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CORPORAL PUNISHMENT

IN the correspondence column of this issue we publish a letter from Mrs M. Kirk in which she takes us to task for our attitude towards corporal punishment, and in particular for the comment which we made at p. 76 (*ante*) on a letter written by Mr F. C. Jordan, honorary secretary of the Howard Penal Reform League. Both Mrs Kirk and Mr Jordan seem to have misunderstood our attitude on this subject and, at the risk of provoking further the displeasure of the League and its supporters, it seems desirable that we should state as precisely and clearly as we possibly can, our views on corporal punishment, the proposals which we should like to see brought into force and, perhaps most important of all, the reason prompting us to advocate the return to corporal punishment for certain offenders.

First, Mrs Kirk is puzzled because we said that the methods of treatment of offenders which Mr Jordan advocated had been tried and found wanting, and asks in what country this took place. We suggest that experiments on these lines have already been tried in New Zealand, certainly only up to a point which is far short of the target at which the League aims but in our opinion the results of the milder methods of treatment of offenders which have crept in over the past few years have been so appalling that they show the need not for a further extension of those methods but for the retracing of our steps *to some extent* towards the sterner methods of former years.

We would ask both our correspondents to note the words in italics in the last paragraph. We certainly do not, nor do we think that others who think with us, have any desire to return to the days of mutilation and the death penalty for comparatively minor offences or, indeed, for the institution of flogging and whipping as an automatic penalty for certain offences. These measures were tried as a deterrent and found wanting in England not so very many years ago. This, of course, is one of the principal arguments of the League against the reinstitution of corporal punishment in any shape or form but the arguments put forward are fallacious in that they do not take account of the changes there have since been in the economic condition of the population and also in the general standard of education.

At the time when these brutal methods were in force many people were on the verge of, if not in actual danger of, starvation, and little, if anything, was being done to ease their distress. In such circumstances was it not natural that some persons should risk stealing a loaf of bread in the hope of evading detection even though their capture might result in some form of mutilation if not in death ? At the present time in this country no one should ever starve. If he is unable to earn a living honestly through some disability, physical or mental, there is the Social Security Fund to give him at least a bare living and if that fails there are many charitable organisations which will help. No one today should be driven into crime by economic considerations.

Moreover, there has been a change in the attitude of humanity to the infliction and suffering of pain. If it were suggested today that we should return to the period when the execution of a criminal should be in public and treated as a gala day one could imagine the response from the public. Human life has acquired a higher value than it carried in days gone by and unnecessary pain is not suffered with the stoicism with which it was at one time endured. In other words we have become a "softer" race, using that term in no derogatory sense.

For these reasons we suggest that to draw any inference from the happenings of even 100 years ago in England is fallacious.

It is now profitable to look back only a few years in our own country to a period before 1941, in which year corporal punishment was abolished by the Crimes Amendment Act of that year. Flogging and whipping were defined in s. 27 of the Crimes Act 1908, and it is not necessary to go into details. Two points of importance were first, that these punishments could be imposed only for certain specified offences and secondly that the Court was empowered but not directed in those cases to order a flogging or a whipping. In short there was even then nothing automatic about these punishments.

The crimes for which corporal punishment was prescribed as a penalty were limited. They included : unnatural offences, (s. 153) ; attempts to commit unnatural offences, (s. 154) ; disabling to commit a crime, (s. 195) ; indecent assault, (s. 208) ; rape, (s. 212) ; attempt to commit rape, (s. 213) ; sundry types of defilement, (ss. 214, 215, 216 and 217).

In addition there were certain other crimes for which flogging could not be ordered if the offender were an adult but a person under 16 years of age could be whipped once.

These provisions were on the Statute Book for many years, but it would be interesting to find out the number of cases in which corporal punishment was actually ordered and carried out. From our own recollection we should say that those cases would have been very few and far between, and that for two reasons. First, the crimes which carried a possible sentence of corporal punishment were by no means as common as they are

today and, secondly, the awarding of a flogging or a whipping was in the discretion of the Court, and such discretion was wisely exercised. Only in the most heinous circumstances would the Court order a flogging or a whipping.

We have said that, in the days when corporal punishment was in force, the crimes which carried it as a possible punishment were not as prevalent as they are today. Why is this? Does it not indicate that the mere possibility of such a punishment, even though rarely used, was a deterrent? As an example let us look at the crime of rape which in some circumstances is the most despicable in the calendar. Its prevalence today has become such as to alarm the whole community. It is hardly possible to pick up a daily newspaper without reading of rape either having been committed or attempted. In fact, on one very day, the morning paper carried reports of a young woman of 20 being assaulted in a Hastings street and dragged on to a vacant section, and of a 67-year-old woman being attacked and raped by an intruder in her home near Helensville. We have also in recent months had a number of cases where parties of youths have seized and raped young girls. In pre-war days such crimes would have been unheard of, now they are commonplace.

We suggest that what is badly wanted is the power vested in the Court to order corporal punishment in suitable cases. The Judges may be relied upon to exercise a wise discretion as to the cases in which their powers are to be exercised and should a judge err on the side of harshness, the Court of Appeal will soon rectify the matter. The form of corporal punishment to be adopted would require careful consideration. The old type of flogging as defined in the Crimes Act is too severe for today but a general type of whipping unlikely to causes any serious or permanent injury should fill the bill.

Mrs Kirk suggests that the infliction of corporal punishment is an exhibition of vindictiveness on the part of John Citizen. If so we would agree that this would be an unhealthy sign but in our opinion there is no such element in the public demands for punishment of this type. The whole emphasis is on the deterrent factor in the punishment provided.

So far we have dealt only with the more serious type of crime, principally rape. But is there a case for similar though milder types of punishment for crimes repeated after earlier attempts at correction? We suggest that there is, particularly for youthful offenders, in cases of vandalism and offences which come under the general heading of "delinquency". We have the case of teenagers who come back to the Courts time after time on charges of car conversion, and often the cars concerned are needlessly damaged when they have served their purpose to the offender. For a first offence there is generally imposed a term of probation, perhaps coupled with a fine and an order for payment of the damage caused to the vehicle. Next follows perhaps a term of borstal training or imprisonment according to the age of the offender. During these two phases all the treatment advocated by the Howard Penal Reform League can be tried to the full, and we are sure that in the majority of cases it will succeed. However, if after all this has been tried and a particular case has failed what is left? Either the offender spends the rest of his life in and out of gaol until he qualifies for and is sentenced to preventive detention, or some other deterrent must be found.

We have heard much of late of detention centres, and one is being established. Just how these will work is not yet known but we understand that what is aimed at is a tough Army type of discipline where everything is done at the double. This sounds very well and accords with the view of many that a term in the armed forces would straighten up the bodgies and other types of delinquents. This discipline must, however, be enforced, and the type of inmate to be brought under control is quite capable of resisting it. What means of enforcement are to be open to the Officer in Charge of such a centre faced with a rebellious crowd of inmates who adopt some form of passive resistance? In the ultimate, resort must be had to force where all other measures fail, and it is better that the force should be applied under the direction of a Judge or Magistrate than that it should be in the uncontrolled power of a prisons officer.

To sum up, we hold the view that corporal punishment would play a useful and important part in our penal system. It is not by any means a substitute for but is ancillary to the methods advocated by the Howard Penal Reform League, and would be used only where those methods had failed with a particular individual or obviously for some reason would fail if they were applied. One safeguard we have not previously mentioned but which is necessary to the scheme is that corporal punishment would never be used where the offender's actions were due to some mental defect which rendered him not wholly responsible for his actions. In such a case psychiatric treatment is indicated and not punishment, but the recognition and and proper treatment of such cases can safely be left to the Courts.

SUMMARY OF RECENT LAW

DAMAGES.

Negligence—Personal injury—Mitigation of damages—Loss of earning capacity—Arrangement with employer for payment of equivalent of wages during incapacity. The respondent brought an action for damages for negligence against the appellants, in respect of injuries suffered as the result of a collision between the appellants' motor vehicle and a taxi-cab in which the respondent was a passenger. Because of the injuries received by her, the respondent was unable to follow her employment for a certain period. She had an arrangement with her employer, whereby he paid her, while she was absent from work, the equivalent of the amount she would have earned had she been at work. Counsel for the appellants made application to the trial Judge that, because of such arrangement, the respondent's loss of earning capacity should not receive consideration by the jury as a head of damage. The trial Judge refused to withdraw such element of loss of earning capacity from the jury's consideration. The respondent obtained a verdict in her favour of £1,970. The appellants appealed to the Full Court. *Held*, (1) The trial Judge had acted correctly in leaving the matter of loss of earning capacity to the jury; (2) the jury's verdict was, having regard to the injuries received by the respondent and to all the circumstances, not excessive, and the appeal should be dismissed. (*Liffen* v. *Watson* [1940] 1 K.B. 556; [1940] 2 All E.R. 213, applied; and *Dennis* v. *London Passenger Transport Board* [1948] 1 All E.R. 779, considered.) *Juranovich* v. *McMahon*. (F.C. New South Wales. 1960. 20 October. Evatt C.J. Herron J. Sugerman J.) [1961] N.S.W.R. 190.

EVIDENCE.

Proof—No general duty on recipient of letter to answer it—Exception where letter calls on him to answer a charge—Inferences which may be drawn from failure or refusal to answer. Section 28 of the Wildlife Act 1953 is not exhaustive of the right of an acclimatisation society registered under that Act to disqualify persons from holding office in the society. The society may have its own rules adding to the grounds of disqualification provided that they are not in conflict with s. 28. Section 29 (2) is not a complete and exhaustive code of the rule-making powers of an acclimatisation society. Its provisions are mandatory so far as they go but nothing in them prevents a society from making such rules as it wishes so long as it does not exceed its common law powers as a corporate body. A rule of an acclimatisation society disqualifying from holding office any candidate who canvasses or touts for votes is basically a qualifying rule (though expressed as a disqualification) since its effect is that no member in breach of it shall be eligible for office at that particular election. It is therefore within the powers of the society to make such a rule under s. 29 (2) (e) of the Act. Although in general there is no duty cast on the recipient of a letter to answer it, when a charge is made against a member of a society that he is in breach of a rule of the society he is called upon to answer the charge when notified to him, and if he fails or refuses to do so an inference unfavourable to him may reasonably be drawn from his refusal or failure. (*Widemann* v. *Walpole* [1891] 2 Q.B. 534, distinguished.) Two of the candidates for election to the council of the defendant society were disqualified from standing for election on the grounds that they had canvassed for votes. The voting was by secret ballot conducted by post; and by the time the disqualification took effect all votes had been cast. Under the rules of the society each voting paper to be valid must contain a vote for the full number of members of the council required, in this case seven. All votes given to the disqualified candidates were disallowed, but the papers which contained votes for the disqualified candidates were treated as valid in respect of votes for the remaining persons voted for in the papers. The election was challenged on the grounds that, because votes in favour of the two disqualified candidates were given in ignorance of the disqualification, the election was invalid and there must be a new election, and, secondly, that the nature of the register of members and the system of voting led to such possibility of error in the final count of votes as to prevent the Court from holding that a fair election had taken place. *Held*, 1. Every vote must be taken to have been cast with full knowledge of the rules of the society and therefore with knowledge of the risk of subsequent disqualification of any candidate for breach, after he had become a candidate and before election. 2. The liability of the candidature of any person being defeated by the canvassing rule was an ordinary incident of the election under the rules of the society. 3. Possibilities of error in the count of votes is not a legal ground for impeachment of an election. If actual error is the ground it must be alleged and proved. *Mosley and Another* v. *Southland Acclimatisation Society.* (S.C. Invercargill. 1961. 7, 8, 16 February. Henry J.)

Divorce and matrimonial causes—Copy of separation order purporting to be certified by the Registrar of the Court in which it was made—No evidence of the official character of the certifying officer or of his signature—Copy not admissible—Destitute Persons Act 1910, s. 70—Evidence Amendment Act 1945, s. 12—See THOMSON *v.* THOMSON (*ante*, 116).

HIRE PURCHASE AGREEMENT.

Delivery by purchaser to vendor of motor vehicle with instructions to sell it and deduct deposit from proceeds—Sufficient compliance with stabilisation regulations—Hire Purchase and Credit Sales Stabilisation Regulations 1957 (S.R. 1957/170), First Schedule, para. 3 (2)—Motor vehicle—Purchaser's right to possession of certificate of registration—See SET OFF (*infra*).

INCORPORATED SOCIETY.

Acclimatisation society—Election of council—Rule disqualifying candidate on grounds of canvassing for votes—Statutory grounds of disqualification and rule-making powers of society not exhaustive—Validity of disqualification rule—Effect of disqualification in postal ballot where it takes effect after all votes cast but befor counted—Wildlife Act 1953, ss. 28, 29 (2)—See EVIDENCE (*supra*).

INSURANCE.

Motor vehicles—General exception relieving insurer if insured under influence of intoxicating liquor—Applies only where driving pab ility of insured is affected. An exception in a motor vehicle insurance policy relieving the insurer from liability when the vehicle is being driven by or is in charge of the insured or any person under the influence of intoxicating liquor applies only where it is shown that the driver was under the influence of intoxicating liquor to such an extent as to disturb the quiet equable exercise of his intellectual faculties thereby rendering him incapable of driving or controlling his vehicle. *Trigg* v. *McFadgen and Another.* (1959. 30 November. 1960. 23 February; 30 May. 1961. 17 January. Donne S.M. Rotorua.)

LAND AGENT.

Appointment—Agreement to pay commission if purchaser introduced by agent—Purchaser introduced by agent but sale made later without his intervention—Flat erected on vacant section between introduction of purchaser and sale—Change of use not affecting authority—Land Agent Act 1953, s. 25. The plaintiff, a land agent, was appointed by the defendant as his agent to see a specified property which included "a spare ½-acre section". The authority provided for payment of commission if the property were sold to anyone introduced through the agency of the plaintiff at the price specified or at any variation of it agreed to by the defendant. The plaintiff introduced a prospective purchaser, one M. who was interested but who for the time being was unable to finance the purchase. Early in 1959 the defendant instructed the plaintiff to "suspend activities" until a tax problem was solved and in March 1959 M. arranged finance and purchased the property without the further intervention of the plaintiff. In the meantime a flat had been erected on the spare section. *Held*, 1. The plaintiff having once established that he introduced M. to the plaintiff and the property was not required to prove that such introduction was the effective cause of the sale. (*Souter and Co.* v. *Barr* (1944) 3 M.C.D. 413 and *Beach* v. *Eckett* (1953) 8 M.C.D. 158, followed. *Weir* v. *Rush* (1952) 7 M.C.D. 639, distinguished.) 2. Although the authority did not specify the flat which had been erected on the spare section, it described the section and that was sufficient to identify any fixtures erected on it which became an inseparable part of it. The authority was therefore sufficient to comply with s. 25 of the Land Agents Act 1953 despite the change of the use of the land. *Cuming* v. *Sushames.* (1960. 16 February; 22 June; 21 November. 1961. 16 January. Donne S.M. Rotorua.)

LICENSING.

Licences—Wine Reseller's Licence—Principles applicable to grant or refusal—Effect of size of applicant's business and number of other licences held—Licensing Amendment Act 1960, s. 7 (9). The proviso to s. 7 (9) of the Licensing Amendment Act 1960 has the effect of enlarging the grounds on which the applicant for a wine reseller's licence may seek to persuade a Licensing Committee to grant him a licence. It does not in any way reinforce the objections which may be offered under s. 91 of the principal Act. In dealing with an application for such a licence the Licensing Committee must consider whether it is desirable or needful for such a licence to be granted in a particular locality. While it must look, among other things, to the applicant's standing and his competence to give a service to the public, it need not look to the size of its business or the multiplicity of its selling units. Except that, where there are several applicants and no marked difference in their merits, a Committee may be disposed to grant the application of a person who had no other wine reseller's licence. *Morgan and Others* v. *T.M.V. Wines Ltd.* (1960. 15 December. 1961. 1 February. Before the Licensing Control Commission. S. T. Barnett (Chairman), Sir William Gentry and F. P. Kelly. Wellington.)

NEGLIGENCE.

Collision at intersection—Obstruction to view by road roller left at corner—Unusual and unexpected object—Contributory negligence of plaintiff—Damages—Reduction for contributory negligence—Comparison of culpability test—Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947, s. 4—Nuisance—On or adjoining highway—Contributory negligence complete defence—Statute—Interpretation—General rule against retrospective effect—Matters of substance distinguished from matters of procedure—Indications of intention to cover situations already existing—Widow's pension not to be taken into account in calculating damages—Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947, ss. 3, 4, 5. The rider of a motor cycle had died as the result of an intersection collision with a bus controlled by the first defendant and driven by its servant. The view of both the motor-cyclist and the sub driver had been somewhat obscured by a road roller left standing on the grass and sand verge at a corner of the intersectio

The plaintiff, widow of the deceased motor-cyclist, sued on behalf of herself and her two infant daughters for damages, framing the claim against the first defendant in negligence and against the second defendant both in negligence and in nuisance. The Judge having found that there was no negligence on the part of the driver of the bus, *Held*, The servant of the second defendant had been negligent in leaving the road roller, an unusual and unexpected object, in a position in which its effect on visibility might not be at once apparent to the driver of a moving vehicle, but the deceased had failed to take reasonable care for his own safety and was guilty of contributory negligence. Under the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947, s. 4, the plaintiff's damages are to be reduced "to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff". *Held*, This involved a comparison of culpability or the degree of departure from the standard of care of the reasonable man. (*Pennington* v. *Norris* (1956) 96 C.L.R. 10, applied.) In the event damages reduced by one-third. *Held*, Further: the Act is limited to claims for damages founded on negligence which is defined to include breach of statutory duty. Contributory negligence therefore continues to be a complete defence to an action in nuisance for obstructing a highway. (*Butterfield* v. *Forrester* (1809) 11 East 59; *Caswell* v. *Powell Duffryn Associated Collieries* [1940] A.C. 152, per Lord Atkin, at p. 165; [1939] 3 All E.R. 722; *McMeekin* v. *Maryborough City Council* [1947] St.R.Qd. 192, per Macrossan C.J., at p. 196, and Philp J., at p. 199, and *Cull* v. *Green* (1924) 27 W.A.L.R. 62, referred to.) *Przetak* v. *Metropolitan (Perth) Passenger Transport Trust and Melville Road Board.* (S.C. Western Australia. Jackson S.P.J. 27, 28 June; 29 July. 1960. [1961] W.A.R. 2.

Occupier of public swimming pool—Relationship to person entering—Licensee, invitee or other category—Duty owed. The plaintiff who was aged 13 years, sustained injuries when, during Christmas holidays, he fell from a diving tower in a public swimming pool under the control and management of the defendant council. Some little time before the accident the diving tower had been painted with a "shiny paint with a smooth surface" and became slippery when used by bathers with wet feet. The plaintiff fell while climbing up the tower when his hand slipped off one of the platform rails which was wet. The plaintiff sued the defendant alleging negligence in that the defendant had not supplied a ladder to give access to the platforms and in painting the structure with a glossy paint. In evidence the plaintiff stated that he knew the paint-work was slippery although until his hand slipped he had not known that the rail was slippery. The trial Judge directed a verdict for the defendant on the basis that the relationship between the parties was that of licensor and licensee and there was no evidence of a concealed danger of which the plaintiff was unaware. *Held*, (i) the trial Judge erred in holding that the relationship was that of licensor and licensee; (ii) the plaintiff was entitled to expect of the defendant at least that standard of care owed by an invitor to an invitee, *viz.*, the defendant is under a duty to take reasonable care to prevent injury to the plaintiff from unusual dangers of which the defendant knows or should have known; (iii) the plaintiff's knowledge of the dangerous condition of the tower would not necessarily prevent him from recovering, although it might afford evidence of contributory negligence or support a defence of *volenti non fit injuria*, but these would be matters of fact for the tribunal; (iv) per Owen J.—there was evidence to go to the jury of a breach of the duty owed to a licensee. A jury could reasonably find that although the plaintiff knew of the slippery surfaces of the tower, he did not fully appreciate them as constituting a danger; (v) per Maguire J.—it is a question for the jury whether the plaintiff having regard to his age and all surrounding circumstances did recognise the full significance of the risk; (vi) per Wallace J.—it is important to distinguish between evidence of knowledge of such a conclusive nature that it destroys a plaintiff's cause of action and evidence however strong which goes only to contributory negligence. (*Aiken* v. *Kingborough Corporation* (1939) 62 C.L.R. 179; *Pettiet* v. *Sydney Municipal Council* (1936) 10 A.L.J. 198; *Vale* v. *Whiddon* (1949) 50 S.R. (N.S.W.) 90, referred to. *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737; [1951] 1 All E.R. 1, explained.) *James* v. *Council of the Municipality of Kogarah.* (F.C. New South Wales. 1960. 6 September; 6 October. Owen J. Maguire J. Wallace J. [1961] N.S.W.R. 97.

PUBLIC REVENUE.

Death duty (estate duty)—Valuation of shares—On death shares to be sold to nominee of company at paid up value—Shares worth much more—Restriction to be disregarded if shares to be valued— Quaere *whether valuation of shares necessary—Estate and Gift Duties Act 1955, s. 76.* The appellant was the administratrix of the estate of her deceased husband, an asset of which was 1,200 fully paid £1 shares in a company. Under the company's articles of association it was provided that, on the death of the holder of shares of the particular class owned by the deceased, his personal representatives should "transfer such shares to such person or persons as the company shall nominate upon payment . . . of the amount paid up in respect of such shares". There followed a provision appointing the company the attorney of such personal representatives. Although the appellant was required to sell the shares to the company's nominee for £1,200, their real value was £5,550, and applying the proviso to s. 76 of the Estate and Gift Duties Act 1955, the respondent valued them at the latter figure in ascertaining the final balance of the estate. *Held*, That the provision in the articles of association of the company referred to above was not a prohibition against alienation or transfer of the shares but was merely a restriction on the persons to whom and the price at which the shares were to be transferred. If any question of valuing these shares did arise in the estate, such provision is to be ignored by the respondent in ascertaining their value. *Quaere*, Whether any question of valuation of the shares arises at all, and whether, having regard to the actual restrictions contained in the articles, the deceased died possessed of anything more than a right to have his personal representatives receive £1,200 in respect of the shares which he held for his lifetime but which, on his death, passed compulsorily back into the hands of the company in whose capital they were held. *Poole* v. *Commissioner of Inland Revenue.* (S.C. Auckland. 1960. 1 November; 16 December. Hardie Boys J.)

Income tax—Loss exclusively incurred in the production of income—Part of gross takings of business lost through robbery—Such loss an ordinary incident of such a business—Amount lost lost deductible—Land and Income Tax Act 1954, s. 111 (1). A petrol-service station owned and operated by the appellant and kept open continuously was held up by an armed robber and a substantial sum of money was stolen. The money was shown to consist of portion of the cash takings of the service station which was being held for banking as soon as the banks were open for business, and the handling and custody of the money followed the ordinary routine of the business. Evidence was produced to show that the risk of theft was an ordinary dent of such a business. *Held*, That the sum lost as a result of the robbery was a loss exclusively incurred in gaining or producing the assessable income of the appellant and was deductible from its gross income pursuant to s. 111 (1) of the Land and Income Tax Act 1954. (*Commissioner of Taxes* v. *Webber* [1956] N.Z.L.R. 552 and *Charles Moore and Co. (W.A.) Pty. Ltd.* v. *Federal Commissioner of Taxation* (1956) 95 C.L.R. 344, followed.) *Gold Band Services Ltd.* v. *Commissioner of Inland Revenue.* (S.C. Christchurch. 1960. 29 September; 13 October. Haslam J.)

SET OFF.

Assignee of hire purchase agreement takes subject to equities arising out of agreement—No set off in respect of personal claims against original vendor. Although the assignee of a chose in action takes subject to all equities as between assignor and the person liable under the chose in action, such equitable rights must arise out of or flow from the assigned agreement. A purchaser under a hire purchase agreement cannot therefore set off against the assignee of the agreement a personal claim against the original vendor for moneys wrongfully retained. (*Stoddard* v. *Union Trust Ltd.* [1912] 1 K.B. 181; 81 L.J. K.B. 140, followed.) Where the purchaser on completion of the hire purchase agreement has handed over to the vendor a vehicle with instructions to sell it and deduct from the proceeds the amount of the deposit on the new vehicle being purchased prescribed by the Hire Purchase and Credit Sales Stabilisation Regulations 1957 (S.R. 1957-170), and has also executed a notice of change of ownership of the vehicle, the provisions of para. 3 (2) of the First Schedule to the regulations are sufficiently complied with. In the absence of provision in a hire purchase agreement the vendor is not entitled to retain possession of the certificate of registration of the vehicle which is the subject of the agreement. *Schuler* v. *Transport Traders Ltd. and Another.* (1959. 26 November. 1960. 31 March; 30 June. 1961. 19 January. Donne S.M. Tauranga.)

THEFT.

Thing capable of being stolen—Bank credit or chose in action not so capable—Cheque capable of being stolen—Value of such a cheque—Crimes Act 1908, ss. 238, 252—See CRIMINAL LAW—FALSE PRETENCE (*ante*, 115).

LEGAL ANNOUNCEMENTS.

Concluded from p. i.

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NOEL SHAFTESBURY GAZE and GRAHAME ERNI BOND, practising as Barristers and Solicitors at Security Buildings, 198 Queen Street, Auckland, C.1., announce that as from 1 April 1961 they have admitted into partnership GLEN IAN SILVESTER, for some years a member of their staff. The practice will henceforth be carried on under the firm name of GAZE, BOND & SILVESTER at the same address.

Notice is hereby given that Mr FERGUS NOBLE-ADAMS who since the recent retirement of Mr Austin Edward Lester Scantlebury has continued to practise at High Street, Blenheim, under the firm name of Scantlebury & Noble-Adams, has admitted into partnership Mr RALPH ELWIN AVERY. The practice will be carried on at the same address under the firm name of SCANTLEBURY, NOBLE-ADAMS & AVERY.

F. NOBLE-ADAMS
R. E. AVERY.

Messrs P. S. ANDERSON, G. M. LLOYD and T. N. JOHNSTON carrying on business as Barristers, Solicitors and Notaries Public under the firm name of BRENT, ANDERSON, LLOYD & JOHNSTON at H.B. Building, 18 Princes Street, Dunedin, announce that they have taken into partnership Mr R. J. HENDERSON, LL.B. (previously employed by them) as from 1 April 1961. This firm will continue to practise under the same name at the same address.

P. S. ANDERSON — G. M. LLOYD
T. N. JOHNSTON — R. J. HENDERSON

Messrs M. L. MORGAN, J. D. CLANCY and J. FISHER, who have been practising as Barristers and Solicitors at Putaruru and Tokoroa under the name of Morgan, Clancy & Fisher, wish to announce that as from 1 April 1961 they have admitted into partnership Mr E. A. OXNER, LL.B., of Tokoroa, who has been associated with them for some time. The practice will in future be carried on under the name of MORGAN, CLANCY, FISHER & OXNER at Main Street, Putaruru, and also at Bridge Street, Tokoroa.

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The **OVERSEAS MISSIONS DEPARTMENT** of the **METHODIST CHURCH OF NEW ZEALAND** desires it to be known that following a recent resolution of the Conference of the Church, the Department's previous designation "Foreign Mission" has now been altered to "Overseas Missions" in connection with its mission activities as carried on in the British Solomon Islands and Territories of New Guinea and Papua.

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HAROLD JOHN SMITH, practising as a Barrister and Solicitor, at Palmerston Street, Westport, under the firm name of D. J. Sullivan & Smith, wishes to announce that as from 1 April 1961 he has admitted into partnership JOHN CADENHEAD, LL.B., and the practice will continue to be carried on at the above address under the firm name of H. J. SMITH & CADENHEAD.

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Winding Up of a Company—Views of Creditors

On a first reading of the judgment in *Re J. R. S. Garage Ltd.* the decision of Barrowclough C.J., seems so obviously correct that the reader is tempted to conclude that the petitioning creditor must have been extremely anxious to secure the winding up of the company. On further reflection, however, the case of the petitioner appears stronger than at first sight. The facts, so far as they can be gathered from the judgment, were these: The company had a nominal capital of £1,500; its realisable assets were estimated at £370 and its liabilities were approximately £2,700. The petitioning creditor sought a winding-up order under s. 217 of the Companies Act which provides that a company may be wound up by the Court if,

(e) The company is unable to pay its debts;
(f) The Court is of opinion that it is just and equitable that the company should be wound up.

On an application of the principles of statutory interpretation the conclusion that these are separate grounds for winding up is inescapable. The learned Chief Justice stated, however, that,

"the grounds of the petition were (1) that the company was unable to pay its debts, and (2) that *in the circumstances* [italics inserted] it was just and equitable that it should be wound up."

The petitioner had quite clearly established that the company was unable to pay its debts in terms of s. 218 but the majority of creditors were opposed to the winding up of the company. It appeared that if the company continued in business the creditors were likely to receive more than if a winding-up order were made immediately. Barrowclough C.J., relied heavily on the decision in *In re Vuma Ltd.* [1960] 3 All E.R. 629; [1960] 1 W.L.R. 1283, where a judgment creditor had sought a winding-up order but the grounds in the petition are not stated in the report. Certainly the company was insolvent but whether the ground alleged was inability to pay its debts is not clear. The two major creditors did not wish the company to be wound up. Lord Evershed M.R. said in relation to the Companies Act, s. 346 (*3 Halsbury's Statutes of England* 2nd ed. 723) (N.Z. s. 332) that the right of a creditor to have a winding-up order was qualified by the rule that the Court will have regard to the wishes of the majority in value of the creditors. Reliance was placed on an extract from *Buckley*, 13th ed., which suggested that it would not be just and equitable for an order to be made if the majority of creditors opposed it. Whether this extract is related solely to the equivalent of s. 217 (f) (*supra*), or applies equally to the other grounds listed in that section, including inability to pay debts, is not made altogether clear in the cases cited by *Buckley* or by Lord Evershed, in his judgment. It is, however, reasonable that if a company is insolvent but, by continuing in business, can increase the amount to be paid to creditors, it should be permitted to do so, if this is the wish of those, or a majority of those, to whom the company is indebted. It would be most unfair if a minor creditor were able to secure the winding up of a company against the wishes of the majority of the creditors. The decision in *Re J. R. S. Garage Ltd.* has made explicit what formerly could only have been implicit, that the powers of the Courts under s. 332 to have regard to the wishes of the creditors extend not only to cases where the petition is based on s. 217 (f)—the just and equitable provision—but also to the other paragraphs of that section. The Chief Justice concluded:

"I think that in the circumstances it is not just and equitable that the company should be wound up by the Court."

Although this is not the test set by s. 217 (f), it is clear that if the Court is satisfied that it is not just and equitable it cannot be of the opinion that it is just and equitable for the company to be wound up.

J.F.N.

Perception on Appeal

When, in *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326; [1955] A.C. 370, the House of Lords discussed the right and duty of an appellate Court to review findings of fact by a Judge sitting alone, they stressed the distinction between perception of facts, and inferences to be drawn from facts, or as it is sometimes put, between findings of primary facts, and inferences from those facts. So far as inferences are concerned, an appeal Court is obviously in as good a position to form an opinion as was the Judge below. But where the primary facts are concerned, the findings of which will usually depend on the credibility of individual witnesses, the appeal Court is at a disadvantage in not having seen or heard those witnesses. Accordingly, Viscount Simonds was able to say in the *Benmax* case:

"I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned Judge." (*ibid.*, 328; 374).

Despite this reluctance in an ordinary case to interfere with a finding of primary facts, nevertheless, in the words of Lord Thankerton in *Watt* (*or Thomas*) v. *Thomas* [1947] 1 All E.R. 582, 587; [1947] A.C. 484, 488, an Appeal Court

"either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witness will vary according to the class of case and it may be, the individual case in question." (*ibid.*, 587; 488).

O'Callaghan v. *Galt*, a recent appeal from a decision of the Magistrates' Court, is an example of a case where an appellate Court was satisfied that the Court below had not taken proper advantage of having seen and heard the witnesses, and accordingly felt able to substitute its own findings of the primary facts.

The action involved a claim and counterclaim in negligence arising from a head-on collision between two motor cars in March 1958. When the vehicles came to rest after the collision, the defendant's car was found to be wholly on its correct side of the road, while the

plaintiff's car was partially on its incorrect side. The learned Magistrate found that the plaintiff's negligence in failing to keep as far as practicable to his left was the only negligence causing the accident, and he gave judgment against the plaintiff on both claim and counterclaim. From this decision, the plaintiff appealed.

The trial had taken place at some distance in time from the collision, and the learned Magistrate took the view that it was impossible, nearly two-and-a-half years after the event, for witnesses to be precise as to distances and like matters. He declined therefore to accept the evidence of the plaintiff's witnesses on these aspects. On appeal, Henry J. took the view that while an accurate estimate of speed or distance could not be expected, a witness's overall impression of high speed or of going too fast was often a valuable piece of evidence. The evidence of the plaintiff's witnesses, even at that distance of time, ought not to have been rejected just because the exact figures hazarded by them could be shown to be in error.

Again, the Magistrate had accepted the defendant's evidence of the presence of a mark on the road, which only the defendant had seen, as corroborating the defendant's evidence. On analysis, Henry J. concluded that if the mark existed at all it could not possibly have had either the origin or the effect ascribed to it by the learned Magistrate. Moreover, the learned Magistrate, in determining the defendant's speed had unjustifiably ignored an admission made by the defendant to a police constable immediately after the accident.

The learned Judge proceeded to refind the primary facts and concluded :

(i) that the roadway was 14 feet wide at the point of impact which took place slightly less than 50 ft. after the defendant came round a right hand blind corner completely on his wrong side ;
(ii) that the defendant's speed as he rounded the corner was at leat 25-30 m.p.h. ;
(iii) that the defendant's brakes did not take effect until he was 16 feet from the point of impact.

From these facts the learned Judge inferred that the defendant had been negligent in cutting a blind corner on a narrow road at a speed which was excessive in the circumstances. On the other hand, the further primary fact remained that after impact the plaintiff's car was partially on its wrong side of the road, while the defendant's car was on its correct side. Granted, the defendant's negligence on the facts as now found, the question still remained whether that negligence was causative. The learned Judge held that it was ; that the defendant had been travelling too fast to pull up at least within his visibility, that he had given the plaintiff no opportunity to take effective evasive action, and that it appeared that, in any event, he had altered course in the direction of the plaintiff at the last moment before the impact. It was impossible to say that the defendant's negligence was exhausted by the time of the impact. The learned Magistrate's finding that the plaintiff had been negligent in failing to keep as far as practicable to his left must be sustained and Henry J. fixed his contribution for the accident at 25 per cent. The defendant's share of the responsibility he fixed at 75 per cent.

B.C.

PERSONAL

Mr Justice Henry and Mrs Henry left Port Chalmers on the *Port Adelaide* on Wednesday 15 March on a visit to the United Kingdom and the Continent. They expect to return to New Zealand in September next.

Mr P. L. Molineaux, Crown Solicitor at Blenheim, has been appointed Attorney-General to the Government of Western Samoa and will take up his appointment shortly.

Mr John Lindley Wragge, of Taupo, was admitted as a barrister in the Supreme Court at Hamilton on 14 April 1961 by Mr Justice Haslam on the motion of Mr R. F. Annan.

Mr Barry Hudson, of Taumarunui, was admitted as a solicitor in the Supreme Court, Hamilton, on 14 April 1961 by Mr Justice Haslam on the motion of Mr D. W. McMullin.

It was announced recently that Mr G. S. Orr, who has been a Crown Solicitor in the Crown Law Office at Wellington for some years, had been awarded and had accepted a Harkness Fellowship of the Commonwealth Fund of New York. Mr Orr proposes to specialise in a study of administrative law in the United States and of the practice and procedure of a number of State and Federal Administrative Tribunals. He will spend some time at Harvard examining particularly the operation of the Massachusetts Model Administrative Procedure Act. A further subject for intensive study will be the method of controlling the regulation-making power by means of preliminary hearings which exists in some States, notably Wisconsin, and the extent to which the Federal and State Courts review decisions of administrative authorities. Mr Orr, accompanied by Mrs Orr and their two children, will be leaving for the United States in September and will be away from New Zealand for approximately 12 months.

Reflections on Retirement.—" Hundreds, indeed probably thousands, of men and women have I interviewed, and have I seen opposite me at my office desk, in the course of a long and busy professional career. Now I shall see no more. Another presence is installed in the room where once I sought to play my small part in moulding in some slight degree the lives of clients rash enough to entrust the guidance of their affairs to me. There is some sadness for me in these thoughts ; but, this notwithstanding, there are also some rewards that memories bring. One of the richest of those rewards, I think, is the recollection that it has been my privilege to hear so often in the course of my professional life those blessed words, 'We regard you as our family solicitor'." (*1960*) *104, S.J.*, 1067.

CORRESPONDENCE

Corporal Punishment

Sir,

In your issue of 21 March 1961 (*ante*, 76), you have published a letter signed by Mr F. C. Jordan as hon. secretary of the Howard League for Penal Reform, together with some comment of your own. With respect, I find your comments puzzling, in that you have stated, as something overlooked by Mr Jordan, the fact that the methods he advocates have already been tried and found wanting; but you do not state in what country this took place.

It is, after all, common knowledge that the methods he advocates have been tried in several countries and found highly successful; it is also self-evident that they cannot have been tried in New Zealand, if only because we do not appear to have available for the purposes either the sort of premises that would be suitable or the full components of the professional team needed for carrying out such a scheme. Nor is it easy to understand why, in expressing the need for a balance between punishment, deterrent effect and reformation, you consider that the methods put forward by the Howard League fail to achieve his aim.

There is, of course, a popular but fallacious idea that modern scientific methods are "soft". If we look at the facts instead of making armchair deductions from our own preconceived ideas, we find that not a few offenders when placed in so-called "open" prisons and given more numerous privileges, become so terrified of the responsibility for their own actions which they are being called upon to accept, that they commit flagrant breaches of the rules in order to be remanded to the "maximum-safety" prison again. Similar motives seem to drive many recidivists. Whatever our personal opinions on the subject may be, the first step to be taken is to abandon the notion that the Howard League is a band of dreamy idealists inspired by a sort of "kindness to animals".

Penal reform is a big part of the scientific programme of the World Federation for Mental Health which is a subsidiary of the World Health Organisation. In this programme, the correction of vindictiveness on the part of John Citizen is just as important to community mental hygiene as the establishment of scientific methods of treatment for offenders, their proper cure and, supervised rehabilitation as useful members of the community.

As Mr Jordan has pointed out, they should be segregated from society until they become "socially fit" and after studying the work of mental health teams over a period of years one leans to the opinion that the function of a Court of law should be to separate the offenders from the innocent, and hand the former over to an organisation which will make itself responsible not to let them loose until they are able to conduct themselves. As this may be much sooner or much later than a Judge or a Magistrate might be able to guess, it seems advisable from the point of view of both society and the offender that instead of this guesswork some more reliable methods of determining the length of a sentence should be employed; and any such policy ought to prove both a deterrent to crime and an incentive to the offender, once apprehended, to co-operate with the mental health team as fully as he is able. Such a team ought to include in suitable proportions not only psychiatrists and clinical psychologists but also psychiatric social workers, occupational therapists, physiotherapists, physical culture instructors, and trained probation officers, all of whom would have regular case conferences to insure uniformity of approach to the individual.

The technique is too well-known to call for further comment and in the broad field of mental hygiene it has amply proved its worth. It may sound rather a luxury service, but in the long run it ought to prove much less wasteful than our existing methods which are an ugly blot on our social structure.

I am, etc.,
MARION KIRK.

Mrs M. Kirk LL.M.,
P.O. Box 5450,
Auckland.

[This letter is the subject of comment on our editorial page—Editor.]

The Astonishing Hinds.—"Hinds is a most remarkable phenomenon and those who have heard him argue his cases are full of admiration for him. Litigants in person have a standard set of forensic shortcomings. Some wander pathetically through a maze of irrelevancies. Some appeal to 'British justice' dramatically but inopportunely. Some plough through a set speech, without any attempt to put themselves in touch with the mind of the tribunal, impatiently brushing aside any interventions or questions from the Judges. Not so Alfred Hinds. His statute law and his case law are all in good order. He listens to what the members of the Court have to say and meets it. His technique of advocacy is such that, if one believed in reincarnation, one might imagine that he was some dead and gone silk reborn into the working class. It is true that his phraseology is sometimes unconventional. 'That will suit me fine' would be more usually expressed as 'If your lordship pleases', and when he told the Lord Chief Justice: 'You have summed it up very well', he really meant: 'Your Lordship has expressed it far better than I could have done'. The spirit was right: it was just a matter of phrasing". *Richard Roe in* (*1961*) *105, S.J.*, 102.

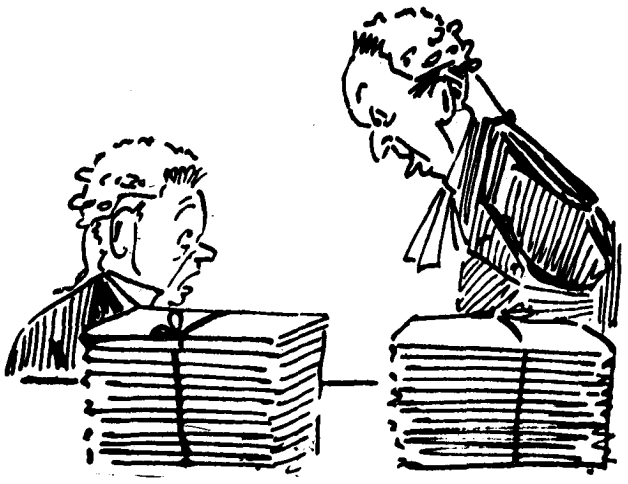
Sound Advice.—"One fatal mistake, once you are installed in the country office of your choice, is to see a client without an appointment. You must therefore guard against the girl on the telephone interrupting your perusal of a settled land abstract in such a way as: "Please, Mr Highfield there is a gentleman in the general office wanting to know if we have anyone who knows anything about law". The novice may easily succumb to this approach and, even if he spends the next half-hour quite entertainingly, he will not make a fortune."—"*Highfield*" *in* (*1961*) *105 S.J.* 51.

FORENSIC FABLE

By "O"

The Society Suit and the Unexpected Settlement

The Case of *Potte* v. *Kettle* was about to be Heard. It was a Society Suit in the Best Sense of the Term. The Countess of Potte (Married Woman) was Suing Lady Cleopatra Kettle (Spinster) for Damages for Slander under the Slander of Women Act 1891. Lady Cleopatra Kettle (Spinster) was Counterclaiming Damages for Slander from the Countess of Potte (Married Woman) under the Slander of Women Act 1891. If the Alleged Observations of Both Ladies were True, Neither of Them was Fit to Move in Respectable Circles. The Defence of Both Parties (Settled by Very Experienced Pleaders) was that the Words had not been Spoken and/or that the Words were Spoken on a Privileged Occasion and/or that the Words were True in Substance and in Fact. Counsel of the First Magnitude had been Briefed. Sir Nathaniel (with Another Leader and Two Juniors) was for the



Plaintiff, and Sir Peregrine (with Another Leader and Two Juniors) was for the Defendant. The Representatives of the Press were Sharpening their Pencils. Fashionable Folk in the Gallery were Telling Each Other to Keep Quiet. The Judge, in a Pair of Clean Bands, was Glancing at "*Fraser on Libel*". The Jury was being Sworn. One of Sir Nathaniel's Juniors was Clearing his Throat Preparatory to Opening the Pleadings. The Air was Charged with Electricity. You could have Heard a Pin Drop. When Eleven Jurors had been Sworn the Associate Whispered to the Judge that One Special Juror had not Turned Up. The Judge, who was a Scholar and an Antiquarian, Rejoiced in Archaic Terminology. "Sir Nathaniel and Sir Peregrine", he said, "An Event has Occurred which Makes it Necessary, if I am not Mistaken, for One or Both of You to Pray a *Tales*". Counsel Conferred. Sir Nathaniel asked Sir Peregrine Whether he Knew what on Earth the Old Boy was Talking About, and What the Blazes was the Thing he Wanted them to Pray for. Sir Peregrine Replied that he hadn't a Notion, and Didn't Sir Nathaniel Think they had Better Settle Sir Nathaniel Cordially Agreed. And so, to the Fury of the Countess of Potte, Lady Cleopatra Kettle, and the Public, the Case of *Potte* v. *Kettle* was Settled on Terms Indorsed on Counsel's Briefs, Judge's Order if Necessary.

Moral.—*Talk English.*

OBITUARY

Mr Alan Walter Brown

Mr Alan Walter Brown, a former Crown Prosecutor in Christchurch, and a participant in many community activities, died recently in Christchurch at the age of 64 years. Mr Brown was born at Kumara in 1897 and was educated at the Temuka District High School and Christchurch Boys' High School. He began his career as a probationary teacher at Lyttleton District High School and in March 1919 he joined the staff of the School for the Deaf, Sumner, where he remained until the end of the year. While teaching Mr Brown was engaged in the study of law and on qualifying he joined the firm of Raymond, Stringer, Hamilton, and Donnelly. He was admitted as a barrister in November 1920 and became a partner in the firm in 1924. For many years Mr Brown assisted Sir Arthur Donnelly as Crown Prosecutor and succeeded to that position in 1954. Both as assistant to Sir Arthur and while himself holding the appointment he appeared in many notable civil and criminal trials, but in 1957, owing to failing health, he was compelled to relinquish his appointment and seek a less exacting occupation.

Mr John Reid

Once well-known to Wellington and Hamilton practitioners as a solicitor employed in the Public Trust Office, Mr John Reid died suddenly in Wellington recently. He was 77 years of age. Mr Reid was born at Tapanui but moved to Christchurch at the age of 20. In 1921 he joined the staff of the Public Trust Office at Wellington, was transferred to Hamilton for the period from 1924 to 1929 but returned to Wellington in that year. On retirement from the Public Service, Mr Reid joined the staff of the Reserve Bank and subsequently obtained employment with a Wellington firm of patent attorneys with whom he remained until the day before his death. He continued in what appeared to be robust health, and his sudden death was a shock to all who knew him. Mr Reid's all-absorbing interest outside his work was cricket. He served various clubs in an executive capacity wherever he was from time to time living, and was also an official of the Wellington Cricket Association. Mr Reid is survived by a son (Jack) of Khandallah and a daughter (Mrs Galloway) of Raumati Beach. Mrs Reid predeceased him.

Mr E. W. White

The death occurred at Christchurch on 4 April of Mr Ernest William White of the firm of E. W. White, Son and Burgess. He was in his 71st year. Mr White was born at Outram and educated at Otago Boys' High School, Otago University and the University of Canterbury. He taught at Otago Boys' High School for a period before entering the legal profession. During the first World War he was Crown Prosecutor and Acting Judge in Western Samoa. In 1920 Mr White joined the firm of which he later became senior partner but which was then Johnston, Mills, and White. He retired from active practice a few years ago.

TEN YEARS OF NEGLIGENCE

A Holiday Digest

Some folk read the *Law Reports* with the same desperate intensity as others devote to *Turf Digest*. Some even keep notes. And I once saw the word "rubbish" rudely pencilled in the margin of a rather drastic judgment in the old *M.C.R.* But whatever the motive, one simply must read them. We are like the doctors who have to know the latest drugs.

But how many of us realise that the *Law Reports* can be read, if we choose, for no reason other than sheer *entertainment*?

This article is no more than a digest of negligence cases in the *New Zealand Law Reports* from 1950 to 1959, disregarding the "important" cases, selecting only those that were a little bit unusual, a bit amusing. As a *legal* contribution, I warn readers that what follows is therefore utterly valueless. But these cases interested me, one way or another. You might like to be reminded of them.

1950

Fresh from the holiday traffic, Stanton J. delivered judgment in February on the motion for new trial in *White* v. *Tip Top Ice Cream Co. (Wgtn.) Ltd.*, p. 406, where it was alleged that the defendant's employee was negligent for driving his vehicle across an intersection *backwards*. His Honour condemned this practice. Motorists now realise that travelling sideways is the only form of movement not yet reviled by precedent but, given half a chance, a jury is not likely to overlook this for long.

Potential plaintiffs should, however, take heed of *Jeune* v. *New Zealand National Airways Corporation*, p. 665. That was an unpleasant reminder that claims for negligence against N.A.C. are limited to £5,000. People who are negligent driving cars, or running factories, might well ponder why some common carriers enjoy such protection.

From flying accidents to flying insects: *Billy Higgs and Sons Ltd.* v. *Baddeley*, p. 605, captured the imagination with its bee in the driver's eye. No negligence, said the Court of Appeal, but "inevitable accident"—a phrase which ought to be allowed to die, for it conveys a totally false impression of an accident occurring without negligence.

Remember *Helson* v. *McKenzies (Cuba St.) Ltd.*, p. 878? That was the woman who left a handbag containing £422 on a counter in McKenzies. She was 75 per cent. contributorily negligent, the majority of the Court of Appeal held. McKenzies were left with 25 per cent. of the damages. The unsolved question: what percentage should be attributed to the unknown person who claimed and walked off with the bag? And, if McKenzies were ever able to locate the villain, could they recover the full value of the bag, or only the 25 per cent. that they had to pay?

It was a quiet year for industrial claims, only *Hiroa Mariu* v. *Hutt Timber and Hardware Co. Ltd.*, p. 458, being remembered for its irksome decision that an Inspector of Factories cannot be called to disclose information obtained in the investigation of an accident; irksome, that is, for the party who thinks the inspector's evidence would be favourable. The opposite party invariably thinks *Hiroa Mariu* an excellent decision.

1951

This year had a nautical tang, with the Wellington wharves a very hot-bed of litigation. The ink on the judgment against McKenzies in 1950 was barely dry before the defendant in *Barton Ginger & Co Ltd.* v. *Wellington Harbour Board*, p. 773, escaped liability for losing a fishing rod that had been unloaded off the *Dominion Monarch*. Just as in the handbag case, here too someone had walked off with the goods. But this time the defendant could not be blamed.

Then there were plaintiffs slipping all over the Wellington waterfront. *Donohue* v. *Union Steam Ship Co. of N.Z. Ltd.*, p. 862, seemed a natural sequel to *Barton Ginger's* case, the lost fishing rod now being followed by the watersider slipping on the fish scales. The scales of justice saw Donohue given damages, but Hay J.'s entry of nonsuit was upheld on appeal.

Perhaps Donohue had been over-confident, for he had had the example earlier in the year of *Ryan* v. *Shaw Savill & Albion Co. Ltd.*, p. 229, where Ryan chose to slip on mutton fat. A jury of meat-eaters staunchly refused to say there was either negligence or contributory negligence for slipping on mutton fat, but Ryan won a new trial. There should be a list somewhere of what substances plaintiffs may slip on to entitle them to damages.

The indefatigable plaintiff in *Stewart* v. *Auckland Transport Board*, p. 576, issued his *third* writ arising out of the same accident, and for the third time had it ignominiously dismissed before trial. Fell J. ominously mentioned that he had no power to restrain the plaintiff from issuing as many further writs as he chose, contrasted with the position in England where, since 1896, the Court has had such power. That all arose out of the celebrated litigation in the eighteen-nineties when Alexander Chaffers brought actions against the Archbishop of Canterbury, the Speaker of the House of Commons, the Lord Chancellor, and some of the Judges, no less than *forty-eight* times. So they stopped it in England but, as Fell J. points out, there is nothing to stop it here.

1952

Accidents will happen, but some seem less likely than others. For example, what malicious imp of fortune was responsible for the accident to the plaintiff in *Ramlose* v. *Moult*, p. 260? She was making her innocent way along the footpath outside the defendant's garage in Levin when the door of the premises chose that fateful moment to collapse and fall upon her. But the Magistrate, from whose decision an appeal was allowed, valued her damages at the unimpressive figure of £5, influenced possibly by the evidence that, on the evening of the accident, the plaintiff was well enough to attend a political meeting. For once, the hallowed explanation, "I was hit by a door", had the ring of truth.

Then there was *Robinson* v. *Glover*, p. 669, where Billy Higgs' bee-sting helped Finlay J. to hold that the

defendant who fainted at the wheel was not negligent. It may depend somewhat on how many times you have fainted before. Regular fainters will be found negligent for not exercising better control, and they should never pass others when they feel like passing out themselves.

One must read *Donaldson* v. *Waikohu County*, p. 731, with becoming gravity. They claimed £9171. general damages, and the jury awarded exactly £8171. Wholly out of proportion, the Court of Appeal majority said, and ordered a new trial. Can someone verify the rumour that the new trial jury awarded £8171 again ? If they did, it shows how one can absolutely rely on juries to assess damages to an exact penny.

Minihan v. *B.A.L.M. (N.Z.) Ltd. and Anor*, p. 955, was a serious blow to cricket in this country. The defendant allowed its employees to borrow company vehicles when they travelled away to play weekend matches. Previously they had required the team to sign a statement that they travelled at their own risk, but that had been overlooked, of course, on the vital day of the match at Marton. So the plaintiff obtained a verdict that the driver of one of the cars, Powell, who was chairman of the B.A.L.M. cricket club, was driving as the agent of the company, and drove negligently. After that, one could perhaps understand if big employers withdrew their support of Sunday cricket clubs, to the detriment of the game.

1953

Undoubtedly the case of the decade was *MacDonald* v. *Pottinger*, p. 196 and nothing gripped the public quite as much as the forceps in poor MacDonald's abdomen. They were there three and a half years. Feature of the trial was the seven-hour retirement of the jury—possibly a New Zealand record—and equivalent to two hours for every year of the forceps. Of the six issues, the jury were unanimous on two, 11 to 1 majority on another, 9 to 3 on the other three.

Talking of proportions, *Joll* v. *Watson*, p. 788, was a teaser. The jury found there was exactly 52 per cent. contributory negligence. Such devilishly accurate figuring is perhaps easier to understand if you average out eleven jurymen saying "50 per cent." and the other holding out for 75 per cent. Result—near enough to 52 per cent.

The year was noted for such keen arithmetic, as exemplified in *Everitt* v. *Martin*, p. 298. Here the plaintiff recovered the costs of damage to his coat, which was caught on the broken mudguard of a parked car. The broken edge projected "*one quarter* or *three-sixteenths* of an inch", the evidence said. The Magistrate held that was a nuisance; the Supreme Court condemned the mudguard as negligent. One would have thought all the costs were hardly worth it, but for the fact that the wearer of the coat was a tailor.

It was sad to read in *Ritchie* v. *Dunedin City Corporation and Anor*, p. 899, that the doctrine of last opportunity was, as a result of the Contributory Negligence Act, to be regarded as obsolete. What a happy hunting ground that had been! But North J. was not one to stand in the way of progress, so out went the last opportunity.

And that left only *Voice* v. *Union Steam Ship Co. of N.Z. Ltd.* p. 176, to explain *res ipsa loquitur* in 18 easy pages of the N.Z.L.R. *Voice's* case had a pleasant nostalgia about it, because the plaintiff was hit on the head by a chest of *tea* falling off a stack. Wasn't it a barrel of *flour* that hit the renowned plaintiff in *Byrne* v. *Boadle*, who then invented the doctrine by loudly exclaiming "*res ipsa loquitur*" ? The Health Department must be right, the way they are always telling us how careless people are handling food.

1954

This was a defendant's year. One by one the plaintiffs failed to hold their verdicts, and even the widow in *Perpetual Trustees, Estate & Agency Co. of N.Z. Ltd.* v. *Crossan*, p. 1033 (a Deaths by Accident claim) was given only £100. What jubilation there must have been when the defence learned that she had remarried only 22 weeks after the fatal accident!

Then the defendants had the people of Taita literally running around in circles. First there was *Reardon* v. *Attorney-General*, p. 978, where the children of Taita were accustomed to playing on the railway turntable and, in fact, even helped turn the trains around. The plaintiff's verdict was set aside and a new trial ordered.

Then that was followed by the merry-go-round case at the Taita Community Centre, *Napier* v. *Ryan and Anor*, p. 1234 (Taita must have been really rotated this year). The Chief Justice held that the plaintiff was a trespasser when having a free Sunday ride and was not entitled to keep his £487 verdict.

1955

All the ten years reviewed in this article were liberally spattered with applications to bring actions out of time. Did any surpass the optimism of the intended plaintiff in *Henderson* v. *Stewart*, p. 141, who left it till 1953 to allege negligence and injury from a car accident in 1946 ? His application foundered in 1954, reaching the *Law Reports* in 1955.

Henderson never even got started, but *Eva* v. *Walpole*, p. 307, was a case where the plaintiff simply threw his verdict away. He gave evidence, clearly enough, that he had made the necessary hand signal, and duly won his jury verdict for the full amount of £2,000 claimed. But, possibly not satisfied that he had made a strong enough impact in the witness box, he found occasion to repeat the vital part of his evidence —that concerning his hand signal—outside the Court during the afternoon break. Members of the jury were reluctant listeners to this second statement. The defence had little trouble in gaining a new trial.

1956

Although railway turntables made another appearance, with unfavourable results to the Railways Department, yet plaintiffs seemed more obsessed this year with *wires*. They hurt themselves, one way or another, with wires.

There was *State Fire Insurance Office* v. *Blackwood and Others*, p. 128, to start with—a real puzzler to anyone not in the know, for the first defendant Blackwood somehow contrived to be a defendant, while at the same time holding the office of General Manager of the State Fire Office—the plaintiff. However, it was a case about insurance responsibility when one Gibbons lost his life as a result of overhead wires being fouled by a crane.

Then *Holland* v. *Attorney-General*, p. 235 saw another attack on the wires—this time when the mast of a

yacht tickled the power lines stretched over Lake Karapiro, with startling but not fatal results. The Crown escaped from this one, as it did also in *McCullough* v. *Attorney-General*, p. 886, another wire case. The injury here wasn't so galvanic, for all McCullough could say was that he spragged his hand on a wire rope. But none could say that the Crown didn't cut it very fine. They managed to obtain a judgment for the defence *non obstante veredicto* on the ground that notice of the accident had not been given as soon as practicable, although this plea was first made in an amended Statement of Defence filed on the very morning of the trial.

Smith v. *Wellington Woollen Manufacturing Co. Ltd.*, p. 491, was hailed as a triumph for the damage-conscious defendants, who thereafter have been allowed to deduct taxes off claims for lost earnings. Ever since, they have gone in fear and trembling that the Commissioner of Taxes would consider himself entitled to the deduction so unwillingly wrested from the plaintiffs.

One could be so absorbed with the off-again on-again nature of the *J. M. Heywood & Co. Ltd.* v. *Attorney-General*, p. 668, struggle (the *res ipsa loquitur* argument when a truck ran down hill out of control) that it comes as a disappointment to find nothing in the report about the fate of the truck itself. The poor driver was killed, we know; but after that fearsome career down the Evans Pass Road between Lyttelton and Sumner, with the truck's horn sounding a continuous warning of impending calamity, what on earth happened to its load—no less than 168 cases of bananas? We are told not a word.

1957

There is no doubt that *Perkowski* v. *Wellington City Corporation*, p. 39, stirred the theorists into discussion. Are we forever to be restricted by these invitor-licensor rules, or should we not be allowed joyously to ask the jury to say simply that there was negligence? The social philosphy of the age, as voiced by juries in New Zealand, Australia, and U.S.A. is to require that he who is injured should be compensated by someone else. *Perkowski's* case was certainly neither the first, nor the last, where the jury answered the tricky "*invitor-licensor*" questions in favour of the defence, but flared their nostrils at the magic word "negligence" as it appeared in the issues. The *Perkowski* fatality was at Worser Bay and the pun is irresistible when we remind ourselves that the jury added a rider to their verdict, criticising the lack of interest taken by the authorities in the swimming facilities which, first erected there about 1941, had since become worser and worser.

Then came *Taylor* v. *Central Waikato Electric Power Board*, p. 407. Has any plaintiff yet beaten Taylor's award of £21,500 for personal injury?

And how one admires the gallant, but foredoomed, attempt in *McCarthy* v. *Palmer*; pp. 442, 620, to claim damages under the Deaths by Accidents Compensation Act for loss of "the society, care, guidance and affection" of the deceased husband. One had thought that the "pecuniary loss only" was enshrined, and the invariable words to the jury—"nothing can be awarded for the grief, the sorrow, for sympathy . . ." had become almost automatic. Yet the McCarthy plaintiffs tried it, both in the Supreme Court and the Court of Appeal but, alas, to no avail. It is noticed that £5,000 was claimed for the loss of affection, and £20,000 for the pecuniary loss—no doubt a reasonable apportionment of the value of most husbands.

Lastly, *Granger* v. *Attorney-General*, p. 355, saw a noble effort in the settlement of witnesses expenses to have a coal miner classified as an expert and thus qualify for a larger allowance. F. B. Adams J. thought sixteen years as a miner did not quite qualify the witness as an expert. But it makes one ponder—cannot a garbage collector be just as much an expert as the pathologist? Six years study for one, six minutes for the other. Where do you draw the line?

1958

Furniss v. *Fitchett*, p. 396, scared the wits out of the medical profession. That was the case where a wife recovered £250 damages from her doctor, who gave her husband a certificate relating to her mental condition. It is to be remembered that Mrs Furniss obtained her verdict, not on the ground that there was any breach of professional confidence, but under the "neighbour doctrine"—it being negligent of him to give a certificate containing statements which he should have anticipated would harm her, when he ought to have foreseen that such statements were likely to be disclosed in her hearing. Interesting thought: could a doctor be sued by a patient for telling that patient what was wrong with him, when he should have anticipated that the bad news would seriously shock him? Or is he only liable for telling someone else, who then harms the patient by repeating it?

It was alleged in the motion for certiorari in *Healey* v. *Rauhina and Anor* p. 945, that the learned Magistrate in the Court below had pre-judged the case by making such statements as: "Insurance companies are getting down to the same standard of ethics as motor dealers" and by making trenchant criticism of finance companies. Although some of these allegations were denied, the writ was obtained on the ground that the cumulative effect of the comments from the Bench was to show that the Magistrate had "so pre-judged the case that the Third Party did not have a fair opportunity to present its case." However, the alleged comments from the Bench (if true) indicate that there somewhere exists a gradation lists, setting out the standard of ethics of various businesses. Apparently insurance companies were supposed to be higher on the list than motor dealers and finance companies. This raises interesting possibilities, not the least of which is the position on the list occupied by the legal profession. And is the gradation list settled by public opinion, or can each business decide whereabouts on the list it ranks itself?

Did sympathy for legal typists play any part in the decision in *Allan* v. *Westfield Freezing Co. Ltd. and Others*, p. 497? The defendants (in four separate actions) applied to join Third Parties. You know the procedure—if leave is granted, you have to serve the Third Party with copies of some of the pleadings and a list of all the others. It is quite a typing job getting out the copies for service in the case of *one* third party. One can well see the practical wisdom of the refusal in *Allan's* case to grant leave, for the application was to join no fewer than *twenty-four* Third Parties. (Presumably they would be called "Third Party of the Nineteenth Part" etc.) And imagine the trial, if each were representated by separate counsel!

1959

Mrs Baxter was a plaintiff (*Baxter* v. *Halliday* p. 961) who was 6 per cent. to blame for contributory negligence. She was an old lady of 73. No one had any compunction in docking 6 per cent. off her total damages. But Berryman, the plaintiff in *Berryman* v. *Attorney-General*, p. 147, recovered every penny of his damages, even though the jury said his contributory negligence ran to 60 per cent. Such is the extraordinary and farcical effect of s. 147 of the Coal Mines Act 1925, and its 1947 amendment, which relieve coal miners of the intolerable burden of being guilty of contributory negligence. But the way to look at *Berryman's* case is to become incensed at the wrong being done to all the other workingmen of New Zealand —the would-be plaintiffs—who have to accept reductions from their damages for their own negligence. Why should they so suffer, when coal miners are exempt ? Obvious answer is to abolish contributory negligence. We would thus please all of them and at the same time avoid offending the miners.

Mrs Baxter, by the way (the six per cent. lady), was the unhappy person whose coat was caught in the door of a taxi. The driver had not bothered to move from the driving seat to see his passenger safely ashore. No, Mrs Baxter alighted, the door slammed shut, roar went the engine and, whoops—away went poor Mrs Baxter with her coat still caught in the door. (One wonders just how they arrived at *six per cent*).

Damages, like manna, literally fell from heaven on the vegetables in *Walker* v. *Weedair (N.Z.) Ltd.*, p. 777. A topdressing aircraft did it on its way to spray willows, and a broken feed pipe let out all the Weedone on the vegetables. The jury was asked to fix the damages for each brand of vegetable. Pumpkins headed the list with £240, followed by watermelons with £50. But the jury thought little of the claims of silverbeet which they valued at a miserly £5.

There was another watersider who slipped on something, but *Colville* v. *Union Steam Ship Co. of N.Z. Ltd.*, p. 127, gave authority to a long-recognised truth. It was held that a person can be in control of a motor vehicle even though not actually driving. This decision has struck terror into the hearts of back-seat drivers, who now have laws to contend with, not merely in-laws.

" It would effect a great simplification if in each case the standard of care required on the part of the occupiers could be determined as a matter of fact in the actual circumstances of each particular case according to the ordinary principles of the law of negligence " —Gresson P. in *Percival* v. *Hope Gibbons Ltd.*, p. 643. This is not the only time that the Court of Appeal has hinted that we in New Zealand might adopt the new United Kingdom Occupier's Liability Act, so as to abolish the old rules tailored to the status of the person visiting premises.

Let us move slowly on this, if move at all. As Diplock Q.C. said (at p. 43) in his minority report to the Law Reform Committee's Report on Occupiers' Liability :

> Over much of that field the law is now reasonably certain and not unsatisfactory . . . An examination of the reported cases has not satisfied me that any drastic alteration of the existing law is needed . . . However imperfect in theory, the practical compromise which the common law has evolved of dividing persons who enter on land into these . . . categories seems to me to still to work substantial justice . . .

And then F. B. Adams J. in *Perkowski* v. *Wellington City Corporation* (1957), at p. 69 :

> . . . it might perhaps be desirable in a jurisdiction where, as in England, such cases are tried by Judges. But, where trial by jury is still maintained, as in New Zealand, it would almost be tantamount to surrendering the whole field of the law on this topic to the untrammelled decisions of juries. The present law may be open to criticism in matters of detail, but at least it provides some measure of certainty over a wide field ; whereas, under the rule suggested, occupiers of premises— whether public or private, and whether consisting of modern buildings or comprising large tracts of untamed country— would be left in complete uncertainty as to the measure of the duties in respect of invitees and licensees which might be attributed to them by verdicts of juries.

The decade ended with a decision that brought a sigh of relief to local bodies who provide cricket grounds for the people, and to players like John Reid and Viscount Cobham who persistently show that the grounds are not big enough. In *Spittal* v. *Wellington City Corporation*, p. 1095, the plaintiff, who had been watching cricket at Kelburn Park for a couple of hours, suddenly " ceased to be a spectator " when he strolled to the kiosk to obtain a cup of tea. It was a pull by a left-hand batsman that flew high backwards of square leg, landed on the asphalt path and hit Mr Spittal's chest on the first bounce. His action failed, but it may have been some consolation to remind himself that the incomparable Bert Sutcliffe has often been out to this shot, a tendency to loft the pull-shot behind square leg being one of the few weaknesses of his magnificent all-round game.

* * * * *

It just goes to show that, once we have made the customary skim through the head-notes of each month's *Law Reports*, and made a mental note to read " that one later ", there is nevertheless a hard core of near-fiction and amusement in their prosaic pages. The loose parts should therefore always be taken to the beach over Christmas for light reading ; and a strong campaign is getting under way that the publishers should, to meet the demands of the not-so-serious reader, produce a copy of the annual volume in a *paper-back edition, with illustrations.*

K. L. SANDFORD.

End of Polemis—" To adapt the words of W. S. Gilbert, ' glad is the student's heart who year by year sees one by one his cases disappear '. The latest casualty is *Re Polemis and Furness Withy and Co. Ltd.* [1921] 3 K.B. 560, which was summarily despatched by the Judicial Committee of the Privy Council last week in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock* and *Engineering Co. Ltd.* It is true that *Polemis* has been in failing health for many years and that it has required courage of the highest order to rely on it unqualified and without reservations. It also is true that the Privy Council are not the House of Lords, but when we examine the composition of the Judicial Committee we may be excused for jumping to the conclusion that the House of Lords might well have reached the same conclusion. So after forty years we know that reasonable foreseeability is the test of liability for damage by negligence."—(*1961*) *105 S.J.* 67.

SOUTHLAND DISTRICT LAW SOCIETY

Annual Meeting

The annual general meeting of the Southland District Law Society was held in the Law Library, Invercargill on Monday 13 March 1961, Mr J. G. Grieve (president) presiding over a good attendance of members.

In moving the adoption of the annual report, Mr Grieve commented that the past year had been his second year in office as president, and he considered that it should be a matter of general practice henceforth that the president should be available to hold office for two consecutive years. This would ensure a greater continuity in the administration of the society's affairs generally, and in particular would be a wise move as regards representation of this district on the New Zealand Council. The appointment of the Hon. Mr J. R. Hannan to Cabinet rank was commented on by Mr Grieve. He also made reference to the recent increase in practising fees, which would be of assistance to the society, and he observed that they were by no means the only society which was obliged to impose a levy on its members. In fact, several other districts imposed heavier and more frequent levies than was the practice in Southland.

Mr Grieve briefly explained the proposed new system of Land Transfer titles and produced a specimen for inspection of members. He reported that a successful golf day had been held and he thanked the golf committee. He also thanked the vice-president, Mr Binnie, and other officers, council members and all members of the society for their support during the year.

Election of Officers

The following officers were elected :

President, Mr A. B. Binnie ; Vice-President, Mr Geoffrey Hall-Jones ; Secretary, Mr I. Hay ; Treasurer, Mr W. D. Ward ; Council, Messrs. C. A. Bayley, J. G. Grieve, R. P. H. Hewat, A. H. Patrick and I. L. M. Richardson ; Delegate to New Zealand Law Society, Mr A. B. Binnie ; Auditor, Mr E. Dolan.

The meeting resolved to send good wishes to Messrs. J. C. Prain and J. R. Mills wishing each of them a speedy recovery from recent illness.

The Grand Jury

Mr Grieve introduced discussion on the topic of the Grand Jury. The New Zealand Law Society desired that District Societies should consider whether or not the Grand Jury should be abolished. Mr Arthur, Mr Brydone, Mr Russell, Mr Preston and Mr Bayley all spoke strongly in favour of retaining the Grand Jury as a safeguard of the liberty of the subject which had stood the test of centuries. They considered that when the rights of the subject were being steadily whittled away, it would be a retrograde and nigh irrevocable step to permit the Grand Jury to be abolished. Mr Preston and Dr Richardson favoured abolition on the grounds that there were sufficient other checks to protect the subject.

Mr Arthur moved that the society strongly oppose any proposal to abolish the Grand Jury. The motion was seconded by Mr Brydone and carried.

Library Facilities at Gore

Mr Barton asked whether improved library facilities could be provided at Gore, including making available text books from the Invercargill Library upon their being replaced by later editions. The president undertook to bring this matter before the incoming council for consideration.

Mr G. C. Broughton

Mr Binnie made reference to the long period amounting to some 25 years, during which Mr G. C. Broughton had served the society in an executive capacity, including terms of office as secretary, treasurer, councillor, and president. It was resolved to record a minute of appreciation for his long and valued services.

Affiliation : Blood Tests.—"A Bill to make blood grouping tests available to Magistrates' Courts to assist in the solution of affiliation cases was introduced in the House of Lords by Lord Amulree on 28 February. In practice such tests are quite frequently being employed in this country if the parties agree and are prepared to meet the costs thereof. Under the Bill, a Magistrate's Court will be empowered to direct, either on its own initiative or at the request of the mother or the putative father, that blood tests of the mother, her child and the alleged father be carried out by an approved expert. Either party may be ordered to pay the costs of the tests, but the Bill envisages that in suitable cases the costs may be met from local funds. The Bill provides for a certificate specifying the results of the test, and such a certificate will be evidence of the facts and conclusions stated therein. Blood tests can be used only to establish a negative, i.e., that a particular man cannot be the father of the child concerned, and, therefore, a certificate which does not show that the alleged father is excluded from possible paternity may not be commented upon to the Court or admitted as evidence supporting the applicant, since such a certificate would, in effect, be no more than a statement that blood groups cannot assist the Court. The present Bill brings English law in line with that of many European countries and of the United States of America."—*(1961) 111 L.J.* 161.

Story With a Moral—"We are indebted to Judge George Cole of Charlottesville for this little human interest story told at the recent meetings in Roanoke. A Charlottesville attorney was suing on a cut and dried account which his client assured him was due and owing. After the plaintiff's evidence was in, the defendant arose and, to the shocked amazement of counsel for the plaintiff, presented a receipt in full signed by the plaintiff. Quickly taking his client aside, counsel demanded an explanation. 'That damned liar', expostulated his irate client. 'That damned, double-crossing liar', he repeated with emphasis, 'he told me he had lost that receipt'. Somehow this little story seems to convey a moral, but we don't quite know what it is."—*Virginia Bar News, May, 1960.*

TOWN AND COUNTRY PLANNING APPEALS

The Presbyterian Church Property Trustees and Others *v.* Minister of Works

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

Zoning—By direction of Minister of Works land zoned as "proposed reserve for national, civic, cultural and community purposes—Auckland University"—Board not concerned with type of university to be provided—Land suitable for national, civic, cultural and community purposes and also Residential D use—University an appropriate use—Sufficient land left in Auckland for commercial development—Preservation of Government House as Vice-Regal residence not a matter for Board—Principles applicable to such an appeal—Town and Country Planning Act 1953, ss. 21, 23, 24, 25, 26.

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

They were, by consent, heard together as they all related to the same provision of the Auckland City Council's proposed district scheme, whereby certain lands generally referred to as the University Site were designated as "Proposed Reserve."

When the scheme had been recommended by resolution of the Auckland City Council, it was submitted to the Minister of Works pursuant to the provisions of s. 21 (5) (a). The Minister, acting under s. 21, s. (6), required that all those pieces of land containing together 284 acres approximately, shown coloure yellow on Planning Map No. 2 of the recommended District Scheme of the City of Auckland and on the said Planning Map No. 2 designated "University of Auckland ', zoned under the Council's undisclosed District Scheme as R sidential 'D', should be re-zoned "proposed reserve for national, civic, cultural and community purposes—Auckland University." The scheme was amended accordingly prior to its being publicly notified pursuant to s. 22 of the Act. When the scheme was publicly notified, the City Council lodged an objection under s. 24 of the Act and also under s. 23 as the owner of part of the land. The Society for the Promotion of Academic and Cultural Education Incorporated lodged an objection under s. 24. All the other appellants lodged objections under s. 23, either as owners or occupiers of part of the area under consideration. By virtue of the provisions of s. 25, (2), the Council could not allow any of these objections without the written consent of the Minister. This consent was refused so that all the objections were formally disallowed and these appeals followed.

Leary Q.C., and *Butler*, for the Auckland City Council.
Weir, for the first appellant.
M. Grierson, for the second, third, fourth and tenth appellant.
Whyte, for the fith appellant.
Warnock, for the sixth appellant.
Solicitor-General, *Wild Q.C.*, for the respondent.
Moller, and *Smytheman*, for the University of Auckland.

The judgment of the Board was delivered by

REID S.M. (Chairman).

PART I

Appeal by the Auckland City Council:

A very substantial volume of evidence was led in support of this appeal, but a great deal of it was directed to an issue that does not call for decision by this Board—namely, what type of University is best suited for Auckland, i.e., campus or precinct and what disciplines should be provided for in that University. These are not town-planning issues. The Board has repeatedly drawn attention to the fact that it has no general equitable jurisdiction. It derives its jurisdiction from the Town and Country Planning Act 1953, and it cannot be called upon to give decisions or even to express views on any issue not falling within the compass of the Act. The learned Solicitor-General correctly stated the position in his opening address when he stated "the true question is, is it contrary to the principles of town planning relevant in the circumstances that provision should be made for the extension of the University on the 28 acres in Princes Street." The only question calling for decision by this Board is whether the area under consideration here, having regard to the health, safety and convenience and the economic and general welfare of the inhabitants of Auckland and the amenities of the area, should be set aside as a University site or, as the appellant Council contends, as a Residential 'D' zone designated for high density residential occupation and professional offices and chambers. The area under consideration is bounded generally by Princes Street on the west, Waterloo Quadrant and Alten Street on the north, Wynyard Street on the east and Wellesley Street East on the south. This is a total area of 405 acres, but by no means the whole of this area would be available for Residential 'D' zoning. The ownership is as follows:

Government House and grounds, owned by the Crown	75 acres
Existing University site	75 acres
Owned by the University (corner of Princes Street and Alfred Street)	15 acres
	165 acres
Proposed additional University extensions (various owners)	20 acres
Streets involved	4
	405 acres

The University also own several individual residential properties within the area, but this factor has little, if any, bearing on the main issue. The question of roads within the area will be dealt with later under a separate heading.

It is indisputable that the area as a whole is topographically a magnificent site that could be equally well adapted for national, civic, cultural and community purposes as it could be for Residential "D" use. The Council's case must stand on the basis that this area of land is essential for the appropriate development of the central area of the City of Auckland bounded by the waterfront (Quay Street) to the north, Symonds Street to the east, Karangahape Road to the south and Nelson Street to the west. This is the commercial heart of Auckland. The Master Transportation Plan for metropolitan Auckland makes provision for what is described as the inner-ring road system. This proposed inner-ring road embraces a slightly wider area than that designated by the road boundaries outlined above. The purpose of this proposed road is to provide ease of access to and egress from the central area. This inner-ring road encloses some 490 acres, of which approximately 50 acres is taken up by public reserves and open space and leaving a balance of approximately 440 acres in which must be included 140 acres taken up by streets. There is a conflict of expert evidence as to whether this area is sufficient for the foreseeable future for development needs of the central area, but on the balance the weight of that evidence is against the appellants.

The central area of any city must make provision not only for commercial development, but also for cultural and civic needs, e.g., art galleries, libraries, civic centres are all non-commercial uses for which provision should be made in central areas. Similarly, a university can be considered as an appropriate land use in a central area if land is available for it.

In 1959 Professor Matthew of Edinburgh, an architectural consultant and town planner of world fame, was invited by the University to inspect and report on the suitability of this site for University use. The appellants laid great emphasis on the fact that Professor Matthew did not comment, and was not invited to comment, on the type of university best suited to Auckland, but only to express a view on the site under review here. This is perfectly correct. The decision to establish or extend the University on this site was a decision come to after full and thorough investigations and deliberations by the University in conjunction with the Government. These two bodies decided the type of University that was considered suitable and that decision is not open to review by this Board. Within those limits, Professor Matthew stated "teaching and student requirements set out in the university's schedule can be satisfactorily planned on this site in an architectural setting worthy of a University in a way that will add to the amenities of the city as a whole." This view was, in effect, endorsed by the report of what is described as the Parry Report, which is the report of the Committee on New Zealand Universities set up by the Minister of Education.

On the evidence, the Board takes the view that what will be left in the central area of Auckland should be sufficient for the foreseeable needs for commercial development. Professor Matthew in his his report, said that this area was "lightly developed". A very complete and thorough investigation and survey of the present intensity of existing use in this central area was carried out by the Town and Country Planning Division of the Ministry of Works. The Board does not propose to

(Continued on p. 144)

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Falsity of Re Polemis.—All lawyers have as students at some time or other read and learnt the decision of *Re Polemis and Furness and Withy and Co. Ltd.* [1921] 1 All E.R. Rep. 40. Now the Judicial Committee of the Privy Council has disapproved in no uncertain terms of a decision which has stood almost unassailed for forty years. The test whether a particular consequence was reasonably foreseeable is, so the Judicial Committee hold, the criterion by which to determine not only whether damage is within the limits of remoteness but also culpability, that is, whether a defendant has committed a breach of duty towards the plaintiff by failing to take due care: *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.* [1961] 1 All E.R. 404. The dichotomy of *Re Polemis* whereby directness of causation was the test in relation to remoteness of damage but foreseeability was the test of culpability, is held to be a false dichotomy. Through many editions of Sir Frederick Pollock's famous work on *Torts*, including editions after the date of *Re Polemis*, as well as those before it, there appears the thesis in relation to those torts which do not involve an absolute duty—" . . . no clear line can be drawn between the rule of liability and the rule of compensation ". Pollock's intransigence of spirit is rewarded. The Judicial Committee have decided, in essence, precisely that. In Australia, therefore, whence came the appeal to the Judicial Committee the rule will now be that a man's civil responsibility in tort is limited to the probable consequences of his acts. Unfortunately, we say unfortunately because to us this rejection of the dichotomy associated with *Re Polemis* seems the better and the juster view. The decision of the Privy Council is not binding on English Courts and, though such decisions are entitled to great weight and are commonly followed, the fate of the doctrine of *Re Polemis* in England must await further decision.

A Doctor's Duty.—The decision of the Court of Appeal (England) in the case of *Chapman* v. *Rix* will shortly appear in the *Law Reports*. The facts briefly were that a butcher sustained injuries owing to the slipping of a sharp knife. He went to the Cottage Hospital where he was treated by the defendant, Dr Rix, and was sent home with emphatic instructions to see his own doctor that evening. The defendant's opinion was that although the wound was deep it had not penetrated to the peritoneum. The butcher told his doctor that the hospital had told him that the wound was " superficial " and his doctor, not appreciating that the hospital was a Cottage Hospital, and that the defendant was not a casualty officer examined the patient and diagnosed a digestive disorder. The butcher died 48 hours later and a post-mortem showed that the wound had penetrated a small intestine. Had the deceased received surgical treatment on the same day he would have lived. The Court of Queen's Bench found for the defendant. but the Court of Appeal reversed the judgment of the lower Court. Now the House of Lords has affirmed the decision of the Court of Appeal confirming a verdict in favour of the plaintiff but this decision is a majority one with Lord Keith dissenting. The decision is interesting because the duties of a doctor towards his patient are set out in unusual detail. Lord Keith, however, seems to feel that Dr Rix was not guilty of negligence and had discharged his duty by emphasising to the deceased that he should immediately see his own doctor. It is suggested that the finding in *Chapman* v. *Rix* appears to place a greater onus on medical practitioners than would have been appreciated before the decision of the House of Lords.

Spanish Champagne.—*J. Bollinger* v. *Costa Brava Wine Co. Ltd. (No. 2)* [1961] 1 All E.R. 561 is an interesting case of passing off which occupied the Chancery Division in London for five days. The plaintiffs sued for themsleves and for all other persons who produced wine in the Champagne district of France and supplied it in England and Wales. The defendant was a company incorporated in June 1956 who imported and offered for sale in England a wine under the name of " Spanish Champagne ". This champagne was alleged to possess the characteristics of the champagne produced in France but was actually produced in Spain. The plaintiffs claimed an injunction and damages, alleging that the defendant was attempting to " pass off ". The defendant argued that the use of the adjective " Spanish " indicated that the defendant's wine was not a wine produced in France. The Court found on the evidence that the description " champagne " in England and Wales in fact meant that the product was produced in the Champagne district of France. An injunction was accordingly granted.

Rape of the Lock.—It would appear that it is over 130 years since the unusual type of assault and/or larceny by haircutting has been recorded. Now three cases have been recently reported in *The Times* The most interesting of these occurred in Kingston, Jamaica, where a member of the bearded Rastafarian sect was awarded damages against a Police Officer who cut his hair and beard " in face " of the plaintiff's objections. It does appear that the Rastafarian sect are originally from Ethiopia and place a great deal of value on the hairs of their beards. There was some conflict of evidence at the hearing. The Police Officer alleged that the plaintiff was already under arrest, that his hair and beard were found to be verminous and the cutting was with his consent. The plaintiff denied the allegations and he was awarded £40 damages against the Police Officer (on what precise ground of tort is not revealed) and a further £20 for assault. Thus was vindicated his protest against what may be called a barefaced outrage to his personal dignity and human rights.

Tailpiece.—In a recent case on a charge of driving while under the influence of drugs or liquor, a medical practitioner called by the prosecution was being cross-examined. Defence counsel asked what tests had been administered by the doctor. He recited several and then stated, " I then asked him to undo his fly buttons and then fasten them up. I timed him." " How long did he take " asked counsel. " Fifty-seven seconds ", was the reply. Requested counsel blandly, " And pray doctor, what is par ?"

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 142.*)

examine this evidence in detail, but it establishes that in the combined commercial and industrial zones total existing building development is equivalent to only 15 storeys. In the residential zone, the floor area ratios and percentage of site coverage are even lower, amounting overall to less than 5rds. of a storey. Within this area, quoting from Professor Kennedy, there is to be found at the present time every imaginable use, ranging from new 10-storey offices to car dumps, half-buil and abandoned structures and some of the most dilapidated obsolescent buildings—residential, commercial and industrial—to be found anywhere in New Zealand. Considerable emphasis was laid by the Council on the proposition that the commercial development of the centre of Auckland was in some way restricted by the inner-ring road and that the only room for expansion in this area would be by developing the area under consideration in this appeal, Princes Street area, for high density residential and professional chambers. One of the principal witnesses, Dr Ledgar who was called in support of the Council's appeal, gave it as his view that the proposal to use parts of the central area for high density residential occupancy was "romantic nonsense". If high density residential development near the central area is necessary and desirable, then it could be readily provided in the Parnell Rise and Freemans Bay areas.

For some unexplained reason the Council's submissions claimed that there could not be expected to be any commercial expansion towards the west beyond approximately the line of Hobson Street. The Board is unable to accept that contention. It was suggested that the erection of one or two modern buildings in Shorland Street indicated a trend of commercial development towards the east, but, on the other hand, the erection of the National Airways Corporation's new building to the west of Nelson Street could equally well be quoted as an indication of the trend to develop to the west rather than to the east. One factor that will tend to restrain commercial expansion into the locality of Princes Street is that Albert Park lies between the Queen Street area and Princes Street and affords a natural and desirable barrier between the commercial areas of Queen Street and the high eminence of Princes Street. The Board also considers that the planned development of the civic centre will lead to full utilisation of the areas lying to the south, south-west and south-east of the Town Hall, and that when the inner-ring road becomes an accomplished fact commercial development appropriate to the central area can be expected to take place on both sides of that road and not be confined entirely to the area lying within it.

It was suggested on behalf of the Council that owners of property lying within the central area could not be compelled to develop their sites to fully capacity. If they did not wish, or could not afford, to so develop their sites the result would be that more land would be needed for commercial development.

Such a position might arise, but if, as Auckland grown, full use is not being made of available space in the central area, then either the Council or Government may have to adopt a "bulldoze and build" policy in order to develop the central area to its full capacity.

Bearing in mind that the onus of proof lies on the appellants, the Board is not prepared to hold that they have discharged that onus. They led no acceptable evidence establishing the need for high density residential development in this area, and the Board is satisfied that in the development to its full capacity of the central area, either within that area or in close proximity to it, ample room can be found for the establishment of professional chambers and offices. The Council's appeal is disallowed.

PART II

Proposed Closing of Streets:

The tentative plan for the development of this area, as advanced by Professor Matthew, envisaged the closing of Alfred Street, O'Rorke Street, part of Wynyard Street and part of Grafton Road. It is clear, of course, that a zoning designation in any Scheme of land inclusive of streets does not have the effect of legally closing those streets or any of them. Public streets cannot be closed without and until all the statutory steps have been taken in that direction (vide s. 170 (4) (h) of the Municipal Corporations Act 1954 and the Sixth Schedule to that Act). It was stated in evidence on behalf of the University that the question of whether or not the closing of these streets is essential to the proper development of the University site, is still an open question. There is no reason why a decision upon the question should not be postponed until the final stages of the development of the site are being reached. The Board considers that the question of closing these streets is something that should be deferred for future examination and consideration in the light of the traffic needs of the future. When the inner-ring road is constructed and in operation, it should be possible to form a better conception of the traffic flow in this area and of the necessity or otherwise of keeping these particular streets open. The Board's decision in disallowing the appeal is not to be construed as approving of the ultimate closing of these streets. That is a question that must be left to be determined in the future.

PART III

Appeal by the Society for the Promotion of Academic and Cultural Education Incorporated.

The real object and aim of this association would appear to be the preservation of Government House and grounds asan historical site. Whether or not Auckland is to continue to have a Vice-Regal residence, and where that residence is to be situated, is purely a matter for determination by Government. Government has made its decision in respect of the present Government House site, and this Board has no power to review it. It is the express intention of the University to retain a substantial part of the grounds as open space, and this proposal is in accord with sound town-planning principles. The Board is not prepared to impose a condition, but it does express the view that as much of the grounds of the Government House site as possible should be preserved as an open space and not built upon.

PART IV

Appeals by the Presbyterian Church Property Trustees and William Wallace Main:

These appeals relate to two properties owned by the Presbyterian Church Property Trustees:

1. Property known as No. 1 Wynyard Street, occupied by the Church Manse, and
2. Property known as No. 2 Symonds Street, occupied in part by a Church officer and in part by Dr Main as consulting rooms.

Both these properties are immediately adjoining the site of St. Andrews Church, which is on the corner of Alten and Symonds Streets. The ministerial requirement does not extend to cover the site occupied by the Church proper, but it does take in the properties in Wynyard and Symonds Streets. The Board considers that a case has been made out by the Trustees for the allowance of their appeal and that appeal is accordingly allowed. It follows, consequentially, that Dr Main's appeal is also allowed. It was suggested that when the time comes for the development of the University in this locality that provision might be made for a manse and accommodation for the Church officer on a site adjoining the Church to the east on the corner of Alten and Wynyard Streets. This suggestion commends itself to the Board as affording a very practicable and desirable adjustment of the boundary of the University with the Church in this locality, but in this decision it does not propose to do more than express its approval of the proposal and to recommend that full and careful consideration be given to it when the time arrives for some adjustment to be made.

PART V

All Other Appeals:

All the other appellants were either owners or occupiers of professional rooms or dwellings used for professional purposes in the area under consideration. This area contains the rooms apparently of approximately some 51 doctors and it is known as the Harley Street of Auckland. Although some of the doctors who gave evidence also expressed their views on the type of University that should be provided for the Auckland area, those views are quite irrelevant to the issue the Board has to decide. The real basis of all these appeals was hardship, and hardship is an issue which the Board is not empowered to take into account. Whilst there can be no doubt that this locality is admirably suited for professional chambers, it is also admirably suited for University use, and having regard to the economic and general welfare of the inhabitants of metropolitan Auckland, its use for a University purpose is of far greater value to the community than would be its use as professional chambers. Professional chambers could be sited and provided elsewhere without any great difficulty; the University as planned could not go elsewhere. All these appeals are disallowed.

Appeals of Presbyterian Church Property Trustees and William Wallace Main allowed.

All other appeals dismissed.