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DIVORCE: VARIATION OF MAINTENANCE UNDER SEPARATION AGREEMENT.

SECTION 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), provided as follows :

> The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.

This section is now s. 192 of the Supreme Court of Judicature Act, 1925 (*9 Halsbury's Complete Statutes of England*, 401).

Section 37 of the Divorce and Matrimonial Causes Act, 1928, was taken from the above section (except the final sentence, which repeats the amendment made by s. 3 of the Matrimonial Causes Act, 1878 (41 & 42 Vict., c. 19), and is as follows :

> The Court may, after pronouncing a decree for divorce or for nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage as the Court thinks fit, and the Court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage.

Recently in *Coutts* v. *Coutts* (to be reported), an ex-husband, after his wife had obtained a decree absolute founded on the continuance in force of a deed of separation, applied for ancillary relief—namely, the variation or modification of his liability to pay the weekly sums of maintenance which, in such deed of separation, he had covenanted to pay to his ex-wife. Johnston, J., in giving his reasons for reducing the amount of maintenance, said :

> There will be liberty to apply in the event of any sudden improvement in the husband's circumstances.

The ex-wife appealed to the Court of Appeal against the formal order, which reserved leave to either party to apply at any time for the variation of that order.

In its recent judgment, the Court of Appeal in *Coutts* v. *Coutts* (to be reported) held that a deed of separation made between husband and wife, under which maintenance is payable by the husband to the wife, is a " post-nuptial settlement " within the meaning of that term as used in s. 37 of the Divorce and Matrimonial Causes Act, 1928.

This was common ground between counsel in the case before the Court of Appeal. In *Worsley* v. *Worsley*, (1867) L.R. 1 P. & D. 648, the Judge Ordinary, Lord Penzance, when considering s. 5 of the English statute (*cit. supra*), said the Court would have great difficulty in saying that any deed which is a settlement of property, made after marriage and on the parties to the marriage, is not a post-nuptial settlement : it would not be justified in narrowing the reasonable scope of the words used in the section. That was followed by Sir James Prendergast, C.J., in *Soler* v. *Soler*, (1898) 17 N.Z.L.R. 49, where an agreement was entered into between the parties after a decree of judicial separation had been made. After citing Lord Penzance's judgment, the learned Chief Justice, at p. 54, added that the circumstance that an agreement for separation was made in settlement of matters in controversy about alimony and custody of children makes no difference. The Court of Appeal, dismissing an appeal from this judgment, apparently accepted this statement of the law, as none of the Judges referred to it.

The next matter for consideration by the Court of Appeal was whether the Court had power to make an order, such as Johnston, J., had done, that was subject to review on the happening of some subsequent event or on a future change of circumstances. The Court held that the jurisdiction under s. 37 to vary a settlement must be exercised once and for all. Once an order of variation has been made under s. 37, there is no power to revise it ; and there can, therefore, be no reservation in the order for further review.

This accords with English authority on the true interpretation of s. 5 of the English statute (*cit. supra*), from which s. 37 of the Divorce and Matrimonial Causes Act, 1928, was taken. In *Gladstone* v. *Gladstone*, (1876) 1 P. & D. 442, 444, 445, Sir James Hannen held that the Court had no power to review and vary an order made as to a post-nuptial settlement by reason of any matters arising subsequently to the date of the order. His Lordship based his objection to the review of an order made after a divorce varying a post-nuptial settlement on the ground that the party objecting to the order had the opportunity of presenting to the Court at the proper time the arguments and facts which were sought to be brought before the Court on the application for variation of the order.

In *Benyon* v. *Benyon*, (1890) 15 P.D. 29, Butt, J., said that *Gladstone* v. *Gladstone* had never been challenged in a Court of Appeal, and that, whatever other considerations might apply, counsel seeking to vary an order of this kind must confine himself to matters which had occurred before the order, and which might have been submitted to the Court to induce it to make a different order; but that he was not at liberty to go into anything which had occurred since the order was made. On appeal to the Court of Appeal, the judgment of Butt, J., was approved by a Court comprising Cotton, Lindley, and Lopes, JJ. (*ibid.*, 54). In his judgment, Cotton, L.J., at p. 58, said:

> The original order was made under 22 & 23 Vict., c. 61, s. 5, which first gave the Divorce Court power over settled property. This is a power different from that given by s. 4 [s. 38 of the Divorce and Matrimonial Causes Act, 1928] to make orders "from time to time," which is a power relating to children whose status is not altered by a dissolution of the marriage, and different from the powers as to provision in the nature of alimony which are to be exercised while the relation of husband and wife is still subsisting. Under s. 5 the Court has power to vary the trusts of a settlement, and in my opinion it was intended that the Court should consider how far they ought to be varied, and make an order once for all. If the Court can take off part of the burden originally imposed, it must have power to add to that burden, and it is not desirable that the arrangement should be liable to fluctuation. The original order was made on full materials being laid before the Court; the property was invested in securities not of the most approved character, so the order did not give the husband a share of the income, but a definite yearly sum. The matter was fully gone into then, and the Court has never altered an order so made under this section, though no doubt it might frame its original order so that the allowance would vary according to circumstances.

Lindley, L.J., said that, according to the true construction of the section [our s. 37], the Court must make an order once for all. There is nothing in its language that points at varying an order when made. At first sight, indeed, it might appear that nothing could be more reasonable than for the Court to have power to vary the provisions for the parties as circumstances change. But this is a power to vary the trusts of a settlement when the relation of husband and wife has determined, and the object of the Legislature appears to have been to enable the Court to make an order which will give the parties the same benefits as they practically would have if the conjugal relation had continued. His Lordship added that it would easily be seen that great mischief might arise if an order of this kind were not to be treated as permanent, but liable to be altered at a subsequent time.

Lopes, L.J., pointed out that the section gives the Court a power which only arises after a final decree—*i.e.*, after the relation of husband and wife has ceased—and that under it the Court has only power to make one order. He added that throughout the statute a distinction was kept up between orders in the nature of alimony and orders made after final decree. The previous section (our s. 38) speaks of making orders "from time to time," which shows that, where the Legislature intended to authorize the making of temporary orders, it said so.

Reverting to *Coutts* v. *Coutts*, our Court of Appeal said that, when Johnston, J., said there would be liberty to apply "in the event of any sudden change in the husband's circumstances," His Honour had exercised his discretion upon a wrong principle in considering that the circumstances of the parties could be subsequently reviewed. In the words of Callan, J.:

> This settles that the reservation was intended to provide the means for future revision because of future events. It also settles that, instead of weighing the then existing chances of future improvement in the husband's circumstances, and fixing once and for all what order it was fair to make under the section, having regard, among other things, to those chances, His Honour restricted himself to a consideration of the then existing circumstances, and what it was just to do having regard merely to them to the exclusion of future possibilities or probabilities. It follows that, even if it be proper to make any variation, the question has not been approached on a proper basis, and that, for this reason alone, the judgment appealed from cannot stand.

The only possible exception to the foregoing is that an order varying the maintenance provisions in a deed of separation may be reviewed, but only in respect of matters arising before making it, (*a*) on the ground of a slip or a mistake, common to all parties, made in drawing up the order, in regard to matters arising before or when the order was made: *Arkwright* v. *Arkwright*, (1895) 73 L.T. 287; or (*b*) when facts existed before or at the time of the making of the order which had not been brought to the notice of the Judge at the time, and which, had they been known, would have justified the making of a different order: *Newte* v. *Newte and Keen*, [1933] P. 117. Where, however, the mistake is not one of expression, but of substance, and it has been acquiesced in by the parties, the Court will not make an order for further variation: *Taylor* v. *Taylor*, (1926) 161 L.T. Jo. 236.

In *Coutts* v. *Coutts*, the Court of Appeal went into several other broader matters of importance relative to the true meaning and effect of s. 37 of the Divorce and Matrimonial Causes Act, 1928, and the extent of the Court's jurisdiction thereunder in considering applications for ancillary relief for the variation, after a divorce, of the maintenance provisions of a deed of separation made by the parties. To this part of the judgment, we may refer in detail on some other occasion.

Here, however, we have confined our consideration of the judgment of the Court of Appeal to where it gave an interpretation of s. 37 not generally realized—that, once an order has been made under that section, a Court has no power to revise it or to make a further order on the ground of anything that has happened since the order was made: the jurisdiction must be exercised once and for all. In such an order, there can, therefore, be no reservation of leave to apply for any further review. The only possible exception that could arise is when facts, which then existed, were not brought to the notice of the Court when the order was made.

SUMMARY OF RECENT LAW.

ADMINISTRATION LAW.

Ministerial Decisions and Natural Justice. (F. A. Blanco White.) *12 Conveyancer and Property Lawyer*, 248.

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Charitable Purposes—Advancement of Religion—Public Benefit—Carmelite Convent—Association of strictly cloistered and purely contemplative Nuns. *Re Coats's Trusts, Coats* v. *Gilmour*, [1948] 1 All E.R. 521 (C.A.).

Charitable Purposes—Gift "to His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he in his absolute discretion thinks fit." *Re Flinn (deceased), Public Trustee* v. *Griffin*, [1948] 1 All E.R. 541 (Ch.D.).

Charitable Purposes—Gift to Vicar and Churchwardens for time being of Named Church "for purposes in connection with the said church"—Added Directions as to User—Requirements of Children in Parish—Prohibition of Aid for Overseas Missions. *Re Eastes (deceased), Pain* v. *Paxon*, [1948] 1 All E.R. 536 (Ch.D.).

Recent Cases. *12 Conveyancer and Property Lawyer*, 63, 140, 283.

COMMERCIAL LAW.

Points in Practice. *98 Law Journal*, 202.

COMPANIES.

Money had and received—Failure of Consideration—Invalid Issue of Shares—Transfer by Shareholder to Transferees—Subsequent Claim against Company for Repayment of Price of Shares. In 1935 the appellant applied for and was allotted 775 preference shares in the respondent company. In 1939 she executed transfers in blank of the shares which, in September, 1941, were completed in favour of transferees, the transfers being registered with the company, the old share certificates being cancelled and new ones issued, and the transferees being placed on the register of members of the company in place of the appellant. In 1943 the appellant began proceedings against the company alleging that the resolution of the company authorizing the issue of the shares was invalid and that the allotment of the shares to her was void and claiming the return of the sum paid by her for the shares as for money had and received on a total failure of consideration. HELD, The appellant having been duly registered by the company as a shareholder and having parted for value with her shares by a sale which the company had recognized by the registration of her transferees, she could not claim that she had received something of no value and that there was a total failure of consideration and successfully challenge the validity of the issue of shares. *Linz* v. *Electric Wire Co. of Palestine, Ltd.*, [1948] 1 All E.R. 604 (J.C.).

See 7 *Halsbury's Laws of England*, 2nd Ed. 283, para. 394; and for cases, see 12 *E. and E. Digest*, 228–233, Nos. *1888–1928*.

CONVEYANCING.

Construction of Documents by the Court: Notice. *205 Law Times Jo.*, 116.

Options to Purchase: An Amplification. *92 Solicitors Journal*, 107.

Recent Cases. *12 Conveyancer and Property Lawyer*, 40, 136, 278.

Standard Forms and Deletions. (E. O. Walford.) *12 Conveyancer and Property Lawyer*, 40.

Statutory Charges on Land. (J. F. Garner.) *12 Conveyancer and Property Lawyer*, 45.

Variation of Marriage Settlements after Divorce or Nullity. (D. Tolstay.) *12 Conveyancer and Property Lawyer*, 112.

CRIMINAL LAW.

Accessory after the Fact—Plea of Guilty—Principal Offenders subsequently acquitted. *R.* v. *Rowley*, [1948] 1 All E.R. 570 (C.C.A.)

Evidence of Similar Acts—Ground of Admissibility. The admissibility of similar acts depends upon its relevancy, and not upon the question whether a particular defence is raised or not raised in the proceedings. If it is relevant to some matter which it is essential for the Crown to establish in the course of its case, then it is admissible unless there is some specific ground upon which it is excluded. The sole test of the admissibility of the evidence is whether it has any probative value other than that it shows that the accused has a disposition to commit crime, or crimes of the kind charged. The trial Judge, in the exercise of his discretion, is entitled to refuse to admit the evidence when it is directed to an issue only formally in contest, or when its probative value is very small in comparison with the prejudice it will engender against the accused by showing that he has a disposition to commit the crime with which he is charged. (*Makin* v. *Attorney-General of New South Wales*, [1894] A.C. 57, considered. *R.* v. *Sims*, [1946] 1 All E.R. 697, followed.) *R.* v. *Yuille*, [1948] V.L.R. 41. (Full Court (Gavan Duffy, O'Bryan, and Fullagar, JJ.)

Jury—Empanelling—Jury List exhausted—Jurors stood aside by Crown—Whether Names to be replaced in Jury Box—Judge's power to discharge Jury—Miscarriage of Justice. Where the Juries Act prescribes a procedure in mandatory terms and there has been a departure from that procedure, to the possible prejudice of the accused, there is a miscarriage of justice within the meaning of s. 594 (1) of the Crimes Act, 1928 (Vict.). The action of a Judge in discharging the members of a jury before the jury is fully empanelled must be supported on grounds other than that of a Judge's inherent power to discharge a jury. The procedure laid down by s. 67 of the Juries Act, 1928, for empanelling a jury is mandatory. If, before the full number of jurors has been empanelled, the cards of all jurors have been withdrawn from the jury box, the cards of jurors ordered to stand aside by the Crown must be returned to the box to be redrawn. Observations on praying a *tales* where there is an insufficiency of jurors. *R.* v. *Abrahams and Bull*, [1948] V.L.R. 53. (Full Court (Herring, C.J., Lowe and Fullagar, JJ.))

Rape—Evidence—Complaint—Whether Complaint made as soon as could be expected — Question for Judge. *R.* v. *Cummings*, [1948] 1 All E.R. 551 (C.C.A.).

DAMAGES.

Damages under Rescinded Contracts. *98 Law Journal*, 197.

Detinue and Conversion: Measure of Damages. *205 Law Times Jo.*, 116.

Principal and Agent—Warranty of Agent's Authority to sell Land—Untrue Representation—Agent not authorized by Owner to sell or receive Deposit on Account of Purchase-money—Plaintiff induced to act upon Agent's Warranty and to plant Trees, &c., on Land—Repudiation by Owner of Authority—Measure of Damages—Owner repudiating Agent's Authority and Purported Sale—Not a "contract or agreement"—Transaction not avoided by Failure to apply for Consent—Servicemen's Settlement and Land Sales Act, 1943, ss. 44, 45, 46. C. approached G., a licensed land agent, with the object of purchasing a dwelling-house. G. quoted a certain house and said it belonged to T., who lived elsewhere. C. asked G. if he had written authority to sell the house, and G. represented that he had such authority. He had, in fact, no such authority, written or verbal. On July 25, 1947, C. paid to G. a deposit of £100 on account of the purchase price, and received from G. a receipt accordingly. C. said that G. had recommended him to go to a named solicitor to act for him on the purchase, and that he would see that solicitor and give him all particulars. When C. saw the solicitor later, complaining of delay, he was informed that G. had not communicated with the solicitor. G. told C. that it would be safe for him to plant trees, &c., on the property before the transaction was completed, telling him "the house is yours." The property had been sold by T. to B. C., on hearing of this, consulted a solicitor, and later received back his deposit by G.'s cheque. In the period of three months during which the foregoing proved incidents occurred, G. had never communicated with T., but, after becoming aware of the sale to B., had sent T. a telegram that the property was sold, and that he held the deposit. No application for the consent of the Land Sales Court had been made, although the Court had consented to a previous sale, which had fallen through, at the same sale-price. On October 16, 1947, T. repudiated the contract. C. sued G. for damages, including loss of interest on the deposit, cost of fruit-trees and hedges planted, loss of garden and vegetables planted, labour in planting, &c., and legal costs. *Held*, 1. That G., by inducing C. to act in a matter of business (not necessarily a contract) on the faith that he had the authority as the agent of T., could be sued for damages for breach of an implied warranty. (*Oliver* v. *Bank of England*,

[1902] 1 Ch. 610, followed.) 2. That all that is necessary to found a cause of action on breach of warranty of authority is a representation of such authority by the defendant which is untrue; inducement of the plaintiff to act upon it; and damages directly caused by so acting upon it. (*Yonge* v. *Toynbee*, [1910] 1 K.B. 215, and *McLaren* v. *Horsley*, [1926] G.L.R. 44, followed.) 3. That, as s. 43 (1) of the Servicemen's Settlement and Land Sales Act, 1943, deals only with a " contract or agreement " for the sale of any freehold land or interest in land, the transaction was not avoided by failure to obtain the consent of the Land Sales Court, since no contract or agreement existed between the plaintiff and the owner of the dwellinghouse. 4. That the plaintiff was induced to go on with the work of planting trees, &c., by the defendant's assurance that " the property is yours," thereby continuing to misrepresent his authority to speak as the vendor's agent in that regard. 5. That the plaintiff was entitled to damages in the amount of the loss of interest on his deposit; his legal costs incurred in investigating his position; and the sum of £25 for the value of the trees, vegetables, and hedges planted, and the labour involved in planting them. (*Hadley* v. *Baxendale*, (1854) 9 Exch. 341; 156 E.R. 145, applied.) *Cantwell* v. *Geary*. (Feilding. April 13, 1948. Coleman, S.M.)

DEATH DUTIES.

Recent Cases. *12 Conveyancer and Property Lawyer*, 148.

DESTITUTE PERSONS.

Maintenance — Illegitimate Child — Practice — Complaint for Affiliation Order only—Separate Complaint for Maintenance Order—Order for Maintenance under Part I in addition to Order under Part II—" Near relative "—" Maintenance order "—Destitute Persons Act, 1910, ss. 5, 8—Maintenance Orders (Facilities for Enforcement) Act, 1921, s. 3. The power of a Magistrate to include, in an affiliation order made under Part II of the Destitute Persons Act, 1910, an order that the putative father pay a sum not exceeding 21s. until the child reaches the age of sixteen years, is not dependent on proof that the child is a destitute person, as there is an irrebuttable presumption of destitution, and, in practice, the only inquiry is as to the defendant's means. The power to make a maintenance order under Part I of the Destitute Persons Act, 1910, against the father of an illegitimate child is not limited to cases where the child has reached the age of sixteen years, and the maintenance order made under Part II has lapsed; consequently, in the appropriate circumstances, the putative father may be required to pay, if he is of sufficient ability, a further weekly sum of 42s., in addition to the amount of an order up to 21s. already made under Part II. (*Klein* v. *Tutty*, (1915) 34 N.Z.L.R. 1084, applied.) Consequently, an application may be made for an affiliation order only, and a separate complaint can be made under Part I for a maintenance order. *Hanna* v. *Hobbs*. (Otahuhu. March 22, 1948. Luxford, S.M.)

DIVORCE.

Baxter v. *Baxter*. *92 Solicitors Journal*, 104.

Desertion—Maintenance Order—Non-cohabitation Clause—Clause struck out on Appeal—Date on which Deletion Operative. *Thory* v. *Thory*, [1948] 1 All E.R. 553 (P.D.A.).

ELECTRICITY CONTROL.

Electricity Control Order, 1948 (Serial No. 1948/55). Revoking all previous Orders; and regulating load control, and the issue of permits for connections of electrical installations; controlling the use of water-heating, space-heating, electric radiators (prohibiting in, *inter alia*, offices during the months of April, May, June, July, August, and September, the use of any electric radiator between 4 p.m. and 6 p.m. on any day of the week, except a Sunday); and creating offences for breaches of the Order and prescribing penalties.

EXECUTORS AND ADMINISTRATORS.

Recovery of Money Mistakenly Paid by Personal Representatives. *12 Conveyancer and Property Lawyer*, 275.

FACTORIES.

Factories Act Extension (Revocation) Order, 1948 (Serial No. 1948/57). Revoking Factories Act Extension Order, 1938, affecting fruit-grading and fruit-packing factories.

HEALTH.

Health (Infectious and Notifiable Diseases) Regulations. 1948 (Serial No. 1948/59). Revoking previous regulations, and providing for the notification of disease by medical practitioners and by funeral directors; the isolation of persons suffering from infectious diseases; the control of contacts and carriers; the exclusion from school of infected persons; the organization of local committees; vaccination against smallpox, and the creation of offences and penalties on conviction thereof.

HOSPITALS AND CHARITABLE INSTITUTIONS.

Hospital Employment Regulations, 1948 (Serial No. 1948/62), Relating to persons employed by Hospital Boards whose conditions of employment are not for the time being fixed by award or industrial agreement, or order of the Court of Arbitration.

INCOME TAX.

Allowance—Child—" Entitled in own right to income "—Wages—Finance Act, 1920 (c. 18), s. 21 (1), (3) (as amended by Finance (No. 2) Act, 1939, s. 9 (3)). A taxpayer had living with him during the relevant period a son, aged under sixteen, who earned in wages more than £50 a year. *Held*, The wages were " income " to which the son was " entitled in his own right " within the meaning of the Finance Act, 1920, s. 21 (3) (as amended by the Finance (No. 2) Act, 1939, s. 9 (3)), and the taxpayer was deprived of his right to an allowance under s. 21 (1) of the Act. (*Miles (Inspector of Taxes)* v. *Morrow*, (1940) 23 Tax Cas. 465, followed.) *Williams* v. *Doulton (Inspector of Taxes)*, [1948] 1 All E.R. 603 (K.B.D.).

See *17 Halsbury's Laws of England*, 2nd Ed. 304, para. 602; and for cases, see *28 E. and E. Digest*, 91, No. *540*, and 2nd Digest Supp..

Deduction—Life Assurance—Loans to Assured—Recovery out of Amount payable at Death—Payments not in Nature of Annuities—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21. *Inland Revenue Commissioners* v. *Wesleyan and General Assurance Society*, [1948] 1 All E.R. 555 (H.L.).

Exemption—Charity—Trade carried on by Charity—Company " established for charitable purposes only "—Objects—Statement in Memorandum—Relevance of Motives of Formation and Subsequent Acts—Main and Subsidiary Objects—Finance Act, 1921 (c. 32), s. 30 (1) (c) (as substituted by Finance Act, 1927 (c. 10), s. 24), (3). *Tennant Plays, Ltd.* v. *Inland Revenue Commissioners*, [1948] 1 All E.R. 506 (C.A.).

Recent Cases. *12 Conveyancer and Property Lawyer*, 70, 149, 299.

Some Assessments on Solicitors. *92 Solicitors Journal*, 106.

INDUSTRIAL CONCILIATION AND ARBITRATION.

Dismissal of Worker—Worker in Course of Claiming Payment of Remuneration in Excess of that being paid to him—Claim for Penalty — Onus of Proof on Owner that Dismissal for Other Reason—Standard of Proof—Industrial Conciliation and Arbitration Amendment Act, 1943, s. 2 (1). The defendant company as employer was liable to penalties for a breach of s. 2 (1) of the Industrial Conciliation and Arbitration Amendment Act, 1943, unless it could prove to the Court that it dismissed a worker for a reason other than that the worker was entitled to claim, or had claimed, a benefit under the award—namely, remuneration in excess of that which he was receiving. The onus of proof being thus upon the defendant company, the question was as to the measure of such burden of proof. *Held*, That the principles set out in *R.* v. *Carr-Braint*, [1943] 2 All E.R. 156, apply to an action under s. 2 (1) of the Amendment Act, 1943. (Such burden of proof having been discharged by the defendant company, judgment was given in its favour.) *Hopper (Inspector of Awards)* v. *Lyall Bay Pictures, Ltd.* (Wellington. March 22, 1948. Tyndall, J. (Ct. Arb.))

Offences—Printing and Publication of Circular calculated to obstruct or interfere with or prejudicially affect a Matter before a Conciliation Council—Stencilled Circular issued to Union Members—Whether " printing or publishing "—Industrial Conciliation and Arbitration Act, 1925, s. 115. On an information laid by the Secretary of the Auckland Employers' Association against the Secretary of the Auckland Milkroundsmen's Union, alleging that the defendant did print or publish a circular which was calculated to obstruct or interfere with or prejudicially affect a matter before a Conciliation Council, *Held*, 1. That the Legislature, in using the word " print " in s. 115 of the Industrial Conciliation and Arbitration Act, 1925, intended an interpretation of that word wide enough to cover the cutting of a stencil and the running off of 150 copies thereof. 2. That the sending of the circulars to the whole membership of the Union, including the assessors representing the workers on the Conciliation Council, amounted to " publication " of the circulars within the meaning of the word " publishes " in s. 115. 3. That the circular was framed and published in such a manner as to obstruct or interfere with or prejudicially affect the settlement of the dispute which was then the matter before the Council, so that the second meeting of the Council proved abortive largely as the result of the circular. *Anderson* v. *Robertson*. (Auckland. April 12, 1948. Tyndall, J. (Ct. Arb.))

INFANTS AND CHILDREN.

The Juvenile Court. *92 Solicitors Journal,* 105.

LANDLORD AND TENANT.

Damage by Frost. (J. T. Plume.) *12 Conveyancer and Property Lawyer,* 118, 152.

Deviation of Licenses. (E. O. Walford.) *12 Conveyancer and Property Lawyer,* 121.

Dual Relationships. *92 Solicitors Journal,* 108.

Duration of Term. *205 Law Times Jo.,* 130.

Lease—Forfeiture—Breach of Covenant—Permitting Premises to be used for the Purpose of Gaming—Notice of Breach—Notice not containing Requirement that Breach should be remedied—Validity—Relief—Law of Property Act, 1925 (c. 20), s. 146 (1), (2). The lease of premises, which were to be used as a working-men's social club, contained a covenant by the tenants not to do or suffer to be done any act or thing which might be to the annoyance or damage of the landlord, but to conduct the club in a proper and orderly manner and comply with all legal and other necessary regulations, and there was a proviso for re-entry in the event of a breach of covenant. The tenants committed a breach of covenant by allowing the premises to be used for the purpose of gambling, on February 21, 1947, their manager and other members of the staff being convicted under the Betting Act, 1853. The tenants then appointed a new manager, but he was one of the staff who had been convicted of assisting the former manager, and they continued to allow gambling on the premises, though on a smaller scale than before. On March 20, 1947, the landlord served on the tenants a notice under the Law of Property Act, 1925, s. 146 (1), alleging the conviction of the tenants' manager and that the club had been carried on in breach of covenant, but the notice did not require the tenants to remedy the breach. *Held,* (1) Even if the premises were no longer used for gambling, that could not alter the fact that the tenants had allowed the property to be used for an illegal purpose, and the landlord was entitled to be protected from the slur involved in being said to be the landlord of a gaming-house, even though he had suffered no monetary damage, and, therefore, the breach was one which was not capable of remedy within the Law of Property Act, 1925, s. 146 (1), and the notice was a valid notice although it did not require the tenants to remedy the breach. (*Rugby School* v. *Tannahill,* [1935] 1 K.B. 87, and *Egerton* v. *Esplanade Hotels, London, Ltd.,* [1947] 2 All E.R. 88, considered.) (2) In the circumstances of the case, the tenants were not entitled to relief against forfeiture under s. 146 (2) of the Act. (*Hyman* v. *Rose,* [1912] A.C. 623, considered.) *Hoffman* v. *Fineberg,* [1948] 1 All E.R. 592 (Ch.D.).

See *20 Halsbury's Laws of England,* 2nd Ed. 257-259, 260, 261, paras. 290, 291, 293; and for cases, see *31 E. and E. Digest,* 483-486, 487, 488, Nos. *6322-6342, 6354-6356,* and Supplement.

LICENSING.

Offences—Supply of Liquor to Person under Twenty-one Years—Licensee charged with " allowing " Liquor to be so supplied —No Evidence of Licensee's Knowledge or Connivance—Information dismissed—Licensing Act, 1908, s. 202 (1). A licensee is vicariously liable under s. 202 (1) of the Licensing Act, 1908, in respect of the offence of selling intoxicating liquor to a person apparently under the age of twenty-one years, for the acts of his servant acting within the general scope of his authority. If, however, the licensee is charged with the separate offence under s. 201 (1) of allowing liquor to be so supplied, there must be proof of knowledge or connivance on the part of the licensee of the wrongful act of his servant in supplying liquor to a person apparently under the age of twenty-one years. (*Sivyer* v. *Taylor,* [1916] N.Z.L.R. 586, followed.) If, therefore, a licensee is charged with allowing the liquor to be supplied to a person apparently under the age of twenty-one years, and there is no evidence of knowledge or connivance on the part of the licensee of the wrongful act of his servant, the information must be dismissed. *Semble,* Such an information should not be amended; because to call upon the licensee to answer the charge in its amended form would, in effect, be tantamount to laying a new information for a new offence. In the present case, the time limit of three months had already passed since the offence was committed. *Martin* v. *Jude.* (Auckland. February 13, 1948. Luxford, S.M.)

LOCAL AUTHORITIES (MEMBERS' CONTRACTS).

Candidate nominated for City Council Elections—Goods ordered from Company of which Candidate a Member—Candidate elected next day as Member of Council—Payment made after his taking Office—Goods ordered for Domain Board whereof control vested in City Council—Resignation of Councillor on ascertaining Position—Ouster from Office—Local Authorities (Members' Contracts) Act, 1934, s. 3—Municipal Corporations Act, 1933, s. 7. The words of s. 3 of the Local Authorities (Members' Contracts) Act, 1934, " any contract made by or on behalf of the local authority if the payment made or to be made on behalf of the local authority " cover the case where the contract is made by a City Council as agent for a Domain Board, the control of which is vested in the Council acting as the Domain Board, or acting in its capacity as such Board. A candidate for election to the Palmerston North City Council, nominated on October 28, 1947, was a shareholder in a company having fewer than twenty members. On November 18, the City Council by an order form of that date signed by the City Engineer ordered certain goods from the Manawatu Welding and Engineering Co., Ltd.; on November 19, respondent was elected a member of the Palmerston North City Council; on November 26, he took office, not being aware of the order made upon the company; on December 31, an invoice was made by the company as against the City Treasurer, Palmerston North, for the goods referred to in the order form charging £24 18s.; on January 13, 1948, the Town Clerk became aware that the respondent was a member of the company; on January 14, the goods were delivered; and on February 5, the respondent tendered his resignation as a councillor. It was admitted that the goods were ordered for the Pohangina Valley Domain, a reserve administered by the Pohangina Valley Domain Board, the control of which reserve is vested in the Palmerston North City Council acting as the Pohangina Valley Domain Board, membership of which is possible only by virtue of membership of the City Council. On an application under s. 47 of the Municipal Corporations Act, 1933, that the respondent be ousted from office as a councillor of the Palmerston North City Council, *Held,* adjudging the respondent to be ousted from office, 1. That the Board was not a separate entity for which the Council acted as agent only; and it was irrelevant that the contract was made on behalf of another local authority. 2. That the respondent's lack of knowledge of the contract was not a relevant factor. 3. That a person who is disqualified from office in a local authority cannot resign that office. (*In re Denize,* (1921) 16 M.C.R. 31, applied.) *Palmerston North City* v. *Plimmer.* (Palmerston North. April 14, 1948. Herd, S.M.)

MILITARY LAW.

Military Justice System. (Captain P. C. M. Hayman.) *205 Law Times Jo*, 89, 115.

MOTOR-SPIRITS.

Motor-spirits Prices Regulations, 1942, Amendment No. 14 (Serial No. 1948/56). Substituting for the Set of Differentials applicable to Sales Area No. 32 (Opotiki) No. 44 for No. 36.

NATIVES AND NATIVE LAND.

Maori Tribal Organization Regulations, 1948 (Serial No. 1948/58), pursuant to the Maori Social and Economic Advancement Act, 1945.

NEGLIGENCE.

Clause in Award directing Employer to provide " a properly-secured shed " for Storage of Workers' Tools—Window of Shed secured by Stops and Nails, but not barred—Window forced by Burglar and Tools stolen and not recovered—Liability of Employer to Worker to provide Shed as secure as it Reasonably should have been made—Duty of Employer to have barred Window—Possibility of Loss even if Window had been barred—No answer to Action for Negligence—Practice—Appeals to Supreme Court—Appeal on Point of Law—Magistrate's finding of Negligence—Evidence such as would have bound Judge to leave Question of Negligence to Jury—Question of Fact—Finding not open to Review on Appeal on Point of Law—Magistrates' Courts Act, 1928, s. 165. The appellant company was the employer of the respondent, whose terms of employment were governed by the award, in which a clause provided, *inter alia,* that " each employer shall provide on the works a properly-secured shed in which the workers may . . . store their tools." The window in the shed provided by the appellant company was a very tight-fitting sash, secured on the outside by stops and on the inside by three nails, but was not barred. There was a bracket bench on the outside front wall below the window, which would enable a man standing on it to reach the window. A burglar prised open the window with a jemmy and stole the tools of the respondent, which were stored in the shed. They were not recovered. In an action by the respondent against the appellant company, the learned Magistrate found " as a fact " that the company was negligent and gave judgment for the respondent for the value of the tools. On an appeal on point of law by way of case stated, with the leave of the Magistrate, *Held,* dismissing the appeal, 1. That the clause in the award created a civil liability of the appellant company to the respondent to provide a shed as secure as it reasonably should have been made. 2. That negligence is a question of fact; and, on an appeal on point of

law only, the Court was not free to differ from the learned Magistrate on a finding of fact. (*Commissioner of Taxation* v. *English, Scottish and Australian Bank*, [1920] A.C. 683, referred to.) 3. That, as there was evidence such as would have bound a Judge to leave to the jury the question of negligence in not making the shed more secure, the learned Magistrate had not misdirected himself on a point of law in finding it was negligence not to provide a shed which was as secure as it reasonably should have been. (*Gilmour* v. *Marchant*, (1892) 11 N.Z.L.R. 518, distinguished.) *Semble*, Assuming that the learned Judge was free, on the appeal, to consider whether negligence should be found, the appellant company was negligent in not having barred the window. 4. That the respondent's loss arose from the breach of the appellant company's duty towards him; and it could not set up as an answer to the action the possibility that the burglar might have got in, even if the window had been better protected. (*Davis* v. *Garrett*, (1830) 6 Bing. 716; 130 E.R. 1456, applied.) *Fletcher Construction Co., Ltd.* v. *Webster*. (Auckland. December 15, 1947. Callan, J.)

Duty to take Care—Breach—Damage resulting from Breach—Decorator leaving House with Front Door unlocked during known Absence of Tenants—Entry and Theft by Third Party. The plaintiff, a painter and decorator engaged under contract in doing work at the defendant's house, left the house unoccupied while he went to obtain material, and, in order that he might be able to secure re-entry, pulled back the latch of the Yale lock of the front door. He was away from the house for two hours, and during his absence a thief entered the premises by the front door and stole a quantity of jewellery. In a claim by the plaintiff for work and labour, the defendant counter-claimed for damages for negligence. *Held*, In the circumstances the plaintiff owed a duty to the defendant to take care of the premises, there had been a breach of that duty, and the entry of the thief which caused the damage was the direct result of the plaintiff's negligence. (Dictum of Lord Sumner in *Weld-Blundell* v. *Stephens*, [1920] A.C. 956, 986, distinguished.) *Stansbie* v. *Troman*, [1948] 1 All E.R. 599 (C.A.).

See *23 Halsbury's Laws of England*, 2nd Ed. 594, para. 845; and for cases, see *36 E. and E. Digest*, 30-34, Nos. *165-205*.

NUISANCE.

Strict Liability. (E. O. Walford.) *12 Conveyancer and Property Lawyer*, 259.

POWERS.

Nature of Fraud on a Power in the Contemplation of Equity. (B. B. Benas.) *12 Conveyancer and Property Lawyer*, 106.

PRACTICE.

Appearance—Unconditional Appearance—Defendant's Right to plead that Plaintiff has no Cause of Action—R.S.C., Ord. 25, r. 2 (Code of Civil Procedure, R. 154.) *Wilkinson* v. *Barking Corporation*, [1948] 1 All E.R. 564 (C.A.).

New Trial—Application by Plaintiff for New Trial—Juror in Criminal Trial of Defendant also a Juror in Subsequent Trial of Civil Action against him—Defendant formerly indicted on Criminal Charge of Negligent Driving Causing Death and Acquitted—Civil Jury finding Defendant not Negligent—Fact that Juror had been on Jury in Criminal Trial not disclosed to Court and unknown to Counsel in Trial of Civil Action—Juror's Act of Omission not Misconduct—Plaintiff not entitled to New Trial on that Ground. A. was a juror in the criminal trial of C., who was indicted on a charge of negligent driving causing death. Later, A. was also a juror in the trial of a civil action against C., in which damages were claimed on the ground of C.'s negligent driving. The evidence in each case was the same. A. did not disclose to the Court before the trial of the civil action that he had been a juror in C.'s criminal trial, and the fact was unknown to counsel. The civil jury found that C. was not negligent. On a motion by the plaintiff for a new trial on the ground, *inter alia*, that A. was guilty of misconduct in not informing the Court that he was one of the jurors in the criminal proceedings against the defendant. *Held*, That, although a juror could have been properly challenged in the civil action, the fact that he was not so challenged could not be imputed to him for misconduct entitling plaintiff to a new trial. (*Fortescue and Coake's Case*, (1612) Godb. 193; 78 E.R. 117, and *Hollington* v. *F. Hewthorn and Co., Ltd.*, [1943] 1 All E.R. 35, referred to.) *Public Trustee* v. *Connor*. (Palmerston North. April 14, 1948. Christie, J.)

RABBIT NUISANCE.

Rabbit-destruction Council (Travelling-allowance) Regulations, 1948 (Serial No. 1948/61).

RENT RESTRICTION.

Business Premises—Monthly Tenancy—Action for Possession—Owner requiring Premises for its own Use—Meaning of "suitable alternative accommodation"—Matters Court may take into Account—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184),Reg. 21B (3). The requirement in Reg. 21B (3) of the Economic Stabilization Emergency Regulations, 1942, that "suitable alternative accommodation is or will be available to the tenant," means that the tenant should have substantially the same accommodation as he already had, if that accommodation was of such a standard as was reasonably necessary for his business, so that the tenant can carry on his business, substantially at least, in the same way in the offered premises as he had been carrying it on previously—provided that that had been a reasonable and businesslike way—in the premises of which possession is sought. Unless the landlord can provide such accommodation, the tenant is to remain where he is. The Court, in considering whether the premises offered provide "suitable alternative accommodation," may take into account the difference in locality, and the fact that the premises offered would result in a substantial detriment to the amount of business carried on, to the character of the business, and to the opportunities for carrying it on. *Atwaters (Auckland), Ltd.* v. *Knott*, (Auckland. April 8, 1948. Fair, J.)

ROAD TRAFFIC.

Pedestrians. *92 Solicitors Journal*, 103.

SALE OF LAND.

Sales of Land by Auction. (P. Moerlin Fox.) *22 Law Institute Journal*, 41.

SHIPPING.

Salvage—Award—Apportionment among Crew—Basis—Basic Pay—Exclusion of War Bonus. *The Empire Gulf*, [1948] 1 All E.R. 564 (P.D.A.).

TRUSTS AND TRUSTEES.

Sale of Land—Attorney for Trustee—Right to delegate—Ratification. This was an appeal from a judgment of the Ontario Court of Appeal, arising from an action by the purchaser for specific performance of a contract of purchase and sale of real property. The property had been owned by Georgiana Roberge, deceased, and her will appointed Antoine Roberge, her son, as executor and trustee. The property was to be held by him in trust for the use of her husband L. D. Roberge during his lifetime, and thereafter the trustee was given power to dispose of it. The son moved to Michigan and there executed a power of attorney to his father empowering the father to act on his behalf and to purchase, rent, or sell real property. Acting under his power, the father gave to one Wright an option to purchase the property in May, 1944. About May 23, 1944, the son was in Canada, and the father, the son, and Wright discussed the transaction. Wright informed them that he was assigning the contract to McLellan. A subsequent meeting was arranged with all parties and their solicitors, and the son left instructions with his solicitor to "get the matter closed out." The option was duly accepted, and notice thereof, as well as notice of assignment to McLellan, was duly given. On July 3, the purchaser's solicitor wrote saying he was prepared to settle. The solicitor for Roberge replied setting out the reasons why the sale was not to be completed, which reasons were (i) that the father was not empowered to enter into the agreement, (ii) that the son as executor had no power to sell, and (iii) that the vendors were unable to remove the objections taken to title. The letter concluded with these words: "The vendor therefore rescinds the agreement herein." The trial Judge (*Mackay*, J.) decreed specific performance, and held that, while the son could not validly delegate authority, the son had here, by his conduct, adopted and ratified the agreement. The Court of Appeal held that the son could not delegate and that the actions of the father were void, and that, therefore, the whole option was a nullity which could not be ratified. Further, it was held that there was no memorandum sufficient to satisfy the Statute of Frauds. The trial judgment was, therefore, reversed and the action dismissed. On appeal to the Supreme Court of Canada, the trial judgment was restored. All conduct of the son in discussing terms and going forward with the completion of the agreement would constitute a ratification or an adoption of what his attorney had initiated on his behalf. Such an agreement negotiated by an attorney could not be enforced, but the cases cited and the texts referred to did not justify the conclusion that the word "void" should be used in the sense that the attorney's act could not be ratified. A trustee was permitted to delegate the performance of his duties in certain cases.

(*Speight* v. *Gaunt*, (1883) 9 App. Cas. 1, *Stuart* v. *Norton*, (1860) 14 Moo. P.C.C. 17; 15 E.R. 212, *Stickney* v. *Tylee*, (1867) 13 Gr. 193, *Re Huntly*, (1887) 7 C.L.T. Occ. N. 251.) The delegation of authority involved nothing of that illegality which rendered an act void or a nullity in law. It was proper for a trustee to give a power of attorney, but, if the attorney did something which the trustee should not have delegated, then that act was unenforceable, and in that sense invalid, and might be either void or voidable, depending on its nature and character. (*Bowstead on Agency*, 10th Ed. 6, 33, 39, 69, *Spackman* v. *Evans*, (1868) L.R. 3 H.L. 194, *Merchants' Bank* v. *Lucas*, (1890) Cam. Cas. 280.) It was further held that there were sufficient memoranda in writing between the contract, the letters of the solicitors, and the ratification by the son to constitute a sufficient memorandum under the Statute of Frauds. (*Maclean* v. *Dunn*, (1828) 4 Bing. 722; 130 E.R. 947.) There was also no evidence that the sale was improvident. There was no question that a trustee might authorize an agent to sign on his behalf documents, such as the letters here in question, in the course of carrying out a sale which he himself had already made. The requisitions did not enter the situation, since they had been waived. The appeal was accordingly allowed. *McLellan Properties* v. *Roberge*, [1947] 4 D.L.R. 641. (Supreme Court of Canada. Rinfret, C.J.C., Kerwin, J., Taschereau, J., Kellock, J., Estey, J.)

Secret Trusts. (J. G. Fleming.) *12 Conveyancer and Property Lawyer*, 28.

WAGES PROTECTION AND CONTRACTORS' LIENS.

Contractor's Work, part unfinished, accepted by Employer—On such Acceptance, Work Completed—Employer's Liability limited to Moneys retained in Terms of Statute—Liability extinguished if Sub-contractor or other Claimant fails to give Notice of Lien and to commence Action within Sixty Days—" Completion of the work "—Wages Protection and Contractors' Liens Act, 1939, ss. 31, 32, 34 (4). An employer is entitled to determine whether he accepts what has been done under the contract in complete performance of the contractor's obligations. The moment he so determines, the work is completed within the meaning of s. 32 of the Wages Protection and Contractors' Liens Act, 1939; and his liability is limited to the moneys he is required by ss. 31 and 32 to retain. This liability becomes extinguished if a claimant fails to give notice of his intention to claim a lien and to commence action within the sixty days mentioned in s. 34 (4). *Webster* v. *Hallas*. (Auckland. April 4, 1948. Luxford, S.M.)

WAR EMERGENCY LEGISLATION.

Industrial Man-power Emergency Regulations—Compulsory Union Membership—District Man-power Officer directing Employer to deduct Union Fees from Wages—Revocation of Regulations—Union's Demand for Union Fees after such Revocation—Worker ceasing to be bound by Regulations not liable to Pay them—Industrial Man-power Emergency Regulations, 1942 (Serial No. 1942/296), Reg. 32. The defendant was a trained and experienced shipwright, and had for some years worked for the Wellington Harbour Board as a carpenter, and, latterly, on the floating-dock. Before 1941, he was a member of the Shipwrights' Union, and in November, 1941, he wrote to the Union Secretary resigning from the Union and forwarding the sum of £1 for his clearance. Early in 1942, he became and remained a member of the Harbour Board Employees' Union. In November, 1943, the Shipwrights' Union wrote to the defendant asking him to rejoin that Union and to renew membership, and stating that, failing his doing so, it was the Union's intention to request the District Man-power Officer to deduct from his wages contributions to that Union in accordance with Reg. 32 of the Industrial Man-power Emergency Regulations, 1942. The Harbour Board was directed accordingly by the Man-power Officer, who considered that the Shipwrights' Union was the appropriate Union to which the defendant should belong under the regulations. He continued to be a member of the Harbour Board's Employees' Union, paying his fees to it; but the Harbour Board also paid Union fees for him to the Shipwrights' Union. Early in 1946, he met with an accident and was off work for some time, and he was off sick for six months towards the end of that year. In July, 1947, the defendant's name was removed from the Shipwrights' Union. He recently rejoined the Shipwrights' Union, as otherwise the Harbour Board would have to replace him on the dock in accordance with the latest award. The Shipwrights' Union claimed from the defendant Union fees up to the time when his name was removed from the register. *Held*, 1. That at all material times the defendant was a member of the Harbour Board Employees' Union, and neither he nor his employer could offend against the law as to compulsory unionism. 2. That, when the Industrial Man-power Emergency Regulations were revoked in 1946, the Shipwrights' Union, by asking the defendant to rejoin that Union, must have regarded him as having ceased, in 1943, to be a member of it; otherwise there was no purpose in asking him to rejoin it. 3. That the direction of the District Man-power Officer ordering the Harbour Board to pay the defendant's fees to the Shipwrights' Union did not make that Union the appropriate one to which the defendant must belong under Reg. 32 of the Industrial Man-power Emergency Regulations; he was bound by those regulations only while he was employed in accordance with them; and, once they were revoked, his obligation in that respect ceased, and no further Union fees were recoverable after the regulations had been revoked. Judgment was given for the defendant. *New Zealand Shipwrights' and Boatbuilders' Industrial Union of Workers* v. *Ham.* (Wellington. April 8, 1948. Goulding, S.M.)

WILL.

Construction—Direction to set aside Amount and to pay Income thereof to Testator's Sister for Life—Such Amount after Death to fall into Residue—Part only set aside—Numerous Specific Pecuniary Bequests—Capital Shortage in Estate—Part amount as set aside available to meet Demands of Beneficiaries under Gift antecedent to Gift of Residue—Rights of Beneficiaries thereto—Rate of Interest in respect of delayed Payments. Clause 3 of a will was in the following terms: " I direct my trustees to set apart the sum of four thousand pounds free of all duty and to pay the income therefrom to my sister Mary during her life and upon the death of my said sister the sum so set apart shall fall into and form part of my residuary estate." (Miss Mary Fleming, sister of the testator mentioned in this clause, died on December 4, 1946.) By cl. 4, the testator made a large number of specific pecuniary bequests, particulars of which are set out in the judgment. Clause 8 of the will was as follows: " I declare that in the event of the failure of any of the foregoing legacies or gifts such legacy or gift shall fall into and form part of my residuary estate and I declare that if there shall be insufficient in my estate to pay all the foregoing legacies and gifts in full then the same shall abate *pro rata*." Clause 9 deals with the residue as follows: " As to all the rest residue and remainder of my estate (herein referred to as my residuary estate) including upon the death of my sister the sum of four thousand pounds hereinbefore directed to be set apart for her benefit I direct my trustees after payment thereout of my just debts funeral and testamentary expenses and all estate succession and other duties to divide the same into seven equal parts and to pay one of such parts to each of the following." Then follow the names of those among whom residue is to be divided. St. David's Presbyterian Church, Auckland, is one, and the others are individuals. All are specific legatees under the will, but there are a great many specific pecuniary legatees who take no share of residue. Owing to the difficulties in realization, three-quarters of each legacy had been paid, and three-quarters of each sum directed to be set aside had been set aside, but nothing had been paid as interest. The surviving executor, ready to distribute, found a capital shortage, exclusive of the fund of £9,172 10s. constituted under cl. 3. On originating summons for the decision of the questions that had arisen on the administration of the estate, *Held*, 1. That the sum of £3,000 set aside on account of the £4,000 directed to be set aside under cl. 3 of the will was available to meet the demands of those who, or whose predecessors in title, had not yet received all that was specifically bequeathed by the portions of the will antecedent to the gift of residue. (*Farmer* v. *Mills*, (1827) 4 Russ. 86; 38 E.R. 737, distinguished. *Dudman* v. *Shirreff*, (1870) 18 W.R. 596, *In re Tootal's Estate, Hankin* v. *Kilburn*, (1876) 2 Ch.D. 628, *Hichens* v. *Hichens*, (1876) 36 L.T. 8, and *In re Lyne's Trust*, (1869) L.R. 8 Eq. 65, referred to.) 2. That the residue was liable to make up all the legacies and all the funds (other than that mentioned in cl. 3 of the will) to their full amounts. 3. That the residue was also liable for interest at 4 per cent. per annum, as from one year from the testator's death, on the amounts for the time being unpaid and unallotted. *In re Fleming (deceased), Ruddock* v. *Morpeth.* (Auckland. February 2, 1948. Callan, J.)

Construction—Meaning of " Survivors." The word " survivors " *is a word of variant meaning, and has to be construed* according to the context. The words in the will before the Court were: " and if any of my children having entered into possession of any portion shall die unmarried then the share of the child or children so dying shall revert to the survivors on the above terms." The natural meaning of the word " survivors " in that context was " those children of mine who shall *then* survive "—that is to say, at the date of the death which brings the accrued share to them. The Court, when faced with an ambiguity such as exists here, will turn aside

from a construction if it be irrational, and, although neither construction contended for produced very convenient results, the inconvenience is diminished by adopting the above construction. (*In re Wilson*, (1900) 19 N.Z.L.R. 406, applied. *In re Joyce, Public Trustee* v. *Smith*, [1926] N.Z.L.R. 835, referred to.) *In re Christian, Christian* v. *Christian.* (Auckland. March 23, 1948. Callan, J.)

Recent Cases. *12 Conveyancer and Property Lawyer*, 64, 141, 280.

Right of Pre-emption: Time specified for Exercise held to be of Essence. *21 Australian Law Journal*, 433.

Rule in *Shelley's Case*: Whether " issue " a Word of Limitation or of Purchase. *21 Australian Law Journal*, 430.

WOOL INDUSTRY.

Wool Levy Regulations, 1945, Amendment No. 1 (Serial No. 1948/60). Revoking Reg. 4, and substituting new maximum rates of levy chargeable on wool (each bale, 5s., each fadge, 2s. 6d., each bag or sack, 10d.).

WORKERS' COMPENSATION.

Alternative Remedies—Recovery of Compensation—Conditional Payments by Employer—Right of Action against Third Party not to be prejudiced—Repayment if Action Successful—Payments to be treated as Compensation if Action failed—Workmen's Compensation Act, 1925 (c. 84), s. 30 (1). *Elligott* v. *Nebbett*, [1948] 1 All E.R. 514 (K.B.D.).

Evidence—Evidence taken at Inquest on Deceased Worker—Admissibility on Claim for Workers' Compensation. Subject to the provisions of s. 46 of the Workers' Compensation Act, 1922, evidence taken at the inquest on the deceased worker in respect of whose death his dependants claim compensation is not evidence in the Compensation Court; but it can be used for cross-examination of the witness who gave it, and to contradict his evidence in the Compensation Court where it differs. *Fotheringham* v. *The King.* (Christchurch. March 19, 1948. Ongley, J.)

ACQUISITION OF TITLE TO LAND BY ACCRETION.

By E. C. Adams, LL.M.

I.

As to the acquisition of title to land by accretion, see *3 Halsbury's Laws of England*, 2nd Ed. 136, 137, and (1939) 15 New Zealand Law Journal, 272, and (1943) 19 New Zealand Law Journal, 104, 119.

For the doctrine of accretion to apply, two factors must be present: (i) a freehold with a movable boundary; and (ii) a gradual and imperceptible change in such *movable* boundary.

Lands bounded by the sea, rivers, or streams of *running* water will be subject to the doctrine. Conversely, if waters gradually and imperceptibly wear away the soil, and the sea or stream encroaches, the owner will lose title by erosion: *In re Hull and Selby Railway Co.*, (1839) 5 M. & W. 327; 151 E.R. 139. A legal incident to land bounded by moving waters is the possibility of gradual changes in the positions in such water-boundaries.

In *Attorney-General* v. *Findlay*, [1919] N.Z.L.R. 513, the land was described in the Crown grant as bounded by " high-water mark," and the successor in title of the Crown grantee was held entitled to an accretion (a mud-flat situated in the Firth of Thames) which had formed slowly and gradually. *Verrall* v. *Nott*, (1939) 39 N.S.W.S.R. 89, was a case of a successful claim to an accretion by the owner of a section at Manly Beach, Sydney, the land being described in the Crown grant as " on the south by the shores of North Harbour."

Auty v. *Thomson*, (1903) 5 G.L.R. 541, is an example of the application of the doctrine to a parcel of land bounded by a stream. Accretion applies to land bounded by navigable, as well as by non-navigable, rivers or streams.

The mere fact that the original boundary has been accurately defined (such as by reliable survey), and is still definable, or is still ascertainable (for example, by a cliff, wall, or mound), will not prevent a landowner from being entitled to an accretion: *Secretary of State for India in Council* v. *Foucar and Co., Ltd.*, (1923) 50 T.L.R. 241, *Frost* v. *Palmerston North–Kairanga River Board*, [1916] N.Z.L.R. 643, *The King* v. *Lord Yarborough*, (1824) 3 B. & C. 91; 107 E.R. 668; aff. on app. *sub nom. Gifford* v. *Lord Yarborough*, (1828) 5 Bing. 163; 130 E.R. 1023.

The doctrine of accretion does not apply to non-tidal sheets of more or less stagnant water, or to ponds, canals, or lakes: *Trafford* v. *Thrower*, (1929) 45 T.L.R. 502. And it may not apply to lagoons which are not regularly open to the flux and reflux of the sea tide: *Booth* v. *Williams*, (1910) 10 N.S.W.S.R. 834; 10 C.L.R. 341. But in *Attorney-General of Southern Nigeria* v. *John Holt and Co.* (*Liverpool*), *Ltd.*, [1915] A.C. 599, the Privy Council applied the doctrine to land described as " facing the lagoon."

Nor does it apply where the boundary is a *fixed* line: *Smart and Co.* v. *Suva Town Board*, [1893] A.C. 301, and *Hindson* v. *Ashby*, [1896] 2 Ch. 1, 13, 26. In this connection, the Australian case *McGrath* v. *Williams*, (1912) 12 N.S.W.S.R. 477, is worthy of the closest study. The Crown grant was subject to a certain " reservation " of " all land within 100 ft. of high-water mark on the sea coast, and on every creek, harbour, and inlet of the sea." It was held that the reservation operated by way of *exception* from the grant, and that, consequently, the 100 ft. must be measured from the high-water mark *as at the date of the grant*. In other words, the boundary between the land granted and the land excepted by the Crown was fixed and immovable. This rule has common application in New Zealand, where roads or river-bank reserves lie between the river and the land granted; no matter to where the river may change its course, the boundaries of the land Crown-granted will always remain the same: *Attorney-General and Southland County Council* v. *Miller*, (1906) 26 N.Z.L.R. 348. (*cf. Pipi te Ngahuru* v. *Mercer Road Board*, (1887) 6 N.Z.L.R. 19, which, according to general professional opinion, was wrongly decided.)

The second condition is that the change in the movable boundary must have been gradual and imperceptible. Where the change is sudden—*e.g.*, as the result of earthquake or flood—the title boundaries remain what they were immediately before such sudden change: *Thakurain Ritraj Koer* v. *Thakurain Sarfaraz*

Koer, (1905) 21 T.L.R. 637. Where, for example, marks show that increases to land are rapid and noticeable over short periods of time, the accretion will not pass to the adjoining owner: *Attorney-General* v. *Reeve*, (1885) 1 T.L.R. 675. Thus, if a river permanently changes its course overnight, the ownership of the bed remains unchanged.

It is not the sudden or gradual nature of the *event* which governs the doctrine of accretion, but the perceptible or imperceptible nature of the acquisition. As was said in *Williams* v. *Booth*, (1910) 10 C.L.R. 341, 346, 356, referring to *Hall's Essay on the Sea Shore*, 3rd Ed. 793:

> Whatever reason and common sense denominates imperceptible and indefinable, or which, even if perceptible and definable, is still too minute and valueless to appear worthy of legal dispute or separate ownership, will be deemed part of the adjoining soil, and, as it were, to have grown out of it.

Moore on Foreshore, says:

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

The reason for the rule was stated by the Privy Council in *Sree Eckowrie Sing* v. *Heeraloll Seal*, (1868) 12 Moo. Ind. App. 136, 140, 141; 20 E.R. 292, 293, 294:

> The title by accretion to a new formation generally, is not founded on equity of compensation, but on a general accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will then follow the title to that parcel to which it adheres.

And a Scottish writer in 1681 said in *2 Stair's Institutions of the Law of Scotland*, 201:

> Appropriation by alluvion is admitted in all nations, for thereby the adjection of another's ground insensibly and unperceivably, by the running of a river, becomes a part of the ground to which it is adjected; because it is uncertain from whose ground such small and unperceivable particles are carried by the water, and thereby also the frequent questions that would arise betwixt the proprietors upon the opposite banks of rivers are prevented; and though the adjection may be perceivable and considerable in a tract of time it maketh no difference if at no particular instant the adjection be considerable; as the motion of the palm of a horologe is insensible at any instant, though it be very perceivable when put together in less than the quarter of an hour.

The doctrine of accretion appears to come to us from the Roman law, where it was classified as *accessio*. It is said in *Hunter's Introduction to Roman Law*, 7th Ed. 53:

> The slow increase of land near the mouth of a river, so gradual as to be at each moment imperceptible, was called *alluvio*, and the increase belonged to the owner of the lands enriched by the accretion.

A mortgage or other instrument affecting land automatically affects an accretion to such land, unless, of course, the accretion is expressly excluded therefrom: *Mercer* v. *Denne*, [1904] 2 Ch. 53, and *Coulson and Forbes on Waters and Land Drainage*, 5th Ed. 41. Thus, an accretion may be subject to an easement or *profit à prendre* to which the principal land is subject.

A road or street adjoining the sea or a stream may be entitled to an accretion, and, if so entitled, the accretion is part of the highway; and, if the street is vested in the local body, the accretion also becomes vested in the local body: see unreported judgment of *Salmond*, J., in *Mayor, &c., of Eastbourne* v. *Sullivan*, Supreme Court, Wellington, June 9, 10, 1924 (No. 1923/85).

Procedure.

It has been held both in New Zealand and Australia that the doctrine of accretion applies to land held under the Torrens system: *Auty* v. *Thomson*, (1903) 5 G.L.R. 541, and *Verrall* v. *Nott*, (1939) 39 N.S.W.S.R. 89.

If the landowner thinks that he is entitled to an accretion, he should first have his land (together with the accretion) surveyed in accordance with the regulations for the survey of Land Transfer land, in order to enable the District Land Registrar to issue a correct certificate of title in accordance with s. 74 of the Land Transfer Act, 1915. In support of his application for amendment, the registered proprietor must submit evidence establishing that the accretion has been gradual and imperceptible; this is usually furnished in the form of statutory declarations: see Precedents Nos. 1 and 2, *infra*. If, after the plan has been duly approved as to survey by the Chief Surveyor, the District Land Registrar (who in these matters acts judicially) thinks that the claimant has established title to the accretion, he will on payment of a fee of £1 cancel the existing title and issue a new one based on the newly deposited plan. Before doing so, he may serve notice on any interested person—*e.g.*, on the Attorney-General on behalf of the Crown—who may be prejudiced by the issue of a certificate as aforesaid.

If the District Land Registrar declines the application, the claimant will be obliged to bring an action in the Supreme Court for a declaration of title. All interested parties must be made parties to the action, it being the practice to make the District Land Registrar a nominal defendant. An example of this procedure is Precedent No. 3, *infra*.

If the boundary is the sea, the legal boundary is the line of medium high tide between the spring and the neap tides; such line should be ascertained by taking the average of those medium tides in each quarter of a lunar revolution during the year: *Attorney-General* v. *Findlay*, [1919] N.Z.L.R. 513.

If the boundary is a river, the accretion must be permanent in this sense, that it must not be covered by water at ordinary floods during the rainy season. Where land is bounded by a river, the landowner is entitled to have his certificate issued to the bank only: *In re White*, (1927) 27 N.S.W.S.R. 129. Owing to s. 206 of the Coal-mines Act, 1925 (which vests the beds of *navigable* rivers in the Crown and considerably widens the common-law definition of "navigable river"), it is usually impossible for a District Land Registrar to judge whether or not a title extends *ad medium filum aquae*. Adopting the definition of counsel (the late Sir John Findlay, K.C.) in *Palmerston North–Kairanga River Board* v. *Frost*, [1916] N.Z.L.R. 1110, 1114, we can confidently say that the bed of a river is all that area of land which is covered by the river-waters at the time of average or normal freshes or floods, and the banks are the land adjoining the river left uncovered in average or normal flood. A piece of land, however, does not cease to be accretion and become a part of the bed of the river because it may happen

to be flooded occasionally (say, once in every two or three years), when the rainfall has been long continued and of more than usual severity: *Kingdon* v. *Hutt River Board*, (1905) 25 N.Z.L.R. 145, 157. See Precedents Nos. 1 and 2, *infra.*

Although an owner of land is not entitled to an accretion brought about by works *for the purpose of reclamation* (*Attorney-General of Southern Nigeria* v. *John Holt and Co.* (*Liverpool*), *Ltd.*, [1915] A.C. 599), the mere fact that he has brought about an accretion as the result of his legitimate actions in protecting his own land—*e.g.*, by the erection of groynes or the building of a rubble wall or the planting of trees—will not disentitle him to the accretion: *Brighton and Hove General Gas Co.* v. *Hove Bungalows, Ltd.*, [1924] 1 Ch. 372, and *Verrall* v. *Nott*, (1939) 39 N.S.W.S.R. 89.

Where an accretion has been gradually formed to the lands of several adjoining owners, the Court seeks to do justice by a fair apportionment. The rule is (after making due allowance for indentations or sharp projections, such as a cape) to give to each owner a share of the new shore-line in proportion to what he held in the old shore-line, and to complete the division of the land by running a line from the boundary between the parties on the old shore to the point thus ascertained on the new: *Riddiford* v. *Feist*, (1902) 5 G.L.R. 43.

Precedents will appear in next issue.

LAW SOCIETIES' ANNUAL MEETINGS.

Wellington District Law Society.

The Annual General Meeting, held on March 1, 1948, was attended by ninety-two members.

Report and Balance Sheet.—In moving the adoption of the Annual Report and Statement of Accounts the President, Mr. J. R. E. Bennett, welcomed back to active practice Mr. R. E. Pope and Mr. C. W. Neilsen, who had been laid aside by illness during the year.

The President reported on the action taken in connection with the resolutions which were passed at the last Annual Meeting, when it had been decided that the resolutions should be forwarded to the Prime Minister, the Attorney-General, the New Zealand Law Society, and the Press. The resolution concerned the following matters: (*a*) delays in disposing of cases in the Supreme Court and the Compensation Court; (*b*) judicial appointments; (*c*) shortage of Magistrates; and (*d*) enactments by Order in Council.

(*a*) In this matter the Attorney-General had advised that the Judge of the Compensation Court had been freed from other work, and would in future be concentrating on compensation work.

(*b*) In addition to the Society's resolution, similar resolutions from other societies were considered by the New Zealand Law Society at its March meeting, when it was decided to forward to the Attorney-General and to the Press the following resolution:—

"That no Judge be appointed to the Supreme Court Bench or Court of Appeal, who is not at the time of his appointment an actively practising member of the Bar of acknowledged standing."

(*c*) Regarding the sittings of the Magistrates' Court in the Hutt Valley, the President stated that these had been rearranged, and it was understood that the work of the Court was now proceeding satisfactorily.

(*d*) The Wellington resolution was adopted by the Council of the New Zealand Law Society, and a copy sent to the Attorney-General and to the Press.

In respect to delays in the Stamp Duties Office, as this position was found to apply generally throughout New Zealand, representations were made by the New Zealand Law Society to the Commissioner of Stamp Duties and to the Minister of Stamp Duties, who attributed the delays to shortage of qualified staff. The suggestion of decentralization was urged by the New Zealand Society. Further representations were then made to the Public Service Commission, it being pointed out that, if the public were required to pay some £4,000,000 in death duties per annum, then the public were entitled to expect adequate service in return.

The President stated that 1947 had been an unusually busy year, and included the preparation and organization for the Dominion Legal Conference held in Wellington at Easter. The Conference had been one of which the Society might reasonably be proud, and he expressed his thanks to all the members of the profession who had assisted in any way. He informed members that the joint secretaries had compiled a complete record of the Conference and its arrangements.

The President expressed appreciation of the faithful service given by Mr. W. P. Shorland, who retired from the Council this year under the "oldest inhabitant" rule. He had served on the Council continuously since 1939 and was President of the Society in 1946. He had also been a member of the New Zealand Law Society and of its Standing Committee for two years, and, as such, had taken a very full share of the work carried out by that Committee. This work included making representations to Ministers of the Crown, Parliamentary Committees, and Departmental Officers.

The President also expressed his appreciation of the assistance given him by the Secretary and the staff.

In his remarks, the President made reference to the fewer complaints requiring action by the Council. The most serious were two instances where long delays had occurred in the completion of documents for State Advances loans. Members were urged in their own interests to avoid such delays wherever possible.

Mr. Leicester, in seconding the motion, referred to the items shown in the annual accounts, and expressed the view that, largely as a result of the numerous admission fees received during the year, the finances of the Society were in a most satisfactory state. The Solicitors' Benevolent Fund Account was gradually building up, and the No. 2 Account was also in a healthy state.

No. 2 Account: Mr. Buxton proposed that it be a recommendation to the incoming Council that it consider its policy with regard to No. 2 Account. In his opinion, the Account should not be allowed to hold accumulated funds, but the suggestion which had already been made to the Society—that social gatherings for the profession such as a luncheon or even a dinner might be arranged—should be adopted.

The Annual Report and Statement of Accounts were then formally adopted.

Election of Officers.—President: Mr. G. C. Phillips, the only nominee, was elected President.

On taking the Chair, Mr. Phillips thanked the members, and expressed the hope that he would be able to give the same standard of service as his predecessors had given to the Wellington Society.

The President then thanked Mr. Bennett on behalf of the Council and the Society for the vast amount of work carried out by him during his term of office as President of the Society and as a member of the Standing Committee of the New Zealand Law Society. In every instance, he had given of his services willingly and unstintedly. He expressed the view that the Society owed a debt to Mr. Bennett for the capable and punctilious way in which he had carried out the duties of his office.

Vice-President: Mr. W. E. Leicester, the only nominee, was elected Vice-President.

Treasurer: Mr. F. C. Spratt, the only nominee, was elected Treasurer.

Members of the Council: Fourteen nominations being received for the eight vacancies on the Council, a ballot was duly held, and the following were duly declared elected as members

of the Council: Messrs. J. R. E. Bennett, E. D. Blundell, R. Hardie Boys, R. L. A. Cresswell, E. T. E. Hogg, I. A. Macarthur, E. F. Rothwell, and C. A. L. Treadwell. Members representing branches: Palmerston North, Mr. G. I. McGregor continues in office; Feilding, Mr. J. Graham continues in office; and Wairarapa, Mr. R. McKenzie continues in office.

Delegates to New Zealand Law Society.—Messrs. P. B. Cooke, K.C., J. R. E. Bennett, W. E. Leicester, and G. C. Phillips were elected to represent the Wellington Society on the Council of the New Zealand Law Society.

Mr. Cooke traversed the report of the work carried out by the New Zealand Law Society during the year, and stated that the heaviest work of the Society had arisen in regard to new legislation. No fewer than nine bills had contained clauses on which, after careful consideration, the New Zealand Society had prepared submissions which were made to Ministers of the Crown or Parliamentary Committees.

He also reported the position of the Solicitors' Fidelity Guarantee Fund.

He referred to the fact that Mr. Bennett and Mr. Treadwell had been deputed by the New Zealand Society to appear before the Council of Legal Education in regard to the Wellington proposals concerning the March special examinations for servicemen.

Mr. Buxton proposed a vote of thanks for, and appreciation of, the work that had been done by the Wellington members on the New Zealand Council.

The proposal was carried by acclamation.

Auditors: Messrs. Clarke, Menzies, Griffin, and Co., were elected auditors for the ensuing year.

Easter Vacation.—It was decided that the Easter Vacation should be observed from the usual closing time, Thursday, March 25, to the usual opening hour on Monday, April 5.

Christmas Vacation.—It was decided that the Christmas vacation should be observed from the usual closing time on Thursday, December 23, 1948, to the usual opening hour on Wednesday, January 12, 1949.

Federal Reports.—Mr. Leicester stated that the set of Reports consisted of approximately 496 volumes of Reports, Digests, and Rulings and Decisions, which occupied some 90 ft. of shelving. The subscription was paid direct to the publishers in the United States. The Reports were very seldom used and the Council were given authority to dispose of the volumes as they thought best.

Amendment to Rules—Horowhenua County.—Mr. N. M. Thomson proposed that cl. (*d*) of R. 7 of the Rules of the Society should be amended by adding the words: "and one member practising in the Horowhenua County including Foxton."

A very lengthy discussion ensued, in which many members took part, after which Mr. Wild moved the following amendment:

"That the incoming Council be recommended to consider the question of representation on the Council of the Society, to take the views of country practitioners on the subject, and to bring down a report to the next annual meeting of the Society."

The Horowhenua practitioners attending the meeting expressed regret that, by carrying such a resolution, no change could be effected for two years. Mr. Wild's amendment was put to the meeting and carried. The amendment thus becoming the motion was carried.

General.—Mr. Phillips referred to a letter received that day intimating that Mr. N. G. Wakelin of Upper Hutt had been forced to retire on account of ill health. Reference was also made to the illness of Mr. J. W. Rutherfurd. It was decided to send to each of these members the good wishes of the Society for a speedy recovery.

Special Meeting.—The following resolutions were carried unanimously:

"That the incoming Council be directed to consider the following proposals and that a Special General Meeting be called within four months for the purpose of receiving the Council's report and deciding on what action should be taken:

(*a*) For the provision of a District Law Society Headquarters with adequate social amenities, including smoking and luncheon rooms.

(*b*) For a recommendation to the New Zealand Law Society that a Public Relations Committee be constituted to keep before the public the views of the Society and the work that is done to check legislation and protect the community.

(*c*) For a recommendation to the New Zealand Law Society that an Annual Meeting be held for the discussion of the general affairs of the profession, such meeting to be open to all members of the profession.

(*d*) For the holding of quarterly meetings of the Wellington District Law Society, instead of only one each year, to enable the general affairs of the profession to be discussed."

Mr. Spratt reported that representations had been made during the year to the Minister for increased office accommodation and Library space, including a room for the use of law students, but, although the deputation had been sympathetically received, it was apparent that no extra building facilities could be made available whilst the housing priority existed.

Delays in Compensation Court.—It was reported that the last ordinary sitting of the Compensation Court held in Wellington was in June, 1947, which extended to July. Some fixtures were made for August, but had not yet been heard. The present outlook appeared to be that the Judge would be engaged in the Northern district until later in the year, which would mean that Wellington would be without a sitting for nearly a year. A recommendation was made to the incoming Council that it take up the matter of the delays in the Compensation Court with the New Zealand Law Society and that it be suggested that there should be a quarterly sitting for each centre.

(*a*) *Delays in the Stamp Office.*—Mr. Wild expressed the view that some public statement should be made concerning the delays occurring in the Stamp Office.

(*b*) *Delays in the Supreme Court.*—Mr. Wild also referred to the delays occurring in the hearing of cases before a Judge alone. He stated that the delay was not due to lack of pressure by counsel or to the lack of attention by the Court staff, but it seemed impossible to have litigation proceeded with expeditiously. He urged that the Council should take these matters up.

Staff.—On behalf of members, Mr. Hardie Boys expressed appreciation of the courteous manner in which Mrs. Gledhill and the staff had carried out their duties during the year.

Southland District Law Society.

The Annual General Meeting was held on March 3, 1948. The President, Mr. K. G. Roy, was in the chair.

Election of Officers.—The election of officers resulted as follows: President, Mr. J. H. B. Scholefield; Vice-President, Mr. H. K. Carswell; Secretary, Mr. J. W. Howorth; Treasurer, Mr. C. N. B. French; Council, Messrs. I. A. Arthur, A. B. Binnie, E. H. J. Preston, K. G. Roy, and W. H. Tustin; Hon. Auditor, Mr. G. C. Broughton; Delegate to Invercargill Chamber of Commerce, Mr. J. G. Imlay; Delegate to Southland Progress League, Mr. H. E. Russell; and Delegate to New Zealand Law Society Council, Mr. J. H. B. Scholefield. The appointment of the Librarian was left to the incoming Council.

Levy.—A levy or levies not exceeding £3 in all were authorized in respect of all members of the Society practising on their own account or in partnership, and payable at such times and in such manner as the Council might direct.

Wages Agreement.—Power was given to the incoming Council to negotiate and conclude a wage agreement which had been put forward by Mr. E. J. McLauchlan on behalf of the Union.

Release of Probates.—Mr. Macdonald stated that the Dunedin Office of the Stamp Duties Department released probates on payment of the full amount of death duty without waiting for certification of the accounts by the Head Office. The President agreed to interview the local office with a view to having this practice introduced.

Land Transfer Office and Stamp Duties Department.—The question of having these two Departments separated was discussed. It was pointed out that the matter had been dealt with by the New Zealand Law Society, and that the real opposition comes from those who hold the joint positions of District Land Registrars and Assistant Commissioners and would lose grading if the Departments were divided. It was mentioned that the opposition to decentralization comes from those men, who, being Land-Transfer trained, feel unqualified to certify Stamp Accounts.

Land Sales Court Staff.—The lack of efficiency of the Land Sales Court Staff, caused by its being continually changed, was discussed. The Council was instructed to see what could be done, with a view to obtaining more permanency in it.

Traffic Cases.—Mr. Mills suggested that an endeavour should be made to have traffic cases held once monthly, to reduce

the amount of waiting counsel have to put up with. The President said the Council already had this in hand.

Petrol Licenses.—It was reported that an application has been made by the New Zealand Law Society to the Oil Fuel Controller for a basic petrol ration for the legal profession, but that no decision had been given. It was decided that all practitioners should be urged to apply immediately for licenses as business executives.

Superannuation Scheme.—It was resolved that the Council should attempt to devise a scheme for payment of superannuation to members in conjunction with the Guarantee Fund, and forward such plan to the New Zealand Law Society.

THE LATE MR. H. R. COOPER.

Tributes by Fellow-practitioners.

Mr. H. R. Cooper, senior member of the firm of Messrs. Cooper, Rapley, and Rutherfurd, Palmerston North, died on March 18 on the eve of completing fifty years of active practice. He had held the offices of Crown Solicitor and City Solicitor. His great ability was recognized for many years by his brother-practitioners, by whom he was much beloved.

On March 22, in the Magistrates' Court at Palmerston North, Mr. J. R. Herd, S.M., presided over an attendance of all the solicitors practising in Palmerston North. There was also a good attendance of Feilding practitioners.

The President of the Palmerston North Branch of the Wellington District Law Society, Mr. T. M. N. Rodgers, said that the members of the profession were gathered to discharge a most painful duty: to make reference to the loss which had befallen the profession, and the community as well, in the death of Mr. H. R. Cooper. He continued:

"Mr. Cooper as a boy enjoyed a distinguished career, both scholastically and in the field of sport, at the Wanganui Collegiate School, and gave promise, which was more than amply fulfilled, of an outstanding future career. He was prominent—and, indeed, excelled—in most sports, and while at school he held the unique distinction of being Captain of the First Fifteen and First Eleven, Head Prefect, and Head of the School. Later, he was prominent in the inauguration of representative hockey, and in the Manawatu Golf Club and Manawatu Racing Club, having served as President of both these bodies. But it was in his capacity as a barrister and solicitor that we knew him best. He practised his profession in Palmerston North for nearly half a century, and has for many years been the acknowledged leader of the Bar in this district, and it is fitting that here in this Court, where he practised most, his fellow-practitioners should gather to pay tribute to his memory, and extend their sympathy to his relatives. Here in this Court, he appeared prominently in nearly all the important cases heard for many years.

"In the practice of his profession, he was a model for all of us, and maintained at all times the highest professional traditions, and gave an example which has been, and which cannot fail to continue to be, an inspiration to all practitioners who were fortunate enough to come in contact with him. His great ability at all times commanded universal respect, and his conspicuous integrity our universal admiration, but it was his personal characteristics and qualities which endeared him to us most of all. Approachable at all times to the most junior practitioners, Mr. Cooper was a constant source of help and encouragement to his professional brethren, who will always remember the irredeemable debt of gratitude they owe him. His unfailing courtesy and charm of manner will always remain with us as happy memories. He was more than just a prominent or leading lawyer, and more than just a friend to us—he had that indefinable characteristic, all too rare, which commands an abiding and affectionate regard from all whose privilege it was to be associated with him in the great profession he adorned, and in the Law which he served with such ability, impartiality, and dignity for so many years.

"As City Solicitor and Crown Solicitor, he served the citizens and community, but he served the Law and his fellow-men at all times, and largely to him is due the very happy relationship which has existed between the local practitioners over the years.

"We all feel a very great personal loss, but we also feel that we can be thankful for the example he gave us, and that we can best show this by endeavouring to follow that example and inspiration in our own practice of the profession, and emulate also the remarkable and cheerful fortitude with which he bore his last illness. We shall never forget him.

"To his widow and sons we express the sincerest and most heartfelt sympathy of each and every member of the profession, and the hope that our expressions of sympathy will be of some comfort to them in the loss which they have suffered, which is even greater than that of the profession."

On behalf of the practitioners of Feilding, Mr. John Graham said that they desired to join with their brethren of Palmerston North in the tribute being paid by them to the memory of the late Mr. Cooper. He said: "My own knowledge of Mr. Cooper goes back nearly five decades before either he or I commenced practice in this District. He was then in Wellington, under the tutelage of that wonderful and brilliant lawyer, the late Sir Charles Skerrett. I particularly remember being present in the Court of Appeal and listening as a student to legal argument in the well-known case of *Riddiford* v. *Warren*, (1901) 20 N.Z.L.R. 572, in which the late Mr. Cooper appeared as junior to the late Sir Francis Bell. I remember hearing the President of the Court (the late Sir Joshua Williams), at the conclusion of Mr. Cooper's argument as junior counsel, confer with the other Judges and say that it was the wish of himself and his brother Judges to congratulate junior counsel on his able and lucid argument. Mr. Cooper was then a young man of twenty-five years of age, on the threshold of his career. The promise that he then gave was destined to be fulfilled, because shortly afterwards he came to practise his profession in the Manawatu, and for forty years there was hardly a case of any moment in Palmerston North in which his services were not sought after. He was loved and respected by every member of the profession, and, because of his many sterling qualities and his friendly, lovable, and gentlemanly nature, his memory will be ever cherished by us all."

Senior-Sergeant Audley added the sympathy of the Police with the members of the late Mr. Cooper's family. He said that for fifteen years Mr. Cooper had been Crown Prosecutor, and the relations within that office with the Police had been inspiring, and always of the happiest and most helpful nature.

Mr. J. R. Herd, S.M., said that he desired on his own behalf and on behalf of the former occupants of the Magisterial bench present, to be associated with the tribute which had been paid by the former speakers. The Magistrate continued:

"I lacked the acquaintance of the late Mr. Cooper, but, from accounts which I have had of his bright personality and his ability, that lack is a very definite loss. I have been asked on behalf of the Registrar and the other members of the staff of the Court, to say that they also wish to be associated in sympathy with the members of the profession and the Police in the loss the profession has suffered."

The Court was adjourned as a tribute of respect.

LEGAL LITERATURE.

New Books and Publications.

Middle Temple Ordeal (Being an account of what World War II Meant to the Inn). Privately printed for the Honourable Society of the Middle Temple by Sir Isaac Pitman and Sons, Ltd. Price 7s. On Sale by Butterworth and Co. (Publishers), Ltd.

Journal of Criminal Science, Vol. 1, by L. Radzinowicz and J. W. C. Turner. London: MacMillans. Price 21s.

Execution of a Judgment, by J. F. Josling. London: Solicitors Law Stationery Society, Ltd. Price 5s.

Road Haulage Law and Compensation, by H. F. R. Sturge and T. D. Corpe. London: Sweet and Maxwell. Price 47s.

Criminal Procedure from Arrest to Appeal, by Lester Bernhardt Orfield. Oxford University Press (New York University Press). Price 42s.

A First Book of English Law, by O. Hood Phillips, M.A., B.C.L. (Oxon.). London: Sweet and Maxwell. Price 22s. 6d.

Palmer's Company Law, 18th Ed. (1948), by His Honour Judge Topham, LL.M., K.C. London: Stevens and Sons. Price 47s.

The Law in Relation to Partners, by Peter Elman, M.A. London: Stevens and Sons. Price 5s. 6d.

The Agriculture Act, 1947, by Anthony Cripps, M.A. London: Butterworth and Co. (Publishers), Ltd. Price 28s.

LAND SALES COURT

Summary of Judgments.

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

No. 132.—McD. to N.

Rural Land—Basic Value—Low-lying Swamp Land—Desirability of Run-off for Cattle in Mid-winter—No run-off included in Sale—Costs of Winter Grazing taken into Consideration of Value of Land Sold.

(*Concluded from p. 100*). Upon the evidence, therefore, we are of opinion that the budget presented by the Crown represents the minimum income which a farmer lacking in initiative or suffering from grave ill fortune might reasonably expect to receive, but that an average efficient farmer is reasonably entitled to expect substantially to increase his income by one or other of the alternatives abovementioned. On the other hand, it seems clear that a farmer would be extremely lucky to earn the surplus envisaged by Mr. Hosking, and that the Committee was entitled to make a very substantial deduction from that surplus, on account, not only of the probable cost of winter grazing, but of the risk that such grazing might be difficult, or, indeed, impossible, to secure. Mr. Hosking himself admitted in cross-examination that the cost of grazing would not be less than £60.

" The figure arrived at by the Government represents a deduction from Mr. Hosking's surplus for capitalization of some £95 and an increase upon the Crown's surplus of some £37. We are of opinion that the actual cost of winter grazing, if available, would be in the vicinity of £60, but, by reason of the risk that it might not be available, we think the Committee was amply justified in reducing Mr. Hosking's surplus by £95. The vendor, indeed, has not appealed against this reduction. We are also of opinion, for the reasons which we have given, that some addition must be made to the surplus as assessed by the Crown, and our only concern, therefore, is as to whether the increase of £37 allowed by the Committee is too great.

" We have no doubt that an average buyer would be prepared, and reasonably so, to pay more than the productive value as assessed by the Crown, in the hope and belief that he would be able to carry on a substantially larger herd with the assistance of one or other of the alternatives which have been mentioned. A further method by which an owner might reasonably expect to increase his income would be by fattening a few lambs in the Spring. We think that, with reasonably good fortune, any average efficient farmer should in a normal year make well over £37 more than the surplus envisaged by the Crown, and we find it difficult to be convinced that the Committee was wrong in increasing the Crown's assessment by this amount. It is true that, in the result, the basic value found by the Committee amounts to £52 per acre, which appears an exceedingly high value for this particular piece of land. On the other hand, it is proper for us to remember that the purchaser is a returned soldier, who is at present farming the land under a share-milking agreement, and who is well acquainted, not only with this property, but with the surrounding district, and that he is anxious to buy at the value fixed by the Committee and that the vendors are prepared to sell. It is an elementary principle that we ought not to interfere with a Committee's decision unless thoroughly satisfied that it is wrong, and, in the foregoing circumstances, it is particularly desirable that we should not interfere with the terms of the contract unless completely satisfied that the price is excessive. The evidence produced by the Crown as appellant does not so satisfy us, and the appeal will, therefore, be dismissed."

No. 133.—B. to L.

Urban Land—Sale of Land—Sale of Goodwill, Plant, and Fittings—Same Agreement relating to Both Sales—Application for Consent to Sale of Business filed—Mutually Dependent Sales—Vendor of Business not filing Separate Application for Consent—Matter to be dealt with on Application before Committee. Jurisdiction—Personal Property dealt with in Association with Land—Operation of Statute extended—Servicemen's Settlement and Land Sales Amendment Act, 1946, s. 8.

On August 20, 1947, the appellant L. agreed to sell to one B. the goodwill, stock, plant, and fittings of a business at Mt. Eden, the consideration being £100 in cash and the transfer of a freehold house and section of land in Dominion Road, Auckland. The agreement, in so far as it related to the transfer of the land, was expressed to be subject to the consent of the Land Sales Court. No lease or other interest in land was intended to pass with the business. B. duly filed an application for the consent of the Court to the transfer of the land, and, at a hearing before the Auckland Urban Land Sales Committee, its basic value was fixed at £1,260. It therefore became clear that the cash value of the consideration to be given by B. for L.'s business was £1,360. Counsel for L. produced evidence to show that the value of the business did not exceed £600. He therefore claimed that, as the consideration for the land was less than its basic value, consent should be granted. The Committee, however, relying upon the terms of s. 8 of the Servicemen's Settlement and Land Sales Amendment Act, 1946, ruled that an application for consent to the sale of the business must be made by L. as vendor of the business, and adjourned the matter to enable this to be done. It is against this ruling that the present appeal is brought.

The Court said: " We desire first to point out that there appears to have been no order made or filed by the Committee against which an appeal can properly be brought. The Committee has expressed a view as to the meaning and effect of s. 8 which the appellant desires to contest, and on which he desires a ruling of this Court. The proper course, where the opinion of the Court is desired upon a point of law prior to the making of a final order upon an application, is for the Committee to apply for directions under s. 17 of the Amendment Act, 1946. In this case, it was agreed that the matter should be dealt with upon written submissions, and the submissions of counsel and report by the Committee which have been filed would have been adequate to enable us to give directions, had they been sought. We are satisfied that it is desirable to refer the case back to the Committee with suitable directions, and, although the papers are not strictly in order, we have decided to deal with the matter as if it were an application under s. 17.

" The view held by the Committee may be summarized as follows:

" (1) That, though entered into as parts of the same transaction, the parties have really made two mutually dependent sales, the sale, on the one side, of land, and, on the other, of a business.

" (2) That, by virtue of s. 8 of the Amendment Act, 1946, Part III of the principal Act is made applicable to the sale of the business as well as to the sale of the land.

" (3) That by subs. 2 of s. 8 the Committee is enjoined to inquire into the consideration to be given for the business, and to refuse consent unless it deems the consideration to be 'fair and reasonable, having regard to the prices and costs ruling at the date of the contract or agreement.'

" (4) That, to enable this to be done, it is incumbent upon the vendor of the business to file a separate application for the consent of the Court.

" The substantial question in issue is as to the extent to which the jurisdiction of the Court is extended (if at all) by s. 8 of the Amendment Act, 1946. In general terms, this section undoubtedly provides that, where, as part of a transaction to which Part III of the principal Act applies—*i.e.*, a transaction involving the sale or leasing of land—the parties enter into a contract or agreement for the sale, *inter alia*, of personal property, Part III shall apply with respect to that contract or agreement as well as to the rest of the transaction of which it forms a part. From the generality of the opera-

tive words of s. 8, together with the equally general terms found in the subsidiary provisions of the section, the Committee has concluded that the intention of the Legislature was to extend the control of sales and leases of land effected by Part III of the principal Act to the control, *inter alia*, of sales of personal property in all cases where personal property is associated with a transaction concerning land.

" We think it unnecessary to traverse in detail the careful analysis of s. 8 contained in the Committee's report and the equally careful examination of the section set out in the submissions filed on behalf of the Crown. The general effect of both of these analyses of s. 8 is that its wording is wide enough to extend the control heretofore exercised by the Court over land to personal property whenever dealt with in association with land, and that, in the absence of limiting words, it must be assumed that the Legislature intended to extend and widen the operation and effect of the Land Sales Act accordingly.

" The effect of this view—if it is the correct one—is well illustrated by the present case. Here we find L. with a business to sell but with no interest in land to dispose of. The general law makes no attempt to control the sale of businesses as such, and, accordingly, L. is free to dispose of his business for cash at any price a purchaser may be willing to pay. On the other hand, B. has a house property of the basic value of £1,250. According to the interpretation placed by this Court upon the Land Sales Act, B. is entitled to sell her property for cash at any price below £1,250, but for no more than that sum. The Act moreover speaks of 'purchase money . . . or other consideration,' and it has not heretofore been contemplated that any different principles apply when the consideration consists of some other kind of personal property instead of money. If, indeed, land is given away, the transaction is expressly exempted from the operation of the Act. When, however, L. chooses to exchange his business for B.'s house, it follows, if the Committee's view is correct, that he can no longer sell it for more than its true value, and that, consequently, B. cannot dispose of her house at less than its basic value. The value of each must exactly balance the other, or consent must be refused or made conditional upon the payment of an amount to equalize the value of the respective considerations.

" Notwithstanding the fact that, as pointed out by the Committee, the terms of s. 8 of the Amendment Act, 1946, may seem wide enough, when read alone, to justify such an interpretation, we do not think that it was the intention of the Legislature to make so radical an extension of the scope of the Land Sales Act. The principal Act relates, and relates only, to land and to interests in land. Its terms admit of no doubt upon this point, and its procedure and the procedure provided for in the Regulations made under the Act are designed only for the control of transactions affecting land. The main object of the Amendment Act, 1946, appears to be to prevent evasion of the provisions of the principal Act, and, apart from its provisions relating to penalties and to the prevention of evasion, it is concerned only with minor amendments to the principal Act. The general character of the Amendment Act does not lead us to suppose that the Legislature intended to extend the operative effect of the principal Act, except to the extent that a limited control over personal property which is disposed of with land is necessary, in order to prevent evasion of the Act.

" Full effect may be given to s. 8, without conflict with the provisions of the principal Act as heretofore interpreted by this Court, if it is construed as applying only when the dealing in personal property or other matter specifically covered by the section is made or undertaken by the vendor or lessor of the land which is affected by the transaction, and by reason of which the whole transaction is brought within the ambit of Part III of the principal Act. It is when a vendor or lessor of land agrees, by the same or by a related contract, to sell personal property, or to execute works or to erect buildings, that the opportunity for evasion of the Act presents itself if the Court lacks jurisdiction to inquire into the value of the personal property sold or the services to be rendered, so as to be satisfied that an excessive price is not in fact being paid for the land. We are of opinion that it was for the purpose of preventing such evasion that the section was enacted, and that its application to such a case as the present, where personal property is not sold with the land but is the consideration given by the purchaser for the purchase of the land, was not within the contemplation of the Legislature.

" Counsel for the Crown points out that the Court, by virtue of s. 50 (3) (*b*) of the principal Act, was already empowered to inquire into related transactions, and suggests that, if the restricted view of the intention of the Legislature which we have propounded be correct, the Amendment has done little but clarify the existing law. It should be remembered, however, that, at the time when the Amendment Act was before the Legislature, the extent of the Court's powers under s. 50 (3) (*b*) might well have been in doubt, and the Court had not then claimed the right of indirect control over related transactions which emerged from its judgment in *In re A Proposed Sale, Mountney to Young*, [1947] N.Z.L.R. 436, delivered just after the Amendment Act came into force. The mischief arising from attempts to circumvent the Act by the sale of articles of personal property with land was well known, and the Legislature may well have deemed it desirable to strengthen the hands of the Court, by setting out in plain terms the powers which the Court subsequently determined to be implicit in s. 50 (3) (*b*) and by extending those powers, for s. 8 appears to extend the powers of the Court to inquire into and to control related contracts far beyond the powers conferred by s. 50 (3) (*b*) of the principal Act.

" The Committee draws attention to the fact that the sale of small businesses to discharged servicemen and others at prices in excess of their fair value is a mischief which it might well be the intention of the Legislature to remedy by bringing the sale of such businesses under the control of this Court. That such a mischief exists, and is, indeed, a mischief which might well merit legislative action, may well be the case, but the fact remains that the Legislature has not taken steps to control the sale of businesses in general, or to restrict the prices at which they may lawfully be sold. The sale of businesses is no doubt effected in a majority of cases without any dealing in land, and free from the control of the Court. To attempt to control the sale of businesses which happen to be disposed of as part of a transaction affecting land while the sale of all other businesses is uncontrolled would, in our opinion, be illogical, and we are unable, in the absence of clearer evidence of intention, to draw the conclusion from the terms of s. 8 that such was the intention of the Legislature. It seems to us that the reasonable and proper inference to be drawn is that the Legislature deemed it necessary to define and extend the powers of the Court in cases where land and personal property are substantially sold together, and where inquiry into, and control of, the sale of personal property is necessary to enable the Court effectively to control the sale of the land, with which alone it is directly concerned.

" We are of opinion, therefore, that, although the sale of the business is, in this case, part of the same transaction as the sale of the land, the Committee is concerned only to see that the value of the consideration to be given for the land does not exceed its basic value. If so satisfied, the Committee is not empowered by the Land Sales Act and its amendments to refuse its consent to the transaction merely because the consideration for the business may be more than it is reasonably worth. The Committee therefore exceeded its jurisdiction in requiring that an application for consent to the sale of the business be filed by the vendor thereof.

" Had our views on the substantial question in issue been in agreement with the Committee, we think that a further and separate application by the vendor of the business would nevertheless have been unnecessary, and that the Committee might properly have dealt with the whole matter upon the application already before it, subject, if necessary, to an amendment of the application to make it referable to the whole transaction, and subject to the production of evidence as to the value of the business. The present case relates to a single transaction, evidenced by a single document. By s. 48 (2) of the principal Act, it is provided that an application for consent to any transaction may be made by any party to the transaction. The Act makes no provision for applications for consent to parts of a transaction. Here we have one transaction, and an application for consent duly filed by one of the parties. The application should have been so drawn as to apply to the transaction as a whole, and, if not so drawn, should be amended to make it so applicable. The Committee would then have been entitled to exercise the whole of its functions upon the authority of that application. A separate application by the other party was not only unnecessary but would have been out of time when the Committee called for it to be made, and we are by no means satisfied that the Committee could properly have entertained such an application at that time.

" The case is therefore referred back to the Committee, with directions as follows :

" (1) There is no necessity for a separate application for consent to be filed by the vendor of the business. The whole matter may properly be disposed of by the Committee upon the application already before it.

" (2) The Committee is not concerned to inquire as to any excess of consideration to be given for the business, but is concerned only to be satisfied that the consideration to be given for the land is not in excess of its basic value."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Undefended Divorces.—Delays in the hearing of Judge-alone cases, particularly in the North Island, call to mind the remarks of Lord Justice MacKinnon on one branch of this work: "The text-books about divorce purport to set forth principles that are said to have been laid down—*e.g.*, as to the exercise of judicial discretion in favour of a petitioner who confesses to have himself or herself committed adultery. I have never been able to discover that there really are any principles at all; I believe you could find some authority for anything you thought fit to do." And he concludes: "I cannot conceive why these cases cannot be heard in the County Court, and by its Registrar. It would still not be hard on that capable official; for, in fact, they would not tax the powers of the stupidest man who was ever an Acting-Deputy-Registrar of a County Court." MacKinnon, L.J., had no stomach for this class of work, and he would speak with unfeigned disgust of it. "Not only is it repulsive to have to sit and listen to repeated tales of adultery, but the actual work involved would be degrading to the meanest intellect"—a saying that has been compared with that of Hill, J., who, having to judge both in Admiralty and in Divorce, said that he sat with one foot in the sea and the other in the sewer. As matrimonial life has tended to become more complex, the divorce rate has risen, and more Court time must be set aside accordingly for consideration of the various prayers for relief. The great majority of undefended cases could be adequately handled by a Registrar, provision being made for reference to a Judge in difficulty or doubt. After all, the Registrar "makes" as many decrees absolute as the Judge "grants" on motion. For the most part, it is simply a question of whether the evidence is sufficient to establish the ground relied upon, and the average Judge relies upon the Registrar to see that the papers are in order.

Cripps, K.C.—American *Life* in a current issue contains a "close-up" of Sir Stafford Cripps, who now holds the dual post of Chancellor of the Exchequer and Minister of Economic Affairs in England's present Cabinet. With a background of scientific training, Cripps established a name for himself at an early age by specializing in patent cases—a field where passionate rhetoric has to take a back seat to cold analytical logic. In the 1930's, he was reputed to be earning over £30,000 yearly, despite the increasing pressure of Parliamentary work. *Life* relates that on one occasion, after winning a major case for a coal-mining company in Cardiff, his client asked his clerk the amount of his fee. "Two thousand guineas," replied the clerk. When the client commenced to write out a cheque, Cripps said: "Don't bother to make it out to me. Just make it payable to the Cardiff Labour Party." But, speaking of fees, that great figure of the Victorian Bar, Sir Edward Clarke, was only able to average £160 a year during his first four years of full-time practice; Hawkins (afterwards Baron Brampton) made £80 in his first year, £160 in his second, and £320 in his third; while Haldane, a more modern and distinguished figure, took £30 in fees for the first year, less for the second, and was making arrangements to emigrate to Hong Kong when his luck changed.

The Human Side.—Sir Henry Hawkins gained a huge fortune from his practice, although this was attributed by those who disliked him to exceptional meanness on his part. In his nineties, it was his habit to warn all and sundry to have nothing to do with the law. Nevertheless, he could on occasion be human, as the following incident shows. He was listening at the Nottingham Assizes to a youthful advocate making a desperate plea on mitigation of sentence. His client had been convicted, had a record, and there was little that could convincingly be said for him. Hawkins, J., kept interrupting and admonishing him with such severity that he was covered with confusion. Suddenly, the Clerk of Assizes rose and whispered something to the Judge, who remained silent while counsel finished his plea. Addressing the prisoner, he said: "You stand convicted of a serious crime, and I had intended sentencing you to a long term of penal servitude. But I have had the advantage of hearing the very able appeal which has been made to me by your counsel, feeling bound to take into consideration matters favourable to you which he has placed before me. I congratulate you upon having such an advocate, and I venture to prophesy great things for him in his career at the Bar. The sentence of the Court is that you be imprisoned and kept to hard labour for twelve calendar months." The prisoner was removed from the dock, the Judge retired, and it was then noticed that, seated at the back of the Court, there was an elderly man, overcome with emotion, and hiding his face in his hands. The explanation lay in the comment that the Clerk had, in his critical intervention, made to the Judge. "My Lord," he had stated, "this is his first brief in a criminal case, and his father is listening at the back of the Court."

Here and There.—Scriblex is indebted to a Wanganui correspondent who, like himself, has a weakness for the more pithy passages of the reports. Here are three he has selected from his reading of the *Law Times*.

"Making all necessary allowances for the fact that the kind of humour of such a play [a musical comedy named *Hit the Deck*] seems melancholy in print, the part assigned to the plaintiff is so trivial that even in relation to this play the verdict is fully warranted."—Lord Buckmaster in *Herbert Clayton and Others* v. *Oliver*, 142 L.T. 588.

"A legal publication whose columns are open to the solution or attempted solution of problems of its readers was specifically asked . . . Far be it from me to belittle the wisdom of the anonymous expert who answered that question, but I will read without comment what he (or possibly she) said."—Vaisey, J., in *Re Kinsett*, 177 L.T. 5.

"One of the arguments on the other side was that he had, in point of fact, put himself in a position where he was, in fact, obtaining those benefits (those of a free pass) because he was at the time when he suffered the injury (having one foot on the step and the other foot hanging in the air) "bus-borne," a word with which Mr. Monier-Williams thought it convenient or desirable to enrich the vocabulary of the English language."—Lord Greene, M.R., in *Wilkie* v. *London Passenger Transport Board*, 177 L.T. 72.

PRACTICAL POINTS.

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

1. Wages Protection and Contractors' Liens.—*Action to Enforce —Statement of Defence—Rules Applicable.*

QUESTION: Where an action has been commenced in the Supreme Court under s. 34 of the Wages Protection and Contractors' Liens Act, 1939, is it necessary for a defendant who desires to be heard to file a statement of defence, and, if so, within what time? If a statement of defence is not required, should a warrant to defend be filed? The Rules made under the 1908 Act are very brief, and the only provisions of the Code of Civil Procedure which are expressly applicable are RR. 583 and 584.

ANSWER: The Rules referred to in the question covered the former procedure under s. 66 of the now-repealed Wages Protection and Contractors' Liens Act, 1908. Now, as the proceeding under s. 34 of the Wages Protection and Contractors' Liens Act, 1939, is by "*action*" in the Supreme Court, the rules of the Code of Civil Procedure dealing with actions will apply; and, if it is desired to defend the proceedings, the filing of a statement of defence is necessary. The writ of summons, which will be issued when the action is instituted, will set out the time within which a statement of defence may be filed.

E.2.

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2. Land Transfer.—*Old Subdivision—Strip of Land reserved—Right of Original Subdividing Owner to deal with same.*

QUESTION: A in 1909 subdivided a parcel of land: one Lot is a long narrow strip apparently intended as a reserve—*e.g.*, as a common right-of-way. There is, however, no reference to its being a reserve on the plan: it is edged green and has a separate number in the same manner as the other Lots. All the other Lots have been sold, but this particular Lot is still in the name of the original subdividing owner.

Can he transfer this Lot to a purchaser? If so, must the transfer be made subject to existing rights, if any, over the Lot?

ANSWER: The owners of the other Lots have no rights over this Lot. The registered proprietor may sell or otherwise deal with this Lot, and it will not be necessary for the memorandum of transfer to be made subject to existing rights: *In re Miller*, (1886) N.Z.L.R. 5 S.C. 199. The position would have been different had this Lot been reserved for some specific public purpose.

X.2.

3. Easement.—*Glasgow Leases—Mutual Grants of Easements—Party-wall Rights.*

QUESTION: A and B are lessees of adjoining pieces of land from the same local body as lessor. Between the two properties there is a party-wall. The leases are Glasgow—*i.e.*, there is a perpetual right of renewal—and the rent is based on the unimproved value. Can A and B enter into a mutual grant of party-wall rights?

ANSWER: Yes, provided the easements are for terms not exceeding the term of each respective lease; see, for example, *Booth* v. *Alcock*, (1873) L.R. 8 Ch. 663; *11 Halsbury's Laws of England*, 2nd Ed. 266, 276, paras. 483, 509.

X.1.

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4. Land Transfer.—*Sub-mortgage — Sub-mortgagee exercising Power of Sale—Procedure.*

QUESTION: My client is the sub-mortgagee under the Land Transfer Act. Both the sub-mortgagor (the original mortgagee) and the head mortgagor are in default. Can my client exercise power of sale and vest the fee simple in the purchaser? There is no power-of-attorney clause in the sub-mortgage. What notices, if any, must my client give?

ANSWER: The client, the sub-mortgagee, cannot vest the fee simple at the present stage, unless the sub-mortgage is dated prior to March 1, 1914: First proviso to s. 3 of the Land Transfer Acts Compilation Act, 1915, *Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Registrar-General of Land*, [1935] N.Z.L.R. 726. He must first exercise power of sale under his sub-mortgage, and the only way he can get the head mortgage vested in him is through a Registrar's sale.

Before exercising power of sale under the sub-mortgage, he must give the sub-mortgagee notice under s. 3 of the Property Law Amendment Act, 1939. We think that that section must apply to a mortgage of a mortgage of land, as well as to a mortgage of land: *Re Bennett and Jacobsen*, [1924] G.L.R. 44. See also the definition of "land" in s. 2 of the Property Law Act, 1908.

X.2.

POSTSCRIPT.

Justice and Probation.

In criminal proceedings the Court's overriding duty to the community is to enforce the law, and in discharging that duty the Court is not primarily concerned with remedial or preventive treatment for the offender. It is, however, equally the Court's duty, in a proper case, to bear in mind its power to make a probation order. When this power is exercised, the offender is often a juvenile. In the field of juvenile delinquency an experienced layman can be of inestimable help to the Court; and the layman does, in fact, play an extremely valuable part in various roles (including that of probation officer) in the administration of justice. Some of a probation officer's duties are described in a pamphlet recently published by the Clarke Hall Fellowship and entitled "*Probation—An Instrument of Imaginative Justice.*" The author submits that "the public interest may often better be served by a sympathetic and constructive approach than by rule-of-thumb justice." He illustrated this by reference to the juvenile court, where, he says, "the Court strives to administer a justice which is informed, redemptive, positive." By this he means that the Court should be fully informed on the delinquent's education and home background; that it should endeavour not only to bring home to him his responsibility for his offence but also to ensure that he does not offend again; and that it should also be concerned to build his character and to inculcate in him a sense of community. To these ends the Court must call in aid every available agency, and, of course, the probation officer's help is vital. It is incumbent upon the probation officer to do all he can to help the delinquent to observe the terms of the probation bond, and equally to insist that the terms are observed. But the probation officer is neither a mere administrator nor a monopolist; he needs, therefore, freedom to experiment, and must work with all the other specialists. It is obvious that only a fully-trained officer can discharge his duties efficiently, and that there is no room for sentimentality. If, says the author, a sufficiency of able men and women can be attracted to the Probation Service, then "probation may prove, in very truth, an instrument of imaginative justice." A step towards attracting people to the Probation Service has been made in England by the Probation Officers (Superannuation) Act, 1947, by which the Secretary of State is empowered by order to give to probation officers and their clerks the benefit of the pension provisions of the Local Government Superannuation Act, 1937.