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NEW LEGISLATION OF INTEREST TO PRACTITIONERS

THE Parliamentary Session of 1961 has been the most fruitful of legislation ever to have been held in New Zealand. It has only recently concluded, but it is considered desirable even at this early stage to commence the usual review of new legislation.

Much of this legislation is, of course, administrative in nature and not of general interest to practitioners; some statutes, notably the Land Transfer Amendment Act, the Estate and Gift Duties Amendment Act and the Stamp Duties Amendment Act will be the subject of special articles, of which one on the subject of Statutory Easements has already appeared; but this still leaves a good deal of ground to be covered, too much in fact to be treated in one article. As a beginning, we are commenting only on the statutes assented to down to and including 10 November 1961, leaving the rest to be dealt with in a later article which will appear in an early issue.

Judicature Amendment Act

The first group of sections in this Act, namely ss. 2 to 7, deals with the appointment of Judges to the Supreme Court Bench. The number of Judges authorised is increased from 14 to 15, the former number having been fixed by the Judicature Amendment Act 1959. The dates of permanent appointment of Mr Justice Leicester and Mr Justice Woodhouse are made retrospective to the dates on which they were respectively appointed temporarily, and new salaries for all Judges are prescribed.

Sections 6 and 7 relate to the appointment of temporary Judges. Section 11 of the principal Act as amended by s. 2 of the Judicature Amendment Act 1923 is further amended by providing that a temporary Judge, restricted under the original section to a one year term of office, may be reappointed, provided that no Judge should hold office under that section for more than two years in the aggregate. It is also provided that a temporary Judge should not be subject to the compulsory retiring age of 72 years prescribed by s. 13 of the principal Act. It was, of course, under this latter provision that Mr Justice Spratt became eligible for appointment.

Section 8 contains an amendment of s. 2 of the amending Act (No. 2) of 1955. Section 2 provided for a jury notice to be delivered to the proper officer of the Court at least eight days before the commencement of the sittings at which the action to which it related was to be tried and for a copy of the notice to be served upon the other party to such action at least four clear days before the commencement of such sittings. The main effect of the amendment is to remove the discordance of the times fixed by the statute for giving a jury notice and by R. 250 of the Code of Civil Procedure for setting down for trial, this discordance having been criticised by Finlay A.C.J. in *Kay* v. *Baker* [1957] N.Z.L.R. 1078, and, more recently, by McGregor J. in *Henry Williams and Sons Ltd.* v. *Ferguson Construction Co. Ltd.* [1961] N.Z.L.R. 974. Under the Amendment the jury notice is to be given "within the time and in the manner prescribed by the rules of the Supreme Court", and no doubt appropriate amendments to the rules will appear in due course.

Of the remaining sections, s. 9 adds the Solicitor-General as a member of the Rules Committee, s. 10 requires the tender to a prospective witness of allowances and travelling expenses, and s. 11 entitles every witness in a civil proceeding as against the party calling or subpoenaing him to a sum for his allowances, travelling expenses and loss of time in accordance with the scale prescribed for the time being by regulations made under the Summary Proceedings Act 1957. There is, however, a proviso that the Court may disallow the whole or any part of such sum. Nothing is said as to the grounds on which this jurisdiction is to be exercised, but one must assume that a witness would be deprived of his expenses etc. only for some impropriety of conduct.

Child Welfare Amendment

Section 2 of this Act provides for the review of a committal order after it has been in force for 12 months. Application for review may be made by the child who is the subject of the order, by a parent, by the person who would be the guardian of the child if the order had not been made or by the person who had the custody or control of the child immediately before the making of the order. Application is made in the first instance to the Superintendent of Child Welfare, and, if that application is refused, a further application may be made to the Children's Court. Section 3 provides for the review of supervision orders.

Under s. 4 a Children's Court or Judge of the Supreme Court, when sentencing a juvenile offender

to be placed under supervision, may order that the offender shall be transferred to probation on attaining the age of 17 years, while s. 5 authorises the Court to transfer a child from supervision to probation on the application of the Child Welfare Officer. In the main, the provisions of the Criminal Justice Act are applied to probation ordered under the Child Welfare Act. Notice of all applications made to the Court under the amending Act by persons other than a Child Welfare Officer is to be given to the Superintendent of Child Welfare.

Section 11 is new, and transfers from the Children's Court to the ordinary Courts jurisdiction over all traffic offences committed by children, other than those punishable by imprisonment.

Law Reform (Testamentary Promises) Amendment

Section 2 of this Act repeals and re-enacts subss. (1) and (6) of s. 3 of the principal Act, and adds a new subs. (8) which declares that nothing in s. 3 shall affect any remedy which a claimant may have apart from the Act. Where a claimant has the two remedies available he may enforce either but not both. The section allows alternative claims in respect of the two remedies to be put forward in the one proceeding.

The effect of an order made under the principal Act is laid down by s. 4 of that Act. That section is amended by s. 3 of the amending Act which repeals subss. (2) and substitutes a new subsection of two paragraphs. Paragraph (a), along with a new subs. (3) are in effect the same as the old subs. (2) but para. (b) declares that for all purposes other than those of the Estate and Gift Duties Act 1955 any amount awarded by an order shall be deemed to have been bequeathed by the testator to the claimant, and any property vested in or directed to be transferred to him shall be deemed to have been bequeathed or devised to the claimant.

Section 4 of the amending Act deals with the limitation of actions. The relevant section of the principal Act (s. 6) provided that no distribution made before an application for an extension of time is made shall be disturbed by such application or by any order made thereon. This provision is replaced by a direction that no distribution shall be disturbed that has been made before the administrator received notice that an application for an extension of time had been made to the Court, or after a notice of intention to make such an application had lapsed under s. 2 of the Administration Amendment Act 1960.

Section 5 provides that every action under the Act shall be commenced by writ of summons but directs that with every such writ there shall be filed a motion for directions as to service. The motion is to be dealt with in all respects as though it had been filed with an originating summons.

Land Settlement Promotion Amendment

The provisions of the principal Act as to personal residence are repealed. Section 29 of the principal Act is repealed, and a new section is substituted. This new section deals with consent to transactions after a hearing, and all references to personal residence are omitted. A new s. 29A is substituted for that enacted by s. 4 of the Land Settlement Promotion Amendment Act 1959.

Magistrates' Courts Amendment

The general effect of this amendment is to extend the jurisdiction of Magistrates' Courts to claims up to £1,000 from the former figure of £500, and to claims for the recovery of land where the rent payable for such land does not exceed £550, or, if there is no rent payable, where the value of the land does not exceed £7,000. Actions may be transferred to the Supreme Court where the amount of the claim exceeds £200 as against £100 as prescribed in the principal Act.

The right of an infant to sue for wages without the intervention of a guardian *ad litem* is extended to cases where the amount at stake does not exceed £1,000, and the right of appeal without leave is restricted to cases where the claim exceeds £50.

Cook Islands Amendment

This Act deals principally with domestic matters of no general interest to New Zealand practitioners, but s. 20 contains a provision to which attention should be drawn.

Under s. 476 of the principal Act, a native of the Cook Islands who is out of that territory may execute an instrument of aleniation of native land by an attorney, provided that the attorney is a European. This latter requirement is now repealed, and the attorney may be of the native race if so desired.

State Advances Corporation Amendment

Section 3 of this Act contains new provisions regarding the guarantee by the Corporation of portions of mortgages granted by financial institutions, as defined in the section, for housing purposes. Section 4 further provides for the guarantee by the Corporation of portion of loans granted by any lender for the development or establishment of tourist hotels. Resort to these sections may enable practitioners to assist clients to raise those last few pounds which are so often the stumbling block preventing the completion of some conveyancing transaction.

Section 5 gives the Corporation power to waive or reduce a borrower's contribution to the General Reserve Fund. The power is exercisable when the borrower has earlier had a loan from the Corporation which has been repaid within five years of the date of the application for the new loan, whether or not the two loans affect the same security.

Law Practitioners Amendment Act

Part I of this Act contains the new provisions as to legal education. We shall shortly be publishing an article on this topic. Part II provides for the appointment of an agent to conduct a legal practice.

Part III contains miscellaneous amendments to the principal Act. Section 28 authorises the suspension from practice of a practitioner on the grounds of physical or mental disability and s. 29 amends s. 24 of the principal Act by adding conduct unbecoming a barrister or solicitor as a matter for investigation and action by the Disciplinary Committee.

Section 30 authorises the Disciplinary Committee to bar from employment by a practitioner persons guilty of conduct which would be professional misconduct if committed by a practitioner, or of grave impropriety or infamous conduct.

Land and Income Tax Amendment

As is usually the case, this Act contains a number of amendments on diverse subjects which cannot be dealt with adequately in an article of this nature.

Estate and Gift Duties Amendment

As already mentioned, it is intended to treat this Act in a special article. Briefly, however, it prescribes new scales of Estate and Gift Duty, and amends the provisions of the principal Act as to the exemptions allowed to widows, widowers and infant children. The prepayment of Estate Duty is abolished, and the exemption from liability for Gift Duty in respect of small gifts is extended to include gifts up to £100.

Stamp Duties Amendment

The main provisions of this Act which will interest our readers are those amending the rates of duty payable on conveyancing transactions. In particular, conveyance duty is reduced to 10s. per £50 of consideration money or value, a reversion to a rate which was in force many years ago. The former *ad valorem* duty charged on Bills of Exchange and Promissory Notes is also abolished and replaced by a flat duty of twopence.

The Act also virtually abolishes the use of adhesive stamps to denote the payment of duty.

Crimes

It is obviously impossible to deal at any length with this Statute. It has now been on the stocks for a long time, and a great deal of thought has been given to its provisions by those best qualified to assess the needs of the present day. Generally the Act must be acknowledged to be a vast improvement on its predecessor, and removes many anomalies while it brings up to date the definitions of various crimes and brings the scale of punishments prescribed into line with modern conditions. It is too much to expect that no defects will be found in a statute of such length, but they should be few.

The Act is singularly free from contentious matter, and the only three topics on which there have been real disputes are the failure to re-introduce corporal punishment, the abolition of capital punishment for murder and the virtual abolition of the Grand Jury. On the first two subjects we have nothing to add to what has already been said in previous articles. As to the Grand Jury, despite the views held in some quarters that it formed one of the bulwarks of the freedom of the subject, it is suggested that the sweeping away of the hearing before the Grand Jury will do nothing to affect adversely the rights or the liberty of the law-abiding citizen, and in fact will have a beneficial effect in expediting and making less expensive the administration of justice.

Conclusion

To date the legislation of the session has been a very mixed bag. Looking at the Statutes dealt with in the closing hours of the Session, there is much which still requires comment. As has already been said, this further legislation will be dealt with in a further article early in the New Year.

Editor

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SUMMARY OF RECENT LAW

DESTITUTE PERSONS

Maintenance (Wife's)—Provisional order put forward for confirmation—Principles to be applied—Whether family benefit to be taken into account—Destitute Persons Act 1910, s. 17 (3)—Maintenance Orders (Facilities for Enforcement) Act 1921, s. 5—Social Security Act 1938, s. 29 (3). When considering the confirmation of a provisional maintenance order under s. 5 of the Maintenance Orders (Facilities for Enforcement) Act 1921 the Court should apply the same principles as to quantum as it would in determining a similar question under the Destitute Persons Act 1910. In assessing the respondent's means to pay maintenance, moneys received by him by way of family benefit under the Social Security Act in respect of the defendant children should be taken into account as one of the circumstances of the case, notwithstanding the provisions of s. 29 (3) of the Social Security Act 1938. *Moore* v. *Moore.* (1959. 11 November; 3 December. Sinclair S.M. Dannevirke.)

MASTER AND SERVANT

Employer's liability—Employee using unsafe means of access to employer's premises—Safe means of access provided—Whether employer liable for injuries—Whether maxim volenti non fit injuria *applicable.* The plaintiff was required in the course of his employment by the defendant to visit at intervals the third floor of the defendant's premises while carrying some equipment in one hand. The normal and orthodox means of access to such third floor was by a staircase but there was also an almost vertical fire escape. The defendant and other employees regularly used the fire escape in preference to the staircase, claiming that this saved time, and it appeared that the defendant knew of and did nothing to prevent this practice. It did not however direct the use of the fire escape. While climbing the fire escape the defendant slipped and was injured. He claimed damages, alleging the provisions of an unsafe means of access to his place of work. *Held,* 1. That the plaintiff was a mature and intelligent individual and the dangers inherent in the use of the fire escape were patent and well known to him. There was a safe means of access to the third floor available to him, and his action therefore failed. (*Ashdown* v. *Samuel Williams & Sons* [1957] 1 Q.B. 409; [1957] 1 All E.R. 35, followed.) 2. That in any case the plaintiff must have known of the risk he ran of a fall, and that the consequences could prove to be grave. There was nothing to oblige him to take the risk, and the maxim *volenti non fit injuria* therefore applied. *Middleton* v. *Auckland Farmers' Freezing Co. Ltd.* (1961. 2, 24 October. Spence S.M. Auckland.)

OCCUPIER

Negligence—Children permitted to use land for play with a football—Land abutting on highway and separated only by low wall—Motor cyclist on highway injured as result of football kicked over wall on to highway by child—Whether occupier liable—Road traffic—Negligence—Contributory negligence—Motor cyclist not wearing crash helmet—Whether contributory negligence. The defendants were the owners and occupiers of factory premises which included a piece of open grassland called the Green, one side of which adjoined a busy highway and another side of which adjoined a narrow lane. Children up to 10 or 11 years of age had permission to play on the Green and to the knowledge of the defendants regularly played with a football. Two boys in particular practised kicking at goal using a poplar tree bordering the lane as one goal post and a stick stuck in the ground as the other and kicking in the direction of the highway. The only barrier between the goal and the highway was a wall three feet two inches high on the Green side and four feet high on the pavement side. From time to time the ball went over the wall and had to be retrieved from the highway. On 23 February 1959, while the two boys were so playing the ball went over the wall causing a passing motor cyclist to fall and sustain a fractured skull from which he died. The motor cyclist was not wearing a crash helmet; at the date of the accident the Highway Code contained no advice that motor cyclists should always wear crash helmets. In an action by his widow for damages, *Held,* (i) a reasonable man, being the occupier of the Green, would have come to the conclusion that, as a result of the children's playing with a football, there was a risk of damage to persons using the road and that the risk was not so small that he could safely disregard it and refrain from taking steps to prevent possible injury; therefore, as the defendants had taken no such steps, they were liable for negligence. (Dicta of Lord Reid in *Bolton* v. *Stone* [1951] 1 All E.R. at p. 1086, and of Lord Somervell of Harrow in *Cavanagh* v. *Ulster Weaving Co. Ltd.* [1959] 2 All E.R. at pp. 751, 752, applied.) (ii) failure to wear a crash helmet was not, at the time of the accident, contributory negligence. *Hilder* v. *Associated Portland Cement Manufacturers Ltd.* (Queens Bench Division. Ashworth J. 1961. 11, 12, 20 July) [1961] 3 All E.R. 709.

PRACTICE

Particulars—Pleading—Traverse of negative allegation—Not pregnant with affirmative—Whether particulars of traverse should be ordered. Paragraph 7 of a statement of claim alleged that a trade union and three other defendants, its officials, failed to conduct an election of an assistant general secretary in accordance with the relevant rule. The paragraph then gave particulars of this allegation. Paragraph 7 of the defence was in these terms: "The defendants and each of them deny each and every of the allegations contained in para. 7 . . . of the statement of claim". The plaintiff delivered a request for further and better particulars under para. 7 of the defence. The defendants resisted the application on the ground that they were not obliged to plead to particulars and that particulars could not be ordered of a traverse, even of a negative allegation whose effect might be to imply an affirmative statement. *Held,* particulars would not be ordered because: (i) a defendant need not plead to particulars and the fact that the particulars in para. 7 of the statement of claim might more appropriately have been included in the body of the paragraph did not of itself make an exception to the rule. (*Pinson* v. *Lloyds & National Provincial Foreign Bank Ltd.* [1941] 2 All E.R. 636, applied.) (ii) the traverse in para. 7 of the defence did not imply an affirmative allegation, for in order to do so a traverse should import some affirmative allegation beyond that which was in any event to be implied from a mere denial of a negative allegation. (Dictum of Stable J., in *Pinson* v. *Lloyds & National Provincial Foreign Bank Ltd.* [1941] 2 All E.R. 644, applied; *Duke's Court Estates Ltd.* v. *Associated British Engineering Ltd.* [1948] 2 All E.R. 137, followed.) *Chapple* v. *Electrical Trades Union and Others.* (Chancery Division. Pennycuick J. 1961. 25, 26 July.) [1961] 3 All E.R. 612.

POLICE OFFENCES

Trading or dealing on Sunday—Motor vehicle auctioneer's premises open for inspection of vehicles—No vehicles bought or sold—Keeping premises open for purpose of "trading or dealing" on Sundays prohibited—Police Offences Act 1901-1957, s. 61. The appellant company carried on the business of motor vehicle auctioneers and with the intention of facilitating sales during the following week, opened their premises on a Sunday, for the purpose of allowing members of the public to inspect the vehicles which were to be auctioned. Apart from being able to inspect vehicles, members of the public were able to obtain from employees of the company values of vehicles brought to the roadway outside the company's premises. The premises were not kept open for the purpose of vehicles being bought and sold, and in fact no vehicles were bought of sold on the particular day. The appellant company was summoned under the Police Offences Act 1901-1957 for keeping premises open "for the purpose of trading or dealing on Sunday", contrary to s. 61 of that Act. The company was convicted before a Court of Petty Sessions. On appeal to the chairman of Quaretr Sessions, a case was stated for the opinion of the Court of Criminal Appeal. *Held* (Collins J., *dissenting*), That for a motor vehicle auctioneer to open premises on a Sunday with the intention merely of facilitating sales during the following week did not amount to opening premises "for the purpose of trading or dealing", within the meaning of s. 61 of the Police Offences Act 1901-1957. (*Goodwin (W.) & Co. Pty. Ltd.* v. *Bridge* [1957] S.R. (N.S.W.) 181, distinguished; *Ex parte Rogerson* (1888) 9 L.R. (N.S.W.) 30; *Sydney Newspaper Publishing Co.* v. *Muir* (1888) 9 L.R. (N.S.W.) 375; *Finlay* v. *Kent* [1937] V.L.R. 322; *Bank of N.S.W.* v. *Commonwealth* (1948) 76 C.L.R. 1; *Spence* v. *Ravenscroft* (1914) 18 C.L.R.

349, referred to.) *R.* v. *University Motor Auctions Pty. Ltd.* (Court of Criminal Appeal of New South Wales. Evatt C.J. Herron and Collins JJ. 14, 21 April; 23 June. 1961.) [1961] N.S.W.R. 1091.

TENANCY

Dwellinghouse—Dwellinghouse let unfurnished—Subsequently furnished and relet after enactment of Tenancy Act 1955—Whether a new dwellinghouse—Whether Tenancy Act applicable—Tenancy Act 1955, ss. 2, 7, 18 (2). The letting of premises unfurnished on the one hand or furnished on the other is a difference of substance which is recognised by the definition contained in s. 2 of the Tenancy Act 1955. Any furniture or chattels or land or outbuildings are to be regarded as an integral part of the premises let and not as mere appendages or accessories thereto. A new dwellinghouse for the purposes of the Act may be created by the addition of sufficient furniture to a dwellinghouse hitherto let unfurnished. (*Sail* v. *Taigel* [1946] N.Z.L.R. 306; [1946] G.L.R. 131 and *Stirton* v. *Aylett* [1960] N.Z.L.R. 956, followed.) If a new dwellinghouse is so created after 21 October 1955 (the date of coming into operation of the Tenancy Act 1955), that new dwellinghouse is not, by virtue of s. 7 subject to any of the provisions of the Tenancy Act, and in particular it is not subject to s. 18 (2). *Fisher* v. *Public Trustee.* (S.C. Auckland. 1961. 29 August; 6 September. Woodhouse J.)

WORKERS' COMPENSATION

Liability for compensation—Pneumoconiosis—Whether a disease—Worker affected by pneumoconiosis but displaying no symptoms—Changing employment on medical advice to prevent progress of disease—Whether entitled to compensation—Workers' Compensation Act 1956, s. 19. Pneumoconiosis is to be regarded as a disease within the meaning of s. 19 of the Workers' Compensation Act 1956. A coal hewer affected by pneumoconiosis but not suffering from any symptoms changed his occupation on medical advice to a less dusty one as a measure to prevent the progression of the disease. His earnings were reduced as the result of the change. *Held,* That he had in the circumstances suffered an incapacity from pneumoconiosis and was entitled to compensation. (*Powell* v. *The King* [1919] G.L.R. 31, distinguished.) *Burn* v. *Attorney-General.* (Compensation Court. Greymouth. 1960. 14 September. Christchurch. 1961. 31 July. Wellington. 1961. 13 September. Dalglish J.)

WELLINGTON DISTRICT LAW SOCIETY

Special General Meeting

A special general meeting of the Wellington District Law Society was held on 9 November to consider the proposals for the erection of a building by the New Zealand Law Society in Wellington. There was an attendance of 65 members.

In opening the meeting the President Mr J. C. White, outlined the proposals and made appreciative reference to the work done by Mr McGrath in investigating various means of carrying out the Society's objects. He commended the scheme to the meeting and then called on Mr McGrath to move a resolution.

Mr McGrath referred in some detail to the history of the investigations which had been made and also dealt with the economic aspects of the proposed building. He reported that there were already indications of a keen demand for space, and that the ground and first floors could be let at rentals in excess of the estimate of 26s. per foot.

Mr McGrath then went on to deal with the division of costs between the New Zealand Law Society and the Wellington District Law Society. Concern was felt in Wellington that other societies might regard the building as a "Wellington benefit" and it was therefore essential that Wellington should make a generous approach to the matter of sharing costs and responsibilities.

Mr McGrath then moved:

1. *That* this Special General Meeting of the Wellington District Law Society approve the following proposals regarding the erection and occupation of a building in Waring Taylor Street by the New Zealand Law Society and Wellington District Law Society:

(a) That a ceiling price of £210,000 be fixed for the building contract. (Land £25,000; Architects' Fees £15,000; Building Contract £210,000; Total £250,000).

(b) That the Society should own its own building.

(c) That Messrs. Stephenson & Turner should be appointed the Society's architects for the erection of the building.

(d) That the Society should be content with one floor at present for its own use.

(e) That the building consist of eight storeys plus (if the Standing and Building Committees so decide) a penthouse.

2. *That* the Wellington District Law Society endorses the proposals regarding the Law Society building and the basis of its furnishing and occupancy as set out in the Council's minutes of 26 September 1961, namely:

(a) That the Wellington District Law Society, on the assumption that one floor only would be occupied, provide initially the furniture and equipment for the space occupied by the two Societies, a preliminary estimate of which is £5,000; and the Wellington Society would also advance, on an interest free basis, the balance between the actual cost of the furniture and equipment and its available funds of £9,500, such loan to be repaid only as and when surplus revenue from the building permits such repayment *pro rata* with the repayment of the moneys provided for the building by the New Zealand Law Society or any District Society.

(b) The space required from time to time by the New Zealand Law Society and the Wellington District Law Society should be provided without any charge for rental to either Society. If there is any deficit it should be met as to three-fifths by the New Zealand Law Society and two-fifths by the Wellington District Law Society. Any surplus should be disposed of, first by the creation of an adequate reserve fund to meet possible future deficits; and secondly in the repayment *pro rata* of all moneys provided for the project by the New Zealand Law Society, the Wellington District Law Society and any other District Society, with the exception of the amount expended by Wellington for the provision of furniture and equipment: the disposal of any surplus after such moneys have been repaid, to be expressly left open for future consideration.

(c) That the Annual Practising Fees should be increased by £5 per annum, commencing from 1 January 1962, such increase initially to be allocated to the capital requirements of the building; consideration to be given to the position of employed members of the Society where such levy would be payable by the member personally.

The motion was seconded by Mr D. Perry, President of the New Zealand Law Society, and provoked general discussion. On behalf of Palmerston North members Mr J. A. L. Bennett moved as an amendment,

That the motion of Mr McGrath seconded by Mr Perry, should be the subject of a postal ballot of members of the Wellington District Law Society.

After further discussion the amendment was lost and the motion originally proposed by Mr McGrath was carried by a large majority.

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Nuisances Created By Local Authorities

Nobilo v. *Waitemata County Council and the Auckland Education Board* (judgment 19 July) is an illustration of the favoured position which local authorities enjoy in respect of damage caused as a consequence of their activities. The plaintiff claimed that both defendants had been guilty of nuisance in discharging on to his land and thereby causing damage, water in greater quantities and in a more concentrated volume than he was bound to receive. This discharge was the result of the action of the first defendants in sealing the road on which the plaintiff's land abutted and of the second defendants in erecting various school buildings and sealing the surface of various portions of the school grounds, the water from which flowed through a culvert under the roadway on to the plaintiff's land.

After a thorough examination of the evidence, Haslam J. found that no nuisance existed. But he further held that even if a nuisance had been created by the defendants, they were protected against civil actions for damages by virtue of the Public Works Act 1928. Both the sealing of the road and the work on the school grounds were "public works". The plaintiff's only remedy for any injury suffered by him was therefore to claim compensation under the Public Works Act. He cannot sue for damages: *Farrelly* v. *Pahiatua County Council* (1903) 22 N.Z.L.R. 683; 5 G.L.R. 294; *Lyttle* v. *Hastings Borough* [1917] N.Z.L.R. 910; [1917] G.L.R. 553.

The County Council was, in respect of such work as was done after 1 April 1957—the date of coming into operation of the Counties Act 1956—given further protection by s. 190 of that Act which reads:

> Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance.

These words, as they appeared in s. 173 of the Municipal Corporations Act 1933 (now s. 168 of the Municipal Corporations Act 1954), were held in *Irvine & Co. Ltd.* v. *Dunedin City Corporation* [1939] N.Z.L.R. 741; [1939] G.L.R. 390, to deprive any person of a right of action for a nuisance which was necessarily or inevitably involved in the construction and maintenance of an authorised public work and which would found a claim for compensation under the Public Works Act. In the instant case, Haslam J. said he would have had no hesitation in finding that any nuisance complained of was a necessary consequence of the construction and maintenance of the roadway.

The pattern of depriving individuals injuriously affected by public works of the right to claim damages for nuisance and giving them instead a right to claim compensation is too firmly fixed in our law to be displaced at this stage, even though the consequences are normally a dilatory hearing and less pecuniary compensation than would be awarded at common law. One shred of comfort remains. The relevant legislation does not exonerate the local authority from liability for negligence in carrying out the works: *Farnworth* v. *Manchester Corporation* [1930] A.C. 171; *Marriage* v. *East Norfolk Rivers Catchment Board* [1949] 2 All E.R. 1021; [1950] 1 K.B. 284. In the instant case, negligence was not alleged and in consequence the problems connected therewith received only a passing reference from the learned Judge.

A.G.D.

Mens Rea In Statutory Offences

D'Audney v. *Marketing Services (N.Z.) Ltd.* (4 September 1961), is yet another instance of a Court having to determine whether or not the Legislature, in creating an offence in terms making no reference to the state of mind of the offender, intended to create an offence of absolute liability. The respondent had been charged in the Magistrates' Court with an offence under the Customs Act 1913, s. 46. That section provides that it is not lawful to import certain specified types of goods. By subs. (5) an offence is committed by any person who imports such goods into New Zealand or by any person who is *knowingly* concerned in their importation. The prohibited goods include any indecent document within the meaning of the Indecent Publications Act 1910. The respondent company imported three books which were admittedly indecent documents, but the Magistrate found that it had no knowledge of the contents of the books and had an honest and reasonable belief that they were of an innocuous nature. He held that the offence under s. 46 was one in which it is a defence to show absence of *mens rea* and accordingly dismissed the information. On an appeal by the prosecutor, Turner J. upheld the Magistrate's interpretation of the section.

The question whether an offence is one of absolute liability is to be answered by considering (1) the language of the statute; (2) the scope and object of the statute and "the various circumstances which may make the application of the doctrine reasonable or unreasonable" (per Edwards J. in *R.* v. *Ewart* (1905) 25 N.Z.L.R. 709, 730; 8 G.L.R. 22, 32). In the present case the language of the statute was held not to require a construction involving absolute liability for the offence of "importing", despite the contrast, in the very same subsection, with the offence of "being concerned with the importing", which can only be committed "knowingly", a contrast upon which the appellant relied as suggesting absolute liability in the case of "importing". The appellant's further argument that the offence of importing was one of absolute liability because the Customs Act 1913 is a revenue statute was unsuccessful because the particular section in issue had nothing whatever to do with the protection of revenue. Nor, the learned Judge held, did considerations of the public interest require such a construction. The public interest, he pointed out, was adequately safeguarded by other enactments concerned with the various classes of prohibited goods, for example, in the case of the goods concerned in these proceedings, the Indecent Publications Act 1910. Finally the nature of the penalty provided was held

not to lead to the inference that the Legislature intended absolute liability, but rather the contrary. The fact that the penalty provided by a statute is substantial does not necessarily exclude absolute liability because, as the Court of Criminal Appeal said in *R.* v. *St. Margaret's Trust Ltd.* (1958) 42 Cr. App. R. 183, 190, the Court is free to use its power to impose a nominal penalty or none at all in appropriate cases. But this is obviously so only where the Court in fact has such a power. In the present case it had not; the statute imposed a minimum fine of £25. This, Turner J. said, was

> a compelling consideration, strongly favouring the view that the Legislature cannot have intended that this offence should be one independent altogether of *mens rea*.

The main importance of the present case lies perhaps, in its thus drawing attention to the significance of the existence of a minimum penalty, at least where this is reasonably substantial, as an indication of the intention of the legislature. But in these cases the "intention of the legislature" for which the Judges have to search, is largely fictitious. It is in the highest degree improbable that, in most cases, the legislature or its members had any conscious and deliberate intention one way or another about the matter. The Courts must proceed as the learned Judge did in the present case, by seeking for any factors which may serve as *indicia* of a presumed legislative intention. But behind the detailed analysis of such *indicia* as may exist lies the fundamental question of policy. Why is absolute liability for criminal offences imposed at all? The justification for the existence of statutes imposing absolute liability has been well expressed in a passage by Roscoe Pound (*The Spirit of the Common Law* (1921), 52), cited with approval in *Reynolds* v. *G. H. Austin & Sons Ltd.* [1951] 1 All E.R. 606, 611; [1951] 2 K.B. 135, 149. "Such statutes" he says "are not meant to punish the vicious but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals". Where a clear intention to create absolute liability exists the Courts must, of course, give effect to it. But where there is doubt, a basic consideration must be whether the adoption of a construction which involves absolute liability would effect the purpose of "putting pressure upon the thoughtless and inefficient" in the public interest, or whether, if such a construction were adopted, the law would be merely engaged, as Devlin J. said in *Reynolds* v. *G. H. Austin & Sons Ltd.* (*supra*), 612, 149, "in pouncing on the most convenient victim". The task of the Courts in these cases is, Lord Goddard more than once remarked (see e.g. *Brend* v. *Wood* (1946) 175 L.T. 306, 307) "of utmost importance for the protection of the liberty of the subject". Judged by this broader criterion the decision in the present case seems a laudable one.

P.B.A.S.

"INTOLERANCE, INDIGNATION AND DISGUST"

Report on an Experiment Conducted in the Jurisprudence Class, Victoria University of Wellington, on 5 September 1961

A class composed of 41 members was handed out cyclostyled question papers. These read: "Write *one* sentence expressing concisely your opinion about the morality of each of the following forms of behaviour:

1. Deliberate cruelty to animals.
2. Homosexual acts between adult consenting males —in private.
3. Adultery.
4. Prostitution."

The time allowed for the writing of the four sentences was five minutes.

Mr Justice Devlin (as he then was), argued in his Maccabaean Lecture (delivered to the British Academy in 1959 and printed as a pamphlet), for the view that "it is not possible to set theoretical limits to the power of the State to legislate against immorality" (p. 14).[1] The practical question therefore became: in what circumstances should the State *exercise* its power (p. 15)? But there was a preliminary question: How were the moral judgments of society to be *ascertained*? Devlin evoked the "*reasonable* man" (not to be confused with the "*rational* man"). This reasonable man, whom Devlin identified with the member of society who is called to serve on a jury, "is not expected to reason about anything and his judgment may be largely a matter of feeling" (*ibid.*). "Immorality . . . is what every right-minded person is presumed to consider to be immoral" (p. 16). To the main question, Devlin answered that the individual could not be expected to surrender to the judgment of society the whole conduct of his life, and since one would not talk sensibly of a *public* and a *private* morality, the problem was to reconcile a *public* interest and a *private* interest, often in conflict (p. 17). Certain elastic principles could be formulated as to how society should consider the matter. The first of these was that: "There must be toleration of the maximum individual freedom that is consistent with the integrity of society". "Nothing should be punished by the law that does not lie beyond the limits of tolerance" (both p. 17). The problem now became one of ascertaining these limits:

Devlin supplied his own answer: "Not everything is to be tolerated. No society can do without intolerance, indignation and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice" (*ibid.*).

The experiment was designed as an exercise in ascertaining the "limits of tolerance" as they exist in New Zealand society in relation to four debated

[1] Cf. the recent assertion in the House of Lords of a residual power "where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare", per Viscount Simonds in *Shaw* v. *The Director of Public Prosecutions* [1961] 2 All E.R. 446, 452; [1961] 2 W.L.R. 897, 917-918. Cf. also *R.* v. *Quin* [1961] 3 All E.R. 88; [1961] 3 W.L.R. 611 (C.C.A.).

cases. More pretentiously, it was an exercise in practical "sociological" jurisprudence. If the jury of 12 is a competent body to ascertain these limits, the feelings of a class of law students which could supply more than three juries should provide an equally reliable index to society's feelings of disgust, etc., at the types of conduct in question. (Subject to limitation 7, *infra*.)

The answers were marked on the following scale:

1. *Very* intolerant, *very* indignant or *very* disgusted (or combination of these).
2. Lesser degree of intolerance, indignation or disgust (or combination of these) shown.
3. "All depends on the circumstances" attitude, e.g. on the adultery question, an answer qualified by asking whether the spouses were living together, or had been long separated.
4. "I am *neutral* on the morality of this", including e.g. "purely for the individual", or "purely for private conscience".
5. "I *approve* this type of conduct" including "I do *not* regard this as immoral".
6. Sentence failed to answer the question; or spoke not of morality but of the desirability of legislation.

The following chart sets out the number of answers falling within each of the six categories to each of the four questions:

Categories	1	2	3	4	5	6	Total
A. Deliberate Cruelty to Animals	9	13	2	9	0	8	41
B. Homosexual Acts between Adult Consenting Males—in private	2	12	3	10	5	9	41
C. Adultery	4	18	9	4	2	4	41
D. Prostitution	2	13	4	6	7	9	41
Totals ..	17	56	18	29	14	30	164

Limitations of the Test

1. There may have been some "experiment sophistication", since some of the students had already read Devlin's lecture for essay purposes, and may have been influenced, consciously or unconsciously, by Devlin's guesses at what the "reasonable man" would feel on the topics of "Deliberate cruelty to animals" and "Homosexual acts, etc.".

2. A "reasonable man" could very reasonably experience different moral feelings depending on the exact type and gravity of the conduct in question. For example, under A., "Deliberate cruelty to animals", one *might* feel quite differently at the sight of (a) a cat's tail being pulled; (b) a horse being brutally whipped for a protracted period (to take two extremes).

3. Some few members of the class may have had inadequate time to write their opinions down.

4. Some of the answers were on the borderline, e.g. between Categories 1 and 2 or between Categories 3 and 4, and had to be allotted, somewhat arbitrarily, to one or other category: a more elaborate test might develop a number of further categories such as (3 and 4) or (2 and 1).

5. As can be seen from the table, 164 answers in all were recorded; of this number the surprisingly large number of 30 failed to answer the question asked. Many of the answers in this category referred not to the question of morality but to the desirability of legislation; others stated a general attitude and then virtually contradicted themselves, e.g. "I consider this immoral, but I don't disapprove of it, since . . .". It was impossible to place such answers in any category other than No. 6.

6. As Hart, re-stating Devlin's thesis, puts it (in "The Listener" for 30 July 1959, p. 162): "Disgust is not enough . . . what is crucial is a combination of intolerance, indignation and disgust". The criterion adopted for allocation to Category 1 was not, therefore, strictly Devlin's own, but a slightly diluted version. If Devlin's criterion (in so far as it can be said to be definitely formulated by him) had been strictly applied, some answers might have had to be transferred from Category 1 to Category 2.

7. The average age of the group was of the order of 22-23 years: for that reason, the group might claim to be representative of "the young members of society" rather than of "society as a whole".

Results

It is doubtful whether the figures show any very decided trend. The most obvious inference to be drawn is that *on each of the four questions* the opinions of the class differed widely. Generalisation on New Zealand's "conventional morality" about any of the four types of conduct in issue can therefore, it is suggested, be made only with the greatest hesitation.

Cruelty to Animals

Devlin (at p. 18) states "I suppose that there is hardly anyone nowadays who would not be disgusted at the thought of deliberate cruelty to animals". (One supposes that this is *shorthand* for the statement that most people would experience a feeling of intolerance, indignation and disgust at the idea of such deliberate cruelty: *sed quaere* ?)

The number of answers (9) in Category 1 was surprisingly small. More (13) felt deliberate cruelty to animals to be morally wrong, but were in no way disgusted or indignant. No one positively approved such conduct; eight answers unfortunately had to be placed in Category 6. If we take categories 1 and 2 together, the total is only 22. Hence only slightly more than half the class regarded such cruelty as definitely morally wrong. *Devlin's proposition seems to stand disproved*! Nevertheless, the Legislature has enacted anti-cruelty laws, as it ought to have done if Devlin's main thesis and guess as to the facts were both correct. See the Animals Protection Act 1960 (N.Z.) (replacing ss. 7 and 8 of the Police Offences Act 1927). Under this Act, any person is subject to penalties who (*inter alia*) "cruelly ill-treats any animal". "Cruelty" is defined as meaning "The wilful infliction upon the animal of pain or suffering that . . . is unreasonable or unnecessary".

Homosexual Acts Between Consenting Males—in Private

"We should ask ourselves . . . whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it." On the other hand, "our feelings may not be so intense as that". (Devlin, *loc. cit.*, p. 18.)

Here again, perhaps, the members of the class had different mental pictures of homosexuality, though no

LEGAL ANNOUNCEMENTS

Concluded from p. i.

Messrs C. J. O'Regan & Arndt, Barristers and Solicitors, Wellington, wish to announce that they have admitted to partnership Mr Vernon Henry Peters, LL.B., who has been associated with them for some years. The practice will be carried on under the name of C. J. O'Regan, Arndt & Peters.

Qualified Barrister and Solicitor required to handle mainly conveyancing, trust, and estate work and some Court work. Preference will be given to an applicant able to undertake Magistrates' and Supreme Court actions and matters for the firm. Apply to:—
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P.O. Box 16,
Wanganui.

one actually drew the distinction between lesser acts of indecency and the full offence. Devlin suggests in passing that, in proscribing such conduct, a distinction might well be made between the two (p. 20).

As can be seen from the chart, only two answers were sufficiently screwed up to a " concert pitch " of " intolerance, indignation [or] disgust " to merit allocation to Category 1. Twelve answers registered a lesser degree of moral condemnation. Of the entire class, approximately only one third felt that such homosexual acts were definitely morally wrong. Yet Mr Justice Devlin, without the benefit of supporting evidence, gave it as his opinion (p. 18) that " There is . . . a general abhorrence of homosexuality ", and since that exists, provided only that it is " deeply felt and not manufactured ", it is a very relevant factor indicating that the " limits of tolerance " are being reached. There may be some doubt as to exactly where " abhorrence " should be fitted in on the ascending scale of disgust, but assuming that this word was used as a stylistic variant denoting feelings of the concert pitch variety, the inference from the test, if it is to be taken at all seriously, is that such abhorrence *does not in fact exist* ! (Subject of course to the important limitation No. 7.) It has been argued that Devlin's totally irrationalist morality must be rejected anyway, since it makes morality rest " on what we would ordinarily think to be everything most arbitrary and unreliable in human nature ; that is to say, feeling in its most primitive reaches ". (*Wollheim, Crime, Sin and Mr Justice Devlin, Encounter*, November 1959, 34, at p. 39.) The present writer agrees wholeheartedly with this objection. But even if we accept Devlin's method of ascertaining morality, it seems that only a minority *actually feels* such abhorrence at the idea of homosexual acts falling within the triple limits, viz. between adult males, who consent, the acts taking place in private. The alleged " abhorrence " of society is, therefore, a factor which can be omitted altogether in considering the desirability of a reform of the law, since even if it is relevant, it is non-existent. Eliminating this factor accordingly, we could then approach the topic of homosexuality on purely rationalistic lines. Thus, for example, we could ask : *How much* harm does this activity cause society ? Does the fact that many offences are bound to go unpunished produce contempt for the law ? If so, is the extent of the contempt such that it ought to count very heavily as a relevant factor ? Again, it might be asked: is it so important to discourage homosexual acts on the part of those quite capable of resisting homosexual urges but who simply fail to do so, that the undesirability of punishing those who suffer from " inversion " should be endured ? St. John-Stevas in *Life, Death and the Law*, p. 214, defines " inversion " as " the direction of the psycho-sexual impulse more or less exclusively towards persons of the same sex in persons who should have reached psycho-sexual maturity ". In the case of persons in this category, homosexual conduct is undoubtedly morally wrong, but surely less " unnatural ". Should a special exemption be created to cover such cases, and a lighter punishment specified ?

In New Zealand, homosexuality is penalised under ss. 153 and 154 of the Crimes Act 1908. Section 153 makes buggery itself an offence, s. 154 deals with attempts to commit buggery, assaults with intent to commit buggery, and the case where a male indecently assaults another male. Like England and the United States, the *state* of homosexuality is not a crime, nor does it confer any special status in law. No change in the law is effected by the Crimes Act 1961, although a distinction is drawn between homosexual acts between consenting *adults* and those which take place with *boys and adolescents*. The former type of offence is to carry a maximum sentence of seven years' imprisonment ; the latter a maximum of 14 years. The writer had understood that it was the Government's intention to consider the whole question of homosexuality in a separate Bill, after the Crimes Bill had been debated and enacted. But this is not the impression gained from reading the Minister of Justice's remarks made when opening the Second Reading Debate.

As reported in *The Dominion*, 4 October 1961, Mr Hanan said : " . . . the present Bill made it clear beyond the possibility of misunderstanding that the criminal law would continue to reflect the attitude of the community towards these unnatural offences ".

An informative historical and sociological survey of the problem of homosexuality, from the Roman Catholic viewpoint, is to be found in Norman St. John-Stevas's stimulating recent book, *Life, Death and the Law* (Eyre & Spottiswoode, 1961), Chapter 5.

Adultery

Here again, the greatest number of answers (18) were allotted to Category 2. Several members of the class felt that the moral turpitude of adultery depended on the state of the marriage invaded ; others made their answers depend on the question whether a child was involved, or whether there had been condonation. Some of those who expressed the view that adultery was morally wrong as injuring the fabric of society had apparently been influenced by the survey of the effects of adultery undertaken by Dr B. D. Inglis in his book on *Family Law*.

Devlin does not deal with the question of adultery. If Devlin's general thesis were to be applied to this question, the results of the test would provide support for the retention of the present policy of non-intervention by the criminal law.

Prostitution

" The prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute. If the exploitation of human weaknesses is considered to create a special circumstance, there is virtually no field of morality which can be defined in such a way as to exclude the law " (Devlin, p. 14). It is not altogether clear what this sentence means. I understand it as meaning that the fact that a form of immorality is a " natural weakness " should not qualify it for a specially lenient approach by the law.

This question attracted the greatest number (7) who were prepared to approve such conduct, mostly on the ground that it was an outlet for natural sexual urges. Some felt that to permit prostitution reduced the instance of crimes such as rape. One member of the class gave the surprising answer that it is wrong " because it is done for remuneration "; others indicated that they regard the morality of prostitution in a different light from the morality of living off the earnings of another's prostitution which was indeed " revolting " or " disgusting ".

Again, if we ask whether public opinion is aroused to a concert pitch of "intolerance, indignation and disgust" by the prospect of prostitution the test provides us with a negative answer. There would therefore be no theoretical justification, on the basis of Devlin's thesis, for prohibiting prostitution *as such*. The present legal position is that prostitution in itself is not an offence in New Zealand or England. But the Police Offences Act 1927, s. 46, makes it an offence for a "common prostitute" (who is not defined in the Act) to loiter and importune passengers in a "public place" or to behave "in a riotous or indecent manner" in any "public place". The Police Offences Amendment Act (No. 2) 1952, s. 11, brings penalties upon the head of a person who (a) "Keeps or manages, or acts or assists in the management, of any brothel". Paragraphs (b) and (c) of the same section create offences in connection with the leasing of premises for the purposes of prostitution.

The foregoing discussion can clearly lay no claim to be an exhaustive treatment for the four complex social problems involved. The writer would be pleased if it merely indicated some of the questions to be asked, and answered, before we allow Parliament to legislate against immorality, and if it stressed the need for viewing Lord Justice Devlin's provision of a theoretical basis for enforcing morality with considerable reserve and suspicion.

There is more than a grain of truth in Mark Twain's proposition that "we don't reason where we feel; we just feel". *Connecticut Yankee*, p. 88 (1889).

Addendum

Devlin makes *morality* depend on feelings: Conduct is immoral if it makes the reasonable man, the man in the jury box, feel sick. It is interesting to note the competition between the appeal to *reason* and the appeal to *feelings* in the recent debate on Capital Punishment in the House of Representatives. References are taken from the report of the debate in *the Dominion*, 4 October 1961, p. 14. A selection of extracts follows:

1. Mr Hanan (col. 1), referring to the proposed death sentence for "aggravated murder", spoke of "murders which shocked the public conscience and merited the death sentence". (Presumably *because* they shocked the public conscience?) Mr Hanan went on to disapprove this proposed solution of the problem of punishment for murder by condemning the imprecision of the words "planned and deliberate" by which "aggravated murder" was to be defined.
2. Mr Hanan (col. 2) rejected the argument that "some murders were so grave and so shocked public opinion that the only appropriate penalty was death". For although murder "rightly shocked" public opinion . . . "that did not justify a departure from reason when dealing with the offender".
3. Mr J. R. Marshall (bottom col. 2) supported the retributive motive for punishment with the assertion that: "There were some crimes that so outraged the conscience that the only fitting penalty was death". This might with justification be regarded as an appeal to feelings to the exclusion of reason.

Further quotation would be possible but tedious. The essential point which emerges from a consideration of the whole debate is that many speakers on both sides of the argument failed to differentiate between "public opinion" or "public feeling" on the one hand and reasoned argument based on a critical assessment of all relevant factors on the other.

This is a distinction which must be firmly grasped. Must we not attach a very different weight to public feelings from that which we give to reasoned argument? Must we not be careful to see that public feelings, assuming these to be ascertainable, are not based on ignorance, wrong information or sheer prejudice possibly inherited from parents? The writer concedes that law must often keep in step with public opinion. This should not, however, be allowed to obscure the fact that in some areas of the law—and it is believed that the capital punishment issue is one of these—the law may need to march resolutely ahead of public opinion. If what people *feel* about enforcing morality or punishing certain kinds of crimes is relevant at all, it is scarcely the most important factor that must be considered. The idea apparently sponsored by some Members of Parliament that it is the *only* factor merits our violent condemnation.

D. L. Mathieson

The Reasonable Judge and the Reasonable Man.—"Yes, the reasonable omnibus driver must make no mistakes in driving but the reasonable judge may make mistakes in law. His mistakes may cost the parties a lot of money, but, although his decision may be reversed in the Court of Appeal and although its decision may be reversed in the House of Lords, the salary and position of all the judges concerned remain intact. For the truth is that, although all the law is locked up in the breasts of the judges, it is not expected to come out in all circumstances from all judges. The reasonable man never omits to do anything which a reasonable man would do. But one reasonable judge—in his judicial capacity—may omit to do something which another reasonable judge would do. And indeed, who is to say which of two reasonable judges is the more reasonable? The reasonable judge of first instance says that, in his view, the plaintiff is in the right. Champagne is drunk by the plaintiff and his legal advisers. Three reasonable judges in a most reasonable Court of Appeal say that, in their view, the defendant was in the right. Champagne is drunk by the defendant and his legal advisers. Five reasonable judges in the most reasonable of all Houses of Lords say that, in their view, it has not been proved that anyone was in the right and the thing should start all over again. On this occasion only the legal advisers on each side can afford to drink champagne. Many lawyers will tell you that litigation is a mug's game." Henry Cecil in "*Not such an Ass.*"

LEGAL LITERATURE

Butterworth's New Zealand Annotations (Two Volumes) and Supplement 1960. Wellington. Butterworth and Co. (New Zealand) Ltd. Pp. 1382 (Main Volumes) 157 (Supplement). Price £13.

In a legal system as dependent upon case law as ours it is of the first importance that there should be readily available the means of ascertaining what judgments have been given on any particular topic. These technical aids to the practice of and research into the law need not be readable. Two requirements at least they must satisfy: they must be exhaustive and they must be absolutely accurate. Humdrum qualities perhaps; but without them digests of case law are traps for the unwary. No better example of the dangers of incompleteness and inaccuracy can be found than the celebrated omission from every single English digest of case law until 1953 of the House of Lords decision in *Thomson* v. *Cremin* (1941) 71 Ll.L.R.1, now also reported at [1953] 2 all E.R. 1185.

The well known annotations of New Zealand statutes published by Butterworth & Co. (New Zealand) Ltd. have long provided the profession with a dependable guide to the case law on legislation.

With the publication of the last of the volumes of the *New Zealand Statutes Reprint* 1908-1957, Butterworths have now provided the legal profession with two companion volumes in almost (but not quite) the same size as the volumes of the statutory reprint. Those two volumes contain a full annotation of New Zealand cases, in inferior Courts as well as in the Supreme Court and Court of Appeal, touching on the New Zealand statutory provisions in force in 1957. Not only is there a reference to the relevant cases, but there is also a brief resume of the specific point involved in the case which makes it relevant by way of annotation. Furthermore the annotation gives an indication of the comparable statutory provisions which may have been precursors of the enactment at present in force. It provides a useful guide to members of the profession who wish to have in ready form a convenient compendium of New Zealand case law on New Zealand statutes up to 1957.

The first volume under review also contains a comprehensive and accurate annotation of statutory amendments prepared by Mr W. Iles.

Accompanying the main volumes is a supplement bringing the annotations up to 1960, which affords all the technical assistance in the task of finding relevant case law that any lawyer is entitled to expect. The volume contains an innovation, however, which should be treated with reservations. The Editor, Mr Jenner Wily S.M., has included references to " the relevant cases reported in the *All England Law Reports* from 1 January 1958 to 1960, Vol. 3, p. 592 ". The inclusion of these citations to English cases might easily be misleading. It can never be emphasised sufficiently that decisions on United Kingdom statutes should only be applied to the construction of apparently similar New Zealand statutes with great caution. At first sight many of the English decisions (why only English decisions, when United Kingdom statutes are construed and interpreted by the Courts of Scotland and Northern Ireland ?) seem to be of marginal relevance. One chosen at random is *Re Gillingham Bus Disaster Fund* [1959] Ch. 62 (the *All England Law Reports* citation only appears in the Supplement) which is appended to s. 38 of the Charitable Trusts Act 1957. The main question in that case was whether contributions of money to be held (*inter alia*) for " such worthy cause or causes in memory of the boys who lost their lives " in the bus disaster were imperfect trust provisions preserved by s. 1 of the Charitable Trusts (Validation) Act 1954 (U.K.) by being limited to trusts for charitable purposes. It is difficult to see how the decision can be relevant to s. 38 of the Charitable Trusts Act 1957, which deals with the definition of " charitable purpose " in Part IV of the Act, and which does not contain the phrase " worthy cause or causes ". If the decision is to be included at all in New Zealand annotations, the appropriate provision to which it should have been appended is not s. 38 of the Charitable Trusts Act 1957, but s. 82 of the Trustee Act 1956, to which there is no annotation.

G.P.B.

OBITUARY

Mr C. L. MacDiarmid

The death occurred recently at Hamilton of Mr Campbell Larnach MacDiarmid, retired barrister and solicitor, at the age of 85 years.

Mr MacDiarmid was born at Dubbo, New South Wales in 1876 but came to New Zealand at an early age. He was educated at Napier High School, New Plymouth High School and Auckland University College, graduating LL.B.

He had lived in Hamilton for some 50 years, and at the time of his retirement was senior partner in the firm of MacDiarmid, Mears and Gray.

Apart from his professional activities, Mr MacDiarmid led a full life. He was Chairman of the Board of Governors of the Hamilton High School for some 21 years, was at one time a member of the Hamilton Borough Council and was a past president of both the Hamilton Rotary Club and the Orphans' Club. He also served as Session Clerk of St. Andrew's Church for 20 years, was a member of the Hamilton Patriotic Committee and was prominent in Masonic affairs.

His death has removed a prominent and well-respected figure from the scene of public affairs in the Waikato.

HAMILTON DISTRICT LAW SOCIETY

Golden Jubilee

Sixty-seven members and their 13 guests attended a Bar Dinner in Hamilton recently to celebrate the half-century of existence of the Society. The guests included Mr Justice Turner, Mr Justice T. A. Gresson, Mr Justice Hardie Boys, Mr Justice Woodhouse, Sir George Finlay, Sir Joseph Stanton, Messieurs S. Hardy and G. J. Donne, Stipendiary Magistrates, Messieurs S. L. Paterson and W. H. Freeman, retired Stipendiary Magistrates, and Mr S. W. W. Tong, President of the Auckland Society.

In opening the proceedings, the President of the Hamilton District Law Society and Chairman for the evening, Mr K. L. Sandford, expressed the delight of the Society at the presence of the large number of guests. It was a unique experience for the Society that the entire Bench of the Supreme Court Judges in Auckland should be present at such a function.

Mr Sandford referred particularly to the presence of Messieurs S. Lewis and W. Tudhope, who had been present at the meeting which decided upon the formation of the Society, and who were respectively a member of the Society's first Council, and its first secretary. He expressed his regret at the absence through illness of Mr C. L. MacDiarmid, " the grand old man of this Society ".

[Mr MacDiarmid passed away a few days later.]

At Mr Sandford's invitation, Mr J. H. Murray (the Society's present secretary) then read extracts from the minutes of the meeting which resolved to form the Hamilton District Law Society, held at Hamilton on Friday 8 December 1911 at 10.30 a.m. (no doubt, as was said, as practitioners were on their way to work !)

Mr Sandford proposed that these Minutes be re-confirmed and this having been done by the approving voices of Messieurs Lewis and Tudhope, Mr Sandford signed and dated a suitable endorsement on the original Minutes.

In proposing the toast of " The Judiciary " Mr Sandford said that in New Zealand there existed an image of justice that showed the confidence the public had in the system, an image which was shaped by the quality of the judiciary. It was no wonder that practitioners appreciated their presence at such functions. In lighter vein, it could be said that with the function proceeding so happily the convenience of those attending could be assisted by an immediate sitting of the Traffic Court and then no doubt an immediate hearing of the inevitable appeals.

The toast to the Judiciary was then honoured.

In reply, Mr Justice Hardie Boys expressed the pleasure obtained by members of the Bench from such opportunities of sharing in the fellowship of the profession. The period was one of change, both in the law and in its institutions, but with courage and wisdom, and a true appreciation of the spirit of fellowship and humour, the challenge was one that could be faced.

The toast of " The Visitors " was proposed by Mr F. L. Phillips, Vice-President of the Society. Messieurs S. W. W. Tong and S. Lewis replied, the latter recalling many amusing and interesting memories of earlier days in the history of the Society.

Thus concluded a most enjoyable function characterised by the feeling of fraternity in the law.

Christmas Message to the Profession

From the ATTORNEY-GENERAL

I am grateful to the Editor of THE NEW ZEALAND LAW JOURNAL *for granting me the privilege of sending a message to members of the legal profession.*

During the year there have been several notable events. In February there was the United Nations Seminar on the Protection of Human Rights in the Administration of Criminal Justice, which brought to Wellington many distinguished lawyers from countries in this region. Later in the year we had the honour of welcoming to New Zealand the Lord Chief Justice of England, Lord Parker and Chief Justice Earl Warren of the United States.

The legislative programme has been a particularly heavy one. The Crimes Bill with more than 400 clauses has at last become law, its passage being facilitated by a free debate in Parliament on the issue of capital punishment. Other measures of interest to the Profession have also been enacted but I assume that they will be listed elsewhere in this JOURNAL.

Although my period in office has been short—no more than about 12 months—it has been long enough for me to see the great help which is given to the Administration in various ways by the Profession and I record here my deep appreciation.

May I wish you all a merry Christmas and a happy New Year and last but not least an enjoyable vacation.

J. R. HANAN,
ATTORNEY-GENERAL

SESSIONAL LEGISLATION

37. Agricultural and Pastoral Societies Amendment
72. Agriculture (Emergency Regulations Confirmation)
34. Apprentices Amendment
138. Appropriation
31. Auckland Electric Power Board Amendment
23. Births and Deaths Registration Amendment
117. Broadcasting Corporation
76. Carriage by Air Amendment
75. Chattels Transfer Amendment
26. Child Welfare Amendment
133. Chiropractors Amendment
59. Cinematograph Films
77. Civil Aviation Amendment
42. Civil List Amendment
78. Clerks of Works Amendment
33. Coal Mines Amendment
15. Cook Islands Amendment
131. Counties Amendment
43. Crimes
45. Criminal Justice Amendment
57. Customs Acts Amendment
5. Dairy Production and Marketing Board
88. Distillation Amendment
79. Dogs Registration Amendment
56. Education Amendment
30. Electric Power Boards Amendment
80. Electricity Amendment
61. Emergency Regulations Amendment
70. Engineering Associates
28. Estate and Gift Duties Amendment
65. Factories Amendment
25. Family Benefits (Home Ownership) Amendment
120. Finance
81. Fire Services Amendment
112. Friendly Societies Amendment
82. Gaming Amendment
24. Gas Industry Amendment
39. Government Railways Amendment
83. Guardianship of Infants Amendment
114. Harbours Amendment
113. Health Amendment
84. Hospitals Amendment
35. Hydatids Amendment
85. Immigration Restriction Amendment
1. Imprest Supply; 2 (No. 2); 4 (No. 3); 8 (No. 4); 17 (No. 5); 58 (No. 6)
109. Indecent Publications Amendment
125. Industrial Conciliation and Arbitration Amendment
126. Industrial Conciliation and Arbitration Amendment (No. 2)
137. Inland Revenue Department Amendment
3. International Finance Agreements
11. Judicature Amendment
62. Juries Amendment
86. Land Amendment
74. Land Agents Amendment
27. Land and Income Tax Amendment
13. Land and Income Tax (Annual)
21. Land Settlement Promotion Amendment
9. Land Transfer Amendment
87. Land Valuation Court Amendment
47. Law Practitioners Amendment
19. Law Reform (Testamentary Promises) Amendment
135. Licensing Amendment
136. Licensing Trusts Amendment
52. Lincoln College
71. Local Authorities Loans Amendment
22. Local Elections and Polls Amendment
132. Local Government Commission
127. Local Legislation
69. Machinery Amendment
20. Magistrates' Courts Amendment
89. Manapouri-Te Anau Development Amendment
46. Maori Education Foundation
129. Maori Purposes
41. Maori Social and Economic Advancement Amendment
90. Married Women's Property Amendment
53. Massey College
134. Meat Amendment
40. Mental Health Amendment
115. Mining Amendment
12. Monetary and Economic Council
91. Mortgagors and Lessees Rehabilitation Amendment
10. Motor Spirits Duty
60. Municipal Corporations Amendment
116. National Military Service
110. National Provident Fund Amendment
29. New Zealand Army Amendment
92. Otago Boys' and Girls' High Schools Amendment
18. Penal Institutions Amendment Bill
93. Physiotherapy Amendment
122. Police Amendment
94. Post Office Amendment
36. Poultry Amendment
95. Poultry Runs Registration Amendment
73. Primary Products Marketing Regulations Confirmation
96. Property Law Amendment
32. Public Works Amendment
64. Quarries Amendment
14. Republic of Cyprus
128. Reserves and Other Lands Disposal
97. Royal New Zealand Air Force Amendment
98. Sale of Goods Amendment
99. Scientific and Industrial Research Amendment
100. Shipping and Seamen Amendment
6. Social Security Amendment
101. Soil Conservation and Rivers Control Amendment
55. Stamp Duties Amendment
16. State Advances Corporation Amendment
102. State Supply of Electrical Energy Amendment
118. Stock Amendment
103. Stock Remedies Amendment
44. Summary Proceedings Amendment
111. Superannuation Amendment
63. Taranaki Scholarships Trust Board Amendment
123. Tariff and Development Board
66. Tenancy Amendment
104. Tourist Hotel Corporation Amendment
130. Town and Country Planning Amendment
124. Trade Practices Amendment
105. Transport Amendment
106. Trustee Savings Bank Amendment
54. Universities
50. University of Auckland
49. University of Canterbury
48. University of Otago Amendment
51. Victoria University of Wellington
107. Visiting Forces Amendment
67. Wages Protection and Contractors' Liens Amendment
108. Waikato Valley Authority Amendment
7. War Pensions Amendment
68. Western Samoa
38. Wool Commission Amendment
121. Wool Commission Amendment (No. 2)
119. Wool Industry Amendment

BILLS NOT PROCEEDED WITH

Civil Defence
Expiring Laws Continuance
Interest on Deposits
Nature Conservation Council
Parliamentary Commissioner for Investigations
Public Bodies Meetings
Public Revenues Amendment
Staff Superannuation
Transport
Workers' Compensation Amendment

An Occupational Hazard—"Many Judges and registrars have a secret dread of the case in which an attractive young lady appears as a party. It is not so much that they fear that justice may not be done—they are professionally impervious to even the most seductive feminine charms—but they feel that if they find for the lady it may not manifestly be seen to be done". (1961) 105 S.J. 621.

JUDICIAL RETIREMENTS

Judge W. F. Stilwell, M.C.

It was recently announced that Judge W. F. Stilwell, Additional Judge of the Arbitration Court since 1949, was to retire in September 1962 and he has already commenced his retiring leave. So ends a judicial career of nearly 30 years.

The Judge was a recruit to the legal profession as office junior to an Auckland firm in the days when the typewriter was regarded with some suspicion. He recalls that all letters of any importance were handwritten in copying ink and a press copy was then taken in a letter book, such copying being a large part of his duties.

Mr Stilwell, as he then was, had always been interested in military affairs, and left New Zealand with the Main Body of the 1st N.Z.E.F. In the course of his service he was awarded the Military Cross.

On returning from active service, Mr Stilwell became Managing Clerk of his firm and subsequently entered practice on his own account with Colonel Dawson. In 1933 he was appointed a Stipendiary Magistrate, in 1948 a Deputy Judge of the Arbitration Court and in 1949 an Additional Judge, the office which he still holds.

Apart from the ordinary duties of his various judicial offices the Judge has been Chairman of various Commissions of Inquiry including most if not all of the inquiries which have been held into commercial-aircraft accidents. He was also Chairman of the Public Service Appeal Board for 13 years during which time he did much to straighten up the procedure of that body and make its proceedings compare with ordinary judicial principles while at the same time avoiding too much formality. He has also been Chairman of the Film Industry Board, the Pharmacy Authority, the Sea Fisheries Licensing Appeal Authority, the Government Railways Industrial Tribunal, the Post and Telegraph Staff Tribunal and the Government Services Tribunal.

Judge Stilwell proposes to continue to live in Wellington, but hopes to see more of New Zealand than he has had time for in the past. He also intends to make an all-out effort to sharpen up his short game at golf.

Mr Raymond Ferner S.M.

Another judicial officer of long standing, Mr Raymond Ferner S.M. of Christchurch, commenced his retiring leave on 11 December.

After returning from service with the 1st N.Z.E.F., Mr Ferner practised as a barrister and solicitor at Auckland from 1920 to 1936, when he was appointed to the Magisterial Bench. It is interesting to note that from 1933 to 1936, he served as Mayor of Mount Albert, a position in which he succeeded Judge Stilwell. He was also a member of the Auckland Transport Board, the City and Suburban Drainage Board and served as a Governor of the Greymouth Technical High School from 1937 to 1949 and of the Whangarei High School from 1940 to 1944.

Mr and Mrs Ferner will leave on a tour of Britain and the Continent in April next and will return to Christchurch towards the end of next year.

PERSONAL

Consequent on the retirement of Judge Stilwell, Judge K. G. Archer of the Land Valuation Court has been appointed as a temporary Judge of the Court of Arbitration. It is intended that, during the period of Judge Stilwell's retiring leave, Judge Archer shall act as Chairman of the Government Services Tribunal, a position which can be held only by a Judge of the Court of Arbitration or a Stipendiary Magistrate.

With the retirement of Mr Joseph Hore through ill health from the firm of Buddle, Weir & Co., Auckland has lost from active practice one of New Zealand's ablest and most experienced counsel in the field of Employers' Liability. He was admitted as a solicitor in 1915, and as a barrister in 1923. In 1922 he joined the staff of Buddle, Richmond & Buddle (as it then was), having previously been in practice in Taranaki. In 1940 he was admitted to partnership, and when he retired last September he was senior partner in the firm. A former President of the Auckland Medico-Legal Society, he has been an enthusiastic supporter of it since its foundation. He will be gratefully remembered by many readers for his ready help and advice in their problems of Workers' Compensation and allied topics.

Mr J. E. Farrell of Oamaru left recently for a visit to Europe with the object primarily of studying the legal and political implications of integration in Europe. On his return it is hoped to publish a series of articles setting out the results of his study.

In the Supreme Court at Hamilton on 16 November, Mr G. D. Carter was admitted as a barrister and solicitor by Mr Justice Leicester on the motion of Mr P. A. Bennetts. On the same occasion, Mr G. J. Fuller was admitted as a barrister on the motion of Mr R. M. Jansen.

In the Supreme Court at Auckland on 10 November, Mr Justice T. A. Gresson admitted Mr Thakor Parbhu as a barrister and solicitor on the motion of Mr F. H. Haigh.

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

A Tragic Case—A case reported in the All England Reports (1961 3 All E.R. 323) relates a most tragic set of circumstances. A 20 months old child was injured in a motor accident due to the negligence of another party as a result of which injuries the child became a mental defective, lost practically all amenities of life and would spend most of his life in a State Institution. General damages for the child were assessed at £11,000. In assessing this sum the trial Judge took into account the loss of earnings during the period of loss of expectation of life and treated as irrelevant the prospect that the child might not be able to use the money awarded as damages, meaning thereby that he would be maintained by the State in a Health Service Institution. The Court of Appeal held that although the trial Judge had erred in taking into account the loss of earnings during the period for which expectation of life was lost, yet that factor must have been small having regard to the remoteness of the period. The award was therefore not varied.

Fruits of Illegal Dealing—The case of *Medders* v. *Ferguson* reported in the Victorian Law Reports September 1961 at page 594 raises some interesting possibilities. The plaintiff was a passanger in a motor car driven by a lady and he was gravely injured as a result of her negligence. The plaintiff sued the driver of the car claiming general damages for his injuries and also a sum of £725 representing loss of wages for a period of 29 weeks. The plaintiff in his evidence stated that for a period prior to two years before the accident he had worked at the docks as a rigger at 10s. 6d. per hour. However, for the ten months prior to the accident he had been employed as a clerk to a starting price bookmaker. This bookmaker was unlicensed and, therefore, the business he was carrying on was unlawful. The Court decided that although it accepted the evidence that the plaintiff would have been employed earning a sum of £25 per week had it not been for the accident, the fact that such employment was unlawful debarred him from succeeding. No allowance was, therefore, made for special damages insofar as loss of wages was concerned.

Perchance to Dream—The tourist industry, states a writer in the *Solicitors' Journal*, appealing, as it does, to dreaming and escapism by hyperbole and exaggeration must surely sow in its promises the seeds of innumerable actions. A socially aspiring tourist lured to some literally lousy fonda in Spain by descriptions of luxurious living with impeccable service may well feel that he has suffered an actionable wrong, while a romantic tourist who has expressly stipulated for a place remote, retired, inaccessible, savage, devoid of all the demoralising influences of modern civilisation, may feel himself even more bitterly cheated and deluded in being fobbed off with some colourless, up-to-date, hygenic, tourist barracks with not one trace of the fleas that tease in the high Pyrenees nor the wine that tasted of the tar. An Eastbourne hotel keeper who had too lavishly fed the yearnings of his potential customers for the delights of yesteryear was nearly in trouble in the Magistrates' Court there. A brochure which he circulated contained a photograph of the bandstand taken (as was evident from the women's clothes) some time in the 1930's. The view from the hotel lounge displayed the pier as it was at least 40 years ago. The municipal orchestra was described as playing daily in the Floral Hall an echo of harmonies silenced by the war since when no municipal orchestra had been engaged. All this appeal to a sleep-walking nostalgia went with an elusive offence under the Registration of Business Names Act which cost the pedlar of evaporated charms a fine of £190. It was a lesson, and he need not despair for the future. Every tourist agency knows that even if the camera avoids lies it can get along very nicely with subtle touches of *suggestio falsi* and *suppressio veri*.

Devalued Lawyers—So long as people were convinced that law and order provided the framework within which individual freedom could operate the prestige of the lawyers was high and so correspondingly were their rewards. Judges were not expected to queue for buses or wash up the dinner things. But now that people care so much less for liberty than for the services supposed to be rendered to them by social scientists, statisticians, assorted technologists and members of the managerial class, the world in general has far less use for the lawyer and rewards him accordingly. This is true even of traditionalist England, where there is now a marked tendency to fly from the devalued legal profession into the affluence of business or industry. It is yet more true of revolutionary Russia. Thus a Scottish Queen's Counsel in a recent travel book, while praising the conscientiousness and the technical efficiency of the Moscow lawyers, found the Court buildings and appointments shabby and unimpressive and the clothes and general appearance of the lawyers suggestive of a condition of under-privilege. This state of affairs adds point to a recent complaint in a Russian newspaper of what is happening to law graduates expensively educated by the State. " Wearing a stylish suit and carrying a snow-white napkin over his arm, a graduate from the Moscow Institute of Laws manoeuvres among the tables. What a joy it is to watch the juridical politeness with which this waiter bows before the customer and the magnificent accomplishment with which he notes orders and calculates bills." This is no doubt, very good for the tourist trade, but it is a loss to the law to be deprived of such presence and precision. It is rather puzzling. No doubt all over the West End of London there are hordes of well-tipped waiters far more richly rewarded than the average barrister or struggling junior solicitor. But in officially tipless Russia what is the clue to the preference for the restaurant tables over the tables of the law ? One reason would seem to be that newly-trained specialists of all sorts are expected to be ready to be rocketed into the outer spaces of far-flung corners of the Soviet Union to " build communism " there, an unalluring prospect after five years of stimulating student life. Better stay in Moscow and be a waiter. He also serves—in a way.

A Smart Lawyer—A smart lawyer is one who can take a law meant to be a stone wall, find a hole in it and convert it into a triumphal arch large enough for a team of four to drive through it with colours flying.

TOWN AND COUNTRY PLANNING APPEALS

McDonald and Another *v.* New Plymouth City Council

Town and Country Planning Appeal Board. New Plymouth. 1961. 7 August.

Zoning—Land zoned as parking area—Application by owner for Order for immediate taking of land—Whether "imminent change of use"—Not required as car park for at least five years—Appellant considering giving up business carried on on land—Not concrete evidence of intention to change use of land in immediate future—Town and Country Planning Act 1953, s. 47.

Appeal under s. 26 of the Town and Country Planning Act 1953. The appellants were the owners of a property containing in all 21.87 pp., being part of Section 1516 on the Public Map of the Town of New Plymouth. This property was situated on the corner of Gover and Leach Streets. Under the respondent Council's proposed district scheme, as publicly advertised, this property was zoned as an off-street parking area. The appellants lodged an objection to this zoning, claiming that their land should be zoned as industrial B. The objection was disallowed and this appeal followed.

N. H Moss, for the appellants.
J. P. Quilliam, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds as follows:

1. A considerable volume of evidence was led and lengthy submissions were filed by counsel, but it is not the intention of the Board to review these in detail. As the hearing developed, it became apparent that the main objective of the appellants was to obtain an order under s. 47 of the Act requiring the respondent Council to take the property under the Public Works Act 1926.
2. The Board is satisfied that the respondent Council has estabished a need for the reservation of a car-parking area in this locality in the future and it is not prepared to allow the appeal in so far as it relates to the zoning of the appellants' land. If the appellants' land had not been required as part of the car park, an industrial B zoning would have been appropriate and if in the future the respondent Council takes the land under the Public Works Act, the Board considers that the compensation to be awarded to the appellants should be based on the assumption that the appellants' land, if it had not been required for public purposes, would have been zoned as industrial B.
3. Turning now to the question of whether or not an order should be made under s. 47 requiring the respondent Council to take the land forthwith, the Board has given full and careful consideration to the submissions made by both counsel on this question, but it sees no reason to depart from the view it takes or the interpretation of this particular section as enunciated in its decision in Appeal No. 216-60: *Burgess, Fraser and Co. Ltd.* v. *New Plymouth City Council.* In that decision, the Board examined s. 47 and in particular the wording of subs. 3 (b) and the meaning to be placed by subs. 4, on the words "shall have regard to the imminence or otherwise of any change in the use of the said land". The Board there held that the question of imminence or otherwise of a change of use must be a question of fact to be determined from the evidence. If there is no imminent change of use established, then no order should be made under s. 47. In this particular case, there is no evidence establishing any imminent change of use of the land under consideration. The respondent has indicated that the property will not be required for car parking before the first five-yearly revision of the scheme. So far as the appellants are concerned, their evidence is that they reside on part of the property where one of them conducts a business as a ladies' hairdresser, but it goes no further than indicating that the appellants are giving consideration to the winding up of the hair-dressing business and the disposing of their property. As was held in the appeal of *Burgess, Fraser and Co. Ltd.* (*supra*), a declaration of intention to do something at some indeterminate date in the future is not concrete evidence of intention to change the use of land in the immediate future.

The appeal is disallowed. This decision will not deprive the appellants of any rights because they can make application to the Board at any time under s. 47, subs. (3), when the circumstances are such as to justify such an application being made.

Appeal dismissed.

Minister of Works *v.* Bay of Islands County Council

Town and Country Planning Appeal Board. Kawakawa. 1961. 14 July.

Zoning—Change of circumstances affecting decision on earlier appeal—Amendment of decision—Town and Country Planning Act 1953, s. 26 (3).

Application by the Bay of Islands County Council made pursuant to the provisions of s. 26 (3) of the Town and Country Planning Act 1953 for a review of the decision given herein by the Board on the twenty-fourth day of May 1960: (1960) 1 T. & C.P.A. 131. The following order was made:

UPON READING the application of the Bay of Islands County Council filed herein and BEING SATISFIED that since the decision herein given on the twenty-fourth day of May 1960 was issued there has been a change of circumstances which might have affected the decision, the Board HEREBY DIRECTS that the decision be amended in manner following:

1. The land referred to in para. 3, subpara. (c) of the decision lying to the north of the proposed car park, having frontages to two proposed streets, is to be zoned as commercial B and not as rural as provided for in the said decision.
2. That the land referred to in para. 3, subpara. (d) of the said decision and there described as the smaller block lying to the north of lots 7 and 8 is to be zoned as commercial B and not as rural as provided for in the said decision.
3. That the land shown as industrial A on the Council's District Scheme, as publicly notified, and lying to the north of the land mentioned in para. 1 hereof is to remain zoned as industrial A.

Dated at Wellington this fourteenth day of July 1961.

F. F. Reid
Chairman.

Proof of Sanity—"Doctors being no more or less human than legal aid committees, it is not surprising that some people get medical 'sustificates' on as dubious grounds as they do legal aid ones. The main difference is that the latter are legible, whereas the former are not. There are occasional exceptions to this rule, of course. Take, for instance, the one held by a defendant who claimed that it was 'a sustificate to prove I'm conscious'. One remembers also the story of the wild-eyed plaintiff who insisted that the defendant was mad, and challenged him to prove he was not. In order to placate him, the Judge pointed out that it was very unlikely that anyone could prove that he was not mad. 'I can'! claimed the plaintiff triumphantly, and produced his certificate of discharge from a mental hospital".—(1961) 105 S.J. 480.