and also to order an adjustment between the parties in respect of any variation in the value of the stock. (*Spence* v. *Crawford* [1939] 3 All E.R. 271, applied.) *Root* v. *Badley.* (S.C. Wellington. 1960. March 16, 17; April 23; May 20. McGregor J.)

CRIMINAL LAW.

False pretences—Representations implied on the part of one countersigning and negotiating traveller's cheque—No need for evidence from issuing bank of reason for dishonour—Crimes Act 1908, s. 251. When a person negotiates a traveller's cheque after countersigning it he represents that he has the right and authority to countersign it and make it good and valid in the hands of the person by whom it is cashed. Only one person has the right to countersign, and, in effect, the negotiator is representing that he is that person. The falsity of the above representation may be proved without evidence from the bank issuing the cheque as to the dishonour of the cheque and the reason therefor. *R.* v. *Griffiths.* (C.A. Wellington. 1960. June 2; July 4. Gresson P. Cleary J. McGregor J.)

Sentence—Breach of probation—Eligibility of offender for corrective training to be judged at date of sentence for breach of probation and not at date of sentence for original offence—Criminal Justice Act 1954, ss. 11 (4), 21—Corrective training—Breach of probation—Eligibility of offender to be judged at date of sentence of corrective training and not at date of original offence—Criminal Justice Act 1954, ss. 11 (4), 21. Where an offender is brought before the Court for sentence for a breach of the terms of his probation his eligibility for a sentence of corrective training is to be judged by his age at the time when he so comes before the Court, and not at the time when he was sentenced to probation for his original offence. *R.* v. *Scoffin* [1930] 1 K.B. 741; *R.* v. *Clifford* [1939] 1 All E.R. 352 and *In re Martinovich* [1936] N.Z.L.R. 238: [1936] G.L.R. 107, followed. *In re Dixon* [1960] N.Z.L.R. 317, affirmed. *In re Dixon* (*No. 2*). (S.C. Auckland. 1960. February 15; June 21. T. A. Gresson J.)

DESTITUTE PERSONS.

1. Separation—Failure to maintain a deserting wife who has reasonable cause for living apart ground for separation order as well as maintenance order—Destitute Persons Act 1910 ss. *17(1)(a); 17 (7).—Failure to maintain depends on existence of duty to maintain—Destitute Persons Act 1910, s. 17 (1).* Where a statutory jurisdiction depends, as does the jurisdiction under ss. 17 and 18 of the Destitute Persons Act 1910, on the presentation of a complaint making a particular and specific allegation, any order made on a complaint which fails to make that particular allegation may well be void for lack of jurisdiction. Even synonyms should not be substituted for statutory words on which jurisdiction may depend. Although s. 17 (7) of the Destitute Persons Act 1910 confers on the Court an arbitrary discretion in the exercise of which the authorities governing the right of the wife to live apart may be disregarded, that discretion should not be exercised in an arbitrary manner, and the recognized legal standards should always be taken into account in deciding whether a wife has reasonable cause for living apart. Where reasonable cause for living apart is found to exist under s. 17 (7) so that the husband may be found guilty of failure to maintain under s. 17 (1) (a) a separation order as well as a maintenance order may be made. Dictum of Turner J. in *Rolfe* v. *Rolfe* [1959] N.Z.L.R. 1227, 1229 dissented from. The words " has failed to provide " is s. 17 (1) of the Destitute Persons Act 1910 mean something more than " has not provided", and a husband does not fail to provide maintenance unless he is under a duty to maintain. The word " failed " in itself imports an element of wrongful intention and the omission of the word " wilful " from the section makes no material difference. *King* v. *Wilson* [1960] N.Z.L.R. 272, dissented from in part. *Bulman* v. *Bulman* [1958] N.Z.L.R. 1097, affirmed. *Grieve* v. *Grieve.* (S.C. Christchurch. 1960. July 4. F. B. Adams J.)

2. Separation—Persistent cruelty—Mental ill-treatment may be coupled with physical ill-treatment—Principles to be applied—Destitute Persons Act 1910 ss. *17, 18.* Where a husband has an association with another woman which the wife has reasonable grounds to belive is adulterous, persistently refuses to break that association and insists on bringing the woman into the matrimonial home, such conduct may amount to mental ill-treatment which may be coupled with physical ill-treatment to found a charge of persistent cruelty which will support the granting of a separation order. *Crawford* v. *Crawford* [1955] 3 All E.R. 592 followed. Such an order dissolves the obligation to cohabit, and the question in each case is whether or not the circumstances reasonably require the dissolution of that obligation. *Gibbs* v. *Gibbs.* (S.C. Dunedin. 1960. June 27. Henry J.)

EVIDENCE.

Admissibility—Answer to leading question not inadmissible but to be regarded with suspicion. The fact that an important question is put to a witness in a leading form does not render the answer inadmissible, but such answer should be treated with reserve and suspicion. (*Moor* v. *Moor* [1954] 1 W.L.R. 927; [1954] 2 All E.R. 458, considered.) *See* PRACTICE—NEW TRIAL (*infra*).

Burden of proof—Does not pass on defendant merely because facts alleged by plaintiff are peculiarly within defendant's knowledge.

There is no wide general rule that, where the facts alleged by the plaintiff are peculiarly within the knowledge of the defendant, the defendant must begin. The rule is that, where a negative allegation is made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it. (Dictum of Bayley J. in *R.* v. *Turner* (1816) 5 M. & S. 205, 211; 105 E.R. 1026, 1028, applied.) *McBride* v. *Brown.* (S.C. Dunedin. 1960. May 16; June 1. Henry J.)

LIMITATION OF ACTION.

General—Debt payable on demand—Provision for payment of instalments pending demand—Time runs from date of demand—Limitation Act 1950, s. 4. Where money lent is repayable on demand without provision for any notice of demand, the debt is a present debt, and time begins to run under s. 4 of the Limitation Act 1950 as from the date of the loan. Where, however, the terms of the loan require certain instalments to be paid "pending demand", these words must mean "until some demand should be made", and the contract should be construed as intended by the parties that a notice of demand should be given and received as a pre-requisite to liability to repayment. In such a case time will not begin to run under the statute until the requisite notice has been given. (*Norton* v. *Ellam* (1837) 2 M. and W. 461; 150 E.R. 839, and *Jackson* v. *Ogg* (1859) Johns. 397; 70 E.R. 476, distinguished.) *Murphy* v. *Lawrence and Another.* (S.C. Auckland. 1960. February 24; May 24. Turner J.)

PATENT.

Process for which patent sought a biological or physiological invention—Not a bar to grant of patent. The fact that a process for which a patent is claimed is a biological or physiological invention is no bar to the grant of a patent, and if the process results in an improved vendible product it is a "manner of manufacture" and available for patenting provided that it has the necessary measure of novelty. (*National Research Corporation* v. *Commissioner of Patents* [1960] A.L.R. 114, followed.) *Swift and Co.* v. *Commissioner of Patents.* (S.C. Wellington. 1960. May 25; June 3. Barrowclough C.J.)

POLICE FORCE.

Retirement on medical grounds—Appeal tribunal has complete powers of determination—Not restricted to determining correctness of certification upon which requirement of retirement based—Police Act 1958, s. 28. Where a statute goes out of its way to give a right of appeal, an interpretation which tends to make the right more effective is more consonant with the "fair large and liberal construction and interpretation" required by s. 5 (j) of the Acts Interpretation Act 1924. The medical practitioners determining an appeal under s. 28 of the Police Act 1958 have complete and unfettered powers of determination (other than that power to impose conditions to be complied with by the Commissioner), and are not limited to determining the correctness or otherwise of the certification made pursuant to s. 28 (1) upon which the requirement to retire was based. *Sterritt* v. *Commissioner of Police.* (S.C. Christchurch. 1960. April 17; June 15. F. B. Adams J.)

PRACTICE.

Jurisdiction—Jurisdiction to order trial together of actions brought by separate plaintiffs against same defendant based on same facts. The Court's inherent jurisdiction to prevent abuse or oppression by means of its processes may be exercised to control the manner of trial of separate actions brought by different plaintiffs against the same defendant arising out of the same facts. Where all the issues in two such actions are identical except in relation to damages it is proper to order the actions to be tried together. (*Brady* v. *McDonald, Smyth* v. *McDonald* [1931] N.I. 157 and *Malone* v. *Great Northern Railway Co.*, [1931] I.R. 1, followed). *Clark* v. *Sutton; Christy* v. *Sutton.* (S.C. Gisborne. 1960. May 26; June 21. Shorland J.)

New trial—Jury assessing general damages under three heads—Amount assessed under only one such head excessive—New trial as to whole of general damages—Code of Civil Procedure R.279. If the jury when assessing general damages in an action for damages for personal injuries makes separate assessments under the headings of pain and suffering, loss of enjoyment of life and economic loss, and a new trial is ordered on the ground that the assessment under one of those headings is excessive on the evidence that was given at the trial, the whole of the general damages should be left to be determined by the new jury, and not only that portion of them which has been held to be excessive. *Quaere* whether, if there had been no evidence whatever to support the assessment under one of the headings, the jury's assessment under that heading could be disregarded and judgment entered only for the damages assessed under the remaining two headings. (*Lionel Barber and Co.* v. *Deutch Bank* [1919] A.C. 304 and *Stewart* v. *O'Brien* [1925] N.Z.L.R. 400, considered. *Gabrielsen* v. *Farmer.* (S.C. Wellington. 1960. May 30; June 14, 23. Barrowclough C.J.)

Right to begin—Defendant can be called on to begin only when burden of proof on whole case rests on him. Before a plaintiff in an action can require a defendant to begin he must show that, if no further evidence is called, he is entitled to judgment in terms of the prayer of the statement of claim. It is not sufficient to show that some issue or issues are not determined in the plaintiff's favour. He must show that the whole of the remedy claimed will flow from the admissions made. Where the allegations in the statement of claim impeach a sale of trust property from a *cestui que trust* to a trustee, the burden is cast on the trustee to show that the transaction should stand, and it may be in such a case that the defendant should begin; but where both trust property and property not subject to the trust are included in the subject-matter of the action so that, in order to succeed, the plaintiff must establish fraud in respect of the property not subject to the trust, the burden of proving that fraud rests on the plaintiff, and he should therefore begin on the whole case. *McBride* v. *Brown.* (S.C. Dunedin. May 16; June 1. Henry J.)

Trial—Actions tried together—Procedure—See PRACTICE JURISDICTION (*supra*).

Trial—Dispensing with setting down—Exigencies not restricted to procedural matters—Principles applicable—Code of Civil Procedure, R. 250A. The "exigencies" referred to in R. 250A of the Code of Civil Procedure are not limited to those of a procedural nature only, but relate to all the exigencies which may arise in regard to the particular case. Where an action relates to an alleged breach of contract but the effective rights of the plaintiff to cancel the contract depend upon an early trial of the action, the plaintiff should not be deprived of the opportunity of exercising those rights by procedural difficulties in connection with the setting down of the action for trial. *Bell and Another* v. *Ashton.* (S.C. Christchurch. 1960. June 10, 13. Richmond J.)

PUBLIC REVENUE.

Estate Duty—Superannuation scheme—Contribution by employer only—Benefit, on death of employee before retiring age, payable by trustees of fund "in their absolute and unfettered discretion" for the benefit of any one or more of deceased's dependants—such benefits, paid by trustees to son and daughter of deceased, not forming part of deceased's dutiable estate—Estate and Gift Duties Act 1955, s. 5 (1) (g). For many years before December 3, 1949, and thereafter continuously down to his death on May 25, 1957 the deceased was employed by a company. On December 3, 1949 by a deed entered into between the company, certain trustees and certain employees of the company (of whom the deceased was one) the company established a superannuation scheme for the benefit of certain of its employees. No contribution to the scheme was payable by any employee. Under the deed the company was to pay certain contributions in respect of each member to the trustees who were to use those contributions to provide the premiums ayable under certain insurance policies on the lives of the members in question. Provision was made for certain benefits on retirement, and, if a member died before retirement, the deed directed the trustees to pay the proceeds of the insurance policies on the life of the deceased member to his personal representatives, or, "in their absolute and unfettered discretion", to the dependants of that member whether or not application should have been made for Probate or Letters of Administration. Upon the death of the deceased, two sums, one of £1,000 and one of £2,177 12s. became payable to the trustees under the insurance policies referable to him, and the trustees paid such sums to the son and daughter of the deceased as his dependants. *Held:* That on the above facts it could not be said that in any sense the insurance policies were "purchased or provided" by the deceased who did no more than acquiesce in a trust towards the creation of which he is not shown to have done anything, which did not result from any contract with him, which imposed no liability upon him and which at any time might have been terminated by the employer. *Re J. Bibby and Sons Ltd.'s Pensions Trust Deed; Davies* v. *Inland Revenue Commissioner* [1952] 2 All E.R. 483, followed. *Commissioner of Inland Revenue* v. *Burt and Another.* (C.A. Wellington. 1960. June 16. Gresson P. Cleary J. Hutchison J.)

SOME MEDICO-LEGAL ASPECTS OF EPILEPSY*

Epilepsy is one of the commonest major medical problems. Approximately one in two hundred persons suffers from epilepsy in some form at some time during his life. As the disorder may be hereditary, as it may result from injury to the brain and as prominent features commonly associated with the epileptic seizures are sudden loss of consciousness without warning and abnormal behaviour during and after the attack, it is inevitable that the law must interest itself in epilepsy and the epileptic.

I begin with a brief discussion of the more important manifestations of epilepsy, its fundamental nature and its causes. During this time I will ask the medical members of the Society to bear with me and when, during the second part of the discussion I indicate some of the ways in which the law interests itself in the epileptic I would ask for the forbearance of the legal members.

Difficult Definitions.

I should begin with definition of epilepsy. Neurologists have sought this definition for the last hundred years and, in spite of many attempts, no really satisfactory definition of epilepsy which is in accordance with all the known facts has been found. This difficulty is not necessarily apparent to the layman, who, in response to the word epilepsy pictures the grand mal or major seizure. In this the patient gives a hoarse cry, falls like a log to the ground, shakes convulsively, goes blue and froths at the mouth. But this is only one form of epilepsy though perhaps the commonest. Increasing knowledge of the protean manifestations of this disorder and of its causes and accompaniments has made an all-embracing definition so far impossible. This I shall illustrate shortly. The lack of an exact medical definition has obvious implications when the word is used in a legal statute. Any legal provisions must necessarily depend on a medical opinion whether epilepsy is the proper diagnosis in a given case. This is recognized in the law relating to epilepsy in the State of New York, where an epileptic is defined as "a person suffering from epilepsy as defined in medical practice".

Nature of Abnormality.

As I cannot define epilepsy I will describe briefly the nature of the essential abnormality and seek to indicate the difficulty. The epileptic attack is a transient disturbance of the proper working of the brain, or part of the brain. The brain is composed of a multitude of nerve cells each consisting of a cell body, the diameter of the largest of which is approximately 1/250th of an inch. From this cell body project a number of fine strands or nerve fibres the diameter of which is of the order of 1/5000th of an inch. These strands or nerve fibres establish contact with other cells which are in turn similarly related to others. As each cell body may give off a number of nerve fibres, and as nerve fibres may branch repeatedly, the complexity of the intercommunication and relations of the millions of nerve cells composing the central nervous system defies description or imagination. In comparison, the vaunted electronic brain of today is a nursery toy.

Signals or nerve impulses pass along the nerve fibres with the speed of an express train. Each signal consists of a minute electrical charge which passes down the nerve fibre and is capable of exciting the nerve cell at which it arrives to send a signal down its nerve fibres in turn. As far as we know such minute electrical signals, channelled through this inconceivably complex relay system, constitute the physical basis of all nervous activity and are responsible for all movement, feeling, sight, hearing, speech and thought.

Modern advances in electronic technique and amplification enable us to detect, measure and investigate the electrical changes accompanying the activity of the central nervous system. One such instrument is the electroencephalogram which contains amplifiers sufficiently powerful to detect and measure the minute electrical currents generated in the brain after they have passed through the skull and scalp, by placing electrodes on the patient's head. In the normal person it is found that electrical discharges are present throughout life, the pattern of which is fairly constant from person to person in given circumstances but varies according to whether the patient is asleep or awake and whether his mind is active or at rest. It is altered by the administration of various drugs and by a number of disease states. The electroencephalogram has revealed what is probably the common and essential underlying abnormality in the epileptic attack. During the attack the normal pattern of the electrical activity of the brain is interrupted by an abnormal electrical discharge which indicates an abnormal and disorderly discharge from a group of nerve cells. This is the fundamental abnormality and the only characteristic which in our present state of knowledge is thought to be common to all forms of the epileptic attack. The outward manifestation of such an abnormal and disorderly discharge of a group of nerve cells depends on which group of nerve cells in the brain is involved and whether the abnormal discharge spreads to other parts of the brain or not.

In the grand mal or major seizure the initial discharge spreads rapidly and apparently involves all the nerve cells in the brain. All the nerve cells which send their nerve fibres to the muscles of the limbs and trunk discharge signals which cause a disorderly contraction of all the muscles in the body at once, and this results in the convulsion. The nerve cells in the brain which send their signals to the salivary glands cause the glands to discharge saliva into the mouth, resulting in frothing, and impulses to the bladder may cause the bladder to contract causing the passage of urine. Consciousness is of course lost, but no doubt could the patient describe sensation during a major seizure he would report extraordinary disturbances of vision and hearing, smell and taste and abnormal sensations from all parts of the body, as those nerve cells concerned with these functions discharge.

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* Address given to the Auckland Medico-Legal Society by Dr Gavin Glasgow, M.R.C.P., M.R.A.C.P. (Auckland). By courtesy of the *New Zealand Medical Journal*.

Variety of Forms.

If the abnormal and disorderly discharge of nerve cells does not spread but is confined to a group of nerve cells with a particular function, the resulting outward manifestation may take an almost infinite variety of forms according to which group of nerve cells is involved. For example if a group of nerve cells concerned in activating the muscles of the right arm discharge in this way there will be a twitching of the right arm. If the cells are concerned in detecting touch sensation from the left hand the patient will experience pins and needles in the left hand. In the same way the patient may experience a flashing light, a disgusting smell or taste, a peculiar sensation in the abdomen, a convulsive movement in any part of the body or a disturbance of speech. An epileptic discharge confined to certain other parts of the brain may give much more bizarre effects. There may be formed visual or auditory hallucinations, disturbances of thought and profound disturbance of the emotions. Examples of this sort of thing from my recent experience are: During his epileptic attacks a young man found the name Maria von Lukendon running through his mind repeatedly. He had never heard of any such person. A 28-year-old woman found herself dressing dolls in the house of a certain Mrs Laird. She had not been in Mrs Laird's house since the age of four. A 16-year-old youth always found himself contemplating a fairy castle set on a low hill which was surrounded by a softly glowing radiance. He was overwhelmed by a feeling of restful bliss. A middle-aged man always heard a baritone singing, "The Overlander Trail". And a young woman found herself seized with indescribable horror because there was something behind her which was evil. She believed it was the devil and it would jump on her shoulders just as she lost consciousness.

Such descriptions could probably be continued indefinitely, as they seem to depend not only upon which part of the brain is involved, but also on the content of memory and experience which is mysteriously stored in those nerve cells which are affected, the content of which is an individual matter. Such episodes were not recognized as epileptic for many years and still might escape accurate diagnosis were they not brief, unprovoked, repeated, stereotyped and abnormal experiences. If it can be shown that any brief, unprovoked, repeated, stereotyped, abnormal experience is accompanied by an abnormal, disorderly, transient electrical discharge in the brain it is epileptic in nature. You can therefore see that the only all-embracing definition of epilepsy must concern itself with the underlying abnormal discharge of nerve cells. It is of considerable interest that Dr Hughlings Jackson, the brilliant pioneer of modern neurology, defined epilepsy as an occasional sudden, brief, abnormal, excessive discharge of grey matter. This definition was offered in 1873 when nothing was known of the electrical activity of the brain.

Causes Various.

The causes of epilepsy are as various as its manigestations. Any insult to the brain may render it liable to misbehave from time to time in this way. Changes in the blood supply to the brain, the composition of this blood supply, infections, tumours and injuries are all relatively common causes. In the majority of epileptic patients, however, a complete medical investigation during life and an examination of the brain after death shows no structural deviation from normal. To cloak our ignorance we refer to this kind of epilepsy as "idiopathic" with the untenable implication that there is in fact, no cause. We really mean that there is no structural or chemical abnormality of the brain that we can detect in our present state of knowledge, but there can be no doubt that future research will elucidate the problem.

Of these patients in whom no cause can be found about 20 per cent. will be found to be closely related to one or more other epileptics. I say closely related advisedly, because if one in two hundred of the population is affected, none of us will have to go back many generations before we find that we, too, have a family history of epilepsy. There is no doubt, however, that hereditary factors are important in many instances. Uninformed recognition of this fact has been taken by the law in a number of States in the United States of America. In seventeen such States marriage is forbidden the epileptic and any marriage contract is void. In six States not only is such a marriage void but to marry constitutes an actual crime. Such laws were framed at the beginning of the century and current thought at that time is illustrated by the view of the Court in Connecticutt in 1905 in *Gould and Gould*, an action for annulment of marriage. The view of the Court was, "that epilepsy is a disease of a peculiarly serious and revolting character tending to weaken mental force and often descending from parent to child or entailing on the offspring of the sufferer some other grave form of nervous disease, is a matter of common knowledge of which the Courts will take judicial notice. One mode of guarding against the perpetuation of epilepsy obviously is to forbid sexual intercourse with those affected by it and preclude such opportunities for sexual intercourse as marriage furnishes". This opinion was as ill-informed as it was ineptly phrased Modern surveys show that only one in forty of the children of an epileptic and a normal person will develop the disorder. Conversely only one epileptic in twenty-five has a parent similarly afflicted. There is, in my view, no adequate reason for advising against marriage between an epileptic and a normal person with no family history of epilepsy. If there is epilepsy, or a family history of epilepsy in both partners, this is another matter, as one in four approximately of the children are likely to be affected.

Head Injuries.

The common cause of epilepsy with medico-legal implications is head injury. In this connection injuries to the head must be divided into two distinct groups. On the one hand is the injury which results only in bruising or laceration of the scalp together, perhaps, with a crack in the bony skull but no displacement of the bony fragments. Such injuries are referred to as closed, or blunt, head injuries. On the other hand is the injury in which there is penetration of the skull by a sharp object and often penetration of the fibrous covering of the brain and of the brain itself. We have ample information about the incidence of epilepsy following penetrating wounds of the head, obtained from the gun-shot wounds of the two World Wars. A review by Ritchie Russell of 1,166 cases from World War II followed up five years after the injury, showed that 43 per cent. had developed epilepsy. This is in spite of having had the benfit of modern neurosurgery. There is no doubt that other patients in this group developed epilepsy for the first time after this survey

LEGAL ANNOUNCEMENTS

Continued from page i.

An opportunity exists in a Hamilton practice for a clerk to specialize in conveyancing. Applications are invited from those who have recently qualified, but age or absence of qualifications are not necessarily objections, and the duties can be formulated to suit the successful applicant. All applications will be treated as confidential. Apply to :—

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was made five years after the injury, and Ritchie Russell considers that the over-all incidence of epilepsy following penetrating wounds of the head approaches 50 per cent. Such injuries are relatively uncommon in civil life and the main medico-legal problem concerns the incidence of epilepsy following a closed head injury.

Information on this matter is much less plentiful. One of the best surveys was made by Rowbotham in 1956, who traced 430 of 1,000 patients seen at a hospital in Manchester after a closed head injury. Of these patients, eleven had developed epilepsy in the subsequent five years. This is $2\frac{1}{2}$ per cent. Similar figures are given by Ebaugh and Benjamin in *Trauma and Disease*, where they say that 2 per cent. to 3 per cent. of their patients suffering closed head injuries have developed epilepsy subsequently. A similar survey was made by Mr David Robertson at the Auckland Hospital, and he found that 2 per cent. of the patients that he was able to trace had developed epilepsy. We may accept the figure of 2 per cent. as the general incidence of epilepsy following closed head injuries such as are so frequently sustained in car accidents and industrial injuries.

It seems to me that this possible complication of a head injury is viewed with pleasure by the solicitor for the plaintiff, and with alarm and despondency by the defendant. It merits some closer examination. The first difficulty is to decide the degree of the severity of head injury that places the patient in this category. No guidance in this matter can be obtained from the published reports. There are of course all degrees of severity of closed head injury, from the bump that produces a single curse, to that which causes unconsciousness for two or three months. Somewhere between these two extremes should be fixed an arbitrary dividing line to define the degree of severity of injury which carries this possible complication. The best simple measure of the degree of severity of a head injury is the duration of the associated amnesia, and it is suggested, after discussion with medical colleagues interested in this matter, that a traumatic amnesia of one hour might be used as the measure of the degree of severity of the injury which places the patient in this category. Such a dividing line has, of course, no scientific foundation, but it has been used as a convenient division between injuries to be classified as slight, and those described as moderate.

Post-traumatic Incidence.

If your client falls into this category what then are the implications for his future In the first place, of all those patients who are going to develop post-traumatic epilepsy, Ritchie Russell's survey shows that 54 per cent. will have had their first fit by the end of six months. By the end of one year 76 per cent. have begun to have fits and at the end of two years 90 per cent. have had their first attack. And so if you settle your case at the end of one year the 2 per cent. chance is diminished to 24 per cent. of 2 per cent., i.e., $\frac{1}{2}$ per cent and at the end of two years to 10 per cent. of 2 per cent., i.e. 1/5 per cent. Now supposing the worst happens and he gets fits. Ritchie Russell, in discussing epilepsy following penetrating head wounds, states that " although the incidence of post-traumatic epilepsy is so high, the actual fits in most cases are so infrequent and so easily controlled by anti-convulsant drugs that post-traumatic epilepsy is seldom, in our experience, a serious disability ". In assessing the prognosis in post-traumatic epilepsy, Earl Walker followed 212 patients who had suffered from post-traumatic epilepsy for ten years. At the end of ten years, 46 per cent had had no fits for more than two years, 35 per cent. had had none for five years and 14 per cent. had only one or two a year. In only 5 per cent. of these patients suffering from post-traumatic epilepsy, was the epilepsy a disabling problem.

In other words, if a patient falls into this category of a 2 per cent. liability to epilepsy following a closed head injury, the liability falls to something considerably less than $\frac{1}{2}$ per cent. by the time that the average case is settled, and of that small number only a very small fraction will, with modern treatment, have any serious disability. I think that the possibility of post-traumatic epilepsy following the average civil injury has possibly been causing us too much concern.

If your client does develop epilepsy he will face the two common problems which beset all epileptics. He may have difficulty in keeping his job or finding suitable employment, and he will be debarred from driving a car. The attitude of employers in this city [Auckland] towards the employment of epileptics is improving thanks largely to the efforts of the New Zealand Branch of the British Epilepsy Association, but many employers refuse to keep an epileptic even in a suitable job which does not involve working at heights or the use of dangerous machinery or chemicals, on the grounds that should he have a fit and injure himself during the course of his work, the employer mayfind himself liable for compensation. I have personal experience of a number of instances of this attitude in discussing the employment of some of my patients with their employers. I will be interested to hear whether this is in fact correct in law. If it is, it might be advantageous to the epileptic if the employer could in some way contract out of liability for any injuries incurred in working hours, in consequence of an epileptic attack.

Epiletics and Car-driving.

When a person develops epilepsy for the first time in adult life he may find that one of the most serious inconveniences is that he may not drive a car. This may lead to loss of livelihood, may be a serious inconvenience or merely a constant source of annoyance and another burden to bear. There is in my mind, however, no doubt that those liable to epileptic attacks of any kind must not drive a powered vehicle. In three-and-a-half years of practice in Auckland I have come across no less than twelve car accidents caused by epileptic attacks. Surprisingly, all have been minor incidents and no one has been hurt. In the great majority of cases the driver has been unaware that the two or three blackouts that he has had in the preceding months were epileptic in nature. In the *British Medical Journal*, Hierons has described his investigation into this problem in London and cites a number of alarming incidents in train drivers, bus drivers and heavy-transport drivers. I saw several London bus drivers who continued to drive in spite of epileptic attacks when I was working at Guy's Hospital, and indeed I began to think that epilepsy was an occupational hazard of working for London Transport. In applying for a licence to drive, the applicant is required to state that he does not suffer from epilepsy or various other kinds of attacks, and this takes care of the situation at this stage as far as is practicable. When a patient is seen who has

developed epilepsy and holds a driving licence, he is urged not to drive, but it is only under very special circumstances that his doctor could take any further steps to see that this instruction is carried out. The main difficulty arises when a patient who has had epileptic attacks in the past, but has been free for some time, wants to resume his driving. In a correspondence with the Commissioner of Transport on this subject I could get no clear answer whether or not any legal provision has been made in this matter. The Commissioner implied that it is entirely at the discretion of the doctor as to when the patient who has had epileptic attacks may resume driving. He enclosed a copy of a report of a Committee of the British Medical Association which reported on this matter to the New Zealand Road Safety Council some time back. It was the Committee's opinion that an inflexible rule debarring epileptics from driving permanently was unduly harsh. Such a law may well prevent some people from declaring that they do in fact suffer from epilepsy, and it was the opinion of the Committee that a patient who has had epileptic attacks may be permitted to drive after he has been free from all fits for two years, provided that he is under regular medical supervision and undertakes to carry out meticulously the instructions of his doctor. He should also agree to continue under medical supervision while the licence is operative. The Committee stated further that "clearly, sufferers from epilepsy should not drive commercial vehicles or any form of public transport".

With these views I agree and I presume that the Commissioner of Transport also subscribes to them. As far as I can make out, however, these recommendations have no actual legal recognition. I feel myself that although it is perfectly proper under these circumstances to permit a person to drive a private vehicle, provided that he continues under medical supervision and remains free from attacks, the doctor's responsibility in this matter is rather too great.

I consider that the holder of a driver's licence who develops epilepsy should be required to surrender his licence forthwith, and declare the reason for its surrender. He should not re-apply for his licence until two years have elapsed, and his application would have to be supported by a medical certificate. A provisional licence should be issued which would be subject to review at intervals of six months for the next three years. In this way the patient would, so to speak, declare his epilepsy and the doctor's responsibility would be shared. I do not think that allowing patients who have been free of all attacks for two years to drive again, provided that they keep under medical supervision, imposes any more risk on the general public than is ever present from drivers who have disease of the coronary arteries or diabetes treated with insulin.

Defence in Law.

And now for some comments on epilepsy as a defence against a criminal charge. Such a defence may take two forms. It may be claimed that the offence was committed while the defendant was actually suffering from an epileptic attack, or it may be claimed that the state of the defendant's mind is such in consequence of suffering from epileptic attacks, that he is not responsible for his actions. From the medical point of view the second defence is in general a bad one. It is based on a cherished misconception dating back to unenlightened times, when epilepsy was viewed with awe and distaste, and it was held that a common sequel of repeated epileptic attacks was mental and moral degradation. We now know that this is rarely if ever the case. Mental and moral degradation may occur in an epileptic but if it does it is one symptom of an underlying disease of the brain of which epilepsy is another. In other words there are progressive diseases of the brain which result in epilepsy and mental deterioration, but mental deterioration is not to be regarded as a symptom of epilepsy. The defence, then, in this connection should be based on the mental state of the patient and his epilepsy should be regarded as further evidence of some serious underlying brain disorder and in considering such a defence the M'Naghten Rules (s. 43 of the Crimes Act) would presumably apply.

Of more interest is the defence that the crime was committed in consequence of an epileptic attack. It was laid down as a principle by the learned Judge in *Rex* v. *Perry* (1919) Cr. App. R. that for such a defence to be valid an epileptic attack must be present at the time that the alleged crime is committed. From the medical point of view one might cavil at this opinion as imprecise. The underlying abnormality of the epileptic attack is the abnormal and disorderly discharge of some or all of the nerve cells of the brain. This constitutes the attack proper, and the discharge rarely lasts for longer than two minutes. During this time something is happening to the patient which is quite beyond his control and I have never seen or heard of any kind of epileptic seizure in which it seems possible or likely that a crime could be committed. After the attack proper is over, however, immediate recovery may not take place. The patient's mind remains confused, though he has regained control of his body, and during this time abnormal behaviour of one kind or another, which may be violent, may occur. The electroencephalogram may be very abnormal during this phase though no actual epileptic discharges are present. When he recovers the patient will have no memory whatsoever of this interval which may extend for from several minutes up to half-an-hour or even, occasionally, longer. It is during this state of post-epileptic confusion induced by the actual epileptic attack, which is now over, that behaviour which might lead to a criminal charge may occur. Medically this is the sequel of an epileptic attack rather than the attack itself.

Such abnormal behaviour with amnesia may occur following the common grand-mal attack. It is relatively more common, however, after a focal epileptic discharge from one or other temporal lobe of the brain. The outward manifestation of the actual epileptic discharge from the temporal lobe may take many forms. In a common variety it begins when the patient experiences the hallucination of an unpleasant smell which is followed by loss of awareness. He is quite oblivious of his surroundings and usually sits or stands quite still. He will make swallowing and mouthing movements, dribble, and probably go slightly blue. This phase may last a few seconds or up to a minute, and may be followed by a variable period of abnormal behaviour of which he will have no recollection. Some examples of this sort of thing from my practice have been: A middle-aged man who following such an attack always took off his pants. After he had done this three times in a London bus the police became

interested. In this state of confusion a young man would go and peer in the windows of the neighbour's house and was threatened with prosecution as a peeping Tom. One young woman has not infrequently found herself with a pile of vegetables when she comes round from an attack. These have been taken from the neighbour's vegetable plot. On two occasions a middle-aged woman found on coming round from her attack that her shopping basket contained a number of articles for which she had not paid. All these episodes might have led to prosecution. It may well be that they represent anti-social tendencies to which the patient is prone, but which in normal circumstances he is able to control, and which come to light with confusion of mind and impaired reasoning powers and moral sense.

Automatism.

The defence that an alleged crime was committed in a state of post-epileptic confusion is called automatism. So-called automatism may arise from several other causes, such as following a head injury, sleep walking, and taking drugs and alcohol. It is held that the defendant was temporarily deprived of his reasoning powers and moral sense, and that his mind was confused at the material time. In consequence, guilty intent, a necessary ingredient of most crimes, was absent. It is claimed that he cannot, therefore, be held responsible for his actions.

I have looked up some of the law in connection with automatism. It is clearly a complex problem and its legal implications have not necessarily reached final stability. The whole situation has been fully reviewed in 1958 in a case before the Court of Appeal in this country, *R.* v. *Cottle* [1958] N.Z.L.R. 999. The appellant had been convicted for breaking and entering a warehouse, and his defence had been that this took place during a period of automatism following an epileptic seizure, to which he was known to be liable. One of the grounds of appeal concerned a misdirection of the jury by the Judge in connection with this defence.

The appeal for a new trial was granted on other grounds, but the Court took the opportunity of reviewing the whole question of automatism as a defence.

Mr Justice Gresson P. observed that, "there is much difference of opinion on this topic, and such decisions as there are, in England or elsewhere, are difficult to reconcile". Automatism is defined in the *Concise Oxford Dictionary* as, "the quality of being automatic or of acting mechanically only; involuntary action". Mr Justice Gresson defined it in connection with the law as, "conduct of which the doer is not conscious—in short, something done without knowledge of it, and without memory afterwards of having done it—a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements". And again as, "action without any knowledge of action, or action with no consciousness of doing what was being done".

It was held by the Court that, where such a defence is raised, the onus of proving automatism does not lie on the defendant. It was held that the prosecution must not only prove that the alleged criminal act was carried out by the defendant, but also that he had formed the necessary guilty intent. The defendant must provide the evidence on which the defence of automatism is based and Mr Justice North stated that, "the only onus that rests on the prisoner is the particular burden of providing some evidence in support of the plea". A clear distinction was therefore made between the defence of automatism and the defence of insanity. Where the defence of insanity is raised it lies on the defendant to prove that, for this reason, he was incapable of forming a guilty intent.

One of the grounds for appeal in this case was that the trial Judge regarded the defence of automatism as that of temporary insanity, and considered that it should be dealt with under the appropriate section of the Crimes Act. He therefore directed the jury that the onus of proof was on the defendant.

It was held by the Court that where the defence of automatism is raised, it does not preclude the consideration of the defence under the section of the Crimes Act dealing with insanity. Where it appears in evidence that the automatism is a symptom of a "disease of the mind" the Judge may direct the jury to consider whether the prisoner should be considered insane. In which case, of course, he may receive a conditional acquittal, "not guilty but insane" and be detained at the Queen's pleasure. Where, however, automatism is put forward as a defence, and a proper foundation has been laid for it and where the automatism is of a type consistent with sanity, there is no reason why, should the defence be successful, the accused should not receive an ordinary acquittal.

"Disease of the Mind."

The question whether a post-epileptic confusional state constitutes a "disease of the mind" which comes within the meaning of s. 43 of the Crimes Act 1908, was also before the Court. The question had been put to a neurological consultant who expressed the opinion that, "a phase of automatic action following an attack could be described as such".

Mr Justice North stated, "In my opinion, the meaning that the words 'disease of the mind' in the M'Naghten Rules, and in s. 43 of our Crimes Act may properly bear, is a question of law for the Judge. It is his duty to instruct the jury what constitutes a 'disease of the mind' and then it is for the jury to say whether the prisoner was suffering from a disease of the mind. . . . Surely it cannot be left to a medical witness to apply his own definition!"

The plea of automatism may carry some risk that the evidence may be construed to indicate a "disease of the mind" and that the Judge may direct the jury to consider whether the proper verdict should be "not guilty but insane" in spite of the fact that the defendant may disclaim that this is his defence. The relevant statutory provision is s. 31 of the Mental Health Act 1911: "If upon the trial of any person charged with an indictable offence it appears in evidence that he was insane at the time of the commission of the offence, and he is acquitted, the jury shall be required to find specially whether he was insane at the time of the commission of the offence, and to declare whether he was acquitted on account of his insanity". A trial would take this turn of events, presumably, at the discretion of the Judge, according to the evidence presented. It is noteworthy that Mr Justice Cleary, in connection with this particular plea that breaking and entering occurred in a post-epileptic confusional state, said: "To my mind, this condition, affecting the mind and consciousness of the sufferer from time to time, could only properly be characterized as a disease of the mind". The defendant

did not make any plea of insanity but might well find himself declared not guilty but insane. Such a turn of events could, conceivably have unfortunate consequences for the defendant, as in a case quoted by Mr Justice Cleary, where the accused person had claimed that in driving a motor car he was suffering from concussion and cerebral disturbance resulting from blows received in a fight. The trial Judge directed the jury that this was the defence of insanity. Mr Justice Fullagar commented that this direction was fundamentally wrong and a grave misdirection.

Medical Point of View.

It is clear that the defence of automatism is no primrose path to an unqualified acquittal. I will make some comments on this matter from the medical point of view. I do not think that automatism is a good word to describe the behaviour disturbance which may follow an epileptic seizure. The definition in the *Concise Oxford Dictionary* suggests that it would consist of purely reflex behaviour, robot-like behaviour. What patients actually do suggests that it is behaviour determined partly by the environment, that is reflex, and partly by abnormal reasoning due to mental confusion. Mr Justice Gresson's definition in respect of the law, " conduct of which the doer is not conscious", " something done without knowledge of it ", " a temporary eclipse of consciousness ", makes no mention of the abnormality of the behaviour. In judging whether post-epileptic confusion of mind is present, a doctor looks for behaviour which is senseless and out of keeping with the known usual habits of the patient. Furthermore, as amnesia is an essential ingredient of this state, it is impossible to ascertain whether the person is " conscious ", or has " knowledge " of his actions at the time he carries them out. Patients recovering from an epileptic attack will tell you that they are confused and muddled as they come round. I suggest that the word automatism should not be used in this connection, but the more accurate term, post-epileptic confusion of mind should be substituted. This would do away with the need for elaborate and difficult definitions. Similar criticism on the same lines could be directed against the use of automatism to describe the behaviour consequent on confusion of mind induced by a head injury or by alcohol or drugs.

Mr Justice Cleary stated that the post-epileptic confusional state " could only properly be characterized as a disease of the mind ". By this he appears to mean that a plea of post-epileptic confusion of mind should be dealt with under s. 43 of the Crimes Act 1908, the relevant subsection (2) of which reads: " No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render such a person incapable of understanding the nature and quality of the act, and of knowing that such act or omission was wrong ". As I understand it, this means that the verdict, if post-epileptic confusion of mind is accepted, is " not guilty, but insane ". I cannot agree with an opinion that equates epilepsy, or the post-epileptic confusional state, with insanity. It is true that epilepsy may be a symptom of disease of the brain which in some cases may lead to a disorder (or disease) of the mind. But the majority of epileptics are perfectly normal between their attacks. If I understand Mr Justice North correctly he also inclines to the view that this plea should often be dealt with under s. 43 of the Crimes Act. He expresses concern lest an unqualified acquittal should leave open the possibility that there would be a repetition of the incident that led to the charge. He points out that it is not the purpose of this Statute to punish the defendant. All this is true and important. Perhaps there is some way of qualifying an acquittal other than specifying insanity that I am unaware of. If there is not, it seems there should be, and the Court should be able to require that adequate medical treatment and supervision should be carried out, if necessary in an institution.

Mr Justice North said that it was the duty of the Judge to direct the jury as to what constitutes a " disease of the mind " in law. I think doctors would in some instances be very grateful to be relieved of this responsibility, though they might have serious misgivings. I for one have no clear idea about what is meant by a disease of the mind in this Statute.

The lot of the epileptic down the ages has not been a happy one. The improvement in medical treatment in the last twenty years should now enable the majority to take a normal place in society. He is, however, still faced with much prejudice and misapprehension and there is a need for more understanding of his problem in the light of modern knowledge. Our Lord, having miraculously cured an epileptic referred to the casting out of devils. Even today devils may be found in possession of the epileptic. Their usual names are Resentment, Frustration, Bitterness and Loneliness. Are there any alterations which should be made in the law of our land which might help to drive them out

Gavin Glasgow.

An Offender's Choice—(England). The *Berkshire Chronicle* reports a case in which a youth aged seventeen was asked by Thesiger J. whether he would rather go to borstal or to a probation home. The youth had already been on probation. He chose a probation home, and the learned Judge made a probation order for three years, with residence in a probation home for one year. The course taken may appear unusual, but really it is not much more than informing the offender, in accordance with s. 3 (5) of the Criminal Justice Act 1948, of the terms of a probation order, and giving the additional information that, if he does not consent to the order, he will go to borstal. Many an offender would like to know what the Court would do if he did not express willingness to comply with the terms of a proposed probation order, but there is no obligation on the Court to enter into any explanation about its various powers.

New Use for Barracks.—The British Government have decided to allow the use of Haslar Barracks, Gosport, which are no longer needed by the Army, as a detention centre for youths aged 17 to 21. A public local inquiry into the proposal was held last December. The inspector who held the inquiry said in his report that he thought it beyond question that there was a need for a detention centre in the area and that the use of a redundant service establishment would save public money. The point at issue was whether this particular site was suitable, having regard to the three main objections made on the score of security, property values, and the town planning of Gosport. He did not think there was much strength in the first two of these objections. He attached more weight to the third. He did not make formal recommendation about the proposal.—*Justice of the Peace and Local Government Review.*

HOW EFFICIENT ARE YOU?

Most solicitors have now adopted typewriters and the more advanced among us are installing such a wealth of machinery that our capital equipment approaches in value that of a 500-acre farm, writes E. A. W. in *104 Solicitors Journal*, 415. We study new methods of filing and we vaguely consider the possibility of mechanical accounting. We are all of us very keen on efficiency but we are apt to think of it as something that can be bought. In the long run the most important piece of machinery in a solicitor's office is his head and it may be that there are ways and means of using our heads to better advantage than we have used them in the past.

Some of us are clever and some are plain dull but there cannot be many solicitors who are really very dull because you have to be pretty shrewd nowadays to outwit the examiners. However, we do vary a lot as all human beings do and it stands to reason that some people get through more work in a working day than others do. The two greatest assets a solicitor can have are a quick brain and a strong memory and these are things we either have or have not. They cannot be acquired. If, on the other hand, you take a group of average solicitors, and consider the amount of work they individually get through in a year, there are variations, sometimes quite remarkable variations.

Speed is important to solicitors in two ways, just as it is to the operator of an airline. The reason why airlines fall over each other to buy faster and faster aeroplanes is that these aeroplanes not only provide a more attractive service to the public but get through more work in a year. A fast aeroplane will fly more services on a given route in a single year than a slow aeroplane because it spends less time on each flight. For this reason, a Comet is actually cheaper per passenger-mile than the Dakota was when it was new.

Overheads.

All this has a bearing on the work of a solicitor. Each of us has to pay, in a given year, for a certain quantity of fixed overheads. Most of the overheads really are fixed, including the important items like rent and rates and heating and lighting. To some extent our overheads increase with the speed of our work. If we write more letters in a year, then we need more paper and more stamps and we may in time require more staff to type the letters and file them, but a very important mass of overheads remains fixed, no matter how active we are. It follows that if one solicitor gets through 400 jobs in a year, he may only just meet his expenses, while if another solicitor works in a similar office and manages to get through 500 jobs, he will make a nice profit. This point is often overlooked when solicitors argue with each other at conferences about the percentage of the turnover of their offices which is absorbed by overheads. One man gloomily observes that overheads consume 90 per cent. of his costs. Another one keeps quiet and remarks to you casually afterwards over a drink that he finds that overheads are not more than 50 per cent. of his costs, and very often in conversation with the two solicitors concerned you can guess why.

Expedition.

We help ourselves in two ways by being quick. In the first place we please our clients and in the second place we get through more work and so earn more money while the bulk of our expenses remains static.

It is accordingly of vital importance to a solicitor to work quickly. How can we get through our work quicker than we do already?

A solicitor spends a lot of his time reading and a good deal of it just sitting and thinking, but the actual execution of work is done in one of four ways. Either we talk to somebody personally, or we talk to someone on the telephone, or we dictate or we write. Writing is becoming less and less common. When drafting a particularly difficult clause it may be essential do doodle it out in pencil on a sheet of paper, but to most solicitors the pen and the pencil are now things of the past except for signing their names. If you think I am wrong when I say this, then you are one of the people at whom this article is aimed.

We have then to get through our work in three ways. Face-to-face talking, telephoning and dictating. All these three are vital; we cannot dispense with any of them. But I do suggest that with great care and attention, involving a very considerable mental effort, we can train ourselves gradually to minimize the amount of personal talking and telephoning and to increase the amount we dictate. By doing so we can vastly increase the amount of work we do per day.

To take these three things one by one. Face-to-face talking is the staple of the solicitor's trade and cannot possibly be abolished. Our work is essentially personal and we must meet our clients. We must know them and they must know us and on important occasions nothing can replace the intimacy and completeness of direct conversation.

The Telephone.

The telephone also is essential. It is the quickest of all means of communicating a thought over a distance and there are numerous occasions day by day when some urgent brief message must be sent by telephone.

On the other hand, both of these can be overdone. If you send a client a draft contract with no explanation and ask him to approve it, the chances are that he will turn up at your office a few days later and ask to see you and you will spend the best part of an hour going through it with him. If, on the other hand, you take the trouble to send him a long letter commenting on all the vital parts of the contract and explaining them and advising where advice is necessary and pointing out the only one or two places in which a decision is actually called for from him, then the chances are that he will post it back with a short note and you will be spared a long interview. It is a great temptation, when you are uncertain exactly what to say to a client, to ask him to call and in conversation to go on fumbling round the subject until gradually a few ideas occur to you and eventually some sort of conclusion is reached. If, on the other hand, you have the strength of mind to think very hard about what it is that you ought to ask or tell or advise your client, and set it down briefly in a letter, you will find that you can dictate it in five minutes instead of spending fifty minutes over an interview.

The telephone is an even more tempting thing and is the constant resource of the solicitor who is not

sure of himself. It has the added glamour that when you use the telephone you can kid yourself that you are being terribly businesslike and up-to-date. In fact the telephone is the worst time-waster ever invented. There are those important brief messages, in particular making and breaking appointments, that are best done by telephone, but the solicitor himself should not do these. He should leave them to his secretary. You can tell a really bad solicitor by the way he fiddles with his post in the morning and then, with a letter in one hand, starts pawing blindly for the telephone. "I think I'll give old Charles a tinkle", he says. "Old Charles" may be his client or his accountant or the solicitor on the other side. The fact is that the man reading the letter just cannot think what to say in reply and so he picks up the telephone and rambles on for minutes discussing a dozen different ideas and, having eventually half-cleared his cloudy brain, he sends for his secretary and dictates a letter saying something entirely different. The recipient is left completely confused whether he is to believe what was said to him on the telephone or what he reads in the letter when he receives it. Worst of all is the expense of time. I could go on for hours listing the dangers of the telephone (the fact that both parties to the conversation are often left at the end with a quite different impression of the conclusion reached and the further fact that the only record remaining is a short note kept by the sender, which probably does not tally with what he said anyhow), but the greatest danger of the telephone is its power to consume time. It may enable you to get one item of business done more quickly than you could by letter but in doing so you use up a disproportionate amount of your day. Set yourself the task of telephoning four different people, carry on to the bitter end and then look at the clock and see how long you have been. Probably you will have occupied an hour. In the same time, if you are even moderately trained in the art of dictating, you could have written thirty letters.

Dictating Machines.

I repeat that you must sometimes telephone and you must often see people, but by and large you will get through infinitely more work in a year if you limit your personal interviews and cut down your telephoning to a couple of calls a day. Nearly everything that can be done by interview or by telephone can be done not only better but much faster by dictating. Those who have got used to dictating machines will agree that you can dictate into them even faster than you dictate to a very good secretary. It is not easy. It has to be learnt and practised. It also requires a lot of concentration. One of the merits of dictating wherever possible is that it forces you, sometimes against your own inclination, to crystallize your ideas. Nothing is more humiliating than to receive back from your secretary a neatly typed letter in which you have expressed yourself badly. You simply must think and think hard and think clearly. You must cultivate the art of putting things down in numbered paragraphs. It helps you and it helps the person who receives the letter.

It is also very frequently a better way of giving instructions in your office than the standard way of sending for your staff and having a talk. Your income depends upon the amount of work they do in a day. The more you interrupt them the less work they will achieve. Moreover, sending for one of the staff always involves waiting a few minutes, even in the best-mannered of offices, and when they arrive in your room, you tend to ramble on a bit before you have finished saying what you meant to say. The whole thing may occupy seven or eight minutes whereas a note could have been dictated in fifteen seconds, your assistant would not have been interrupted, and he has the advantage of a clear and unmistakable instruction instead of the recollection of a natter of several minutes.

I repeat that it would be an enormous mistake to think that you must cut yourself off from personal contacts. These are and always will be vital. My point is that personal contacts are easier and pleasanter and in many ways much less trouble than dictating a clear cut letter or note but the first process may take ten or twenty times as much of your time per item of business to be dealt with as the second. A day spent in personal interviews may result in half a dozen matters each having been given one push forward. A day spent at the telephone may enable you to deal with a dozen ; but a day spent with a dictating machine can give 100 different jobs an individual impetus and so enable you to get through a vastly increased quantity of work in the time available to you in the course of a year. This is the real crux of the problem of keeping overheads down to a modest percentage of one's earnings.

Evidence of Paternity.—"If the illegitimate father is to be considered as capable of giving a valid consent, is it every illegitimate father? Certainly not; because in many cases no satisfactory evidence can be given of paternity. What evidence is to be required to establish that point? Not his own testimony; because a man cannot be allowed, upon his own claim and assertion only, to make his consent necessary to the marriage of another person. Or is it to be proved by the filiation, in the manner directed by the Act of Parliament, for the special purpose of ascertaining the settlement of the child? Supposing that this evidence which the law has provided for the special purpose of exonerating the parish, and for that purpose only, as far as appears, is to be borrowed and applied to this purpose, it will not answer the exigencies of many cases; it would not in the present case, where no such filiation has been proved, or, I presume, can be proved. But, supposing such filiation, what sort of paternity is acquired by it? In the language of the statutes, he is styled the putative father, he is still recognized only as a father by mere reputation. Is it then to be asserted that this right of giving consent belongs to every father who is so merely by reputation? If that is to be admitted, can any thing be more uncertain, any thing more lax, to serve as the foundation of a right of this nature? In what manner, and on what proof is the licence [to marry] to be granted, if it is not to be granted to every such father? In what way is it to be shown at the time of granting that licence that he has that popular repute in the requisite degree? Is the acknowledgment of the party, the maintenance and education of the child, to be called in aid? If the mere affidavit of the father is not sufficient for the purpose, in what way is that evidence to be obtained?"— Sir William Scott P. in *Horner* v. *Horner* (1799) 1 Hag. Con. 337, 355; 161 E.R. 573, 580.

Charities and Charitable Institutions

HOSPITALS - HOMES - ETC.

The attention of Solicitors, as Executors and Advisers, is directed to the claims of the institutions in this issue :

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Official Designation :

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"**The Auckland Presbyterian Orphanages and Social Service Association (Inc.).**" P.O. Box 2035, AUCKLAND.
"**The Presbyterian Social Service Association of Hawke's Bay and Poverty Bay (Inc.).**" P.O. Box 119, HAVELOCK NORTH.
"**The Wellington Presbyterian Social Service Association (Inc.).**" P.O. Box 1314, WELLINGTON
"**The Christchurch Presbyterian Social Service Association (Inc.).**" P.O. Box 2264, CHRISTCHURCH.
"**South Canterbury Presbyterian Social Service Association (Inc.).**" P.O. Box 278, TIMARU.
"**Presbyterian Social Service Association (Inc.).**" P.O. Box 374, DUNEDIN.
"**The Presbyterian Social Service Association of Southland (Inc.).**" P.O. Box 314, INVERCARGILL.

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I Give and Bequeath to the NEW ZEALAND RED CROSS SOCIETY (INCORPORATED) (or).....Centre (or).....Sub-Centre for the general purposes of the Society/Centre/Sub-Centre.....(here state amount of bequest or description of property given), for which the receipt of the Secretary-General, Dominion Treasurer or other Dominion Officer shall be a good discharge therefor to my Trustee.

If it is desired to leave funds for the benefit of the Society generally all reference to Centre or Sub-Centres should be struck out and conversely the word "Society" should be struck out if it is the intention to benefit a particular Centre or Sub-Centre.

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I bequeath to the British and Foreign Bible Society: New Zealand, the sum of £ : : , for the general purposes of the Society, and I declare that the receipt of the Secretary or Treasurer of the said Society shall be sufficient discharge to my Trustees for such bequest.

NEW ZEALAND COUNCIL OF LAW REPORTING.

Annual Meeting.

The annual meeting of the Council of Law Reporting was held at Wellington on April 28, 1960. Those present were Messrs H. R. C. Wild Q.C. (Chairman), D. Perry, E. C. Champion, A. M. Cousins and A. T. Young. Apologies were received from the Hon. H. G. R. Mason Q.C., Messrs J. P. Cook and L. P. Leary Q.C.

The chairman, speaking to the annual report, said that three major matters had been dealt with during the past year:

(1) The editorship, which had been assumed by Mr C. N. Irvine as at April 1, 1960. It would be noted that the headnotes in the *April Reports* had been much reduced and that some of the judgments had been heavily edited. Mr Wild said that Mr Irvine would be attending later for a short discussion with the Council.

(2) The Digest: The Wellington sub-committee held a number of meetings with Butterworth and Co. (New Zealand) Ltd., and an Index had been produced before Christmas.

(3) The rate of the subscription for the NEW ZEALAND LAW REPORTS had been under review and settled, subject to formal approval of the meeting.

The sub-committee reported that the standard of REPORTS had been generally satisfactory for the year. Messrs Wild and Young, together with a further Wellington member of the Council, were appointed to the committee under para. 16 of the agreement with Butterworths.

It was resolved that the Council of Law Reporting, England, be requested to furnish the New Zealand Council with a copy of the notes of argument in New Zealand Privy Council cases.

Mr C. N. Irvine, the new editor of the NEW ZEALAND LAW REPORTS then joined the meeting for an informal discussion with the Council.

The chairman welcomed him and wished him well in his new position.

Mr Irvine outlined briefly the policy which he proposed to follow, principally in connection with keeping the headnotes as brief as possible, consistent with accuracy and usefulness, and in limiting the size of the annual volume. He hoped to achieve the latter object by cutting unnecessary narrative out of judgments, and reducing discussion of facts wherever possible.

Mr Wild thanked Mr Irvine for attending the meeting.

The next meeting was fixed tentatively for Thursday, April 27, 1961.

LEGAL LITERATURE.

Books Received or Published in New Zealand by Butterworth and Co. (New Zealand) Ltd. January to June, 1960.

Adams's Law of Estate and Gift Duty in New Zealand, Supplement 1960 to Third Edition. 20s. Volume and Supplement, 90s.

Australian and New Zealand Annotations to All England Law Reports, 1956-1959 Supplement. 25s.

Butterworths Annotations to 1958 Consolidated Victorian Statutes, 1958-1959 Supplementary Volume. 35s.

Butterworths Cases Annotations to the New Zealand Statutes Reprint 1908-1957, Volume 1, 1960, by H. JENNER WILY S.M. £6.

Chalmers and Dixon's Road Traffic Laws of New Zealand, Second Cumulative Supplement 1960, to Third Edition. 25s. Volume and Supplement, 110s.

Cheshire and Fifoot's Law of Contract, Fifth Edition 1960, by G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, some time Vinerian Professor of English Law in the University of Oxford, and C. H. S. FIFOOT, M.A., F.B.A., of the Middle Temple, Barrister-at-Law, Reader in Common Law to the Council of Legal Education. 65s.

Essays in African Law, with special reference to the law of Ghana, 1960, by ANTONY ALLOTT, M.A., Ph.D., Lecturer in African Law at the School of Oriental and African Studies, University of London. 55s.

Garrow & Willis's Law of Evidence in New Zealand, Fourth Edition, 1960, by J. D. WILLIS S.M. 45s.

Gunn's Commonwealth Income Tax Law and Practice, Sixth Edition, 1960, by J. A. L. GUNN, C.B.E., in collaboration with O. E. BERGER and M. MAAS. £9 9s. Butterworths Taxation Service, 95s. per annum.

Hire Purchase Law in New Zealand, 1960, by D. F. DUGDALE, B.A., LL.B., Barrister and Solicitor. 37s. 6d.

Introduction to British Constitutional Law, 1960, by D. C. M. YARDLEY, LL.B., M.A., D.Phil., of Gray's Inn, Barrister-at-Law, Fellow of St. Edmund Hall, Oxford. 30s.

Introduction to Company Law in New Zealand, Fourth Edition, 1960, by J. F. NORTHEY, B.A., LL.M., Dr. Jur. (Toronto), Professor of Public Law, University of Auckland, Barrister and Solicitor. 42s.

Law of Agency, 1960, by G. H. L. FRIDMAN, M.A., B.C.L. (Oxon.), LL.M. (Adelaide), of the Middle Temple, Barrister-at-Law, Lecturer in Law at the University of Sheffield. 50s.

Stevens's Elements of Mercantile Law, Thirteenth Edition, 1960, by JOHN MONTGOMERIE, B.A., of Lincoln's Inn, Barrister-at-Law. 27s. 6d.

Underhill's Law of Trusts and Trustees, Eleventh Edition, 1959, by C. MONTGOMERY WHITE, a Bencher of Lincoln's Inn, Q.C., and M. M. WELLS, of Gray's Inn, Barrister-at-Law. 117s. 6d.

Victorian Companies Act 1958, 1960, by W. E. PATERSON, Barrister-at-Law, and H. H. EDNIE, B.Com., LL.B. (Hons.), A.A.S.A. (Prov.), Barrister-at-Law. 117s. 6d.

Victorian Law Reports 1875-1956 Reprint. 1956 Reprint, 1960. 84s. per volume.

Western Australian Reports. Volume 1 commenced 1960. Annual subscription, £6 10s. (loose parts and bound volume).

Will-Draftsman's Handbook, Second Edition, 1960, by P. H. NEVILL, LL.B., Barrister and Solicitor. 27s. 6d.

CORRESPONDENCE.

Letters to the Editor.

Legal Education.

Sir.

I think I am reasonably well qualified to speak on the subject of legal education. From 1950 to 1953 inclusive, I attended (then) Auckland University College full-time for an Arts degree ; and from 1954 to 1958 inclusive I studied law part-time, working in various law offices and studying extra-murally during 1957 and 1958. So I have personal experience of all aspects of University study.

I have come to this conclusion : that part-time study causes a tudent to miss out on the best of both the principles of law (at the University) and the practice of law (in the office).

In the first place, part-time study at the University did not inculcate that legal training and cast of mind which it was supposed to, simply because there was no time for real study. Due to the constant pressure (lectures in the morning, work during the day, lectures in the evening), one became concerned only to cram a sufficient number of skimpy and superficial facts into one's mind to justify a 50 per cent. pass. It was a truism that students seldom if ever completely read a judgment ; the head note was enough, thank you. Indeed, I think quite a few students passed through the law faculty without reading a case at all. So that although I got my 50 per cent. with greater regularity than many, I do not think that I received a legal training.

The fact that students were always pressed for time reduced the "un-practical" subjects such as Jurisprudence, Constitutional Law and International Law to a barely supportable irritant administered to uninterested students by a lecturer who experienced the humiliation of seeing the students bored and disgruntled despite all and any efforts he might make. Jurisprudence particularly suffered. This is the subject that should bind and cement the different legal topics which have previously been studied separately, into a reasoned and systematic whole so that the Law emerges and law students are converted (not overnight—that's a little too much to expect) into lawyers. But the system forced students into treating it with impatient contempt.

In the second place, part-time practice of law in a law office was frustrating to both me and my employer. I learnt little while I was in the office during the day (stamping, registering, searching and Court filing can be mastered in three weeks) and I was not in the office long enough to justify my employer trying to teach me more. Not that my employer tried to teach me much any way ; he was too busy at his practice. One just picked up scraps. A great deal of the talk about the importance of training in a law office during one's junior years is, I submit, not related to the facts.

I cannot see that the present quandary about legal education cannot be simply resolved. The University should have jurisdiction over its Law Course ; the profession should have jurisdiction over admission to the profession. If a young man comes up to the University at the age of eighteen, studies full time for three years to graduate LL.B. and then works in a law office or a Government Department for one or two years doing reasonably responsible work, he should then be in a position to be admitted to the profession. (Incidentally, a practical effect of this proposal would be that the country practitioner would no longer be starved of staff while his city brother in the four main centres suffers a glut.) As to the economics of the matter, a greatly increased system of bursaries should be justified by the results, both as far as the educational authorities are concerned and as far as the employers are concerned—they will receive better value for their money than they do now.

A word about lectures on legal ethics. They were a waste of time. The students resented another "un-practical" subject and had to be coerced into attending them. I attended them (unwillingly) for two years and have memories of two eminent Judges telling us what we should wear in Court (white shirt, clean collar) and that we should never allow clients to sit at counsel's table, and of a leading member of the Bar instructing us on how to make a speech effective —drop your voice here, raise it there, hurry along at one spot, pause at another. This was interesting information but it had nothing to do with legal ethics, except superficially. On the other hand, I agree with Nigel Wilson Q.C. that the omission of bookkeeping and the Solicitors Audit Rules and Solicitors Deposit Rules from the Law Course is a grave one, since these topics have to do with a solicitor's (or, in wider terms, a lawyer's) responsibility to his client. My suggestion is that a brief series of lectures should be given by a practitioner at the end of the above-proposed Law Course, emphasizing and making explicit certain points that are basic in the practice of law : how to keep your books and trust account, the importance of getting your facts right and making sure they are all the relevant facts that you can get, the elements of a conveyancing transaction, the steps in debt-collecting and in common-law and divorce actions, the analysis and preparation of a case to make sure that you have covered all the points that you will be required to prove, and the individual responsibility that rests upon a solicitor when he certifies a document correct, whether this certificate is given to the Court or to the District Land Registrar. This, to my mind, really is legal ethics—the proper practice of the law. Further, such lectures would cut down the time needed for a clerk to get adjusted to the office and make him all the more valuable to his employer.

It comes to this, that leaving a student to pick up scraps, whether of legal principles or of legal practice, is just not good enough. That we have eminent lawyers among us is, I submit, in spite of the present system of legal education and not because of it.

Yours, etc.,
G. J. FULLER.

TOWN AND COUNTRY PLANNING APPEALS.

Penrose Sawmilling Co. Ltd. *v.* Whakatane County.

Town and Country Planning Appeal Board. Whakatane. 1960. March 1.

Zoning—Conditional use—Sawmill in land zoned as rural—Permit for erection of homes for sawmill staff—No addition to detraction from amenities caused by sawmill—Removal of houses if sawmill ceases operation—Town and Country Planning Act 1953, s. 38 (1) (b).

Appeal under s. 38 of the Town and Country Planning Act 1953.

The appellant company owned and operated a sawmill on a property comprising 15 ac. adjacent to Murupara Township.

This property was in an area zoned as " rural " under the Council's undisclosed district scheme for Whakatane County (Murupara Section).

Under the proposed Code of Ordinances for this area sawmills were a conditional use in a rural area. On September 24, 1957, the appellant was granted a permit for the erection of its sawmill as a conditional use. The permit allowed the erection of the following buildings: 1, two-roomed dwelling; 2, one-roomed office; 3, sawmill.

In its letter informing the appellant of the granting of this permit the Council expressly stated that " no further dwellings can be erected on the sawmill site ".

In October, 1958, the appellant was seeking permission to erect four dwellinghouses on the property to house mill personnel.

A considerable volume of correspondence passed between the parties but the Board did not find it necessary for the purpose of its decision to refer to this correspondence in detail.

Finally the Council on July 29, 1959, resolved to refuse a permit on the grounds that the buildings would be a " detrimental work " as defined by s. 38 (1) (a) (ii).

This appeal followed.

The judgment of the Board was delivered by

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

1. Counsel for the appellant submitted that the Council fell into error in relying on s. 38 (1) (a), as clearly the dwellings could not be a " physical obstacle " to any work likely to be constructed in the area. The Board agrees that that submission is well founded.

   The appropriate subsection for the Council to have invoked is subs. (1) (b), that the dwellings would detract from the amenities of the neighbourhood likely to be provided or preserved by or under its undisclosed district scheme.

   The Board proposes to deal with the appeal under that subsection.
2. The scheme provides for a minimum subdivisional standard of 5 ac.

   It is a recognized principle in the planning of rural areas that residential occupancy should, as a general rule, be limited to at least five-acre allotments. Sporadic and indiscriminate or too close residential development in rural areas does detract from the amenities of a rural area, so that if the question to be determined here related to the erection of four dwellings close together for residential use simpliciter the refusal of a permit would be justified as detracting from the amenities of the neighbourhood.
3. The proposed Code of Ordinances under the heading " Conditional Uses " lists various types of buildings including sawmills that may be erected as " conditional uses ". The last of these (i) " being buildings (other than residential buildings) accessory to buildings or to use of land for any of the foregoing purposes ".

   The words " other than residential buildings " do not occur in the corresponding provision in the Standard Code set out in the Town and Country Planning Regulations 1954. (See Fourth Schedule under the heading " Rural Zones " " Conditional uses "), at p. 37.

   It was submitted by counsel for the appellant that the words " other than residential buildings " are too restrictive and are not " likely to be embodied " in the scheme when it becomes operative, but on the view the Board takes it is not necessary for it to express its views on that submission but it inclines to the opinion that a blanket restriction over the whole area covered by this section of the scheme might be held unreasonable.
4. In appeals under s. 38 (1) (a) or (1) (b) it is the probability of detracting from the amenities of the neighbourhood that must be examined.

   Applying that test to the facts of this case, the position is that here is a sawmill situated in close proximity to the industrial zone of Murupara Township so that a detraction from amenities already exists by the very existence of permitted industrial uses.

   The issue then narrows down to the question of whether the erection of dwellings adjacent to the mill will add anything to an already existing detraction.
5. Under the Standard Code of Ordinances set out in the Regulations, sawmills falling as they do in Appendix " B " are predominant uses in industrial C zones.

   In industrial C zones one of the predominant uses is " living quarters for a caretaker or other person whose employment is such that he is required to live on the premises ", and one of the conditional uses is " living quarters for persons required to be at call when off duty ". It is clear therefore that the intention of the Legislature was that in certain cases or certain types of industry it is reasonable to make some provision for living quarters for some employees on the site.
6. In effect, the Council contends that as sections are available in Murupara Township that the appellant's employees should live there but it made no attempt to contend that the erection of dwellings on the site would detract from the amenities of the neighbourhood and that is what it must establish when it invokes s. 38.
7. On the evidence the Board holds that for a sawmill of the type and size under consideration here, housing should be provided for 4 company personnel who fall into the category of " persons required to be on call when off duty ", viz.: 1, breaking-down hand; 2, benchman; 3, head yardman; 4, manager.

   If living accommodation on the site is provided for them, essential services, i.e. water and electric light are available. School bus service and shopping amenities are also available and the houses will be sited well back from the road frontage.

The manager already has a house on the site.

The appeal is allowed to the extent of authorizing the erection of three houses, subject to the condition that the appellant company shall enter into a satisfactory bond with the Council conditioning it to remove all houses on the property if required so to do within three months of the mill ceasing operations on the present site.

Appeal allowed in part.

Stanaway *v.* The Minister of Works.

Town and Country Planning Appeal Board. Wanganui. 1960. March 30.

Subdivisional plan—Subdivision in district prohibited by Minister of Works—Desirability of avoiding sporadic development or isolated residential subdivisions in rural areas—Compact and orderly expansion of existing residential areas to precede opening up of further land for housing—Creation of traffic hazards—Town and Country Planning Act 1953, s. 38 (14) (Town and Country Planning Amendment Act 1947, s. 25).

Appeal under s. 38 of the Town and Country Planning Act 1953.

The appellant was the owner of a property containing 3 ac. 38.4 pp. more or less situate in Block II Westmere Survey District being part of Section 108, Right Bank, Wanganui River and being also Lot 4 and part Lot 5, on Deposited Plan No. 17398. This property fronted on to the Hawera-Wanganui State Highway.

On the property were erected two buildings, a general store owned and operated by the appellant and a separate residence where he lived.

The property was in the county of Waitotara.

The appellant submitted a plan for the subdivision of this property into eight lots to the Waitotara County Council for approval, but the Council refused its consent to the subdivision.

This refusal was made pursuant to a requirement by the respondent for the prohibition of this subdivision under s. 38 (14) of the Act.

The respondent required the Waitotara County Council, inter alia, to prohibit subdivision of land adjoining the relevant section of the State Highway into allotments of less than 5 ac. in area and 264 ft. of frontage unless the consent of the respondent was first obtained.

The judgment of the Board was delivered by

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

1. The proposed subdivision excluding the appellant's store and his residence provides for five building sites and an access road debouching on to the State Highway.
2. The land in question is topographically suited for residential occupation and it has little, if any, present or potential value for food production but it is situated in a rural area predominantly rural in character and occupancy. It is one-and-a-half miles from the northern boundary of Wanganui City and a little more than ten chains from the northern boundary of Otamatea County Town.
3. A small residential subdivision comprising three lots on which houses have been erected lies immediately north of it and a single section with one residence on it adjoins it on the south so that there is already in existence a small "spot" residential zone in a rural area. It is contended for the appellant that the addition of four or five further residences to this zone will not make any material difference to an already existing situation. This submission is not acceptable.
4. The evidence establishes that Wanganui City has a present population of 31,300 (approx.) and it is anticipated that this population will, by 1980, have increased to 42,000.

   This population could be accommodated within the present city boundaries.

   In addition it is calculated that the County Town of Otamatea on a low density basis will accommodate a population of more than 2,500, so there would appear to be no need for further residential development in rural areas adjoining the already established urban areas.

   The Board has in previous decisions held as town-and-country-planning principles that "sporadic development or isolated residential subdivision in rural areas is to be avoided" and that "the compact and orderly expansion of existing residential areas should precede the opening up of further land for housing".

   The appellant's proposal offends against both principles.
5. It was contended by the respondent that the proposed subdivision and access road would greatly add to traffic dangers on the State Highway.

   The appellant's property is situated on a curve opposite the junction of the State Highway and the Rapanui Main Highway. To permit the construction of another road debouching on to the State Highway at this point would undoubtedly tend to create an additional traffic hazard.

   The appeal is disallowed on the grounds that the proposed subdivision would be contrary to the public interest and not in accord with town-and-country-planning principles.

Appeal dismissed.

Dolphin *v.* Auckland City.

Town and Country Planning Appeal Board. Auckland. 1960. May 26.

Zoning—Land zoned as Residential B—Owner appealing on ground that it should be zoned as Industrial—Principles applicable—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellant was the owner of property situated in Rosebank Road, Avondale, containing 21 ac. 3 ro. 10 pp., being Lot 52 on Deposited Plan No. 177, being part of Allotment 6 of the Parish of Titirangi. Under the respondent Council's district scheme, as publicly notified, this land was zoned as private open space (drive-in theatre). The appellant lodged an objection to this zoning, asking that the land be zoned industrial B. When the objection came before the Council it was ascertained that there was no necessity for zoning the property as private open space, because a tentative proposal—the operation of a drive-in theatre—had been abandoned. By consent the objection was considered on the basis of whether the land should be zoned residential or industrial. The Council zoned it as residential B and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. This property is at present being used for rural purposes, but rural zoning would not be appropriate. It is bounded generally towards the north by a block of land zoned for railway purposes; on the east in part by an estuary and in part by land zoned as residential; to the south it is bounded by Rosebank Road, but land lying to the south of Rosebank Road is zoned as residential and is already in residential occupation; to the west the property is bounded generally by an area zoned as industrial B.

2. On the evidence the area zoned as industrial B in this locality would appear to be sufficient for the foreseeable light industrial needs of the locality, taking into account the fact that it is anticipated that there will be substantial reclamation towards the north in the future and that that reclaimed land, estimated to contain some 700 ac., will ultimately be available for industrial use.

3. It was conceded by the Council that probably part of the appellant's land at the north-western end of the block might be zoned for industrial use, leaving the south-eastern part as residential.

4. The Board considers that the present zoning as residential B is appropriate and the appeal is disallowed. The Board also considers that the north-western portion of the appellant's land might be better adapted to industrial than to residential use, by reason of the fact that it is bounded to the north by a railway reserve, on the west by an industrial area and on the east by the estuary, but the data available at present is not sufficient for the Board to determine where the line dividing the appellant's property into two blocks—one for industrial use and the other residential use—should be defined.

Appeal dismissed.

Ambassador Picture Theatre Ltd., *v.* Auckland City.

Town and Country Planning Appeal Board. Auckland. 1960. May 26.

Undisclosed District Scheme—Land designated as "Works Depot"—On objection, designation changed by local authority to "off-street parking"—No power for local authority to change designation on objection—Town and Country Planning Regulations 1954 (S.R. 1954/141), Reg. 25 (2).

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

The appellant company was the owner of a property situated on the south side of the Great North Road at Pt. Chevalier, having a width of 102 ft. with an average depth of 310 ft. On the street frontage for a depth of 136 ft. were erected five shops and the Pt. Chevalier theatre. The balance of the land at the back, 102 ft. wide with an average depth of 174 ft., was level vacant land. Under the Council's proposed district scheme, as publicly notified, this vacant land at the back was designated as "works depot". The appellant lodged an objection to the zoning of the land reserved as a "works depot", claiming that this land should be zoned as commercial B. When this objection came to be considered by the Council, the Council resolved to change the zoning of the land under consideration from "works depot" to "off-street parking". The appellant company appealed against that decision. When the appeal came to hearing counsel for the appellant submitted that the decision of the Council was one which it could not properly make on the hearing of an objection, in that it involved not a decision on an objection but a decision to vary the provisions of the scheme. Section 25 (4) of the Act provides that the procedure for the institution, hearing and determination of proceedings under the section shall be in accordance with regulations. Regulation 25 (2), provides that a Council, after hearing objections, shall either allow or disallow each objection, either wholly or as to any part thereof. In this particular case, therefore, the Council failed to comply with the procedure laid down by the Act. It could only allow or disallow the objection either wholly or in part. It could not vary the provisions of the scheme.

As the Council did not require this land zoned as "works depot" the appeal is allowed; the land under consideration is to be zoned as commercial B. The Board awards the appellant company costs in the sum of seven guineas.

Appeal allowed.