New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXIV. TUESDAY, NOVEMBER 2, 1948. No. 20

EVIDENCE: THE PERIOD OF GESTATION.

OF particular interest to those practitioners who are concerned with the conduct of affiliation cases under the Destitute Persons Act, 1910, or of divorce proceedings involving the proof of non-access by a husband at the time of the probable conception of a child, is *Hadlum* v. *Hadlum*, [1948] 2 All E.R. 412. The judgment is also of interest to them in view of the abolition, in New Zealand, of the rule in *Russell* v. *Russell*, [1924] A.C. 687, effected by s. 15 of the Evidto a Amendment Act, 1945. This will possibly lead ence greater frequency of evidence by one of the parties to prove access or non-access, such, for example, in divorce suits on the ground of the wife's alleged adultery, as proof that the spouses did or did not have sexual relations with each other at some particular time.

The general rule of law that sexual intercourse between husband and wife in normal circumstances is presumed, as laid down in the *Banbury Peerage Case*, (1811) 1 Sim. & St. 154; 57 E.R. 62, and cited with approval by Lord Lyndhurst, L.C., sitting as a Judge of first instance, in *Morris* v. *Davies*, (1837) 5 Cl. & F. 163, 215; 7 E.R. 365, 385, is as follows:

> In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

In *Ah Chuck* v. *Needham*, [1931] N.Z.L.R. 559, 569, after referring to that rule, Herdman, J., said:

> As I understand the opinion of the Judges in the case cited [the *Banbury Peerage Case*], they were emphatic that the presumption of legitimacy which arises when a child is born in wedlock can only be met by some kind of definite proof that sexual intercourse between husband and wife did not, or could not, take place at the time the woman conceived.

Consequently, the child of any woman is presumed to be the child of the man to whom she was married, either at the time when the child was begotten, or at the time when he was born, or at any intervening time. This presumption may be rebutted by appropriate evidence, as by proof that, at any time when the child could have been begotten, the father was absent from the country in which his wife was then resident: *Co. Litt.* 244; that the father was impotent: *Banbury Peerage Case* (*supra*); that the parents had no opportunity of sexual intercourse: *Hawes* v. *Draeger*, (1883) 23 Ch.D. 173, and *Burnaby* v. *Baillie*, (1889) 42 Ch.D. 282; or that it is highly improbable that such intercourse took place: *Morris* v. *Davies* (*supra*), *Bosvile* v. *Attorney-General*, (1887) 12 P.D. 177, and *The Poulett Peerage*, [1905] A.C. 395.

In the present article, we propose to confine our attention to the question which must inevitably arise where, in a suit for divorce on the ground of a wife's adultery, the husband alleges that a child born to her during their marriage could not be his child, by reason of his not having had, at the time of the child's conception, opportunity of access to his wife, or that, at such time, it was improbable that intercourse between the spouses could have taken place. This question invariably raises the matter of the duration of the period of gestation, which, in each case, is one of fact.

It is generally accepted that conception usually takes place from 270 to 280 days before the birth of a child, or at a time which, if not actually within that period, is outside that period by a slight margin.

In *Cozens* v. *Griffiths*, [1947] N.Z.L.R. 495, an affiliation case, Christie, J., in adverting to this topic, at p. 499, referred to Sir Arthur Keith's statement in his textbook, *Human Embryology and Morphology*, 4th Ed. 50:

> Observations made on cases where the date of impregnation may be inferred show that the actual *mean* period of gestation is 270 days. The 270th day is the bull's eye at which nature aims, but even the best of marksmen make "inners" and "outers," and it is so in all nature's shootings. She is ever subject to the law of chance; hence in all developmental and growth manifestations we meet with variation round a mean.

In another modern textbook cited by His Honour, *Obstetrics and Gynaecology*, 2nd Ed. 155, written in collaboration by Dr. J. M. Munro Kerr, Regius Professor of Midwifery at Glasgow University, and three other distinguished medical writers, the authors say:

> Human pregnancy lasts probably 273 days, calculating from the date when a single coitus is known to have taken place.

We shall now consider some of the judgments in which evidence of a period of gestation longer than the normal has been held as insufficient as proof in rebuttal of the presumption that a child, born in wedlock, is the lawfully-begotten child of the spouses.

Gaskill v. *Gaskill*, [1921] P. 425, was a husband's petition for divorce on the ground of his wife's adultery. He had intercourse with her on October 4, 1918, and the same day he rejoined his unit and left for Salonika without seeing her again. On September 1, 1919, she gave birth to a child. He returned to his country in December, 1919. There was no evidence against her, or reflecting on her conduct, except the lapse of time between the last coition and the birth of the child (331 days). Evidence was given by three medical specialists, stated to be amongst the greatest living English authorities on the subject, that such an interval could not, in the present state of medical knowledge, be said to be impossible. The petition was dismissed.

The case was heard in the Probate Division by the Lord Chancellor, Viscount Birkenhead, as a Judge of first instance, who, in the course of his judgment, dealt with three cases in which the length of the particular pregnancy was not the sole material factor. The earliest of them was the *Gardner Peerage Claim*, (1824) *58 Lords Journals*, 165, in which the interval was 312 days. A large body of evidence, medical and lay, was called upon the point of duration, but other evidence was given of conduct from which adultery could be inferred, and it was clear that the decision that the child was illegitimate turned not only on the expert evidence, but on the evidence of the woman's conduct.

In the second case, *Bosvile* v. *Attorney-General*, (1887) 12 P.D. 177, the lapse of time, 176 days, was not sufficient of itself to negative the possibility of the husband being the father; but there was other evidence as to the conduct of the wife, and the issue was whether there was evidence to justify the jury in finding that the child was illegitimate. They had so found, and the Court refused to set their verdict aside.

In *Burnaby* v. *Baillie*, (1889) 42 Ch.D. 282, described by His Lordship as a case similar to, but somewhat stronger than, *Bosvile* v. *Attorney-General*, the period was 279 days. North, J., after considering, not merely the medical evidence, but evidence as to the relations between the wife and another man during the period to which the birth could refer, decided against legitimacy.

Lord Birkenhead mentioned a fourth case, *Bowden* v. *Bowden*, (1917) 62 Sol. Jo. 105, which differed from the other three cases in that there was no evidence of adultery apart from the length of pregnancy. The length of the period was 307 days. The evidence there given was that the average period was 275 days, the normal period 273 days to 280 days; but instances were given of 306 and 309 days. Upon this evidence, Horridge, J., held that the child was legitimate.

Lord Birkenhead had no doubt that the principles on which he ought to act in coming to a conclusion of fact upon the evidence in *Gaskill* v. *Gaskill* were those which had been laid down in *Morris* v. *Davies*, where the opinion of the Judges in the *Banbury Peerage Case* (*cit. supra*) was cited with approval by Lord Lyndhurst, who pointed out that all that *Head* v. *Head*, (1823) 1 Sim. & St. 150; 37 E.R. 1049, decided was that the Court must be satisfied that sexual intercourse did not take place,

> not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or jury, to whom that question is submitted.

The presumption of law, Lord Lyndhurst stated, was not lightly to be repelled. It was not

> to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.

Lord Birkenhead said that he recognized that these observations had been made in reference to a legitimacy suit; but he could not conceive that in the present case any different principle could apply; otherwise it might happen that the mother would be condemned for adultery on evidence which would not disentitle the child to be declared to be the legitimate issue of her husband. In the case before Lord Birkenhead, the only evidence of adultery was the admittedly abnormal length of pregnancy (331 days). No other fact or circumstance had been adduced which in the slightest degree cast any reflection upon the chastity or modesty of the wife, who had on oath denied the alleged adultery. His Lordship said he could only find her guilty if he came to the conclusion that it was impossible, having regard to the present state of medical knowledge and belief, that the petitioner could be the father of the child. The expert evidence rendered it manifest that there was no such impossibility. In these circumstances, the evidence of the wife was accepted, and the petition founded on her alleged adultery was dismissed.

Wood v. *Wood*, [1947] P. 103; [1947] 2 All E.R. 95, resembled the case just considered in that there was not a shred of evidence adduced by the husband about any sort of association between the wife and any other man, named or unnamed; and the husband had based the charge of adultery solely on the length of the period of gestation, on the assumption that the conception was the result of their last cohabitation, which involved a period of gestation of 346 days. That, it was alleged, was proof positive that the child was not the husband's, and, therefore, that the wife had committed adultery.

Lord Merriman, P., recalled that Lord Birkenhead in *Gaskill* v. *Gaskill* had dealt with facts whereby it was fixed that the last possible date for sexual intercourse before the birth of the child was 331 days. In the converse case of *Clark* v. *Clark*, [1939] P. 228, he (Lord Merriman) had dealt with a case in which the earliest possible date on which sexual intercourse could have occurred before the birth of a prematurely-born child was 174 days. In both cases (he said), Lord Birkenhead and he

> were pointing out the necessity of attempting, but the difficulty of achieving, some reconciliation between the notional reckoning of the normal period of gestation and a period in which the earliest or latest date, as the case might be in the one case or the other, from which conception could possibly exist was fixed and known.

"This at least is clear," the learned President added, "that it is fallacious to attempt to mix the notional and the actual in the period of calculation." The Court had been asked to say that there came a point at which any Judge must take judicial knowledge of the fact that the period was altogether outside what, in nature, was possible. His Lordship agreed. Then, he said:

> Of course, there must come such a point, and the whole question is whether, in a case in which we have had no advantage of medical evidence or argument on the other side (though counsel has been most careful to put everything before us in the clearest possible way) we are bound to say that that stage has come at a point fifteen days longer than the period with which Lord Birkenhead dealt in 1921 in similar circumstances, in a case in which, as here, there was not a shred of evidence of any adulterous or improper

association between the wife and any man. One can, of course, add grains of corn together, and there must come a time when they become a heap. You can say that it is impossible to know where to draw the line; yet you can say that one case or another must plainly be on the wrong side of the line you can possibly draw. With all that I agree. But I absolutely decline, on the information before us in this case, to say that we are judicially bound to hold that this wife has committed adultery, and that the Magistrates were wrong in rejecting that contention.

The period involved in the most recent case, *Hadlum* v. *Hadlum* (*supra*), was one of 349 days. The husband did not admit the paternity of the child, and the wife denied the adultery upon which the husband founded his petition. Judge Topham, K.C., sitting as a Divorce Commissioner, dismissed the petition, and the husband appealed. The facts were that the husband, a serving soldier, having last cohabited with his wife on August 28, 1944, went overseas and remained there until July 7, 1945. The wife gave birth to a child on August 12, 1945—*i.e.*, 349 days after the husband had left her. In a petition for divorce by the husband, on the ground of her adultery with an unknown man, the foundation for the allegation of adultery was the abnormal length of the pregnancy, as suggestions that there was other evidence which might tend towards proof of adultery had been rejected by the Court. Medical evidence was given that it was not impossible for the husband to be the father of the child.

The case resembled the first three that we have cited from Lord Birkenhead's judgment, in that the length of the period was not the sole consideration upon which the petitioner relied; but the learned Commissioner (as the Court of Appeal held, rightly) rejected the other evidence of adultery as inadequate, and the case fell to be determined on the principles formulated in *Gaskill* v. *Gaskill* and *Wood* v. *Wood*, cases in which it was left open for decision in a future case what the position might be where there was some other evidence which might tend to prove adultery.

In the course of a judgment in which Bucknill and Somervell, L.JJ., concurred, Tucker, L.J., said that the case must be approached from the point of view that the period between the last meeting of husband and wife and the birth of the child was three days longer than the period in *Wood* v. *Wood*, where a Divisional Court had refused to take 346 days as conclusive against the wife. Here, there was medical evidence to the effect that a period of gestation of 349 days was not an impossibility. There had been a number of unusual features in the pregnancy; but none of them was sufficient to impel the Court to reject the doctor's evidence, and to infer that adultery had taken place. The appeal failed accordingly.

Until last year, when *Wood* v. *Wood* involved a gestation period of 346 days, the period of 331 days in *Gaskill* v. *Gaskill* was the longest period of gestation adduced to prove the impossibility of access by the husband; and the wife succeeded in her defence to the charge of adultery. The importance of *Hadlum* v. *Hadlum*, in which the Court of Appeal (Tucker, Bucknill, and Somervell, L.JJ.) gave judgment on July 8 of the present year, lies in the fact that—twenty-seven years after *Gaskill's* case—the Court would not infer, after it had heard medical evidence (which was not given in *Wood's* case), that the wife had committed adultery, although the period of gestation was 349 days, thus showing that the medical knowledge and belief on this question is the same now as when *Gaskill's* case was decided.

In *Gaskill* v. *Gaskill*, Lord Birkenhead, at p. 434, made a final observation which can be kept in mind by those asked to advise in this difficult type of litigation. He said that the petitioner in that case had conceived a natural anxiety as to the integrity of his wife. The Court's decision and the medical opinion on which it was based might have reassured him on that point. The wife, on the other hand, ought not to resent the attitude which her husband had adopted. "Both have been the sport of Nature; both are still young," he added. They were happy together until the suspicion arose. As that had been dissipated, they should consider whether they could not recapture that which they had lost. The wife, in that case, and the wife in *Wood* v. *Wood*, as Lord Merriman there observed, had done nothing wrong herself, but had been the victim of a freak of Nature.

SUMMARY OF RECENT LAW.

APPRENTICES.

Apprentices Act, 1948, repeals all previous legislation relating to apprentices, and consolidates and amends the law relating to them.

COMMON LAW.

Points in Practice. *98 Law Journal*, 571.

CONSTITUTIONAL LAW.

Bank of New South Wales and Others v. *Commonwealth.* (Associate-Professor G. Sawer.) *22 Australian Law Journal*, 213.

The Rule of Law and the Planned State. (Professor W. Friedmann.) *22 Australian Law Journal*, 207.

CONVEYANCING.

Hire-purchase: Collateral Agreement and Subsequent Formal Document excluding Warranties. *22 Australian Law Journal*, 222.

COOK ISLANDS.

Cook Islands Amendment Act, 1948. Section 241 is amended by the addition of two sections dealing with the unlawful entry of a dwellinghouse by night (s. 241A), and threats to do bodily harm (s. 241B); and s. 537 is amended by removing the limit of the amount of maintenance orders.

CUSTOMS DUTY.

Customs Tariff Amendment Order, 1948 (Serial No. 1948/173), suspending specified portions of Tariff, as from November 1, 1948.

DIVORCE AND MATRIMONIAL CAUSES.

Standard of Proof in Adultery. (J. A. Lee.) *22 Australian Law Journal*, 217.

FRIENDLY SOCIETIES.

Friendly Societies Amendment Act, 1948, amending the qualification as to registration of societies; increasing the maximum annuity payable to members to £104 a year; increasing to 2s. 6d. the amount chargeable for copies of rules; repealing s. 55, relating to loans by societies and branches to members on personal security, and substituting a new section; and amending the provisions of s. 60 as to special resolutions.

GIFT.

Party at request of Another purchasing Horse for Latter—Horse intended to be Free Gift—Donee taking Delivery of Horse at Saleyards as his own Property—Horse remaining on Donor's Property as Concession to Donee—Ingredients of Gift by Word of Mouth of Chattels Capable of Delivery. In order to constitute a perfect gift by word of mouth of chattels capable of delivery, the donee must have had the chattels delivered into his possession by the

donor; and, in principle, there is no distinction between a delivery antecedent to the gift and a delivery concurrently with or subject to the gift. (*Re Stoneham, Stoneham* v. *Stoneham*, [1919] 1 Ch. 149, followed.) Appeal from the judgment of Mr. A. M. *Goulding*, S.M., dismissed. *Everton* v. *Everton*. (Wellington. August 5, 1948. Stanton, J.)

INCOME TAX.

Cases and Notes. *98 Law Journal*, 589.

Retiring Allowances to Employees. *22 Australian Law Journal*, 225.

INVITOR AND INVITEE.

The Invitor and his Independent Contractor. *98 Law Journal*, 586.

JUDICIAL CHANGES.

Mr. Justice Singleton and Mr. Justice Denning, both of the King's Bench Division, have been appointed Lords Justices of Appeal, and both have been sworn of the Privy Council.

JUSTICES OF THE PEACE.

Justices of the Peace Amendment Act, 1948 (October 29, 1948). This Act makes the following amendments: S. 187: s. 1A is added to apply Part II to all proceedings for the summary trial of indictable offences, with consequential amendments of ss. 188 and 238, and repealing ss. 189, 204, 239, 240, 249, 258, 259, and 378 (1), and the Third Schedule; and of s. 2 of the Police Offences Amendment Act, 1935. Section 58 is amended to provide for a summons to witness requiring him to bring documents and produce them at the hearing. Section 72 is amended to make provision for the amendment of informations; power is given to allow continuing bail on adjournment (in case of summary proceedings) or on remand (in case of indictable offence), with consequential amendment of ss. 87 and 149 and the form in the First Schedule. Where a defendant is granted bail, he may be required to report to the Police. Section 369 is amended to extend the powers of the Registrar of the Magistrates' Court as to taking recognizances and affidavits, and s. 301 to authorize the Registrar or Deputy-Registrar of the Supreme and Magistrates' Courts to take statutory declarations. Section 84 is amended by substituting a new subs. 1 authorizing the Justices to order parties to pay to a witness such sum as the Justices think fit as witness expenses, but not exceeding the amount prescribed in the regulations made under the Act.

JURISPRUDENCE.

Natural Justice. *98 Law Journal*, 548.

LANDLORD AND TENANT.

Covenants. *98 Law Journal*, 558, 570.

Land Sales and Price Control (Western Australia). *22 Australian Law Journal*, 207.

MINING.

Mining Act Amendment Act, 1948, containing various amendments of the Mining Act, 1926, to come into force on January 1, 1949, in particular, the fixing of royalty on mineral licenses by weight or quantity; restricting the right to renewal of mining licenses other than a business-site license or a residence-site license; providing that the consent of the Minister is required to the grant of a mining privilege over land affected by a coal-mining right; the hours of work underground not to exceed seven hours a day, and restricting the employment of youths underground; and prohibiting any miner under the age of twenty-one years and with at least two years' experience in underground mining from being put in charge of any place in a mine.

MOTOR-SPIRITS.

Motor-spirits Prices Regulations, 1942, Amendment No. 15 (Serial No. 1948/166), fixing new main-port prices for motor-pirits as from October 21, 1948.

NEGLIGENCE.

Liability for Accidents in Loading and Unloading on Wharves. *206 Law Times Jo.*, 123.

PATENTS.

Patents (London Accord) Regulations, 1948 (Serial No. 1948/164), prescribe the powers of the Registrar of Patents to revoke patents in which no person other than a German national had any interest on July 27, 1946, and provide for objections thereto.

PRACTICE.

Appeal: Death of Appellant and Continuance by Executors. *22 Australian Law Journal*, 227.

Equal Division in the High Court. *22 Australian Law Journal*, 205.

RENT RESTRICTION (BUSINESS PREMISES).

Suitable Alternative Accommodation — Jurisdiction — Tenant Occupying Ground-floor Premises—Upstairs Premises in same Building offered as Suitable Alternative Accommodation—Order for Possession subject to Landlord's carrying out Reasonable Alterations and Renovations to such Upstairs Premises required by Tenant—Date of Possession deferred until same carried out—Absolute not Conditional Order—Certiorari refused—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184), Reg. 21B (3). D. was the tenant of part of the ground floor of a building of the defendant company, which sought possession. The company was willing to make reasonable alterations to the upstairs portion of the same building, which it had offered to D. as alternative accommodation. On the hearing of a claim for possession of the ground floor premises, the Magistrate held that the upstairs premises constituted "suitable alternative accommodation" within the meaning of that term as used in Reg. 21B of the Economic Stabilization Emergency Regulations, 1942; but, as it was common ground that certain alterations and renovations to such alternative accommodation were necessary, the actual date for possession was to be deferred until they were made. On March 2, 1948, he made the following order: "Order made that possession be given on or before April 2, 1948, subject to any reasonable alterations and renovations to alternative accommodation required by tenant being carried out. Right reserved to either party to apply further to Court if they cannot agree as to what constitutes reasonable repairs, &c. Rent for alternative accommodation to be 15s. per week." On a motion for certiorari to quash that order, *Held*, 1. That the order was an absolute and not a conditional one, and the postponement of the date of possession until the alterations and renovations were made was within the Magistrate's power. 2. That the Magistrate had jurisdiction to determine whether the company had discharged the onus upon it to establish that the upstairs premises constituted suitable alternative accommodation for the tenant, and his decision was not examinable by the Supreme Court. (*New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, applied.) *Douglas* v. *New Zealand Express Co. (Auckland), Ltd.* (Auckland. October 8, 1948. Stanton, J.)

RENT RESTRICTION (DWELLINGHOUSE).

Order for Possession made on Ground that Landlord reasonably required Premises for his own Use and Occupation—Evidence on which Magistrate entitled so to find—Order made without Sufficient Proof of Alleged Ground—Erroneous Decision in Exercise of Jurisdiction—Fair Rents Act, 1936, s. 13 (1) (d)—Finance Act, 1937, s. 63 (2). In an action claiming possession of a tenement following a formal notice to quit, the only ground upon which the landlord had claimed possession was that the premises were reasonably required for his own occupation as a dwellinghouse within s. 13 (1) (*d*) of the Fair Rents Act, 1936. The learned Magistrate made an order for possession, and, later, he dismissed an application for an order staying or suspending the execution of that order or postponing the date of possession specified therein. On motion by the tenant for a writ of prohibition restraining the Magistrate and the landlord from further proceeding or exercising jurisdiction in the action, or, alternatively, for a writ of certiorari, on the ground that there was no evidence on which the Magistrate could so determine the action, and that he therefore acted without jurisdiction, *Held*, That, even if a Magistrate makes an order for possession without sufficient proof of one of the grounds enumerated in s. 13 of the Fair Rents Act, 1936, his error is an erroneous decision in exercise of his jurisdiction and not an erroneous assumption of jurisdiction which he did not possess. (*Van de Water* v. *Bailey and Russell*, [1921] N.Z.L.R. 122 (approved in *Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, and in *Akel* v. *Clark*, [1940] N.Z.L.R. 147), followed.) *Scanlon* v. *Salmon*. (Wanganui. August 23, 1948. Sir Humphrey O'Leary, C.J.)

Premises originally let not a "dwellinghouse"—Notice determining Tenancy—Landlord gradually resuming Possession of Land surrounding House—Small Area retained by Tenant as Statutory Tenant—No Agreement as to Rent for Reduced Area—Fair Rent not fixed—No Tender or Payment of Reasonable Amount for Beneficial Occupation—Fixing of such Sum within Magistrate's Discretion in Action for Possession and Unpaid Rent—

Fair Rents Act, 1936, ss. 2, 13 (1) (a). In 1943, the appellant became the tenant of a property comprising a dwellinghouse, stable, and approximately 6½ acres of land. He and his family lived in the dwelling, and he used the land and stable for grazing, housing, and training the race-horses from which he derived his income, which was supplemented at times by the sale of produce grown on the property. The rental was £1 10s. a week. The respondent company, having purchased the property, subject to the tenancy, in December, 1945, gave the appellant one month's notice of the determination of his tenancy of the whole property. Thereafter the company gradually resumed possession of various portions of the land occupied by the appellant, and, by February, 1948, he retained only the dwellinghouse with a small area equal to a normal building-site. On this area, a small stable was erected which the appellant used in connection with his training of race-horses. From November, 1945, the appellant paid no rent or other consideration for his use of occupation of the property. There was no evidence of any agreement between the respondent and the appellant as to what amount was lawfully payable for rent and for use and occupation in respect of the reduced premises. In February, 1948, in an action for possession of the dwellinghouse, the learned Magistrate found that for over two years the appellant had remained in occupation of the dwellinghouse and had neither paid nor tendered any rent or other remuneration to the landlord; and he held that, in those circumstances, the appellant was not entitled to remain in possession even if the provisions of the Fair Rents Act, 1936, applied to the property. On appeal from that judgment, *Held*, 1. That, as originally let, the premises were not a "dwellinghouse" within the definition of s. 2 of the Fair Rents Act, 1936; but, in February, 1948, they had been reduced to a size which brought them within that definition, not withstanding the existence of the stable, and, on the expiry of the notice determining the tenancy, the appellant was a statutory tenant. (*Remon* v. *City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49, followed.) (*Dalzell* v. *Smith*, [1946] N.Z.L.R. 421, distinguished.) 2. That, notwithstanding there was no evidence of any agreement as to what amount was payable in respect of the reduced premises for rent or use and occupation, the word "rent" as used in s. 13 (1) (*a*) includes the payment which was proper and appropriate for the beneficial occupation. 3. That the fact that the tenant had not tendered what he considered a proper amount or had not applied to the Court to fix a fair rent left it open to the Magistrate, on the hearing of the action, to say what was a proper amount to be paid for rent and to treat the appellant as having been in default for not having paid it. (*Ritchie* v. *Hall*, (1903) 23 N.Z.L.R. 409, and *Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, referred to.) *Jones* v. *Korma Mills, Ltd.* (Auckland. October 8, 1948. Stanton, J.)

Recovery of Possession—Occupation in Exchange for Some Services to Owner—No Rent paid or agreed to be paid—Order for Possession—Magistrates' Courts Act, 1928, s. 183—Fair Rents Act, 1936, s. 2. An order for possession under s. 183 of the Magistrates' Courts Act, 1928, may be made in an action claiming possession when it is proved that there was no pecuniary rent paid for the tenement and no agreement to pay rent, as the Fair Rents Act, 1936, does not apply. (*Cranch* v. *Bryers*, [1938] N.Z.L.R. 469, and *Hornsby* v. *Maynard*, [1925] 1 K.B. 514, followed.) The tenants were allowed the use of a dwellinghouse, with the exception of one room reserved to the landlord, in return for providing the landlord with board and washing, gas, light, and firing. The landlord continued to pay rates and insurances; he had access to the other rooms, which were partly furnished by him and partly by the tenants; and he retained the right to keep fowls on the premises, and sold the eggs and certain of the produce from the garden. The landlord gave the tenants one month's notice to vacate the premises. In an action for possession of the premises, *Held*, That, although the landlord was entitled to some services from the tenants, they were not his servants, but were merely licensees. (*Luckens* v. *Gunn et Ux.*, (1944) 3 M.C.D. 371, applied.) (*Thompsons (Funeral Furnishers), Ltd.* v. *Phillips*, [1945] 2 All E.R. 49, and *Wairarapa South County* v. *Pye*, (1944) 4 M.C.D. 582, distinguished.) *Robotham* v. *Hickson*. (Masterton. October 14, 1948. Herd, S.M.)

ROAD TRAFFIC.

Traffic Regulations, 1936, Amendment No. 5 (Serial No. 1948/170), prohibiting parking in any part of a roadway within a parking zone in respect of which parking signs are maintained. Regulation 10 (3A) prohibits the operation of a motor-vehicle unless the steering-gear and associated mechanism is in a safe and efficient working condition.

TOKELAU ISLANDS.

Tokelau Islands Act, 1948, incorporating the Tokelau Islands as part of New Zealand, and making provision for their government, as from January 1, 1949.

TRADE.

Trades Certification Act, 1948, establishes the New Zealand Trades Certification Board to conduct trade examinations, &c., and defines its functions.

TRANSPORT LICENSING.

Gross Weight of Vehicle exceeding Maximum Gross Weight in Certificate of Fitness—Charge of Permitting Use of Vehicle exceeding such Weight—No Offence—Transport Licensing (Goods-service) Regulations, 1936 (Serial Nos. 1936/49, 1940/36), Regs. 10 (1), 16 (3). There is nothing in the Transport Licensing Act, 1931, or in any order or regulation, making it a specific offence to use a vehicle when its gross weight exceeds the amount specified in the certificate of fitness. Consequently, where the gross weight of a motor-vehicle is in excess of the gross weight permitted by the certificate of fitness, there is no breach of Regs. 10 and 16 (3) of the Transport Licensing (Goods-service) Regulations, 1936. *Quaere*, Whether a charge may lie under cl. 24 of the Transport (Goods) Order, 1936, for using the vehicle in connection with a goods-service, as the certificate of fitness may be valid, as such, only while the gross weight does not exceed the amount specified in the certificate. *Hunter* v. *W. Lovett, Ltd.* (Auckland. October 22, 1948. Luxford, S.M.)

TREATIES OF PEACE.

Treaties of Peace Regulations, 1948 (Serial No. 1948/162). These regulations provide for the payment and collection of debts owing by or to New Zealand nationals by the Governments or nationals of Italy, Roumania, Bulgaria, Hungary, and Finland without affecting the Treaty of Peace (Finland) Regulations, 1947 (Serial No. 1947/187).

WILL.

Direction to pay Debts of Creditors, Secured and Unsecured. *22 Australian Law Journal*, 221.

WORKERS' COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Contraction of Shoulder-muscles—Result of Slipping on Concrete Floor during Employment—Allergic Condition of Respiratory System alleged but not proved—Continuance of Full Compensation for Period of Physiotherapy Treatment—Workers' Compensation Act, 1922, s. 3. The plaintiff, who was seventy years of age, in the course of his employment slipped on the concrete floor of the hotel where he was employed and struck his left chest on a concrete buffer. He alleged fractured left ribs and a general set-back in health, the development of an allergic condition of his respiratory system, and a contraction of his left shoulder-muscles preventing the use of his left arm. *Held*, on the evidence, That the worker's shoulder injury arose directly from the accident; it was not cleared up, since a recurrence of his bronchial trouble encouraged the continuation and confirmation of the shoulder condition, and his condition was not in a large degree attributable to constitutional causes; but the alleged condition of his respiratory system had not developed as a result of the accident. (*Harwood* v. *Wyken Colliery Co.*, [1913] 2 K.B. 158; 6 B.W.C.C. 225, applied.) Judgment was given on the basis of full compensation up to the maximum of three months from the date of judgment if and so long as the worker regularly undertakes physiotherapy treatment within and during that period, and, thereafter, weekly payments based on 30 per cent. of total loss of left arm. *English* v. *Birchall*. (Comp. Ct. Wellington. September 20, 1948. Stilwell, D. J.)

Suburban Work—Employer authorizing Worker to use his own Means of Transport to go to and from his Work—Accident to Worker while so travelling—Accident "deemed to arise out of and in the course of the employment"—Workers' Compensation Amendment Act, 1943, s. 7. An employer, by instructing a worker to use the worker's own bicycle to go to and from his work, authorizes its use as a means of transport, with the result that an accident caused to the worker while so travelling is "deemed to arise out of and in the course of the employment," by virtue of s. 7 of the Workers' Compensation Amendment Act, 1943. *So held* by the Court of Appeal on case stated by the Judge of the Compensation Court following his decision in *Hassett* v. *Bridgeman*, *Ante*, p. 205. *Hassett* v. *Bridgeman (No. 2)*. (C.A. Wellington. October 15, 1948. Sir Humphrey O'Leary, C.J., Kennedy, Finlay, Gresson, JJ.)

THE MAINTENANCE OF CONSTITUTIONAL PRINCIPLES.

A Recent English Example.

Our attention has been drawn by a member of the profession to a Press Association cable which appeared recently in the local newspapers relative to the judicial inquiry which the Prime Minister, Mr. Attlee, had announced for the investigation of alleged irregularities in the Board of Trade. The cable contained this paragraph :

> It has now been decided that the inquiry will take place in public, and the names of two Judges of the High Court—Mr. Justice Birkett and Lord Justice Tucker—are mentioned as probable Presidents of the Court. The Attorney-General, Sir Hartley Shawcross, will present the evidence and examine the witnesses.

The foregoing, it was suggested, was at variance with the statement made by the Rt. Hon. Sir Michael Myers to the Wadestown Men's Club, regarding the "Mountpark" case, as reported on p. 253, *ante*, in relation to Ministerial or Executive appointment of Judges on special inquiries.

That is not so. On the contrary, the cable quoted completely confirms his plea for the preservation of constitutional principles in New Zealand, and his conclusion as to the manner in which, the "Mountpark" case should have been dealt with.

The practice in England under the Tribunals of Inquiry (Evidence) Act, 1921 (*8 Halsbury's Complete Statutes of England*, 256), in regard to a special inquiry into a definite matter is that both Houses of Parliament pass a resolution describing such a matter as of urgent public importance, and a tribunal is then appointed by His Majesty or a Secretary of State. Such a resolution, by virtue of the Act quoted, has itself the practical effect of an Act of Parliament, and, since the above cablegram was published, a further cablegram has reported that the necessary resolution has already been passed by the House of Commons.

It will be remembered that, in the address to which we have referred, Sir Michael Myers said, at p. 254 :

> Constitutional principles were involved, and the matter was one for Parliament itself, not for a single Minister or even the Executive. Had that been done and an Act passed, a Judge would, of course, have been bound to act upon it, but Parliament would have itself taken the responsibility, and the Judges would have been immune from any possibility of adverse comment. The case would then have come before the Court as an ordinary action under the ordinary rules of the Court in the ordinary course of the business of the Court.

That is, in effect, what has been done in England. They do things better there, and with due regard to constitutional principles.

CONTRIBUTORY NEGLIGENCE.

Considerations for the Jury.

Recently in New Plymouth there was heard one of the first actions to come before a jury for assessment of damages under the Contributory Negligence Act, 1947. The following is a portion of Mr. Justice Hutchison's direction and summing-up which deals with the jury's duty in assessing damages in such circumstances. His Honour said :

"After dealing with the collision itself, certain questions will be put to you. The first one is : 'Do you find for the plaintiff or for the defendant ?' As I have said, if you find that the effective cause of the collision was the negligence of the plaintiff only, then you will find for the defendant. If you find that the effective cause of the collision was the negligence of the defendant only, then you will find for the plaintiff. If you find that the effective cause of the collision was the negligence of both the plaintiff and the defendant, you will likewise find for the plaintiff, but subject to a proportionate reduction of damages, as I shall explain to you.

"In 1947, there was passed a new Act called the Contributory Negligence Act, 1947. Before that, if the plaintiff and the defendant in a case were both guilty of negligence which effectively contributed to the collision, then the plaintiff was not entitled to recover, because of the doctrine that there then was, the doctrine of contributory negligence. The law declared that, where there was contributory negligence, then the loss lay where it fell. But in 1947 this new Act was passed, under which, with any accident that occurred after August 14, 1947—and this accident occurred on September 6, 1947—the damage that was sustained where both parties by negligence have contributed to it is to be assessed by the jury, and a proportion allowed to the plaintiff according to the respective shares of the parties in the responsibility for the accident.

"If there is one party only whose negligence was the real cause of the accident, then the law remains as it was before, but, as I have explained to you, if the negligence of both parties contributed to the accident, then damages are to be proportioned in the way that I have said. There will, therefore, be a question put to you, and this is the second question, asking you, in the event of your finding for the plaintiff, to fix the total damages that the plaintiff is to recover if he has not been effectively at fault, or that would have been recoverable by him if he had not been effectively at fault. That is put in the alternative, but the answer would be the same either way, and there is only one answer required to it.

"Then you will be asked the third question : if you find that both parties contributed to the collision, by what amount the damages so fixed are to be reduced on that account, having regard to the plaintiff's share in the responsibility for the collision. If you find for the defendant, you are not concerned at all with the questions dealing with damages. If you find for the plaintiff and you do not find that the plaintiff has been at fault, then you do not need to deal with the third question, though you have to deal with the second question. If you find that both plaintiff and defendant have been at fault, and that the negligence

of both has contributed effectively to the result, then you have to go on to deal with the third question.

" I would like to point out the responsibility which rests upon this jury in this, the first case of its kind to be dealt with by a jury in this district, and, indeed, one of the first cases of its kind in New Zealand. It is essential for a jury that understands and accepts its responsibility to fix the total damages that would be recoverable if the plaintiff were not at fault—that is Question 2—on a proper and considered basis, and then, if, in its view, both parties have been at fault, to reduce that amount in its answer to Question 3 in accordance with its findings as to the degree of fault of the plaintiff.

" You may say that it is to be reduced by a certain percentage or by a certain sum, but I really think the proper way to deal with that is to say it is to be reduced by a certain percentage.

" Suppose, for the sake of argument, that the accident was caused 25 per cent. by the plaintiff's negligence and 75 per cent. by the defendant's negligence, then you would say the amount of damages claimed was to be reduced by 25 per cent. Or, if it was the other way, 75 per cent. the plaintiff's negligence and 25 per cent. the defendant's negligence, then you would say that it is to be reduced by 75 per cent.; or, if you find that it was 50 per cent. the plaintiff's negligence and 50 per cent. the defendant's negligence, then you would say it is to be reduced by 50 per cent.

" All these, of course, are just examples. I am not suggesting anything to you. In that way only—that is, by fixing the total figure on a proper and considered basis and then reducing it accordingly as you find there is negligence on the plaintiff's part—in that way only can the Act work with the justice between the parties that was contemplated by Parliament, which enacted it."

His Honour went on to deal with the assessment of damages.

STATUTE OF FRAUDS, S. 4.

Considerations as to its Repeal.*

By Professor James Williams.

I have been asked to express any views I might have on the question of the repeal or amendment of s. 4 of the Statute of Frauds, s. 83 of the Judicature Act, 1908, and s. 6 of the Sale of Goods Act, 1908.

The like question for England was considered and reported on in 1937 by the Lord Chancellor's Law Revision Committee. That Committee's report (Cmd. 5449) was reprinted in [1937] W.N. 284. The Committee recommended the repeal of:

(*a*) So much as remained in England of s. 4 of the Statute of Frauds. (The clause in s. 4 relating to contracts dealing with land had been repealed, and re-enacted with some modifications by s. 40 of the Law of Property Act, 1925. This clause, therefore, the Committee remarked, was outside the Committee's terms of reference, and it made no recommendation with respect to it.)

(*b*) Section 3 of the Mercantile Law Amendment Act, 1856 (the original of s. 83 of our Judicature Act, 1908).

(*c*) Section 4 of the Sale of Goods Act, 1893 (to which our s. 6 of the Sale of Goods Act, 1908, corresponds).

A minority of the Committee recommended that writing should be retained for the contract of guarantee.

Opinions on the question of the repeal of these statutes or one or more of them are to be found in the following places: (*1885*) *1 Law Quarterly Review*, 1, (*1913*) *29 Law Quarterly Review*, 247, (*1927*) *43 Law Quarterly Review*, 1, *6 Holdsworth's History of English Law*, 379-397, *8 Holdsworth's History of English Law*, 48, and *Salmond and Winfield on Contracts*, 141-143 (Professor P. H. Winfield).

Arguments in favour of the repeal of the statutes are chiefly that:

(i) the deficiencies in the law which occasioned the enactment of ss. 4 and 17 of the Statute of Frauds (s. 17 was the original of s. 6 of our Sale of Goods Act) have long since disappeared;

(ii) in general, like cases should come under like law; and this principle is infringed by the statutes inasmuch as they impose special evidentiary requirements in respect of some six contracts which do not possess features requiring them to be differentiated in this respect from contracts in general (it is suggested that, if a man may effectively contract by word of mouth to sell shares of unlimited value, it is absurd that his contract to sell a nearly worthless piece of land should not be enforceable against him by action unless evidenced in a writing signed by him or on his behalf);

(iii) in many of the reported cases in which the statutes have been successfully pleaded there has been no doubt what were the terms of the contract; and the defendant, therefore, in invoking the relevant statute, escaped from a liability by which in justice he should have been bound.

At one time, influenced by arguments such as those that I have just mentioned, I considered that s. 4 of the Statute of Frauds should be repealed (*Statute of Frauds, Section 4*, 283); and I thought similarly in regard to s. 6 of the Sale of Goods Act.

My opinion has since changed, and I now think that the question is not to be resolved by considerations such as those I have mentioned. It is a commonplace that a rule of law introduced for one reason may be found in practice useful in other ways; so that the mere fact that the circumstances leading to the enactment of these statutes no longer obtain is not a conclusive reason for repealing them. Again, the argument

*Being a Report made at the request of the New Zealand Law Revision Committee, and supplied by the Committee for general information.

that all contracts should be treated alike in the matter of writing, and that therefore these statutes should be repealed to secure uniformity, is a merely formal argument: *elegantia juris* is only a sufficient reason for changing the law in the absence of any considerations of substance. And the argument that in some cases the statutes have facilitated fraud is not conclusive, for there is still the question in how many cases the statutes have prevented frauds.

It now seems to me that the question to be considered is not a merely formal one, but one of substance—*viz.*, in respect of each type of contract comprehended within these statutes, is justice more likely to be served by maintaining the present requirements, or by repealing or modifying them? This is a question to be considered not by *a priori* arguments of a theoretical sort but from experience in the circumstances at present prevailing in New Zealand. It is not sufficient to say that merely because one may effectively contract by word of mouth to sell £10,000 worth of shares, therefore there should be no requirement of form in the case of a guarantee or an agreement for the sale of land. Within recent times it has been found expedient to require the appointment of a land-agent to be in writing, signed by or on behalf of the person to be charged with the commission, before the land-agent may sue for or recover any commission: s. 30 of the Land Agents Act, 1921-22, re-enacting in somewhat different terms s. 13 of the Land Agents Act, 1912. Writing has also been required in the case of a contract between money-lender and borrower: s. 8 of the Money-lenders Amendment Act, 1933. I do not suppose that the wisdom of the requirement in either of these cases would be disputed.

Testing the matter in this way, my opinion on the question of repealing these statutes is as follows:

Section 4 of the Statute of Frauds.

(i) I can see no value in the clauses dealing with contracts in consideration of marriage and promises by executors. They should, I think, be repealed.

(ii) Nor, after careful thought, do I think the clause as to contracts not to be performed within the space of a year should be retained. The criterion is a curiously illogical one; the clause itself has been greatly cut down by decisions of extreme subtlety; and the interpretation of the clause even to-day is difficult and in some respects uncertain. It is to be observed that share-milking agreements were recently excluded from the operation of the clause: s. 7 of the Share-milking Agreements Act, 1937.

(iii) Writing should, I think, continue to be required for contracts of guarantee. I do not think that a man should be held liable for the debt of another unless it is clear beyond doubt that he undertook that liability; and the requirement of a signed writing as a condition of liability is, I think, reasonable. In this connection I would particularly refer to the observations of the minority of the Lord Chancellor's Law Revision Committee in their recommendation as to guarantees: [1937] W.N. 294. As to whether the existing provisions should be retained or some new and different provision enacted as the minority recommend, I think there is room for differing opinions. My own opinion is that the interpretation of the existing provisions is now thoroughly well settled, and, for this reason, and for reasons of substance, I think the present provisions as to guarantees should be retained.

(iv) It appears to be a very generally held opinion that a signed writing should continue to be required in contracts as to interests in land; and that is my own view. I think the present provisions should be retained.

Section 83 of the Judicature Act, 1908.

If the clause in s. 4 of the Statute of Frauds as to guarantees is retained, this section should be retained also.

Section 6 of the Sale of Goods Act, 1908.

I can see no substantial reason for retaining this section. There appears to me to be nothing in the contract of sale of goods which requires that it should be differentiated as at present from contracts in general. I think the section should be repealed.

OBITUARY.

Mr. David Hutchen (New Plymouth).

Mr. David Hutchen, the author of *Hutchen's Land Transfer Act*, died at New Plymouth on September 15. His retirement from practice, after sixty years in the profession, was recorded in this Journal in 1944 (Vol. 20, p. 82).

There was a large representation of members of the Bar, on behalf of whom Mr. W. Middleton, President of the Taranaki District Law Society, spoke. He apologized for the absence on circuit of Mr. W. H. Wooodward, S.M.

He traced Mr. Hutchen's career in the legal profession, in which he practiced for the extraordinarily long time of sixty-two years. In addition to his legal work, he found time to serve the community of Taranaki in some public body offices. He served his profession with distinction and became recognized as an expert in conveyancing. His book on the Land Transfer Act was the recognized text-book on that subject.

"Behind a brusqueness of manner," said Mr. Middleton, "there was a kind and genial disposition, and in his dealings with clients he invariably placed their interests before his own. In negotiations he was considerate, and always inclined to be helpful toward setttlements. He had a most retentive memory, and could cite his authorities often without reference to the law books."

Mr. Middleton said the Society appreciated the privilege of paying this tribute in the Court in which Mr. Hutchen had practised for so long, and he extended the sympathy of members of the profession to his widow and family.

"His name and work are known throughout New Zealand, and he was widely recognized as a sound lawyer of outstanding ability," said Mr. Justice Fair, in associating himself and the judiciary with the tribute paid by the Taranaki District Law Society to the memory of Mr. Hutchen. His Honour said he had met Mr. Hutchen on only a few occasions, but knew of the high regard in which he was held in the profession. His book had been in general use, and would continue to be, for many years, for the assistance of the profession and the benefit of the public.

"Here in New Plymouth," said His Honour, "he was well known for his work in the profession and for his service to the community. To the legal profession and the Bench he was known for his integrity and great ability. Among outstanding characteristics was his intellectual honesty in the seeking after truth and a determination to apply the principles, established throughout the centuries, that justice should be done and that no man should be denied justice."

Characteristics such as these, continued the learned Judge, were among the greatest contributions that anyone could make to the cause of justice. They confirmed that respect for the rule of law and its principles that were the valued possession of every civilized community. They confirmed public confidence in our method of government and strengthened the aversion that all British people had to the tyranny and oppression of dictatorship.

"To have contributed to a substantial degree to this means a successful life," said His Honour, "and David Hutchen goes to his long rest leaving behind him a memory of work well done and a life well lived."

His Honour associated himself with the expression of sympathy with Mr. Hutchen's family, and also, at his request, joined Mr. W. H. Woodward, S.M., with that expression.

SOVIET COMMUNISM TO-DAY.

Practising on A Collective Basis.

By JUDGE WILLIAM L. RANSOM, Editor-in-Chief,
American Bar Association Journal.

"Law in Bulgaria will henceforth be practised on a collective basis," was the announcement in *Free Bulgaria*. "This is the salient reform introduced in Bulgarian legal life by the new Law on Attorneys-at-Law, published in No. 257 of the November 5, 1947, issue of the *State Gazette*." The statement continues:

> The new law exhaustively regulates the conditions under which one shall be able to practise the legal profession. Following, on the whole, the pattern of the old law, it contains stipulations regarding the way in which one can become a lawyer, obligatory legal apprenticeship, the organization of the members of the Bar, lawyers' collectives, work, duties, and rights, their disciplinary and penal responsibility. Reforms have been introduced in all these phases of legal life, but the radical change is contained in Articles 30-38 of the law, regulating lawyers' collectives.
>
> These articles stipulate that a lawyer cannot exercise his profession if he is not a member of a lawyers' collective, except in places where the number of practising lawyers is less than six. Lawyers' collectives shall be freely formed. The number of lawyers forming a collective cannot be less than three at inhabited places with a total of less than ten practising lawyers, less than five at places with up to fifty lawyers, and less than ten where the total number of lawyers is more than fifty. In Sofia, the minimum of lawyers that will go to make a collective will be fifteen.
>
> The collective shall be a juridical person, which must be approved by the Lawyers' Council (Bar Association) and registered with the latter. The collective, however, shall not be subject to taxation; its members shall pay their taxes individually in accordance with their respective incomes.
>
> The Lawyers' Council may assign new members to a collective, or transfer lawyers from one collective to another when it finds important reasons therefor. The decision of the Lawyers' Council is subject to appeal before a committee composed of the President and Public Prosecutor of the Regional Court and two representatives of the Lawyers' Council elected by the latter.
>
> The collective shall be represented by its secretary or his deputy, who shall both be elected for one judicial year by the general meeting of the collective which shall notify their names to the Lawyers' Council.

THE COLLECTIVE DEALS WITH CLIENTS AND COLLECTS ALL FEES.

The individual lawyer is left with no contact with clients: the secretary of the collective handles all that. All fees for legal services are paid to the collective. The statement says:

> Only the secretary or his deputy shall contract with the clients. They shall endeavour to obtain an even distribution of the work among the members of the collective, taking into account their respective qualifications. When a client expressly points out a lawyer whom he wants to entrust with his work, he shall pay an additional remuneration in favor of the collective, determined under a separate table. The same rule applies to legal adviserships.
>
> All remunerations shall be paid to the collective's treasury. Every lawyer shall receive the sums which shall thus have been paid for the work done by him after deducting a certain amount to meet the common needs of the collective and another 20 per cent. to be distributed among all members of the collective. By unanimous decision of all members, the distribution of sums from the collective's treasury can be effected in a different manner; such a decision can be amended by a vote of three-quarters of the total number of members.
>
> The collective's general meeting shall vote its internal rules and regulations, which will be approved by the Lawyers' Council. It shall take decisions on all questions regarding the collective's activity. It shall be called together by the Secretary on the latter's own initiative or at the request of at least one-quarter of the members. The general meeting by argumented decision of the majority, shall admit new members to the collective. In case of refusal, the interested parties shall be able to appeal the decision before the Lawyers' Council within a period of two weeks. The Council's decision is final. The general meeting can, by decision of three-quarters of all members, expel members from the collective when they do not carry out conscientiously the work with which they have been charged, or disturb the life of the collective. The decisions of the general meeting can be appealed against before the Lawyers' Council which has the final say.

RIGID CONTROL AS TO WHO MAY BE LAWYERS.

Many classes of persons are proscribed from being members of the Bar at all, even in a collective. Plenary control is kept by Government: names may be struck from the list. The statement continues:

> Other important changes introduced by the new law pertain to the qualifications entitling a person to exercise the lawyer's profession. The list of reasons which disqualify a person from being a lawyer has been amplified. Thus, in addition to those cases in which a person was heretofore disqualified from exercising the profession of a lawyer, the following have been added: persons condemned for murder, under the Law on the People's Court, under the Law of the Defence of the People's Government, the Law on Supplies and Prices, as well as persons convicted to strict imprisonment, though they may have been exempted from punishment through pardon, a conditional sentence, rehabilitation, or prescription; persons who beside their lawyer's profession exercise personally or through third persons another profession which is their chief occupation, or which is incompatible with the profession of a lawyer; persons who have a bad reputation or a disgraceful name at the Courts, in the lawyers' college or in society, and persons manifesting Fascist tendencies.
>
> The law further stipulates that all persons who have acquired the right to practise the legal profession under the laws existing heretofore, except those sentenced under the various laws enumerated in the preceding paragraph, shall retain their rights.
>
> After the publication of the law, a Commission consisting of the President and the Public Prosecutor of the Regional Court in the central city of the region, or their deputies, a member of the same Court, two lawyers delegated by the Lawyers' Council, a member of the Regional FF Committee, and a representative of the respective county FF Committee shall make a pronouncement as to which lawyers registered with the Lawyers' Council before the publication of the new law possess the required qualifications and shall order all those who do not possess them to be struck out from the list of lawyers.
>
> A lawyer whose name has been deleted from the list of lawyers, can ask for new inscription after the expiration of a period of three years.
>
> The stipulations regarding lawyers' collectives shall come into force three months after the publication in the *State Gazette* of the order by which the Minister of Justice shall put them into effect.
>
> Within a period of one month after the publication of the order, those lawyers who have agreed to form a collective must file a collective petition to the Lawyers' Council for the confirmation and registration of the collective. During the same term lawyers who have failed to join a collective must file petitions to that effect.
>
> Every lawyer must present to the secretary of the collective a list of all contracts which he has concluded with his clients, indicating what sums are still due under them. These con-

* Condensed from *American Bar Association Journal*, March, 1948.

tracts remain effective, but all sums due under them shall be paid to the treasury of the collective.

For those who would read the most authoritative statement for American Communists as to what *they say* their programme and objectives are as to this country, the New York *Herald-Tribune* recently published a twelve-column statement by William Z. Foster, leader of the Communist Party. Foster stated that American Communists " uphold " the Constitution of the United States, but that :

> under present political conditions in this country the United States Constitution requires many vital democratic amendments, including . . . the abolition of the present conservative and paralyzing system of Government checks and balances, &c.

America appears to be momentarily at the crossroads as to what to do to combat Communists and Communism without sacrificing essential American principles. Doubt and concern are expressed by many as to how far legislation should go. There seems to be agreement on " exposure " and " publicity " as weapons, and on *public understanding* of what Communism means and would do to our country. At this stage of the discussion, a prime duty and opportunity of lawyers everywhere appears to be to " think on these things " and so to inform themselves that they can do their part in reasoned and demonstrative arguments against the totalitarian menace.

LAND SALES COURT.

Summary of Judgments.

No. 144.—L. TRUSTEES TO K.

Rural Land—Basic Value—Deductions—Deficiencies in Winter Feed and Pasture—Method of determining Value—Directions.

Appeal concerning the valuation of a farm property in South Otago, brought by the Crown to obtain a direction as to the application of the principles defined in *No. 123.—H. to H., Ante*, p. 25, to alleged deficiencies in winter feed and pasture.

The Court said : " It is first desirable to recapitulate the substance of what was said in *No. 123.—H. to H., Ante*, p. 25. A farmer is entitled to have the productive value of his land assessed by reference to the farming programme which is shown in evidence to be the most advantageous, when considered broadly and as a long-term policy, to him. The productive value may then have to be adjusted, however, to make it a fair value. A productive value will be fair to a purchaser only if the farm is handed over with an approved farming programme in actual operation, and with the pastures and growing crops necessary to enable it to be carried on by the purchaser without interruption, further capital expenditure, or loss of anticipated income. It is, therefore, fair, as between vendor and purchaser, that the vendor should be bound, either by the contract itself or by conditions imposed by the Court, to hand over the farm to the purchaser in full working order, or, in the alternative, to accept something less for it than its full productive value. In *No. 123.—H. to H., Ante*, p. 25, the contract related to a dairy-farm, possession of which was to be given in the early winter. On the admission of all parties, a substantial quantity of hay would be needed for the wintering of stock. The question before the Court was whether the provision of that hay was the responsibility of the vendor or of the purchaser. The provision of hay for use on the farm, but not for sale, was envisaged by the budget as part of the normal farming programme. The Court was of opinion that the vendor, who should have provided the hay for the ensuing winter in the normal course of his farming operations, ought to hand it over to the purchaser, just as he would hand over the pasture and growing crops, without extra charge. The Court's direction to the Land Sales Committee was that it should ascertain the quantity of hay which a prudent farmer would have in hand at the date of possession and impose a condition that a similar quantity of hay be left on the farm by the vendor, or, in the alternative, that the purchaser be suitably compensated by a reduction in the basic value.

" The appeal now before us arises from a claim by the Crown that £440 should be deducted from the productive value of the land, which was agreed on at £7,950, by reason of alleged deficiencies in winter feed and pasture. The facts of the case are complicated by a misunderstanding on the part of the Crown Valuer when preparing his budget as to whether a certain paddock had been sown down in grass, and by delays in the hearing which resulted in a postponement of the date of possession from late autumn to mid-winter. No good purpose would now be served by attempting to set out the facts in full and to apportion the weight to be given to various complicating factors. An agreement has been reached by the parties which the Court is prepared to confirm, and under which possession is to be deemed to have been given on June 23, 1948, and a deduction of £200 is to be made from the productive value.

" The Crown is desirous, however, that we should give further directions to assist it in dealing with cases where winter feed (other than hay) or pasture may be claimed to be deficient.

" It is clear in principle that what has been said as to the obligations of a vendor with regard to the provision of hay may properly be applied to the provision of other forms of winter feed or of pasture, or to the carrying on of any of the normal operations comprised in an approved farming programme. It is equally clear that the assessment in quantity or value of pasture or growing crops is likely to be more difficult than in the case of hay. It should be remembered, moreover, that a productive value need be adjusted only when some addition or reduction is necessary in order to make it a fair value, and there is no occasion for either valuers or Committees to contemplate the need to adjust a productive value unless the circumstances of the case are such as to raise the presumption that a failure to do so may lead to substantial injustice. We have frequently held that, in respect of buildings, there is no necessity to consider the question of excess or deficiency unless in quantity or in character the actual buildings differ substantially from the normal. In respect of winter feed or pasture, there will be many cases in which the risk of a deficiency may be so small as to be negligible. It is not intended to involve valuers or Committees in difficult and perhaps fruitless calculations concerning winter feed or pasture except where the matter is of sufficient magnitude to have a substantial bearing on the price which ought fairly to be paid. As with regard to hay in *No 123.—H. to H., Ante*, p. 25, the Court intends no more than that, where, on the evidence before it, a Committee is of opinion that special provision should be made to obviate the possibility of substantial injustice resulting from the failure of the vendor to provide adequate winter feed or pasture, it is proper for special provision to be made accordingly.

" In the case now under consideration, the Crown made an inspection of the property in February, when its valuer deemed the provision already made for winter feed and pasture to be sufficient. A second inspection was made some two months later and just before the hearing, when the valuer found that a turnip crop had failed and that the pasture was not entirely satisfactory. The Crown in particular seeks directions as to (*a*) at what time the sufficiency of crops and pasture should be determined, and (*b*) what weight should be given to a deterioration of crops and pasture such as occurred between the two valuations. The difficulties inherent in these questions may be resolved if it is remembered that it is with the contractual obligations of the parties that the Court is primarily concerned. The application before the Court is an application for consent to a contract. The purpose of inspections is to ascertain whether the terms of the contract may properly be given approval, having regard to the provisions of the Land Sales Act. The parties to an application are entitled to have it disposed of and a basic value fixed with the least possible delay. Inspections for the purpose of valuation should, therefore, be made promptly There is no occasion to postpone a hearing so as to see how a crop may develop, nor, in general, to vary the basic value by reason of changes in the state of crops or of pasture subsequent to the execution of the contract. The short answers to the questions posed by the Crown are, therefore : (*a*) the sufficiency

of crops and pasture, having regard to the terms of the contract and the farming programme envisaged in the budget, should be determined as soon as possible after the filing of an application; (*b*) as a general rule there should be no occasion for two inspections separated by a substantial period of time, so that the problem presented by a deterioration in crops and pasture ought not to arise.

"It is fair to recognize, however, that the application of these answers to individual cases may have to be varied according to circumstances. Notwithstanding that, in principle, applications should be disposed of promptly, and more than one inspection should not be necessary, it must be acknowledged that delays may be unavoidable, and that in some cases it may be desirable for valuers, in the interests of accuracy, to inspect a property more than once. Whether this should be done must generally be left to the discretion of the valuer concerned. It should not be necessary merely for the purpose of viewing the growth of crops or pasture.

"The real problem which arises in appropriate cases with regard to pasture and winter feed is whether or not special conditions should be imposed by the Court to make good a lack of express provision as to these matters in the contract itself. In practice, a valuer should determine whether, in view of the farming programme envisaged by his budget and the date when possession is to be given, it is reasonable to ask the vendor to make any special provision as to winter feed or pasture. If his opinion is in the negative, the matter calls for no further consideration. If, on the other hand, he considers that, in fairness to the purchaser, it should be made incumbent upon the vendor to take certain steps so as to ensure the provision of adequate winter feed, he must then ascertain whether the contract already binds the vendor to take such steps. If the contract so provides, and is otherwise in order, it may properly be approved, and the responsibility of enforcing the contract then passes to the purchaser. It is only if the contract fails to make such provision that the Committee is further concerned in the matter. Supposing that the contract is silent, the valuer still has to consider two alternatives. He may recommend the Committee to impose a special condition with regard to the provision of winter feed. He may have found on his inspection, however, that the vendor has already taken all the steps to provide winter feed and done all he could reasonably have been asked to do in the matter. It is in deciding whether such is the case that the actual condition of the crops and pasture on inspection becomes of importance. It must be considered as a factor in determining whether or not any condition relating to crops or pasture need be made by the Committee to supplement the terms of the contract itself.

"In the case now under consideration, the contract was silent as to winter feed. The Crown Valuer, on inspecting the property in February, was in a position to judge whether, by putting in a turnip crop and laying down certain pasture, the vendor had discharged his reasonable obligations in this regard. It was, therefore, competent for the Valuer to say, in effect: 'The vendor has done all he can reasonably be called on to do in the matter of supplying winter feed and laying down pasture, so there is no necessity for imposing any conditions upon him.' That was, indeed, what the Valuer decided, and the Committee might properly have dealt with the application on that basis following his first inspection.

"It will be construed from what has been said that, in our opinion, the obligations of the vendor should be determined by reference to what he might reasonably have been asked to undertake by the terms of the contract itself at the time when it was entered into. A Committee should not seek to impose on a vendor obligations more onerous than it would have been reasonable for him to undertake at the time of execution of the contract. Thus, while it would have been reasonable for the contract to provide for a crop of turnips to be sown in due course and tended up to the date of possession, it would be unusual for the contract to provide, and the Committee should not by imposing a condition seek to provide, for the vendor to be responsible for the success of the crop. The vendor having been shown by inspection to have sown a suitable area in turnips, the Committee and the Crown Valuer were not concerned as to any subsequent failure of the crop, the results of which, in the normal course of events, must be borne by the purchaser. The position with regard to pasture would have been the same had the valuer ascertained, as he should have been able to do on his first inspection, whether or not the vendors had carried out the reasonable requirements of the farming programme. The true position is that the valuer made a mistake on his first inspection, and discovered the true position only on re-inspection of the property. He was entitled, on that account, to amend his valuation, but that course should not have been necessary.

"The application of the principles illustrated by *No. 123.—H. to H., Ante*, p. 25, and the present case cannot be reduced to a simple procedure or formula, and must be varied to meet the requirements of the individual case. The Land Sales Act is not intended to alter the ordinary incidence of farming risks as between vendor or purchaser, nor necessarily to protect a purchaser in minor matters as to which it is still competent for him to protect himself in the terms of his contract. There are, however, cases where the provision of winter feed is so substantial a factor in the farming economy that a failure by a vendor to make due provision for the same would inevitably involve the purchaser in such serious additional expenditure or financial loss as to nullify the efforts of the Court to stabilize farm values. In other cases, as was the case in *No. 123.—H. to H., Ante*, p. 25, the contract itself may purport to alter the incidence of responsibility for the provision of winter feed in a manner contrary to the principles which the Court has laid down. It is in such cases that we are of opinion that, in order to fix a fair value for the property, the Court must see that proper provision on these matters is made either in the contract or by conditions attached to the Court's consent.

"In the present case, the order made by the Committee will be varied by consent in the following manner:

(i) The basic value fixed by the Committee shall be reduced by £200.

(ii) Possession shall be deemed to have been given under the contract on June 23, 1948.

(ii) Interest at 4 per cent. per annum shall be paid by the purchaser on the unpaid purchase-money from the date of possession to the date of settlement."

No. 145.—B. to H. Electric-power Board.

Rural Land—Land near Township—Public Body as Purchaser—Potential Value—Special Value—Land taken under Public Works Act not subject to Court's Consent—Position under Ordinary Purchase.

Appeal by the Crown against the grant of consent to a sale of a section at Paraparaumu to the H. Electric-power Board for £300. The Wellington Rural Land Sales Committe intimated in its decision that it accepted the Crown Valuer's assessment of the value of the section for ordinary residential purposes at £180, but allowed an additional sum of £120 as "a special value to the purchaser." No evidence of value save that of the Crown Valuer was called either before the Committee or before the Land Sales Court. The purchasing Power Board, however, called evidence showing that the section was particularly suitable for its purposes by reason of its situation in close proximity to its trunk power-lines and to the township of Paraparaumu, and that it was the only section available for purchase and having these characteristics which it had been able to find after lengthy and extensive inquiries.

The Court said: "In argument before the Court, Mr. *Tripe*, for the respondent purchaser, claimed that the evidence submitted by the Power Board established a potential value justifying the Committee in allowing an additional £120 above the normal value of the land, in accordance with the principles enunciated in reported decisions of this Court and in the English decisions referred to therein. Mr. *Beveridge*, for the Crown, contended that the circumstances failed to establish potential value, and established no more than a particular desire or necessity on the part of the purchaser to secure this section, or a section with similar advantages in the vicinity.

"It is first desirable that we should make clear that we are unable to accept the contention of Mr. *Tripe* that the evidence establishes that this particular section is the only one suitable for the Power Board's purposes, or that that fact, if it be a fact, was generally known, or was known to the vendor. It is clear that the section is eminently suited to the Power Board's requirements, and that it is the only suitable section which the Board has been able to find and which is immediately available for sale. There is no evidence, however, to suggest that there are not many other sections in the vicinity of Paraparaumu which would be suitable for the Board's purposes if they happened to be upon the market. It follows that any argument based upon the contention that the Board was a potential purchaser for this particular section, and this section alone, must fail.

"It must also be assumed for the purposes of this appeal that, unless some potential or special value can be established, the value of this section for the purposes of the Land Sales Act is £180, and no more. That is the only evidence of value before the Court, and, according to the Committee's report, the Crown Valuer's evidence was not contested.

"In *No. 97.—L. to N.Z.S.C., Ltd.*, (1947) 23 N.Z.L.J. 51, *No. 101.—S. to A. Brothers, Ltd.*, (1947) 23 N.Z.L.J. 153, and *No. 106.—M. to D.*, (1947) 23 N.Z.L.J. 225, the Court has attempted to point out that, in its opinion, added value attributable to a potentiality pertaining to land is not to be measured by an assessment of so-called 'special value' to the purchaser, nor by what a particular purchaser may be willing to pay, or find it profitable to pay, for the land, save to the extent that such circumstances add actual value to the land in the sense that they increase the amount which the owner of the land might reasonably have expected to realize upon a sale of his land in the open market. The Court has accordingly ruled that the personal desires, needs, and circumstances of a purchaser, unless they may fairly be deemed to affect the land under consideration, must be disregarded.

"In the present case, the evidence establishes that the purchasing Board is particularly desirous of securing a section in or close to the township of Paraparaumu, and that the section in question admirably suits its purposes. It is clear that, in order to secure a suitable section, the Board is prepared to pay more than the basic value of the land under the Land Sales Act. It may well be, indeed, that the Board's need of a suitable section is such as would justify it, if it could legally do so, in paying more than the basic value. In this respect, however, we are unable to see that the Board is in any different position from a business concern whose needs are such that it would readily pay more than the basic value under the Land Sales Act for a piece of land it desired to acquire, or from a private individual who, from the urgent necessity of securing a home, would readily pay more than the Land Sales value if he were permitted to do so. The Land Sales Act makes no provision for an increase in the basic value by reason only of the needs or requirements of a purchaser, save in the limited class of case where, in accordance with the authorities, a potential value can be established for the land itself.

"In the present case, we think it is clear that there are numbers of sections in the vicinity of Paraparaumu, and having a basic value for the purposes of the Land Sales Act of £180 or thereabouts, which would meet the requirements of the purchasing Board. The Board's contention, in effect, is that, because it finds one only of these sections available for sale, and decides to buy it, the basic value of that section is thereby raised to £300. We are unable to accept this contention or to agree that the case is covered by the existing authorities on the subject of potential value. On the other hand, the present case seems clearly to be one in which the vendor having sections for sale, and knowing full well that he is not entitled under the Land Sales Act to more than £180 for his sections, increases his price to £200 when he finds that the Power Board is a potential buyer, and for the sole purpose of securing from a public body a greater price than he could lawfully secure from any other purchaser. It may well be that, on a free market, such increases in price when public bodies are seeking to buy land are by no means uncommon, but it is precisely to protect public bodies from such increases that the Public Works Act provides that a public body may take land compulsorily at its fair value. In argument before us and before the Committee, it was contended that, if the Power Board took this land under the Public Works Act, the total cost to the Board would be in excess of £300, and that, accordingly, in the public interest, the present sale at £300 should be approved. We are unable to accept this contention. There is no evidence before us from which we are entitled to draw the conclusion that it would cost the Board £300 to acquire the land under the Public Works Act, and we have already expressed the view in an unreported decision referred to in *No. 121.—C. to Dunedin City Corporation*, (1947) 23 N.Z.L.J. 321, that it is outside the functions of this Court to consider the respective advantages to a local body of purchasing land by private contract or taking it under the Public Works Act, and that a Committee should, therefore, refuse to embark upon an inquiry as to the probable cost of taking land under the Public Works Act, and should refuse to take such a matter into account in fixing the basic value of land under the Land Sales Act.

"Notwithstanding the foregoing, however, the Court held in *No. 121.—C. to Dunedin City Corporation*, (1947) 23 N.Z.L.J. 321, that, where a contract between the parties made it clear that the public body desired, and, if necessary, intended, to acquire the land compulsorily, and had agreed with the vendor, first, as to the price of the land, and, secondly, as to a proper amount to be paid in satisfaction and compromise of a proper claim for compensation for disturbance, such a contract for sale might properly be approved by the Land Sales Court.

"It follows, therefore, that, in our opinion, a public body desirous of acquiring land may adopt any of the following alternatives: (i) It may purchase under an ordinary contract of sale, in which case the Land Sales Court will fix the basic value in the ordinary way, but can make no allowance on account of the special needs of the purchaser or on account of disturbance or compensation to the vendor. (ii) It may purchase under a contract which clearly expresses the amount to be paid for the land and an additional amount to be paid for compensation, and the Court, if satisfied as to the basic value, and as to the compensation being reasonable, may consent to the transaction. (iii) It may take the land under the Public Works Act, in which case the Land Sales Court is not concerned with the transaction.

"It appears perfectly clear to us that the contract which is now under consideration falls in the first of the three classes above mentioned. It is an ordinary contract of sale. There is no suggestion that the vendor is entitled to compensation, or that the purchasing Board intends to pay compensation, in addition to the basic value of the land, and the matter must accordingly be treated for the purposes of the Land Sales Act as an ordinary sale. Nothing appearing in the evidence or in the carefully prepared argument of Mr. *Tripe* convinces us that any potential value attaches to this land, or that, for the purposes of the Land Sales Act, it has any greater value than its normal basic value of £180 as assessed by the Committee. The sum of £120 added by the Committee for 'special value to the purchaser' must, accordingly, be disallowed, and, if the vendor is unwilling to sell at the basic value, the obvious and proper course for the Power Board to pursue, if it deems it necessary to acquire the vendor's land, is to take it under the Public Works Act.

"The appeal will accordingly be allowed, and consent will be granted to the transaction subject to a reduction in the price to £180.

No. 146.—L. TRUSTEES TO McC.

Urban Land—Old Dwelling—Demolition Value—Allowance for Purchaser's Profit—Value of Materials after Demolition assessable on Present-day Prices.

Appeal relating to the sale of an old building and section of land at Port Nelson for £1,210. The questions in issue related to the value of the land and that of the building respectively.

The Court said: "As to the land, the vendors' valuer assessed a value of £12 per foot as against £9 per foot by the Crown which was adopted by the Committee. We are of opinion that the value of £9 per foot is in line with comparable sales, and must, accordingly, be accepted as the value of the land.

"The building is some seventy years old, and in a dilapidated state. The weight of evidence is that it could be repaired and rendered habitable. The evidence on this aspect of the matter, however, is inconclusive both as to the cost of necessary renovations and as to the value of the building when renovated, and we are accordingly given little help by this evidence in regard to the present value of the building. The Crown witnesses contend that the renovation and repair of the building would not be economic, and that, accordingly, it has no more than a demolition value. As to the extent of its demolition value, there is considerable divergence of opinion. The Crown originally claimed the demolition value should be no more than £50, but, on appeal, admitted that it might be £100, and that, in any case, it was largely a matter of opinion. Witnesses for the vendors claimed that the fittings and materials in the building ought to realize between £300 and £400, and that, after deduction of expenses, there should be a net return after demolition of not less than £250. We are satisfied, however, that in these calculations the vendors' witnesses made no allowance for a profit on the part of the person undertaking demolition.

"For the purpose of the present assessment, there is no evidence on which we can satisfactorily assess the value of the building on the basis of its being repaired and renovated, and, in any case, we ave grave doubts as to whether that course would be justified. We therefore conclude that our only safe method of assessing its value is on the assumption that it will be demolished. Where buildings are sold to a purchaser as they stand, but are fit only for demolition, we are of opinion that the true test of their value is not the net amount which is likely to be realized on demolition, but the amount which a vendor might reasonably expect to receive for the buildings if sold for removal or demolition purposes. In other words, an allowance must be made, not only for the costs associated with demolition, but for a reasonable profit to the person undertaking the work. In the present case, the vendors, in assessing the net return after demolition at £250,

have made no allowance for such profit. On the other hand, the Crown in assessing the demolition value at £100, has assumed that that is the amount likely to be secured on a sale of the building by tender. After an inspection of the building, we are of opinion that the Crown's estimate is somewhat too low, and that a proper assessment of the value of the building may be obtained by reducing the vendors' estimate of £250 by a sum sufficient to cover the purchaser's reasonable profit upon the undertaking of demolition. A purchaser taking the risk of turning such a dilapidated building into money is entitled, in our opinion, to a fairly high rate of profit, and, without attempting to fix that profit precisely, we are of opinion that the deduction or profit from the vendors' figure of £250 would properly reduce that figure to something below £200. In view, however, of the fact that a purchaser may find it possible to make use of the building in its present state, or to turn it to advantage by repairs and renovations, we think that we should assess the value of the building at £100 in excess of the amount allowed by the Committee, or at a total of £216.

"The Crown asked us to give a ruling as to whether the value of materials in a building to be demolished should be assessed as at prices ruling in 1942 or as at the present date. While it is true that the value of a building as such must be assessed as at December, 1942, it is equally true that, in the case of a building fit only for demolition, the materials comprised therein will in due course be realized at present-day prices. We are accordingly of opinion that, in order to assess a value which is fair to all parties, any computation based upon the value of materials after demolition must be based on current prices. The true test of value of a building sold *in situ*, however, is not the net value of the materials comprised therein, but, as has been stated above, the amount which a purchaser intending to demolish the building would pay for it as it stands. As against the advantage of current prices for the resulting materials, therefore, there must be offset all costs of demolition and a reasonable profit on the undertaking. It is also, perhaps, desirable to point out that this method of assessing the value of buildings may properly be applied only where the evidence shows that demolition is prudent and advisable, and where it is reasonable to conclude that the premises are being bought and sold for that purpose.

"The vendors' appeal is accordingly allowed to the extent that the price at which consent will be granted is increased from £850 to £950. In all other respects, the appeals are dismissed."

CORRRESPONDENCE.

Citation of Cases in Court.

The Editor,
NEW ZEALAND LAW JOURNAL.

Sir,

At the risk of seeming to be pedantic or conservative, I raise a protest against a practice that seems to be gaining ground of citing in Court cases reprinted in such reproductions as the English Reports or (less frequently) the Revised Reports by a reference to those reports only, and without reference to the report or reports where the case originally appeared. I know well that such reprints are often handy and convenient when the older and original reports are not always available, but it is my submission that counsel using such a case should cite it from the original report where such is available, and in every case should give that as its reference, supplemented if necessary by a reference to the reprint if the original is not likely to be readily accessible to the Judge.

I draw attention to this now lest a continuance of this practice may one day draw a rebuke from the Bench.

Yours, &c.,
R. J. LOUGHNAN.

[We agree with our correspondent; but we draw his attention to the fact that it is the invariable practice in the *New Zealand Law Reports* to give the references to both reports, and, in addition, parallel citations of the corresponding pages in them. The manner of reference in Court to all reports, including the old reports, appears in (1945) 21 NEW ZEALAND LAW JOURNAL, 174, in an article prepared and published at the request of the New Zealand Council of Law Reporting.—ED.]

Indian Appeals to the Privy Council.

The Government of India Act, 1935, gave power to the Indian Federal Legislature to limit appeals from the High Courts of India to the Privy Council. And the Indian Independence Act, 1947, empowers the two Dominions of India and Pakistan to enact legislation limiting or abolishing completely the right of appeal from Indian Courts to His Majesty in Council. The Dominion of India has already exercised that right in part. By the Federal Court (Enlargement of Jurisdiction) Act, 1948, an appeal to the Federal Court from the High Courts in India may be brought without leave, when an appeal from a civil judgment could have been brought to His Majesty in Council without leave; and with special leave of the Federal Court in any other case. No direct appeal to His Majesty in Council either with or without special leave lies from any such judgment. The right of appeal from the judgment of the Federal Court remains, however, unimpaired in civil cases. That right exists from any judgment of the Court given in the exercise of its original jurisdiction in disputes which concern the interpretation of the Government of India Act or an Order in Council made thereunder; and, also, in any other case, by leave of the Federal Court or of His Majesty in Council. The right of appeal from the High Courts in Pakistan is not affected by the legislation of the Indian Legislature. A new Federal Court has been set up for Pakistan by an Order under the Indian Independence Act. And the right of appeal from that new Federal Court is governed by the provisions of the Government of India Act, 1935, concerning the Federal Court of India. The total effect therefore is that civil appeals may still go to the Privy Council, either from the Federal Court of India by special leave, or from the Federal Court of Pakistan by special leave, and from the High Courts in Pakistan in accordance with the old provisions.

That Agony is our Triumph.

If it had not been for these things, I might have lived out my life, talking at street corners to scorning men. I might have died, unmarked, unknown, a failure. Now we are not a failure. This is our career and our triumph. Never in our full life can we hope to do such work for tolerance, for justice, for man's understanding of man, as now we do by an accident. Our words—our lives—our pains—nothing! The taking of our lives—lives of a good shoemaker and a poor fish-peddler—all! That last moment belongs to us—that agony is our triumph.—Bartolomeo Vanzetti to Judge Webster Thayer at the Sacco-Vanzetti trial.

Precedents.

It is a maxim among these lawyers that whatever has been done legally before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the Judges never fail of directing accordingly.—Jonathan Swift: *Gulliver's Travels*, Part IV, Chap. V, "A Voyage to the Country of the Hounyhnhms."

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A Meeting of the Council of the New Zealand Law Society was held on September 24, 1948.

The following Societies were represented: Auckland, Messrs. F. J. Cox (Proxy), V. N. Hubble, J. B. Johnston, and L. P. Leary; Canterbury, Messrs. L. J. Hensley and W. R. Lascelles; Gisborne, Mr. G. J. Jeune; Hamilton, Mr. D. J. Lundon (Proxy); Hawke's Bay, Mr. A. E. Lawry; Marlborough, Mr. A. M. Gascoigne; Nelson, Mr. K. E. Knapp; Otago, Messrs. J. B. Deaker and C. B. Barrowclough, Southland, Mr. J. H. B. Scholefield; Taranaki, Mr. H. S. T. Weston, Wanganui, Mr. R. S. Withers; and Wellington, Messrs, P. B. Cooke, K.C., J. R. E. Bennett, W. E. Leicester, and G. C. Phillips.

The President, Mr. P. B. Cooke, K.C., occupied the Chair. Mr. A. T. Young (Treasurer) was also present. An apology for absence was received from Mr. E. F. Clayton Greene.

The following were among the matters considered at the meeting.

Mr. Justice Stanton.—The following resolution was carried:

The Council of the New Zealand Law Society respectfully tenders to the Honourable Mr. Justice Stanton its congratulations on his appointment to the Supreme Court Bench and trusts that he will have a long and happy period of judicial service.

Mr. Justice Hutchison.—The following resolution was carried:

The Council of the New Zealand Law Society respectfully tenders to the Honourable Mr. Justice Hutchison its congratulations on his appointment to the Supreme Court Bench and trusts that he will have a long and happy period of judicial service.

The Council desires also to express to him its deep gratitude for the invaluable service that he, as a member of the Disciplinary Committee, has rendered to the profession for the last ten years.

Disciplinary Committee.—The resignation of Mr. Justice Hutchison on his appointment to the Supreme Court Bench was received, and Mr. L. D. Cotterill was appointed to fill the vacancy.

New Zealand Council of Law Reporting: The late Mr M. J. Gresson.—The following resolution was passed, members standing in silence as a mark of respect:

The Council of the New Zealand Law Society desires to place on record its appreciation of the great service that Mr. M. J. Gresson gave to the profession as a member of the Council of Law Reporting since its incorporation in 1938. The Council has learnt with deep regret of his death, and respectfully tenders to his family its sincere sympathy.

Mr. L. J. Hensley was appointed a member of the New Zealand Council of Law Reporting to fill the vacancy caused by the resignation of Mr. M. J. Gresson, and to hold office as his successor for the residue of the term for which Mr. Gresson was appointed.

Council of Legal Education.—Mr. J. W. Rutherfurd wrote as follows:

Owing to ill health I have found it necessary to resign from the Council of Legal Education to which body I was nominated by your Society. I am taking this early opportunity of notifying you as there is a very limited period in which your Society has the right to nominate my successor.

Would you please express to the Council firstly my regrets that I am unable to carry on for the term for which I was nominated, and secondly, my appreciation of this compliment which the Society paid me in nominating me.

I trust that your Society will be successful in its efforts to maintain at least a share in the control of the standard required for entrance to the Profession.

The following resolution was passed:

The Council of the New Zealand Law Society has learnt with much regret of the resignation of Mr. J. W. Rutherfurd as a member of the Council of Legal Education and desires to express to him its deep gratitude for the great service that he, as a member of that Council, has rendered to the Profession. The Council expresses its sympathy with him in his illness and sends him its best wishes for his speedy recovery.

On the motion of the Chairman, the following resolution was carried:

The Council of the New Zealand Law Society respectfully recommends to His Excellency the Governor-General that Mr. William Perry Shorland of Wellington, Barrister and Solicitor, be appointed a member of the Council of Legal Education, to fill the vacancy caused by the resignation of Mr. James Willoughby Rutherfurd and to hold office for the residue of the term for which Mr. James Willoughby Rutherfurd was appointed.

Legal Education: Special March Examinations.—The following letter was received from the Registrar of the University of New Zealand:

Further to our telephone conversation of to-day, I have to advise you that the Senate at its meeting last week agreed to continue to conduct in March, 1949, and March, 1950, special examinations in the subjects of the Solicitors' Professional qualifications, Divisions II, III, and IV, for those servicemen who have had at least three full years of mobilized service. The minor details governing the examinations have yet to be settled by the War Concessions Committee but it is understood that the detailed rules will follow closely upon those which have governed the examinations of March, 1948.

Marks concessions will continue to be allowed to ex-servicemen who, at the time of examination, have not been demobilized for more than two academic years.

It was resolved to ask the Registrar to thank the Senate.

International Bar Association.—The President reported that the Hon. Sir David Smith and Mr. A. H. Johnstone, K.C., had represented the Society at the Conference held at The Hague in August, 1948.

Transport Law Amendment Bill.—The President reported that he had appeared with Mr. Leicester before the Select Committee of Parliament and that they had made representations on various matters including representations relating to Licensing Authorities and the Transport Charges Appeal Authority, and representations relating to the proposed amendments with regard to "hit-and-run" drivers. He said that the Bill is still before the Select Committee, and that he would make a more detailed report later.

It was resolved that the Council is of opinion that the Transport Licensing Authority should be a barrister or solicitor.

Land and Income Tax Act: Reprint.—The following letter was received from the Minister of Finance:

In reply to your letter under date July 30, regarding the reprinting of the Land and Income Tax Act, 1923, I have to advise that the matter is at present receiving consideration.

Statute of Frauds, s. 4: Sale of Goods Act, 1908, s. 6: Judicature Act, 1908, s. 3.—The following letter from the Under-secretary of Justice had been circulated to District Societies for their views:

July 15, 1948.

The Law Revision Committee is disposed to recommend that the above provision should no longer be applicable in New Zealand, and that s. 6 of the Sale of Goods Act, 1908, and s. 83 of the Judicature Act, 1908, should be repealed. Before making any final recommendations, however, the Committee desires to have an expression of the views of your Society on the proposal.

I am directed in this connection to refer your Committee especially to (i) *Holdsworth's History of English Law*, Vol. VI, pp. 379-397, especially p. 396; Vol. VII, p. 48; (ii) *Law Quarterly Review*, 1855, Vol. 1, p. 1 (Mr. Justice Stephen); 1913, Vol. 29, p. 247; 1927, Vol. 43, p. 1; (iii) *Salmond and Winfield on Contract*, 141-143; (iv) *The Statute of Frauds, section four*, by James Williams (now Professor of English and New Zealand Law at Victoria University College), 280-283; (v) Sixth Interim Report of the Law Revision Committee (U.K.) (Cmd. 5449; 1937).

I shall be glad if you will arrange for this matter to be considered by the Law Society in time for the October meeting of the Law Revision Committee.

The majority of the District Societies were opposed to the section being repealed, and the remainder thought that the section should not be repealed unless there were suitable statutory provisions substituted. It was resolved that the Council oppose any alteration to s. 4 of the Statute of Frauds; and that, except for the substitution of £50 for £10, the Council oppose any alteration to s. 6 of the Sale of Goods Act, 1908. It was resolved that the Council oppose any alteration to s. 83 of the Judicature Act, 1908.

(To be concluded.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Memo. on Bicycles.—The Court of Appeal at its recent sessions has held in *Hassett* v. *Bridgeman* that a bicycle is a means of transport within the meaning of s. 7 of the Workers' Compensation Amendment Act, 1943 (now s. 45 of the Workers' Compensation Amendment Act, 1947), and that, if the employer has expressly or impliedly authorized its use for that purpose, he is liable for an accident by the worker using it to take him to or from his work. As far as Scriblex is aware, no one sought to clarify the issue by referring to the view of of Bigham and Phillimore, JJ., in *Cannan* v. *Earl of Abingdon*, [1900] 2 Q.B. 66, that a bicycle was covered by the words "every coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, dray, cart, car, or other carriage whatsoever." In case anyone wants to know exactly what a "carriage" is, the judgment of Phillimore, J., provides a snappy answer. It is:

> any mechanical contrivance which carries people or weights over the ground, carrying the weights or taking people off their own feet, so that the foot of man and the body and trunk of man do not support his own weight or the weight of the burden carried.

Scooters, presumably, are included.

Judicial Criticisms.—One of our distinguished lawyers who has had considerable experience of the profession overseas tells Scriblex that the readiness of English Judges to make a prompt and appropriate *amende* for a hasty and offensive remark to counsel, and their recognition that an apology or expression of regret in such circumstances, so far from detracting from, actually adds to, the judicial dignity and the public respect for the Bench, are illustrated by the following anecdotes. J. P. Benjamin was once arguing a case in the House of Lords, with Lord Selborne presiding. The learned counsel very early in his argument formulated, after his manner, the propositions of law for which he was about to contend. One of these drew from Lord Chancellor Selborne the word: "Nonsense!" Benjamin stopped short, slowly put his papers together, tied the tape round them, made a low bow, and left the Bar of the House. His junior had to fill the breach; but before he had proceeded far in his argument the Lord Chancellor said that he was sorry that Mr. Benjamin had left the House, and he was afraid he was the cause of it in saying what he ought not to have said. The other anecdote relates to Mr. Justice Grantham, who once got into serious trouble with the Bar and the Bar Committee by propounding the doctrine that "counsel are paid to raise false issues before the jury." The learned Judge, while treating with defiance the remarks of the Bar Committee, made every reparation to the particular counsel to whom his words had been addressed.

The Pritt Affair.—One of the most featured "differences" between Bench and Bar occurred some ten years ago when Pritt, K.C., was visiting Gibraltar on behalf of the Republican Government of Spain, and asking, before Sir Kenneth Beatty, C.J., that a writ for the arrest of portion of the cargo of s.s. *Stancroft* should be set aside. The application was successful. The Chief Justice decided that the Court had no jurisdiction to entertain an action against property belonging to a foreign sovereign state, but he declined to allow costs, saying that he had no sympathy with shipping companies that loaded munitions of war aboard British ships and that were aware of embarrassing the British Government. Whereupon Pritt rose and said: "On behalf of my clients, for whom your Lordship says you have no sympathy—a fact which your Lordship has made painfully and unjudicially obvious—I must protest against statements prejudicial to them which you made without warrant, or evidence, or justification. With reference to the statements concerning the shipping company, I feel compelled to say that your Lordship's unwarranted statements are a grave sin against British justice and the honour of the Court." The Chief Justice, intervening: "I wish to hear no further." Mr. Pritt: "I should be prostituting our honourable profession if I were to say one word less than I have said." To this the Chief Justice replied: "I see no reason for this unprovoked attack." The Crown appealed, and counsel later returned to the Rock. At the hearing, a further scene occurred, this time with the Acting Chief Justice, who angrily stated that he was leaving the Court. "I'm very glad to hear it," said Pritt. On being told to stand up, he added, "Under your orders, and under protest, I stand up." As a sequel, he was charged with contempt of Court, on account of his impertinent and sarcastic remarks, although the main basis of the charge was the repetition three times of a remark imputing lack of veracity to the Acting Chief Justice. An unreserved apology being tendered, the Acting Chief Justice stated that he did not propose to fine counsel, but he considered his conduct worthy of the strictest censure.

The Outspoken Prisoner.—Whatever counsel may say to the Bench in righteous indignation, accused persons are well advised to be more philosophical about the course of events. In *R.* v. *Aston*, [1948] W.N. 252, the appellant pleaded guilty before the Recorder of Dudley to a charge of housebreaking, and was sentenced by him to two years' imprisonment. On leaving the Court, the appellant said: "And you call that English justice, you ———." Later in the day, the Recorder recalled the appellant and said: "After the sentence of the Court had been passed upon you, you expressed a grave doubt as to my parentage. The sentence for the offence to which you pleaded guilty I vary to one of four years' penal servitude." On an appeal to the Court of Criminal Appeal, the sentence was reduced to the original sentence of two years' imprisonment. Lord Goddard, L.C.J., said that the appellant was a man of exceedingly bad character, and that he well deserved a sentence of four years' penal servitude, but the appellant's remark was nothing but abuse, and the Recorder should have treated it with the contempt which it deserved. The Recorder had reported to that Court that he did not deal with the appellant for contempt of Court, but that, on reconsideration of all the facts of the case, he thought the appellant deserved a longer sentence. If the Recorder had so stated to the appellant, the position might have been very different. Justice must not only be done, but must manifestly be seen to be done: anybody who had heard the words actually used by the Recorder would have felt that he was increasing the sentence because of the appellant's offensive remark, and he certainly could not do that.

PRACTICAL POINTS.

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1. Landlord and Tenant.—*Tenant continuing to occupy formerly leased Land with Owner's Consent—Owner wishing to re-occupy—Refusal of Occupier to quit—Whether Tenant Trespasser or Tenant by Suffrance—Notice.*

QUESTION: A. by agreement took on lease an old dwelling and 10 acres of Land Transfer land which he cultivated. The term of the lease expired in 1944, but was continued without formal renewal until 1946. A. then gave up the land, and it was verbally agreed he might continue to occupy the house rent-free for up to two years. There was no consideration for this; the house was in bad disrepair, and the owner had no use for it at the time. The two years expired three months ago; the owner now wants the house to demolish it, but A. refuses to leave. The Fair Rents Act does not apply (*Cranch* v. *Bryers*, [1938] N.Z.L.R. 469), nor did s. 16 of the Property Law Act, 1908, apply to the free tenancy, as there was an agreement as to the term of the free tenancy. The owner has at no time acquiesced in the holding over. Is A. merely a trespasser, or is he now a tenant by suffrance, and, as such, entitled to notice to quit?

ANSWER: It seems that A. is either a tenant at suffrance or a tenant at will. Although the question was left open whether, on the *determination* of a tenancy at will, the tenant would be a trespasser or a tenant at suffrance in *Turner* v. *Doe d. Bennett*, (1842) 9 M. & W. 643; 152 E.R. 271, landlords have, since that date, received little, if any, judicial encouragement to treat tenants at will as trespassers when their tenancy has been determined.

A.'s tenancy at will has not been determined. It may have ended, and the distinction between determination and ending may be relevant: *Town* v. *Stevens*, (1899) 17 N.Z.L.R. 870.

There was a lease or tenancy, but without payment of rent, for two years from 1946, the acceptance of the lease or tenancy by the tenant being sufficient consideration for the contract: see *Hill and Redman's Law of Landlord and Tenant*, 10th Ed. 4 (*d*); and, in the circumstances, the continuance of the occupation may well have provided continued consideration for the tenancy as a tenancy subject to s. 16 of the Property Law Act, 1908, after the expiry of the two years, just as continued acceptance of rent would where a rent was contracted for. As is stated in *Wily and Cruickshank's Magistrates' Courts Practice*, 2nd Ed. 380: "Only slight evidence is necessary to show the new creation of a tenancy at will." The advice of the learned authors should be adopted: "In all cases of tenancy at will and tenancy by suffrance it simplifies matters to give the month's notice to quit [under s. 16]." A.2.

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2. Easement.—*Surrender of Easement—Both Tenements mortgaged—Procedure.*

QUESTION: A's land has an easement over B's land. Both tenements are mortgaged. A and B have agreed for the surrender of the right of way. How may this intention be effected? We can find no express provision in the Land Transfer Act dealing with the point. Will the mortgagees have to concur in the arrangement?

ANSWER: It is correct to say that there is no express provision in the Land Transfer Act dealing with surrenders of easements registered under that statute; but there is a long-established practice that the registered proprietor of an easement may surrender the same to the registered proprietor of the servient tenement by memorandum of transfer: *Goodall's Conveyancing in New Zealand*, 285 (*a*), referring to surrenders of leases.

The operative words of the transfer should be: "I, the said A, do hereby transfer and surrender to B all my interest in the said easement."

The District Land Registrar will not register the transfer without the consent of the mortgagee of A's land—*i.e.*, the mortgagee of the dominant tenement. Such consent should be endorsed on the memorandum of transfer.

The consent of the mortgagee of B's land will not be necessary, as the servient tenement will benefit by the surrender of the easement. X.1.