New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"
VOL. XXXVI TUESDAY, AUGUST 23, 1960 No. 15

A NEW CONCEPT IN THE LAW OF NEGLIGENCE.

11

IN our last issue, in dealing with *Heard* v. *Forest Products Ltd.*, [1960] N.Z.L.R. 329 we did little more than detail the facts, the pleadings, and the grounds of the motions filed by the plaintiff and the defendant respectively. The time is now ripe to discuss at some length the judgments which were delivered, and in particular to endeavour to throw some light on the points on which the President and the other Judges comprising the Court found themselves in disagreement.

On the question of current operations, the Court was unanimously against the plaintiff. This particular basis of liability rests on the fact that the special rules governing the liability of the occupier of premises to one who is lawfully on the premises relate only to the static condition of the premises. If the occupier is carrying on activities on the premises, or current operations as they are called, then he is under a general duty to carry out those activities in such a manner as not to injure those lawfully on the premises. Under this doctrine there is no difference in the standard of care to be exercised whether the person so on the premises is an invitee or a licensee. The doctrine is discussed in *Percival* v. *Hope Gibbons Ltd.* [1959] N.Z.L.R. 642 by Gresson P. (*ibid.*, 657) and by Cleary J. (*ibid.*, 671) and is clearly applicable to New Zealand.

The basis of liability in such a case is of course that the current operations are carried on negligently, but in *Heard's* case [1960] N.Z.L.R. 329 the Court had no difficulty in finding that the doctrine had no application, at least so far as the manufacturing processes of the defendant were concerned. Gresson P., at p. 339, after discussing various authorities bearing on this doctrine, said :

> The passage of the belt overhead was in a sense a current operation but not such an operation as to change the nature of the premises any more than was the escalator on which the children played in *Hardy* v. *Central London Railway* [1920] 3 K.B. 459. In *Haseldine* v. *Daw* [1941] 1 All E.R. 525, Hilbery J. treated the operation of a lift, the mechanism of which failed, as such an activity as would permit of the application of the ordinary rules relating to negligence. On appeal, [1941] 3 All E.R. 156, [1941] 2 K.B. 343 ; this view was rejected. Even if the conveyor belt could be regarded as a current activity it has not been shown to have been operated negligently.

His Honour then went on to point out that the static condition of the premises did not alter after the plaintiff entered the chipper house. The conveyor belt was dripping water and pieces of bark when the plaintiff entered, and this was a normal occurrence. It was something ordinarily incidental to the operations being conducted, the general nature of which was familiar to the plaintiff.

In the joint judgment of North and Cleary JJ. (which was delivered by Cleary J.), it is said at p. 360 :

> Here it was not suggested—and could not, we think, be suggested—that the defendant was carrying out its activities in a negligent fashion. Further, we think Mr Sandford was right when he argued that the activity duty, at least as it has been applied in these cases, can be invoked only when the activity itself, unrelated to the condition of the premises, has caused the injury, and that here the accident was caused not by the manufacturing operations but by the state of the floor. It is true that the floor had become wet and dangerous because of the operations carried on by the defendant, but we do not think that is enough to enable the plaintiff to rely on the activity duty. We think before he can do this he must show that the current operations themselves have caused the injury of which he complains.

The judgment goes on to distinguish *Slade* v. *Battersea and Putney Group Hospital Management Committee* [1955] 1 All E.R. 429, [1955] 1 W.L.R. 207 ; which had certain similarities on the facts to *Heard's* case. In *Slade's* case, the plaintiff entered the hospital governed by the defendant to visit her husband. While she was there, polish was spread on a part of the floor over which she would pass on taking her leave, and was not properly polished off. On leaving she fell and was injured, and Finnemore J. held that, whether she were an invitee or a licensee, the polishing of the floor was a current operation negligently carried out, and the defendants were responsible for the damage suffered by the plaintiff. The point of distinction between the two cases is that in *Slade's* case there was a change in the condition of the premises brought about by the acts of the defendant's servants between the plaintiff's arrival and departure. In *Heard's* case there was no such change. The operation of the conveyor belt with the consequent dripping of the water and dropping of pieces of bark on to the floor of the chipper room was unchanged from before the plaintiff's entry into the chipper room until the time of the accident. In *Slade's* case, therefore, the plaintiff's injuries were due to a change in the condition of the premises while the plaintiff was lawfully on the premises, such change having been held to have been

negligently brought about by the defendant's operations, while in *Heard's* case the injuries were due to the static and unchanged condition of the premises.

Before passing to the crucial point of the case which gave rise to the difference of opinion among the members of the Court, it is desirable to dispose of the defence founded on the principle *volenti non fit injuria*.

Gresson P. would have rejected the plaintiff's claim quite apart from the defence of *volenti*, and it was therefore not really necessary for him to examine this defence, and its possible application to the facts of this case. However, at p. 341 of the report he embarks on a short but valuable discussion of the defence with a survey of the authorities. He says that, in order to be an effective defence, the plaintiff must have been shown to have had " full appreciation of the danger ". He must not only know of the facts which constitute the danger, but must also know and appreciate the full extent of the danger created or arising out of those facts. His Honour then went on :

> How far there was put to the jury the distinction between knowledge of the facts which constitute a danger and knowledge that the facts constitute a danger we have no means of knowing. It may well be that the plaintiff should have been asked more questions than he was asked in cross-examination to establish such a pleading. The finding of the jury appears to depend solely on inference. If it were the only inference that could be drawn, that might well suffice. But the evidence is equally consistent with an inference that he did not appreciate that to walk across the wet patch involved danger to himself. As Denning L.J. said in *Smith* v. *Austin Lifts Ltd.* [1959] 1 All E.R. 81 ; [1959] 1 W.L.R. 100 : " It is not enough tha the should know of the defective condition of the premises. It is not enough that he should realize there is some risk. He must know and appreciate the full extent of the danger. If he was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought it was, then he can recover " (*ibid.*, 93 ; 115). In my opinion, in the absence of evidence to warrant such a finding, the defendant cannot rely upon it. I do not think that the answer of the jury to Issue No. 14 can be supported.

The joint judgment in an equally valuable passage at p. 357 draws a distinction between *volenti* and contributory negligence, a distinction which is, of course, much more important since the passing of the Contributory Negligence Act 1947. In a nutshell it put the distinction as follows :

> A plaintiff may be guilty of contributory negligence if he did not know but nevertheless ought to have known of the danger which confronted him. But he can never be held to have been volens unless it is first shown that he had full knowledge of the nature and extent of the risk he ran, and then, with that full knowledge, in fact incurred it. Again, a plaintiff may be guilty of contributory negligence when he is careless for his own safety, but he may be truly volens even when he is exercising the utmost care for his own safety.

Their Honours also pointed out that full knowledge and appreciation of the risk is only a bar when the plaintiff is free to act. After a discussion of the evidence they came to the conclusion that, although the plaintiff did see the conditions which constituted the danger, he was never in a position where he could exercise a deliberative judgment whether he should proceed or retire, and concluded :

> In our opinion, it is plain that the jury could never have appreciated the true nature of the issue which they were called upon to decide. There seems no doubt that the jury thought, and no doubt properly thought, that the plaintiff should have been more careful, particularly having regard to his disability, but that is not sufficient, and merely goes to the question of contributory negligence. On the view we take of the case, then, the answer to the final question submitted to the jury should be disregarded on the ground that there was no evidence from which it could be properly inferred that the plaintiff was volens. The correct verdict, as the jury also found, was that he had been guilty of contributory negligence.

Up to this point the members of the Court had been largely at one on all the issues which they had been considering, but now a sharp cleavage of opinion developed. As we have earlier pointed out, it was only in the course of the argument in the Court of Appeal that counsel for the plaintiff raised the submission that, the defendant company having undertaken to guide the plaintiff around its plant and premises, a general duty of care arose. Two separate conceptions were involved in this submission—namely :

(a) That the guiding was a current operation negligently conducted.

(b) That in any case, when the defendant undertook to guide the plaintiff round its premises and plant, a general duty of care arose on the principle of *Donoghue* v. *Stevenson*.

Gresson P. at p. 342 describes this submission as a complete departure from the plaintiff's motion, and points out that a current operation of the type finally relied upon, viz. guiding, was never pleaded, never raised at the trial, never submitted for a pronouncement by the jury and in respect of which there could never have been a direction by the trial Judge. He went on to say that he doubted whether the plaintiff should have been allowed to advance this argument, but proceeded to consider it in detail.

At p. 342 of the report the President summarized the reasons which, in his opinion, precluded the upholding of the plaintiff's contention as follows :

> (1) In the circumstances of this case, it is very doubtful whether the conducted tour, as it may be termed, was a current operation giving rise to a duty of care.
>
> (2) If the guiding or conducting was such a current operation which, if negligently performed, imposed a general liability, this was never alleged in the pleadings.
>
> (3) If the pleadings can be regarded as sufficiently comprehensive to include a plea of negligent guiding, it was never advanced at the trial and consequently never investigated, never submitted for the decision of the jury thereon and necessarily never dealt with by the trial Judge in the summing-up.
>
> (4) A litigant must be held to the case he sets up, and the allegation of negligent guiding now belatedly put forward cannot be decided upon evidence which

was not directed to that issue; it requires a finding of fact that there was guiding of such character as to import an activity duty and that it was negligently performed; the jury, and only the jury, are competent to decide these issues.

On the first reason above quoted His Honour held that, if in fact there was a guiding or conducting which might have constituted a current operation, there would be liability if that guiding were negligently performed. He was of opinion, however, that the jury had considered neither the question whether there had been a guiding or conducting constituting a current operation, nor whether any such guiding or conducting had been negligently performed. Without the necessary finding of fact to support it, the submission, so far as it treated the guiding as a current operation must fail.

As to the second, third and fourth points quoted above, the learned President dealt at some length with the extent to which a party to an action is bound by his pleadings and by his conduct at the trial. The relevant portion of his judgment is too long to quote, but is commended for study to all those whose activities include actions at common law. The crux of the judgment on this point is contained in the following extract from p. 352 of the report:

> (4) In amplification of the view expressed above that a litigant must be held to the case he sets up, I desire to adopt Lord Greene's observation in *Leavy and Co. Ltd.* v. *Hirst and Co. Ltd.* [1943] 2 All E.R. 581, 582; [1944] K.B. 24, 27: "I hope that it will not be thought that I am in any way pedantic on the matter of pleading" and, adopting the attitude he took up, I would regard it as a grave injustice that a judgment should be given against a defendant upon an issue not properly pleaded, if pleaded at all, not raised at the trial, never formulated as a basis of liability until after all the evidence had been called, the issues settled and put, the jury directed, and the trial itself completed as to all except the final entry of judgment. I do not think that the defendants "can be held responsible because they did not negative some possible case which had never been alleged against them in the pleadings or made against them in the course of the trial"; per Earl Jowitt in *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864, 868; [1956] A.C. 218, 237.

In their joint judgment, North and Cleary JJ. said nothing in disagreement with the principles enunciated and acted upon by the President as to the extent to which a party is bound by his pleadings and conduct at the trial. However, they read the pleadings much more liberally in favour of the plaintiff than the President was prepared to do, and held that they were sufficiently wide to cover the submission that a special duty of care arose because of the defendant's undertaking to guide the plaintiff round the premises.

With the greatest respect, we suggest that in so holding, the majority of the Court went a long way in the interpretation both of the pleadings and of the findings of the jury, and that the view of the President is to be preferred. The judgment of the majority will tend to encourage rather inexact pleadings, with the addition of allegations in very general terms which are sufficiently wide to cover any submission which may occur to counsel during the trial or, as here, on the argument of motions after trial. It is especially noteworthy in this regard that the majority of the Court placed some weight on the general allegation that the defendant had failed to take reasonable care for the safety of the plaintiff, an allegation commonly found in statements of claim but generally regarded by the parties as no more than a restatement in very general terms of the more specific allegations earlier made in the statement of claim. Defendants, faced with such general allegations in future, would be well advised to consider whether they should not ask for further particulars in an attempt to limit the matters which may be brought against them without proper notice.

Another point on which the majority of the Court placed some reliance was that in its statement of defence the defendant had pleaded that the plaintiff had been negligent in failing to remain with the defendant's employee engaged in showing the party around the premises but, according to the majority judgment itself, the evidence adduced at the hearing did not give any support to this allegation. If such an allegation in a statement of defence is to have the effect of extending to an indefinite degree general allegations of negligence in the statement of claim, it will behove those responsible for the defendant's pleadings in such actions to be most careful in the allegations they bring against the plaintiff.

We had hoped in this issue to reach and deal with the main point at issue in the case, but the judgments are so full of interest and importance that it has not been possible to carry that hope into effect. This article will, however, be concluded in our next issue with a full discussion of the matters still not dealt with.

Denial of Justice?—"The rule that no action is maintainable by a person who is injured as the result of the non-repair of a highway has often been criticized but never more severely than by His Honour Judge Ould in a recent case in the Pontefract County Court. The plaintiff sued the National Coal Board for damages for personal injuries which she suffered when she fell on the footpath near her home. It was alleged that the fall was caused by pavement stones which had subsided because of mining operations, but the plaintiff's claim did not succeed as professional and scientific evidence established that this was not the case. In the course of his judgment the learned County Court Judge said: 'I am very sorry that the plaintiff must fail. The law is such that as it stands at the moment she is prevented from getting justice. The fault of this case lies on the Castleford Corporation, who left the footpath in a deplorable condition. I have no doubt that it was a very old footpath. It was obviously very dilapidated and worn out'. Another clear example of the rule that non-feasance does not give rise to liability may be found in *Burton* v. *West Suffolk County Council* [1960] 2 W.L.R. 745; where the plaintiff was unable to recover damages in respect of injuries which he received when his car skidded on ice which had formed because a road was inadequately drained, and it may be wondered if the time has not come to require highway authorities to take reasonable care to make and keep the surface of the highways reasonably safe for those who use them."—(1960) *104 S.J.* 453.

SUMMARY OF RECENT LAW.

ARMED FORCES.

Resignation of Commission by Naval Officer—Whether entitled as of right to have it accepted—Naval Defence Act 1913, s. 7—Navy Act 1954, s. 19. Section 7 of the Naval Defence Act 1913 created a right in a Naval Officer to resign his commission in time of peace, but did not confer a "status" or a "capacity" on such an officer. Such right is not "acquired, accrued or established" for the purposes of s. 20 of the Acts Interpretation Act 1908 until notice of resignation is given. Where therefore a naval officer, commissioned under the 1913 Act, gave notice of resignation after the coming into operation of the Navy Act 1954 and the consequent repeal of the Naval Defence Act 1913, his right to resign his commission was governed by the Navy Act 1954, and his resignation was subject to the consent of the Navy Board. *Quaere*, whether even under s. 7 of the Naval Defence Act 1913 the Naval Authorities might not refuse to accept the resignation of an officer's commission. *Hume* v. *Attorney-General.* (S.C. Wellington. 1960. July 11. McCarthy J.)

COSTS.

"Bullock" order—Forms of order—Discretion of Judge—Circumstances to be taken into account—Bankruptcy of unsuccessful defendant—Whether any principle of law that where unsuccessful defendant bankrupt costs of successful defendants should be given directly against him. A plaintiff brought an action for damages ultimately quantified at £20 10s. against two defendants of whom the second defendant, a builder, paid £15 into Court with a denial of liability. More than a year after disclosure, by further and better particulars of the second defendant's defence, of the name and address of a sub-contractor by whom the work giving rise to the damage complained of had been carried out, the plaintiff joined the sub-contractor as third defendant. During the fifteen months which elapsed between the delivery of the particulars and the trial the plaintiff made no inquiries as to the financial standing of the third defendant, who was in fact an undischarged bankrupt. At the trial she obtained judgment for the £20 10s. against the third defendant, and the first and second defendants succeeded in their defences. In the course of the argument on costs the County Court Judge said that he could not take the bankruptcy of the third defendant into account in making an order, but he apparently did not wholly disregard it. He made an order for the costs of the first and second defendants to be paid by the plaintiff and for such costs to be added to the plaintiff's costs recoverable from the third defendant (a *Bullock* order) and refused to make an order for the first and second defendants' costs to be paid instead by the third defendant direct (a *Sanderson* order, sometimes also termed a *Bullock* order). On appeal, *Held*, (Harman L.J., dissenting): the order of the County Court Judge should stand because: (i) costs were in the discretion of the Court, subject only to the requirement that the discretion must be judicially exercised, and there was no principle of law that required the County Court Judge to make an order for the first and second defendants to recover their costs direct from the third defendant merely because the third defendant was insolvent, nor was it shown that the County Court Judge failed to take into consideration the third defendant's insolvency when deciding what order to make as to costs; therefore the County Court Judge had not failed to exercise discretion judicially and the Court of Appeal would not interfere. (*Rudow* v. *Great Britain Mutual Life Assurance Society* (1881) 17 Ch.D. 600); and *Sanderson* v. *Blyth Theatre Co.* [1903] 2 K.B. 533, considered. (ii) if, however, the Court were to consider the position de novo, the costs of the first two defendants should, in the first instance, fall on the plaintiff in the circumstances of the present case since, though the sum paid into Court had been only less by £5 10s. than the effective claim, the plaintiff had continued the action for fifteen months after being informed of the third defendant's name and address, without making any inquiry as to the financial standing of the third defendant. *Mayer* v. *Harte and Others.* (Court of Appeal. Sellers, Willmer and Harman L.JJ. 1960. May 19, 20, 23; June 1.) [1960] 2 All E.R. 840.

CRIMINAL LAW.

Evidence—Statement made in accused's presence—Principles on which admissible in evidence. Statements made in the presence of an accused person are sometimes admissible in evidence, not as evidence of what the statements assert but only as to the reaction of the accused person in whose presence they are made, if any words or conduct on his part can be regarded as an acceptance or admission of the truth of the statements. If some part of a statement is admitted by the accused, that part is admissible to show what it is that the accused has admitted. If, while a statement is being made in the presence of the accused, he is barred or discouraged from challenging the correctness of the statement, it is impossible fairly to extract from the accused's reaction to the statement any sort of acceptance or admission. Where the statement tendered in evidence contains some matter expressly admitted by the accused in a written statement and some matter denied by him, the former statement should not be admitted in evidence at all, since the matter expressly admitted by the accused is adequately proved by production of his own statement with an account in very general terms of the circumstances in which it was given. *R.* v. *Campbell.* (C.A. Wellington. 1960. June 21; July 4. Gresson P. Cleary J. McGregor J.)

Soliciting for the purposes of prostitution—Whether soliciting from window or balcony is soliciting "in a street"—Street Offences Act 1959 (7 & 8 Eliz. 2 c. 57), s. 1 (1). A common prostitute who solicits in a street from the balcony of a house or from behind closed or open ground floor or first floor windows of a house adjoining the street commits the offence of soliciting "in a street or public place" contrary to s. 1 (1) of the Street Offences Act 1959. *Smith and Another* v. *Hughes and Others.* (Queen's Bench Division. Lord Parker C.J., Hilbery and Donovan JJ. 1960. June 16.) [1960] 2 All E.R. 859.

Trial—Jury—Waiting jurors present when accused arraigned on one charge not disqualified from acting on jury on trial of second charge. The arraignment of an accused person on one charge in the presence of waiting jurors does not in itself preclude his trial on another charge by a jury drawn from them. Should there be real grounds for fearing that prejudice might result, an application may always be made for a later trial. *R.* v. *Matich.* (C.A. Wellington. 1960. June 20; July 4. Gresson P. Cleary J. McGregor J.)

DIVORCE AND MATRIMONIAL CAUSES.

Motion to set aside instrument on ground that entered into to defeat petitioners' "rights"—Not necessary to show that motive as the only or the dominant one—"Rights" includes those accrued prior to institution of suit—Divorce and Matrimonial Causes Act 1928, s. 34. In an application under s. 34 of the Divorce and Matrimonial Causes Act 1928 by a wife to set aside an instrument entered into by her husband on the grounds that it has been entered into to defeat the wife's claim or rights to damages, alimony, costs or maintenance of children it is sufficient to show that the instrument was entered into for one of the purposes specified in the section. It is immaterial that the husband had some other motive also, and where there are two or more motives the wife is not bound to show which of them is the dominant one. The "rights" which the Court is enabled to protect under s. 34 are not restricted to those which have arisen in a matrimonial suit already begun at the date of the instrument in question, but include rights which have arisen before the institution of that suit. (*Fullicks* v. *Fullicks* (1929) 46 W.N. (N.S.W.) 158, distinguished.) *Murtagh* v. *Murtagh.* (S.C. Christchurch. 1959. December 11. 1960. June 16. Macarthur J.)

Instrument entered into to defeat petitioners' "rights"—Not indefeasible under Land Transfer Act—Divorce and Matrimonial Causes Act 1928, s. 34—Land Transfer Act 1952, s. 63. *See* MOTION TO SET ASIDE (*supra*).

Mortgage set aside—Appointment of receiver—Divorce and Matrimonial Causes Act 1928, ss. 34, 52. *See* MOTION TO SET ASIDE (*supra*).

LANDLORD AND TENANT.

Eviction—Characteristics of act of eviction—Crown lease—Covenant for quiet enjoyment implied—Extent of covenant in relation to acts done in performance of Crown's executive duty—Requisition by Crown under Defence (General) Regulations 1939, Reg. 51. In 1937 the Commissioners of Crown Lands granted a lease for a term of twenty-five years which in 1939 was assigned to the tenants. The premises were requisitioned in 1945 by the Ministry of Works on behalf of the Crown in exercise of the powers conferred by the Defence (General) Regulations 1939, Reg. 51, and were retained in requisition until 1955. From

the date of the requisition no rent was paid by the tenant, and the Crown claimed arrears of rent accrued within the period allowed by the Limitation Act 1939. The lease contained no express covenant for quiet enjoyment. *Held*, the requisitioning of the premises did not constitute an eviction of the tenant so as to disentitle the Crown to rent because: (i) (per Lord Evershed M.R., Ormerod L.J., concurring) in order to constitute an eviction at law a landlord's act must have the characteristics of permanence, of having beend one with an intention of deprivint the tenant of the enjoyment of the property demised, and of wrongfulness; in the present case (a) the intention attributable to the Crown in requisitioning the property under statutory powers and in performance of executive duty was not such an intention as characterized an eviction, particularly as compensation was payable for the requisition, and (b) the act of requisition under statutory powers lacked the element of wrongfulness, particularly as no covenant on the part of the Crown to refrain from exercising statutory powers would be implied in the lease. (ii) (per Devlin L.J.): an act which would amount to an eviction by the Crown would also amount to a fundamental breach of the implied covenant for quiet enjoyment, and there had been no act which amounted to that, since any covenant on the part of the Crown for quiet enjoyment that might be implied in the lease would exclude acts done for a general executive purpose in the national interest, such as an act of requisition under statutory powers or under the royal prerogative. (*Upton* v. *Townend* (1855) 17 C.B. 30, applied. *William Cory & Son Ltd.* v. *London Corpn.* [1951] 2 All E.R. 85, considered.) *Commissioners of Crown Lands* v. *Page*. (Court of Appeal. Lord Evershed M.R., Ormerod and Devlin L.JJ. 1960. May 10, 11; June 2.) [1960] 2 All E.R. 726.

LIBEL.

Privilege—Qualified privilege—Foreign judicial proceedings—Report of criminal trial abroad of British subject in which he confessed to crimes in England, including murder of which he had previously been acquitted by English Court—Whether report protected by qualified privilege—Scope of such privilege—Whether extending to report of statement concerning murdered man having been father of child of the murderer's wife. There is in the common law of defamation no qualified privilege *of a general character* for a fair and accurate contemporaneous report of foreign judicial proceedings. *Risk Allah Bey* v. *Whitehurst* (1868) 18 L.T. 615; *Riddell* v. *Clydesdale Horse Society* 1885 22 Sc.L.R. 657 and *Pope* v. *Outram & Co. Ltd.* 1909 S.C. 230, considered. If, however, a fair and accurate contemporaneous report of foreign judicial proceedings is published by a newspaper in England without malice, the report is privileged, if it is of appropriate subject-matter, viz., matter of legitimate and proper interest to the English public, not merely matter that is of an interest due to idle curiosity or a desire for gossip. *Wason* v. *Walter* (1868) L.R. 4 Q.B. at pp. 93, 94; *Cox* v. *Feeney* (1863) 4 F. & F. 13; *Allbutt* v. *General Council of Medical Education and Registration* (1889) 23 Q.B.D. 400 and *Perera* v. *Peiris* [1949] A.C. 1, considered. *Quaere*, whether a report of foreign proceedings must have appropriate status, as well as appropriate subject-matter, if it is to be protected by qualified privilege. *Webb* v. *Times Publishing Co. Ltd.* (Queen's Bench Division. Pearson J. 1960. May 27, 30, 31; June 2.) [1960] 2 All E.R. 789.

SOLICITORS.

Discipline—Disciplinary committee—Privilege against liability for defamation—Solicitors Act, 1957 (*5 and 6 Eliz. 2 c. 27*), *s. 46—Solicitors (Disciplinary Proceedings) Rules, 1957 (S.I. 1957 No. 2240), r. 21.* Proceedings before the disciplinary committee constituted under s. 46 of the Solicitors Act, 1957, are judicial in character, and the proceedings (including the committee's findings and order) have the benefit of the absolute privilege against liability for defamation that protedts the proceedings before a court of justice, notwithstanding that, under r. 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, the committee hear all applications in private and only pronounce their findings and order in public. Principle laid down by LORD ESTHER, M.R., in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* ([1892] 1 Q.B. at p. 442) applied. *Barratt v. Kearns* ([1905] 1 K.B. 504) considered. *Addis* v. *Crocker and others*. [Court of Appeal (Hodson, Pearce and Upjohn, L.JJ.), May 23, 24, 25, 1960.] [1960] 2 au. G.R. 630.

TRANSPORT.

Cancellation of licence and disqualification—Power to suspend licence for less than three months—Transport Act 1949, s. 31 (3) (Transport Amendment Act 1955, s. 8). Section 31 (3) of the Transport Act 1949 (as enacted by s. 8 of the Transport Amendment Act 1955) includes in the powers vested in the Court in cases to which the section applies power to suspend a motor-driver's licence for a period of less than three months. *Baker* v. *Dunlop*. (S.C. Dunedin. 1960. July 7. Henry J.)

Licensing—Appeal—Reference back to Licensing Authority an administrative and not a judicial act—Transport Act 1949, s. 149... Where the Transport Licensing Appeal Authority, after considering an appeal from a Licensing Athority, refers the matter back to such Licensing Authority for reconsideration, under s. 149 of the Transport Act 1949, the Appeal Authority determines a question affecting the rights of the parties to the appeal.
question affecting the rights of the parties to the appeal. In so referring the matter back, the Appeal Authority is excercising a power in an administrative way, and is, therefore, not obliged to give either party a hearing. *Fletcher* v. *Archer and Another* (S.C. Auckland, 1960. July 1. Turner J.)

WORKERS' COMPENSATION.

Assessment of compensation—Worker employed for ten months in coal-mining after four years in other manualwork—Coal-mining not "former usual employment"—Worker's Compensation Act, 1956, s. 17 (7) (b).—Where a worker since coming to New Zealand has spent about three years as a painter, one year as a railway surfaceman and ten months as a coal-miner, in which employment he received injuries, coal-mining is not to be regarded as his "former usual employment" for the purposes of s. 17(7)(b) of the Workers' Compensation Act 1956. The most that can be said as to such former usual employment is that it was employment in manual work of various kinds. A period of three to four years spent in coalmines in Holland before coming to New Zealand is to be disregarded in considering this question. *Hoeymans* v. *Attorney-General* (Comp. Court. Hamilton. 1960. June 2, 10. Dalglish J.)

PERSONAL.

The Chief Justice, Sir Harold Barrowclough, who has been in hospital suffering from pneumonia is now convalescing at his home in Kelburn.

* * * * *

Mr J. S. Rumbold, a Senior Crown Counsel at Nairobi, Kenya, and a former resident of Wanganui is visiting New Zealand on three months' furlough. Mr Rumbold, who was a member of the firm of Bain, Keesing and Rumbold, of Wanganui, took up his present appointment early in 1957.

* * * * *

The death occurred in Christchurch on August 3, of Mr John Heaton Rhodes, of the firm of Rhodes, Godby and Fraser. Mr Rhodes was born in September, 1888, at 15 Princes Gate, London. He was the son of Mr George Hampton Rhodes of Claremont, Timaru, and was educated at Christ's College, Twyford School Winchester, Haileybury College and at Christ Church Oxford, where he took a Master of Arts degree. He was called to the Bar of the Inner Temple, London, in 1911 and since 1924 had been a partner in the Christchurch firm. In World War I Mr Rhodes served as an officer in the Royal Army Service Corps on the Salonika front. The St. John Ambulance Association and brigade were Mr Rhodes's chief personal interests, and three years ago he was made a Knight of Justice of the Order of St. John of Jerusalem. This was the second death within six weeks in the partnership of Rhodes, Godby and Fraser, Mr H. H. Godby having died on June 21.

LAW REPORTS AND LAW REPORTING.

I. Development Through Centuries.

A lawyer's books are as much his tools of trade as the pen of the draftsman, the hod of the bricklayer, or the plane of the carpenter. Like the artisan, the man of law must have to hand instruments fashioned of the best materials and properly contrived for the work he has to do. But unlike the craftsman who need not be concerned about the means adopted in the production of precision in his implements, the lawyer must be able to appreciate the quality and the reliability of the work that lies behind the fashioning of materials that are provided for his use. In their production there are three influences—the law draftsman, the text-book writer, and the law reporter—and for the practitioner who is alive to the opportunities inherent in the very stuff of which the law is made, the law reporter may well be the greatest. The principle of Judge-made law, however it may be debated, challenged, or negated, is a first consideration for the practitioner, whatever the sphere of his influence.

If such a proposition is accepted as axiomatic, and it must be, it should not be out of order to direct attention once again to the importance of law reports in the practitioner's library, the aims of the LAW REPORTS, the complexities of their compilation, the problems encountered, and the manner in which these are solved.

FUNCTION AND PURPOSE.

The profession as a whole, excepting of course, those whose particular duty it is to monitor and approve the method and technique of law reporting, may be excused for an unquestionable tendency to take law reports for granted as a service to be universally appreciated but not necessarily perfectly understood. It is important, if only from the purely utilitarian standpoint, that practitioners should have a proper understanding of the efforts that are expended in their behalf. A reasonable comprehension of the functions of a law reporter (together with the restrictions that hedge him in) is essential to the efficient use of the service provided. It is an historical art, born of intimate excursions into the realm of trial and error, and most of all it has the special merit of judicial respect and acceptance. That it has chinks in its armour will not be denied by its most ardent champions, for it has difficulties to surmount and differences to resolve which are common to all human effort, and which can be overcome, not by singular dissent and destructive criticism but by co-operative discussion based on a full understanding of the pitfalls and ardours of the task. The common fault of those to whom law reports are dedicated is to accept them casually as familiar things which, like Topsy, "just growed". Nothing could be further from the truth, or more capable of grave disservice to those who make most use of the reports.

Law reports are authoritative and permanent, and errors and omissions excepted, may be regarded as the practitioner's Bible. The statutes are vital; text-books are important; but the last and most rewarding resort is to the law reports. It is imperative therefore that full regard should be had to the stuff of which they are made. Since it is doubtful, at the present time, whether more than a few persons outside the Council of Law Reporting and those actively engaged in the production of the reports have any adequate conception of the method of their preparation, or of the special knowledge and capabilities required of those whose obligation it is to produce them, this survey—historical and contemporary—has been attempted.

The present purpose is to emphasize the practical considerations governing the production of law reports. Their historical background, as old in unofficial and authoritative form as the Common Law, is an intriguing story, and the reason for their publication, though it should not be necessary of explanation in the seventy-sixth year of publication of the NEW ZEALAND LAW REPORTS, is worthy of recapitulation. Law reports are not copies of the Court records. That may be asserting the obvious, but the fact remains that, while most discussions on the point concede the essentiality of law reports, they are too often limited to such questions as whether too many or too few cases are reported, whether actual reports are unduly lengthy, or some similar consideration. The important thing is to examine the nature of the function of law reports and the principles that should be followed in the fulfilment of that function. To say that the duty of the reports is to report law cases is far too vague a statement to be accurate.

Newspapers report law cases, but a newspaper reporter is not as such a law reporter. The function of the newspaper is to give to the public such news as it is presumed to need or desire, but the law reports are not concerned, at least not primarily, with the general public. The newspaper reporter and his editor need consider only such cases as may interest the public that reads their newspaper, and, subject to the obligations of giving a fair and accurate report, only such parts of those cases as are the cause of such presumed interest. The law reporter and his editor must consider what is of interest to the legal profession, including Judges, academic lawyers, and the qualified legal advisers or representatives of the public. Such interest is of necessity professional.

Unless the ordinary practitioner is assisted in his work, the report of a case is of no value. Law reports therefore report law cases for the use of the profession, and consequently they report only such cases as are "reportable"—an adjective which rather states than serves to solve the problems of the editor. But that is a matter that can be considered later in its place.

EARLY BEGINNINGS.

The beginnings of law reporting, for all their obscurity, are interesting as pointers to the system that has developed through six centuries. Back in the Middle Ages, somewhere about the 1300's, both counsel and students began noting arguments and decisions (mostly for their own purposes) and gradually there developed a legend that official note-takers existed. This was the genesis of law reporting and the first clumsy manuscript versions gradually found recognition. Their authors cherished them, but also found the heart to

LEGAL ANNOUNCEMENTS

(*Continued from p. 238.*)

Mr W. R. P. MOODY, having retired from the firm GRIERSON, MOODY, JACKSON & PARTNERS, the remaining partners continue in partnership at Auckland and Pukekohe under the name of GRIERSON, JACKSON & PARTNERS.

Mr W. M. MACLEOD of Dargaville wishes to announce that he has been joined in partnership by Mr PETER WILLIAM MAHOOD, LL.B. The practice hitherto carried on under the name of GOULD & MACLEOD will in future be continued by Mr MacLeod and Mr Mahood in partnership under the name and style of GOULD, MACLEOD & MAHOOD, Victoria Street, Dargaville.

Qualified man required for legal practice, conveyancing and some lower Court experience desirable, with good prospects of partnership to suitable applicant.

S. D. RICE & SONS,
Solicitors,
PAPAKURA.

Continued on p. ei.

LEGAL ANNOUNCEMENTS

Continued from page i.

ALEXANDER TOLHURST YOUNG, JACK ROBINSON EFFINGHAM BENNETT, DAVID WILSON VIRTUE, JOHN CHARLES WHITE and PETER THOMAS YOUNG who have hitherto practised as Barristers and Solicitors under the firm name of YOUNG, BENNETT, VIRTUE & WHITE at 85 Customhouse Quay, Wellington, announce that as from August 1, 1960, they have admitted into partnership CHARLES GUY POWLES and WARREN LANCELOT ALLEN. The business of the new partnership will continue to be carried on under the name of YOUNG, BENNETT, VIRTUE & WHITE at the same address.

WANTED competent lady law clerk qualified or unqualified experienced in conveyancing in North Island city centre. Salary to commence £1,000 per annum. Apply in first instance to :—

LENNARD & CHESHAM,
12 Kitchener Street,
AUCKLAND.

Young barrister and solicitor, mainly common-law experience, wishes to purchase share in practice in Auckland. Limited finance available.

No. 116,
c/o C.P.O. Box 472,
WELLINGTON.

SHELL BURSARY

Applications for the 1961 AWARD of the SHELL BURSARY, valued at £750 per annum for two years, are invited from Male Graduates in Arts, Commerce or Law to take an additional degree, or in exceptional circumstances, a higher degree at Oxford or Cambridge Universities. Applicants should be single and, preferably, below the age of 25 years.

Cost of travel to the United Kingdom will normally be borne by Shell Oil New Zealand Limited.

Closing date for applications is the 1st November 1960. Regulations and Application Forms will be supplied on request to :—

The Staff Manager,
SHELL OIL NEW ZEALAND LIMITED,
P.O. Box 2091,
WELLINGTON.

Mr E. H. DE JOUX, Barrister and Solicitor, Bank of New Zealand Building, Upper Hutt, wishes to announce that as from July 1, 1960, he has admitted into partnership TERRENCE JAMES RYAN, B.A.,LL.B.,who has for the 18 past months been a member of his staff. The practice will be carried on at the same address under the name of DE JOUX & RYAN.

BARRISTER AND SOLICITOR in middle thirties with experience in common-law work in both Magistrates' and Supreme Courts, company and taxation work, wishes to obtain position with a Wellington firm offering opportunity in common law and commercial field. Please reply to :—

No. 110,
c/o C.P.O. Box 472,
WELLINGTON.

Messrs C. G. BENNETT, A. A. LUCAS, and W. H. BLYTH, practising in partnership as Barristers and Solicitors at 12 O'Connell Street, Auckland, announce that they have been joined in partnership as from June 30, 1960, by Mr HENRY JULES VOLLEMAERE, LL.B., for some time past a member of their staff. The practice will continue at the same address under the name of BENNETT, JACOBSEN & Co.

We have available an excellent position for a qualified Solicitor with the ability to undertake a wide variety of responsible work mainly in the company, trust, and conveyancing fields.

WALLACE, MCLEAN, MOLLER & BAWDEN,
Barristers and Solicitors,
P.O. Box 2022,
AUCKLAND.

Young Barrister and Solicitor required for an old-established practice in a North Island Provincial Supreme Court Centre. The position offers wide scope in all branches of legal work, including Common Law and good prospects of early partnership for suitable applicant.

Commencing salary from £1,000 p.a. according to experience and qualifications.

Apply to :—

No. 108,
c/o C.P.O. Box 472,
WELLINGTON.

PROGRESSIVE BUSINESS in North Island Provincial Town requires a Solicitor with view to partnership. Must be energetic, prepared to work hard and keen on all classes of legal work, particularly Court work. Good salary offered.

"PROGRESS",
c/o C.P.O. Box 472,
WELLINGTON.

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 :

No. 109,
c/o C.P.O. Box 472,
WELLINGTON.

An excellent opening in a large North Island town approaching City status is available for a lady solicitor experienced in conveyancing. Salary £1,100 to commence with prospects of an early partnership in well-established practice in new modern office. Reply in first instance to :—

"LADY SOLICITOR",
c/o C.P.O. Box 81,
AUCKLAND.

LEGAL PARTNERSHIP

£2,000

A leading firm of Solicitors in a major North Island provincial centre wishes to appoint an additional partner for their expanding practice.

CONDITIONS OF APPOINTMENT

Conveyancing ability is essential. The successful appointee will also need to undertake broad legal responsibilities, including Court work.

★ Salary £2,000 guaranteed minimum for the first year.
★ Generous partnership terms will be offered on successful completion of this preliminary period.

QUALIFICATIONS

★ Formal legal qualifications and appropriate background are essential.

The firm regards integrity and outright ability of equal importance to academic qualifications and wishes to appoint a man of outstanding potential who has the capability to make a real contribution to the success of the practice. The present partners are prepared to make full recognition for this.

Applications will be kept strictly confidential ; should be fully informative and addressed to :

Mr. M. C. SHEFFIELD, M.A.
NORMAN SPENCER & Co. LTD.
Management Consultants,
33 Willis Street, Wellington. Telephone 44-457

lend them, and borrowers were legion. Some of the earliest reports were years late being published because someone found them too useful to be returned to their owners.

In the course of time, the demand for such records developed to the point where the more enthusiastic reporters collected them into volumes known as *Year Books*. Chronology, content, and authority were for a long time less important than voluminousness, but despite the fact that most of them were still in manuscript form the product found fairly wide acceptance. Then came the digests of the *Year Books*, the first abridgments, and the forerunners of the modern *Digest*.

With the sixteenth century still in its early decades the popularity of the *Year Books* began to decline, and after a period of only intermittent appearances they suffered total eclipse. But the idea had been born, and almost co-incidental with the publication of the last *Year Books* the first LAW REPORTS made their debut. This was about 1537. Out of the death throes of the *Year Books* emerged the embryo of the formal reports which today are represented by anything from 1,300 to 1,500 series which can be, and are, cited from time to time.

Among the developments that lent urgency to the evolution of law reporting at this stage was the transition from Latin and Norman-French to English in the language of the law (e.g. the Reports of Sir Edward Coke) and the invention of printing which emerged just before the rise of law reports.

Here then are the origins of the present world-wide system. And it is significant to observe that, even in these early stages, the question of "reportability" was regarded as of paramount importance. The law reports of the sixteenth century were concerned with recording decisions on points of law. In fact, the actual result of litigation was for this purpose so relatively unimportant that it was not infrequently ignored altogether.

THE BAR TAKES OVER.

These earliest reports were not necessarily contemporary. They included all sorts of past decisions and pleas, and even at this point the emphasis was as much on personal benefit and guidance as on general use. It was only with the rise of the reputation of special reporters and authors that circulation began to progress to any marked extent. One inevitable result of this wider publication was that reporting gradually became a specialized activity and fell exclusively into the hands of members of the Bar.

Each reporter tended to frequent his own particular Court and thus reports came to be grouped in series after the fashion of the modern English reports. But irregularity of publication was still an obstacle to steady progress. In fact, it was not until about the end of the eighteenth century, when the reports of Dunford and East began to appear regularly at the end of each legal term, that continuity was achieved. These publications became known as *Term Reports*. They are important in the process of development if only from the fact that they introduced to law reporting for the first time a genuinely contemporary character. But they had an even greater significance, since it was about this time that the rule was established that the Courts would have regard to reports authenticated by a reputable member of the Bar and no others.

Early in the nineteenth century, with the entry of the *Law Times* and the *Law Journal* into the field, general reports covering all Courts began to appear. But progress, as usual, brought its problems. By the middle of the nineteenth century the multiplicity of series of reports began to attract a lot of critical attention. The right to report in any Court was free to all counsel, and it now became the rule rather than the exception that two or more reporters would be seen in a single Court. As the merits of these note-takers were not equal, it was hardly surprising that some of the reports were less than impeccable. Obviously the value of some must exceed that of others.

The inevitable happened. Judges began to be outspoken about the demerits of reports that did not please them, and counsel frequently found themselves in a dilemma as to which authorities could be cited most advantageously. Lord Holt on one occasion attacked the contemporary *Modern Reports* with more than the customary choler. He said they were "skambling" and likely to cause future generations to think that the Judges were "blockheads".

Referring to Espinasse's Nisi Prius Reports (Esp. (1793-1807), 170 E.R.) one Judge is reputed to have exclaimed: "I don't care if it is in Espinasse or any other ass!"

NINETEENTH CENTURY REFORMS.

The need for reform became more and more pressing until in 1865 the English Council of Law Reporting, which had already begun to acquire most of the private reports, embarked on the publication of modern authentic, but still unofficial, *Law Reports*. This stage was reached only after much professional discussion, meetings of the Bar, and other matters of inducement (see *Daniel's History of the Law Reports*).

The English Council of Law Reporting is 0ot a Government or official institution. It has no legal privileges and does not claim any monopoly; in fact, it is a joint Committee of the Inns of Court, the Law Society and the Bar Council.

Speaking to the American Bar Association in 1936, Sir Frederick Pollock, who in 1895 was appointed Editor-in-Chief of the *Law Reports* said: "My learned colleagues on the staff of the *Law Reports* and myself are not an official hierarchy. We are not members of the Civil Service. We have no insignia, no precedence, no title to be invited to State functions. The lay public is hardly aware, if aware at all, of our existence. We are even among the few things in the British Empire unknown to *Whitaker's Almanack*, that compendious and almost universal book of reference. If these be drawbacks, and I doubt whether most of us would count them such, we have our compensations. Disciplined co-operation is, of course, a necessity; though some learned persons, when the establishment of the *Law Reports* was under discussion, did not see of what use an editor would be. But our bond is more like that of a college crew than that of a Government office".

ALL ENGLAND REPORTS.

With the disappearance of most of the private reports and the development of the existing series known as the *Law Reports*, the evil of multiplicity of reports

which was thoroughly investigated in England by the Lord Chancellor's Committee in 1940, has virtually disappeared. But in this connection it should be emphasized that even the comprehensive coverage of the *Law Reports* has not entirely satisfied the requirements and inclinations of the general field of practitioners.

This is strikingly illustrated by the success and popularity of such relatively new series as the *All England Reports* and the *Times Law Reports*. The *All England Reports*, which were begun by Butterworth and Co. (London) Ltd. in 1936, enjoy an unqualified acceptance not only in England, but in every jurisdiction where the Common Law is received or its authorities are quoted. Moreover, the publishers, appreciating the need for the widest possible sources of authority in the past as well as the present and future, have embarked on the preparation of a reprint series—The *All England Reprint*—which when concluded will cover the period from 1843 to 1936. This series will comprise in thirty volumes a carefully selected number of "living cases" from 177 volumes of the *Law Times Reports*. The 4,000 cases which will comprise the *Reprint*, already more than one-third completed, will provide ready access to judgments delivered over a period of 115 years.

"LOVE ME, LOVE MY DOG"

We are the owner of a golden-haired cocker spaniel—one of those mournful looking darlings who pinches your chair by the fire and puts his feet on your chest immediately you get out of the car on a wet night. We have been told by the Police that they have highly intelligent dogs, but we have pointed out their dogs have to be trained while our cocker depends on his natural intelligence. Our dog, Sherry by name, goes down each week to the bookseller and puts his feet on the counter to get our John O'London and New Zealand's national weekly. The bookseller wraps the papers up and Sherry takes them from his hand and brings them to the office. He has become well-known to passers-by.

In most country towns there may be found a person whom nobody seems to love who stands staring three parts of the way across the footpath holding a piece of paper in her hand. A newcomer to this band very much to the bookseller's annoyance took up her stand immediately outside our bookseller's shop. On a wet day Sherry who entirely misunderstood her attitude—to the delight of the bookseller—took the paper and tried to leave his foot marks on the lady's dress.

On Saturdays while others work in the garden we have of late years taken to thinking of next day's sermon or the afternoon's results. Either way we object to answering the door to be told about our soul. Last Saturday another of these ladies with a pamphlet in her hand called but we saw her first and Sherry was delighted when we sent him for the paper.

This question of dogs has obtruded itself lately into the office. The night watchman of a firm in which we have more than a passing interest has a watch dog called Fido which has learnt much from Sherry. His ancestry is a matter of conjecture; we have heard it described as half Alsatian and half Palmerston North. In motion he weighs about the same as Mr Jones—the phootballer not the fotographer—and if you are wrongly on his territory by night you are likely to collapse under his charge. He then stands over you, barks twice, and makes a noise like an hysterical vacuum cleaner until his boss turns up. He had been taught to do this noise when his ribs were tickled. Very early in his career we had thought it wise to make friends with Fido. A month or two back Fido had a passage at arms with an uninvitee whose excuse was that he had intended to call on the night watchman for the perfectly lawful purpose of discussing the composition of the team for South Africa. He did not explain this to Fido who went through his routine and the night watchman in due course assisted the uninvitee to get off the premises. The uninvitee's lawyer was now writing the sort of letter we expect from uninvitees.

On March 31, we called on the general manager, it being his silver wedding day, and he took a mean advantage of us in hope of a free consultation. We finally agreed not only to take his nephew home but to interview the nightwatchman about Fido on the way. It had started to rain so he lent us a smelly and oily overcoat. Arriving at the nightwatchman's cottage about midnight we received what at first we thought was a personal welcome from Fido but we had forgotten our smelly overcoat and it was only when we blasphemed that Fido recognized us and apologized for his untoward action in the absence of his boss. On duty at the police station there was an officer who was inclined to decry Fido's qualities in favour of a mythical dog the policeman said he used to own in Auckland. It has always been our ambition to help the police and we thought it would be helpful if he saw a really good dog under working conditions. As we did not want the policeman to feel under any personal obligation to us we asked our passenger to ring 111 (the local equivalent of Whitehall 1212) and explain that the nightwatchman had disappeared, that he was having trouble at the factory and that he had found a note that had been left on the cottage table. The policeman as policemen do started asking for details so we stamped our feet on the floor, our passenger dropped the receiver and we tickled Fido's ribs. Fido growled. We then decided to say goodbye to Fido. As we left we heard a very fast car pull up at the cottage and pausing for a while we heard Fido give two short barks signifying action completed. After which we proceeded happily homewards.

Next Court day our partner heard a very exaggerated account of the incident and asked whether there really had been a note on the table. The policeman pulled out a piece of paper and said he couldn't see any sense in it. Our partner having read the note decided not to do any translation. The note read "Poisson d'avril Fido".

Somebody at the round house must have learnt French for it is some time since we have heard of that Auckland dog.

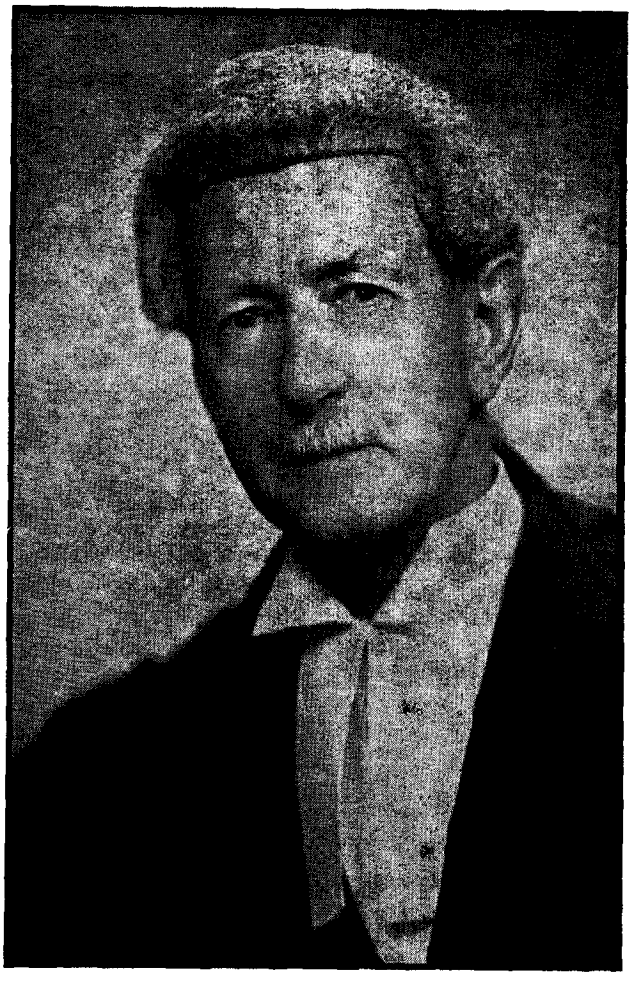
ADVOCATUS RURALIS.

MR JUSTICE F. B. ADAMS

Commencement of Retiring Leave.

APPOINTED to the Bench on August 3, 1950, Mr Justice F. B. Adams presided in the Supreme Court at Christchurch probably for the last time on July 22, 1960, when he was tendered a farewell by members of the Bar on the eve of the commencement of his retiring leave.

Mr Justice Adams was born in Dunedin in 1888 and received his primary education at the Arthur Street school of which he was dux in 1902. He then went on to the Otago Boys' High School where again he was dux and also Chamber of Commerce Medallist. His studies in law commenced at Victoria College (now Victoria University of Wellington) in 1907 and he continued them at Otago University, graduating B.A. in 1909, LL.B. in 1910 and LL.M. in 1916. He was admitted to the Bar in 1911.



Mr Justice F. B. Adams.

Mr Justice Adams served as a lecturer in various subjects at Otago University for some years, but there was an interruption in his career by war service from 1914 to 1918. In the latter year he was wounded at Bapaume.

In 1921 the Judge's father, Mr Justice A. S. Adams was appointed to the Supreme Court Bench, and Mr F. B. Adams (as he then was), was appointed Crown Solicitor in Dunedin, a position which he held until his own appointment to the Bench in 1950. As Crown Solicitor he was engaged in most important and interesting litigation, not the least of which were some twenty murder trials.

Both as counsel and Judge, Mr Justice F. B. Adams has been noted for his keen brain and careful attention to detail, coupled with a very high degree of patience and courtesy. In recent years he tried two cases of great length which must have been wearisome in the extreme, the Westport "Mining Case" and the Christchurch "Mower Case", but throughout his patient attention to the evidence and his courtesy to witnesses and counsel never flagged.

The judgments which the Judge has contributed to the *Law Reports* are legion and constitute a lasting contribution to the law on a diversity of subjects. Clarity of expression and careful reasoning have always been a feature of the judgments which he has written.

It is possible that the readers of the NEW ZEALAND LAW REPORTS have sometimes wondered why the Judge has always been accorded the style of "Mr Justice F. B. Adams", in contrast to the absence of initials in all references to his brethren on the Bench. It may now be stated that this departure from precedent was at the request of the Judge himself, acting with the concurrence of the then Chief Justice, Sir Humphrey O'Leary, the purpose being to avoid confusion of his judgments with those of his father, Mr Justice A. S. Adams, who had retired from the Bench not very many years before.

At the farewell which was tendered in Christchurch on July 22, there were present some 150 members of the Bar from Canterbury, the West Coast, Wellington and Otago. There were also some fifty invited guests, including the Mayor of Christchurch (Mr G. Manning), the Bishop of Christchurch (the Right Rev. A. K. Warren), the Right Rev. Monsignor Kennedy, Vicar-general of the Roman Catholic Diocese of Christchurch (in the absence overseas of the Roman Catholic Bishop of Christchurch, the Right Rev. E. M. Joyce), the president of the Baptist Mission in Christchurch (the Rev. A. L. Sincock), Magistrates and former Magistrates, the descendants of former Judges and many others. A telegram of apology was read from the Attorney-General, the Hon. H.G.R. Mason Q.C.

LAW SOCIETY'S TRIBUTE.

On behalf of the New Zealand Law Society, the president, Mr D. Perry, opened his address to His Honour as follows:

"An upright Judge—as such, if your Honour pleases, will you be remembered by the whole legal profession of New Zealand as you step down today for the last time from the Bench you have adorned.

"The profession of the law is in your debt. And the public of this country owes you, as it does to all our Judges, a debt of gratitude of which they are barely conscious. How many members of the public

appreciate, as we are so close to them appreciate, how exacting is the task of a Judge ? How many are there who appreciate that these are workers who enjoy no five-day week ? How many are there who appreciate that our Judges work by day and by night, not five days a week but six and seven ? It would certainly appear that their paymasters have no such appreciation when one realizes that the purchasing power of a Judge's salary today is £1,000 less than it was 30 years ago.

" Your Honour, we part from you with sadness, but with pride in the lustre you have lent to the Bench, and as you leave us, I would want you to know that the whole legal profession of New Zealand wishes you well in what we hope will be a long and happy period of ease and peace."

Mr Perry then quoted at some length from the inaugural address of the Lord Chancellor (Viscount Kilmuir), delivered to the Eleventh Dominion Legal Conference on the subject of judicial qualities and spoke of His Honour's patience, courtesy, ability to discount his own prejudices, and integrity.

Canterbury Society.

The next speaker was Mr W. K. L. Dougall, president of the Canterbury District Law Society, who opened his address by saying :

" All present here today, in what has been your Court for the past seven years, are grateful for this opportunity of expressing our thanks to you and, I think I may add, the thanks of the public generally for your life of service to the community and for your distinguished and impartial administration of justice.

" When congratulations were tendered to you on the occasion of your elevation to the Supreme Court Bench in Dunedin in 1950, Mr A. N. Haggitt, speaking of the precepts of the Emperor Justinian, suggested that those precepts would be safe in your hands. Justinian referring to the office of a Judge said, ' his first care ought to be never to judge otherwise than according to the laws, constitutions or customary usage ' and he defined ' justice ' as ' the constant and perpetual wish to render everyone his due '.

" May I now, sir, on this occasion publicly affirm that those precepts have indeed been safe in your hands.

" During your retirement, which will commence next November, we hope that your Honour will take pleasure in looking back on what we know to be a brilliant scholastic career and a life dedicated to the service of the public. I know that the members of your family and your friends, many of whom are here today, recognize with pride the magnificent service which you have rendered to the law and to the citizens of New Zealand in times of both peace and war.

" Finally, may I express the grateful thanks of both counsel and witnesses for your unfailing courtesy and patience at all times.

" Particularly during the last three or four years, the demands made on your Honour have been excessive, and although the position has been recognized to some extent in centres other than Christchurch, it is only recently that the Executive has seen fit to appoint two resident Judges to Christchurch.

In addition to the strain imposed on your Honour by the knowledge of an ever-increasing number of cases awaiting hearing, your Honour has also been called upon, on many occasions, to conduct witness actions under almost impossible conditions in the grand jury room. On one occasion when there was difficulty over the availability of a second courtroom, and when it was necessary to have two Judges sitting in Christchurch on the one day, I heard it said quite seriously by a senior Christchurch barrister that if the administration of justice so required it, your Honour would be prepared to sit in a tree. Counsel went on to say that even in those peculiar circumstances, your Honour's Court would still be conducted with decorum and due and proper dignity.

" The profession is deeply grateful to you for your courage and selfless determination in continuing with the patient and thorough administration of justice under the very difficult conditions which have pertained to Christchurch during the past few years.

" I have received messages from the Westland and Auckland District Law Societies asking that I associate them with this function and they now join with the profession in Christchurch in wishing your Honour many happy years of retirement."

Mr Dougall then dealt with His Honour's scholastic career, war service and career in the profession until appointed to the Bench, and his service to the Otago District Law Society, New Zealand Law Society and the Council of Law Reporting. He also detailed certain cases in which His Honour had been concerned, some as counsel, some as Judge, and referred to the extent to which His Honour's judgment had been quoted with approval in overseas publicity and overseas tribunals.

On behalf of the Otago District Law Society, Mr J. B. Deaker apologized for the absence of the president of that society, and referred to the wide variety of cases in which His Honour had taken part. He concluded :

" Your name will long be remembered with affection and respect in your native city. On behalf of the members of the Otago District Law Society I extend to your Honour their congratulations at the closing of an eminent and successful career and their most sincere wishes for a long and happy retirement."

With typical courtesy and thoughtfulness His Honour then invited those present to be seated.

His Honour's Reply.

After acknowledging the presence of the official guests other than members of the Bar, including a number of his own relatives and friends, His Honour prefaced his reply as follows :

" There are somethings I desire to say before responding to what has been said, and I ask you to bear with me while I do so.

" The tradition being that this Court sits ' coram rege '—in other words, in the presence of the Sovereign —and that the Judge on his Bench represents the Sovereign, it is not customary for him to speak directly on occasions such as this to persons other than the members of the Bar.

" I hope, however, that it may be permissible for me to say how glad I am of the presence of relatives and friends, some of whom have journeyed far in order to be with me today. They include my four daughters and their husbands, with such of their children as are

of understanding years and were able to come. They include also a sister who, in my late father's day, was well known to some of you as the Judge's younger daughter; and my brother, Mr H. S. Adams, for many busy and happy years my partner in practice, and, for a decade now, the successor of my father and myself in the office of Crown Solicitor at Dunedin. They also include Mr Deaker, who has addressed me on behalf of the Otago District Law Society—my cousin and my partner in practice for many years. And I cannot refrain from mentioning my old school friend, Mr E. W. White, an honoured member of your Bar, whose conversion from school teacher to lawyer occurred when he joined me as managing clerk in Gore about 45 years ago, and who now shares with me the privilege of being known as grandfather to one small girl who is here today and two small but vigorous boys, who could not as yet be trusted to sustain the decorum of a Court of law, but who may some day—who can tell?—bear the burdens of legal practice formerly borne by their grandfathers and still carried by their father. Another grandson, listening to me now, has a second grandfather and a father in active practice, and may not inconceivably be destined to a similar career. It was in 1873 that the first member of our Adams family donned wig and gown in Dunedin. The family name will soon disappear from the lists of practitioners, but there is satisfaction in the thought that perhaps, under other names, descendants may be cound in the practice of the law for many years to come.

"There are others here today, including members of the Bar to whom I should have liked to make some fleeting reference for old acquaintance's sake; but time does not permit, and I can only say how vivid in my memory are the associations and friendships which their presence brings to mind."

Thanks to Speakers.

"I had thought at one time that I might fade quietly from the scene; but it was impossible to do otherwise than accede to the kind request that I should appear once more upon this Bench after my work was finished, and the time had come when no one could any longer entertain either hopes or fears in respect of anything I might do as a Judge.

"I know what it means for busy men to spare the time for such an occasion, and am grateful to you one and all for the honour you have done me by coming here this afternoon. I am grateful to Mr Perry, who has travelled from Wellington to represent the New Zealand Law Society; to Mr Dougall, who has gone to so much trouble on behalf of the Canterbury District Law Society; and to Mr Deaker, who has come from Dunedin, commissioned to represent the Otago Law Society, the society to which I formerly belonged, and on which my memories of legal practice are naturally centred. I am more than grateful to each of you for the sentiments you have so kindly expressed—sentiments which are, I fear, more generous than just, and far exceed the due meed of any merits to which I might lay claim.

"The law is a stern mistress. She has worked me hard, both at the Bar and on the Bench. But there are no regrets on that score, and I would play the game again with her as my taskmistress; and the remarks you have made may perhaps encourage me to believe that the labour has not been in vain. It will, indeed, have been worthwhile if I have succeeded in maintaining the high standards of industry, integrity and impartiality which are characteristic of the great profession to which we all belong.

Early Associations.

"I find it hard to believe that my course is run, or—to vary the metaphor—that the last arrow has been shot from the bow. It seems but yesterday that I opened my first legal textbook under the tuition of the late Sir John Salmond, whose wise guidance I was then too immature to appreciate. For lack of effort on my part, it bore little fruit, and the learned jurist must have classed me, if he thought of me at all, as one of his less promising students. That may seem but yesterday, but arithmetic and the calendar tell me it was 53 years ago. It marked the time when I first came to know as fellow students such men as Sir David Smith, Sir Robert Kennedy, and Sir Humphrey O'Leary—to mention them in the order in which they came to the Bench—and many others whose names have since become familiar to us all.

"As a student, however, there was one commanding influence brought to bear upon me, and it is fitting that I should here acknowledge the great debt I owe, both as a lawyer and in all other spheres, to the influence, encouragement and active help of my late beloved father. It was a privilege, well recognized at the time, but appreciated more fully as the years have gone by, to learn something of the theory and practice of the law from daily association and discussion with a lawyer of his calibre.

"It would not become me to dwell on the topic, but it would be foolish and insincere to pretend that I am unaware of the respect and admiration which afterwards came to be accorded to him by the Christchurch Bar in the course of the decade during which he occupied the seat in which I now sit; and I feel impelled to say that, if there be some among you today who have reason to think of him with an element of gratitude in their thoughts, they will be able to realize dimly how much greater is my own debt of gratitude to him. I gladly confess that any success I may have achieved in the practice of the law is justly to be attributed to him, and I have never ceased to marvel at the patience and understanding he displayed towards an unlearned and inexperienced youth; and the natural affection of a son for a father is mingled with admiration of his qualities as a lawyer, and with thankfulness for the training he gave.

"His portrait looks upon us today from the wall of this Court, and I have deemed it an inestimable privilege to exercise judicial functions in the Court where he once sat, and where your predecessors thought fit to commemorate him by means of that portrait, thus conferring upon him an honour which he valued, I believe, more than any other that came to him. It has stirred me deeply that your Law Society has expressed the desire to honour me in the same way.

The Doors Close.

"I regret that I have reached the end of the road. There is, in the retirement of a Judge, a distressing element of finality. The doors of the law, to all intents and purposes, close upon him once and for all. But I am fortunate in having reached this stage with health unimpaired, and with reason to hope that new interests may arise to fill the void. When I look back over my decade on the Bench, I am amazed to

note how many of my colleagues have failed to reach retiring age. The hand of death has been busy, and no fewer than six of my brethren have died under the age of retirement—Chief Justice Sir Humphrey O'Leary, Mr Justice Callan, Mr Justice Northcroft, Mr Justice Cooke, Mr Justice Hay and Mr Justice Haggitt—and I pay my tribute to them as loyal friends and colleagues and worthy occupants of the Bench.

" There is little more that I feel able to say, and I hope no one expects me to fill his ears with words of wisdom. What impresses me most perhaps, as I survey the legal scene, is that—contrary, I imagine, to what many people suppose—Bench and Bar are engaged fundamentally in a co-operative task, each doing its appropriate share in the great work of elucidating the truth and meting out impartial justice. Just as those objectives cannot well be achieved unless the presiding Judge brings to bear all his efforts and all the powers with which he may be endowed, so also does their achievement depend on the industry and efficiency of the practitioners who appear before him.

" Without the help of learned counsel, the ablest Judge would strive with difficulty, or in vain, to maintain the standard of justice which is so important in a community such as ours. I firmly believe that counsel in our Courts are conscious of the responsibilities that rest on them, and recognize that their primary function is, not the winning of cases, but the task of ensuring by all the means in their power that, so far as is humanly possible, right shall prevail and justice be done. The motto, *Fiat justitia ruat coelum*—let justice be done if the heavens fall—is the common motto of Bench and Bar, and I would wish that, on my parting from you, that thought should be uppermost in all our minds.

" We have laboured here as colleagues, and it is as such we part. The time has come when I must perforce withdraw my hand from the torch we have carried. But the torch remains alight, and is to be carried forward, not only by the hands of Judges who may succeed me here, but by your hands as well.

GRATITUDE TO CHRISTCHURCH.

" Throughout the period of my service in Christchurch the many kindnesses extended to me by the Canterbury District Law Society and by its members individually, and the uniform courtesy and consideration which learned counsel have displayed in all their dealings with me, have left me in no doubt as to the friendliness of your sentiments towards me, and have created an atmosphere, both in and out of Court, which has made my sojourn here a happy one. I have no regrets that my concluding years of service have been spent with you in Christchurch, and nothing could please me more than to believe that you on your side have been conscious of reciprocal courtesy and consideration from the Bench.

" Following established precedent, no other Judge has accompanied me on the Bench today. I regret that Mr Justice Richmond had to depart for Auckland this morning, but Mr Justice Macarthur has kindly agreed to join me on the floor of the Court when we adjourn. I desire to express my good wishes to both of these brethren, and the hope that, in their work in Christchurch, they may find the same pleasure and satisfaction as have fallen to my lot.

" When the Court adjourns in a moment's time, I hope to meet you individually. It will be impossible for me to say to each what it might be in my heart to say; but, when I shake your hands, as I hope I shall, let it not be regarded as a gesture of farewell. My work may be ended, but I look forward to a continuance of our friendship in the years that lie ahead.

" In conclusion, I repeat my thanks to you all for your presence here today, and to those who have addressed me for the exceeding kindness and generosity of their remarks, and for the good wishes they have conveyed to me on behalf of all. With the utmost sincerity, I wish for each one of you all that could be desired of happiness, success and prosperity, both in private life and in the profession to which you are devoted. Coming now to the last words I shall utter in a long series of speeches delivered in Court during a period of nearly fifty years, I say to you, may you and those who follow you strive fearlessly and unceasingly in the cause of justice."

His Honour then moved to the floor of the Court where he met personally all those present. He was there joined by Mr Justice Macarthur.

Subsequently Mr Justice Adams and his personal guests were entertained to afternoon tea by courtesy of his fellow Judges, Mr Justice Macarthur and Mr Justice Richmond.

Street Lighting a Nuisance.—For the purposes of the law of tort, a nuisance may be said to be an unlawful interference with a person's use or enjoyment of land, and such an unlawful interference may be caused by things such as roots of trees (*Davey* v. *Harrow Corporation* [1958] 1 Q.B. 60), smoke (*Crump* v. *Lambert* (1867) L.R. 3 Eq. 409) and fumes (*St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L. Cas. 642). However, as Lord Wright stressed in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances, and in a recent case at the West London County Court His Honour Judge Geoffrey Howard was prepared to extend this list and hold that a white fluorescent light streaming into the plaintiff's bedroom from a street lamp erected by the defendants outside her house could be a nuisance in respect of which damages and an injunction would be granted. In the event, the learned County Court Judge did not take this course as s. 130 of the Metropolis Management Act 1855, required the defendants to cause the streets within their district to be " well and sufficiently lighted ", and in complying with this statutory requirement the defendants, unlike the appellants in *Manchester Corporation* v. *Farnworth* [1930] A.C. 171, for example, had acted in a bona fide and reasonable manner."—*104 Sol. Jo.* 414.

A Question of Will.—" It may be that in the operating room the parties hereto were of the opinion that they were acting in the best interests of Mrs Yule in extracting the teeth. That would have been very important in their consultation with and their advising of Mrs Yule, but it does not justify their proceeding without her consent. As was said by Garrison J. ' No amount of professional skill can justify the substitution of the will of the surgeon for that of his patient ' (*Bennan* v. *Parsonnet* (1912) 83 N.J.L.R. 20 at 26.) "

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:

BOY SCOUTS

There are 42,000 Scouts in New Zealand undergoing training in, and practising, good citizenship. They are taught to be truthful, observant, self-reliant, useful to and thoughtful of others. Their physical, mental and spiritual qualities are improved and a strong, good character developed.

Solicitors are invited to commend this undenominational Association to Clients. The Association is a Legal Charity for the purpose of gifts or bequests.

Official Designation:

The Boy Scouts Association of New Zealand,
159 Vivian Street,
P.O. Box 6355,
Wellington, C.2.

PRESBYTERIAN SOCIAL SERVICE

Costs over £250,000 a year to maintain.
Maintains 21 Homes and Hospitals for the Aged.
Maintains 16 Homes for dependent and orphan children.
Undertakes General Social Service including:
Care of Unmarried Mothers.
Prisoners and their families.
Widows and their children.
Chaplains in Hospitals and Mental Institutions.

Official Designations of Provincial Associations:

"**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.

CHILDREN'S HEALTH CAMPS

A Recognized Social Service

There is no better service to our country than helping ailing and delicate children regain good health and happiness. Health Camps which have been established at Whangarei, Auckland, Gisborne, Otaki, Nelson, Christchurch and Roxburgh do this for 2,500 children — irrespective of race, religion or the financial position of parents — each year.

There is always present the need for continued support for the Camps which are maintained by voluntary subscriptions. We will be grateful if Solicitors advise clients to assist, by ways of Gifts, and Donations, this Dominion wide movement.

KING GEORGE THE FIFTH MEMORIAL CHILDREN'S HEALTH CAMPS FEDERATION,
P.O. Box 5013, WELLINGTON.

THE NEW ZEALAND Red Cross Society (Inc.)

Dominion Headquarters
61 DIXON STREET, WELLINGTON,
New Zealand.

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.

In Peace, War or National Emergency the Red Cross serves humanity irrespective of class, colour or creed.

The BRITISH AND FOREIGN BIBLE SOCIETY: N.Z.

P.O. BOX 930,
WELLINGTON, C.1.

A GIFT OR A LEGACY TO THE BIBLE SOCIETY ensures that THE GIFT OF GOD'S WORD is passed on to succeeding generations.

A GIFT TO THE BIBLE SOCIETY is exempt from Gift Duty.

A bequest can be drawn up in the following form:

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.

RIGHT TO CRITICIZE PERFORMANCES IN PUBLIC.

"The Innocent Mountebank and the Modern Mezzo-Soprano."

One who goes upon the stage to exhibit himself to the public, or who gives any kind of performance to which the public is invited, may be freely criticized, says Mr Gatley, *Libel and Slander*, 4th ed., p. 365.

"When will Hollywood learn that to make everything larger, louder and lumpier than life, is simply to diminish its effect", said a London film critic in a broadcast review of "The Green Years", *Turner* v. *Metro-Goldwyn-Mayer Pictures Ltd.* [1956] 1 All E.R. 449.

"A three-Act musical absurdity" wrote the *Western Morning News* with impunity of "The Major", written and composed by Mr T. C. McQuire, and presented on June 24, 1901, at the Theatre Royal, Plymouth. "It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, "The Major" is composed of nothing but nonsense of a not very humorous character, while the music is far from attractive. This comedy would be very much improved had it a substantial plot, and were a good deal of the sorry stuff taken out of it which lowers both the players and the play. No doubt the actors and actresses are well-suited to the piece, which gives excellent scope for music-hall artists to display their talent. Among Mr McQuire's company there is not one good actor or actress, and, with the exception of Mr Ernest Braime, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness." *McQuire* v. *Western Morning News Co.* [1903] 2 K.B. 100.

The path of the playwright, actor or theatrical entrepreneur has always been beset with thorns, and he must be prepared to endure the slings and arrows of the critics in the hope that one fine day another "Salad Days" or "My Fair Lady" must surely raise its lucrative head.

The situation was apparently no brighter in Hokitika in 1866, during Mr Bartlett's season at the Prince of Wales Opera House. On August 27 of that year the *West Coast Times* published the following article:

PRINCE OF WALES OPERA HOUSE.

"The engagement of Miss Julia Mathews has commenced an era as new as it is welcome in theatrical amusement in Hokitika, which lately has been of so poor a quality as to defy—because it was beneath—criticism. We do not refer to any want of energy on the part of Mr Bartlett with respect to the production of novelties. On the contrary, if variety possesses that charm usually ascribed to it, there have been changes enough to satisfy the most fickle: they have been, indeed, a great deal too rapid to allow any one piece to get into proper order for representation. Apart from this, the most objectionable feature in management has been the poorness of the talent engaged, which has in most cases acted as an insuperable bar to the success of any piece.

"Granted that the building of a theatre on such a scale, in such a town as Hokitika, was a bold speculation—granted that Mr Bartlett had already incurred a heavy outlay before the theatre was indeed opened: yet the hearty and unanimous response made by the Hokitika public should have been quite sufficient assurance that proper support would not be wanting to repay a spirited enterprise. But one cannot be constantly lost in admiration of the building, nor is one's good nature always proof against paying heavily for an inferior article. . . . For a while the manifest mediocrity of the company was endured, in the hope that time would produce an alteration for the better, and indulgent—indeed partial—criticism and unlimited encouragement were alike bestowed. But it appeared that Mr Bartlete held a different opinion, and expected a continuanct of liberal support without troubling himself as to giving an adequate return; apparently looking upon himself as a public benefactor—instead of a mere business man. This erroneous course in time brought its inevitable fruits. Their feeling of goodwill, and desire to encourage, aside, the intelligence of the public revolted against the inferior fare provided, and objected to five shillings' worth of yawning discomfort every night; and though sham benefits and bogus testimonials might attract some, and fancy bills of doubtful propriety, others, yet the theatre was generally looked upon as a failure—lamentable but hopeless. . . .

"One of the most glaring defects in Mr Bartlett's acting is his stereotyped style, which shows forth in every piece and through every character. . . . This disagreeable peculiarity, which would at first be unnoticed, becomes painfully evident in proportion to the frequency of this actor's appearance; and though the readiness with which Mr Bartlett got through his first attempts at genteel comedy in Hokitika led us to ascribe his success to a quiet knowledge of his own powers, a skilful conception of the character, and an unstudied abandon, yet it is now plainly to be noticed that a series of limited but well-conned posturing lessons only are his stock-in-trade, which every evening, and through every character assumed, are unvaryingly and invariably the same; and which lessons, however they might do credit to a performing monkey or tumbling *mountebank*, are scarcely worthy of an actor—especially one of such lofty pretensions as Mr Bartlett. . . .

"If Mr Bartlett were to throw more study and less impudence into his parts, in time he might become a fair second-rate colonial actor in his particular line; but the constant repetition of his present stereotyped attitudes will only obtain for him the appellation of a 'stick'. . . . About the highest praise we can award Mr Bartlett is that he always remembers his part—a particular generally lost sight of by most of his company. But as against this quality we must object to Mr Bartlett's style of constantly 'leading off' a laugh, as if he were claqueur in chief to the house instead of manager.

It has a vile effect even when successful, but when—as it often happens—it is the reverse and Mr Bartlett has the grin entirely to himself, it is heartily worthy of unqualified censure. . . . The chorus and minor singers may be shortly classed as execrable.

" We are aware that in thus speaking we have been treading on delicate ground. A critic has always a difficult and sometimes a disagreeable task to perform, and especially in the present case where the proverbial thin skin of the actor has become in the person of Mr Bartlett so morbidly sensitive of the slightest titillation as to shrink from the approach of anything like fair and honest criticism. We have not made the above remarks in any spirit of ill-nature—far from it. But it seems that the undulgence and leniency hitherto shown to the company of the Prince of Wales has not had the desired effect of encouraging and stimulating, but rather to have caused a relaxation of their energies. Like spoiled precocious children they have mistaken the too partial praise of their friends for their rightful due. . . ."

Mr Bartlett could scarcely be expected to disreardg such colourful and studied abuse, and on September 7 he issued a writ for defamation, alleging that the words " were used by the defendant in a defamatory sense, calculated to injure him in his profession and bring him into public contempt, ridicule and disgrace ", for which he claimed no less than £5,000 damages. The defendant pleaded fair comment and " the absence of any malicious motive or intent whatsoever ". The action came on for hearing on December 12 before H. B. Gresson J. and a special jury of twelve. By their verdict the jury found that the words complained of had been published by the defendant and were defamatory. They negatived the defence of fair comment, and assessed the plaintiff's damages in the contemptuous sum of £5. A case reserved for the Court of Appeal was dismissed on November 16, 1867, and Mr Bartlett then suffered his final indignity when, upon taxation of the costs payable to him by the defendant, the Registrar reduced counsel for the plaintiff's fee on brief from thirty to twenty guineas, and his total costs from £181 to £119.

Seventy-seven years later Madame X, mezzo-soprano, received a more chivalrous verdict at the hands of an Auckland jury. A weekly journal reviewed her recent concert in the Lewis Eady Hall in the following terms :

SONG RECITAL.

" Last week's concert in the Lewis Eady Hall given by Madame X, mezzo-soprano, must have left the audience with mixed feelings. Madame X has a commanding personality : she is not troubled by nervousness, and no one is likely to deny that she has a powerful voice, at least in the upper register. Her interpretation of the various songs she chose seemed to be satisfactory enough, although many of them were unfamiliar to the normal run of a concert-goer. When all that is said, however, the fact remains that Madame X is no singer. There is no particular reason why she should not sing as much as she likes for her own edification, or for that of a private circle of friends, but it is not easy to see why she finds it necessary to extend that privilege to the public.

" It seems necessary to emphasize, and this applies to the large majority of aspiring sopranos, mezzo-sopranos and contraltos, that the primary and indispensable requisite of a singer is a good voice. A charming manner and a sensitivity to words and music cannot provide a substitute for that quality. It is true that Madame X had not long recovered from a bronchial cold, and that her voice may have been affected in consequence. Perhaps she should have postponed her concert until she had fully recovered. However that may be, the chief impression left by the tonal qualities of her voice was that of a peculiar harshness. Softness and quality of tone were lacking. Her lower register might have provided this, but if so the heavy hand of the accompanist did not give the audience much chance to hear them."

Madame X, with some justification, alleged that as a professional singer and teacher she had been much injured in her credit and reputation by the publication of these words, and had been brought into odium, ridicule and contempt. In due course, a jury rejected the defendant's plea of fair comment, and awarded the plaintiff the sum of £400.

One may perhaps surmise that in suing for the comparatively small sum of £750 Madame X and her advisers had profited from Mr Bartlett's earlier rebuff, and in the final result their modesty achieved its due reward.

" T.A.G."

CORRESPONDENCE.

Letters to the Editor.

" Punishment and Prevention ".

Sir,

At p. 166 of the Conference Issue, second paragraph, the report reads :

" . . . must we not be sure that the Courts do not overlook—and, with respect, in this country they have overlooked it up to the present—the vital necessity of matching reformation with deterrence ".

I think it would have been presumptuous of me to say that the Courts *have* overlooked this necessity. I certainly intended to say, and believe that I did say, that the Courts " . . . have *not* overlooked it . . ."

The remarkable accuracy of the remainder of the report makes me believe that I must have inadvertently omitted the vital word " not " or else said it in a tone of voice that escaped your reporter.

Yours etc.,

K. L. SANDFORD.

TOWN AND COUNTRY PLANNING APPEALS.

St. Heliers Bay Picture Theatre Ltd. *v.* Auckland City Council.

Appeal under s. 26 of the Act.

The appellant company was the owner of a property containing 1 ro. 5.3 pp., situate on the corner of Parkside Street and St. Heliers Bay Road, having a frontage of 170 ft. to St. Heliers Bay Road and 96 ft. to Parkside Street. Under the respondent Council's proposed district scheme, as publicly notified, this land was zoned as residential. The appellant company lodged an objection to this zoning, claiming that the land should be zoned commercial B. The objection was disallowed and this appeal followed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The property under consideration is situated at the intersection of five streets, viz. St. Heliers Bay Road, Maskell Street, Riddell Road, the continuation of St. Heliers Bay Road and Parkside Street. There are already two commercial B zones on this intersection, viz. Maskell Street-Riddell Road area and Riddell Road-St. Heliers Bay Road area.

2. The main grounds of the Council's refusal to re-zone the land under consideration for commercial use is that such a use, particularly so if a picture theatre were erected on the property, would tend to aggravate an already existing traffic hazard.

3. St. Heliers Bay Road is the main-access route to St. Heliers Bay. Maskell Street and Riddell Road also give access to the north-east and east of the intersection to substantial residential areas, which can be expected to increase very considerably in density in the more or less immediate future. The Board considers that this intersection creates a traffic problem at the present time and with increased residential development in the area the problem will be more acute in future. There are already two commercial areas situated on the intersection, the St. Heliers Bay school is on another intersection, and to create a further commercial zone on the appellant's property would undoubtedly add to the traffic hazard. If further commercial development is needed at this intersection in the future it should be provided along Maskell Street and Riddell Road by extension of the already existing commercial zones. The appeal is disallowed.

Appeal dismissed.

Bitumix Ltd. *v.* Mt. Wellington Borough Council.

Appeal under s. 26 of the Act. The appellant company was the owner of a property containing 2 ac. 2 ro., 3.9 pp., being part Lot 1 on Deposited Plan No. 32674. It also owned an adjoining area of approximately 17k ac. It carried on business as bituminous asphalt manufacturers, bitumen and tar suppliers and contractors and roading and general contractors, and it had occupied its property for the past sixteen years. The property lay in the centre of an area bounded generally on the north by Lunn Avenue and on the south by Marua Road and it was close to substantial quarry zones lying to the north and west. Under the respondent Council's proposed district scheme, as publicly notified, this property was in an area zoned as industrial C.

Objections to this zoning were lodged by owners of residential properties located in or adjacent to this zone and the company lodged objection to the objections. The Council allowed the objections in part and re-zoned parts of the industrial C zone as a special zone designated as industrial B1, including therein part of the appellant's land. It was against this re-zoning that the appellant appealed.

The judgment of the Board was delivered by

REID S.M. (Chairman). 1. The property lies in a locality which may be described as a mixed industrial and residential area. This area is of comparatively recent development and industrial and residential development appear to have taken place more or less simultaneously.

2. Owing to the existence of two large quarries lying to the north and west very little further residential expansion can be expected to take place, but the area, by reason of its situation and the fact that substantial industrial development has already taken place, is well suited for industrial development.

3. In re-zoning part of the area as industrial B1 the respondent Council would appear to have been actuated by a desire to placate some of the owners of residential properties, but the Board considers that the creation of comparatively small "special" zones designed to cover an immediate situation is not generally in accord with sound town-and-country-planning principles. There may be occasions when the facts and circumstances are such as would justify "special" zoning, but the Board does not consider that there are any special facts and circumstances in this particular case to justify that course being followed.

The appeal is allowed.

The Board directs that such part of the appellant's property as is zoned industrial B1 be re-zoned industrial C.

Appeal allowed.

T. H. Ferguson and Son Ltd. *v.* Mt. Wellington Borough Council.

Appeal under s. 26 of the Act. It related to a block of land having a frontage to Banks Road in the Borough of Mt. Wellington. This block of land was for many years used as a quarry. Under the respondent Council's proposed district scheme, as amended after the hearing of certain objections, this block of land was zoned as residential. The appellant company appealed against that zoning claiming that the land should be zoned as industrial or commercial.

The judgment of the Board was delivered by

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

1. The area of the land under consideration is 2 ac. 1 ro. 38.6 pp. It is bounded on the north by the back boundaries of seven vacant residential lots, while in the northern corner is a narrow entrance strip giving vehicular access from Banks Road. The eastern boundary forms the back boundaries of eight built-on residential lots fronting on to Boakes Road. On the south and west it is bounded by land zoned as quarry reserve and a metal reserve. The area in question has been virtually worked-out as a quarry, the deepest portion of the excavation being twenty-seven feet below the general surrounding undisturbed ground. The Board considers that zoning as residential is unrealistic. The cost of filling it up, levelling it off and making it suitable for residential occupation would be uneconomic.
2. The company has been using part of the property as a concrete metal mixing yard and this has been the source of annoyance and discomfort to occupants of the residences fronting on to Boakes Road. The Board considers that to zone this land for industrial use without any restrictions would detract from the amenities of the residential area fronting on to Boakes Road and the residential area which will be developed fronting Banks Road. It also considers that the property should not remain idle. It is prepared to allow the appeal in part, the land is to be zoned as industrial B but subject to the condition that its use is to be limited to the uses set out in subcl. (c) and (d) of the Code of Ordinance under the heading *Predominant Uses*—(c) warehousing and storing except as specified in Appendix B of this code; (d) accessory buildings for such a use.

Appeal allowed in part.

D. M. Black Ltd. *v.* Stratford Borough.

Town and Country Planning Appeal Board. Stratford. 1960. March 28.

Zoning—Joinery factory—Land zoned as light industrial—Joinery factory not a conforming use but allowed as conditional use—Principles applicable—Town and Country Planning Act 1953, s. 26.

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

The appellant company was the owner of a property fronting on to Broadway North containing 33 pp. being Section 280 on the public map of the Town of Stratford.

Under the Council's proposed district scheme as publicly notified this property was in an area zoned as industrial A. The company carried on business as builders and joiners in premises which were too small for it and it wished to build on its Broadway land, but its business was of a type not permitted in an industrial A zone.

It accordingly lodged an objection to the zoning but the objection was disallowed and this appeal followed.

The decision of the Board was delivered by

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

1. Following on the hearing of objections the Council amended its proposed scheme by amalgamating the original industrial A and industrial B zones into one zone designated light industrial.

   Under the Code of Ordinances, in a light industrial zone certain types of industrial use falling within Appendix "B" are not permitted.

   Among the industries listed in Appendix "B" are "joinery factories".

2. The company's business is a mixed one. It does not operate on a large scale but it does a certain amount of building contract work. It also does some of the joinery work needed in connection with its own building contracts, it repairs furniture and it appears to do a considerable business in supplying the joinery needs of private house builders and in particular of the "do it yourself" home workmen.

   It does not supply the building trade except for an occasional small special need joinery job.

   In no sense does it operate as a "sash and door factory" but some of its operations at least bring it into the category of a "joinery factory".

3. It was claimed for the appellant that its business is really that of a "tradesman's workshop". The Board is unable to accept this but in any case the Council's Code of Ordinances defines "tradesmen's workshops" as "workshops for repairs and servicing", and the appellant's business clearly does not fall into this category.

4. In coming to a decision the Board has given considerable weight to the site of the appellant's property. Adjoining it on the north is a substantial motor garage carrying out motor repair work including a certain amount of panel beating, and on the south it adjoins a garage engaged in servicing and repairing farm tractors and similar machinery, while on the east it is bounded by the railway line.

   The Board does not consider that a business such as that carried on by the appellant can detract from the amenities of the neighbourhood so long as "joinery" constitutes only a part of its business.

The appeal is allowed in part, that is to say that the company is to be permitted to carry on its present business on the site the subject of this appeal as a "conditional use" only.

The conditions are to be settled by the parties themselves but leave is reserved to either party to apply to the Board for directions in the event of any dispute arising as to the reasonableness or otherwise of any proposed condition.

Appeal allowed in part.

R. H. White and Co. Ltd. *v.* Stratford Borough.

Town and Country Planning Appeal Board. Stratford. 1960. March 28.

Zoning—Area zoned as "Commercial"—Site coverage limited to 75 per cent. for buildings other than "residential"—Limitation in accordance with Town and Country Planning principles—Town and Country Planning Act 1953, s. 26.

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

The appellant company was the owner and occupier of a property situate on Broadway containing 19.3 pp. being Lot 1 Deposited Plan 3801, part Section 389 Town of Stratford, where it carries on a retail drapery and mercery business. The property was in an area zoned as commercial under the Council's proposed district scheme.

The Code of Ordinances to the scheme as publicly notified provided, inter alia, under the heading of "Bulk and Location Requirements", that site coverage in commercial zones should be limited to 75 per cent. for buildings other than residential.

The company lodged an objection to this requirement claiming that it should be allowed 100 per cent. coverage in respect of its property.

This objection was disallowed and this appeal followed.

The decision of the Board was delivered by

REID S.M. (Chairman). Having inspected the property under consideration the Board finds:

1. After the hearing of objections the Council amended its Code of Ordinances so as to allow an extension of site coverage beyond 75 per cent. as a conditional use having regard to: (a) proposed or existing service lanes; (b) covered loading bays; (c) off street parking; (d) open space requirements; (e) yard requirements; (f) such other factors as the Council deems relevant,

   so that the position now is that the company if it wishes to rebuild can do so as of right as to 75 per cent. of the site and as a conditional use as to all or part of the remaining 25 per cent. as the Council may determine.

2. The limitation of 75 per cent. site coverage in commercial areas is in accordance with town-planning practice and with town-and-country-planning principles.

3. The company has failed to establish that there are any special circumstances relating to its property that would justify the Board in approving of any departure from or modification of the provisions of the Code of Ordinances as it now stands, and the appeal is disallowed.

Appeal disallowed.

Tawhero Properties Ltd. *v.* Bay of Islands County.

Town and Country Planning Appeal Board. Paihia. 1960. April 28.

Zoning—Land zoned as "industrial"—Need for urban community to be provided with service industries serving its day to day need—Service Industrial Area to be located in central position—Town and Country Planning Act 1953, s. 26.

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

Under the Council's proposed district scheme, as publicly notified, part of a property owned by the appellant was zoned as industrial. That part of the appellant's property so zoned comprised 1 ac. and was described as Lot 44. It is situated near the western end of Williams Road.

The appellant lodged an objection to the zoning and when its objection was disallowed this appeal followed.

The decision of the Board was delivered by

REID S.M. (Chairman). Having inspected the property, the Board finds:

1. The property in question adjoins land zoned as residential and there are already some houses erected on a hillside overlooking the site.

   In general industrial areas must be regarded as detracting to a certain extent from the amenities of a residential neighbourhood, but in this particular case the Board is called upon to weigh some detraction from the amenities of the neighbourhood against the essential need of an urban community to be provided with various types of service industries such as laundries, bakers, tradesmen's workshops and similar industries serving the day to day needs of a community.

2. A service industrial area should wherever possible be located in a reasonably central position and essential services such as power and water should be readily accessible.

   The property under consideration meets these needs and on the evidence it appears to be the only available site having the requisite qualifications.

3. The company, as part of its case submitted that under the Council's Code of Ordinances any form of industry could be operated in the area as a predominant use.

   An examination of the Code indicates that there has been some omission in that although the Code contains Appendices "A" and "B" similar in form to the Appendices set out in the Fourth Schedule to the Regulations there is nothing to connect the Appendices to the text of the Code.

The appeal is disallowed but the Board directs that only light industries serving the day to day needs of the community are to be allowed to operate in the area and in particular that none of the industries listed in Appendices "A" and "B" are to be permitted either as predominant or conditional uses.

Appeal dismissed on above conditions.