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DEATH DUTIES: INTERESTS PROVIDED BY THE DECEASED.

THREE recent cases, dealing with the application of para. (*g*) of s. 5 (1) of the Death Duties Act, 1921, are of importance to those who are concerned with death-duty matters. One is an English case, *Re Miller's Agreement, Uniacke* v. *Attorney-General*, [1947] 2 All E.R. 78, a decision of a Judge of first instance only, which, so far, does not appear to have gone to appeal. The other two are decisions of our own Court of Appeal, *Commissioner of Stamp Duties* v. *Russell*, *ante*, p. 60, and *Craven* v. *Commissioner of Stamp Duties*, *ante*, p. 61; and, in addition, these two judgments also clear up some uncertainties in relation to the application of para. (*j*) of s. 5 (1).

Section 5 (1) (*g*), which is one of the most difficult, and, at the same time, one of the most comprehensive, provisions in our revenue statutes, is as follows:

> (1). In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property . . .
>
> (*g*) Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

This part of the section (apart from the final sentence) is taken from s. 2 (1) (*d*) of the Finance Act, 1894 (57 & 58 Vict., c. 30) (*8 Halsbury's Complete Statutes of England*, 122). Its main purpose, as Lord Loreburn, L.C., said in *Lethbridge* v. *Attorney-General*, [1907] A.C. 12, 23:

> appears to be to prevent a man escaping estate duty by subtracting from his means, during his life, money or money's worth, which, when he dies, are to appear in the form of a beneficial interest accruing or arising at his death.

It proved insufficient for that purpose, for certain difficulties of construction arose. The approval by judicial decision of certain methods of avoidance of the subsection called for some amendment.

The first extension arose out of the successful claim that, where an "interest" consisted of property in which a beneficiary had had an interest in expectancy during the lifetime of the deceased, the subsection only had application to the extent of the excess value of the property on the death of the deceased over the expectant value during his lifetime: *Adamson* v. *Attorney-General*, [1933] A.C. 257. This decision was countered by s. 28 of the Finance Act, 1934 (*27 Halsbury's Complete Statutes of England*, 217), which provided that the extent of the beneficial interest should be ascertained "without regard to any interest in expectancy the beneficiary may have had therein before the death." This extension was adopted in New Zealand: see s. 27 of the Finance Act, 1937, and the article thereon by Mr. E. C. Adams in (1936) 14 NEW ZEALAND LAW JOURNAL, 23.

The next extension was occasioned by the fact that it was possible, by reason of the decision in *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, for premiums payable in respect of a policy on the life of the deceased to be paid by the third party it was intended should benefit, out of moneys placed by the deceased unconditionally at his disposal. This led to many ingenious forms of avoidance, many of which are set out in *Green's Death Duties*, to which the interested reader can refer. It is sufficient to state that the loophole was closed (so far as Great Britain was concerned) by s. 30 (1) of the Finance Act, 1939 (*32 Halsbury's Complete Statutes of England*, 168), which provided that any interest or annuity provided by any person "who was at any time entitled to, or amongst whose resources there was at any time included any property derived from the deceased," should be deemed to be an annuity or interest provided by the deceased himself. The onus of proving that the "property derived from the deceased" was in fact insufficient to support the interest or annuity provided was placed on the beneficiaries. But this extension has *not* yet been adopted by the New Zealand Legislature, and this particular loophole still exists in New Zealand.

As extended, the subsection seemed unassailable until the decision in *Re Miller's Agreement, Uniacke* v. *Attorney-General*, [1947] 2 All E.R. 78, which seems, as an English commentator remarks, "to have driven the proverbial coach and four through it."

I.

The facts in *Miller's* case were that a retiring partner sold his interest in a partnership to the remaining partners, and it was a condition of the sale that the purchasing partners should pay stated annuities to his daughters as from the date of his death. The arrangement was embodied in a deed executed by all the partners, and under which the remaining partners *charged their interests in the partnership* with the payment of the annuities to the persons " entitled thereto." When the retiring partner died, a claim was made by the Crown for estate and succession duties. The former was claimed on the ground that the annuities had " accrued " to the annuitants, and the latter on the ground that the annuitants had become " entitled " to them (" to the extent of the beneficial interest accruing or arising "; s. 5 (1) (*g*)). Wynn-Parry, J., decided against the Crown, holding that the term " interest " meant an interest in property which could be protected by a Court of law or equity; and that the annuitants had no rights under the deed at common law, and that it did not create a trust in their favour. Moreover, the local provision corresponding to s. 44 of the Property Law Act, 1908, did not give them any enforceable rights. The annuitants, therefore, had no rights which they themselves could enforce against the partners. His Lordship further held: (*a*) that the phrase " persons entitled thereto " was a loose use of the word " entitled," and conferred no rights on the annuitants by its use; (*b*) that the charge for the payment of the annuitants upon the interests of the remaining partners was merely ancillary to the main obligation of the deed, and was, therefore, immaterial to the questions in issue; and (*c*) that, since the annuitants did not become " entitled " to any property, no claim could arise for succession duty.

The judgment applies the principles laid down in previous cases, where it had been held that a policy or contract for the payment of moneys to persons who were not parties to the policy or contract did not confer any legally enforceable rights upon such persons unless the arrangement constituted a declaration of trust by the contracting parties in favour of them: *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124, and *Re Foster, Hudson* v. *Foster*, [1938] 3 All E.R. 357. Summarized, the position would therefore now appear to be that, where a person enters into an enforceable agreement with another to provide a benefit for a third party, such third party cannot enforce the agreement. Consequently, there is no interest " accruing or arising " under our s. 5 (1) (*g*) in respect of which a claim could be founded for either estate or succession duty. In His Lordship's words, the payments to the daughters, if and when made, would be no more than voluntary payments, and, as such, the payments appeared to him to be quite outside the scope of s. 5 (1) (*g*), as the annuitants were not persons to whom the deed purported to grant something, or with whom an agreement or covenant was purported to be made, and the annuities were not " annuities " within the meaning he placed on the word " annuity " as it appears in s. 5 (1) (*g*).

Now, it has been repeatedly pointed out by the Courts, following *Lethbridge* v. *Attorney-General* (*supra*), that the aim of s. 5 (1) (*g*) is to catch transactions by which there has been a subtraction from the means of deceased during his life of money or money's worth, which, when he dies, is to reappear in the form of a beneficial interest accruing or arising upon his death. Here, if ever there was one, was a subtraction from deceased's means—instead of taking cash for his partnership share he transferred most valuable partnership assets to the other partners; and here, too, there were beneficial interests arising on deceased's death, the annuities payable to deceased's daughters. Yet the Court held that, against the Crown, this transaction was not caught by the provision corresponding to para. (*g*), because, in the opinion of Wynn-Parry, J., no " beneficial interest " accrued to the daughters within the meaning of our para. (*g*), as the daughters themselves had no right to compel payment. In coming to his decision, His Lordship applied to para. (*g*) the principle of the leading case on contracts made for the benefit of third persons: *Re Schebsman, Ex parte Official Receiver, The Trustee* v. *Cargo Superintendents (London), Ltd., and Schebsman*, [1943] 2 All E.R. 768. (As to this case, see the article by Mr. E. C. Adams in (1945) 21 NEW ZEALAND LAW JOURNAL, 35.) Had a valid trust been created in favour of the daughters, the decision would have been different. The annuities were charged, it is true, as on the partnership assets; but that was not sufficient, as, in the Court's opinion, the charge was merely ancillary to the deed. It would seem that the deceased's executors could have sued on the contract, though not for the benefit of deceased's estate, *but for the benefit of the daughters*. There was little chance of the daughters' not receiving payment of the annuities. If correctly decided, this case discloses a wide gap through which the death-duty collector may be sidestepped by a skilled draftsman.

Furthermore, so far as we have been able to ascertain, this is the first time it has been held that, before s. 5 (1) (*g*) can operate, the annuitant or payee of the money provided by the deceased must himself be able to sue for the annuity or other interest accruing or arising on the death of the deceased; in other words, as the earlier cases, on contract apart from revenue, indicate, the annuitant or payee must either have been a party to the original contract or a valid trust in his favour must have been created during the lifetime of the deceased. In some cases, where, although the instrument does not in terms create a trust, the intention to benefit the named person is so unequivocal that the provision will be construed as a trust, the beneficiary can enforce it: *cf. Re Webb, Barclays Bank, Ltd.* v. *Webb*, [1941] 1 All E.R. 321, and *In re Gordon, Lloyds Bank and Parratt* v. *Lloyd and Gordon*, [1940] Ch. 851; and *Miller's* case will not avail such a beneficiary. But, if the interest of the beneficiary is indefeasibly vested bfore deceased's death, it still will not be caught by s. 5 (1) (*g*).

In this place, in 1945 (22 NEW ZEALAND LAW JOURNAL, 141, 155), and in an article by Mr. E. C. Adams in 21 NEW ZEALAND LAW JOURNAL, 77, there was some consideration given to the principles applicable to New Zealand conditions governing the protection from death duties of life-insurance policies. In those articles there was discussion of *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R. 208, and *Hamilton's Trustees* v. *Lord Advocate*, [1942] S.C. (Ct. of Sess.) 426. We showed that s. 5 (1) (*g*) does not apply—except with regard to life interests—to life-insurance policies if the interest of the beneficiary is indefeasibly vested

before the death of the insured; and that s. 5 (1) (*f*) applies only to a policy effected by a deceased person on his own life. And, as an example of a life interest being caught by s. 5 (1) (*g*), we referred to *Public Trustee* v. *Commissioner of Stamp Duties*, (1912) 31 N.Z.L.R. 1116. However, we do not intend to repeat the material parts of those articles, to which reference can easily be made.

In our next issue, we propose to give some consideration to the recent judgments of the Court of Appeal in *Commissioner of Stamp Duties* v. *Russell* and *Craven* v. *Commissioner of Stamp Duties*.

SUMMARY OF RECENT LAW.

BUILDING.

Building Construction Control Notice No. 25 (Serial No. 1948/83).

CHARITIES.

Recent Charity Cases. *92 Solicitors Journal*, 225.

COMPANY LAW.

Automatic Re-election of Directors. *92 Solicitors Journal*, 201.

Company Law Reform. (G. Wallace, K.C.) *22 Australian Law Journal*, 25.

Resolution in Writing. *92 Solicitors Journal*, 227.

CONFLICT OF LAWS.

Points in Practice. *98 Law Journal*, 286.

CONSTITUTIONAL LAW.

Inconsistency between Commonwealth and State Laws. (H. E. Zelling.) *22 Australian Law Journal*, 45.

CONTRACT.

Building Contract—Alleged Verbal Contract varying Terms of Written Contract—Variation not proved—Builder unable to complete Work—Overpayment for Work actually done—Builder's Lien discharged. This was a claim by the Official Assignee for a lien on the defendant's land, and for judgment for £1,245 5s. for construction work done by the bankrupt for the defendant in the construction of a residence. *Held*, That the plaintiff had failed to prove any variation in the written contract on which the claim was based, and, on the facts, he had received more than he was entitled to receive for the work which he had done. Judgment for the defendant, and discharge of the lien on the defendant's land. *In re Bouterey (A Bankrupt), Official Assignee* v. *Maybury*. (Christchurch. May 27, 1948. Fleming, J.)

Illegality—Hotel-keeper's Purchase of Spirits—Agreed Purchase at Prices in Excess of Maximum charged by Merchants—Action to recover Amount of Balance not refunded—Transaction Illegal—Balance Irrecoverable—Control of Prices Emergency Regulations, 1939 (Serial Nos. 1939/275, 1948/169), Reg. 20. An experienced hotel-keeper, suing for recovery of the balance of a sum paid by him to the defendant for the purchase of ten cases of whisky and seven cases of rum, and alleged to have been received by the defendant to the use of the hotel-keeper, said in cross-examination: "I am perfectly aware that I was paying Caird [the defendant] more than the maximum charged by merchants. I was paying Caird for his services. I was not attempting to purchase liquor on the black market." The defendant called no evidence, and the plaintiff was nonsuited by the learned Magistrate who heard the action. On appeal from that decision, *Held*, dismissing the appeal, 1. That the appellant's case had been destroyed by his admission that he was "perfectly aware" that he was paying for the spirits an amount in excess of "the maximum charged by merchants," as, in the context, "charged" meant "chargeable" or authorized by law—*i.e.*, approved by the Price Tribunal and set out in a Price Order made under the Control of Prices Emergency Regulations, 1939. 2. That the contemplated transaction was, as the appellant knew, in breach of the law; and, so long as the illegal purpose could be effected, he was in favour of effecting it; and the fact that the illegal purpose for which the money was paid was not carried out, the appellant having abandoned the transaction only when he realized that the venture had miscarried, did not entitle him in law to recover the money paid. *Davis* v. *Caird*. (Wanganui. May 6, 1948. Cornish, J.)

CONVEYANCING.

Exchange of Contracts. *92 Solicitors Journal*, 228.

Parties to Deeds in Various Capacities. *205 Law Times Jo.*, 213.

CRIMINAL LAW.

Sentence — Borstal Detention — Consecutive Sentences — Undesirability—Prevention of Crime Act, 1908 (c. 59), s. 5 (1). It is undesirable, in the interests of the Borstal training scheme, to pass consecutive sentences of Borstal detention. *R.* v. *Beamon*, [1948] 1 All E.R. 947 (C.A.).

As to Detention in Borstal Institutions, see *9 Halsbury's Laws of England*, 2nd Ed. 243–247, paras. 343–348; and for Cases, see *14 E. and E. Digest*, 480, 481, Nos. *5238–5252*.

As to Consecutive and Concurrent Sentences, see *9 Halsbury's Laws of England*, 2nd Ed. 228, para. 321; and for Cases, see *14 E. and E. Digest*, 476, 477, Nos. *5171–5192*.

DEATH DUTIES.

Concessions and Personal Representatives. *92 Solicitors Journal*, 202.

Gift Duty—Father Winner of First Prize in Overseas Lottery—Division of £9,000 between Wife and Eight Children equally—Part applied in Purchase of Shares in Father's Company and their Transfer at Nominal Value—Father not Agent or Trustee for Purchase of Ticket—Gifts subject to Duty—Value of Shares in Excess of Nominal Value at Time of Transfer—Excess also Gifts—Death Duties Act, 1921, ss. 37, 38. In 1943, the deceased purchased a ticket in an overseas lottery, and he was paid £10,000 by the lottery promoters. He retained £1,000 as his own share, and the balance was paid to or used by the deceased for the benefit of his wife and eight children, to each of whom he gave £250 in cash, and the balance in the purchase of shares in his own company, which he transferred to them at their nominal value in equal shares. The Commissioner of Stamp Duties treated the several transactions between the deceased and his wife and children as gifts, and assessed gift duty in respect thereof. The administrators of the estate of the deceased appealed under s. 62 of the Death Duties Act, 1921. *Held*, 1. That the deceased purchased the ticket without reference to his wife and children, and not as the authorized agent of a "syndicate" comprising himself, his wife, and eight children, or as a trustee for them; and the distribution of the sum received by the deceased as the holder of a winning ticket constituted gifts within the meaning of the Death Duties Act, 1921. 2. That, if the real value of the shares, at the time of their transfer, exceeded their nominal value at which they were transferred, then, in view of s. 38 of the Death Duties Act, 1921, the transfer of those shares also constituted gifts to the extent of the excess in each case. *Taylor* v. *Commissioner of Stamp Duties*. (Wellington. June 3, 1948. Christie, J.)

DESTITUTE PERSONS.

Maintenance—Registration of Supreme Court Order in Magistrates' Court—Order for Weekly Maintenance and Payment of Lump Sum for Past Maintenance—Registration of such Orders limited to Orders for Weekly or Monthly Sums—Time when Defendant under such an Order may be prosecuted for Default before such Registration—Destitute Persons Act, 1910, s. 61—Destitute Persons Amendment Act, 1926, s. 8. Section 8 of the Destitute Persons Amendment Act, 1926, limits the Supreme Court orders which may be registered in the Magistrates' Court to orders for the payment of weekly or monthly amounts, and does not empower the registration of orders for the payment of a lump sum, as for past maintenance. An order for the payment of a lump sum made by the Supreme Court can be enforced only in that Court. *Quaere*. Whether a defendant who has made default in payment of maintenance before the registration in the Magistrates' Court of a Supreme Court order for maintenance may be prosecuted immediately the order is registered, or whether he can commit an offence under s. 61 of the Destitute Persons Act, 1910, until he is in arrears for fourteen days after such registration. *Maintenance Officer* v. *Taylor*. (Hamilton. May 28, 1948. Paterson, S.M.)

Maintenance—Separation Order—Arrears—Recovery—Claim by Widow to recover against Estate of Husband—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 5 (c), 9. On December 17, 1923, a separation order was made by Justices under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*), on the ground of the husband's persistent cruelty, and under s. 5 (c) the husband was ordered to pay the wife £2 a week. Section 9 of the Act provides that such payment "may be enforced in the same manner as the payment of money is enforced under an order of affiliation," in effect, by distress and committal. The husband made some payments under the order down to 1928, but he then disappeared and the wife received no further payments. On January 16, 1945, the husband died. The wife claimed against his estate for arrears of maintenance. *Held:* (i) The wife's claim, as a creditor of the husband's estate, to arrears of maintenance under the order of 1923 failed. (ii) Nor could the wife claim against her husband's estate for sums which she ought to have received during his life in respect of his common-law liability to maintain her or in respect of any equitable right of hers so to be maintained. (*Re Hedderwick, Morton* v. *Brinsley*, [1933] Ch. 669, and *Re Woolgar, Woolgar* v. *Hopkins*, [1942] Ch. 318; [1942] 1 All E.R. 583, followed.) (*Re Stillwell, Brodrick* v. *Stillwell*, [1916] 1 Ch. 365, and *Firman* v. *Royal*, [1925] 1 K.B. 681, not followed.) *Re Bidie (deceased), Bidie* v. *General Accident Fire and Life Assurance Corporation, Ltd., and Others,* [1948] 1 All E.R. 885 (Ch.D.).

As to Recovery of Arrears of Maintenance, see *10 Halsbury's Laws of England*, 2nd Ed. 794, 795, para. 1260; and for Cases, see *27 E. and E. Digest*, 540,541, Nos. *5897–5910*.

DETINUE.

Damages in Detinue. *92 Solicitors Journal*, 199.

DIVORCE.

Desertion despite Deed of Separation. (P. E. Joskem, K.C.) *22 Australian Law Journal*, 38.

Matrimonial Causes (War Marriages) Order, 1947, Amendment No. 1 (Serial No. 1948/81). In second column of Schedule, "1945" is substituted for "1946," after Matrimonial Causes Jurisdiction Act.

Recent Decisions. *92 Solicitors Journal*, 189.

The King's Proctor and the Onus of Proof. *205 Law Times Jo.*, 185.

Wilful Refusal as a Background to Constructive Desertion. *112 Justice of the Peace Jo.*, 211.

EXECUTORS AND ADMINISTRATORS.

Contract entered into by Testator—Disclaimer of Contract—Right of Devisee to Performance of Contract at Expense of Personal Estate—Property damaged by Fire before Testator's Death—Insurance Moneys paid in respect of Damage—Contract for Repairs accepted by Testator. A testator devised to N. a freehold farm, which, after the date of the will but before the testator's death, was damaged by fire. The testator received £400 in respect of his claim under a fire insurance policy, and accepted a builder's estimate in the sum of £550 for the repairs. Before the work began, the testator died, and his executors repudiated the building contract. *Held:* N. was entitled to have expended on the repairs indicated in the estimate such a sum not exceeding £550 out of the testator's personal estate as was necessary for that purpose. (*Re Day, Sprake* v. *Day*, [1898] 2 Ch. 510, followed.) (*Cooper* v. *Jarman*, (1866) L.R. 3 Eq. 98, applied.) *Re Rushbrook's Will Trusts, Allwood* v. *Norwich Diocesan Fund and Board of Finance (Incorporated) and Others,* [1948] 1 All E.R. 932 (Ch.D.).

As to Devolution of Rights under Building Contract, see *3 Halsbury's Laws of England*, 2nd Ed. 311, para. 576; and for Cases, see *7 E. and E. Digest*, 420, Nos. *346–349*.

FAMILY PROTECTION.

Exclusion of Family from Testamentary Benefits. *98 Law Journal*, 285.

Intestacy—Interests Assigned by Law to Next-of-kin to be treated as if given by Deceased's Will—Adult Unmarried Daughter's Claim prima facie *entitled to Preference over that of Adult Able-bodied Son—Family Protection Act, 1908, s. 33—Statutes Amendment Act, 1939, s. 22.* In the case of an application under the Family Protection Act, 1908, where the deceased died intestate, the Court must proceed as if the deceased had disposed by will of his estate, leaving to the several beneficiaries the interests to which they are entitled on his intestacy. Although the preference given by the Court in past years to the claims of adult unmarried daughters over those of adult and able-bodied sons may not now, when many women have achieved a higher standard of economic independence, be justified to the same extent as hitherto, the distinction is still a proper one. *In re Muir, Muir* v. *Public Trustee.* (Napier. May 18, 1948. Christie, J.)

Time for Application—Lost Will—Grant of Letters of Administration—Will found—Revocation of Grant—Grant of Probate—Inheritance (Family Provision) Act, 1938 (c. 45), s. 2 (1). The Inheritance (Family Provision) Act, 1938, s. 2 (1), provides: "an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out." A testator, who made a will dated February 10, 1937, died on January 16, 1945. The will was not found, and on April 13, 1945, on the assumption that the testator had died intestate, a full grant of administration was made to the widow and one of her sons. When the will was discovered, the grant of administration was revoked, and on September 7, 1946, a grant of probate was made to the executor named in the will, which made no provision for the widow. On January 8, 1947, a summons was issued by the widow claiming that some provision should be made for her under the Act of 1938. *Held:* On the construction of s. 2 (1) of the Act, the date on which representation in regard to the testator's estate for general purposes was first taken out was April 13, 1945, when letters of administration were granted, and, notwithstanding the subsequent revocation thereof, time began to run for the purposes of that section from that date, and the widow's claim was, therefore, barred. *Re Bidie (deceased), Bidie* v. *General Accident Fire and Life Assurance Corporation, Ltd., and Others,* [1948] 1 All E.R. 885 (Ch.D.).

GAMING.

Offences—Advertising as to Betting—Circulars advising on Wagering on Race-horses—Essential Part of Scheme that Bets should be made on Totalizator—"Any such bet or wager"—Investments on Totalizator not included—No Invitation to break Law—Gaming Act, 1908, s. 63 (b). The defendant was a principal in an enterprise known as the "Turf Analysis Service," and he supplied circulars and other typewritten and printed matter to those who applied to the circular of his Service. He was charged, under s. 63 (*b*) of the Gaming Act, 1908, with sending a circular with intent to induce the recipient to apply to the Turf Analysis Service with a view to obtaining advice for the purpose of wagering on race-horses. *Held*, 1. That, as the words "any such bet or wager," as used in s. 63 (*b*) of the Gaming Act, 1908, refer to the various kinds of bets and wagers mentioned in that statute, investments on the totalizator are not included in that phrase. (*Warren* v. *Hammond*, [1928] N.Z.L.R. 808, followed.) (*McLennan* v. *France*, [1938] N.Z.L.R. 391, applied.) 2. That, looking at the whole of the documents supplied by the defendant to ascertain their true intent and meaning, notwithstanding certain isolated statements in equivocal language, they could not be construed as an invitation to break the law, as it was an essential part of the scheme that the person making the bets should necessarily make them upon the totalizator. (*Fletcher* v. *Lord Sondes*, (1826) 3 Bing. 501; 130 E.R. 606, applied.) *Police* v. *McKay*. (Wanganui. May 17, 1948. J. H. Salmon, S.M.)

IMMIGRATION.

Immigration Restriction Regulations, 1930, Amendment No. 4 (Serial No. 1948/80). Amendment No. 3 and Reg. 14 are revoked.

INCOME TAX.

Insolvency. *92 Solicitors Journal*, 200.
Partnerships. *92 Solicitors Journal*, 225.
Procedure. *92 Solicitors Journal*, 173.

LANDLORD AND TENANT.

Validity of Notice to Quit. *205 Law Times Jo.*, 174.

LAW PRACTITIONERS.

Fifth Australian Law Convention. *22 Australian Law Journal*, 3.

Law Office Organization. (R. N. Vroland.) *22 Australian Law Journal*, 33.

LEGAL AID.

A Legal Assistance Scheme. (D. B. Ross, K.C.) *22 Australian Law Journal*, 51.

LEGAL EDUCATION.

Some Problems of Post-war Legal Education. (Professor K. O. Shatwell.) *22 Australian Law Journal*, 17.

LOCAL AUTHORITIES.

Delegated Powers of Local Authorities. *205 Law Times Jo.*, 170.

MAGISTRATES' COURTS.

Equitable Execution in the County Court (*cf.* Magistrates' Courts Act, 1947). *205 Law Times Jo.*, 171.

MASTER AND SERVANT.

Servant Inventor as Trustee for Master. *205 Law Times Jo.*, 188.

Statutory Obligations and the Common Law. *205 Law Times Jo.*, 212.

NEGLIGENCE.

Bailee—Hotel—Residential Hotel—Theft of Resident's Clothing from Room—Key left on Board in Office during Absence—No Proper System of Control. A notice posted in all bedrooms of a residential hotel contained the following clause: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained." A resident left the hotel for a few hours, and, following the custom usual in the hotel, she deposited her key on a keyboard in the hotel office. During her absence, an unauthorized person entered the hotel, took her key, and stole several articles of clothing from her room. In an action for damages against the proprietors, *Held :* (i) The notice, read as a whole, must be construed as referring to valuable, such as jewellery, and not to ordinary clothes. (ii) There was clear evidence of negligence on the part of the proprietors in failing to ensure that no unauthorized person would be able to obtain possession of the key, and there was neither acceptance of the risk nor negligence on the resident's part in acquiescing in the system, and, therefore, the resident was entitled to succeed. *Olley* v. *Marlborough Court, Ltd.*, [1948] 1 All E.R. 955 (K.B.D.).

As to What is a Common Inn, see *18 Halsbury's Laws of England*, 2nd Ed. 136, para. 197; and for Cases, see *29 E. and E. Digest*, 2-4, Nos. *1-20.*

PRACTICE.

Discovery—Production of Documents—Documents relating solely to Defendants' Case—Police Officer's Notebook—Action against Officer—Claim for Damages for False Imprisonment. On an order for discovery in an action for damages for false imprisonment and assault, the defendants, Police officers, set out in their affidavit as documents which they objected to produce their Police notebooks, stating that those documents related solely to their own case and not to the case of the plaintiffs, and did not in any way tend to support or prove the plaintiffs' case or to impeach their own. *Held :* Assuming that the notebooks related solely to the defendants' case, the defendants were entitled to resist the application for their production, since the plaintiffs were not entitled to the production of documents which related solely to the defendants' case and did not support the plaintiffs' case, and this privilege was not confined to documents which were admissible in evidence. (*Frankenstein* v. *Gavin's Cycle Cleaning and Insurance Co.*, [1897] 2 Q.B. 62, and *O'Rourke* v. *Darbishire*, [1920] A.C. 581, followed.) (*A.-G.* v. *Emerson*, (1882) 10 Q.B.D. 191, explained and distinguished.) *Brooks and Another* v. *Prescott and Others*, [1948] 1 All E.R. 907 (C.A.).

As to Documents Relating Solely to the Case of the Party, see *10 Halsbury's Laws of England*, 2nd Ed. 400, 401, para. 482; and for Cases, see *18 E. and E. Digest*, 148, 149, Nos. *983-990.*

As to Conclusiveness of Affidavit, see *10 Halsbury's Laws of England*, 2nd Ed. 367, 368, para. 445; and for Cases, see *18 E. and E. Digest*, 87, Nos. *389-391.*

PUBLIC AUTHORITIES.

Legal Status of Incorporated Public Authorities. (Professor W. G. Friedmann.) *22 Australian Law Journal*, 7.

PUBLIC SERVICE.

Public Service Amending Regulations, 1948 (No. 2) (Serial No. 1948/79).

PUBLIC WORKS.

Proclamation—Landlord and Tenant—Rent Restriction—Land purchased by and vested in Crown by Proclamation—Part occupied by Tenant—Tenant at Date of Proclamation a Statutory Tenant—Tenant remaining in Occupation and paying Rent to Crown—Crown using Land for Storage of Heavy Material—Inconvenienec and Interference with Tenant's Privacy—Breach of Covenant for Quiet Enjoyment—Damages—Statutory Protection given by Fair Rents Act, 1936—Whether an "estate or interest" and, as such, discharged by Proclamation taking Land occupied by Statutory Tenant—Public Works Act, 1928, ss. 22, 23, 32—Fair Rents Act, 1936, ss. 2, 13. The Crown, for the Public Works Department, purchased (apparently under s. 32 of the Public Works Act, 1928, as the conditions prescribed by ss. 22 and 23 of that Act were not complied with) a section of land, upon which there was, *inter alia*, a cottage, occupied, with some of the vacant land adjoining, by the appellant under a tenancy with no agreement as to its duration. Before the date of the Proclamation, this tenancy had been terminated by notice. Subsequently, the appellant was allowed to continue in occupation for about two years, and, for that period, he paid rent to the Public Trustee as agent for the Public Works Department. The Department dumped a considerable amount of material for outdoor storage during the War upon the land close to the cottage, causing the appellant inconvenience and some slight interference with his privacy and comfort. He claimed damages for deprivation of the full use of the land in breach of the implied covenant for quiet enjoyment. It was held by *Christie*, J., that the suppliant had not established any claim to a tenancy of the land, and that any use by the Department had not infringed his rights. On appeal from that determination, *Held*, by the Court of Appeal, 1. That the tenancy which the appellant had after the expiry of the notice to quit was, under the statutory protection given by the Fair Rents Act, 1936, commonly called "a statutory tenancy," or under a new tenancy entered into with the Public Works Department, identical with the former tenancy; and that either tenancy conferred a right to quiet enjoyment, the invasion of which entitled him to damages. (*Morrison* v. *Jacobs*, [1945] 2 All E.R. 430, *Levy* v. *Kesry*, [1945] N.Z.L.R. 209, and *Player* v. *Boughtwood*, [1946] G.L.R. 65, referred to.) *Quaere*, Whether the provision of s. 23 of the Public Works Act, 1928, that the land specified in the Proclamation should be vested in the Crown in fee simple discharged from all estates or interests in the land, operates to extinguish the statutory protection, which is properly not an estate or interest at all, under the Fair Rents Act, 1936, which binds the Crown. *Semble*, In the case of a purchase of land by the Crown under s. 32 of the Public Works Act, 1928, the statutory protection under the Fair Rents Act, 1936, which binds the Crown, applies. Appeal from the judgment of *Christie*, J., allowed, and £30 damages awarded. *Cameron* v. *The King.* (Wellington. May 25, 1948. (S.C & C.A.))

RATIONING.

Tea Rationing Revocation Order, 1948 (Serial No. 1948/84). Revoking the Tea Rationing Order, 1942, as from June 1, 1948.

RENT RESTRICTION.

Control and Injunction. *92 Solicitors Journal*, 191.

Sales of Premises subject to Tenancies. *92 Solicitors Journal*, 190.

Sub-tenant or Lodger surviving Tenant. *92 Solicitors Journal*, 229.

Statutory Tenancy—Forfeiture—"Non-occupying tenant"— "Animus possidendi"—"Corpus possessionis"—*Tenant serving Term of Imprisonment.* A "non-occupying" tenant *prima facie* forfeits his status as a statutory tenant under the Rent Restrictions Acts, but that term does not cover every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. Absence may, however, be sufficiently prolonged or unintermittent to compel the inference, *prima facie*, of a cesser of possession or occupation. The question is one of fact and of degree. Where the absence is sufficiently long to have this effect, the onus is then on the tenant to repel the presumption that his possession has ceased, and, in order to do so, he must at all events establish a *de facto* intention to return, but neither in principle nor on the authorities is that enough. If it were, the spirit and policy of the Acts would be frustrated. The authorities suggest that the effect of such an absence may be averted if the tenant clothes his inward intention with some formal, outward, and visible sign of it—

i.e., instals a caretaker or representative with the status of a licensee, and with the function of preserving the premises for his ultimate home-coming, or leaves furniture on the premises as symbols of continued occupation. Apart from authority, in principle possession in fact requires not merely an "*animus possidendi*" but also a "*corpus possessionis*"—*viz.*, some visible state of affairs in which the *animus possidendi* finds expression. If, however, the caretaker or the furniture be removed from the premises otherwise than quite temporarily, the protection ceases, whether the tenant wills or desires such removal or not. A tenant serving a term of imprisonment cannot rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action so as to be in a better position than if his absence and inaction had been voluntary. *Brown* v. *Brash*, [1948] 1 All E.R. 922 (C.A.).

As to Statutory Tenancies, see *20 Halsbury's Laws of England*, 2nd Ed. 334, 335, paras. 400, 401; and for Cases, see *31 E. and E. Digest*, 575, 576, Nos. *7226–7255*.

RENT RESTRICTION (BUSINESS PREMISES).

*Lease containing Non-assignment Provision—Tenant letting Another into Possession during Term of Lease—Sub-tenancy inferred from Facts—Consent of Landlord implied from his Conduct—On expiry of Lease, Person in Possession deemed Sub-tenant by Operation of Law—Economic Stabilization Emergency Regulations, 1942, Regs. 21*B, *21*E *(1)*. A lease of business premises for a term to expire on February 11, 1948, provided that the lessee would not assign, sublet, or otherwise part with the possession of the premises without the written consent of the landlord first had and obtained. Before the expiry of the term, W., the tenant, either parted with possession of the premises to S., or, alternatively, had sublet the premises or a part of them to S. S. went into possession and paid the rent to W., who, in turn, paid it to the landlord. The landlord visited the premises, and was asked by S. for a new lease, but was given a non-committal reply. S. erected a large and conspicuous sign outside the premises showing its name, and the landlord was accustomed to collect his rents from other property in the same block. The landlord told S. that he had the offer of another shop which might suit S., and, some days before the expiry of the term of the lease, he asked S. to contribute to the cost of cleaning a drain serving the premises and other property of the landlord, and S. did so contribute. On February 26, 1948, the landlord accepted rent from W. to the date of the expiry of the term of the lease, and, on returning the rent-book, made no reference to his having discovered that S. was in possession. In an action by the landlord claiming possession from W. and S., *Held*, 1. That, on the facts, there was a sub-letting by W. to S., and an implied consent by the landlord to the sub-tenancy, though the landlord may have considered that the sub-tenancy would cease on the expiry of the head tenancy. 2. That, by virtue of Reg. 21E (1) of the Economic Stabilization Emergency Regulations, 1942, on the expiry of the contractual tenancy of the head-tenant, the sub-tenant by operation of law became the tenant on the terms on which the head-tenant had held from the landlord; and he was accordingly entitled to the protection given by Reg. 21B (1). *Leuthart* v. *Watkins, Ltd.* (New Plymouth. May 25, 1948. W. H. Woodward, S.M.)

RENT RESTRICTION (DWELLINGHOUSE).

Possession—Landlord requiring Premises for his own Occupation—Previous Judgment that Hardship to Tenant greater than to Landlord—Subsequent Proceedings for Possession—Landlord proving Material Changes in Facts of Hardship since Former Hearing—No Estoppel—Fair Rents Act, 1936, s. 13 (1) (d), *(2)*. A landlord who has taken proceedings for the recovery of a dwellinghouse on the ground set out in s. 13 (1) (*d*) of the Fair Rents Act, 1936, and has been refused an order for possession on the ground that the hardship caused to the tenant by the grant of the application would be greater than that caused to him, is not thereby estopped from taking fresh proceedings and obtaining an order for possession, if he establishes that the factors establishing hardship—which are subject to change, both in kind and degree—have materially changed since the former hearing, so as to reverse the position as to the respective hardship to the parties. *MacDonald* v. *Fyson*. (Gisborne. May 26, 1948. Christie, J.)

SAMOA.

Samoa Reserved Enactments Regulations, 1948 (Serial No. 1948/85). To the enactments referred to in s. 9 of the Samoa Amendment Act, 1947, a new Schedule of Acts and Regulations are added.

SETTLED LAND.

Provisions Tending to Induce a Tenant for Life not to Exercise his Powers. *205 Law Times Jo.*, 173.

STAMP DUTY.

Assessment of Duty on Settlements. *92 Solicitors Journal*, 176.

TRUSTS AND TRUSTEES.

Power of Court to appoint Statutory Trustees for Sale. *22 Australian Law Journal*, 58.

VENDOR AND PURCHASER.

Memorandum of Contract: Admission of Evidence to prove Different Contract. *22 Australian Law Journal*, 57.

Specific Performance—Contract for Sale of Freehold Land and Business Assets—Vendor only Leaseholder—Ability to compel Assurance by Freeholder. A private company with a capital of £2,500 in £1 shares purchased a freehold road house, and leased it with its furniture and fittings for forty years from November 11, 1944, at a rent of £1,200 per annum, to E., who held 2,499 shares in the company, the remaining share being held by his nominee. E. was the company's sole director, an office which, under the articles, he was to hold for life, and a quorum at a board meeting was one. In 1946, E. decided to sell the business which he carried on at the road house, and signed a document addressed to the defendant in these terms: "December 19, 1946. In the consideration of the sum of £50 paid by you to me (the receipt whereof is hereby acknowledged) I (being collectively the holders of or beneficial owners of freehold of Hilden Manor Road House and Country Club) hereby grant to you the option during the term of one calendar month from the date hereof of purchasing such business, lock, stock and barrel, at the price of £45,000. The option shall be exercisable by notice in writing addressed to me at Hilden Manor Road House and Country Club." On January 17, 1947, the defendant wrote to E: "I hereby give you notice that I exercise the option on the freehold Manor Country Club contained in the letter dated December 19, 1946, addressed by you to me." After the submission of the formal contract, the defendant declined to proceed, owing to E.'s refusal to provide an itemized schedule of fixtures, fittings, stock, &c. In an action for specific performance, *Held*: (i) On construction, the two documents constituted a contract for the sale of the freehold property and the goodwill and all the assets (less liabilities) of the business, but the words "lock, stock and barrel" did not extend its meaning to articles not assets of, or devoted to the purposes of, the business. (ii) Although he was only entitled to a leasehold interest, E. was always able to compel the assurance of the freehold property and the assets of the business to the defendant by virtue of his position *vis-a-vis* the company, and, therefore, the defendant could not repudiate on the ground of E.'s lack of title. (*Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233, applied.) *Elliott and Another* v. *Pierson*, [1948] 1 All E.R. 939 (Ch.D.).

As to Extent of Vendor's Obligation as to Title, see *29 Halsbury's Laws of England*, 2nd Ed. 307, 308, para. 404; and for Cases, see *40 E. and E. Digest*, 134–153, Nos. *1055–1222*.

WILL.

Gift to Wife during Widowhood: Annulment of Widow's Marriage. *22 Australian Law Journal*, 57.

Rule against Perpetuities—Provision for Widows of Sons of Testator—Provisions for Grandson (subject to his Mother's Life) vesting in Interest but not in Possession within Period Permitted by Law—No Infringement of Rule. The testator created a trust fund consisting of the whole of his residuary estate. He gave the income of the whole to his wife for life, and, after her death, one fifth of it to each of his five children by name. There were two sons and three daughters, all of whom survived the testator. He provided that, if either of his sons should die without having been married (whether before or after his death), or if any of his three daughters should die without leaving issue before or after his death, then the income which would have been payable to such son or daughter had he or she survived testator was to be divided equally among the surviving children. If either of his sons should die (whether before or after his death) leaving a widow, then such widow should take the share of

income which her husband would have taken had he lived. The will then provided that " upon the death whether before or after my death of any of my children leaving issue (but subject so far as regards each of my sons to the payment of income to their respective wives (if any) during their lives) my trustees shall hold the capital represented by the portion of income payable to such child at his or her death, or that would have been payable to such child dying before me had he or she survived me as well as all future income from such capital upon trust for such issue being a son or sons on his or their respectively attaining the age of twenty-one years or being a daughter or daughters on her or their attaining that age or marrying under that age and, if more than one, in equal shares, each of such grandchild's share (*sic*) to vest at my death or at the time of the death of its parent being one of my children or being a grandson on his subsequently attaining twenty-one years of age or being a granddaughter on her attaining that age or marrying under that age whichever event shall last happen." *Held*, 1. That neither of the provisions in favour of the widows of the testator's two deceased sons failed to any extent by reason of the rule against perpetuities. (*Re Taylor's Trusts, Taylor* v. *Blake*, [1912] I.R. 1, and *In re Allott, Hanmer* v *Allott*, [1924] 2 Ch. 498, applied.) (*Davis* v. *Samuel*, (1926) 28 N.S.W.S.R. 1, referred to.) 2. That, as the share of capital given to a testator's grandson, where his mother was given a life interest therein, vested in interest within a period permitted by law, the fact that the enjoyment of it might be deferred beyond the period of a life in being (his father's) and twenty-one years thereafter did not make the limitation in favour of unborn grandsons bad. *In re Earl, Dobson* v. *Earl.* (Wanganui. May 5, 1948. Cornish, J.)

Satisfaction—Covenant to pay Annuity—Bequest of Similar Annuity. On July 6, 1932, the testator entered into a deed of covenant with G.S., an old servant, that, in consideration of the faithful service which G.S. had given, the testator or his personal representatives would pay G.S. " or his assigns during his life an annuity of 20s. per week free of income tax payable quarterly in advance on the usual quarter days." The provision that the annuity should be free of income tax was invalid. On August 7, 1936, the testator made his will, by cl. 9 of which he gave several annuities, including one of £52 per annum to G.S., to be paid free of all deductions, including income tax at the current rate, by equal quarterly payments, the first to be made at the end of three months after the testator's death, providing that " (*d*) If any of the said annuitants shall commit permit or suffer any act default or process whereby but for this present provision the said annuity hereinbefore bequeathed to him or her or any part thereof would or might become vested in or payable to any other person or persons then such annuity shall immediately thereupon absolutely cease and determine as if such annuitant were dead . . . (*f*) Any annuity which I may hereafter during my lifetime provide for any one or more of the annuitants hereinbefore referred to shall be applied *pro tanto* in substitution for the annuity hereby bequeathed to any such respective annuitant." By cl. 11 he directed his trustees to hold his residuary estate on trust for sale and conversion and to pay thereout and out of his ready money his " funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto." The testator died on March 12, 1937, and the question arose whether the annuity bequeathed to G.S. by the will was in satisfaction of his annuity under the deed of covenant. *Held*: Having regard to all the circumstances, the terms of the will, the fact that the annuity given to G.S. by the will was different in quality from the annuity under the deed, and the difference was not to his advantage, and, especially, to the fact that it was clear from cl. 9 (*f*) of the will that the testator considered the question of satisfaction and applied the doctrine expressly to annuities granted after the date of the will, G.S. was entitled to the bequest in addition to the annuity under the deed. (Dictum of *Bowen*, L.J., in *Horlock* v. *Wiggins*, (1888) 39 Ch.D. 142, 147, applied.) *Re Van Den Bergh's Will Trusts, Van Den Bergh* v. *Simpson and Others*, [1948] 1 All E.R. 935 (Ch.D.).

As to Satisfaction, see *13 Halsbury's Laws of England*, 2nd Ed. 161–175, paras. 147–160; and for Cases, see *20 E. and E. Digest*, 449–453, 469–473, 474–487, Nos. *1743–1768a, 1946–1999, 2010–2143.*

Testamentary Capacity—Execution. This case depended entirely upon its own facts, with the application thereto of the principles enunciated in *Barry* v. *Butlin*, (1838) 2 Moo. P.C.C. 480; 12 E.R. 1089, explained in *Tyrell* v. *Painton*, [1894] P. 151, and applied in *Chatterton* v. *Howe*, [1926] N.Z.L.R. 595. In finding that the testator was not of sound mind, memory, and understanding, the principles enunciated in *Banks* v. *Goodfellow*, (1870) L.R. 5 Q.B. 549, and *Harwood* v. *Baker*, (1840) 3 Moo. P.C.C. 282, 13 E.R. 117, were applied. Probate was accordingly refused. *Fish* v. *Schoell.* (Napier. May 24, 1948. Sir Humphrey O'Leary, C.J.)

WORKERS' COMPENSATION.

Dependants—Child of Deceased Worker not born at Date of Accident—Presumption of Dependency—Domicil of Child that of Father—Child a Dependant—Workers' Compensation Act, 1922, ss. 4 (2), 31. The Court, by virtue of s. 4 (2) of the Workers' Compensation Act, 1922, must presume that a deceased worker's child, who was unborn at the time of the accident through which his father, the injured worker, met his death, was dependent on the earnings of the deceased worker at that time. His domicil accordingly was that of his father—namely, New Zealand—as the statutory presumption of dependency at the time of the accident includes existence at that time, and dependency fixes domicil. *In re Callaghan (deceased).* (Dunedin. May 21, 1948. Ongley, J.)

Heart Disease—Coronary Thrombosis or Coronary Occlusion as cause of Worker's Incapacity. The plaintiff, working at the defendant's factory in April, 1944, was endeavouring to pull a case weighing 2 cwt. to 3 cwt. from a wall, when he felt a sharp pain in his shoulder and chest, which gradually got worse. He was ordered rest, and later, on seeing a heart specialist, was told that he had burst a blood vessel in his heart, and that he would not be able to work at his trade again. He went back to light work, but did not make any claim for compensation until the publication of the judgment in *Charlton* v. *Makara County*, [1945] N.Z.L.R. 335, when he was advised to see a solicitor. The defence was, *inter alia*, that the plaintiff had broken down in the ordinary course of thrombosis due to a blood clot, and that the work he was doing was not a material factor in causing the breakdown. *Held*, 1. That there was nothing in the evidence to enable the Court to select effort as the more likely cause of the accident, and exclude disease as the less likely. 2. That it was doubtful whether the case fell within the requirements of " the new school " of medical opinion in regard to degree and duration of effort, and effort as the cause of the clot was excluded by the view that a clot takes time to form. 3. That, thrombosis was the more probable cause of the plaintiff's breakdown—that is, more probable than coronary insufficiency—and the Court was unable to find that effort rather than disease caused the thrombosis. *Williams* v. *Henderson and Pollard, Ltd.* (Auckland. April 23, 1948. Ongley, J. (Comp. Ct.))

Heart Disease—Ventricular Fibrillation—Angina Pectoris predisposing Cause. Effort of an unusual sort, especially if it arises in circumstances where there is an element of danger or emergency or urgency, in which the worker is forced to persist in the effort after the onset of warning pain, may precipitate the onset of ventricular fibrillation in a diseased heart. *Quaere*, Whether it can be shown that an effort which is controllable by the worker, in the sense that he could cease the effort on the onset of pain, could have any effect in precipitating fatal ventricular fibrillation. *So held*, adopting the report of Dr. P. P. Lynch, as medical referee, who said that there was nothing in all the circumstances of the last illness and death of the deceased worker inconsistent with his having died from the natural consequences of the disease from which he was suffering—*i.e.*, angina pectoris—and, accordingly his death was due to natural disease, and the work which he was doing on the days before his death or on the morning of his death—digging an onion bed and breaking up the dug ground with a hoe—was not a material factor in his death. *Public Trustee* v. *McCormack.* (Dunedin. May 26, 1948. Ongley, J. (Comp. Ct.))

Practice—Commencement of Action—Weekly Payment made to Injured Worker until Re-commencement of Work—Worker working for Three Days—Motion for Order for Continuance of Weekly Payment—Action for Compensation to be commenced by Writ—No Power in Court to deal with Motion or waive Defect or amend—Workers' Compensation Act, 1922, s. 22 (3)—Workers' Compensation Rules, 1939, Ch. 21, RR. 4, 5. The right to compensation is statutory, and, as the Workers' Compensation Act, 1922, has prescribed the remedy and the procedure, the commencement of every claim for compensation must be by writ. Until that procedure is adopted, there is nothing on which the Court can act, by amendment or otherwise. *Bartle* v. *Shaw Savill and Albion Co., Ltd.* (Auckland. April 7, 1948. Ongley, J. (Comp. Ct.))

MIDDLE TEMPLE ORDEAL.

The Effect of the Blitz.*

This is but a booklet, whose reading takes a matter of minutes. It is but the record of a few years in the life of a few hundred square yards of ground. It is but a paragraph in the proud history of a nation's greatest hour. But to members of the legal profession all over the world it is the story of the desecration of a cherished shrine and the tragedy of a brief space of time, as time goes in the traditions of our craft, in which much of the physical landmarks of the spirit of the Common Law was irreparably damaged or destroyed. It is but one of the many golden pages of the chronicle of the six years when England, sometimes alone, sometimes with others, but always steadfastly and in the van, stood for all those things that belong to the tradition of the Common Law epitomized in freedom under the rule of law.

Let us not as we read this bravely sad record of destruction of the places hallowed by the footsteps and memories of our ancestors in the law allow the poignancy of the tragedy divert our thoughts to blame upon the barbarian iconoclasts whose rage against the spirit of freedom nurtured in this cloistered acre could only find vent in the destruction of the outward symbols, however beautiful, however venerated they may have been. Let us rather remember that their futile spite proved for all time the invulnerability of the soul for which those ancient buildings now lying in dust and rubble were but the mortal frame.

Let us also learn the lesson that our own calling teaches us: that the ways of law are the ways of peace, and war is the negation of the law.

As the lights of freedom in Europe go out one by one under the aggression of a new dictatorship, we are surely reminded by this story of the days when the physical lights of Europe went out under the aggression of another aspirant for world domination, another enemy of freedom, another barbarian horde, using outlaw means to the enslavement of the free peoples.

So let us turn our thoughts to ourselves and search our hearts to know whether the indomitable courage that bore this ordeal of fire and battle can answer this new challenge to liberty. Our freedom grew hand in hand with the building of the Temple. Now the Temple lies in ruins. But the testing time for our freedom still continues. Will it also perish ?

There is little one can say about the booklet itself. It is an intimate story of a small corner of the land whose punishment under the enemies' bombs is a tale too often told to need repetition. Its interest for us lies in the sanctity of the places that suffered their share of the common damage. It is to be hoped that we shall share some of the burden of rebuilding the ruined shrines.

There is, however, one passage in the booklet that is of especial interest. On December 12, 1944, the Queen took her place as a Bencher, the first lady Bencher of the Middle Temple, not in the Hall where her illustrious predecessor and namesake had watched Shakespeare act—the enemy had seen to that—but in the new Parliament Chamber. It was a happy occasion, when the dawn of the war's end was already on the horizon and the Temple's ordeal was almost over. Indeed, the record shows that the last bomb to fall on the Temple, or even to damage it, had already fallen. But, when you read Her Majesty's brief words of thanks for the toast to her health, you may wonder whether the dawn that seemed then to be showing was not a false dawn, whether the immutable qualities of the spirit of which Her Majesty spoke, and for which the Common Law has always stood, do not face a greater trial in the days to come than all the terror and destruction of those six years when the Luftwaffe rained high explosive and incendiary upon the Temple of our Faith.

The Middle Temple Hall.

R. M. Willis Chitty, K.C.

[Note :—Copies of *Middle Temple Ordeal* can be secured from Butterworth & Co. (Aus.) Ltd., 49 Ballance Street, Wellington: Price, 7s.

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THE ENGLISH CIRCUIT SYSTEM.*

By the Rt. Hon. Sir Norman Birkett,
of the King's Bench Division.

It is my purpose to speak for a few moments to-night on one aspect of the administration of the law in England which I have called "The English Circuit System." It is that procedure whereby the English Judges travel from London to every part of the country as they have been accustomed to do for centuries, to sit in the Assize Courts of the county towns to administer the law in the criminal and the civil Courts. It is a system abounding in history and tradition, and it is an integral part of the English way of life. In these critical and anxious days in which we live, the English way of life is the subject of much discussion. The future of England is so eagerly canvassed, and by so many conflicting voices, that perhaps you would permit me one further general word in which to proclaim my faith, before I discuss my particular subject.

There is no doubt that we in England are passing through a grave economic crisis. It is not for me to analyze the causes, nor to apportion the blame, nor to suggest remedies. But in justice I think it must be said that a primary cause is the unparalleled exertion the country made during the hard years of war. They gave all they had. But no useful purpose would be served by seeking to minimize the gravity of the crisis, and only by resolute effort and much sacrifice will the crisis be overcome.

But I observe in some quarters a disposition to exaggerate the crisis and to say that England's day is over, and her power in the world has passed away forever, and that we are now witnessing the first stages of her permanent decline and fall. Let me say to you in all humility that I do not believe it for one moment, and nobody who reads the signs of the times aright could believe it either. It would be contrary to all history, all experience and all knowledge of the English people. Ask yourselves what Canada means to you and there you will find the convincing and reassuring answer. The indescribable grandeur of Canada, its immensity, its infinite variety, the mountains, the rivers, the forests, the prairies, the sea-girt islands—all are but the noble background to the spirit of the men and women of Canada of many generations, alike those whose fame has gone out around the earth and those who have no memorial, but who together have made this mighty land the living thing it is, so that Canada has become to you dear beyond all expression.

In like manner I ask myself what England means to me. There is an England of great natural beauty, the land of the green fields and winding lanes, of the Cotswold villages and the lakeland hills—the blue remembered hills of which Mr. Carl Rix spoke so movingly to-day—the country churches, the soft light stealing over the woods and the reaches of the rivers, the cathedral towns, and all the magic of the coloured counties. But, as with you, there is an England of the spirit, as real as the land itself: the England that did more than conquer and explore and colonize, though these were far from inglorious things to do; the England that bred saints and poets and soldiers, men and women who were good and brave and steadfast—people like Elizabeth Fry, going fearlessly into infected prisons; like Edith Cavell, dying bravely for love of country; like John Wesley, taking the world for his parish, and blind old Milton, justifying the ways of God to men; and a thousand others. *That* England, seen in her history, lives still to-day in the lives of her people; and, whatever the crisis, *that* England will survive to take her place with Canada in fulfilling her great destiny and making the contribution she alone can make to the welfare and happiness of the whole world.

Cricket will continue to be played on the village greens of England and His Majesty's Judges will continue to travel the counties of England.

Now, the English people have always been great lovers of tradition, and they are so still. As forms of government alter and modes and manners change, as old institutions outlive their usefulness and new institutions take their place, this desire to maintain and perpetuate the old traditions seems to grow in intensity. It springs, I think, from a sense of history, a pride in the continuity of the national life and a consciousness of a great inheritance. As Professor Saintsbury has said: "Every commemoration of the past, every linking of the common dying things that are, with the immortal and stable things that have been, is an infinite gain for the health and the life, the pleasure and profit of the soul." The members of the House of Commons, whatever their politics, preserve with the most jealous care the traditions of the House as they have existed for centuries, and the Ancient Worshipful Companies of the City of London, though most of their old powers are gone, still follow the traditional procedure of eight hundred years ago. The House of Commons, as you know, opens each day with traditional ceremonial. A schoolboy who witnessed it and afterwards wrote an essay upon it said: "Parliament is opened each day with prayer. The Chaplain looks upon the assembled members and then he prays for the country."

But nowhere is this respect for tradition more strikingly shown than in the administration of the law; nor with greater reason. For the supreme test of any civilized society lies in its respect for the law and its just and inflexible administration. For nearly twelve months it was my duty to sit on the International Military Tribunal at Nuremberg listening to a record of crime never surpassed in all the dark annals of human wickedness; and although the legal consequences of Nuremberg will doubtless be the subject of disputation for generations to come, one great truth has already been established. Nuremberg is a solemn warning to all peoples in all lands of the terrible fate that overtakes a nation when the rule of law is abandoned and justice is denied. The age of tyranny begins; the security of the citizens vanishes; the essential freedoms are lost, and fear invades the land so that the very knock on the door may be the sound of doom, the summons to the concentration camp, to torture, to exile, and to death.

* The Address delivered at the 29th Annual Meeting of the Canadian Bar Association on September 3, 1947.
(By courtesy of the *Canadian Bar Review.*)

If Nuremberg did no more than to enforce the necessity of respect for the law, it would have been infinitely worth while. In England, I am glad to say, there is widespread and deeply-rooted respect for the law, whether it be the law of the police court or the law of the Privy Council.

Paradoxically enough, there is no overwhelming love for the individual lawyer as such. He is a little suspect and, in the estimation of many, he is still thought of in the words of Swift as one who makes black white, or white black, according as he is paid. This is, of course, excessively unjust, but it will be a very long time before the lawyers reach the felicity of the medical profession, whose individual members are sometimes referred to, as was the author of the Third Gospel, as "the beloved physician." "The beloved lawyer" is a title, I am afraid, to which we must be content to aspire; although I could name several who are always so regarded by me.

But respect for the law is universal, even amongst the members of the Bar. They are not unlike to an old verger of the University Church at Oxford who said: "Man and boy, I've heard every University sermon preached in this church for fifty years, and thank God I'm still a Christian." But the Bar must be permitted a little licence on occasion. I well remember, when I was at the Bar, a learned friend of mine making application to postpone a case for three weeks. The Judge, in assumed horror, said: "But, Mr. Jones, three weeks! Why, all the Judges of the King's Bench Division might be dead by then." To which my learned friend smilingly replied: "Oh, my Lord! that would be too much to hope for!"

The English people not only respect the law, but they take a special delight in the circuit system, because of its history, its ceremonial, and its traditions. At certain seasons of the year the majority of His Majesty's Judges of the King's Bench Division leave the Royal Court of Justice in the Strand and go out to every county in England and Wales. In every county town the people see His Majesty's Judges clothed in scarlet and ermine, and attended with some state, passing through the streets and bringing the administration of justice to their very doors. When the Judges do this, they go where English Judges have gone for many centuries and, in all essentials, they still do the same things as their ancient brethren and in very much the same way. This, of course, is said without prejudice, remembering Judge Jeffreys and the Bloody Assize.

Some changes of course there are. Presents, for example, are still made to the Judges on circuit, though not in the quantity they once were. Lord Campbell, you will remember, when recording the life of Sir Matthew Hale, says that the Dean and Chapter of Salisbury gave six sugar loaves to the Judges, and gifts of venison, sheep, and sack were common. But still at Oxford the Vice-Chancellor gives the Judges an ornamental pair of gloves, and at that superior seat of learning, Cambridge, Trinity College gives the Judge six bottles of port; and the Judge, as a good Judge should, tries them all patiently and punishes them all severely.

At York, the Judge is presented with a charming silver box filled with sweet-smelling herbs, in place of the posy of flowers formerly given to ward off gaol fever. But the most interesting present of all is made at Newcastle-on-Tyne. There the Judge is given a beautiful gold coin, a Rose Noble of Edward II. Newcastle is now on the North Eastern Circuit, though formerly it was on the Northern Circuit, which comprised the northern counties of England. In the seventeenth century their condition was deplorable, as Macaulay testifies in his famous chapter. When the Judges left Newcastle for Carlisle, an armed guard was provided by the corporation to protect them from the perils of the journey. Later, the Judges provided their own armed guard, but the corporation paid for it. An armed guard is now no longer necessary, but the Lord Mayor of Newcastle still gives to the Judges the Rose Noble of Edward II as "dagger money" for the journey, thus perpetuating the old custom and the old tradition.

Now, perhaps I may speak with a little more freedom than I have up to the present.

It was in 1176, in the reign of Henry II, that eighteen Judges of the High Court were appointed to six circuits, and so continued with some changes until 1285 in the reign of Edward I, when the Judges of Assize and Nisi Prius were appointed. The great contribution made by Henry II to the administration of the law is now universally recognized. His new system of judicial procedure, as the event proved, fashioned the whole future of English society and politics and gave distinctive habits of thought to all English-speaking nations and peoples.

Henry II was one of those fortunate people who builded much better than he knew; for with no foreknowledge of the future greatness of Canada and the United States of America he yet conferred upon them one of their greatest blessings. The Charter of Henry I has its historic importance, and at the time of Magna Charta it was a powerful weapon in the armoury of the Barons in the great struggle for the ultimate freedoms; but the work of Henry II was destined to leave its mark, not merely on legal procedure and practice, but on all subsequent history. He gave extended power and jurisdiction to the Central Courts at Westminster and clothed the itinerant Justices in all the shires of England with the same powers; and it was this simple fact, perhaps more than any other, which made possible the quick growth of the English common law that has now gone out to the far corners of the earth. This "common law" was, of course, the native system common to the whole land in contrast with the provincial customs of the shire and the Hundred Courts and the private jurisdictions. It is now recognized to be the great inheritance of the English-speaking peoples and has separated them in the most striking and the most decisive way from the habits of thought that prevail in the spheres of Latin and Roman tradition.

The development of the common law has been a most fruitful theme for jurists and historians, but it is interesting tonight in passing to recall that the work of Henry II not only affected the lawyers but affected the whole nation and was to affect the whole world. It is a great landmark recording one of the historic divisions of mankind. The praise that has been so freely lavished on the common law has, no doubt, been well deserved; but it is well to remember that a not inconsiderable body of opinion finds the greatest virtues in the Civil Code. The power of Rome lives on and the influence of Justinian still survives. Indeed, these two great systems of law symbolize the distinction between what may be crudely

termed the lovers of theory and the lovers of practice. Justinian's conception was a world of order, logic, and reason and the application through law of these principles to the complex and baffling field of human relationships. The common law relied on precedent and practice, and adapted itself as the occasion demanded. It was, in a measure, the expression of the English temperament, that temperament that has had on critical and momentous occasions to pay a heavy price for its indulgence, but on the whole has been the secret of its greatest triumph.

The respect for the law of which I spoke has its roots here. It is the respect of a free people, conscious of the right, to the law itself, a law deriving from their own customs and consonant with their innate sense of justice, modified and adapted from age to age to meet changing needs and upheld by that power which they themselves bestow. When that law is expounded by an expert and independent judiciary, and supported by a fearless and independent Bar as the source and guardian of the virtue of the Bench, then the rule of law is established as the foundation on which all else is built.

There is another point of peculiar importance for any gathering of lawyers that emerges from the work of Henry II. The solidarity of the legal profession as a great community within the national life was made possible. Certainly from the time of Edward I, our English Justinian, the rapid development of the common law had brought into being practitioners who were not in Holy Orders, and henceforward the promotion was from Bar to Bench, and the single self-conscious society of lawyers was formed. That principle still operates to-day, but as the wise counsel observed, "The Bench is like heaven; everybody wants to go there—but not yet!"

The importance of this development cannot be over-emphasized. It has meant the continuance of great traditions, the maintenance of standards of probity and honour, the wise understanding between Bench and Bar, and their full co-operation in the administration of justice. The present Master of Trinity College, Cambridge, Professor Trevelyan, our greatest living historian, has said of this development:

> Jealous of outsiders, rivals to the ecclesiastical lawyers, "learned brothers" to one another, makers and guardians of a great intellectual and moral tradition, acquiring too all the faults and all the unpopularity of a powerful and highly organized profession, they were not a close "noblesse of the robe," but offered to any Englishman of brains and industry a ladder to wealth and greatness as attractive as the Church herself.
>
> The common lawyers were, as a class, the first learned laymen, and as such were of great importance to the growth of the nation. . . . Without the lawyers, neither the Reformation nor the victory of Parliament over the Stuarts would ever have been accomplished.

For nearly eight hundred years, therefore, the Judges have been going out on circuit, and the great tradition has been unbroken.

Great changes have, of course, taken place. Three factors in particular have transformed the system: the coming of the railways, that brought every part of the country within easy reach of London, the establishment of the County Courts with limited jurisdiction, and the continuous sittings in London. But the attraction, and, indeed, the fascination, of the circuit system remains.

When I return to London, I shall go out in the Michaelmas term on the Northern Circuit and visit Carlisle, Appleby, Lancaster, Liverpool, and Manchester—that is to say, to the northern counties of Cumberland, Westmoreland, and Lancashire. They are the three Lake Counties of England, perhaps the most beautiful counties of all, although our largest lake of Windermere is only twelve miles long and one mile wide; when I think of Lake Superior I feel I ought almost to apologize for mentioning it! But the Judges unfortunately do not visit the lakes; they go to places like Manchester, and I cannot give you a better impression of the climate of Manchester than in the words of the little girl who lived in Devon and was being sent to visit some relatives in Manchester. She was overheard praying the night before she went, and she said: "Well, good-bye, God; I am going to Manchester for a fortnight."

Before leaving London, the Judge signs and delivers a series of precepts to each sheriff of the county. The authority to hold the Assizes is still the King's Comission, which is now a single document, whereas in olden times Assizes were held by virtue of six Royal mandates. The day on which the Judge travels to the Assize town is called Commission Day. The old ceremonial of Commission Day is now gone and the Commission is read in the Crown Court by the Judge on the morning of the first working-day. The Judges in full scarlet and ermine and wearing full-bottomed wigs, accompanied by the High Sheriff of the County and his Chaplain, the Under-Sheriff, the Judges' Marshal and Clerks and the Civic Authorities and Police, attend Divine Service before the opening of the Assizes. In York Minster, or Durham Cathedral, this is a ceremony never to be forgotten.

The existing circuits are, in addition to the Northern, the South Eastern Circuit, the Midland Circuit, the North Eastern Circuit, the Oxford Circuit, the Western Circuit, and Wales and Chester. Each Circuit has its own traditions and associations. Each county town is a thing peculiar to itself, and everywhere are to be found oddities and survivals and reminders of the past. Let me tell you of one such reminder of the Northern Circuit, where I go at the opening of the Michaelmas term.

At Lancaster in the dock of the Crown Court there is still to be seen the iron clamping device into which the hand of a man could be put, the brazier and the branding-iron with the letter "M" at the end of it. They were put there because of an Act of Parliament of 1487. Down to the year 1826 the penalty for every felony was death, subject, of course, to that most remarkable element in English law called "benefit of clergy." Benefit of clergy originally arose from the immunity of the cleric from the jurisdiction of the secular Courts. As clerics were supposed to be the only people who could read, benefit of clergy came to be allowed to anybody who could read in the dock. The test was to read the first verse of the 51st Psalm, which was known as the "neck verse." If it could be recited, even though the book were open at another page or upside down, it was enough. With a little ingenuity, the most brutal murderer could go free if he could but say: "Have mercy upon me, O God, according to thy loving-kindness: according unto the multitude of thy tender mercies blot out my transgressions. Wash me thoroughly from mine iniquity, and cleanse me from my sin." This shocking system was mitigated by the Act of 1487. After that date, a prisoner who successfully claimed

benefit of clergy was branded in the thumb with the letter "M" for murder and "T" for other felonies; and these branding-instruments are still in the dock at Lancaster. Until quite recently they were to be seen at Northampton, and they have been placed in the museum at Chester.

One of the duties of the Judge's Marshal was to go to the dock where the prisoner was being branded by the gaoler and cry out, "Good mark, my Lord." During the war, I had the very great privilege of taking as my Marshal to Warwick, on the Midland Circuit, Mr. Richard Hyde, of Montreal, the son of my esteemed friend Gordon Hyde; to Kingston, on the South Eastern Circuit, I took Mr. Stanley Biggs, of Toronto, and to Lincoln, on the Midland Circuit, I took Mr. R. A. Ritchie of Halifax. It was a great happiness to me thus to link my association with Canada to the ancient ceremonial of the English Circuit system, and a greater happiness still to find those three dear friends of mine present here tonight.

Now, let me end, as I began, by thanking you for the never-to-be-forgotten kindness of the Canadian Bar Association. By their gracious hospitality I have been privileged to travel from Montreal to Vancouver and to see the wonders and glories of this great land.

When all Thy mercies, O my God,
My rising soul surveys;
Transported with the view, I'm lost
In wonder, love, and praise.

In the ninth chapter of the Second Book of Chronicles it is recorded that one of the wonders King Solomon displayed to the Queen of Sheba was the meat at his table. Coming from England, I am not so sure that a menu of the Canadian Pacific Railway Company is not a greater wonder than any King Solomon ever displayed! But I would fain adapt and adopt the language of the Queen of Sheba to express my own feelings at the wonders of Canada:

It was a true report which I heard in mine own land of thine acts, and of thy wisdom:

Howbeit I believed not their words, until I came, and mine eyes had seen it: and, behold, the one half of the greatness of thy wisdom was not told me: for thou exceedest the fame that I heard.

Happy are thy men, and happy are these thy servants, which stand continually before thee.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The Annual Meeting of the Council of the New Zealand Law Society was held on March 12, 1948.

The following Societies were represented: Auckland, Messrs. C. J. Garland (Proxy), V. N. Hubble, L. P. Leary, and H. R. A. Vialous (Proxy); Canterbury, Messrs. L. J. Hensley and E. S. Bowie (Proxy); Gisborne, Mr. G. J. Jeune; Hamilton, Mr. E. F. Clayton-Greene; Hawke's Bay, Mr. A. E. Lawry; Marlborough, Mr. A. M. Gascoigne; Nelson, Mr. K. E. Knapp; Otago, Messrs. J. B. Deaker and F. J. D. Rolfe (Proxy); Southland, Mr. J. H. B. Scholefield; Taranaki, Mr. H. S. T. Weston; Wellington, Messrs. P. B. Cooke, K.C., J. R. E. Bennett, and G. C. Phillips. Mr. A. T. Young (Treasurer) was also present. Apologies for absence were received from Messrs. C. B. Barrowclough, J. B. Johnston, W. R. Lascelles, W. E. Leicester, and J. K. Patterson. The President, Mr. P. B. Cooke, K.C., occupied the Chair and welcomed all members of the Council attending for the first time.

On the motion of the President, the Annual Report and Balance Sheet were adopted.

Standing Committee.—The following letter was received from the Canterbury District Law Society:

"At the Annual Meeting of the Canterbury Law Society held in the Supreme Court at Christchurch on Monday, the 8th instant, the following resolution was unanimously passed, and I was directed to convey it to your Society:

"That this meeting of members of the Canterbury Law Society expresses its appreciation of the work of the New Zealand Law Society, and especially of the various Standing Committees thereof, during the year. The meeting is mindful of the constant and watchful attention given in Wellington to the interests of the legal profession as a whole, and is grateful for the time and trouble voluntarily and unsparingly given by the members of such Standing Committees."

The President said that the members of the Standing Committee very much appreciated the Canterbury resolution.

Election of Officers.—President: Mr. P. B. Cooke, K.C., the only nominee, was re-elected. *Vice-President*: Mr. A. H. Johnstone, K.C., the only nominee, was re-elected. *Hon. Treasurer*: Mr. A. T. Young, the only nominee, was re-elected. *Management Committee*: Messrs. E. P. Hay, A. H. Johnstone, K.C., D. Perry and A. T. Young, the only nominees, were re-elected. *Audit Committee*: Messrs. H. E. Anderson and J. R. E. Bennett, the only nominees, were re-elected. *Conveyancing Committee*: Messrs. A. B. Buxton, S. J. Castle, and E. P. Hay, the only nominees, were re-elected. *The New Zealand Council of Law Reporting*: The resignation of Mr. H. P. Richmond as a member of the New Zealand Council of Law Reporting was received with regret. Mr. L. P. Leary of Auckland, the only nominee, was appointed to hold office as Mr. H. P. Richmond's successor for the residue of the term for which Mr. H. P. Richmond was appointed.

Resolutions of Appreciation.—On the motion of the President, the following resolution was carried:

That this Council expresses its great appreciation of the service that Mr. H. P. Richmond has rendered as a member of the Council of Law Reporting for no less than twenty-five years and of the constant and active interest he has always taken in its work.

Disciplinary Committee: The resignations from the Disciplinary Committee of Messrs. A. H. Johnstone, K.C., and G. G. G. Watson were received with regret. Messrs. P. B. Cooke, K.C., W. H. Cunningham, M. R. Grant, A. N. Haggitt, E. P. Hay, J. D. Hutchison, J. B. Johnston, and L. P. Leary, the only nominees, were appointed the members of the Disciplinary Committee.

On the motion of the President the following resolution was carried:

This Council places on record its deep appreciation of and its gratitude for the invaluable service that Messrs. A. H. Johnstone, K.C., and G. G. G. Watson have continuously rendered to the profession as members of the Disciplinary Committee since its inception in 1935.

Library Committee: *Judges' Library*: Messrs. T. P. Cleary and F. C. Spratt, the only nominees, were re-elected members of this Committee.

State Advances Corporation: *Signing Releases of Mortgages.*—The following letter was received from the State Advances Corporation:

February 19, 1948.

I desire to confirm that the Corporation regrets that it has not yet been able to obtain legislation which would enable its Branch Managers to execute releases of its mortgages.

It was resolved to renew the representations that were previously made.

Solicitors Audit Regulations.—The following letter was received from the Registrar of the University of New Zealand :

December 16, 1947.

Further to your letter of September 30 regarding the Solicitors Audit Regulations I would advise that the Council of Legal Education has instructed me to ask the Law Society to suggest the subject or section of a subject with which these regulations should be included in the Statutes of the University. In making its recommendations the Society is to be asked whether any sections of the regulations should be specially stressed.

Finally, does the Society feel that the regulations should be included in a subject in which there is certain to be a written examination ? For example, if they were included in Conveyancing, some candidates would not require to take the examination concerned.

On the motion of Mr. Bennett it was resolved :

That the Solicitors Audit Regulations should be dealt with under Conveyancing by way of instruction and not necessarily by examination and the terms examiner should be satisfied that the student has a good working knowledge of the subject.

Mr. Lawry stated that the resolution expressed the views of the Hawke's Bay Society who raised the matter.

State Advances Corporation Progress Payments.—Following an interview which Messrs. Bennett and Phillips had with the Assistant General Manager and the Solicitor of the State Advances Corporation, the following suggestions concerning progress payments to solicitors were submitted to the Corporation :

1. That the Corporation should continue to use the existing form which sets out the value of the work done for the purpose of the Wages Protection and Contractors' Liens Act.

2. That the amount to be actually paid to the solicitors by the Corporation should be 75 per cent. of the value of the work as valued by the Corporation.

3. That the said form enclosing the cheque should have endorsed thereon a statement to the effect that the amount transmitted represents 75 per cent. of the value of the work as valued as aforesaid.

4. That there should also be endorsed on the form, instructions to the solicitors, that they should pay to the mortgagor (or as he may direct) such sum as shall protect the Corporation under the provisions of the Wages Protection and Contractors' Liens Act.

The reply received from the Corporation read as follows :—

In reply to your letter of the 25th ultimo, the Corporation will be happy to accede to your Society's request, and will adopt the suggestions contained in your letter.

We are glad to have your agreement that the present cl. 15 in our printed form of solicitors' instructions meets your desires under suggestion No. 4. This clause, as you know, reads as follows :—

"15. You should, whether the mortgage has been registered or not, protect the Corporation under the Wages Protection and Contractors' Liens Act, 1939, including under s. 32 in cases where the Corporation may be liable as an 'employer' within the definition of that word in s. 20, notwithstanding the amount the Corporation may have remitted at any time."

The report was received.

Scale of Costs : Transfers to Beneficiaries.—The Conveyancing Committee reported as follows :

The Committee considers that the reasons set out in Ruling 203 for the adoption of the scale fixed by that ruling show clearly that the third interpretation set out in the letter from the Wellington Society is the correct one and that any misapprehension as to the interpretation of the scale arises from the use of the word "thereafter" with a possibly slightly ambiguous meaning.

The committee recommends the adoption of the change in wording suggested by the Wellington letter so that the scale will read as follows :—

Two-thirds of the ordinary scale up to £10 10s. with a minimum of £2 2s.

If two-thirds of the ordinary scale costs amounts to more than £10 10s. the costs should be half the scale costs with a minimum of £10 10s.

It was resolved to adopt the report.

Conveyancing Scale : Releases of Mortgages.—The Conveyancing Committee reported as follows :

The question asked in the Wellington letter appears to be answered by the ruling of October 3, 1919, appearing in *Ferguson's Scale of Conveyancing Charges in New Zealand,* 3rd Ed. 27, but which was apparently omitted from the consolidations made since 1920. The ruling is as follows :

"Where an unusual amount of correspondence is involved or it is necessary to obtain separately execution by a number of parties, whether the mortgagees be trustees or mortgagees who have advanced the moneys in equal or unequal shares or otherwise an additional charge may be made.

"The criterion of whether an additional charge is proper depends not upon the number of signatures but upon whether the solicitor has had to incur more time and trouble than usually incurred in procuring a release."

The fee payable in the case mentioned in the Wellington letter should be calculated with regard to the additional time and trouble incurred in obtaining the signatures of the two sets of trustee mortgagees and not merely by the number of signatures obtained.

It was resolved to adopt the report.

Conveyancing Scale : Agency Charges.—The Conveyancing Committee reported as follows :

If Ruling 187 is read in conjunction with the scale of conveyancing charges it is clear that the gross charge for an agency search of one Land Transfer title or two Land Transfer titles if in the same name and with the same encumbrances is to be 17s. 9d. whether the agent sends his original search note with or without a covering letter or whether he incorporated the result of his search in a letter reporting. The wording suggested by the Otago Society would remove any doubt as to the interpretation of the scale and the Committee recommends the adoption of the Otago Society's suggestion if the scale is being reprinted—namely, one certificate of title or two if same registered proprietor and same (if any) encumbrances including letter reporting, gross charge 17s. 9d. —principal 5s. 10d., agent 11s. 11d. Each additional title 10s., 3s. 4d., 6s. 8d. If the report is very lengthy as in the case of some leases then a larger fee is charged for reporting proportioned to work involved.

It was resolved to adopt the report.

Supply Regulations Bill, 1947.—The President referred to the letter received from the Minister of Supply and Munitions, November 28, 1947, and suggested that if there are any War Regulations as to which members think representations should be made, particulars should be supplied to the Standing Committee as soon as possible.

Joint Audit Committee.—A letter was received informing the Society that Mr. D. A. F. Crombie had been appointed to represent the New Zealand Society of Accountants on the Joint Audit Committee.

Patent Law and Procedure.—A letter was received from the Secretary of the Patents Committee enclosing a questionnaire asking whether the Society desired to give evidence before the Committee set up to consider Patent Law and Procedure in the Dominion.

It was resolved that the Society should be represented before the Committee with a view (*inter alia*) of resisting any suggestion that the jurisdiction of the Supreme Court and Court of Appeal in Patent matters be in any way abridged or curtailed. It was further resolved that the matter be left in the hands of the Standing Committee with power to appoint a representative of the Society to appear before the Committee.

International Bar Association.—The President read the letter which had been sent to the International Bar Association asking that the Society should be admitted as a member, and, if possible, as a charter member, of the International Bar Association. The annual membership fee amounted to $100, and a permit had been obtained to forward a draft for this amount.

Consolidation : Rulings and Decisions.—The following report was received from the President and Messrs. J. R. E. Bennett and G. C. Phillips :

1. That no change should be made in the present method of printing and issuing decisions, &c.
2. That at reasonably frequent intervals, having regard to the number of decisions, &c., issued, suitable supplementary indexes should be prepared and issued by the Council. Such indexes should contain, where appropriate, references to earlier rulings, &c.
3. That inquiries should be made to ascertain the cost of suitable loose leaf folders to contain future rulings, &c. If the cost is not unreasonably high, it is suggested that a supply be obtained for sale to all members at cost.

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. 135.—C. to O.

Rural Land—Basic Value—Sale of Part of Area used for Mixed Farming—Carrying-capacity of Part Sold—Adjustment of Price upon Per-Acre Value if Survey Showed Variation on Estimated Area—Basic Value of Land as Sold notwithstanding Adjustment in Nominal Area following Survey.

The vendors, being the owners of a holding of 1,930 acres at Tangowahine, North Auckland, sold an area of approximately 714 acres to the purchaser for £9,511 10s., subject to an adjustment on survey. At the hearing before the Committee, Mr. Colmore Williams presented a budget showing a basic value of £9,539, but he admitted the necessity for certain adjustments, as a result of which he presented to the Court an amended budget showing a reduced value of £9,261. The Crown relied on a joint budget by Messrs. Smeaton and Flux showing a basic value of £7,025. The Committee fixed a basic value of £8,000, and against this assessment both parties appealed.

The Court said: "In the past, the whole area owned by Mr. C. has been the subject of mixed farming. The principal source of income has been dairying, carried on by three share-milkers, but substantial income has been received from running dry cattle and a moderate-sized flock of sheep. The property now sold represents, both in area and in the quality of the land, roughly one-third of Mr. C.'s land, and, indeed, it would appear to be his intention to dispose of his property in three parts, each part comprising the land previously used by one of the share-milking herds together with a reasonable proportion of the back land upon which the cattle and sheep had been depastured. There is, accordingly, no dispute as to the fact that upon 531 acres of the land now sold a dairy herd of some 150 cows has for some years been maintained by a share-milker named H., and that in addition certain other stock have been carried on this area during parts of the year, while cattle and sheep have been depastured upon a further area of 183 acres of fairly high country at the back of the dairy land. On the other hand, it is admitted that the replacement stock for the dairy herd has in the past been carried in part upon other parts of Mr. C.'s land, and has not been restricted to the land now sold. It is claimed, however, on the part of the vendors, that for many years the area now sold has in fact carried a dairy herd of approximately 150 cows, and has in addition carried the equivalent of the replacement stock for the herd, together with a considerable number of other cattle and sheep. Mr. Colmore Williams, for the vendors, has therefore budgeted on the basis that the land now sold will carry a dairy herd producing the same quantity of butterfat as that produced by the share-milker H., together with replacements and also some 58 steers and 250 sheep. The Crown does not seriously dispute the carrying-capacity of the vendors' property as a whole in the past, but claims that the portion now sold will carry no more than the existing dairy herd and its replacements, together with fifty steers and no sheep.

"A great deal of evidence was presented by the vendors to justify the carrying-capacity of the land, including that of the owner and his son, the share-milker H., who has been on the property for seven years, and a previous share-milker, who worked on the property for sixteen years. We see no reason to disregard this evidence, which substantially establishes that in the past the property as a whole has carried the stock and produced the butterfat claimed by the vendors, and that the property now sold has carried its fair share both of dairy cattle, steers, and sheep. The weight of evidence, furthermore, supports the view that the production claimed by Mr. Colmore Williams in his budget is justified by the proved production of the property in the past, and that the Crown is taking too conservative a view in its belief that, by reason of the subdivision of the property, its total production and carrying-capacity will be substantially reduced. We are further influenced to accept Mr. Colmore Williams's estimate of production by the fact that his budget provides for the manure and lime which have previously been applied to this land to be trebled and doubled respectively. The Crown budget also provides for a similar increase in manure and lime, but nevertheless anticipates a reduction in carrying-capacity.

"This is a case where both sides have purported to be guided by the proved production of the property in the past. Both sides appear to be in agreement that the property has been reasonably and properly farmed, in accordance with the standard of efficiency to be expected from an average efficient farmer. There is little serious dispute between the valuers, except as to detail, and upon the general question as to whether an owner of the smaller area now sold would be likely to take the trouble of maintaining a small flock of sheep. Upon all of these minor questions in dispute we are of opinion that the weight of evidence supports the views put forward by Mr. Colmore Williams, and that, accordingly, we must accept his budget in preference to that of the Crown. Mr. Colmore Williams has already amended the budget which he placed before the Committee to correct certain inaccuracies which became evident during the Committee hearing. We see no reason to require any further amendment of his budget save with respect to a reduction of £100 in his deductions for deficiencies which were shown as £1,616 in Mr. Colmore Williams's budget to the Committee and as £1,516 in his budget to the Court. We are not satisfied that good grounds exist for this amendment, which we disallow, and the basic value, according to Mr. Colmore Williams's budget, should, therefore, be reduced to £9,161, which we are prepared to adopt as the basic value of the land.

"One further matter requires consideration. The Committee's order provided for the deletion of the provision in the contract for an adjustment of the price upon a per-acre basis in the event of the area sold being found on survey to differ from the estimate of 714 acres. Counsel for both vendors and purchaser claim the provision to be a usual and proper one, and submit that it should be permitted to stand subject only, and if necessary, to an amendment in the stipulated rate per acre. The Court is of opinion that the effect of such a provision must be considered in relation to the particular contract in which it is found and to the methods adopted in arriving at the basic value. It is conceivable that, if certain methods of valuation were used, a basic value might be arrived at which would be directly dependent upon the estimated area of land sold, so that it would naturally follow that, if the area were subsequently found to be incorrect, the basic value would, in consequence, require adjustment. On the other hand, it is possible for valuations to relate to the specific piece of land sold, having regard, not to the area of that land, but to its proved productive capacity. In such a case, the basic value, if correctly assessed, would represent the productive value of the land without regard to its area, and its true productive value would not be affected by any amendment in its area. In such a case, it would be, not merely unnecessary, but improper, to amend the basic value simply because on survey there had been found to be an error in the estimated area. We are of opinion that the present case falls substantially in the latter category. The basis of valuation adopted by both parties is that this particular piece of land is capable, by reference to its past production, of earning a certain net income. This estimated income has little or no relationship to its supposed area of 714 acres, and would not, in our opinion, be substantially affected should it be found on survey that the true area is a few acres more or less. In any case, it seems clear that the estimated area is substantially correct. To make an adjustment on a per-acre basis in the event of a minor amendment to the area would not, in the circumstances, be justified, and would, indeed, lead to a false conclusion, to the detriment of one or other of the parties. In the present case, therefore, we are of opinion that the Committee was right in stipulating that the basic value as fixed should be deemed to be the basic value of the land sold, notwithstanding that an adjustment in the nominal area may be shown to be necessary by a survey. It does not follow, however, that a similar condition should necessarily be imposed in all cases.

"The vendors' appeal will, therefore, be allowed, and the order will be amended to provide that consent is to be granted to the transaction subject to a reduction in the purchase price to £9,161. In all other respects the conditions contained in the Committee's order are confirmed. The Crown's appeal will be dismissed."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Illegal Sales.—With very few exceptions, members of the profession will find themselves in full agreement with the views of Mr. T. E. Maunsell, S.M., who refused the application by a purchaser for the return to him of all or part of an amount of £490 secretly paid by him for a property above Land Sales price. "I do not think any intention should be assigned to the Legislature to hold out a bribe to an accomplice to procure a conviction," he said. In this case, he distinguished between the position of a purchaser as a very willing witness and that of a purchaser required to give evidence where the authorities have reason to suspect from outside sources that an offence has been committed and the purchaser is *required* to give evidence. "If purchasers who become accomplices to these illegal payments can confidently rely on getting their money, or some of it, returned to them, there exists a strong inducement for purchasers to commit fraud on vendors by agreeing to make a secret payment and then proceeding to inform the authorities with a view to getting their money back." The plain fact of the matter is that, as soon as some feature of his purchase turns out not to be to his liking, an unscrupulous purchaser has in the present situation a powerful and at times profitable weapon with which to blackmail a vendor who may have been a veritable *deus ex machina* in respect of much-needed accommodation; but, whether this is so or not, there is a great deal to be said for the tried wisdom of the common law which refuses to allow the Court, in an illegal bargain, to make refunds or to lend its aid to either party. At least, this principle commands much greater respect than the statutory enactment.

Spare the Judges.—The request of the Attorney-General to Sir Humphrey O'Leary, C.J., to appoint a Judge to arbitrate in the Mountpark dispute makes timely a reference to a recent comment by the *Law Times* on the situation in England arising from pressure of work of the judiciary in its appointed sphere. It recalls what Lord du Parcq described as "one constructive proposal." It was, the learned Lord said, most flattering to the judiciary—and he was sure all Judges appreciated it—that the Government so often found it convenient and in the public interest to go to the Judges and to the Court of Appeal to find someone to preside over an important Committee or Royal Commission, but it helped to dislocate the work of the Court of Appeal when that was done, because, if the Judge had to go off to a meeting of his Committee or Commission, the whole business of a Division of the Court might be disturbed and the whole of the arrangements made by the Master of the Rolls might be upset. "I would, therefore, appeal to His Majesty's Government," his Lordship concluded, "great as I know is the temptation, to say that, while the Court of Appeal is in this great dffiiculty, they will not take away any more of its members to do other public work." The Lord Chancellor said he would gladly bear in mind that injunction. He always tried to impress upon his colleagues that they really must not ask for the services of Judges in the way they did. "Sometimes," he said, "I am afraid I am guilty myself, but I will try to reform, and I will try to reform others, too."

Permanent Court of Appeal.—In his farewell speech to the Bar (which for balanced shades of grave and gay was quite a model of its kind), Smith, J., observed that he had intended to say something of the permanent Court of Appeal, but thought he would refrain from discussing so controversial a subject. So far as Scriblex can gather, the main controversy surrounding this somewhat esoteric project is as to what has happened to it. Has it manifested its proposed peripatetic nature by walking off somewhere by itself, or is it merely resting in some place unknown, as, for instance, an Executive pigeon-hole? On the other hand, in seeking to sum up the situation, the profession may be caught in an impasse of imponderabilia, adrift amongst factors too unknown for it to evaluate.

How and Hummel.—These colourful criminal lawyers of a past era, referred to in these columns last year, are now the subject of a biography published by Richard H. Rovere in New York, and described as the most fascinating book of the season. There is one phase of their numerous activities upon which Scriblex, possibly from a sense of shyness, did not touch earlier. This was the function of two of their clerks to comb Broadway and the Bowery in search of seductions for which compensation had not been claimed:

> They would make the acquaintance of young actresses and chorus girls and explain to them how, by friendly co-operation with Howe and Hummel, last year's infatuations could be converted into next year's fur coats. They had the girls rummaging around in their memories for old seductions the way antique dealers get home-owners tearing up their attics in search of old glass-ware and ladder-back chairs.

In 1884, so the author informs us, they were attorneys for all the major brothel owners, and, when the Madams of seventy-four of these were taken in charge by a Vice Squad, all of them named this firm as their counsel—surely a single illustration of the Tennysonian lines that kind hearts are more than coronets and simple faith than Norman blood.

Legal Longevity.—"Age," wrote Oliver Wendell Holmes, "like distance, lends a double charm." In the case of Sir David Smith, the age of retirement must have for him the dual attractions of enabling him to look back upon twenty years of judicial work performed to the entire satisfaction of the profession and of permitting him to look forward to many years of service to the University of New Zealand of which he is the distinguished Chancellor. But, upon this topic of legal longevity, Scriblex cannot help but recall those old friends, Lord Halsbury and Sir Harry Poland, who for many years shared Chambers in the Temple. The former, who enjoyed a record term of seventeen years as Lord Chancellor, died in his ninety-eighth year, while Poland, one of the great criminal lawyers of the nineteenth century, passed his ninety-ninth year. One of the stories told of this long friendship concerns an occasion when the two were observed to be having a heated and distressing argument in a corner of the Benchers' room at the Inner Temple. Struck by the vehemence of the dispute, the Benchers made inquiry as to its cause, and were amused to learn that one of these old veterans was exceedingly angry over the unpardonable conduct of the other, whom he accused of having added a year to his age.

PRACTICAL POINTS.

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1. Subdivision of Land.—*Contiguous House Properties—Separate Certificates of Title—One Property without Street Frontage—Separate Dealings—Public Works Act 1928, s. 125—Municipal Corporations Act, 1933, s. 332.*

QUESTION: My client owns two contiguous house properties, each held under a separate certificate of title. One has a frontage to a public street; the other has no actual frontage to a public highway, but most convenient access to the same public street is obtained by means of a duly registered right of way over an adjoining property. Can my client sell one property and retain the other without the consent of the local body, and without dedicating any of his land as a public highway? The properties are in a Borough.

ANSWER: Your client can sell the property fronting the public road provided he has not, at the date of such sale, sold, or agreed to sell, the property having only a right of way access to the highway. It is not thought that he could sell the latter property until he has disposed of the other one: *Moss* v. *Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.*, [1922] N.Z.L.R. 264.

Section 332 of the Municipal Corporations Act, 1933, as amended, does not apply, because the land is already held under separate certificates of title: that section provides its own definition of the term "subdivision"; and the consent of the local body is not necessary.

Section 125 of the Public Works Act, 1928, prevents a sale of *part* of a person's land, and, for the purposes of this section, the test is not separate titles, but physical contiguity: *Peers* v. *McMenamin,* (1908) 27 N.Z.L.R. 833, and *Upham* v. *Bardebs,* [1927] N.Z.L.R. 722. But it does not appear that the section prevents the sale of the *residue* of a person's land.

X.1.

2. Co-operative Company.—*Compulsory Dividend—Alteration of Articles to make Payment of Dividend Discretionary.*

QUESTION: A co-operative company by its articles must pay a dividend of 6 per cent. to all its shareholders out of profits. This is proving most embarrassing, as income tax has to be paid on the sum set aside to produce the dividend, and it is minimizing the intended benefits of co-operation, the true purpose of the company being to sell the produce of its shareholders. Can the company alter its articles so as to make the payment of a dividend discretionary?

ANSWER: Any such alteration to the articles would be ineffective unless all the shareholders consented thereto: *Geary* v. *Melrose Co-operative Dairy Co., Ltd.*, [1930] N.Z.L.R. 768; see also the judgment of *Herdman*, J., in *Johnson* v. *Eltham Co-operative Dairy Factory Co., Ltd.*, [1931] N.Z.L.R. 216, 250, 251. In the circumstances stated, it is most improbable that all the shareholders would consent.

X.1.

3. Wages Protection and Contractors' Liens.—*Extinguishment of Lien by Non-prosecution.*

QUESTION: When does a lien or charge become extinguished under s. 34 (6) of the Wages Protection and Contractors' Liens Act, 1939?

ANSWER: According to *Squire* v. *Ireland*, (1942) 2 M.C.D. 340, a right to a lien or charge lapses unless the claimant (*a*) commences the action for enforcement within the prescribed time, or (*b*) commences the action for enforcement within such extended time as may be fixed by the Court under s. 34 (5); or (*c*) takes the steps prescribed by s. 36 (2) to become a party to an action for enforcement duly commenced by another person of the same order of priority. There would still remain the question of getting the lien off the title, if it had been registered, as to which see s. 44 of the Act, and (1937) 13 NEW ZEALAND LAW JOURNAL, 298.

BX.1.

POSTSCRIPT.

The Lost Golf Ball.

With the delightful understatement in *Hibbert* v. *McKiernan*, [1948] 1 All E.R. 860, that "on every golf course balls must be lost from time to time," the Lord Chief Justice touched upon a point on which golfers would, from bitter experience, speak with some warmth. Yet, were they to study the decision of the Divisional Court in this case, they might derive comfort from the thought that the law, after all, does not leave their interests, even in lost golf balls, unprotected. Stated briefly, the facts were as follows: the appellant, whilst trespassing on some golf links belonging to the members of a golf club, took up and carried away eight golf balls that, so it was held, had been lost and abandoned—*i.e.*, the owners were held to have renounced their possession and property in the balls. The club had taken steps to exclude trespassers from the links and to prevent the taking of balls, but the officials of the club did not know at any given moment the position or number of balls that might be lying on their property. In these circumstances, the appellant was charged under the Larceny Act, 1916, s. 2, with stealing the golf balls and was convicted by the Magistrates of the offence. In arriving at this conclusion, the Magistrates struggled manfully with the difficult problem whether the appellant had acquired a title to the balls by finding them, which, as they had been abandoned by their original owners, would prevail against the owners of the land on which they were found. This led them to consider a line of cases such as *Bridges* v. *Hawkesworth*, (1851) 21 L.J.K.B. 75, *Elwes* v. *Brigg Gas Co.*, (1886) 33 Ch.D. 562, and *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q.B. 44; these cases, said Lord Goddard, L.C.J., had long been the delight of professors and text-writers whose task it often was to attempt to reconcile the irreconcilable, and he recalled that, though the soundness of the decision in the *Bridges* case had been questioned, it had been reinvigorated by Birkett, J., in *Hannah* v. *Peel*, [1945] 2 All E.R. 288. Happily, these interesting questions did not arise in this case, for the charge was one of larceny, and the thief took the balls *animo furandi*, quite unlike the honest man who, finding an article on the land of another, proclaims that fact with a view to discovering the owner if he can, and, when no owner comes forward, asserts a possessory title against the owner of the land on which it was found. In the view of the Divisional Court, every householder or landowner means or intends to exclude thieves or wrongdoers from his property, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent. This was the decision in *R.* v. *Rowe,* (1859) Bell C.C. 93, which the Court applied. In the result, it was held that, since, on the evidence, the appellant had a felonious intent, he was rightly convicted of larceny.