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LEGAL AID AND ADVICE: THE ENGLISH SCHEME.

I.

THE presence on our Statute Book of the Legal Aid Act, 1939, makes the new scheme for legal aid and advice about to be put into operation in England of particular interest to New Zealand practitioners.

The Legal Aid Act, 1939, was designed as a foundation for a comprehensive system of free or assisted legal aid in civil proceedings to persons of small means and resources, with any advisable extension of the present scheme of legal aid in criminal proceedings. The primary responsibility for carrying into effect this venture was placed upon the legal profession, the whole structure of legal aid being designed to rest on a scheme to be administered by the New Zealand Law Society, with the assistance of the District Law Societies.

The title of the Legal Aid Act, 1939, is " An Act to make Further Provision for Legal Aid to Poor Persons." It does no more than give power to make regulations providing for such legal aid. The Governor-General is empowered to make regulations by Order in Council to define the term " poor persons " for the purposes of the regulations, and to prescribe the classes of persons qualified to receive legal aid as poor persons. The New Zealand Law Society is to be authorized to establish committees and panels of legal practitioners for the assistance to poor persons; and, for this purpose, it is to be empowered to require practitioners to serve on those committees and panels and to undertake the advising of poor persons and the conduct of litigation on behalf of poor persons. The regulations may empower the Society to delegate any of its functions under the regulations to any District Law Society. The regulations are to prescribe the nature and extent of legal aid that may be granted and the conditions upon, or subject to, which it may be granted. They may prescribe the manner in which legal aid is to be provided and administered, and they are to provide for the remission of fees payable under any Act, rule, or regulations in relation to Court proceedings to which poor persons are parties. Any regulations made under the statute may apply generally with respect to all legal matters, whether relating to proceedings in any Court or otherwise, or may apply with respect to specified classes of matters or proceedings.

The passing of the Legal Aid Act, 1939, which was promoted by the New Zealand Law Revision Committee, and approved by the New Zealand Law Society, coincided with the outbreak of hostilities. It was impossible during the war years for any legal aid scheme to be launched with any hope of success, owing to the absence of so many practitioners on active service and the almost total lack of law clerks, qualified and unqualified, owing to war conditions.

Since the profession has been returning to its normal pre-war position, the Law Revision Committee and the New Zealand Law Society have had under consideration draft regulations intended to implement the provisions of the Legal Aid Act, 1939. Their efforts were halted for the time being owing to the setting up in England of the Departmental Committee, appointed by the Lord Chancellor, and since known as " the Rushcliffe Committee on Legal Aid and Legal Advice in England and Wales." The Report of that Committee at the end of 1945 was of general interest in this country; and it was thought advisable to await the translation of that report into statutory form before proceeding further with the legal aid scheme envisaged by the New Zealand statute.

A Government Bill has now been introduced into the House of Commons to put into effect the proposals of the Rushcliffe Committee, which represented both branches of the legal profession in Great Britain, the Attlee Government, the major political parties, and various charitable and benevolent organizations. At this stage, we feel that it will be of general interest to practitioners in this country, as well as of assistance to those who guide the destinies of the New Zealand Law Society, if we set out in some detail the provisions of that Bill. In explanation of its text, reference is made to recommendations in the Rushcliffe Committee's Report.

The Legal Aid and Advice Bill, 1948, which was introduced in the House of Commons on November 18, provides for the establishment of a scheme to afford legal aid and advice for the benefit of persons of limited means, and for making legal assistance in criminal proceedings more readily available for such persons, on the lines recommended in the Report of the Rushcliffe Committee on Legal Aid and Legal Advice in England and Wales (Cmd. 6641 of 1945). The Bill also provides for legal aid and advice for members of the Forces both at home and overseas in like manner to that recommended by the Rushcliffe Committee in the case of civilians. A Bill to provide for Scotland has also been introduced: Legal Aid and Solicitors (Scotland) Bill, 1948.

The existing arrangements under which legal assistance is made available for Poor Persons in civil proceedings are now no longer satisfactory for various reasons. In the first place, the income limits which must be satisfied before anyone can be admitted to take or defend proceedings as a Poor Person are too low and even if the litigant is admitted there are still certain out-of-pocket expenses which he has to meet. Secondly, assistance does not extend to the County Court or to other inferior Courts. Finally, the task of acting gratuitously for Poor Persons places a very considerable burden on both branches of the legal profession and the Government consider that it is no longer fitting that this burden should be borne by one section of the community.

In the case of criminal proceedings, the present position is somewhat different. As in New Zealand, facilities exist under the present law for the grant of free legal aid to persons charged with criminal offences who are unable to afford the cost of legal assistance.

The Rushcliffe Committee recommended certain modifications of the existing system so as to enable these facilities to be more widely used, and also recommended that the cost of free legal aid in criminal proceedings, which is at present a charge on local rates, should be transferred to the Exchequer (as here).

The object of the scheme is to provide assistance in a more effective form in the conduct of civil proceedings and legal advice for those of slender means and resources, so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right, and to allow counsel and solicitors to be remunerated for their services. The principle of the scheme is that legal aid should be available to persons, to be called "assisted persons," whose income, computed in accordance with rules to be applied by the National Assistance Board (which administers the legislation corresponding with our Social Security Act, 1938), does not exceed £420 a year, and whose capital, as so computed, does not exceed £500. Where the assisted person can afford to make a contribution to the costs of his case, he will be liable to pay an amount which will be settled with due regard to his financial resources. Assisted persons will be able to choose their own solicitor and counsel from those who have volunteered to come into the scheme and whose names appear on the appropriate panels, except in certain divorce cases where the work will be undertaken by solicitors specially employed for this purpose by the Law Society. In cases in the House of Lords, Court of Appeal, and High Court, remuneration of counsel and solicitors, which will be paid out of the Legal Aid Fund, will be 85 per cent. of the amount allowed on taxation of their fees and profit costs; while in the County Court the Bill provides that full scale fees and costs are to be paid.

To work the scheme successfully, it is essential to make provision for ascertaining whether a prospective litigant has a reasonable cause of action, for assessing the contribution (if any) which he can reasonably be expected to make, and finally for conducting the litigation. The Government have accepted the recommendation of the Rushcliffe Committee that the best way to secure these objects will be to place the primary responsibility for the working of the scheme upon the legal profession. The administration of the scheme, both for legal aid in civil proceedings and for legal advice, will accordingly be in the hands of the Law Society, with the addition of representatives of the General Council of the Bar, under the general guidance of the Lord Chancellor. The Law Society will be responsible for the administration of the Legal Aid Fund, which will be financed by the State, and will be required to submit to the Lord Chancellor annual accounts which will be laid before Parliament. An advisory committee, consisting of laymen as well as lawyers, will be set up to advise the Lord Chancellor on the working of the scheme.

The Bill does not deal with all the details of the new service but with its main structure. Further provisions will be contained in regulations to be made by the Lord Chancellor, subject to the control of Parliament, and in an administrative scheme to be made by the Law Society with the approval of the Lord Chancellor and the Treasury.

Legal Aid in Civil Proceedings.

General Organization. It is contemplated that, under the Scheme to be made by the Law Society under cl. 7 of the Bill, England and Wales will be divided into twelve areas, instead of the eleven recommended by the Rushcliffe Committee. For each area there will be an Area Committee consisting of some fifteen practising barristers and solicitors, appointed, in the case of the barristers, by the Bar Council, and, in the case of the solicitors, by the Council of the Law Society. The members of the Area Committee will hold office for three years, retiring in rotation, but will be eligible for re-appointment. They will not be paid a salary, but will be entitled to travelling-expenses and a small attendance allowance. The successful working of the legal aid scheme will turn upon the efficiency of the Area Committees, each of which will need a small staff.

The Area Committees will be responsible for the initial organization and subsequent administration of the legal aid scheme in their areas. They will be responsible for the preparation of panels of barristers and solicitors willing to participate in the scheme; the provision of adequate facilities for legal advice in their areas; the grant of permission to employ more than one counsel in the High Court and to call expert witnesses; the appointment and supervision of local committees and the determining of appeals against their decisions; the handling of contributions; the collection and payment of costs; and the rendering of estimates, reports, and accounts to the Law Society.

Local Committees. Each Area Committee will appoint such number of local committees for its area as may be necessary—it is estimated that some 110 committees will be required. The local committees also will consist of practising solicitors and, so far as they are available, barristers. As in the case of the Area Committees, the members of the local committees will hold office for three years and will be eligible for re-appointment. The principal duty of the local committees will be to consider and determine applications for legal aid, and it is intended that this function should be discharged by sub-committees, to be known as "Certifying Committees," consisting of between three and five members of the local committee. Members of the Certifying Committees will be entitled to travelling-expenses and attendance allowances.

Scope of the Scheme. The principle embodied in cl. 1 of the Bill is that legal aid—that is to say, the conduct of civil proceedings by a solicitor and, if necessary, by a barrister—is to be available for the purposes of any proceedings which the assisted person desires to

bring, or be a party to, in the principal Courts of law. These Courts are set out in Part I of the First Schedule to the Bill, and include the House of Lords, the Supreme Court, the County Court, Court of Summary Jurisdiction (in regard to civil cases), Coroners' Courts, and certain others. The Rushcliffe Committee recommended that legal aid should be available in all Courts and tribunals in which counsel and solicitors have the right, or are normally allowed, to appear. But the tribunals of a judicial and semi-judicial character which would be included under this proposal are so numerous that the Government have decided that it would be unwise to extend the scheme at its outset beyond the ordinary Courts. If the scheme is initially too ambitious in scope, there is a real danger that the legal profession, and the administrative organization to be set up to operate the scheme, will be swamped. Experience may show that the benefits of legal aid can be extended to proceedings before other Courts and tribunals without causing confusion or delay or placing an undue burden on the legal profession, and accordingly power is taken to vary the lists of Courts set out in the Schedule by regulations, subject to the affirmative resolution procedure.

The Rushcliffe Committee also recommended that legal aid should be available in all types of proceedings, with the exception of judgment summonses in the County Court and proceedings by defendants in the County Court where the only issue is as to time and mode of payment of debt. The Government, however, consider that there are other proceedings for which legal aid ought not to be available, at any rate until the scheme has had a fair start and some estimate can be made of its potential capacity. As in the case of the excluded tribunals, it is thought better to proceed with caution in the first instance. Consequently there are excluded from the scheme certain specified types of proceedings, including, in addition to the proceedings recommended for exclusion by the Rushcliffe Committee, actions for libel and slander, actions for breach of promise of marriage, actions by common informers, and certain others: see Part II of the First Schedule to the Bill. Again power is taken by regulations to vary the list of excluded proceedings, so that in the light of experience some of those initially excluded from the benefits of legal aid may be brought in later on, or further types may be excluded.

But although legal aid under the Bill will be available in the ordinary Courts of law for the vast majority of proceedings usually brought, cl. 1 provides certain safeguards against abuse of the scheme. A person who wishes to receive legal aid will have to apply to a local committee for a certificate, to be known as a "civil aid certificate." Legal aid will be refused unless the local committee is satisfied that the applicant for assistance has reasonable grounds for taking, defending, or being a party to the proceedings in question. The local committee may also refuse legal aid if the circumstances of the applicant's particular case render it unreasonable that his proposed litigation should be assisted under the scheme: cl. 1 (6). By these means it is intended to secure that vexatious, frivolous, or other discreditable proceedings, or proceedings in which the costs are likely to be out of all proportion to the amount or importance of the claim, are not brought at the public expense.

If in the exercise of its discretion the local committee refuses an application for legal aid, the applicant will be able to appeal to the Area Committee within fourteen days of being notified of the local committee's decision. The Area Committee may thereupon dismiss the appeal or direct the local committee to issue a certificate.

Financial Conditions The questions whether a person's financial circumstances are such that he is entitled to legal aid under the Bill, and, if so, whether he should receive legal aid free of cost or should himself make a contribution towards the cost, will be determined by reference to what the Bill describes as his "disposable income" and "disposable capital": see *infra*. Legal aid will be available to any person whose disposable income does not exceed £420 a year; where, however, he has a disposable capital of more than £500, the local committee will have a discretion as to the grant of legal aid: cl. 2 (1). Such persons may be asked to contribute up to half the excess of their disposable income for a year over £156, together with the excess of their disposable capital over £75: cl. 3 (1). Thus, if an applicant's disposable income were £150 and his disposable capital £50, he would receive legal aid free of cost: if his disposable income were £200 and his disposable capital £100, he would be liable to contribute half the excess of his disposable income for a year over £156—*i.e.*, £22—plus the excess of his disposable capital over £75—*i.e.*, £25—making a total contribution of £47. But he would only pay the full amount if the actual cost of his case was equal to, or exceeded, that sum.

The Rushcliffe Committee recommended that capital in excess of £25 in the case of a single man, and £50 in the case of a married man, should be treated as available for meeting the costs of legal proceedings. The Government have thought it right to increase these figures. As mentioned above, cl. 3 (1) of the Bill provides for £75 being disregarded after the disposable capital has been calculated. In making this calculation, however, the National Assistance Board will allow £75 for dependants (see *infra*), so that a married man or other applicant who has dependants will in effect be entitled to keep £150 of his capital.

An applicant's disposable income and disposable capital will be determined by the National Assistance Board, acting for this purpose through its local officers: cl. 4 (6). When the case is referred to them by the local committee, the first duty of these officers will be to inquire of the applicant about his circumstances. It is hoped that, so far as is possible, these inquiries will be made by personal interviews with the applicant at his home. The applicant's disposable income and capital will then be calculated in accordance with regulations made by the Lord Chancellor with the concurrence of the Treasury. The result of this calculation together with the amount, if any, of the applicant's maximum contribution will then be notified by the National Assistance Board to the local committee. The Board will draw the attention of the local committee to any special circumstances affecting the maximum amount of the lump sum and the periodical payments which the assisted person could reasonably make on account of his contribution. In the light of the findings of the Board, the Certifying Committee will estimate, having regard to the probable cost of the proceedings in question, whether the full amount of the maximum contribution or some less amount is required, and whether it should be payable in a lump sum or by instalments.

The matters to be taken into account by the National Assistance Board in assessing the means of an applicant

for legal aid are outlined in cl. 4 of the Bill. Regulations will provide for deductions in respect of dependants, loan interest, income tax, rates, and rent. The resources of the applicant, and of his or her wife or husband, will normally be aggregated, but will not be treated as including the subject-matter of the dispute. The resources specified in the Second Schedule to the Bill will be disregarded to the extent there mentioned on the lines followed by the National Assistance Board in dealing with an application for assistance under the National Assistance Act, 1948. Thus, save in exceptional circumstances, no account is to be taken of any money which the applicant might be able to raise by selling or mortgaging his house. A varying degree of protection is given to such sources of income as sick-pay from a friendly society or trade union, superannuation payments, attendance and maternity allowances under the National Insurance Acts, wound and disability pensions, disablement pensions under the Personal Injuries (Emergency Provisions) Act, 1939, weekly payments on account of workmen's compensation, and disablement benefit under the National Insurance (Industrial Injuries) Act, 1946.

(To be concluded.)

SUMMARY OF RECENT LAW.

AGENCY.

Agency of Necessity—Gratuitous Bailee—Sale of Bailed Goods—Owner's Instructions unobtainable — Detinue — Conversion — Damages—Gratuitous Bailee—Instructions of Owner of Goods unobtainable—Sale without Instructions—Date at which Damages Assessable—Expenditure by Bailee on Goods. By permission of the licensee the owner of a motor-car left it for nearly three years in the yard of an inn. The licensee found that it was causing difficulty to drivers of vehicles using the yard, particularly ambulances of the St. John Ambulance Corps, to whom a garage on the premises was let. Being unable to trace the owner, he had repairs carried out on the car at a cost of £85, and then had it sold by auction for £105, less commission amounting to £5. The value of the car was £120 at the date of judgment. *Held,* (i) That the doctrine of agency of necessity could be applied to goods stored in premises, if at all, only in a case of emergency necessitating the disposal of the goods, which did not exist here, and, accordingly, the licensee was liable to the owner for detinue and conversion of the car. (ii) That the measure of damages for the conversion and in detinue was the value of the car at the date of judgment less any increase in value attributable to the expenditure of money on it by the licensee, and judgment would, therefore, be given for the plaintiff for £35. (*Rosenthal* v. *Alderton and Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] K.B. 374, and *Sachs* v. *Miklos*, [1948] 1 All E.R. 67; [1948] 2 K.B. 23, applied.) *Munro* v. *Willmott*, [1948] 2 All E.R. 983 (K.B.D.).

As to Acts Amounting to Conversion, see *33 Halsbury's Laws of England*, 2nd Ed. 52–56, paras. 84–90; and for Cases, see *43 E. and E. Digest*, 469–485, Nos. *86–222*.

ANNUAL HOLIDAYS.

Bonus Payments based on Worker's Weekly Production in Excess of Production Target—Such Payments not Part of Worker's "ordinary pay"—"Ordinary time rate of pay"—Annual Holidays Act, 1944, s. 2 (1) (2). A bonus payment, based on weekly excess of work done over a target set for production and paid to a worker in addition to his weekly rate of wages, is not part of his "ordinary pay," as that term is defined in s. 2 (1) of the Annual Holidays Act, 1944, and such an accretion to the weekly wage is not to be taken into account in determining the amount of holiday pay. *So held,* by the Court of Arbitration on case stated by a Stipendiary Magistrate for the opinion of that Court in respect of a claim for a penalty for breach of the Annual Holidays Act, 1944. *Augustine* v. *Wellington Woollen Manufacturing Co., Ltd.* (Ct. of Arb. Wellington. December 16, 1948. Tyndall, J.)

COMMON LAW.

Reason and Logic in the Common Law. (Dennis Lloyd.) *64 Law Quarterly Review*, 468.

"Without Prejudice." *92 Solicitors' Journal*, 653.

COMPANY LAW.

Security for Costs—Company Plaintiff—Court or Judge's discretion to Order Sufficient Security to be given—Discretion to refuse to order Security or to allow less than Complete Indemnity to Defendant—Companies Act, 1933, s. 380—Code of Civil Procedure, Third Schedule, Table C, cl. 38. Section 380 of the Companies Act, 1933, gives the Court or Judge an entire and absolute discretion as to whether or not any security should be ordered; and an order may be made ordering less than the whole amount of security necessary to indemnify the defendants against costs incurred. (The Court, in view of the provisions of cl. 38 of Table C to the Third Schedule of the Code of Civil Procedure, limited the amount of security to be given to the sum of £300.) (*Martin* v. *Davis*, (1884) 18 W.N. 86, *Clarke* v. *Barber*, (1890) 6 T.L.R. 256, *Brownrigg Coal Co., Ltd.* v. *Sneddon*, (1910) 48 S.L.R. 881, *Dominion Brewery, Ltd.* v. *Foster*, (1897) 77 L.T. 507, applied.) *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan*, (1866) L.R. 1 Ch. 437, distinguished.) (*Mokau Timber Co.* v. *Berry, Mokau Timber Co.* v. *Public Trustee*, (1908) 11 G.L.R. 212, and *Sunday Times Newspaper Co.* v. *McIntosh*, (1933) 33 N.S.W.S.R. 371, referred to.) *Semble,* An application under s. 380 of the Companies Act, 1933, for security for defendant's costs, should, where the matter is fully argued, be removed into Court, so that the matter may be determined upon one hearing, leaving any party aggrieved to apply to the Court of Appeal for rehearing. *Jollands, Ltd.* v. *Whitley and Others*: *Jollands, Ltd.* v. *Burton and Others.* (Wellington. December 20, 1948. Fair, J., Cornish, J.)

CONFLICT OF LAWS.

Desertion and Domicil. *206 Law Times Jo.*, 310.

CONVEYANCING.

Administration of a Small Estate. *92 Solicitors' Journal*, 614.

COVENANT.

Covenant to settle "property"—Inclusion of Reversionary Interest—Claim for Damages for Breach of Covenant—Right of Volunteer to sue—Volunteer a Covenantee. On January 23, 1941, a deed of separation was executed by the defendant of the first part, his wife of the second part, and the plaintiff, their daughter and only child, of the third part. After reciting that "unhappy differences" had arisen between husband and wife and that they had agreed to live apart in future, the deed stated that "in pursuance of the said agreement and in consideration of the matters hereinafter appearing the husband and the wife hereby mutually covenant with each other and declare as follows and he [the husband] hereby covenants also separately with the daughter in the terms of cll. 4, 5, 6, and 7." Clause 3 prescribed for payment of income by the husband to the wife, and, by cl. 4, it was provided that during the daughter's life and the lives also of the husband and the wife a payment would be made by way of income to the daughter. Clause 7 prescribed: "If and whenever during the lifetime of the wife or the daughter the husband shall become entitled at one and the same time by gift *inter vivos* from or under the will or codicil or on the intestacy of either of his parents or any other person to any money or property exceeding in net amount or value £1,000 he will forthwith at his own expense and to the satisfaction of the wife and the daughter or the survivor of them settle one half of such money or property upon trust for himself for life and for the wife for life after his death and subject thereto in trust for the daughter absolutely but as to his life interest charged with the payment of the monthly sums hereinbefore mentioned." By the will of his father, who died on December 3, 1944, the defendant became entitled, subject to a life interest of his mother, to a quarter share of a residuary trust fund absolutely. The defendant's wife died on June 23. It was conceded that this interest and reversion was worth more than £1,000. The defendant having failed to settle this interest on the terms of cl. 7 of the deed, the plaintiff brought an action for damages for breach of covenant. *Held,* (i) That the reversionary interest to which the defendant became entitled dependent on the death of his mother was "property" within the meaning of cl. 7 of the deed. (*Re Hughes' Settlement*, [1924]

2 Ch. 356, distinguished.) (ii) That the plaintiff was entitled to succeed, since, although a volunteer, she was not only a party to the deed but also a direct covenantee under the covenant on which she sued, and did not require the assistance of the Court to enforce the covenant as she had a legal right to enforce it. (*Re Pryce*, [1917] 1 Ch. 234, and *Re Kay's Settlement*, [1939] 1 All E.R. 245; [1939] Ch. 329, distinguished.) *Cannon* v. *Hartley*, [1949] 1 All E.R. 50 (Ch.D.).

As to the Effect on Reversionary Interests of a Covenant to Settle After-acquired Property, see *29 Halsbury's Laws of England*, 2nd Ed. 575–577, para. 840; and for Cases, see *40 E. and E. Digest*, 501–506, Nos. *484–524*.

CRIMINAL LAW.

Accessory after the Fact—Direction to Jury—Specification of Acts alleged to have been done to assist the Felon—Statement made to avoid arrest on Other Charge. The appellant, who had been acquitted on a number of counts charging him, with his wife and another person, of receiving stolen goods, was convicted of being an accessory after the fact to those offences of which the wife had been found guilty. The only evidence against the appellant on these charges consisted of his words and actions when the Police visited his house. The Assistant Recorder, in his summing-up, gave the following direction to the jury on the charges of being an accessory after the fact: "An accessory after the fact is one who, knowing that another person has been guilty of felony, takes some active step to conceal the felony and to prevent the apprehension of the principal felon, and, if it is material, you will have to consider whether Jones's conduct was that of a man taking active steps to conceal a felony committed by Mrs. Jones, assuming, of course, that you think Mrs. Jones was guilty of receiving." No further reference was made to the charges of being an accessory. *Held*, That it was essential that the Assistant Recorder should have specified the act or acts alleged to have been done by the appellant for the purpose of assisting his wife to escape conviction, and have pointed out to the jury that, since he was also charged with the offence of receiving, his evasions and untruths may have been due to his anxiety to avoid arrest quite apart from any desire to protect his wife. (Direction to jury in *R.* v. *Levy*, [1912] 1 K.B. 159, approved.) *R.* v. *Jones*, [1948] 2 All E. R. 964 (C.C.A.).

As to Accessories after the Fact, see *9 Halsbury's Laws of England*, 2nd Ed. 36, 37, para. 35; and for Cases, see *14 E. and E. Digest*, 99, 100, Nos. *714–728*.

Assaults. *92 Solicitors' Journal*, 641.

Murder—Manslaughter—Evidence on which Jury might find Manslaughter caused by Criminal Negligence—Issue of Manslaughter not left to Jury as Possible Verdict—New Trial—Crimes Act, 1908, ss. 171, 173, 175, 182, 186—Criminal Appeal Act, 1945, ss. 3, 4. In a trial for murder, where, upon the evidence, the jury might find a verdict of manslaughter on the ground that death had been caused by the criminal neglect of the prisoner, although such a finding was improbable, manslaughter should be left to the jury as a possible verdict after that issue had been adequately dealt with in the summing-up. Where that has not been done, a new trial should be granted. (*Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462, and *Mancini* v. *Director of Public Prosecutions*, [1942] A.C. 1; [1941] 3 All E.R. 272, followed.) (*R.* v. *Roberts*, [1942] 1 All E.R. 187, and *Kwaku Mensah* v. *The King*, [1946] A.C. 83, referred to.) *The King* v. *Stuck*. (C.A. Wellington. October 12, 1948. Kennedy, Finlay, Gresson, Hutchison, JJ.)

DEATH DUTIES.

Notes on the Death Duties. *92 Solicitors' Journal*, 579, 594.

DEFAMATION.

Report on the Law of Defamation. *92 Solicitors' Journal*, 616, 626.

DESTITUTE PERSONS.

Maintenance—Complaint for Maintenance filed in Magistrates' Court—Divorce Proceedings commenced by Husband—Magistrate declining Jurisdiction on Hearing of Complaint—Such Jurisdiction ousted during Divorce Proceedings—Destitute Persons Act, 1910, s. 17—Divorce and Matrimonial Causes Act, 1928, s. 37. A Magistrate cannot deal with a complaint for maintenance under s. 17 of the Destitute Persons Act, 1910, while a petition for divorce brought by the husband is pending in the Supreme Court, as the jurisdiction of the Magistrate is ousted during those proceedings. (*The King* v. *Middlesex Justices, Ex parte Bond*, [1933] 1 K.B. 72, *Higgs* v. *Higgs*, [1935] P. 28, and *Knott* v. *Knott*, [1935] P. 158, followed.) (*Coutts* v. *Coutts*, [1948] N.Z.L.R. 591, considered.) *Walker* v. *Walker and Another*. (Wellington. December 20, 1948. Sir Humphrey O'Leary, C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Adultery—Proof—Evidence of Clandestine Nocturnal Drives—No other Evidence of undue Familiarity except One Improbable Incident Testified to by Husband and Private Inquiry Agent—Evidence of Latter Untrustworthy—Strict Proof of Adultery required—Danger of Evidence of Private Inquiry Agents—Divorce and Matrimonial Causes Act, 1928, s. 10 (a). The same strict proof is required upon charges of adultery in divorce proceedings as in criminal proceedings. The commission of the offence must be proved by establishing it beyond any reasonable doubt to the satisfaction of the Court. (*Ginesi* v. *Ginesi*, [1948] 1 All E.R. 373, followed.) (*Ross* v. *Ross*, [1930] A.C. 1, and *Webster* v. *Webster*, [1945] N.Z.L.R. 537, referred to.) A petition for divorce by a husband against his wife, separated from him and receiving maintenance from him, was based upon charges of her adultery with the co-respondent, a friend of twenty-five years' duration, a married man living with his wife. It was admitted that, in a period of three and a half months, the respondent had met the co-respondent on several occasions in the evenings a short distance from the boarding-house where she resided, had taken her for drives unaccompanied, and left her, at times late at night, a short distance from her place of residence. Apart from such drives, there was no evidence of undue familiarity between the respondent except evidence given by the petitioner and a private inquiry agent of alleged adultery in highly improbable circumstances. *Held*, on the facts, That, as no weight could be attached to the evidence of the private inquiry agent, the husband's evidence was uncorroborated, and the petition was dismissed. (*Sopwith* v. *Sopwith*, (1859) 4 Sw. & Tr. (Supp.) 243; 164 E.R. 1509, referred to.) Observations as to the danger of accepting the evidence of private inquiry agents. *Andrews* v. *Andrews*. (New Plymouth. December 6, 1948. Fair, J.)

Connivance. *92 Solicitors' Journal*, 595.

Evidence—Presumption against Condonation—Displacement by Uncorroborated Evidence of Spouse—Proceedings instituted in consequence of Adultery—Plea of Condonation by Co-respondent—Respondent a Compellable Witness—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198 (Divorce and Matrimonial Causes Act, 1928, s. 47). The Supreme Court of Judicature (Consolidation) Act, 1925, s. 198, is reproduced as s. 47 of the Divorce and Matrimonial Causes Act, 1928 (N.Z.). In January, 1948, a wife, after confessing to her husband that she had committed adultery, left the matrimonial home. On February 12, 1948, the husband petitioned for divorce on the ground of the wife's adultery. The suit was undefended except by the co-respondent on the issue of damages, but at the trial for the first time the co-respondent raised the issue of condondation, alleging that sexual intercourse had taken place between husband and wife on the occasion of two visits by the husband to her on February 21 and 22, 1948. The co-respondent called the wife on subpoena, and the learned Commissioner before whom the case was tried compelled her to answer, against her will, the question whether there had been any sexual relations between her and her husband since the petition was served. Her answer was in the affirmative, and the Commissioner thereupon found that the husband had condoned the matrimonial offence and dismissed the petition. *Held*, (i) That a witness who is competent by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 198, is also compellable, and, therefore, the steps taken by the Judge to compel the wife to answer were lawful. (ii) That there is a provisional presumption against condonation, and the uncorroborated evidence of the wife was insufficient to dispel this presumption. *Tilley* v. *Tilley*, [1948] 2 All E.R. 1113 (C.A.).

For the Supreme Court of Judicature (Consolidation) Act, 1925, see *9 Halsbury's Complete Statutes of England*, 391.

Nullity of Marriage. *64 Law Quarterly Review*, 324, 583.

EVIDENCE.

Admissibility—Statement in Document—"Person interested"—Domestic Servant in charge of Employer's Child—Injury to Child—Action for Negligence against Person alleged to have caused Injury—Evidence Act, 1938 (c. 28), s. 1 (1) (3). In the absence of her mother, a child had been left in charge of a domestic servant. While playing, the child sustained injuries to her mouth, face, and right eye which were alleged to be due to the negligence of a chemist leaving acid in a glass container in a yard or wash-house to which the child had access. After

the writ in an action for negligence against the chemist had been issued, the servant made a written statement with regard to the accident, and at the date of the hearing she could not be traced. *Held*, That, the domestic servant being in charge of the child, and her reputation for care in minding a child being in issue, she was "a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish" within the meaning of the Evidence Act, 1938, s. 1 (3), and, therefore the statement was not admissible in evidence. (Dicta of *Morton, J.*, in *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*, [1941] 1 All E.R. 314; [1941] Ch. 251, considered.) *Evon and Another* v. *Noble*, [1948] 2 All E.R. 987 (K.B.D.).

Secondary Evidence—Contents of Document—Lost Document—Note or Memorandum of Agreement—Lease—Admission of Counterpart on Proof of Loss of Lease—Law of Property Act, 1925 (c. 20), s. 40. By an agreement in writing, dated August 10, 1936, E.B. let certain offices to the defendant for a term of ten years from August 3, 1936, at a yearly rent of £52 per annum. On August 5, 1945, E.B. died, leaving the plaintiff as sole beneficiary. On August 3, 1946, the plaintiff gave the defendant notice to quit the premises, but the defendant claimed that he was entitled to a renewal of his lease under a lease alleged to have been executed by E.B. on March 31, 1938. The only written evidence of this document was the counterpart of the lease held by the defendant and bearing his signature, but not signed by E.B. At the hearing, the defendant testified that he and E.B. had together gone to a solicitor, when the lease and counterpart had been signed, and this evidence was corroborated by the solicitor. The plaintiff contended that there was no evidence that the alleged lease of March 31, 1938, had been executed by E.B., and, alternatively, that there was no note or memorandum in writing of the covenant to grant a further lease sufficient to satisfy s. 40 of the Law of Property Act, 1925. *Held*, (i) That, satisfactory proof of the loss of the lease having been given, secondary evidence as to its contents in the form of the counterpart was admissible. (ii) That, the contents of the lease having been thus proved, the lease constituted a sufficient note or memorandum under s. 40. (Dictum of *Lord Cozens-Hardy*, M.R., in *Read* v. *Price*, [1909] 2 K.B. 730, applied.) *Barber* v. *Rowe*, [1948] 2 All E.R. 1050 (C.A.).

As to Admission of Drafts and Counterparts as Secondary Evidence, see *13 Halsbury's Laws of England*, 2nd Ed. 532, para. 597; and for Cases, see *22 E. and E. Digest*, 234–235, Nos. *2089–2095*.

EXECUTORS AND ADMINISTRATORS.

Appropriation to Answer Annuities. *92 Solicitors' Journal*, 656.

FAMILY PROTECTION.

Discovery. *22 Australian Law Journal*, 319.

HUSBAND AND WIFE.

Desertion—Parties living under Same Roof—Need to prove de facto *Separation—Parties sharing Household.* A husband and wife were at all material times living under the same roof until a date within one month before the husband filed a petition for divorce on the grounds of his wife's desertion. He claimed that desertion began more than three years before the presentation of the petition by reason of the wife withdrawing to a separate bedroom, no marital intercourse taking place, the frequent occurrence of quarrels between them, and his wife doing no mending or washing of his clothes and no separate cooking for him. On the other hand, he always had his meals, which were cooked by the wife, in the common dining-room with the other members of the family, and, when not in his bedroom, he shared the rest of the house with his wife and daughters. *Held*, That, while *de facto* separation, which with *animus deserendi* is an essential element of desertion, can exist even while the parties are under the same roof, there can be no such separation until husband and wife cease to share one household and set up two households. On the facts in this case, there had been no *de facto* separation, and there was, therefore, no desertion of the husband by the wife. (*Smith* v. *Smith*, [1939] 4 All E.R. 533; [1940] P. 49, distinguished.) (*Wanbon* v. *Wanbon*, [1946] 2 All E.R. 366, criticised.) (*Thomas* v. *Thomas*, [1948] 2 All E.R. 98; [1948] 2 K.B. 294, discussed.) (*Evans* v. *Evans*, [1947] 2 All E.R. 656; [1948] 1 K.B. 175, disapproved by *Denning*, L.J.) *Hopes* v. *Hopes*, [1948] 2 All E.R. 920 (C.A.).

As to What Constitutes Desertion, see *10 Halsbury's Laws of England*, 2nd Ed. 835–838, para. 1338; and for Cases, see *27 E. and E. Digest*, pp. 307–310, Nos. *2840–2880*, and p. 322, Nos. *3000–3013*.

"Residence Together" and "Co-habitation." *92 Solicitors' Journal*, 625.

INCOME TAX.

Depreciation Allowance on Facilities for Employees. *22 Australian Law Journal*, 318.

Points in Practice. *99 Law Journal*, 5.

JUDICIAL CHANGES.

Mr. Justice Finnemore has been transferred from the Probate, Divorce, and Admiralty Division to the King's Bench Division.

Mr. Justice Pearce, recently appointed, has been appointed to the Probate, Divorce, and Admiralty Division.

Lord Stevenson, Senator of His Majesty's College of Justice for Scotland since 1936, has resigned.

LAND AGENT.

Commission—Contract to pay Commission on Introduction of a "purchaser able and willing to complete"—Able and Willing Purchaser found—Vendor's Refusal to complete. After an interview with the defendant at which they were instructed to sell the defendant's house, the plaintiffs, a firm of estate agents, wrote to the defendant: "We confirm that in the event of our introducing a purchaser who is able and willing to complete the transaction, our commission will be in accordance with the recognized scale." The Court held as a fact that these words were the basis of the contract between the parties. The plaintiffs introduced a prospective purchaser, whom the Court found to have been at all times able and willing to purchase, but the defendant refused to complete. It was argued by the defendant that the qualification of the word "purchaser" in the plaintiffs' letter—"able and willing to complete the transaction"—was otiose and should be struck out, and, therefore, the plaintiffs had not performed the contract until they had introduced a purchaser who actually completed the purchase. *Held*, That the expression "a purchaser who is able and willing to complete the transaction" meant, not a person who did, in fact, ultimately purchase the property, but one who was prepared to purchase it at the seller's price, and, as the estate agents had found such a person, they were entitled to their commission. *E. H. Bennett and Partners* v. *Millett*, [1948] 2 All E.R. 929 (K.B.D.).

As to Remuneration of Agents, see *1 Halsbury's Laws of England*, 2nd Ed. 256–263, paras. 431–436; and for Cases, see *1 E. and E. Digest*, 488–503, 508–518, Nos. *1664–1728, 1753–1801*.

Commission—Introduction of Person "able" to purchase Property—"Ability" to pay. By a contract in writing, the owner of certain house property instructed a firm of estate agents "to procure for me a person able, ready and willing to purchase my property . . . at the price of £2,900 O.N.O. [or near offer]," and undertook to pay them commission on the introduction of such a person making a firm offer to purchase at the price required. *Held*, That ability to purchase within the meaning of the contract did not depend on whether the purchaser had the money in hand at the time of his introduction to the purchaser, but it was sufficient if the agents proved that, if the vendor had been ready and willing to carry out his contract, the purchaser could have found at the proper time the necessary money to perform his obligation. (Dictum of *Atkin*, L.J., in *James* v. *Smith*, [1931] 2 K.B. 322, applied.) *Dennis Reed, Ltd.* v. *Nicholls*, [1948] 2 All E.R. 914 (K.B.D.).

As to Remuneration of Agent, see *1 Halsbury's Laws of England*, 2nd Ed. 257–259, paras. 432, 433; and for Cases, see *1 E. and E. Digest*, 512–514, Nos. 1770–1776, and Supplement.

LAND TRANSFER.

Vendor and Purchaser—Agreement to purchase Land subject to Tenancy—Tenant by Agreement with Vendor entitled to Building—No Notice to Purchaser of such Right until after Title acquired—Removal of Building by Tenant—Action by Purchaser against Tenant, Vendor joined as Third Party—Purchaser not put on Inquiry by Reference to Tenancy in Purchase Agreement—Purchaser not bound by Constructive Notice—Purchaser entitled to Value of Building and General Damages payable by Tenant—Land Transfer Act, 1915, s. 58—Code of Civil Procedure, R. 99K. The plaintiffs purchased from the third party by sale-and-purchase agreement a freehold property, subject (as stated in the agreement) to a tenancy to the defendant for one year expiring on November 28, 1947, of part of the land. On June 30, 1947, the plaintiffs acquired a title to the said land

under the Land Transfer Act, 1915. Although warned not to do so by the plaintiffs, the defendant subsequently removed buildings affixed to the soil. According to the agreement between the third party and the defendant, the defendant was entitled to the buildings, and the third party (as between himself and the defendant) had no right to sell them to the plaintiffs. The plaintiffs first heard of the defendant's claim to the buildings immediately before October 15, 1947. In an action by the plaintiffs against the defendant for the return of the said buildings, or, in the alternative, for damages, in which the third party was joined, *Held*, 1. That the sale-and-purchase agreement did not put the plaintiffs on inquiry as to whether buildings which were part of the freehold were removable by the tenant. 2. That the plaintiffs were entitled to succeed against the defendant on their alternative claim for damages—namely, the value of the buildings and general damages for the high-handed way in which they were removed. *Semble*, Even if the purchasers were put on inquiry, the fact that they did not inquire would amount only to constructive fraud, and would not disentitle them to the protection of s. 58 of the Land Transfer Act, 1915. (*Assets Co., Ltd.* v. *Mere Roihi*, [1905] A.C. 176; N.Z.P.C.C. 275, applied.) As between the vendor and the third party, judgment was given for the defendant for £120, the value of the buildings (excluding the general damages), together with the costs that the plaintiffs were entitled to recover against the defendant, and the defendant, being responsible for the general damages, had to pay his own costs. *Morrison* v. *Song Hing* (*Steggall, Third party*). (Gisborne. November 25, 1948. Hutchison, J.)

LANDLORD AND TENANT.

Assignment of Controlled Tenancy: Refusal of Consent. *92 Solicitors' Journal*, 615.

Damages for Breach of Lessors' Repairing Covenants. *92 Solicitors' Journal*, 598.

Tenancy Agreement containing Clause requiring Tenants to "reside permanently and continuously" in the Tenement—One Tenant working as Accountant in Office Twenty-eight Miles distant, but returning to Premises in Evening and Sleeping there—Sufficient Compliance with Clause. An agreement for the tenancy of that part of the Egmont National Park whereon the Dawson Falls Hostel stands, provided: "The tenants [husband and wife] shall during the term hereby created reside permanently and continuously in the said Dawson Falls Hostel." In an action for possession, on the ground that the tenant had failed to perform conditions of the tenancy because, *inter alia*, the tenant husband had failed to "reside permanently and continuously" in the hostel, *Held*, That the tenant-husband had complied with the condition by working all day as an accountant in an office twenty-eight miles distant from the hostel, and returning to the hostel in the evening and sleeping there. *Egmont National Park Board* v. *Blake*. (New Plymouth. December 6, 1948. Hutchison, J.)

MASTER AND SERVANT.

Liability of Master to Third Persons for Acts of Servant—Acts within Scope of Authority and Course of Employment—Threat by Garage Customer to report Employee—Assault on Customer by Employee. Erroneously believing that the plaintiff had tried to drive away from the garage without paying or surrendering coupons for petrol which had been put into the tank of his car, a petrol pump attendant used violent language to him. The plaintiff paid his bill and gave up the necessary coupons, and, after calling the Police, told the pump attendant that he would report him to his employers. The pump attendant then assaulted and injured him. In an action for damages for personal injury by the plaintiff against the employers, *Held*, That the defendants were not liable for the wrongful act of their employee, since that act was one of personal vengeance on the employee's part and was not done in the course of his employment, it not being an act of a class which the employee was authorized to do or a mode of doing an act within that class. (Observations of *Bankes* and *Scrutton*, L.JJ., in *Poland* v. *John Parr and Sons*, [1927] 1 K.B. 240, 243, applied.) *Warren* v. *Henlys, Ltd.*, [1948] 2 All E.R. 935 (K.B.D.).

As to the Master's Liability for Wrongful Acts of his Servant in the Course of Employment, see *22 Halsbury's Laws of England*, 2nd Ed. 225–230, paras. 403–409; and for Cases, see *34 E. and E. Digest*, 125–131, Nos. *964–1006*.

MUNICIPAL CORPORATIONS.

Offences—Continuing Offences—Limitation on Penalty—Municipal Corporations Act, 1933, s. 370 (1). Section 370 (1) of the Municipal Corporations Act, 1933, which is as follows, "Every person guilty of a breach of any by-law made under this Act is liable to a fine not exceeding twenty pounds; or where the breach is a continuing one, then to a fine not exceeding five pounds for every day or part of a day during which such breach continues," provides for a maximum daily fine for a continuing offence and a maximum period so long as the offending state of affairs continues; but it does not empower the Court to inflict a continuing fine *in futuro*. That is to say, a penalty may be awarded in respect only of the days on which the breach is proved to have continued. *Semble*, Section 370 (2) indicates that the Council, after a conviction for an offence, may apply to the Supreme Court for an injunction. (*Airey* v. *Smith*, [1907] 2 K.B. 273, and *Russell* v. *Watson*, (1907) 2 M.C.R. 142, distinguished.) *Pratt* v. *Samuels*. (Christchurch. October 29, 1948. Ferner, S.M.)

PHARMACY.

A.P.C. Tablets—Vendor endorsing Name and Trade-mark upon Package—Tablets compounded of Known Constituents—Sale by Person not Authorized or Qualified to sell Drugs—Offence—"Proprietary medicine"—Pharmacy Act, 1939, ss. 2, 32 (1) (a), (b), *(4), 33 First Schedule, Parts I and II.* The vendor's endorsement of his own name and trade-mark upon the package in which is sold a known compound of known chemical constituents in the proportions in which they are commonly employed, cannot make such a compound a "proprietary medicine" within the meaning of that term as used in Part II of the First Schedule to the Pharmacy Act, 1939, simply. (*Sharland and Co., Ltd.* v. *Commissioner of Trade and Customs*, (1892) 11 N.Z.L.R. 557, *Grommes* v. *Seeberger*, (1889) 41 Fed. Rep. 32, and *Ferguson* v. *Arthur*, (1886) 117 U.S.R. 482, distinguished.) Such a vendor, if he is not a person authorized or qualified to sell drugs in terms of s. 32 (4) or s. 33 (1) of the Pharmacy Act, 1939, commits an offence under the statute if he sells "A.P.C. Tablets" consisting of acetyl salicylic acid, phenacetin, and caffein, which constitute neither a drug within the exceptions set out in s. 32 (1) of the statute, nor a "proprietary medicine" within the meaning of that term as used in Part II of the First Schedule to that statute. Consequently, it is not lawful for any person to sell A.P.C. Tablets unless he is authorized or qualified to do so in terms of s. 32 (4) or s. 33 (1) of the said Act. *So held* by the Court of Appeal, dismissing an appeal against the conviction by a Stipendiary Magistrate of the appellant company for a breach of s. 32 of the Pharmacy Act, 1939, removed into the Court of Appeal under s. 5 of the Justices of the Peace Amendment Act, 1946. *Woolworths (N.Z.), Ltd.* v. *Wynne*. (C.A. Wellington. December 17, 1948. Kennedy, Finlay, Gresson, Hutchison, JJ.)

PRACTICE.

Costs—Claim for Amount due under Contract—Counterclaim—Defendants awarded Damages for Fraud—Judgment for Plaintiffs for Balance of claim above Amount of Damages—Plaintiff awarded Lump Sum for Costs—Defendant awarded Scale Costs as on Amount of Damages awarded. The plaintiff company sued the defendants for £2,000 as moneys due under a contract plus interest, and the defendants counterclaimed for damages for fraud. The jury found that the contract was induced by fraud, and awarded damages to the defendants in the amount of £1,119. Setting damages awarded against the contract figures and interest, there remained the sum of £988, for which judgment was given for the plaintiff company against the defendants. *Held*, That the plaintiff company, on its claim, should receive as costs the sum of £30 in full, plus disbursements, and judgment be given against the defendants therefor; and that the defendants should have judgment against the plaintiff company for scale costs as on £1,119 for filing the counterclaim, preparation for trial, and trial, with witnesses' expenses and disbursements, including jury fees. *R. Farry and Co., Ltd.* v. *George*. (Dunedin, September 2, 1948. Kennedy, J.)

New Trial—Ground that Damages awarded by Jury excessive—Principles to be applied in considering Application—Code of Civil Procedure, R. 276 (c). In approaching the consideration of a motion for a new trial upon the grounds that the damages awarded by the jury were excessive, the Court has not to consider whether, in fact, the assessment was correct or not—that is, it has not to consider merely whether it would make the same assessment; and the Court has necessarily to proceed with caution, for so many matters relevant for consideration are matters peculiarly within the knowledge of a common jury, who are in a special position to estimate the value of the evidence given and to draw proper inferences from it. Enunciation of principles to be applied to the consideration of a motion for an order for a new trial on the ground that the damages awarded by the jury were excessive. (*Johnston* v. *Great Western Railway Co.*, [1904] 2 K.B. 250, and *Mechanical and General Inventions Co., Ltd., and Lehwess* v. *Austin and Austin Motor*

Co., Ltd., [1935] A.C. 346, followed.) *Pimm* v. *Gordon and Gotch (Australasia), Ltd.* (Dunedin. December 8, 1948. Kennedy, J.)

Review of Judge's Order—Motion to be made within Twenty-eight Days from making of Order complained of—Code of Civil Procedure, R. 421. Semble, A motion under R. 421 of the Code of Civil Procedure to review a Judge's order, by analogy with the English practice, should be made within twenty-eight days from the making of the order complained of. Such a motion is not an appeal, but is for a rehearing. (*In re Giles, Real and Personal Advance Co.* v. *Michell*, (1889) 43 Ch.D. 391, and *Boake* v. *Stevenson*, [1895] 1 Ch. 358, applied.) *Jollands, Ltd.* v. *Whitley and Others*: *Jollands, Ltd.* v. *Burton and Others*. (Wellington. December 20, 1948. Fair, J., Cornish, J.)

RENT RESTRICTION.

Economic Stabilization Emergency Regulations—Relative Hardship—Onus of Proof—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184), Reg. 21B (1) (d). Regulation 21B (1) (*d*) of the Economic Stabilization Emergency Regulations, 1942, cast upon the landlord the onus of proving that his hardship exceeded the hardship of the tenant; without such proof, his claim must fail. Where both the landlord and the tenant were picture-theatre companies, it was held on the facts that, as the concentrated financial loss and the personal deprivation which would be inflicted on the landlord company and its shareholders by refusing the order constituted a greater hardship on them than the relatively smaller financial loss that would be inflicted on the tenant company and its shareholders in its purely impersonal business, the landlord was entitled to an order of possession of its picture-theatre. *Paeroa Theatre Buildings, Ltd.* v. *Te Aroha Amusements, Ltd.* (Auckland. December 10, 1948. Stanton, J.)

"Lawfully Sub-let." *92 Solicitors' Journal*, 583.

Possession—Failure to comply with Conditions of Tenancy—Breaches remedied before Action—"Relevant matter"—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184), Reg. 21B (2). In an action for possession on the ground that the tenant has failed to perform conditions of the tenancy, it is a "relevant matter," within the meaning of that term as used in Reg. 21B (2) of the Economic Stabilization Emergency Regulations, 1942, and of decisive weight, that the breaches of the lease which were established had been remedied, and there had been no breaches over a period approaching a year. *Egmont National Park Board* v. *Blake*. (New Plymouth. December 6, 1948. Hutchison, J.)

ROAD TRAFFIC.

Pedestrian Crossing—Controlled Crossing—Duty of "approaching" Driver—Interrupted View of Crossing—Injury to Foot passenger thereon—Pedestrian Crossing Places (Traffic) Regulations, 1941 (S.R. & O., 1941, No. 397), Reg. 3. The Pedestrian Crossing Places (Traffic) Regulations, 1941, Reg. 3, provides: "The driver of every vehicle approaching a crossing shall, umless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing." A pedestrian was knocked down by an omnibus while on a pedestrian crossing controlled by traffic-lights. The lights were in favour of the omnibus driver, but his view of the crossing was masked by a stationary taxi-cab which was drawn up at the kerb on the crossing. When the omnibus became stationary, its front wheels were on the crossing. *Held*, That a crossing controlled by lights did not cease to be "a crossing" within the meaning of Reg. 3 even when a green light was being shown to oncoming traffic, and, therefore, as the omnibus driver was prevented by the stationary taxi-cab from seeing that there was no foot passenger on the crossing, and, nevertheless, approached at such a speed that he could not stop before reaching the crossing, he was guilty of a breach of Reg. 3, and the breach was a contributory cause of the accident. The pedestrian's contributory negligence did not adeem the driver's failure to obey the regulation, but, under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), merely reduced the amount which the pedestrian was entitled to recover. (Decision of the Court of Appeal, [1947] 2 All E.R. 509; [1947] K.B. 930, affirmed.) *London Passenger Transport Board* v. *Upson and Another*, [1949] 1 All E.R. 60 (H.L.).

For the Pedestrian Crossing Places (Traffic) Regulations, 1941, see *34 Halsbury's Complete Statutes of England*, 350.

SHOPS AND OFFICES.

Public Holidays—Exemption from Closing-hour Provisions—Jurisdiction to grant Exemption in respect only of Closing-hours for Working-days—Shops and Offices Act, 1921-22, s. 69—Shops and Offices Amendment Act, 1927, s. 19. A Magistrate has no power under s. 69 of the Shops and Offices Act, 1921–22, or under s. 19 of the Shops and Offices Amendment Act, 1927, to grant exemptions from the closing-hours fixed either by the statute or by any award in respect of Boxing Day, New Year's Day, the day after New Year's Day, Easter Saturday, Easter Monday, King's Birthday, Labour Day, and Anniversary Day. *In re Paraparaumu Beach Stores, Ltd., and Others*. (Wellington. December 21, 1948. Goulding, S.M.)

TRUSTS AND TRUSTEES.

Beneficiary unheard of previously to Testator's Death and during eighteen years succeeding that Death—Order to Trustee to divide Beneficiary's Share on Footing that he did not survive Testator. On application to the Court by a trustee for directions, it was shown that the testatrix, who died on September 10, 1930, by her will divided the residue of her estate between her two brothers. One brother survived her, but the other brother, R.M.M., had not been heard of for a time before the death of the testatrix, and there was no information concerning him in the eighteen years since her death intervening. The Court ordered that, in the absence of evidence that R.M.M. survived the testatrix, the trustee of the testatrix's will should be at liberty to divide the share of the testatrix's estate devised and bequeathed in favour of R.M.M. upon the footing that R.M.M. did not survive the testatrix. *In re Millar (deceased), Walker* v. *Millar*. (Dunedin. November 26, 1948. Kennedy, J.)

WAGES.

Economic Stabilization—Rates of Pay forming Basis of Calculation of Bonus Payments—Increases in such Rates not approved by Wages Commissioner—Annual Holidays Pay based on such Unapproved Rates Irrecoverable—Economic Stabilization Emergency Regulations, 1942, Reg. 34. A claim for annual holiday pay based on a rate of remuneration which is irrecoverable by virtue of Reg. 34 (2) of the Economic Stabilization Emergency Regulations, 1942, cannot be sustained. *So held*, by the Court of Arbitration on case stated by a Stipendiary Magistrate for the opinion of the Court of Arbitration in respect of a claim for a penalty for breach of the Annual Holidays Act, 1944. *Augustine* v. *Wellington Woollen Manufacturing Co., Ltd.* (Ct. of Arb. Wellington. December 16, 1948. Tyndall, J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

Contractor—Sub-contractor—Abandonment or Repudiation of Head Contract—Contractor's Right to recover Moneys already Payable in Terms of Contract—Sub-contractor under Entire Contract for Supply of Materials—Right to Charge on Moneys Payable to Contractor under Head Contract—"Work"—"Completion of the work"—Wages Protection and Contractors' Liens Act, 1939, ss. 20, 21, 24, 26, 28, 31, 32. A contractor to build a house does not, by the abandonment or repudiation of his contract, forfeit his right to recover moneys that have already become payable to him in accordance with the terms of his contract. (*Cutter* v. *Powell*, (1795) 6 Term Rep. 320; 101 E.R. 573, distinguished.) The Wages Protection and Contractors' Liens Act, 1939, confers on a sub-contractor under such a contractor, in respect of materials actually provided by him for the purposes of the work, a right to a charge on moneys payable to the contractor, notwithstanding that the sub-contract was an entire contract for the supply of materials; so that, when the head contract is abandoned, the sub-contractor possesses an immediate right to recover the value of the work performed by him, although the sub-contract has been performed only in part. (*Appleby* v. *Myers*, (1867) L.R. 2 C.P. 651, and *De Bernardy* v. *Harding*, (1853) 8 Exch. 822; 155 E.R. 1586, followed.) Observations on the creation of charges, as to the retention of moneys under ss. 31 and 32, as to priorities, and as to the general purpose and scheme of the statute. *Stern and Another* v. *J. A. Redpath and Others*. (Wellington. December 3, 1948. Christie, J.)

WAR CONDITIONS.

Civilians in Enemy Occupied Territory. (Clive M. Schmitthoff, LL.D.) *64 Law Quarterly Review*, 492.

Enemy Property and the Paris Peace Treaties. (F. A. Mann, LL.D.) *64 Law Quarterly Review*, 492.

WILL.

"All my bloodstock"—Inclusion of Half Share in Horse and Interest as Member of Syndicate owning Stallion—Costs—Appeal to Court of Appeal—Costs of Several Parties with Same Interests and Same Arguments—Allowance of only One Set of Costs. By cl. 3 (*c*) of his will dated February 4, 1943, a testator, who died on March 3, 1944, gave to H. "all my bloodstock." At the date of the will, the testator owned several thoroughbred horses including a colt called Pink Flower. He subsequently sold a half share in Pink Flower to Mrs. H., but the horse remained

as part of his stud. The testator was also at the date of the will interested in a stallion called Colombo, which had been purchased on November 1, 1942, by a number of persons, including the testator. On December 31, 1942, the purchasers entered into an agreement appointing a committee to act in all matters appertaining to Colombo as agents for the purchasers, and as a result of the agreement the purchasers were entitled to free nominations for mares to be served by Colombo according to the proportion of the purchase price put up. The testator had subscribed one-fortieth share, and was entitled to one free nomination. The testator's stud at all material times included Pink Flower, but never included Colombo. *Held*, That, on the true construction of the will, the words "all my bloodstock" included the testator's share of Pink Flower, but the testator's interest in Colombo was more in the nature of an investment than an interest in a horse, and did not form part of his "bloodstock." (*Re Sykes*, [1940] 4 All E.R. 10, distinguished.) Per *Lord Greene*, M.R., When an appeal is made to the Court of Appeal and there are several parties in precisely the same interest, with precisely the same arguments, who below were separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in the Court of Appeal. If parties with precisely the same argument come to the Court of Appeal and three separate sets of costs are incurred, the practice is to allow only one set of costs, certainly where costs are being charged on residue or on a fund the persons interested in which either are absent or are infants. *Re Gillson (deceased), Ellis* v. *Leader*, [1948] 2 All E.R. 990 (C.A.).

As to Descriptions or Property, see *34 Halsbury's Laws of England*, 2nd Ed. 236–239, paras. 291, 292; and for Cases, see *44 E. and E. Digest*, 645–649, Nos. *4852–4893*.

THE NEW MAGISTRATES' COURTS ACT AND RULES.

The New Rules Considered.

II

The statutory provisions relating to the New Magistrates' Courts have been dealt with in a previous article, in which the jurisdiction of the new Court has been discussed. We now proceed in this and subsequent articles to examine the procedure prescribed by the new Magistrates' Courts Rules (Serial No. 1948/197) which will come into force as from January 1, 1949.

Parts I, II, and III of the new Rules may be passed over quickly as being only preliminary in nature. It is interesting in passing to note that the Clerk of the Court is now as mythical a figure as the phoenix—from his ashes arises the Registrar of the Magistrates' Court, with his Deputy-Registrar (once known as Assistant Clerk) behind him to act when necessary in his place and stead. The Registrar, it may be noted, is able, by virtue of R. 332, to exercise the powers of the Court, other than those which relate to the actual hearing of an action.

Place of Commencement of Proceedings.

The Rules as to place of commencement of proceedings are contained in Part IV of the Rules: RR. 26-35. They do not differ substantially from those hitherto in force, but there is at least one new provision which will be found a convenience to practitioners—*viz.*, R. 34, which provides that, notwithstanding anything contained in the Rules, any proceedings may be commenced in *any Court* with the written consent of the defendant. This will be found very convenient in the larger cities in the case of tenement summonses. It has been well known that at Auckland, for instance, tenement cases relating to properties in the eastern suburbs have hitherto often had to be tried at Onehunga or Otahuhu, the old sections (ss. 180 *et seq.*) making this procedure mandatory; in fact it has been held that the Court had no jurisdiction if the plaint were issued in any other Court: *Ihipera Ahipene* v. *Davis*, (1940) 1 M.C.D. 512: *Wily's Magistrates' Courts Practice*, 377. It will now be possible in many cases where a tenant intends contesting a tenement summons to obtain in advance from him or his solicitor an agreement that the plaint shall be entered in the more convenient city Court. Moreover, a like consent filed with the plaint will enable many motor-collision actions to be tried more conveniently in a city Court, rather than in the locality where the accident occurred.

"Default Actions."

In order to ensure that the more detailed rules as to pleading will not unnecessarily complicate mere "debt-collecting" actions, provision has been made to divide all actions into "ordinary" and "default" actions. Any cause of action may be used as a basis for an "ordinary" action, which is commenced, as hitherto, by the filing of a plaint note and a statement of claim, together with a summons which is much in the accustomed form.

A "default" action *may* be brought in respect of any *liquidated demand*, but may *not* be brought—

(*a*) Against an infant or a mentally defective person; or

(*b*) By an assignee of a debt or other thing in action; or

(*c*) To recover moneys lent by a money-lender within the meaning of the Money-lenders Act, 1908, or interest on moneys so lent, or to enforce any agreement made or security taken in respect of moneys so lent; or

(*d*) To recover moneys payable under any hire-purchase agreement within the meaning of the Hire-purchase Agreements Act, 1939; or

(*e*) To recover interest.

The summons in a default action does *not* summon the defendant to come before the Court on a fixed day, but merely notifies him that the plaintiff claims from him the liquidated amount specified in the statement of claim, and informs him that, unless he defends (or pays into Court) within seven days after service, the plaintiff may, immediately the seven-day period has expired, sign judgment by default. While the plaintiff may so sign judgment by default, he is not bound to do so, but may, if he so decides, set down the case for hearing and ask for judgment from the Court. If a notice of intention to defend is filed, the Registrar then fixes a date for hearing and notifies the parties. It is suggested that this procedure will be found very convenient in practice; it will prevent Court days being filled up with lists of debt-collecting summonses, few of which, if any, are to go to actual hearing, and it allows a plaintiff to sign judgment by default after seven days after service, whether or not a Court is able to be held.

It may be noted that by R. 228 it is provided that, where in a default action judgment is entered by default and the defendant satisfactorily explains his default and satisfies a Magistrate or Registrar that he has a defence or counterclaim which ought to be heard, the Magistrate or Registrar may, on application made on notice, stay execution and set aside the judgment and make an appropriate order for the due hearing of the action.

NOTICES OF INTENTION TO DEFEND: COUNTERCLAIMS.

In an "ordinary action" the summons specifies a date for hearing and the rules are substantially similar to those hitherto in force. Seven days are given after service, and the rules are drafted quite strictly to ensure that defendants shall file their notices of intention to defend, pay into Court, issue third-party notices, &c., within that period. It would seem to the author of this article that this period of seven days is rather unduly insisted upon by the Rules, and that in fact some modification of this strictness may be found necessary in the light of experience. Meanwhile it is sufficient to note that the new Rules do not look kindly on the practitioner who delays on the receipt of a Magistrates' Court summons. If he intends to defend, he should remember that a defendant *shall within seven days* file *and serve* a notice of intention to defend; if he fails to do so within the period, while he is not necessarily precluded from defending, his client may be ordered to pay costs. A similar rule applies to counterclaims. It is difficult to see why a defendant should have to file *and serve* a counterclaim within seven days after service of the summons. It is well known that a defendant will often, in ignorance, leave consulting his lawyer for several days after service of a summons, and that a counterclaim cannot always be drafted on the spot. Nevertheless, the Rule is definite, and a similar Rule prevails (with a similar qualification) to that regarding notices of intention to defend.

It is true that by R. 147 power is given to the Court to enlarge or abridge any time on application; but parties should not (it is submitted) be put needlessly to the trouble of making formal applications to the Court, nor should the time of the Court be taken up in dealing with such applications.

STATEMENTS OF DEFENCE.

An entirely new provision is that relating to statements of defence. The general rule (R. 113) provides simply (as hitherto) for a notice of intention to defend to be filed—within seven days after service of the summons—and for special defences—*i.e.*, infancy, Statute of Limitations, and discharge from bankruptcy—to be specified. A supplementary provision, however, sets out—

(*a*) That in any case a defendant *may* (if he wishes) file and serve a statement of defence.

(*b*) That a defendant may at any time be *ordered by a Magistrate* to file and serve a statement of defence. Such a statement of defence shall be a full and explicit statement of the particulars of his defence, including such particulars of time, place, names of persons, and dates of instruments, as may suffice to ensure that the Court and the opposite party are fully and fairly informed of the nature of the defence.

(*c*) That, notwithstanding that a statement of defence has already been filed, a Magistrate may at any time order a party to file and serve a fuller and more explicit statement of defence.

It is as yet impossible to forecast just what rules will be laid down by Magistrates as to the application of the above procedure. It would appear clear, however, that Magistrates will of necessity order a statement of defence to be filed (upon application by the plaintiff) after a notice of intention to defend has been filed) in practically all cases where the equitable jurisdiction of the Court has been invoked; and it would also seem clear that in negligence actions, for instance, where they are being defended on the facts, it will become the universal procedure to require a statement of defence so as to compel a defendant to specify (for instance) particulars of such allegations of contributory negligence as he intends to set up by way of defence.

THIRD-PARTY PROCEDURE.

The third-party procedure prescribed by the new Rules is a distinct improvement on the old. It will be remembered that the old rule (s. 65 of the old Act) provided in a limited degree for third-party notices; but, as *Wily's Magistrates' Courts Practice*, 81, points out, this section has never been amended to bring it into line with R. 95 of the Supreme Court Code, introduced in 1939. The result was that the degree of finality between all parties which was possible in a Supreme Court action was not possible in the Magistrates' Court. The new Rules now gazetted remove this anomaly, and the new R. 138 is substantially identical in form with the Supreme Court Rule 95. This will have two advantages—it will allow the wider relief hitherto possible only in the Supreme Court to be given in the Magistrates' Court, and it will enable a settled body of law as laid down already in reported cases in the Supreme Court to become applicable at once to the new Magistrates' Court procedure.

It may be noticed as a blemish in the new procedure that it is mandatory that notice of an application for a third-party notice shall be filed and served on the plaintiff within seven days after service of the summons. This will often in practice give rise to difficulties, particularly where a defendant fails to consult his solicitor till some days have elapsed after receipt by him of the summons. Take, for example, a plaintiff in (say) Hokitika, issuing a plaint at Kaikohe (North Auckland), where the defendant resides, and suppose that the defendant, residing out in the country, is served by post. By the time the defendant has consulted his solicitor some days will probably have elapsed after service. It may be that some further documents or evidence have to be considered before an application for a third-party notice can be drafted—possibly even the name of the proposed third party (say the owner of a motor-vehicle) is unknown in the first place to the defendant, and inquiries have to be made. How is it going to be possible to draft an application for a third-party notice *and serve it at Hokitika* within the seven days? The draftsman would have been better advised not to have insisted upon a rigid time-limit. It has not been found necessary in the Supreme Court, where the only test is whether the application has been unduly delayed, and whether the delay has been such as to prejudice the plaintiff. A similar rule could well have governed the new Magistrates' Court procedure, and it is submitted at this early stage that the new Rule will be found oppressive and will in due course have to be amended.

Provision is also made in the new Rules for fourth parties and subsequent parties, as in the Supreme Court.

LAND SALES COURT.

Summary of Judgments.

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

No. 150.—*In re* W. TRUSTEES.

Rural Land—Basic Value—Allowances—Management Reward —Death Rates for Sheep—Prices for Two-and-a-half-year Steers—Fencing—Hay—Chaff—Accountancy—Commissions on Sales of Store Stock—Application of Settled Principles.

Cross-appeals by the claimants and the Crown in respect of a decision of the Gisborne Land Sales Committee awarding £56,349 as compensation for the taking by the Crown for servicemen's settlement of a property known as the Hihiroroa Station. The station comprised 4,482 acres and was described as good sheep-farming land. The claim, as lodged by the owners, was for £69,000, and the amount offered by the Crown as compensation was £42,082. At the hearing before the Committee, budgets were presented on behalf of the claimants by Messrs. Graham, Harris, and Ball, and on behalf of the Crown by Mr. S. M. Jones. The Committee, after hearing the valuers and other witnesses, reserved its decision, and subsequently arrived at its award by adopting Mr. Jones's budget as a basis of assessment, but amending it in respect of various items.

The Court said: "Before the hearing of the appeal, the parties had agreed to accept for the purposes of the appeal many of the figures adopted by the Committee, and had agreed as to the specific items to be contested. The difficulties with which we are confronted when two or more different budgets are placed before us have accordingly been avoided, and the work of the Court has been greatly facilitated.

"The principal issue in dispute was as to the amount to be allowed in the budget for management reward, and it will be necessary for us to deal with that matter at some length in due course. The other issues relate mainly to questions of fact. We shall deal with each of the subjects of controversy in order, leaving the question of management to the last.

"*Death Rates For Sheep.* While the carrying-capacity of the station has been agreed on, there was considerable difference of opinion as to the proper percentage of losses for the various classes of sheep. Mr. Jones estimated losses of ewes at 6½ per cent. and of dry sheep at 5½ per cent., while the witnesses for the claimants varied in their estimates from an average rate of 4 per cent. to rates of 4 per cent. for ewes and 1½ per cent. to 2 per cent. for dry sheep. The Committee compromised between these figures, and, according to its report, purported to allow for an over-all average of from 4½ per cent. to 5½ per cent. The effect of lowering the Crown's death rate was to increase the number of sheep and the quantity of wool available for sale, and so to increase the revenue provided for. The Committee on this account allowed an additional £110 of revenue, but did not disclose how this amount was made up. On appeal, both parties claimed that the original assessments of losses by their respective valuers should be confirmed. We are of opinion that the weight of evidence supports the Committee's view that a correct allowance for lossess should be somewhat below that made by the Crown. We think, however, that in allowing a further £110 of revenue the Committee has erred a little on the high side, and that its allowance in this respect should be reduced to £75.

"*Prices of Two-and-a-half-year Steers.* The only other revenue item in dispute related to the sale of fourteen two-and-a-half-year steers. The amount in dispute was small, but the issue involves an interesting question of principle. The question is whether the prices provided for two-year and two-and-a-half-year steers in the schedule of prices for farm products issued by the Department of Lands and Survey are correctly set out, or whether the schedule contains a misprint or is otherwise in error. The price for two-year steers according to the schedule is £8 5s. and for two-and-a-half-year steers £7 10s. The claimants contended that it was absurd for two-and-a-half-year steers to be priced at less than two-year steers, and they invited the Committee to assume that the prices had been accidentally transposed. The Committee accepted this view, and, accordingly, allowed £8 5s. for two-and-a-half-year steers. The Crown denied that there was any error in the schedule. It pointed out that two-year steers are sold in the spring, and are usually in great demand, while two-and-a-half-year steers are sold in the autumn, when feed is usually scarce and prices are frequently poor. The Crown showed that similar conditions were reflected in the schedule prices for steers in several other districts, and its evidence indicated that the schedule was in accordance with the actual prices for stock in the Gisborne district in 1942.

"The schedule is not intended to be followed slavishly, and the prices therein may properly be varied when the evidence justifies such a course. We are of opinion, however, that the schedule should be accepted as *prima facie* evidence of the propriety of the prices therein set out. The onus is accordingly on the party so contending of satisfying us that the schedule should be disregarded. We cannot agree that an error in the schedule is self-evident, or that it has been established in evidence. On the contrary, we think the weight of evidence favours the view that the schedule is substantially correct, and we are not satisfied that the Committee was justified in substituting £8 5s. for the schedule price of £7 10s. The addition of £10 made by the Committee in respect of the sale of fourteen two-and-a-half-year steers, is, therefore, disallowed.

"*Fencing.* A major difference on the expenditure side related to the cost of fencing. The claimants submitted that an expenditure of £245 per annum for contract work, together with labour provided by the ordinary staff, would enable the fences to be kept permanently in good order. The Crown, on the other hand, allowed £280 annually for the replacement of fences, and, provided for a fencer at £312 for general fencing repairs. About twenty-six miles of fencing is involved, and the parties agree that provision must be made to replace a proportionate part of the fencing each year and to keep the rest of the fences in good order. The real issue is as to whether necessary current repairs can be effected by the ordinary staff or whether an additional man is required for this purpose. The Committee reduced the specific allowance for fencing to £200 but allowed £312 for fencing labour. We think that the labour cost of fencing must be considered in relation to the total amount allowed for employed labour. We have carefully perused the evidence and are of opinion that the Crown is right in allowing for labour in addition to that of the ordinary station staff. It does not follow that an extra man will be continuously employed on fencing, nor is it material whether he is described as a fencer or not. In substance, the provision made by the Committee will be upheld, but we consider that the evidence justifies us in reducing its allowance for fencing by £75.

"*Hay and Chaff.* A sum of £100 was provided for the purchase of hay and chaff. It was agreed that hay and chaff would be required, but it was contended by the claimants that it should be grown on the property without extra cost. The weight of evidence supports the Crown's contention that it is customary for hay and chaff to be purchased, and the allowance of £100 for this purpose is accordingly confirmed.

"*Accountancy.* The Crown allowed £70 for accountancy fees and £5 for stamps and stationery, and these amounts were adopted by the Committee. The claimants established in evidence that the actual cost of accountancy services for some years before and after 1942 was £45. We are of opinion, after hearing the accountant concerned, that his charge was a reasonable one, and that, accordingly, the allowance for accountancy, stamps, and stationery should be reduced to £50.

"*Commission on Sales of Store Stock.* This is a question as to whether commission on sales of store stock should be charged at 4½ per cent. or at 3½ per cent. The facts are that commission is charged at 4 per cent. on sales of stock at the yards and at 3 per cent. on sales effected on the farm. The claimants say that a rate of 3½ per cent. would be a fair average of the charges actually incurred. We think the weight of evidence supports this contention, and a reduction of £13 will, therefore, be made in the allowance for commission.

"*Capital Value of Breeding Cows.* The price of breeding cows in accordance with the schedule is £6, but Mr. Jones contended that a better type of cow should be provided for at a cost of £8 per cow. He has made no allowance, however, for

an advance on schedule prices upon sales of cattle, and we are not satisfied that there is good reason for departing from the schedule allowances for capital stock. The Crown's provision for 330 cows at £8, which was accepted by the Committee, will accordingly be amended to £6 per cow, with a consequential reduction of £33 in the debit for interest on capital stock.

"*Management.* The last and most substantial matter in dispute related to management, for which the claimants allowed £650 and the Crown £1,200. Both parties claimed to find support for their assessments in past decisions of this Court. Those decisions do no more, however, than apply certain principles which are stated in the following terms in *No. 66.—B. v. The King,* (1946) 22 N.Z.L.J. 24, 25: 'the remuneration to be allotted to the owner for his work in the production of the income in terms of s. 53 (5) of the Servicemen's Settlement and Land Sales Act, must express in proper monetary terms the responsibility of the owner for the evolution and administration by himself, of a proper farming policy, and that in circumstances where, as is claimed by the appellant, that policy may comprehend several forms of activity. Then, account must be taken of the degree to which climatic and other conditions constitute a challenge to competence, care and resource. Regard must also, it is thought, be paid to the amount of capital involved in the venture. And in *No. 88.—In re B.,* (1946) 22 N.Z.L.J. 262, 263: 'The section speaks of remuneration for the work performed by "the farmer" and in the opinion of the Court the term *prima facie* relates to a farmer who is also the owner of the property and such reward must be provided for in the budget as would be reasonably sought by a working-owner (in addition to interest at 4½ per cent. upon his capital) as his reward for farming the property and for determining and administering a proper farming policy.' It has not previously been necessary for the Court to consider in detail how those principles should be applied to the actual assessment of an appropriate management reward in the case of a large sheep station.

"Though appearing as an item on the expenditure side of the budget, the allowance for management differs in character from the other debit items, all of which relate to actual payments or to allowances which, in due course or in certain circumstances, may be the subject of actual payments. The allowance for management is something retained by the owner, and represents in the budget the value of his services to the farming business. In that respect, it is analogous to the surplus which is capitalized to find the productive value, but which is also retained by the owner save in so far as it is required to meet payments of interest on borrowed capital. In common parlance, a farmer would no doubt speak of the total sum he had left after payment of outgoings as his income, his earnings, or his annual profit. It is unlikely that he would consider it as in part remuneration for work and in part interest upon capital. He would probably, and we think rightly, claim that the whole of his income or profit, whatever it may be called, and however it may be apportioned, was earned in his farming operations, and in a broad sense was his remuneration for his work. When an owner's surplus is apportioned into two parts which are referred to for convenience as remuneration and interest upon capital, it is important to remember that both of these terms are used loosely and not in their strict signification. An owner's so called 'remuneration' is not a wage or salary paid to or earned by him. His 'interest on capital' is not strictly speaking 'interest' at all. Both are parts of his profit and are the fruits of his efforts in his farming business. The division of net income into remuneration and return upon capital is at best an artificial apportionment, and one in which the analogy of wages and interest should not be pressed too far.

"As the 'management allowance' and 'surplus for capitalization' in a budget really comprises a common fund representing the surplus remaining after debiting all outgoings and proper allowances against the revenue, it is possible, when all the other items in the budget have been determined, to ascertain the amount of that surplus. It will be remembered that in the present case the Committee adopted a certain budget, and that, for the purposes of the appeal, all the items in the budget were accepted by both parties except those we have already dealt with, and the allowance for management. We are, therefore, in a position to amend the Committee's budget, in accordance with our findings, and with the following result:

Revenue as found by Committee			£8,817
Less as hereinbefore determined:			
On account of sheep and wool	£35		
On account of cattle	10	45	
Adjusted revenue			£8,772
Outgoings (as found by Committee less £700 allowed for management)		£5,523	
Less as hereinbefore determined:			
On account of fencing labour	£75		
On account of accountancy	25		
On account of commission	13		
On account of interest on capital stock	33	146	
Adjusted outgoings			5,377
Surplus of revenue over outgoings, being amount available for management and return upon capital			£3,395

"The starting point for the consideration of any question affecting management is to be found in s. 53 of the Servicemens' Settlement and Land Sales Act, 1943. By that section, the 'productive value' of farm land is defined as the net annual income that can be derived from the land by an average efficient farmer, capitalized at the rate of 4½ per cent. The 'net annual income' is to be ascertained by first assessing the gross income that can be derived from the land and then deducting all the expenses, other than capital expenditure, required to be incurred in the production of the income (all prices and costs being those ruling in December, 1942). The section then provides that the term 'expenses' shall be deemed to include rates, land tax, provision for maintenance, interest at 5 per cent. per annum on the value of stock and chattels, and 'reasonable remuneration for the work performed by the farmer or any other person in the production of the income.'

"The words last quoted are intended to cover both the wages paid to employees and a proper allowance for the owner's services. The cost of employed labour is a question of fact, and its assessment is seldom a matter of difficulty. The problem which now confronts us is to determine upon a proper allowance for the owner.

"Mr *Richmond* for the claimants urged that there must be a close relationship between the allowance for an owner's services and the salary payable to a manager, by reason that the statutory justification for both is found in the words 'reasonable remuneration for . . . work.' While superficially attractive, we are of opinion that this contention is unsound. It is based on the assumption that, because 'remuneration' usually connotes wages or salary, the remuneration of an owner must be assessed by reference to the wages or salary payable to a manager, as the recipient of wages or salary whose work most closely approximates to that of an owner. It presupposes also that the work of a manager is substantially the same as that of an owner. We think, however, that the work of an owner in the case of a large sheep station differs both in character and responsibility from that of a manager. We think, moreover, that it is just as unsound to contend that the term 'remuneration,' in the case of an owner, must necessarily be associated with salary or wages, as that the term 'work' should necessarily be associated with manual labour. We have already pointed out that the remuneration received by a station-owner for his work is neither in fact nor in law a wage, but that it is a profit, earned in his farming business. By whatever name it may be called, however, we are satisfied that an owner has always expected and usually received, and we think he is entitled to receive, a much higher return for his work than a manager. If it were not so, there would be little advantage to be gained from the ownership of land. Evidence as to the amount which it would be reasonable to pay to a manager enables us to fix a minimum below which the reward of an owner cannot properly be assessed, but we are not satisfied that it affords a reliable basis for the assessment of the greater amount to which the owner is entitled. Both parties were in agreement that the reasonable cost of paid management in the case of Hihiroroa would have been in the vicinity of £600.

"Holding, as we do, that the work of an owner is somewhat more difficult and responsible than that of a manager, and that its reward in our present economic system has the character of a profit rather than a wage, we are now faced with the problem of assessing a reasonable allowance for management in terms of money. As to this, we must be guided by the evidence, and by the opinions of those called as experts.

"The claimants' valuers each allowed £650 for management in their respective budgets. This sum, according to their evidence, was intended to represent the amount which it would be reasonable to pay to a manager, or for management and supervision, together with an additional £50 for the owner's additional responsibilities. No convincing reasons were given as to why the additional sum should be limited to £50, and it seems to us to be demonstrably too small. The witnesses appeared, indeed, to be

imbued with the idea that the use of the terms 'remuneration' and 'work' in s. 53 made it incumbent on them to assess the value of the owner's services on precisely the same scale as if he were not the owner but a manager. In this respect, and for the reasons already given, we think the claimants' valuers have adopted too narrow a construction of the section. The proper reward of an owner must be assessed by reference to his work as an owner and to the rewards usually received by owners, and not by reference to what he might have earned if he were not an owner but merely a manager.

"For the Crown, Mr. Jones gave lengthy evidence in support of his allowance of £1,200. As a basis for assessing management reward, he tentatively suggested that it should approximate to 2 per cent. of the total capital involved. The proposition is an interesting one, if only for the reason that, when added to 4½ per cent. on capital, it provides for a total net return almost identical with that acknowledged to be reasonable by several other witnesses, not all on the side of the Crown, who said that an average farmer would be entitled to expect a net return, to cover management and interest on capital, of not less than 7 per cent. on the cost of his land. If management reward could be assessed as a fixed percentage of the capital value of the land, our problem would be solved. We know that we have a surplus of £3,395 to apply to interest and management. Interest must be calculated at 4½ per cent., so that, if management can be assessed at 2 per cent., the surplus may readily be apportioned in the ratio of four to nine, and with the following results: Management, £1,045; Interest, £2,350; Productive value, £52,222. We are of opinion, however, that in its present form this formula gives undue weight to the relationship of management reward to capital invested, and that for this reason, and because it takes no account of the many other factors affecting management, it is basically unsound, and might well be dangerously misleading.

"Mr Jones then referred to the returns of dairy farmers, with a view to showing that from dairying land of the same capital value as Hihiroroa a dairy farmer should be able to earn over £1,200 in addition to interest on capital. In the case of dairy farms, however, a fixed proportion of the income, based upon the guaranteed price formula, is in general applied to management and labour, and the owner receives for himself whatever is left of this amount after his employed labour has been paid. This simple means of assessment is rendered possible by the similarity of conditions prevailing throughout the dairy industry and by the guaranteed price, which ensures that revenue will in all cases be in strict proportion to butter-fat production. There is no such similarity of condition or uniformity of earning-power in the sheep-farming industry. Under the conditions at present prevailing in the sheep industry, we do not think that an examination of the returns secured by dairy farmers will assist us in fixing the reasonable remuneration of a station-owner.

"Mr. Jones then proceeded to define in detail the factors which he claimed to be relevant to the assessment of a proper management allowance. Among such factors he included the ease or difficulty of working the land, the degree of skill required, the risks of reversion and erosion, the accessibility and general desirability of the property, the climatic conditions and hazards of droughts, floods, and stock diseases, the risk of ownership, the possibility of price fluctuations, the amount of capital involved, the likelihood of increases in rates, the facilities for education, the cost of upkeep of the homestead, the need for domestic help, and the amount which the owner would have left after payment of income tax. The Court acknowledges that all these matters might well influence a prudent purchaser in deciding what to offer for a particular area of land. We are not satisfied, however, that all of them relate to the reward of management in a budget, which is what we have now to assess. Some of them should be adequately taken care of in other parts of a properly-drawn budget. Some do not affect productive value, or must be disregarded under the Land Sales Act by reason of the fact that costs and prices are deemed to be stabilized as at December, 1942. Risks of capital loss should be covered by the rate of interest, which is fixed by the Act at 4½ per cent. Hazards of drought, floods, and stock diseases should be adequately covered by a proper assessment of carrying-capacity, production, and stock losses. The stabilization of prices precludes us from having regard to possible fluctuations in price. The incidence of income tax appears to have no bearing upon productive value, though in the case of an excessively large property it might affect the market value of the land so as to reduce its market value to less than its productive value. If such were shown to be the case, a deduction might properly be made from the productive value in order to make it a fair basic value. On the other hand, it seems clear that such matters as the ease or difficulty of working the land, the degree of skill required, the situation of the property, its access and general amenities, and the educational facilities available, are factors affecting the reasonable remuneration of an owner, just as they would affect the amount which an absentee owner would have to offer in order to secure a satisfactory manager. The amount of capital involved and the magnitude of the undertaking are undoubtedly factors to be taken into account.

"Notwithstanding the care with which he had examined the question, however, Mr. Jones could suggest no means of converting these factors into terms of money, and he was driven to rely upon his general knowledge, judgment, and experience in fixing his management allowance at £1,200. It is to be regretted if the assessment of an allowance so vital to every sheep-farming budget is found to be entirely dependent upon such imponderable factors as knowledge, experience, and opinion, and we are of opinion that the problem might be simplified (as it has been simplified in the dairy industry) if an adequate investigation could be made into the economy of the sheep-farming industry, and if adequate data were available as to the income and outgoings, the capital position, and the net earnings of typical owners engaged in the various strata of the industry.

"Before reviewing the matters which appear to be relevant to the assessment of a proper management allowance in the present case, however, we must make clear just what, as we understand it, is intended to be covered by the term 'management' as an item in a farm budget. In general terms, we have said that it connotes a reasonable allowance to the owner for his management, but it is necessary to remember that the owner receives in addition a free house, which is maintained and depreciated by separate allowances in the budget, free meat and dairy produce, and a travelling-allowance to cover necessary travelling on farming business. On the other hand, the owner is assumed to provide and maintain his own furniture and motor-car, and to pay his domestic and household staff, if such are employed, out of his management reward. Out of it also he pays for all commodities not produced on the farm, and for the education of his children.

"The budget provides for a suitable homestead, and, from a consideration of the size of the homestead and the description of the property, it should be possible to obtain a fairly clear picture of the domestic establishment which it would be reasonable for the owner to maintain. Reliable evidence as to the cost to an owner of maintaining a suitable domestic establishment in 1942 would, we think, be of assistance in the assessment of a proper management reward. We conceive that a 'productive value' under the Land Sales Act is intended to be such a value as will enable an average efficient farmer who buys land at that value to earn from farming the land enough to provide his costs, interest on capital, and a reasonable living for himself and a family of average size. What constitutes a reasonable living may be determined by reference to the living standards enjoyed by other farmers upon comparable farms. The cost of maintaining a reasonable standard of living is usually an important factor when wages or salaries have to be determined as between employer and employee, and, in assessing the remuneration of an owner of farm land, his reasonable cost of living is a matter which may properly be taken into account. We think it is clear, moreover, that the remuneration to which an owner is entitled should be sufficient to enable him to maintain himself and his family in reasonable comfort without recourse to interest on capital. Only so can the remuneration for his work be a 'reasonable remuneration,' as the Act requires. The fact that an owner may have additional income available, which is equivalent to interest on capital invested, must, therefore, be disregarded in the assessment of a proper allowance for his work. To be a fair return, his management reward should itself be sufficient, together with his free house and other perquisites, to provide the owner and his family with the standard of living to which they are reasonably entitled.

"What, then, are the factors by which we must be guided in fixing a proper management allowance in the present case? We have the admitted fact that the cost of employed management would be £600. We have the knowledge that £3,395 is available, according to the budget, to provide management reward and surplus for capitalization. We know that the station is one of considerable size, and that the undertaking is one likely to involve a capital expenditure of at least £60,000. We have heard the claimants' valuers, who allow £650, but whose reasons for assessing management at that figure do not impress us as being sound. We have heard Mr. Jones, who impresses us as an able valuer, but who appears to have taken into account, in making provision for £1,200, certain factors not strictly relevant to management. We have also a good deal of evidence

concerning the station itself. It is situated some twenty-seven miles from Gisborne and in a fairly isolated locality. Its access is not good and an unfenced stock road traverses the property. Parts of it consist of good easy country, but the greater part is fairly steep and subject in some degree to risk of erosion and scrub reversion. Its management calls for a fairly high degree of skill in hill-country sheep and cattle farming. Its owner may be expected to be a man of education and more than average ability, who would be capable of earning a substantial income in other walks of life. The budget envisages his maintaining a house and grounds in keeping with his status in the community, and he may well find it necessary to incur some expenditure upon domestic help. The cost of educating his children is likely to be substantial. Having regard to all these factors, we propose to allow for the owner's services the sum of £1,000.

"Our final adjustment of the budget figure is, therefore, as follows:

Surplus as already determined	£3,395
Less management allowance	£1,000
Surplus for capitalization	£2,395
Productive value	£53,222
Plus, as agreed for plantation	100
	£53,322
Less, as agreed, for deficiencies	1,395
BASIC VALUE	£51,927
or say (in round figures)	£52,000

"Counsel for the claimants has asked for costs. Both parties are appellants in these proceedings, and the Crown, though not wholly successful, has succeeded to a greater degree than the claimants. In the circumstances, we do not think that costs should be allowed to either side.

"The appeal by the Crown will be allowed. The compensation awarded the claimants will be reduced to £52,000, together with interest thereon at 4½ per cent. from the date of possession to date of payment. The appeal by the claimants is disallowed."

MR. JUSTICE FLEMING.

Farewell by the Christchurch Bar.

There was a large attendance of members of the Bar at the Supreme Court, Christchurch, on the last day on which Mr. Justice Fleming was to sit as a Judge in that city. Practically everyone available had gathered to express their appreciation of the manner in which he had performed his duties as a temporary Judge during the previous two years, in the absence of Mr. Justice Northcroft as a member of the International Military Tribunal for the Trial of Eastern War Criminals in Japan.

Judge Archer, of the Land Sales Court, and all the Christchurch Magistrates were present.

THE PROFESSION'S FAREWELL.

The President of the Canterbury District Law Society, Mr. L. J. H. Hensley, addressed His Honour as follows:

"May I, on behalf of the Bar, crave your indulgence to address you on what we understand will be the last occasion of your sitting in Christchurch.

"Your Honour is leaving Christchurch to-night, having completed your duties as a temporary Judge of the Supreme Court stationed in this district. It has been the wish of every member of the profession that the occasion of your Honour's departure should not go unmarked by us, and, although it is not possible for everyone who has appeared before your Honour to be present here this morning, I feel that I am instructed by every member of the Bar to express respectfully our appreciation of your Honour's work among us, and our sincere regret that the time has come for you to depart.

"Your Honour came to us two years ago as a stranger, but we part from you as a friend. You were appointed, Sir, to fill no easy position, and to perform duties of the highest importance to the State. Your Honour may leave the Bench with the satisfaction of knowing that, in the respectful opinion of the Bar, you have discharged those duties honourably and well.

"All of us from the beginning have been charmed by your Honour's very sincere kindness and courtesy, which you have extended, not only to those who have practised before you, but, we feel, to everyone with whom you have come in contact. Your patience and anxiety to do justice have been noteworthy, and your industry has conquered many difficult tasks with which you have been confronted.

"As your Honour well knows, a Judge's work does not comprise merely his public appearances in Court. A considerable, and indeed an important, portion of it is done in Chambers, and this work has always been performed by you with expedition and with a minimum of inconvenience to counsel. Above all, your Honour, both in and out of Court, has always been so approachable that I am sure younger counsel, especially, will feel grateful in obtaining Court experience before so kindly a Judge.

"From remarks that you have passed to many of us from time to time, we feel that you have enjoyed your sojourn in Christchurch, and that you have been made to feel at home by the profession. We are glad if this is so. Now that your Honour is leaving this Court, I wish, on behalf of the Bar, to pay this public tribute to your services, and to convey to you our most cordial wishes for your future, in whatever sphere it may fall, and also at this time of the year, to extend to you the seasonal and traditional greetings of a very merry Christmas and a happy New Year."

HIS HONOUR'S REPLY.

Mr. Justice Fleming, in reply, said that it was very kind of the members of the Christchurch Bar to assemble in such numbers on the eve of his departure, and to express such generous sentiments, which, he assured them, were very heartily reciprocated.

"When I came here almost two years ago, it was to be for a period of two weeks, but at the end of that time I found myself in charge of this important Judicial District," His Honour continued. "I knew then that this could not have happened but with your generous approval.

"From my coming amongst you, up to the present time, members of the Bar in all parts of the South Island where I have presided have done all in their power to make my stay in this Island a happy one.

"I desire to thank you for the help you have given me during my time here. You have prepared your cases well, and have put them before me fully and without prolixity. We have handled a very large number of cases, You have never wasted the time of the Court with irrelevancies. If counsel, for a moment or two, did at times stray into bypath or meadow, I found a hint was sufficient to return him to the straight and narrow path of relevancy. As a result, actions here have been tried with expedition.

"You have always been most respectful and courteous and in every way helpful, and I, on my part, feel that not even the youngest counsel has ever come into this Court in any fear, or trembling and feeling that the Judge was ready to jump upon him on the slightest pretext. On the other hand, I have striven to be a friend of counsel, and to assist them in the carrying out of their onerous duties.

"I wish to take this opportunity of expressing my thanks to the staff; to Mr. Parker, the Registrar, Mr. Sansom, the Deputy Registrar, and to their assistants, including Mr. Keay, the Crier. Their work has been done with great efficiency and has been of the greatest service to me.

"I wish again to compliment the Christchurch Police of both branches. I have done so before, and desire to repeat it now. The country is fortunate in having such an excellent Police Force, who carry out their duties fairly and impartially, and with commendable skill.

"During my stay here, I have made many friends, both in the Profession and out of it. My life is all the richer for this experience, which will continue with me always as a happy memory."

His Honour concluded by wishing the President and the members of the Christchurch Bar a very happy Christmas, and a future of usefulness, prosperity, and contentment in carrying out the important duties entrusted to them.

At the conclusion of His Honour's speech, he went down into the body of the Court, and shook hands with all who were present as they filed past him.

Mr. Justice Fleming's term of office will conclude at the end of February.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Judicious Praise.—With the coming Legal Conference in Auckland, this particular form of gathering in New Zealand, although intermittent, will reach its majority, the first Conference being held in Christchurch in 1928. The second was in Wellington the following year, and the toast of "The Judiciary" was then entrusted to a practitioner, now deceased, who came from one of the smaller districts. Unfortunately, he overlooked his task until reminded of it on the evening of the dinner, when, beginning on the dubious note of "There are Judges good, bad, and indifferent," he allowed his interest to wander in the main to the groups of the second and third part. MacGregor, J., was equal to the occasion. "We are so used to having our bread well buttered," he said in reply, "that, if this time the butter seems a little thin, we shall have to attribute this to the machinations of the local Dairy Board." Legend has it that, when Lord Russell offered the Woolsack to Lord Langdale, then Master of the Rolls, he paid some very handsome compliments to the suggested recipient of the Chancellorship. The latter, who had no wish to exchange one office for the other, replied: "It is useless talking, my Lord. So long as I enjoy the Rolls, I care nothing for your butter!"

The Matrimonial Home.—Aided and abetted for many years by counsel, Magistrates have in general clung tenaciously to the fallacy that, save where she is able to prove a recognized ground for a separation order or reasonable grounds for living apart, a wife is guilty of desertion if she declines to accept her husband's offer of a matrimonial home chosen by him. In *Dunn* v. *Dunn*, [1948] 2 All E.R. 822, the Court of Appeal (Bucknill and Denning, L.JJ., and Pilcher, J.) has now had to consider whether a husband has necessarily the right to decide where the parties should live, and whether, if she refuses to join him, his wife becomes a deserter. According to Denning, L.J., the decision as to where the matrimonial home should be was one that affected the parties and their children, and it was the parties' duty to decide it by agreement, and not by the imposition of the will of one of them upon the other. Each had an equal voice in the ordering of affairs which were of common concern. Neither had a casting vote, though they should so try to arrange their affairs that they spent their time together as a family, and not apart. If such an arrangement were frustrated by the unreasonableness of one or the other, and that led to a separation, then the party who had produced the separation by his or her unreasonable behaviour was guilty of desertion.

The Sheep that Strayed.—According to one of the immortal charwomen that for years the late George Belcher drew in *Punch*, innuendo consists in inferring behind a lady's back what one wouldn't say to her face. A drier definition is to be found in the text-books. Recently, at a meeting of the township of Edinbane in Skye (where the municipality had a sheep stock club and owned, *inter alia*, a flock of sheep), one of the members said to the clerk in Gaelic, but in a voice that none could fail to hear, "You took a sheep belonging to the township; you sold it to Toban and did not enter it in the book." The fact was that the clerk (he was only a temporary clerk, one should hasten to add) had sold a strayed sheep, as he was entitled to do, but had delayed entering the sale in the ledger in strict accordance with the book of rules. The clerk instituted proceedings against the member, averring an innuendo to the effect that the statement meant he had been guilty of dishonesty. Lord Blades in the Court of Session declined to accept this, and, in refusing to send the case to the jury, decided that the words used naturally and reasonably could not bear the slanderous construction put upon them: *Macaskill* v. *Silver*.

The Angry Gardener.—The outraged member in *Macaskill* v. *Silver* recalls a story told of the late Sir Thomas Wilford, K.C., whose elderly Scottish gardener felt that he should force his reluctant family to support him. In a weak moment, "Tommy" had promised to take the case, but one adjournment followed another, during which the gardener tended his roses mournfully and brooded over his wrongs. All arguments in favour of further adjournments proving of no avail, counsel found himself, when the matter was called, with no brief other than an extremely dim recollection. "Without further ado," he said, "I'll put my client in the box and let him tell his own story." The complainant burst into a stream of broad Gaelic which all were powerless to stem. "That's my case," said counsel imperturbably. "But, Mr. Wilford," said the Magistrate, restraining his indignation with difficulty, "I don't understand it, not a word of it." "Neither do I, sir," replied Tommy. "You see, I know this man well, and you can rest assured that everything he has said is perfectly honest."

Devlin and Pearce, JJ.—The King has conferred the honour of Knighthood upon Mr. Edward Holroyd Pearce, K.C., and Mr. Patrick Arthur Devlin, K.C., on their appointments as Judges of the High Court of Justice. The latter, who was a junior counsel to the Ministries of War Transport, Food, and Supply during the last war, and Attorney-General to the Duchy of Cornwall, is the better known of the two. On his taking his seat in the King's Bench Division (Pearce, J., will be sitting in the Divorce Division), he was welcomed by Cartwright Sharp, K.C., who said: "We all hope that for many years you will dispense justice, either in your present, or in an even more exalted position." Mr. Justice Devlin said he was grateful that it was Mr. Cartwright Sharp who voiced the good wishes: "I remember, even if you do not, Mr. Sharp, that I started my career as your pupil. I shall not attempt to hold you responsible for any judicial errors."

Here and There.—"Speaking for myself, I have never been able to understand the distinctions which have been drawn in many of the reported cases between a *causa causans* and a *causa sine qua non*": Oliver, J., in *Holling* v. *Yorkshire Traction Co., Ltd.*, [1948] 2 All E.R. 662.

"The mere fact that a dentist fractures the patient's jaw when extracting a tooth is not *prima facie* evidence of negligence": per Lynskey, J., in *Fish* v. *Kapur*, (1948) 64 T.L.R. 328.

PRACTICAL POINTS.

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

1. Local Authorities.—*Subdivision of Land in Borough—Consent of Local Body to Subdivision—Delay in lodging Plan in Land Transfer Office.*

QUESTION: In 1946, my client obtained the consent of the local Borough Council to a subdivision of his land. There has been some considerable delay in getting the plan of survey lodged in the Land Transfer Office. Will the subdivision need to be re-approved under s. 332 of the Municipal Corporations Act, 1933?

ANSWER: Formerly, it would not have been necessary to get the subdivision re-approved, and there are decided cases to this effect. But this has recently been altered, and the effect of s. 36 (2) of the Municipal Corporations Amendment Act, 1948, is that the previous approval is deemed to have lapsed and a fresh approval of the Borough Council is now necessary. Presumably, the Council can now impose fresh conditions within the statute. X.1.

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2. Death Duties.—*Bequest to Hospital Board—Liability to Death Duty.*

QUESTION: I have a client who desires to leave £1,000 to the ——— Hospital Board. Will this bequest be liable to death duty on my client's death?

ANSWER: Such a bequest will constitute a good charitable trust in New Zealand: *In re List, List* v. *Prime*, [1948] G.L.R. 541. Therefore, it will be liable to estate duty but exempt from succession duty: *Adams's Law of Death and Gift Duties in New Zealand*, 37, 119, 120.

X.1.

3. Sale of Land.—*Rescission of Contract of Sale*—Restitutio in integrum—*Rectification of Land Transfer Register—Procedure.*

QUESTION: A agreed to sell to B a parcel of land, but the Supreme Court has now rescinded the contract on the grounds of misrepresentation. The transfer from A to B has, however, been registered under the Land Transfer Act. Can the Land Transfer Register be amended so as to show A again as the registered proprietor, or must B retransfer to A by formal memorandum of transfer? If a transfer from B to A is necessary, will the consent of the Land Sales Court also be necessary, and what will the stamp duty be?

ANSWER: The circumstances appear rather unusual; rescission usually precedes any conveyance or transfer. As this is not a case of a transfer having been registered by mistake, the Register cannot be amended under s. 74 of the Land Transfer Act, 1915. It will, therefore, be necessary for B to retransfer the land to A. In such transfer, the relevant facts should be stated. As this is to evidence the blotting out of a sale, and is not a new sale from B to A, the consent of the Land Sales Court will not be necessary. The transfer will be stampable as a deed not otherwise chargeable under s. 168 of the Stamp Duties Act, 1923. X.1.

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4. Crown Lands.—*Lease in Perpetuity—Mortgage of Same—Consents Required.*

QUESTION: My client owns a lease in perpetuity under the Land Acts. He is raising a sum of money on this by mortgage. Will the consent of any person or authority be required?

ANSWER: If the mortgage is dated before April 1, 1949, no consent will be necessary, as s. 90 of the Land Act, 1924, does not apply to a mortgage. But the Land Act, 1948, comes into force on April 1, 1949; and, if the mortgage is dated on or after that date, consent of the Land Settlement Board will be necessary under s. 89 of that statute. X.1.