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A NEW CONCEPT IN THE LAW OF NEGLIGENCE.

III.

WE now come to the real point of *Heard* v. *New Zealand Forest Products Ltd.* [1960] N.Z.L.R. 329—namely, whether the conduct of the defendant company in undertaking to conduct and guide around its plant and premises the party of which the plaintiff was a member created a special duty of care towards the plaintiff and of course the other members of the party also.

It is today well recognized that the Law of Torts is fluid and adjusts itself to changes in the conditions of human life and relationships. In short, the categories of negligence are never closed. Modern authority to this effect is to be found in *Donoghue* v. *Stevenson* [1932] A.C. 562, 619; [1932] All E.R. Rep. 1, 30; *Hay* (*or Bourhill*) v. *Young* [1942] 2 All E.R. 396, 404; [1943] A.C. 92, 107. There is, however, one classification in the Law of Torts which has been regarded as fixed and immutable—namely, the classification of those persons who enter on the property of another. *Salmond on Torts*, 11th ed., p. 548 puts it as follows:

> "Persons entering on premises in the occupation of another are of two kinds: (1) Those who enter in pursuance of a contract between themselves and the occupier; (2) Those between whom and the occupier there exists no such contractual relation. These fall into three categories. They may go to the premises; (i) by the invitation express or implied of the occupier; (ii) with the leave and licence of the occupier; and (iii) as trespassers. These three categories are exhaustive *and the temptation to introduce further subdivisions should be resisted.*"

The italics are ours.

The classification into three groups of those entering on property in the occupation of another otherwise than pursuant to a contract is based on a passage from the speech of Lord Hailsham L.C. in *Addie and Sons* v. *Dumbreck* [1929] A.C. 358, 364; [1929] All E.R. Rep. 1, 4. Lord Dunedin also spoke to the same effect (*ibid.*, 371; 8). In *Sutton* v. *Bootle Corporation* [1947] 1 All E.R. 92; [1947] K.B. 359, the Court of Appeal in England treated the classification set out in *Addie's* case (*supra*) as exhaustive. Asquith L.J. there said:

> "*Addie* v. *Dumbreck* . . . appears to decide that persons entering on premises in the occupation of others (otherwise than under a contract) are classifiable exhaustively as either trespassers, licensees or invitees, and there are no intermediate or hybrid classes" (*ibid.*, 366; 96).

Coming nearer home, we need only to refer back to *Percival* v. *Hope Gibbons Ltd.* [1959] N.Z.L.R. 642. In that case, North J. said:

> ". . . the line that separates each of the three classes viz. trespassers, licensees and invitees is an absolutely rigid line 'there is no halfway house, no no-man's land between adjacent territories'" (*ibid.*, 661).

Cleary J. also dealt with the question as follows:

> "Lord Dunedin's observations in *Robert Addie and Sons* v. *Dumbreck* that there are three different classes—invitees, licensees, trespassers—and that the line that separates each of these three classes is an absolutely rigid line, has been often cited and remains applicable in New Zealand today . . ." (*ibid.*, 672).

It must never of course be forgotten that this classification applies only where the damage complained of is due purely to the static condition of the premises and that an entirely different position arises where the damage is due to the negligent carrying out of a current operation. The classification also does not come into operation where the person entering on property does so pursuant to a contract. That exception has no application in *Heard's* case. The contract above referred to must be a fully binding contract entered into for valuable consideration, or created by specialty: *Holt on the Liability of an Occupier of Premises for Negligence* (1918) 34 L.Q.R. 160. There was no suggestion in either argument or judgment in *Heard's* case of any such contract, and this class of entrant may therefore be disregarded.

What then has the majority of the Court of Appeal decided? First their Honours rejected the defence of volenti. Then they held that the plaintiff's injuries did not arise from the negligent carrying on of a current operation. On this point the judgment says (p. 360):

> "The cases to which we have referred, and other cases touching on the circumstances under which an occupier could become subject to the activity duty, were discussed fully in argument. In our opinion, however, difficulties arise when it is attempted to apply the activity duty illustrated by this line of authority to the facts of the present case. 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. To say that a general duty of care arises where a floor has become wet or slippery as the result of the occupier's normal operations would be tantamount, under the guise of applying the activity principle, to setting aside altogether the rules governing the liability of occupiers. Those rules, however, must be recognized and applied by the Courts of this country unless and until we have here legislation similar to the English Occupiers' Liability Act 1957, under which the distinction between the occupier's liability as such and his liability arising from a breach of his activity duty has ceased to have any application."

Here then is an express finding that the injuries suffered by the plaintiff were due not to the negligent carrying out of a current operation but to the static condition of the premises caused by the normal operations of the occupier of the premises.

Then it was submitted in argument that the guiding of the plaintiff was a current operation negligently performed. On this submission North and Cleary JJ. commented as follows (p. 364):

> "The jury might well have been specifically asked to determine whether there was negligence in the guiding, but, as it is, they have found that the defendant was negligent in failing to warn the plaintiff of the danger constituted by the presence of the water and chips on the floor, and also that this was a danger which was known or ought to have been known to the defendant. They have also found that there was a failure to take reasonable care for the safety of the plaintiff. The existence and nature of the duty owed by the defendant is a matter of law, and was fully argued before us. We are of opinion that these findings of the jury are sufficient to establish a breach of the duty which we think existed and, this being so, the plaintiff is entitled to judgment."

This can only be read as meaning that, although negligent guiding might have founded a claim for damages, there was no such finding of fact by the jury to justify the entry of judgment for the plaintiff on this ground.

The judgment is thus founded entirely on the finding of the jury that the defendant failed to warn the plaintiff of the danger, along with the general finding that it failed to take reasonable care for the plaintiff's safety but the effect of those findings of fact can be judged only in relation to the duty of care owed by the defendant to the plaintiff. At the highest the plaintiff's status on the premises was that of an invitee, and it was readily conceded by counsel for the plaintiff in argument that in face of the findings of the jury, the plaintiff could not succeed as an invitee simpliciter. The majority judgment then has fixed on the defendant a duty even higher than that which it would have owed to an invitee, and thus has in effect created a fourth class of persons entering on property in the occupation of another. The Court has then by this judgment changed the immutable and extended that which has always been regarded as fixed and rigid, hence our statement in the opening para. of Part 1 of this article that the judgment appears to run counter to very weighty authority. In reaching their decision, North and Cleary JJ. derived assistance from certain cases which it will be profitable to discuss shortly.

The first was *Rich* v. *London County Council* [1953] 2 All E.R. 376; [1953] 1 W.L.R. 895, cited in support of a dictum that a school is in a special relationship towards its scholars. This was not a case of injury arising from the static condition of the premises, but turned on the two questions whether the Council had been negligent in leaving coke where it was readily available to children as a source of missiles, and whether it, through its servants, had exercised adequate supervision over the children to prevent such use of the coke. The special relationship found to exist created a duty to take such care of the children as a careful parent would exercise in like circumstances.

Next was *Thompson* v. *Bankstown Corporation* (1952) 87 C.L.R. 619. The injuries suffered by the plaintiff in this case arose when the plaintiff, a boy of thirteen, leaned his bicycle against a power pole erected and controlled by the defendant for the purpose of reaching a bird's nest in a decayed portion of the pole some feet above the ground. As he reached into the pole, he came into contact with a vertical wire on the pole which should not have been but was alive. The plaintiff received a severe shock and suffered serious injuries. The High Court held that this was not a case to be decided on the ordinary occupier-trespasser rules. The pole was on the highway and carried high tension lines. There was therefore a general duty of care to the public at large to see that the defendant's poles and lines did not create a danger. This duty did not arise out of any special relationship between the defendant and the plaintiff and the Court rejected and characterized as unreal the view that the defendant's duty was to be measured by the fact that that it was in possession of the pole. With respect we submit that *Thompson's* case gives no support to the majority judgment in *Heard's* case.

Harris v. *Perry and Co.* [1903] 2 K.B. 219 was a case where a passenger was carried gratuitously on a locomotive used on construction work and was injured owing to the negligence of the defendant's servants. It was plainly a case of active negligence on the part of such servants in a current operation and liability did not arise out of the static condition of the premises. *Lewys* v. *Burnett* [1945] 2 All E.R. 555 was also a case of breach of a duty arising from an activity or current operation and has no application to those cases where the injuries complained of arise from the static condition of the premises.

With respect, then, we submit that none of the cases cited supports the majority judgment in *Heard's* case and that the judgment of Gresson P. is sounder and much to be preferred.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Summary Proceedings—Accused pleading guilty and electing to be dealt with summarily—Leave given to withdraw plea—Right to change election and claim trial by jury—Summary Proceedings Act 1957, s. 55 (2). See JURISDICTION (*infra*).

INDECENT PUBLICATIONS.

Novel of literary merit—Standards to be applied in considering whether there is undue emphasis on sex—Indecent Publications Act 1908, ss. 5, 6—Customs Act 1913, s. 257. The question whether there is undue emphasis on sex in a literary work must be fixed in relation to a standard—namely, that of the community in which the book is to be distributed. In considering the persons, classes of persons or age groups likely to read the work, the Court must deal with the matter as if no such attention had been focused upon the contents of the book as is likely to arise from Court proceedings concerning it, and on the basis that the book was brought into New Zealand as a new novel and sold in the ordinary way. A book should not be held to be indecent simply because of its theme; but the more a novel deals with perverted sex the more restrained the writer must be if the book it to comply with the test laid down in the Indecent Publications Act 1908. The fact that the theme of a novel is perverted sex does not widen the scope of what may properly appear in it. *In re* "*Lolita*" (S.C. Wellington 1960, June 7,8. July 5. Hutchison J.)

INDUSTRIAL AND PROVIDENT SOCIETY.

Alteration of rules—Objects may be altered—New objects not restricted to those reasonably in contemplation of members when

society formed—Industrial and Provident Societies Act 1908 ss.7, 25. The power to amend a rule of a society registered and incorporated under the Industrial and Provident Societies Act 1908 contained in s. 7 of the Act includes the power, with identical limitations, to alter an object of the society. The power of amendment in such a case is not restricted to such objects as can reasonably be considered to have been within the contemplation of the members when the society was established. *New Zealand Fruitgrowers' Federation Ltd.* v. *Registrar of Building Societies* [1931] N.Z.L.R. 273; [1931] G.L.R. 28, followed. Apart from the embodiment of some unlawful purpose in the intended amendment the only requirement is the satisfaction of the Registrar that the amendment is not contrary to the provisions of the Act. *Public Service Investment Society* v. *Phillips and Another.* (S.C. Wellington 1960. April 12, 13: July 14. Haslam J.)

JURISDICTION.

Magistrates' Court—Criminal law—Accused pleading guilty and electing to be dealt with summarily—Leave given to withdraw plea—Right to change election and claim trial by jury—Summary Proceedings Act 1957, s. 66 (2). Where leave to withdraw a plea of guilty is given under s. 42 of the Summary Proceedings Act 1957, the conviction (if any) is vacated and the earlier proceedings on the charge are expunged for all purposes. It is then open to the defendant to elect trial by jury (if the charge is one on which such an election is open) even though in the earlier proceedings he elected to be dealt with summarily. *Ratu* v. *Harlow* (S.C. Napier 1960. July 8. Haslam J.)

JURY.

Trial by—Criminal jurisdiction—Waiting jurors present when accused arraigned on one charge not disqualified from acting on jury on trial of second charge. Even where the jurors in the second trial may have been aware that the same witnesses were called to support an alibi in the first trial and, knowing of the accused's conviction, may have inferred that the first jury declined to accept their evidence, this falls far short of warranting the view that the second trial was unsatisfactory. *R.* v. *Matich.* (C.A. Wellington. 1960. June 20; July 4. Gresson P. Cleary J. McGregor J.)

LANDLORD AND TENANT.

General—Termination of tenancy at will on purported assignment. The defendants, tenants of licensed premises holding under a contractual tenancy at will determinable by three months notice on either side, purported to sell the tenancy with some chattels to the plaintiff. It was a term of the contract of sale that, should the tenancy be discontinued without fault on the part of the plaintiff within three years of the sale, the defendants should pay to the plaintiff a sum of money to be calculated in proportion to the balance of the said period of three years still unexpired at the date of termination of the tenancy. Within the period of three years the owners of the premises gave to the plaintiff three months' notice of the termination of his tenancy, but by arrangement, the plaintiff remained in occupation of the premises, and continued to pay rental, down to the date of hearing. The plaintiff brought an action to recover an amount alleged to have fallen due under the contract of sale in respect of the determination of the plaintiff's tenancy at the expiration of the notice to quit. *Held* 1. A tenancy at will is not assignable, and purported assignment with notice to the landlord will determine the tenancy. The tenancy previously held by the defendants therefore came to an end when the defendants purported to assign it to the plaintiff. 2. Subsequently a new tenancy was created between the owners and the plaintiff by acceptance of rent and by certain acknowledgments given by the owners. 3. That such new tenancy was subject to the provisions of s. 105 of the Property Law Act 1952, was terminable on one month's notice, and the three months' notice given by the owners to the plaintiff was effective to determine it. 4. That the owners, during the currency of that notice to quit, re-established the plaintiff in a further new tenancy at will which had not been determined up to the date of hearing of the action. 5. That although the plaintiff's actual tenancy acquired following on the contract of sale had come to an end, he still remained in occupation of the premises as a tenant, and it was premature to seek to invoke the provisions of the contract of sale by claiming moneys which were payable only in the event of the 'discontinuance' of the tenancy. *Sangster* v. *Burns* (S.C. New Plymouth 1960, May 9; July 1. Hardie Boys J.)

LAND TRANSFER.

Indefeasibility of title—Instrument liable to be set aside under the Divorce and Matrimonial Causes Act 1928, s. 34 not made indefeasible by registration—Land Transfer Act 1952, s. 63. If under an instrument attacked a third party under s. 34 of the Divorce and Matrimonial Causes Act 1928 has acquired a registered interest under the Land Transfer Act 1952, that interest is not rendered indefeasible by s. 63 of the Land Transfer Act. Section 63 precludes only the types of action which it specifically mentions, and the proceedings under s. 34 of the Divorce and Matrimonial Causes Act are of quite a different type. The Court will, therefore, in a proper case act under the power given to it by s. 34, and will set aside a Land Transfer instrument even though the registered proprietor claiming thereunder has become so registered without actual fraud on his part. *Murtagh* v. *Murtagh.* (S.C. Christchurch. 1959. December 11. 1960. June 16. Macarthur J.)

LIMITATION OF ACTION.

Actions against Crown and public and local authorities—Leave to bring action out of time granted on condition that statement of claim should follow draft filed with application—Subsequent application for leave to amend—Principles applicable—Limitation Act 1950, s. 23 (2). The practice of granting leave under s. 23 of the Limitation Act 1950 to bring an action out of time on condition that the statement of claim in the proposed action should follow a draft which has been lodged with the application is amply justified in cases in which leave is granted on considerations of prejudice or justice, but the reasons leading to the adoption of this practice have much less relevance where leave is granted on the ground that the plaintiff has been influenced by mistake or other reasonable cause. It is an added reason in such a case for the granting of leave to amend that the proposed amendment has the effect only of abandoning one allegation of negligence and adding one additional respect in which it is alleged that the defendant's system of work was unsafe, when lack of a safe system has already been alleged in other and kindred respects. *Cooke* v. *Auckland Harbour Board (No. 2)* (S.C. Auckland 1959. December 18, 1960. March 1. Turner J.)

MEDICAL PRACTITIONERS.

Infamous conduct in a professional respect—Sexual relations between superintendent of hospital and nurse on duty—Powers of Court on application for removal of name from register—Medical Practitioners Act 1919-1955 (S.A.), s. 26. A medical practitioner who was superintendent of a country hospital had sexual relations with a nurse employed at the hospital on several occasions and on at least two occasions intercourse took place on the hospital premises while the nurse was on night duty and on at least one of the occasions she was the only member of the staff on duty. *Held*, that it was open to the Medical Board of South Australia to deem the medical practitioner to have been guilty of infamous misconduct in a professional respect within the meaning of s. 26 of the Medical Practitioners Act 1919-1955 (S.A.). *Hoile* v. *The Medical Board of South Australia.* High Court of Australia. Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ. 1960. April 21, 22; May 27.) (1960) 34 A.L.J.R. 62.

NEGLIGENCE.

Damages—Personal injury—Measure of damages—Loss of future earning capacity—Whether assessment to be based on plaintiff's shortened expectation of life or on what should have been his normal working life. The plaintiff, a man fifty-two years of age, was seriously injured in a motor accident for which the defendants admitted liability. Before the accident he had carried on his own business as a master builder. As the result of the accident he had become a permanent invalid. According to the medical evidence he would probably live another five years and might live ten years. On the question of the damages to which he was entitled in regard to loss of future earning capacity. *Held:* the plaintiff was entitled to be compensated for what he had in fact lost through the defendant's negligence, and, therefore, the period to be considered in assessing damages for loss of earning capacity was the period during which, apart from the accident, he might reasonably have expected to work, not the period of life left to him as a result of the accident. Dicta of SLESSER L.J., in *Roach* v. *Yates* ([1937] 3 All E.R. at p. 447) applied. *Harris* v. *Bright's Asphalt Contractors Ltd.* ([1953] 1 All E.R. 395) not followed. *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.* ([1955] 3 All E.R. 205) considered. *Pope and Others* v. *D. Murphy & Son Ltd.* [BRISTOL ASSIZES (Streatfield J.), June 30, July 1 1959] [1960] 2 All E.R. 873.

OPTION.

Purchase—Option to purchase freehold—Tenant's option conferred by tenancy agreement to purchase "at any time" at fixed price—Term of tenancy agreement a five years' term—Property

becoming subject to Rent Restrictions Acts after date of agreement—Tenant holding over as statutory tenant—Exercise of option while statutory tenant—Validity. By an agreement dated May 26 1939, the landlord let certain premises to the tenant for the term of five years from June 1 1939, at the rent of £52 per annum exclusive, and it was agreed that the tenant should have the right of option to purchase the freehold " at any time at £675 ". On May 26 1939, the premises were not within the Rent Restrictions Acts, but became subject to the Acts later in 1939 by virtue of the Rent and Mortgage Interest Restrictions Act 1939. After the term of five years had expired on May 31 1944, the tenant remained in possession as a statutory tenant under the Rent Restrictions Acts and was still in possession when, on June 6 1959, notice in writing was given to the landlord on the tenant's behalf of his intention to exercise the option. On the question of the validity of the purported exercise of the option. *Held :* on the true construction of the agreement of May 26 1939, the words " at any time " in the option to purchase meant at any time during the currency of the tenancy created by the agreement, and, therefore, the purported exercise of the right to option after the expiration of the original term of five years was invalid. *Rider* v. *Ford* ([1923] All E.R. Rep. 562) distinguished. *Longmuir* v. *Kew* [CHANCERY DIVISION (Cross J.), June 28 1960.] [1960] 3 All E.R. 26.

PRACTICE.

Amendment—Leave to bring action granted under Limitation Act 1950 on condition that statement of claim should follow draft filed with application—Subsequent application for leave to amend—Principles applicable. See LIMITATION OF ACTION (*supra*).

Motion for new trial on ground of misdirection—Not misdirection to fail to direct jury that a high standard of care is required from a motor driver. In regard to the duty to one's neighbour, the standard is that of the ordinary reasonable and prudent man and, in the case of a driver of a motor-vehicle, the standard is that of the ordinarily reasonable and prudent driver having regard to all the existing particular circumstances of the case. How much care a particular situation demands is dependent upon the circumstances and these must be taken into account by the jury in deciding what a reasonably prudent driver would have done or would not have omitted in those circumstances. It is wrong to direct the jury that the standard is a " high standard " or one " very high indeed ". (Decision of Henry J. [1960] N.Z.L.R. 319, affirmed.) *Russell* v. *Harris.* (C.A. Wellington. 1960. May 16; July 4. Gresson P. Cleary J. McGregor J.)

Particulars—Pleading—Traverse of negative allegation—Negative pregnant with affirmative allegation—Denial that defendant "failed to furnish any such particulars without reasonable excuse"—R.S.C., Ord. 19 r. 7, r. 19. In an action for penalties for failure to furnish particulars of income, etc., to the Special Commissioners of Income Tax under s. 22 of the Finance Act, 1922, s. 42 (10) of the Finance Act 1927, and s. 232 of the Income Tax Act 1952, the Crown as plaintiffs pleaded : " The defendant without reasonable excuse has failed to furnish the particulars required ... within the time prescribed ". The defendant in his defence denied " that he failed to furnish any such particulars without reasonable excuse or that he is liable to any penalty, as alleged or at all ". *Held :* further and better particulars of the defence must be ordered, since the defendant's denial was a negative pregnant indicating that he intended to set up an affirmative case of which the Crown were entitled to have particulars. Dicta of GODDARD L.J., and of STABLE J., in *Pinson* v. *Lloyds & National Provincial Foreign Bank Ltd.* ([1941] 2 All E.R. at pp. 641 and 644), as applied by HARMANN J., in *Duke's Court Estates Ltd.* v. *Associated British Engineering Ltd.* ([1948] 2 All E.R. at p. 140) applied. *Inland Revenue Commissioners* v. *Jackson* [COURT OF APPEAL (Sellers and Pearce L.J.J.), June 24, 1960.] [1960] 3All E.R. 31.

PUBLIC REVENUE.

Death Duties (Estate Duty)—Mortgage given for no consideration—Gift duty paid as on a cash gift—Mortgage not a deductible debt—Interest paid during last three years brought into estate—No deduction for gift duty paid—Estate and Gift Duties Act 1955, ss. 5 (1) (b), 9 (2) (a), 43 and 66. A directed his accountants to make an entry in his ledger crediting the sum of £5.000 to his son. He then executed a document in which he acknowledged that he had given to his son the sum of £5,000. This document was attested by a witness who signed his name and added his occupation and address. A also executed a memorandum of mortgage in favour of his son over certain land which he owned. A then filed with the respondent a gift statement along with the above-mentioned acknowledgment. Details of the gift were shown as " Money "—Consideration nil—value £5,000. Gift duty was assessed and paid as on a cash gift of £5,000. On the death of A his executors claimed allowance, as a debt owing at the date of death, of the principal sum of £5,000 plus accrued interest to the date of death. The respondent not only disallowed the claim to a deduction but claimed that interest paid under the mortgage during the three years preceding the death should be brought into the dutiable estate. In assessing estate duty no deduction was made in respect of the sum paid for gift duty. *Held,* 1. The above-mentioned acknowledgment was not a deed, the ledger entry and the acknowledgment did not effect a completed gift, and the mortgage was given for no consideration. The estate was not therefore entitled to treat the principal sum and accrued interest as a deductible debt. 2. The mortgage was a voluntary contract for the purposes of s. 43 of the Estate and Gift Duties Act, the payments of interest thereunder were dispositions of property in performance thereof and consequently to be deemed to be gifts. 3. The asset which attracted estate duty in this case was the land subject to the mortgage. This land was not " the same property " as attracted the gift duty which had been paid, and the estate was therefore not entitled to deduct gift duty already paid from the estate duty assessed. *Hawken and Another* v. *Commissioner of Inland Revenue.* (S.C. Wanganui. 1960. July 5. Haslam J.)

RECEIVER.

Mortgage set aside in matrimonial suit—Power to appoint receiver—Divorce and Matrimonial Causes Act 1928, ss. 34, 52. Where an instrument in question is a mortgage, a receiver may be appointed under the general powers contained in s. 52 of the Divorce and Matrimonial Causes Act 1928. *Murtagh* v. *Murtagh.* (S.C. Christchurch. 1959. December 11. 1960. June 16. Macarthur J.)

TENANCY.

Licensed premises—Compensation payable if tenancy " discontinued " Actual tenancy terminated but replaced by new tenancy—Tenancy not " discontinued "—Compensation not payable. See LANDLORD AND TENANT (*supra*).

WILL.

Construction—Direction to convert followed by specific devises read as power of sale only—Reversionary interests—Includes such interests as are owned by testator and not reversions created by will itself. A will placed before the Court for interpretation must first be read as a whole, and the intention of the testator must, if possible, be gleaned from such a consideration of it. A will directed conversion of the estate, directed payment of the income to the widow with power to supplement the income by advances from capital and then after giving certain specific devises, disposed of the residue of the estate. *Held* 1. That, as to read the direction to convert as mandatory would result in the adoption of the specific devises and as this would defeat the obvious intention of the testator, the direction to convert should be treated only as a power of sale. 2. That technical terms used in a will should be read in their narrow and correct sense unless the testator has shown that he has used them in some other sense. The term " reversionary interests " used in the will therefore referred to reversions which the testator owned at the time of making his will and did not include reversionary interests in the testator's own estate created by the will itself. *In re Motion, New Zealand Insurance Co. Ltd.* v. *Hargraves and Another.* (S.C. Auckland 1960, April 8; July 4, Turner J.)

WORKERS' COMPENSATION.

Accident arising out of and in course of the employment—Anginal pain following severe effort—Effort though severe not unusual—Coronary infarction about same time—Absence of causal relationship between infarction and effort. The plaintiff, a surfaceman in a coal mine, engaged in a heavy lift on ground giving a poor footing, felt a sharp, disabling pain. On other occasions during the next few weeks he felt similar pain and on medical investigation of his condition it was found that he had suffered a cardiac infarction. All medical witnesses agreed that at the time of the first onset of pain the plaintiff was suffering from fairly advanced heart disease, including hypertension. *Held :* That although the evidence established a causal relationship between the effort exerted by the plaintiff at his work and the pain experienced by him, this did not establish that the effort caused the infarction of the heart muscle. The pain experienced was of an anginal nature caused by the exertion of effort beyond the then capacity of the coronary arteries. *Greenhill* v. *Attorney-General.* (Comp. Ct. Hamilton 1959 July 9. Wellington 1960, February 4. Dalglish J.)

Accident arising out of and in the course of the employment—Coronary disease—Effort persisted in after onset of warning anginal pain and followed by death—Death due to accident arising out of and in course of employment. A person working in a coalmine shovelling coal on to a conveyor belt complained of pain in his chest at approximately 9 a.m., 9.15 a.m. and 9.30 a.m. He continued at work until about 9.45 a.m. when he reported that he was too ill to continue at work, and obtained permission from the deputy to leave the mine. He was later found in a state of collapse about ten minutes' walk from where he was last seen by the deputy, and he died of heart-failure at about 11.45 a.m. *Held:* That although the deceased was shown to have been suffering from advanced coronary disease, his failure to take notice of the warning anginal pain felt at 9 a.m. and his persistence in effort at work after that time cause a change in his heart which led to his death. His death was consequently due to an accident which arose out of and in the course of his employment. *Taituha* v. *Attorney-General.* (Comp. Ct. Hamilton 1959. April 16. Wellington 1959. December 9, Dalglish J.)

Assessment of compensation—Compensation for death—Basis of calculation when maximum rate of compensation changed during period of 274 weeks from date of death—Workers' Compensation Act 1956, s. 11 (1) (a). The rights to workers' compensation of the dependants of a worker who has died as the result of an accident arising out of and in the course of his employment accrue and are enforceable immediately on his death. Under s. 11 (1) (a) of the Workers' Compensation Act 1956 the total dependants of such a worker are entitled to receive a sum equal to the aggregate of weekly payments of compensation at the prescribed maximum amount for 274 weeks and that period of 274 weeks commences from the date of death. If during that period of 274 weeks the maximum rate of compensation is altered, that alteration must be taken into account in calculating the exact amount of compensation due, and the calculation should be made on the basis of weekly compensation from the date of death to the date on which the alteration comes into force at the maximum weekly rate payable during that period, plus compensation for the balance of the total period of 274 weeks at the new maximum weekly rate payable under the amending order. *Public Trustee* v. *Christchurch City Corporation.* (Comp. Ct. Christchurch. 1960. June 14, 15; July 4. Dalglish J.)

PERSONAL.

The Chief Justice, Sir Harlod Barrowclough, resumed his seat on the Bench in the last week in August after a period of illness in hospital.

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Mr W. E. Leicester and Mr R. B. Cooke, both of Wellington, returned to New Zealand from London in the second last week of August after appearing in the *Truth (N.Z.) Ltd.* v. *Holloway* appeal before the Judicial Committee of the Privy Council. Mr Cooke appeared for the appellant company and Mr Leicester for the Minister of Industries and Commerce (Mr Holloway).

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Mr W. R. Birks, of Wellington, has been appointed by the New Zealand Law Society as a member of the New Zealand Council of Law Reporting to fill the vacancy caused by the resignation earlier in the year of Mr A. M. Cousins.

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The Public Service Commission at the end of August announced the appointment of two assistant secretaries of the Justice Department. They are Mr K. Menzies, director of the penal division of the department and its acting secretary during the absence overseas of Dr J. L. Robson, and Mr C. L. Cutler, chief administrative officer to the department. Mr Menzies will be in charge of the penal division, probation service and prison industries, and within Mr Cutler's jurisdiction will come the Courts division, lands and deeds, the Registrar-General of Births and Deaths, registration of aliens, the electoral office and the patents office.

* * * * *

The death occurred in Gisborne on July 20 of Mr John Stewart Wauchop, aged 80, who practised in Gisborne from 1916 to 1950. In 1917 Mr Wauchop joined the firm of Messrs Rees, Brothers and Bright (now Wauchop, Kohn & McIntyre) and was later joined for a short period by the late Louis Carey Parker. Mr Wauchop was an outstanding swimmer and was made a life member of the New Zealand Surf and Swimming Association and also gave outstanding service to Rugby Football in the district. It was due largely to his efforts also the memorial was erected on the Kaiti foreshore to mark the landing of Captain Cook.

* * * * *

Mr Malcolm James Imlay LL.B., of Invercargill, died on July 26 at the untimely age of thirty years. He was the eldest son of Mr J. G. Imlay M.A., LL.B. who was on the staff of the City Solicitor, Wellington, in 1920-1922 and then commenced practice in Invercargill, first on his own account, and later with Mr E. H. J. Preston, they practised as Messrs Imlay and Preston. Mr J. G. Imlay retired in March, 1958. Mr M. J. Imlay studied at Otago University, and was a law clerk with Messrs Brugh, Calvert, and Barrowclough (Dunedin), and later with Messrs Baylee and Brunton (Dunedin). He was then employed by Messrs Imlay and Preston until his death.

* * * * *

A function was tendered in the County Club, Hastings, on August 4 by Mr E. J. W. Hallett's partners to signalize his withdrawal from active practice after fifty-three years. The whole of the Hastings Bar was present, with representatives of the Justice Department and the Police. In addition the Hawke's Bay District Law Society was represented by the President (Mr W. A. McLeod) and Mr H. W. Dowling. Mr I. T. Heath, who presided, referred to the fact that Mr Hallett had been an adornment to his profession and was still every bit as much a student of the law as he must have been when he embarked on practice. Messrs E. L. Commin, E. T. Gifford and L. J. Mackersey recalled the happy association that they had had with Mr Hallett over the years, and agreed that he had invariably been a practitioner whose word was his bond. Mr J. H. von Dadelszen then made a presentation to the guest of honour, and Mr Hallett replied. He stated that the law was not the leisurely profession that it had been when he first commenced practice, and that he looked back with pleasure to the days when he could claim mastery of all the Acts in the Statute Book. In particular, he regretted the fee simple title, being quite certain that no such thing existed any longer. He expressed delight at the opportunity given him to say farewell to all his friends in Hastings, and promised to keep a friendly eye on the doings of the profession in his retirement.

ANSWERING REQUISITION FROM THE STAMP OFFICE.

There is a legend in the Stamp Office that once upon a time in New Zealand there was a senior officer of that Department who on his retirement from Her Majesty's service sought a position in a solicitor's office to the intent that his rather meagre pension might be thereby augmented appreciably, and lo and behold the first day of his employment in the solicitor's office he was shown a list of requisitions from the Stamp Office which the senior partner with a twinkle in his eye asked him to be good enough to reply thereto. On looking at them he recognized them as being one of his last pieces of official work. History does not record what sort of job he made of the answers, but the universal opinion in the departmental circles of those rather distant days was that he was hoist with his own petard. I hope my readers will not miss those words " of those rather distant days ", lest some of them should think that I was the gentleman from the Stamp Office who was hoist with his own petard. However, I have troubles of a different nature. Sometimes these days when I attempt to answer a requisition from the Stamp Office an officer there politely points out that my answer does not appear to agree with a passage to be found at page so and so of the latest edition of *Adams on Estate and Gift Duty Law.*

In an early number of this Journal there will be found a most interesting and humorous article intituled, " Dickens and the Law ", by W. G. Wakelin. Readers of this Journal who are lovers of the great author, while enjoying his stories, may not have given much attention to the manifold matters of a legal nature mentioned in his books or the multitude of persons connected with the law used by him as characters therein. Moreover the author's profound knowledge of the law as it was in his day may not be fully appreciated by the average reader . . . *David Copperfield* is rich in legal characters with the author himself appearing as an articled clerk to Mr Spenlow, who had the mysterious partner.* The name of the mysterious partner was Jorkins. They practised at Doctors Commons. Dickens also shows in his books that he had a good knowledge of the various Government Departments with whom lawyers came into contact in those days. There was, for example, the Stamp Office, which apparently at that time also did work of a matrimonial nature. David got married.

According to that well-known Auckland wit, the late Mr Bryce Hart, a similar pleasant state of affairs existed in a legal back-wash in New Zealand until about 1920. In (1951) 27 N.Z.L.J. at p. 276 (recording the Demise of the Deeds System) he is reported as saying :

> " I shall always have happy memories of those dear old gentlemen known as recorders, and of their copperplate writing as they copied the various deeds into their large books. They were scrupulously careful in their work, and paid great attention to detail. They exhibited what I would call the true *spirit.* I know this, because I have smelt it in their very breaths. They have long since gone to meet their Redeemer, taking with them in each case, I assume, an equity of redemption.
>
> "There are the names in the sweet old visionary connexion. David Copperfield and Dora Spenlow ; and there, in the corner, is that Parental Institution, the Stamp Office, which is so benignantly interested in the various transactions of human life, looking down upon our Union ; and there is the Archbishop of Canterbury invoking a blessing on us in print, and doing it as cheap as could possibly be expected."

Those of us who have read David Copperfield remember Barkis who in the earlier chapters of the book was " willin ", and whom Peggotty in due course married. As a husband he was extremely parsimonious in money matters, but about half-way through the book he departs this world, leaving Peggotty a nice little nest-egg. She puts the estate *re Barkis deceased* into the hands of Messrs Spenlow & Jorkins, and David does most of the work of administering the estate, which appeared to have consisted wholly of personalty. David relates : " Taking the management of Peggotty's affairs into my own hands, with no little pride, I proved the will, *and came to a settlement with the Legacy Duty-office*, and took her to the Bank, and soon got everything into orderly train ". Not very much different after all from the death duty procedure existing to-day in New Zealand. The Stamp Office must have issued requisitions as its New Zealand counterpart does today, and the visit to the Bank must have been for the production of the probate. " Peggotty's business, which was what we used to call ' common-form ' business " in the Commons (and very light and lucrative the common-form business was), being settled, I took her down to the office one morning to pay her bill ". The business is perhaps still fairly lucrative, but owing mainly to requisitions from the Stamp Office it cannot always be called light. In any case in Dickens's day there was no *notional* estate to worry about. Messrs Spenlow & Jorkins would not have had to prove to the Stamp Office for example, that old Barkis had never made any gifts, although no doubt Peggotty would have had strong views on that point, as indeed many of our clients and our wives have today.

The present Departmental practice in New Zealand of issuing requisitions and that of some solicitors in forwarding a covering letter with the accounts filed, in anticipation of requisitions, is mentioned (with apparent approval) by Callan J. in *Commissioner of Stamp Duties* v. *Wallace* [1942] N.Z.L.R. 241 ; [1942] G.L.R. 174.

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* In the course of his article (1934) 10 N.Z.L.J. at p. 225 Mr Wakelin states :

> Here is a description of a law writer's office given many years ago by an old clerk whose memory went back to Dickens's time. There were no typewriters in those days and all documents and Court papers were engrossed by hand. Many copies of one document might be required at once. Therefore the law writer had always available from six to a dozen clerks who were paid a penny a folio for their engrossing. As work came in spasmodically, the clerks did not keep regular hours at the office. When wanted, the law writer blew a whistle. The effect of this was to cause a number of clerks to come tumbling out of the nearest public houses ready for their next job. They earned about ninepence per hour, but as their principal article of diet seemed to consist chiefly of strong ale which was only one penny per pint, it is probable that they subsisted quite easily and very agreeably.

LEGAL ANNOUNCEMENTS

Continued from page i.

An opportunity exists in a Hamilton practice for a clerk to specialize in conveyancing. Applications are invited from those who have recently qualified but age or absence of qualifications are not necessarily objections, and the duties can be formulated to suit the successful applicant. All applications will be treated as confidential. Apply to:
No. 109,
c/o C.P.O. Box 472, WELLINGTON.

FOR SALE BY TENDER

Law Library and Office Chattels and Furniture

The Public Trustee invites tenders for the purchase of the following:

(a) The books of a Law Library as listed and annexed to the Conditions of Sale by Tender;
(b) Forms and stationery relating to a defunct legal practice at Helensville, and the right to take over the custody of files, deeds and documents relating thereto, but subject to the rights of clients in respect thereof;
(c) Office chattels and furniture enumerated in the list of furniture annexed to the Conditions of Sale by Tender.

Any tenderer may tender for any of the lots separately, or for any two or more of the lots together.

Conditions of tender may be inspected at, and any further particulars obtained from, the Public Trust Offices at Auckland and New Lynn.

A deposit of £10 per centum of the amount of the purchase price tendered must accompany each tender. The highest or any tender will not necessarily be accepted.

Tenders close a 4 p.m. on 3rd October 1960 at the office of the District Public Trustee, Auckland, to whom tenders are to be addressed, enclosed in sealed envelopes and marked "Mrs I. MacLean—Tender for Purchase of Law Library, etc.".

J. F. COSGROVE,
District Manager, Public Trust Office,
NEW LYNN.

The Department now issues to practitioners a very thorough questionnaire, hoping that the answers thereto will accompany the accounts. A copy of the questionnaire now issued by the Department will be found in the 1960 Supplement to my book on the *Law of Estate and Gift Duties in New Zealand*. In practice I find it most convenient to interview as soon as possible after deceased's death a relative of the deceased in the expectation that he may be able to answer most, if not all, of the questions. Alternatively, a business associate of deceased or perhaps his accountant may be able to render useful assistance in this connection. If this procedure is adopted, the work of compiling accounts may be considerably lightened and the number of requisitions reduced to the absolute minimum.

I furnish herewith precedents, being statutory declarations furnished to the Stamp Office at its request to establish a set of facts set up by the taxpayer.

As to Precedent No. 1, it emanated from a requisition as to the beneficial ownership of a sum of money held in the Post Office Savings Bank for many years in the name of the wife who had predeceased her husband. As Precedent No. 1 was not in itself satisfactory to the Department; it was followed up by Precedent No. 2: this too was supported by the surrounding circumstances: the family furniture and matrimonial home were owned jointly and when the spouses had desired to acquire a motor-car moneys for that purpose were withdrawn from the Post Office Savings Bank, and the car licensed in their joint names. In support of the "joint purse" submission the following cases were cited: *Thomson* v. *Thomson* [1951] N.Z.L.R. 1047; *Fenton* v. *Inland Revenue Commissioners* [1957] N.Z. L.R. 564, 572, and *Fribance* v. *Fribance* [1957] 1 All E.R. 357.

When a husband puts or permits property or money to be put into the sole name of his wife, there is a *presumption* that he intended to make a gift of that property or money to her but that presumption may be rebutted by admissible evidence to the contrary. A New Zealand case, where that presumption was successfully rebutted by the taxpayer, is *Milne* v. *Commissioner of Stamp Duties* [1959] N.Z.L.R. 566, 570, 571.

Precedent No. 3 arose out of a requisition as to the beneficial ownership of a piano which was in the matrimonial home as at the date of deceased's death the deceased being the husband. The facts are set out in the declaration, and the following authorities were cited in support thereof: *Jenkin* v. *Commissioner of Stamp Duties* [1949] G.L.R. 65, 66; *33 Halsbury* 2nd ed. para. 253, page 152; *Hammond* v. *Inland Revenue Commissioners* [1956] N.Z.L.R. 690, 694. The taxpayer successfully set up that deceased and her husband were beneficial owners of the new piano in the respective shares contributed by each to the purchase thereof.

As to the mode of making a gift of a piano, see the interesting and informative judgment of North J. in *Williams* v. *Williams* [1956] N.Z.L.R. 970. Apart from a gift effected by way of a deed, in order that there should be a valid gift of a chattel *inter vivos*, three things are necessary; (1) the expression of the intention of the donor to make a gift; (2) the assent of the donee to the gift; and (3) the actual or constructive delivery of the chattel to the donee. Even in the case of a gift to a member of the donor's family, there must be some overt act on the donor's part which can be treated as evidence of the delivery of the subject of the gift to the donee. The case is particularly useful as showing what is and what is not constructive delivery.

Precedent No. 4 deals with a more common type of transaction. Where property is put into the name of a married woman the Department usually requires evidence by statutory declaration as to the source of the purchase money, if the transaction is by way of sale. That is because in order for liability to gift duty to arise, it is not always necessary that a deed or other written evidence be executed or signed: a gift of a sum of money for instance may be made by the donor handling the money to the donee. Whatever requisitions the English Stamp Office in Dickens's time was accustomed to make, it certainly would not be concerned with gifts in death duty matters. In Precedent No. 5 the facts were more complicated and the Stamp Office requisition read: Kindly forward a declaration by C. D. setting out the date of the advance and the circumstances of the loan and the dates of repayment. Please forward any documentary evidence of the loan.

PRECEDENT NO. 1.

IN SUPPORT OF A CLAIM BY HUSBAND TO A BENEFICIAL INTEREST IN HIS WIFE'S BANK ACCOUNT.

IN THE ESTATE of A. B. late of the City of Wellington in the Dominion of New Zealand, Married Woman, Deceased.

I, C. D. of Wellington, Railway Porter, do solemnly and sincerely declare as follows:

1. I am the Husband of the abovenamed deceased.

2. For all our married life I kept a very small Bank Account which was rarely used.

3. All the family moneys with the exception of a few shillings a week for my expenses were paid into my wife's Bank Account.

4. My wife did not work or have any income or earnings during our married life. All the income therefore banked into my wife's Account represented the balance of my earnings after paying household and current expenses.

5. The Ford motor car was paid for from my wife's Bank Account. The car was registered in the joint names of my wife and myself and has always been so registered. It was purchased on the 1st September 1959 for £850 which amount was paid in cash by cheque from my wife's Savings Bank Account.

AND I make this solemn declaration conscientiously believing the same to be true and under and by virtue of the Oaths and Declarations Act 1957.

DECLARED at Wellington this .....day of.....1960 before me: C. D.

E. F.

[*A Solicitor of the Supreme Court of New Zealand.*]

PRECEDENT NO. 2.

SUPPLEMENTING PRECEDENT No. 1.

IN THE ESTATE of A. B. late of the City of Wellington in the Dominion of New Zealand, Married Woman, Deceased.

I, C. D. of Wellington, Railway Porter do solemnly and sincerely declare as follows:

1. That the income banked into my Wife's account was at all times intended to be held by us as in the nature of a Joint Purse and that no payments made therein were ever intended to be an absolute gift of all such moneys to my Wife. The said moneys were always so regarded by my wife and myself as being beneficially owned by us jointly.

AND I make this solemn declaration conscientiously believing the same to be true under and by virtue of the Oaths and Declarations Act 1957.

DECLARED at Wellington this .....day of.....1960 before me : C. D.

E. F.
[*A Solicitor of the Supreme Court of New Zealand.*]

PRECEDENT NO. 3.

IN SUPPORT OF A CLAIM BY DECEASED'S WIFE TO A BENEFICIAL INTEREST IN A PIANO.

IN THE MATTER of the Estate and Gift Duties Act 1955

AND

IN THE MATTER of the Estate of A. B. Deceased :

I, C. D. of Lower Hutt, widow, do solemnly and sincerely declare as follows :

1. I am an executrix in the abovenamed estate and the widow of the said A. B., Deceased.

2. When I was a child many years ago my parents purchased a piano : I studied music and was taught to play the piano, and I habitually practised on the said piano.

3. When I married deceased my parents gave me the said piano as a wedding gift and it was shifted to our matrimonial home. I continued to play the said piano for my own pleasure : my husband did not play the piano.

4. In 1957 my husband and I decided to purchase a new piano. We eventually purchased a new piano for the sum of £198, from Piano Importers, Wellington, trading in my said piano as part payment of the purchase price.

5. We were allowed the sum of £70 as a trade-in balance in respect of my said piano and my husband paid the balance (£128) of the purchase price for the new piano.

6. In so contributing the said sum of £70 towards the purchase of the new piano I never intended in any way to make a gift to my said husband, and I feel sure that my husband never looked upon the transaction as in anyway constituting a gift from me to him.

7. Since the purchase of the said new piano I have played it for my own pleasure and entertainment.

8. So far as the voucher from the said Piano Importers shows that the purchaser of the new piano was my husband, that was the more convenient business course to pursue, as it was my husband who gave the cheque for £128, the balance of the purchase price.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declaration Act 1957.

DECLARED at Wellington by the said C. D. this.....day of..... 1960 before me : E. F.

[*A Solicitor of the Supreme Court of New Zealand.*]

PRECEDENT NO. 4.

DECLARATION AS TO SOURCE OF PURCHASE MONEY.

IN THE MATTER of the Stamp Duties Act 1954 and the Estate and Gift Duties Act 1955

AND

IN THE MATTER of a certain Memorandum of Transfer from A. B. to C. D. of Wellington, Waterside Worker and E. F. his wife affecting the land in Certificate of Title Volume Folio.

I, E. F. wife of C. D. of Wellington, Waterside Worker, do solemnly and sincerely declare as follows :

1. That the said C. D. and I this declarant are the transferees named and described in the Transfer above mentioned.

2. That the purchase money £2,850 mentioned in the said transfer was satisfied as follows :

(a) By raising a first mortgage for £1,750 from The Company Limited.

(b) By raising a second mortgage for £200 from G. H. of Wellington, Insurance Manager.

(c) By a cash payment of £900.

3. The source of the said cash payment of £900 was as follows : [*Set out here source.*]

AND I make this solemn declaration conscientiously believing the same to be true and under and by virtue of the Oaths and Declarations Act 1957.

DECLARED at Wellington by the said E. F. this.....day of..... 1960 before me : E. F.

I. J.
[*A Solicitor of the Supreme Court of New Zealand.*]

PRECEDENT NO. 5.

IN SUPPORT OF A CLAIM BY A SON BY WAY OF LOAN OVER A HOUSE PROPERTY OWNED BY HIS FATHER

IN THE ESTATE of A. B. late of Hamilton, in the Dominion of New Zealand, Retired Draper, Deceased.

I, C. D. of Hamilton, Builder, do solemnly and sincerely declare as follows :

1. I am a son of the abovenamed deceased.

2. Prior to 1948 my father owned vacant land at Cambridge being 32 perches more or less being part [set out here official description of land] and being all the land in Certificate of Title Volume Folio Auckland Registry. It was decided by my late father and my sister and myself that a bach would be erected on the said land and that the bach at a later stage would be converted into a house. I purchased materials for the building of the bach expending approximately £450. My father purchased materials at a cost of approximately £200. Building work was carried out by myself, by my father and by my sister. By reason of my experience as a builder and my physical ability, the vast amount of the work was done by me. The bach took approximately ten months to build.

3. After the completion of the bach, we built first a shed, then we fenced the section, and then we built a motor garage. All materials were purchashed by me, the cost being approximately £150.

4. Over the next two to three years, materials were acquired by me and paid for by me to enable us to add on to the bach and build a home. The total cost of materials acquired during this time and during the building of the rest of the house and paid for by me, was approximately £900. The building of the finished house took approximately another three years. The work was done by the three of us as indicated above.

5. No payment for labour or services rendered by me was made or was expected.

6. Upon the final completion of the work, it was arranged that my father would secure the repayment to me of the moneys expended by me as detailed above and totalling the sum of £1,500 by executing a mortgage over the said parcel of land.

7. At all stages of the undertaking it was acknowledged that I was to be reimbursed by my father for amounts expended by me. Upon completion of the work, it would have embarrassed my father to have paid in cash and the mortgage was taken as security for this debt.

8. Vouchers for all materials supplied by me were handed to my then Solicitors, Messrs . . . That firm is now unable to find the vouchers and state they were returned to me. I have no recollection of having the vouchers returned to me.

AND I make this solemn declaration conscientiously believing the same to be true and under and by virtue of the Oaths and Declarations Act 1957.

DECLARED at Hamilton by the said C. D. this.....day of.....1960 before me : E. F.

[*A Solicitor of the Supreme Court of New Zealand.*

E. C. ADAMS

Legal Aid—Costs—The Attorney-General was asked whether he was aware that in a recent lawsuit [*Auten* v. *Rayner* [1960] 1 All E.R. 692] costs of £45,000 would have to come from public funds since the claimant was legally aided. In a written reply the Attorney-General stated that, as the costs incurred by the plaintiff in that case had not yet been taxed, it was not at present possible to say how much would be paid out of the Legal Aid Fund in respect of them. There was no reason for thinking that the application for aid in the case was not examined with sufficient care. The Judge said that no criticism could be made of the Committee for granting certificate. (1960) 110 L.J. 337.

IN PARLIAMENT.

To the end of July little progress had been made with the session's legislative programme, the attention of the House being concentrated on the Address-in-Reply Debate, the delivering of the Budget, and the opening of the Budget Debate, and the usual debates on two Imprest Supply Bills.

The Nelson Railway Authorization Bill was one of the highlights of the session to date, being put through all stages at the one sitting which extended over some twenty-two hours.

The Acts passed to the end of July comprised only the two Imprest Supply Acts and the Nelson Railway Authorization Act.

One controversial matter was the Controller and Auditor-General's Report, referred to from both sides of the House on several occasions. The matter has been fully ventilated in the daily press and calls for no comment from us.

Bills now before Parliament are the following:

Animals Protection Bill
Broadcasting Amendment Bill
Cheques Bill
Chiropractors Bill
Coal Mines Amendment Bill
Crimes Bill (as reported from the Statutes Revision Committee)
Criminal Justice Amendment Bill (as reported from the Statutes Revision Committee
Domicile Bill
Education Amendment Bill
Electoral Amendment Bill
Fertilizers Bill
King George the Fifth Memorial Children's Health Camps Amendment Bill
Manapouri-Te Anau Development Bill
Municipal Insurance Bill
Napier High School Amendment Bill
Police Offences Amendment Bill
Political Disabilities Removal Bill
Public Safety Conservation Amendment Bill
Rabbits Amendment Bill
Republic of Ghana Bill
Stock Remedies Amendment Bill
Summary Proceedings Amendment Bill (as reported from the Statutes Revision Committee)

and a number of local Bills.

The last report to Parliament of the recently retired Secretary for Justice contains a passage which will not be relished by Judges and Magistrates and which would have been better omitted. After expressing himself as dissatisfied with the rate of progress in penal reform and voicing the opinion that too many people were sent to prison unnecessarily, the report continues:

> "I am sure that there could be a reduction in the use of prisons as a means of crime control. One still reads of members of the Judiciary saying that having regard to the offence 'There is no other alternative than imprisonment'. Of course there is in some cases, but there is an ingrained prejudice about some offences—for instance—'theft as a servant'.
>
> "I will not write about the dubious value of imprisonment as a 'deterrent'. It depends so much on the individual and most offenders do not think of consequences. Indeed, I fear that some offenders are punished beyond their personal deserts merely to discourage others—who are not thereby deflected from their crime. What is certain is that the deterrent effect of prison can neither be measured nor proved."

It does not lie in the mouth of a Government official writing from his office chair to criticize the sentences imposed by Judges and Magistrates who reach their decisions with detailed knowledge of the facts of the case, the background of the offender, a full appreciation of the purposes of punishment, and the extent to which such purposes are likely to be achieved by a particular sentence in a particular case.

The function of the head of the Justice and Prisons Departments is surely to carry into effect the sentences imposed by the Courts and not to set himself up as an expert in a subject upon which the Judiciary is far better qualified than he is.

A Dog's Evidence.—"As Lord Alverstone C.J., said in *R.* v. *Laycock* (1911) 6 Cr. App. R. 209: 'A question of identification is essentially one for a jury to decide', and he added that a conviction should not be set aside unless the Court is convinced that there was no evidence upon which the jury could properly have acted. This principle was applied in *R.* v. *Gilling* (1916) 12 Cr. App. R. 131, where the substantial contest was on the question of identity and the Court of Criminal Appeal found that there was evidence on which the Judge was bound to leave the case to the jury, and which justified the jury, if they believed the evidence for the prosecution, in convicting. The jury did convict, but as their Lordships allowed further evidence to be called which emphasized the unreliability of the evidence of identification of the accused, they thought that the only safe course was to quash the conviction. Yet another question of identity arose recently in the course of an appeal to the Scottish Court of Criminal Appeal. The appellant had been convicted of breaking into a house with intent to steal and he contended that the sheriff should not have accepted evidence that an Alsatian tracker dog had picked up a scent from carpets in the house and followed it to a tenement property in which the appellant was found. Their Lordships dismissed the appeal, although they did not think that any general ruling could be laid down as to the value of tracker dog evidence as it was a question of the circumstances of each particular case. Lord Thomson, the Lord Justice-Clerk, said that the evidence as to what the tracker dog did had to be weighed along with the other evidence which had been brought before the Court. In the case with which they were then confronted the other evidence had 'cast a sinister light' upon the appellant's conduct and, taken in conjunction with the evidence relating to the tracker dog's behaviour, his Lordship thought that it amply justified the conviction. It is firmly established that evidence of identification may be given by photographs (*R.* v. *Dwyer and Ferguson* [1925] 2 K.B. 799), handwriting (*R.* v. *Smith* (1909) 3 Cr. App. R. 87), fingerprints (*R.* v. *Castleton* (1909) 3 Cr. App. R. 74), or by voice (*R.* v. *Keating* (1909) 2 Cr. App R. 61), but, so far as we are aware, this is the first occasion on which the evidence of a tracker dog has been accepted by a superior Court."—*104 Sol. Jo.* 394.

LAW REPORTS AND LAW REPORTING.

II. The New Zealand Scene.

While law reporting in England was moving slowly but steadily towards the ordered and authoritative procedure and production of the present day, the first stirrings of responsibility in this direction were being felt in the still infant Colony of New Zealand. Although the statute creating a Supreme Court of New Zealand had been passed twenty years before, the first systematic reporting of judgments delivered in this country was delayed until 1861 when Mr James Macassey of Dunedin began work on a selection of banco and Court of Appeal cases which eventually filled a solid volume of 1188 pages.

It was a determined and wholly meritorious beginning, but the *New Zealand Reports*, as they were then styled, had one particular defect. They were limited to cases argued and determined in a single judicial district—Otago and Southland. The reason for this was almost entirely the difficulty of communications in the Colony at a time when Judges were still doing a great deal of their travelling on horse-back, or even, on occasions, on foot. It was impossible to keep in touch with happenings in the Northern District, and the young editor of the *Macassey Reports* (he died at the age of thirty-nine) confined his attention to his own district.

The localization of the reports was in those days less of a drawback than it would be at the present time. Dunedin in the sixties was the mercantile centre of New Zealand and the thriving gold-mining industry in the province was in full swing. In fact, mining was so productive of litigation that Mr Macassey produced a separate volume of *Mining Cases*. The multifarious and varied nature of business transactions in Otago at that time provided an extraordinarily complete cross-section of contemporary legal practice in the new country, and it is hardly surprising, in spite of the restricted nature of the selection, that the *Macassey Reports* should include the material of many of the Dominion's leading cases.

First Reported Case.

The first reported case was *Teschemaker* v. *McLean*, which was argued before H. B. Gresson J., and the first Court of Appeal report deals with a Case Stated from the above-mentioned suit. The hearing was before Sir George Arney C.J., and Johnston and H. B. Gresson JJ. and lasted for five days at the end of February in 1863.

Mr Macassey had the reputation of being an astute and able lawyer and the pages of his reports show that he was, in addition, a capable and painstaking reporter. Whatever success he may have achieved at the Bar in his short career, he will be best remembered in legal history as the father of law reporting in New Zealand. His editorial work set a high standard and his reports throw much light on early goldfields law and on the law relating to Crown lands and conveyancing.

An interesting sidelight on publishing problems in those far-off days is contained in the editor's foreword to the first part of New Zealand's first serious reports :

> " The effort now being made will be attended by any result but that of pecuniary profit to the Editor ; and, as his only aim has been to render a service to the profession, he sincerely craves the kind indulgence of those of his readers who may be numbered amongst its ranks."

The New Zealand Jurist.

The *Macassey Reports* continued from 1861 to 1872 and the year after they ceased the *New Zealand Jurist Reports* came into being. Once again it was left to Dunedin to fill the breach, and two volumes were published at this time covering the years 1873 to 1875. But this was not the only development. Almost contemporaneous with the appearance of the *New Zealand Jurist* was the emergence of Mr Justice Alexander J. Johnston's first volume of the *Court of Appeal Reports*. Mr Justice Johnston had been appointed to the Supreme Court Bench in 1858 and sat mainly in the Central District of the Colony (Wellington). For a time, in 1867, he acted as Chief Justice. His first volume, covering the years 1867, 1868, 1869, 1870 and 1871, was produced by the Government Printer in 1872. This was some months before the first of the *Jurist Reports* went to press. A second volume of *Court of Appeal Reports*, covering the years 1872 to 1874, was brought out in 1875. Included in this series was the first report of a New Zealand hearing before the Judicial Committee of the Privy Council—*McLean and Others* v. *Macandrew and Others* May 9, 1874, in which their Lordships affirmed the judgment of the Court of Appeal.

The *Court of Appeal Reports* survived a third volume in 1877, the period dealt with being 1875 and 1876, and part of 1877. These reports were well received and provided an admirable basis for the future. The cases reported occupied the energies of some noted counsel who were later to leave their mark on the Judiciary. Among them were J. B. Prendergast, later Chief Justice, F. R. Chapman, later the Hon. Sir Frederick Chapman, Robert Stout, who as Sir Robert Stout was Chief Justice for twenty-seven years, and Edward Tennyson Conolly, who sat as a Judge for four years.

Destroying an Illusion.

Indicative of the reception given the Johnston *Court of Appeal Reports* is the following extract from a review which greeted the appearance of the second volume :

> " Perhaps nothing would tend more to destroy the illusion, which pervades Europe, of painted man-eaters, as figurative of New Zealand, than to offer a few copies of this work in the cities of the Old World."

In the meantime, the *New Zealand Jurist* was battling along against odds. The *Jurist Reports* were published in monthly parts, and represented a distinct advance on the *Macassey Reports* in that they included a selection of cases from all the judicial districts in

New Zealand, as well as Court of Appeal judgments. But communication with other centres was still a problem and the editor, Mr G. D. Branson, a member of the English Bar who had settled in Dunedin, had the greatest difficulty maintaining the breadth of coverage that was his aim. But the quarto format from the printing works of Mackay, Fenwick and Co. of Princes Street, Dunedin, was becoming a familiar sight in chambers up and down the country.

The first volume covered the period from January, 1873, to August, 1874, but the original editor was not destined to see that volume completed. Ill-health caused Mr Branson to relinquish control after the issue of the seventh part, and the task of carrying on was shouldered by Mr F. R. Chapman, of the Inner Temple, the son of Mr Justice H. S. Chapman, who would himself sit on the Supreme Court Bench nineteen years later for a period of nearly twenty years.

The new editor found his post an arduous and frequently frustrating one, particularly in the matter of securing accurate and reliable reports from outside Otago and Southland. He compromised with his problems to the extent of replacing monthly parts with quarterly publications. The second year of the *Jurist* saw the addition of serviceable extracts from the *New Zealand Gazette*, where, according to Mr Chapman, "it has been truly said that half of the law of New Zealand is buried". The *Jurist* also devoted considerable space to notable legal occasions such as judicial farewells—one of the most interesting being the wholesale resignations of 1875, when Sir George Arney C.J., Mr Justice H. B. Gresson and Mr Justice H. S. Chapman all left the Bench on the same day.

Editorial Change.

The last number of the *New Zealand Jurist* in 1875 notified a change of editorship, Mr G. B. Barton succeeding Mr Chapman. Mr Barton was the brother of Sir Edmund Barton, later Prime Minister and Chief Justice of Australia. He was well known at the Dunedin Bar where he was called "Long" Barton to distinguish him from "Little" Barton, the firey diminutive Irishman whose frequent skirmishes with Prendergast C.J. made legal history and culminated in his imprisonment for contempt—and eventually his election to Parliament for a Wellington constituency while he was still in gaol.

Under Mr Barton's control, the *Jurist* (*New Series*) came into being and introduced the first list of reporters, who operated in Auckland, Wellington, Nelson, Westland Christchurch and Dunedin. Volumes I, II and III appeared with fairly commendable regularity, with cases grouped according to judicial districts and Court of Appeal reports in a special section at the end. These issues covered judgments delivered up to 1878.

But volume IV was doomed almost from the outset. Anyone who finds the occasion to peruse it today will notice that it is innocent of either index or ending. Its records cease abruptly in 1879. It was begun in Dunedin, but parts 2 and 3 came from Wellington, to which centre Mr Barton had transferred, and its final instalments issued from Melbourne without imprint, and with only the assumption that the editor had forsaken New Zealand for Victoria. This was the swansong of the *New Zealand Jurist* (*New Series*)—incomplete, but still respected, if one excepts the magazine section of which Sir Fredrick Chapman wrote in 1933:

> "I would go so far as to say, on the authority of the leading practitioners of its day, that it is a tissue of wholly indefensible libels."

In 1875, the *Colonial Law Journal*, probably the least known of all early reports, was born and died in a few brief months. Mr Macassey was the moving spirit behind it, and began with some hitherto unreported cases of the year 1865. He then turned his attention to judgments delivered from May 1874 onwards. These cases were digested by Mr Maurice Richmond and are incorporated in the *New Zealand Law Reports Consolidated Digest* (1861-1902) prepared by Mr P. Levi, of Wellington. The *Journal's* brief existence ended in 1875, however, with a Supreme Court judgment of October of that year.

The *Colonial Law Journal* comprised in all only 180 pages, of which 140 pages were devoted to reports of cases "argued and determined" in both the Supreme Court and the Court of Appeal. The remaining 40 pages consisted of a magazine section with comments both biographical and judicial from a variety of sources.

O. B. and F. Reports.

The profession was not completely bereft, however, as a new series was already in prospect in Wellington. Mr F. M. Ollivier, Mr H. D. Bell (later Sir Francis Bell, Prime Minister and Attorney-General) and Mr W. FitzGerald (one of the reporters of the *Jurist*) had banded together to produce what are today known as the *O.B. and F. Reports*. While the *Jurist* (*New Series*) was still striving with its unfinished fourth volume the *O.B. and F. Reports* were ready to issue from the printers hands. The new reports filled a gap from 1878 to 1880 when they too fell a victim of what Sir Fredrick Chapman referred to in the *New Zealand Jurist* as the

> "peculiar geography of the country, which has affected our constitution so as to make it differ radically from that of any other colony."

Unfortunately it seemed to be still nobody's business to report banco cases and, owing to the difficulties of communication, many important Court of Appeal cases were irretrievably lost. The end came for the *O.B. and F. Reports* in 1880, but they had achieved more than mere publication. They had laid the foundations of the *New Zealand Law Reports*. While the same could be said for the *Macassey Reports*, the *Jurist* series, and the Johnston *Court of Appeal Reports*, and even the modest *Colonial Law Journal*, the *O.B. and F.* trio had the distinction of being acquired by the New Zealand Council of Law Reporting which came into existence in 1882 and foreshadowed the advent in 1883 of the *New Zealand Law Reports*.

The Council in 1882 comprised the following: Edward Tennyson Conolly, Attorney-General and later Judge of the Supreme Court; Walter Scott Reid, Solicitor-General; Edwin Hesketh and A. E. T. Devore (Auckland); H. D. Bell (later Sir Francis Bell, Attorney-General and Prime Minister) and W. B. Edwards (later a Judge of the Supreme Court); F. Joynt and G. Harper (Christchurch); W. D. Stewart and F. R. Chapman (later a Judge of the Supreme Court), Dunedin; with Mr H. D. Bell as treasurer.

MOTOR VEHICLE DEALERS ACT 1958, SECTION 27.

This section reads as follows :

" 27. *Warranty implied in Contracts by Motor Vehicle Dealers*—In every contract of sale or exchange or other disposition of a motor vehicle made by a motor vehicle dealer, whether as principal or agent and whether made by the dealer or by his partner or by any person in his employ, there shall be implied a warranty by the dealer that :

(a) The person by whom or on whose behalf the motor vehicle is sold or exchanged or otherwise disposed of is the true owner thereof, or is duly authorised to sell, exchange, or otherwise dispose of the motor vehicle pursuant to a power of attorney from the true owner thereof ; and

(b) The motor vehicle is not subject to any encumbrance other than those (if any) disclosed to the other party to the transaction in writing by the dealer at the time of the sale or exchange or other disposition ;

and, where the other party to the transaction suffers any loss arising out of the breach of any such warranty, that party shall be entitled accordingly to recover the amount of the loss from the dealer."

There are several aspects of this provision on which doubts may arise.

Firstly, has s. 14 of the Sale of Goods Act 1908 any operation now in respect of the sale of a motor vehicle ? This Act defines " goods " as including " all chattels personal other than money or things in action ", Section 14 says that in a contract of sale, unless there is a different intention, there is

(a) an implied *condition* by the seller that he has the right to sell the goods

(b) an implied *warranty* of quiet enjoyment

(c) an implied *warranty* that the goods are free from undisclosed charges.

Now neither an exchange of goods, nor, no doubt any " other disposition " referred to in s. 27 above is a sale under the Sale of Goods Act. Thus if the two provisions do overlap they do so only in respect of the *sale* of a motor vehicle (a fairly common occurrence). In respect of the sale, then, is there any discrepancy ? The Sale of Goods Act section creates an implied *condition* that the seller has the right to sell (i.e. it is a term of the contract entitling the buyer to rescind if broken) while the above s. 27 (a) creates an implied *warranty* by the motor vehicle dealer that the seller is the true owner or is authorized to sell by the owner. It appears reasonable to assume that the meaning of the word " warranty " in s. 27 is similar to or identical with that word as defined in s. 2 of the Sale of Goods Act as the two enactments appear to be (on this point) *in pari materia*. We thus have the situation that breach of the Sale of Goods Act provision entitles the buyer to rescind, but breach of s. 27 above entitles the buyer to damages only. This inconsistency between the two provisions brings about the odd situation that the buyer's rights will differ depending on whether he buys a motor vehicle from a dealer or privately from his next door neighbour. From the latter he is entitled to a *condition* under s. 14 that the neighbour has the right to sell ; from the dealer, a *warranty* only which entitles him to damages. The intention of the Act appears to have been to regulate dealers and one would have expected them to be placed under title obligations not less extensive than those imposed upon sellers of other goods or upon private sellers of motor vehicles.

In regard to the undisclosed encumbrance the two provisions are substantially to the same effect although the wording differs.

Presumably if dispute arises as to which Act is appropriate, the 1958 Act will be applied if the sale is of a motor vehicle by a dealer, as this Act concerns itself with that special subject-matter (to the extent that it does so) but in respect of the remainder of the area of operation of s. 14 of the Sale of Goods Act, that provision will apply. Not a very satisfactory situation.

Next some matters arising from s. 27 itself. By the clause (a) the dealer warrants that the seller is the true owner or is authorized to sell *pursuant to a power of attorney* from the owner. Now the expression " power of attorney " has a clear enough meaning ; the reference is obviously to a written instrument having the effect of a deed, conferring specified powers on the appointee. Normally the appointment of an agent by power of attorney is only necessary where the agent is to execute deeds on behalf of his principal. Although the wording of s. 27 is not as clear as it could be, it is apparently not required that the dealer himself should be appointed to sell by power of attorney but that the person giving instructions to him to sell is warranted by the dealer to be either the true owner, or is authorized to arrange a sale pursuant to a power of attorney from the true owner. One would think a simple appointment as agent should have sufficed. The dealer himself is appointed to sell by a written authority under s. 28 which makes it a condition of recovery of commission that the dealer is appointed " in writing signed . . . by the person to be charged ". One may wonder why the dealer has to warrant that the person instructing him to sell (where not the owner) holds a *power of attorney* authorizing that person to give those instructions, when a less formal method of authorization which may still lawfully bind the owner is acceptable in other spheres. Perhaps the warranty that the authorization is by power of attorney is provided by the section in order to remove from doubt the validity of the seller's authority to sell and to perfect the sale even though the person instructing the dealer to sell was not the true owner or did not have the true owner's authority.

The position at common law is clear enough. At p. 231 of *1 Halsbury's Laws of England*, 3rd ed., it is stated :

" Where any person purports to do any act or make any contract as agent on behalf of a principal he is deemed to warrant that he has in fact authority from such principal to do the act or make the contract in question. If, therefore, he has no such authority he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent to believe that he had authority to do the act or make the contract and who by acting upon such belief has suffered loss in consequence of the absence of authority."

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

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Official Designation :

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P.O. Box 6355,
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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.
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" **The Auckland Presbyterian Orphanages and Social Service Association (Inc.).**" P.O. Box 2035, AUCKLAND.
" **The Presbyterian Social Service Association of Hawke's Bay and Poverty Bay (Inc.).**" P.O. Box 119, HAVELOCK NORTH.
" **The Wellington Presbyterian Social Service Association (Inc.).**" P.O. Box 1314, WELLINGTON.
" **The Christchurch Presbyterian Social Service Association (Inc.).**" P.O. Box 2264, CHRISTCHURCH.
" **South Canterbury Presbyterian Social Service Association (Inc.).**" P.O. Box 278, TIMARU.
" **Presbyterian Social Service Association (Inc.).**" P.O. Box 374, DUNEDIN.
" **The Presbyterian Social Service Association of Southland (Inc.).**" P.O. Box 314, INVERCARGILL.

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

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

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

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

Would this common law rule not have been sufficient without making the dealer warrant in terms of s. 27 para. (a) ?

Then there is the provision that where the buyer suffers loss because of the breach of either warranty, he may recover that loss from the dealer. The common law principle is, of course, that an agent contracting for a disclosed principal incurs no liability on the contract apart from warranty of authority. He is a mere conduit pipe joining the principal and third party in contract. Often motor vehicle dealers do not purport to contract fro their principal, but sell in their own name and in that case they assume the obligations of any seller to give good title. But the dealer selling for a disclosed principal is made personally liable for loss arising not only through his principal's lack of authority to sell, (he was liable for this at common law on warranty of authority) but also for non-disclosure of encumbrances of which he may be ignorant. This is salutary but there will be hard cases. The dealer is in effect created an insurer and his right of recourse against his principal may be worthless. It is open to argument whether motor vehicle dealers who are by the Act obliged to obtain licences to carry on business from the Magistrates' Court, to give security bonds for performance (inter alia) of the above warranties and generally to meet requirements as to character, fitness and financial position, should have to bear a greater standard of liability on their contracts than an agent appointed without these safeguards who sells goods for his disclosed principal. The Legislature has presumably imposed this personal liability on the dealer as a disciplinary measure.

It will be interesting to see how the Courts will interpret this section when it comes before them.

G. CAIN.

SECOND COMMONWEALTH AND EMPIRE LAW CONFERENCE, 1960—OTTAWA.

From September 14 to 21, 1960, will be held the second Commonwealth and Empire Law Conference in Ottawa, Canada.

To those who had the privilege of attending the first conference held in London, 1955, this will bring nostalgic memories.

The work of organization involved is beyond conception and yet for the complete success of the conference no detail can be overlooked.

The approximate number of registrations received outside Canada is, as one would expect, headed by the United Kingdom whence an attendance of 747, including guests, is expected. There have been 227 registrations received from Australia and eleven New Zealanders are also expected to attend besides representatives from other Commonwealth countries.

The provisional programme states that the Chateau Laurier, Ottawa, is to be the Headquarters Hotel with the use of the Ballroom, Salons, Convention Hall and Lounge.

On Tuesday, September 13, is to be held a meeting of the executive committee preceded by the usual coffee hour in the drawing room followed in the afternoon by a meeting of the advisory committee in the salon.

On Wednesday, September 14, the formal opening of the conference will be held in the foyer of the Supreme Court of Canada prior to which the Royal Canadian Mounted Police Band will play in front of the building.

Addresses of welcome are to be given by the Hon. E. Davie Fulton Q.C., M.P., Minister of Justice of Canada and the Hon. Patrick Kerwin, Chief Justice of Canada, after which responses by representative delegates will be given.

At the opening general session to be held in the Ballroom addresses are to be given by the President of the Canadian Bar Association, the representative of the governing bodies of the legal profession in Canada and the Rt. Hon. Viscount Kilmuir P.C., G.C.V.O., Lord High Chancellor of Great Britain. Five o'clock receptions in the Senate and House of Commons of Canada are to follow with a later reception by the President and members of the Canadian Bar Association.

The subjects to be discussed at the general sessions, include Human Rights and Civil Liberties, Reciprocal Enforcement of Judgments, Trends of Legal Education within the Commonwealth, Estate Planning having regard to the incidence of Taxation, Problems of Federalism in the Commonwealth, Necessity of Proof of Wrongful Intention in Criminal Cases, Matrimonial Property Laws within the Commonwealth, Transfer of Lawyers within the Commonwealth, Administration Tribunals and their Functions in a Legal System, the Legal Profession of the Future, Restrictive Trade Practices, the Role of the Lawyer in Community Affairs, Consideration of Liability for Taxation in Assessing Damages and Compensation for Industrial Injuries.

Social activities include a tour of Ottawa, coach tour—Gatineau Parkway, one to Toronto and Niagara Falls, to Quebec City, a tour of Carleton University and other places of interest.

The conference ball is expected to be held on *H.M.C.S. Carleton.*

An interesting feature of the programme is a special convocation at the University of Ottawa for the purpose of conferring an Honorary Degree on Viscount Kilmuir.

On September 21, the closing general session will be held in the afternoon, a reception for the delegates and their guests by the Ontario members of the Canadian Bar Association and at 7.30 p.m. the concluding function is to be a dinner for the delegates and their guests, when the address is to be given by the Rt. Hon. John G. Diefenbaker Q.C., M.P., LL.D., D.C.L., Prime Minister of Canada.

If the decision reached in 1955 to hold such a conference every five years is adhered to, it will be interesting to learn in due course which of the remaining countries in the Commonwealth will be prepared to undertake the stupendous task of acting as host for the 1965 conference.

New Zealand registrations to date are as follows:

Messrs. G. E. Bisson, A. O. Woodhouse (Napier), W. C. Kohn (Gisbourne), R. T. Garlick (Auckland), F. C. Henry (Hamilton), C. O. Bell, J. W. Y. Miles, R. E. Pope, A. B. Sievwright (Wellington), R. S. Grater (Oamaru).

D. I. GLEDHILL.

DAMAGES FOR LOSS OF FUTURE EARNING CAPACITY.

A submission which would sound strange to the ears of New Zealand counsel was made by counsel for the defendant in *Pope* v. *D. Murphy and Son Ltd.* [1960] 2 All E.R. 873.

The plaintiff, a man of 52 years, and a master builder in business on his own account, was seriously injured in a motor accident for which the defendants admitted liability. As the result of the accident he became a permanent invalid and, according to the medical evidence, he would probably live another 5 to 10 years.

On the question of the assessment of damages for loss of future earning capacity, counsel for the defendant submitted that the amount should be calculated in relation to the expectancy or working life left to the plaintiff after the accident. He founded his argument on a judgment of Slade J. in *Harris* v. *Bright's Asphalt Contractors Ltd.* [1953] 1 Q.B. 617; [1953] 1 All E.R. 395, where it was held that the correct basis was to look at the actual loss of earnings during the period of life left to the plaintiff as a result of the accident, the Judge saying " . . . I cannot think it right that I should give damages for loss of earnings during a period which *ex hypothesi* he will not be alive to earn them."

In *Pope's* case Streatfeild J. discussed this decision and found it to be contrary to authority and to the ordinary conception of justice, since it enabled the tortfeasor to take advantage of his own wrong. He held therefore that the correct period to take into account in assessing damages for loss of earning capacity was the period during which, apart from the accident, the plaintiff might reasonably have expected to work.

With respect, it is difficult to follow the reasoning of Slade J. in *Harris's* case. Had there been incapacity with no shortening of life, the damages for loss of earning capacity would unquestionably have been assessed in relation to the expectancy of working life, taking into account, of course the ordinary contingencies of life. Why therefore should that period be shortened merely because the plaintiff's life expectancy has been shortened *entirely as a result of the accident*?

We said that the defendant's submission in Pope's case would have seemed strange to New Zealand ears. We do not know of any similar submission having been made in New Zealand and so far as we are aware the longer period has always been taken into account in assessing damages.

LEGAL LITERATURE.

Will-draftsman's Handbook. By PHILIP NEVILL, LL.B., Lecturer in Trusts, Wills and Administration at the University of Otago. Second Edition, 1960. Wellington: Butterworth & Co. (New Zealand) Ltd., Pp. xii + 84. Price 27s. 6d., post free.

The second edition of Philip Nevill's *Will-draftsman's Handbook* will be welcome. A slim neat book conveniently sized and more easily handled than the larger volumes of precedents, it contains the clauses which are likely to be required for the majority of wills. The author is loyal to a conservative style yet he has been alert to make adjustments which changes and developments in the law have seemed to require.

Conveyancing precedents do not relieve the skilled draftsman of his professional responsibility and this is especially true in regard to the preparation of wills. The most perfect precedent should never be adopted blindly, and it is no reflection upon the quality of this useful work to say that the responsibility for a correct expression of testator's intention will always remain with the practitioner. For example, he should not fail to appreciate the wide meaning of the word " use " in the context of the new clauses 27A and 27B

Testators do not always desire bequests and devises to be free of death duty and in recognition of this some of the clauses provide for exemption from duty while others do not. The importance of due discernment is illustrated by observing that he who drafts a will which relieves some bequests from duty but not others, should remember that a general trust for payment of all duty out of residue may not cast upon the residue the incidence of duty in respect of the dispositions which are not expressly relieved. (*In re King, Barclay's Bank Ltd.* v. *King* [1942] Ch. 413). The complete will forms in ch. 6 reveal care in this respect.

The lawyer who really values good precedents is he who, in adapting them, tries to improve them. Students and experienced draftsmen will appreciate the concise summaries of practical suggestions and legal principles which appear in the opening chapters.

E. A. D.

Morpheus on the Motorway—IN the case of *Kay* v. *Butterworth* ((1945) 173 L.T. 191) the King's Bench Divisional Court held that if a motorist felt that he was about to be overcome by sleep it was his duty to stop and rest until the need, with its obvious dangerous consequences, abated. It is, therefore, no defence to a charge under s. 12 of the Road Traffic Act 1930 that a driver allows himself to be overtaken by sleep (*Henderson* v. *Jones* (1955) 119 J.P. 304, following *Kay* v. *Butterworth* (*supra*)). Anyone who drives the roads of England will have seen the trunker having a kip in the cabin of his wagon—or if you like it, the driver sleeping in the cab of his lorry—on the lay-bys off the roadside. Yet on January 16 1960, a man was fined £3 for stopping on the hard shoulder of the M1 motorway—nothing but a glorified lay-by—otherwise than in an emergency: he had pulled up to sleep there. The *Concise Oxford Dictionary* defines " emergency " as a " sudden juncture demanding immediate action ", and this seems aptly to fit the need for sleep on a road where traffic is moving fast, and every driver must have his wits about him. And it is not as if the M1 is studded with side roads down which the somnolent driver may turn: considerable distances separate ways off it. Unless there are other facts, not reported, the magistrates' decision in the present case is difficult to reconcile with the two cases quoted above. (1960) 110 L.J. 114.

TOWN AND COUNTRY PLANNING APPEALS.

Irvine *v.* Mt. Wellington Borough Council

Town and Country Planning Appeal Board. Auckland. 1960. May 18.

Street widening—Possession of land taken by local authority to satisfy requirements of Regional Planning Authority—Liability of local authority to take title to land and pay compensation—Town and Country Planning Act 1953, s. 47 (3).

Application under s. 47 (3) of the Town and Country Planning Act 1953.

The decision of the Board was delivered by

REID S.M. (Chairman). The appellant was the owner of all that parcel of land containing 7 pp. more or less, being part of Lot 1 on Deposited Plan No. 43245, being part of the land comprised in Certificate of Title Volume 1618, folio 6 Auckland Registry (North). This piece of land was situated on the corner of Jellicoe Road and Queens Road in the Mt. Wellington Borough. The Council in August 1959 took possession of this land for street widening purposes and converted it into a public street, but no attempt had been made to take the land legally under the Public Works Act or to compensate the appellant in any way. In its reply, the Council stated that the taking of this land was done to satisfy the requirements of the Regional Planning Authority and submitted that the Council should not be called upon to pay any compensation the appellant might be entitled to. The Board consider that this attitude of the Council is untenable.

The Board hereby orders, pursuant to subs. (3) of s. 47 of the Act, that the Council take within three months from the date hereof under the Public Works Act 1928, for the purposes of its district scheme, the appellant's estate or interest in the land herewith before described.

Order accordingly.

Delaney *v.* Wanganui City Council.

Town and Country Planning Appeal Board. Wanganui. 1960. March 23.

Subdivisional plan—Frontage of sections not complying with minimum standard frontage required by uncisclosed district scheme —Plan not suitable for approval—Town and Country Planning Act 1953, s. 38.

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

The appellants were the owners of a property situate on Lincoln Road in the City of Wanganui comprising 2 ro. 32.6 pp. being Lots 35 and 36, Block I, Deposited Plan 4484, part section 12a Right Bank Wanganui River.

They submitted a plan for the subdivision of this land into three allotments, to the Council for approval. Approval was refused on the grounds that the subdivision was not in conformity with the town-and-country-planning principles likely to be embodied in its undisclosed district scheme for the area. That scheme envisaged a 25-ft. strip of land comprising 22 pp. along the western boundary of the appellants' property being required for roading purposes.

The decision of the Board was delivered by

REID S.M. (Chairman). The appellants' plan provided for three sections each having a frontage of 47 ft. 6 in. to Lincoln Road. At the time when the plan was prepared and considered by the Council the frontages of 47 ft. 6 in. shown on the plan complied with the minimum standard frontage required in residential subdivisions, but in November 1959 the Council adopted as part of its undisclosed district scheme the standard Code of Ordinances as set out in the Regulations to the Act and prescribed as a normal minimum standard for new subdivisions in residential zones a frontage of 50 ft.

It follows therefore that the plan under consideration cannot be approved as the frontages are below the prescribed minimum.

The appeal is disallowed on the grounds that the subdivision does not comply with the Council's Code of Ordinances.

Appeal dismissed.

Hall *v.* Bay of Islands County

Town and Country Planning Appeal Board. Kawakawa. 1960. May 4.

Zoning—Land zoned as residential—Used for commercial purposes—District scheme making adequate provision for foreseeable commercial site needs—Undesirability of spot commercial zone in residential zone—Town and Country Planning Act 1953, s. 26.

Appeal under s. 26 of the Act.

The appellant was the owner of a property situate on the State Highway in Moerewa being Lot 4 on Deposited Plan No. 28604 of Allotment 140 Block XV Kawakawa Survey District.

This property was in an area zoned as residential under the Council's proposed district scheme. When the scheme was publicly notified the appellant lodged an objection to the zoning of the land claiming that it should be zoned commercial. Her 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. On the property are erected an electrical goods workshop and a separate building comprising a retail shop and office. Both these uses are "non-conforming" in a residential area.
2. The property is situated some seven to eight chains from the nearest commercial zone and is in an area predominantly residential in character.
3. The Council's plan makes more than adequate provision for the foreseeable commercial site needs of Moerewa in areas already zoned as commercial.
4. To zone the appellant's land as commercial would create a "spot" commercial zone in a residential area and would be contrary to town-and-country-planning principles. The appeal is disallowed.

Appeal dismissed.

Prime Meats Ltd. *v.* Auckland City Council

Town and Country Planning Appeal Board. Auckland. 1960 May 24.

District Scheme—Proposed street widening—In accord with sound town-planning principles—Town and Country Planning Act 1953, s. 26.

Two appeals under s. 26 of the Town and Country Planning Act 1953, heard together by consent of the parties. The respondent Council's proposed District Scheme, as publicly notified, contained provisions for street widening to be carried out in Parnell Road and Nelson Street. The appellant Company owned properties in both streets and lodged objections to these street widening proposals. Their objections were disallowed and these appeals followed.

The decision of the Board was delivered by

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

1. *Nelson Street.*

   The company owns a property on the intersection of Victoria Street West and Nelson Street. The proposed street widening will involve taking part of the Nelson Street frontage of this property. The proposal for the widening of Nelson Street is part of the master plan for the development of traffic routes in metropolitan Auckland. The Board considers that the proposal is in accord with sound town-planning principles and the appeal in respect of this property is disallowed.

2. *Parnell Road.*

   The proposal to make provisions for the widening of Parnell Road is also part of the master plan for the development of main traffic routes for metropolitan Auckland. The proposal to widen Parnell Road, as indicated in the Council's scheme, is in accord with sound town-planning principles and the appeal in respect of the appellant company's Parnell Road property is also disallowed.

Appeal dismissed.

Guardian Trust and Executors Co. of New Zealand Ltd. and Another *v.* Bay of Islands County.

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

Zoning—Land zoned as proposed car park and bus depot—Car park not an immediate necessity, but likely to become so—Need to plan for the future—Street parking contrary to Town and Country Planning principles—Town and Country Planning Act 1953, s. 26.

Two appeals under s. 26 of the Town and Country Planning Act 1953. As they both related to the same block of land and the same provision of the Council's proposed district scheme they were heard together.

The first named appellant was the owner of Lots 31, 32 and 33 on Deposited Plan 11040, the second named appellant was the owner of Lot 34 on Deposited Plan 11040. The total area was 1.6 ac. The properties have frontage to Williams Road and School Road.

Under the Council's proposed district scheme this land was zoned as a proposed car park and bus depot.

The appellants lodged objections to this zoning and when their objections were disallowed they appealed.

The decision of the Board was delivered by

REID S.M. (Chairman). Having inspected the area under consideration the Board finds as follows:

1. It is a recognized principle of town planning that provision should be made for off-street parking of vehicles wherever practicable.
2. The present permanent population of Paihia is estimated at 550 and allowing for a substantial rise in that population during the planning period there would not appear to be any necessity for setting aside any substantial area for off-street parking to meet the requirements of the permanent population, but during some months of the year—from late spring to early autumn—Paihia has to find accommodation for a large influx of visitors, particularly at holiday periods. This transient population has been variously estimated at from 1,200 to 1,500 and that number can be expected to increase as the amenities of the area become more widely known and access to it improves.
3. In the preparation of a district scheme, authorities must endeavour to plan, not for the present, but for the future, and make provision for estimated future needs.

   While a car park may not be an immediate necessity for Paihia it will inevitably become so in future.

   The amount of unoccupied flat land suitable for a car park available in Paihia is very limited and the Board considers that the Council acted wisely and in accord with town-planning principles when it designated the property under consideration for use in the future as a car park and bus depot.
4. The appellants' main objection to the proposal is the expense that will be involved in acquiring the land and developing it as a car park. The actual development of the land is something that can be done gradually over a period as the demand for parking space increases.

   The parking of cars in streets, which was put forward as a suitable answer to the problem, is contrary to town planning principles and is to be avoided as much as possible.

The appeal is disallowed.

Appeal dismissed.

Galbraith *v.* Stratford Borough

Town and Country Planning Appeal Board. Stratford. 1960 March 31.

Zoning—Area zoned as commercial but containing residential properties—"Spot" residential zone in centre of area appropriately zoned as commercial—Contrary to 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 was the owner of a property containing 1 ro. being section 366 Town of Stratford situate in Miranda Street Central. This property was in an area zoned as commercial under the Council's proposed district scheme.

When that scheme was publicly notified the appellant lodged an objection to this zoning claiming that her property should be zoned as residential. Her 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. On the property is erected an 8-roomed wooden residence estimated to be at least 60 years old. It is in a poor state of repair.

   It was suggested on behalf of the appellant that it might be converted into two flats so as to give the appellant a more adequate return than she at present gets from it but this would not be permitted because the building is in the "brick" area.
2. Under the Council's scheme the block bounded by Regan Street, Broadway, Fenton Street, and Miranda Street, in which the appellant's property is situated, is zoned as commercial. This block constitutes the commercial heart of Stratford.

   Although at present on the eastern side of Miranda Street there are several residences as well as the appellant's they are old buildings having a limited life.

   The zoning of the whole of this block as commercial is in accord with town-and-country-planning principles as it is inevitable that in course of time it will be fully occupied by commercial undertakings.

   To allow the appeal would be to approve of a single unit "spot" residential zone in the centre of an area appropriately zoned as commercial. This would be contrary to town-and-country-planning principles.

The appeal is disallowed.

Appeal dismissed.,

Hills and Others *v.* Auckland City Council

Town and Country Planning Appeal Board. Auckland. 1960. May 25.

Zoning—Land zoned as Residential C—Suitable for high density housing by erection of flats or as motels—Zoning as industrial detracting from amenities of adjoining residential area—Town and Country Planning Act 1953, s. 26.

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

The appellants were the owners of a property situated at No. 390 Great North Road, Auckland, containing 1 acre, 1 rood 13.6 perches, more or less being Lot 5 on Deposited Plan No. 21391, being portion of Allotment 18 of Section 7 of the suburbs of Auckland.

Under the respondent Council's proposed District Scheme, as publicly notified, it is zoned as Residential C. The appellants lodged an objection to this zoning, claiming that their land should be zoned as Industrial B. Their objection was disallowed and this appeal followed.

The decision of the Board was delivered by

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

1. The property under consideration has a frontage of only 40 feet with a maximum width over the greater portion of 110 feet.
2. It is common ground that the rear half of the property by reason of its topography is of little value for either industrial or residential use. By reason of its narrow frontage, the property could not be subdivided for either of those uses and it would be an uneconomical proposition to attempt to develop it by way of an access road from Commercial Road.
3. There is a substantial industrial area lying to the west of the property but on the eastern side it is bounded by land zoned as residential and fully developed as such.
4. The Board considers that the front half of the property could be usefully developed for high density housing by the erection of flats or as motels, either of which uses would be appropriate to a residential zone.

   To zone it as industrial would tend to detract from the amenities of the adjoining residential area fronting on to Commercial Road.

The appeal is disallowed.

Appeal dismissed.