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THE FAIR RENTS AMENDMENT ACT, 1947.

ANOTHER instalment of amendments to the Fair Rents legislation is effected by the Fair Rents Amendment Act, 1947, which came into force on November 27, 1947. As these amendments make several important changes in the existing law, the new Act requires some detailed consideration. The general amendments are contained in Part I.

Basic Rent on Variation of Tenancy.

Section 2 is as follows:

(1) For the purpose of defining the basic rent a house or part of a house let as a separate dwelling shall be deemed to be and always to have been the same dwellinghouse, whether or not any furniture is let therewith, and whether or not the tenant has the right to the use in common with any other person of any other part of the house or building or premises.

(2) Where immediately before the passing of this Act any dwellinghouse had a basic rent that is different from its first basic rent determined in accordance with section four of the Fair Rents Amendment Act, 1942, that first basic rent shall be deemed to be restored, and the basic rent in force on the passing of this Act shall cease to be the basic rent, but shall, subject to section eight of the principal Act, be deemed to be the fair rent of the dwellinghouse as if it had been fixed for a period of one year from the passing of this Act by order of a Magistrate under section seven of the principal Act.

(3) The basic rent of any dwellinghouse as determined in accordance with section four of the Fair Rents Amendment Act, 1942, and this section shall be the basic rent for the purposes of every subletting of the dwellinghouse.

(4) Where on the passing of this Act any dwellinghouse is sublet at a rent in excess of the basic rent, that rent shall, subject to section eight of the principal Act, be deemed to be the fair rent of the dwellinghouse for the purposes of the subletting as if it had been fixed for a period of one year from the passing of this Act by order of a Magistrate under section seven of the principal Act.

Under s. 4 of the Fair Rents Amendment Act, 1942, in order to restrict the raising of rents, the expression "basic rent" is defined as follows:

(1) For the purposes of the principal Act the expression "the basic rent" means—

(*a*) With reference to a dwellinghouse let as such on the first day of September, nineteen hundred and forty-two, the rent payable as on that date:

(*b*) With reference to a dwellinghouse that was not let as such on that date, the rent that was last payable before that date or, in the case of any premises first let as a dwellinghouse after that date, the rent first payable in respect thereof.

(2) Any increase in the basic rent of any dwellinghouse to which the principal Act applies that has been made since the first day of September, nineteen hundred and forty-two, and before the passing of this Act, and any increase in the basic rent of any such dwellinghouse that is made after the passing of this Act shall, notwithstanding anything to the contrary in any agreement, be irrecoverable.

The change made by s. 2 of the new Amendment Act may be illustrated by two cases that have actually arisen.

(i) A granted to B a lease of a house unfurnished at £1 a week. The house was let as a separate dwelling, and came within the definition of "dwellinghouse" in s. 2 of the principal Act. B, who would not be in residence for some time to come, sublet the house furnished to C at £1 5s. a week for a period. This was a higher rental than B was paying. Both the subtenancy and the head tenancy were in force on September 1, 1942.

Under the definition in s. 4 of the Amendment Act, 1942, there were two "basic rents," one as between A and B, and the other as between B and C. Section 2 (2), as set out above, makes the basic rent payable by B to A also the basic rent between B and C, but it permits B to continue to charge £1 5s. a week to C for one year from November 27, 1947. If B desires to continue to charge that rent to C after November 26, 1948, he must obtain an order fixing it as the fair rent, or an approved agreement to that effect.

(ii) A let to B an unfurnished house at £1 a week. The dwellinghouse was so let on September 1, 1942; and, accordingly, £1 a week was the basic rent of the unfurnished house. B vacated the premises, and A thereupon furnished the house and let it to C at £2 a week. As the premises had not been let furnished previously, the basic rent of the furnished house became £2 a week.

To digress a moment: In similar circumstances, Mr. H. P. Lawry, S.M., in *Collins* v. *Reid*, *Collins* v. *Billens*, (1944) 3 M.C.D. 443, held that the introduction of furniture into a dwellinghouse already, in its unfurnished state, subject to the Fair Rents Act, 1936, does not amount to a reconstruction of the premises or destroy the house's identity so as to remove it from the protection of the statute. Consequently, the

learned Magistrate held, for a landlord in such circumstances (except in pursuance of an agreement approved under s. 21 of that statute) to charge a higher rent than the basic rent is to usurp the jurisdiction conferred on a Magistrate by s. 6 of the principal Act, and to bring himself within the penal consequences of Reg. 26 (*c*) of the Economic Stabilization Emergency Regulations, 1942.

In *Sail* v. *Taigel*, [1946] N.Z.L.R. 306, Johnston, J., held that, when a landlord, on the tenancy of an unfurnished dwellinghouse being determined, furnishes it and lets it furnished to a new tenant (as in the example given above), the dwellinghouse loses its character as an unfurnished dwellinghouse, and the landlord can fix the new rent for it without being hampered by the restrictions upon the raising of the rent imposed by s. 4 of the Amendment Act, 1942, or incurring the penal consequences of Reg. 26 (*c*) of the Economic Stabilization Emergency Regulations, 1942. This judgment, of course, completely overruled Mr. Lawry's judgment in *Collins's* case; and the law so stood until the passing of the Fair Rents Amendment Act, 1947.

In Mr. Lawry's judgment, the rent of £1 a week in example (ii) above was, and remained, the basic rent, whether or not the house was furnished or unfurnished subsequently to its first letting. This interpretation has now been made the statutory rule, as s. 2 (1) of the Amendment Act, 1947, declares. Consequently, the judgment in *Sail* v. *Taigel* has been abrogated, and the amendment makes possible only one basic rent for a "dwellinghouse" in the exclusive occupation of the tenant, irrespective of the addition or subtraction of furniture, or whether or not the rights to all conveniences are varied.

Section 2 then deals with the position where a new basic rent had arisen, in consequence of the *Sail* v. *Taigel* judgment, because of the addition or subtraction of furniture. It declares that the actual rent payable for the particular dwellinghouse, whether furnished or unfurnished on September 1, 1942, is the basic rent if the dwellinghouse were let on that date. If the dwellinghouse were not let on September 1, 1942, then the basic rent is the rent last payable immediately before that date; or, if the first letting (whether furnished or unfurnished) began after September 1, 1942, then the rent at which it was first let.

Some people will find themselves in a difficulty by reason of this alteration in the law. Consequently, subs. 2 leaves the position as it was at the date of the passing of the amending legislation (November 27, 1947), and, subject to s. 8 of the principal Act, rent paid on that date is deemed the basic rent for one year thereafter. The basic rent, after November 26, 1948, will revert to what it was on September 1, 1942, or on first letting, subject to the fixing of a fair rent for the dwellinghouse by a Magistrate or by an approved agreement made between the parties.

Subsections 3 and 4 were explained under example (i).

Tenancy Registers.

Section 3 of the Amendment Act, 1947, brings into the Fair Rents legislation in respect of dwellinghouses provisions regarding the keeping of tenancy registers, and creates, as an offence, failure to comply with the provisions of the section or making or causing to be made in any tenancy register any false entry. Where a register has been kept under Reg. 25 of the Economic Stabilization Emergency Regulations, 1942, in respect of any dwellinghouse, that register enures for the purposes of s. 3 of the Fair Rents Amendment Act, 1947, as if it had originated thereunder. State-owned dwellings are exempted from the dwellinghouses in respect of which registers are to be kept; but a tenant may apply for a memorandum showing the particulars that would otherwise be required in a tenancy register, and this must be prepared.

Where a tenant sublets the whole or part of the premises let to him, he is the landlord of his sub-tenants, and he, too, must provide and maintain a register with regard to each such sub-tenancy. If the head tenant's own tenancy comes to an end, he must pass that register on to the landlord under the head tenancy; but if he assigns his tenancy, he must pass the register on to his assignee.

Application to Fix Fair Rent.

Section 4 (2) provides that the applicant, on any application to fix the fair rent made after November 27, 1947, must post or deliver notice thereof to the office of the Inspector of Factories nearest the Court in which the application is made at least seven days before the date fixed for the hearing.

Acceptance of Irrecoverable Rent.

Section 5 is as follows:

> Every person commits an offence against the principal Act who stipulates for or demands or accepts for himself or for any other person on account of the rent of any dwellinghouse any sum that is irrecoverable by virtue of the principal Act.

This section incorporates in the Fair Rents Act a provision similar in terms to Reg. 26 (*c*) of the Economic Stabilization Emergency Regulations, 1942. The word "irrecoverable" in the section refers to sums that the landlord is unable to recover by action from a tenant. Thus, it is an offence for the landlord to demand or accept any rent in excess of the fair rent while a fair rent order is in force, or in excess of the basic rent when no such order is in force, in respect of any dwellinghouse.

Payments for Obtaining or Renewing Tenancies.

Section 11 of the Fair Rents Act, 1936, provided that an offence was committed by every person who required or accepted a fine or premium in respect of the grant, renewal, or continuance of a tenancy of a dwellinghouse. This section has now been repealed, and s. 6 of the Amendment Act is designed to stop any gaps that may exist in the effort to promote economic stability, since the Fair Rents legislation is regarded as part of the Stabilization Plan, by ensuring that inflationary rentals are not created by collusion.

Two main changes have been made in substituting the new section for s. 11 of the principal Act.

In *Gonda* v. *Shelmerdine*, (1946) 5 M.C.D. 21, Mr. Sinclair, S.M., had to deal with Reg. 20 (1) of the Economic Stabilization Emergency Regulations, 1942, which was a reproduction of s. 11 (1) of the Fair Rents Act, 1936. The learned Magistrate held that the provision enabling the tenant, without prejudice to his right to recover by action, to deduct from the rent payable to the landlord within a period of six months, indicated that the only person upon whom the Legislature intended to confer the right of recovery was the person by or on whose behalf payment was made, and who became a tenant under the tenancy in respect of which

the payment was made. It followed that no offence was committed where the landlord demanded or accepted from an outgoing tenant a payment for agreeing to grant a tenancy to the outgoing tenant's nominee. Such a payment is now made an offence by s. 6 (1) (*a*) of the Amendment Act, 1947 :

> In consideration of the grant, renewal, termination, or continuance of a tenancy of any dwellinghouse, requires or accepts, whether from the tenant or from any outgoing tenant or incoming tenant, any fine, premium, or other sum in addition to the rent.

This offence is not committed, in respect of the sale for consideration of a goodwill in a lease or tenancy, if the conditions sets out in s. 6 (1) (*c*) are observed.

Any person, including the landlord or an outgoing tenant, who stipulates for, demands, or accepts any consideration for doing anything for the purpose of obtaining a dwellinghouse for another, thereby commits an offence. The offence, as set out in s. 6 (1) (*b*), would be committed by a land agent who took a fee or made a charge for obtaining a tenancy, whether in the way of " key money " or commission.

Sale of Goodwill of Lease.

Paragraph (*c*) of s. 6 (1) is important. It is as follows : Every person commits an offence who—

> (*c*) In consideration of the transfer of a tenancy of any dwellinghouse (whether directly, or by means of the creation of a new tenancy, or otherwise), in a case to which Part III of the Servicemen's Settlement and Land Sales Act, 1943, does not apply, requires or accepts from the new tenant any sum other than the rent, except such sum (if any) as may be previously approved for the purposes of this section by an Inspector of Factories.

This is intended to make clear the right of a tenant, who has a genuine goodwill in his tenancy, to sell that goodwill. Thus, if the tenant has a long-term lease of a dwellinghouse at a low rental, he may sell the goodwill of the lease and so transfer the tenancy for a consideration ; or he may sell for a consideration the goodwill of an assignable right of renewal of a lease of a dwellinghouse. He commits no offence, under subs. 1 (*a*) of s. 6, if he obtains the consent of the Land Sales Court, where Part III of the Servicemen's Settlement and Land Sales Act, 1943, applies ; or the consent of an Inspector of Factories in respect of any tenancy to which that Part does not apply. Thus, a person selling the goodwill of a lease which has not less than two years to run must obtain the consent of the Land Sales Court to the transfer ; and, in respect of leases with a currency of less than two years, the consent of an Inspector of Factories.

Subsection 2 of s. 6 extends the period of recovery of moneys received by any one in contravention of the section to twelve months (instead of six months, as formerly).

Occupation by One of Joint Owners or Purchasers.

Section 7 (*a*) amends the provisions of s. 13 (1) (*d*) of the principal Act by allowing an order for possession of a dwellinghouse to be made in favour of joint owners if one or more (but not all) of the joint owners require the premises for his or their personal occupation. The effect of this amendment is to nullify the judgment of Mr. Woodward, S.M., in *Handley* v. *Fieldes*, (1947) 5 M.C.D. 151, where it was held that the language of s. 13 (1) (*d*) rendered unavailable to one of two joint owners an order for possession for his own occupation of the dwellinghouse. The amendment brings our statute in line with the differently-worded English, statute, as interpreted *obiter* by Somervell and Asquith, L.JJ., in *Baker* v. *Lewis*, [1946] 2 All E.R. 592.

Section 7 (*b*) makes similar provision in respect of joint purchasers, and provides that an order for possession under s. 13 (1) (*f*) may be made in favour of one or more of several joint purchasers for his or their personal occupation.

Ex-Servicemen as Former Tenants.

Section 8 provides a further ground on which a landlord may obtain an order for possession. This is available when a tenant who occupied a dwellinghouse until he had to vacate it to proceed on war service wants again to occupy it as a tenant. As the law stood, the landlord could not put this forward as a ground for seeking possession, as he did not require it for his own occupation. The effect of s. 8 is that the landlord may now obtain an order for possession of a dwellinghouse in order to let it again to his former tenant who occupied it until he vacated it on account of his war service. Safeguards are provided so that this concession may not be abused by landlord or ex-serviceman.

The Position of Sub-tenants.

Section 9 is of considerable importance. Subsection 1 repeals paras. (*a*), (*b*), and (*c*) of subs. 2 of s. 7 of the Fair Rents Amendment Act, 1942, and substitutes three new paragraphs. So amended, s. 7 (2) now reads as follows :

> (2) For the purposes of this section the subletting of any dwellinghouse (whether before or after the passing of this Act) shall be deemed to have been consented to by the landlord—
>
> (*a*) Where the dwellinghouse forms part of premises held by the tenant at the commencement of the subtenancy and those premises were originally designed and constructed for the purpose of being let as two or more separate flats or apartments :
>
> (*b*) Where the dwellinghouse forms part of premises held by the tenant at the commencement of the subtenancy, and those premises at the commencement of his tenancy were let as two or more separate flats or apartments or had been adapted for the purpose of being so let :
>
> (*c*) Where the dwellinghouse forms part of premises held by the tenant at the commencement of the subtenancy, and those premises had during his tenancy been adapted by the landlord or with his consent for the purpose of being let as two or more separate flats or apartments.

The object of this section is to prevent abuse of the protection given to sub-tenants by s. 7 of the Fair Rents Amendment Act, 1942. It has been found that some tenants of flats had, contrary to a specific prohibition in their tenancy agreement, sublet the whole flat, and then terminated their own tenancy, thus usurping the landlord's right to select his own tenant. They did not merely sublet, as they could have done and received protection for themselves and their subtenants, but they completely substituted the incoming occupant for themselves without the landlord's knowledge ; and, in some cases, in spite of the prohibition to the contrary. In State rental flats, where there is a high priority for ex-servicemen and their families, less deserving people were put into possession by an approved tenant, thereby preventing occupation by servicemen with a priority.

If the landlord under the head tenancy has agreed to the subletting, then the sub-tenant is protected. He may expressly agree to the sub-tenancy or he may simply not prohibit it. To avoid the sub-tenancy, he

must prove that he prohibited subletting. But, in the cases set out in paras. (*a*), (*b*), and (*c*) of s. 9 (1), the landlord is deemed to have given his consent; and he is not allowed to prove the contrary.

Subsection 2A of s. 7 of the Fair Rents Amendment Act, 1942 (as inserted therein by s. 9 (2) of the Amendment Act, 1947), is as follows:

> For the purposes of subsection two of this section, where the tenant at the commencement of the sub-tenancy holds two or more parts of any premises under separate tenancies he shall be deemed to hold them under one tenancy commencing on the date on which the earliest of those tenancies commenced.

This is a consequential amendment to prevent the head tenant and the head landlord collusively defeating the protection given by the legislation to sub-tenants. Under s. 7, as originally drafted, a sub-tenant occupying one of a number of self-contained flats in a block of flats was protected absolutely, because the flat formed part of a building designed and constructed for letting in separate flats. The owner of a block of flats could defeat the protection given to his sub-tenants by letting each flat to an intermediate head tenant, and prohibiting subletting without consent. This form of evasion is now prohibited. The sub-tenant of the whole flat is no longer automatically protected unless his immediate landlord—*i.e.*, the head tenant—has sublet the whole of the premises comprised in his head tenancy. The head tenant is deemed to have consented in writing to the subletting.

Breakfast Trays and Rooms.

Sections 27 and 28 of the Statutes Amendment Act, 1946, made an attempt to protect the rooming public from exploitation by landlords under the guise of providing board by means of a breakfast tray, and so evading the provisions of the Fair Rents legislation. They also aimed at the device of giving separate rent-books where two or more shared a room. But the "racket" was not defeated entirely by those sections, which are now replaced by ss. 10 and 11 of the Fair Rents Amendment Act, 1947.

The idea underlying the new sections is to leave the charges in genuine cases of board and lodging to be dealt with by the Price Tribunal, but to bring within the scope of the Fair Rents legislation cases of tenants who, because of some technical exception, were previously without protection.

The relationship of landlord and tenant need not now be established in these cases: it is deemed to exist where there is *a right to occupy* for residential purposes. But, although there is deemed to be a tenancy, the Fair Rents Act will not apply to that tenancy if the payment includes a charge for board unless the case also comes within s. 11 of the Amendment Act, 1947. In other words, if the value of the food supplied is a substantial part of the total payment, then the Fair Rents Act does not apply; but, if the value of the food supplied is not substantial, then, because of the right to occupy for residential purposes, there is deemed to be a tenancy subject to the Fair Rents legislation.

Hardship of "Other Persons."

Section 12 corrects a drafting oversight in s. 63 of the Finance Act, 1937 (amending the Fair Rents Act, 1936). The amendment makes it clear that the Court in assessing the hardship on the tenant's side, may have regard to the hardship of persons other than the tenant himself. A ready example is, in this time of housing shortage, a family sharing the house with the tenant, or a married son or daughter and his or her spouse living with his or her parents while waiting to obtain a house for themselves.

Serviceman Protected in One Dwellinghouse.

Section 13 is as follows:

> The provisions of subsection two of section ten of the Fair Rents Amendment Act, 1942, shall not apply with respect to any dwellinghouse if the tenant is ordinarily resident in another dwellinghouse.

The effect of this amendment is seen from an illustration. A returned serviceman owned and occupied a large house in the city. He was also the tenant of a seaside cottage, owned by a non-serviceman; and he refused to vacate it in favour of the owner, who had been on war-work necessitating his living in another part of the Dominion and wished to regain his cottage as a permanent home. Section 13 withdraws the absolute protection of the serviceman-tenant in such a case.

Letting of Unoccupied Houses.

Part II of the Amendment Act, 1947, deals exclusively with the letting of unoccupied houses. The term "house," as used in this Part, is defined as follows:

> "House" means any building or any part of a building that is constructed or adapted for use as a separate dwelling; but does not include—
>
> (*a*) Any dwelling in which the owner or tenant thereof ordinarily resides and which is his permanent home; or
>
> (*b*) Any dwelling that is ordinarily used for holiday purposes only.

Briefly, the effect of the sections affecting the letting of unoccupied houses is that, where any local authority is satisfied that a house within its district is unoccupied, and has been unoccupied for twenty-eight days or more, or only occasionally occupied, if it deems necessary "having regard to the need for housing accommodation and other relevant considerations," such local authority is to serve a notice on the owner of the house requiring him to let it for immediate occupation as a dwelling, furnished or unfurnished at his option.

Where the owner of a house has died (before or after November 27, 1947), no notice may be given in respect of that house until after the expiration of one year from the date of the owner's death.

An owner, or any person having an estate or interest in the land on which the house is situated, may appeal to the nearest Magistrates' Court within twenty-eight days after the service of the notice on the owner, and an appeal may lie from the Magistrate's decision to the Supreme Court, the decision of which is to be final.

Where an owner fails or refuses to comply with a notice, then, on the expiry of twenty-eight days, or within fourteen days after the determination of an appeal, the local authority must forthwith notify the State Advances Corporation; and the house thereupon becomes subject to Part I of the Housing Act, 1919, but the Board of the Corporation may not dispose of the house by way of sale. On the letting of the house by the Board, the rent is payable, less commission, to the owner. The Board may notify the owner that the house has ceased to be subject to the Housing Act, whereupon the house reverts to the owner unaffected by the legislation; but such a notice may not be given unless the Board is satisfied that the house will be occupied as a dwelling, or that it is unsuitable for letting, or is otherwise unlettable.

Offences in respect of houses coming within Part II are (*a*) resisting, obstructing, deceiving, or attempting to deceive any local authority, Court, or person exercising any power or function under that Part; and (*b*), being a tenant of any house let by the State Advances Corporation, using the premises otherwise than as a private dwelling, or defacing or injuring them, or failing to keep them in good repair, reasonable wear and tear and damage by fire excepted.

PENDING CONSOLIDATION OF FAIR RENTS LEGISLATION.

The Minister of Labour, the Hon. A. McLaglan, has announced that it is proposed to consolidate the Fair Rents legislation during the present year, and he hopes to have the new Act in draft form at an early date. He has asked the New Zealand Law Society for any comments it or any District Society might wish to make for the better working of this legislation.

Any practitioner who has any suggestion for an improvement of the Fair Rents Legislation, or any part of the existing statutes relating to it, should communicate it to the Secretary of his District Society as soon as possible, so that any anomalies or injustices may be removed and any improvements may be included in the proposed new statute.

SUMMARY OF RECENT LAW.

APIARIES.

Apiaries Regulations, 1948 (Serial No. 1948/10). Revoking Bees and Apiaries (Introduction) Regulations, 1946, and substituting new regulations.

BUTTER AND CHEESE.

Butter (Wholesale Prices) Notice, 1948 (Serial No. 1948/13). (Marketing Act, 1936.)

Butter and Cheese Marketing Regulations, 1948 (Serial No. 1948/16). (First regulations under the Dairy Products Marketing Commission Act, 1947.)

Dairy-produce Levy Regulations, 1948 (Serial No. 1948/15). (Agriculture (Emergency Powers) Act, 1934.)

BY-LAW.

Cartage of Timber over County Roads. A by-law made by a County was as follows: "Every person desirous of carting timber in loads amounting to heavy traffic over any of the roads under the control of the Council shall before commencing to carry on such traffic notify the Council of such desire and shall apply for the Council's estimate of the damage which such traffic will do to the said road or roads and of the cost estimated by the Council of reinstating the same . . . (5) No person shall cart or cause or procure to be carted any timber thereinbefore defined in loads amounting to heavy traffic as defined by the Public Works Act, 1928, in or upon any vehicle truck wagon or cart over or upon any of the roads within the County of Clutha and under the control of the Council unless and until the cost as estimated by the Council of reinstating any road or roads is previously paid to the Council by the person desiring so to cart timber over or upon any such road or roads." This by-law was made by virtue of the power contained in s. 174 of the Public Works Act, 1928, which was repealed by s. 12 (5) of the Transport Law Amendment Act, 1939, which makes provision as to extraordinary traffic upon County roads and as to the damage thereby caused; but it does not empower local authorities to make by-laws appertaining thereto. Upon a prosecution by the County for a breach of the by-law, it was held that, as the by-law was made by virtue of the power vested in the County under s. 174, and that section having been repealed, the by-law was abrogated; and the information was dismissed with costs to the defendant. *Taylor* v. *Stuart.* (Balclutha. November 26, 1947. Dobbie, S.M.)

COMMERCIAL GARDENS.

Commercial Gardens Registration Fees Order, 1948 (Serial No. 1948/12). Alteration of fees specified in Second Schedule to Commercial Gardens Registration Act, 1943.

COMPANY LAW.

Agreements for Appointment as Director. *91 Solicitors' Journal*, 634.

Articles and the Companies Act. *204 Law Times Jo.*, 322.

CONTRACT.

Gaming Contract—Payment in Discharge of Wagering Debt. The plaintiff sought recovery of the sum of £700, paid to Drury, the defendant's agent, on behalf of the defendant. The defence was that that sum was a payment in discharge of debts which were contracts by way of gaming and wagering. The jury found that the plaintiff at the defendant's request paid to one Drury the sum of £700, on behalf of the defendant; and the defendant promised to repay the said sum in April, 1946. It was held (1) that the Court has authority to determine whether or not a transaction between the plaintiff and the defendant (through his agent) was a gaming transaction; and the learned Judge determined that it was a gaming transaction. (2) That the transaction between the plaintiff and the defendant, on which the plaintiff's claim was based, was tainted by the transaction out of which it arose—namely, the transaction between Drury, through his agent the plaintiff, and the defendant. (3) That the plaintiff was debarred by s. 70 of the Gaming Act, 1908, from recovering from the defendant the amount claimed. (*Tatam* v. *Reeve*, [1893] 1 Q.B. 44, approved in *Saffery* v. *Mayer*, [1901] 1 K.B. 11, followed.) *Semble*, the plaintiff was also debarred on grounds of public policy. (*Johnston* v. *George*, [1927] N.Z.L.R. 490, followed.) *Field* v. *Healy.* (Wanganui. December 19, 1947. Christie, J.)

Misrepresentation—Offer to repudiate Contract on Repayment of Moneys paid—Contract then executed—Offer not accepted—Difference between Repudiation of Executory Contract and Non-acceptance of Offer to Cancel Executed Contract. The plaintiff claimed damages for alleged fraudulent misrepresentations made by the defendant which induced the plaintiff to buy the defendant's motor-car. On the plaintiff's discovery of the fraud, his solicitor wrote to the defendant as follows: "My client relied on that representation and therefore repudiates the contract. Will you therefore kindly note that my client requires the sum of £500 refunded to him on or before June 3, failing which a writ will be issued claiming rescission of the contract." The defendant's solicitor replied denying the allegation of fraudulent misrepresentation and declining to refund the £500. It was contended for the defendant that, as the plaintiff elected to rescind the contract on discovering the fraud, an action for damages could not be maintained. It was held (1) That, if the plaintiff had discovered the fraud before he had paid the price, or before the property in the car passed to him, and had given notice of repudiation, he would have been deemed to have made an election, and the contract would have been avoided; conversely, if, after discovering the fraud, he had elected to affirm the contract, his right to rescind would have been lost. (2) That, as the contract was not executory but executed, the parties by mutual agreement could have cancelled the contract on the discovery of the fraud, or the party defrauded could commence proceedings for rescission and damages; but a mere statement that he repudiates the contract does not affect the position, unless the repudiation is accepted. (3) That, as the statement was an offer to cancel the contract, and was not accepted, it had no effect. *Cole* v. *Jenkinson.* (Auckland. January 22, 1948. Luxford, S.M.)

CONVEYANCING.

Appointment to a Wife after Divorce. *98 Law Journal*, 46.

CRIMINAL LAW.

Appeal—Miscarriage of Justice—Fresh Evidence—Credibility of Proposed New Witness. M., who was convicted on a charge of murder, appealed against this conviction on the grounds of fresh evidence, and that the Court should make an order that a witness should be brought to Sydney for interrogation. *Held*, That, as the character of the proposed new witness was such that no reasonable jury would be likely to regard him as credible, it was a strong reason for rejecting the proposed new evidence. *Held*, also, That to justify an order under s. 12 (*b*) of the Criminal Appeal Act, 1912, the Court should be satisfied that the person to be interrogated is at least likely to be able to give evidence which, considered with other evidence in the case, would be likely to lead a reasonable jury to doubt the appellant's guilt. *R.* v. *McDermott* (*No. 1*), (1947) 47 N.S.W.S.R. 379 (Court of Criminal Appeal).

Appeal against Conviction—Trial—Appellant charged on Three Indictments each charging Breaking and Entering—Separate Hearings—Appellant Found Guilty by Jury on First Charge—Some Members of Same Jury later hearing Third Indictment—Jury returning Verdict of Guilty on Second Indictment in Presence of Jury hearing Third Indictment—Verdict on Third Indictment set aside—Conviction Quashed—New Trial ordered—Criminal Appeal Act, 1945, s. 4. The appellant had been charged on three separate indictments with breaking and entering, all of which were tried on the same day, the hearings following one another. In the third of these trials, two of the jurymen, who had sat in the first trial, sat on the third jury without its being noticed. While the third trial was in progress, the jury on the second indictment came into Court and delivered a verdict of guilty in the presence of the jury hearing the third indictment. On appeal against conviction, *Held*, That the failure to prevent jurymen, who had sat on an indictment which found the appellant guilty thereon, from sitting on the jury hearing a subsequent indictment, and the delivering of the second verdict in the presence of the third jury, amounted to a failure to observe conditions which were essential to a satisfactory trial, and which made it unjust that the verdict should stand. The evidence on the second indictment was left in so unsatisfactory a state that the verdict on that indictment was also set aside. A new trial was, therefore, ordered on both the second and third indictments. *The King* v. *Parry*. (Court of Appeal. Wellington. December 5, 1947. Sir Humphrey O'Leary, C.J.; Fair, J.; Callan, J.)

Evidence—Interrogation by Police—Delay between Arrest and Charge — Warning — Statement — Admissibility — Discretion of Judge. At the trial of McD. on a charge of murder, evidence was given by the Crown of answers made by McD. to questions by Police officers who had kept him in custody, between his being arrested and charged, for over one hour, during which, after having given him proper warning, they had cross-examined him. One lengthy question at the end of the examination, which summarized the Police view of the case against him and his reply thereto, was excluded by the trial Judge. There was no suggestion that any pressure or inducement of any description was used by the Police officers to obtain the statement. On appeal, it was contended that the evidence should have been excluded by the trial Judge in exercise of his discretion. *Held*, That the admission of the evidence to which objection was taken did not amount to a miscarriage of justice. (*The King* v. *Jeffries*, (1946) 64 W.N. 71, applied.) *The King* v. *McDermott* (*No. 2*). (1947) 47 N.S.W. S.R. 407. (Court of Criminal Appeal: Davidson and Street, JJ., Jordan, C.J., dissenting.)

Police Offences—Permitting Liquor to be taken into Cabaret. See p. 35, *post*.

Police Offences—Trespass—Gratuitous Licensee—Refusal to leave after Warning—"Wilfully trespasses"—Police Offences Act, 1927, s. *6* (*1*) (c). A gratuitous licensee, whose license to occupy premises has been revoked, is entitled to a reasonable time within which to comply with the revocation of his license (not necessarily time sufficient to enable him to find other suitable accommodation) before he can be convicted as a trespasser under s. 6 (1) (c) of the Police Offences Act, 1927. (*Minister of Health* v. *Bellotti*, [1944] 1 K.B. 298; [1944] 1 All E.R. 238 followed.) On February 5, a gratuitous licensee received a notice to quit on February 11 the premises occupied by him. On February 12, an information was laid against him for wilful trespass on the premises in question or neglect and refusal to leave such place after being warned to do so by the owner. On appeal from a Magistrate's dismissal of the information, *Held*, dismissing the appeal, (1) that the license was effectively revoked on February 11 by the notice to quit, and such a notice would have been sufficient warning under s. 6 (1) (c) had it been given to the licensee after he became a trespasser. (2) That the expression "wilfully trespasses" in that paragraph means no more than "intentionally trespasses"; and effective warning to leave cannot, for the purposes of that paragraph, be given while the person warned is still lawfully on the premises and before he becomes a trespasser. (*The Queen* v. *Price*, (1897) 16 N.Z.L.R. 81, followed.) *Archer* v. *Archer*. (Palmerston North. January 13, 1948. Christie, J.)

"Present during the whole of the hearing." *111 Justice of the Peace Jo.*, 734.

DAIRY FACTORIES.

Dairy Factory Managers Regulations, 1941, Amendment No. 1 (Serial No. 1948/11). Adding, as member of the Dairy Factory Managers Board, a certificate-holder nominated by the New Zealand Dairy Factories' Employees' Union; and changing the word "April" to "May" wherever it appears in Regs. 7 and 8.

DEFAMATION.

Libel—Privileged Occasion—Common Interest. In an action of defamation, defendants sought to establish that an admittedly defamatory publication was made on an occasion of qualified privilege in that both they and the persons to whom it was made had a legitimate common interest. *Held*, That to succeed on that contention it was necessary that the defendants should show that both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject-matter, of such a kind that it was desirable, as a matter of public policy, in the general interests of the whole community, that it should be made with impunity, notwithstanding that it was defamatory of a third party. Meaning of "interest" considered. *Andreyevich* v. *Kospvich and Publicity Press* (*1938*) *Pty., Ltd.*, (1947) 47 N.S.W.S.R. 357. (Jordan, C.J., Davidson and Street, JJ.)

Slander—Privileged Occasion—Club-room—Cards—Argument—Dishonesty charged by Member of Committee—Presence of many Members and Non-members of Club—Malice—Damages—Trial—Conduct of Counsel—Offer on behalf of Plaintiff to give Damages to Red Cross Society—New Trial. In an action for slander, counsel for the plaintiff stated in his opening address to the jury that damages, if recovered, would be given to the Red Cross Society. After the trial Judge had informed the jury that the statement should not have been made, and that it was doubtless intended to mean that the plaintiff was concerned only with vindicating his character, an objection by the defendant's counsel to the statement was, at his request, noted. Evidence was then given that at a social club frequented by Greeks the plaintiff, a visitor, was playing, for monetary stakes, a game of cards with a member and a non-member of the club in a room containing about fifty or sixty people, a large number of whom were non-members. During the game the plaintiff threw his cards on the table and claimed a new deal because, he said, the dealer had improperly looked at certain cards. Convinced of his error after argument, the plaintiff apologized to the dealer and the other players. A new deal took place and the game proceeded. During or just after the disturbance, the defendant, a member of the club's committee, who had been watching the game, said to the plaintiff in a loud voice audible to the other persons in the room: "You are a crook." Counsel for the defendant endeavoured to show in cross-examination that the plaintiff was a man who, when he played cards, customarily played an unfair game. The jury awarded the plaintiff £500 damages. On appeal, by leave, by the plaintiff from the decision of the Full Court of New South Wales, *Held*, That the words complained of were not uttered on a privileged occasion; and, therefore, no effective remedial action having been taken at the time by the defendant's counsel in respect of the statement that damages, if recovered, would be given to the Red Cross Society, the verdict of the jury should not be disturbed. Decision of the Full Court reversed. *Guise* v. *Kouvelis*, (1947) 47 N.S.W.S.R. 394 (High Court of Australia: Latham, C.J., Starke, McTiernan, and Williams, JJ., Dixon, J., dissenting).

DIVORCE AND MATRIMONIAL CAUSES.

Agreements to Separate, and Desertion. *91 Solicitors' Journal*, 620.

EMERGENCY REGULATIONS CONTINUANCE.

Pickled Sheep and Lamb Pelt Emergency Regulations, 1947, Amendment No. 1 (Serial No. 1948/9). Extension, with amendments, of date to October 1, 1948, and provision for fixing of reserve prices for auction sales.

GAMING.

Offences—Printing Doubles Chart—No Identification on Chart of Person willing to accept Bets at Chart Odds—Essential Ingredient of Offence not proved—Gaming Act, 1908, s. 30 (*2*). H., a master printer, took full responsibility for printing doubles charts found by the Police at his printint-works. The charts were in the usual form, but all contained in the left-hand top corner a distinguishing mark or device; but there was no evidence to identify any of the marks. On an information charging H. with printing the doubles charts, dismissing the information, it was held that s. 30 (2) of the Gaming Act, 1908, does not make it an offence to print doubles charts *simpliciter*, because there must be some notification on the face of the document which would enable a person receiving it to know that some identifiable person is willing to accept bets at the odds set out in the chart; and there was no evidence from which it could reasonably be inferred that the marks on the doubles charts would enable any person to know that any particular bookmaker was willing to take bets at the specified odds. (*Wildey* v. *Gibson*, (1911) 14 G.L.R. 308, applied.) *Richardson* v. *Herdman*. (Auckland. December 22, 1947. Luxford, S.M.)

HUSBAND AND WIFE.

Married Women's Property—Air Force Allotment—Amount repayable by Wife to Husband. The parties were married on October 11, 1941, when the husband was a member of the Royal New Zealand Air Force service in New Zealand, which continued until his discharge in June, 1945. During that period his allotments to his wife amounted to £650. On November 12, 1945, the parties entered into an agreement for separation. The husband applied for an order under s. 23 of the Married Women's Property Act, 1908. The learned Judge held that the wife was entitled to be credited with the sum of the following items: (*a*) her reasonable cost of maintenance (at 25s. per week) from October 11, 1941, to November 12, 1945 (£270); (*b*) special amounts expended by her in respect of visits paid by her to her husband during his period of service (£65); and (*c*) amounts paid by her to her husband or on his account (including expenses connected with the birth of the child of the marriage) (£159 1s. 6d.). The wife was, therefore, ordered to refund to the husband the sum of £156. *Smart* v. *Smart.* (Blenheim. January 20, 1948. Christie, J.)

JURISDICTION.

Judicial Control and Executive Function. (C. E. Perkins.) *111 Justice of the Peace Jo.*, 735.

LAND SALES.

Offences—Attempting to Procure Payment in excess of Approved Sale Price—Procuring Another to make such Payment—Agent not authorized by Principal to Procure any such Payment—Legal Consequences of Acts done by Agent, as between him and his Principal, irrelevant—Question of Intention material—Servicemen's Settlement and Land Sales Act, 1943, s. 68 (1) (c). The provisions of s. 68 (1) (c) of the Servicemen's Settlement and Land Sales Act, 1943, render necessary a consideration of the legal consequences of acts done by an agent, as between himself and his principal, or as between himself and the other contracting party. The real and substantial question is one of intention. If the agent, by falsely representing that the vendor requires an under-the-table payment, obtains the sum named, or an agreement to pay it, he would be liable to be proceeded against under the Crimes Act, if his intention was to put the money into his own pocket. If, on the other hand, he expects his principal to ratify the arrangement and intends to hand the money over to his principal, he commits an offence under s. 68 (1) (*c*). *Sharp* v. *Onslow-Osbourne.* (Auckland. December 12, 1947. Luxford, S.M.)

LAND TRANSFER.

The Registered Estate. (R. C. Connell.) *11 Conveyancer and Property Lawyer*, 184.

LANDLORD AND TENANT.

General Words in Notice to Quit. *91 Solicitors' Journal*, 609, 623.

Nature and Effect of Licenses. (E. O. Walford.) *11 Conveyancer and Property Lawyer*, 165.

New Text-book: Hill and Redman's *Landlord and Tenant.* First Supplement to 10th Ed., by W. J. Williams, B.A., and M. M. Wells, M.A.

MASTER AND SERVANT.

Invention of Servant—Agreement for Inventions made during Employment to become Exclusive Property of Master—Servant Trustee for Master—Obligation of Servant, after Termination of Employment, to procure Patent Protection for Master in Other Countries. *British Celanese, Ltd.* v. *Moncrieff*, [1948] 1 All E.R. 123 (Ch.D.).

NEGLIGENCE.

Act of God. *91 Solicitors' Journal*, 632.

Infant—Contract of Hire of Rental-car to Infant—Infant's Negligence, while driving Car, resulting in Damage to it—Infant not liable in Damages for Tort directly founded on Contract unenforceable against him. The plaintiff rented to the defendant, aged twenty years, a motor-car, which, while being driven by the latter, was damaged in a collision due to the defendant's neglect in failing to keep a proper lookout and to give way to traffic from the right. In entering on the contract of rental, the defendant did not knowingly supply any false or misleading information within the meaning of that phrase as used in Reg. 13 (1) (*a*) of the Rental Vehicles Regulations, 1939; he was not given the opportunity of reading the contract; and he was not asked his age. In an action claiming from the defendant the amount of the damage caused to the rental car in the collision, it was held that, as any negligence in ascertaining whether or not the defendant was of age was that of the plaintiff, and as the defendant was using the car for the purpose for which it was hired, and not for a purpose not contemplated by the contract, his negligence was an integral part of the contract, and could not be separated therefrom for a separate cause of action, so that an unenforceable contract might indirectly be enforced. (*Jennings* v. *Rundall*, (1799) 8 Term. Rep. 335; 101 E.R. 1419, and *Ingles* v. *Milne*, (1938) 1 M.C.D. 61, followed.) Judgment was accordingly given for the defendant. *Christie* v. *Marden.* (Petone. September 4, 1947. Thompson, S.M.) (Aff. on app.: Wellington. December 15, 1947. Gresson. J. (orally) (unreported).)

Serving Two Masters: *Respondeat Superior. 91 Solicitors' Journal*, 606.

NUISANCE.

Broken Rear Bumper of Motor-car—Car parked alongside Kerb in Public Street—Trousers of Pedestrian crossing Street torn on Bumper—Car hired on Rental—Rental-car Company liable for Damage. A person who lets out on hire a motor-vehicle for use on a highway with knowledge of a patent defect in the vehicle is responsible for any damage arising directly from that defect, unless the person whose body or property is damaged contributes to the accident by his own negligence. This liability arises out of the duty that the owner of the vehicle owes to all persons lawfully using the highway along which the vehicle is travelling, or on which it is parked. (*Donoghue* v. *Stevenson*, [1932] A.C. 562, followed.) Thus, where a pedestrian in crossing a public street, had his trousers torn on the projecting sharp edge of the fractured bumper of a car parked beside the kerb, and such car was owned by a car-rental company, which had hired out the car in that condition, the company was liable in damages to the pedestrian. *Kann* v. *Shorter Rental Cars, Ltd.* (Auckland. January 13, 1948. Luxford, S.M.)

PHARMACY.

Pharmacy Regulations, 1944, Amendment No. 3 (Serial No. 1948/14). Amendment of First Schedule to regulations.

POLICE OFFENCES.

Permitting Liquor to be taken into Cabaret—Private Dance. In a prosecution under s. 59 (1) of the Statutes Amendment Act, 1939, the Police must establish: (*a*) that the dance is being held in a "hall," within the definition of that word in s. 59 (6); (*b*) that the defendants are "persons having control or management of the dance"; and (*c*) that the defendants permitted liquor to be "taken into or consumed in the hall." If the prosecution fails to establish any of these matters, it cannot succeed. The word "hall," as defined in s. 59 (6), contemplates any building in which are held different types of dances. The term "public dance" embraces a dance to which any membe of the public can obtain admission on payment of a subscription in money, in exchange for which he gets admission by ticket or otherwise. Such a dance, if advertised in a newspaper or by poster, would be one upon what is called "general invitation" within the definition. The words "or otherwise" in the definition are aimed at covering such persons as may gain admission either to public or any other dances without payment (either in money or by supplying refreshments, and possibly without receiving any express invitation), such as persons allowed to attend a dance, purely as guests, say, of the committee. Persons who do not pay for tickets come within the category of persons who gain admission to the dance "otherwise than by payment of subscriptions." The words "control and management of any dance," as used in s. 59 (1), refer to what goes on in the hall—namely, the dance. They do not apply to the proprietor of a cabaret who has control of the building and of the control and management of the preparation and service of the supper and the provision of the band, all under a separate contract, which can be divorced from the control and management of the actual dance. (*Reid* v. *Wilson and King*, [1895] 1 Q.B. 315, distinguished.) It was proved that liquor was on the tables of a cabaret during a private dance to which admission was generally by invitation, and by payment of donations or subscriptions. Informations were laid against the proprietor of the cabaret and the members of the dance committee. *Held*, That the persons "having control and management" of the dance were the members of the committee, and they should be convicted of permitting liquor to be taken into the cabaret in breach of s. 59 of the Statutes Amendment Act, 1939. The information against the proprietor of the cabaret was dismissed. *Police* v. *Carr*; *Police* v. *Marshall.* (Wellington. February 11, 1948. Goulding, S.M.)

POWERS.

Fraudulent Exercise—Special power of Appointment among Nephews and Nieces—Power exercised in Favour of a Nephew—Agreement by Appointee to benefit Appointer's Children. *Re Crawshaw*, [1948] 1 All E.R. 107 (C.A.).

PRACTICE.

Discovery—Privilege—Local Authority—Correspondence between Departments—Correspondence between Authority and Ministry of Health—Reports and Proceedings of Committees of Authority. *Blackpool Corporation* v. *Locker*, [1948] 1 All E.R. 85 (C.A.).

RENT RESTRICTION.

Dwellinghouse—Flat—Agreement for Service including Occupation of Flat in Consideration of Employment thereunder—Undertaking to Vacate on Termination of Employment—Employee occupying as Tenant. By written agreement, the plaintiff agreed to employ the defendant as manager of a ladies' hairdressing business, the agreement to continue until determined by either party on one month's written notice to the other. The agreement contained the following clause: "The manageress and her family shall be permitted to occupy the flat upon the said premises at 924 Colombo Street Christchurch during the currency of this agreement paying therefor to the employer as rent the sum of £1 10s. per week commencing on the 14th day of April 1947 by weekly payments on Monday of each week, the first payment to be made on Monday 21st day of April 1947 *and it is hereby agreed between the parties hereto* that the said manageress occupies the said flat by virtue and in consideration only of her employment as manageress under this agreement *and it is further agreed and declared* that upon the termination of this agreement from whatever cause the manageress will forthwith vacate the said flat." There was nothing to indicate the reason for the occupation, or to show that there was any necessity for the defendant to occupy the premises to enable her to carry out the duties of her employment, or that the occupation was for the more convenient performance of her duties. The service agreement was dissolved by mutual consent, and, on the defendant's remaining in the flat in breach of the agreement, she received a month's notice to quit. On her refusal to vacate the flat, the landlord sought possession. It was held (1) that the giving of the notice to quit, even if otherwise unnecessary, did not of itself have the effect of causing the occupation to be one of a tenancy, if no such tenancy had previously existed. (*Manawatu Soap Co., Ltd.* v. *Needham*, (1941) 2 M.C.D. 261, applied.) (2) That the right of occupation was held out as an inducement to the defendant to enter the plaintiff's service, and such occupation was not a condition of the service or necessary for its performance; consequently, the defendant occupied as a tenant, and her tenancy was protected by the Fair Rents Act, 1936. (*Brownjohn* v. *New Garden Court, Ltd.*, (1944) 3 M.C.D. 407, followed. *Betts* v. *Brookfield*, [1947] N.Z.L.R. 170, distinguished.) *Pickup* v. *Greenaway*. (Christchurch. January 27, 1948. Lawry, S.M.)

ROAD TRAFFIC.

Offences—Failure to yield Right of Way to Pedestrian within Authorized Pedestrian-crossing—Pedestrian stationary on Crossing—"Yield the right of way"—Traffic Regulations, 1936 (Serial No. 1936/86) Reg. 14 (7). The purpose of Reg. 14 (7) of the Traffic Regulations, 1936, is to give pedestrians who use an authorized crossing the right of way against motor-vehicles, and it merely requires the driver to refrain from doing anything which prevents or interferes with a pedestrian continuing on his way across the road at the same pace and in the same direction. If, therefore, the driver complies with that requirement, he may still be said to have yielded the right of way by changing the course of his vehicle to enable it to pass either in front of or behind the pedestrian. In view of the definition of the term "right of way" in Reg. 2, a driver cannot be said to have failed to yield the right of way when the pedestrian stops on the crossing, unless it was reasonably necessary in the interests of his personal safety to do so, as the wording of the regulation presupposes a pedestrian in motion, and not a stationary pedestrian. (*Rhind* v. *Irvine*, [1940] 2 W.W.R. 333, distinguished.) *Martin* v. *Kent*. (Auckland. February 2, 1948. Luxford, S.M.)

SALE OF LAND.

Contract — Form — Memorandum in Writing —Admission of Existence of Contract—Evidence—Admissibility to prove Real Bargain different from that contained in Document. *Beckett* v. *Nurse*, [1948] 1 All E.R. 81 (C.A.).

SOLICITORS' GUARANTEE FUND.

The New Zealand Scheme: Reports of Its Working in Canada. *17 Fortnightly Law Journal*, 122.

TRUSTS AND TRUSTEES.

Statutory Power of Advancement: Necessary Consent. *204 Law Times Jo.*, 324.

WILLS.

Construction—Legacy settled on Daughter and her Issue—Gift over if no Child of Daughter should attain Twenty-one—Codicil excluding Issue of Daughter by W. from any Benefit under Will—Daughter having no Issue other than Children by W.—Death of Daughter leaving Children who had attained Twenty-one—Effect of Gift over. *Re Crawshaw*, [1948] 1 All E.R. 107 (C.A.).

Construction—Vesting—Gift equally *per capita* to Children of Testator's Named Brothers—If any of such Children died before Vesting of his or her Share leaving Issue Such Issue to succeed to Same *per stirpes* and not *per capita*—Children's interest vested at Testator's Death. A testator by his will directed that, if he should die leaving a wife but no issue, or if during her widowhood all the issue should die without acquiring a vested interest, certain legacies were to be paid; and out of the income arising from the balance of the estate an annuity of £100 was given to the widow during widowhood and on her remarriage a lump sum of £300. The testator's wife survived him; but there was no issue of the marriage. The following clause of the will thus became operative: "Subject to the interests created by the prior clauses of this my will my trustees shall hold the trust estate as to the principal and income of the same for the benefit equally *per capita* of the children of my brothers Abraham, Leib and Aaron and so that if any of such children shall die before his or her share shall become vested leaving issue such issue shall succeed to the same *per stirpes* and not *per capita*." The named brothers had children, all of whom survived the testator, but some died before the death of the widow. *On originating summons to ascertain the time of the* vesting of the interests of the brother's issue, *Held*, That the interests of the children of testator's three brothers vested absolutely at the date of the testator's death. (*Hickling* v. *Fair*, [1899] A.C. 15, referred to. *King* v. *Cullen*, (1848) 2 DeG. & Sm. 252; 64 E.R. 113, and *In re Morris*, (1857) 26 L.J. Ch. 688, distinguished.) *In re Phillips (deceased), Hislop* v. *Roth and Another*. (Wellington. December 22, 1947. Gresson, J.)

WORKERS' COMPENSATION.

Septic Arthritis—Whether an "accident." The plaintiff on February 17, 1945, was using his knee as a lever in getting a heavy switchboard through a doorway, and said he hurt his knee in the process, and that he felt a rip or rick in his knee. The doctor's certificate of the next day contained the provisional diagnosis of a strained left knee-joint as the result of the accident at work. Four weeks later the plaintiff was admitted to hospital, suffering from septic arthritis. The medical evidence was conflicting on the point whether infective arthritis can develop without trauma. The case was remitted to a medical referee, who found the balance of probabilities in favour of the plaintiff. *Harper* v. *A. and T. Burt, Ltd.* (Compensation Court. Auckland. December 22, 1947. Ongley, J.)

Stroke—Cerebral Thrombosis—No Evidence that Cerebral Thrombosis caused by Effort. Plaintiff had a stroke on May 13, 1944, while working for defendant company, and claimed compensation for the disability arising from it. He began his action on June 15, 1945. Two defences were raised: (*a*) that plaintiff failed to take action within the time prescribed by the Workers' Compensation Act, 1922, and (*b*) that the accident was due to disease and not to any work done for the defendant company. According to plaintiff's evidence, when he was lifting salt to cover hides, working with his head down, he had a "black out" and noise in his head; the following day, when he was fleshing hides and bending down, he had a final black-out stroke, becoming paralysed on his left side; his tongue puffed up and went to one side, and he could not speak, but did not lose consciousness. The medical evidence was that the stroke was caused by cerebral thrombosis. The plaintiff's case was left without evidence that effort could cause cerebral thrombosis. The medical evidence for the defence was that cerebral thrombosis is unassociated with effort. *Held*, That there was no evidence that there was anything unusual in the case; that no inference could be drawn that the work caused the stroke; and that the stroke was accounted for by, and was consistent with, disease, and was not accounted for by effort. On this finding, there was no need to decide whether there was reasonable cause for the action not being commenced within the time allowed by the statute. *Semble*, That the statutory limit was not necessarily set aside by putting the case in the hands of some third party, and that too much reliance can be placed on the fact that a case has been placed in the hands of a third party to attend to. *Cleveley* v. *Thomas Borthwick, Ltd.* (Compensation Court. Wellington. December 22, 1947. Ongley, J.)

OBSERVATIONS.

Re (1) Nonsuit; and (2) Rights of Counsel opening Defence.

Two matters have recently come under notice on which there seem to be confusion and misconception. Both matters are of considerable practical importance to the profession and their clients: and these observations are written in the hope that they may help to clarify the position. The first question has reference to nonsuit, the second to the rights of counsel for the defence (whether in a criminal or civil cause) in opening his case.

AS TO NONSUIT.

(*a*) *Civil proceedings.*

The question of nonsuit in civil proceedings assumes importance consequent on the judgment of the Court of Appeal in *Steele* v. *Evans*, (1947) 23 NEW ZEALAND LAW JOURNAL, 331; [1947] N.Z.L.R. 108. The proceedings were initiated by a motion in the Supreme Court to set aside an award by arbitrators or valuators on the grounds that "the arbitrators were not impartial and that the award was improperly procured by reason of misconduct of the proceedings by the arbitrators." The motion duly came before Mr. Justice Christie, who made an order setting aside the award, and an appeal was made from that order. The Court of Appeal apparently held that there was no misconduct, and no evidence before the Court from which it could be inferred that the valuation which was attacked was not honestly made; but, instead of allowing the appeal and dismissing the application to set aside, the Court remitted the motion to the Supreme Court with a direction that judgment of nonsuit be entered. The reasoning appears to be that (following *Kiwi Polish Pty. Co.* v. *Kempthorne, Prosser, and Co.'s New Zealand Drug Co., Ltd.*, [1922] N.Z.L.R. 177, the motion is an "action" within s. 2 of the Judicature Act, 1908, which is defined as "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court"; that "plaintiff" also by s. 2 includes "every person asking any relief against any other person by any form of proceeding, whether the same is taken by action, petition, motion, summons or otherwise"; that R. 272 of the Code of Civil Procedure provides that the plaintiff in any action may, at any time before a verdict or judgment has been given, elect to be nonsuited, and the Court may nonsuit the plaintiff without his consent; that therefore the Supreme Court had power to nonsuit, and the Court of Appeal had the same power under R. 5 of the Court of Appeal Rules. All this would appear to have been decided without argument of counsel.

Had the point been argued, counsel for the appellant would doubtless have contended:

(1) Is the proceeding an "action"? Is it even a "cause" (which by s. 2 of the Act includes any action "or *other* original proceeding between a plaintiff and a defendant")? Is it not merely "a matter" (which includes *every proceeding in the Court not in a cause*)? Section 51 (1) says that the practice and procedure of the Court in all causes *and matters* within the jurisdiction of the Court shall be regulated by the rules contained in the Code of Civil Procedure. The statutory definitions of "plaintiff" and "defendant" show that you may have a proceeding other than an action in which there may be a "plaintiff" and a "defendant": see the words in the definition of plaintiff, "any form of proceeding . . . action, petition, motion, summons, or otherwise," and, in the definition of defendant, "every person served with *any* writ of summons *or process* . . ." Can it be said that there is a plaintiff here at all—*i.e.*, "a person asking for *relief against any other person*"? Is not the applicant rather a "petitioner" within the definition of s. 2?

(2) But, assuming for the purposes of argument that the proceeding is an "action," as the proceeding in the *Kiwi* case (*supra*) was held to be, no rules of Court have been made under s. 23 of the Arbitration Act, 1908, and therefore the case comes within R. 604 (cases not provided for): see per Salmond, J., in *In re Pukuweka Sawmills, Ltd.*, [1922] N.Z.L.R. 102. In England, rules of Court have been made, and Ord. 52, r. 1, expressly applies: see *Russell on Awards*, 13th Ed. 608. That rule is one of a series which apparently apply to motions generally. In New Zealand, the rules respecting motions are in Part VI of the Code under the heading "Incidental Proceedings in an Action," but, in applying R. 604 to a motion to set aside an award, the procedure prescribed respecting motions would be invoked, and that procedure, indeed, has been adopted as the practice in motions to set aside awards.

(3) Even if the motion be an "action," it is only technically so; it is not, in the words of Salmond, J., "an action in the strict sense of the term."

(4) The definition of "action" in s. 2 of the Judicature Act—the definition is the same as in the English Act—applies only "if not inconsistent with the context": and there are probably dozens of rules referable to "actions" which obviously cannot apply to any proceedings other than actions in the strict sense. Take, for example, the very first rule in the Code, R. 1, which says that "every action" shall be commenced by a writ of summons.

(5) The *Kiwi* case (*supra*) is not, nor is there any other case that is, authority for saying that all the rules relating to "actions" apply to a proceeding which is only technically within that term. Indeed, Salmond, J.'s, judgment in the *Pukuweka* case implies the contrary.

(6) Rule 272, dealing with nonsuit, is a rule in Part III of the Code, which Part provides generally for the "disposal of actions," and an examination of the rules in Part III shows that they can apply only to actions in the strict sense. For example, R. 249 says that all actions shall be *tried* at the place mentioned in the writ of summons. Obviously that cannot apply to any proceeding other than an action in the strict sense.

(7) Under R. 250, an action *must* be set down for *trial*. A motion is not set down as an action, but as

a motion under R. 399, which is one of a *fasciculus* of rules dealing with motions; and it is not tried as an action, but heard as a motion (R. 400).

(8) Rule 272 says that after a nonsuit the plaintiff shall not be debarred from proceeding again to trial on the same statement of claim. In the case of a motion, there is no statement of claim, and no trial. Is it not plain, therefore, that R. 272 can have no application except (*a*) at the *trial*, (*b*) of an *action in the strict or limited sense?*—and there is no power to nonsuit except under that rule.

(9) If R. 272 applies to a motion, then equally, if not *a fortiori*, it would apply to actions for mandamus, injunction, prohibition, also to a rule *nisi* and to every proceeding that comes technically within the statutory category of "action." But that is a proposition which has never yet been suggested, and which (it is submitted) would hardly bear examination.

(10) The Court on a motion (except a motion for judgment, which is a different thing altogether) does not give a judgment (such as judgment for one party or another, or a nonsuit), but makes an order. Nonsuit is not an order, but a judgment, and a judgment and an order are not the same thing: see, for example, s. 66 of the Judicature Act, 1908 ("judgment, decree, or order").

(11) If a party fails in his proof in an action in the strict sense, he may be nonsuited under R. 272 and may proceed to trial again, but, where a party fails on a motion from a substantial defect in his case as shown in his affidavits, R. 410 says that he shall not apply again on amended affidavits unless, in special circumstances, leave to apply again is expressly given by the Court.

(12) It is submitted to be plain, therefore, that, in regard to hearing and disposal generally, motions are in a category of their own, to which R. 272 cannot possibly apply. It may also be relevant to point out that in Table C in the Third Schedule to the Code (Scale of Costs) the trial or hearing of an action, and motions not specially provided for, are treated as separate and different items.

(13) The only course competent, therefore, for the Judge of first instance was either to make an order setting aside the award or to dismiss the application, or, if the case so required (but it has not been suggested that this is such a case), to remit the matter to the reconsideration of the arbitrators under s. 11 of the Arbitration Act; and the only course open to the Court of Appeal is either to allow or dismiss the appeal.

If the point had been raised from the Bar and been the subject of considered argument, would there (or might there) not have been a different decision? As it is, the judgment will doubtless call sooner or later for review, presumably by the two Divisions of the Court of Appeal sitting together.

(*b*) *Criminal proceedings.*

I remember a few years ago, on the hearing of a general appeal under the Justices of the Peace Act, where, at the conclusion of the case for the prosecution, counsel for the defendant (appellant) having applied that the appeal should be allowed and the information dismissed, upon the ground that there was no evidence to support the charge, and therefore no case to answer, the Judge was reported in the newspapers as saying that the application was for a nonsuit, and, as the case was a criminal case, he could not grant a nonsuit until he had heard all the evidence. The defendant thereupon gave evidence, but fortunately no harm was done, as the learned Judge, after hearing the evidence given by the accused, allowed the appeal. But the statement attributed to the learned Judge, if correctly reported, was clearly made *per incuriam*. There is no such thing as a nonsuit known to the criminal law.

Two fundamental rules, two "golden threads," run through the whole of our criminal jurisprudence; first, that an accused person is always presumed innocent until proved guilty; and, second, that the onus of proof on every criminal charge (subject, of course, to any express statutory provision in any special class of case to the contrary) is always upon the prosecution, and never shifts. It must necessarily follow as a corollary that, if, at the close of a case for the prosecution, counsel claims that there is no evidence to support the charge, he is entitled to have, not a provisional ruling on the point (such as is sometimes given in a civil action before a jury because it may be considered the more just course in the long run on grounds of convenience and expense), but a definitive decision; and, if there is no *prima facie* case made out, the charge should be dismissed at once. If that is not done, and the accused is required to enter upon his defence and calls or gives evidence, such evidence may be used to fill in the gaps or supply the defects in the case for the prosecution. But that is the very peril which, under the British system, an accused person should not be required to face: he should not be called upon to make his defence unless the prosecution has made out a *prima facie* case against him. Whatever difficulty there might be in an occasional and exceptional case in the Supreme Court by reason of the fact that the trial is before a jury and may have to proceed without a sufficient break to enable the Judge to consider the matter as fully as he might wish to do, there is no such difficulty in the case of an information heard by a Magistrate or a general appeal under the Justices of the Peace Act heard by the Supreme Court.

These observations are induced by the recent case of *Davies* v. *Glover*, [1947] N.Z.L.R. 806, decided by Mr. Justice Kennedy. At the close of the case for the prosecution on the hearing of the information before the Magistrate, it was submitted on behalf of the defendant that the case had not been proved, that there was no evidence, and that the information should be dismissed. The Magistrate reserved his decision and evidence was given by the defendant which, if regarded, might complete the proof of the offence. The Magistrate thereafter dismissed the information, holding that in law he was bound to have regard only to the evidence of the prosecution and not to take into account the evidence subsequently given on behalf of the defendant. The prosecution appealed, and Mr. Justice Kennedy, on the authority of *R.* v. *Peddle*, (1907) 26 N.Z.L.R. 972, and English decisions to the like effect, allowed the appeal, holding that, if the elements of proof missing in the case for the prosecution were supplied from the defendant's testimony, the Court is warranted in considering his evidence and in considering the case proved notwithstanding the fact that at the close of the case for the prosecution there was no case to answer. But the point is that, the Magistrate having reserved his judgment on the application for dismissal, the defendant should not have been called upon to make his defence until the

application for dismissal had been determined, and, if, as would have been the case, the decision had been in the defendant's favour, he would not have been called on at all.

The report does not show whether or not the defendant's counsel asked for an adjournment of the hearing pending the delivery of the judgment, but one would assume that he simply proceeded, after the Magistrate said he would reserve judgment, to call his evidence without asking for an adjournment, to which (if he applied for it) surely the "golden rules" would have entitled him as of right.

But, as I have said, a "nonsuit" is unknown to the criminal law. A nonsuit is not a final determination, and in a civil action where a nonsuit is granted the result is inconclusive and the action may be tried again, whereas, in the criminal law, the only possible alternatives are conviction or acquittal: and, subject to any statutory right of appeal, such conviction or acquittal is a final determination.

As to the Rights of Counsel opening for the Defence.

One may be permitted to express some surprise at the article in (1947) 22 New Zealand Law Journal, 304, over the name of "Pulex," who, one may suspect, may not be quite so insignificant a person as his nom-de-plume might indicate. With all respect, one finds it difficult to credit the statement that "it is coming to be all too generally believed that, in opening for the defence, and whether the proceedings be civil or criminal, counsel has no right to comment on the evidence already given, and must confine himself to stating the effect of the evidence he proposes to adduce." If members of the Bar are in doubt as to their rights in an important matter of this kind, it is time they considered the formation of a Bar Council, such as exists in England, and such as I have always thought, and frequently said, should be established in New Zealand, whose function would be (*inter alia*) to guide and advise members of the Bar who may be in doubt as to their professional rights and duties, and, if and where necessary, to protect and maintain the rights of the Bar.

On the question of opening for the defence, I never heard, during the period of over thirty years that I practised at the Bar, any doubt amongst members of the Bar on the matter. During that period I heard various eminent Judges who had had great experience at the Nisi Prius Bar and who were masters of Practice say to counsel something like this: "I should like to point out to you, Mr.—, that the primary purpose of an opening address is to state the nature and effect of the evidence that you propose to call. I am well aware, of course, that it may be necessary for you to some extent to criticize your opponent's case and comment upon the evidence already given. That is a matter which must necessarily be left to the discretion and judgment of counsel, and I cannot and do not stop you, but I would suggest that you should as far as possible refrain from comment which would come more naturally in your final address."

It is correct, I think, to say that that was recognized by the Bench and accepted by the Bar as a precept of conduct with which we loyally endeavoured to comply, though no doubt it must frequently have happened that counsel went further than a Judge may have thought was necessary. But, beyond such an admonition (if it may be so described) as I have mentioned, I never knew of any limitation being imposed upon counsel's discretion, which, after all, is a matter of considerable delicacy, and the exercise of which, as anyone must know who has had any substantial nisi prius practice, is often a matter involving much difficulty and anxious thought.

The truth is that frequently—indeed, it may be said, I think, in most cases—it is impossible for counsel adequately to open the defence in either a criminal or a civil case without to some extent referring to, and commenting upon, evidence already given, and even the demeanour of witnesses, and in some cases perhaps indicating a suggested weakness or inconsistency in the case made against him. Such comment may be necessary, indeed, in order to show what the case is that the defence assumes it has to meet and how it is proposed to be met. It is, I take it, for those very reasons that the matter and extent of such reference and comment must necessarily be left to counsel's discretion and sense of propriety.

A perusal of the verbatim report of a recent case in England in which counsel for the defence, probably the foremost nisi prius advocate of the day, commented in his opening upon the plaintiff's evidence and the weakness of his case, without any intervention or comment from the Lord Chief Justice, himself a trial Judge of great experience, and, in his day at the Bar, a leading nisi prius advocate, would, I think, illustrate the practice in England, which accords with what I always understood, when I was myself at the Bar, to be the accepted practice in New Zealand.

Michael Myers.

LEGAL LITERATURE.

Income-tax.

The Double Taxation Conventions, by F. E. Koch, A.L.A.A., A.C.W.A., Vol. 1.—Taxation of Income. Pp. xxiv + 441 (with Table of Cases and Statutes). London: Stevens & Sons, Ltd.

This book is of particular interest because a Double Taxation Agreement has recently been concluded between the United Kingdom and New Zealand Governments.

The study of income taxation has become increasingly complex with the passing of the years, due no doubt to the precautions adopted in the law of the levying authorities to defeat the ingenious devices used by taxpayer experts to circumvent the heaviest burden of payment. Under the high rates of taxation which were universal during the war years, the wider subject of double taxation imposed by two or more countries has assumed a new and important significance in relation to international trade, investment, employment, and professional activities.

It would be difficult to imagine a better presentation of this highly intricate and technical subject than that so ably provided by Mr. F. E. Koch, who touches on international double taxation law, and excludes from the text of his explanatory matter references to case and statute law, preferring to use footnotes as a guide to all his authorities. The book deals in detail with the recent Agreements with the United States, Canada, Southern Rhodesia, South Africa, Australia, and France. There is a complete index to table of cases, and table of statutes for each of the major countries referred to. There are useful summaries of the rates of tax and special exemptions operative in each country.

The title of the book written by Mr. Koch does not indicate exciting reading, but it describes in a simple way the scope of a subject which needs to be understood not only by those whose profession requires an appreciation of income taxation, but also by those whose work entails international transactions in commerce or industry; and it leads to an understanding of our recent Double Taxation Agreement with the United Kingdom.

DIVORCE PRACTICE.

Prayer for Relief to Suits for Restitution of Conjugal Rights.

By E. F. PAGE, LL.B.

In these days when the compilation of returns and the completion of application forms seem necessary to obtain the normal amenities of life, any dispensation in the drafting of unnecessary papers comes as manna from heaven. To those of us who have recently resumed practice, the simplification of the Divorce and Matrimonial Causes Rules comes as a happy omen. But a survival of the practice of the Ecclesiastical Courts for which it is difficult to find any practical explanation, and which entails the duplication of papers, remains in s. 20 of the Divorce and Matrimonial Causes Act, 1928.

Section 20 provides :

> If in any suit or other proceeding instituted for *divorce* or *judicial separation* the respondent shall allege in his or her answer any matter entitling either husband or wife to any relief under this Act, the Court may give to the respondent in such suit, on his or her application, the same relief as he or she would have been entitled to if he or she had filed a petition seeking such relief.

The wording of the section is clearly restrictive and allows relief to be granted only on answers filed to petitions for divorce and judicial separation. This follows the English practice, except in proceedings for judicial separation, prior to the passing of the Matrimonial Causes Act, 1937, but the procedure which will be followed in England in the future is a matter of some doubt. In *Rayden on Divorce,* 4th Ed. 228, 229, it is said :

> Until the recent legislation it was not the practice to allow a prayer for dissolution to be made in an answer to a petition for judicial separation, restitution of conjugal rights, or nullity of marriage, a cross-petition being deemed necessary. This was partly on the ground that dissolution was a statutory remedy, whereas restitution, nullity, and, in some degree, judicial separation, were founded on ecclesiastical practice. The extension of the relief of dissolution to grounds other than adultery, and the fact that the authority to grant other reliefs is now in a much greater degree statutory, have to some extent altered the position . . . It seems clear that dissolution may now be claimed in answer to a petition for judicial separation . . . It is arguable that this, though not hitherto the practice, should now be allowed in answer to a petition of restitution of conjugal rights.

See also *Latey on Divorce*, 13th Ed. 537.

In Australia, on the other hand, the practice differs not only from our own but also varies in different States : see *Joske's Laws of Marriage and Divorce in Australia, passim.*

What steps must be taken by a respondent in restitution proceedings to obtain the relief to which he may be entitled ? An answer must be filed giving particulars of any facts upon which reliance is placed justifying the respondent's withdrawal from cohabitation : *MacLulich* v. *MacLulich*, [1920] P. 439. But, should the respondent have grounds for petitioning for divorce on his own behalf, he cannot simply pray for it in the answer. He must file a fresh petition duplicating in his pleadings all the relevant facts which have already been placed on record. None of the text-books which have been perused attempts to offer any practical reason for the retention of this cumbersome procedure, and it is difficult to see upon what grounds it can be justified.

Unfortunately, the matter does not rest there. What is the duty of counsel for the petitioner on the cross-petition if that proceeds and the restitution proceedings are temporarily abandoned ? Technically, his petition is undefended : no answer has been filed, the earlier petition is not adverted to in the praecipe to set down, and the learned trial Judge has no knowledge of the earlier petition. But counsel's general duty to the Court would, it is suggested, make it imperative for him to disclose the existence of the earlier petition.

Should the petitioner in the restitution proceedings be represented at the hearing of the cross-petition ? Technically, his counsel has no standing whatever, but in some recent instances it has been directed that such counsel should appear for the assistance of the Court. Counsel are placed in the unenviable position of not knowing whether they should be present at such hearings in case they are called upon—and perhaps wasting a valuable half-day—or whether they should, at the risk of appearing discourteous, appear only if called upon.

Similarly, restitution proceedings must be commenced by cross-petition, and cannot be brought by way of a prayer contained in an answer to a petition for divorce. The learned Judge hearing such a petition, if undefended, will have no knowledge of the earlier petition, unless counsel draws his attention to its existence, although such knowledge would probably be most relevant and helpful in the exercise of his discretion.

It is not intended in this short article to deal with the whole matter exhaustively, but from every view it would seem that the present procedure is needlessly cumbersome, and could possibly lead to collusion between the parties without the knowledge of either the Bench or the Bar. With slight amendments to s. 20, any kind of relief could be granted on a prayer contained in an answer to a petition for dissolution, judicial separation, nullity, or restitution of conjugal rights without seriously encroaching on precedent or impairing the remainder of the Act.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Counsels' Estimates.—In response to a request from the Chief Justice, the Council of the Law Institute of Vancouver has made recommendations in connection with Court estimates for consideration by the Supreme Court Judges there. One of these is that, in estimating at the fixing of the lists the length of time that cases will take, solicitors should exercise more care, as experience has shown that these estimates are frequently unreliable and the time mentioned usually exceeded. This particular recommendation will recall to many practitioners the cynical mistrust evinced by Myers, C.J., when counsel attempted difficult forecasts of this kind, particularly where the pleadings bore evidence of something unusual in the claim. "This case will finish within the day," said counsel for the plaintiff on one occasion. Defendant's counsel thought that three days was a more reasonable estimate. "I prefer the longer estimate," remarked the Chief Justice. "Mr. Blank has temporarily overlooked the fact that his injured client has asked for £5,000, and you can't get all that in a day."

The Winning Buns.—One of the matters passed over somewhat lightly by the Gaming Commission was the peril of sweepstake investment. This was illustrated fourteen years ago by the Equity suit of *Prentice* v. *Brown*. The grim facts herein were that one Hazel Brown, aged sixteen, and the youngest of some thirty-six female minors employed in a Sydney factory, was charged with the duty of purchasing daily the luncheon buns of this adolescent team. She purchased these supplies from a Mrs. Keers, who, untramelled by price stabilization, gave by way of bonus upon purchases up to a certain amount a one three-hundredth share in a lottery ticket in what the newspapers now euphemistically describe as an "overseas consultation." As time went by, Hazel had acquired eight of these shares. The Keers ticket topped the poll—or, to vary the metaphor, drew the first prize of £5,000; and whether, and to what extent, Hazel was a trustee for her co-investors in the buns looked momentarily like a point destined to tax the ingenuity of the High Court of Australia, despite the fact that the amount involved was eight three-hundredths of £5,000, or £133 6s. 8d. On the second day of the hearing, the practical triumphed over the academic, and settlement was achieved by Hazel taking half and the others one thirty-fifth each of the remainder, subject, of course (as a law reporter of the time is careful to stress) to due remuneration to the barristers briefed and the solicitors concerned in the case.

First Briefs.—Scriblex is pleased to see that this year the number of applications for admissions as barristers or solicitors, or as both, appears to be increasing. Many of these applicants will look forward with some trepidation to their first appearance as counsel. It is, therefore, relevant to mention the experience in this connection of Lord O'Brien of Kilfenora, who became Chief Justice of Ireland. His first brief was to make a simple application. So flustered did he become that he went into the space reserved for Queen's Counsel, and, once in this forbidden territory, he lost all powers of speech and stood there gaping like a fish brought to the surface. On being asked by the Judge who he was and what he wanted, his throat became so dry that no answer was forthcoming. At this stage, the Registrar stepped forward, snatched the brief from his hand, and did all that was necessary. "It's all right; you can go," he said. And then, in an audible undertone: "You ought to get on—called to the Bar and taking silk on the same day; and not a word spoken." History relates that he more than overcame the last disability, as he was renowned in later years as a considerable talker from the Bench.

Nature Note.—Unguided by precedent upon the point, Scriblex rules that any story that points a moral to lawyer or legislator is legally admissible in these columns. This is told about George Gallup, the poll expert, and relates to an experience which proves how little people listen to what they're told, and how inaccurately they read what is written. At one time a Congressman was chiding the Department for its free-and-easy way with the taxpayers' money. Look at the stuff it printed, said he, hundreds of pamphlets in which no one had the slightest interest—*The Recreational Resources of the Denison Dam*, *The Giant Sequoias of California*, *The Wolves of Mount McKinley*, *The Ecology of the Coyote*. "They print every last thing about nature but the love-life of the frog." Shortly after his harangue, the Department of Agriculture was surprised to find in the mail five or six letters from Congressmen asking for *The Love-life of the Frog*. Similar orders kept coming in so regularly that the Department was obliged to state in a circular, "We do not print *The Love-life of the Frog*." After the public announcement was made, requests for *The Love-life* were trebled. It got to be such a headache for the Department that it finally gave a Press release stating that an error had been made somewhere. The Department had *never* printed a pamphlet about the love-life of the frog, and wanted to hear no more about the whole thing. When this news item came out in the papers, requests began to number up into the hundreds. By now the matter had got out of hand, and the Secretary of Agriculture himself was called in. Determined to stop the foolishness once and for all, he took time during an address on the air, on a nation-wide hook-up, to deny vehemently that the Department had ever prepared any pamphlet concerning the love-life of the frog, that to his knowledge there never was such a pamphlet, and that, if there had been, the Department would not print it. After the broadcast, there were more than a thousand requests in the mail.

Law and the Executive.—"This great principle, that law is above the Executive . . . re-emerged at the Restoration, and was confirmed at the Revolution of 1688, which was effected against James II precisely to establish the principle that law was above the King. That medieval idea of the supremacy of law as something separate from and independent of the will of the Executive, disappeared in continental countries. But in England it became the palladium of our liberties and had a profound effect on English society and habits of thought."—G. M. Trevelyan (Master of Trinity College, Cambridge) in *English Social History*.

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. Workers' Compensation.—*Agreement by Worker as to Compensation—Duties of Magistrate in Approving Same.*

QUESTION: I have to seek the approval by a Magistrate of an agreement under s. 17 of the Workers' Compensation Act, 1922. What material is necessary to place before him so that he may be able to decide whether to grant or withhold his approval?

ANSWER: Before granting his approval of such an agreement, a Magistrate "must take reasonable steps to ascertain whether the worker suffers or has suffered from the disease or injury, and whether the agreement is for the worker's benefit." He must satisfy himself that the agreement is for the worker's benefit: *In re An Agreement, Connew with the Wilton Collieries, Ltd.*, [1934] N.Z.L.R. 1029: "In making such a contract the worker is protected against making an unfair or improvident bargain by the provisions of subs. 3, to the effect that no such agreement shall be binding until it has been approved in writing by a Magistrate" (*ibid.*, 1032, 1033). These words point to the matters which the Magistrate must bear in mind.

X.C.I.

2. Rent Restriction.—*Claim for Possession—Statement of Claim—Grounds to be stated.*

QUESTION: Our client, the landlord, is applying for an order of possession of premises that are subject to the Fair Rents Act, 1936. Is it necessary that in the statement of claim the specific one of the grounds mentioned in s. 13 (1) of that Act should be set out?

ANSWER: By s. 68 of the Magistrates' Courts Act, 1928, "the statement of claim shall give such particulars of time, place, names of persons, amount, dates of instruments . . . and other circumstances as may suffice to fully and fairly inform the Court and the opposite party of the cause of action." This provision gives a very good indication of what is required—namely, such circumstances as will be sufficient to indicate the cause of action. A plaintiff is not required to set out the whole cause of action, but only such particulars as will suffice to inform the Court and the opposite party of what the claim is, and, if a plaintiff's cause of action depends on a statute, he must plead all facts necessary to bring him within that statute: (*1941 Annual Practice*, 349, and cases cited.) In the case, then, of a claim to recover possession of a tenement which is subject to the Fair Rents Act, as the plaintiff's claim must be based upon one of the grounds set out in s. 13 (1) of that statute, it is imperative that he set out such ground in his statement of claim; such inclusion is clearly necessary "fully and fairly (to) inform the Court and the opposite party of the *cause of action*," which includes all facts which a plaintiff must prove: *Read* v. *Brown*, (1888) 22 Q.B.D. 128; *Trower and Sons, Ltd.* v. *Ripstein*, [1944] 2 All E.R. 274. The forms given in the appendix are only to be taken as specimens of the character of the pleadings, and are not binding in any way: see note (and cases) to R. 112 of the Code of Civil Procedure.

C.I.

UNIVERSITY OF NEW ZEALAND.

Changes of Dates for Entries.

Provisional admission.—Candidates who propose to apply for provisional admission to matriculation this year should take particular notice that applications will close on May 1, and that no provision whatever is now made for the receipt of late applications.

Closing of entries.—The dates for the closing of University entries for degrees, diplomas, &c., have also been amended. The closing date for Masters' degrees and for professional subjects of the Engineering course will this year be May 10.

Entries for Bachelors' degrees in general and for diploma and professional examinations will close on June 10.

Certificates of Proficiency.—Attention is most particularly directed to the requirement which comes into force this year that a candidate for Certificate of Proficiency must fulfil all the conditions prescribed for candidates for degrees in the subjects concerned. That is to say, any candidate for a Certificate of Proficiency must be a matriculated student and must keep terms. This is subject to probable revision.

POSTSCRIPT.

Politics and the Bench.

I quite recognize that there may be and often is an honest conflict of philosophical viewpoint in the approach of different judges to any legal problem. It is right that there should be, but there is no place in our legal thinking for the suggestion that the philosophical view of the judge on the bench should be affected by the political policy of the executive or legislative branch of government. I entirely agree with the statement that "the rule of law is in unsafe hands when courts cease to function as courts and become organs for the control of policy." But it must never be forgotten that this statement has a twofold application. While the judge has no right to interpret the law for the purpose of limiting or controlling the policy of the government in power, neither has he the right to colour his interpretation of the law by a desire to advance its political interests.

When the judge goes on the bench he must learn to think independently and to decide independently. But independent thinking does not mean thinking in a vacuum. Judicial decisions apply to living people and may be, and often are, moulded by an honest judicial viewpoint of the public welfare. But that is a very different thing from submission to the straitjacket of political policy as expressed by a party in power or out of power. Political currents change rapidly with the passage of time. The rule of law cannot be advanced by judicial recognition of the immediate course of those currents. The science of law transcends the emotional appeal of politics. It calls for the exercise of judicial wisdom as well as the application of judicial learning. Its interests are best served by applying to new combinations of circumstances those rules of law which are derived from legal principles and judicial precedents, and in developing their application in a manner consistent with the stable advancement of civilization. There is no place in judicial decision for experiment or trifling with political theories be they new or old.—*Hon J. C. McRuer*, to the American Bar Association at Cleveland, September, 1947.