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

VOL. XXIII. TUESDAY, MARCH 18, 1947. No. 5

NEGLIGENCE: DUTIES OF MOTORISTS AT AN INTERSECTION.

IF two vehicles reach an intersection at approximately the same time, and if the necessity, as a matter of care, of a lookout or warning is the *only* particular of negligence to be considered, then, as between the two drivers, it does not lie in the mouth of the driver of the vehicle on the left to contend that failure by the driver of the vehicle on the right to look before entering the intersection is negligence. It was so held recently by the Full Court of Victoria, Sir Edmund Herring, C.J., and Lowe and Martin, JJ., in *Huxtable* v. *Williamson*, [1946] V.L.R. 516, following the decision of the Full Court in *McAsey* v. *Lobban*, [1938] V.L.R. 140. As Gavan Duffy, J., put it in the latter case :

> Where a plaintiff has the right of way under regulations to cross, and where a person coming from the left is under a statutory prohibition to give the right of way, the plaintiff is entitled to assume that the regulations will be obeyed and need not look to see if the person who ought to give way is going to do so.

The learned Judges in *Huxtable's* case added that the duties of the respective drivers might well vary according as one or other vehicle was first into the intersection, and the determination of this fact might well affect the jury's view as to the necessity as a matter of care of a lookout or a warning. This decision, which appears in the last number of the *Victorian Law Reports* to hand, is, in effect, parallelled in the New Zealand judgments on our own right-hand rule.

The right-hand rule in Victoria is, to all intents and purposes, the same as Reg. 14 (6) of the Traffic Regulations, 1936, as amended by Reg. 5 (*b*) of Amendment No. 3 (Serial No. 1943/199). In *Algie* v. *D. H. Brown and Son, Ltd.*, [1932] N.Z.L.R. 779, 783, Sir Michael Myers, C.J., said :

> The plaintiff, assuming that he knew of the right-hand rule, would have been justified, I think, in assuming that any traffic crossing from Chester Street to Oxford Terrace would obey the rule, and that consequently he ought to be perfectly safe in travelling as he did by the side of and under the shelter of the tram-car. This seems to me to be the effect of the decision in *Toronto Railway Co.* v. *King*, [1908] A.C. 260. That was an action for damages against the appellant company for loss of life occasioned by the negligent driving of their tram-car by their servant employed to drive it, and the jury found that the servant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence. Lord Atkinson, delivering the judgment of the Judicial Committee, says [at p. 269] :
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> > It is suggested that the deceased must have seen, or ought to have seen, the tram-car, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things ? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do—namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in *Slattery's case* [3 A.C. 1155], is one thing, to cross in front of a tram-car bound to be driven under regulations such as those above quoted, at such a place as the junction of these two streets, is quite another thing.
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> What was said in that case regarding the driver of the tram-car, in my opinion, applies in this case to the driver of the defendant's motor-car.

The fact that a driver has the benefit of the right-hand rule giving him a statutory right of way, does not absolve him from the duty of driving with due care and attention. The rule is no defence whatsoever to negligent driving, as Reed, J., said in *Simpson* v. *Watson*, [1928] G.L.R. 503—a warning which the same learned Judge repeated in the course of his judgment in *Pearce* v. *Hardiman*, [1935] G.L.R. 57, which, he said, was a typical case of the class that often troubles the Court—that is to say, it was due to a motorist acting on the view, which is unfortunately held by some drivers, and which is a fruitful source of accident, that, because of the right-hand rule, a motorist is entitled to ignore a car crossing his front from the left and barge ahead regardless of the action of the driver of the other car. On the other hand, the comment on the latter case by Sir Michael Myers, C.J., in *Dempsey* v. *Speirs*, [1941] G.L.R. 30, 31, 32, must not be overlooked. He said, in a passage that has since been judicially described as " perhaps the best definition of the importance of the rule and of the limits of the rights it confers " :

> That the appellant was entitled as against the respondent to right of way under the right-hand rule is undoubted, but the learned Magistrate says that a motorist in whose

favour that rule operates is not entitled to rely entirely on the benefit of the rule, and he cites *Pearce* v. *Hardiman*, [1935] G.L.R. 57. That may well be so, but at the same time the rule is a most important one and the right that it confers should not be allowed to be whittled away. Where the rule operates, the person in whose favour it runs is *prima facie* entitled to its benefit, but he may in effect lose that benefit by reason of negligence on his own part. It does not however follow that every act of negligence on his part will result in his losing the benefit of the rule.

The learned Chief Justice then pointed out that a very important question is: Which of the parties was first on the intersection? An important consequential question, as Mr. Paterson, S.M., recently pointed out, is: What was the relative distance of the two cars from the intersection at any given moment—that is to say, at the moment when each driver has to decide for himself whether he can proceed over the intersection as of full right by his judgment of the distance from the intersection of the approaching car and the right or obligation conferred or imposed upon him by the regulations? If the speed of the car approaching from the right is excessive, then the driver is, by reason thereof, putting it out of the power of the other driver to form any reliable judgment. The learned Magistrate, in *Police* v. *Stewart*, (1946) 4 M.C.D. 514, proceeds to examine the authorities on the question; and his judgment is well worth perusal whenever there arises the necessity of determining the relative priorities, by reference to the relative position of the cars approaching an intersection. As he says, the right-hand rule itself is designed to deal with conflicting priorities of passage between people lawfully using the highway.

The whole question of the right conferred on a driver entitled to the benefit of the right-hand rule, and the corresponding obligation on him to keep a good lookout when approaching the intersection, is considered by Mr. Justice Finlay in *Buckley* v. *The King*, [1945] N.Z.L.R. 531. The right-hand rule, he says, is not in any sense absolute. It is qualified by an obligation on the part of the driver entitled to its benefit to take care in making a turn; and he refers to the judgment of Sir Michael Myers, C.J., in *Hazledon* v. *Andrews*, [1943] N.Z.L.R. 261, 264, where he says that motorists should have this warning note—they must not lose sight of the fact that the words of Reg. 14 (5), "and shall then turn into the roadway into which he is entering as directly and quickly as he can *with safety*," emphasize the necessity for care on the part of the driver making the turn.

In a valuable contribution to any discussion of the matter, Mr. Justice Finlay then sums up the result of all the previous decisions on the rights and the duty of motorists having the benefit of the right-hand rule:

> The true legal position, as I apprehend it, is that a driver entitled to the benefit of the right-hand rule is entitled to exercise the right to proceed, which the rule confers upon him, until that point of time at which he sees, or as a reasonably prudent driver he ought to see and appreciate, that if he continues to exercise the right and continues to proceed a collision will result.
>
> The rule is thus a factor, and although a very important factor, nevertheless only one of the factors, which a jury . . . ought to take into consideration in determining whether a driver entitled to the benefit of the rule was or was not negligent. In other words, a jury in a case of this type must decide whether, having regard to all the attendant circumstances, a driver entitled to the benefit of the right-hand rule should in the circumstances, as a reasonable and prudent driver, have abandoned his right to proceed and should have stopped at some point of time which would have enabled him to avoid a collision.
>
> If, in the view of the jury, he should have so stopped, then it is for the jury to decide whether or not his failure to do so was negligent. Any question of the negligence of which any other party may have been guilty, divorced from the fact that the actions of such other party form part of the attendant circumstances, and all questions of causation contributing to the result lie outside the inquiry as to whether the driver entitled to the benefit of the rule was or was not negligent.

As the learned Judge observes, this definition of the legal effect and incidence of the rule seems to be in accord with the spirit and letter of the general law of negligence, and with all previous judicial expositions of the rule.

SUMMARY OF RECENT JUDGMENTS.

MORAN v. KIRKWOOD BROTHERS, LIMITED.

SUPREME COURT. New Plymouth. 1946. May 28, December 6. FINLAY, J.

Rent Restriction—Economic Stabilization Emergency Regulations—Application to have Fair Rent determined—Application filed but not served during Subsistence of Tenancy—Whether such Application valid if Service effected after the Determination of the Tenancy—Code of Civil Procedure, R. 398—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Regs. 15 (2), 16 (1), 19, 20, 21 (2), 24, 25.

Practice—Service of Documents—Defendant Company having no properly notified Registered Office—Failure of Plaintiff to serve filed Notice of Motion—Whether Absence of proper Registered Office an Excuse.

An application to the Court under the Economic Stabilization Emergency Regulations, 1942, to determine the fair rent of a property can be validly made only during the subsistence of the tenancy to which the application related.

A notice of motion seeking an order determining the fair rent of certain premises filed during the subsistence of the tenancy, but not served, if it were served at all, until long after the expiry of the lease of the premises by effluxion of time, does not operate under R. 398 of the Code of Civil Procedure to preserve the rights of the tenant; as, left unserved, under both Reg. 21 (2) of the regulations and under R. 398 of the Code of Civil Procedure, it remained an inchoate step towards making an application, and, therefore, an insufficient application to fix the fair rent of the premises concerned.

Semble, The filing of the notice of motion was not an application under the Economic Stabilization Emergency Regulations, 1942, but a mere step preliminary thereto. If it had been served, it might have operated to preserve the rights of the tenant.

When a defendant company had failed to notify the Registrar of Companies as to the situation of its registered office, and the location of such office could not be ascertained, it was no excuse for delay on the plaintiff's part in serving a filed notice of motion on the company, as, if any difficulty had been met in serving it or having it accepted by the company's solicitors, the plaintiff could have obtained an order for substituted service.

Wilson v. *Harris*, (1905) 24 N.Z.L.R. 730, and *Paton* v. *Simpson*, [1932] G.L.R. 545, referred to.

Counsel: *P. Grey*, for the tenants; *Croker*, for the landlord *L. M. Moss*, for the previous tenant, O'Reilly.

Solicitors: *P. Grey*, New Plymouth, for the tenants; *Croker, McCormick, Greiner, and Evans*, New Plymouth, for the landlord; *Moss and Jamieson*, New Plymouth, for O'Reilly.

BETTS v. BROOKFIELD AND OTHERS.

SUPREME COURT. Auckland. 1946. October 16. FAIR, J.

Rent Restriction—Dwellinghouse—Occupation by Employee of Owner—Whether "let"—Test as to Occupancy being Condition of Employment—"Let as a separate dwelling"—Fair Rents Act, 1936, s. 2.

A dwellinghouse, occupied by an employee of the owner, the occupation of which is made part of, and is regarded as incidental to, the contract of service between the employer and the employee, no particular sum being attributed to rent, is not a "dwellinghouse" within the meaning of the Fair Rents Act, 1936.

Cranch v. *Bryers*, [1938] N.Z.L.R. 469, applied.

Counsel: *Haigh*, for the appellant; *Smytheman*, for the respondents.

Solicitors: *F. H. Haigh*, Auckland, for the appellant; *Brookfield, Prendergast, Schnauer, and Smytheman*, Auckland, for the respondents.

LOWER HUTT CITY CORPORATION v. MARTIN AND OTHERS.

SUPREME COURT. Wellington. 1946. October 17, November 10. JOHNSTON, J.

Municipal Corporations—Powers—Subdivision of Land—Local Act authorizing Council to impose Conditions as to Drainage on Consent to Subdivision—Construction by Owner of "All public and private drains for the disposal of sewage . . . from the said land"—No Power to Compel Owner to construct Public Drain—Whether Conditions imposed as to Sewage Drain unreasonable—Municipal Corporations Act, 1933, s. 33 (4)—Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), s. 5.

Statute—Interpretation—Statute not open to Test of Reasonableness—Right of Appeal from Local Authority to Statutory Board—Test applicable to Council's Administration.

Section 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), provides as follows:—

> "The Council may, in consenting to any subdivision of land under section three hundred and thirty-two of the Municipal Corporations Act, 1933, impose such conditions as to the construction by the owners of the land of all public and private drains for the disposal of sewage and storm-water from the said land as the Council thinks fit."

The Council sought to impose as a condition of its consent to a subdivision of the defendant's land fronting a public road that he pay half the cost of a sewer-drain extension along that road for a distance of 534 ft., at a cost of from £130 to £150. The defendant appealed under s. 332 (3) of the Municipal Corporations Act, 1933, and under s. 5 of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), against the decision of the Council to impose that condition. The appeal was heard by the statutory Board appointed *ad hoc* by the Governor-General under s. 332 of the Municipal Corporations Act, 1933, which allowed his appeal on the ground that, as the power conferred by s. 5 (1) of the Empowering Act, 1941, to impose conditions on owners of land as to the construction of "public drains" was inoperative in the absence of the power to compel the owner to construct a public-sewage drain, the condition imposed was *ultra vires*; and, even if there were such a power, it was unreasonable to compel him to contribute to the construction of part of a public-sewage drain which would be used for carrying sewage from other lands as well as his own: reported (1946) 4 M.C.D. 423.

On motions for mandamus to command the members of the Board to hear and determine on its merits the said appeal, and of certiorari for the purpose of removing into the Supreme Court the Board's decision,

Held, 1. That s. 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), does not call for an interpretation by the Supreme Court that limits its scope by reason of the fact that its exercise interferes with the rights of ownership; and it cannot be submitted, as a by-law can, to the test of reasonableness.

2. That by virtue of s. 5 (2) of the statute, the right of appeal given to the person aggrieved by the imposition by the Council of a condition renders administration under s. 5 liable to the test of reasonableness having regard to the obligations of the Council and the rights of the appellant, in each case a question of fact; and the question of *ultra vires* does not arise.

3. That, as the Board had before it all relevant evidence available upon which to reach the decision complained of, the conclusion must be accepted as a *bona fide* answer to the question before the Board.

Consequently, there was no material upon which to order mandamus or certiorari; but this decision did not amount to a declaration that the defendant was entitled to have the plan of the subdivision approved and registered, or give any expression of opinion as to the effect of the Board's decision or whether or not the Council had to approve the plan without drainage conditions of any kind.

Counsel: *Biss*, for the plaintiffs; *Kennard*, for the defendant.

Solicitors: *Bunny and Gillespie*, Wellington, for the plaintiffs; *Luckie, Wiren, and Kennard*, Wellington, for the defendants.

PERPETUAL TRUSTEES ESTATE AND AGENCY COMPANY OF NEW ZEALAND, LIMITED v. BLACK AND OTHERS.

SUPREME COURT. Dunedin. 1946. March 27. KENNEDY, J.

Will—Construction—Phrase "entitled at his or her death"—Whether meaning entitled "in interest" or entitled "in possession"—"Entitled."

The word "entitled" has no settled legal meaning. It may mean "entitled in interest" or "entitled in possession." Its meaning in any document depends upon the context.

In re Maunder, Maunder v. *Maunder*, [1902] 2 Ch. 875, applied.

A clause in a will was expressed as follows:

> "After the death of my wife my trustee shall continue to pay the said annuity to my sister Bessie during her life and subject thereto shall pay nine twenty-fourths of the said income to my daughter Ruth Muriel six twenty-fourths thereof to my daughter Heather Hill three twenty-fourths thereof to my son Hercus Christie and six twenty-fourths to my son Astley Irvine during their several lives and I direct that . . . ."

On originating summons for interpretation of the clause,

Held, That the word "entitled" as used in this clause meant "entitled in possession," as any other interpretation involved substantial alterations in the language of the will.

The case is reported on this point only.

Counsel: *F. B. Adams* and *I. A. Wood*, for the plaintiff; *H. L. Cook*, for the defendants, R. M. and A. I. Black; *Brassington*, for the defendant, J. A. Barker; *J. S. Sinclair*, for issue of testator's children living at death of survivor and testator's sister M. Davies and the next-of-kin of testator.

Solicitors: *Adams Bros.*, Dunedin, for the plaintiff; *Cook, Lemon, and Cook*, Dunedin, for the defendants, R. M. and A. I. Black; *A. C. Brassington*, Christchurch, for J. A. Barker; *Sinclair and Stevenson*, Dunedin, for issue of testator's children living at death of survivor and testator's sister M. Davies and the next-of-kin of testator.

R. v. R.

SUPREME COURT. Auckland. 1946. October 10, 18. FAIR, J.

Divorce and Matrimonial Causes—Nullity—Insanity—Petition on Ground of Husband's Insanity at Date of Marriage—Onus of Proof on Petitioner—Test of Sanity.

The onus of proof in a petition for nullity of marriage on the ground of insanity is upon the petitioner.

Cannon v. *Smalley*, (1885) 10 P.D. 96, and *Parker* v. *Parker*, (1757) 2 Lee 382; 161 E.R. 377, applied.

The test of the sanity of the respondent is whether he had at the time of the marriage a real appreciation of the nature of the contract, and of the consequences and responsibilities that it entailed.

The treatment of the responsibilities of marriage lightly does not amount to an incapacity to be aware of and appreciate such responsibilities of such a degree as to amount to unsoundness of mind, nor does incapacity of sustained effort or steady application in the normal way.

Durham v. *Durham*, (1885) 10 P.D. 80, and *Hunter* v. *Edney*, (1881) 10 P.D. 93, applied.

Forster v. *Forster*, (1923) 39 T.L.R. 658, and *A.* v. *B.*, [1920] N.Z.L.R. 217, distinguished.

Chertkow v. *Feinstein*, [1929] 3 D.L.R. 339, referred to.

Counsel: *Baeyertz*, for the petitioner; *E. O. Williams*, for the respondent.

Solicitors: *R. E. Bayertz*, Auckland, for the petitioner; *Walklate and Williams*, Auckland, for the respondent.

TRUSTEES, EXECUTORS, AND AGENCY COMPANY OF NEW ZEALAND, LIMITED v. GAMBLE AND OTHERS.

SUPREME COURT. Dunedin. 1946. September 3, 16. KENNEDY, J.

Will—Construction—Distribution of Estate—Will declaring Trusts by Reference to Statutes relating to "the distribution of the personal estate of intestates"—Will coming into operation before Commencement date of Administration Amendment Act, 1944—Deaths after that Date of Persons entitled to Share—No Contrary Intention—Whether Statute applies for Determination of Statutory Next-of-kin—Administration Amendment Act, 1944, s. 10 (2).

The testatrix by her will declared certain trusts "for such person or persons as would have been entitled thereto under the statutes for the distribution of the personal estate of intestates." The will came into operation before the commencement date of the Administration Amendment Act, 1944; but the deaths of persons concerned in the distribution occurred after that date.

On motion for further consideration of an originating summons for the interpretation of the will and for the ascertainment of the persons entitled,

Held, That, in terms of the Administration Amendment Act, 1944, itself, no contrary intention appearing in the will, the Administration Amendment Act, 1944, does not apply for the purpose of determining the statutory next-of-kin, who, in terms of the statute, are to be ascertained by reference to the enactments relating to the distribution of the estates of intestates which were in force immediately before the commencement of the statute.

Re Hooper's Settlement Trusts, Phillips v. *Lake*, [1943] 1 All E.R. 173, followed.

Re Sutcliffe, Sutcliffe v. *Robertshaw*, [1929] Ch. 123, and *Re Walsh, Public Trustee* v. *Walsh*, [1936] 1 All E.R. 327, referred to.

Semble, If there be some real dispute as to the full implications of the reference in s. 10 (2) of the Administration Amendment Act, 1944, which makes any difference to the actual distribution, the question should be precisely formulated and raised by those who make a special contention, and disposed of as a substantive question; not as incidental to a question stated in the originating summons.

Counsel: *F. B. Adams* and *I. Wood*, for the plaintiff trustee; *F. M. Hanan*, for the daughters of the testatrix; *Jeavons*, for M. M. Guthrie and others; *Armitage*, for S. A. Park and others; *J. S. Sinclair*, for D. L. Martin and others.

Solicitors: *Adams Brothers*, Dunedin, for the plaintiff trustee; *F. M. Hanan*, Dunedin, for S. M. Hepburn and others; *Ferens and Jeavons*, Dunedin, for M. M. Guthrie; *Downie Stewart, Payne, and Forrester*, Dunedin, for S. A. Park and others; *J. S. Sinclair and Stevenson*, Dunedin, for D. L. Martin and others.

GREGORY v. JOHN BURNS AND COMPANY, LIMITED.

SUPREME COURT. Auckland. 1946. August 9, September 20. CALLAN, J.

Negligence—Res ipsa loquitur—*Wire Rope being Tested to ascertain Capacity to resist Strain—Rope Breaking and Causing Injury to Worker—Whether Case of* Res ipsa loquitur.

The maxim *Res ipsa loquitur*, which applies to the mere behaviour of inanimate controllable objects in the control of a defendant, does not apply to the breaking of a wire rope, which was being tested and subjected to deliberately contrived heavy stresses for the express purpose of discovering whether it would break under the strain or not. The mere proof, therefore, of the breaking of the rope, and of an accident caused to the plaintiff thereby, involves no change in the burden of proof of negligence.

The case is reported on this point only.

Counsel: *Fawcett*, for the plaintiff; *Reed*, for the defendant.

Solicitors: *Dufaur, Fawcett, and Cairns*, Auckland, for the plaintiff; *Mervyn R. Reed*, Auckland, for the defendant.

MARSH v. BOWLIN.

COMPENSATION COURT. 1945. November 27. 1946. February 27. ONGLEY, J.

Workers' Compensation—Refusal to Submit to Medical or Surgical Treatment—Worker undergoing Treatment in Hospital—Leaving Hospital—Half-caste Maori wanting to die at Home—Subsequently receiving Medical Treatment—Workers' Compensation Act, 1922, s. 16.

Under s. 16 of the Workers' Compensation Act, 1922, which provides that no compensation is payable if and so far as the incapacity is caused, continued, or aggravated by unreasonable refusal of treatment, it has to be shown affirmatively by the employer that the treatment refused had at least a fair and reasonable chance of success either to bring about a cure or materially reduce the incapacity. If that is not shown, it cannot be said that the incapacity is due to the refusal, or that the incapacity is caused, continued, or aggravated by the refusal.

Hamilton v. *Tuck Bros., Ltd.*, [1940] G.L.R. 595, and *Earl Fitzwilliam Collieries* v. *Crossley*, (1925) 18 B.W.C.C. 109, referred to.

Thus, where a half-caste Maori, after having been four months in hospital, where he was receiving "maintenance treatment" which would not have cured him or lessened his incapacity, left the hospital because he thought he would die and wanted to die at home, but later continued treatment, it was not shown that the risks he ran had delayed or adversely affected his chance of recovery. It had not been shown that he refused any treatment that would have brought about his recovery in whole or in part, or had a fair and reasonable chance of doing so, or that his present incapacity was caused, continued, or aggravated by what he did.

Counsel: *C. A. L. Treadwell*, for the applicant; *J. D. Tizard*, for the respondent.

Solicitors: *Treadwells*, Wellington, for the applicant; *Christie, Craigmyle, and Tizard*, Wanganui, for the respondent.

SHAW SAVILL AND ALBION COMPANY, LIMITED v. JONES.

COMPENSATION COURT. Christchurch. 1946. August 20, December 3. ONGLEY, J.

Workers' Compensation—Refusal to submit to Medical or Surgical Treatment—Onus of Proof upon Employer to show that Treatment refused has Reasonable Chance of Success in either Effecting Cure or Reducing Incapacity—Workers' Compensation Act, 1922, ss. 16, 57.

To justify the Court in deciding, under s. 16 of the Workers' Compensation Act, 1922, that no compensation is payable to a worker in consequence of his unreasonable refusal to submit to medical or surgical treatment, or in making an order (if the Court has power to do so) suspending the weekly payments of compensation until such time as the worker shall enter hospital and there submit to appropriate medical or surgical treatment, the employer must show affirmatively that the treatment refused has at least a fair and reasonable chance of success of either bringing about a cure or of materially reducing the incapacity; otherwise it cannot be said that the incapacity is due to the refusal or that the incapacity is caused, continued, or aggravated by the refusal. The onus of showing that is on the employer.

Marsh v. *Bowlin*, *supra*, applied.

Thus, where the treatment proposed for a brain injury was by way of investigation, which was something more than the medical examination which an employer could call for under s. 57 (1) of the Workers' Compensation Act, 1922, and it was not intended to have any curing effect, its purpose being to ascertain whether an operation would be effective, it had not been shown that the proposed treatment had a fair and reasonable chance of success.

Counsel: *Penlington*, for the applicant; *T. A. Gresson*, for the respondent.

Solicitors: *Harper, Pascoe, Buchanan, and Upham*, Christchurch, for the applicant; *Wynn Williams, Brown, and Gresson*, Christchurch, for the respondent.

A SEPARATE COURT OF APPEAL.

Some Expressions of Public Opinion.

The recent leading article in this JOURNAL advocating the creation of a Separate Court of Appeal has received wide attention in the leading columns of the daily Press of the Dominion. As a matter of interest, excerpts from these editorial comments are appended.

New Zealand Herald (Auckland).

The case for setting up a separate Court of Appeal, as presented by the *New Zealand Law Journal*, has a sound basis of common sense which commends it to the ordinary citizen who has had little direct acquaintance with the work of Courts. It is generally known that Supreme Court Judges are worked very hard, and that besides sitting in Court they have to spend long hours in preparing and writing judgments. However, it will come as a surprise to many to learn how great a burden is imposed on them by the antiquated system which requires all Judges to sit each year as members of the Court of Appeal, and what difficulties have to be overcome in sandwiching the latter's sittings between those of the Supreme Court in the various districts. Lawyers and litigants are well aware of the delays involved, the inevitable lateness of many judgments and the hardships imposed when hearings have to be postponed from one appeal session to another. It is not good to be told that proceedings often have to be conducted against time in order that Judges may leave to keep appointments in their own centres. As the *Law Journal* remarks, this is not the atmosphere in which an appellate tribunal should do its important and difficult work. A permanent Court of Appeal would have many advantages. It would sit as required throughout the judicial year and not necessarily in Wellington only. Appeals could be heard promptly. The strength of the Supreme Court Bench would in effect be increased. Altogether it would appear that New Zealand is now populous enough to require and sustain a Court solely for the determination of appeals. The gains are obvious, given the essential condition that appointments to the Court shall be made from among the most eminent of the practising Bar. Any extra cost involved in the change would be more than balanced by greater efficiency.

The Dominion (Wellington).

In the course of a statement to counsel in the Supreme Court at Christchurch recently, the Chief Justice said that, although a temporary appointment to the Supreme Court Bench was to be made—it has since been made—"the position would arise by the end of February that there would be only one, or at the most two, Judges to deal with sittings in Auckland, Wellington and Christchurch." That must be a position equally unsatisfactory to Bench and Bar, and perhaps the time has come for the judicial system of the Dominion to be carefully reviewed. Much is heard from time to time about "the law's delay," but it is essential that, as far as is possible, the administration of justice should be prompt. If an individual's freedom is at stake, then the sooner an appeal can be heard the better, and in matters material long delays can be costly.

Some instances of the delay incurred under the present system have been given in the latest issue of the *New Zealand Law Journal*. This happens, it is contended, "from the fact that the [Appeal] Court sits only three times in a year." Mention is made of an undelivered judgment in a case heard last September, and in which, should the appeal succeed, "the appellants will have lost a large sum in profits, solely through being kept out of possession meanwhile." With respect to criminal appeals delay in having an appeal heard, it is held, "imposes a great hardship on a possibly innocent prisoner." A man convicted in October would have to wait until the sittings of the Appeal Court in the following March to have his appeal heard, and the Journal adds that "in England such an appeal would be disposed of within, usually, ten days at the most."

There is something repugnant, to the average citizen, in the denial of the right or unreasonable delay in the opportunity to appeal to a higher Court. . . .

The issue now under discussion is the establishment of a separate Court of Appeal. As things are the members of the Supreme Court Bench form the Appeal Court, which under the Act of 1913 consists of two divisions. . . . This month five Judges will be required to deal with business awaiting the Court of Appeal, and two will be needed to hear an electoral petition in Raglan, so that the ordinary work of the Supreme Court will have to wait for an indefinite period.

It is contended by many who have devoted study to the matter that the growth of the work before the courts will compel a change in the system. The proposal which seems to have been most widely discussed is that already mentioned, namely the establishment of a separate Court of Appeal, which would sit for a longer period than is now possible. The community certainly regards the right of appeal as a safeguard against the possibility of injustice or hardship, and public opinion has approved of the developments which have given that right, even where a person has been sentenced for a crime on a plea of guilty.

The difficulty to-day lies in the fact that the Judges who comprise the Appeal Court must also go on circuit, to take sessions of the Supreme Court in other centres, and the question arises whether it would not be advisable, in the interests of justice—making it more swift as well as more sure—to divide these duties by establishing a permanent Court of Appeal. This would free the Judges of the Supreme Court for the discharge of the many important duties that attach to their positions. As the volume of Court business grows, it is contended, some such development will become imperative, otherwise the delays at one stage or another may become unconscionable. The matter is primarily one for the members of the judiciary and the legal profession when regarded solely as a matter of judicial machinery, but it has a much wider application in the provision of ready access to the highest Courts in the land essential in any country truly democratic.

Evening Post (Wellington).

In stating a case for a separate Court of Appeal in New Zealand, the *Law Journal*, extracts from whose article we publish to-day, has given reasons for the proposed reform which should commend themselves not only to members of the legal profession but to the public as a whole. They should also command the serious consideration of the Government, with whom the final responsibility rests. [After quoting from the article:] In the administration of justice, the public interest must be paramount. If there are delays in the work of both the Court of Appeal and the Supreme Court—and the evidence presented by the *Law Journal* suggests that under the present system delays are inevitable—then, in the public's interest, there would appear to be a strong case for reform. The question which the Government, the Judiciary, and the legal profession must consider is the shape which the reform should take. . . . Members of the Supreme Court Bench have for some time been working under the most difficult conditions and are in no way responsible for any delays that may have occurred in the hearing of cases and in the preparation of judgments. Indeed, if it had not been for their constant striving against difficulties, the position, as the JOURNAL says, would have been much more unsatisfactory. The Chief Justice and other Judges have, from time to time, stressed the need for obtaining relief. The Government, by the appointment of two temporary Judges, has recognised the need, but what would appear to be necessary is a long-term approach to the problem. The *Law Journal* having stated the case for a separate Court of Appeal, apparently with wide support from the legal profession, it is now for the Government, in consultation with the Judiciary and the Law Society, to consider the whole question, with a view to providing a permanent remedy which will not only give much-needed relief to the Judiciary but will safeguard the public interest.

Taranaki Herald (New Plymouth).

A move to end the deplorable congestion in the Supreme Court business of the Dominion has come from the legal profession with the suggestion of a separate Court of Appeal. This is not the first time this suggestion has been made; in 1907, Sir John Findlay, then Attorney-General, drafted a Bill for the establishment of a separate Court of Appeal, but the profession and the Judges were distrustful of the innovation. To-day the situation is greatly changed, and impatient counsel and overworked Judges alike are concerned at the delays that are hindering an efficient conduct of Supreme Court business. The Taranaki District Law Society, for example, is now unanimously in favour of a separate Court of Appeal and the indications are that the reform will receive widespread support from the profession .

The contention is that sufficient work is now available to occupy the full-time attention of a Court of Appeal and that if Supreme Court Judges were freed from the obligations of service on the Court of Appeal there would be no delay in handling the work of the Supreme Court. Point to this was given last week at New Plymouth when after the briefest of sessions Mr. Justice Cornish had to postpone a mass of civil business in order to be at Wellington for to-day's sitting of the Court of Appeal. Further, it is contended that the administration of justice would be enhanced were Appeal Court Judges appointed for their aptitude for appellate work, as in Britain. To-day, Judges are, as the *Law Journal* says, expected to be "Jacks of both trades" and when they are severely overworked, as at present, the JOURNAL finds it difficult to understand how they get their Appeal Court judgments done at all.

The reform has the appearance of both necessity and value, and it will be of interest to note the reaction of the Supreme Court Judges, the profession and the Government. Obviously the chaos of congestion of the moment cannot be allowed to continue, and if approved by public opinion the necessary legislation amending the Court of Appeal Act should be introduced at the earliest possible moment in the new session.

Taranaki News (New Plymouth).

Recent comment from the Supreme Court Bench and the appointments of two temporary Judges have served to attract the attention of the ordinary citizen to the Judiciary. Though it is not within the purview of the man in the street to suggest remedies in a system that is exposed to him as having defects, he is deeply interested in something that he knows has deep meaning to him.

The ordinary citizen will be alive, therefore, to the importance of the case set out in the *New Zealand Law Journal* for the establishment of a separate Court of Appeal. The essence of the case is that such a move would serve two purposes in the administration of justice. First, the establishment of a superior Court comprised of Judges with special aptitude for appellate work and leisure to devote to this work would elevate the judicial standard in the Dominion.

The second reason is that the establishment of an appeal court would expedite the administration of justice both in the matter of appeals and in ordinary Supreme Court business. The present system of drawing on Supreme Court Judges to sit from time to time as a Court of Appeal means, obviously, that normal Supreme Court work loses their services and, conversely, the attention the Judges must necessarily give to Supreme Court duties means that the processes of appeal are slowed down.

Expert opinion as expressed in the *New Zealand Law Journal* holds that the disadvantages and disabilities of the present system can be effectively remedied by the establishment of a separate Court of Appeal. With gains of this nature, the ordinary citizen would not baulk at any little extra cost that might be involved. In fact, in the interests of the administration of justice, which he knows is so important to him, the ordinary citizen will back the efforts of those who know intimately the workings of the legal system and will trust that their recommendations for its improvement will receive the attention of those in whose power it is, acting on the people's behalf, to give effect to them.

Oamaru Mail (Oamaru).

The statement of the Chief Justice on the subject of the shortage of Judges is not creditable to the administration of the law in this country, or to the Government. The use of Supreme Court Judges to give dignity to commissions and inquiries has for long been much abused, with the result that the Bench has not been able to give the necessary time to its true functions. Of the ten Judges at present holding active appointments, one is absent in Japan and one is engaged on the business of the Gaming Commission. The criminal sessions have begun simultaneously in six centres, and eight available Judges are less than the number required for efficiency. The result is that Court trials are held up for considerable periods, and many persons waste days and weeks of valuable time. Moreover, all the civil business of the Courts is meanwhile at a standstill. It might be argued that one remedy would be to alter the dates of the criminal sessions in some centres, so as to "stagger" the criminal and civil business, and thus to concentrate the Judges at the centres where juries were for the time being sitting. This, however, could not be done without altering the constitution of the Court of Appeal, as it is essential, under the present system (in which all the puisne Judges sit in turn in that Court) to hold all criminal sessions more or less together while the Appeal Court is in recess. It is therefore significant that the Attorney-General, in speaking at Wellington, forecast a possible reorganisation of the Bench, suggesting that the appointment of a separate permanent Court of Appeal was under consideration. It may be regarded as certain that such a reform, coupled with a further rearrangement of the dates of the criminal sessions in the various centres, would have the support of many lawyers all over New Zealand. Besides making for expedition in Supreme Court proceedings, it would enable Judges specially fitted to deal with appeal work to devote their attention exclusively to it. A Court of Appeal thus constituted would also have the advantage that it could sit in centres other than Wellington, to the great convenience of the public. At present the Judges are overworked, and one consequence is to be seen in long-delayed decisions. The appointment of a permanent Appeal Court would effect a substantial improvement in lightening the work of the Judges by increasing their number and at the same time allowing a measure of specialisation on the Bench which the present system denies.

Otago Daily Times (Dunedin).

The comments from the current issue of the *New Zealand Law Journal*, which we print this morning, stating the case for the constitution of a separate Court of Appeal are from an article of considerable length. This article reviews historically the course of previous agitation for the setting up of a court which would handle expeditiously all appeals from judgments in the ordinary courts. It is shown that the constitution of the highest appellate tribunal in New Zealand remains the same as it was 85 years ago, while the volume of the work it is called upon to undertake has increased probably an hundred-fold. In 1946, the Court of Appeal was occupied for 17 weeks in reviewing cases referred to it. One result of this crowded calendar is of first-rate public importance, and that is the delays that are occasioned in the hearing of appeals. The Appeal Court sits three times in the year, and as the *Law Journal* points out, this may mean that great expense may be caused to appellants, while in the criminal appellate division a possibly innocent prisoner may suffer great hardship through delay in hearings.

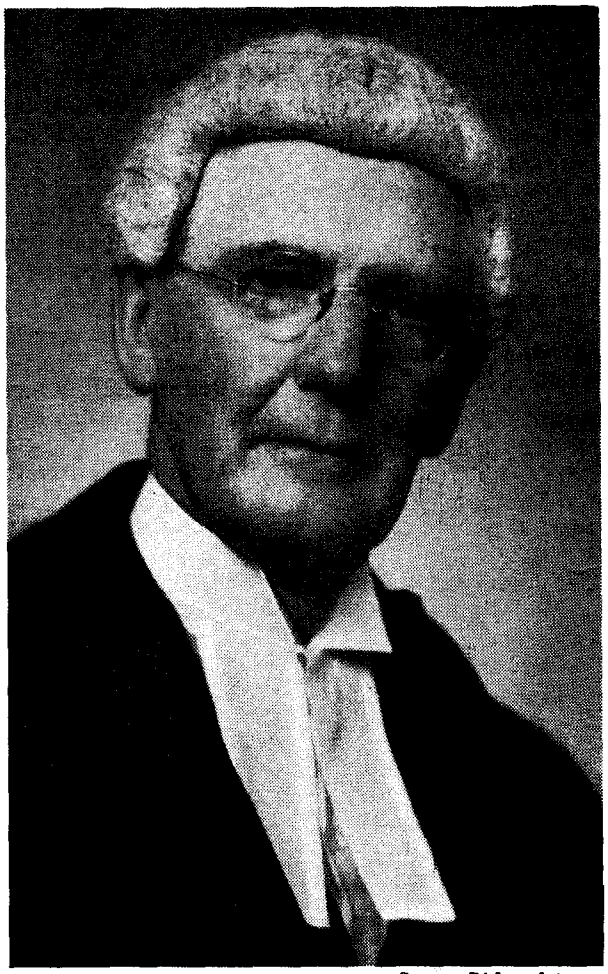
Another point which deserves recognition is that Judges of the Supreme Court may be selected with a view not to their aptitude for appellate work, but in consideration of qualities that fit them admirably for presiding over Courts of first instance. This argument tends to be vitiated by appointments to the Judiciary which fail to suggest that Judges are always so chosen under a system in effect of political appointment.

. . It will certainly be freely admitted that Judges in the appellate division should be selected for their special capacity. The Judges who now sit in the Court of Appeal may very well possess the qualifications, but the variety and pressure of their ordinary work—additional to the extraordinary duties that are increasingly thrust upon them as chairmen of commissions and tribunals—scarcely allow them the time and contemplation that they deserve to be given to devote to work in the Appellate Court. The objection could, of course, be raised to the proposal to constitute a separate court that special appeal Judges would, on the other hand, have very considerable leisure. That, however, is the trend in every phase of our life to-day, and the public might not begrudge to the Bench what is so freely allowed to industrial unionism. In this connection, it may be that the Chief Justice could preside over the Court of Appeal, although the *Law Journal* sees objection to such a procedure In general terms the case for a separate Court, as so ably stated, is a very strong one, and it certainly deserves the close attention of Government.

MR. JUSTICE FLEMING.

Appointment as a Temporary Judge.

On March 1, the Attorney-General, the Hon. H. G. R. Mason, K.C., announced the appointment of Mr. Thomas James Fleming, barrister, of Auckland, as a Justice of the Supreme Court, to serve as such during the pleasure of His Excellency the Governor-General. The appointment was made necessary by the reduction in the number of members of the Bench owing to the absence on other duties of Mr. Justice Northcroft and Mr. Justice Finlay.



Spencer Digby, photo.

Mr. Justice Fleming

The new Judge was born near Cookstown, County Tyrone, Ireland, on March 12, 1882, within a short distance of the birthplace of Lord Russell of Killowen, Lord Chief Justice of England. One of his uncles, well-known in his day as "Counsellor Greer of Derry," of the Northern Circuit, was one of the most prominent "Silks" of his day at the Irish Bar.

After completing his education in his native land, the new Judge came with his parents to New Zealand in January, 1901. After some experience of commercial life, he commenced his studies for his chosen profession in the office of Messrs. Wake and Gow at Eltham, where he qualified.

Admitted in 1911, he went to Whakatane, where he soon built up a varied practice, and was very successful in Court work, becoming known, in particular, throughout the Bay of Plenty, as an expert in land-drainage cases. He was joined in partnership in 1911 by Mr. C. A. Suckling. In 1914, he disposed of his interest in the firm to Mr. D. C. Chalmers, as he was anxious to undertake city practice.

In Auckland, he joined Mr. James McVeagh, brother of the late Mr. Robert McVeagh, of Messrs. Russell, Campbell, and McVeagh, in the partnership which continued until last year under the name of Messrs. McVeagh and Fleming. On the death of Mr. McVeagh, Mr. Fleming's son, Hugh, who has recently returned after a distinguished period of service with the Royal New Zealand Air Force, was admitted into partnership.

During his years in the Bay of Plenty, the new Judge took a keen and active interest in local-body work, and participated in all the sporting activities of the district as player and administrator. He was a member of the Whakatane Town Board, and for many years its chairman. An active member of the Whakatane Rowing Club, and later its President, he is a life member of that Club. He was also President of the Whakatane Chamber of Commerce, a body of which he is also a life member, and President of the Bay of Plenty Railway League. He was solicitor for the Whakatane Harbour Board, and County Solicitor.

In recent years, the new Judge has been President of various sports bodies in Auckland, including two terms as President of the Manurewa Bowling Club. In the War years, he was President of the Auckland branch of the Overseas League during its busiest and most successful period of public service.

In 1935, Mr. Fleming was the National Party candidate for the Roskill seat at the General Election. He proved an able candidate, and his humour and ready repartee made his meetings a feature of a hard campaign. He was defeated by the sitting Member, who has held the seat ever since.

The new Judge has a family of two sons and a daughter. His elder son, Alister, was a Sergeant in the Long Range Desert Group of the N.Z.E.F. His younger son, Hugh, was a Flight-Lieutenant in the R.N.Z.A.F., being attached to the Royal Air Force in Bomber Command for four years. He was awarded the Distinguished Flying Cross for meritorious service. His daughter served throughout the war as a member of the W.A.A.F. The new Judge himself was a member of the Home Guard during the war period, and was Intelligence Officer of the Papakura Battalion.

The new Judge brings to the Bench a long and varied experience of both country and town practice. Those

who know him well recognize that his many qualities of mind and heart will soon be appreciated by all who appear before him. He is essentially kindly and sympathetic, though withal a clearsighted judge of human nature. As may be expected, he has all the shrewdness and common sense of the Ulsterman; and he also possesses the quiet, dry sense of humour that some Ulstermen inherit from Scottish forbears. His keen sense of justice and inherent fairness of mind, combined with a sound knowledge of legal principles and with conspicuous patience and courtesy, bid fair to prove the choice a very happy one. It can be predicted with safety that his many qualities will receive a ready response from all those who appear before him.

LEGAL PROBLEMS IN REAL ESTATE AGENCY.

By I. D. CAMPBELL.

This article has been prompted by the recent publication of *Luxford's Real Estate Agency in New Zealand*. Several propositions which have been retained in this work from its predecessor, *Barton's Land Agent in New Zealand*, or have been added in the new edition, seem open to a useful discussion. The learned author has formulated at least one proposition which is new to the subject of real estate agency, and consequently has impliedly invited comment. The fact that the writer of this article here suggests a different view does not in the least degree detract from his previously expressed opinions on the merits of the book (1946) 22 N.Z.L.J. 166.

Implied Warranties.—The learned author breaks new ground by suggesting that the principal may be liable to the agent for breach of an implied warranty of title if the principal has no title or a defective title and the agent is thereby prevented from earning his commission. He contends that the judgment in *Prickett* v. *Badger*, (1856) 1 C.B. (N.S.) 296, could be supported on this ground. At p. 128 he says: "May it not be that the plaintiff was entitled to the full amount of his claim as damages for breach of contract? . . . The contract of agency could not have any business efficacy unless Badger impliedly warranted that the land was his to sell." This is independent of any peculiarity in the facts of *Prickett* v. *Badger*, for at p. 129 it is urged as a general proposition that any person who employs an agent to sell land impliedly warrants to the agent that he is lawfully entitled to sell the property. Again at p. 133, it is suggested that an agent could maintain an action against his principal for breach of an implied warranty of title.

The only reported decision in which damages have been awarded to a land agent for breach of a warranty of title (no sale having taken place) appears to be *Hunt* v. *Government Insurance Commissioner*, (1940) 1 M.C.D. 400, 35 M.C.R. 55, cited at p. 128 of this work. The decision in that case, however, was based largely on the judgment of the Court of Appeal in *Luxor (Eastbourne) Ltd.* v. *Cooper*, [1941] A.C. 108, [1941] 1 All E.R. 33, which was subsequently reversed on appeal to the House of Lords. In the present work Mr. Luxford offers two further reasons in support of an award of damages for breach of warranty. The first is this: "Every person who enters into a contract as the purported agent of another impliedly warrants that he is duly authorized to do what he purports to do. By analogy it would seem that a person who employs an agent to sell property impliedly warrants that he is lawfully entitled to sell the property." In the second place he says: "It is well established that if a contract of sale is abandoned because the vendor is not able to give title to the land he has agreed to sell, the agent is, nevertheless, entitled to recover his commission. . . . There can be no logical reason why an agent should be in a different position if, after having found a person ready and willing to purchase, it is found, prior to the contract of sale being entered into, that the principal is not able lawfully to sell the land."

The point is very interesting, and will no doubt come before the Courts for decision. In the meantime the writer will state why, in his view, the learned author's proposition cannot be supported. The general rule in respect of all implied warranties is that the person giving the warranty shall, in effect, make good his representation. He is liable to pay by way of damages a sum equal to the loss caused having regard to the position that would have existed had his representation been true. For example, where an agent contracts with another person without the authority of his alleged principal (the analogous case quoted by Mr. Luxford) the measure of damages is the loss suffered through the invalidity of the contract. If the principal is a company which goes into liquidation, the liability is reduced to the value of the debt which would have been incurred by the company if the contract had been binding: *Firbank's Executors* v. *Humphreys*, (1886) 18 Q.B.D. 54. If a similar principle is applied here, there is no scope for recovery of damages on a warranty of title, for, even if the title had been perfect, no claim for commission could have arisen for any services falling short of actually consummating the desired transaction. The Court cannot award damages for breach of warranty of title unless it is prepared not only to require that the principal should, in effect, make good his representation, but also to award compensation for services in direct violation of the principles laid down by the House of Lords in the *Luxor* case. It is there most distinctly declared that the principal is under no liability to accept an offer secured by the agent, and the ground of refusal appears to be entirely immaterial. Similarly, in the case of revocation of an agent's authority, the revocation is effective even though based on the mistaken belief of the principal that he has no power to sell: *Quirk* v. *Winter*, [1920] N.Z.L.R. 98. A claim founded on breach of warranty can be supported only on the theory of awarding damages because the agent has been prevented from earning his commission. The judgments in the *Luxor* case emphatically put an end to this possibility where the principal has a perfect title. If the agent of a principal who has

no power to sell can demand to be placed in the same position as if his principal had full power to sell, there is still this apparently insuperable barrier before him.

This, it is suggested, is the " logical reason " which may have escaped the author's notice, when he compared such a case with the subsequent cancellation of a contract on the ground of want of title in the vendor. Such a cancellation cannot affect the agent's vested right to his commission. But if no contract is ever entered into, the agent of a vendor with a perfect title has no claim. It is difficult to believe that an agent whose principal's title is defective can have any better or higher claim.

Finding a Purchaser.—Cases decided since the book was written will necessitate drastic revision of the section of the work in which the meaning of this expression is discussed. At p. 94 it is said : " It is submitted that where the agent procures a written offer in the precise terms of the authority and produces such offer to the principal for signature, the agent has performed his contract to find a purchaser." On the high authority of *Macnamara* v. *Martin*, (1908) 7 C.L.R. 699, the learned author says that an agent employed to find a buyer performs his contract when he has introduced a person who is ready and willing to purchase on the terms stated in the authority to sell, even although a written offer has not been obtained.

The reports of *Jones* v. *Lowe*, [1945] 1 K.B. 73, [1945] 1 All E.R. 194, and *Turnbull* v. *Wightman*, (1945) 45 N.S.W. S.R. 369, have, however, since come to hand. In *Jones* v. *Lowe*, Hilbery, J., following dicta in *Luxor* (*Eastbourne*) *Ltd.* v. *Cooper* (*supra*), held that commission payable on the introduction of a purchaser is payable only on the conclusion of a legal and binding contract for sale and purchase. " Where a person chooses to say, ' My commission will be payable on my introducing a purchaser,' he is saying ' My commission will be payable only when someone I introduce has purchased.' " This decision was applied in *Turnbull* v. *Wightman*. It was there decided that where an agent is promised commission in the event of his " effecting a sale or introducing any person who shall become a purchaser," he is not entitled to commission by producing a person who is ready, willing and able to purchase on the terms proposed, if his authority is subsequently withdrawn and no sale takes place. This, in itself, does not appear to be inconsistent with anything in Mr. Luxford's book. But it was argued for the appellant that the authority in question was equivalent to an authority to " find a purchaser." Dealing with this submission, Jordan, C.J., delivering the judgment of the Court, said (p. 373) : " I think that it follows from the speeches in the *Luxor* case that, in the absence of some controlling context, ' find a purchaser ' must now be regarded as meaning what it says, namely, find a person, who is not only able and willing to buy on the terms prescribed, but who does in fact buy . . . I do not think we are constrained by *Macnamara* v. *Martin* to treat the phrase as having here a meaning different from that attached to it by the House of Lords." *Macnamara* v. *Martin* and *Vaughan* v. *S. Foster and Son, Ltd.*, (1917) 17 N.S.W. S.R. 281 (cited by Mr. Luxford at p. 99), were not followed.

Jordan, C.J., in the excerpt quoted above, expressly qualified his statement with the words " in the absence of some controlling context." The rule is not a rule of law, but a rule of construction. An example of such a controlling context can be found, it is suggested, in *Woolven* v. *Currie*, (1943) 3 M.C.D. 236, 39 M.C.R. 22, considered by Mr. Luxford at p. 92. In that case commission was payable " in the event of a sale being effected by you or through your instrumentality, or upon you introducing a *bona fide* purchaser." In general, " effecting a sale " and " introducing a *bona fide* purchaser " require the same event to have been brought about by the agent to entitle him to commission. But when both expressions are used in the same instrument they are plainly intended to refer to different events. The *prima facie* interpretation should in such a case yield before the indication of a different intention, and the words " introducing a *bona fide* purchaser " be taken to mean " introducing a person able and willing to purchase on the terms specified and other terms reasonably incidental thereto." The decision in *Woolven* v. *Currie* should, it is submitted, be regarded as sound, not because of the sole agency to which Mr. Luxford attaches importance, but because, in the special context, the words " introducing a purchaser " entitled the agent to commission for the result he had brought about before the principal purported to vary his authority.

Quantum Meruit.—The decision in the *Luxor* case (*supra*) put an end to the possibility of maintaining a *quantum meruit* claim for services rendered by an agent, where his efforts have fallen short of those required to entitle him to commission. But the question remains open whether such a claim may succeed where the requisite event has occurred, but the agreement to pay commission is unenforceable for some other reason. This may happen, for example, where the agent's appointment is not in writing in compliance with s. 30 of the Land Agents Act, 1921–22. Mr. Luxford says, at p. 130, that it is " doubtful " whether a claim for *quantum meruit* could succeed in such a case. The writer of this article would merely wish to add a specific reason for sharing this view.

The Act does not say merely that the contract to pay commission shall be unenforceable, or that no action shall be brought on the contract. It stipulates that " no person shall be entitled to sue for . . . any commission, reward, or other valuable consideration " unless the appointment is in writing. This is clearly wide enough to bar any claim for payment on *quantum meruit*, since the sum awarded could not fail to be " commission, reward, or other valuable consideration in respect of " the transaction. There is a very material difference between this provision and those contained in either the Statute of Frauds or the Companies Act, as to contracts in writing. Section 4 of the Statute of Frauds, for instance, bars a claim on the contract without imposing any prohibition on recovery by way of *quantum meruit*.

Oral Variation of Written Authority.—By reason of s. 30 of the Land Agents Act a land agent is unable to recover commission if he relies on an oral agreement extending the period of the authority granted by the written instrument of appointment. But where the written authority sets out the terms of sale, these may usually be regarded merely as a basis of negotiation with prospective purchasers or tenants. Such terms can be varied orally by the principal, and a transaction effected in accordance with the terms as varied will entitle an agent to commission. This type of oral arrangement does not affect the existence of the agency, or substitute a new oral agency for a written one. It merely regulates the manner in which the agency is

to be performed, by a procedure tacitly provided for in the original appointment.

These rules clearly appear from the cases dealt with by the learned author. In particular, he quotes this passage from *King* v. *Schon*, (1919) 44 D.L.R. 111: "It is a question of interpretation whether the mention of the suggested terms of the proposed sale was intended merely as a basis upon which the agent should negotiate, and therefore subject to modification during the negotiations without in any way varying the agency agreement, or was intended to bind the agent strictly to a sale on named terms before he could claim commission . . . The terms of sale are not necessarily part of an agency agreement at all." *New Zealand Loan and Mercantile Agency Co., Ltd.* v. *Guy*, (1943) 3 M.C.D. 187, 38 M.C.R. 124, in which this principle was applied, is also cited.

It may be useful to try to formulate a statement of the circumstances in which the oral variation, unlike those just mentioned, affects the scope of the agent's authority in such a way that the variation must be in writing to comply with the Act. Variations coming within this category are those extending the duration of the appointment, authorizing an essentially different type of transaction (*e.g.*, exchange, where the original authority was only to sell), or covering property not included in the original appointment. Suppose, however, that the oral variation restricts the agent's authority, by reducing the period of the agency, eliminating one of several types of transaction previously authorized, or confining the deal to part only of the property previously submitted. Generally, the oral variation will be effectual to reduce the agent's authority, whether or not it affects his right to commission. But if, for example, he should sell the land within the reduced period of his authority, can he recover his commission? His authority consists of the written appointment subject to the oral variation. But nothing in the Act appears to prevent his succeeding in an action to recover his commission. Notwithstanding the oral variation, he claims under portion of the written authorized contract, which, it is submitted, will bar his claim only where the variation gives him authority in respect of some property, period of time, or type of transaction not covered by the written appointment, and he is forced to rely on the oral variation.

Conference Bulletin No. 4.

DOMINION LEGAL CONFERENCE, 1947.

PROGRAMME.

The following is a complete programme of the Conference events:

CONFERENCE.

WEDNESDAY, APRIL 9

10 a.m.—Civic Welcome and Opening Ceremony at Concert Chamber, Town Hall.

Inaugural address by the Hon. the Attorney-General (Mr. H. G. R. Mason, K.C., M.P.).

Paper: "The Abuse of Delegated Legislation"—
Mr. A. C. Stephens, Dunedin.

2.15 p.m.—Paper: "The Problems of the Country Lawyer"—
Mr. R. J. Larkin, Matamata.

Paper: "Some Aspects of the Doctrine of Public Policy"—
Mr. L. F. Moller, Invercargill.

Remit:

"(*a*) That the constitution and procedure of the 'new' tribunals are such as to lead to a lowering of the traditional standards of the administration of justice, and

(*b*) That the Council of the New Zealand Law Society be asked further to consider and enquire into the working of such tribunals and to press for such remedial measures as the Council may think necessary or desirable."

9 p.m. — Conference Ball at the Regent Ball Room, 93 Cuba St.

THURSDAY, APRIL 10:

9.30 a.m.—Paper: "The Etiquette of the Profession"—
Mr. J. D. Hutchison, Christchurch.

Paper: "The Profession and the Teaching of the Law"—
Professor R. O. McGechan, Wellington.

2.15 p.m.—Paper: "Co-operatives and the Law"—
Mr. Julius Hogben, Auckland.

Paper: "Is the Profession sufficiently Organised for the Future?"—
Mr. D. W. Virtue, Wellington.

Remit (See p. 54, *ante*).

8 p.m.
(for 8.15 p.m.)—The Conference Dinner at the Royal Oak Hotel.

SPORTS DAY.

FRIDAY, APRIL 11:

9 a.m.—Golf Tournament at Miramar Links (Men).

9 a.m.—Bowls Tournament at the Disabled Servicemen's Centre, Lloyd Street (off Pirie Street) (Men).

10 a.m.—Yankee Tennis Tournament (Mixed) at the Wellington Tennis Club Courts, Palmer Street (off Upper Willis Street), or the Thorndon Lawn Tennis Club Courts, Katherine Avenue (off Fitzherbert Terrace) (depending on weather conditions).

4 p.m.—Afternoon Tea as guests of Mr. P. B. Cooke, K.C., (President of the New Zealand Law Society) and Mrs. Cooke, and Mr. J. R. E. Bennett (President of the Wellington District Law Society), at Miramar Golf House, followed by presentation of trophies.

LADIES' PROGRAMME.

WEDNESDAY, APRIL 9:

10 a.m.—Civic Welcome and Opening Ceremony at Concert Chamber, Town Hall.

11 a.m.—Morning Tea as guests of the Hon. the Attorney-General and Mrs. Mason at Parliament House.

9 p.m.—Conference Ball at the Regent Ball Room, 93 Cuba Street.

THURSDAY, APRIL 10:

9.30 a.m.—Motor Drive to Paraparaumu and Hutt Valley, leaving from the entrance to the Wellington Railway Station.

7 p.m. The Ladies' Dinner at the English Speaking Union Rooms, 5th Floor, Nathan's Building, Grey Street.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Land Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

LAND SALES COURT.

No. 99.—T. TO T.E. & A. CO. OF N.Z., LTD.

Rural Land—Freehold and Crown Lease—Basic Value—Net Annual Income—Calculation of Probable Returns of Average Efficient Farmer—Amendment of Budgets after Committee's Decision.

Appeal by the vendor in respect of an Order of the Otago Land Sales Committee whereby it was made a condition of consent to the sale of the freehold property known as the Moa Flat Downs Station that the price be reduced from £27,300 to £23,995.

The station comprises 12,052 acres of freehold land, farmed for many years in conjunction with a Crown Leasehold of 2,984 acres. It is situated in fairly high and isolated country and its successful farming depends upon a proper balance of breeding ewes, dry sheep and cattle, and upon an adequate programme of cropping. Three budgets presented before the Committee exhibited an unusual divergence of opinion both as to probable income and expenditure and as to the resulting value of the land. The values for the freehold disclosed by the respective budgets were as follows:

For the Vendor

Mr. W.	£38,340
Mr. I.	£39,300

For the Crown

Mr. M.	£22,773

(confirmed by Mr. C.)

After a very careful consideration of all the matters in dispute (as is evidenced by the Chairman's detailed report), the Committee adopted in the main the budget prepared by Mr. M., but subject to certain adjustments resulting in an increase in his value to £23,995, which the Committee found to be the basic value.

The Court (per *Archer*, J.) said: "We are entirely in agreement with the Committee in its rejection of Messrs. W.'s and I.'s valuations of £38,340 and £39,300 respectively, and if justification of its action be required it is found in the fact that Mr. W. was not called at all at the hearing of the appeal, while Mr. I. produced a new budget showing the much lower value of £30,128. We have no doubt that Mr. I. is an able and experienced farmer of more than average efficiency, but he admitted to having had little experience in the preparation of farm budgets. We are satisfied that in both of his budgets he has been guided to too great an extent by the returns from his own farm, and that he has over-estimated the probable returns of an average efficient farmer.

"Mr. M., unfortunately, has also found it necessary to make substantial alterations in his budget since the hearing before the Committee. On the income side he had to calculate afresh the returns from wool, sheep and lambs, in order to account for 221 two-tooth ewes, whose disposal was in some way overlooked in the preparation of his original budget. The result of this adjustment was an increase in anticipated revenue of £205. He has also made additions totalling £146 to various items on the expenditure side of the budget, so that his surplus for capitalization shows a net increase of £59. This amount capitalized would have increased his original basic value by £1,311 to £24,084, but Mr. M. then made a deduction of £570 for an alleged deficiency in buildings, so that his amended value as presented to the Court was £23,514.

"Mr. *Stephens*, for the appellant, made the point with some apparent justification, that it seemed strange that Mr. M., when confronted with the necessity for adjusting his budget so as to show an admitted increase in revenue of £205, should then find items requiring adjustment on the expenditure side so as to reduce the apparent gain of £205 to a net gain in income of £59 only; and further that a building deficiency of £570 should now be claimed where the same buildings were deemed to be adequate at the hearing before the Committee. In explanation, Mr. M. claimed some of the alterations in items of expenditure to be necessary in consequence of the recasting of the income side of the budget, and the balance to have been made in accordance with the principles laid down by the Court in *No. 88.—In re B.*

"After a careful examination of all the evidence we are satisfied Mr. I.'s valuation of £30,128 is too high, as is confirmed by the price at which the trustees were prepared to sell. The Crown budget has allowed for a greater carrying capacity and for a higher gross income than appear to have been enjoyed by the property during the recent years, for which accounts have been produced, and we accept it as being of greater reliability than that of Mr. I. We are not entirely satisfied, however, that Mr. M. was justified in all of his additions to the expenditure side of his amended budget, which go to offset so substantially the increase in estimated revenue. Certain of these increases do not appear to have been adequately explained or justified, while in the case of others the supposed authority of *In re B.* (*supra*) has perhaps been applied so as to weigh unduly heavily against the vendor. In view of the substantial differences between the budgets relied upon by the parties, and of the large number of amendments made to both budgets since the Committee's hearing, it would be unprofitable to embark upon an examination of either budget item by item. We are of opinion that justice will be done if we accept the Crown budget subject to a reduction of £50 in the aggregate sum of £146 by which the expenditure side of Mr. M.'s original budget has been increased. We consider further that any deficiency in buildings is reasonably offset by an excess in the value of others, and that accordingly the deduction of £570 claimed for building deficiency should be disallowed.

"As already mentioned, an area of Crown leasehold has been farmed in conjunction with the freehold land now under consideration. Both budgets have been drawn by reference to the productive capacity of both areas farmed together. It has been mutually agreed that the leasehold has a total value of £2,760, including the Crown's interest in the land, £2,560, and the lessee's interest in the improvements, £200. These sums must therefore be deducted from the productive value of the whole, in order to arrive at the basic value of the freehold land.

"As already stated, the Court accepts as the net annual income of the property as a whole Mr. M.'s amended surplus of £1,199 with the addition of a further £50, making £1,249 in all. This sum when capitalized in accordance with the Act shows a productive value of £27,755, or in round figures £27,760, which may be apportioned as follows:

Crown's interest in leasehold ..	£2,560
Vendor's interest in leasehold ..	200
Basic value of freehold	25,000
	£27,760

"As the value of the freehold so found is in excess of the value found by the Committee, the appeal is allowed and the following order is made in substitution for the order of the Committee:

"'1. The freehold land comprised in this application is found to be suitable or adaptable for the settlement of discharged servicemen under s. 51 of the Servicemen's Settlement and Land Sales Act, 1943.

"'2. The basic value of the said land is £25,000.'

"This order is made upon the understanding that if the Crown acquires the freehold land it will, by arrangement with the lessees, resume possession of the leasehold, and in such case the lessees will be entitled to a further £200, being the value of their interest therein."

No. 100.—L. to B.

Rural Land—Value—Suitability for Mixed Farming—Suggested Valuation upon Basis of Dairying for Town Milk-supply—Difference in Costs—Rejection of Town-supply as Basis of Valuation—Assessment of Prospective Net Income of Average Efficient Farmer—Factors to be considered.

Appeal by the Crown against an order of the Napier Land Sales Committee by which consent was granted to a sale of 94 acres of farm land near Puketapu at the full sale price of £5,655 15s. The land is situated in the valley of the Tutaekuri River some distance above the point where the river emerges on to the Heretaunga Plains, and it consists mainly of river flats with a small amount of hilly country at the back. In common with most of the similar land in the vicinity, it has been used in the past for sheep-farming, and has formed part of a large sheep-station. It is nevertheless suitable for dairy cattle and a few small dairy farms are to be found in the Tutaekuri Valley. Facilities are available for the disposal of dairy products, as a cheese factory and a butter factory are both within a reasonable distance.

The Court (per *Archer*, J.) said: "On account of its limited area, none of the witnesses as to value considered this property suitable for sheep alone, but they differed considerably as to whether it should be valued as a mixed farm or as a dairy farm, and if as a dairy farm as to how its milk should be disposed of. The valuers for the Crown advocated mixed farming and contended that the milk should be sent to one of the dairy factories in accordance with the practice of existing farmers in the district. The parties sought to establish that the land should be valued po n the basis of dairying for town milk-supply.

"The case in support of the Committee's order was substantially presented by counsel for the purchaser. The purchaser was unable to attend in person on account of illness, but we accept his counsel's statement that he deems the land to be well worth the sale-price, and that he proposes to farm it for town-supply, a method of farming which he has followed for some time and with great success on a share-basis with a Mr. H. Mr. H. himself gave evidence of the purchaser's experience and efficiency and of the success which had attended their joint venture, which however was carried on upon entirely different and very much superior land on the Heretaunga Plains. When Mr. H., though disclaiming any knowledge of valuing, proceeded to express the view that the net return envisaged by the purchaser's own valuer, Mr. D., was ridiculous, and that the purchaser would make at least twice that amount out of the place, it became obvious to us either that his opinions were extravagant and unreliable, or that he failed to appreciate that under the Land Sales Act the productive value of farm land must be calculated by reference to the prospective income of an average efficient farmer. All the evidence went to suggest that the purchaser is much above average in efficiency and that this is reflected in his confidence and in that of Mr. H. in the capabilities of Mr. L.'s farm.

"Mr. D. presented a budget based upon a carrying-capacity of forty-five cows and replacements, providing for a minimum of thirty cows to be milked at any one time and all the year round for supply to the Hawke's Bay Raw Milk Co-operative Company, on a guarantee of 40 gallons daily. On the expenditure side, Mr. D. provided for substantially the same outgoings as in the case of a farm worked for factory-supply, and in the result he showed a productive value of £6,200, from which he deducted £543 for deficiency in buildings and so arrived at a basic value of £5,657 which approximated to the sale price.

"Assuming for the moment that there was justification for the basis adopted by Mr. D. for his valuation, we were surprised to hear his opinion that a farmer could reap the benefit of the higher price paid for town-supply, as compared with the factory price, without a consequential increase in costs. This is contrary to the opinion so frequently expressed, that the margin between the price paid for town-supply and the price at the factory is inadequate or is barely adequate to compensate the supplier for the extra work and increased costs involved in maintaining a guaranteed supply of fresh milk of the required standard throughout the year. If Mr. D.'s view is correct, it is strange that so many farmers in the vicinity of Napier and Hastings continue to send their milk to dairy factories, notwithstanding that according to his evidence milk for town-supply is in keen demand and frequently has to be brought from much further afield. We cannot believe that milking for town-supply has the unqualified advantages claimed by Mr. D. and to the extent that he has failed to make due allowance for the extra cost of farming for town-supply his budget is unsatisfactory.

"It is more seriously at fault, however, in that, in our opinion, there is no justification at all for attempting to assess the productive value of this land on the basis of town milk-supply. A productive value in accordance with the Act must be based upon the net income which can be derived from the land by an average efficient farmer. In order to be able to assess the prospective net income of an average efficient farmer, it is necessary for a valuer to envisage and adopt for the purposes of his budget the type of farming which an average efficient farmer would be most likely to carry on upon the land which has to be valued. In this the valuer may well be guided by the methods adopted by farmers of average efficiency upon similar land in the same locality. In the present case the land cannot be classed as the best dairying land, but it is eminently suitable for mixed farming. The surrounding land is utilized for sheep-farming, mixed farming, and to a lesser degree for dairy farming for factory-supply. No other land within a reasonable distance is farmed for town milk-supply, an ! the Raw Milk Company has not in the past collected milk from this district or looked upon it as a promising area for the supply of its requirements. We doubt whether the farming of this property for town-supply would have been contemplated, had it not been known that the purchaser is at present milking for that purpose, and that the Raw Milk Company is prepared in the circumstances to take his milk, notwithstanding his removal to a property which is further away, and off its normal routes for milk-collection. We think, in short, that the proposal to farm this land solely for supply to the Raw Milk Company must be attributed to the personal initiative and industry of the purchaser, and that the increased return which he may enjoy as a result of such a policy must be regarded as the reward of his superior efficiency. If land not particularly suitable or customarily used for town milk-supply is to be given a higher value, because some purchaser might conceivably use it for that purpose, the logical effect would be to entitle all dairy land within a convenient distance of centres of population to a higher value based upon the price for raw milk, notwithstanding that a large proportion of such land must always and of necessity be utilized for factory-supply, owing to the inability of retailers to take the whole production of the land. Taking into account the characteristics of the land, but disregarding the intentions of the purchaser, we are satisfied that the productive value of Mr. L.'s property must be found by reference to its earning capacity as a mixed farm supplying a reasonable quantity of milk or butterfat to one of the local factories.

"Upon this basis, Mr. W. presented to the Committee a budget showing a productive value of £4,555 and a basic value, after making a deduction for deficiency in buildings, of £4,170.

"The three budgets before the Court may therefore be summarized as follows:

For the Parties	*Productive Value.*	*Deficiency of Buildings.*	*Basic Value.*
Mr. D.	£6,200	£543	£5,657
For the Crown			
Mr. W.	£4,555	£385	£4,170
Mr. G.	£4,165	£920	£3,245

"Mr. D.'s budget is unacceptable because of the inappropriate system of farming on which it is based, and because of its inadequate appreciation of the extra allowance for costs and management necessitated thereby. It is interesting to note however that, if the full quantity of milk envisaged by Mr. D. as being produced for town-supply were directed to factory-supply, the net income, after making due allowance for income from pigs and other consequential adjustments of his budget, would be less than that shown by either of the valuers for the Crown.

"The budget prepared by Mr. W. seems in all respects to do full justice to the land; and taking into account the small deduction for deficiency in buildings, his resulting basic value represents, in our opinion, the maximum sum which, upon the evidence before us, can properly be assessed as the fair value of the property under the Land Sales Act. We are, therefore, satisfied that the sale price cannot be sustained. We are confirmed in this opinion by Mr. G.'s valuation, the more detailed consideration of which is rendered unnecessary by the statement, very fairly made by the Crown's Solicitor, that the Crown still relies upon its first valuation as presented by Mr. W. to the Committee. In the circumstances the Court finds Mr. W.'s valuation of £4,170 to be the basic value of the land. The appeal is therefore allowed, and consent is granted to the sale subject to the reduction of the sale price to £4,170 accordingly."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Special Reasons.—Under the English Road Traffic Act of 1930, drivers convicted a second or subsequent time for dangerous driving or for driving while under the influence of drink must lose their driving licenses unless for "special reason" the Court orders otherwise. In *Whittall* v. *Kirby*, (1946) 175 L.T. 449, the respondent was convicted of driving a motor-lorry while under the influence of drink, and the justices refrained from disqualifying him from holding a driving license, on the grounds that he had no previous convictions for motor offences, that his license was essential to his livelihood, and that a substantial fine had been imposed. On an appeal by the inspector, the King's Bench Division held that the reasons mentioned were not "special reasons" within the meaning of the Act, and that the justices must be directed to impose disqualification for one year. Lord Goddard, C.J., said that a "special reason" must be one which was not of a general character, but must be a reason special to the offence and not to the offender. He referred to the decision in *R.* v. *Crossan*, [1939] N.I. 106, as a judicial determination in Northern Ireland agreeing with a view he had expressed in an address to magistrates in 1937, that the fact that a person earned his living by driving was not of itself a special circumstance entitling the Court to refrain either from endorsing or suspending his license, and the fact that a person was a first offender could not be special circumstances for this purpose. He observed that it was not possible to define everything that constituted a "special reason," but one illustration was that of a driver exceeding the speed-limit because he had suddenly been called to attend a dying relative. Driving under the influence of drink or drugs did not amount to a "special reason" unless it was found that a drug had been administered to a driver without his knowledge.

Compensation Delays.—On the appointment of Ongley, J., to the Land Sales Court, Scriblex, in a mood of unrelieved gloom, predicted unhappy results to the profession from the ill-mated union of his two judicial offices, despite his known capacity for work. Results justified the criticism, since both compensation and land sales judgments soon fell into arrears. Upon this position becoming apparent, the Government, by a process of reasoning akin to political legerdemain, granted him a divorce from the Land Sales Court and proceeded to wed him to the Waterfront Control Commission, a most peculiar and undignified situation for a member of the judiciary. The claim for workers' compensation quickly became the orphan of the piece, a dweller in the shadow-world of the solicitor's non-active basket. At the meeting of the Wellington Law Society last month, speakers referred to writs in the Court of Compensation that are two years old and still unheard, cases part heard, and judgments undelivered for over a year. Practitioners are sympathetic to Ongley, J., in his difficulties, but, for a country that has prided itself on the expeditious manner in which justice is administered, such a state of affairs is most undesirable. It is to be hoped that it will not recur.

Equine Brief.—As far as can be judged from the newspaper reports, everyone nearly connected with the turf is to give evidence at the Royal Commisions on Gaming—stewards of racing clubs, trainers, jockeys, punters, racecourse inspectors, totalisator experts, and bookmakers. But none has put the point of view of the horse, the pivot round which the racing industry, or, if you prefer it, the racing sport, revolves. In this respect, a distinction must be drawn between the Commission and the House of Lords, which has now put in a good word for the modest and unambitious hack. It seems that, on an April evening in 1944, one Ernest Searle, riding after dark on the village roads of Warwickshire, ran into a horse and sustained personal injuries. Both County Court and Court of Appeal agreed that the animal had got onto the highway because the fencing of its field was defective, but held that there was no obligation upon an owner to fence in his horses. The House of Lords (Lords Maugham, Thankerton, Porter, Uthwatt, and du Parcq) supports this view, and finds, upon a consideration of equine vagaries, that a horse need not be fenced in, and that an owner has no duty to prevent an animal not normally dangerous from wandering on the highway.

"**Dockers.**"—"The whole system of dock briefs is inconvenient and archaic, but it does at least ensure that no prisoner who can lay his hand on the sum of twenty-three and sixpence (or whose friends can do so) shall be left defenceless at his trial. And for that reason, so long as the allocation of counsel for poor prisoners under the Poor Prisoners' Defence Act remains a matter of discretion for the Court, the dock brief is a valuable safeguard against injustice. The majority of barristers aver that it is humiliating to have to sit like a collection of prize cows under the critical scrutiny of some hardened felon, but most of those who practise in the Criminal Courts would confess to a secret affection for the ancient tradition. For the dock brief gave many of them their first opportunity of uttering that solemn-sounding incantation with which every speech for the defence begins: "May it please your Lordship, members of the jury . . ."—Lars Ulric, in *The Spectator*.

Points of Law.—From the early part of the seventeenth century comes the familiar proverb, "Possession is nine points of the law," signifying that, in a dispute over property, possession puts the possessor or occupier well ahead on points. The original saying, however, appears to have been, "Possession is eleven points of the law." John Ray, in his *Collection of English Proverbs*, published in 1670, puts it: "Possession is but eleven points of the law, and there are but twelve." It is not without interest to reflect upon how many of these twelve points, in a modern age, would be used up by the Fair Rents Act. But, to return to our original nine, one English lawyer once enumerated the nine points of the law to be: (1) a good case; (2) a good deal of money; (3) a good deal of patience; (4) a good lawyer; (5) a good counsel; (6) good witnesses; (7) a good jury; (8) a good judge; and (9) good luck.

Pension Note.—"For the purpose of the Part of this Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person."—National Insurance Act (Imperial), First Schedule, Part II.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Stamp Duties.—*Conveyance Duty.—Voluntary Mutual Cancellation of a Transfer—Whether Stamp Duty may be refunded.*

QUESTION: A purchaser entered into an agreement to purchase a house property, and the sale was approved by the Land Sales Court without reduction in price. The transfer, being presented for stamping within one month from the date of the execution of the agreement for sale, was stamped with *ad valorem* duty, and the agreement for sale was accordingly exempt from duty under s. 92 of the Stamp Duties Act, 1923. There was no provision in the agreement making the sale subject to finance. Subsequent to the execution of the agreement, the purchaser applied for a rehabilitation loan. Some time after the stamping of the transfer, the Rehabilitation Department advised the purchaser to try to persuade the vendor to release him from the contract, as, in the opinion of the Department, the house was unsuitable. The vendor agreed to this, and the contract was cancelled by mutual consent.

A refund of duty may be obtained in proper cases under s. 93, but only where the duty is paid on the agreement for sale, and not where, as in this case, the transfer is stamped and the agreement exempt.

An application for refund of stamp duty elicited the reply from the Stamp Duties Department that there is no provision for a refund in such cases as this. Is this correct, and has the commissioner no discretion in such matters?

ANSWER: The ruling of the Stamp Duties Department is correct.

The contract had been merged in the execution of the transfer. It is, therefore, wrong to say that the contract was cancelled by mutual consent: the contract had been performed by the execution of the memorandum of transfer.

This is a case of voluntary mutual cancellation of a memorandum of transfer, which is termed a "conveyance" in the Stamp Duties Act. Assuming that the transfer was not fully operative within the meaning of s. 53 of the Stamp Duties Act, 1923 (because it was not registered), refund nevertheless cannot be granted under that section, because the cancellation of the transfer was the act of the transferee, who paid the stamp duty. There is no other section which can be availed of, and the regulations as to spoiled stamps, made under the authority of s. 18 of the Act, are not applicable. X2.

2. Social Security.—*Age Benefit—Man and Woman reputedly married—Whether Marriage Certificate Necessary—Requisites for Grant of Age Benefit to Both Parties.*

QUESTION: Our client, who has lived in New Zealand since shortly after the 1914-18 War, has always lived with a woman who is not his wife. They have mutual wills, and share their incomes. They have led an exemplary life, and are much respected. No one has ever suspected that they were other than man and wife. Our client will shortly be retiring from his work and both will then need to apply for Age Benefits under the Social Security Act. They will not, of course, be able to produce a marriage certificate. Is this required?

ANSWER: The fact that two people are living as man and wife would not debar either from Age Benefit, and, on attaining sixty years of age, each could apply independently.

It is not necessary that a marriage certificate be produced, unless for the purpose of proving the age of either claimant. This proof could most probably be obtained from birth and baptismal certificates, or, in this case, from shipping records held by the Social Security Department. The only difficulty which may arise is that the man may find it necessary to stop work and seek Age Benefit before his "wife" reaches the age of sixty. Since the Social Security Act makes no provision for a reputed wife, the man would not be eligible to receive any grant for his under-age "wife" under the provisions of s. 17 (2) (*b*) of the Social Security Act, 1938.

He would thus be eligible, other factors permitting, to receive only a maximum of £104, with nothing for his "wife." Application could, of course, be made to have the wife included in an Emergency Benefit under s. 58, but no certain opinion can now be given that such an application would be successful.

If both man and "wife" were sixty at the time of application, this position would not, of ccurse, arise. The solution of all difficulties related to Social Security would be for the parties to marry. F. 2.

DOMINION LEGAL CONFERENCE.

Special Issue of the "Journal."

The next issue of the JOURNAL will contain a full account of the proceedings at the Dominion Legal Conference, to be held in Wellington during Easter Week, details of which appear on p. 66.

The JOURNAL, which will be an enlarged issue, will contain the full text of papers read at the Conference, and reports of the discussions following them, as well as a detailed description of the various gatherings which form part of the Conference programme.

RULES AND REGULATIONS.

Rabbit-destruction (Ararimu Rabbit-District) Regulations, 1947. (Rabbit Nuisance Act, 1928.) No. 1947/24.

National Security Tax Abolition Emergency Regulations, 1947. (Emergency Regulations Act, 1939.) No. 1947/25.

Drainage and Plumbing Extension Notice, 1947. (Health Act, 1920.) No. 1947/26.

Quarries Amending Regulations, 1947. (Quarries Act, 1944.) No. 1947/27.

Stock Importation Amending Regulations, 1947. Stock Act, 1908.) No. 1947/28.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 11. (Emergency Regulations Act, 1939.) No. 1947/29.

Agricultural Workers (Tobacco-growers) Extension Order, 1947. (Agricultural Workers Act, 1936.) No. 1947/30.

Agricultural Workers Extension Order, 1947. (Agricultural Workers Act, 1936.) No. 1947/31.

Agricultural Workers (Orchardists) Extension Order, 1947. (Agricultural Workers Act, 1936.) No. 1947/32.