New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The nineteenth century relied primarily upon legislation which was to a large extent self-operating—that is, enforced by citizens in their private capacity—but we in the twentieth century rely primarily upon administration created by Parliament to carry out its own Acts."

—W. A. ROBSON.

Vol. XV. Tuesday, November 7, 1939. No. 20.

Children and Dangerous Objects: Degree of Care Required.

I.

WHERE a person of full age does that which will probably afford an inducement, or opportunity, for children to run into danger, he is bound to take reasonable precaution to prevent such inducement, or opportunity, resulting in danger, or to guard against the consequences.

During the period separating the decision of the Court of Queen's Bench in *Lynch v. Nurdin*, (1841) 1 Q.B. 29, 113 E.R. 1041, from that of the recent case of Croom-Johnson, J., in *Culkin v. McFie and Sons, Ltd.*, [1939] 3 All E.R. 613, the Courts have upon a number of occasions been required to investigate the problem of the liability to children that arises from the duty not to leave without supervision or control that to which children may obtain access, and which if meddled with, may prove to be dangerous and cause damage. It has been recognized on the one hand that children are both inquisitive and mischievous, that there is little with which, unless restrained, they will not interfere, that they are easily tempted, and as easily injured; on the other hand, that children will continue to injure themselves in innumerable unforeseen and unforeseeable ways, and that the community cannot be expected to shoulder the burden of being insurers of their safety; but that they are nevertheless entitled to protection against objects obviously or inherently dangerous, or which will become dangerous by reason of being easily set in motion.

This distinction is well illustrated by the decisions in *Lynch v. Nurdin* (*supra*) and *Donovan v. Union Cartage Co., Ltd.*, (1933) 40 T.L.R. 125. In *Lynch v. Nurdin* the defendant left his horse and cart in charge of his carman in Compton Street, Soho. The carman went into a house, leaving the horse and cart standing unattended at the door for about half an hour. During this half-hour the plaintiff, a boy about seven years old, got on to the cart, while another boy led the horse on. The plaintiff fell off the cart and the wheel ran over and broke his leg. At the trial it was contended for the defendant that the case should be withdrawn from the jury. The Judge refused to withdraw the case, and the jury returned a verdict for the plaintiff. A rule *nisi* for a new trial was discharged, the legal aspect of the case being thus expressed by Denman, C.J., at pp. 38–39:

> ". . . can the plaintiff then . . . maintain his action having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child for yielding to that temptation. . . . The child, acting without prudence or thought has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."

In *Donovan v. Union Cartage Co., Ltd.* (*supra*), the defendants, who were cartage contractors, left an unhorsed van standing outside their premises at Bow. The plaintiff, a boy of seven, climbed on to the van, fell off, and was injured. The County Court Judge gave judgment for the defendants, and upon the plaintiff's appeal to the Divisional Court, it was strenuously urged on his behalf that the case was within the principle of *Lynch v. Nurdin*. This contention, however, was rejected, Acton, J., remarking that the unhorsed van was not "in itself both attractive to children and dangerous," and that there was "no relation of cause and effect between an obstruction to the user of the highway and the occurrence of the accident."

In the years intervening between these decisions, similar questions arose on a number of occasions, only a few of which, however, can be considered within the scope of a single article.

In *Jewson v. Gatti*, (1886) 2 T.L.R. 381, 441, the defendants were lessees of a cellar in Maiden Lane, Strand, belonging to the Adelphi Theatre. They used the cellar for painting and preparing scenery, and, while this operation was in progress, protected or purported to protect the entrance to the cellar by means of a wooden bar. The plaintiff, a little girl, being anxious to see what was going on in the cellar, leant against the wooden bar, which, being insecurely fastened, gave way, and precipitated her into the cellar. The trial Judge entered judgment for the defendants, but a motion for a new trial was successful on the grounds that upon the facts there was some evidence of negligence on the part of the defendants. Lord Esher, M.R., in his judgment pointed out that "it must have been known" that "the painting going on in the cellar . . . would attract children," while the presence of the bar was "almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar."

Cooke v. Midland Great Western Railway of Ireland, [1909] A.C. 229, and *Robert Addie and Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358, are interesting and important decisions. In both cases there is a striking similarity on the facts; in both cases the legal position was fully and carefully explored by the House of Lords; and in these cases opposite conclusions were reached. In *Cooke's* case the railway company left an unlocked turntable on their land, which not unnaturally provided a constant source of amusement to the youth of the neighbourhood. The company knew that children

played on the turntable, but made no effort to prevent them from so doing, and a beaten path from a gap in the hedge bore significant witness to the attractions of this unusual toy. While playing on the turntable, the plaintiff, a boy between four and five years old, was seriously injured, and it was held that there was evidence of actionable negligence on the part of the railway company entitling the plaintiff to recover.

In *Dumbreck's* case the colliery company operated as part of their haulage system an endless wire cable passing round a heavy horizontal iron wheel. The cable and wheel were in a field surrounded by a hedge, which was quite inadequate to keep out the public; the wheel proved an exciting toy to the local children, much as the turntable had done in *Cooke's* case. The colliery company knew that children played on the wheel, and their officials had constantly warned children out of the field, warnings which as persistently had been disregarded. The plaintiff's son, a boy of four, was playing on the wheel when it started, and the boy was killed. The father sued the colliery company for damages, and the First Division of the Court of Session decided in his favour. This decision was reversed by the House of Lords, on the grounds that the boy being merely a trespasser on the property of the colliery company, went there at his own risk. *Cooke's* case was distinguished because there the railway company had tacitly permitted children to play on their turntable, with the result that the children were certainly licensees, and perhaps invitees upon the property of the company.

That *Cooke's* case introduced temporary confusion into the law of England was the opinion of Scrutton, L.J., in *Liddle v. Yorkshire (North Riding) County Council*, [1934] 2 K.B. 101. This contention, he thought, was established by the judgments in *Latham v. R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398, and by the explanation of *Cooke's* case by Lord Atkinson in *Glasgow Corporation v. Taylor*, [1922] 1 A.C. 229, that *Cooke's* case must be treated as the case of a child impliedly licensed to use a plaything, which was, for a child, a trap.

The decision of the Court of Appeal in *Liddle v. Yorkshire (North Riding) County Council (supra)*, was a further addition to the series of cases dealing with the liability of occupiers for injuries to children. In that case the County Council were making a road improvement by rounding off a sharp corner and extending the road into a field. A stone wall 4½ ft. high was built on the field side, and there was a sharp drop of about 18 ft. into the field. A culvert ran under the road at that point. A heap of soil lay against the wall. The boy Liddle, who was six years of age, clambered up on to the heap of soil and sat on the wall between two companions. While talking to them he fell over backwards and injured his head. The place where the accident happened had not been dedicated to the public and was the private property of the defendant corporation. Children used to play there when no one was about, but if workmen were there, the children were always warned off. A workman had warned the infant plaintiff. The Court held that these facts disclosed no cause of action, and gave judgment for the defendants.

The duty of an occupier to a person upon his premises varies according to the capacity in which he is present. Apart from contract he is either an invitee, a licensee, or a trespasser. To the invitee the occupier owes the duty of taking reasonable care that the premises are safe, and to the licensee of guarding against a concealed danger of which he knew or ought to have known. To the trespasser he is only liable for some intentional harm "or at least some act done with reckless disregard of the presence of the trespasser": per Lord Hailsham in *Dumbreck's* case (*supra*), at p. 365. It was submitted that these principles of liability apply equally to adults and children, although their application may be different. In *Dumbreck's* case the House of Lords having held that the plaintiff's son, aged four, was a trespasser, applied the ordinary rules of an occupier to a trespasser. In the words of Lord Dunedin, at p. 376,

> "The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is a trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement."

But the execution on his premises of a dangerous act which might reasonably attract children and the knowledge that children were in the habit of trespassing on the premises provides strong evidence that the occupier was acting "with reckless disregard of the presence of the trespasser." This appears to underlie Lord Dunedin's speech in *Excelsior Wire Rope Co. v. Callan*, [1930] A.C. 404, 410, 411; and see also the judgment of Scrutton, L.J., in *Mourton v. Poulter*, [1930] 2 K.B. 183, 190, 191.

The case of *Excelsior Wire Rope Co. v. Callan (supra)* is often regarded as in conflict with *Dumbreck's* case: on which topic see the judgment of Scrutton, L.J., in *Mourton v. Poulter (supra)*, at p. 190. In the *Excelsior* case (*supra*), a railway-siding belonging to the Marquess of Bute adjoined a playing-field for children. The defendants had permission from Lord Bute to erect and use thereon certain truck-hauling machinery. To the defendant's knowledge, the children played round the machinery without interruption except when it was being put into motion. After being told to go away, preparatory to starting the machinery, a little girl swung on a rope and had her hands crushed by a pulley. The company were held to be liable. All the Law Lords agreed, but for varying reasons, that the question whether the child was a licensee or a trespasser was immaterial. The defendants were not technically occupiers; and Lord Atkin appears to base his opinion upon the duty owed by owners of dangerous things. If that is the correct interpretation, this case deals with a point different from that in *Dumbreck's* case (*supra*). It seems, however, that the speech of Lord Dunedin (who with Lord Buckmaster was present in *Dumbreck's* case) contains the real *ratio decidendi*. He points out that it was immaterial to consider in what capacity the child entered the field, since the defendants had committed a breach of their lowest duty to a trespasser, in that their "acting was so reckless as to amount to malicious acting." Lord Dunedin went on to state that the mere fact that the defendants were not occupiers did not in his judgment remove the case from the category of those cases where the land was in the occupation of the person owning the dangerous machine. If necessary, he would have found that the child was a licensee of the defendant's because in this type of case "the word 'licensee' . . . is certainly intended to include . . . a permittee." If Lord Dunedin be right, the *Excelsior* case fits into, and is an example of, the law as laid down in *Dumbreck's* case (*supra*).

In the case of *Latham v. R. Johnson and Nephew, Ltd.* (*supra*), the defendants were the owners of unfenced waste land to which there was access from the back of a house in which the plaintiff, a girl of about three, lived with her parents. The defendant deposited upon the land a cartload of large paving-stones, and upon the same day that the paving-stones were deposited, the plaintiff, unobserved and unaccompanied, left the house and shortly after was found with her hand so badly crushed by one of the paving-stones that a finger had to be amputated. The jury assessed the damages at £15, and Scrutton, J. (as he then was), on the grounds that the facts brought the case within the decision in *Cooke's* case, gave judgment for the plaintiff. This judgment was reversed by the Court of Appeal; and Hamilton, L.J. (as Lord Sumner then was), in a remarkable exposition of the law, examined the principles that govern children's cases, and also subjects *Cooke's* case to a searching analytical criticism. At p. 416, he asked

> "What objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves *simpliciter*. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal."

Summary of Recent Judgments.

SUPREME COURT. Gisborne. 1939. September 22; October 9. *Callan, J.*

HALL AND OTHERS v. GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED, AND OTHERS.

Probate and Administration—Practice—Discovery—Privilege—Executor of Will appointed Administrator under Part IV of the Administration Act, 1908—Action by Beneficiary under Will against him in both Capacities—Distinguishment of his Privilege in each Capacity on Discovery.

A beneficiary under a will has a right of access to documents which belong to the executor and trustee, and, in an action by the former against the latter, privilege for legal professional documents cannot be claimed by the latter except in respect of communications and documents brought into existence by the latter for the purpose of litigation against him by the former.

But when the executor is appointed as administrator under Part IV of the Administration Act, 1908, as between such appointee and a beneficiary under the will, there does not exist the same relationship as between executor and beneficiary that which is the foundation of the above principle.

Therefore in an action by the beneficiary against the executor *qua* such administrator, the latter on discovery can claim privilege for legal professional documents which came into his possession *qua* such administrator.

Documents, however, which came into his possession *qua* executor would still be held by him as executor and subject to the above-stated principle.

In re Loveridge, Silk v. Public Trustee, [1937] N.Z.L.R. 534, G.L.R. 309, applied

Counsel: Lysnar, for the plaintiffs; **Richmond and J. G. Nolan,** for the first defendant; **North,** for the second defendant; **Evans,** for the third defendant.

Solicitors: Whitehead and Graham, Gisborne, for the plaintiffs; **Nolan and Skeet,** Gisborne, for the Guardian, Trust, and Executor Co. of New Zealand, Ltd.; **Blair and Parker,** Gisborne, for the Bank of New Zealand; **Coleman and Coleman,** Gisborne, for the Union Bank of Australia, Ltd.

SUPREME COURT. Wellington. 1939. September 5; October 13. *Myers, C.J.*

In re **COOTE (DECEASED).**

Probate and Administration—Estate administered under Part IV of the Administration Act, 1908—Operative Date in respect of Proof of Debt—Up to what Date Executor can acknowledge Statute-barred Debt so as to take it out of Statute of Limitations and bind "the appointee"—Administration Act, 1908, ss. 61, 64.

An acknowledgment of a statute-barred debt, sufficient to take it out of the Statute of Limitations, by the executors of the deceased debtor or their agent prior to the order appointing the "appointee" under s. 64 of the Administration Act, 1908, and probably also before the filing by the executors of a petition to have the deceased debtor's estate administered under Part IV of the Statute, is binding upon the said "appointee."

Semble, In the administration of the estate under Part IV of the Administration Act, 1908, the date of the death of the deceased debtor whose estate is being administered is the operative date for the determination of the question that debts of the deceased may be proved in such administration.

Ex parte Weldon, In re the Estate of Lowther Broad, (1893) 12 N.Z.L.R. 666, 669, and **In re John McDougal (deceased),** (1927) N.Z.L.R. 587, G.L.R. 404, followed.

Dictum of *Reed*, J., in **In re Loveridge, Silk v. Public Trustee,** (1937) N.Z.L.R. 534, 537, G.L.R. 309, 311, dissented from.

Counsel: Wiren, for the appellant creditor; **Carrad,** for the Public Trustee.

Solicitors: S. A. Wiren, Wellington, for the appellant creditor.

COURT OF ARBITRATION. Auckland. 1939. October 4, 12. *O'Regan, J.*

SPURR v. RICHARDSON AND CO., LIMITED.

Workers' Compensation—"Accident arising out of and in the course of the employment"—Wharf to which Public has Right of Access—Whether indistinguishable from Public Highway—Waterside Worker killed while walking along Wharf from Locus of Employment—Workers' Compensation Act, 1922, s. 3.

Save in the case of certain workers, whose work necessarily continues while they are in streets or highways, a worker is not within s. 3 of the Workers' Compensation Act, 1922, if he is injured in a public highway, while proceeding to or returning from the locus of his employment.

A wharf, to which persons using the wharf in the course of business, as well as any member of the general public, has a right of access, is in principle indistinguishable from a public highway.

Hence, where a waterside worker who had been dismissed from work and paid at the locus of his employment and who was walking along the edge of such wharf to the waterside workers' waiting-shed, where he would leave his overalls, fell into the water and died,

J. J. Sullivan, for the plaintiff; **A. J. Moody,** for the defendant,

Held, That the accident was due to a risk to which any member of the public was exposed equally with the deceased, and did not arise out of his employment.

Brown v. Union Steamship Co., Ltd., [1925] N.Z.L.R. 246, G.L.R. 62; **Charles R. Davidson and Co., Ltd. v. M'Robb (or Officer),** [1918] A.C. 304, 10 B.W.C.C. 673; and **Clark v. Stephens, Sutton, Ltd.,** (1937) 30 B.W.C.C. 340, applied.

John Stewart and Son (1912), Ltd. v. Longhurst, [1917] A.C. 249, 10 B.W.C.C. 266, and **Foster v. Edwin Penfold and Co., Ltd.,** (1934) 27 B.W.C.C. 240, distinguished.

Solicitors: Sullivan and Winter, Auckland, for the plaintiff; **A. J. Moody,** Auckland, for the defendant.

Case Annotation: *Charles R. Davidson and Co., Ltd. v. M'Robb (or Officer)*, E. and E. Digest, Vol. 34, p. 276, para. 2339; *Clark v. Stephens, Sutton, Ltd., ibid.*, Supp. Vol. 34, No. 2348c; *John Stewart and Son (1912), Ltd. v. Longhurst, ibid.*, Vol. 34, p. 279; para. 2357; *Foster v. Edwin Penfold and Co., Ltd., ibid.*, Supp. Vol. 34, No. 2349c.

COURT OF APPEAL.
Wellington.
1939.
September 13;
October 10.
Myers, C.J.
Smith, J.
Johnston, J.
Fair, J.

N.I.M.U. INSURANCE COMPANY, LIMITED v. VILES.

Insurance—Motor-vehicles—Third-party Risks—Workers' Compensation paid by Employer to Employee injured by Negligence of Owner of Motor-vehicle—Successful Claim against Owner for such Amount—Liability of Insurance Company to Indemnify Owner of Motor-vehicle—Motor-vehicles Insurance (Third-party Risks) Act, 1928, s. 6—Workers' Compensation Act, 1922, s. 50.

A liability to indemnify, arising under s. 50 of the Workers' Compensation Act, 1922, against the loss caused by the payment of compensation to a servant or his representatives on account of death or bodily injury sustained or caused by, through, or in connection with the use of a motor-vehicle, constitutes for the purposes of s. 6 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, not a mere statutory contract of indemnity, but a liability to pay damages " on account of death or bodily injury," against which the owner of the motor-vehicle is entitled to be indemnified by the company with which he is insured.

Joyes v. National Insurance Co. of New Zealand, Ltd., [1932] N.Z.L.R. 802, G.L.R. 287, and **Birmingham and District Land Co. v. London and North Western Railway Co.,** (1886) 34 Ch.D. 261, distinguished.

South British Insurance Co., Ltd. v. Feely and Soteros, [1932] N.Z.L.R. 1392, G.L.R. 680, approved.

Appeal from the judgment of *Ostler*, J., [1939] N.Z.L.R. 377, dismissed.

Counsel: H. R. Cooper, for the appellant; **A. M. Ongley,** for the respondent.

Solicitors: Cooper, Rapley, and Rutherford, Palmerston North, for the appellant; **Gifford, Moore, Ongley, and Tremaine,** Palmerston North, for the respondent.

Case Annotation: *Birmingham and District Land Co. v. London and North Western Railway Co.*, E. and E. Digest, Vol. 26, p. 222, para. 1747.

FULL COURT.
Wellington.
1939.
Sept. 19.
Myers, C.J.
Ostler, J.
Smith, J.
Johnston, J.
Fair, J.

DICKIE v. CUNNINGHAM.

Justices of the Peace—Appeal—Sentence—General Appeal in form; but, in Substance, Appeal against Sentence only—Power to modify Sentence—Justices of the Peace Act, 1927, ss. 315, 325, 326.

The Supreme Court has power to entertain an appeal which is in form a general appeal under s. 315 of the Justices of the Peace Act, 1927, but which is in substance an appeal against sentence only, and on the hearing of such an appeal to modify the sentence or fine.

Taylor v. Marsack, (1898) 17 N.Z.L.R. 153, 1 G.L.R. 130, and **Skipper v. Cummings,** [1917] N.Z.L.R. 886, G.L.R. 570, distinguished.

Reg. v. Surrey Justices, [1892] 2 Q.B. 719; **Harris v. Cooke,** (1918) 88 L.J. K.B. 253; **Slipper v. Braisby,** [1930] N.Z.L.R. 953, 970, G.L.R. 599, 608; and **The King v. Kent Justices,** [1936] 1 K.B. 547, mentioned.

Counsel: R. A. Young, for the appellant; **C. H. Taylor,** for the respondent.

Solicitors: R. A. Young, Christchurch, for the appellant; **Crown Law Office,** Wellington, for the respondent.

Case Annotation: *Reg. v. Surrey Justices*, E. and E. Digest, Vol. 33, p. 401, para. 1115; *Harris v. Cooke, ibid.*, p. 391, para. 1019; *R. v. Kent Justices, ibid.*, Supp. Vol. 33, No. 1115a.

Acquisition of Title to Land by Accretion.

A Consideration of Verrall v. Nott.

By E. C. ADAMS, LL.M.

The principles which the common law of England has evolved in establishing the doctrine of accretion to land form a fascinating study and a case recently decided in New South Wales, *Verrall v. Nott*, (1939) 39 N.S.W. S.R. 89, is of particular interest to New Zealand lawyers, inasmuch as it was sought by counsel to establish that these common-law principles do not apply to land held under the Torrens System, or as we know it in New Zealand, under the Land Transfer Act.

The case concerned an accretion claimed by plaintiff to land at Manly Beach, Sydney; the accretion had been " gradually and imperceptibly " formed, but had been facilitated by the erection of a rubble wall on plaintiff's land. Another rather unusual feature of the case was that a certificate of title (pursuant to statutory authority) had issued for the adjoining foreshore, this certificate being under the New South Wales Real Property Act, which appears to correspond with our Land Transfer Act. Therefore, if the plaintiff was entitled to the accretion according to the rules of the common law, it followed that the certificate of title for the adjoining foreshore in favour of the Maritime Services Board would not be showing the correct position; it would purport to include the accretion which belonged to the plaintiff. The Crown grant of the plaintiffs' predecessor in title was dated April 11, 1845, and the land therein was described as follows:—

> " All that allotment or parcel of land in our said territory, containing by admeasurement 2 acres 1 rood 5 perches, be the same more or less, situate in the Village of Balgowlah Parish, of Manly Cove, County of Cumberland, being Allotment 21: *Commencing at the north-east corner, and bounded* on the east by Allotment 26, being a line bearing south, 4 chains 65 links, to the North Harbour; on the south by the shores of North Harbour; on the west by Condamine Street, being a line bearing north, 6 chains, and on the north by White Street, being a line bearing east, 4 chains 50 links, to the north-east corner aforesaid."

It will be seen that in their phraseology Crown grants of land in New South Wales resemble closely the early grants in New Zealand. For many years now in New Zealand Crown grants have been discontinued, the present procedure being by Governor-General's Warrant, where the descriptions of the land are not so detailed, thus putting more importance on the diagrams which are delineated on the certificates of title issuing under the Land Transfer Act, in pursuance of such Governor-General's Warrants.

It was held that the erection of the rubble wall by plaintiff did not prevent him from taking the benefit of the accretion: *Brighton and Hove General Gas Company v. Hove Bungalows, Ltd.*, [1924] 1 Ch. 372, although the wall facilitated the accretion. It is the law, however, that the subject is not entitled to an accretion brought about by works erected *for the purpose of reclaiming land* from the sea: *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd.*, [1915] A.C. 599. One can readily imagine cases in practice, where, owing to the intervention of human agency, it will be difficult to decide as to whether the Crown or the subject owns the accretion.

It was unsuccessfully submitted by counsel for the defendant that, as the land comprised in the Crown grant was described by metes and bounds, therefore the principle of accretion did not apply. This point had in reality been decided by the Privy Council in 1933, on an appeal from Burma: *Secretary of State for India in Council v. Foucar and Co., Ltd.*, (1934) 50 T.L.R. 241. At p. 243, their Lordships dealt with the question thus:

> "The question was, however, considered at length by Chief Baron Palles in *Attorney-General v. M'Carthy*, [1911] 2 I.R. 260, who held that it was concluded by the well-known decision in *Rex v. Lord Yarborough* (3 B. and C. 91), which, as he points out, was affirmed by the House of Lords in *Gifford v. Lord Yarborough* (5 Bing. 163). In that case there was the clearest possible boundary to the land for which the accretion was claimed in the existence of a sea-wall, and yet the doctrine was held to be applicable. The headnote to the report of the Irish case, which expresses concisely the conclusion there come to, is as follows:
>
> "'The decision of the House of Lords in *Gifford v. Lord Yarborough* (*supra*) conclusively determines that where land is added to the seashore by the gradual and imperceptible action of natural causes, the owner of the lands adjoining the accretions acquires in them a good title against the Crown, notwithstanding the existence of marks or bounds or other evidence by which the former, or a former, line of ordinary high water can be ascertained. The real question in every such case of accretion is whether during the process of accretion the progress of the accretion can be ascertained.'
>
> "The question was again considered by Mr. Justice Romer in *Brighton and Hove General Gas Company v. Hove Bungalows, Ltd.*, [1924] 1 Ch. 372, where a similar conclusion was reached.
>
> "In their Lordships' opinion, these cases were rightly decided, and they think that the general principle of accretion applies even where the former boundaries of the land on the waterfront were known or capable of ascertainment. On the assumption, therefore, that this was the position by reference to the plans in evidence in the present case, they are unable to hold that this excludes the application of the doctrine."

It was further unsuccessfully submitted by counsel for defendant that there could be no accretion *against* a title held under the Torrens System, as it was against the general principle of that system that any boundary should be ambulatory. It will be recollected that a certificate of title for the adjoining foreshore had issued in favour of the Maritime Services Board. The writer of this article well remembers making a similar submission at a law moot held in Gisborne more than twenty-five years ago, and presided over by Mr. F. W. Nolan, Crown Solicitor, who had no hesitation in rejecting the argument. Edwards, J., held in *Auty v. Thomson*, (1903) 5 G.L.R. 541, that the doctrine of accretion applied *in favour* of a title held under the Torrens System; it was held in *Verrall v. Nott* that it equally applies *as against* a registered proprietor of land held under that system. Where a certificate of title has become erroneous by erosion or accretion it may be amended under s. 74 of the Land Transfer Act, 1915, which provides that the District Land Registrar has power to amend any certificate of title if he is satisfied that it contains any misdescription of land or of boundaries.

In *Verrall v. Nott* the boundary between the two titles involved was not fixed but varied from time to time in accordance with high-water mark.

Some years ago an eminent authority on our Land Transfer System said:

> "I have often wondered what the effect of the vesting of a foreshore in a Harbour Board has—that is to say, whether the foreshore is a movable quantity or whether the effect was that the land that was the foreshore at the time of the vesting became immovably vested in the Board with the consequence that if the land subsequently ceased to be foreshore by being built up by accretions from the sea, and at the same time a new foreshore further seaward was formed, the Board became the owner of the original foreshore vested in it and also the new foreshore, or, on the other hand, if by erosure the foreshore, as vested in the Board, became wholly covered at medium low tide the Board lost all of its ownership."

Verrall v. Nott appears to supply the answer. If the foreshore gradually retreats, the owner of the adjoining land gets the benefit; if on the other hand, the sea gradually advances, the owner of the adjoining land loses to the extent by which his land is thus eroded. The title of the Harbour Board to the foreshore is a movable freehold. Whatever is the foreshore for the time being belongs to the Harbour Board, subject to this qualification that, if the change is sudden—*e.g.*, caused by an earthquake—then the title boundaries remain as they were immediately prior to such sudden change.

Verrall v. Nott has certain resemblances to *Attorney-General v. Findlay*, [1919] N.Z.L.R. 513. It was held that the meaning of the term "the line of high water at ordinary tides" in s. 12 of the Crown Grants Act, 1866, now s. 35 of the Crown Grants Act, 1908, is the line of medium high tide between the springs and the neap. Where land is described in a Crown grant as bounded "by high-water mark" and by natural accretion, so slow and gradual as to be in a practical sense imperceptible, land is added thereto, the land so gained is vested in the owner of adjoining land. This case concerned a mud-flat situated in the Firth of Thames (a locality lending itself to accretion), and it was held that so much of the mud-flat which was not at ordinary tides, covered with tidal water belonged to the successors in title of the Crown grantee, although the area of the mud-flat was not included in the area expressly Crown granted.

The doctrine of accretion was carefully worked out in Roman law and the English common law appears to have adopted it with certain differences in detail, which the student of comparative jurisprudence will find interesting. The doctrine of accretion applies only to what have been termed movable freeholds—*i.e.*, lands bounded by the seashore, rivers or streams of running water, all of which move from time to time. The possibility of such boundaries changing from time to time is an incident of the title itself. This is illustrated by the old case of *Scratton v. Brown*, (1825) 4 B.C. 485, 498, 107 E.R. 1140, 1145, 1146, where we find the following statement:

> "That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. . . . The Crown by a grant of the seashore would convey, not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between those two termini."

If the boundaries are fixed and definite lines, the doctrine of accretion does not apply. Thus in *Smart and Co. v. Suva Town Board*, [1893] A.C. 301, where the Privy Council had to decide the effect of a Proclamation defining the limits of the Town of Suva, it was held that the only movable boundary thereof was the seaward one, the other three boundaries being straight lines. Take the common example in New Zealand where the Crown grants land in the vicinity of a river,

but at the same time reserves a strip of land—*e.g.*, a road reserve 1 chain wide—between the land granted and the river; here apparently the doctrine of accretion can never apply, for the boundaries between the land of the Crown and of the subject are fixed and settled for all time; no matter where the river may change its course, the boundaries of the land Crown granted will always remain the same.

The doctrine of accretion applies only where a particular boundary is a water boundary which flows or moves. Thus in *Trafford v. Thrower*, (1929) 45 T.L.R. 502, Mr. Justice Eve held that the doctrine did not apply to land fronting the Norfolk Broads, which appear to be inland, non-tidal sheets of shallow and more or less stagnant water; nor does it extend to ponds and canals, nor, apparently, to lakes. As to whether it extends to marine lagoons, the student will find instructive the Australian case, *Williams v. Booth*, (1910) 10 C.L.R. 341, but the Privy Council in *Attorney-General of Southern Nigeria v. John Holt and Co., (Liverpool) Ltd.*, [1915] A.C. 599, applied the doctrine of accretion to land described as "facing the lagoon."

For the doctrine of accretion to apply the change must have been gradual and imperceptible. The following extract from *Foster v. Wright*, (1878) 4 C.P.D. 438, 446, shows what is deemed gradual and imperceptible:

> "The change of the bed of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before."

The meaning of "gradual and imperceptible" is also indicated by the following extract from *Moore on Foreshore*:

> "A jury might reasonably find that accretion was 'imperceptible' in a case where no witness had testified that it could be perceived either in progress or at the end of a week or month, and witnesses did say that the increase was 5½ yds. a year, and 150 yds. in 15 years, 30 to 50 yds. in 5 years—perhaps a quarter mile in 55 years."

Land gained imperceptibly takes on the legal characteristics of the land to which it accretes; thus it may become freehold or leasehold, or become subject to an easement or *profit à pendre* to which the principal land is subject. Probably also an accretion becomes subject to an existing mortgage: *Mercer v. Denne*, [1904] 2 Ch. 534, 560; *Coulson and Forbes on Waters and Land Drainage*, 5th edition, page 49.

Passports.—Nobody has a legal right to a passport at all. The grant of a passport is an act of courtesy by the Sovereign to assist his trusty and well-beloved subjects to go about the world armed with a request that they be well treated. But it is obvious that anyone who requires a passport must make a true declaration at the passport office, and must make no false pretence as to the intention which he has with regard to its use. The case of *R. v. Brailsford*, [1905] 2 K.B. 731, is the leading authority on this point. If a person obtains a passport on the representation that he himself wishes to use it and then hands it to another, he is guilty of a public mischief and may be tried and convicted. This week a Magistrate in the Metropolis had before him a case in the same field as *Brailsford's* case. The charge was of making an untrue statement in order to obtain a British passport for a German-born woman. The law on the matter, though not laid down by statute, is clear enough, and the learned Magistrate did well to impose a substantial sentence.—APTERYX.

The Year Books.

The Ancestors of the Red Book.

By S. H. MOYNAGH.

(*Continued from p. 263*).

Professor Bolland states with great emphasis "that there is nothing else in the whole world like these old Year Books of ours," and exclaims Maitland:

> "What has the whole world to put by their side? Nothing. In the old Year Books of ours, we can hear the actual colloquial phrases and idioms used by the cultured classes in England as they went about their daily business over 600 years ago."

Their story is not confined to mere legal debate as in the modern report, cold and bloodless, impersonal and devoid of any human touch, but, instead, we have portrayed for us the exciting interests of the trial which is proceeding before his (the Reporter's) eyes—the judicial wit, and criticism, and temper, the shifts and turns of Counsel, the skilful move or bungling omission, even to the repartee and exclamations which the heat of a hardly contested fight evoke. (*2 Pollock and Maitland's History of English Law*, 460.) And, as a final tribute to them, the same authors say:

> "They should be our glory, for no other country in the world has anything like them; they are our disgrace, for no other country in the world would have so neglected them."

The owners of the MSS., which have been found scattered all around England, did not know what treasures they had; and it is hoped and almost expected that even yet more manuscripts may come to light. There are some earlier compilations than the earliest generally accepted as commencing the series, the date of which is historically accepted as 1289–90. From that time onwards there is a fairly perfect succession up to the 27th year of the reign of Henry VIII of colourful memory, after which the work of the scribe gives way to that of the machine.

The next question that naturally arises is in what language are they written? The Professor says that, using the word somewhat loosely, they are written in French; but he prefers to call it Anglo-Norman. The last Edition of the *Encyclopædia Britannica* calls it "provincial French." There is here a most interesting philological discussion which unfortunately is not germane to this article, and with regret and reluctance we must pass on. Next, we come to the character of the handwriting of the manuscripts; and again we are on most interesting ground. At the period of the Year Books, two styles of handwriting existed side by side, and were respectively known as the "Court" hand and the "Cursive" hand. All official documents and those intended for preservation were written in the Court hand. The Court hand was more or less standardized. The cursive hand had the same liberty of variation and freedom of translation that we enjoy to-day; and, unfortunately, the Year Books are written in the cursive hand. Professor Bolland says: "This like our cursive hand to-day, varied, and varied with the individual writer." The adjective seems profoundly suitable. The Books, on the whole, for the period and the conditions that we refer to later on, are well

written; but the great trouble in transcribing them arises from the numerous and obscure abbreviations used. The Professor's dissertation on this aspect of the Books, as well as his philological theories, form a most instructive vignette and would in themselves give the material for another paper.

Now come two great speculations. Why were the Books written? And for what purpose? The Professor holds the view that the evidence is that they were not written for circulation in Court, for it is very rare indeed to find them citing any precedent. Case law, he says, did not exist (practically) in Edward II's time or thereabouts. We find, in the 19th year of the Reign of Edward III, Serjeant Robert Thorpe complaining that it was impossible to know what the law was unless the Justices would follow precedent—which does not appear an unduly unreasonable submission. It did not appeal to Mr. Justice Hillary—in fact, it appears to have annoyed him quite a lot—and we can even now catch the acidity of his reply: "The law was the pleasure of the Justices." Chief Justice Stonore at once had to correct him with the following *obiter*: "Nay, the law is, what is according to reason." Some would deem this statement far too comprehensive nowadays, notwithstanding some modern judicial pronouncements on the subject. No definite conclusion has yet been reached as to the authorship of the Books.

If any one has read this far, the question may be asked: Why waste so much time considering an archaic subject of interest only to the antiquarian? The writer has very decided views of the value of most things ancient as compared with the new, but let the Professor provide the answer:

> "The Year Books are the foundation of the Common Law of England; that is, I may explain for the information of those who may not quite grasp the meaning of the term the prescriptive and immemorial law of the land as distinguished from the law made by Parliament. Though that Common Law is now well and firmly established there was a time, long centuries ago, when it was not so established; a time when it was being slowly and gradually forged. The Year Books take us back to that long succession of far-off years and show us how those principles of law which are now so thoroughly recognized and established were once matters of doubt and contest, and after what struggles and difficulties and uncertainties they were at last gradually accepted."

Viewed in the light of contemporary literature—even of the Law Reports themselves—they are unique, for, as the Professor says, "*You can find practically nothing about battles or statecraft in them.*" What a blessed soporific in these days of mental stress and daily new alarms and excursions! Listen to this, you sensation-weary ones. In their many pages "the villein or serf, the poor freeman, the well-to-do tenant, the Serjeant at law, the Attorney, the Bailiff, the Parson, the Vicar, the great Lord of many Manors with the right of wardship and marriage, the Earl, the Bishop, the Prior, and the Mitred Abbot" all pass before us in calvacade, now gorgeous and stately, now lowly and oppressed. It was a period of rigorous exercise of rights; and the pages sometimes re-echo cries of very material hardship and distress. The Forest Laws, for instance. These figures do not move across the stage in silent procession. "They speak to us across the centuries from their own lips by their contemporaries of the lives which the men of all classes in England lived six centuries ago."

(To be continued).

Production of Police Statements in Running-down Cases.

District Law Societies' Views.

The secretary of the New Zealand Law Society some months ago received the following letter from the Commissioner of Transport, stating:

> "I am directed by the Hon. the Minister of Transport to advise that he has received representations, through the Commissioner of Police, for the purpose of having a clause included in the proposed Transport Bill, whereby privilege will be given for statements made to Police or Traffic Inspectors. The proposed clause is to the following effect:
>
> "'No statement made or information furnished to any constable or Traffic Inspector in relation to any accident in which a motor-vehicle is involved, or in relation to any offence alleged to have been committed against any Act, regulation, or by-law relating to the use of motor-vehicles shall be produced or divulged in any civil proceedings in any Court, except with the consent of the person who made the statement or furnished the information.'
>
> "The Minister is desirous of having the views of your Society concerning the proposal, and I shall be pleased to hear from you as soon as possible."

This letter was referred to the various District Societies for an expression of their views. The following are the replies, which are published for general information:—

Auckland.—"Shortly after receipt of your letter my Council set up a Committee to confer with the local Superintendent of Police and to report the result of the conference. This report has now been considered and I am directed to inform you as follows:—

"1. Statements made at or near the time of the occurrence of a motor accident to a disinterested person who has had some training in noting evidence are obviously of great evidentiary value. It is therefore desirable in the interests of justice that such statements should be available to parties to civil actions in motor accident cases.

"In some cases—*e.g.*, where a pedestrian has been killed or severely injured, it may be that a refusal to make available the statements of persons who witnessed this accident may amount to a denial of justice to the injured person or to the representatives of a person who has been killed.

"2. Nevertheless the Superintendent pointed out that there were great difficulties in the way of making these statements available without the consent of the persons making them. Many persons refused to make statements on the ground that they did not wish to become involved in litigation. Since motor accidents have become so frequent, a great deal of time is taken up in correspondence with solicitors and in making copies of the statements. He said that at Auckland the police always gave the name of the owner of the car and of the passengers in it. He thought that there would be no difficulty in arranging for the giving of the names of all persons who were interviewed by the Police: and he further thought that where the Police made a locality plan, that plan could be made available to litigants.

"3. My Council thinks that if, as seems likely, privilege will be given to statements, arrangements should be made whereby the names of the owners of cars, passengers and bystanders who were interviewed by the Police should be made available to other parties, and that the plan made by the Police officer (if any) should also be available."

Canterbury.—"This matter was considered at a meeting of my Council, and the following resolution was passed:

"That the Council is not prepared without cogent reasons being advanced, to support the proposed change."

Wellington.—"The Council of the Wellington District Law Society, for the reasons given below, is opposed to the proposed clause of the Transport Bill:

"It appears to the Council that a very undesirable result of the proposed provision would be to afford protection to a dishonest witness or party. The evidence given

by an honest witness or party is bound to accord with any prior statement given or made by him. The production of a prior written statement or evidence of a prior oral statement is therefore not likely to embarrass him; and, even if the proposed section became law he would have neither motive nor reason for refusing to consent to the production of his prior statement and would be almost sure to do so.

"On the other hand, human sympathies tend to protect persons from conviction in Police prosecutions and criminal trials, and also to assist injured persons to recover damages in civil claims. A dishonest witness or party may truthfully give a statement to the Police exculpating a driver concerned in an accident but, if he knows that such statement cannot subsequently be produced without his consent, he may subsequently in civil proceedings on behalf of the injured party give entirely inconsistent evidence making allegations against the same driver. If, however, this type of witness knew that he was likely to be confronted in civil proceedings with his prior statement to the Police, he would not be likely in such civil proceedings to give evidence inconsistent with that statement, and even if he did, production of that statement would destroy the value of such evidence.

"It is of course very important that statements made to Police and Traffic Officers should be true. When the truth is that a particular driver is at fault a witness will be less likely to give to the Police a statement exonerating such driver if the witness knows that that statement will preclude him from giving evidence of negligence on the part of the driver in a subsequent civil action and that it will therefore hinder or prevent an injured person from recovering damages to which such person is justly entitled. In the Council's opinion, therefore, the proposed clause would tend to obstruct the Police in obtaining a true statement from a dishonest witness.

"Quite apart from what has been said there is a not uncommon type of motor accident in regard to which the proposed clause might prevent an injured person from recovering damages or compensation to which he was justly entitled—*i.e.*, collisions which occur between two motorists or a motorist and a pedestrian and of which there are no other witnesses and in which one of the parties is rendered unconscious and subsequently remembers nothing of the accident. It is quite possible that the other party in a truthful and honest statement to the Police has admitted a state of facts upon which the injured party would be entitled to recover damages. So long as that statement or admission could be proved in Court, the injured party could recover. Under the proposed clause, however, the admission could not be proved unless the party making it consented. Moreover under the proposed clause there would be no obligation to consent and it is obvious that consent would not be given and that just claims would be defeated.

"In the opinion of the Council the provisions of ss. 10 and 11 of the Evidence Act, 1908, are of the utmost value in preventing perjury and injustice, and the Council feels strongly that the inroad on these provisions which would be made by the proposed enactment would to a serious extent destroy the invaluable safeguards they provide. In short the Council considers that an inevitable result of the proposed enactment would be to open the door to false evidence."

Otago.—"The Council view the idea of withholding the production of statements made to Police and Traffic Inspectors as a direct violation of the principle laid down by the Judges of the Court. This Council consider such statements to be most valuable evidence as to what has occurred, and it does not think it is in the interests of justice that such statements should be suppressed."

Marlborough.—"In the opinion of the Council there should be no alteration in the existing law, and that the proposed clause would add to the difficulty of obtaining evidence in civil actions arising out of motor accidents and would greatly increase the possibilities of miscarriages of justice."

Nelson.—"The Council think the clause should be objected to as tending to hamper the administration of justice.

"It does not apply to criminal trials so that the reason for it cannot be to provide against a man incriminating himself.

"It would appear to be promoted by the Police purely to try to exclude Police officers from being called in running-down cases. The Police have already attempted to claim privilege, as for State documents, for reports and statements obtained by them when called as witnesses in running-down cases.

"It is submitted that the Police owe a public duty to see that justice is done not only in criminal cases but in civil cases also and justice cannot be done if the best evidence obtainable is shut out from the Court. The fact that a constable is called to give evidence in a running-down case does not mean the Police are taking sides in the litigation. In many cases the Police have been the only impartial witnesses.

"If statements and information can be used in a case of negligent driving causing death or a trivial breach of regulations they ought to be available to a plaintiff or a defendant where a large sum is involved in a running-down case and no special pleading by the Police Department should be allowed to shut out such evidence."

Gisborne.—"My Council does not approve of the inclusion of the suggested provision in the Transport Bill on the ground that such a provision would infringe upon the well established rule of evidence under which a witness can be confronted with a previous written statement at variance with or contrary to the evidence he is then giving.

"During the discussion members took the view that the provision suggested would not be in the interests of justice. Civil proceedings are often heard months after a motor accident and statements taken at the time should be available. Their production serves the double purpose of putting right mistakes in recollection and of preventing the deliberate falsification of evidence.

"A constable or Traffic Inspector is often on the scene of an accident before the bystanders have dispersed and if the proposed section is passed there may even be a difficulty in obtaining the names of witnesses.

"My Council could see no good reason why a litigant's rights, so far as they extend, to compel a constable or Traffic Inspector to give evidence or to compel the production of documents should be cut down.

"The additional privilege which is sought covers only those cases where the Court would now hold that it is not detrimental to the public interest for the evidence to be given or documents produced. My Council does not believe that if the provision were passed statements would be more freely given than they are now but, even if it were so, regard must be had to the administration of justice as a whole and not only to the administration of the criminal law."

Taranaki.—"The Council is strongly opposed to the proposed change."

Wanganui.—"After consideration of a report supplied by a Subcommittee, it was resolved that this Council is strongly opposed to the clause proposed to be introduced by the Minister of Transport.

The following is the report referred to:—

"My Council has considered the Clause that the Commissioner of Transport proposed to have inserted in the Transport Bill.

"In all Civil proceedings arising out of accidents in which motor vehicles are involved the first essential is that justice should be done between the parties to the proceedings. The proposed clause would enable litigants and their witnesses to suppress evidence which evidence if available might materially affect the finding of the Court on questions at issue between the parties.

"One can visualize a Civil action where one of the parties or his witnesses make statements in evidence at variance to statements made by him to a constable or Traffic Inspector at the time of the accident. In such a case without the witnesses' consent the statements made at the time of the accident could not be produced in evidence and if under cross-examination he denied having made the statements the course of justice might be seriously hampered.

"It is considered that in civil actions the very fullest disclosure is essential and all relevant matter however obtained should be made available to the Court.

"At present, on a plea of privilege by the Police, the Court decides whether statements made by witnesses to the Police should be admitted in evidence. It is considered that procedure hitherto adopted by the Courts should be adhered to and that the admissability of statements in evidence should be decided by the Court and not as is suggested by the person who made the statement."

Southland.—"The Council opposes the proposed amendment to the law."

Westland.—"This Council agrees to the proposed clause suggested by the Commissioner of Transport."

The proposed clause was not included in the Transport Amendment Bill, 1939, as drafted; and it seems that the proposal has been dropped.

London Letter.

By Air Mail.

Somewhere in England.
October 1, 1939.

My dear EnZ-ers,

There has probably never been such a rapid output of legislation as the present war has produced. In the Great War the process was much more leisurely and new statutes were added as occasion required in 1914 and the immediately following years. In the present war, which—whatever official forecasts may say—will not, it may be hoped, rival in length the Great War, the Emergency Legislation has been all produced *uno flater*, and so effective is it expected to be that there will be, it seems, no such general moratorium as was enacted in 1914. That legislation is not, indeed, quite complete; for the Courts (Emergency Powers) Act, 1939, has been supplemented by the Possession of Mortgaged Land (Emergency Provisions) Act, which restricts the right of a mortgagee to take possession. This he can do under his rights as mortgagee even though the mortgage has not been called in, but under the Act he must serve a notice of payment, and further, it seems, after three months he must apply for leave under the Courts (Emergency Powers) Act.

The Defence Regulations have also been amended by adding a Regulation—18A—under which persons considered by the Home Secretary to be dangerous can be interned. The Regulation is authorized by s. 1 (2) (*a*) of the Emergency Powers (Defence) Act, but the Government promised Parliament that there should be a check on the exercise of the power. The regulation accordingly gives a right of appeal to an Advisory Committee and this Committee has now been appointed. Even so, the regulation is open to criticism, and the Committee will, it may be expected, examine every case, especially those of British subjects, with great care. A similar regulation in 1914, though held to be valid, was the subject of Lord Shaw's well-known dissenting judgment in *R. v. Halliday*, [1917] A.C. 260. His advocacy of Magna Carta was of no avail against up-to-date legislation. The danger of assistance to the enemy must be very clear and substantial to justify interference with personal liberty.

Black-out Law.—The black-out law is, of course, a horrid inconvenience to millions of people: but it is necessary to enforce it, and Magistrates are quite rightly imposing heavy fines for those who show lights at night. Magistrates in the Metropolis have been dealing firmly with offenders and I notice also that one of them sentenced a defendant who was charged with assaulting a policeman while on black-out duty to two months' imprisonment. Heavy fines for breach of the Order have also been imposed by Justices throughout the country. One defendant, who dared to tell the police that he would not put up curtains because he was a German and did not wish to assist the police, will have a month when, in the intervals of hard labour, he can reconsider his attitude. We wonder what would have happened to him if he had been an Englishman in Germany and made such an observation to the Polizei or the Gestapo. As to the entry by police into premises, it is expressly authorized by the Defence Regulations when a light is improperly shown. It was as well to give this express power. The right of the police to enter premises is doubtful and is left in the position in which it stood after *Thomas v. Sawkins*, [1935] 2 K.B. 49, was decided by the Divisional Court. Anyhow, so far as entry to enforce the black-out is concerned there can be no doubt at all. There is the power of entry and search in the amended Defence Regulations.

Commodity Insurance.—Some hard things are being said about the new compulsory insurance scheme for commodities of all kinds. There is a complaint by owners that they are compelled to pay as high a rate as 6 per cent. per annum to the Board of Trade, and there is some discontent with the provision of the War Risks Insurance Act, which permits the Treasury to "raid" the Board's insurance fund and carry away the booty and use it for paying off debt. This last complaint may have some justification, even though there may be precedents. It is, in effect, a system of taxation which some people may think would not have been sanctioned by Parliament if its members had had further time for reflection. It is, however, a mistake to say that the premium charged by the Board is so high as 6 per cent for a year. It is true that by the Commodity, &c., Order of September 3 (No. 1063) the Board fixed the first premium at 10s. a month, but a perusal of the text shows that the policy given in return for that premium comes to an end in three months. By that time the Board will have had time to review the situation. It may well be that a lower premium will be authorized. All depends on the efficiency of our air raid defences and on the attacks which they may have to meet. So far, we are thankful to say, they have not been tested.

Viscount Maugham.—For lawyers the most interesting of the recent changes in the Government is the resignation of Lord Maugham and the succession of Sir Thomas Inskip—now Lord Caldecote—to the Lord Chancellorship. Why this change has taken place has not, so far as I am aware, been revealed, and it is useless to speculate. Whether there should be a Minister of Justice is a question which has been keenly discussed, though it is not now a living issue. As things stand the Lord Chancellor is the Minister of Justice, but functions appropriate to that office are also performed by the Home Secretary. It was a happy inspiration of the Prime Minister to appoint to the Woolsack one of the greatest of present-day lawyers—the greatest, perhaps, except the Master of the Rolls—and a lawyer unknown to politics. Lord Maugham's interest in the administration of the law and his reforming zeal are well known, and fortunately these will not be lost. The shortness of his Chancellorship resembles that of Lord Buckmaster, also a very distinguished occupant of the office in 1916. But the case of Lord Buckmaster, and, to take only one other example, Lord Haldane, show what useful work an ex-Lord Chancellor can do. We may be allowed to express regret that the change, whatever its cause, should have been necessary. But the new Lord Chancellor takes his place in a line of Common Law Chancellors—Lord Halsbury, Lord Birkenhead and Lord Finlay—who have well upheld the greatness of the office.

It is satisfactory to see that Lord Maugham has immediately received an advance in the peerage, and is now Viscount Maugham. Those who are familiar with the series of sketches by the late Lord Birkenhead which were collected under the title of *Contemporary Personalities* will remember that in his very appreciative account of Lord Buckmaster he expressed great regret

that Lord Buckmaster had never received the rank which would have enabled him to preside more frequently in the House of Lords on appeals. His short Chancellorship ended in 1916, and it was not till 1933 that he was made a Viscount. This mistake has not been repeated in the case of Lord Maugham, and it may be anticipated that he will have given up the arduous political duties of the Lord Chancellorship only to carry out with greater effect his judicial functions.

Lord Macmillan.—The Ministry of Information is a product of war conditions which not unnaturally is receiving a good deal of criticism. The Prime Minister described its difficulties in a speech on the war situation which he made in the House of Commons recently. "The work of the Ministry of Information is the most difficult type of work that can be assigned to a Government Department." It must steer between giving too much news and too little, information the giving of which will help the enemy, and information the withholding of which will be damaging at home. To meet the difficulty Mr. Chamberlain might have entrusted the task to a leading light in the newspaper world, but perhaps he feared that with such a choice zeal might outrun discretion. So he turned to the law, and found in Lord Macmillan a Minister who, though a lawyer first, has perhaps the most various talents of the day. But from Lord Macmillan's speech in the House of Lords on Tuesday last, it would seem that the difficulty is shifted only to be expressed in language partly philosophical, as was to be expected, and partly in the language of fiction, which is a welcome surprise. The Minister of Information suffers, he says, from a competition of reasons, but for his own part he is advocate and publicist. As advocate for the community he is Oliver Twist, always asking for more. As a publicist he is doubtless weighing the importance of such news as the other authorities allow to trickle through to him. It is an unenviable position, and irksome to the public. who are accustomed to the fuller and more interesting stories of the newspaper correspondent. But if this is all we are to have, it is at least welcome that it comes through Lord Macmillan.

The Place of the Courts.—One of the early duties of the new Lord Chancellor may be to make orders under the Administration of Justice (Emergency Provisions) Act, 1939. Though the Act received the Royal Assent only on September 1, the expediency of having such a measure ready was foreseen, and the Bill was introduced by Lord Maugham in the House of Lords in May. The Act enables the Lord Chancellor to move to places out of London the sittings of the Court of Appeal and of the High Court or any Division of the High Court; and this extends to the registries and offices, including the Central Office and the Principal Probate Registry. Or the sittings of the Court of Appeal or of the High Court may be suspended. The Act contains similar powers as regards the Court of Criminal Appeal. It may be assumed that the places for the sittings of the Courts out of London, should occasion arise, have already been selected, and for appeals and witness actions. While the removal would be productive of great inconvenience, yet the carrying on of business would be practicable. But this cannot be said of the general business of the Chancery Division, which is largely of an administrative nature, and it should not be moved out of London unless such a step becomes absolutely necessary.

Then There Were Six.—The necessity for twelve good men and true has temporarily gone by the board. By s. 7 of the Administration of Justice (Emergency Provisions) Act, 1939, for the purpose of any trial with a jury or inquiry by a jury in any proceedings, whether civil or criminal, it shall not be necessary for the jury to consist of more than seven persons. This concession to the needs of war and the apparently more widespread claims of A.R.P. does not extend to trials of treason or murder, and the Court may direct the usual number if the gravity of the issues warrant it. No question arising in any civil proceedings in the High Court or in any inferior court of civil jurisdiction may be tried by a jury unless the Court thinks it necessary; and persons up to sixty-five years of age may be empanelled. A deficiency, whether intentional or not, was revealed in the new Act recently when one of a jury of seven was taken ill in the course of a case at the Central Criminal Court. Under the previous law, if in the course of a criminal trial a juror died or was discharged, the jury might still be considered as properly constituted, provided its numbers did not fall below ten, and if the accused and the prosecutor assented in writing: Criminal Justice Act, 1925, s. 15. But the Common Serjeant pointed out that under the new Act there was no authority to allow such a waiver. The jury had to be discharged and the trial begun afresh.

Service Powers of Attorney.—Attention was called recently to the question of the giving of powers of attorney by trustees engaged on war service, and it was suggested that the emergency legislation should include a re-enactment of the provisions of the Trusts (War Facilities) Acts, 1914 and 1915. Under the pressure of immediate necessity the former overruled, "for the present war," in the case of "persons engaged on war service," the rule *delegatus delegare not potest.* "War service" had an extensive meaning, and the power of attorney required only to be supported by a statutory declaration by the donee under the power of attorney that the donor was engaged on war service. The Act of 1915 conferred a similar facility on tenants for life, and on executors and administrators. But although these Acts had their origin in necessity, the principle was recognized to be of permanent utility, and a general power of delegating the trust in this manner was conferred on trustees (including by definition personal representatives) and tenants for life by s. 25 of the Trustee Act, 1925. It is, however, only available where the donor intends to remain out of the United Kingdom for a period exceeding one month. A statutory declaration to this effect must be made by the donor. But the only declaration of intention that can be made by a soldier is that he intends to obey his orders. Whether he remains abroad for less or more than a month is a matter about which he cannot be said to have any intention at all. And there are formalities prescribed by the Trustee Act which make recourse to it troublesome. It is not appropriate for trustees who are engaged in war service. More prescience on the part of the Legislature in 1914 might have amplified "present war" into "this and the next war." At any rate the Acts should now be consolidated and re-enacted, and under the circumstances it may be as well to drop any reference to "the present war."

Yours, as ever,

APTERYX.

Conveyancing Notes.

Powers of Attorney.

A power of attorney is strictly construed, and the efforts of the draftsman of a power intended to be wide in its terms must be mainly directed to securing that generality which at every turn the rule of strict interpretation tends to defeat. The words "as fully as I could do in my own proper person" may be useful to ensure the completeness of some particular clause, but will not avail against an overriding restriction that cuts down the whole power. The client should be informed of the risk of ineffectiveness that attends any attempt to restrict his attorney's powers in relation to third parties by provisions in the power itself. He may make as many restrictions as he likes by private arrangement with his agent; but if he cannot trust him to attend to such instructions, he had better select another agent. If, for instance, the attorney is not to conclude a sale of certain property without the principal's approval of the price, or start a contemplated lawsuit without final instructions, let such stipulations be put into a separate memorandum. If they are in the power of attorney itself, they amount to restrictions, of which the third party has notice, on the powers to be exercised. The stipulated consent or instructions must be proved; if given by letter, that letter (which may contain irrelevant matter) has to be produced to the third party, and perhaps surrendered to him; if by cable, it may be impossible to furnish legal proof that can be forced upon a party at arm's length.

Similarly, a power to sell or mortgage "if necessary," or otherwise qualified is objectionable; it raises the issue whether in the circumstances the transaction is necessary and therefore within the power. "If my attorney deems it necessary" is not open to the same objection, but to another; it is mere flourish, and should therefore be omitted. A power to operate on a bank account "for the purposes of" the donor of the power puts a bank upon inquiry, and may therefore reasonably be demurred to: *Midland Bank, Ltd v. Reckitt*, [1933] A.C. 1. A good example is found in *Harper v. Godsell*, (1870) L.R. 5 Q.B. 422, where a power of attorney to carry on a partnership was held not to authorize its extinction by execution of a deed of dissolution. Martin *The Property Law Act 1905*, p. 149. cites *Re Dowson and Jenkin's Contract* [1904] 2 Ch. 219, where a power authorizing a sale of the donor's property was held insufficient for the exercise of a power of sale on a mortgage.

So of recitals. The use of recitals in any deed is threefold. (1) They serve to set out facts on which the deed depends for its effectiveness and so to summarize the matters of which proof aliunde may on occasion require to be given—*e.g.* somebody's marriage or death. (2) An advantage of reciting facts of this kind is that when the deed shall have attained the mature age of twenty years the recital will in itself be sufficient proof of the facts by the aid of s. 60 (*a*) of the Property Law Act 1908. (3) Matters to be mentioned in the operative part of the deed such as a preliminary agreement "in pursuance of" which the deed is made, or a previous deed which the new deed is to supersede, supplement, or modify, are conveniently introduced by a recital.

In a special or limited power of attorney it may be necessary or convenient to recite the subject-matter to which the power is to be restricted, such as an existing contract of sale which the attorney is to complete by assurance, or a right which he is to enforce by legal proceedings. In a general power of attorney, however, recitals may be rather a danger than an assistance. For instance, the recital "whereas I am desirous of appointing an attorney to act for me during my absence from England" made the power exercisable only during the donor's absence: *Danby v. Coutts and Co.*, (1885) 29 Ch.D. 500. Upon an exercise of a power so limited, proof must therefore be tendered and preserved, that the donor is absent from the country. Probably also a power so limited is exhausted by the donor's return, and cannot be relied upon during a second visit abroad: *Re Williams and Sons*, (1854) 23 L.T.O.S. 11. In *Fell v. Puponga Coal and Gold-Mining Co. of New Zealand, Ltd.*, (1904) 24 N.Z.L.R. 758, the recital "whereas I am now about to leave the said Colony and return to England" was held by way of distinction not to limit the attorney's power to the donor's absence, because it did not refer to "acting" in the donor's absence. The distinction is a narrow one, and might lead to further distinctions, each way. If a recital or recital-like statement is inevitable, the safest place for it is the particular clause to which it relates; then at worst it can control only the scope of that clause.

Although the District Land Registrar may be prepared to act on a doubtful power of attorney as sufficient, that does not mean that a purchaser or other person getting on the register by the operation of the power may safely do so, or, if the transaction is in completion of an executory contract, can be compelled to do so. Though, from his position on the register he can give good title to a derivative purchaser, his own position is precarious, and should the donor successfully challenge the scope of the power (as where principals and agents fall out), his position is no better than if he got on the register by means of a forged document.

—A.E.C.

Canterbury's Annual Golf Day.

At the Shirley course on September 29, in perfect weather, members of the Canterbury District Law Society played their annual handicap bogey golf match for the Hunter Cup. There was a good entry of members, who, though they showed varying degrees of proficiency at the game, were all very keen. After the match the members and their wives were entertained at tea by the president of the society, Mr. J. D. Godfrey, and Mrs. Godfrey. Honoured guests were the Hon. Mr. Justice Northcroft and Mrs. Northcroft, the Hon. Mr. Justice Blair, Mr. E. C. Levvey, S.M., and Mrs. Levvey. The winner of the cup was Mr. M. H. Godby, who was square with bogey. His son, Mr. I. M. Godby, who was the winner last year, was 3 down; other good cards were returned by Mr. L. A. Dougall, 1 down; Mr. G. A. G. Connal, 3 down; and Mr. E. J. Corcoran, 3 down. After tea, Mr. Godfrey expressed pleasure at the large attendance and at the presence of two Judges of the Supreme Court; he thanked the Christchurch Golf Club for lending its course for the match, and congratulated Mr. Godby on his success. Mrs. Godfrey presented the cup to Mr. Godby, and a prize for the women's putting competition to Mrs. Alan Fraser of Rangiora.

Practice Precedents.

Land Transfer: Summons for Removal of Caveat.

Sections 145 to 157 of the Land Transfer Act, 1915 deal with caveats in respect of titles to land.

Section 152 provides the procedure for removal of a caveat. A caveator may be summoned to attend before the Supreme Court or a Judge thereof to show cause why a caveat should not be removed: see *Waione Timber Co., Ltd. v. Waimiha Sawmilling Co., Ltd.*, [1922] N.Z.L.R. 892. Such Court or Judge upon proof that such person has been summoned may make such order in the premises either *ex parte* or otherwise as to such Court or Judge seems meet.

Section 155 provides that any person lodging any Caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just. Such compensation is recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

In *Howe v. Waimiha Timber Co., Ltd.*, [1921] N.Z.L.R. 110, the Supreme Court decided that a certain agreement was properly determined by plaintiff, and the Court of Appeal decided there was no jurisdiction to relieve against forfeiture. Plaintiff desired to remove a caveat lodged by the defendant to protect its interests under the above agreement. Defendant resisted the removal on the ground that he was appealing from the decisions of both the Supreme Court and Court of Appeal, that the litigation might easily last another three years, and the Court was not satisfied that the defendant was acting *bona fide*, and held that the caveat should be removed. In *Wharawhara Haimona v. Casey*, [1922] N.Z.L.R. 455, the appellant counter-claimed, *inter alia*, for removal of a caveat, although no order was made for removal, it was pointed out that an order could be had in the circumstances of the case under s. 152 of the Land Transfer Act, 1915.

SUMMONS TO SHOW CAUSE WHY A CAVEAT SHOULD NOT BE REMOVED.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Land Transfer Act, 1915

AND

IN THE MATTER of Caveat No. &c.

LET the above-named caveator his solicitor or agent appear before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Court House on the day of 19 at o'clock in the forenoon or so soon thereafter as the parties may be heard to show cause why the said caveat should not be removed and why the said should not pay the costs of and incidental to this application UPON THE GROUNDS that the said [*Applicant*] is the registered proprietor of the said lands and the said caveat is lodged without reasonable cause

AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein AND FOR AN ORDER.

Registrar.

This summons is taken out by &c.

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

I E. F. of solicitor make oath and say as follows:—

1. That I acted and now act as solicitor for the above-named [*Applicant*] and for one in connection with a purchase by the said from the said [*Applicant*] of the above-mentioned piece of land.

2. That on or about the day of 19 the said [*Applicant*] executed in favour of the said a memorandum of transfer of the said piece of land for the sum of £ .

3. That at the time of the execution of the said transfer the said [*Applicant*] was and he is now registered as the proprietor under the Land Transfer Act of an estate in fee-simple in the said piece of land under Certificate of Title dated the day of antevesting to the day of subject to memorandum of mortgage No. to .

4. That on the day of 19 the Land Board duly confirmed and approved of the said sale evidenced by the said transfer after due enquiry into the said transaction.

5. That on or about the day of I was informed by the above-named caveator's solicitor that the said [*Applicant*] held the said lands as trustee for himself and other aboriginal Natives.

6. That I caused a search to be made of the Native Land Court files and ascertained that the said held the land in his own right.

7. That on the day of I applied to the said Land Board to sign the certificate of confirmation of the said transfer.

8. That the said Board delayed signing the said certificate pending an investigation of the said alleged trust by its President [*Judge*].

9. That such investigation was duly held by the said Judge at on the day of 19 who decided that had acquired a good title in his own right of the said piece of land.

10. That accordingly the said certificate of confirmation was executed by the said Board on the day of 19 .

11. That the above-mentioned caveat was lodged by the above-mentioned on or about the day of claiming estate or interest as a beneficiary under an alleged trust alleged to be imposed by the Native Land Court on the day of 19 .

Sworn &c.

ORDER FOR REMOVAL.

(*Same heading.*)

Before .

day the day of 19 .

UPON READING THE SUMMONS sealed herein on the day of AND THE AFFIDAVITS filed in support thereof AND UPON HEARING Mr. of Counsel for the said [*Applicant*] the registered proprietor of the above-mentioned piece of land and Mr. of Counsel for the caveator, I DO ORDER [or, *it is ordered by the Honourable Mr. Justice*] that the said Caveat No. be forthwith removed from the register AND IT IS FURTHER ORDERED that the said do pay to the said applicant the sum of £ for the costs of and incidental to this summons and this order.

Registrar.

Rules and Regulations.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices General Regulations, 1938, Amendment No. 4. October 25, 1939. No. 1939/227.

Cemeteries Act, 1908. Cremation Regulations, 1939. October 18, 1939. No. 1939/228.

Sale of Food and Drugs Act, 1908. Sale of Food and Drugs Amending Regulations, 1939. October 18, 1939. No. 1939/229.

Marketing Act, 1936, and the Marketing Amendment Act, 1939. Meat Marketing Order, 1939. October 25, 1939. No. 1939/230.

Customs Amendment Act, 1921. Customs Tariff Amendment Order, 1939. October 25, 1939. No. 1939/231.

Marketing Amendment Act, 1937. Citrous Fruit Price and Conditions Notice. October 25, 1939. No. 1939/232.

Emergency Regulations Act, 1939. Alien Control Emergency Regulations, 1939, Amendment No. 1. October 27, 1939. No. 1939/233.

Cook Island Act, 1915, and the Samoa Act, 1921. Dependency Emergency Regulations (No. 2) 1939. November 1, 1939. No. 1939/234.