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MARRIED WOMEN'S PROPERTY ACT, SECTION 23.

BY the combined effect of the Married Women's Property Act, 1908, and of s. 12 of the Law Reform Act, 1936, a married woman is placed, with regard to the ownership and disposition of property, in the same position as a *feme sole*, which is equivalent to that of a man. The Administration Act, 1908, applies equally to her estate and to that of a man. In relation to tort, s. 17 of the Married Women's Property Act, 1908—subject to consequential amendments enacted by s. 10 (1) and the Schedule of the Law Reform Act, 1936—remains unrepealed, and it is specifically preserved by s. 12 of the Law Reform Act, 1936. *Ralston* v. *Ralston*, [1930] 2 K.B. 238, illustrates the failure of a married woman to succeed in a claim for damages for libel against her husband by reason of s. 17, because the action was in tort and not for the protection and security of her own property. In *Bramwell* v. *Bramwell*, [1942] 1 All E.R. 137, a husband sued his wife for possession of a cottage, and it was found in the Court of first instance that she occupied it as a trespasser. On appeal, the Court of Appeal held that no relationship of landlord and tenant was to be inferred from the facts, and an order for possession must be made; but Goddard, L.J. (as the Lord Chief Justice then was), observed that he had the greatest doubt whether a husband can bring against his wife proceedings for the recovery of land (which are in their essence an action for tort, in that the wife is a trespasser if she is wrongly in the occupation of the land), in view of the fact that (our) s. 17 expressly says that an action for tort cannot be brought in any Court by a husband against his wife. His Lordship added that a husband is not, however, left without remedy, as s. 23 expressly provides the procedure for deciding a question between husband and wife as to the possession of property) and, within the scope of its jurisdiction, effect can be given to the section in the Magistrates' Court, and otherwise in the Supreme Court). It seemed to him that a husband, in a case such as *Bramwell* v. *Bramwell*, should proceed in that way.

In *Bramwell's* case, the order was made on the basis that, on the admitted facts, that was the only order which could have been made. However, in *Pargeter* v. *Pargeter*, [1946] 1 All E.R. 570, an order for possession such as that made in *Bramwell* v. *Bramwell* (*supra*) could not be made, because the Court of Appeal found that it was by no means certain, on the evidence before the Court below, that an order for possession was the only proper order which could have been made in proceedings properly constituted; as, in a properly constituted proceeding by application under (our) s. 23 of the Married Women's Property Act, 1908, evidence of an entirely different nature from that required in an action for possession would have had to be adduced for consideration.

The Court of Appeal in *Pargeter's* case (Tucker and Cohen, L.JJ., and Wynn-Parry, J.) was differently constituted from that which heard *Bramwell's* case. In the judgment of Tucker, L.J., with which the others agreed, His Lordship commented upon the decision in *Bramwell's* case, when he said that Goddard, L.J., had there indicated that he was inclined to take the view, but he did not consider it necessary to decide it in the circumstances of that case, that an action for the recovery of land is one which is equivalent to the old action of ejectment, that it is a species of action of trespass, and, as such, an action of tort which cannot be brought by a husband against his wife; and that the proper procedure in such cases is by way of originating summons in the High Court, or, as it is called, originating application in the County Court under our s. 23 of the Married Women's Property Act, 1908.

After drawing attention to the County Court rule that provides that, where proceedings are commenced by action which ought to have been commenced by originating application, the Judge may either allow the proceedings to continue as in an action, or may order them to proceed in accordance with the procedure prescribed for an originating application, with such amendment as he thinks necessary for that purpose, Tucker, L.J., said that the point raised by Lord Goddard may not have been considered by the other members of the Court in *Bramwell's* case, because it had not been argued, and they had made an order for possession on the uncontradicted facts before them because it was the proper order, and the only one that could have been made on the merits. On the other hand, the Court, in view of the County Court rule to which we have referred, may have dealt with the matter under that rule in a way in which the Judge could have dealt

with it himself if the matter had been raised before him. In concluding his judgment, at p. 573, His Lordship said :

> I express no view with regard to the point raised by Goddard, L.J., save to say this, that whether or not these matters can be raised in the County Court by way of summons in an action for the recovery of possession appears to me rather an academic question, having regard to the wide powers of amendment possessed by the County Court under Ord. 6, r. 7; but, however that may be, there can, in my view, be no question that these matters can be raised by means of an originating application in the County Court under the Married Women's Property Act, s. 17 [our s. 23]. I further hold that there was no relationship of landlord and tenant between the parties and that the action was in effect one of trespass against the wife.

In agreeing with Tucker, L.J.'s, judgment, Cohen, L.J., at p. 573, observed that, at the end of his judgment, the County Court Judge had said : " I further hold that there was no relationship of landlord and tenant between the parties, and the action was in effect one of trespass against the wife." His Lordship said that he did not think that the County Court Judge was intending to say or to decide that there could be no cause of action by the husband either by direct proceedings, or if they were competent under the section corresponding with our s. 23. He added :

> I think that what he meant by those words was that that was the only possible action and that the action as framed must necessarily fail. I do not think he was intending to decide anything except that which was raised before the County Court Judge if the husband brings some such proceeding as my Lord has indicated, free and unfettered by what has been said here, and I do not desire to say anything which may prejudice the conclusion which the Judge may reach on the subject when it does come before him.

As stated above, s. 23 provides the proper remedy available to a spouse, who owns the matrimonial home, to obtain possession from the other spouse who remains in possession of it. This was the procedure adopted by the husband in *Kain* v. *Kain*, [1943] N.Z.L.R. 342. There, a new point was argued, *inter alia*, for the wife—namely, that the Court had no jurisdiction to order that possession be given to the husband of a house which was owned by him, for the reason that no " question " had arisen between the husband and wife as to the title to or possession of the property. Of this contention, Sir Michael Myers, C.J., at p. 357, said :

> I can see no validity in this contention. It seems to me to be sufficient that the husband has claimed possession and that the wife has refused to give such possession. Surely then a question has arisen as to the possession of the property : *Gaynor* v. *Gaynor*, [1901] 1 I.R. 217, 220. In principle the case seems to be very similar to *In re Married Women's Property Act, 1882, Re Humphery*, [1917] 2 K.B. 72, where Scrutton, L.J., says that the summons was one of a kind which frequently came before Judges of the King's Bench Division (*ibid.*, 76). Other illustrations of a similar exercise of jurisdiction under the provisions of the English Act (s. 17 of the Married Women's Property Act, 1882) corresponding to s. 23 of our Act are *Phillips* v. *Phillips*, (1888) 13 P.D. 220, *Wood* v. *Wood and White*, (1889) 14 P.D. 157, and *Joseph* v. *Joseph*, [1909] P. 217.

Later, the learned Chief Justice dealt with the contention that, if an order is made under s. 23, it should be made only on condition that the husband first finds another home for the wife. He said :

> *Hill* v. *Hill*, [1916] W.N. 59, was referred to as a case where such an order was made by Neville, J. The report is very brief, and it would appear that the proceeding was by way of an action commenced by writ claiming a mandatory injunction directing the wife to deliver to the husband possession of the residential property in which the parties had resided and of the furniture therein. The matter came before Neville, J., on an application for an interlocutory order, and an injunction was granted; but its operation was suspended until the husband provided a suitably furnished house as a home for the wife and children. But in that case it does not appear that there was any matrimonial suit pending. No doubt the Court has under s. 23 a very wide discretion. Whether or not it is wide enough to enable to be made such an order as is suggested need not now be determined, because the answer to the contention in this case is that an order has already been made under s. 9 of the Divorce and Matrimonial Causes Act for the payment of a very large sum per annum, sufficient to enable the wife to install herself in a furnished home. The wife cannot as it were have it both ways, even though the husband is a delinquent.

In the same case, at pp. 365, 366, Smith, J., said :

> I turn now to the wife's appeal against the order under s. 23 of the Married Women's Property Act, 1908, requiring her to give up possession of the house. The main point is whether the husband can invoke the aid of s. 23. Mr. Mazengarb submitted, and I agree, that, by its terms, s. 23 can only apply where there is a question between husband and wife as to the title to or possession of property. He said there was none in the present case, because the wife did not set up any adverse proprietary claim but, on the contrary, maintained that it was the husband's duty to be in possession of the house. This argument overlooks the fact that the wife has obtained an order for periodical payments which operates in lieu of compliance with the decree for restitution of conjugal rights, and that the amount of these periodical payments is sufficient to enable the wife to provide herself with a home. When she has these payments, the husband is clearly no longer bound to provide her with a home, and, if the husband requires the house and she refuses to give it up, a question does arise as to the possession of the property . . .
>
> As Mr. Watson pointed out, the husband cannot sue his wife in tort. If he has no remedy under s. 23, he has no remedy at all. In my opinion, he must have a remedy under s. 23. I think also that the case of *In re Married Women's Property Act, 1882, Re Humphery*, [1917] 2 K.B. 72, shows that the questions of the kind now in question can be determined between husband and wife who are not separated and not even parties to a matrimonial suit of any kind. I have looked through the other reports of this case (86 L.J.K.B. 775; 117 L.T. 7; and 61 Sol. J. 382) and I cannot find any reference to indicate that the husband and wife were parties to a matrimonial suit. In my opinion, the Supreme Court had jurisdiction to make an order for possession under s. 23.

Next, as to the time when an application by husband and wife may be made under s. 23. In *Telford* v. *Telford*, [1934] N.Z.L.R. 882, Fair, J., observed that s. 23 is intended to apply only where there is a contest between husband and wife. He added that that condition must be fulfilled when the proceedings are first instituted, and, in his view, must continue to be fulfilled, at least until the hearing and possibly until judgment in the proceedings is given. This view does not appear to be a correct statement of the effect of the section, in view of the decision of the English Court of Appeal on the similarly worded section of the Married Women's Property Act, 1882, in *Hitchens* v. *Hitchens*, [1945] 1 All E.R. 451, where Lord Goddard, L.J., in a judgment with which MacKinnon, L.J., and du Parcq, L.J. (as he then was), concurred, showed how circumstances can influence the Court in the exercise of its discretion to make an order. In that case, a wife obtained a decree *nisi* in divorce on May 14, 1943, and the respondent husband applied for an order under the Married Women's Property Act, for an order to determine the ownership of some furniture; and Hodson, J., made an order directing the Registrar to proceed with an inquiry and report. Neither side asked for a fixture for that inquiry; and on March 14, 1944, the decree was made absolute on the husband's application. An inquiry before the Registrar had not then been held; but, on the respondent endeavouring to proceed with it, the Registrar considered that he had no jurisdiction to hold the inquiry, as the parties were no longer husband and wife. In February, 1945, Denning, J., reversed the Registrar's order, and directed that the inquiry should

proceed. On appeal from that order, the Court of Appeal upheld the learned Judge. In the course of his judgment, Goddard, L.J. (as the Lord Chief Justice then was), said :

> I can see that if there has been a decree absolute between the order directing the inquiry and the report, on the report coming before the Court the Court might refuse altogether to make an order. There is nothing to compel it to do so, and it might say that, in the circumstances, it would leave the parties to their remedy at law. On the other hand, as the Court had jurisdiction to act under the section when the application was made, it must have power to carry the matter to a conclusion. That seems to have been the view of Denning, J., and I think it is the right view. The Court had power, on the husband's application while the marriage still subsisted, to direct this inquiry. The inquiry can go on and when it is finished the case can go before the Judge, who will then, of course, if there are matters which call for it, take into account the fact that there has been a decree absolute, which may or may not have some bearing on the decision which he ultimately gives.

That judgment was followed recently by Mr. H. P. Lawry, S.M., in *Andrew* v. *Andrew* (*Post*, p. 61) in a case where an application under s. 23 was filed on October 19, 1947. The applicant was described as a married woman, and a decree *nisi* had been made at the suit of her husband on the previous June 4. The application was heard on February 10 of this year, when it was admitted that the decree had been made absolute on October 7, 1947. It appeared, therefore, that the decree absolute had been made before the application had been filed, so that, at the time when the application was filed, the relationship of husband and wife had ceased to exist; and the application was accordingly dismissed.

The latest judgments which discuss evidence necessary to support a claim for chattels by one spouse and alleged by the other to be a gift to him or her by the claimant are *Re Evans*, [1946] St. R. Qd. 20, and *See* v. *See*, (1946) 46 N.S.W. W.N. 181.

The unduly high prices for furniture now prevalent, and the widespread ownership of chattels by married women, combined with the prevalence of divorce and separation suits, and the increase in disputes between husband and wife in respect of ownership of property in the possession of one or the other, result in applications to the Courts under s. 23 of the Married Women's Property Act, 1908, becoming more common and of greater importance. Not only do these applications involve questions as to the ownership of chattels, but also questions concerning Post Office Savings Bank accounts, the ownership of shares or War Savings Certificates, the right to receive moneys under life insurance policies, or the respective rights of the parties under War-service allotments.

Since the above was in print, Mr, Goulding, S.M., had before him in *Clarke* v. *Clarke* (see *Post*, p. 61) an action in which a husband claimed from his wife the balance of moneys she had received from his military pay during his War-service. She had herself been earning sufficient to maintain herself during his absence, and she had banked in her own name the allotment moneys received by her. The learned Magistrate held that the money which a serviceman had compulsorily to allot out of his pay to his wife was not in the nature of a housekeeping allowance, as in *Blackwell* v. *Blackwell*, [1943] 2 All E.R. 579; but it was her own separate property paid to her for her own maintenance during her husband's Army service. The mere fact that the wife was earning sufficient to keep herself without that allotment, or that she was supplementing it by such earnings, did not alter the position. In coming to this decision, the learned Magistrate decided a point that was expressly left open in the judgment of Wynne-Parry, J., in *Sims* v. *Sims*, [1946] 2 All E.R. 138.

The order which a Court can make under s. 23 is " such order in respect to the property in dispute " as the Judge or Court hearing the application thinks fit. This is wide enough to include, in addition to an order providing for the return or delivery of specific articles, orders declaring ownership of property or shares, or for payment of a sum of money adjudged to be due; with no limit as to the amount of the claim. It appears that any such order is declaratory only, and cannot order the transfer of money or chattels in the hands of a third party to the successful spouse.

SUMMARY OF RECENT LAW.

ADMINISTRATION.

Administration *pendente lite*—Practice of Probate Division—Follows Practice of Chancery Division in appointing Receivers. *Re Bevan (deceased)*, *Bevan* v. *Houldsworth*, [1948] 1 All E.R. 271 (C.A.).

ALIENS.

Enemy Alien—Deprivation of Nationality by Decree of Enemy State—Recognition of Statelessness—Patents—Extension—" Subject of a foreign state "—Patents and Designs Act, 1907 to 1946, s. 18 (6). *Lowenthal* v. *Attorney-General*, [1948] 1 All E.R. 295 (Ch.D.).

CARRIERS.

Taxi-driver—Duty to carry to Destination. The plaintiffs, husband and wife, had employed the Nash Taxi Co. to convey them to 429 Newton Avenue. Evidence of the plaintiffs indicated that they had told the taxi-driver they wanted to go to Dr. Kobrinsky at that address. The defendant, a driver for his co-defendant, took it upon himself to advise the plaintiffs that there were two Newton Avenues. He took the plaintiffs to Newton Avenue in West Kildonan, adjoining Winnipeg. He proceeded to a point on Newton Avenue, beyond which, as he stated, he could go no further, because the road was impassable. He discharged his passengers, and, after collecting a fare, turned his cab and returned the way he had come. The husband plaintiff telephoned to the taxi company, with the result that shortly thereafter a second taxi picked up the plaintiffs at the address from which they had telephoned, and conveyed them to Dr. Kobrinsky's address, at 429 Newton Avenue, Winnipeg. Due to exposure to inclement weather upon the occasion in question, the female plaintiff, who, at that time, was suffering from asthma, contracted pneumonia, as a result of which she was confined to the hospital for some five weeks, and thereafter to her home for some time. The second taxi-cab was able to reach the plaintiffs without any real difficulty, and Thompson apparently only looked at the road, and made no real effort to ascertain its condition, or to see if he could proceed further. The defendant appealed from the Court's judgment in the plaintiff's favour, and the Court of Appeal dismissed the appeal. They said that taxi-cab proprietors are common carriers. In *Leslie's Law of Transport by Railway*, 402, was the following principle, applicable here: " The duty of a carrier of passengers under a contract of carriage which is free from special conditions is to carry the passenger to the agreed destination with due care, and in a reasonable time." In the present case, the defendants failed to perform that duty and there was no reason why it could not have been fulfilled. The illness of the female plaintiff was caused by the exposure she

experienced consequent upon the refusal of Thompson to drive any further. The law as to liability under those circumstances was settled in *McMahon* v. *Field*, (1881) 7 Q.B.D. 591, and *Grinsted* v. *Toronto Railway Co.*, (1895) 24 S.C.R. 570. *Mizenchuk* v. *Thompson*, [1947] 2 W.W.R. 852 (Court of Appeal, Manitoba. McPherson, C.J.M., Williams, C.J.K.B., Richards, J.A.).

CHARITIES.

Charitable Bequest—" Mission work "—Gift to Named Church for " mission work " in district—Bequest to take Effect on Death of Life Tenant—Church demolished and District laid waste by Enemy Action after Death of Testator—Date of Ascertainment of Practicability. *Re Moon's Will Trusts, Foale* v. *Gillans*, [1948] 1 All E.R. 300 (Ch.D.).

COMPANY LAW.

Points in Practice. *98 Law Journal*, 118.

CONSTITUTIONAL LAW.

The New Zealand Constitution (Amendment) Act, 1947 (11 Geo. 6, c. 4), received the Royal Assent on December 6, 1947.

CONTRACT.

Contracts for the Benefit of Third Parties (Pt. I). (J. G. Starke.) *21 Australian Law Journal*, 382.

CONVEYANCING.

Cancellation of Deeds and Delivery Up. (Master R. L. Moss.) *98 Law Journal*, 4.

Disclaimers. *98 Law Journal*, 103.

The Use and Misuse of Paper. *205 Law Times Jo.*, 18.

COOK ISLANDS.

Cook Islands Trade Dispute Intimidation Regulations, 1948 (Serial No. 1948/23).

CRIMINAL LAW.

Absent Defendants and Previous Convictions. *112 Justice of the Peace Jo.*, 37.

Adjournments *Sine Die*. *112 Justice of the Peace Jo.*, 37.

Indictment—Count charging Conspiracy—Substantive Offences also charged—Verdict of Guilty of Conspiracy, Not Guilty of Substantive Charges—Unreasonable Verdict—Conviction quashed—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (Criminal Appeal Act, 1945, s. 4 (1) (N.Z.)). The appellants, who were Police officers, were charged in an indictment containing nine counts. The first count was a charge of conspiracy to steal, the next four charged the appellants with four separate cases of robbery, and the last four charged, alternatively, larceny in the same four cases. The only evidence given by the prosecution was that of the four persons whom it was alleged that the appellants had robbed, or, alternatively, stolen from, together with evidence corroborating their testimony. The jury convicted the appellants on the first count of the indictment, but acquitted them on all the remaining counts. *Held*, That, as in the circumstances of the case the verdict of Guilty on the first count could be supported only if the jury believed the general story of the prosecution, and as, by their verdict of acquittal on the remaining counts, they must be taken to have found that they did not believe the general story, the verdict on the first count must be set aside as one that was unreasonable and could not be supported having regard to the evidence, within the meaning of s. 4 of the Criminal Appeal Act, 1907. Observations on the desirability of including in an indictment charging a specific offence a count for conspiracy to commit that offence where it is plain that that count must stand or fall with the other counts. (*R.* v. *Luberg*, (1926) 90 J.P. 183, referred to.) Observations on the desirability of the Court of Criminal Appeal being given power to order a new trial. *R.* v. *Cooper and Compton*, (1947) 112 J.P. 38 (C.C.A.).

Police Officer sent into Premises to commit Offence—Object the Detection of Offences by Others—Practice condemned. Observations as to the undesirability of a Police officer being sent into premises for the purpose of detecting offences by other persons, a practice which Lord Goddard, L.C.J., said the Court observed with concern and disapproval, and as wholly wrong. If Police officers committed offences in such circumstances, they should also be convicted and punished, for the order of their superior would afford no defence. *Brannan* v. *Peek*, (1948) 112 J.P. 10 (K.B.D.).

Trial—Plea—Plea of Guilty of Lesser Offence—Acceptance—Duty of Prosecutor. *R.* v. *Soanes*, [1948] 1 All E.R. 289 (C.C.A

DEATHS BY ACCIDENTS COMPENSATION.

Widow and Three Infant Children Dependants—All resident in China—Amount of Compensation paid into Court—Apportionment by Court—Accurate Information as to Dependency involving Difficulty, Delay, and Expense—Order in respect of Infants—Chinese Civil Code applied—Public Trust Office Amendment Act, 1913, s. 13. The amount of £1,125 was paid into Court in settlement of an action under the Deaths by Accidents Compensation Act, 1908, brought by the executors of a deceased Chinese in respect of an accident in which he lost his life. Application was made for an order that the moneys be paid through the Chinese Consul-General to the widow, who, with three infant children of the deceased, was resident in China. *Held*, 1. That, in the inherent jurisdiction of the Court to apportion the amount of compensation, in the absence of adequate information as a guide in making an allocation, and owing to the difficulty, delay, and expense involved in the procuring of accurate information, the amount be apportioned as one-half to the widow and one-sixth to each of the children. (*Walters* v. *Ryan*, [1933] N.Z.L.R. 821, applied.) 2. That, in view of the provisions of the Chinese Civil Code (that parents are the statutory agents of their infant children, that property accruing to an infant constitutes his separate property, and that the separate property of a child is managed by the father, and, where he cannot do so, by the mother), it was justifiable in the order to be made under s. 13 of the Public Trust Office Amendment Act, 1913, to order payment of the deceased's children's shares to the mother in the hope that she would administer properly the trust for the benefit of each child in the stated proportions. 3. That the executors at the time of payment to the widow should communicate to her the terms of the Court's order; and they were recommended that the payment be made through the Chinese Consulate-General in Wellington. *Chung Hong and Chung Tong* v. *Tremewan and Another*. (Wellington. March 4, 1948. Gresson, J.)

DEATH DUTIES (ESTATE DUTY).

Whole-life Policy on Life of Deceased taken out by her Father—Covenant by him in Subsequent Marriage Settlement to keep up Premiums—Premiums paid accordingly by Father during Daughter's Lifetime—Assignment of Policy by Deceased to Trustees. The term " interest " as used in s. 5 (1) (*g*) of the Death Duties Act, 1921, includes a life insurance policy. (*Attorney-General for Ireland* v. *Robinson*, [1901] 2 I.R. 67, and *Attorney-General* v. *Murray*, [1904] 1 K.B. 165, followed.) The principal object of that paragraph is to bring into the dutiable estate of the deceased an interest, on the purchase or provision of which he has subtracted from his means in his lifetime, and in respect of which a beneficial interest arises or accrues on his death by survivorship or otherwise. The paragraph contemplates that the interest which produces the beneficial interest on the death is to be provided by one person only, the deceased, whether alone or in concert or by arrangement with any other person. There is no provision for apportionment of liability where the deceased has partly provided the means for producing such interest. (*Lethbridge* v. *Attorney-General*, [1907] A.C. 19, applied. *Adamson* v. *Attorney-General*, [1933] A.C. 257, distinguished.) Section 5 (1) (*f*) deals specifically with an insurance policy on the life of the deceased which is kept up for the benefit of a beneficiary, and it provides that, if the deceased has paid only a part of the premiums, a proportionate part of the proceeds of the policy must be included in deceased's dutiable estate. (*Attorney-General for Ireland* v. *Robinson*, [1901] 2 I.R. 67, distinguished.) If, either alone or in concert or by arrangement with the deceased, some other person purchases or provides the whole or part of the interest, the interest is outside s. 5 (1) (*g*). The interest is not provided by the deceased, where, though he has purchased or provided it for some period, he subsequently transfers it during his lifetime for adequate consideration. In determining whether the deceased did purchase or provide the policy, the Court, having regard to the legal nature of the transaction in question, ascertains whether the means of the deceased were used for the purpose of acquiring and maintaining the policy. *So held*, by the Court of Appeal, on appeal from the judgment of Cornish, J. *Held*, further applying the foregoing principles, 1. That, where, after a family settlement of property including an insurance policy on the deceased's life, the deceased had neither paid the premiums thereon nor provided the means therefor, but such premiums were paid by her father, the policy moneys payable on her death were not caught by s. 5 (1) (*g*) of the Death Duties Act, 1921, but (without deciding whether a commercial transaction for adequate consideration is outside the scope of s. 5 (1) (*j*)) such moneys were within s. 5 (1) (*j*) as a settlement of deceased's interest in the policy, being primarily a family arrangement, which would not

have been made with third parties. 2. That such moneys were not within s. 5 (1) (*j*) (*i*), as the settlement did not reserve to deceased any life-interest in the policy itself, but they were within s. 5 (1) (*j*) (*ii*) as the assurance of an annuity to the deceased was the consideration for the transfer of the deceased's interest in her policy. 3. That, accordingly, the Commissioner of Stamp Duties was entitled to bring into the dutiable estate of the deceased the value of the policy as at the date of the settlement. Appeal from the judgment of Cornish, J., allowed. *Commissioner of Stamp Duties* v. *Russell.* (Supreme Court. Wellington. 1946. July 15, 16. 1947. March 19. Cornish, J. Court of Appeal. Wellington. 1947. July 3, 4, 8, 9. 1948. January 30. Blair, J., Smith, J., Kennedy, J.)

Policy on Life of Deceased—Premiums thereon paid by Deceased's Father to whom Policy Mortgaged—No Substantial Equity—Father paying Premiums until Policy fully paid up, with Right to Deduct Same from Policy Moneys—Policy, subject to Mortgage, settled by Son not an "interest purchased or provided by the deceased" within s. 5 (1) (g) of the Death Duties Act, 1921, but "property comprised in any settlement" within s. 5 (1) (j) (ii)—Death Duties Act, 1921, s. 5 (1) (f) (g), (j) (i) (ii). A son mortgaged an insurance policy on his life to his father to secure a sum of £687 and any further advances and interest thereon, and also on premiums paid by the father. By a subsequent deed of settlement, the son settled his policy in favour of such of his brothers and sisters and their issue living at the date when the policy moneys were received by the trustees. The terms of the settlement provided that the father would pay any further premiums until the policy was fully paid up, but subject to a right to deduct the same and all premiums previously paid by the father but at a reduced rate of interest from the moneys payable in respect of the policy. In consideration of this settlement by the son, the father settled a sum of £20,000 on the son for life, and after his death upon his issue.

On a case stated under s. 62 of the Death Duties Act, 1921, and moved into the Court of Appeal for hearing and determination, *Held*, 1. That the principles enunciated in *Commissioner of Stamp Duties* v. *Russell, supra*, were applicable. 2. That the son, the deceased, in connection with whose estate the questions as to duty arose, did not provide the policy for the purpose of s. 5 (1) (*g*) of the Death Duties Act, 1921, because his life interest in the sum of £20,000 settled by his father was more than full consideration for the assignment of his rights in the policy, and also, after the settlement, the deceased did not pay any premiums due on the policy or provide the means for payment of same. (*Lethbridge* v. *Attorney-General*, [1907] A.C. 19, followed.) 3. That, without deciding whether a commercial transaction for adequate consideration is outside the scope of s. 5 (1) (*j*), the settlement by the son of the life policy was a settlement by deceased within s. 5 (1) (*j*), being not a commercial transaction for value, but a transaction which would not have been made between strangers, and the motive for which was family regard. 4. That s. 5 (1) (*j*) (*i*) did not apply, as no interest for life in the son's equity of redemption in the policy was reserved to the son under the settlement. 5. That s. 5 (1) (*j*) (*ii*) did, however, apply, as the son's settlement of the equity of redemption in the policy was accompanied by his life interest in the settlement of the sum of £20,000 ;and, therefore, the value of the property which was transferred by the son under the settlement—namely, the value of the policy at the date of the settlement—less the amount then owing under the mortgage, was dutiable under s. 5 (1) (*j*) (*ii*). (*Commissioner of Stamp Duties* v. *Begg*, [1916] G.L.R. 248, applied.) Per *Blair*, J., The settlement was not caught by s. 5 (1) (*g*) of the Death Duties Act, 1921, because the interest contributed thereto by deceased was merely nominal. *Craven* v. *Commissioner of Stamp Duties.* (Court of Appeal. Wellington. 1947. July 8, 9. 1948. January 30. Blair, J., Smith, J., Kennedy, J.)

DESTITUTE PERSONS.

Husband and Wife: Interim Orders. *112 Justice of the Peace Jo.*, 52.

DIVORCE AND MATRIMONIAL CAUSES.

Application for Rehearing; and Applying for Maintenance out of Time. *205 Law Times Jo.*, 19.

Jurisdiction—Marriage in China—Marriage contracted since Chinese Law prohibited Polygamy and Concubinage—Jurisdiction to dissolve such Marriage. The Supreme Court has jurisdiction to dissolve the marriage of parties contracted in China since January 24, 1931, the date on which there came into force the law governing marriage contained in Book IV of the Civil Code of the Republic of China, which prohibits bigamy, allows only monogamy, and treats concubinage as a matrimonial offence. (*Public Trustee* v. *Ng Kwok Shi*, (1913) 16 G.L.R. 405, distinguished.) *Wong* v. *Wong and Chan.* (Auckland. 1948. February 20; March 4. Fair, J.)

Practice—Restitution of Conjugal Rights—Plea of Justification—Right to begin. *Hewitt* v. *Hewitt*, [1948] 1 All E.R. 242 (C.A.).

Variation of Settlements—Separation Deed—Wife's Covenant to pay Husband £5 per week—Husband's Adultery—Decree Absolute—Variation of Deed—Discretion of Court. *Tomkins* v. *Tomkins*, [1948] 1 All E.R. 237 (C.A.).

EDUCATION.

Post-primary Teachers' Bursaries Regulations, 1948 (Serial No. 1948/28).

EVIDENCE.

Admissibility of Statements in the Presence of a Party. *21 Australian Law Journal*, 387.

Chinese Law—Translation of such Law by Translators including Two Barristers in Text-book for Professional Use—Proper Source of Reference for Ascertainment of Chinese Law—Evidence Act, 1908, s. 40. A translation into English of the Chinese Civil Code, the translators including two members of the Shanghai Bar Association, with an introduction by the Chairman of the Civil Codification Commission, and intended for professional and responsible use, was held under the authority of s. 40 of the Evidence Act, 1908, to be a proper source for reference for ascertaining the laws in force in China. *Wong* v. *Wong and Chan.* (Auckland. March 4, 1948. Fair, J.)

HUSBAND AND WIFE.

Compulsory Basic Allotment to Wife from Military Pay—Wife's Separate Property for her Maintenance. Moneys compulsorily allotted by a soldier out of his pay to his wife are not in the nature of a housekeeping allowance so that the savings from it are his, but are her own separate property paid to her for her own maintenance during her husband's Army service. The fact that they are her separate property is not altered by her earning sufficient to keep herself without that allotment, or supplementing it by her earnings. (*In the Goods of Tharp, Tharp* v. *Macdonald*, (1878) 3 P.D. 76, applied. *Blackwell* v. *Blackwell*, [1943] 2 All E.R. 579, distinguished. *In re Sims*, [1946] 2 All E.R. 138, considered.) *Clarke* v. *Clarke.* (Wellington. March 9, 1948. Goulding, S.M.)

Maintenance—Both Parties earning—Calculation of Amount. The rule whereby a wife was awarded as maintenance not more than one-third of the joint income of husband and wife less the wife's own income is not applicable where both parties are at work and earning, and does not constitute a standard for justices to observe. The duty of justices is to make an award which is reasonable in the circumstances, and, although s. 5 (c) of the Summary Jurisdiction (Married Women) Act, 1895, requires them to have regard to the means of both parties, it does not require them to have regard to no other circumstance. (Dictum of Lord Merrivale, P., in *Jones* v. *Jones*, (1929) 94 J.P. 30, 31, followed.) *Ward* v. *Ward*, (1947) 112 J.P. 33 (P.D.A.).

Married Women's Property—Application made after making of Decree Absolute between Parties—No Jurisdiction to entertain Same—Position where Application filed after Decree Nisi but not heard until after Decree absolute. After a decree absolute for divorce has been made between the parties, no application by either of them under s. 23 of the Married Women's Property Act, 1908, can be entertained. *Aliter*, When an application is made between the making of the decree *nisi* and the making of the decree absolute, as the Court has power to carry the matter to a conclusion. (*Hichens* v. *Hichens*, [1945] P. 23; [1945] 1 All E.R. 451, followed; *Telford* v. *Telford*, [1934] N.Z.L.R. 882, considered; and *Joseph* (*otherwise King*) v. *Joseph*, [1909] P. 217, mentioned.) *Andrew* v. *Andrew.* (Christchurch. February 20, 1948. Lawry, S.M.)

INCOME TAX.

Trustee and Beneficiary—Income derived by Trustee payable to Beneficiary as Annuity from Date of Deceased's Death—Income Retained by Trustee for Ten Years on Account of Contingent Liabilities—Payment in Full in Eleventh Year of Total Annuity for Previous Ten Years—Whether Beneficiary taxable thereon for that Year. Arrears of an annuity, on their receipt by the annuitant, cannot be included in assessing the annuitant's assessable income for income tax when they are paid out of income derived by a trustee in a previous income year, notwithstanding that, as a result of the trustee having been assessed under s. 102 (*b*) on the same income, the tax payable by the trustee is treated by the trustee as an expense chargeable against residue; because the income, having been taxed in the trustee's hands, could not again be taxed in the

hands of the annuitant, since s. 102 of the Land and Income Tax Act, 1923, is a special code in itself for the taxation of income derived by a trustee, and, once income is taxed under either method described in that section, it cannot be taxed when it comes into the hands of a beneficiary. *Commissioner of Taxes* v. *Luttrell.* (Christchurch. February 26, 1948. Fleming, J.).

Points in Practice. *98 Law Journal*, 104.

INNKEEPER.

Duty to supply Refreshment to Traveller—Reasonable Excuse for Refusal—Question of Fact—Right to Reserve Tables. An innkeeper is bound to supply food and lodging to a traveller unless he has reasonable excuse for refusal. What is a reasonable excuse is a question of fact. If an innkeeper has no food in his inn at the time of the request, he is not bound to send out to procure it, nor is he obliged to allow the whole of the food in the inn to be consumed forthwith because a request is made to him by a traveller to be supplied with food. The innkeeper is entitled to keep back food for a later meal, for breakfast next day, or to meet the requirements of his family and servants, if such retention is reasonable in all the circumstances. It is not illegal for an innkeeper to reserve tables for prospective guests and to refuse to serve anyone who has not made a reservation, even if he has still food in the inn, unless a jury, on full consideration of all the facts, regard such a refusal as unreasonable. *R.* v. *Higgins*, (1947) 112 J.P. 27 (C.C.A.).

JUDICIAL CHANGES (1947).

House of Lords: Lord Wright retired; the Rt. Hon. J. C. MacDermott, of the High Court of Northern Ireland, appointed in his place; and Lord Oaksey and Morton, L.JJ., also appointed Lords of Appeal in Ordinary.

Court of Appeal: Wrottesley, J. (King's Bench), and Evershed, J. (Chancery Division), appointed to the Court of Appeal.

High Court of Justice: King's Bench Division: Charles, J., senior Judge, and Macnaghten, J., retired; Byrne, J., transferred from the Probate, Divorce and Admiralty Division; and Messrs. F. E. Pritchard, K.C., D. L. Jones, K.C., and G. Streatfeild, K.C., appointed. Chancery Division: Mr. C. E. Harman, K.C., appointed. Probate Division: Judge Finnemore, of the County Court Bench, appointed.

LANDLORD AND TENANT.

Forfeiture—Relief—Conditional Relief—Breach of Covenant—House converted into Flats—Impracticability of Reinstatement—Measure of Damages. *Duke of Westminster* v. *Swinton* (*Adams, Third Party, and Williams, Fourth Party*), [1948] 1 All E.R. 248 (K.B.D.).

Jurisdiction—Action for Possession—Tenement—Cottage being on Half-acre being Part of Twenty-two acres of Farm Land—Government Valuation of Whole Area—Extent and Value of Tenement not sufficiently and clearly defined by Valuation Roll—Magistrates' Courts Act, 1928, s. 27 (f) (ii). A farm-employee occupied, rent-free, as part of the conditions of his service, a tenement consisting of a cottage with half an acre of land surrounding it. This formed part of an area of 22 acres, 2 roods, 29 perches, owned by the employer, and appearing in the District Valuation Roll as: "Capital value: £1,795; unimproved value: £1,020; and value of improvements, £775." On termination of his employment, the occupant of the tenement refused to give up possession of the cottage. In an action for possession, *Held*, That the Court had no jurisdiction to entertain the action, because the extent and value of the tenement of which possession was sought was not sufficiently and clearly defined or established by the Valuation Roll; and the Court was not at liberty to draw inferences of fact as to the value of the tenement in order to give itself jurisdiction under s. 27 (*f*) (*ii*) of the Magistrates' Courts Act, 1928. *Elston* v. *Rose*, (1868) L.R. 4 Q.B. 4, distinguished.) *Watson* v. *Michie.* (Feilding. February 11, 1948. Coleman, S.M.).

Licensee—Farmer's Cottage occupied by Stockman. Appeal by way of case stated by the appellant, a stockman, against an ejectment warrant issued by the Stafford Justices under the Small Tenements Recovery Act, 1838. The appellant was engaged in September, 1946, by the respondent, a farmer, at a weekly wage to look after the stock. A house was rented for the appellant by the respondent, rent and rates free, and the appellant was required to live there for the purpose of his employment. The respondent terminated the appellant's engagement by a notice expiring on August 16, 1947, and required the appellant to vacate the house, which was needed for occupation by another employee of the respondent whom he had engaged. The appellant did not vacate the premises, and the respondent thereupon asked the Justices to issue a warrant of ejectment. The Justices rejected the appellant's contention that he was not a tenant but a licensee. They held that the case was similar to *Smith* v. *Hughes* ((1930) 169 L.T. Jo. 399); that a tenancy existed; and that they had, therefore, jurisdiction to issue the warrant. The appellant appealed. *Held*, That the case was within the principles stated in *Dover* v. *Prosser* ([1904] 1 K.B. 84), and the appellant's occupation was not under a tenancy but by license. The Court was not saying, however, that in every case where a farmer had a cottage and wanted an employee to live there for convenience the Justices had no jurisdiction to issue a warrant; but where it was clearly a service occupancy, such as that of a gardener who was required to occupy a cottage in his employer's garden, or that of a chauffeur who was required to live over the garage, then there would be no tenancy. *Ramsbottom* v. *Snelson*, (1948) *98 Law Jo.* Newsp. 49 (K.B.D. Lord Goddard, L.C.J., Humphreys and Singleton, JJ.).

Notice to Quit—Validity—Agreement for Three Months "and afterwards from year to year"—Tenancy Determinable on Three Months' Notice at any time. *H. and G. Simonds, Ltd.* v. *Heywood*, [1948] 1 All E.R. 260 (K.B.D.).

Termination of Tenancies. *21 Australian Law Journal*, 389.

MILITARY LAW.

The Military Justice System. *205 Law Times Jo.*, 16.

MUNICIPAL CORPORATION.

By-law—Meetings—By-law providing No Meeting to be held in (inter alia) *Any Public Reserve "except with the prior written authority of the Town Clerk"*—Ultra Vires—*Unreasonable.* Clause 62 (as amended) of Part I of the Wellington City By-laws (dealing with streets and public places) made it an offence on the part of any one who "(*a*) organises, holds, or conducts or attempts to hold or conduct any public meeting, gathering or demonstration or make any public address or attempts to collect a crowd in along or upon any street, private street' public place or public reserve in the City except with the prior written authority of the Town Clerk." On a prosecution charging each of three defendants with the offence of conducting meetings in Dixon Street Reserve, vested in the Wellington City Corporation, without prior written authority of the Town Clerk, *Held*, 1. That the by-law in question is *ultra vires* the City Corporation in that a delegation to the Town Clerk of the power to grant permits for public meetings, &c., on all streets, public places, and reserves, is so wide and general that it ceases to be a delegation of something to be done "in any particular case" within the meaning of those words in s. 13 (1) of the By-laws Act, 1910, and becomes a complete delegation to the Town Clerk of all power. (*Staples and Co., Ltd.* v. *Mayor, &c., of Wellington*, (1900) 18 N.Z.L.R. 857, *Bremner* v. *Ruddenklau*, [1919] N.Z.L.R. 444, and *Munt Cottrell and Co., Ltd.* v. *Doyle*, (1904) 24 N.Z.L.R. 417, followed; and *Stanley* v. *Scott*, [1935] N.Z.L.R. s. 15, distinguished.) 2. That, for the same reasons, the by-law is "unreasonable" within the meaning of that term as used in s. 13 (2) of the By-laws Act, 1910. *Semble*, That the by-law in question is unreasonable, and might well be a source of oppression, in view of the common-law right of freedom of speech and opinion at public meetings and gatherings, in leaving the right to grant permits under it to the unfettered discretion of the Town Clerk. *Hazeldon* v. *Barrington*; *Same* v. *Birchfield*; *Same* v. *McAra.* (Wellington. March 3, 1948. Goulding, S.M.)

NEGLIGENCE.

Defective Premises—Servant of Landlord in Occupation—Whether Tenant—Liability of Landlord. Witney was the owner of a summer resort, and employed his co-defendant Smythe to manage the property. Smythe occupied a store building on the property on which there was a balcony protected by a railing. The plaintiff visited the resort in August, 1945, but, because there was not a cottage available for her to rent, was given a room on the second floor of the store building. While on the balcony, she leaned against the railing and it collapsed, and she fell to the ground. At the trial, the action was dismissed aginst both defendants, against Witney on the ground that the plaintiff's contract was with Smythe, who occupied the store building for his own benefit and sublet to the plaintiff, against Smythe on certain admissions on the pleadings which precluded recovery unless they were amended. The plaintiff appealed. The Court of Appeal dismissed the appeal. There was evidence to support a finding of negligence in the construction of the railing. There was, however, no action against Witney in contract, because there was no privity, and an action in tort would not lie. Smythe was the servant of Witney

in the management of the property, but, as far as the store building was concerned, he was a tenant of Witney. Where a person is permitted to occupy premises as a privilege, or as part payment for services, he is a tenant. Where he is required to occupy for the due performance of his duties, he occupies as a servant: *Reed* v. *Cattermole*, [1937] 1 All E.R. 541, 22 *Halsbury's Laws of England*, 2nd Ed. 117. Smythe being a tenant, Witney was not liable to sub-tenants or invitees of the tenant: *Cavalier* v. *Pope*, [1906] A.C. 428, *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, *Otto* v. *Bolton*, [1936] 1 All E.R. 960, and *Davis* v. *Foots*, [1940] 1 K.B. 116. The principle of *Donoghue* v. *Stevenson*, [1932] A.C. 562, did not apply, as the cases cited showed. As to Smythe, who was not represented on the appeal, the statement of claim disclosed no cause of action against him. *Couture* v. *Witney*, [1947] 4 D.L.R. 765. (Court of Appeal. Saskatchewan. Martin, C.J.S., Gordon, J.A., Macdonald, J.A., Anderson, J.A.)

Running-down Action—Withdrawal from Jury. The defendant's truck-driver saw the plaintiff cyclist approaching an intersection on the left of the truck, and he assumed that the plaintiff would give way to him. The defendant veered to his right to give the plaintiff more room as the latter changed direction to his right. It was the duty of the truck-driver (despite the plaintiff's negligence) to try to avoid a collision. As the learned Judge was of the opinion that no jury of reasonable men could attach any negligence to the truck-driver for what he did in the circumstances, he withdrew the case from the jury, on the ground that there was no evidence of negligence to go before them; and he nonsuited the plaintiff. *Briggs* v. *Perkins*. (Greymouth. March 1, 1948. Fleming, J.)

NUISANCE.

Trees and Highways. *112 Justice of the Peace Jo.*, 22.

OBITUARY.

Viscount Sankey, P.C., G.B.E., formerly Lord Chancellor of England. (February 8.)

Sir Isaac Isaacs, P.C., G.C.M.G., formerly Chief Justice of the High Court of Australia. (February 16.)

PATENTS.

Infringement—Validity of Patent—Novelty dependent on Anterior Discovery—Ambiguity and Obscurity in Specification—Indication of Inventive Step—Width of Claim—Limitation of Claim by reference to Plan. *Raleigh Cycle Co., Ltd.* v. *H. Miller and Co., Ltd.*, [1948] 1 All E.R. 308 (H.L.).

PRACTICE.

Action in Tort: Third Party Procedure. *21 Australian Law Journal*, 392.

Costs—Security for Costs—Order against Defendant—Plaintiff and Defendant out of Jurisdiction—Plaintiff ordered to give Security. *Naamlooze Vennootschap Beleggings Compagnie "Uranus"* v. *Bank of England*, [1948] 1 All E.R. 304 (Ch.D.).

Costs—Two Defendants—One Successful—One Unsuccessful. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, under R.S.C., O. 16, r. 7 [R. 64 of the Code of Civil Procedure], join several defendants in the same action for the purpose of claiming relief against them severally or in the alternative. In an action for damages for negligence, the plaintiffs so joined the two defendants and succeeded against the second defendants; they failed, however, in their action against the first defendants. The plaintiffs next applied for an order that the costs of the first defendants should be paid by the second defendants, which is a special type of order commonly known as a "Bullock order," deriving its name and origin from the ruling of the Court of Appeal in *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264. It was submitted on their behalf that, if a plaintiff reasonably exercised the right conferred by R.S.C., Ord. 16, r. 7, he was entitled as of right, and not only in the exercise of the discretion of the Court, to such order against the defendant who was found ultimately to be liable; and the test to be applied was simply whether it was reasonable for the plaintiffs to believe, at the beginning of the action, that they had a right of action against either or both of the defendants. In support of this argument, reference was made to a case, based on similar facts, in which a "Bullock order" was granted—namely, *Besterman* v. *British Motor Cab Co., Ltd.*, [1914] 3 K.B. 181, 191. The Court rejected that contention. Lord Greene, M.R., in the course of his judgment, said that R.S.C., O. 16, r. 7, merely gives an option to the plaintiff in the circumstances stated to avail himself of the rule, and the result of his doing so is, in point of costs, not affected by the rule at all, but is governed by the general rules as to costs. If a plaintiff exercises the right conferred on him by the rule, it cannot be said that he is acting in a way that the rules do not authorize; but, conversely, it cannot be said that the fact that he has so acted in any way entitles him to a special order as to costs. Lord Greene, M.R., added that he read the observations of Swinfen Eady, L.J., as relating to the facts of the *Besterman* case only, and not as intending to lay down a general rule of law; if that were what the passage meant, then, with respect, he would not agree with it. In the result it was held that whether or not a special order should be made was a matter of discretion for the Judge, and the fact that, when the action was started, it was a reasonable course for the plaintiff to join the successful defendant did not entitle the plaintiff to a special order as to costs if, in the opinion of the Judge, it was not reasonable that the unsuccessful defendant should be penalized. It followed, therefore, that the granting of a special order as to costs depends solely on the merits of each case. *Hong* v. *A. and R. Brown, Ltd.*, [1948] 1 All E.R. 185.

Payment into Court—Acceptance in Error—Mistaken Interpretation of Pleadings—Power of Court to grant Relief. *S. Kaprow and Co., Ltd.* v. *Maclelland and Co., Ltd.*, [1948] 1 All E.R. 264 (C.A.).

Practice and Procedure in England in 1947. *98 Law Journal*, 89, 117.

RATES AND RATING.

Urban Farm Land—Objections—Objection on Ground that Land is not "farm land"—Objection not in Writing—Land without Sewerage System—Substantial Part of Income from Land not derived from Use for Prescribed Farming Purposes—Whether such Land within Definition of "Urban farm land." When an objection is made to a farm-land list under s. 6 of the Urban Farm Land Rating Act, 1932, on the sole ground of the unfairness or incorrectness of the special rateable value therein, but there is no objection in writing against the farm-land list, any objection at the hearing upon the ground that the land was incorrectly inserted in the list, is not a "relevant matter" within the meaning of that term as used in s. 13, since the Court's jurisdiction is limited by s. 13 (1) to alteration of the farm-land list only in respect of any matter set out in a written objection. *Semble*, 1. Land is not within the definition of "urban farm land" in s. 2 as being "used exclusively or principally" for one of the prescribed farming purposes set out in para. (*b*) of that definition unless the person using the land for any such purpose derives the whole or a substantial part of his income therefrom. 2. Land is not within the definition of "urban farm land" in s. 2 as being "fit for subdivision for building purposes or likely to be required for building purposes within a period of five years" (as those words appear in para. (c) of that definition) unless in the meantime such property be connected with the sewerage and drainage system of the borough in question. *In re Aitken and Others.* (Mosgiel. October 31, 1947. Dobbie, S.M.)

RABBIT-DESTRUCTION.

Rabbit-destruction (Kawhia) Rabbit District Regulations, 1948 (Serial No. 1948/24).

RENT RESTRICTION.

Devolution of Tenancies subject to Rent Restriction Acts. *98 Law Journal*, 101.

Furniture and Attendance. *205 Law Times Jo.*, 19.

RES JUDICATA.

Decision of Court of Appeal—Overruled by House of Lords in Subsequent Case—Right to Reconsideration *de novo*. *Re Waring (deceased)*, [1948] 1 All E.R. 257 (Ch.D.).

SALE OF GOODS.

Sale by Description—Breeding Ewes sold as "genuine age-marked five-year ewes"—Sale by Auction subject to Standard Conditions of Sale—Ewes actually from Differing Ages Four-years to Seven-years—Descriptive Statement Substantive Part of Contract—Breach of Warranty—Measure of Damages. H. authorized an auctioneering company to sell 300 "5-year age-marked ewes," and they were so described by the company in its sale advertised, and offered at the sale. W. bought 199 of them for £1 6s. each, relying on their being genuine age-marked 5-year ewes, as described. The sale of these sheep and all other sales by the auctioneering company on that day were expressly made subject to the rules, terms, and conditions of the Live Stock Auctioneers' Association. Clause 5 of the conditions of sale provided that the auctioneer, or his clerk, was constituted the agent of the successful bidder to sign the sale-book or memorandum of agreement as purchaser and that such signing bound both vendor or purchaser. Clause 6 was

as follows: "No guarantee or warranty shall be given with any stock sold under these conditions as to sex, age, condition, description, title or otherwise howsoever, nor shall any guarantee or warranty be implied from any affirmation or statement made at the time of the sale or from any of the circumstances of the sale. But in all cases where a guarantee or warranty is intended, the same shall attach and be enforceable only if reduced to writing before delivery of the stock and signed by the vendor or by the auctioneer acting as agent for the vendor and the absence of such writing shall be conclusive evidence in case of dispute that no guarantee or warranty was given or intended." Clause 7 provided that no error or misdescription as to title, age, number, sex, &c., should annul the sale, but compensation should be allowed by the vendor to the purchaser (in any such case) as the auctioneer, acting as arbitrator, might fix. On later inspection, after removal from the sale-yards, W. found the ewes he had purchased were of differing ages ranging from four years to seven years. H. failed to comply with the auctioneer's requests to inspect the sheep. W. accordingly resold the sheep by auction, and they averaged £1 4s. 6d. a head. Good five-year ewes were then worth about £1 8s. W. could have sold them, if they had been as described, by private sale at £1 8s. 6d. a head. The entries in the sale-book, incorporating the conditions of sale where the description of the sheep was entered as "A.M. [age-marked] 5-year ewes," and duly signed by the auctioneer as agent for both parties, constituted a written memorandum of the sale sufficient to comply with the Sale of Goods Act, 1908. In an action claiming damages for the loss or re-sale by auction, droving fees, grazing, and loss of profits under the contract of re-sale which fell through, *Held*, 1. That the defendant's statement concerning the age of the ewes was intended to influence prospective or possible buyers, and was intended to be, and, in fact, was, an express term of the contract of sale: it did not comprise independent and collateral representations concerning the subject-matter of the contract, but was a descriptive statement embodied in the written memorandum and forming a substantive part of the contract and a condition precedent. (*Behn* v. *Burness*, (1863) 3 B. & S. 751; 122 E.R. 281, *Riddiford* v. *Warren*, (1901) 20 N.Z.L.R. 572, and *Bentsen* v. *Taylor, Sons and Co.*, [1893] 2 Q.B. 274, referred to.) 2. That, the plaintiff having elected to treat the breach of condition as a breach of warranty, as he was entitled, under the Sale of Goods Act, 1908, to do, the defendant was liable in damages. 3. That the measure of damages for such breach was the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach; and it did not include an amount claimed as loss of profit under the agreement the plaintiff had for re-sale of the ewes, which fell through owing to the sheep not according to the defendant's description. *Wilson* v. *Harris*. (Ohakune. February 4, 1948. Coleman, S.M.)

TORT.

Refresher Article. *98 Law Journal*, 5.

TRUSTS AND TRUSTEES.

Appointment of New Trustees—Concurrence of Continuing Trustee—Refusal to Concur—Enforcement by Beneficiaries of Concurrence—Trustee Act, 1925 (*c.* 19), s. 36 (1) (*b*). *Re Brockbank (deceased)*, *Ward* v. *Bates*, [1948] 1 All E.R. 287 (Ch.D.).

WESTERN SAMOA.

Samoa Amendment Act, 1947. Commencement Order, 1948 (Serial No. 1948/27). The Act is proclaimed as having come into operation on March 10, 1948.

Western Samoa *Fautua* Appointment Regulations, 1948 (Serial No. 1948/25).

Western Samoa Legislative Assembly Regulations, 1948 (Serial No. 1948/26.)

WILL.

Construction—"I exonerate all people from the repayment of moneys owing to me at the time of my death"—Secured and Unsecured Debts owing to Testatrix. *Re Coghill*, [1948] 1 All E.R. 254 (Ch.D.).

Gift of Income of Residue to Wife during Widowhood—Effect of Annulment of Second Marriage. A summons was taken out by the trustees of the will of the testator to determine the question whether the testator's widow, who had contracted a second marriage in 1942, which was declared to be null and void by a final decree of the Divorce Division on March 31, 1947, on the ground of the incapacity of the husband to consummate the marriage, was to be treated for the purposes of the will as still being the widow of the testator, and entitled, as she claimed, to the whole, or to only one-half, of the income of the estate. The sole question was whether the widow was entitled to the income from and after the date of the decree of nullity. *Held*, That, having regard to the form of that decree, the second marriage must now be treated as void for all purposes, with the result that Mrs. Dewhirst could say that since the date of the annulment she was the widow of the testator. She was, therefore, entitled to the whole of the income. *Re Dewhirst*, *Flowers* v. *Dewhirst*,, (1948) *98 Law Jo.* Newsp., 49 (Ch.D.).

WORKERS' COMPENSATION.

"Arising out of and in the course of the Employment"—Accident within Company's Premises—Workman on way to "clock in" before starting Work—Accident where Public allowed to cross Company's Premises, although no Right-of-Way—Workmen's Compensation Act, 1925 (*c.* 84), s. 1 (1). *Hill* v. *Butterley Co., Ltd.*, [1948] 1 All E.R. 233 (C.A.).

Coronary Thrombosis—Accident at Work—Subsequent Heart Attack—No Casual Connection. The plaintiff had a heart attack at his home on May 12, 1945. He had been working on a building job from which he had returned home on the previous day. He alleged that the heart attack was the result of personal injury which had occurred in the course of his work a few days earlier. It was common ground that the plaintiff had coronary artery disease before that accident; that a breakdown such as the plaintiff suffered results in the ordinary course of the diseases, but, on the theory of the school of medical thought which says that effort can initiate or precipitate the breakdown, the medical evidence did not show causal relationship between the work and the breakdown. The plaintiff was nonsuited. *Brandon* v. *Brandon and Silvester* (Wellington. February 24, 1948. Ongley, J. (Comp. Ct.)).

Lumbar Intervertebral Disc—Accident due to Fall in 1926—Payment of Weekly Compensation for Six Weeks—Claim for Compensation for Subsequent Permanent Injury. The plaintiff on June 30, 1926, while at work strained the muscles over his right hip as he stepped back into a tin of oil and turned quickly to avoid falling. He was off work for six or seven weeks, and was paid compensation. He returned to work. Nothing more was heard by his employers or their insurers until, on September 19, 1945 (some nineteen years later), he applied for leave to commence an action claiming the maximum amount of compensation, alleging continuance of his incapacity from time to time since the accident, as the result of a diseased or damaged fourth lumbar intervertebral disc and a ridge of new bone formation resulting from the accident of June 30, 1926. The plaintiff's evidence was definite that he was off work from time to time, but indefinite as to when and how long; and there was no corroborative evidence as to his being off work. *Held*, 1. That the plaintiff's evidence was too indefinite (and the Court could not act on evidence that was not anything more than a guess), since the plaintiff could not show with certainty when he was off work and for how long. 2. That the evidence was too indefinite to show a continuity of symptoms to connect the fall in 1926 with the condition found in 1945. 3. That the evidence failed to show (*a*) that the plaintiff did not know the accident was the cause of the injury, or (*b*) that he thought the injury was trivial. Plaintiff nonsuited. *Ridley* v. *British Traders Insurance Co., Ltd.* (*as indemnifier of Hudson Concrete Co., Ltd.* (*defendant company, wound up in April*, 1934). (Auckland. February 17, 1948. Ongley, J. (Comp. Ct.)).

UNIVERSITY OF NEW ZEALAND.

Certificate of Proficiency Examinations.

Since the new regulations governing examinations for Certificates of Proficiency were given publicity, the University has received a number of protests at a change in regulations which, though it was known to persons within the University, was totally unexpected by many students outside the University who were studying for qualifications which include Certificate of Proficiency passes.

The Committee of the Senate has given consideration to the hardship involved for those persons and has resolved that during the present year entries will be received for Certificate of Proficiency examinations under the regulations which were current during 1947. In the meantime, the University will consider whether the new regulations should be fully enforced during 1949.

EVIDENCE OF AN ACCOMPLICE.

A Reply to "Ilex."

By A. K. North, K.C.

In these pages (*Ante*, p. 6), there appeared an article by "Ilex" in which he reviewed the judgment of Callan, J., in *Whillans* v. *Slater*, [1947] N.Z.L.R. 924, and reached the confident conclusion that Callan, J., was wrong, and that Christie, J., was right in declining to follow him in *Oxnam* v. *Ferguson* (not yet reported).

In my respectful submission, "Ilex" has not dealt with the issues adequately, nor do I think he has been quite fair to Callan, J., when he says: "What Callan, J., seems to have overlooked, if one may respectfully say so, is that he was himself sitting as a jury." On the contrary, I would have thought that the judgment most plainly showed that Callan, J., was acutely conscious of this fact, and never doubted that it was competent for him to convict; the only question was: should he convict? "Ilex" says that "principle and practice" called for a conviction, once the learned Judge said that he believed the evidence of the accomplice. I am not so sure.

In 1911, our Court of Appeal in *R.* v. *Reynolds and Peterson*, (1911) 30 N.Z.L.R. 801, considered the question of the proper direction to a jury where the Crown case rested on the uncorroborated evidence of an accomplice, and held that the rule that it was unsafe to act on the uncorroborated evidence of an accomplice was "in fact not a rule of law but a rule of common sense." In 1916, in view of the conflicting decisions in England, a very strong Court was specially constituted in the case of *R.* v. *Baskerville*, [1916] 2 K.B. 658, to review and restate the law applicable to the corroboration of the evidence of accomplices. Lord Reading, L.C.J., delivered the considered and unanimous judgment of the Court, in the course of which he said that the rule, "long a rule of practice, is now virtually a rule of law." In 1936, the Privy Council, in *Mahadeo* v. *The King*, [1936] 2 All E.R. 813, expressly approved of this statement.

It may, then, I think, be fairly said that the importance of the rule has, if anything, been more plainly recognized in later years. The case of *R.* v. *Beebe*, (1925) 19 Cr. App. R. 22, which was cited by Callan, J., was decided in 1925 and shows that it is the duty of a Judge to direct the jury that it is "always dangerous" to convict a person on the uncorroborated evidence of an "accomplice." Indeed, it may well be the duty of a Judge in particular cases to go further and inform the jury that it is unsafe to convict: see also *R.* v. *Cleal*, [1942] 1 All E.R. 203. The important point, however, which "Ilex," if I may say so, seems to have overlooked, is that it is nowhere said that in a particular case it may be proper for the Judge to direct the jury that they "ought" to convict if they are satisfied with the evidence. It is competent for them to do so, but they are not to be encouraged to do so. The following passage from the judgment of Lord Hewart, L.C.J., in *R.* v. *Beebe* (*supra*) I think makes this clear:

> It is quite clear when one looks at that enumeration of the various courses that nowhere is to be found directly or indirectly any reference to a case in which it might be the duty of the learned Judge to advise the jury in such a case that they ought to convict.

What, then, is the position of a Judge sitting without a jury? Plainly, he is obliged to give himself the same warning, and in the same terms. Should he then ignore that warning and proceed confidently on his own assessment of the honesty of the evidence of the accomplice? I think not. With great respect to Mr. Justice Christie, I would suggest that "principle and practice," if anything, called upon him to take heed of the warning. But, in my submission, it is unnecessary to vex oneself with what really savours of a problem in ethics, for, contrary to "Ilex," I do not think Callan, J., ever reached the stage of "conviction." The short extract given by "Ilex" from the judgment of Callan, J., does not put matters in true perspective. The statement, "I have a definite opinion that this particular purchaser is incapable of such depravity. I believe his evidence," occurs in the first paragraph of the judgment, and before Callan, J., considered the rule. The learned Judge then proceeded to say:

> No matter where I turn, I find myself compelled to acknowledge that my belief in the purchaser rests solely upon my impression of him. Were I to decide judicially that the purchaser is telling the truth, I know that, in reality, I would be resting solely upon my judgment of him as a human being, upon my opinion that he is incapable of acting so basely as he would be acting in this case if his testimony were false. But to decide in that way would be to accept his uncorroborated evidence. He is an accomplice. This was not disputed by counsel for the respondent. I am, I think, bound to remind myself that it is *always dangerous* to act upon the uncorroborated testimony of an accomplice. That is how I would be bound to put the matter to a jury, if there were a jury. It would not do to introduce exceptions or qualifications, such as that it is *generally* dangerous to convict on the uncorroborated testimony of an accomplice: *R.* v. *Beebe*. It is *always* dangerous. Am I, then, to take the great responsibility of disregarding the warning? I think not . . . The warning to be given and taken about accomplices is not merely to act with caution and suspicion and to hesitate *before* believing. It is stronger than that. It is that it is *always* dangerous to act on their uncorroborated testimony, which means that, although you believe, there is always danger that you may be mistaken in your belief. If I say that in this particular case I am confident that I cannot be mistaken, I thereby encourage Magistrates and juries to have similar confidence in their strong impressions, and to disregard warnings.

It is apparent, then, that in result the learned Judge having administered the warning, found himself short of conviction and unwilling to match his own belief against the emphatic warning which he was obliged to have regard to. This being the case, in my respectful submission, he very properly declined to convict.

I find, moreover, that this very question has been considered in Canada by the Appellate Court of Alberta: see *R.* v. *Ambler*, [1938] 3 D.L.R. 344, where McGillivray, J.A., in a judgment in which Harvey, C.J.A., concurred, said, at pp. 350-352:

> Now if it be dangerous for a jury to convict upon the uncorroborated evidence of an accomplice, it is, I venture to think, equally dangerous for a trial Judge to do so, and if it be quite wrong for a trial Judge to tell a jury (after a proper warning) that it is their duty to convict if they believe the accomplice, it cannot be the trial Judge's duty to convict because he happens to believe the accomplice. To say that a trial Judge should convict upon the uncorroborated evidence of an accomplice in every case in which he believes the accom-

plice, is to my mind to entirely disregard the rule . . . In my opinion the submission that a trial Judge should convict upon the uncorroborated evidence of an accomplice in every case in which he believes the evidence of the accomplice, cannot be entertained . . . To my mind, generally speaking, it would be a travesty of justice for a Judge, sitting as a Judge and jury, to solemnly instruct himself that it is dangerous to deprive any man of his liberty upon the uncorroborated evidence of an accomplice, and then proceed to do so. Acting judicially Judges surely do not generally do that which they are bound to tell others is dangerous for them to do . . . to be logical it must be said that if a trial Judge admittedly alive to the danger of convicting, to give effect to his own opinion and inclination in a particular case, chooses to accept the risk of doing that which is dangerous according to the experience and wisdom of the great jurists of the past he is at liberty to do so and the Court is powerless to interfere. To summarize the views expressed, I would say that a trial Judge may but should not convict upon the uncorroborated evidence of an accomplice.

Mr. Justice Callan at all events, then, appears to be in tolerably good company.

POSITIVE COVENANTS IN EASEMENTS.

The Legal Aspect.

By E. C. ADAMS, LL.M.

(*Concluded from p. 52.*)

It is true that a covenant may create an easement, but, if an easement is necessarily negative in its nature so far as the servient tenement is concerned, how, may it be asked, can a covenant *positive* in effect create an easement? *Rowbotham* v. *Wilson*, (1860) 8 H.L.Cas. 348, 11 E.R. 463, is a case of a covenant constituting an easement. There the owner of land covenanted that the owner of certain minerals under it should have the right to work the minerals without liability for letting down the surface. It was in fact the grant of a right to disturb the soil from below and alter the surface—a true easement, because the owner of the servient land (the surface owner) merely suffered the dominant owner to do something to the servient land which, apart from the grant, he, as the owner merely of the minerals, would not have the right to do. Lord Wensleydale said, at pp. 362; 469:

> If the words could only be read as amounting to a covenant it must be admitted that such a covenant would not affect the land in the hands of the assignees of the covenantor; but if they amount to a grant, the grant would be unquestionably good, and bind the subsequent owners of the surface.

It is submitted that in *Cameron* v. *Dalgety* the clauses which the Court had to consider were mere covenants, and not a grant of an easement; they were not negative in their nature, but imposed active duties on the covenantors to cleanse and maintain the water-race. The grant is set out in the New Zealand Law Reports, and many of the covenants, being of a negative nature, would undoubtedly run with and bind the servient tenement, as constituting a valid easement, but these negative covenants were not in issue.

There is, however, this aspect in *Cameron* v. *Dalgety*. The water-race ran partly through the land of the plaintiffs. Therefore the defendant's land had an easement over the plaintiff's land, and, accordingly, it appears to me that the defendants were liable to cleanse, maintain, and repair that part of the water-race which ran through plaintiff's land. And probably the plaintiffs could have said to the defendants, "Carry out your predecessors' covenants, or take your water-race off my land."

There remains to be considered the effect of ss. 184 and 187 of the Municipal Corporations Act, 1933. In a city, borough, or town district, no valid right-of-way can be created without the consent of the local body, and s. 184 authorizes the local body to impose *conditions* when so consenting. Some local bodies impose the condition that the owner of the *servient* tenement shall construct and maintain the right-of-way. Section 187 commands the District Land Registrar or Registrar of Deeds to make a note of these conditions so imposed, and, if the land is under the Land Transfer Act, they shall be deemed to constitute a registered *encumbrance*. Do these conditions bind subsequent owners of the servient tenement? It is submitted that they do not. Under the general law, they would not, and it is not to be supposed that the Legislature intended that they should bind servient land under the Land Transfer Act if they do not also bind servient land not under that Act: *Cator* v. *Newton*, [1940] 1 K.B. 415; [1939] 4 All E.R. 457. Secondly, the wording of s. 187 is quite different from s. 7 of the Fencing Act, 1908, which makes fencing covenants, if registered, binding on assigns. The conditions imposed by s. 178 constitute an *encumbrance*, and, where land is mortgaged, the transferee from a mortgagor, in the absence of a special covenant by such transferee, is not liable to be sued by the mortgagee on the covenants by the original mortgagor: *Ramsay* v. *Brown and Webb*, [1922] G.L.R. 71.

It is now time that I dealt with the two methods (previously referred to) by which in practice the servient tenement can be bound by positive covenants.

The first method is to create a rentcharge out of the servient tenement: see *Morland* v. *Cook*, (1868) L.R. 6 Eq. 252. This method is available to land under the Land Transfer Act: see *Mahony* v. *Hosken*, (1912) 14 C.L.R. 379. Resort should be made to Form F, Second Schedule, Land Transfer Act, 1915. But this method is not recommended. The encumbrance creating the rentcharge would constitute a serious blot on the title for the servient tenement, which might prove embarrassing if the owner sought a loan.

The better method appears to be for the grantor to covenant that on a transfer of the servient tenement he will obtain from the transferee a covenant that he (the transferee) will carry out the covenants, and will in his turn get a similar covenant from a transferee from him. On a transfer of the servient tenement, the grantor should obtain an indemnity from his transferee. A point sometimes overlooked in practice is that on these covenants the *original covenantors remain liable*. When the dominant tenement is transferred, the benefit of the covenant should be expressly assigned by the transferor to the transferee,

as was done in *Shayler* v. *Woolf*, [1946] 1 All E.R. 46; aff. on app., [1946] 2 All E.R. 54.

His failure to obtain an indemnity from his transferee proved expensive to the original covenantor in *Cator* v. *Newton*, [1940] 1 K.B. 415; [1939] 4 All E.R. 457. Newton obtained a land certificate for his land, and on the certificate an entry had been made stating that the land was subject to the covenant entered into in 1919 by Newton with the estate owner. In 1928 Newton transferred the land to one Bates by a transfer in the common form which referred to the registered title. The transfer did not contain any express covenant to indemnify Newton against his personal liability under the covenant in the deed of 1919. Subsequently, the then owner of the estate sued Newton for the sum of £6 8s. 1d., being a proportion of the maintenance charges for roads on that estate, and Newton joined Bates, claiming indemnity from him. It was held that Bates was not liable under the covenant, because Newton, when he transferred the land to Bates, had not taken an express covenant for indemnity. It was held also that, as the covenant was a positive one, the fact that it was entered on the Register did not extend the liability of the transferee, Bates.

In the course of this article we have been considering the liability for positive covenants of assigns of the *grantor*. Let us turn for a minute to the liability of the assigns of the grantee.

The rule appears to be that liability to repair and maintain can be made to run against the dominant tenement so as to bind assigns. In *Jones* v. *Pritchard*, [1908] 1 Ch. 630, Parker, J., said, at p. 638:

> There is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damages due to any want of repair.

Gale quotes the civil law as follows: "*In omnibus servitutibus refectio ad eum pertinet, qui sibi servitutem adserit, non ad eum cujus res servit.*" And *Stroud's Law of Easements*, 199, says:

> An easement to take water or drainage in pipes across the land of another not only confers upon the dominant proprietor a right but imposes upon him a duty to keep the pipes in repair. Liability for default is not dependent on negligence, but would arise even in the absence of any knowledge of the easement.

Then the liability to repair may be enforced by the grant of a *conditional* easement. It is permissible for the grantor of an easement to annex to the easement the qualification that the grantee and his successors in title must repair: *11 Halsbury's Laws of England*, 2nd Ed. 334.

A SECOND NUREMBERG TRIAL.

Judges tried for Subservience to the Fuhrer.

By H. F. von Haast.

A second Nuremberg trial has recently concluded, perhaps of even greater significance than that of the great war criminals, for it sounds a warning as to what happens in a bureaucracy when the independence of the Courts is sapped and Judges become servants of the bureaucratic state or the powers that should be exercised by them are transferred to the Executive.

The trial was by a United States Military Tribunal, which convicted of war-crimes charges ten former state secretaries, prosecutors and Judges in Hitler's Ministry of Justice and imposed sentences varying from life imprisonment to five years.

The exact composition of the Court is not stated in the *Christian Science Monitor* of December 6, 1947, which gives a summary of the Court's verdict. But the *Monitor's* report of the trial speaks of "Judges sitting in judgment on other Judges," and the Court's report was evidently the production, if not of actual Judges, of sound constitutional lawyers, who revealed "the dagger of the assassin concealed beneath the robe of the jurist."

The Court found that, in seeking the explanation of a concept of German justice in which recognized legal authorities with liberal academic background could deem it their duty to disregard the recognized legal code and merely carry out the will of the Führer, even if it infringed every recognized law of liberty, the following factors should be remembered:

(i) A German Judge was not independent in the western sense, but, always a civil servant, he was a creature of Government. His duty was not to question the legality of the régime or its decrees.

(ii) Judges, as civil servants, were dependent upon the State for pensions.

(iii) The judicial system provided separate education for lawyers and Judges, so Judgeship developed in a legal vacuum.

(iv) Witnesses were seldom brought to the stand. Cross-examination was not developed to an effective general practice.

The Court indicated signs of political pressure on the German Courts as far back as 1932, and recounted in detail the march to absolutism. In April, 1942, the German Reich gave Hitler full power to intervene personally in any case wherein he felt the Judge had not done his duty, without being bound by existing regulations. Hence, when Hitler read a newspaper report of the sentencing of a man to two years' imprisonment for stealing eggs, he sent an order that the offender must be shot. The Judge altered the sentence, and the execution took place.

Those who remember the allegations of some of our Stipendiary Magistrates that attempts had been made to give them instructions will read with interest how from 1942 it became the practice to give "letters of instruction" to Judges. The first of these letters in October, 1942, provided:

> A corps of Judges [exhibiting proper leadership] will not slavishly use the crutches of the law. It will not anxiously search for support by the law, but, with a satisfaction of its responsibility, it will find within the limits of the law the decision which is the most satisfactory for the life of the community.

Hence in a secret memorandum, Kurt Rothenberger, who became Hitler's State Secretary of the Reich's

Ministry of Justice, viewed the independent Judge as a remnant of the liberalistic age, and considered that the judiciary should be freed from intermediate red tape, so as to be subservient directly to the Führer. The significance of the verdict is thus summed up:

> Liberty is safe as long as Courts are free. Liberty is lost when the Judge himself becomes a servant of the bureaucratic state.

The dual protection for defence against dictatorship is incorruptible Judges and unwarped legal codes. A legal code must be rooted firmly in liberal tradition; a judiciary must be educated to a sense of law that transcends nationalistic duty. In other nations where Communist controls have swept away the established juridical system, the dangers of dictatorship are at hand. Democracies, take note, your last line of defence is the independence of your Courts.

A GREAT ANGLO-AMERICAN.

On May 6, 1884, Judah Benjamin died in Paris at his wife's house in the Avenue d'Iona. In his seventy-three years he had contrived to complete two careers: first as a brilliant member of the United States Senate and the brains of the Confederate Cabinet, and second as an extremely successful member of the English Bar. The legend of Judah Benjamin—perhaps the greatest Jew America ever produced—has suffered neglect on both sides of the Atlantic. Now, at long last, a historian has come along with twelve years of research and a good book.*

Benjamin was born in the Virgin Islands. When he was eight years old the family went to live in a North Carolina township which had been settled by Highland fugitives from the 'Forty-five. His schoolmaster was a Presbyterian minister from Inverness, and he heard Gaelic spoken on the streets; even the conversation of the negro slaves was laced with Gaelic phrases. At the age of seventeen Benjamin migrated to New Orleans, and read for the Bar. A month after he was called, he appeared before the Louisiana Supreme Court and became an immediate success, building up such a large practice that he was able to buy—for week-end relaxation—one of the largest sugar plantations in the South, with 140 slaves. In 1850 he was elected to the Louisiana Legislature on the Whig ticket. Two years later, at the astonishingly early age of forty-one, he was offered, and refused, a seat on the United States Supreme Court. The following year he was elected United States Senator, being only the second Jew to sit in that august body. Mrs. Jefferson Davis, who met him for the first time at this period, remarked that he had "rather the air of a witty *bon vivant* than that of a great Senator . . . an elegant young man of the world." A generation later, her illustrious husband was to describe Benjamin as "the most accomplished statesman I have ever known."

Benjamin's career in the Senate lasted eight years, and was absorbed by the acrimonious debates on slavery and states' rights which preceded the Civil War. This was the ominous period of *Uncle Tom's Cabin*, the Dred-Scott decision, the Kansas-Nebraska Bill, the Charleston Convention, John Brown's raid, and the other tragic preliminaries. In all these disputes Benjamin took the extreme position of the Southern Conservatives, excoriating the "Black Republicans" of the North. On the last day of 1860 Benjamin harangued the Northern Senators with a speech of defiance which brought "disgraceful applause, screams, and uproar" from the Senate galleries. He said: "The fortunes of war may be adverse to our arms; you may carry desolation into our peaceful land, and with torch and fire you may set our cities in flames . . . but you never can subjugate us; you never can convert the free sons of the soil into vassals. Never! Never!" Five weeks later Benjamin withdrew from the Senate. Sir George Lewis heard his farewell speech, and reported that it was "better than our Benjamin himself [Disraeli] could have done."

When Jefferson Davis was inaugurated as President of the Confederacy, Benjamin's political future was in doubt, because he had once challenged Davis to a duel. But Davis apologised for the insult which provoked the challenge, and appointed Benjamin to his Cabinet. William Russell, *The Times* correspondent, reported that Benjamin was the Pooh Bah of the Confederate Government. We catch a fascinating glimpse of him at this period in Stephen Vincent Benet's narrative poem of the Civil War:

> "Judah P. Benjamin, the dapper Jew,
> Seal-sleek, black-eyed, lawyer and epicure,
> Able, well-hated, face alive with life,
> Looked round the council-chamber with the slight
> Perpetual smile he held before himself
> Continually like a silk-ribbed fan."

**Judah P. Benjamin*, by Robert Douthat Meade, Oxford University Press, New York.

But, as Secretary of War, Benjamin was not an unqualified success. He knew little of soldiering, and became embroiled in bitter quarrels with General Beauregard and General Johnston. Perhaps the most bizarre incident in his tenure of the War Department concerns the capture of Parson Brownlow, the self-righteous Tennessee Methodist who had crusaded for the North. When called upon to decide the fate of the renegade parson, Benjamin magnanimously allowed him to leave the Confederacy unmolested. As he passed through the lines, Parson Brownlow expressed his satisfaction in these immortal words: "Glory to God in the highest, and on earth peace, goodwill toward all men, *except a few hell-bound rebels in Knoxville.*"

In March, 1862, friction between Benjamin and the Generals became so acute that it was necessary for Davis to promote him to be Secretary of State. In this position, Benjamin was responsible for the conduct of Confederate foreign policy and for the direction of Slidell, Mason, and Hotze, the emissaries who were trying to secure recognition of the Confederacy from England, France, and other European Powers.

In his efforts to obtain French recognition, he offered to help Louis Napoleon against Juarez in Mexico and to present him with 63,000,000 francs' worth of cotton. But the Emperor would not act without British support, and Lord Russell's sympathies were on the Union side. The Cabinet in London would not even agree to Napoleon's proposal for joint Anglo-American mediation in the war. Finally, in desperation, Benjamin sent a mission to Europe to offer emancipation of the slaves in return for recognition of the Confederacy, but it was too late; Palmerston was unmoved.

One of Benjamin's duties was the direction of the Confederate Secret Service. His agents, who included the celebrated Rose Greenhow and the Clerk to the Senate Committee in Washington, engaged both in espionage and sabotage. His saboteurs set fire to Northern shipping, dynamited bridges, and burned down buildings. They negotiated with dissident Northern politicians, including at least one former President. They promoted peace movements and other subversive organizations throughout the Union. The most ambitious operation attempted by Benjamin's saboteurs was the burning of New York City. They started by setting fire to Barnum's Museum and a dozen hotels, but, owing to the faulty combustion of the "Greek fire" and the exertions of the local firemen, the fire was put out. The Union counter-espionage agents, under the guiding genius of Pinkerton—the Scottish predecessor of the great Edgar Hoover—played havoc with Benjamin's operations. They broke his ciphers, captured his spies, and planted double agents in his organization. Perhaps their greatest scoop was the capture of Rose Greenhow.

When news of Lee's surrender at Appomatox reached the Davis Cabinet, Benjamin alone was for continuing the fight with the 25,000 soldiers still in the field under Johnston. He quoted Addison to his wavering colleagues:

> "My voice is still for war,
> Gods! Can a Roman Senate long debate
> Which of the two to choose, slavery or death?"

But Johnston's army was on the verge of surrender, and the Cabinet took flight. We catch a glimpse of Benjamin, too fat to ride a horse, travelling by ambulance. He and his party got stuck in a mud-hole in the darkness; Benjamin sat there placidly smoking his cigar and regaling his fellow-refugees by reciting the *Ode on the Death of the Duke of Wellington*. The Northern soldiers were hot on their trail. Benjamin obtained a horse and buggy, wore goggles, took the name of Monsieur Bonfals, and conversed only in French. After weeks of hair-breadth escapes, he reached the Florida coast and boarded a yawl. Unable to buy food, he lived on turtle-eggs and coconut milk, and survived the scrutiny of a Northern gunboat by disguising himself as a chef. Reaching the Southern tip of Florida,

(*Concluded on p. 70*).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Success Formula.—It is a hopeful sign for the future of this country to see the keen desire shown by a number of our younger practitioners in the gaining of Parliamentary or municipal honours, but the fact remains that, with rare exceptions, the leaders of the profession of more recent years have not been attracted by either. While at the Bar, both Sir Charles Skerrett and Sir Michael Myers resisted many blandishments to induce them to use their talents in these directions, showing a marked distaste for public life of this kind. On the other hand, the third of our Chief Justices, Sir James Prendergast, was invited to become Attorney-General on the understanding that he had a claim to the Chief Justiceship when it fell vacant. He held office for over twenty-four years. Sir Alexander Herdman stepped from Cabinet rank to the Bench, and then, after seventeen years' service on the Bench, which took him to the position of senior puisne Judge, re-entered the field of politics on the day following his resignation and farewell by the Auckland Bar—an action which many considered had a tendency to lower in the public mind the respect always held for our dignified judiciary. What, then, is the formula of legal success in New Zealand, for in England politics constitute a recognized stepping-stone to high judicial attainments? It may be that the answer is to be found in *The Jottings of an Old Solicitor*, the memoirs of the late Sir John Hollams :

> I devoted the whole of my time to my profession—never speculated or sought to make money in any other way. I never applied for a share in any company, and I have never sold any investment I had once acquired. With very few trifling exceptions I have never lent money at interest, either with or without security. With one trifling exception I have never been surety for anyone, and have never acted in the promotion of a company, except professionally. All this doubtless sounds very selfish, but it had the advantage of enabling me to devote my time and thoughts to the professional work I had in hand, and this has doubtless to a great extent contributed to such professional prosperity as I have had.

The view of Lord Tweedsmuir was that it was only right that the politician should pay a tribute to the lawyer, since, in his opinion, it was the lawyer's job to unravel the tangles of the politician and to clear up the mess he had made. When he expressed this view to the City of London Solicitors' Company, he was Colonel John Buchan, M.P., Governor-General designate of Canada ; but it is no less true to-day than it was then. "It is your solemn duty," he advised, "to try to interpret statutes which are often passed in haste and repented at leisure."

Note on Divorce.—The attention paid by the House of Lords in *Baxter* v. *Baxter*, [1947] 2 All E.R. 886, to nullity in relation to contraceptives makes Scriblex think that here at least is one branch of law that has caught up with modern living. The earliest Judge in matrimonial matters was the Bishop who punished the adulterous wife and denied to the adulterous husband every Christian right until satisfied of his contrition. From the twelfth to the sixteenth century, marriage in England was governed by canon law—an ecclesiastical victory won at the time William I separated the Church and the lay Courts. Canon law recognised no dissolution of a valid marriage in the modern sense : *a vinculo matrimonii* was a mere declaration of nullity. The Consistory Court had its uses, since it was not until 1670 that the first Act of Parliament allowing a divorce was passed. Less than a hundred years ago in England, in order to obtain a divorce, one had first to go to an ecclesiastical Court, then to go to a Court of common law, and finally to procure a private Act of Parliament. A woman petitioner in divorce was a rarity. The effect of the 1923 Act, which put women on an equal footing with men and enabled wives to divorce husbands on grounds of adultery, resulted in the following four years in an increase of 130 per cent. in the number of wives' petitions, while "*Holy Deadlock*" Herbert's Act of 1937 made desertion a ground of divorce and started the rush that mounted, in the Services Department alone, to 50,000 cases. To-day, in England, costs are such that divorce is a commodity for the rich or the very poor. The middle classes find it difficult to qualify for the Poor Persons Procedure, which admits of no exceptions to a maximum income of £4 weekly and a worldly wealth of £100.

Temporary Judges.—Christie and Fleming, JJ., appear to provide the only instance of more than one temporary Judge in New Zealand at the same time. Quilliam, J., appointed during Ostler, J.'s, sick-leave, was on the Bench between May and December, 1938. Before him, there were Frazer, J. (November, 1928, to February, 1929) ; Button, J. (March, 1907, to February, 1908,) ; Martin, J. (April, 1900, to November, 1900) ; Pennefather, J. (April, 1898, to April, 1899—actually a year to the precise hour) ; Ward, J. (October, 1868, to May, 1870, and, with a second wind, October, 1886, to February, 1889) ; and Moore, J. (May, 1866, to June, 1868). There were probably temporary Judges before Sir William Martin, the first C.J., appointed January, 1842 ; if there were, there is no record of them, and they were probably eaten before their work found its way into the Law Reports. This mournful consideration, however, need not deter the Government from the appointment of a new Judge, so badly needed now to deal with rapidly mounting arrears of litigation.

The Gentle Touch.—On one occasion Sir George Long Innes, after sentencing a prisoner to a long term of imprisonment, was roundly and savagely abused by him before he was hustled from the dock. Aghast at the incident, those present waited expectantly to see how the Judge would assert the prestige of his office. He ordered the prisoner to be brought back and called on him to show cause why he should not be punished for contempt of Court. The critic's rage was spent and no words came. He was sentenced to six months for his contempt, but, catching sight of the crestfallen face of the prisoner, Innes, who was one of the kindliest of the Australian Judges, suddenly relented and revealed his own humanity by making the term concurrent with the longer sentence he had earlier imposed.

Here's that Rule again.—According to the *Courier* (December, 1947), there is a highway law in New Hampshire (U.S.A.) which runs : "When two vehicles meet at an intersection, each shall come to a full stop and neither shall proceed until the other is gone." Adoption of this salutary practice would deal both with speed and with conflicting theories of the "offside" rule.

PRACTICAL POINTS.

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1. Land Transfer Act.—*Registration of Particulars of Marriage of Female Registered Proprietor—Liability to Stamp Duty.*

QUESTION: Does the statutory declaration which the District Land Registrar usually requires from a female registered proprietor before registering evidence of her marriage require to be stamped, or is it exempt under s. 166 (*o*) of the Stamp Duties Act, 1923, as a declaration in proof of identity?

ANSWER: The declarations referred to are not always drawn in the same form; some would undoubtedly be exempt as being declarations in proof of identity merely. Others specifically declaring to the *factum* of marriage present more difficulty, but on the whole we think that they too are exempt. The general rule is thus stated in *Adams's Law of Stamp Duties in New Zealand*, 175: "Declarations in proof of death or identity will not be exempt if they contain material not relating to proof of death or identity. But they are not liable merely because they may contain provisions of an incidental, ancillary, or explanatory nature." The main object of such a declaration, we think, is to establish identity—the identity of the female registered proprietor with the female party to the marriage, as evidenced by the marriage certificate, the production of which the District Land Registrar, as a matter of practice, usually requires. Section 129 of the Land Transfer Act, 1915, does not specifically require a statutory declaration, nor, for that matter, production of the marriage certificate; but it does require a *statement* in writing (and a mere statement in writing is not liable to stamp duty) as to the *factum* of marriage signed by the female registered proprietor. Section 129 may be usefully compared with s. 123 (dealing with *transmissions*); s. 123 requires that certain particulars must be supplied by applicants for *transmission*, and these particulars must be verified by statutory declaration, which must be liable to stamp duty, for it must contain matters other than the identity or the *factum* of death.

X.1.

2. Municipal Corporation.—*Endowment vested in Borough—Intended Sale of Same.*

QUESTION: Our client borough has a certificate of title for a block of land, which was reserved under an early Land Act, as an *endowment* for the benefit of that borough. Can this block be alienated by way of sale? We desire to refer you to s. 156 of the Municipal Corporations Act, 1933.

ANSWER: Endowments of this nature cannot be alienated by way of sale: see *Auckland City Corporation* v. *The King*, [1941] N.Z.L.R. 659, 666, 667, and s. 5 of Appendix No. 1 to the Land Transfer Act, 1915. A *sale* (as distinguished from a lease) would defeat the purpose of an endowment—to provide a source of perpetual revenue to the local body. X.1.

3. Mortgage.—*Trustee Mortgagee—Discharge signed by Trustee's Attorney—Proof required that Trustee out of Dominion.*

QUESTION: T. is the registered proprietor of a memorandum of mortgage by virtue of a transmission in the estate of M., the original mortgagee. T., on the usual universal form of power of attorney, which is approved by the Law Society and specifically includes delegation of trusteeships, has appointed S. his attorney. S. has now executed a discharge of the mortgage, the mortgagor having paid all moneys owing. Can the mortgagor and persons acting under the discharge—*e.g.*, the District Land Registrar—require proof that at the date of the discharge T. was absent from New Zealand?

ANSWER: It would appear the answer to your question is in the affirmative. The title shows that an instrument of delegation under s. 103 or s. 104 of the Trustee Act, 1908, is required. The only persons who can give a valid discharge of the mortgage are T., who derives his title from M., or T.'s duly authorized delegate under s. 103 or s. 104 of the Trustee Act, 1908. It appears to be clear law that a delegate under these sections can only act whilst his principal (in this case, T.) is outside the Dominion: see article (1939) 15 NEW ZEALAND LAW JOURNAL, 289. X.1.

4. Magistrates' Court.—*Judgments—Interest.*

QUESTION: Can you inform me whether the judgments of the Magistrates' Court carry interest?

ANSWER: No: see *R.* v. *County Court Judge of Essex and Clarke*, (1887) 18 Q.B.D. 704. Although s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), empowered all Courts of Record to award interest on judgments for debt or damages, this section was not enacted in New Zealand when ss. 1 and 2 of that statute became ss. 3, 5, and 6 of the Law Reform Act, 1936. While the Judgments Act, 1838 (1 & 2 Vict., c. 110), s. 17 of which provides for interest on "every judgment debt," is in force in New Zealand, it has seldom been relied upon, and is to a large extent superseded by New Zealand legislation. It is worthy of note that s. 17 of the Judgments Act, 1838, is still in force in England (see *Halsbury's Complete Statutes of England*, Cumulative Supplement, 1946, p. 3); though by s. 3 (2) of the Law Reform (Miscellaneous Provisions) Act, 1934, ss. 28 and 29 of the Civil Procedure Act, 1833 (dealing with interest in certain cases), were repealed.

C.1.

A GREAT ANGLO-AMERICAN

(*Concluded from p. 68.*)

he sailed out boldly into the Atlantic, and was shipwrecked between Biminis and Nassau, to be rescued by H.M. Light House Yacht 'Georgina.'

Judah Benjamin, the fugitive Secretary of State, landed at Southampton on August 30, 1865. He was fifty-five and a penniless refugee. Twelve years later, this indomitable man was earning £15,000 a year at the London Bar. Soon after his arrival in England he had the good fortune to meet Charles Pollock, who recognized his quality and took him into his Chambers. Until Benjamin began to practise, he kept alive by writing leaders for *The Daily Telegraph* at £5 a week. By 1870 he was appearing before the House of Lords, and had acquired a great reputation by the publication of his famous text-book on *Sales*, which is still in use to-day.

He was elected a Bencher of Lincoln's Inn. The size of his practice may be judged from the fact that in Volume III of the Appeal Cases for 1878 he is listed in no less than thirty of the sixty-five cases, including one in which he appeared with Herbert Asquith. When the Tichborne case went to the House of Lords, Benjamin led for the appellant (*Castro* v. *The Queen*). He also practised with distinction in Scotland, appearing in eight of the fifteen cases listed in the Sessions Reports for 1881. On one occasion in the House of Lords Benjamin was stating propositions of law on which he relied when Lord Selborne whispered, "Nonsense!" Benjamin heard and stalked out. The next morning Selborne apologized, and Benjamin was persuaded to return to Court.

When he retired in 1883 he was given a dinner by the Bar in the Inner Temple Hall. The Attorney-General was in the chair, and the company of two hundred included the Lord Chancellor, the Lord Chief Justice, the Solicitor-General, the Lord Advocate for Scotland, and the Attorney-General for Ireland. A year later, he was dead.

—DAVID OGILVY, in *The Spectator*.

* * * * *

Mr. Benjamin, Q.C., appeared in two New Zealand appeals before the Privy Council. The first was *Daniell* v. *Sinclair*, (1881) N.Z.P.C.C. 140, when he led for the appellant; the appeal was dismissed. The other case has left its mark in our legal history, *Rhodes* v. *Rhodes*, (1882) N.Z.P.C.C. 708, when, with Horace Davey, Q.C. (and two juniors, both to become famous, Carson and A. L. Smith), he appeared for the successful appellant.