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THE OCCUPIER'S DUTY TO A TRESPASSER.

Recently there appeared in the JOURNAL a series of articles on the case *Heard* v. *Forest Products Ltd.* [1960] N.Z.L.R. 329, in which we suggested that the majority judgments of the Court of Appeal had departed from principle in upholding a verdict for the plaintiff. In judgments delivered on July 25, 1960, in *Commissioner of Railways* (*N.S.W.*) v. *Cardy* (1960) 34 A.L.J. 134 the High Court of Australia has in the same field but on quite different facts upheld a verdict for the plaintiff by apparently disregarding principle and striking out on a line of its own.

The Commissioner of Railways was the owner and occupier of a large area of land, portion of which he used as a dump, in an industrial area of Sydney. Portion of the material dumped was ashes, some of hot and burning coals, and such material might remain smouldering for a long time under a surface crust. On these facts it could not be denied that this ash dump constituted an unusual and hidden danger.

The plaintiff was a boy aged fourteen and a half years. Years before he had played on this site but had gone to live in the country, and the day on which he received the injuries which were the basis of the action was the first time on which he had entered the area since his return to Sydney. On that occasion when he was going down a bank of ashes his feet went through the surface crust into the hot ashes underneath and he was severely burnt.

The plaintiff brought an action in the Supreme Court of New South Wales alleging that the plaintiff was on the railway land with the implied leave and licence of the Commissioner, and that the ash dump contained a concealed danger from which the Commissioner as occupier of the land should have taken care to protect the plaintiff. The trial Judge refused a motion for a verdict for the defendant upon the ground that there was no evidence that the plaintiff was present on the land as licensee, and the jury returned a verdict for the plaintiff. An appeal to the Full Court was dismissed and a further appeal was brought to the High Court, resulting in the judgments on which we are now commenting. In the only report available to us as yet the issues put to the jury are not recorded.

The leading judgment was delivered by Sir Owen Dixon C.J. who was severely critical of the lengths to which the Courts had gone in implying licences against the occupiers of land when all they had done was to take no, or no effective, steps to exclude trespassers from their property. He pointed out that, when the distinction between licensees and trespassers was taken and the respective measures of responsibility to them for the safety of the premises upon which they come were defined, the duty of an occupier of land to express licensees was regarded as the outcome of his consent, which was considered as a voluntary grant to others of a benefit from which he was entitled to exclude them. By granting that express licence the occupier was regarded as voluntarily accepting the duty of care imposed by the law on an occupier/licensor. He then went on to refer to the practice of inferring or implying a licence when resistance to the presence of strangers is weak, and expressed the opinion that that practice departs from the foundation of the principle on which a licensor's liability was erected—"namely his own voluntary act in giving his consent without exercising due care by warning or otherwise to avert injury to the licensees from concealed danger of which he is aware and they are ignorant where there is a deceptive appearance of safety."

In dealing with the facts of the case the Chief Justice found :

(a) The dumping of hot ashes certain to smoulder under an apparently firm and reliable crust or surface presented an unusual and hidden danger to all who frequented the place.

(b) This was not a characteristic of such a dump which all who came upon it should know.

(c) It must have been known to the Commissioner through his servants and agents.

(d) The Commissioner again through his servants and agents, was aware that adults and children did frequent the place.

His Honour then continued :

"One may venture to think that no person who came to the case familiar with general juristic concepts but unindoctrinated with the notion that to be a trespasser is to be *caput lupinum* would expect to find a system of law which denied altogether the existence in the Commissioner of any duty of any sort in reference to the likelihood of persons coming to the site and suffering grievous injury. He would find that our law has not denied the duty but has placed it upon the supposal of a licence so that there will be no trespass. But is it necessary that we should go on ever constructing the liability out of the materials that can be found for inferring, implying or imputing a licence, fictional though it must inevitably seem ?"

It is at this point that the Chief Justice's view of the case begins to emerge. Impatient with the supposed need to imply a licence in order to fix the defendant with liability, a licence which in his opinion is fictional or notional only and which can be brought into being

only by straining if not disregarding the facts, he embarks on a search for some other more reasonable basis of liability.

His Honour first reviewed the authorities on this vexed topic of the implication of licences, dealing with *Cooke* v. *Midland Great Western Railway of Ireland* [1909] A.C. 229; *Lowery* v. *Walker* [1911] A.C. 10; *Latham* v. *R. Johnson and Nephew* [1913] 1 K.B. 398; *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44 and *Robert Addie and Sons* v. *Dumbreck* [1929]A.C. 358: [1929] All E.R. Rep. 1. Of the last mentioned case he says that it was a return to the rigid classification of those entering the premises of others and a denial of any duty of precaution against harm, unless wilful which might befall a trespasser. he having found in certain dicta in the cases earlier mentioned a tendency to depart from the rigidity of these two principles.

The Chief Justice then went on to deal with *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404; [1930] All E.R. Rep. 1, of which he says that it is an example of the recognition that a duty exists "with reference to the safety of young people likely to come into danger by interfering with things of others and that it is a duty of care whatever be the measure of care extracted". This is a case which text-book writers have found difficult to reconcile with *Addie's* case (*supra*) decided only the year before, but the points of distinction seem to be clear, namely:

(a) That the Excelsior Wire Rope Co. was not the occupier of the land on which their haulage rope was erected.

(b) In any case the company's employees acted with complete disregard for the safety of children whom they knew to be on the premises.

Even had the Company been occupier of the land the actions of its employees would have imposed liability on the company under the ordinary accepted principle on which an occupier is liable to a trespasser. With respect, this case does nothing to support the principle later enunciated by His Honour.

Lastly the Chief Justice passed to consider *Edwards* v. *Railway Executive* [1952] 2 All E.R. 430; [1952] A.C. 739, and quoted a passage from the speech of Lord Goddard in which he said:

> "Now to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it."

Sir Owen Dixon C.J. then entered on a discussion of the evolution of a principle in English law, saying:

> "The foregoing decisions of the House of Lords provide a lesson by example in the ways of the law when it evolves principle. The fixed rule that a trespasser comes at his own risk and that only wilful injury to him is actionable is modified by the assimilation of 'reckless disregard of the presence of the trespasser' to wilfulness. It needs no argument to show that reckless disregard of the presence of a man must include not only the case of a man who is there but also of one whose coming is expected or foreseen. But the application of the rule is modified to the point of exclusion by inferring a licence from circumstances notwithstanding the unreality of the supposition that there was any actually consenting mind or will. The process of inference is then transmuted to a different and wider conception, that expressed by Lord Goddard, conduct on the part of the occupier of such a kind that he cannot be heard to say that he did not give a licence. At that point, by precluding the denial of a licence the law has surely reached the use of fiction, and if now we boldly look at the facts which give rise to the imposition in this manner of the liability it will be but to complete the course of development by a process for which the history of the law furnishes many precedents. It is but to attribute the liability to the constituent elements of the title to the correlative right and to explain why they create it. No doubt there is some conscious acceleration of the process and an open acknowledgment of the course pursued. But it is evident that for want of some rationalization of the kind great confusion not to say dissatisfaction, as to the state of the law exists. Is there any reason why in Australia the step should not be taken? With respect to licensees and invitees the law has been completely changed in England by the Occupiers' Liability Act, 1957 (5 & 6 Eliz. II, ch. 31). What indirect effect the change may have on the practice of inferring, implying or imputing a licence from facts where no actual intention to grant a licence existed and none was expressed, it would be hazardous to prophesy. But it is at least clear that in England to impute a licence is now to place upon the occupier a duty of care measured by a much higher standard. Whatever may be the outcome it involves a distinct point of departure from the law obtaining in Australia. Why should we here continue to explain the liability which that law appears to impose in terms which can no longer command an intellectual assent and refuse to refer to it directly to basal principle?

Such a recognition of principle by no means involves the imposition upon occupiers of premises of a liability for want of care for the safety of trespassers. What is does is to confine the duty of licensors to its true province, the case of a voluntary or gratuitous grant of an advantage to another, consisting in the use of or entry upon premises and to recognize that it is the grant that forms the course of the limited duty. The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognizes that nevertheless, a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence. The duty may be limited to perils of which the persons so using the premises are unaware and which they are unlikely to expect or guard against. The duty is measured by the nature of the danger or peril but it may, according to circumstances, be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder or by removal or reduction of the danger. It may perhaps be useful to remark that upon the facts of *United Zinc and Chemical Co.* v. *Britt* ((1922) 258 U.S. 268) the question whether the neglect to safeguard children from the poisoned pond involved liability would depend upon the likelihood of children entering the premises and using the pond so as to encounter a risk of poisoning and upon the knowledge which the occupier had or ought to have had of the danger and of that likelihood. The doctrine of the decision in *Britt's* case has been considered harsh and the decision itself can hardly

be justified except on the footing that there was no sufficient reason to think that the pond would be visisted by children or that they would be imperilled by the existence of the poisoned pond unless excluded.

In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge."

His Honour then again referred to the facts, and held that they brought the case within the principle which he had laid down in the passage quoted above.

The Chief Justice at this point found himself faced with a procedural difficulty. The trial went on the traditional basis of liability, but the High Court was departing from that basis and basing liability upon a new principle. Should there be a new trial? After hesitation he thought not, since he considered that independantly of all discretion the facts implicit in the findings of the jury really covered the ground, and both on those findings and on the evidence the Commissioner's liability was satisfactorily made out.

McTiernan J. adopted a more conservative and orthodox attitude to the appeal, and contented himself with holding that there was evidence on which the jury could properly find that the plaintiff was a licensee on the defendant's land and that the heap of ashes was an allurement to him.

Fullagar J. referred to some of the cases above-mentioned and found difficulty in reconciling *Addie's* case (*supra*) with the *Excelsior Wire Rope* case (*supra*). He then went on to say:

"Of still greater importance is it to remember that a little more than two years after the *Addie Collieries* case the House of Lords decided the leading case of *Donoghue* v. *Stevenson*. This case (albeit, it may be thought to be restorative rather than revolutionary) in a sense reoriented the whole law of negligence, and left perhaps few cases which went to the root of that subject and which were not liable to be re-examined and tested in the light of it."

After quoting certain dicta of Lord Goddard, concurred in by Lord Reid, in *Edwards* v. *Railway Executive* (*supra*) which show that their Lordships considered that there was a tendency to infer a licence too readily in order to provide one really a trespasser with a remedy for injuries received, his Honour said that in the case before him the plaintiff was a trespasser, and that there was no escape from that conclusion. He went on:

"The defendant or his servants knew that children frequently wandered and played about in the area, and it was obviously, as one of the witnesses said, a physical impossibility to keep them out. That having been the position for many years, I do not think it can be said however unwelcome the children were, that no duty of care was owed to them. It may have amounted to no more than a negative duty not to do anything on the land, or place anything on the land, from which a danger to wandering children would arise. The plaintiff could read, and it may be that in the particular case the duty of reasonable care would have been discharged if a notice had been erected stating that hot ashes or burning coals had been deposited at the place where the plaintiff was injured. But the defendant's servants did place live coals on the land, and these were below the surface and not visible, and no warning notice was erected."

A little later he said:

"It might be possible in this case for the plaintiff to succeed even on the narrower view that an occupier is liable to a trespasser only for 'positive acts of negligent misfeasance'. It might be suggested that the depositing of the ashes in the circumstances amounted to a positive act of that nature. It has seemed to me, however, that the gravamen of the case against the defendant is not that his servants deposited ashes on the land—a thing that he was perfectly entitled to do—but that he failed to give any warning or take any other precaution for the safety of persons likely to wander in the vicinity of the deposit. I do not think that the plaintiff can succeed in this case except on the wider view which, in the light of *Donoghue* v. *Stevenson*, I am convinced is the correct view."

Fullagar J. also discussed the question whether a new trial should be ordered but agreed with the Chief Justice that it was not necessary to do so in this case.

Menzies J. was in a minority in considering that the appeal should be allowed. He considered that the Court was bound by the course of the trial to consider only whether there was evidence to support the verdict. Even assuming that the evidence would have been sufficient to establish a licence over the roadway and perhaps the tracks on the railway land be considered that it afforded no basis for the finding that the plaintiff was on the ash heap as a licensee.

As to the defendant's duty to the plaintiff if he were a trespasser and not a licensee Menzies J. said:

"I have not considered the defendant's duty to the plaintiff if he were a trespasser and not a licensee. It seems to me the only issue of negligence committed to the jury by the pleadings and the direction was whether the defendant failed in its duty to the plaintiff if he were a licensee and that was the only issue decided by the verdict. I do not regard it as possible for an appeal court to sustain that verdict and the judgment based upon it by deciding for itself that the defendant failed in its duty to the plaintiff as a trespasser upon its land. If the plaintiff had sued as a trespasser, the defendant would have been entitled to a new trial if the judge had directed that the standard of care applicable was the higher standard appropriate to a licensee. Here, the defect was even more fundamental, for if the plaintiff was a trespasser, as I hold he was, the verdict decided nothing as to the defendant's liability to him."

The remaining member of the Court, Windeyer J. held that there was evidence to support the verdict. He also thought that, without resorting to what he called "the conventional misnomer of trespassers as licensees", the circumstances could give rise to a duty in the defendant to take reasonable measures to warn persons coming upon the land of the danger there existing.

With the greatest respect, the decision cannot be regarded as a satisfactory one. To render an occupier of land liable to a trespasser for a hidden danger on

land which has not been created for the purpose of injuring the trespasser is a complete departure from principle, and adds to the heavy burden already carried by the occupier who of necessity has dangerous things on his land.

This case is another step towards the proposition that such a person must keep unauthorised persons off his land in order to avoid liability but as Lord Goddard said in *Edwards* v. *Railway Executive* (*supra*) : " In this respect children, small boys especially, resemble burglars. If they want to get in they will, take what precautions you may." It is true that the judgments delivered in the High Court suggested that a notice warning of the danger would have been a sufficient protection to the Commissioner ; but what use would such a notice have been had the person injured been a young child unable to read ? It is a short step in such a case to hold that trespassers must be completely excluded from the danger area or the occupier must take the consequences.

Cardy's case is a striking example of the old adage that " hard cases make bad law ". No doubt in the near future we shall have claims in New Zealand seeking to take advantage of the principle there laid down, and it will be interesting to see what attitude our own Court of Appeal will take in any such case. If it should decide to follow *Cardy's* case, an appeal to the Privy Council would be well worth considering should the amount involved justify the expense.

SUMMARY OF RECENT LAW.

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ARMED FORCES.

Army—Indecent act—Not an ingredient of an offence that it should be done in public or with intent to offend someone—New Zealand Army Act 1950, s. 38 (f). It is not a necessary ingredient of an indecent act which is the basis of a charge brought under s. 38 (f) of the New Zealand Army Act 1950 that it should either be done in a public place or, alternatively, that it should be done with intent thereby to insult or offend any person. The section makes indecency an offence irrespective of any such additional intent. Observations as to what constitutes an indecent act. *R.* v. *Murray and Parker.* (C.-M.A.C. Wellington. 1960. August 29, 30. McGregor J. Inglis S.M. Blundell Esq.)

COMPANY DIRECTOR.

Governing director—Contract of service—Dual capacities as director and servant—Governing director killed while piloting company's aircraft under alleged contract of service—Workman's compensation claim—Whether sole governing director and principal shareholder could also be working as servant of company under contract of service negotiated by him with company—See WORKERS' COMPENSATION *(infra).*

CONTRACT.

Offer and acceptance—Identity of party—Deception as to identity—Oral offer of car for sale on basis of payment by cheque—Purchaser present in person—Mistaken belief that he was another person of standing—Belief fraudulently induced by purchaser—Cheque accepted on basis of mistake—Whether contract formed. Where, in negotiations for a contract conducted orally inter praesentes, apparent agreement is reached but there is deception as to the identity of a proposed party, the test by which to determine whether there is a contract despite the deception is to answer a question of fact, viz.—whether, contrary to the prima facie presumption that an offer is made to the person to whom it is addressed, the offeror is not contracting with the physical person to whom he utters the offer but with another individual whom he believes the person physically present to be. In answer to an advertisement of a car being for sale, a swindler called on two sisters, joint owners with a third person of the car, and agreed with one of the sisters, E, who negotiated for the owners, to purchase the car for £717. On her categorically refusing to accept a cheque in payment, he tried to convince her that he was a reputable person and said that he was a Mr P. G. M. Hutchinson and lived at Stanstead House, Stanstead Road, Caterham. While the discussion was going on, the other sister went to the local post office near by and returned to say that she had checked the name and address in the telephone directory. E thereupon decided to accept the cheque, on which the swindler wrote the name and address of Hutchinson, and the owners parted with the car to him. The cheque was dishonoured and the man, who was not Mr P. G. M. Hutchinson, disappeared. In an action by the owners to recover the car or its value from a purchaser to whom the swindler had sold it within a few days of obtaining it, and who had bought it in good faith, the Court found that E had intended to part with the property in the car to the swindler in the belief that he was the P. G. M. Hutchinson named in the telephone directory, but that otherwise the sisters would not have accepted the cheque or parted with the car. On appeal, *Held* (Devlin L.J., dissenting), The offer to sell on payment by cheque was made only to the person (Mr P. G. M. Hutchinson) whom the swindler had represented himself to be, and, as the swindler knew this, the offer was not one which was capable of being accepted by him; therefore there had been no contract for the sale of the car by the plaintiffs and they were entitled to recover the car or damages from the defendant. (*Phillips* v. *Brooks Ltd.* [1919] 2 K.B. 243, considered and distinguished on the facts.) *Ingram and Others* v. *Little.* (Court of Appeal. Sellers,, Pearce and Devlin L.JJ. 1960. June 27, 28, 29, 30; July 28.) 3 All E.R. 331.

EVIDENCE.

Admissibility—Income tax—Carbon copies of invoices sent to defendant and of a receipt issued to him admissible as primary and not secondary evidence—Admissibility of stock firm's ledger account. On the hearing of charges of wilfully making false returns of income brought against a farmer, carbon copies of invoices issued by a stock firm, the originals of which would in the ordinary course of business have been sent to the defendant and a carbon copy of a receipt issued to him are admissible in evidence without notice to produce the originals and are primary and not secondary evidence of their contents. The original record of the stock firm's account, identified as that of the defendant, is also admissible in evidence when the defendant's knowledge of its contents, his connection with the transactions recorded and his acknowledgment of the correctness of such record are evidenced by his acceptance of payments based on such record. (*Maxwell* v. *Inland Revenue Commissioner* [1959] N.Z.L.R. 708, distinguished.) *Buckley* v. *Macken.* (S.C. Palmerston North. 1960. August 5; October 13. McGregor J.)

JUSTICES.

Offences—Incorrect date of offence in information—Date not amended—Dismissal otherwise than on merits—Plea of autrefois acquit—Whether plea available—Justices Act 1958 (Vict. No, 6232), ss. 88 (3), 200, 215. On an information laid on April 11. 1959, the defendant was charged before a Court of Petty Sessions with a summary offence under the Police Offences Act, the information alleging the date of the act complained of as January 9, 1958. Upon evidence to the effect that the offence occurred on January 9, 1959, the defendant was convicted. The difference in the dates escaped the notice of the Court and the parties. On appeal to a Court of General Sessions on August 24, 1959, the difference in dates likewise escaped notice until after the police evidence had been given, when the chairman noticed and drew attention to the error. An application on the part of the prosecution to amend the date on the information to January 9, 1959, was not granted, and the Court quashed the conviction, the chairman stating that he was not deciding the appeal on the merits. A fresh information was laid on August 24, 1959, the date of the offence being described as "between August 25, 1958 and January 9, 1959". On the hearing of this second information before a Court of Petty Sessions, the defendant successfully pleaded autrefois acquit. *Held,* On review, where there is a time limit within which an information for an offence must be laid, the date of the alleged offence is an essential part of the information. Because the first information alleged an offence on a date outside the limitation period of twelve months prescribed by s. 215 of the Justice Act 1958, the defendant could not have been convicted of the offence alleged while the information stood unamended. The dismissal of the first information was not on the merits, and the defendant, therefore, had not been in jeopardy on the first information. (*Broome* v. *Chenoweth* (1946) 73 C.L.R. 583; [1947] A.L.R. 27, applied.) Further, the second offence with which the defendant was charged was not the same offence with which she had been charged and acquitted by the Court of General Sessions. The defendant's plea of autrefois acquit was therefore bad. (*R.* v. *Green* (1856), Dears & B. 113, applied; *Halsted* v. *Clark* [1944] K.B. 250; [1944] 1 All E.R. 270, and *Curyer* v. *Foote* [1939] S.A.S.R. 203, distinguished.) *Hackwill* v. *Kay.* (Full Court. Supreme Court of Victoria. 1960. April 8, 11; May 23. O'Bryan, Dean and Monahan JJ.) [1960] V.R. 632.

LICENSING.

Licences—Temporary transfer—Does not divest original licensee of licence permanently—Licence revests in original licensee on expiration of temporary transfer—Licensing Act 1908, ss. 120, 121. Licences—Temporary and permanent transfers granted after void purported removal of licence—Transfers themselves a nullity for misdescription of premises. There is nothing in the provisions of the Licensing Act 1908 as to temporary transfers of licences which implies that, on the grant of such a transfer, the licence ceases permanently to be that of the original licensee. Immediately on the expiration of a temporary transfer the licence revests in the original licensee. In a case where a permanent transfer follows the temporary transfer the revesting is momentary and notional, but in the absence of a temporary transfer such revesting will be permanent. An order for the removal of a licence is made when the Licensing Committee grants the application for removal and not when the licence is endorsed as to its removal. A Licensing Committee considered an application for removal of a wholesale licence and resolved that it was prepared on receipt of the Licensing Control Commission's approval to grant it. The Commission forwarded its approval and the licence was endorsed without further consideration by or decision of the Committee. Subsequently the Committee granted temporary and permanent transfers of the licence, describing it as relating to the new premises.

Held, 1. That the purported removal of the licence was a nullity because the Licensing Committee had acted without jurisdiction since it had not obtained the *prior* approval of the Licensing Control Commission as required by s. 127 (10) of the Licensing Act 1908. 2. That the description of the premises to which the licence is attached is a vital and fundamental part of the licence. The description of the licence as attached to the premises to which it had been purported to be removed resulted in the permanent and temporary transfers being themselves void as relation to a licence which did not exist. *Johns and Another* v. *Westland District Licensing Committee and Others.* (S.C. Greymouth. 1960. July 18; September 8. Richmond J.)

Licences—Removal—Granted when Licensing Committee makes decision and not when licence endorsed—Removal of wholesale licence approved by Licensing Control Commission between grant by Committee and endorsement of licence—Removal a nullity—Licensing Act 1908, s. 127 (10)—See LICENSING *(supra).*

LIMITATION OF ACTION.

Action against Crown and public and local authorities—Prejudice through lateness of notice not affected by statutory presumption of negligence—Failure of owner of coal mine to report accident to Inspector not removing prejudice—Need to state circumstances relied on as negligence in notice—Limitation Act 1950, s. 23—Coal Mines Act 1925, ss. 145, 147—Coal Mines Amendment Act 1937, s. 27. The existence of the provisions of s. 147 (1) of the Coal Mines Act 1925 which declares that any accident occurring in a coal mine shall be prima facie evidence that it was due to some negligence on the part of the owner of the mine makes early notice of an intended common-law claim important to the Crown as mine-owner in order that it may take prompt steps to investigate the whole circumstances of the accident so that it can call evidence covering all aspects of an employer's duty of care not only as to the premises, but also as to the plant and system of work. (*McLeod* v. *Napier Woollen Mills Ltd.* [1957] N.Z.L.R. 147, applied.) Where there has been delay in giving notice of an intended common-law claim to which s. 147 (1) of the Coal Mines Act would apply the fact that s. 145 of the Coal Mines Act and s. 27 of the Coal Mines Amendment Act 1937 have not been complied with by the Crown does not deprive it of the right to plead prejudice owing to the lateness of the notice. Notice of an intended claim given under s. 23 (1) of the Limitation Act 1950 should specify the circumstances relied upon as constituting negligence towards, or breach of duty owed to, the intending plaintiff (Dictum of Shorland J. in *Brewer* v. *Auckland Hospital Board* [1957] N.Z.L.R. 951, 959, adopted.) *Marsh* v. *Attorney-General.* (S.C. Greymouth. 1960. July 19 September 9. Richmond J.)

MASTER AND SERVANT.

Negligence—Safe system of work—Permitting unsafe system to be in operation—Whether workman required to plead and prove alternative system of work which would have been safe. The plaintiff, in the course of his employment, was holding a piece of wood in position so that a fellow workman could hammer a nail into it. Owing to the nature of the work, the other workman had to lean over, above the piece of wood, holding the nail, and the plaintiff's face was about a foot or so from the nail. The other workman struck the nail with a hard blow but did not strike it directly, and the nail flew out, hitting the plaintiff in the eye. As a result of the accident the plaintiff lost the eye. The system of work used on this occasion had been used by the employers' workmen for some twenty years, and there had been some previous occasions when some facial injuries had been caused to workmen. In an action against the employers for damages for personal injuries, the plaintiff, in his statement of claim, alleged that a safe system of work would have avoided the accident. Judgment was given for the plaintiff. On appeal, it was contended by the defendants that, where failure to provide a safe system was pleaded, it was essential for the plaintiff to set out what the proper system of work was. *Held*, In a case such as the present case, it was not essential for the plaintiff to plead, and prove, what the safe system would be; and, in the circumstances, the appeal would be dismissed. (Dictum of Viscount Simon L.C. in *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* [1945] 1 All E.R. at p. 328, explained.) *Dixon* v. *Cementation Co. Ltd.* (Court of Appeal. Lord Evershed M.R., Ormerod and Devlin L.JJ. 1960. May 20.) [1960] 3 All E.R. 417.

NEGLIGENCE.

Liability in tort for servants lent out. *(1960) 13 Australian Lawyer*, 157.

PRACTICE.

Judgment and order—Judgment by default—Claim in tort may be for liquidated amount—Application to set aside—Arguable defence on question of law disclosed by statement of claim—Affidavit of merits not necessary—Code of Civil Procedure, RR. 226, 236. While most claims for damages in tort will be in the nature of unliquidated demands, there are some claims in tort which are clearly liquidated, and within the scope of R. 226 of the Code of Civil Procedure. The true interpretation of that Rule is to be ascertained by considering the various meanings of the word "liquidated" and selecting that meaning which appears to be most appropriate to the meaning and object of the Rule. If a claim is for an amount which is settled in the sense that the amount of liability is clear and plain and not really open to dispute, it is a claim for a liquidated amount, even though such amount has not been settled by litigation or agreement. Where application is made under R. 236 to set aside a judgment entered under R. 226, it is usual for the Court to require the defendant to file an affidavit of merits showing that he has at least an arguable defence. If, however, it appears on the face of the statement of claim that the defendant has an arguable defence on a question of law, there is no need for an affidavit of merits to show that which is already revealed by the pleading. In such a case the defendant may be entitled to have the judgment set aside and be given leave to defend, not *ex debito justitiae* and without terms on the ground that the judgment was irregularly obtained, but on the ground that, though the judgment was regular, it is proper to make such an order subject to such terms as the Court thinks fit to impose. *Wing and Another* v. *Leeder.* (S.C. Wellington. 1960. June 3; August 31. Barrowclough C.J.)

SUMMARY.

Nonfeasance (1960) 104 S.J. 480.
Views as Evidence (1960) 34 A.L.J. 46.

WORKERS' COMPENSATION.

Workman—Governing director of company exercising full and unrestricted control of company's affairs but also working for company as pilot and being paid wages—Death of governing director while acting as pilot on company's business—Whether contract of service with company—New Zealand Workers' Compensation Act 1922 (1922, No. 39), as amended, s. 2. In 1954, the appellant's husband, L, formed the respondent company for the purpose of carrying on the business of aerial top-dressing. Of the three thousand £1 shares forming the nominal share capital of the company, L was allotted 2,999 shares. He was appointed governing director of the respondent company and pursuant to art. 33 of the articles of association was employed as chief pilot of the company at a salary arranged by him. Article 33 provided that in respect of such employment the rules of law applicable to the relationship of master and servant should apply between the company and him. In his capacity as governing director and controlling shareholder, L exercised full and unrestricted control of the affairs of the respondent company and made all decisions relating to contracts for aerial top-dressings. Different forms of insurance cover for the benefit of the respondent company and its employees were arranged by the company secretary, and certain personal accident policies were taken out in favour of L, the premiums in respect of which were paid by the respondent company and debited to L's. personal account in the books of the company. The respondent company owned an aircraft equipped for top-dressing and L was a duly qualified pilot. In March, 1956, L was killed while piloting the aircraft during the course of aerial top-dressing and the appellant claimed compensation under the New Zealand Workers' Compensation Act 1922, s. 3 (1), under which, if personal injury by accident arising out of and in the course of any employment to which the Act applied was caused to a worker, the employer was liable to pay compensation. By s. 2 of that Act, "worker" was defined as "any person who has entered into or works under a contract of service . . . with an employer, whether by way of manual labour, clerical work, or otherwise, and whether remunerated by wages, salary, or otherwise". *Held*, L was a "worker" within the meaning of s. 2 and the appellant was entitled to compensation under the Act, since L's. special position as governing director and principal shareholder did not preclude him from making on the company's behalf a contract of employment with himself, nor preclude him from entering into, or working in the capacity of servant under, a contract of service with the company. (*Salomon* v. *Salomon & Co.* [1897] A.C. 22, applied.) *Lee* v. *Lee's Air Farming Ltd.* (Privy Council. Viscount Simonds, Lord Reid, Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest. 1960. July 6, 7; October 11.) [1960] 3 All E.R. 420.

REFLECTIONS ON THE 83rd ANNUAL MEETING OF AMERICAN BAR ASSOCIATION.

At the 83rd annual meeting of the American Bar Association held in Washington D.C. from August 29 to September 2, 1960, there were some 800 visiting British lawyers (mainly from Great Britain and Australia) and their wives present as guests. This was the occasion for the Americans to return the hospitality they had enjoyed in England three years ago.

The meeting, or Conference as we should call it, was of fantastic proportions by New Zealand standards as can readily be shown by these figures. It was attended by over 6,000 American lawyers. The "Program" comprised some 139 pages, the list of speakers set forth in the programme included 251 names and when one looked at the Schedule of Events for, say, the morning of Tuesday the 30th August one was bewildered to find a choice of 12 functions at 8 a.m., 1 at 8.30 a.m., 9 at 9 a.m., 7 at 9.30 a.m., 21 at 10 a.m., and 3 at 11 a.m., a total of 53 attractions.

A Notable Assembly

Probably the greatest number of lawyers ever assembled together attended the Convocation of the Bench and Bar to open the Conference on the grassy slopes of the Sylvan Theatre in the open air at the foot of the great Washington Monument, a stone obelisk rising over 500 feet into the sky. Among those seated on the platform were:

The Rev. Frederick Brown Harris
Chaplain of the United States Senate.
The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., M.P.
Her Majesty's Attorney General.
The Hon. Earl Warren
Chief Justice of the United States.
The Hon. John D. Randall
President of the American Bar Association.
The Rt. Hon. Viscount Kilmuir, G.C.V.O.
Lord High Chancellor of Great Britain.
The Hon. William P. Rogers
Attorney-General of the United States.
The Hon. Denys Theodore Hicks, O.B.E., T.D.
President of The Law Society of England.
The Hon. J. Lee Rankin
Solicitor-General of the United States.
Seven Associate Justices of the Supreme Court of the United States.
The Rt. Hon. Lord Evershed
Master of the Rolls of England.
The Rt. Hon.
Lord Morris of Borth-y-gest, C.B.E., M.C.
Lord of Appeal in Ordinary.
The Rt. Hon. Lord Justice Sellers, M.C.
Lord Justice of Appeal.
The Rt. Hon. Lord Justice Pearce
Lord Justice of Appeal.
The Hon. Lord Walker
Judge in the Court of Session of Scotland.
The Hon. Geoffrey Lawrence, Q.C.
Chairman of the Council of the Bar of England and Wales.
The Hon. James N. Dandie
President of the Law Society of Scotland.
The Hon. Renault St. Laurent, Q.C.
President of the Canadian Bar Association.
The Hon. Oscar J. Negus, Q.C.
President of the Law Council of Australia.
The Hon. Sir Leslie Ernest Peppiatt
Past President of the Law Society of England.
The Hon. Sir Charles Norton, M.B.E., M.C.
Past President of The Law Society of England.
The Hon. Sir Edwin Herbert, K.B.E.
Past President of The Law Society of England.
The Hon. Sir William Charles Crocker
Past President of The Law Society of England.
The Hon. Ralph Risk
Past President of the Law Society of Scotland.
The Hon. D. Park Jamieson, Q.C.
Past President of the Canadian Bar Association.

There were present twenty-six Judicial Representatives from England, three from Scotland, one from Canada, five from Australia and one hundred and seventy-nine from the United States.

While musical selection were played by the U.S. Army Band the many thousands attending this opening ceremony were skilfully directed to seats and the Convocation Procession guided to the platform by one Marshal, two Chief Deputy Marshals, nine Deputy Marshals and two Special Deputy Marshals. To the great credit of the organization the Invocation by the Chaplain of the United States Senate commenced punctually at 10 a.m. as planned. The two National Anthems followed. Then the Attorney-General of the United States and the President of the American Bar Association made short speeches followed by the address of welcome by the Honourable Earl Warren, Chief Justice of the United States. Responses were made by The Right Honourable Viscount Kilmuir G.C.V.O. Lord High Chancellor of Great Britain, The Right Honourable Sir Reginald Manningham-Buller Q.C.M.P., Her Majesty's Attorney-General and The Honourable Denys Theodore Hicks, O.B.E., T.D., President of The Law Society of England. The vast congregation stood for the Benediction and The Recessional which concluded the simple but impressive ceremony which not even a blazing sun and high humidity could mar.

Presidential Address.

The President of the United States, the Honourable Dwight D. Eisenhower, honoured the Conference with an address that afternoon in Sheraton Hall, at the Sheraton-Park Hotel. A closed television screen showing of this address was provided in the Grand ballroom of the Mayflower Hotel. Mr President was eloquent and jovial. The visitors greatly appreciated his appearance and the warmth of his personal welcome to the United States. Many references were made during the conference by Americans to their debt to British lawyers and the Common Law. The President threw this into relief when he pointed out that of the thirty-five lawyers who took part in the drafting of the Constitution, thirty-two derived their legal training in England. President Eisenhower appeared to have recovered from his period of ill health, and when he came to the vital topic of the conference, whether the United States should repeal the Connally Reservation, he spoke with force and directness.

Connally Reservation.

The Connally Reservation was attached when the United States Senate ratified the World Court Statute in 1056. The ratification said originally that the World Court would not have jurisdiction over "matters essentially within the domestic jurisdiction of the United States". The Connally Amendment added to that phrase "as determined by the United States." Without this reservation the World Court itself would decide what issues were "domestic". In effect, the Reservation allows the United States to decide when it will allow itself to be sued. Thirty-three countries have accepted the World Court without reservation while five countries besides the United States have the reservation—Liberia, Mexico, Pakistan, South Africa and the Sudan.

Referring to the need for repeal of the Connally Reservation, President Eisenhower said, "I'm not a lawyer, and so you don't have to pay much attention to my opinion; but certainly far be it from me to fail to express it". This brought applause and then he went on to appeal for the repeal of the Reservation in these words: "It strikes me that of all people who should work for the rule of law, lawyers should be among the forefront. I merely say to you; look at the great objective. Look at what peace means. And how are we ever going to travel that road unless we are ready to made some concessions that, as I see it, cannot possibly hurt us?"

The House of Delegates of the American Bar Association later in the Conference after the expression of many strongly held opposing views voted 114 to 100 in favour of the repeal of the Reservation. However, the American Bar Association in General Assembly came out overwhelmingly in favour of the abolition of the Reservation. It remains to be seen whether the Government of the United States will take any action in the matter.

President Eisenhower delighted his audience with a legal anecdote. An accused who was not represented by Counsel was told by the Bench he could select a Counsel from the local panel two of whom were in Court and the other was not. The accused looked at the two in Court and asked for the other to be appointed.

There had been some confusion as to who were invited to the President's Reception that evening at the White House as invitations which had been posted had, in many cases, not been received, owing to travel arrangements. However, the President himself removed all doubt by closing his address with the warmest of welcomes to everyone to attend. This they certainly did as a visit to the White House at the invitation of the President and Mrs Eisenhower was a signal event in the lives of both the visitors and Americans alike.

Breakfast Sessions.

A convention practice in the United States is to hold Breakfast Sessions. These were well attended but were not so popular with the more conservative English, who are notoriously taciturn at breakfast. The practical aspect of the matter is that the American hotels do not include meals in their tariff so guests can choose where they eat and with whom they eat. The breakfast session, therefore, gives another opportunity for friends staying at different hotels or for particular groups to meet over a meal. For instance, on Monday, August 29 there were 9 different Breakfast Sessions, as follows:

7.30 a.m. Section of Insurance, Negligence and Compensation Law, British-American Breakfast, Blue Room, The Shoreham.

8.00 a.m. The American College of Probate Counsel, Breakfast Meeting, Assembly Room, Sheraton-Park Hotel.

American Law Student Association, Host School Breakfast, Grand Ballroom, Willard Hotel.

Chicago-Kent College of Law Alumni, Breakfast, New York Room, The Statler Hilton.

Joint Committee on Continuing Legal Education of A.L.I. and A.B.A., Breakfast Meeting, East Room, The Mayflower.

Institute of Judicial Administration, Inc., Breakfast, Embassy Room, The Statler Hilton.

Section of Municipal Law, Council Breakfast Meeting, South Lounge, The Sheraton-Carlton.

National Conference of Bar Examiners, Board of Managers Breakfast Meeting, Concord Room, The Mayflower.

National Council of Patent Law Association Breakfast Club Room, The Shoreham.

As one can imagine from the holding of Breakfast Sessions, American hotels are very different from New Zealand hotels. We in New Zealand have not yet developed the so called convention hotel which provides suitable accommodation for all conference functions. For example, the Sheraton-Park Hotel in Washington D.C. can seat 3,000 for meetings and 2,000 for dinner in its "Sheraton Hall", likewise 450 and 350 respectively in its "Continental Room", 400 and 300 in its "Burgundy Room", 250 and 150 in its "Canibar Room", 100 and 75 in its "Franklin Room", 60 and 50 in its "Madison Suite", and 60 in each of the "Hamilton" and "Adams" Rooms which can be combined. These figures demonstrate the considerable accommodation available in a single hotel.

The programme included a demonstration of modern theories of procedure presented by the Section of Judicial Administration of the American Bar Association with the co-operation of the Fellows of the American College of Trial Lawyers and the Junior Bar Conference. This demonstration was staged in the Ceremonial Court Room of the United States Court House, Washington D.C. On the Bench were three Judges of District Courts and at the Bar were three counsel for each party to the action, being a claim for damages for personal injury. The demonstration was not of the trial itself but of the pre-trial procedure which has been developed to varying degrees and with varying success to reduce Court congestion in the United States. The object of the demonstration was to expose some misconceptions responsible for limited success in this field and to provoke serious consideration of some of the more modern theories of procedure.

Pre-Trial Conferences

The leading part in the demonstration was taken by the Honourable Stephen S. Chandler, Chief Judge of the United States District Court, Oklahoma City, who has proved in his own Court how completely successful pre-trial is in clearing away any back-log of cases waiting trial. This new system of procedure involves the complete disclosure of all evidence by each party to the other or others. "Discovery" includes the supplying of the depositions of all

witnesses. In this way the chances of settlement are considerably advanced because it prevents a party from producing trump cards from his sleeve at the trial itself or from bluffing during negotiations for a settlement.

When both sides to an action completely reveal all the available evidence not only is a settlement more likely, but also a fairer settlement is more likely.

Following "Discovery", a pre-trial conference takes place before the Judge who would hear the case. At pre-trial, the Court is informed of the issues and all preliminary applications are disposed of and an early fixture made so that to case can then go to trial without delay. Of course, after counsel have gained the view of the Judge at pre-trial, the chances of a settlement are greatly increased.

Judge Chandler has written in the *Oklahoma Law Review*:

> "Prior to the advent of the Federal Rules of Civil Procedure, conferring upon the court full power to require complete discovery, a lawsuit was a game of wits in which all too often the outcome was dependant upon the ability of a lawyer to conceal the true facts concerning his case and to delay it so long by procedural tactics that justice was an impossibility. Delaying tactics and the inability to require full disclosure of all true facts made speedy and just decisions impossible.
>
> "When the point in the case is reached where the chips are down and all the cards are face up, there is great likelihood that the case will not be tried unless there is a close question of law which counsel wish to test. If the case should be tried, the trial is short and to the point, the record for appeal small and the judgment more likely to be just.
>
> "A judge need never fear having to try too many cases if in each instance he requires full disclosure of all facts. It is only when a lawyer is permitted to retain undisclosed, some evidence with which to surprise opposing counsel at trial that cases are tried which would otherwise be settled. In and of itself, the invariable requirement of disclosure of the entire truth disposes of about nine cases out of ten, and thus removes them from the docket.
>
> "Perhaps the greatest advantage of the requirement of full disclosure of all facts is the furtherance of settlements. After the attorneys have "discovered" the other side of the lawsuit and have met and discussed the case with the judge, they are in a position fairly to evaluate their chances at the trial and to assess the value of the suit to their clients. If they be experienced lawyers, each knows exactly what the lawsuit is worth and each can tell his client with reasonable accuracy what the outcome of a trial is likely to be and can intelligently advise him regarding settlement. The judge should do no more, in the judgment of the writer, than to request at pre-trial conference that counsel discuss settlement after the conclusion of the pre-trial. A judge should not be present and should take no part in such negotiations. His request alone, if he has already required full disclosure of all facts, will produce astonishing results."

Judge Chandler has been quoted at some length because he so forcefully advocates and has proved by his own experience that full disclosure and the pre-trial conference clears Court lists. The procedure is somewhat startling but it springs from the concept that the Court is a temple of justice, that the Bench and Bar are ministers in that temple, and that tactics of surprise, delay, and the hiding of facts do not lead to true justice. Truly a challenging concept and a radical change for the lawyer who seeks rather to win cases than to see justice done.

Social Aspects.

On the social side, a memorable event was the visit to Mt. Vernon, the historic and beautiful home of George Washington, some 1,500 visitors being conveyed there by steamer on the Potomac River to the strains of negro spirituals. Visits were also arranged to many places of interest, including F.B.I. Headquarters, I.B.M. demonstrations of Electronic Data Computer Methods, an Exhibit of Progress in Industry through Patents, the Showcase of Progress in the Home Building Industry, the U.S. Naval Academy at Annapolis, a Supermarket, Congressional tour of House and Senate, a twilight dress parade by U.S. Marine Corps, museums and art galleries. There were numerous receptions and entertainment ranged from ballet to baseball.

An impressive event was a special session of the Supreme Court of the United States to admit nearly 2,000 lawyers to practice in that Court. The swearing in ceremony was by far the largest in the Court's 170-year history. Each attorney admitted paid 25 dollars for documents certifying his right to practise before the Supreme Court and the proceeds of all such admissions go to a special fund which the Court uses to provide the costs of appeals by impoverished litigants.

One left Washington D.C. inspired by the American enthusiasm for the rule of law and their keen initiative in tackling legal problems, impressed by their lavish entertainment and warmed by the personal friendliness on every hand, a friendliness which is proffered to the visitor and not held in reserve, which surely is true hospitality.

G. E. Bisson.

Decision.—There are occasions when it is exceedingly difficult to make up one's mind. The country as a whole, often somewhat apathetic towards certain aspects of the political scene, has been refreshed by a masterly example of solving difficulties on political policy by deciding to vote in favour of both of two opposed policies. It is, perhaps, a practical method of preserving a conservative result. In the field of judicial decision there are, no doubt, cases in which recourse would readily be had to the solution of difficulties of decision by some other method than reaching a conclusion on them, if that were permissible. The proposition that a court is not entitled to dismiss a civil claim on the ground that it is unable to decide which party is right is enshrined in *Bray* v. *Palmer* ([1953] 2 All E.R. 1449). A Judge has, however, one advantage. There is always the onus of proof, which lies normally on the party who asserts something. A Judge can, therefore, safely decide that both of two opposing claimants are wrong. What he cannot properly do, in the view of the Court of Appeal in the case cited, is to accept both parties' stories as equally possible and thereupon to refuse relief to both, for that deprives both of something to which they are equally entitled. (*1960*) *110 L.J.* 598.

The Good Judge.—"Recently a certain English Judge died and this is what was written about him: "That he made an admirable Judge surprised no one. He had all the judicial qualities—learning, patience, humour and detachment. But above all his was a sympathetic character." Could any of us—Bench or Bar—ask for a better epitaph than that?" (*1960*) *230 L.T. Jo.* 177.

CHARGING ORDERS UNDER THE SUPREME COURT CODE AS AFFECTING TITLE TO LAND.

The recent judgment of Shorland J. in *Coulson's Ltd.* v. *Dyer* [1960] N.Z.L.R. 281, is useful in at least two respects. First, His Honour clearly defines the difference between a charging order against land made under the Administration of Justice Act 1956 (United Kingdom) *36 Halsburys Statutes of England* 2nd. ed. 473 and one made under our Code of Civil Procedure. In the United Kingdom registration of the charging order under s. 6 of the Land Charges Act 1925 *20 Halsbury's Statutes of England* 2nd. ed. 1071 is necessary, and the judgment creditor cannot, as he can in New Zealand, issue a writ of sale against the land; having obtained the charging order he can either concurrently or thereafter obtain the appointment of a receiver with power to sell. In the United Kingdom the charging order is itself a security for payment, and the holder of the charging order is a secured creditor in the bankruptcy should the debtor go bankrupt.

On the other hand, a charging order in New Zealand is absolute in the first instance if it affects land, and may be registered against the land. Registration thereof is not obligatory but has this advantage; it is a stop order preventing the disposition of the property until the creditor has an opportunity of making the judgment effectual by seizure and sale, the sale being by writ of sale by the sheriff. The registration of the charging order in New Zealand does not make the judgment creditor a secured creditor in bankruptcy. As Shorland J. in the above-cited case at p. 284 neatly put it:

> In my view, a charging order against land does no more than "freeze" for a limited period of time the owner's right to deal with the land. It gives the holder no right to possession during the limited period of its life, and, in my view, it confers no estate or interest in the land.

The New Zealand charging order is subject to R. 319 which provides:

> Such order shall cease to bind the land affected thereby, unless some deed of conveyance or instrument of transfer upon writ of sale is registered within six months after such order has been sealed; but the Court or a Judge on good cause may from time to time extend the effect of such order for any period not exceeding two years in the whole, and any order granting such extension shall be registered in the same way as the original order.

In *Kinsman* v. *Brown* [1958] N.Z.L.R. 807, at p. 809 F. B. Adams J. said:

> Rule 319 of the Code presents an analogy. Charging orders registered against land cease to bind the land after six months, but there is a limited power to "extend the effect of such order". It has been held (under an earlier rule in somewhat different form) that the Court cannot exercise that power after the charging order has ceased to bind the land: *Commercial Agency Ltd.* v. *Adams* (1901) 19 N.Z.L.R. 578, 3 G.L.R. 227; followed in *Murphy* v. *Murphy* [1933] N.Z.L.R. s. 39; [1933] G.L.R. 322. In the earlier of these two cases, Edwards J. said that "the effect of the charging order had wholly gone", and that the charging order was dead.

There is another fundamental principle affecting charging orders common both to the United Kingdom and New Zealand, which principle also appears to prevail in Australia, and it is this. A judgment creditor is not in the position of a mortgagee. He simply takes under the process such interest as the debtor may happen to have. *He is subject to all prior charges, legal or equitable, whether he knows of them or not, and cannot by charging order attain priority over them*; thus in *In re Beattie* (1887) 5 N.Z.L.R. 342, a charging order absolute had been registered against land the registered owner of which had previously executed a transfer, which, however, was unregistered. It was held that, as the order had not been acted on by sale, the Court under Rule (now) 320, could interfere at the instance of any party prejudicially affected, and cancel the registration. In *Nichol* v. *Raven* [1925] N.Z.L.R. 155; [1924] G.L.R. 186, a charging order was removed to enable a prior mortgage to be registered.

Rule 320 of the Code provides that any person alleging that he is prejudicially affected by an order charging land may at any time apply to the Court or a Judge to have the registration of such order cancelled or the effect thereof modified, and the Court or a Judge may make such order with reference thereto as may be just. I particularly desire to point out that the effect of a charging order may be *modified*.

I was very interested recently when being furnished with a search note of an Auckland Land Transfer title to learn that Mr Justice Turner had ordered that a registered memorandum of mortgage should take priority over a charging order, for *modifications* of charging orders under R. 320 are rare in practice. The precedent hereunder given is modelled on that order. The search note showed the following position as to the state of the Land Transfer Register:

Registered proprietors of the fee simple: A.B., of Auckland, contractor, and C.D., his wife.

Encumbrances:

(1) Agreement as to fencing in Transfer No.....
(2) Drainage easement in Transfer No.....
(3) Mtge. No. ..... to ..... Commissioner.
(4) Charging Order 13247 in the action.....Ltd. A.B. prod. 1:9:59.
(5) Mtge. 475738 to the .....Bank. prod. 18:9:59.
(6) Order 13290 of the Supreme Court giving Mortgage 475738 priority over Charging Order 13247.
(7) Order 13311 extending Order 13247 for six months from 1:3:60 to 1:9:60.
(8) Order 13418 extending Order 13247 for six months from 1:9:60 to 1:3:61.

PRECEDENT.

ORDER OF THE SUPREME COURT MODIFYING CHARGING ORDER.

BETWEEN ..... LIMITED *Plaintiff.*
AND A. B. *Defendant.*

Before the Honourable Mr Justice Turner.

..... *day this* ..... *day of* ..... 1960.

UPON READING the Notice of Motion for Modification of Charging Order filed herein and the Affidavit of (Bank Manager) filed in support thereof IT IS ORDERED that the Memorandum of Mortgage bearing date the 20th day of August 1959 from A. B. and C. D. affecting all the land in Certificate of Title Volume..... (Auckland Registry) shall take priority over the Charging Order obtained by the abovenamed Plaintiff against the abovenamed Defendant and dated the 1st day of September 1959 and that the effect of the said Charging Order is hereby modified by making it subject to the said Memorandum of Mortgage.

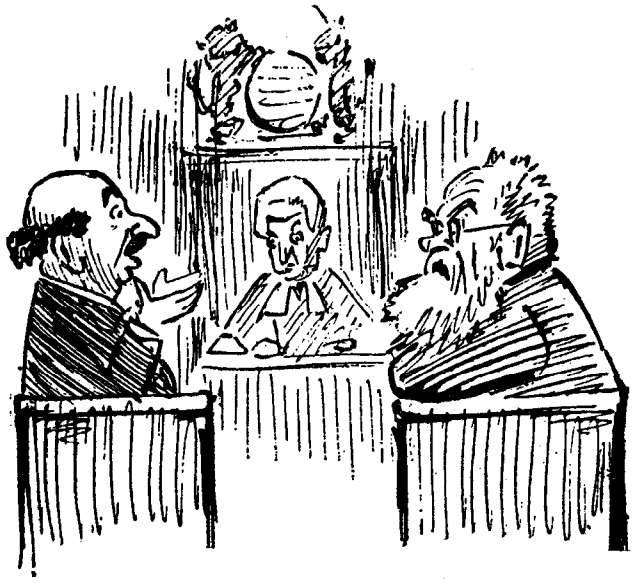
By the Court,
Deputy Registrar.
E. C. ADAMS.

FORENSIC FABLE.

By "O"

The Sarcastic Counsel and Mr. MacIntosh, the Moneylender

A Sarcastic Counsel Smiled Grimly as he Perused his Brief. He was to Appear for a Borrower (Mr. Algernon FitzCholmondely) against a Moneylender (Mr. Alexander MacIntosh, of Jermyn Street, W.1). It was a Short Cause. Mr. FitzCholmondely had Borrowed a Hundred Pounds from Mr. MacIntosh, Handing to him at the same time a Promissory Note for Two Hundred Pounds, Payable by Four Monthly Instalments of Fifty. After Paying Two Instalments Mr. Fitz-Cholmondely had Defaulted. He had then Borrowed a Further Hundred Pounds, Accepting, at the same Time, a Bill of Exchange for Five Hundred. Thereafter a Series of Complicated Transactions had been Carried Through, with the Final Result that Mr. FitzCholmondely had Borrowed One Thousand Two Hundred and Fifty Pounds, Repaid Two Thousand Five Hundred, and Still Owed Three Thousand Pounds, Eleven Shillings and Nine Pence. As the Short Cause List was to be Taken by a Judge of Scottish Extraction, the Sarcastic Counsel Felt that he would Have Some



fun. His Lordship, he Shrewdly Surmised, would not Sympathise with the Attempt of a Caledonian from Judea to Take Advantage of a Foolish and Needy Englishman. The Case Came on and Mr. Alexander MacIntosh went into the Box. To the Extreme Surprise and Annoyance of the Sarcastic Counsel, he Proved to be a Genuine Scot with a Red Beard and an Aberdonian Accent of Appalling Purity. Whereas Mr. Algernon FitzCholmondely had Reluctantly to Admit in Cross-Examination that he was Born in Warsaw and that his Name was Originally Rosenbaumski. Not Only did the Judge of Scottish Extraction Enter Judgment for the Plaintiff for the Full Amount, but he Peremptorily Refused a Stay of Execution.

Moral—*Look Out.*

WELLINGTON DISTRICT LAW SOCIETY ANNUAL DINNER.

The 1960 annual dinner of the Wellington District Law Society was held at the Grand Hotel, Wellington, on October 13, 1960.

Mr H. R. C. Wild Q.C., president of the society was in the chair and there was an attendance of over one hundred and forty members.

Guests of honour included the Chief Justice, the Rt. Hon. Sir Harold Barrowclough, Mr Justice North, Mr Justice Cleary, Mr Justice McCarthy, Mr. Justice Haslam, Mr Justice Tyndall, Judge Stilwell, Judge Dalglish, Mr W. H. Carson S.M., Mr J. B. Thomson S.M., and Chief Judge Morrison and Judge Jeune of the Maori Land Court.

An innovation was the attendance of lady members of the society, Miss S. Smith, Mrs Lyndon and Miss Margaret McGregor, along with the Secretary of the Society, Miss Francis Parker being present.

The toast list was short, and comprised the Layol Toast, "The Judiciary", proposed by the president and replied to by Sir Harold Barrowclough, C.J. and Mr W. H. Carson S.M., and "De Minimis" proposed by Mr C. J. Pottinger and replied to by Mr J. B. O'Regan.

COSTS AND DISBURSEMENTS IN RESPECT OF BUILDING LOANS.

Where loan moneys are being advanced by the State Advances Corporation or by way of capitalization of the family benefit for the purpose of the building of a house and the moneys so made available are barely sufficient to cover the cost of the house, the deduction from these moneys of costs and disbursements by the practitioner handling them can cause embarrassment to both borrower and builder unless the borrower has been warned of the need to meet such costs and disbursements and has made other arrangements to provide the necessary funds.

The matter was called to the attention of the Council of the Wellington District Law Society by the Wairarapa Master Builders Association, and the Council has decided to issue a circular in the following terms:

"*Building contracts financed by State Advances Corporation loans and capitalization of Child Benefits.* The attention of the Council has been drawn to the fact that in some cases of buildings being erected with finance from the above sources, the owners have not been warned in advance of the necessity of providing themselves with the necessary costs and disbursements involved. Where solicitors are consulted at the outset of any such transaction the Council recommends that they should endeavour to ensure that the necessary legal costs and disbursements will be forthcoming where the finance being provided is sufficient only to cover the costs of purchase of the section and erection of the house."

SALE OF ASSETS TO A COMPANY.

Need for Clear-Cut Agreement.

In the Supreme Court at Christchurch recently Hutchison J. delivered a judgment which, although it states no new principle of law and will not be reported in the *New Zealand Law Reports*, calls for mention in this JOURNAL as it brings home to practitioners the need for a complete and clear-cut agreement where assets are sold to a company in exchange for shares.

The judgment was delivered in respect of an application by the liquidator of *Cooper and Pellowe Ltd. (in voluntary liquidation)*, under ss. 254 and 298 of the Companies Act 1955, that two contributories each pay to him the sum of £1,250, the amount of a call which he had made on them respectively, along with interest to the date of payment.

Messrs Cooper and Pellowe, the contributories in question, carried on business in partnership as builders up to 1952, when they formed the company abovementioned with a capital of £2,500. The company took over the assets of the partnership and each partner took up 1,250 shares.

The company went into liquidation on February 13, 1950, and on November 26, 1958, the liquidator made a call of £1 per share on each shareholder and the question before the Court was whether the shareholder were liable to pay the amount of the call or whether the shares were to be treated as fully paid up.

The judgment is short, and the relevant portions read as follows :

"No cash was actually paid to the company in respect of the shares. There was no written agreement to issue them fully paid, nothing of relevance in the Memorandum or Articles of Association and no minute of the company dealing with the point. The company took over the assets of the partnership and carried on the business previously carried on by the partners. There was at the time of the take-over an assessment which showed the assets of the company as being woth £2,500, but the liquidator described this as unsatisfactory, saying that, in his consideration of it, he could not get anywhere near that figure. There was in the books of the partnership, which were carried on as the books of the company, a journal entry debiting Cooper and Pellowe each with £1,250 and crediting capital with £2,500. This the liquidator, a public accountant, said purported to show that they were paying for their shares, but he said that this, in his opinion, meant nothing. The shares were throughout shown in the company's balance sheet as fully paid. Neither of the respondents gave or called evidence.

"There are two possibilities to be considered as against the liquidator's claim. The first of these is that payment for the shares may have been made in something other than cash. Payment in actual cash is not required to constitute payment for shares ; the payment may be in some consideration other than money if the company has contracted to accept that consideration in satisfaction of the shareholder's liability : see *In re Stephen (J. A.) Ltd.* [1924] G.L.R., 446, especially in the references to *Coregum Gold Mining Co. of India* v. *Roper* [1892] A.C. 125. The other is that the shares may have been issued as fully paid by virtue of a contract to that effect between the shareholders and the company. The burden of proof of such a contract rests on the shareholders : *Albert* v. *Liquidator of Suburban Land and Construction Co. Ltd.* [1934] G.L.R. 744. The burden of proof of the contract under the first possibility must also, in my opinion, rest on them.

"I have referred to these possibilities as separate or alternative ones, and strictly, as I think, they are, for the former of them was recognized even at the time when failure to comply with the statutory requirements as to filing with the Registrar a contract for the issue of fully paid shares involved the shareholder in a liability to pay the nominal value of them in cash—see 1 *Morrison's Company Law in New Zealand*, 3rd. ed., pp. 78 et seq. But now, when the right of the shareholder who has such a contract with the company, remains unaffected by the failure to file the contract, or the particulars of it if it is not in writing, there is, as it seems to me, no practical distinction between them And so, *In re Stephen (J. A.) Ltd. (supra)*. dealing, as I. think, with the former of them, was treated as an authority on the other of them in *H. J. Harris Ltd. (in liq.)* v. *Harris* [1935] G.L.R. 377.

"I think it likely that the respondents thought that their shares were to be issued to them fully paid and that this was so by virtue of a contract for the sale of their business to the company. The journal entry, as explained by the liquidator, may point rather to the same result having been sought by the other route ; and Mr. Thomas's agreement rather went on that basis. However, it does not seem to me that any contract on the part of the company has been proved either to issue fully paid shares or to accept any other consideration in lieu of cash in payment for original contributing shares. Sir Michael Myers C.J. in *H. J. Harris Ltd.* v. *Harris (supra)* endeavoured to distinguish that case from *In re Stephen (J. A.) Ltd.* and *Albert* v. *Liquidator of Suburban Land and Construction Co. Ltd.*, but was unable to. There are, of course, certain points of difference between each of those three cases and this one, but the important question common to all of them is whether a contract by the company has been proved. I have endeavoured to distinguish this case from them, but, being unable to find that such a contract has been proved, I have not been able to."

His Honour then made an order for payment of the calls on the shares.

The facts in *Stephen's* case (*supra*) were rather stronger in favour of the shareholders than those in *Cooper and Pellowe's* case. In *Stephen's* case a company with a capital of £1,000 in £1 shares was formed to take over a business carried on by I.W. the wife of R.W. In the articles of association it was stated that the shareholders should be I.W. for 495 fully paid shares, F.C. for five fully paid shares and R.W. for 500 shares paid up to 10s.

There was no evidence of any agreement between I.W. and the company that the company should accept the business and the assets, subject to the liabilities, in satisfaction of the moneys payable on the shares of the shareholders or even of those allocated to I.W. herself, nor did the memorandum or articles of association contain any reference to the business previously carried on by I.W., or to any arrangement for the purchase of that business, but from the incorporation of the company that business was treated and carried on as the business of the company, which took possession of the assets and assumed the liabilities. The articles of association at least did state the extent to which the shares were paid up, a matter which was not expressly covered in *Cooper and Pellowe's* case, but despite this, Adams J., held that, in the absence of any contract binding on the company to accept moneysworth in satisfaction of the liability of the shareholders, each of them was liable to pay the full sum of 20s. in respect of each share subscribed for.

After stating the facts as summarized above, Adams J., continued as follows :

"Now there never has been any doubt that a subscriber to the memorandum of association of a company limited by shares and registered under the Companies Act has agreed to be a shareholder for the number of shares in respect of which he has subscribed the memorandum, and to contribute to the capital of the company the sum mentioned in the

memorandum in respect of each such share. In this connection it has to be borne in mind that the purpose of the Companies Act is to relieve shareholders in companies incorporated under the Acts from the common-law liability of partners for the whole debts and engagements of the joint undertaking, and to substitute for that unlimited liability the limited liability defined in s.. 14, 15 and 66 of the Companies Act, which in the case of companies limited by shares is ascertained by the 'shares of a certain fixed amount' into which the capital of the company is divided in accordance with the provisions of s. 15 (d). The liability can be satisfied only by payment in money or money's-worth. The whole question is fully discussed and finally determined in the *Coregum Gold Mining Co.* v. *Roper* [1892] A.C. 125. In that case the company was registered under the Companies Act (England), 1862, which did not require a filed contract to authorize payment for shares otherwise than in cash. The obligation to pay for the shares subscribed for in money or money's-worth cannot be dispensed with by anything in the articles of association or by any resolution of the company or by any contract between the company and outsiders who have been invited to become members of the company and who come in on the faith of such a contract: Per Lord Macnaghten in the *Coregum Co.'s* case (*supra*) at p. 145. The question to be determined, therefore, is whether the applicants or any of them have actually paid in money or money's-worth, the amount payable in respect oj the shares subscribed for. Payment in cash is not required. A company is free to contract with a shareholder to accept as payments considerations other than money which the company has agreed to accept as representing in money's-worth the nominal value of the shares. The Court would doubtless refuse effect to a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount or to accept less than money's-worth in satisfaction; but so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash its estimate ought not to be critically examined: Per Lord Watson in the *Coregum Co.'s* case at pp. 136, 137. In cases where such a contract has been entered into the Court will not inquire into the value of the consideration while the transaction is not impeached, and it will not rip up a transaction which is not impeached as and proved to be dishonest, merely because the company may have paid an extravagent price for the property."

The other case referred to by Hutchison J., was *Albert* v. *Liquidator of Suburban Land and Construction Co. Ltd. (in liquidation)* where the facts were somewhat similar. The case went to the Court of Appeal and was disposed of by short oral judgments on the ground that, in the absence of proof of a contract by the company to issue the shares in question as fully paid up, they must be treated as contributory shares on which no part of the capital had been paid to the company. The leading judgment was delivered by Sir Michael Myers C.J., and reads as follows:

"If an agreement could be shown for the issue of fully paid shares as the consideration, or part of the consideration, for the property transferred to the company, then, clearly enough, the adequacy of that consideration could not be inquired into by the Court unless the whole transaction were a sham and the consideration illusory. That is the effect of the decision in *Schneideman's* case [1917] N.Z.L.R. 48; [1916] G.L.R. 788, and the authorities cited therein by Mr Justice Edwards in his judgment. The whole question here is whether or not an agreement has been proved on the part of the company to issue 1,000 shares fully paid up as consideration for the land transferred, and in my opinion the learned Judge in the Court below rightly held that no such agreement had been shown. There is some evidence as to an alleged agreement, but, even so, the parties who speak of that agreement are not at one as to its terms. Apart from that, as far as I can see, whatever may have been in the minds of the vendors, there is no agreement by the company. There is not the usual preliminary agreement in writing for the sale of the assets the company was taking over followed by an adopting agreement after incorporation, nor was there (without a preliminary agreement) an agreement for sale in writing after incorporation. There is nothing whatever to show a contract; no agreement in writing, no resolution, no entry in the minute book of any discussion by directors or shareholders, nothing except the transfer itself, which in my view tends to negative the existence of any contract on the part of the company to issue fully paid up shares. The onus is upon the appellant to show that there was a contract. It lies upon him to show that the shares were taken up for a consideration other than cash, and in my opinion this he has failed to do. I think therefore that the appeal must be dismissed."

The warning implicit in these cases is obvious. Where it is alleged that shares in a company which have not been paid for in cash, are fully paid, the onus of proof rests on the shareholder to establish some contract by the company to accept something other than cash in payment for the shares. The judgment of Sir Michael Myers C.J., quoted above indicates the evidence for which the Court will look when asked to decide whether there was such a contract, but it would be unwise to rely on one only of the several types of evidence which he sets out. In such a case the legal advisers of the shareholders would be imprudent not to insist on a clear and precise agreement in writing coupled with the necessary entries in the minute book and books of account of the company. It may be that the agreement will attract fairly substantial stamp duty. Even if that be the case it would be cheaper to face up to that liability rather than later to have to meet calls for the total nominal value of shares which have hitherto been regarded as fully paid up.

Indecent Assaults on Children.—One aspect of punishment which is sometimes overlooked was referred to by Donovan J., on an application to the Court of Criminal Appeal (which was refused) for extension of time for leave to appeal against consecutive sentences of one year and two years in respect of indecent assaults on girls aged five and six respectively. The case was *R.* v. *Read* (*The Times*, July 28). The learned Judge said "You have to take the public interest into account; if the Court were to pass derisory sentences you might get parents taking the law into their own hands." The Courts are not influenced by newspaper stunts or immoderate outbursts on the subject of sentences, but it is necessary that the way in which offenders are dealt with should not outrage moderate public opinion. Few offences give rise to more indignation ,and rightly so, than sexual offences against small children. There is a natural temptation to parents who believe they have discovered the offender to resort to violence, but usually they resist the temptation in the belief that the law will take suitable measures. As Donovan J., observed, the public interest must be taken into account. Some of these sexual offenders are mentally abnormal and may be in need of skilled treatment. Even so the public demands that they should be kept in suitable custody for whatever period is necessary in order that they may have no opportunity of committing further offences. It may be difficult to determine that period. In *R.* v. *Peters* (*The Times*, July 28) the appellant, who had several previous convictions for similar offences, had been sentenced to eight years' preventive detention for an indecent assault on a girl aged 12. Cassels J., delivering the judgment of the Court, said it was quite clear that quarter sessions had come to the conclusion, and there was reason in their so doing, that this man was a real public nuisance, but the Court considered the sentence was too severe in the case of this man. A sentence of two years' imprisonment was substituted. (*1960*) *124 J.P.* 524.

LIGHT RELIEF FOR THE EXAMINER.

II

The marking of the papers has been finished and the results announced. All that is left is to share with readers of the JOURNAL the remaining gems of wisdom contributed by candidates.

A question on hearsay evidence drew forth some enlightening information. The first answer was :

" Hearsay evidence is the spoken testimony of a witness not present at the hearing."

This was so nearly right that its marking caused some difficulty.

Another candidate defined hearsay evidence as :

" The statement by one person to another about some other person."

This seems to resemble slander rather than hearsay. Then there was the other candidate who, in reply to the same question said :

" If A. heard B. say that C. said to B. that he was going to murder A. this would be hearsay."

The examiner was heard to mutter, " I'll say it would."

Candidates were asked to distinguish between the standard of proof in civil and criminal cases. One candidate informed the examiner that in a criminal case a matter must be proved beyond reasonable doubt but in a civil case the matter can be proved and if there is a certain amount of doubt the responsibility is apportioned among the parties concerned.

Two other answers called forth whole-hearted agreement from the examiner, who had spent much time appearing for the defendant in civil jury cases. They were :

" There is not so much notice taken of proof in civil trials as in criminal cases."

" The standard of proof in civil cases may be proved by a minimum of facts."

There seems to be some relationship between two further answers on the same topic which read respectively :

" The standard of proof is proof for a thing which does not need proving."

" The standard of proof is evidence of fact such as that which the Court need not accept but which would make the Court look silly."

The last phrase in the second answer gives the clue. The candidates were confused between the standard of proof and judicial notice.

The final answer on this topic was also puzzling and has not yet been solved. It read :

" In criminal cases the party alleging the affirmative must bear the onus of proof and in civil cases those stating the negative must bear the onus of proof."

Some queer ideas on the traffic regulations were disclosed. Two definitions of the " half-distance " rule were as follows :

" The ' half-distance ' rule applies when a motorist must not overtake when there is not less than half the clear distance of roadway ahead of another vehicle he is overtaking."

" The ' half-distance ' rule applies when the other vehicle, presumably on your left, is half-way across the intersection. Even though you are on the right, he has the right of way. He is ' half the distance ' through the intersection and has the right of way."

Strangely enough, this second answer was only one of several on the same lines.

Finally a question was put on the right-hand rule, based on *Leveridge* v. *Kennedy* [1960] N.Z.L.R. 1, inquiring when and in what circumstances the right-hand rule imposed an obligation on a motorist to give way to traffic approaching on his left. The answers were many and varied, but the two best were :

" A motorist is obliged to give way to traffic on his left if he is stationary."

" The right-hand rule operates in reverse when a vehicle is backing. Thus in these circumstances it is necessary for a motorist to give way to his left."

An interesting and somewhat gruelling experience is over for another year. There were many more answers which were worth publishing, but such things can become very wearisome if overdone. We now go into recess until next year at the earliest.

Assessment of Permanent Incapacity. Facts similar to those in *Pope and Others* v. *D. Murphy and Son Ltd.* [1960] 2 All E.R. 873. have already occurred in New Zealand and are likely to recur. Here, the plaintiff, a master-builder of fifty-two years of age, received serious injuries in a motor-accident for which he was in no way to blame. As the result he had become a permanent invalid, was in constant pain and had lost the ordinary amenities of life. His doctor-specialist thought that he might live for another five years or at most ten years. Streatfeild J. held that he 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 been expected to work, not the period of life left to him as the result of the accident. In arriving at this conclusion, the learned Judge adopted a passage from *Kemp and Kemp on the Quantum of Damages* which adversely and forcibly criticized a contrary opinion of Slade J. in *Harris* v. *Bright's Asphalts Contractors Ltd.* [1952] 1 All E.R. 395.

That Comfortable Feeling. Attempted variants from the time-honoured and approved phrase " reasonable " doubt seem inevitably to lead to trouble ; and *Thomas* v. *The Queen* (1960) A.L.R. 233 affords another example. In this trial for murder, the direction to the jury was to convict if they " come to a feeling of comfortable satisfaction that the accused is guilty," The Court of Criminal Appeal of Western Australia held that the words must be considered in the context in which they appear and, when so considered the use of the words did not amount to a misdirection : [1960] W.A.R. 102. Against this decision special leave to appeal was granted, and the appeal allowed.

TOWN AND COUNTRY PLANNING APPEALS.

Auckland Regional Planning Authority *v.* Mount Wellington Borough.

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

Regional Planning Authority—Powers and duties—Highways forming part of regional plan for traffic routes of Metropolitan Auckland—Right of Regional Planning Authority to appeal against allowance of objections to road widening proposals—Town and Country Planning Act 1953, s. 24—Road widening—Need to make provision for future and to provide foundation for further development after the period covered by District Scheme has expired.

An appeal under s. 26 of the Town and Country Planning Act 1953. The respondent Council's proposed District Scheme as publicly notified, pursuant to s. 22 of the Act, contained, inter alia, provision for road widening on the following roads within the Borough :

Ellerslie-Panmure Highway, from the Ellerslie Borough boundary to Domain Road.

Mt. Wellington Highway, from the Ellerslie-Panmure Highway to the Otahuhu Borough boundary.

Great South Road, from the Ellerslie Borough boundary to the Otahuhu Borough boundary.

Objections to these road widening proposals were lodged by the owners of properties affected, all of whom were represented at the hearing of the appeal. Their objections wer sustained except in the case of major motorway and arterial road junctions. The appellant gave notice of objection to the objections, pursuant to the provisions of s. 24 of the Act. Its objection to the objections was disallowed and this appeal followed.

Weir, for the appellant
Pleasants, for the Respondent.

Southwick, for B.A.L.M. Paint N.Z. Ltd., Westfield Freezing Co. Ltd., Auckland Meat Co. Ltd. Fisher and Paykel Lh.

Smytheman, for Wrigley Co. N.Z. Ltd.

Moller, for Alex Harvey and Sons Ltd., R. & W. Hellaby Ltd.

Barer, for Mason and Porter Ltd., Taniwha Products Ltd.

The decision of the Board was delivered by

REID S.M. (Chairman) At the hearing counsel for Balm Paints (N.Z.) Ltd., Fisher and Paykel Ltd. and Wrigley (N.Z.) Ltd. entered appearances on behalf of those companies and intimated that they formally opposed the appeal but did not propose to call any evidence and agreed that the companies named would abide by the decision of the Board. At the conclusion of the hearing of evidence, counsel were granted leave to make submissions in writing. These submissions have been made and have been duly considered by the Board. It is not proposed to traverse them in detail. The broad effect of the submissions made on behalf of the property owners is that the appellant in this appeal has no statutory right to make any requirements in regard to the provisions of the Council's district scheme. That submission is well-founded, but the position here is that the appellant is not appealing against a refusal by the Borough Council to meet " a requirement ". As the appeal indicates, the appellant appeals under s. 26 against the disallowance of an objection made under s. 24 of the Act. Under the latter section every Regional Planning Authority has rights of objection on the grounds of public interest. It is on those grounds that the appellant filed its opposition to the objections and is on those grounds that it appeals. Its case briefly is that the road widening proposals are deemed to be essential to meet the needs of future traffic and that it would be against the public interest to allow objections that would result in inadequate provision being made for future traffic ways. A Regional Planning Authority is responsible, inter alia, vide s. 3 of the Act, for the co-ordination of all such public improvements, utilities, services and amenities as are not limited by the boundaries of any one local authority or do not relate exclusively to the development of any one such district. The highways under consideration here are part of and form an integral section of the regional plan, known as the master plan, for determining the traffic routes of Metropolitan Auckland. They are not local roads serving principally or exclusively the Mt. Wellington Borough. They are routes in which a Regional Planning Authority is empowered to take an interest in and to make representations in respect of them. The Board has no hesitation in finding that the appellant is a competent appellant and that its views on the questions at issue are entitled to and should receive full weight and consideration. After hearing the evidence adduced and having inspected the highways under consideration and having considered the submissions made by counsel the Board finds as follows :

1. The appellant's proposal is that the provision made under the Council's proposed district scheme, as publicly notified, should stand and that the Council's subsequent decision to deleted road widening provisions from the scheme should be overruled. The appellant's view is that the provision should be made for future road widths of 99 feet, to utilized as follows : 2 12 ft. footways, under which ultimately would be carried gas, water mains and other similar services ; Two 8 ft. parking ways ; Two 24 ft. carriageways ; One median strip 11 ft. in width to provide turning off points. This would provide for two constantly moving two-way traffic streams and also provide adequate parking space and via the median way appropriate turning off points for traffic changing direction. A considerable volume of evidence was submitted by the parties opposing the appeal directed towards the proposal that this would be far in excess of the traffic needs on the toutes under consideration. The Board does not propose to traverse this evidence or comment on it in detail.
2. The Board is satisfied that the Mt. Wellington Borough District is a rapidly growing industrial area and very substantial industrial expansion can be expected to take place in the future. The highways under consideration, as already stated, form an integral part of the master transportation plan and they will be link roads of high potential carrying capacity and will certainly not be confined to the local internal traffic needs of the Mt. Wellington Borough.
3. The Board has held in previous decisions, and it is still of the same opinion, that it is essential in the initial stages of planning to make provision for the foreseeable future needs of the district under consideration. In particular, the widths and locations of proposed highways, internal roads, service lanes, access ways, parking spaces, public open spaces and so on should whenever reasonably practicable be shown on the initial plan, even though their development for the designated uses may be something which will not come to pass for many years. Counsel opposing the appeal stressed the point that the traffic needs of the district fifteen to twenty years hence will not reach the density that would justify highways of the widths proposed, but the planning period of twenty years provided for by the Scheme is proposed to cover or make provision for not only what it is expected will be completed during that period, but also to provide the foundation for still further development after that period has expired. It would not be in accord with sound town planning principles to fail toimake provision for anticipated future traffic needs until such time as the need for them becomes manifest. If, in fact, these particular highways, as they are at present constituted, provide appropriately for the traffic they will be called upon to carry beyond a planning period of twenty years then there will be no necessity for land to be taken for road widening purposes, but if provision is not made now for the possibility of wider roads being required, it could well be economically impossible to provide them in future.
4. If, in the future, the anticipated increase in traffic flow and density does not in fact eventuate, then the land subject to the proposed road widening restriction will not be required for that purpose and a readjustment of front yard requirements will leave the land available to the owners.

The Council took the view that future road widening requirements could, where necessary, be met by a reduction of the existing front yard requirement of 25 feet. The Board considers that wherever possible this front yard requirement of 25 feet should be maintained. It is appreciated that in certain cases, owing to topographical features or some similar reason, a 25-foot front yard would not be practicable or might be unduly costly, but the Code of Ordinances permits a relaxation of the requirements at the discretion of the Council. In general terms, the Board considers that a 25 ft. front yard requirement is desirable. A front yard of reasonable depth appropriately laid out can, even in an industrial area, contribute substantially to the pleasantness and coherence of the environment. Within the Mt. Wellington Borough itself the premises of Fisher and Paykel Limited are an outstanding example of how properly laid out industrial premises can add to the pleasantness of the environment.

Dealing specifically with the three highways under consideration, the Board's decision is as follows :

(a) *Ellerslie-Panmure-Highway.*
No evidence was offered in opposition to the appellant's submission that this road should be widened and the appeal is allowed.

(b) *Mt. Wellington Highway.*

The appeal is also allowed in respect of this highway and the road widening provision as set out in Appendix D to the Code of Ordinances is to stand, that is to say that from the Ellerslie-Howick Highway to the motorway the building line is to be 48 feet from the centre line and from the motorway to Mt. Richmond Domain it is to be set back 63 feet from the centre line on the west side only, as indicated on the District planning map No. 1.

(c) *Great South Road.*

The appeal is allowed in respect of the general proposal of the widening of this street from Penrose Road to Portage Road to 99 feet, but it directs that from a point opposite Bell Avenue to the Boundary of the Mt. Richmond Domain the building line should run in accordance with the proposal put forward on behalf of R. & W. Hellaby Ltd. and more particularly indicated on the Plan E attached hereto, which is to be deemed to form part of this decision.

Appeal allowed.

Auckland Harbour Board *v.* Auckland City Council.

Town and Country Planning Appeal Board. Auckland. 1960. June 28; July 1.

Proposed District Scheme—Land leased by Council and used as recreation ground designated as existing public open space—Extensively used for recreational purposes and near important residential area—Effect of proposed motorway Zoning as industrial contrary to town and country planning principles.

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

The Board was the owner of a property situated in Victoria Bezumont, Fanshawe and Halsey Streets in the City o Auckland, containing 23 ac. and 18.2 pp. being Part Lots 1, 2 all of 3.22, 24:52 City plan 37 and also Part Freemans Bay Reclamation and also part Lot A. D.P. 4027 of 15 of Section 8 Suburbs of Auckland. The open space of this area containing 22a ac. was leased to the Council for a term of years expiring in 1987. This open space is known as Victoria Park. It is a condition of the lease that the land is to be used only for recreational purposes. The balance of the land comprises eight sections fronting on to Victoria Street West and one section fronting on to Beaumont Street. Four of those properties are leased in perpetuity under Glasgow leases and four of them on short term leases. The Council is the lessee of four of the properties held under lease in perpetuity. It acquired the leases of these properties by purchase with the intent of eventually incorporating them in the recreational area.

Under the Council's proposed district scheme as publicly notified, the land now used as a recreation ground was designated as an existing public open space and the balance at present used for industrial or commercial was designated as proposed open public space. The appellant Board lodged an objection to this zoning, claiming that the land should be zoned industrial. Its objection was disallowed and this appeal followed.

Hutchinson, for the appellant.
Butler, for the respondent.

The judgment of the Board was delivered by

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

5. Victoria Park is an important sports area providing valuable sporting and recreational facilities for both organized games, passive recreation and children's play areas. In importance as a recreational area it is second only to the Auckland Domain. Approximately 100,000 persons per annum make use of it for active or passive recreation. It is located near to an important residential area where no other playing fields of a similar nature are available.

2. It was submitted on behalf of the appellant Board that the motorway viaduct or elevated roadway leading from Victoria Street to Fanshawe Street, which will traverse the south western corner of the park will tend to restrict the use of the area for recreational purposes. The Board is satisfied that with a re-alignment of existing playing fields there will be little if any limitation of the existing facilities.

3. Topographically the land is admirably suited for commercial or industrial use but to zone it for such use would be to deprive the City of Auckland of a valuable and irreplaceable public open space and be directly contrary to town-and-country-planning principles.

The appeal is disallowed.

Appeal dismissed.

Marua Trading Co. Ltd. and Others *v.* Mt. Wellington Borough

Town and Country Planning Appeal Board. Auckland. 1960. June 15, 24.

Zoning—Attempt to shape zoning to cover existing industries—Creation of small special zones to cover an immediate situation not generally in accord with sound town and country planning principles.

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

They all related to the same area and the same zoning proposal, and by consent of the parties were heard together. When the Council's proposed district scheme was publicly notified, objections were lodged by a number of owners of residential properties to the zoning of an area bounded generally by Lunn Avenue, Marua Road and Stanhope Road and extending northwards to a quarry zone, as industrial C. The present appellants who were the owners of industrial undertakings in this area, lodged objections to the objections. After hearing the objections the Council re-zoned part of the industrial C zone as a special zone designated industrial B1. These appeals were against that alteration in zoning.

Stanton, for the appellants.
Pleasants, for the respondents.

The judgment of the Board was delivered by

REID S.M. (Chairman). After having inspected the area under consideration, the Board finds :

1. The area originally zoned as industrial C lies in a locality which may be described as a mixed industrial and residential area. This area is of comparatively recent development and industrial and residential development appear to have taken place more or less simultaneously.

2. With the existence of two large quarries lying to the north and west of this area, very little further residential expansion can be expected to take place, but the area by reason of its situation and the fact that substantial industrial development has already taken place is well suited for industrial development. In re-zoning part of the industrial C zone as a special industrial B1 zone, the Council endeavoured to shape the zoning to cover existing industries. This would appear to have been done in an endeavour to placate some of the owners of residential properties. The Board considers that the creation of comparatively small special zones designed to cover an immediate situation is not generally in accord with sound town and country planning principles. There may be occasions when the facts and circumstances are such as would justify special zoning, but the Board does not consider that there are any special facts and circumstances in the cases under consideration that would justify that course being followed.

3. The Board considers that this area is well situated for industrial development, particularly having regard to its proximity to two large quarries, which can be expected to be operated as such for many years to come. It takes the view that the appropriate zoning for this area was the zoning originally determined by the Council, that is to say industrial C. The appeals are allowed and the properties under consideration are to be re-zoned as industrial C.

Appeals allowed.