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THE INTERNATIONAL COMMISSION OF JURISTS

WE welcome the news, recently released, that steps are to be taken to form a New Zealand section of the International Commission of Jurists. We understand that shortly all practitioners in New Zealand will receive a circular giving details of the proposals and inviting an application for membership.

The Commission is a non-government and non-political organisation with headquarters in Geneva, devoted to the support and advancement throughout the world of the Rule of Law. It has been accorded Consultative Status, Category B, with the Economic and Social Council of the United Nations, and is supported by many Judges, legal practitioners, law teachers and associations (mainly of lawyers) in many countries.

The International Commission of Jurists grew from a Standing Committee of six members set up at an international legal congress held in West Berlin in July 1952. The original purpose of the committee was to follow up the inquiry made on the abuse of justice in East Germany and other East European countries. From the start it became apparent that an international body, established by spontaneous initiative and expressing the concern of the world legal community over violations of human rights, should not, and could not, limit its interest and concern to a specific area or system. A broader scope of action became imperative.

In 1952, a permanent Secretariat was established at The Hague, where the Commission was incorporated in 1955 as a non-profit-making and non-political legal entity under the laws of the Netherlands. In 1959, the Secretariat moved to Geneva, Switzerland.

The position of Secretary-General was held from 1952 to 1956 by Mr A. J. M. van Dal, Attorney-at-Law at the Supreme Court of the Netherlands. In 1956, Mr van Dal was succeeded by Mr Norman S. Marsh, Barrister-at-Law, former Fellow of University College, Oxford, and Lecturer in Law at the University, who was Secretary-General of the Commission until 1958 and is at present Director of the British Institute for International and Comparative Law.

To further the application of the principles of the Rule of Law to concrete situations in various parts of the world and to promote the mutual exchange of ideas and experience, the International Commission of Jurists encourages and supports the creation of National Sections co-operating with the Commission on the basis of common purpose and interests. There are at present over 30 such sections including the following members of the British Commonwealth: United Kingdom, Canada, Australia, India, Malaya, Ghana and Nigeria.

Keeping in close touch with the Secretariat, the National Sections supply materials on legal developments in their respective countries, undertake research on matters of particular concern to their members, hold local and regional meetings, organise public lectures, and occasionally hold joint sessions with other Sections to discuss matters of common interest and engage in other related activities. Pamphlets and special studies are published from time to time.

The aims and purposes of the Commission are accomplished in a number of ways: through publication of its regular periodicals and special reports, through meetings ranging from student seminars to international congresses, and by suitable action in cases where violations of the Rule of Law occur or are threatened. National Sections or Working Groups provide invaluable assistance in the Commission's world-wide efforts, and there are close relations with organisations which pursue objectives similar to those of the Commission.

Visits to various countries are frequently made for fact-finding purposes or to explain the aims of the Commission in public lectures and informal meetings.

There are four categories of publications issued by the Commission.

(a) *Bulletin of the International Commission of Jurists*—The first *Bulletin* of the Commission appeared in November 1954. It was printed in English, French and German and had a circulation of 14,000 copies. By way of comparison, issue No. 10 (February 1960) was distributed to 32,000 readers through one of its four editions (English, French, Spanish and German). The *Bulletin* is intended to reflect current events in the legal field and to project important recent developments, facts and situations against the background of the Commission's objectives. It reports not only on violations of the Rule of Law but also on favourable and encouraging developments as they may occur. It has become the most popular means of communication between the Commission and its thousands of friends.

(b) *Newsletter*—Since April 1957, a *Newsletter* has been published to keep the supporters of the

Commission abreast of its organisation and activities and of the work of the National Sections. Printed as the need arises, the *Newsletter* provides current information on important steps taken by the Commission and on international reaction to its work.

(c) *Journal*—The number of the Commission's regular periodicals was completed in Autumn 1957 by the publication of the first issue of the *Journal of the International Commission of Jurists*, dealing on a scholarly level with manifold aspects of the Rule of Law and especially the administration of justice in different legal systems. The *Journal* appears twice a year and is distributed for a small subscription fee.

(d) *Special Studies and Reports*—In addition to its periodical publications the Commission publishes special studies on topics on serious and immediate concern. Some of the topics dealt with have been as follows :

The Hungarian Situation and The Rule of Law (1957).

The question of Tibet and The Rule of Law (1959).

Tibet and the Chinese People's Republic (1960).
South Africa and the Rule of Law (1960).

Congresses and meetings of the Commission are held from time to time. To date there have been the following :

Congress of Athens 1955, which resulted in the *Act of Athens* published below.
Conference on Hungary 1957.
Vienna Conference 1957.
Congress of New Dehli 1959 at which was adopted the Declaration of Delhi published below.

The finances of the Commission are drawn from the subscriptions of members, which are however kept to a nominal figure to encourage membership, and contributions from members, National Sections, professional and learned societies, private trusts and other individuals. The subscriptions for members of the New Zealand Section have naturally not yet been fixed, but they will probably be of the order of £1 1s., for Individual Full Members, and £2 2s., to £3 3s., for Corporate Full Membership i.e. membership of any legal firm, partnership association or Society consisting exclusively of persons eligible for individual membership. There may be other classes of members at varying subscription rates but they are unlikely to interest our subscribers.

The Constitution of the New Zealand Section will be a matter for the inaugural meeting but the draft to be submitted to that meeting will set out as the objects of the section the following :

(a) To keep under review, expound, develop, strengthen and protect the principles of the Rule of Law in New Zealand.

(b) Without prejudice to the generality of the foregoing object, to promote and preserve in New Zealand :
  (i) independence of the judiciary and of the legal profession ;
  (ii) the fundamental liberties and other rights of individuals ;
  (iii) the recognition by the Government that it should be subject to the law ; and
  (iv) the right to a fair trial of every accused person.

(c) To publish material and sponsor lectures in furtherance of the foregoing objects.

(d) As and when requested to do so by the Commission, to assist in helping peoples in other countries to obtain or retain the benefits of the Rule of Law.

(e) To support the Commission in its activities.

(f) To co-operate with any national or international body which pursues objects similar to or compatible with the foregoing objects.

We have already mentioned the *Act of Athens* and the *Declaration of New Delhi*. The text of these is as follows :

Act of Athens

We free jurists from 48 countries, assembled in Athens at the invitation of the International Commission of Jurists, being devoted to the Rule of Law which springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom ; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.

Being concerned by the disregard of the Rule of Law in various parts of the world, and being convinced that the maintenance of the fundamental principles of justice is essential to a lasting peace throughout the world,

Do solemnly Declare that :

1. The State is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as Judges.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.

And we call upon all Judges and lawyers to observe the principles and

Request the International Commission of Jurists to dedicate itself to the universal acceptance of these principles and expose and denounce all violations of the Rule of Law.

Declaration of Delhi

This International Congress of Jurists, consisting of 185 Judges, practising lawyers and teachers of law from 53 countries, assembled in New Delhi in January 1959 under the aegis of the International Commission of Jurists, having discussed freely and frankly the Rule of Law and the administration of justice throughout the world, and having reached conclusions regarding the legislative, the executive,

the criminal process, the judiciary and the legal profession, which conclusions are annexed to this Declaration.

Now solemnly

Reaffirms the principles expressed in the Act of Athens adopted by the International Congress of Jurists in June 1955, particularly that an independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice;

Recognises that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised;

Calls on the jurists in all countries to give effect in their own communities to the principles expressed in the conclusions of the Congress; and finally

Requests the International Commission of Jurists

1. To employ its full resources to give practical effect throughout the world to the principles expressed in the conclusions of the Congress.
2. To give special attention and assistance to countries now in the process of establishing, reorganising or consolidating their political and legal institutions.
3. To encourage law students and the junior members of the legal profession to support the Rule of Law.
4. To communicate this Declaration and the annexed conclusions to governments, to interested international organisations, and to associations of lawyers throughout the world.

This Declaration shall be known as the Declaration of Delhi.

With the world in its present unsettled state and the lengths to which oppression is being practised in so many countries there is a great need for an organisation such as the International Commission of Jurists. The formation of each National Section adds to the strength of the parent body and each Section also has its part to play in the achievement of the objects of the Commission. We therefore strongly commend the move for the formation of a New Zealand Section to our subscribers. The following leaders of the profession have already promised their support: The Right Hon. Sir Harold Barrowclough, K.C.M.G., C.B., D.S.O., M.C.; Chief Justice of New Zealand; Mr David Perry, President of the New Zealand Law Society; Mr H. R. C. Wild, Q.C., Solicitor-General and Immediate Past President of the Wellington District Law Society, and Professor I. D. Campbell, Dean of the Faculty of Law at Victoria University of Wellington.

EDITOR

[The New Zealand Law Journal is not the official Journal of the New Zealand Law Society.]

SUMMARY OF RECENT LAW

ADMINISTRATIVE LAW

Judicial review of administrative decisions. (*1961*) *231 L. T.*, 271.

CONTRACT

Acceptance of offer by post. (*1961*) *35 A.L.J.*, 38.

CRIMINAL LAW.

Evidence—Possession—Receiving stolen goods—Goods received by servant in absence of master—Master denied knowledge of receipt of goods—Submission of no case to answer overruled. For a man to be found to have had possession of goods, something more must be proved than that the goods were found on his premises; it must be shown either, if he were absent, that on his return he became aware of them and exercised some control over them or that the goods had come, albeit in his absence, at his invitation or by arrangement with him. A lorry driver took six drums of oil, which he should have delivered to a customer, to the appellant's yard where they were unloaded by an employee of the appellant. The appellant, who was away at the time, was questioned by the police on his return and at once denied that he knew anything about the matter. He was charged with receiving the oil knowing it to be stolen. At the end of the prosecution case a submission was made that there was no case to be left to the jury that the appellant had possession or constructive possession of the oil or that he knew that it was stolen. This submission was rejected, the trial proceeded and the appellant was convicted. On appeal, *Held*, the submission of no case had been rightly rejected. *R.* v. *Cavendish* (Court of Criminal Appeal. (Lord Parker C.J., Winn and Widgery JJ.) 13, 14, February 1961. [1961] 2 All E.R. 856.)

LAND TRANSFER.

Certificate of title—Mining privilege—Validly granted mining privilege under the Mining Act prevailing over Certificate of Title and over title of bona fide *purchaser without notice—Land Transfer Act 1952 s. 62—Mining Act 1926, s. 58.* The Warden's jurisdiction under s. 58 of the Mining Act 1926 is not limited to the granting of privileges relating to gold or other minerals expressly reserved to the Crown on the alienation of Crown Land. (*Skeet and Dillon* v. *Nicholls* (1911) 30 N.Z.L.R. 611; 13 G.L.R. 591 and *In re Cameron's Application* [1958] N.Z.L.R. 225 distinguished.) The consent of the owner of land required by s. 58 of the Mining Act as a prerequisite to the grant to a person other than such owner of a licence under that section is required only to the initial grant of the licence and when once granted the licence is valid for its term notwithstanding any purported withdrawal of consent subsequently or any change in the ownership of the land. A mineral licence validly granted under the Mining Act 1926 is valid and effective against the title of the person who is registered under the Land Transfer Act 1952 as the proprietor of the land affected by the licence. *So held* by the Court of Appeal (Gresson P., Cleary and McGregor JJ.) dismissing an appeal from the judgment of Henry J. [1959] N.Z.L.R. 220. *Miller* v. *Minister of Mines and Attorney-General.* (C.A. Wellington. 1960, 13, 14, 15, 16, 17 June; 1961. 6 June. Gresson P. Cleary J. McGregor J.).

MAGISTRATES' COURT

Practice—Summons served by substituted service—Judgment by default entered—Death of defendant before expiration of time for filing defence—Judgment set aside—Magistrates' Courts Rules 1948, r. 175. The plaintiff sued the defendant to recover arrears of rates and obtained an order for substituted service which called for the advertising of the proceedings on 28 August 1958 and 3 September 1958. The advertisements were published and judgment by default was in due course entered for the plaintiff. Subsequently it was discovered that the defendant had died between the dates of publication of the advertisements and some nine days before the expiration of the time for filing a defence. There was no evidence that she had seen the advertisement published before her death. The plaintiff applied for an order striking out from the proceed-

ings the name of the defendant and substituting that of her executor. *Held*, 1. That in the circumstances the summons could not be said to have been properly served on the defendant. 2. That the defendant having died before the expiration of the period allowed her for filing a statement of defence, and consequently before she was required to appear, the judgment entered against her was null and void and should be set aside. (*Lazard* v. *Banque Industrielle de Moscou* [1932] 1 K.B. 617, followed.) 3. That the proceedings should be amended by substituting the name of the executor for that of the deceased defendant and should then be served under the normal procedure. *Waiheke Road Board* v. *Franklin*. (1961. 17 April. Astley S.M. Auckland.)

MINING.

Mining privileges—Land other than Crown lands—Warden's jurisdiction not limited to privileges in respect of goldmining—Mining privileges prevailing over Land Transfer title—Mining Act 1926, s. 28—See LAND TRANSFER (*supra*).

MORTGAGE.

Demand—Service—Death of mortgagor—Letter demanding repayment in accordance with instrument of charge addressed by mortgagee to mortgagor six months after his death—Whether demand validly made—Whether receiver's acts established relationship of landlord and tenant between mortgagee and occupiers—Possession—Parties—Personal representatives of deceased mortgagor and not necessary parties if not prejudiced by order. Barclays Bank Ltd. v. *Kiley and Another* (Chancery Division. Pennycuick J., 3, 4, 10 May 1961. [1961] 2 All E.R. 849).

NUISANCE.

The Frontiers of Nuisance, (1961) 231 L.T. 300.

PRACTICE

Judgment and Order—Summons served by substituted service—Judgment by default entered—Death of defendant before expiration of time for filing defence—Judgment set aside—Magistrates' Courts Rules 1948, r. 175—See MAGISTRATES' COURT (*supra*).

Appeals to Court of Appeal—Application for judgment non obstante veredicto—*No evidence to support verdict—Functions and powers of Court of Appeal—Trial by jury—Application for judgment* non obstante veredicto—*No evidence to support verdict—Functions and powers of Court.* When an action is tried by a jury, that tribunal is the only Judge of the facts and no appellate tribunal can substitute its finding for that of the jury. An appellate Court has a revising function to see first, whether there is any evidence in support of the issue found by the jury; and secondly whether the verdict can stand as being one which reasonable men might have come to. If on the latter question it is obvious that no verdict for the plaintiff on all the available evidence can be supported the Court may save the waste of time involved in ordering a new trial which could only have one result by ordering the verdict and judgment to be entered for the defendant. (*Mechanical and General Inventions Co. Ltd.* v. *Austin* [1935] All E.R. Rep. 22; [1935] A.C. 346, followed.) It is not a usurpation of the function of the jury to hold that there is no evidence on which a jury can arrive at a particular conclusion. There is a distinction between cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by a jury. *So held*, by the Court of Appeal (Gresson P., Cleary and McGregor JJ.). Observations as to the functions and powers of the Court in reviewing the verdict of a jury. *Further held* (per Cleary J.), 1. The verdict of a jury may be set aside only where it shows unreasonableness of such a nature as to evidence failure by the jury to perform its duty. (Dictum of Lord Wright in *Mercantile and General Inventions Co. Ltd.* v. *Austin* (*supra*) at p. 375, followed.) 2. In considering any question as to the existence of evidence to support a jury's verdict it is important to have regard to all the answers given so as to obtain a picture of the accident which presented itself to the jury. In some cases a jury may be satisfied that there was negligence in some respect within the area of the allegations made but at the same time may find difficulty in assigning that negligence within the specific particularity which the formulation of a series of questions requires of them. (*Doonan* v. *Beacham* (1953) 87 C.L.R. 346, referred to.) The defendant in his car was proceeding along Railway Avenue, Lower Hutt, at a speed not exceeding 27 miles per hour when the plaintiff emerged from between two parked cars and began to cross the road. He was struck by the defendant's car and injured. The jury found the defendant negligent in driving at a speed excessive in the circumstances and in failing to pass behind the plaintiff but exonerated him from negligence in all other respects alleged. The plaintiff was found to have been negligent in a number of respects, his share of responsibility for the accident being assessed at 50 per cent. *Held*, by the Court of Appeal (Gresson P. and McGregor J., Cleary J., dissenting). That there was no evidence to support the finding of negligence on the part of the defendant and judgment should accordingly be entered for the defendant. *Jensen* v. *Hall.* (C.A. Wellington. 1960. 4, 5 May; 20 October. Gresson P. Cleary J. McGregor J.)

Trial by jury—Difficult questions of law not inextricably mixed with questions of fact—Case not to be tried by Judge alone—Principles applicable—Judicature Amendment Act (No. 2) 1955, s. 2 (5) (a) (Judicature Amendment Act 1960, s. 4). Section 2 (5) (a) of the Judicature Amendment Act (No. 2) 1955 (s. 4 of the Judicature Amendment Act 1960) deals with practical problems likely to arise during the progress of a trial and is not concerned with questions of law, however difficult, which the Judge may have to decide before a final judgment can be entered, and which do not make it inconvenient to have a jury as the tribunal of fact. The cases which came within para. (a) of s. 2 (5) are those where the questions of law are of such a nature that it becomes difficult to keep the respective functions of Judge and jury separate from one another as for example where matters of law and matters of fact so merge into one another that the task of the jury becomes complicated in the application to the facts of questions of law which it is difficult for the Judge to explain in language the jury could be expected to understand, or where, during the course of the trial, the Judge will be called upon to give consideration to difficult questions of law and it is not possible to isolate satisfactorily questions of fact for submission to the jury. Appeal from the judgment of Turner J. [1961] N.Z.L.R. 591, dismissed. *Guardian Assurance Co. Ltd.* v. *Lidgard.* (C.A. Wellington. 1961. 6 February; 28 April. Gresson P. North J. Cleary J.)

Pleading—Motion for further particulars—Right to particulars not lost through filing statement of defence. A defendant does not necessarily lose his right to apply for particulars by pleading. (*Sachs* v. *Speilman* (1887) 37 Ch.D. 295, followed.) A motion for further particulars of matters in a statement of claim is not necessarily too late even though the action is ripe for trial, discovery has been given and the evidence of a witness taken on commission. *Notter* v. *McInnes.* (S.C. Whangarei. 1961. 26 May. Turner J.)

PUBLIC RESERVE

Land vested in corporation as recreation ground—Used for many years as botanical gardens—Shown in proposed district town planning scheme as such—Power of council to change use of land to open park—See MUNICIPAL CORPORATION, p. 228, *ante*.

STATUTORY REGULATIONS

TRANSPORT LICENSING REGULATIONS 1960, AMENDMENT NO. 4 (S.R. 1961/75)—Exempting from licensing the carriage of livestock otherwise than for hire or reward for any distance in competition with the railways, increasing the 30-mile restriction to 40 miles and abolishing the "notional" railways from Pokeno to Kopu and from Hamilton to Te Poi.

LICENSING REGULATIONS 1949, AMENDMENT NO. 4 (S.R. 1961/76)—Prescribing the procedure for the grant etc. of restaurant licences, rewriting the provisions as to extended hours and restaurant permits and prescribing a new form of wine-reseller's licence.

TRUSTEES' COMMISSION RULES (S.R. 1961/81)—Replacing the Executors' Commission Rules 1935.

TOWN AND COUNTRY PLANNING

Land shown on proposed district-scheme plan as botanical gardens—Power of council to change use of land without amendment of scheme—Scheme to be amended later—Town and Country Planning Act 1953, ss. 22, 35—See MUNICIPAL CORPORATION, p. 228, *ante*.

WORKERS' COMPENSATION

Assessment of compensation—Income tax to be disregarded in calculating weekly earnings and average weekly earnings—Workers' Compensation Act 1956, s. 15 (1), (3), (4) and (6). No account is to be taken of income-tax deductions in the calculation of a worker's weekly earnings under s. 15 (1) (3) and (4) or of his average weekly earnings under s. 15 (6) of the Workers' Compensation Act 1956. *Head* v. *Hart.* (Comp. Ct. Wellington. 1961. 13 April; 17 May. Dalglish J.)

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Satisfaction at Second Hand

Before issuing a search warrant under the Licensing Act 1908, s. 228, the Justice of the Peace to whom application is made must be " satisfied " by information on oath that there is reasonable ground to believe that liquor is sold or exposed or kept for sale in unlicensed premises. In *Inglewood Servicemen's Club Inc.* v. *Mauriri* (May 31, 1961) Hutchison J. decided that a warrant had been validly issued by a Justice who had been " satisfied " by hearsay evidence. It was argued for the appellant that because the Police Sergeant who had completed the affidavit had no personal knowledge of the events described in the affidavit there was no evidence on which a person acting judicially could " satisfy " himself as to the matters set out in s. 228.

Hutchison J. observed that applications for warrants are made *ex parte* in circumstances where there may be some urgency when it would be inconvenient to secure sworn statements from those who actually observed the facts sworn to. He concluded on the authority of Lord Parmoor's remarks in *Local Government Board* v. *Arlidge* [1915] A.C. 120, 140, that to act on hearsay evidence was not incompatible with a duty to act judicially. Lord Parmoor's statement is not as explicit on the point of acceptance of hearsay evidence as *Wilson* v. *Esquimalt & Nanaimo Railway Co.* [1922] 1 A.C. 202, 214, where their Lordships stated :

> Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and think there was nothing necessarily incompatible with the judicial nature of the inquiry in the fact that such evidence was received.

Apparently the Court was not required to draw conclusions from other cases where words such as " satisfied " had been interpreted. These cases offer a bewildering diversity of view as to the meaning of words such as " satisfied ", " in the opinion of ", " reasonable grounds to believe " and " reasonable cause to believe " to select a few more or less at random. In *Liversidge* v. *Anderson* [1942] A.C. 206 ; [1941] 3 All E.R. 338, the House of Lords by a majority declared that " reasonable cause to believe " meant that if the person (the Secretary of State) believed he had reasonable cause to believe and certified accordingly the Courts would not examine the grounds for his belief. On the other hand, in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, the words " reasonable grounds to believe " were interpreted to mean that if the person (the Controller of Textiles) persuaded the Court that his grounds were reasonable, his decision would be upheld. Finally, in *Reade* v. *Smith* [1959] N.Z.L.R. 996, where both the above cases were mentioned, Turner J. decided that " in the opinion of " entitled the Court to examine as a question of law whether the Governor-General's opinion was tenable. The Court in the *Inglewood* case did not go this far ; it merely expressed its satisfaction with the reliability of the evidence on which the Justice had acted.

J.F.N.

What Price Stolen Cheques ?—A Postscript

In an earlier note at p. 85 *ante* on *R.* v. *Bennitt* [1961] N.Z.L.R. 452, mention was made of a problem raised but not decided by McGregor J. in that case, namely the value of a stolen cheque for the purposes of subss. 252 (1) (a) and 252 (2) of the Crimes Act 1908. The point was that the maximum punishment provided for the offence of procuring by a false pretence differs markedly depending on whether the value of the thing procured is more or less than £2. The thing procured must be capable of being stolen and while a cheque can be stolen, it can be stolen only *qua* chattel, i.e. as a piece of paper. The bank credit which it represents is a chose in action and as such is incapable of being the subject of theft. Accordingly, it seemed to be arguable that since a cheque could be stolen only *qua* piece of paper it should be valued only as a piece of paper for the purposes of s. 252 (1) (a). Additional colour was lent to the argument by the fact, not mentioned in the earlier note, that it was thought necessary in England to provide by the statute 2 Geo. 2 c. 25 that the stealing of bills of exchange, promissory notes, and the like should, notwithstanding they were termed in law choses in action, be deemed a felony in the same manner as it would have been if the offender had stolen any other goods to the value of the money due on such choses in action or secured thereby and remaining unsatisfied ; and that the offender should be punished accordingly. Since there is no equivalent statutory provision in this country, it might have been argued that the former common law position still applied, so that a cheque would have only nominal value : see *Calye's* case (1584) 8 Co. 32a.

Some of the questions raised in the earlier note have now been answered by the decision of the Court of Appeal in *R.* v. *Lanham and Gilmore* (15th May 1961) The facts were very similar to those of *Bennitt's* case. As in that case, the counts in the indictment charged the procuring of sums of money whereas in fact what were procured were cheques for amounts part of which were lawfully payable in any event. The Court of Appeal considered *inter alia* the requirement under s. 252 (1) (a) that " the thing . . . procured . . . exceeds in value the sum of two pounds " and had this to say about it :

> " The word ' value ' can have many meanings and often has to be defined more precisely by some supporting adjective. The term when applied to a cheque does not necessarily mean the amount shown in the body of the cheque, for it is well recognised in criminal law that a cheque may be quite valueless. But the particular cheques in this case being Treasury cheques to be met by the Government, it is impossible to attach to them a value of only £2 or less, so that in our opinion, without attributing to them necessarily their face value, it may properly be held that each had undoubtedly a value exceeding £2 in the hands of the payee F. & J. Bognuda Ltd., to whom the delivery was to be made and was in fact made. If the amounts by which the cheques were increased had been under £2, it might well be said that it would

have been contrary to the spirit of s. 252 to have laid the charges under para. (a) instead of under subs. (2), but this was not the case ".

The following comments might be made:

(a) The question of valuation was decided strictly on an interpretation of the word " value " as used in the subsection.

Accordingly, it was not found necessary to have regard to the position at common law.

(b) Where only part of the amount of the cheque affected by a false pretence, valuation is to be restricted to that part of the amount so procured.

(c) The exact measure by which cheques are to be valued was left undecided, so that a number of the problems pointed in the earlier note remain. No doubt at one end of the scale a not-negotiable order cheque on a non-existent account may be classed as valueless, and at the other end, apparently, a Treasury cheque for an amount exceeding £2 made payable to the offender, and in fact paid, may be regarded as being worth more than £2, though not necessarily worth its full face value. There still remain the problems of the date at which the valuation is to be taken (e.g. is it to be relevant whether payment is made or the cheque stopped ?) and whether what is to be determined is the objective value of the cheque, or only its value in the hands of the person procuring its delivery. And is application of the one subsection or the other, in other words, is punishment, to turn on the procurer's state of knowledge at the time he receives the cheque (to be related that is to the extent of his fraudulent intention) or is it to depend on accidental and external factors ?

One is tempted to ask whether the proper solution might not be an amendment to the Act along the lines of the English provision mentioned above, under which the value of the cheque would be taken in all cases either to be its full face value, or, where appropriate, the face value of that part of it procured by the false pretence.

B.C.

Bankruptcy—Power to Order Payment out of Earnings

In *In re Kahu Maxwell Te Rangi (a bankrupt)* (judgment delivered 14 June 1961) the Chief Justice had to consider whether, in the circumstances of the case, he had power to fine or imprison the bankrupt for contempt of Court in wilfully disobeying the Court's order to make a payment to the Official Assignee of a weekly sum out of his wages. The order of adjudication against the bankrupt was made in February 1957. Proved debts amounted to nearly £400. There were no assets. The bankrupt was a single man with no dependants and was capable of and was in fact earning a substantial wage. On 20 March 1959, on the application of the Official Assignee and with the consent of the bankrupt, an order was made under s. 62 of the Bankruptcy Act 1908 directing him to pay to the Official Assignee the sum of £4 per week to be applied towards the discharge of the debts provable in the bankruptcy. The order recited that it appeared that the bankrupt after a reasonable allowance was made for the maintenance of himself and his dependants was able to pay from his wages . . . the sum of £4 per week.

Section 62 enacts that if it is shown to the satisfaction of the Court that a bankrupt, after a reasonable allowance for the maintenance of himself and his family . . . is able, from any source to pay any sum towards the discharge of debts provable under the bankruptcy the Court . . . may make an order that the bankrupt shall pay to the Assignee such sum towards the discharge of provable debts as the Court is satisfied the bankrupt is able to pay. This section was thoroughly examined by Turner J. in *In re Burney* [1955] N.Z.L.R. 1071. His Honour held that the Court has power, in proper cases, to make an order declaring how much of a bankrupt's earnings or income is reasonably necessary for the maintenance of himself, his wife and family, and order that any balance shall be paid to the Official Assignee. In short, there is no power to order payment of a specified sum, but only of the balance of the earnings after an allowance for reasonable maintenance. Turner J. pointed out that the effect of an order that the bankrupt should pay a fixed sum to the Official Assignee might be that the bankrupt was left with an indefinite amount of his original earnings which might not be sufficient to support him and his family.

Consequently the order in the present case, calling upon the bankrupt to pay the specified sum of £4 per week, was invalid. Not being a lawful command of the Court, it could not be made the subject of an order for committal for contempt. With obvious regret his Honour found himself compelled to dismiss the summons despite the fact, as found by the evidence, that the bankrupt was substantially in arrear with his payments, that his net earnings had regularly been about £15 a week ; that he had no one to keep but himself ; that he spent £5 a week and sometimes more on racehorses ; that he spent about £3 10s. a week on beer and used taxis quite a lot.

The Chief Justice was of the opinion that there were good grounds for suggesting an amendment of s. 62 so as to permit the making of such an obviously desirable order as was made in the instant case. With that opinion one must, on reading the facts, respectfully agree. One might also, with respect, suggest that if the section is amended, the amendment should operate retrospectively.

A.G.D.

We Wonder, Too.—" We wonder how many young people who cheerfully undertake responsibility for hire-purchase payments for household articles and other things which may be useful and helpful, but in many cases are by no means necessities, stop to consider how they are going to meet their commitments if any additional responsibilities or difficulties have to be encountered. In the Courts we hear only too often of cases in which hire-purchase payments reduce the amount of money available for food and clothing to such a level that either there is a temptation to steal or the difficulties cause matrimonial difficulties and wrangles. Is it worth while ? " (1961) 125 J.P. 124.

ISSUE ESTOPPEL AND THE NEGLIGENT MOTORIST

The doctrine of *res judicata* provides that a judicial determination on some cause of action finally disposes of it so that it cannot be litigated again. The cause of action is merged in the judgment and no longer exists. The analogous doctrine of issue estoppel applies the same principle to a decision on any issue of fact or law which was fundamental to, or was the ratio of, the decision itself. In other words, estoppel is not confined to the legal decision alone. Even though the same parties are litigating a different cause of action, they are estopped from raising any issue of fact or law which was fundamental to the previous decision and which was finally determined in the previous proceedings. For the purposes of issue estoppel the test is whether the precise point was in issue between the same parties in previous proceedings and was judicially decided as being fundamental to, or the ratio of, the previous decision.

The application of issue estoppel to actions for negligence has led in modern times to some difference of judicial opinion. Opinions have varied, for instance, as to whether the decision in an action between two drivers involved in a motorvehicle collision is conclusive as between themselves when they are later sued by a passenger or by some other third party who has suffered harm through the same collision. For example, if A and B are two motorists who have collided, and in an action by A against B for damages it is held that each is 50 per cent to blame, are they estopped from disputing this assessment of responsibility when one claims contribution from the other in respect of a subsequent action brought by a passenger ? That is, must they meet the passenger's claim, if proved, in the proportions previously determined ? Questions of this kind are of considerable practical importance at the present day since they arise constantly in the ever-increasing volume of motor-accident litigation, and the object of this article is to suggest that the most recent judgment on the topic in New Zealand, *Clyne* v. *Yardley* [1959] N.Z.L.R. 617, does not correctly represent the true state of the law.

In *Clyne* v. *Yardley*, Shorland J. had to decide a question of law raised before trial as to whether a party was prevented by issue estoppel from litigating a cause of action. The proceedings arose from a motor collision which occurred in Cambridge on 22 February 1958. A car driven by Clyne collided with a car owned by Yardley senior and driven by Yardley junior. Clyne sued Yardley junior in the Magistrates' Court at Hamilton for the cost of repairs to his car and recovered judgment for the amount of the repairs less 25 per cent for contributory negligence. Yardley senior sued Clyne in the Magistrates' Court for the cost of his repairs and recovered judgment for the total repair costs. Clyne then sued Yardley junior in the Supreme Court under s. 17 of the Law Reform Act 1936 claiming to recover 75 per cent of the total amount of the judgment which had been obtained against Clyne by Yardley senior. Clyne was therefore invoking the doctrine of issue estoppel against Yardley junior and the question which Shorland J. had to decide was whether the doctrine applied in these circumstances.

His Honour held that the doctrine applied, and that Yardley junior was estopped by the judgment in the Magistrates' Court from denying that his contribution to Clyne's loss was 75 per cent. The present claim was brought under s. 17 of the Law Reform Act 1936 whereas the Magistrate's apportionment of liability had been made under s. 3 of the Contributory Negligence Act 1947, but his Honour held that the criteria of assessment of responsibility under each statute were identical. He then went on to consider whether the assessment of responsibility for the collision in the lower Court action between Clyne and Yardley junior was a final determination of that particular issue of fact for the purpose of any subsequent proceedings, and his Honour decided that it was. It will be observed that Clyne's cause of action was not the same in the Supreme Court. His claim before that tribunal was for contribution to the amount which he was liable to pay to Yardley senior, whereas his claim in the Magistrates' Court was for damage to his own car. However, Shorland J., decided that the fundamental issues of fact were the same, and that those issues of fact had already been conclusively determined as between the same parties.

In reaching this decision, Shorland J., had been faced with the task of considering two decisions of high authority which in the final analysis he found irreconcilable. These were the judgment of the Court of Appeal is England in *Marginson* v. *Blackburn Borough Council* [1939] 1 All E.R. 273 ; [1939] 2 K.B. 426, and the judgment of the High Court in Australia in *Jackson* v. *Goldsmith* (1950) 81 C.L.R. 446. Shorland J. followed *Marginson's* case and declined to follow *Jackson* v. *Goldsmith*.

It may be convenient at this juncture to see what the decisions in these two cases respectively were.

In *Marginson's* case the facts were :

1. A collision took place between a motor bus owned by the Blackburn Corporation and a motor car owned by Marginson in which he was a passenger and which was being driven by his wife.
2. As a result of the collision Marginson was injured, his wife was killed, and the bus ran into and damaged two houses.
3. The owners of the houses brought an action in the County Court against the Blackburn Corporation and Marginson as co-defendants, claiming damages against both in respect of the alleged negligence of the Corporation's servant and of Mrs Marginson, she being Marginson's agent. In their defences the Corporation and Marginson each alleged that the collision was solely due to the negligence of the servant or agent of the other. They served third-party notices on each other claiming indemnity or contribution in respect of the damage to the houses. In addition, the Corporation claimed in its third-party notice damages against Marginson for repairs to its bus.
4. The County Court Judge found in favour of the plaintiffs, holding the Corporation and Marginson

equally liable. The third-party claims were therefore dismissed, including the claim for damages made by the Corporation, because both defendants had been negligent and the Contributory Negligence Act 1945 had not then been passed.

5. Marginson later brought an action against the Corporation in the High Court claiming (a) on his own behalf, damages for personal injuries (b) under the Law Reform Act 1934 as administrator of his deceased wife for the benefit of her estate, damages for the loss of her expectation of life, and (c) under the Fatal Accidents Act 1846 as administrator of his deceased wife, damages on behalf of himself and his daughter.

In its defence the Corporation pleaded (*inter alia*) that Marginson was estopped by the County Court judgment from denying that the negligence of his deceased wife had contributed to the extent of 50 per cent to the collision and the injuries and damages which followed, and this would have the result that Marginson's action wholly failed since his agent had been guilty of contributory negligence. Lewis J. (as he then was) tried this issue as a preliminary question of law and found in favour of Marginson, holding that he was not estopped by the County Court judgment. The Corporation appealed, and the Court of Appeal held :

(a) That because the decision of the County Court Judge on the third-party claim by the Corporation against Marginson for damage to its bus had been that each party was equally to blame, that decision estopped Marginson in his High Court action from maintaining his claim for damages for his own injuries.

(b) But that it did not estop him from maintaining the other two claims, which were not made in his personal capacity but in a representative capacity as administrator of his deceased wife.

In *Jackson* v. *Goldsmith* the facts and ultimate decision were as follows :

1. A motor cycle ridden by Jackson, carrying one White as passenger, collided with a motor car driven by Goldsmith. White was injured.

2. Goldsmith sued Jackson in the District Court claiming damages for repairs to his car, alleging negligence on the part of Jackson. The District Court Judge held that Jackson had been negligent, and that Goldsmith had not, and therefore Goldsmith obtained judgment for the damage to his car.

3. White then sued Jackson in the Supreme Court claiming damages for personal injuries, alleging that the collision was due to Jackson's negligence. Jackson issued a third-party notice against Goldsmith under the Law Reform Act 1946, claiming contribution or indemnity on the grounds that Goldsmith had been guilty of negligence causing or contributing to the collision.

4. Goldsmith pleaded by way of defence that the District Court judgment estopped Jackson from maintaining his claim for contribution or indemnity because that Court had held Jackson to be negligent, and Goldsmith not to be negligent.

The Full Court of New South Wales held by a majority of two to one that Goldsmith's plea of estoppel succeeded. Jackson therefore appealed to the High Court, and his appeal was followed. The High Court held :

(a) That the proceedings in the District Court only determined whether there was any breach by Goldsmith of a duty which he owed to Jackson.

(b) That the proceedings in the District Court did not determine whether there was any breach by Goldsmith of a duty which he owed to White.

(c) That the District Court decision therefore did not estop Jackson from alleging that Goldsmith was guilty of a breach of duty which he owed to White.

The High Court held that *Marginson's* case was clearly distinguishable. Williams J. said in the course of his judgment that since the County Court had found Marginson and the Blackburn Corporation equally responsible for the collision (meaning thereby the decision of the County Court in the third-party claim by the Corporation for damage to its bus) it followed that that issue was the same as the issue sought to be litigated in the High Court—namely whether the Corporation by its driver had been negligent so as to have caused Marginson's injuries.

It will be seen that the decision in *Jackson* v. *Goldsmith* turned on the proposition that the driver of a vehicle on the road owes a separate duty of care to each individual or object within the foreseeable ambit of his operations. If he owed one general duty of care to a class of persons or objects then the issue whether there had been a breach of duty to one specified individual would be identical with the issue whether there had been a breach of duty towards another or others in the same class. To translate the proposition into the terms of *Jackson* v. *Goldsmith*, Jackson's proved breach of duty towards Goldsmith would be decisive of the issue whether he had also committed a breach of duty towards his own passenger. It is settled law, however, since the decision of the House of Lords in *Bourhill* v. *Young* [1942] 2 All E.R. 396 ; [1943] A.C. 92, that a road user owes separate duties of care towards the various persons or objects coming within the sphere of his conduct. The decision in *Jackson* v. *Goldsmith* therefore rests on the basis that the issues arising out of alleged breaches of these separate duties are not identical, so that a judicial determination on one issue does not estop the same parties litigating the same facts when they involve a different duty of care.

It will be remembered that Williams J. in *Jackson* v. *Goldsmith* distinguished *Marginson's* case on the ground that the issues in the County Court and in the High Court involved the same duty or duties of care but as it turned out, there came into existence shortly after *Jackson* v. *Goldsmith* was decided yet another reason for holding that *Marginson's* case was inapplicable to the facts in *Jackson* v. *Goldsmith*. This reason is contained in the well-known Privy Council decision in *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448 ; [1951] A.C. 601, in which it was held that in order to set up the defence of contributory negligence it is not necessary for the defendant to show that the plaintiff owed him a duty of care, because the plaintiff is guilty of contributory negligence if he is proved to have been in breach of the duty of care owed to himself. Applying that principle to *Marginson's* case, the Blackburn Corporation would have succeeded in its claim for property damage against Marginson but for the finding of contributory negligence ; that is, it had been held

guilty, through its driver, of a breach of its duty to preserve the safety of its own property and servants. The judgment in the County Court therefore did not necessarily involve a determination of the separate issue whether the Corporation had committed a breach of its duty of care towards Marginson, and since this was the very issue raised by Marginson when he sued the Corporation for damages for personal injuries, he could not therefore be estopped by the County Court judgment. It would therefore appear that in view of the law as stated in *Nance's* case, there could not have been any question of estoppel in *Marginson's* case, as there was no identity of issues. This was the view of Sholl J. in *Edwards* v. *Joyce* [1954] V.L.R. 216, a case referred to by Shorland J. in his judgment.

Shorland J. also referred to *Bell* v. *Holmes* [1956] 3 All E.R. 449; [1956] 1 W.L.R. 1359, in which McNair J. upheld a plea of estoppel on facts similar to *Jackson* v. *Goldsmith*. A taxi driven by Bell collided with a car driven by Holmes. A passenger in Holmes's car sued both drivers and recovered damages against them, the County Court finding that Bell was five-sixths to blame and Holmes one-sixth. Bell then sued Holmes in the High Court for personal injuries sustained in the collision, and McNair J. held that Bell was estopped by the earlier proceedings from denying that he was five-sixths to blame for his own injuries. This judgment, however, is open to serious objection as an authority. The case was decided at Assizes, and although McNair J. was referred to a head-note or summary of *Jackson* v. *Goldsmith* the actual judgments in the latter case were not available to him. *Jackson* v. *Goldsmith* was directly in point, and McNair J. was therefore deprived of the opportunity of giving proper consideration to the question whether it was distinguishable. Further, no reference seems to have been made in *Bell* v. *Holmes* to the law of contributory negligence as enunciated in *Nance's* case.

In effect, therefore, the accepted concept of separate duties of care seems plainly to support *Jackson* v. *Goldsmith*. Likewise, the decision in *Nance's* case seems to nullify *Marginson's* case. Under these circumstances, how did Shorland J. justify his decision to follow *Marginson's* case and to reject *Jackson* v. *Goldsmith*? His Honour dealt with the difficulty by holding that whether there was one duty of care or several, the test was whether the fundamental facts were the same in each case. His Honour put the matter in the following way, at page 627 of his judgment:

> In any determination as to the negligence of one driver, certain facts relating to his care and management of the vehicle driven must provide the ration for and be fundamental to the decision reached, e.g., that he drove at a speed which in the circumstances was excessive, or that he failed to keep an adequate lookout, or that he drove on his incorrect side of the roadway; and so on.
>
> Such fundamental matters having been put in issue between himself and his opposing driver, it appears to me that the principle of issue estoppel arises as between the two drivers, not merely as to negligence *inter se*, but also as to all such fundamental facts in issue as are the ratio for and fundamental to the finding of negligence.
>
> If thereafter the issue of failing to exercise reasonable care to avoid coming into collision with the opposing vehicle should again arise on third-party proceedings between the two drivers in respect of that duty as owed to a passenger, it appears to me that the fundamental facts which were previously found against a driver, and found to constitute negligence in respect of the duty owed to the opposing driver, must, either because the duty is the one identical duty owed to several, or because the several duties fall to be performed by the one series of actions and measures, establish negligence in the duty owed to the passenger.

In reaching this conclusion his Honour relied upon *Hoystead* v. *Federal Commissioner of Taxation* [1926] A.C. 155, in which the Privy Council confirmed previous decisions to the effect that the principle of estoppel was not confined to the decision alone, but extended to any point which was in substance the ratio of and fundamental to the decision. In this case the appellant trustees had appealed against an assessment for the 1918-1919 tax year and the High Court decided in their favour that the beneficiaries whom the appellants represented were "joint owners" of property within the meaning of the taxing statute. This finding entitled the appellants to claim certain deductions which otherwise would not have been allowable. Then the Commissioner assessed the appellants in the following year on the basis that their beneficiaries were not "joint owners". The appellants again appealed and the Commissioner contended that no estoppel arose out of the previous proceedings for the reason (*inter alia*) that he had erroneously admitted the status of the beneficiaries as "joint owners" in those proceedings. The Judicial Committee held that whether admitted or not, the point had been determined in the earlier proceedings and that since it was fundamental to the earlier decision, which had been between the same parties, the Commissioner was estopped from litigating the point again. It is of interest to note, however, that in the second proceeding the Commissioner was asserting the same legal right as in the first proceeding. His duty under the taxing statute was to assess the estate income in each year in which it was derived. The cause of action in each proceeding was different, but the same statutory power was being invoked in respect of the same estate income, and therefore, it is submitted, the Commissioner was claiming under the same purported legal right on each occasion. The point is well exemplified in *Outram* v. *Morewood* (1803) 3 East 346, a case relied on by the Judicial Committee in *Hoystead's* case. In *Outram* v. *Morewood* it was held that a decision as to title in an action of trespass was conclusive as between the same parties in a subsequent action of trespass involving the same right of possession.

The principle of issue estoppel formulated in *Hoystead's* case might well be limited, in its application, to cases where one party is relying in the subsequent proceedings on the same legal right.

In the case of *New Brunswick Railway Co. Ltd.* v. *British and French Trust Corporation* [1938] 4 All E.R. 747; [1939] A.C. 1., the House of Lords rejected a proposed extension of the doctrine in *Hoystead's* case. In the *New Brunswick* case the appellant company had issued a series of debentures. The respondent had sued the appellant previously on one of the bonds and the appellant had let judgment go by default. The respondent later sued the appellant on a number of bonds of the same series and the appellant raised a defence based on the construction of the wording of the debentures. The respondent claimed, on the authority of *Hoystead's* case, that the appellant was estopped from raising this defence as the point of construction had been decided against the appellant, even though by default, in the previous action. In *Hoystead's* case the point decided against the Commissioner had also not been argued, the Commissioner having admitted its validity. The House of Lords held that there was no estoppel in the *New Brunswick* case. Lord Maugham said, at page 21:

> The issue of construction in the second action could indeed

> be proved in the second action to be *similar* to that decided in the first; but it related to a different cause of action based on other bonds and could not be asserted to be the same issue.

Lord Romer made it clear, in the course of his judgment, that the principle in *Hoystead's* case could not prevent a party litigating, not the same question, but a question that is merely substantially similar to the one that has been determined as part of the earlier decision. Although more than one of the learned Law Lords stressed the fact that the judgment in the earlier case had gone by default, and that estoppel would not readily operate in such circumstances, the *New Brunswick* decision really proceeded on the basis that in the second action the alleged legal rights of the respondent had a different origin. The rights and liabilities flowing from one debenture bond may be exactly similar to, but are not the same as, those flowing from another debenture bond of the same series.

The *New Brunswick* case therefore appears to be direct authority against the conclusion reached by Shorland J., that questions of fact fundamental to the first decision are conclusive as between the same parties in the second action, notwithstanding that different legal rights are being litigated. Apart from authority, however, the approach favoured by Shorland J. seems doubtful in principle. For example, suppose that one motorist sues another in respect of a collision and each is found 50 per cent to blame, and then a passenger sues both motorists for damages for personal injuries. The passenger may be a young child or an adult with some physical infirmity which would cast on his driver an abnormally high duty of care. He may on the other hand have been so careless of his own safety as to warrant a finding that he was partly to blame for his own injury Under such circumstances it is surely open to the other driver to assert that the original finding of 50 per cent responsibility against him is of no relevance in the passenger's claim. Shorland J. apparently met this difficulty by holding that the estoppel operates, not as to the assessment of responsibility, but as to any decision of fact relating to that driver's conduct on the occasion in question. For example, given a finding of negligent driving causing injury to the plaintiff, the Court would disarticulate the corporate structure of liability and detach the factual finding that the defendant had failed to give way to the right. It would then treat that isolated fact as decisive against the defendant in later proceedings between the same parties arising out of the same collision. The flaw in this reasoning, it is submitted, lies in the supposition that it is the happening of the accident which is the basis of both actions. The gist of each action is not the occurrence of the accident, but the harm suffered by each claimant. A finding of fact that one driver failed to give way to the right does not become the fundamental basis of the decision, or the ratio of the decision, until it is coupled with a finding that the failure to give way caused the injury complained of. Up to that point it is merely a fact established by the evidence but possessing no legal quality. As was said by Dixon J. (as he then was) in *Blair* v. *Curran* (1939) 62 C.L.R. 464, at page 532:

> But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion.

In the final analysis, the question whether issue estoppel applies in a negligence case seems plainly to depend on whether the subject-matter of the earlier litigation involved wholly or in part a different duty of care. In the ordinary running-down case the distinction may be purely academic, as it was in *Jackson* v. *Goldsmith*, but the law clearly maintains that distinction, and holds that the question whether A's conduct is in breach of his duty to B is a different question from whether his same conduct amounts to a breach of his duty to C.

It has been suggested by Dr Glanville Williams, and it seems implicit in the judgment of Shorland J., that for reasons of practice and convenience it is unsatisfactory to have the same set of facts re-litigated, possibly with a different result, when the ultimate questions for determination are virtually identical. No one would disagree with this criticism. The doctrines of *res judicata* and issue estoppel are founded on the policy of the law that there should be an end to litigation, and when two drivers involved in a collision have had their respective liabilities determined in litigation between themselves it seems unsatisfactory from the practical point of view that substantially the same issue becomes once more at large if they become defendant and third party in a later action brought by a passenger. But such criticisms may leave out of account the dominant influence exercised over modern negligence litigation by the contract of insurance. The wide application of issue estoppel envisaged in *Clyne* v. *Yardley* would raise serious difficulties in everyday practice from the insurance point of view. Two motorists who litigate a minor claim for property damage in the Magistrates' Court would be finally bound by that decision for all purposes of contribution or indemnity when sued by a passenger for many thousands of pounds. One or both drivers might not be comprehensively insured and their indemnifiers under Part V of the Transport Act would find themselves finally committed by proceedings over which they had no control. Alternatively, the passenger's claim might be litigated first and one motorist, in proceedings not controlled by him, might find his liability for property damage pre-determined when he is later sued by the other motorist and is uninsured. His indemnifiers under the Transport Act might even admit liability to the other motorist in respect of the passenger's claim and thus leave him without a defence in the subsequent proceedings. Other difficulties and injustices of like nature can readily be postulated. Such considerations may be outside the realm of legal theory but they provide some measure of practical justification for accepting *Jackson* v. *Goldsmith* and rejecting *Clyne* v. *Yardley*.

In conclusion, it is therefore submitted:

(a) That *Marginson* v. *Blackburn Borough Council*, even if decided correctly at the time, would now be decided differently in view of *Nance's* case.

(b) That in any event, *Marginson's* case was rightly distinguished in *Jackson* v. *Goldsmith*.

(c) That *Jackson* v. *Goldsmith* was correctly decided, and that *Nance's* case further supports its correctness.

(d) That *Bell* v. *Holmes* and *Clyne* v. *Yardley* were wrongly decided, because in both cases the issue in the later proceedings was merely similar to, and not precisely the same as, the issue previously determined.

P. T. MAHON.

LEGAL ANNOUNCEMENTS

Concluded from p. i.

SHELL BURSARY

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N.Z. LAW REVISION COMMITTEE

At the 43rd meeting of the New Zealand Law Revision Committee those present were the Attorney-General, the Hon. J. R. Hanan; the Solicitor-General, Mr H. R. C. Wild Q.C.; the Secretary for Justice, Dr J. L. Robson; the Parliamentary Law Draftsman, Mr D. A. S. Ward; Sir Wilfrid Sim Q.C.; the Hon. H. G. R. Mason Q.C.; Mr H. E. Evans Q.C.; Professor I. D. Campbell; and Messrs H. J. Butler, J. P. Kavanagh, and A. C. Stephens.

Occupiers' Liability.—Mr Justice Cleary was present to assist the Committee during the discussion on the suggested legislation relating to occupiers' liability.

The Committee considered a report prepared by the Department of Justice in consultation with the Faculty of Law of Victoria University of Wellington as to the desirability of adopting in New Zealand the provisions of the Occupiers' Liability Act 1957 of the United Kingdom. The Committee agreed in principle that such legislation should be introduced, but considered certain modifications of the United Kingdom statute suggested in the report.

It was considered that the distinction between occupancy duty and activity duty was irrelevant. It was agreed that, in the absence of an express term in a contract, the claim should be in tort and not a claim based on an implied term in a contract. Some clarification in drafting was suggested in relation to s. 5 (3) of the United Kingdom statute.

Juries: Choosing a Foreman.—The Committee approved a suggestion that a jury should be given an opportunity to retire to choose their foreman.

Law Reform (Testamentary Promises).—The Committee considered a draft cl. 2A prepared by the Law Draftsman to give effect to a recommendation of the Committee at a previous meeting that, for purposes other than the computation of the estate duty payable in respect of the deceased's estate, any amount awarded by the Court should rank as a legacy unless the Court should order it to rank as a debt, and that property given to the claimant under the Court order should be deemed to be a devise or bequest.

A reply by the Chief Justice to an inquiry by the Committee relative to a suggestion that the procedure for bringing claims be by way of originating summons showed that the Judges appeared to oppose the proposal. It was decided that the claims should be brought, as at present, by way of action, but that, with every writ of summons, the plaintiff should file a notice of motion for directions as to service, as if the motion were filed with an originating summons.

The Committee recommended that a draft Bill be prepared to include its recommendations, and that the draft be circulated to members for comment.

Shipping and Seamen Act 1952.—The Committee considered a suggestion for an alteration to s. 460 of the Act to bring the limitation of shipowners' liability in case of loss of life, damage to goods, etc., in the sphere of international shipping into line with the legislation of other countries. The Department of Justice was asked to examine the question of the limitation of liability imposed on vessels not engaged in international trade, with particular reference to lighters and barges, in consultation with the Marine Department and any other interested parties.

Architects' Liability for Negligence.—The Committee considered a suggestion by the Consumer Service that architects should be liable for negligence for the wrongful issue of certificates of completion to contractors. It was the view of the Committee that this form of negligence was not a matter which could be dealt with by legislation.

Comprehensive Motor Vehicle Insurance.—The Committee considered a suggestion that accidental omission to renew a driver's licence should not invalidate claims under comprehensive motor vehicle insurance policies. The matter was referred to the appropriate insurance company interests for consideration, and any action was deferred until their reply had been received.

Hire Purchase Agreements Act 1939.—The Committee considered a proposal to adopt in New Zealand legislation along the lines of s. 8 (2) and (3) of the Hire Purchase Act 1938 (U.K.). The Committee's attention was drawn to a recent Act passed in Victoria which might be useful in determining what the Committee's recommendation on the matter should be. It was agreed that the matter be deferred for further consideration and that the Department of Justice circulate among members copies of the United Kingdom and Victorian legislation and a draft of a possible clause to cover the point raised in the suggestion. The Minister instructed the Department to raise the matter at the next meeting.

The suggestion for amending the Traffic Regulations raised in conjunction with this matter was also considered and the Department was requested to consult such other Departments as it thought fit and determine what action, if any, should be taken.

Chattels Transfer Act 1924.—The Committee adopted a suggestion for an amendment of the statute to avoid the necessity for the swearing of an affidavit verifying the execution of a memorandum of satisfaction by a company or body corporate.

Municipal Corporations Act 1954.—The Committee considered a suggestion that an amendment be made to the Municipal Corporations Act 1954 in the light of the decision in *Woolworths (N.Z.) Properties Ltd.* v. *Mt. Wellington Borough* [1961] N.Z.L.R. 445. The Committee agreed that the Law Draftsman be asked to prepare a draft of a suitable amendment after consultation with the Registrar-General of Land.

Disposal of Civil Jury Cases.—The Committee agreed that the speedier disposal of jury cases be referred

to the Department of Justice to set up a committee to look into the question and report. It was suggested that the New Zealand Law Society be approached to nominate representatives on the committee who should be drawn from large and small district societies.

A suggestion was made that the committee should also review any other matters relating to the machinery of the Courts that needed revision (such, for example, as abolition of Supreme Court districts) The Committee did not consider those matters as being as important as the problem of disposing of jury cases more efficiently, but thought that the proposed committee should go on to consider other matters after it had reported on the primary one. The Committee recommended that investigation of the disposal of jury cases should be undertaken immediately.

LEGAL LITERATURE

Munkman's Damages for Personal Injuries and Death, 2nd. ed., by JOHN H. MUNKMAN, LL.B., 1960: London: Butterworth and Co. (Publishers) Ltd.: pp. xxvii and 198. Price 40s.

For those whose Court practices take seed in the hot housey atmosphere of the Library, to flourish and bud before Judge Alone and thence to reach full flower "across the road", the Second Edition of *Munkman's Damages for Personal Injuries and Death* will remain as inviolate as any of the Bronte sisters. For those whose lot it is to tangle with the 12, or tilt with the five figure claim, or savour the well-calculated "payment in", the Second Edition of *Munkman* will make refreshing and stimulating reading.

General principles are stated clearly and succinctly, and the text includes liberal but apt references to the leading cases. The author has classified or categorised various types of injuries, and then selected a fair sample of cases, (mostly decided in the fifties) to indicate the extent and range of damages awarded. He has also included a number of cases where awards have been varied (in both directions) by the Court of Appeal.

The value of this work in New Zealand, in the absence of a New Zealand pilot of cases, lies rather in its treatment of general principles than its treatment of damages in the sample cases. One illustration may give some bite to the foregoing generalisation. It is considered that the author's views on the proper treatment of "the contingencies of life" are entitled to the greatest respect.

> "It is suggested that, where the facts of the case do not indicate some special individual risk, the general contingencies of life ought not to be rated too high, and in the case of a healthy person no allowance at all ought to be made, except as shown in tables of average expectation of life".
>
> "After all, the Court is not compelled to exercise its imagination for the benefit of a wrong-doer".

On the other hand, the selected cases are of little "educational" value in this country. For, as the author says in the Preface to his First Edition, "Juries are allowed to be capricious, but Judges are not". This generalisation would no doubt find fairly general acceptance among defendants' counsel. It is of some interest to note, however, that cases involving the loss of sight in one eye are generally valued by United Kingdom Judges from £2,000 to £2,500—it is felt that awards by juries in this country for this type of injury are in the same range. Whereas it is submitted that there are clearly marked differences in most other fields which render suspect most of the sample cases, e.g. loss or virtual loss of one leg or one arm (U.K. £3,000 to £6,000; N.Z. £6,000 to £9,000). Loss of two legs by a shunter (1958 award by Havers J. £10,500; 1959 award by Christchurch jury £16,700). No doubt a major reason for the apparent differences in awards would be the different wage structures in the United Kingdom and New Zealand. Again, it could be contended that juries are more liberal in their treatment of pain and suffering and loss of enjoyment of life. But these differences could not explain a 1953 award of £3,000 for a midget whose right arm was bitten off by a tiger (*Horton* v. *Chippenfield's Circus*). Perhaps this was truly a case of *de minimis non curat lex*.

The Second Edition of *Munkman* should find a place in the libraries of all firms whose Court practice involves accidents on the road and in the factory.

J.D.D.

Movable Fee Simple—"A movable fee simple (lot meadows) is an estate rarely encountered. 'Flying' freeholds—the right to have part of a building in an air space above the ground—are commonplace compared with the novelty of a movable fee simple. The Land Registry had been consulted about this kind of thing at the time of my visit. It concerned meadowland on the north bank of the River Thames or Isis in the parish of Yarnton, Oxfordshire. The title was supported by a statutory declaration that read like a page from 'Alice in Wonderland'. It dealt with the allotment of strips of meadowland, determined by 13 cherry-wood balls, each having a different name, quaint names like William of Bladon and Waterey Molly, to mention two of them. The ownership for one year of each strip is governed by the drawing of the 13 balls. No doubt the registry will cope with this unusual situation with their customary phlegm".—(1961) 105 S.J. 486.

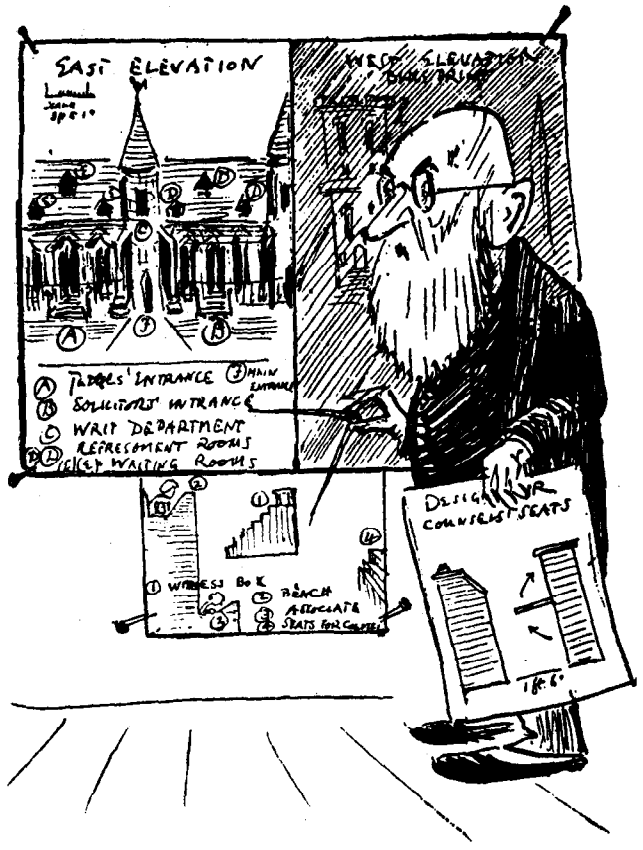
Mistaken Identity—"There was once a newly appointed London stipendiary magistrate, who on arriving at his court for the first time, inquired his way about the building of the policeman at the door and was directed to the cells"—RICHARD ROE in (1961) 105 S.J. 505.

FORENSIC FABLE

By "O"

The Distinguished Architect and the Palace of Justice

There was Once a Distinguished Architect who Won an Open Competition for the Best Design for a Palace of Justice. He was an R.A. His Plans Carried Out the Best Architectural Traditions. The Palace of Justice, which Cost Several Millions, was in the Norman-Jacobean-Early-English Style. Each of the Thirty Courts was Extremely Lofty. The Gallery for the Waiting Jurors was Approached by a Tortuous Stairway. The Jury-Box was a Structure into which the



Twelve Good Men and True could Just Fit if they Held their Breath. The Judge's Seat was Half-Way up the Wall. The Seats for Counsel were so Arranged that they Could not Get In or Out without Injuring Each Other; and the Desks so Sloped that their Briefs and Papers Fell to the Floor unless Held on by Main Force. The Witness Occupied a Box so Far Removed from both Counsel and the Jury that the Witness had to Shout his Answers if he was to be Heard. The Doors Clapped Noisily when they were Opened or Shut. The Floors Contained Concealed Steps down which the Unwary Fell with a Crash. Everybody Agreed that the Palace of Justice was a Miserable Failure. When a Great Many Years had Gone by the Palace of Justice, owing to some Defect in its Patent Heating Apparatus, was Burned to the Ground. There was Universal Rejoicing, for it was Felt that now At Last the Errors of the Distinguished Architect Could be Put Right. Were they? They were Not. The Authorities Unearthed the Distinguished Architect (now in a State of Senile Decay) and Paid him an Immense Sum of Money to Reproduce his Old Plans. Thus the New Palace of Justice Proved to be the Twin of its Predecessor, except that the Courts were Ten Feet Higher and the Judge was Placed Still Nearer to the Ceiling.

Moral—*It Might be Worse.*

BILLS BEFORE PARLIAMENT

The Bills now before the House are as follows:

Agricultural and Pastoral Societies Amendment
Apprentices Amendment
Births and Deaths Registration Amendment
Child Welfare Amendment
Chiropractors Amendment
Coal Mines Amendment
Cook Islands Amendment
Criminal Justice Amendment
Dairy Production and Marketing Board
Education Amendment
Engineering Associates
Estate and Gift Duties Amendment
Family Benefit (Home Ownership) Amendment
Gas Industry Amendment
Government Railways Amendment
Hydatids Amendment
Land and Income Tax Amendment
Land and Income Tax (Annual)
Land Settlement Promotion Amendment
Land Transfer Amendment
Law Reform (Testamentary Promises) Amendment
Lincoln College
Local Elections and Polls Amendment
Magistrates' Courts Amendment
Maori Education Foundation
Maori Social and Economic Advancement Amendment
Massey College
Mental Health Amendment
Mining Amendment
Monetary and Economic Council
Motor Spirits Duty
Nature Conservation Council
New Zealand Army Amendment
Penal Institutions Amendment
Poultry Amendment
Public Revenue Amendment
Quarries Amendment
Republic of Cyprus
Social Security Amendment
Staff Superannuation (Private Member's Bill)
State Advances Corporation Amendment
Transport
Universities
University of Auckland
University of Canterbury
University of Otago Amendment
Victoria University of Wellington
War Pensions Amendment
Workers' Compensation Amendment.

STATUTES ENACTED

Imprest Supply
Imprest Supply (No. 2)
Imprest Supply (No. 3)
International Finance Agreements

Is There Nothing New?—"There is now less flogging in our great schools than formerly, but then less is learned there; so that what the boys get at one end they lose at the other."—Dr SAMUEL JOHNSON (1775).

TOWN AND COUNTRY PLANNING APPEALS

New Plymouth Savings Bank v. New Plymouth City Council.

Town and Country Planning Appeal Board. New Plymouth. 1961. 6 January.

Undisclosed District Scheme—Comes within definition of "operative and proposed district schemes"—Right of local authority under undisclosed district scheme to require provision of off-street parking space in new building or payment in lieu—Town and Country Planning Act 1953, ss. 2, 35A.

Two appeals both relating to the same subject-matter which were, at the request of counsel, heard together.

L. M. Moss, for the appellant.
J. P. Quilliam, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). The first appeal (No. 71/59) purports to be made under s. 38 of the Act, the second (No. 227/60) purports to be made under ss. 26 and 38. For reasons hereinafter set neither appeal was correctly intituled and the question at issue really fell for determination under s. 35A (5).

The salient facts may be set out as follows:

In 1957-1958 the appellant, having in contemplation the erection of a building for offices in Devon Street, approached the Council in regard to the question of how much site coverage would be permitted. The Council's scheme was then an undisclosed scheme and under the proposed Code of Ordinances only a 75 per cent coverage was permitted. It is unnecessary to refer in detail to the negotiations that took place or the correspondence that passed between the parties. It is sufficient to state that the Council having regard to the topography of the site, agreed to allow an 85 per cent coverage.

The appellant called for tenders for the erection of the building and a tender having been accepted, the contractors commenced work in October 1958. No application for the requisite building permit was made until 3 March 1959.

At the hearing the appellant endeavoured to establish that in October 1958 plans and specifications were lodged with the Council although no application for a permit was made but this was denied by the respondent.

The only evidence that the plans and specifications had been lodged in October 1958 as claimed was that of the secretary of the contracting company who stated in evidence-in-chief: "I lodged at the engineer's office copies of the completed plans and specifications," but under cross-examination he admitted that he had not personally lodged the plans as claimed but only that he was aware that they had been so lodged. The person who had actually lodged the plans was not produced and no explanation of the failure to adduce primary evidence on this point was offered. Against this the building inspector stated positively that the plans were not produced to him until 3 March 1959 when the application for a building permit was received. That application was not filed until after the building inspector, having become aware that building operations were in progress, had telephoned the contractor and drawn attention to the fact that plans and specifications had not been filed and no application for a building permit had been made. An officer of the City Engineer's Department, through whose hands in the normal way all such plans and specifications pass, stated that the first time he saw these particular plans and specifications was on 4 March 1959.

Bearing in mind that the onus of proof lies on the appellant, the Board holds that the date on which plans and specifications were lodged and an application for a building permit made was for the purpose of this decision, 3 March 1959.

On 24 March 1959 the appellant was informed by letter that the following resolution had been passed by the Council.

> "That in connection with the application of the New Plymouth Savings Bank for a permit to erect new premises in Devon Street West and modify its adjoining premises for its own use and use for shops and lettable office space the Council resolves that in accordance with the provisions of Ordinance 23 of the New Plymouth City Council Central Area District Planning Scheme the Owner shall provide for the off-street parking of five (5) motor vehicles:
>
> Provided however that the Council being of the opinion that the provisions of subs. (2) of s. 35A of the Town and Country Planning Act 1953 are applicable thereto will, if required by the owner, instead of enforcing the said provisions accept payment of the sum of five hundred pounds (£500) such payment to be made before the permit is issued."

Subsequently it was ascertained that, having regard to the number of proposed occupiers, off-street car parking for only four motor vehicles was required and the payment in lieu of £500 was reduced to £400.

The appellant is by reason of the provisions of s. 35A (5) clearly entitled to apply to this Board to determine the reasonableness of the amount claimed but the appellant's case discloses no right of appeal under s. 38

That section under subss. (8) and (10) gives a right of appeal against a refusal or a prohibition. In this present case there has been no refusal and no prohibition of anything. Similarly s. 26 gives a right of appeal against the disallowance of an objection made by an owner or occupier of property affected against the scheme. The appellant's case was directed to the submission that the Council had no power to demand the payment asked for. Even it it could be contended that the appellant was also appealing against any provision requiring parking space being included in the scheme then such a contention is untenable.

The Legislature clearly contemplated that town-planning schemes should contain provisions for off-street parking spaces. (See the second Schedule to the Act, the Town and Country Planning Regulations 1960 Reg. 15 (2) and the Model Code of Ordinances in the Fourth Schedule to the regulations under the heading Ordinance VI Clause 2. Mr Porter, a town-planning consultant called to give evidence on behalf of the appellant, agreed that provision for off-street parking space for private vehicles was a necessary concomitant of any scheme and in accord with town-planning principles. If it is necessary for it so to do the Board has no hesitation in finding that the provision made in the Council's scheme requiring off-street parking space to be provided is in accord with town-planning principles and must stand as part of the scheme.

Turning to the real questions at issue in this appeal, they are as follows:

(a) Had the Council any legal right to require payment of any sum in lieu of parking space and

(b) If it had that right is the amount claimed reasonable?

On the question of the Council's right to ask for the payment it is established that at the time the Council passed the resolution quoted *supra* its scheme was an undisclosed scheme as defined by s. 2 of the Act. Counsel for the appellant in effect submitted that the Council could not invoke s. 35A until its scheme had reached the stage of being a proposed district scheme. This stage was reached on 21 September 1959 some six months after the resolution fixing the payment in question was passed.

He argued that because s. 35 of the Act relating to specific departures from the provisions of a scheme can be invoked only in respect of operative and proposed district schemes by some rule of construction which the Board finds itself unable to follow, s. 35A also relates to specific departures from operative and proposed district schemes and must be read in conjunction with and as either ancillary to or in some way integrated with s. 35—and that accordingly the words "a district scheme" in s. 35A must be construed as having reference only to "operative and proposed district schemes."

It is unnecessary to strain for some artificial or implied definition of the words "district scheme". The Act itself provides a definition in s. 2 as follows:

> "District scheme means a district scheme prepared or *in course of preparation* under Part II of this Act."

Section 35A (2) commences:

> "Where a district scheme requires a parking area."

Section 35A was imported into the Act by the 1957 Amendment Act. Before the passing of the Amending Act s. 33 dealing with departures referred only to "Operative Schemes". The words "proposed district scheme" were put in under the Amending Act (s. 22). If it had been the intention of the Legislature that ss. 35 and 35A were to be read together it would have been a

(Continued on p. 256)

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Drunk in Charge—The case of *John* v. *Bentley* reported in the *Solicitors' Journal* of May 5 1961, raised interesting possibilities. Three men, one of whom was the respondent, set out in a borrowed motor car to visit the respondent's employers with the sole purpose of getting dead drunk. They arranged that should they succeed in this object then they would either stay the night at a public house or find some other transport to take them back to their homes. However, the three gentlemen succeeded in their plan, but late in the evening the motor vehicle was found outside the home of the respondent and at the back of the car lay both gentlemen grossly intoxicated, but neither of them possessed the ignition keys. The medical evidence was that no men had ever been seen so drunk. The respondent was convicted before the Justices for being in charge of a motor vehicle while under the influence of liquor. Quarter Sessions allowed an appeal against the conviction on the ground that there was no likelihood of the appellant driving because of his condition. The case went even further and the Court of Appeal, Lord Parker C.J. delivering judgment, said that while he might not have come to the same conclusion as Quarter Sessions there was evidence on which they could have come to that conclusion and it could not be said to be an unreasonable conclusion. Another interesting facet of this case is that it was the Crown that appealed to the Court of Appeal against the acquittal of the respondent.

Power to Order Retrial—The much-debated question whether the Court of Criminal Appeal should have the power to order a retrial was once again discussed at a public debate, organised by *Justice* on 29 March. Although no vote was taken at the close of the debate, the majority of the meeting appeared to be clearly in favour of the motion. Professor A. L. Goodhart, K.B.E., Q.C., in opening the debate, stressed that plainly guilty men sometimes had their convictions quashed, and public comment on a quashed conviction was inhibited by the danger of defamation. The proviso to s. 4 of the Criminal Appeal Act 1907 was an insufficient safeguard, since it could be applied only where the Court was satisfied that the jury would inevitably have reached the same verdict despite the technical error at the trial. Professor Goodhart reminded the audience that Lord Goddard had expressed himself in favour of the proposal, and then went on to say that it was fallacious to argue that the principle that a man should not stand in double jeopardy would be infringed since the first trial was a nullity. Mr Edward Clarke Q.C. took the view that the Court of Criminal Appeal was exercising its unfettered discretion to apply the proviso satisfactorily and there was no justification for saying that in those few cases where a conviction was quashed the prisoner was, in fact, guilty. Speakers from the floor required to know why there should be a power of retrial in British territories overseas but not at home; retrial took place when the jury disagreed, and the innocent man should have nothing to fear from a retrial, particularly since an acquittal by a jury was a preferable verdict to a quashing of a conviction. Lord Tucker, summing up as chairman, drew attention to the unanimouse recommendation of the Committee over which he presided in 1954, in favour of a second trial where fresh evidence was discovered; in such cases, he maintained, the case for a second trial was unanswerable. Lord Tucker added that it seemed to him illogical to say that if a man's first trial was unfair he should go scot-free (the Court quashing the conviction) rather than be given a second trial, and he, like Professor Goodhart, considered the view of a man being put in peril twice to be a complete misconception and fallacy. Many New Zealand lawyers will feel that there should be a right to appeal on the part of the Crown in criminal cases where the findings of a jury are obviously wrong. The old cliche that " It is better that a thousand guilty men should go free rather than that one innocent man should be punished " is becoming somewhat worn at the seams.

Patent of Nobility—The Canadian Bar Association recently decided to petition the College of Arms for a grant. An officer was appointed to gather together the historical data relating to the early beginnings of the Bar in Canada. Why should not the New Zealand Bar follow suit ? When one studies the shields of the four English Inns of Court, the letters patent to the Worshipful Society of Apothecaries, the Worshipful Company of Fishmongers, and other elite groups, surely we qualify ? The Brewers received their proper recognition in 1468, the Tallow Chandlers 12 years earlier and the Worshipful Company of Barbers in 1451. It would be also pleasurable to recognise a fellow member across the tables by the peculiar emblazonment on his breast pocket !

And perhaps we could adopt the words :

" Here's tae us
Wha's like us
Damn few
And they're a deid ".

Who's Who in Sin—In the case of *Shaw* v. *The Director of Public Prosecutions* [1961] 2 All E.R. 446, the appellant demonstrates an ingenuity, which has been rewarded with convictions and gaol sentence. Mr Shaw published a magazine called *Ladies' Directory*. It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures and also indicating the type of activities in which the advertisers were prepared to indulge. Mr Shaw received fees from the prostitutes, whom he canvassed and advertised and the prostitutes paid for advertising out of the earnings of their ancient profession, some of them obtaining customers as a result of the advertising. Copies were also on sale. Mr Shaw was convicted before a jury under s. 30 (1) of the Sexual Offences Act 1956 in that he was paid by prostitutes for goods and services supplied. The decision of the Court of Appeal confirming this and other offences was confirmed by the House of Lords. The dissenting judgment of Lord Reid is a very fine judgment indeed. His final comment on his perturbation that the view that a jury be considered " '*censor morum*' is one that is inconsistent with the function of juries ", a comment which will be sympathetically received by others holding judicial office in this country.

TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 254.*)

simple matter to have said so. Similarly if it had been intended that the words "a district scheme" in s. 35A were to be construed as applying only to "Operative and Proposed District Schemes" clearly those words would have been used.

The Board holds that as at 24 March 1959 the Council had "a scheme in the course of preparation", coming within the definition of "a district scheme" and therefore it had statutory authority to accept a payment in lieu of the provision of parking space. No evidence whatever was offered to support the submission that the amount of the payment asked for was unreasonable or excessive. The Board determines that the amount to be paid by the appellant to the Council is £400.

The appeal is disallowed.

Appeal dismissed.

Canterbury Club Incorporated and Others v. Christchurch City Council.

Town and Country Planning Appeal Board. Christchurch. 1961. 23 February.

Proposed District Scheme—Zoning—Land zoned as "reserve for National, Civic, Cultural and Community purposes (civic)"—Relationship between zoning and designation—Owner entitled to have land zoned as residential, commercial or industrial, designation of purpose proposed for it then to be attached—Town and Country Planning Act 1953, s. 21—Town and Country Planning Regulations 1954, (S.R. 1954/141) Reg. 17 (2) and Third Schedule.

Appeals under s. 26 of the Town and Country Planning Act 1953. As they both related to the same provision in the respondent Council's proposed district scheme, they were taken together. The first-named appellant was the owner of a property containing one acre, being Town Sections 403, 404, 407 and 409, situated at the corner of Worcester Street and Cambridge Terrace, Christchurch. The second-named appellant was the owner of parts of Town Sections 411, 413, 415, 416, 417 and 418, being Nos. 292-294 Montreal Street and Nos. 48, 52, 56 and 60 Worcester Street, Christchurch. Under the Council's proposed District Scheme, as publicly notified, the block bounded by Worcester Street, Cambridge Terrace, Hereford Street and Montreal Street was zoned as "reserve for national, civic, cultural and community purposes (civic)". Both appellants objected to this zoning and when their objections were disallowed, the appeals followed.

A. C. Perry, for the first appellant.
Alpers, for the second appellant.
W. R. Lascelles, for the respondent.

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

1. This purported zoning of the block under consideration relates to a proposal to erect a Town Hall and Civic Centre on this block. The Board desires to emphasise that it is not called upon to enter on an enquiry as to which of various alternative sites is best suited for the Civic Centre of Christchurch. That decision is a domestic matter to be determined by the Christchurch City Council. In these appeals, the Board is only concerned to enquire whether or not the proposal to site the Town Hall and Civic Centre on the block under consideration is contrary to town-and-country-planning principles and practice. On the evidence, the Board is satisfied that the site is intrinsically suitable for the designated purpose. The Board is not concerned to give any decision on whether it is the best available site, but only whether it is a suitable site. On the evidence the Board has no hesitation in holding that the site is suitable for the designated purpose.
2. Submissions were made by counsel for the appellants that the Council had fallen into error in purporting to zone this land for the designated purpose. Put shortly, their submission is that zoning in town planning is one thing, designating proposed reserves, etc., is another. The Board agrees with this submission. Section 20 (1) of the Act provides that in preparing a scheme, the Council may relate it to all or any of the matters specified in the Second Schedule to the Act. The Second Schedule to the Act, under the heading "Matters to be dealt with in district schemes" reads:

"1. The zoning or definition of areas to be used exclusively or principally for specific purposes or classes of purposes.

. . .

"3. The designation of reserves and proposed reserves for national, civic, cultural and community purposes."

The Town and Country Planning Regulations 1954, which were the Regulations in force when the respondent Council's Scheme was prepared, provide in Reg. 17 (2) "every scheme statement shall follow generally the form set out in the Third Schedule hereto". Turning to the Third Schedule, this sets out a model form of scheme statement. Clause 8, Part I, on p. 28 reads: "To provide over the planning period adequate space for the outdoor recreational needs of the various age groups, provision must be made in advance of subdivision. *Within some zones*, provision requires to be made for sites for public buildings and other civic and administrative uses and for recreation."

The Council, in its own scheme statement on p. 10, Cl. 8, follows exactly the words set out in the passage quoted *supra* from the Regulations. The 1954 Regulations have been revoked by the Town and Country Planning Regulations 1960, and although those Regulations do not follow exactly the wording of the 1954 Regulations, nevertheless the Third Schedule to the 1960 Regulations indicates a distinction between "zoning" and "designation". Part III of the Third Schedule, Cl. 3 (1) reads: "General Control. The areas within the district that are zoned for rural, residential, commercial and industrial purposes, etc". Part V, Cl. 2, reads: "Land or buildings owned or proposed to be acquired by public authorities for national, civic, cultural and community purposes have been shown as so reserved in accordance with the notations assigned to them on the district planning map". In this category are, *inter alia*, civic buildings.

Turning now to the Appendices to the scheme statement, as set out in the Regulations, Appendix I, referring to Part III, Cl. 3 (1), of the scheme is headed "General Description of Areas Zoned for Particular Purposes"; Appendix II is related to land proposed to be acquired "for reserves, open spaces and other uses". It will be seen, therefore, that the Act and the Regulations draw a distinction between "zoning" and "designation". The Board considers that the proper method to be followed in the preparation of a town-planning scheme is, broadly speaking, that the local authority concerned should first determine the appropriate zoning, i.e., rural, residential, commercial or industrial, of the whole area then, within those zones, the district map should indicate by appropriate notation the location of public reserves, hospitals, schools, etc., and also proposed reserves, proposed motorway, proposed civic centre, etc. It might appear that this distinction between "zoning" and "designation" is somewhat technical, or academic, but this is not the case. The owner of any property which it is proposed to take at some future unspecified date for some public purpose is entitled to have his land zoned in its appropriate category, i.e. residential, commercial or industrial as the case may be. This is so because the appropriate zoning of his land, if it were to be taken for some public purpose, is a matter of importance when claims for compensation come to be considered and the point of time at which this zoning should be done, is when the scheme is in its proposed stages.

3. The Board accordingly directs that the Council's scheme is to be amended as follows:
   (a) The Canterbury Club's property to a depth of two chains from the Cambridge Terrace frontage is to be zoned Commercial B; the balance of its land is to be zoned Residential C.
   (b) The whole of Mrs Clifford's property is to be zoned Residential C.

   An appropriate notation is to be placed on the district map indicating that both these properties are designated as "proposed civic centre".

Appeals Allowed.