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DIVORCE: POWER TO VARY MAINTENANCE UNDER SEPARATION AGREEMENT.

IN our last issue we considered the judgment of the Court of Appeal in *Coutts* v. *Coutts* (to be reported) in so far as it held that variation of a post-nuptial settlement—here, the maintenance provisions in a deed of separation—must, after the divorce of the parties, be made once and for all.

The judgment in the Court of Appeal also dealt with several matters relative to the exercise of the Court's discretion under s. 37 of the Divorce and Matrimonial Causes Act, 1928, in the variation of the provisions made during the continuance of a marriage by a husband for the maintenance of his wife, as in a deed of separation. These matters, in the words of Callan, J., required the consideration of questions of law which are both difficult and important.

Counsel for the appellant (the former wife) submitted that the jurisdiction to vary is never to be exercised except to the disadvantage of a guilty spouse, and to the advantage of an innocent spouse: that in this case, where the divorce, which was undefended, was based on a separation agreement which had remained in full force for three years, there was no question of guilt or innocence, and, therefore, no scope for the exercise of the power conferred by the section. In support of this proposition, he relied on such judicial explanations of the origin and purpose of s. 37 as were given in *March* v. *March and Palumbo*, (1867), L.R. 1 P. & D. 440, *Michell* v. *Michell*, [1891] P. 208, *Loraine* v. *Loraine and Murphy*, [1912] P. 222, *Morgan* v. *Morgan and Kirby*, [1923] P. 1, and *Bosworthick* v. *Bosworthick*, [1926] P. 159, 163, per Lord Merrivale, P., affirmed on appeal, [1927] P. 64.

To this submission counsel for the respondent (the former husband) rejoined that the meaning and effect of the section is not to be controlled by language used in English decisions at a time when there could be no divorce unless one of the spouses had been guilty in a grave degree, and that the wide words of the section must be given their full and literal meaning, and then applied in New Zealand to situations which arise under our divorce law, because the New Zealand Legislature has retained the language of s. 37 as part of a statute which enables a divorce to be obtained although neither spouse is a guilty party.

Referring to the submission of counsel for the appellant (the former wife) that, in the exercise of its discretion under s. 37, the Court, in dealing with an application made under that section, will not interfere with the bargain made by the parties unless there is some misconduct on the part of the spouse from whom it is proposed to take some benefit, the learned Chief Justice, after considering the authorities mentioned above, said:

> These authorities do support the contention put forward, and what was submitted may well be the law in England. There, before 1937, because of the grounds then existing on which a divorce could be granted, there must be a "guilty" party to a divorce; but in 1937 insanity was made a ground, and it may well be that the English Courts would now take a different view of what is necessary to lay the foundation for an application under the section, because "guilt" is not necessary in every suit for divorce. Where insanity is the ground, both parties may be perfectly innocent. In New Zealand, insanity has been a ground for divorce since 1907, and separation by mutual consent or by order of a Court since 1920. In both of these cases, there may well be—indeed, there frequently is—no "guilty" party. Many divorces are granted each year on these grounds, and a restriction such as appellant sought to be imposed on the use of the section would mean that a number of post-nuptial settlements could not be varied, for a separation deed embodying a covenant to pay a stipulated sum is such a settlement: *Worsley* v. *Worsley*, (1867) L.R. 1 P. & D. 648, and *Soler* v. *Soler*, (1898) 17 N.Z.L.R. 49.

The learned Chief Justice went on to say that he thought there was much weight in the contentions of the respondent that there is nothing in the plain words of the section which imposes a limitation, such as that for which the appellant contended, on applications which may be made under it, and that the English practice should not be applied in New Zealand to such cases as the present one. To hold that the section should not be used unless there was some misconduct, and should only be used to protect an innocent party, may well have been justified when there was necessarily a guilty party; but the section is to be applied to

present-day law and conditions; and, as these provide for divorce between two innocent parties, he thought that the section should apply to a settlement in which two such parties were concerned.

In a long judgment, Callan, J., considered that, having regard to the wide general language of the section, the explanation given by Lord Penzance in *March* v. *March and Palumbo* (*cit. supra*), and all similar explanations, should be taken as descriptive of typical cases which prompted the Legislature to confer the jurisdiction, and of cases in which the conferred jurisdiction ought to be exercised, rather than as an exclusive definition of the only class of case in which the jurisdiction exists and should be exercised. He thought it would be unsafe to say that even in England, and even when divorce necessarily imported guilt on the part of at least one spouse, the jurisdiction conferred by this legislation might not be exercised in favour of a guilty spouse. In *Wootton Isaacson* v. *Wootton Isaacson*, [1902] P. 146, Gorrell Barnes, J., raised the question as to a wife guilty of adultery who had settled all her property on her husband, and asked whether she was to be left penniless. There was force, he thought, in the submission of counsel for the respondent that, if in England even the guilty may apply for and obtain variation of a settlement, *a fortiori* in New Zealand one of two innocent spouses may, in a proper case, obtain variation against the other. After considering the English cases on the section corresponding with s. 37, Callan, J., said:

> I think this power to vary a settlement has been given to the Court to enable it to correct injustice which it perceives would be caused if the settlement were allowed to continue in force unvaried. But this power has been given to this Court only in its capacity as a Divorce Court, and can be exercised only after a decree absolute has been pronounced. So much appears from the language of the section. From this, and from the history of the legislation, it seems to me to follow that, where the Court is invited to use this power of varying an existing settlement, it should not seize on the divorce in order to redress an injustice which exists or has arisen quite independently of the divorce. That would, I think, involve using a power for a purpose for which it was not conferred, and would be, in effect, an abuse or usurpation of jurisdiction. The Court, in its capacity, as a Divorce Court, has been given no power to redress what is, or appears to it to be, injustice unless there has been a divorce, and, therefore, I think, should be satisfied that the injustice is in some way connected with the divorce. It should, I think, assume that a settlement into which the spouses or their relatives or friends have voluntarily entered contained no element of injustice when it was entered into, and should require to be satisfied that the divorce has in some way rendered unjust the continuance of the settlement unvaried. An examination of the decided cases appears to me to confirm the English section, of which our s. 37 is a copy, has always been interpreted and applied in this way.

His Honour then examined in detail the cases in which the English prototype of s. 37 has been applied to separation deeds or separation agreements. He continued:

> An examination of the decided cases appears to me to confirm the view that the power to vary conferred by s. 37, which can be exercised only *after* a divorce, should be exercised only where it is shown that the continuance unvaried of the settlement has been rendered unjust *by the divorce or the conduct which occasioned the divorce.*

Cornish, J., said:

> However wide and liberal a construction is put on the language of the section, it is, I think, plain from all the cases—and they are many—that variation has always been sought and decreed on the ground that it was the divorce itself that had caused, or would cause, undeserved loss to the party seeking variation. In my opinion, the purpose of s. 37 is to prevent unfair hardship being thrown on a former spouse by the dissolution of the marriage.

In this case, an agreement for separation making provision for the wife "until death or remarriage" was before the Court. It was held by the Court that decisions of the Court under s. 33 (which deals with orders for alimony and maintenance) are separate and distinct. The learned Chief Justice said that the matter seemed to be settled by the English Court of Appeal in *Clifford* v. *Clifford*, (1884) 9 P.D. 76. Callan, J., said:

> It seems that, subject to "interfering as little as possible with the deed," His Honour treated the matter as though he were dealing with an application under s. 41 to vary an order for a periodical payment made by the Court under the provisions of the Divorce Act. But this, I respectfully suggest, would involve approaching the matter on a wrong basis.
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> In *Clifford* v. *Clifford*, the result of erroneously treating the question of one of alimony, and of concentrating on the husband's means, was an erroneous refusal to vary, although the husband had suffered by the divorce, and by the wife's conduct before and after the divorce. Here, the result of concentrating on the husband's means appears to have been to grant a reduction for reasons which have no causal connection with the divorce, or what gave rise to the divorce. Each would appear to be such an error in principle as would entitle an appellant to succeed, although the jurisdiction in the Court below involves the exercise of discretion.
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> *This is not an application to the Court to review its own* order in the light of changed circumstances. Nor is it an application for the exercise of the jurisdiction conferred by s. 42 of the National Expenditure Adjustment Act, 1932.

It was, as we have seen, contended for the appellant (the former wife) that the Court should not, in the exercise of its discretion, take something away from an innocent spouse where parties expressly contemplated the severance of the marriage tie and had made their bargain to enure beyond that happening. The learned Chief Justice said that the answer to this was really contained in the answer to the first contention. Whatever the bargain of the parties, the section gives power to vary the settlement. He added that it may well be, however, that the bargain of the parties is an important matter for consideration on the question whether the settlement should be varied or not.

After considering previous applications under s. 37 (or its earlier equivalent) in respect of a deed of separation making provision for a wife, as dealt with in *Jackson* v. *Jackson*, [1928] N.Z.L.R. 88 (commented on in *Burton* v. *Burton*, [1928] N.Z.L.R. 496, 499), and *Buzza* v. *Buzza*, [1930] N.Z.L.R. 737, the learned Chief Justice said:

> In all these cases, except *Buzza* v. *Buzza*, the husband had remarried, and there seems to be in them a generally accepted principle that, though the husband has remarried, his primary duty is to maintain his innocent first wife. Furthermore, the time for considering the variation is at, or immediately after, the decree for dissolution, and the Court should not consider extraneous events subsequent to the dissolution as good ground for varying the settlement.
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> In the present case, there has been no remarriage and no expressed intention of remarrying. There has been no substantial change in the relative financial positions of the parties between the separation and the decree absolute, and, if one followed the decisions before referred to without having heard arguments which were apparently not put forward in those cases, the result would be that the settlement would not be disturbed.

It was, however, contended for the respondent, the former husband, that, because of the divorce, and the consequence that the parties were now in a position to remarry, it would be unjust not to vary the settlement. Counsel for the respondent submitted that it is not in the public interest, and it is against public policy, that a divorced man should be so bound as to prevent his remarriage, and the Court should facilitate the re-

marriage of divorced persons by granting relief in proper cases. Junior counsel elaborated this by saying the right to remarry is useless and empty unless the Court is prepared to help him to succeed by granting relief in proper cases (in this case, by reducing the amount he has covenanted to pay his first wife).

This argument was founded on the judgment of the Court of Appeal in *Mason* v. *Mason*, [1921] N.Z.L.R. 955, where the intention of the Legislature in enabling spouses (and even guilty spouses) to obtain a divorce on separation for three years and upwards was discussed, and also on certain considerations of public policy elaborated by Viscount Simon, L.C., in *Blunt* v. *Blunt*, [1943] A.C. 517, 525, [1943] 2 All E.R. 76, 78.

His Honour the Chief Justice, before considering these cases, repeated that, in addition to the self-evident proposition that the Court acquires its power to deal with an application after pronouncing a decree for divorce, it seems to be well established that the power to vary should be exercised only where it is shown that continuance unvaried of the settlement has been rendered unjust by the divorce, or the conduct which occasioned the divorce: *Clifford* v. *Clifford*, (1884) 9 P.D. 76, 79.

The question had to be considered whether, because of the divorce, it would be unjust to continue the payments unvaried. The learned Chief Justice then considered *Mason* v. *Mason* and *Blunt* v. *Blunt*, and examined them to see whether they justified the respondent's contention. After referring to the similar views expressed by Salmond, J., in his earlier judgment in *Lodder* v. *Lodder*, [1921] N.Z.L.R. 876, His Honour said that he could not find in these judgments any statement from which it could be inferred that public policy demands that the man's financial position should be adjusted so as to facilitate his remarriage, nor did he find expressed or implied in the statute which established separation as a ground for divorce any such pronouncement of public policy. The learned Chief Justice continued:

> The effect of the divorce is that the man is placed in the position of an unmarried man, he is free to marry. It is said that, if he is free, but because of financial stress unable to marry, immorality will result. I think it an unwholesome doctrine that, because a man who previously married has not a wife, he will be immoral. No such doctrine is formulated in respect of single men.
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> If there is to be imputed to the Legislature in enacting s. 10 (11) (which made separation a ground for divorce) not only an intention to ensure that a man be not bound by a marriage that has failed and that he be free to remarry, but also an intention to ensure his ability to marry by adjusting his financial obligations, then where will the matter end? If the formerly married is to be so looked after, why not the man who has never been married? Why should not his financial obligations be adjusted? Many a single man cannot marry because of financial obligations: he must be patient and wait. No one has heard of any legislative intention, express or implied, to help him to embark on matrimony by adjusting his obligations, so why impute it to the Legislature in respect of the class of which the respondent is one?
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> In my opinion, the contention goes far beyond what was said in *Mason* v. *Mason*, and is not acceptable to me.

In answer to the respondent's contentions on this point, Callan, J., said:

> As to the submission that the respondent is left in a financial position which disables him from undertaking another marriage, several answers commend themselves to my mind—namely, (i) The ex-husband himself in his affidavit nowhere makes this case. He nowhere suggests that he desires or may desire to remarry. (ii) Having regard to his expectations on his mother's death, it is improbable that he will continue long in his present financial situation. (iii) It appears undesirable to formulate a doctrine which might seem to encourage husbands to induce wives to agree to separation by promising defined maintenance which is to continue after divorce, and then, when a divorce has eventuated, to ask to be relieved from their promises. In this particular case, had there been no promise of the maintenance which was promised, there might have been no separation agreement and no divorce.

In His Honour's opinion, this ex-husband, when he made this application for variation, undertook the burden of establishing that the *divorce* had rendered it unjust that he should continue bound by the maintenance provisions of the deed. When he entered into the deed, he was a mature, educated man. The terms of the deed were negotiated between the respective solicitors of the spouses. According to its tenor, its terms remain operative after divorce. There would not otherwise have been any need for an application to vary. It was reasonable to assume that the possibility that a separation might in due course lead to divorce was realized by the parties. In terms, the husband bound himself to pay £2 10s. 9d. a week until his wife's death *or remarriage*. Remarriage would necessarily import a precedent divorce. It was also, His Honour said, reasonable to assume that the duration and circumstances of the marriage, the existing and probable future earning-capacities of both parties at the date of the deed, and the financial expectations of the husband were all taken into account. In the result, he bound himself to pay £2 10s. 9d. a week until his wife died or remarried. He now asked the Court to relieve him from some part of the obligation he voluntarily assumed. His Honour concluded:

> In my opinion, he makes no case for the view that the *divorce* has rendered unjust the continuance of these obligations. The case made in his affidavit is that the obligations he assumed have proved more burdensome than he expected. He would have had just as strong or as weak a case for relief had there never been a divorce, and had the parties remained merely separated spouses. But, if this Court has any jurisdiction to relieve persons of bargains advisedly entered into, without bad faith by the other party, merely because they prove more burdensome than has been anticipated, no such jurisdiction has been conferred by s. 37, and, as that is the real nature of the case made by the applicant for variation, I am of opinion that no order for variation should have been made.

In expressing a dissenting view, Smith, J., said:

> Where it does not appear that one party is the injured party, but where, as here, the separation is not shown to be due to more than mutual incompatibility, the ground for adjusting the provisions of the deed of separation cannot be that the Court should try to place one party in the same position as if the family life had not been broken up by the misconduct of the other . . . The divorce is merely that consequence of the mutual separation which changes the status of the parties. Accordingly, I think the review under s. 37 should take account of *all the circumstances existing at the time of the application for review*, though they will not include the element of "the guilt" of one party and the innocence of the other. One of these circumstances is the right of each party to remarry. The exercise of that right may be hampered by the terms of the deed of separation. If the husband has agreed, by the deed, to pay his wife a fixed sum until remarriage, the Court, after the divorce, may well hold him to that agreement; but, in my opinion, the circumstances may justify an adjustment in the public interest. To take an extreme case, suppose that, since the deed of separation was entered into, the wife had become wealthy through some unexpected bequest, while the husband remained poor, and, after the divorce, unable to remarry if he continued to pay the full amount of maintenance. In that event, the Court would, in my opinion, not only have jurisdiction to adjust the payment to be made by the former husband, but, in the absence of special circumstances which I do not foresee, should do so.

The italics are ours.

On the foregoing points, the Court of Appeal appears to have settled the law as follows:

The fact that one or other or both of the parties to a deed of separation has been guilty of misconduct is not a condition of the jurisdiction of the Court to exercise its discretion, conferred by s. 37, to vary the financial provisions of such a deed.

The majority of the Court (Smith, J., dissenting) have held that the power given by s. 37 to vary a post-nuptial settlement (including a deed or agreement of separation) should be exercised only where it is shown that an unvaried continuance of payment of the wife's benefits has been rendered unjust by the divorce or by the conduct which occasioned the divorce; and the Court has not the power (as Smith, J., considered) to take into consideration all the circumstances existing at the time of the application for review, including the question of the possible remarriage on the part of one or both of the parties.

Consequently, when a Judge, purporting to exercise the discretion given him by s. 37, has reduced the amount of maintenance secured by a post-nuptial settlement for reasons which have no causal connection with the divorce, or with the conduct which gave rise to the divorce, he has, in so varying the settlement, made an error in principle.

SUMMARY OF RECENT LAW.

COMMON LAW.

Points in Practice. *98 Law Journal*, 215, 229.

COMPANY LAW.

Automatic Re-election of Directors. *205 Law Times Jo.*, 86.

Points in Practice. *98 Law Journal*, 229.

Statutory Provisions as to the Secretary. *92 Solicitors Journal*, 120.

What constitutes a Meeting? *98 Law Journal*, 118.

CONFLICT OF LAWS.

Points in Practice. *98 Law Journal*, 145.

CONTRACT.

Contracts for the Benefit of Third Parties. (J. G. Starke.) *21 Australian Law Journal*, 382, 422, 455.

CONSTITUTIONAL LAW.

British Nationality Bill. *98 Law Journal*, 116.

Public Meetings and Free Speech. *205 Law Times Jo.*, 100.

CONVEYANCING.

Appointment of New Trustees: Rights of Beneficiaries. *205 Law Times Jo.*, 102.

Compulsory Acquisition of Land and Restrictive Covenants. (D. F. Bunkall.) *92 Justice of the Peace Jo.*, 149.

Family Arrangements. *98 Law Journal*, 214.

On the Forgiveness of Debts. *205 Law Times Jo.*, 143.

Variation of Restrictive Covenants. (John Baalman.) *21 Australian Law Journal*, 459.

CRIMINAL LAW.

Appeal—Appellant indicted on charge of Carnal Knowledge "on or about" a Specified Date—Crown Case not Exclusively fixed for that Date—Direction of Judge that Conviction justified if Offence committed within Reasonable Time of that Date. Where an indictment alleges that a crime was committed on or about October 4, and the case for the Crown is not exclusively fixed for that date, as was the case in *R.* v. *Dean*, [1932] N.Z.L.R. 753, the decision in that case does not apply, and there is no necessity for the trial Judge to direct the jury that they could not find the accused guilty of the offence with which he was charged unless they first rejected an alibi as to that specific date. Where the trial Judge directed the jury that it was open to them to find a verdict of guilty if they were satisfied that the offence, while not committed on that date, had been committed within a reasonable period of that date, such as a period of four or five days, or even a week, before or after it, and there was evidence to justify a conviction for a crime committed within a week after October 4, but none to support a conviction for an offence committed within a week before October 4, and the jury's verdict was reasonably capable of being supported on the evidence for a date within a week after October 4, there was no miscarriage of justice. (*R.* v. *Dean*, [1932] N.Z.L.R. 753, distinguished.) On a review of the evidence: No ground was shown for holding that the verdict was unreasonable or could not be supported having regard to the evidence. *So held* by the Court of Appeal on appeal against a conviction on an indictment charging carnal knowledge "on or about the fourth day of October, 1947." *The King* v. *Wae Wae Uatuku.* (Court of Appeal. Wellington. April 29, 1948.)

Assisting the Police. *98 Law Journal*, 233.

Co-defendant as Witness. *92 Justice of the Peace Jo.*, 147.

Conspiracy—Indictment—Three Separate Conspiracies charged in One Count—One Count charging Several Prisoners with conspiring together to contravene, between 1940 and 1946, Orders made under Defence (General) Regulations, 1939, for Control of Toilet Preparations—Material Alterations of the Law between Relevant Dates. Held, 1. The effect of the indictment was to charge a conspiracy to contravene the law as to control which must mean the existing law, *i.e.*, the law which would be known to the conspirators and was the law of the country at the time the conspiracy was formed. An agreement to disobey any future law which might be made on the same subject and with the same object would not amount to an indictable conspiracy. (Definition of conspiracy in *Quinn* v. *Leathem*, [1901] A.C. 495, 528, and in *Mulcahy* v. *The King*, (1868) L.R. 3 H.L. 306, 317, applied.) 2. Although the orders of October 27, 1941, and August 23, 1943, had the same object as the order of June 6, 1940, they each in turn made a radical alteration in the nature of the offence which would be committed by a person disobeying the order. A person contravening the law on the subject from time to time during the six years covered by the indictment would be offending against each of these three orders in turn, but could not be said to be offending against all three together, since they were not all in force at any one time, and, therefore, the indictment was bad in that it charged three separate conspiracies in one count. (Observations of Tindal, C.J., in *O'Connell* v. *The King*, (1844) 11 Cl. & Fin. 155, 237; 8 E.R. 1061, 1093, applied.) 3. Although a Judge was entitled to exercise his discretion in directing an amendment of the indictment without any application by either side for leave to amend, he should invite the parties, and, in particular, the defence, to express their views on the matter before deciding to do so. *R.* v. *West*; *R.* v. *Northcott*; *R.* v. *Weitzman*; *R.* v. *White*, [1948] 1 All E.R. 718 (C.C.A.).

As to CONSPIRACY, see *9 Halsbury's Laws of England*, 2nd Ed. 43-45, para. 43; and for cases, see *14 E. and E. Digest*, 110-114, Nos. *805-822*.

Mens rea: Statutory Exceptions: Defences. *205 Law Times Jo.*, 83.

CROWN SUITS.

Crown Proceedings Act, 1947 (U.K.). (Sir Thomas Barnes, Treasury Solicitor.) *26 Canadian Bar Review*, 387.

Proceedings by and against the Crown. (D. Park Jamieson, K.C.) *26 Canadian Bar Review*, 373.

DEATH DUTIES.

See PUBLIC REVENUE.

DESTITUTE PERSONS.

Wife's Maintenance Order: Fresh Evidence after Divorce. (C. V. Adams.) *92 Justice of the Peace Jo.*, 179.

DIVORCE.

Desertion: *Bona fide* Belief of Adultery. *92 Solicitors Journal*, 120.

Restitution of Conjugal Rights: Right to Begin. *205 Law Times Jo.*, 145.

EDUCATION.

Education (Grading of Public-school Teachers) Regulations, 1948 (Serial No. 1948/63).

Failure to carry out Posted Course of Instruction—School temporarily closed—No Punishable Offence—Finance Act, 1931, s. 37. There is nothing in s. 37 of the Finance Act, 1931, or in any other statute, creating an offence for failure to carry out the requirements of a course of instruction by correspondence during the temporary closing of the school on the register of which the defendant's child is enrolled. *Reade* v. *Steer.* (Cambridge. May 7, 1948. Paterson, S.M.)

EXECUTORS AND ADMINISTRATORS.

Joint Executors—Trustee Company and Private Executor—Commission. When a trustee company and a private executor were joint executors in a small estate, the administration of which was not attended by any difficulty, the statutory commission payable to the trustee company was reviewed and reduced, and commission was allowed to the private executor in a sum equivalent to the amount by which the company's commission had been reduced. *In re Finlay,* [1947] Q.W.N. 46.

INCOME TAX.

Retirement and Admission of Partners. *21 Australian Law Journal,* 469.

Retirement Benefits and Money's Worth. *98 Law Journal,* 136.

INDUSTRIAL CONCILIATION AND ARBITRATION.

Award—Power of Court of Arbitration to Order Retroactive Increases in Wages—When exercisable—Industrial Conciliation and Arbitration Act, 1925, s. 89 (8). There are only two provisions under which the Court of Arbitration is empowered to order the payment of retroactive increases in wages—namely, s. 89 (8) of the Industrial Conciliation and Arbitration Act, 1925, and the Economic Stabilization Emergency Regulations, 1942 (which had no application here). The only occasion when the Court would have power under s. 89 (8) to order increased minimum wages for bacon-workers in the Wellington Industrial District for the period from February 1, 1946, to March 31, 1946, would be when it is making some new award for bacon-workers in substitution for the Wellington Bacon-workers Award, 1945; and, as that award is still in operation, the opportunity has not yet arrived. As cl. 6 (*f*) of that award is not unambiguous, and is capable of different interpretations, the Court could not recognize that it was an effective device by which the Court had invested itself with a third means of ordering retroactive payments of wages. Appeal from Mr. A. M. Goulding, S.M., dismissing a claim for recovery of penalties for failure to pay award wages, dismissed. *Hopper* (*Inspector of Factories*) v. *J. C. Hutton* (*N.Z.*), *Ltd.* (Wellington. April 6, 1948. Tyndall, J. (Ct. Arb.).)

INSURANCE LAW.

Insurance Law Revision. *26 Canadian Bar Review,* 444.

INTERNATIONAL LAW.

Charter of the United Nations. (Louis St. Laurent.) *26 Canadian Bar Review,* 363.

International Justice. (Sir Hartley Shawcross, K.C.) *205 Law Times Jo.,* 156.

JUSTICES OF THE PEACE.

Information—Duplicity—Refusal of Adjournment—Whether Denial of Natural Justice—Prohibition refused. After P. had been charged at Petty Sessions upon an information alleging that he had not kept licensed premises free from offensive or unwholesome matters as required by s. 65 (1) (c) of the Liquor Act, 1912, as amended, the Magistrate rejected submissions that the charge was bad for duplicity or uncertainty and that the prosecutor should be put to his election, and refused an application by P. for an adjournment. Evidence was given of offensive matters as alleged, all known to P., and P. was convicted. Upon application to make absolute a rule *nisi* for prohibition, *Held,* 1. That the information and the conviction were not bad for duplicity or uncertainty. 2. That the refusal of the adjournment was not a denial of natural justice. 3. That the rule *nisi* should therefore be discharged with costs. *Ex parte Polley, Re McLennan,* [1947] N.S.W. S.R. 391.

LAND AGENT.

Sole Right to find a Buyer for Period of Twenty-one Days—Withdrawal of Authority—Right to Remuneration—Liquidated Damages or Penalty. On February 14, 1947, the respondent, by a contract in writing on a stock form prepared by the appellant, a licensed commission agent, gave to the appellant the sole right to find a buyer for his property for a period of twenty-one days. The purchase price was stated to be not less than £850. It was a term of the contract that, even if the agent's authority were withdrawn within that period, or the property were sold privately or through any other agent, the respondent undertook to pay the appellant a sum equal to the commission on the purchase price mentioned in the contract, calculated at the usual rate of 5 per cent. on the first £500 and 2½ per cent. on the balance. The property was not sold, although advertised by the appellant; and on February 19, 1947, the respondent withdrew the appellant's authority. The property was still unsold on March 6, 1947, the date on which the contract expired. The appellant claimed £33 15s. in the Magistrates' Court as a sum equal to commission and payable under the sole agency contract, or, alternatively, as liquidated damages for the breach by the respondent thereof. The Magistrate gave judgment for the appellant for £5 with costs as unliquidated damages for breach of contract. On appeal to the Full Court, *Held,* allowing the appeal, That, on the true construction of the contract, the appellant was entitled to be paid the sum of £33 15s., whether he found a buyer at the agreed minimum purchase price or at any other price, or if the property were withdrawn or sold privately or through another agent within the period of currency on the contract. (*Edwards* v. *Sheppard,* [1946] St. R. Qd. 159, distinguished.) *Edwards* v. *Massey,* [1947] St. R. Qd. 226.

LAND SALES.

Sale to Company of which Vendor Substantial Shareholder: see *Post,* p. 129.

LANDLORD AND TENANT.

Demise of Part of Premises for Use as Theatre on Nights and Afternoons—Whether Lease or License. A municipal council demised the messuage and premises, known as the concert hall, situate in its town hall, to hold the same unto the lessee for a period of three years for the purpose of using the demised premises as a theatre on six nights in each week, during the term granted, for night performances, and also on Saturday afternoons and public holidays for *matinées.* Provision was made for the lessee limiting its user to three nights a week plus *matinées.* By way of grant of a "license for occupancy," the lessee covenanted to permit the council, on giving notice, to use and occupy the demised premises for its own purposes twelve times a year. There were covenants by the lessee to repair, to permit entry by the council, to yield up in good and tenantable repair, and provision for a weekly tenancy at the expiration of the term. *Held,* That the council had granted a lease, and not a mere license, to the lessee. (*Attorney-General* v. *Shire of Dandenong,* [1942] V.L.R. 33, distinguished.) *Radio Theatres Pty., Ltd.* v. *City of Coburg,* [1948] V.L.R. 84 (F.C.).

Term or Interest of Tenant ending—Surrender of Tenancy—Tenant not in Occupation—Another Person actually occupying Premises—Application for Warrant of Ejectment—Landlord and Tenant Act, 1928 (No. 3710), s. 69. (Cf. s. 186 of the Magistrates' Courts Act, 1928). A tenant, by agreement with the landlord, went out of occupation of premises and surrendered his tenancy, but his wife remained in occupation of the premises and refused to leave. The landlord served on the wife a notice of owner's intention to proceed to recover possession of the premises pursuant to s. 69 of the Landlord and Tenant Act, 1928, and a Court of Petty Sessions ordered a warrant of ejectment to issue. *Held,* That the wife was a person by whom the premises were "then actually occupied" within the meaning of s. 69, and that the order was properly made. In proceedings under s. 69 of the Landlord and Tenant Act, 1928, against a person other than the tenant, it is not necessary that such person possess or claim some proprietary right under the tenant. (*Griffiths* v. *McDougall and Carroll,* (1894) 16 A.L.T. 29, distinguished.) *Zunneberg* v. *Batt,* [1948] V.L.R. 107.

LOCAL AUTHORITIES.

Voting in Committee. *92 Justice of the Peace Jo.,* 180.

MILITARY LAW.

The Military Justice System. (Capt. P. M. Hayman, J.P.) *205 Law Times Jo.,* 47, 87.

MORTGAGE.

Mortgagee in Possession—Account between Mortgagee in Possession and Mortgagor—Rests—Account to be Continuous without Rests, except in Special Circumstances—Nature of such Special Circumstances—Position of Mortgagee in Possession after wrongful Rejection of Tender of Amount due. The general rule is that an account taken against a mortgagee is a continuous account without rests. (*Wrigley* v. *Gill,* [1905] 1 Ch. 241; aff. on app. [1906] 1 Ch. 165, applied.) (*Cockburn* v. *Edwards,* (1881) 18 Ch.D. 449, distinguished.) (*Graham* v. *Walker,* (1847) 11 I. Eq. R. 415, referred to.) In order to justify the ordering

of rests, there must be shown special circumstances, among which are the following: (*a*) When a mortgagee has agreed, either expressly or impliedly, to take his principal or portions thereof by instalments out of any surplus of rents over interest and charges. (*b*) The wrongful denial by the mortgagee that the mortgagor remained a mortgagor and the wrongful assertion that he had no right to redeem. (*Incorporated Society in Dublin* v. *Richards*, (1841) 1 Dr. & War. 258, *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.*, (1879) 4 App. Cas. 391, followed.) (*c*) *Semble*, There has been a great and notorious excess of income over outgoings. A mortgagee in possession who wrongly rejects a tender of the amount due to him has no longer the status, and cannot claim the advantages, of a mortgagee in possession, and, therefore, he cannot debit the mortgagor with expenditure by him since such rejection (for repairing chimneys, plumbing repairs, and painting and repairing buildings on the mortgaged land), for none of which he has the authority or acquiescence of the mortgagor or her attorney. On an application to the Court to give directions to the Registrar in the taking of accounts between a mortgagor and a mortgagee, *Held*, That none of the above stated special circumstances relied upon by the mortgagor had been established, and, therefore, the direction given was that the account be taken continuously without rests. The judgment contains further directions upon other questions arising between the mortgagee and the mortgagor. (*Woods* v. *Robertson*, (1901) 21 N.Z.L.R. 137, and *Shepard* v. *Jones*, (1882) 21 Ch.D. 469, applied.) *Couzens* v. *Francis*. (Auckland. March 18, 1948. Callan, J.)

MOTOR-VEHICLES.

Traffic Regulations—Offences—Overtaking Vehicles—"Clear view of the road and the traffic thereon"—Scope of Regulation—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14 (10) (b). The dominating words of Reg. 14 (10) (*b*) of the Traffic Regulations, 1936, "a clear view of the road and the traffic thereon," do not mean "a road clear of traffic" or "a clear road," because the view which is the deciding factor is not only a view of the road but also of the traffic thereon. (*Archer* v. *Ramstead*, (1940) 1 M.C.D. 342, discussed.) *Semble*, To attempt to overtake a vehicle when another vehicle is approaching is *prima facie* negligent or dangerous if the approaching vehicle is sufficiently near to cause danger, but this is independent of Reg. 14 (1) (*b*), though, in an action for damages based on negligent driving, that regulation may be looked at as an illustration of what may amount to negligence. (*Suridge* v. *Hercock*, [1939] G.L.R. 521, referred to.) *Fletcher* v. *Jack*. (Cambridge. April 27, 1948. Paterson, S.M.)

NEGLIGENCE.

Duty to Take Care. *98 Law Journal*, 212.

NUISANCE.

Flooding of Downstairs Premises—Water from Lavatory used by Upstairs Tenant in common with Others—Doctrine of Res ipsa loquitur *not applicable—No Duty on Tenant.* A., the appellant company, and C., the respondent, were tenants of portions of a building, A.'s premises being on the ground floor and C.'s premises, including a billiard-room and the use of an adjoining lavatory, were on the floor above. On April 14, 1947, the lavatory floor became flooded to a depth of 3 in. to 4 in., and a considerable quantity of water found its way through to the floor below, causing injury to A.'s stock. In an action for damages in the Magistrates' Court, judgment was given for C. On appeal, *Held*, 1. That, as C. did not have the sole occupancy or control of the lavatory, the control being that of the landlord, the doctrine of *res ipsa loquitur* did not apply. 2. That there was no evidence of any statutory requirement or custom requiring C. to provide a leaden floor, and no duty was cast upon him, as one of a number of tenants having the mere right to use the lavatory; and there was no evidence that the lavatory, when in working order, was not adequate to the requirements of those using it. The appeal was accordingly dismissed. *Amos, Ltd.* v. *Campbell*. (Christchurch. April 14, 1948. Fleming, J.)

PRACTICE.

Appeal as of Right—Judgment involving Civil Right—Order in Affiliation—Proceedings for Maintenance of Child—Whether of Value of £300. A Court adjudged the defendant to be the father of a child and ordered him to pay 12s. 6d. a week for maintenance until the child reached the age of eighteen years or until further order. The present value of the weekly payments actually (on the assumption that the order remained unaltered) exceeded £300. On appeal to the Supreme Court, the order was quashed. It was held by the High Court of Australia that the order involved a civil right and imposed a present liability which exceeded £300, and, under the relevant statutory provisions in that behalf, an appeal by the complainant was competent. *Cocks* v. *Juncken*, (1947) 74 C.L.R. 277 (H.C. of Aust.).

Costs—Security for Costs—Order against Defendant—Plaintiff and Defendant out of Jurisdiction—Plaintiff ordered to give Security. In an action to decide the ownership of certain bearer bonds, it was discovered by the plaintiffs, a Dutch company incorporated out of the jurisdiction, that one of the defendants was in effect agent for a Dutchman and a Dutch charity, both resident out of the jurisdiction, and, on the plaintiff's volition, these parties were joined as defendants. The two new defendants applied for security for costs, which was ordered by the Master, and thereupon the plaintiffs asked that the new defendants should also give security as being persons out of the jurisdiction. This the Master also ordered. On appeal by the new defendants: *Held*, That it could not be accepted that, where the plaintiff and one or more defendants were resident out of the jurisdiction, and such defendant or defendants were granted an order for security of costs, it was only equitable that the plaintiff should himself be given such an order, and, therefore, the general rule being that a defendant should not be ordered to give security except in exceptional circumstances—*e.g.*, where he is in the position of plaintiff through having filed a counterclaim—the plaintiff's application should have been dismissed. (Observations of Stirling, J., in *Re Compagnie Générale d'Eaux Minérales et de Bains de Mer*, [1891] 3 Ch. 451, 458, considered.) *Naamlooze Vennootschap Beleggings Compagnie "Uranus"* v. *Bank of England and Others*, [1948] 1 All E.R. 304.

As to security for costs, see *26 Halsbury's Laws of England*, 2nd Ed. 64-68, para. 108; and for cases, see *E. and E. Digest, Practice*, 903-915, Nos. *4428-4583*.

Payment out of Court in Administrative Actions. *98 Law Journal*, 227.

Security for Costs: When allowable. *98 Law Journal*, 117.

Trial by Jury: Its Origin and Merits. (P. A. Jacobs.) *21 Australian Law Journal*, 462.

PROBATE AND ADMINISTRATION.

Lost Will—Limited Grant of Probate to Applicant as Executrix of Lost Will—Sufficiency of Evidence of Loss where Persons beneficially entitled to an Intestacy are Applicant and Consenting Party respectively. Where, of the only persons who would be beneficially interested on an intestacy, one is the applicant for probate of a lost will and the other consents in a form which implies his acceptance of its alleged contents, less evidence will be required as sufficient to establish the loss of the will and its contents than might otherwise be required. The grant appropriate in the circumstances is a grant of probate to the applicant as executrix of the will propounded. That grant is limited until the original will, or an authentic copy, shall be brought into Court. *In re Campbell (deceased)*. (Wellington. March 5, 1948. Gresson, J.)

PUBLIC REVENUE.

Death Duties (Estate Duty) — Debts — Rates allowable as Debts of Deceased—Distinction between General Rates and Annually recurring Special Rates—Death Duties Act, 1921, s. 9—Municipal Corporations Act, 1933, ss. 77, 79—Rating Act, 1925, ss. 51 (a), *68—Local Bodies Loans Act, 1926, ss. 21* (3), *23, 48, 53.* General rates, and any rate of a similar nature, leviable at the discretion of a local authority are not debts to be allowed in computing the final balance of an estate, unless actually levied before the death of the deceased testator or intestate; but special rates or similar rates levied as annually recurring rates over a term of years prior to the death of such deceased, and still in force at the time of his death, are debts to be so allowed under s. 9 (3) of the Death Duties Act, 1921, for the amount levied for the rating year in which the deceased died. In the event of a sale or transfer of rated land during the rating year in which the deceased ratepayer died, rates comprising a "contingent debt" within the meaning of that term in s. 9 (*d*) of the Death Duties Act, 1921, should be apportioned according to the practice whereby the transferee pays to the transferor a proportionate amount from the date of the transfer to the end of the rating year. (*R.* v. *Mayor, &c., of Inglewood*, [1931] N.Z.L.R. 177, applied.) (*Karori Borough* v. *Buxton*, [1918] N.Z.L.R. 730, and *Oborn and Clark* v. *Auckland City Corporation*, [1935] N.Z.L.R. 1, referred to.) *Hobbs* v. *Commissioner of Stamp Duties*. (Christchurch. April 23, 1948. Fleming, J.)

Death Duties (Succession Duty)—Residue of Estate given for Charitable and Religious Purposes—Selection and Division amongst such Charities as Trustees of Will "think fit"—Charities, when ascertained, the "Successors"—Death Duties Act, 1921, ss. 15, 16 (a), *18, 72, 74.* Where the trustees of a

will have a power of selection and are authorized to divide a bequest amongst such charities as they think fit, the charities in whose favour they make the disposition are, when ascertained, the "successors" within the meaning of that term as used in the Death Duties Act, 1921. (*Attorney-General* v. *New Zealand Insurance Co., Ltd.*, [1937] N.Z.L.R. 33, *Lord Advocate* v. *Nisbet's Trustees*, (1878) 15 Sc.L.R. 508, *Thomas* v. *Howell*, (1874) L.R. 18 Eq. 198, and *In re Piercy, Whitwham* v. *Piercy*, [1898] 1 Ch. 565, applied.) (*Commissioner of Stamp Duties* v. *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd.*, [1925] N.Z.L.R. 714, *Williams* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 88, and *Garland* v. *Commissioner of Stamp Duties*, [1919] N.Z.L.R. 792, referred to.) *Williams* v. *Commissioner of Stamp Duties*. (Wellington. April 13, 1948. Gresson, J.)

Property subject to Duty—"Annuity or other interest purchased or provided by the deceased" (*cf.* s. 5 (1) (*g*) of the Death Duties Act, 1921). *98 Law Journal*, 160.

RENT RESTRICTION (BUSINESS PREMISES).

Economic Stabilization Emergency Regulations, 1942, Amendment No. 13 (Serial No. 1948/64). This Amendment applies to "Urban property" the provisions of ss. 4 and 6 of the Fair Rents Amendment Act, 1947 (see *Ante*, p. 29), in the original language of those sections, with the addition of a new regulation, Reg. 20 (2), which provided that, where a premium was paid in consideration of the grant of a lease of any property, executed before December 15, 1942, the regulation reproducing s. 6 of the Fair Rents Amendment Act, 1947, is not to apply so as to prohibit the payment of a premium in consideration of any renewal or successive renewals of that lease, or in consideration of the grant of a new lease or successive new leases of the same property. The amount of the premium paid in respect of any lease, renewal, or new lease must, however, be taken into consideration in ascertaining the rent payable thereunder as if the premium were part of the rent and accrued from day to day throughout the term of the lease, renewal, or new lease, as the case may be. (The balance of the Amendment consists of consequential amendments of Regs. 25 and 26, and the revocation of Reg. 3 of Amendment No. 3.)

Points in Practice. *98 Law Journal*, 131.

TORT.

Apportionment and Contribution. *98 Law Journal*, 117.

Government Liability in Tort. (Edwin Borchard.) *26 Canadian Bar Review*, 399.

Statutory Limitation Period and Contribution. *98 Law Journal*, 117.

WILL.

Construction—Child of Testator dead at Date of Will—Whether included in Expression "any of my said children shall die in my lifetime"—Children of such Deceased Child to take Share Parent would have taken had she survived Testator—Whether such Children benefit under Residuary Clause. A testator gave devised and bequeathed his residuary estate upon trust to be divided amongst all his children living at the time of his death in equal shares provided that in case "any of my said children shall die in my lifetime leaving a child or children" who should survive testator and being a son should attain the age of twenty-one years, then such child or children "shall take . . . the share which his her or their parent would have taken under the trusts of this my will if such parent had survived" the testator. In addition to four children who survived him, the testator had a daughter, who died before the date of the testator's will but left a son who survived the testator and died after attaining twenty-one years. *Held*, The personal representative of the son was entitled to the share of the residuary estate which the daughter would have taken under the trusts of the will had she survived the testator. (*Loring* v. *Thomas*, (1861) 1 Dr. & Sm. 497, followed.) *In re Wharton, Union Trustee Co.* v. *McMurtrie*, [1948] V.L.R. 98.

Signature—Sufficiency—Testator enfeebled—Surname Incomplete—Attestation—Mental Presence of Testatrix—Wills Act, 1837 (c. 26), s. 9. The deceased, Ellen Chalcraft, an elderly woman suffering from cancer, executed a will, dated July 29, 1946, and died on December 30, 1946. A short time before her death, she had given instructions for the sale of her house for £700, out of which £500 was to be paid to her married daughter, Mrs. West, and her husband, to enable them to purchase a house. In return for this sum, it was intended that Mr. West should enter into a deed of covenant to maintain the deceased and her other daughter, Helen, for the rest of their lives. On December 30, 1946, when death was imminent, a strong dose of morphia was administered to the deceased, the effect of which was gradually to induce drowsiness, and, as a result, indirectly to affect her mental faculties. The daughter, Helen, in the presence of other members of the family and of two attesting witnesses, then prepared a document, on a writing-pad, in the following terms: "96 Osborne Road, Acton. I wish my house to be sold and £500 made over to Mr. C. F. West for purchase of 33 Stilecroft Gardens." This was shown to the deceased, who, when asked whether that was all and whether it gave effect to her wishes, nodded assent. The daughter Helen then put the pad before the deceased and, supporting her on the bed, in which she was propped up, said: "If you can't sign your name, put a cross." The deceased took the pen which was handed to her and began to sign her name, but when she had got as far as "E. Chal" her signature came to an end and was never completed. The document was then passed to the attesting witnesses and was immediately signed by them, and from that time onward the deceased was never really conscious. The plaintiff propounded the document as a codicil to the will of July 29, 1946, and the defendants contended that the document was not a testamentary document. The Court having found that the proper inference from the facts proved was that, when she was invited to sign the document, the deceased knew and approved of its contents, and that the document was intended to be a testamentary document and not a disposition *inter vivos*, *Held*, 1. As it appeared from the evidence that what the deceased wrote was intended by her to be the best she could do by way of writing her name, it was a signature which satisfied the requirements of the Wills Act, 1837. (*In the goods of Maddock*, (1874) L.R. 3 P. & D. 169, distinguished.) 2. As it appeared that the attestation was completed before the deceased became incapable of understanding what was going on, the will had been attested not only in the physical, but also in the mental, presence of the deceased. *Re Chalcraft, Chalcraft* v. *Giles*, [1948] 1 All E.R. 700 (P.D.A.).

As to methods of signature by testator, see *34 Halsbury's Laws of England*, 2nd Ed., 56, para. 68; and for cases, see *44 E. and E. Digest*, 249, 250, Nos. *752-769*.

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Neuritis—Alleged Result of Alterations in Place of Work resulting in Suppliant being subjected to Cold Draughts of Air. The suppliant, on September 4, 1946, while employed by the State Hydro-Electric Department, was cooking over oil stoves in the kitchen at the Tutira Camp, when he became subjected to cold draughts of air caused by the removal of a wall. He alleged that, as a result, he suffered from stiffness in the neck, shoulders, and back, which later developed into neuritis, which affected his shoulders, both arms, and hands. He had been totally incapacitated from work since September 9, 1946, and such incapacity was of a permanent nature. There was a conflict of evidence as to when the alterations to the cook-house took place, and as to whether the neuritis came on before or after the alterations. *Held*, That it was not proved that the attack came on after or during the alterations to the cook-house, and the suppliant had not proved that his disability arose out of or in the course of his employment. *Wiffen* v. *The King*. (Wellington. April 21, 1948. Ongley, J. (Ct. Arb.).)

Evidence—Payment of Weekly Compensation—Factor for Consideration—Weight dependent on Circumstances—Balance of Probabilities. Payment of several weekly instalments of compensation by an employer to an injured worker without qualification is some evidence of liability to pay; but the weight to be given to that evidence depends upon the circumstances. (*Way* v. *Penrikyber Navigation Colliery Co., Ltd.*, [1940] 1 All E.R. 164; 32 B.W.C.C. 368, followed.) The plaintiff has not proved his claim for compensation if, on balancing the evidence for and against, on the issue whether his injury was due to accident arising out of and in the course of his employment, including the evidence of the circumstances in which weekly compensation was paid, the balance of probabilities is not in his favour. *Wong Sing* v. *Shacklock's, Ltd.* (Wellington. April 30, 1948. Ongley, J. (Comp. Ct.).)

Heart Disease—Coronary Thrombosis—Whether resulting from Effort—Whether Effort can cause Subintimal Haemorrhage thereby causing Thrombosis and Infarct. The theory that effort can cause subintimal haemorrhage, thereby causing thrombosis and infarct, was not accepted by the learned Judge in *Tansey* v. *Renown Collieries, Ltd.*, [1946] N.Z.L.R. 738, or in the present case, and remains an open question. It was held in the present case that, on the evidence, there was no deterioration, as there was in *Tansey's* case, and that the symptoms during the interval between the work and the breakdown did not point to injury rather than disease, and, therefore, the plaintiff's claim for compensation failed. (*Tansey* v. *Renown Collieries, Ltd.*, [1946] N.Z.L.R. 738, distinguished.) *Williams* v. *Residential Construction Co.* (Wellington. April 23, 1948. Ongley, J. (Comp. Ct.).)

CASE AND COMMENT.

The Rule of Law.

Pursuant to the New Towns Act, 1946, Sched. I, para. 3, the Minister of Town and Country Planning held a public local inquiry into objections to a proposed order under s. 1 (1) of that Act, called the Stevenage New Town Designation Order, 1946, by which Stevenage was designated as a "new town" within the Act. In a speech at a public meeting before the passing of the Act, the Minister had stated that the Bill would become law, that Stevenage was a most suitable site and should be the first scheme under the Act, and that the Stevenage project would go forward. At the inquiry, no evidence in support of the order was adduced, and the objections then made were subsequently considered and rejected by the Minister. He dealt in writing with the substance of all objections except that directed to the difficulties of water supply and sewage disposal, with regard to which he said he was taking advice, having in mind a scheme which representatives of the Metropolitan Water Board and the Lee Conservancy had agreed would meet the difficulty. The appellants, who were local residents and landowners, challenged the order under s. 16 of the Town and Country Planning Act, 1944, on the ground that (i) before considering the objections the Minister stated that he would make the order, and was thereby biased in any consideration of the objections which the Act of 1946 impliedly required should be fairly and properly considered, and (ii) the inquiry did not comply with the statutory requirements for such a public local inquiry in respect that no evidence in support of the draft order was led on behalf of the Minister:—

HELD, 1. No judicial or quasi-judicial duty was imposed on the Minister in the discharge of his statutory duties, those duties being purely administrative; the only question was whether he had complied with the statutory direction to appoint a person to hold the public inquiry and to consider that person's report; and the appellants had not established either that in his speech he had prejudged any genuine consideration of the objections or that he had not genuinely considered the objections at a later stage when they were submitted to him.

2. The words "in respect thereto" in para. 3 of Sched. I to the Act of 1946 meant "in respect of the objections"; they definitely limited the scope of the inquiry, and none of the general procedural provisions of s. 290 of the Local Government Act, 1933, could be held to extend its scope; the object of the inquiry was further to inform the mind of the Minister, and not to consider any issue between the Minister and the objectors, which was for the Minister thereafter to consider and decide; and, therefore, there was no need for the Minister to lead evidence at the inquiry in support of the draft order.

Per Lord Thankerton: The proper significance of the word "bias" is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, such as an arbitrator.

Franklin v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 289.

The text is now available of the arguments and decision of the House of Lords in "the Stevenage case": *Franklin* v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 289. The original hearing in the King's Bench Division before Henn Collins, J., attracted considerable attention, as a Cabinet Minister's Order under the New Towns Act, 1946, was set aside on the ground that it was contrary to natural justice and biased: [1947] 1 All E.R. 396. The Court of Appeal (*ibid.*, 612) and the House of Lords have reversed this judgment, and it is interesting to note the point of departure.

Stevenage was officially chosen as the site of a new town before the enabling legislation was passed, for it appears from the reports that the Minister announced the choice in the House of Commons before the second reading of the Act in question, and that he further addressed a Public Meeting at Stevenage three months before the Royal Assent was given to the Bill. This was the ground for the charge of bias.

Stevenage was not expressly referred to in the Act, but there were general provisions for the drawing up of a scheme, the lodging of objections, the holding of a public local inquiry, and the filing of an official report. The final reference to the Minister was in these words:

> If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town . . . he may make an order designating that area as the site of the proposed new town.

A scheme was duly prepared, objections were lodged, and a local inquiry held. Before completing the order, the Minister circulated a letter among the parties concerned which contained the following paragraph:

> The problems arising from the provision of an adequate water supply and of efficient sewage disposal for the new town, and the consequent effects on the River Lee and London's water supplies, were the subject of representation by the Metropolitan Water Board, the Lee Conservancy Board, and the Lee Conservancy Catchment Board. These problems have been taken into account from the beginning and have been the subject of discussions with the Ministry of Health from an early stage and subsequently with the Metropolitan Water Board and Lee Conservancy Board. After carefully examining the representations made to him, the Minister feels justified in going forward with the establishment of a properly planned community and will maintain close contact with the Ministry of Health and the statutory undertakers at every stage of the development. It has been fully recognized from the outset that every possible precaution must be taken to protect London's water supplies from any avoidable risk of pollution. The Minister has, accordingly, appointed a consultant to examine the possibilities of a scheme which will apply to a much wider area than that of the immediate vicinity of Stevenage. As regards the dispersal of surface water, the Minister is satisfied that the problems involved can be dealt with effectively and he will ensure that the responsible Government Departments and the interested local authorities are consulted as to the measures to be adopted.

The construction of this paragraph was the point of departure in the Courts. Reading it with the Minister's speeches, Henn Collins, J., decided that the objections had not been properly disposed of, and set aside the order. In the Court of Appeal and in the House of Lords, it was read with the evidence taken at the inquiry on behalf of the Metropolitan Water Board and the Lee Conservancy Board that the questions of water supply and sewerage were really matters of expense to be incurred in transporting a large amount of water from the River Thames into the River Lee, and that such a scheme was not entirely impracticable. In all the Courts, it was agreed that the Minister was bound to deal with the objection in a judicial spirit: the fact that the New Towns Act, 1946, provided for the making of objections and the holding of an inquiry was treated as sufficient to show that the use of the word "satisfied" implied a judicial consideration.

The report is remarkable for the argument of the Attorney-General (Sir Hartley Shawcross). In the Court of first instance, it ran as follows:

> The Minister's duty as laid down in the statute in the clearest terms was to consider and discuss the desirability of making Stevenage a new town. He had to do that before any question of objection arose. When he announced the fact that he had reached a provisional conclusion that there

should be a new town, that was a decision of the Government. If the objective argument were right, not only would the present Minister be precluded from making Stevenage a new town, but any successor of his in the Ministry would be so precluded, since the decision to make the new town was a statement of policy made on behalf of the Government as a whole.

This argument was elaborated in the Court of Appeal as follows :

> He [counsel] submitted that it was the national interest which was the overriding consideration. The Minister might come to the conclusion that the objections in a given case were so strong as to be virtually unanswerable and yet that in the national interest they must be put on one side : that being the case, he could not be regarded as exercising a judicial function.

In the House of Lords, the argument was even more contemptuous :

> *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851, indicates that it is idle to talk of natural justice in a case of this kind or of any necessity for an appearance of justice. If that were so *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338, could not have been decided as it was nor could innumerable cases under the Defence Regulations . . . In those cases the Ministers refused to disclose their reasons for their action, while the objectors put forward reasons, the only ones known to the public, suggesting that the Ministers' conclusions were wrong and unfair. There was no appearance of justice in what was done. It was held that if the Minister was satisfied, the matter was a subjective one for him, and that, unless it could be shown that he acted in bad faith, his decision stood.

The most apt criticism of these arguments is to compare them with those put into the mouth of the Fascist Rakovski in Elmer Rice's play, *Judgment Day*. Five Judges have retired to their consulting-room to consider their verdict and Rakovski is shown in :—

> RAKOVSKI : I am informed, gentlemen, that there is some difference of opinion among you . . . I ask for your serious attention. I have come to tell you something of the utmost importance. There is only one possible verdict in this case—a unanimous verdict of guilty.
>
> JUDGE VLORA : What you ask is impossible, your Excellency : the evidence will not support such a verdict.
>
> RAKOVSKI : I do not agree : but even if you are right the verdict must nevertheless be guilty . . . A national emergency exists. The fate of the National Government hangs in the balance. I shall tell you something, gentlemen. This afternoon there was a disturbance in the Voidovov quarter—a demonstration in favour of the prisoners. The Police were ordered to fire on the crowd. They refused. Do you see what that means ? Do you see the results of your delay and vacillation ? Rumours have spread that the Court is divided. The agents of the People's Party are stirring up the mobs. There is only one answer to that—the conviction and immediate execution of the defendants. A unanimous verdict of guilty will quiet the mob spirit. As soon as the verdict is announced, we shall arrest every known member of the People's Party . . . But we cannot act until we have the verdict of guilty—and these defendants have been convicted of attempting to murder the Minister-President. Give us that and we will strike. If we do not strike at once, the position will get out of hand. Now you know where your duty lies. Fail to perform it and I shall not be responsible for the consequences.

It will be a sorry day for English common law when such arguments prevail.

When we come to the decision of Henn Collins, J., the atmosphere is much clearer. Dealing with the Attorney-General's contention that under the statute the Minister was not bound to act judicially, the learned Judge said ([1947] 1 All E.R. 396, 397, 398, 399) :

> This is, at any rate, a sturdy contention, particularly in view of the line which the Courts have consistently taken in respect of the rights of objectors under earlier legislation providing for public inquiries. One of the functions of the Court is to stand between the Executive and the members of the public so far as the common law requires and legislation permits, and, if it sees that being done which is contrary to natural justice, then, within those limits, it will intervene . . . The Minister's view, the Attorney-General contends, is a matter of policy—the decision of the Government, and, I suppose he would add, as such, immutable at the instance of objectors. I myself prefer the view that all matters of policy are embodied in the Act, and that its application to a particular place is not a matter of policy . . . No doubt, the Minister is put in a difficult position. To act fairly in a matter about which one has, before hearing and considering all the evidence and arguments, formed and expressed a view, requires a firm mind and enough moral courage to say one was mistaken. But are those qualities out of reach of a Minister of the Crown . . . How can it be said that he weighed the objection with an open mind when he acknowledges that he did not, and does not, know the force of it . . . I am convinced that he did not consider the question : "Aye or No should the order be confirmed ?" with an open mind, but that he meant to confirm it whatever the force of the objections might be, trusting that some solution would be found. This, in my judgment, involves a denial of natural justice, and I, accordingly, quash the order, with costs.

In the Court of Appeal, Morton and Tucker, L.JJ., both based their decision on the different construction of the Minister's letter above referred to, though Morton, L.J., makes the curious additional point that, after the Minister had publicly announced his intentions about Stevenage, Parliament still designated him as the person to decide the fate of the area—surely a far-fetched conclusion. Lord Oaksey, L.J., is more inclined to lean towards what we may call the Fascist view and to limit the rights of the individual. "The only obligation," he says, "which in my opinion rests on the Minister after that inquiry is fairly and *bona fide* to consider the report of the person who held it." In the previous paragraph, he seems to take the view that, when the Minister is really deciding on his own claims, the objectors are not entitled to hear the evidence against their own views.

In all the reports, it is said that there is only one direct case in point (*In re London-Portsmouth Trunk Road* (*Surrey*) *Compulsory Purchase Order* (*No. 2*), *1938*, [1939] 2 All E.R. 464), which was decided on a point of procedure, but there are at least two decisions of the House of Lords which discuss the principles applicable to such decisions as these. In *Board of Education* v. *Rice*, [1911] A.C. 179, 182, an inquiry had been held into alleged discrimination between provided and non-provided schools, and Lord Loreburn made the following comments :

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon Departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided

this is done, there is no appeal from the determination of the Board under s. 7 (3) of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In *Local Government Board* v. *Arlidge*, [1915] A.C. 120, 130, 131, 132, the position of the Local Government Board after the hearing of such an inquiry was also considered, and Lord Haldane made the following comments:

I have thought it important to set out with some fullness the conflicting views in the Court of Appeal. It is obvious that two of the Judges there based their conclusions on the principle that in the absence of a direction to the contrary, which they could not find in the statute, the analogy of the procedure in a Court of justice must guide them. *Hamilton*, L.J., on the contrary, thought that he found in the statute a scheme of procedure that excluded this analogy. Which of these opinions was right can only be determined by referring to the language of the Legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in its mind, excepting so far as the language enables us to do so. There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is his own. Such rights are not to be affected unless Parliament has said so. But Parliament, in what it considers higher interests than those of the individual, has so often interfered with such rights on other occasions, that it is dangerous for Judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is to-day. I therefore turn to the Acts of Parliament which are relevant with the sense that there is little justification for looking in advance for the embodiment of one scheme as more probable than the embodiment of another . . . it is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from Courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported . . . When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interest of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.

The essentially judicial nature of the Minister's duties was further emphasized in *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, when, after the close of an inquiry, certain further representations were made to the Minister and he acted on them. It was held by Greer, Maugham, and Roche, L.JJ., that in doing so he had held a private inquiry of his own after the public inquiry, and that his order must be set aside. It is notable that in his argument Sir Donald Somervell did not go nearly so far as the present Attorney-General. He admitted that a public inquiry involved judicial considerations, but that, after the inquiry, the matter was one of high policy and finance.

In the reports of all these cases there is a notable tendency to inquire whether the nature of the official act is judicial, quasi-judicial, or administrative, and to assume that, once the administrative label has been applied, the jurisdiction of the Courts is excluded. It is a regrettable tendency, as tending to introduce into English law the idea of *droit administratif*, against which *Dicey* warned us in our student days. And it attacks the question from the wrong angle. "By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus [or certiorari] is granted to enable justice to be done": per Bowen, L.J., in *Reg.* v. *Inland Revenue Commissioners, In re Nathan*, (1884) 12 Q.B.D. 461, 478, 479. There is no exception in Magna Charta of matters administrative; and the true principle is to inquire whether by any later statute Parliament has taken away the duty (not the right) of the King's Courts to interfere in a case of injustice. If an absolute discretion has been expressly conferred on an official or a local body, there can, of course, be no interference by the Courts, and it is a fair inference that in trivial or routine matters there should be an absolute discretion. But this is very far from saying that, because the adjective "administrative" can be properly applied to an official action without any precise definition of what is administrative, then it follows that Magna Charta is to be treated as impliedly repealed so far as that particular action is concerned. As Lord Parmoor said in *Local Government Board* v. *Arlidge*, [1919] A.C. 120, 142:

Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.

And in the extract from Lord Loreburn's judgment cited above he says that: "it [the question for determination] will, I suppose, usually be of an administrative kind."

Although Henn Collins, J., has been overruled on the facts, his judgment remains valuable for its statement of principle, and is to be ranked with the vigorous dissenting judgment of Lord Atkin in *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338, and the like vigorous dissenting judgment of Lord Shaw in *R.* v. *Halliday*, [1917] A.C. 260, where similar questions were raised in the World War of 1914-18. It is a long-standing contest between the individual and the State. Shakespeare wrote of "the insolence of office" 300 years before Lord Hewart wrote of "the new despotism": and 400 years before that the Barons at Runnymede saw and provided for the same contest. If there were records, we might find the same contest in Atlantis.

—C. PALMER BROWN.

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. 134.—L. to R. Hotel, Ltd.

Jurisdiction—Sale by Vendor to Private Company of which he was Substantial Shareholder—Power of Committee to require Information as to Shareholders—Onus on Vendor.

Practice—Interrogation of Party by Crown Representative before Hearing—Committee alone entitled to require Information—Prescribed Forms—Committee's Inquiries not limited to Matters specifically referred to in such Forms.

Appeal by the Crown relating to an application for consent to a transfer of an hotel to a private company of which the transferor was to be the substantial shareholder.

The Court said: "The appeal raises questions of general application and it is proposed to deal first with basic principles and then to relate them to the particular case under review.

"The substantial issue is as to the extent to which a Committee is concerned or entitled in such a case to inquire as to the identity of the intended shareholders and their shareholdings in the proposed company and as to their intentions, if any, with respect to dealings in shares subsequent to the incorporation of the company.

"In the present case, and following a common practice, the Crown representative requested the applicant to supply certain information regarding these matters. The vendor refused to do so, though her counsel, Mr. *McGinley*, gave the names of the proposed shareholders at the hearing. Mr. *McGinley* submitted that the Crown representative had no authority to interrogate any party before the hearing, and we understand him to contend that no party may properly be required before the hearing to supply information beyond that specified in the forms prescribed by the regulations under the Land Sales Act.

"As to the first point, we agree that, unless acting under authority from the Committee, a Crown representative is not entitled to interrogate a party before hearing. There is no impropriety, however, in a Crown representative indicating to counsel the attitude which he proposes to adopt and inviting the disclosure in advance of information which he intends to seek at the hearing. The Committee alone has power to require information to be given, and, as a matter of procedure, we are of opinion that, in all cases where information is desired by a Committee prior to hearing, the request for the same should be made on its behalf by the Deputy Registrar.

"As to the contention that no information may properly be sought beyond that specified in the prescribed forms, we are of opinion that the latter are intended merely to ensure the minimum disclosure necessary to enable a preliminary examination of the application to be made by the Committee. We find nothing in the Act or regulations to suggest that a Committee's inquiries either at or before a hearing are to be limited to the matters specifically referred to in the prescribed forms. A Land Sales Committee in the exercise of its functions is deemed to be a commission of inquiry, and the provisions of the Evidence Act, 1908, apply to its proceedings. Subject to regulations, or to the direction of the Court, it is entitled to regulate its own procedure. The proper exercise of its functions requires the consideration of the circumstances of the particular case and of all other relevant matters. Its discretionary power of investigation is subject only to the limitation that its inquiries must be directed to matters relevant to the application before it. Its jurisdiction is not restricted to the interrogation of witnesses at a hearing, and, in considering an application before hearing, it may properly direct inquiries to be made of parties or their counsel. We see no reason why, in a proper case, a Committee should not stipulate that the required information be verified by statutory declaration.

"We have now to consider whether the matters on which information was sought were relevant to the application now under consideration. Mr. *McGinley* did not seriously contest the submission that a Committee is entitled to know the shareholders and their holdings when permission is sought to transfer land to a proposed private company. This appears to follow from the fact that a Committee is entitled to be fully informed as to a proposed transferee of land, and this, in the case of a company to be formed, includes, in our opinion, information as to its proposed shareholders. This view is supported by the conclusions we have reached as to the relevance of inquiries as to intended dealings in shares, and is in accordance with our recorded opinion that, in an appropriate case, the acquisition of land by a private company may amount to aggregation: *No. 117.—G. to F.: W. to F.*, (1947) 23 N.Z.L.J. 293.

"The seriously contested issue, however, in this case was whether the Committee had jurisdiction to inquire as to proposed transactions in shares subsequent to the incorporation of the company.

"Supporting the view that a Committee has such jurisdiction, the Crown referred to a practice stated to be not uncommon, and which it claimed to conflict with the objects of the Land Sales Act. The practice was described as that whereby an owner of land, desirous of disposing of the same at a price higher than that at which he might properly sell with the consent of the Land Sales Court, incorporates and transfers his land to a private company of which he is substantially the proprietor and then sells his shares at an enhanced price so as in fact to secure a sum in excess of the basic value to which he would have been restricted on an ordinary sale. That this or similar procedures have been adopted with the intention of escaping from the restrictive effects of the Land Sales Act we have no reason to doubt. The question whether a Committee may properly inquire whether a sale by a vendor to a proposed company is intended to be the initial step in such a procedure depends, in our opinion, upon the answer to a related question—namely, whether, if satisfied that such is the case, it is competent for the Committee to refuse the application so as to prevent the accomplishment of the vendor's design.

"On this point, Mr. *Kent*, for the Crown, submitted that a practice of the character described would amount to a device, plan, or scheme to contravene the Land Sales Act, and so would render the vendor liable for an offence under s. 68 (*d*) of the Servicemen's Settlement and Land Sales Act, 1943 (as amended by s. 14 of the Land Laws Amendment Act, 1944). An application by a vendor guilty of such an offence should be refused, he claimed, or granted subject only to conditions restricting the powers of the vendor to profit from his plan by a subsequent disposal of his shares. Mr. *McGinley*, on the contrary, contended that an owner of land is entitled as of right to transfer his property to a private company, that the only concern of this Court is as to the price at which the land may be so transferred, and that subsequent dealings in the company's shares are entirely beyond its jurisdiction. He therefore joined issue with the Crown as to whether inquiries might properly be made as to the vendor's intentions subsequent to the incorporation of the proposed company, and submitted that, in the absence of positive evidence of guilt, a vendor must be presumed to be innocent of any offence under the penal provisions of the Land Sales Act.

"We are unable to accept either of these views in its entirety. We find it unnecessary to consider whether a vendor in the accomplishment of the design which has been described would render himself liable to prosecution, and, for the purposes of this judgment, we assume that no offence under the Act is involved therein. The presumption of innocence is, accordingly, inapplicable, and cannot avail the vendor.

"The duty of a Land Sales Committee in the exercise of its functions is set out in s. 50 of the Land Sales Act. The real question for the Committee, in circumstances such as we have envisaged, is whether, having regard to the matters to which the Committee is directed to have regard by s. 50 (3), the proposed transfer to the company is entitled to the approval of the

Court. Its decision whether to grant or to refuse consent to the transaction must be governed entirely by the considerations set out in s. 50 (3). Those considerations, and those alone, should be the concern of the Committee.

"It is, therefore, necessary to determine whether such a scheme as we have described is a matter to which, in accordance with s. 50 (3), a Committee should properly have regard. We think it is, for the reason that such a practice, in our opinion, tends to increase the price of land and may involve its use for speculative purposes.

"In arriving at this conclusion, we have found it helpful to consider the practice in what are probably two of its most common forms:

"*Case 1.* A vendor, A, well knowing that the basic value of his land does not exceed £10,000, and desiring to obtain £12,000 from a purchaser, B, who would be willing to buy it for that amount, incorporates a private company, of which he is substantially the proprietor, and transfers the land to the company for £10,000, after which he disposes of his shares for £12,000 to B.

"*Case 2.* The vendor, A, in similar circumstances, but not having a particular purchaser in view, incorporates a private company, and transfers his land to the company for £10,000, with the intention of subsequently seeking a purchaser willing to buy his shares for £12,000.

"It is assumed in each case that the land (including, of course, improvements, and, in the case of an hotel, the license and goodwill associated therewith) will be the principal asset of the proposed company, and that the disposal of his shares at an enhanced price is the reason, or one of the reasons, for the formation of the company by the vendor.

"In either case, the Land Sales Committee becomes concerned with the matter when an application is filed for consent to the transfer of the land to the proposed company. In Case 1, it may reasonably be inferred that there is an arrangement or understanding between A and B, and we think it is clearly incumbent upon A to disclose any such arrangement to the Committee. We cannot agree that the proposed sale of shares is not related to the transfer of the land to the company. The intended share transaction is of necessity dependent upon the company becoming the owner of the land, and the substantial consideration for the purchase of the shares is the acquisition of control of the land by the purchaser.

"The Committee being directed to take into account not only the circumstances of a particular case, but all other relevant considerations, including the terms of any related transaction, and being under a duty to discourage transactions tending to increase the price of land, it would be incumbent upon it, on being informed of A's proposed share transaction with B, to consider the effect of the two transactions together upon the price of land. The suggestion that the second transaction affects only the price of shares, and has no effect on the price of land, appears to us to be specious rather than substantial. It is true that in form the sale relates only to shares. The company's principal asset, however, and its only asset capable of supporting the value of its shares, is in fact the land. If the basic value of the land be £10,000, and the vendor properly receives shares worth £10,000 on the transfer of his land to the company, no satisfactory reason other than a corresponding increase in the value of the land can be assigned to account for an apparent increase from £10,000 to £12,000 in the value of the company's shares. Notwithstanding the form of the transaction, the real reason why B is prepared to offer £12,000 for A's shares in the proposed company is because B considers A's land to be worth that amount. In its essence, therefore, the transaction enables B to secure *de facto* control of A's land for a payment of £2,000 greater than its basic value under the Land Sales Act and enables A to benefit accordingly. The 'price of land' rises or falls in sympathy with changes in the 'value' of land, and it must, in our opinion, be affected *pro tanto* by all payments made for land or for the control and enjoyment of land, and whether such control or enjoyment be secured by purchase of the land or by such an indirect means as the purchase of shares. The effect of A's ingenious scheme is to enable B to place his own value upon the control and enjoyment of the land and to secure such control and enjoyment for a consideration substantially greater than he could lawfully pay for the fee simple of the land under the Land Sales Act. It seems manifestly clear that every such transaction which is carried into effect must tend to increase the price of land.

"The similar scheme which we have described as Case 2 is identical in principle. It differs from Case 1 only in that the vendor has no purchaser for his shares in view, but his intention is to sell his shares in due course at a figure enabling him to realize a sum in excess of the basic value of his land. The successful accomplishment of his design will of necessity tend to increase the price of land. The transaction cannot be absolved from the disqualifying effect of this tendency because of an element of uncertainty as to the extent to which the vendor's purpose may ultimately be achieved.

"The scheme envisaged in Case 2 appears also to be speculative in character. Where a vendor incorporates a land-holding company for the purpose of securing a speculative profit on the sale of his shares, it is reasonable to presume that the value to a purchaser of the land or of control of the land held by the company will be the determining factor affecting the price of the company's shares. A transfer of land to a company for the purpose of securing a speculative profit on the sale of shares involves, therefore, in our opinion, the use of the land for speculative purposes.

"Having come to the foregoing conclusions as to the nature of the practices which we have described, we cannot doubt but that it is the duty of a Committee in any such case to refuse consent to the initial step in a procedure designed to enable the vendor to secure results conflicting so flagrantly with the purposes of the Land Sales Act. We think, moreover, that refusal of consent is the Committee's only proper course, and that it is neither practicable nor desirable for a Committee to seek to remove the objectionable features of such a transaction by the imposition of conditions. We doubt whether any condition imposed by this Court can be effectively enforced after completion of the transfer affected thereby, and it is therefore undesirable for a Committee to impose conditions purporting to restrict the power of a shareholder to dispose of his shares subsequent to the incorporation of a proposed company.

"We have so far assumed that the Committee concerned is fully cognisant of the vendor's intention in respect of a subsequent disposal of his shares. It follows, however, that such an intention on the part of a vendor is a relevant matter for the consideration of a Committee, and we are accordingly of opinion that in appropriate cases a Committee may properly interrogate a vendor as to his intentions, and may pursue reasonable inquiries relating thereto. The onus of satisfying a Committee that an application should be granted, and that it does not directly or indirectly conflict with the purposes of the Land Sales Act, is upon an applicant for consent. The satisfaction of this onus in a case where a vendor proposes to transfer his land to a company of which he will be the substantial proprietor requires that the Committee shall be satisfied that the securing of a sum in excess of the basic value of his land by the indirect method of selling his shares at a premium is no part of the vendor's purpose in seeking consent to the proposed transfer.

"Several Land Sales Committees have in the past followed the practice of requiring a vendor of land to a private company to file a declaration as to various relevant matters in addition to completing the usual prescribed forms. We think this practice should be generally adopted, and, to secure uniformity in procedure, we propose to issue a general direction to Committees in connection therewith.

"It is not intended, however, that the filing of a declaration in terms negativing a desire to escape from the restrictive effects of the Land Sales Act shall necessarily be deemed conclusive as to the *bona fides* of an appellant, and, except in special circumstances, and with the approval of the Committee, we are of the opinion that in such cases vendors should be required to attend for cross-examination at a hearing. On the other hand, it should be remembered that Committees are concerned only with the situation existing at the time of hearing, and, if a Committee is satisfied as to a vendor's *bona fides*, and that the proposed transaction is a proper one and free from the disqualifying features to which we have referred, the application should be granted.

"It now becomes necessary to consider the effect of the foregoing principles upon the specific case which is before us. The vendor, one L., is described as a spinster, and is stated to have acquired the hotel which is the subject of the present application from her mother's estate. We are informed that she is to be allotted all but one of the shares in the capital of the proposed company which she is said to be incorporating for normal business reasons associated with her ownership of the hotel. The license, however, is held by a tenant, and we have no information as to L.'s ultimate intentions with regard to the hotel or its business. There being no dispute as to price, the only matter discussed at the hearing of the application was as to the Committee's right to require further information from the vendor, and the application was granted to enable the Crown to appeal for the purpose of obtaining a ruling thereon from this Court. It cannot be claimed, therefore, that the Committee has dealt with the application on its merits so as to impose on the Crown the onus of proving that the decision on the merits was wrong.

"The issue before us in respect of the present application is not whether L. is or is not seeking to escape from the provisions of the Land Sales Act (on which the evidence is silent), but whether the Committee should have asked for, and, if necessary, insisted upon, a further disclosure of her future plans (if any), with a view to determining whether her ultimate intentions might conflict with the purposes of the Act. In the absence of a much fuller disclosure than has been made, we agree with the Crown that the Committee was insufficiently advised to enable it to be satisfied that the application should be granted, and that, in the circumstances, the onus upon the applicant of satisfying the Committee that her reasons for seeking to transfer her land to the proposed company were such as to entitle her to the consent of the Court has not been discharged.

"This appeal will accordingly be allowed, and the application will be referred back to the Westland Land Sales Committee for further consideration."

ACQUISITION OF TITLE TO LAND BY ACCRETION.

By E. C. Adams, LL.M.

(*Concluded from p. 112.*)

Precedent No. 1.
Declaration establishing Title to Accretion.

In the matter of the Land Transfer Act, 1915

and

In the matter of Deposited Plan No. prepared by E. F. of , Registered Surveyor, affecting [*set out official description of land*].

I, I. J. of Engineer do solemnly and sincerely declare as follows:—

1. That I am the Engineer to the County Council.
2. That I know the land and locality comprised in the above-mentioned plan.
3. That the accretions shown to Lots 6 and 8 on the said plan have been gradual and imperceptible and are not the result of an earthquake, sudden flooding or other sudden act of nature and that the present banks of the river are of a permanent nature, and not liable to ordinary flood, the said accretions not being subject to ordinary flood during the rainy season.
4. That C. D. the registered proprietor of the said land has been in sole occupation of the said accretions, farming and cropping the same.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act, 1927.

DECLARED at this day of , , before me:— } I. J.

G. H.
A Solicitor of the Supreme Court of New Zealand.

3s. Stamp.

Precedent No. 2.
Declaration establishing Title to Accretion.

In the matter of the Land Transfer Act 1915

and

In the matter of Deposited Plan No. prepared by E. F. of , Registered Surveyor, affecting [*set out official description of land*].

I, A. B. of contractor do solemnly and sincerely declare as follows:—

1. That I am a Contractor and I have been carrying on business in and around the City of and County of for a period of twenty-five years.
2. That I know the land and locality comprised in the above-mentioned plan.
3. That the accretions shown to Lots 6 and 8 on the said plan have been gradual and imperceptible and are not the result of an earthquake, sudden flooding or other sudden act of nature and that the present banks of the river are of a permanent nature, and are not liable to ordinary flood, the said accretions not being subject to ordinary flood during the rainy season.
4. That C. D. the registered proprietor of the said land has been in sole occupation of the said accretions, farming and cropping the same.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act, 1927.

DECLARED at this day of , , before me:— } A. B.

G. H.
A Solicitor of the Supreme Court of New Zealand.

3s. Stamp.

Precedent No. 3.
Statement of Claim in Action to Establish Title to an Accretion.

IN THE SUPREME COURT OF NEW ZEALAND
District.

Between the Mayor Councillors and Burgesses of the Borough of a Municipal Corporation incorporated under the Municipal Corporations Act 1933 having its office situate at in the City of

Plaintiff

and A. B. wife of C. D. of Carpenter E. F. of Spinster G. H. of District Land Registrar for the District of and His Majesty the King

Defendants

Statement of Claim.

The plaintiff Corporation by its solicitor I. J. says:—

1. By Crown Grant dated the day of 1856 a certain piece or parcel of land being Section No. , Survey District and bounded by high-water mark was granted to one K. L. By Conveyance Registered No. bearing date the day of 1883 the trustees under the will of the said K. L. conveyed the said land unto M. N. By Conveyance Registered No. dated the day of 1892 M. N. conveyed the said land unto O. P. and Q. R. as tenants in common in equal shares.
2. The said O. P. and Q. R. in or about the year 1896 subdivided part of the said Section No. into allotments for sale and on or about the day of 1896 deposited in the Deeds Registration Office at a plan of the land so subdivided into allotments which said plan bears the reference number of . A copy of such plan is hereunto annexed and marked "A."
3. In subdividing the land so subdivided into allotments as aforesaid and in depositing the said plan of subdivision the said O. P. and Q. R. intended to dedicate and did dedicate all the land between the western boundary of the various allotments shown on the said plan and the sea as a public road parade reserve or highway. The allotments numbered 16 to 24 inclusive have no access to any road other than the said road parade reserve or highway.
4. After subdividing the said land and depositing the said plan of subdivision the said O. P. and Q. R. proceeded to sell mortgage and deal with the various allotments comprised in such subdivision and by divers conveyances and assurances to purchasers of allotments mortgages and other deeds and by oral representations made to purchasers of allotments confirmed the said dedication.
5. That at the time of the subdivision of the said land into allotments and the deposit of the said plan any land between the western boundary of the allotments shown on such plan and the sea was of no value for the purpose of incorporation in a plan of subdivision other than as a means of access to such allotments.
6. That since the said land was subdivided into allotments and the said plan was deposited there has been added by gradual and imperceptible degrees an accretion to the land between the western boundary of the allotments shown on the said plan and the sea.
7. That ever since the said land was subdivided into allotments for sale and the said plan was deposited all the land between the western boundary of the allotments shown on such plan and the sea has been continuously used by the public as

a public road parade reserve or highway and in particular as a means of access to the various allotments abutting on the same shown on such plan.

8. When the said lands were subdivided as aforesaid and the said plan was deposited all the land shown on such plan including all the land between the western boundary of the allotments shown on such plan and the sea was within the boundaries of the County and under the control of the County Council.

9. On the day of 1906 the Borough was constituted and all the land shown on the said deposited plan including all the land between the western boundary of the various allotments shown thereon and the sea and any accretion thereto became lands within the boundaries of and under the control of the plaintiff Corporation.

10. By virtue of the provisions of the Public Works Act 1894 and in particular by section 101 thereof all the land between the western boundary of the allotments shown on the said deposited plan and the sea and any accretion thereto became vested in Her Majesty Queen Victoria and her successors until the said day of 1906 when such land and any accretion thereto became by virtue of section 212 of the Municipal Corporations Act 1900 vested in the plaintiff Corporation in fee simple. If the said land and accretion are not the property of the plaintiff Corporation then the plaintiff Corporation says that the same are still Crown Lands.

11. Her Majesty Queen Victoria and her successors and the plaintiff Corporation have been in lawful rightful actual peaceable exclusive and uninterrupted possession of all the land between the western boundary of the allotments shown on the said plan and the sea including any accretion for a period of over twenty years that is to say years or thereabouts.

12. From the date of the deposit of the said Deeds Plan No. down to the end of 1932 or thereabouts neither of the defendants the said A. B. or E. F. nor their predecessors in title have made any claim to the land between the western boundary of the allotments shown on the said plan and the sea.

13. That the defendant A. B. with the consent of the defendant the said E. F. has recently applied to the District Land Registrar at to have all that piece of land containing acres roods and perches being part of the said land between the western boundary of the allotments shown on the said plan and the sea including accretion brought under the provisions of the Land Transfer Act 1915 and notice of such application was advertised in the New Zealand Government *Gazette* of the day of , .

14. That the plaintiff Corporation on the day of , lodged at the Office of the District Land Registrar at a caveat forbidding the bringing of such land under the Land Transfer Act.

WHEREFORE THE PLAINTIFF CORPORATION PRAYS:

(1) A decree that the land included in such application to bring land under the Land Transfer Act is the property of the plaintiff Corporation and that the plaintiff Corporation is accordingly entitled to an estate in fee simple in possession in the same.

(2) That a writ of injunction be issued to restrain the defendants the said A. B. E. F. and the District Land Registrar and His Majesty the King from bringing the land comprised in the said application under the provisions of the Land Transfer Act.

(3) Such further and other relief as the plaintiff Corporation may be entitled to in the premises.

PRECEDENT No. 4.
ORDER OF COURT ESTABLISHING TITLE TO ACCRETION.

IN THE SUPREME COURT OF NEW ZEALAND.
District.
BETWEEN THE MAYOR COUNCILLORS AND BURGESSES of the Borough of

Plaintiff

AND A. B., E. F., G. H. and HIS MAJESTY THE KING

Defendants.

BEFORE THE HONOURABLE MR. JUSTICE .

day the day of , 19 .

THIS ACTION COMING on for trial on the and days of , before the Honourable Mr. Justice AFTER HEARING Mr. , K.C. with Mr. of counsel for the plaintiff and Mr. K.C. with Mr. of counsel for the defendants A. B. and E. F. and the other defendants submitting to the judgment of the Court and the evidence then adduced on behalf of the plaintiff IT IS DECLARED AND DECREED that the land referred to in the statement of claim being the land between the allotments shown on the plan deposited in the Office of the Registrar of Deeds at Wellington and bearing the reference Number and the sea and any accretion thereto is a public highway vested in the plaintiff AND IT IS ORDERED that an injunction do issue against the defendants, A. B. and E. F. against proceeding with the application to bring the land referred to in the statement of claim under the Land Transfer Act, 1915, AND IT IS FURTHER ORDERED that the defendants A. B. and E. F. do pay plaintiff the sum of for costs.

By the Court.
DEPUTY REGISTRAR.

LEGAL LITERATURE.

New Books and Publications.

Welford and Otter-Barry's Law Relating to Fire Insurance, 4th Ed. (1948), by Sidney H. Noakes. London: Butterworth & Co. (Publishers), Ltd. Price 72s. 6d.

Law Students' Pronouncing Dictionary (founded on P.G. Osborn's Concise Law Dictionary). London: Sweet and Maxwell. Price 12s. 6d.

Introduction to the Law of Contracts, by Sir Charles E. Odgers, M.A., B.C.L. London: Sweet and Maxwell. Price 34s.

Law and Practice of Meetings, 2nd Ed. (1948), by Frank Shackleton. London: Sweet and Maxwell. Price 42s.

Crown Proceedings Act, 1947, by J. R. Bickford Smith, B.A. (Oxon.). Scottish Application of the Act, by K. W. B. Middleton, B.A. (Oxon.), LL.B. (Edin.). London: Butterworth and Co. (Publishers), Ltd. Price 21s.

Prideaux's Forms and Precedents in Conveyancing, 24th Ed. (In 3 Vols.). Vol. I (1948), by J. Brook Richardson, M.A., LL.B. London: Stevens and Sons and Solicitors Law Stationery Society. Vol. I. Price £3 19s. (No price yet fixed for Vols. I and II.)

Apportionments for Executors and Trustees, by J. F. Josling, assisted by Charles Caplin. London: Solicitors Law Stationery Society. Price 2s. 9d.

Running-down Cases.

Motor Claims Cases, Being a Digest of Fully Annotated Cases connected with Motor Claims, by Leonard Bigham (With 1948 Supplement). Pp. lx + 311 and Index (Supplement: 68 pp.). London: Butterworth and Co. (Publishers), Ltd. Price (with Supplement) 47s. and postage.

This work is not a text-book in the usual form on the principles of negligence or insurance law, but is a digest painstakingly extracting from the judgments reported up to July, 1947, all material principles and observations of value to the working lawyer and insurance official. The form adopted is that of a Digest in the chapters on Negligence, Damages, Practice Notes, and Insurance, with a text-book treatment of Evidence. The explanatory notes are many and valuable.

This work has found much favour with practitioners in New Zealand, whose work includes claims under the Motor-vehicles Insurance (Third-party Risks) Act, 1928. They find that it is an invaluable tool-of-trade in meeting practical problems, the handy case-arrangement and notes being of material use in supplementing the recognized text-books on the subjects treated.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

Probing the Evidence.—The inquiring mind that demonstrates a marked inclination to test things for itself is, for the most part, a distinct asset in a Judge, but even that quality can be carried too far, as the late Ostler, J., discovered when the Court of Appeal raised its judicial eyebrows on his entering judgment for a defendant *non obstante veredicto* primarily as the result of his inspection of the set-up of a boot-store subsequent to the trial: *Pinner* v. *Martin's Boot and Shoe Stores, Ltd.*, [1941] N.Z.L.R. 55. One aggrieved counsel relates how, in a hotly-contested building case, where everything in the construction and materials was in dispute except a new type of heating system, the greater part of the time on a view was spent by Blair, J., making a minute and fascinated examination of the mechanics of a boiler which even the disgruntled plaintiff willingly admitted had behaved itself in a most exemplary manner. Neither Judge, however, altogether measures up, in the sphere of practical curiosity, to Sir Edmund Saunders, a seventeenth-century Judge, who tried an action about excise duty on brandy. Some of this was handed up to the Bench after being labelled "Exhibit A" by the Registrar. Commotion arose later, and the case could not be proceeded with, because, as distressed counsel exclaimed, "His Lordship has consumed the evidence."

Newspaper Rewards.—Public discussion on the proposed abolition of the death penalty in England has drawn attention to the undesirable practice of some newspapers of offering, as a publicity stunt, large rewards for the apprehension of murderers. Lincoln Springfield, in his excellent journalistic biography, *Piquant People*, relates that Alfred Harmsworth featured this procedure in his Press. Once, when a child had been run over and left lying in the road by a callous motorist, he made a stunt out of the unhappy affair, piling on the agony every day and offering £500 for information that would lead to the apprehension of the driver. The sinister hue and cry eventually revealed that, although he was not actually in it at the time, the owner of the car was his own younger brother, who demonstrated a singular lack of sympathy with Alfred's circulation-building methods. A month or so later, the body of a murdered girl was found on the Brighton railway. It was suggested to Harmsworth that he should offer a reward for the ascertainment of the miscreant. "We'd better see first," said Harmsworth, with a grim smile, "where my brothers were at the time of the crime."

Soldiers' Wills.—In *In re Anderson, Anderson* v. *Anderson*, [1943] 2 All E.R. 609, Lord Merriman held that, where a member of the Home Guard, when visiting his solicitor in the capacity of a civilian, had given him instructions for a will, this was not privileged under s. 11 of the Wills Act, 1837. A different result was arrived at by Wallington, J., in *In the Goods of Rowson*, (1948) 171 L.T. 70, where a member of the Women's Auxiliary Air Force was in Balloon Command at the time of her death. It was held that it would be wrong to say that she was not in actual military service, having regard to the circumstances in which the war was being carried on and to the activities in which the deceased was plainly engaged from time to time. The most recent case concerns a pilot officer who, while training in Canada for operational duties, executed a testamentary document which did not otherwise comply with the Act. On the question as to whether probate could be obtained under s. 11, Pilcher, J., thought that, even under the conditions prevailing in the last war, he could not regard the whole world as a theatre of war nor hold that a member of the Forces who was sent under orders to a place far removed from the fighting-zones in order that he might pursue his training without hostile interference was "in actual military service" within the meaning of the section: *In re Wingham (deceased)*, [1948] 1 All E.R. 208. The Court, he thought, had to consider whether the particular soldier would, under Roman law, have been regarded as *in expeditione*; and Service personnel in time of war who were *in expeditione* were confined at least to those who (i) were actually engaged on a campaign; (ii) were proceeding, or were under orders to proceed or to hold themselves in readiness to proceed, on a campaign; or (iii) were situated in what could properly be called a beleaguered fortress or a war base from which active offensive or defensive operations were being conducted.

Servicemen and Fair Rents.—Many New Zealand practitioners would not be averse to seeing the Roman principle of *in expeditione* introduced by our Courts into an interpretation of s. 10 of the Fair Rents Act, 1942. It is open to question whether the absolute protection given to returned servicemen in relation to their continued occupancy of tenancies has not in a number of instances had an effect opposite to that which the Legislature intended—namely, that some landlords tend to reject applications by servicemen in favour of those from whom possession can be obtained if circumstances render this course necessary. The discretion which Magistrates have to weigh questions of hardship in instances where the section does not apply could be extended to cases where, instead of complete protection, this was dependent upon the amount or nature of military service performed. In one Wellington case, s. 10 was applied in favour of a defendant who had, during the war, served for two days only—and in the National Reserve. This fact was elicited by a chance remark of the Magistrate as the witness left the box. Until reminded, he had forgotten it!

From My Notebook.—"A Locrian who proposed any new law stood forth in the assembly of the people with a cord round his neck, and, if the law was rejected, the innovator was immediately strangled": Gibbon, *Decline and Fall of the Roman Empire.*

"Nine-tenths of the attorneys, as Sir George Stephen pointed out, 'live by guarding their clients from litigation instead of by fomenting it.' But in the best regulated office litigation is bound to come, and it is when clients lose that they become scurrilous and bitter. From abusing the other side's attorney, they turn to the rending of their own": R. L. Hine, *Confessions of an Uncommon Attorney.*

"For twelve honest men have decided the cause, who are judges alike of the facts and the laws": Sir William Pulteney (1684-1764), of whom Horace Walpole said that he feared his tongue more than another man's sword.

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. Landlord and Tenant.—*Proof of Term of Tenancy—Land bought Subject to Lease—Lessee holding under Unregistered Lease for Three Years.*

QUESTION: A. has purchased a property subject to a lease of more than three years, which is not registered. Has A. to prove the terms of the tenancy in order to sue for and obtain possession (see *Hodge* v. *Premier Motors, Ltd.*, [1946] N.Z.L.R. 778), or is the lease void for non-registration (see s. 93 of the Land Transfer Act, 1915)?

ANSWER: Section 93 of the Land Transfer Act, 1915, deals with the normal lease for a fixed life or for a fixed term; it does not deal with periodic tenancies—*e.g.*, weekly, monthly, or half-yearly tenancies, which go on for period after period until determined by the act of either party.

A registered proprietor who has recognized such a periodic tenancy would be estopped by his conduct from alleging that the tenancy did not exist. Despite s. 93 and the other sections conferring indefeasibility of title, a registered proprietor who had accepted rent would be bound by the terms of his adopted contract with the tenant. The indefeasibility of the statute cannot be employed to defeat existing contracts *inter partes*. A registered lessee for a term of years might be able to defeat a periodic tenancy, but not the registered proprietor who has impliedly adopted the periodic tenancy. The only realistic way in which *Hodge* v. *Premier Motors, Ltd.*, can be dealt with is by an amendment of s. 16 of the Property Law Act, 1908, abrogating that judgment. X.2.

2. Cemeteries.—*Trustees desiring to purchase Land for Extension—Method of obtaining Same.*

QUESTION: The trustees of a cemetery appointed pursuant to s. 4 of the Cemeteries Act, 1908, desire to enlarge the cemetery, and for that purpose to acquire a piece of adjoining land. It is intended that the land proposed to be acquired should come under the provisions of the Cemeteries Act. What steps should be taken to give effect to the proposed transaction?

ANSWER: The Cemeteries Act, 1908, does not give express power to the trustees to purchase land or take it compulsorily. Section 10 provides only that they shall have power to hold land conveyed to or vested in them, and there does not appear to be in the statute any provision from which a power to purchase or take land may be inferred.

The local authority concerned should be asked to acquire the land under the authority conferred upon it by ss. 50 and 51; and then to transfer the land to the trustees. W.2.

3. Land Transfer.—*Mortgage—Mortgage held in Trust by Registered Mortgagee—Mortgage not transferred to Beneficiaries before his Death intestate—Procedure to vest Mortgage in Beneficial Owners.*

QUESTION: G. is the registered mortgagee of land under the Land Transfer Act. He executed a declaration of trust in respect of the mortgage, but failed to transfer it to the beneficiaries before his death in 1943. He died intestate, leaving no assets. It would be possible to obtain a grant of administration in G.'s estate, and his administrator could then execute the trust, but this would be troublesome and expensive. The principal sum involved is only £200. Is there any other method whereby the mortgage can be vested in the beneficiaries?

ANSWER: It is assumed that G. was the original mortgagee or acquired the status of mortgagee by a memorandum of transfer; in other words, it is assumed that the Land Transfer Register does not show that G. holds the mortgage in a representative capacity. If these assumptions are correct, then the procedure suggested could be adopted, for in law a trustee's property is regarded as his own, and the Supreme Court would have jurisdiction to grant administration of G.'s estate.

Alternatively, the beneficial owners of the mortgage could petition the Supreme Court for orders under ss. 41 and 43 of the Trustee Act, 1908, on the principle of *In re Park*, (1907) 10 G.L.R. 111. The word "lands" in s. 43 appears to include a land transfer mortgage: *In re A Mortgage, McDonald to Martin, Ex parte McDonald*, [1933] N.Z.L.R. 602, and *In re H. W.*, [1942] N.Z.L.R. 462. The vesting order would be made in favour of the beneficiaries, and, on registration of the order under s. 92 of the Land Transfer Act, 1915, the legal, as well as the equitable, ownership of the mortgage would be vested in them.

The vesting order would be subject to stamp duty of 11s.: s. 64 of the Trustee Act, 1908. X. 2.

POSTSCRIPT.

In the Good Old Times.

On November 27, 1847, the *Law Times* printed an important leading article on "the very inconvenient habit into which the Barons of the Exchequer have fallen of interrupting the arguments of counsel by interrogatories, to the utter confusion of all processes of reasoning, and the entire destruction of the dignity that is so desirable in a Court of justice. It is not particularly the habit of one Judge or of another; all have lapsed into the same fault. Nor is it partially exercised. From the highest to the lowest, every counsel comes in for his share of interruption and questioning. Very little reflection will, we are sure, suffice to convince the learned Barons of the impropriety of this practice. An argument that is good for anything must be full in a man's mind from the first proposition to the conclusion before he opens his mouth; and he must develop it in its order to make it clear to his audience. But the effect of an interruption is to break the chain of reasoning by diverting the attention; and the chain, once broken, in the mind of either speaker or listener, is with difficulty resumed. The Barons give themselves a great deal of additional labour, and occupy much time needlessly, by the practice of which we complain. They cannot thus abbreviate an argument; but they can and do add immensely to its longitude by the time lost in question and answer and in the tracing of the steps back again to the point in the reasoning at which the link was severed. Then what an unseemly aspect does it give to the Court. Instead of the gravity of a legal tribunal, the Judge listening and counsel speaking, we have the spectators treated to a dialogue, in which the Bench joins, with the advantage of being four against one! We trust that the common feeling of the Bar, to which we have given expression in these remarks, made with the profoundest respect and esteem for the learned Barons, will be received by them in the spirit in which they are offered and that there will be no occasion to repeat the complaint."

On the Liberty of the Subject.

"The rights of the person may be again divided into three: the right of security, by which a man has a right to be locked up in the station-house, if found drunk and incapable of taking care of himself; the right of personal liberty, by which a person may go wherever he pleases, if he has only the money necessary to pay the fare; and the right of private property, enabling every man to keep what he has got, when the Government has helped itself, through the medium of taxation, to all that it requires": Gilbert à Beckett, *The Comic Blackstone*. (1856 Ed.).