New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes.
VOL. XXV. TUESDAY, MARCH 1, 1949. No. 4.

THE WORK OF THE NEW ZEALAND LAW REVISION COMMITTEE, 1948.

UNOBTRUSIVELY, but without any slackening-off of its interest and attention, the New Zealand Law Revision Committee continued its useful work during last year. No suggestion for the improvement of the law made by the New Zealand Law Society, by individual practitioners, or even by members of the general public, was overlooked; each was given the close attention of the Committee with a view to a possible improvement of the law on the lines suggested to it. Not all these suggestions could, of course, survive the close attention given to them; but we propose, in outline, to indicate some of the varied work done by the Committee during the past twelve months, resulting in recommendations for improving the present law.

Infants Act, 1908.—A proposal that s. 21 of the Infants Act, 1908, should be amended so as to approximate the status of an adopted child closely to the relationship of a natural child, was placed before the Committee, with particular reference to the right of succession of such adopted child through its adoptive parents. After very careful consideration, the Committee recommended the repeal of s. 21 (as amended by s. 42 of the Child Welfare Act, 1925) and the substitution of a new and carefully-worded section, which, it is hoped, will resolve the doubts and difficulties shown by judgments, some of them conflicting, interpreting the section proposed to be repealed.

It was also recommended that the Destitute Persons Act, 1910, be amended so as to cancel the liability of an adopted child's natural parents to provide for the child's maintenance: see ss. 4 (5) and 12 of that statute.

Divorce and Matrimonial Causes.—The New Zealand Law Society forwarded to the Committee a letter received from a District Society suggesting several amendments to the Divorce and Matrimonial Causes legislation.

The Committee gave its attention to the outline of a draft bill, which was duly prepared, but it has not been finally approved by the Committee. It is intended to recommend amendment of the Divorce and Matrimonial Causes Act, 1928, as follows: (*a*) By giving the Court power to make a decree of presumption of death and of dissolution of a marriage at the suit of any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead, and the fact that for a period of seven years or upwards the other party has been continuously absent, and the petitioner has no reason to believe that the other party has been living within that time, is to be evidence that he or she is dead in the absence of proof to the contrary. (*b*) When the party to a marriage has been deserted by the other party, the desertion is not to be deemed to be terminated by reason only of the mental deficiency of the deserting party, if it appears to the Court that the desertion would probably have continued if the deserting party had not become mentally defective: see *Williams* v. *Williams*, [1939] 3 All E.R. 825, followed in *M.* v. *M.*, [1944] N.Z.L.R. 328. (*c*) Section 10 (*d*) is to be amended, if the Committee's recommendations are accepted, by giving as the ground for divorce a conviction of attempted murder or of wounding of the petitioner or any child of the petitioner or respondent. (*d*) Section 12, it is suggested, should be amended by substituting two years for the present three years as the period qualifying a wife resident in New Zealand for the acquisition of New Zealand domicil for the purposes of a petition. (*e*) It is proposed that the provisions of s. 33 be extended to enable the Court to order that reasonable maintenance of a divorced wife, after her husband's death, shall be continued by his personal representatives, and that s. 36 be amended so that the Court may order a settlement of the husband's property.

A useful amendment is the suggested repeal of s. 45 abolishing the requirement of an affidavit verifying a petition.

Section 41, which gives the Court power to vary any order for the periodical payment of money, it is proposed should be amended by adding a provision that any application under the section may be made either by the person liable to make the payment, or (after his or her death) by any creditor or other person interested in the distribution of his or her estate, or entitled to apply for an order under the Family Protection Act, 1908, in respect thereof. The Committee is also considering the inclusion in the legislation of a definition of the grounds for a decree of nullity: *cf.* s. 7 of the Matrimonial Causes Act, 1937 (U.K.) (*30 Halsbury's Complete Statutes of England*, 335, 339).

Promise of Testamentary Provision.—Section 3 of the Law Reform Act, 1944, has been before the Courts in several cases: notably in *Nealon* v. *Public Tustere*,

[1948] N.Z.L.R. 324, the judgment in which, on appeal to the Court of Appeal, was recently delivered (*Post*, p. 53). Earlier, during last year, the Law Revision Committee recommended that the term "promise" in the section should be deemed to extend to, and include, a statement of fact, or intention, or representation by the testator or intestate as to the making of testamentary provision; that the section should apply where the services relied upon are rendered before or after the making of the promise; that the section should apply to promises of devises of land and bequests of specific chattels; that the Court should have power to vest real or personal property in the promisee where the promise relates to specific, real, or personal property capable of being so vested; and that the Statute of Frauds should not operate to defeat the purpose of the section. On reading the Court of Appeal judgments in *Nealon's* case, it is interesting to observe how astutely the Committee anticipated them, and made preparation to nullify them before they were even delivered. The proposed amendments were not intended to apply to proceedings which had been commenced, but in other respects they should be retrospective to the date of the passing of the Law Reform Act, 1944. This proposed amendment of s. 3 is awaiting the attention of the Legislature.

Statute of Frauds.—A suggestion was made to the Committee that s. 4 of the Statute of Frauds, s. 83 of the Judicature Act, 1908, and s. 6 of the Sale of Goods Act, 1908, should be amended or repealed. After taking the opinion of the New Zealand Law Society, and referring the matter to the learned author of the text-book *Section 4 of the Statute of Frauds*, Professor J. Williams, the Committee recommended that legislation be drafted to take out of the Statute of Frauds, 1677, contracts in consideration of marriage, promises by executors to answer from their own estates, and contracts to be performed within a year; and that s. 6 of the Sale of Goods Act, 1908, should be repealed. The draft amendment, when prepared, will be submitted to the Law Society for its consideration.

Monthly Tenancies.—Since the decision in *Hodge* v. *Premier Motors, Ltd.*, [1946] N.Z.L.R. 778, the Committee has given consideration to an amendment of s. 16 of the Property Law Act, 1908, so that its intent and meaning should be clear, and in that form binding on all the Courts. It will be remembered that the Committee proposed a section to this effect—s. 31 (2)—when approving the draft of the Magistrates' Courts Bill, 1947; but it considered that such was merely a temporary measure, and that the amendment of s. 16 should be of a general nature, and should be inserted as part of the section which it most concerned. It therefore approved an amendment to the effect that every tenancy should, in the absence of proof of an express agreement to the contrary, be deemed to be a tenancy terminable at the will of either of the parties by one month's notice in writing. If and when that amendment to the Property Law Act should become law, then s. 31 (2) of the Magistrates' Courts Act, 1947, could safely be repealed. It is a pity that the proposed amendment did not reach last year's Statute Book.

Guardianship of Infants.—The Committee gave its attention to the suggestion made through the New Zealand Law Society by the Hamilton District Society for the promotion of legislation providing for a more simple and direct procedure for deciding questions concerning the custody of children, other than those arising in divorce suits. It was of the opinion that the present cumbersome machinery for obtaining a decision as to the custody and then the possession of children—namely, by way of application for a writ of habeas corpus—was unnecessary, and should be dropped altogether. The Committee accordingly recommended, and afterwards approved, a draft Bill to the effect that, in any case not provided for under the Divorce and Matrimonial Causes Act, 1928, or the Destitute Persons Act, 1910, an application for, or in respect of, the guardianship or custody of any infant may be made to a Judge of the Supreme Court, or, where the Magistrates' Court has jurisdiction, to a Magistrate, and, on such application, the Court may make such an order as it thinks fit. At the time of the making of the order, or at any time thereafter, any other Judge or Magistrate would be empowered to issue a warrant authorizing any Constable or Child Welfare officer, or any other person named in the warrant, to take possession of the infant and deliver him to the person entitled to his custody under the order, with all necessary powers of entry and search for the purpose of executing any such warrant. It was also agreed that s. 6 of the Infants Act, 1908, should be amended to give the father a statutory right equal to the present right given to a mother to apply for an order for custody.

Crown Proceedings.—The Committee gave a great deal of attention to the proposal to bring the law relating to Crown proceedings, and in particular to the procedure therein, in line with recent legislation in Great Britain. It therefore recommended the preparation of a Crown Proceedings Bill, (*a*) to re-enact the present advanced New Zealand legislation contained in the Crown Suits Act, 1908, and its amendments; and (*b*) to embody, as a Part of such Bill, the improvements in procedure contained in the English legislation. It is hoped to have a draft of this Bill ready for detailed consideration at the Committee's next meeting.

Limitation of Actions.—For some considerable time there has been a great deal of murmuring at the variety of periods spread over a number of statutes relating to the limitation periods imposed in respect of various classes of actions. The Committee recommended the preparation of a statute on the lines of the Limitation Act, 1939 (U.K.) (*32 Halsbury's Complete Statutes of England*, 223), in which all periods of limitation should, as far as possible, be co-ordinated as to time, it being the opinion of the Committee that only two periods should be imposed—namely, six years and twelve years respectively—and that the periods of limitation should be so classified. Special consideration was given to the case of Harbour Boards and local authorities. After hearing representations in respect of those local bodies, as regards the period of notice and for tendering amends, the Committee gave careful consideration to a schedule prepared for it which shows the periods of limitation for different classes of actions over the whole field of law as now in force in New Zealand in comparison with those imposed by the English statute of 1939; and a draft Bill containing the result of the Committee's deliberations is now in course of preparation.

Insurance Contracts.—The Committee's attention was drawn to various anomalies and inequalities arising out of insurance contracts and the forms of proposal and policies in general use. It therefore recommended

the preparation of an Insurance Contracts Bill. Two of the present seemingly unfair features of these contracts should, in the Committee's view, be eliminated from these contracts: (*a*) notwithstanding the warranty of correctness of answers in a proposal form, innocent misrepresentations should not vitiate the contract if they are not material to the risk; and (*b*) the clause in policies requiring the submission of claims to arbitration should not be treated as a condition precedent to actions on the policy. It was agreed, however, that no further action should be taken regarding the proposal to add a clause to the Bill to provide that disclosures to an agent of an insurance company be deemed disclosures to the company: *cf. Canny* v. *General Accident Fire and Life Assurance Corporation, Ltd.*, (1947) 5 M.C.D. 267.

Administration Act, 1908.—Amendments to the common law and in modification of the Administration Act, 1908, as recommended by the Committee, have been enacted as the Administration Amendment Act, 1948, and these deal with the succession of married women and infants in respect of movable property belonging to women and children whose movable property in New Zealand would, at common law, devolve on their deaths according to the law of the husband's domicil. Section 2 of the Statutes Amendment Act, 1948, provides that, in these circumstances, such property is to devolve in the event of death in accordance with New Zealand law: see (1948) 24 NEW ZEALAND LAW JOURNAL, 343, for a more detailed explanation of the amendments.

Workers' Compensation Act, 1922.—The Committee approved a proposal to add to s. 14 of the Workers' Compensation Act, 1922, a provision similar to s. 7 of the Law Reform Act, 1936, giving claims for compensation to partial dependants. The Committee approved a draft clause prepared on the lines it had suggested; and this now appears as s. 47 of the Statutes Amendment Act, 1948. It remedies a curious anomaly in the legislation: see (1948) 24 NEW ZEALAND LAW JOURNAL, 346.

Juries.—The Committee requested the Law Draftsman to prepare legislation to provide for compilation of jury lists six months later in each year than is now provided for; and for the exemption of a juror from service only for the session for which he is excused. The suggestion for this amendment emanated from the Auckland District Law Society, which pointed out that the present provision in ss. 14 and 16 of the Juries Act, 1908, gave the constables who prepared jury lists only the month of February for completion of their task. This is an inconvenient period for fixing the lists; and all inquiries showed that some period in the winter months would be more suitable and would enable the constables to make a much more satisfactory and exhaustive survey of their districts. At present, when a juror has applied for, and obtained, exemption, his name is not returned to the ballot-box for the remainder of the jury year. As reasons for exemption from jury service are usually temporary, it was considered that the names should go back for balloting, so that the extra jurors' names be returned to the box marked "Common Jurors in use," instead of (as at present) into the box marked "Common Jurors in reserve."

Mortgagees' Notices.—From the New Zealand Law Society came the suggestion that that law should be amended so that s. 7 of the Mortgagors' and Lessees' Rehabilitation Amendment Act, 1937, be repealed, and that it be provided that the notice required by s. 68 of the Mortgagors' and Lessees' Rehabilitation Act, 1940, and notice by s. 3 of the Property Law Amendment Act, 1939, be combined in one notice if the mortgagee so desires; and, further, that the Court, having jurisdiction to make orders under s. 8 of the Property Law Amendment Act, 1939, should be empowered to give directions as to service of notices, or to make orders dispensing with those notices, such Court being the Supreme Court, or, where the amount secured is £2,000 or less, the Magistrates' Court. Section 3 of the Property Law Amendment Act, 1939, gives some protection to all mortgagors, and is in practically the same words as s. 7 of the Mortgagors' and Lessees' Rehabilitation Amendment Act, 1937, and it must tend to the greater convenience of practitioners that the Magistrates' Court should, within its jurisdiction, be given powers similar to those conferred on the Supreme Court: see, generally, *H.* v. *I.*, [1940] N.Z.L.R. 235, 237, wherein Mr. Justice Ostler suggested that the one month's notice in s. 3 of the Property Law Amendment Act, 1939, and the one month's notice under s. 7 of the Mortgagors' and Lessees' Rehabilitation Amendment Act, 1937, should be combined. The proposed draft Bill, which the Law Revision Committee has recommended, should be a satisfactory simplification of both these matters.

Evidence.—Some suggestions were made to the Committee by the Society for the Protection of Women and Children that a wife should be competent and compellable to give evidence against a husband in cases of criminal assault by a father against his child. Clause 10 of the Crimes Amendment Bill which was introduced into the Parliament of Victoria last year was to the effect that, notwithstanding any rule of law to the contrary, where a person is charged with rape, attempted rape, or any other similar offence, and the person against whom or in respect of whom the offence is alleged to have been committed is a girl under the age of sixteen years, who is a daughter or granddaughter of the person charged, or of his wife, whether such relationship is or is not traced through lawful wedlock, or she is under the care and protection of the person charged, or his wife, then the wife of the person charged is to be a competent but not a compellable witness for the prosecution without the consent of the person charged. The Law Revision Committee recommended that an amendment to the Evidence Act, 1908, on those lines, should be prepared.

General.—Many other matters have received the attention of the Law Revision Committee. Some of them, major ones, such as the consolidation of the Land Transfer legislation, of the Property Law legislation, and of the Trustee legislation, have been referred to competent committees of practitioners and officers of the State Departments more particularly concerned. Their task is a long and onerous one; but the Committee hopes that during the present year it will have drafts of such consolidated and amended legislation for submission, through the Law Societies, to the profession for its approval.

The work of the Law Revision Committee can be facilitated greatly by the assistance of members of the profession in bringing before its notice anomalies or other matters requiring rectification in the general law, or in the statute law. The Committee has, as practitioners know, done much valuable work since it was

called together by the Attorney-General, the Hon. H. G. R. Mason, K.C., after the Dominion Legal Conference in Dunedin in 1936.

The Committee, however, would be the first to acknowledge that the incentive of many alterations to the law, which have since appeared on the Statute Book, was the continued interest of the profession, both in its corporate capacity through the Law Society and as individual practitioners, in making suggestions for such improvements. It would also be eager to acknowledge the assistance and advice so readily given by practitioners to whom the Committee has often submitted its problems for consideration and report. This work has always been done promptly and well.

It is to be hoped, in the interest of the profession itself and of the larger public which it serves, that these suggestions and recommendations will continue to proceed from them, regularly and without any cessation of interest, to the Committee which so ably serves both the profession and the public.

SUMMARY OF RECENT LAW.

COMMERCIAL LAW.

Points in Practice. *99 Law Journal*, 19.

COMPANY LAW.

Points in Practice. *99 Law Journal*, 47.

CONSTITUTIONAL LAW.

Action against Minister of Crown—Competency—Minister of Supply—Privileges and Immunities inherent in Crown—Action by Conservancy Authority against Minister as Cargo Owner to recover Expenditure incurred in removing Wrecked Ship—Writ—Service—Service out of the Jurisdiction—Action "properly brought" against Defendants within Jurisdiction—Action by Conservancy Authority against Shipowners and Minister of Supply as Cargo Owner to recover Expenditure incurred in removing Wreck—Shipowners outside Jurisdiction—R.S.C., Ord. 11, r. 1 (g) (*cf. Code of Civil Procedure, R. 48* (e)). A conservancy authority incurred heavy expenditure in clearing the obstruction caused by the wreck of a Belgian ship and its cargo consisting of ordnance stores, which were the property of the Crown. Under the War Department Stores Act, 1867, s. 20, as adapted by the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, the Minister of Supply was empowered to institute or defend any action in regard to these stores, but a proviso to s. 20 retained the privileges and prerogatives of the Crown and gave the Minister the right in any action to exercise such privileges and prerogatives as if the Crown were a party to such action. In an action against the shipowners and the Minister of Supply to recover the expenditure incurred, the conservancy authority asked for leave to serve notice of a concurrent writ out of the jurisdiction on the shipowners, who were a Belgian company, registered and resident in Belgium. *Held*, (i) That, in determining whether or not leave should be granted under R.S.C., Ord. 11, r. 1 (*g*), where the law was plain and all the facts necessary for a decision were set out and uncontradicted, the Court should decide on the hearing of the summons whether the plaintiffs would succeed against the defendants within the jurisdiction, and, if it decided that the action against the English defendants was bound to fail, it must conclude that the action against them was not "properly brought," within the meaning of the rule, and refuse leave to serve out of the jurisdiction. An action could not be said to be "properly brought" merely because it was brought *bona fide*. (Observation of *Lindley*, L.J., in *Witted* v. *Galbraith*, [1893] 1 Q.B. 577, 579, explained, and observation of *Hawkins*, J., in *Temperton* v. *Russell*, [1893] 1 Q.B. 434, not approved.) The right to bring a foreigner before the British Courts should be sparingly used, and care should be taken in interpreting the rule and in exercising the discretion which arose when a case was brought within it. (ii) That the effect of the War Department Stores Act, 1867, s. 20 (as adapted by the Ministry of Supply Act, 1939, and the order made thereunder), was to enable the Minister to be sued without the necessity of a petition of right, but it did not debar him from the protection which the Crown itself would have had in the particular case. (*Minister of Supply* v. *British Thomson-Houston Co., Ltd.*, [1943] 1 All E.R. 615; [1943] K.B. 478, explained.) (iii) That, as the Crown itself was clearly free from any liability to the conservancy authority, the action against the Minister, who was acting as the agent of the Crown, was bound to fail, and, therefore, it was not "an action properly brought," within the meaning of R.S.C., Ord. 11, r. 1 (*g*), and service out of the jurisdiction on the shipowners could not be allowed. Decision of the Court of Appeal, [1947] 2 All E.R. 363, [1948] P. 33, affirmed. *Tyne Improvement Commissioners* v. *Armement Anversois Société Anonyme, The Brabo*, [1949] 1 All E.R. 294 (H.L.).

As to Service out of the Jurisdiction, see *26 Halsbury's Laws of England*, 2nd Ed. 31–33, para. 44; and for Cases, see *E. and E. Digest*, Practice, 355–362, Nos. *690–741*.

As to Legal Proceedings against the Crown and its Servants, see *6 Halsbury's Laws of England*, 2nd Ed. 486–491, paras. 599–603, and Supplement; and for Cases, see *11 E. and E. Digest*, 523, 524, Nos. *284–293*.

CRIMINAL LAW.

Medico-legal Aspects of Chemical Tests of Alcoholic Intoxication. (I. M. Rabinowitch, M.D.) *26 Canadian Bar Review*, 1437.

Murder — Manslaughter — Chance-medley — Provocation — Offences against the Person Act, 1861 (*c. 100*), *s. 7.* While walking with a woman, the applicant passed three men, one of whom make a remark about the woman which the applicant resented. He went back, knocked down one of the men, and, in the scuffle which followed, he killed another of them by stabbing him through the heart with a knife which he was carrying. On being charged with the murder of the deceased, he pleaded that the killing was by chance-medley and amounted to manslaughter and not to murder. *Held*, (i) That the doctrine of chance-medley had no longer any place in the law of homicide, having been finally abolished by the Offences against the Person Act, 1828, s. 10. (ii) That the rules to be followed in deciding whether there had been sufficient provocation to reduce a crime from murder to manslaughter were now laid down in *Holmes* v. *Director of Public Prosecutions*, [1946] 2 All E.R. 124; [1946] A.C. 588. (iii) That, on the facts, the applicant was guilty of murder. *R.* v. *Semini*, [1949] 1 All E.R. 233 (C.A.).

DESTITUTE PERSONS.

Cruelty—Persistent Cruelty—Summary Proceedings by Wife—Degree of Cruelty necessary to be proved—Summary Jurisdiction (Married Women) Act, 1895 (*c. 39*), *s. 4* (*Destitute Persons Act, 1910, s. 17 (1)* (*b*)). At least the same degree of cruelty must be proved to justify the making of a maintenance order by a Court of summary jurisdiction in favour of a wife under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, as is required to substantiate a charge of cruelty in the Divorce Division of the High Court. On the facts, *Held*, that a finding of cruelty was not justified, and the wife was not entitled to a maintenance order. (Observations of *Denning*, J., in *Perks* v. *Perks*, [1945] 2 All E.R. 492, not approved.) *Barker* v. *Barker*, [1949] 1 All E.R. 247 (P.D.A.).

As to Persistent Cruelty, see *10 Halsbury's Laws of England*, 2nd Ed. 838, para. 1339; and for Cases, see *27 E. and E. Digest*, 556, 557, Nos. *6120–6123*.

DETINUE.

The Measure of Damages in Detinue and Conversion. (G. W. Paton.) *22 Australian Law Journal*, 406.

ECONOMIC STABILIZATION.

Rent—Basic Rent—Low Rent due to Conditions in Napier since Earthquake—Special Circumstances—Economic Stabilization Emergency Regulations, 1942 (*Serial No. 1942/335*), *Regs. 15, 16* (*2*). Where it can be shown that the rent for the time being under the tenancy within the meaning of Reg. 15 of the Economic Stabilization Emergency Regulations, 1942, is unduly low, owing to conditions prevailing in Napier since the earthquake of 1931, that is a "special circumstance" within the meaning of that term as used in Reg. 16 (2) to be considered when fixing a fair rent under Reg. 15. *Public Trustee* v. *Burts Furnishers, Ltd., and Others.* (Napier. December 20, 1948. Sinclair, S.M.)

EVIDENCE.

Foreign Law—Foreign Statute—Foreign Private Document—Construction. Appeals by the applicants from orders of *Jenkins*, J., dated June 25, 1948, dismissing three interlocutory applications. Each application had as its object the stopping of an action by a French company against an English one in which the plaintiffs alleged that the defendants had passed off goods as those of the plaintiffs which did not originate from the plaintiffs and claimed damages and an injunction. The applications turned on the construction of a French statute of March 7, 1925, and of a document which was, in effect, the articles of association of the French company. The evidence given by the expert witnesses was conflicting, and, accordingly, the Court, both as regards the private document and the statute, construed the text, deriving such assistance as it could from the evidence, and, in particular, from a decision of a French Court. The appeals were dismissed. The case only calls for report in respect of the statement made by *Lord Greene*, M.R., with regard to the law relating to these matters. *Rouyer Guillet et Compagnie* v. *Rouyer Guillet and Co., Ltd., Rouyer Guillet* v. *Jackson Knowland and Co.*, [1949] 1 All E.R. 244 (C.A.).

EXECUTORS AND ADMINISTRATORS.

Claims—Promise by Deceased to remunerate by Testamentary Provision for Services rendered or Work done for him—Term "Promise" not used in Technical Sense—Extent to which Claim based on such a Promise Enforceable—Promise to devise Realty Enforceable by Award of Reasonable Amount to Extent that Deceased failed to make Promised Testamentary Disposition—No Power given to Court to order Transfer of Promised Realty—Inapplicability of Statute of Frauds to Claims for Remuneration in lieu of Promised Testamentary Provision—"Promise"—Law Reform Act, 1944, s. 3 (1)—Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4. Section 4 of the Statute of Frauds, 1677, has no application to a claim made under s. 3 of the Law Reform Act, 1944. The word "promise" is not used in s. 3 (1) of the Law Reform Act, 1944, with its technical meaning of an accepted offer amounting to a valid contract, and it is not restricted in any legal sense. It means an assurance, undertaking, declaration, or intimation to make "some testamentary provision" in reward for the services rendered or the work done, communicated to the person who has rendered those services or done that work, and likely to create an expectation by him of testamentary provision. What is enforced against the personal representatives of the deceased is not a contract or an agreement made by the claimant and the deceased, but a promise, fictionally attributed by s. 3 to the parties, and the claim founded on that promise is enforceable to the same extent and in the same manner as if it were a promise to pay money in the lifetime of the deceased. The promise must be of such a character that from it a Court can properly conclude that the services were rendered or that the work was done, not merely gratuitously or in expectation of reward, but pursuant to an assurance, express or implied, that reward for the services or work would be forthcoming, and that the benefit of the services or work was accepted by the person enjoying that benefit, followed by an express or implied assurance that he would pay for it. (*Bennett* v. *Kirk*, [1946] N.Z.L.R. 580, *McAllister* v. *Public Trustee*, [1947] N.Z.L.R. 334, and *Ace* v. *Guardian, Trust, and Executors Co., Ltd.*, [1948] N.Z.L.R. 103, referred to.) (*Sutherland* v. *Towle*, [1937] G.L.R. 509, and *Baxter* v. *Gray and Abbott*, (1842) 3 Man. & G. 771; 133 E.R. 1349, mentioned.) Although there may be a promise to reward by making testamentary provision in the form of a devise, s. 3 confers no jurisdiction on the Court to direct a transfer of land to the promisee, but it gives the Court power to award to him after the death of the deceased, by way of substitution for any form of remuneration not expressed in money, a reasonable payment, but only to the extent that the deceased has failed to make the promised testamentary provision. (*Bennett* v. *Kirk*, [1946] N.Z.L.R. 580, on this point, not applied.) *So held*, by the Court of Appeal, reversing the judgment of *Fleming*, J., reported [1948] N.Z.L.R. 324. The case was remitted to the Supreme Court for hearing and determination on the basis of the judgment of the Court of Appeal. The question, raised in *McAllister* v. *Public Trustee*, [1947] N.Z.L.R. 334, 340, whether a promise supported by a past consideration would enable a valid claim to be made, did not arise for decision because the promise pleaded by the claimant was earlier in date than the rendering by him of the services to the deceased in respect of which his claim was made. *Nealon* v. *Public Trustee*. (Wellington. December 17, 1948. Sir Humphrey O'Leary, C.J., Kennedy, Finlay, Gresson, Hutchison, JJ.)

GAMING.

Quiz Competition—Questions drawn at Random from Box—Competitor receiving and answering Question and receiving Prize—Unsuccessful Competitor paying Forfeit and receiving Prize of Less Value—No Money Prizes—Substantial Element of Skill—Competition not a "lottery"—Ejusdem Generis *Rule*—*"Prize whether of money or of any other matter or thing"—Gaming Act, 1908, s. 41* (a) (b). The defendant, for a salary only, was employed by a syndicate to organize and manage a series of entertainments called "Riddles, Risks, and Rewards," for the purpose of profit and advertising. The tickets for the entertainments were sold for 3s. 4d. each; and with each ticket a form of entry for the competition, and another entry form for a Talent Quest, were given to each ticketholder, if requested. The ticketholder might, if he wished, fill in these entry forms, or one of them, and return them to the theatre before the entertainment took place. At each of such entertainments, certain names were drawn at random from a specially constructed box, and the persons whose names were so drawn were asked to come forward on to the stage, and did so. From another box, envelopes were drawn containing cards, on one side of each of which there was a question to be answered by the competitor, and on the other side the name of an article to be given as a prize. Some 175 persons entered for the competition, and of these the names of approximately sixteen were drawn, and they were asked to come on the stage. If the question on his card were answered correctly by the person called, he was entitled to the prize named on the reverse side of his question card. If he were unsuccessful in giving the correct answer, he was given some other article as consolation prize, after being asked to perform some act by way of a penalty for failing to answer. The consolation prizes were not so valuable as the prizes named on the question card. The competition was fairly conducted, but it was contended that the distribution of the prizes amounted to a "lottery," because the determination of who could compete for them was made by the drawing of lots. On an information charging the defendant under s. 41 (*a*) and (*b*) of the Gaming Act, 1908, with establishing a scheme by which prizes were competed for by mode of chance, *Held*, 1. That, because of the substantial element of skill involved, there was no "lottery or scheme" within the meaning of those words as used in s. 41 (*a*). (*Moore* v. *Elphick*, [1945] 2 All E.R. 155, 162, applied.) (*Kerslake* v. *Knight*, (1925) 41 T.L.R. 555, and *Minty* v. *Sylvester*, (1915) 84 L.J. K.B. 1982, distinguished.) 2. That the *ejusdem generis* rule applied to the phrase "prize whether of money or of any other matter or thing" in s. 41 (*a*) of the Gaming Act, 1908; and, as the prizes offered were not of money, or something of the same nature or kind as money, but a mere chance to compete, no offence had been committed. (*Scott* v. *Director of Public Prosecutions*, [1914] 2 K.B. 868, and *Lee Sun* v. *Conolly*, (1905) 24 N.Z.L.R. 553, applied.) *Police* v. *Coates*. (Masterton. January 19, 1949. Herd, S.M.)

JUSTICES.

Information—Validity—Language of Information obscure—Defendant sufficiently notified of Charge against him—No Defect in Substance—Justices of the Peace Act, 1927, s. 79. The defendant was charged with an offence against the Building Emergency Regulations, 1939, as follows: "On or about January 7, 1948, at Hamilton, did without the precedent consent of the Building Controller use cement or ready mixed concrete for the construction of a retaining wall . . . contrary to the Building Construction Control Notice No. 23 (*1947 New Zealand Gazette*, 1169), cl. 14, and the Building Emergency Regulations, 1949, and to the form of the statute in such case made and provided." On objection to the validity of the information on the ground that it disclosed no legal offence, *Held*, 1. That the information charged the defendant with an act in contravention of a direction or restriction—namely, the Building Construction Control Notice No. 23, given or imposed under the Building Emergency Regulations, 1939; and therewith an offence created by Reg. 10 (2) of the Supply Control Emergency Regulations, 1939, of which the Building Emergency Regulations, 1939, are deemed a part; and that, in effect, the information set out the fact or act which was relied on as constituting the offence, and said that such fact or act was contrary to the Building Emergency Regulations, 1939. 2. That it could not be said that the language of the information was so obscure that the defendant could not tell what charge was made against him; and, though the information should have been expressed with more particularity and clarity, failure to do so is a defect in substance or in form which does not invalidate the information. (*Jackson Stansfield and Sons* v. *Butterworth*, [1948] 2 All E.R. 558, referred to.) *Fennell* v. *Vautier*. (Hamilton. December 17, 1948. Paterson, S.M.)

LANDLORD AND TENANT.

Rent Restrictions. *99 Law Journal*, 61.

MARRIED WOMAN.

Restraint on Anticipation—Validity—Imposition by Will dated 1932—Codicils dated 1937 confirming Will—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 2 (1) (2) (Law Reform Act, 1936 (N.Z.), s. 13 (1) (2)). By his will, dated December 10, 1932, the testator directed his trustees to hold a share of his estate on trust to pay the income to his daughter during her life for her separate use and so that during coverture the same should be without power of anticipation, with remainders over to her children. In 1933 and 1934 the testator executed four codicils which did not vary the provision for his daughter, but confirmed the will except as otherwise varied. In 1937 the testator executed two further codicils, which did not affect the said provision for his daughter, but they both confirmed his will as amended by the former codicils. In 1939 the testator died. *Held*, That the restraint on anticipation was attached by an instrument executed before January 1, 1936, and was contained in no other instrument, and, therefore, notwithstanding the codicils of 1937, it was not rendered invalid by the Act of 1935. *Re Heath's Will Trusts, Hamilton* v. *Lloyds Bank, Ltd.*, [1949] 1 All E.R. 199 (C.hD.).

MASTER AND SERVANT.

Safe System of Working—Delegation of Duty to Servant—Servant's Attention drawn to Statutory Regulations—Contributory Negligence—Electricity (Factories Act) Special Regulations, 1908 (S.R. & O., 1908, No. 1312), Reg. 18 (d) *(as amended by Electricity (Factories Act) Special Regulations, 1944 (S.R. & O., 1944, No. 739)).* The workman entered the employment of the defendant electricity undertakers as a labourer, and after about four years became a fitter. He acquired a certain amount of knowledge in electrical matters, but was not given any training or tuition. In 1935, he became the assistant of a skilled electrician, the superintendent in the sub-station department of the employers' undertaking, and helped to prepare the equipment for the tests which the superintendent performed at sub-stations. In carrying out these tests, the superintendent did not follow the instructions laid down by the Electricity (Factories Act) Special Regulations, 1908, Reg. 18 (*d*) (as amended by the Electricity (Factories Act) Special Regulations, 1944). He adopted a method which involved some danger, but, he considered, was more expeditious. By a departmental letter, dated October 21, 1944, the workman was appointed an "authorized person" within the meaning of the Electricity Regulations to carry out without supervision the duties performed by the superintendent, and he was instructed to make himself conversant with a memorandum on the Electricity Regulations. On November 21, 1946, while the workman was carrying out a test at the switchboard, an explosion occurred and he was injured. He brought an action against the employers claiming damages (*a*) at common law, for failure to provide and maintain a safe system of work, and (*b*) for breach of statutory duty in failing to comply with the Electricity (Factories Act) Special Regulations, 1908 and 1944. The employers denied negligence and pleaded that they had complied with the regulations by providing a safe system of work and that they had expressly delegated their statutory duty to the workman. They also pleaded contributory negligence. *Held*, (i) That the workman was not entitled to recover damages for breach of statutory duty, since the duty of doing the test without supervision had been expressly delegated to him and he himself had committed a breach of the regulations. (*Smith* v. *Baveystock and Co., Ltd.*, [1945] 1 All E.R. 531, applied.) (ii) That the employers had not discharged their common-law duty to provide a safe system of work by merely instructing the workman to read and comply with the requirements specified in the regulations as disclosed by the memorandum, and, further, if they had at one time provided a safe system, it had been disregarded by long usage. (iii) That, as the workman was not a skilled electrician, and had never been instructed in the correct way of doing the work, but had always seen his superior officers doing it in a manner that involved some risk, he was not guilty of contributory negligence in carrying out the work in the same manner. *Barcock* v. *Brighton Corporation*, [1949] 1 All E.R. 251 (K.B.D.).

As to Master's Duty to Provide a Safe System of Work, see *22 Halsbury's Laws of England*, 2nd Ed. pp. 187, 188, para. 314, p. 190, para. 318; and for Cases, see *34 E. and E. Digest*, 196-198, Nos. *1602-1623*.

MUNICIPAL CORPORATION.

Construction of Footway—Section owned by Corporation and leased to Tenant—Corporation constructing New Footway fronting Section—Demand on Tenant for Share of Cost—Tenant liable as "Owner"—Municipal Corporations Act, 1933, ss. 2, 182. The term "owners" (of lands and buildings fronting a footway permanently constructed by the municipal corporation) in s. 182 of the Municipal Corporations Act, 1933, includes a tenant of a section owned by the corporation, which constructed and formed a footway fronting that section; and such tenant is liable for part of the cost of the construction of the footway as provided by s. 182. (*Auckland City Corporation* v. *Guardian Trust and Executors Co. of New Zealand, Ltd.*, [1931] N.Z.L.R. 914, distinguished.) *Palmerston North City Corporation* v. *Taylor*. (Palmerston North. January 18, 1949. Herd, S.M.)

NUISANCE.

Negligence—Cricket Match—Injury from Ball hit from Ground into Highway. During a cricket match, a batsman hit a ball which struck and injured the plaintiff, who was standing on the adjoining highway. At the point at which the ball left it, the cricket field was protected by a fence rising to 17 ft. above the cricket pitch, the distance from the striker to the fence being about 90 yds. and that to the place where the plaintiff was hit being nearly 100 yds. Matches had been regularly played on the ground since 1864 and no one had been injured before, and there was evidence that only very rarely was a ball hit over the fence during a match. The road on which the plaintiff was standing had been constructed in 1910. In an action against the cricket club for damages for negligence and nuisance, *Held*, (i) That there was no evidence of negligence. (ii) That the playing of cricket was not a non-natural user of the land, and, therefore, the principle laid down in *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, did not apply. (iii) That, to constitute a nuisance, there must be a state of affairs, however temporary, and not merely an isolated happening, and the facts of the present case did not establish a nuisance. *Quaere*, Whether, since the cricket ground was in constant use before the construction of the road on which the plaintiff was standing, she was in any better position than would have been users of the land as it originally was, and was subject to such obstructions and dangers as existed at the time of dedication. *Stone* v. *Bolton and Others*, [1949] 1 All E.R. 237.

As to Circumstances in which an Act may Constitute a Nuisance, see *24 Halsbury's Laws of England*, 2nd Ed. 22, para. 38; and for Cases, see *36 E. and E. Digest*, 159, Nos. *25-31*.

RENT RESTRICTION (BUSINESS PREMISES.)

Possession—Competing Companies—Relative Hardship—Onus of Proof—"Hardship"—"Any other person"—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184), Reg. 21B (1) (d), *(3)* (b). Regulation 21B (1) (*d*) of the Economic Stabilization Emergency Regulations, 1942, casts upon the landlord seeking an order for possession the onus of proving that his hardship would exceed the hardship of the tenant; and, 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 the landlord company was entitled to an order for possession of its picture-theatre when the concentrated financial loss and the personal deprivation, which would be inflicted on the landlord company and its shareholders (who were within the term "any other person" in Reg. 21B (3) (*b*)) 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 by making the order. (*Jewellers' Chambers, Ltd.* v. *Thomson*, [1948] N.Z.L.R. 200, followed.) *Paeroa Theatre Buildings, Ltd.* v. *Te Aroha Amusements, Ltd.* (Auckland. December 10, 1948. Stanton, J.)

ROAD TRAFFIC.

Motor-vehicle—Driving while under the Influence of Drink—Disqualification for holding Licence—"Special reasons" for not disqualifying—Driver fit when commencing Journey—Stopping Car on feeling Effects of Drink—Road Traffic Act, 1930 (c. 43), s. 15 (2). After drinking a quantity of intoxicating liquor, a motorist entered and drove his car. Ten minutes later, he felt dizzy, stopped his car, and fell asleep. He was convicted of being in charge of a motor-vehicle while under the influence of drink so that he was incapable of having proper control of it, but he was not disqualified for driving. On a case stated by the Magistrate, *Held*, That the fact that as soon as the incapacity made itself felt the motorist stopped his car was not a "special reason" under the Road Traffic Act, 1930, s. 15 (2), why he should not be disqualified. (*Rennison* v. *Knowler*, [1947] 1 All E.R. 302, *sub nom. Knowler* v. *Rennison*, [1947] K.B. 488, applied.) *Duck* v. *Peacock*, [1949] 1 All E.R. 318 (K.B.D.).

IRELAND IN INTERNATIONAL AFFAIRS.

A Footnote to Constitutional Law.*

By the Hon. John A. Costello, Prime Minister of Eire.

In choosing the subject of my address to you I was actuated by the knowledge of the dual capacity in which I appear before you, that of a lawyer and head of the Irish Government. In deciding to address you on the subject of Ireland in international affairs I am perhaps departing from the pattern to which you have been accustomed, but I felt that the matters coming within the scope of my address would interest you not only as lawyers but in your capacities as citizens of a great nation interested in the political ideals, aspirations and constitutional development of another nation, whose descendants form no small proportion of the citizens of your own country.

Yesterday afternoon the Hon. A. T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, spoke of the necessity for so enlarging the functions of members of the Bar that they may be the better enabled to develop and mould public opinion. Last night Maître Maurice Ribet, Batonnier de l'Ordre des Avocats à la Cour de Paris, in an inspiring address, reviewed the role of the profession in the defence of the rights and the liberties of the human person. To-day, I propose to take the discussion one stage further and survey the part played by lawyers in asserting the rights and the liberties of peoples, with particular reference to recent human history in the context of national sovereignty and its relations with other countries.

This address is not intended to be an expression of mere nationalistic egotism. Lurking underneath the apparently innocuous title there will, I hope, be found something not merely of general interest to lawyers, but considerations of fundamental importance in the future of that community of nations which is known as the British Commonwealth of Nations.

By the Statute of Westminster the Crown is declared to be the symbol of the free association of the states forming that community of nations. In British constitutional theory the Crown was the link which bound the self-governing parts of the British government to the mother country. That Crown was regarded as one and undivided, and recognition of that link a prerequisite to continued membership of or association with the British Commonwealth of Nations. The Crown was a symbol, a rallying point for peoples who sprang from and recognized the common origins and the common motherland.

The British Empire, certainly before it developed into the British Commonwealth of Nations, was really a close family circle. It consisted on the one hand of the mother country, Great Britain ; and the daughters, grown or growing up, Canada, Australia, and New Zealand, on the other. The daughters were rapidly developing in independence and self-expression as nations, but their rapid development did not necessarily carry with it any weakening in their sense of family, or any lessening of their pride in the family connection. With the inclusion in that family circle of the South African nation, the British Commonwealth of Nations could no longer be held to be a commonwealth of British nations. In the case of Canada, New Zealand, and Australia, loyalty to the Crown was natural and understandable in the light of historical facts. When the colonies began to grow into nations, the communities which first attained the new status were those whose populations were predominantly of British stock. It was natural that the strongest bond between these communities and between each of them and the mother country should be the consciousness of their British origins and traditions, and this reflected itself in the constitutional and political structure of the growing nations.

As dependent and subordinate colonies gradually became autonomous communities, the old constitutional forms, expressive of family loyalties and traditions, remained, although obsolescent, unchanged. By reason of seven centuries of struggle with England, and because of the fact that the political institutions, which grew up naturally in Great Britain and her Dominions as the expression of their national individuality, were imposed upon Ireland, those institutions could never be really acceptable to Irishmen or be expected to earn the respect of Irishmen, much less their loyalty. Irish national instincts, deep-rooted in history, recoiled from the forms which were to them, not the embodiment of their national pride in the social structure, but the symbol of centuries of civil and religious persecution and confiscation.

To understand the Irish attitude a knowledge and appreciation of the historical relations between Great Britain and Ireland are essential. To appreciate our present attitude and friendly desires, our good relationship with all the members of that community of nations, the British Commonwealth of Nations, it would be necessary for me to give the merest sketch of the historical picture, so as to bring about a better understanding of the problem to be faced and the difficulty to be solved, and by no means to rake the dying embers of past feuds or stir the bitter waters of ancient antagonisms.

It has never been denied, as it could not be challenged, that Ireland is a mother country. No nation has contributed so generously of its life blood to the enrichment of other countries, and no nation has produced so many exiles, who, while never forgetting their debt to their motherland, have discharged with unstinted loyalty and devotion their obligations to the lands of their adoption. Throughout dark and oppressive decades the Irish have left their homes to go into exile. After the Great Famine of a hundred years ago a tide of emigration began, which threatened to destroy our nation for ever. What Ireland lost, other countries gained : Canada, the United States of America, Australia, South Africa, New Zealand, and South America.

* This is the text of an address delivered by the Prime Minister of Eire at the Annual Meeting of the Canadian Bar Association on September 1, 1948, at Montreal. It is reproduced here, by courtesy of the *Canadian Bar Review*. Without necessarily agreeing with the speaker's views, the address is a useful contribution to the study of Commonwealth Relations, as part of our Constitutional Law, as showing a lawyer's point of view not otherwise readily available. Mr. Costello has been one of the leaders of the Irish Bar and three of his senior Ministers are also distinguished barristers.

But, even before the famine, our exiles had spread themselves and made themselves felt across the continent of Europe. They left their homes because of the oppression and persecution of an alien government, which had hoped that the day would dawn when "a native Irishman on the banks of the Shannon would be as rare as a Red Indian on the banks of the Potomac."

During all that period, the Crown was a symbol of a political and religious ascendancy and became anathema to the vast majority of the Irish people. The harp without the Crown symbolized the ideal of Irish independence and nationhood. The harp beneath the crown was the symbol of conquest. The bitter facts of history have inevitably prevented our people from having that outlook which the people of the great self-governing members of the British Commonwealth of Nations may have for that traditional link. Whatever other conclusions may be drawn from the long and varied history of our national struggle, it established certain historical facts which are of great importance as marking a sharp distinction between us and the other members of the group of nations with which we became associated by the treaty with Great Britain of December 6, 1921.

Ireland throughout the centuries was denied the opportunity of building up political institutions naturally springing from and adapted to the genius of native Irish culture and tradition. The institutions by which the Irish were governed throughout the centuries were of alien origin. Throughout our history we were powerfully influenced by the consciousness that we are not a British people, but an Irish people with a distinctive nationality and language, poetry, music, and ancient culture entirely our own. Far from our associating the ideas of liberty with British constitutional forms and ideas, the whole purpose of our national struggle was to free ourselves from those institutions, which, as the inevitable consequence of our history, had become associated in our minds with the idea of national subjection. For the four essential human freedoms, of which the late President Roosevelt spoke, our people had fought for long, and for long they were denied them. Freedom of speech, freedom of worship, freedom from want, and freedom from fear, were unknown to the Irish for seven centuries.

It is of special pride as well to the United States of America as to the British members of the Commonwealth of Nations that the British colonists brought to their new countries the priceless heritage of the British common law. In this context let me quote the words of the late Hugh Kennedy, first Attorney-General and first Chief Justice of Ireland, who some years ago addressed this Association, in an address on the Constitution of the Irish Free State which he delivered to the American Bar Association in July, 1928:

> Wherever British colonists have gone and settled and laid the foundations of new nations, they have carried with them British traditions, British institutions, British constitutional theories, and, above all, their admired common law, and these were the inheritance which they handed on to the Dominions that sprang from their loins. In Ireland, however, these things were for centuries the possession of an alien ascendancy and had no roots in the heart of the Irish people who had their own traditions and their own laws which they were forbidden to enjoy while denied at the same time the benefit of the alien institutions. That tradition of hostility survived even the later time when British law extended through the whole country. And it must be remembered that if we mean by "common law" customary unwritten law only, that law which is the product of the daily lives and habits and settled practice of a community and, therefore, their natural law, so to speak, English common law was never "common law" in that sense among the Irish. Here we have the clue to the refusal to recognize in constitutional matters legal fictions which the English legal genius has made the cover for the growth and development of the common law. Fictions as to the doing of constitutional acts by the Crown, acts which are in fact though not in name done by Ministries which are responsible for such acts to Parliament, are not readily acceptable to people who have not had any part in the evolution of the reality under cover of the fiction and who, therefore, insist that the fiction must be the reality, and the reality only a pretence. This was one of the fundamental difficulties in obtaining general acceptance for the constitutional theories involved in the treaty of 1921, a difficulty for which allowance was not made by many Englishmen and others because they did not understand it.

After three years of fierce and sustained struggle the treaty of December 6, 1921, was signed and marked a new era in the relationship between our country and Great Britain. By that treaty Ireland was given in the community of nations known as the British Commonwealth of Nations the same constitutional status as Canada, Australia, New Zealand, and South Africa. Shortly put, the status acquired was the status enjoyed, in accordance with constitutional law, usage, and practice, by the Canadian nation. Canada was taken as the model because Canada had always been in the forefront of the advance towards full nationhood in that community of nations. The characteristic marks of the community into which Ireland entered by that treaty were constitutional forms which had their roots far back in British constitutional history. The member states of that community had attained their membership and reached nationhood by a process of gradual constitutional evolution within the framework of British constitutional traditions and ideas.

We entered the group as the result of a treaty which brought to an end a struggle which had lasted over 700 years. The results of that bitter struggle were that, far from associating the idea of liberty with British constitutional forms and ideals, the whole purpose of the national struggle was to secure freedom from British institutions and forms, which as the inevitable consequence of our history had become associated in our minds with the idea of national subjection. Our national ideas and prejudices were fashioned, imposed, and must be explained, by history. Although no formal agreement of an authoritative character had been yet formulated precisely defining the national and international status of the Dominions, constitutional usage and practice had outgrown constitutional law and legal theory, and in fact, if not in law, the Dominion of Canada had attained to full nationhood. Michael Collins, one of the signatories of the treaty, who gave his life to honour the name of Ireland, described the treaty as giving us the freedom necessary to enable us to achieve freedom. That phrase aptly describes the purpose and direction of our national policy in the succeeding years.

The real fact of the settlement of 1921 was obscured by the lack of a sufficiently precise definition of status. At that time there was in relation to Dominion status that lack of precise and formal definition of legal and constitutional relationships which is so characteristic of all British institutions and which is more intelligible to the British mentality than it is to the more logical minds of the Irish. There were also surviving constitutional forms which, though obsolescent, suggested the dependent status of the early colonial period instead of proclaiming the reality of the freedom which then existed. These forms, to any save those who, having grown up with them, understood their significance in practice, inevitably implied dependence.

In the succeeding years efforts were directed to the removal of all outworn forms and of existing laws and practices which in fact or in theory might limit, or appear to limit, the sovereignty of the new State. The first task was the formulation of a new constitution within the Treaty. This constitution contained clauses relating to the position of the constitutional Crown asserted by British legal theory as being necessitated by the status accepted under the Treaty. However, in article 2 of the constitution it was declared that all powers of government and all authority, legislative, executive, and judicial, in Ireland were derived from the people of Ireland. The institutions established in Ireland in 1921 derived none of their authority or validity either from any act of the Imperial Parliament or from the authority of the British Crown or from anything other than the freely expressed wishes of the Irish people themselves.

This fact, and the attitude of mind responsible for it, is something which must be borne in mind when considering later developments. A continental jurist (Dr. Kohn, *Constitution of the Irish Free State*, 81) stated the matter as follows :

> The constitution [of 1922] was a most comprehensive and in spirit, essentially republican constitution on continental lines. It had the characteristic dogmatic ring of all constitutions which embody not the legislative crystallization of an organic development, but the theoretical postulates of a revolutionary upheaval. It mocked the time-honoured empiricism of the British constitution by the enunciation of basic principles and the formation of dogmatic definitions. It postulated fundamental rights. It defined in detail the scope and the functions of the several constitutional powers. It reduced to precise terms the conventional rules of the British constitution. Its archaic symbol had to be introduced, but their meaninglessness for Ireland was writ large on every page. The monarchical forms paled into insignificance in the light of the formal enunciation of the principle of the sovereignty of the people as the fundamental and the exclusive source of all political authority.

The point is put by an authoritative British commentator (W. K. Hancock, *Problems of Nationality, 1918–1936*) in another way. He says that the constitution of 1922

> opposed the phrases of national sovereignty to the phrases of monarchy. It jostled togther two symbolisms. By external tests it might be judged to approximate to the Dominion model, but a closer examination would reveal a conflict of principle reminiscent of the constitution of Louis Philippe's France. There was, however, this difference between the constitution of the Irish Free State and the July monarchy ; that whereas, under the latter, the principles of monarchical authority and popular sovereignty started their conflict on fairly even terms, under the former, popular sovereignty dominated the life of the Free State from the very beginning.

The Irish delegation went to the Imperial Conference of 1926 determined that, while keeping within the letter and the spirit of the treaty of 1921, they would secure a definition of constitutional status which would make it clear, not merely to their own people but to other nations, that the status of Ireland was the status of an independent state ; that all real or apparent limitations on executive, legislative or judicial sovereignty would be eliminated and that legal theory would be made to conform to the political and existing facts. Under the old colonial system, by the principle of the supremacy of the British Parliament, by the sanction of the Imperial statute, by the administrative machinery of the Colonial, afterwards the Dominions Office, and by the powers of the Governor-General, legal bonds were forged which bound the Colonies to, and secured the paramount interest of, Great Britain. In consequence of the Imperial Conference of 1926, the Conference on the Operation of Dominion Legislation and Merchant Shipping of 1929, the Imperial Conference of 1930, and the Statute of Westminster, the sovereignty of each Legislature of each State of the British Commonwealth of Nations was recognized ; the Colonial Laws Validity Act, 1865 (which in Irish legal opinion did not apply to Ireland), ceased to be effective ; the supremacy of the British Parliament and British statute law was abrogated, the objectionable provisions of the Merchant Shipping Act repealed ; and all real or apparent fetters on complete legislative, judicial, and executive independence disappeared.

One matter appeared solely to be in doubt. The provision in the constitution of 1922 appearing to allow an appeal to the Privy Council was widely resented in Ireland, and strenuous efforts were made at the Imperial Conference in 1926 to secure the concurrence of the British authorities to its deletion. In 1925 the Privy Council had, contrary to what was believed to have been the appropriate practice, allowed an appeal in a case of mere local importance relating to the interpretation and effect of the Land Act, 1923. By the Land Act of 1926, the preparation of which was my first act after I was appointed Attorney-General, the appeal was rendered nugatory by what the late British Lord Chancellor Cave described as "an ingenious device."

During the sittings of the Imperial Conference of 1926 a private meeting was held to discuss the matter between the late Kevin O'Higgins, who also gave his life for the maintenance of the Irish treaty and Irish freedom, and myself, the late Lord Birkenhead and the then Attorney-General, Sir Douglas Hogg, as the result of which we agreed, largely at the request of Lord Birkenhead, to postpone a decision on our claim to abrogate the right of appeal to the Privy Council, so that the question might be later discussed in an atmosphere of less heated controversy. We were certainly under the impression that agreement would eventually be reached on the abrogation of the right.

During the discussions of the matter at the Imperial Conference of 1930 one of the Canadian Ministers, delegate to that conference, summed up what appeared to him to be the views of the then Prime Minister, the late Mr. Ramsay MacDonald. He said that Mr. MacDonald had stated the propositions that Canada had the right to abrogate the appeal to the Privy Council, that Ireland had the same constitutional status as Canada, and that from those two propositions the British Prime Minister appeared to draw the astounding conclusion that the Irish Free State had no such right.

Agreement, however, was not reached. The Statute of Westminster finally put the legislative power to abolish the appeal beyond all doubt. The right, however, was not formally abrogated at the instance of the Irish Government which had conducted the negotiations of 1926, 1929, and 1930, though bills had in fact been drafted for the purpose, because of the desire that agreement should be reached on the point and that nothing done by them might appear to give ground for a suggestion that the treaty had been broken in any way. The right of appeal to the Privy Council was finally abolished unilaterally without reference to the British authorities by the Constitution (Amendment No. 22) Act, 1933.

(To be concluded.)

THE NEW MAGISTRATES' COURTS ACT AND RULES.

The New Rules Further Examined.

IV.

Hearing of Actions.

The new Rules as to hearing of actions are set out in RR. 200-206. They will not be found to alter substantially the existing procedure. A new Rule (R. 207) relates to injunctions. It reads as follows:

(1) In any proceedings in which an injunction has been or might have been claimed, a plaintiff may, before or after judgment, apply for an injunction to restrain the defendant from—

(a) The repetition or continuance of the wrongful act or breach of contract complained of; or

(b) The commission of any wrongful act or breach of contract of a like kind, relating to the same property or right or arising out of the same contract,—

and the Magistrate, in addition to giving judgment for such damages and costs as the plaintiff may be entitled to, may grant the injunction on such terms as may be just.

(2) An application under this rule may be made—

(a) Before the hearing of the proceedings, in accordance with R. 149 hereof; or

(b) At or immediately after the hearing, in which case the order shall be included in the judgment; or

(c) After judgment on notice and supported by affidavit.

Inspection by Magistrate.

There is an interesting appendix to R. 208 which provides that a Magistrate may inspect any property or thing covering which any question may arise in the proceedings. It provides that the expenses of such an inspection under this Rule shall be paid in the first instance by the party on whose application the inspection is made or ordered, or, if made or ordered without an application, by the plaintiff, and shall be costs in the proceedings unless the Magistrate otherwise orders.

Appeals.

A complete innovation in the new procedure is the provision that all appeals shall be by way of rehearing: s. 76. Under the old Act (old s. 164), there were, of course, two appeals—one on law only, and one on fact. An appeal on law was by way of case stated; one on fact was decided on the pleadings together with the Magistrate's notes of evidence and the judgment. Though the old Act gave the Supreme Court power to hear additional evidence, or to re-hear the case, where particular circumstances required such a course, in fact it was only in rare circumstances that the Supreme Court availed itself of these powers, and it has come to be regarded as a difficult matter to persuade the Supreme Court to reverse a Magistrate's decision where he based it specifically on a finding of fact. This position will be entirely altered by the new Act. Only one form of appeal is provided for the future—a general appeal whether fact or law is involved — and the procedure is in all cases the same.

It must be remembered that it is possible for the parties to agree beforehand not to appeal: s. 71. In such case, the agreement must be put in writing in the form prescribed by R. 232 and filed in the Court before the hearing of the action.

Upon judgment being given, either party may appeal to the Supreme Court (*a*) without the leave of the Magistrates' Court where the amount of the claim on the value of the property or relief claimed or in issue exceeds £20 or where the title to any hereditament has come in question; and (*b*) with the leave of the Magistrates' Court where the amount of the claim on the value of the property or relief claimed or in issue does not exceed £20.

The procedure is by *notice of motion lodged in the Supreme Court.* It must be lodged within twenty-one days after judgment or such further time as may be allowed by a Supreme Court Judge. Security for costs of appeal must be lodged, to be fixed by the Magistrate, such security when lodged being to the satisfaction of the Registrar (of the Magistrates' Court). When this is given, the Registrar transmits to the Supreme Court:

(*a*) A copy of the pleadings.
(*b*) A copy of the Magistrate's notes of evidence.
(*c*) All affidavits or exhibits.

Thereafter the appeal takes its course (by way of rehearing) before a Supreme Court Judge.

"Actions" and "Matters."

An "action" is defined by s. 2 of the Act to be a proceeding which may be commenced by *plaint.* Other proceedings are called "matters"; they are commenced by *originating application.* Rule 75 sets out the procedure for originating applications.

Costs.

The new scale of costs and fees appended to the Rules deserves some attention. The Court costs prescribed by the Third Schedule, while not identical with the former scale, are not substantially different. The scale of witnesses' expenses has been completely recast. The scale for expert witnesses now allows from £1 1s. to £2 2s. per day together with up to £1 1s. per hour for qualifying expenses. For lay witnesses, in place of the old differentiated scale ("gentlemen, merchants, bankers and professional men," "auctioneers, accountants," "artisans and journeymen," &c.), we now have a flat rate prescribed for all lay witnesses—12s. to 24s. per day. A general clause authorizes the Court to grant an increased allowance in exceptional cases. A scale of travelling-expenses and night-allowances is also prescribed.

Solicitors' fees are increased in the cases where the increased jurisdiction is exercised. In a claim for £250 or over, for instance, the fee for drawing a statement of claim is fixed at £2 in the case of default actions, and at £4 in the case of other actions. This compares favourably with the maximum fee of £1 previously allowed. (There does not appear to be any regulation designed to prevent the form of an "ordinary action" (with its higher cost) being used in cases where the "default" procedure is appropriate; but possibly the Magistrates will deal with this matter, if abuses arise, by way of case law.) In defended actions a fee for trial of £5 5s. with a minimum of £4 4s. is provided in actions for £50 or over. An innovation is a fee provided for the

preparation of a statement of defence when this has been ordered by the Court, or where this item is certified for—this is a necessary consequence of the new formalities of pleading which the new jurisdiction necessitates. Another new item in the scale provides for a certificate in the case of a trial going into a second or third day; the Supreme Court procedure has been followed, and a certificate can be granted for second and subsequent days at a satisfactory figure. A notable omission is the absence of any provision for costs of discovery or inspection, which has already been adversely criticized in a previous article.

ROAD TRANSPORT LAWS.

Transport Law Amendment Act, 1948, and Regulations.

By R. T. Dixon.

(*Continued from p. 45.*)

Section 44 enables the sections enumerated in it to be applied to licensed goods-services; this is done by regulations under authority of s. 47 of the Transport Licensing Act, 1931.

Traffic Amendments. Part II relates to road traffic. Section 46 (1) newly defines "motor-vehicle," with two effects. First, any exemption from the definition based on weight is repealed, thus bringing in as "motor-vehicles" small units such as motorized scooters and bicycles. Secondly, motor-vehicles while temporarily being towed are exempted from the definition, thus completing the exemption given to the same type of vehicle in the definition of "trailer."

Subsection 2 enables the Minister to declare that any trailer attachment of a three (or more) axle vehicle requires licensing separate from that of the main vehicle.

Section 47 makes limitations, in the exemption from the offence of no driver's licence provided by s. 20 of the Motor-vehicles Act, 1924, for those persons being taught to drive; and the offence now exists even if the unlicensed driver is accompanied in the driver's seat by a licensed driver when (*a*) the unlicensed driver is for the time being disqualified from driving, or (*b*) the licence of the licensed driver does not cover the class of vehicle in use.

Section 48 fills a want many times expressed by the Courts, in that a special penalty is fixed for a person who drives while disqualified. He is now for this offence liable to £100 fine and an additional one year's disqualification from driving.

Section 49 provides for automatic revocation of the driving licence when a reception order as mental defective is made for the holder.

Section 50 contains important modifications of the law relating to motor-vehicle accidents. It is now a definite obligation of the motorist who is involved in an accident causing personal injury to report the accident in person to a constable or the nearest Police station as soon as possible, and in any event within twenty-four hours of the accident, provided that the motorist is not rendered incapable of doing so by injuries sustained in the accident.

Also, the section provides that the person commonly known as the "hit-and-run driver" is liable only to three months' imprisonment or £100 fine if no personal injury results from the collision, thus enabling the less serious types of this offence to be disposed of summarily.

Section 51 gives authority for regulations to be issued fixing temporary maximum speed limits during such emergency occasions as road repair operations.

Section 52 increases regulation powers provided by s. 10 of the Motor-vehicles Amendment Act, 1936, so that traffic rules may be issued for any type of road traffic at all, inclusive of trams.

Section 53 authorizes any Traffic Inspector to conduct for another Traffic Inspector any prosecution relating to road traffic, even if the former is not the informant. This applies only to Traffic Inspectors of the Transport Department or of any City Council, or to any Traffic Inspector whose appointment is approved by the Minister of Transport.

Since the preceding part of this series was published, (1948) 24 New Zealand Law Journal, 97, the Government has continued with the revocation of Emergency Regulations.

By s. 2 of the Emergency Regulations Amendment Act, 1948, the regulations specified in the First Schedule thereof are revoked. Among these are included the following which related to transport laws.

Traffic Emergency Regulations, 1942 (No. 2) (Serial No. 1942/230).—These fixed a speed-limit of forty miles per hour on the open road, and also contained restrictions on tyre-loading. The former measure has been replaced by a speed-limit of fifty miles per hour: Traffic Regulations, 1936, Amendment No. 6 (Serial No. 1948/212).

Transport Legislation Emergency Regulations, 1940 (Serial No. 1940/206).—These regulations enabled the Minister of Transport to suspend, in the interests of emergency, any enactment relating to road transport, and in addition to issue substituted provisions. Two Orders in force pursuant to these regulations are now consequentially revoked—namely, the Transport Legislation Suspension Order, 1940, No. 2 (Serial No. 1940/319) (dealing with licence fees' exemption for farmers' trucks, for replacement of which see Second Schedule to Motor-vehicles (Licensing Fees Exemption) Regulations, 1948 (Serial No. 1948/208)); and His Majesty's Forces (Motor-vehicles) Suspension Order, 1943 (Serial No. 1943/161) (dealing with exemption of Crown vehicles from certain equipment requirements).

Also, by virtue of s. 35 (10) of the Transport Law Amendment Act, 1948, the Goods-service Charges Tribunal Emergency Regulations, 1943, and three amendments thereof (Serial Nos. 1943/40, 1943/123, 1944/182, and 1945/87, respectively) were revoked. Substituted provisions therefor are contained in ss. 12–35 of the latter Act.

Towards the close of 1948, some important transport regulations were issued, and it is proposed to commence a review of these in a future article.

(*To be concluded.*)

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. 151.—*In re* M.'s Trust Settlement.

Rural Land—Claim for Compensation—Productive Value—Assessment—Existing Productive Capacity—Potentiality for Improvement—Ascertainment of Basic Value.

Appeal by the claimants in respect of an award by the Wellington Rural District Land Sales Committee of the sum of £43,541 for an area of 2,378 acres of land at Kaitoke near Wanganui, taken by the Crown under Part II of the Servicemen's Settlement and Land Sales Act, 1943. The property comprised a sheep farm, and the appellants originally claimed £70,170, made up of productive value £60,042, special locality value £7,128, and value of gravel deposits £3,000. In its award, the Committee included a sum of £750 for locality value (owing to the proximity of the property to Wanganui), and £250 for the value of some waste land included in the title but not considered as contributing to the productive value. The claim for gravel deposits was disallowed. At the hearing of the appeal, it was intimated that agreement had been reached that a sum of £1,000 should be awarded in addition to the productive value, and the claimants did not pursue their claim for special allowances in excess of this amount. The issue on appeal was limited to the assessment of the productive value.

The Court said: "Two budgets had been placed before the Committee, and were presented again to the Court. For the claimants, Mr. Webster's budget showed an income of £7,006, a surplus for capitalization of £2,644, and a productive value of £58,755. The Crown Valuer, Mr. Bolton, presented a budget showing an income of £6,992, and a productive value of £43,541. There was little between the parties as to gross revenue, and the difference in the surplus for capitalization depended almost entirely upon the assessment of items of expenditure, and in particular of those relating to labour and management.

"It was admitted that the average production of the farm over a period of seven years, and assessed as at 1942 prices, had amounted to less than £5,500, so that in effect both of the budgets provided for production substantially in excess of that secured in the past from the property. This was because the claimants had used no fertilizer, and possibly had not utilized the property to full capacity. Both of the budgets provided for some 50 tons of fertilizer per annum, and allowed in consequence for a substantial increase in production. Both valuers agreed, however, that the production for which they had budgeted could not be immediately secured. Mr. Webster expressed the opinion that it would be three years before the land could produce the revenue provided for in his budget, while the Crown Valuer said that it would be from three to five years. Neither of the valuers made any deduction from the productive value on account of the fact that the full revenue budgeted for would not be available until the expiration of at least three years.

"This was a serious defect in both of the budgets. *Prima facie*, farm land should be valued in its existing state, and the productive value of land means its value having regard to its productive capacity at the time of valuation. It is true that, where the existing productive capacity could be readily increased by improved farming methods, it would be unfair to a vendor to disregard that fact entirely in fixing the fair value of the land, but it would be equally unfair to a purchaser to value the land as if that increased productive capacity had already been achieved. There are two methods of arriving at a fair value in such a case. One is to value the property in its existing state, and then to add something on account of its potentiality for improvement. The other is to value the property as it will be after the anticipated improvement has been effected, and then to deduct something on account of the fact that the improvement of the land will take time and will be dependent upon the efforts of the purchaser. If the present property be valued as it is now, and again as it will be after the application of fertilizer for three years, the difference is the monetary equivalent of a potentiality for improvement possessed by the land. The owners of the land are entitled to something in excess of its present productive value on account of that potentiality, but they are not entitled to the full value to which the land, if improved by their successors, may attain at the end of three years of better farming.

"We are able from Mr. Webster's evidence to deduce his idea of the value of the potentiality for improvement possessed by this land. We have already said that Mr. Webster's budget, based on the returns to be expected after three years' application of fertilizer, showed a productive value of £58,755. For the purposes of the appeal, however, Mr. Webster prepared a second budget based on the proved production of the land as averaged over the past seven years, and upon that basis he arrived at a productive value of £50,155. The difference of £8,600 is Mr. Webster's measure of the extent to which the land is capable of improvement in the hands of an average efficient farmer. Mr. Webster acknowledged that it would be unreasonable to award the whole of this sum to the claimants, whose position for the purpose of these proceedings is analogous to that of vendors. He suggested that as between vendor and purchaser a fair apportionment of the 'potential value' would be upon a fifty-fifty basis. It is clear that the projected improvement of the land will be dependent entirely on the efforts of the purchasers, and dependent upon their being able to secure 50 tons of fertilizer each year. It will in any case take at least three years, and its realization is subject to risks which render it to some extent a matter of speculation. The claimants undertake none of the responsibility for improving the farm, and bear none of the risks attendant thereon. We cannot agree, therefore, that they are entitled to 50 per cent. of the potential value. We think that, in the circumstances, the claimants will be fairly compensated if they receive one-third of the potential value of the land in addition to its productive value based on its present productive capacity.

"Before examining the budget in detail, we must refer to the submissions of counsel for the claimants, who contended that, in the case of a claim for compensation for the resumption of land by the Crown, the statute should be interpreted and the facts applied strictly in favour of the claimants and against the Crown. The Court is in agreement with the principles relied on by counsel, but subject to the qualification that a claim for compensation under the Land Sales Act is limited by the terms of the Act and its amendments, which do not appear to justify so liberal an award as might properly be made under other statutory provisions for compensation. Our understanding of the intention of the Land Sales Act is that a claimant is entitled, just as a vendor is entitled, to the basic value of his land, as defined in the Act. The 'basic value' is the productive value of the land, with such additions or deductions as may be necessary in order to make it a fair value. In this particular case, any question of adjustment of the productive value has been settled by agreement, so that the only issues before us relate to the assessment of the productive value. In assessing the productive value, we are of opinion that the Act envisages that the same principles will be followed in a claim for compensation as in an ordinary transaction between a vendor and purchaser. The principles relied on by the claimants have a limited application only to this case, to which they apply only to the extent that, if we are left in doubt as to any of the factors affecting productive value, it is proper that the claimants should have the benefit of the doubt.

"Coming now to an examination of Mr. Bolton's budget, as presented for the Crown, we find that Mr. Bolton provided in the first instance for a surplus of £1,973, but that in the course of the hearing he agreed to three amendments to his budget, all affecting and increasing his surplus for capitalization. He agreed to add £60 to his revenue for wool, and to deduct £8 from his allowance for interest on capital stock and £16 from his allowance for rates. In effect, therefore, he increased his surplus by £84 to £2,057, and his capital value to £45,400. Several items in Mr. Bolton's budget were attacked by the appellants for the purpose of showing that his surplus and capital value should have been even higher. On the other hand, it

is clear that Mr. Bolton purported to value the property as it should be at the end of three years' good farming, and in effect credited to the claimants the whole of any potential value enjoyed by the land. In this respect, his basis of valuation was unsound. Nevertheless, the Crown has based its case upon Mr. Bolton's evidence, the substance of which was that the land was worth £45,400, and, accordingly, it is not competent for us to award the claimants less than that amount. But, if the claimants ask us to amend Mr. Bolton's budget so as to increase his productive value, we are at liberty—and, indeed, in duty bound—to offset against any such increase the amount by which he has been over-generous to the claimants by crediting them with the whole of the property's potential value instead of the one-third share of potential value to which, in our opinion, they are entitled. We are satisfied that any amount which, upon the evidence, might properly be added to Mr. Bolton's productive value is more than wholly offset by the deduction which ought to have been made to give effect to a fair apportionment of the potential value. While, therefore, we find that, upon the admissions of the Crown's valuer, the claimants are entitled to £45,400, we are not satisfied that, by reference to Mr. Bolton's budget alone, a greater claim can be sustained.

"It is on Mr. Webster's evidence, however, that the claimants rely to justify their claim to something in the vicinity of £60,000. We have now to consider whether Mr. Webster's evidence, supported as it was by the evidence of neighbouring farmers, is such as to justify an award in excess of £45,400. We have already expressed the view that Mr. Webster's first budget was in error, as was Mr. Bolton's, in making no allowance for the fact that the land as now being disposed of is not in the state of improvement envisaged by the budget. Mr. Webster's budget was attacked by the Crown in several minor respects, and in particular as to his allowances for labour and management. As to the minor items in dispute, we are satisfied that Mr. Webster should have allowed on the expenditure side an additional £20 in respect of maintenance and depreciation on plant, £15 for roads and culverts, and £10 for travelling-expenses. The assessment of labour costs is a question of fact, and, having regard to all the evidence, we think Mr. Webster's allowance for labour is too low, and should be increased by £50.

"As to management reward, the Crown contended that £800 should have been allowed, as against £500 provided for by Mr. Webster. The Court's considered judgment as to the principles to be applied in the assessment of a proper allowance for management has been fully set out in our recent decision *No. 150.—In re W. Trustees, Ante*, p.27, concerning the Hihiroroa Station in Poverty Bay, and no good purpose will be served by the reiteration of those principles. *Sufficient* be it to say that we are unable to accept the claimant's submission that the allowance for management must be limited to a sum closely comparable with that which would be reasonably payable to a paid manager. In the Hihiroroa case, which comprised a property of substantially greater area but of little greater capital value than the property now in issue, the Court allowed for management the sum of £1,000 and in the Hiwiniu case, which was heard at the same time, and which concerned a somewhat larger sheep station, the sum of £1,250 was allowed. The present property is more easily worked than Hihiroroa, and is much more conveniently situated. After attempting to give due weight to the principles set out in the Hihiroroa decision, as applied to the evidence in the present case, the Court has arrived at the opinion that the sum of £750 should be allowed for management in this case.

"The adjustments above mentioned may be incorporated into Mr. Webster's original budget as follows:

Mr. Webster's surplus		£2,644
Less adjustments on:		
Plant	£20	
Roads and culverts	15	
Travelling	10	
Labour	50	
Management	250	
		345
Amended surplus		£2,299
Amended productive value		£51,100

"A similar adjustment of Mr. Webster's second budget may be made as follows:

Surplus as per budget		£3,257
Less adjustments on:		
Roads and culverts	£15	
Travelling	10	
Labour	50	
Management	250	
		325
Amended surplus		£1,932
Amended productive value		£42,900

"The apparent inconsistency of these values is readily resolved if it be remembered that the difference in the values represents the potential value of the land, which in the first case is included in full in the productive value and in the second case is entirely disregarded. The conclusions we draw from Mr. Webster's budgets, upon which the claimants base their case, is that the productive value of the land in its present condition is £42,900, but that it has a potential value amounting to £8,200, of which the claimants are entitled to be credited with one-third, or £2,733, making their present interest in the land £45,633.

"The effect of our examination of the budgets presented by Mr. Bolton and Mr. Webster respectively is, therefore, that on Mr. Bolton's budget the claimants are entitled to not less than £45,400, and on Mr. Webster's budget they are entitled to not more than £45,633. In arriving at his figures, however, Mr. Bolton had deducted £303 for deficiencies, while Mr. Webster deducted £2 only. We think that a more substantial deduction should have been made by Mr. Webster, and, having regard to this fact, we propose to fix the productive value at £45,500.

"To the productive value has to be added, by consent, a further £1,000. We therefore find the basic value of the land taken to be £46,500. As this is in excess of the sum awarded by the Committee, the appeal succeeds. The compensation awarded to the claimants is increased to £46,500, together with interest thereon at 4½ per cent. from the date of possession to date of payment."

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on Friday, December 10, 1948.

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

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

The President welcomed Mr. B. C. Haggitt, who was attending the meeting for the first time.

Mr. Henry de Denne.—The following resolution, moved by the President, was carried:

"The Council of the New Zealand Law Society, having learnt of the impending retirement of Mr. Henry de Denne after twenty-nine years as Secretary of the Hawke's Bay District Law Society, records its appreciation of his long and continuous co-operation with the New Zealand Law Society and conveys to him its sincere congratulations upon his long term of service."

New Zealand Council of Law Reporting.—The President reported that, after careful consideration, the New Zealand Council of Law Reporting had approved (subject to the approval of the Price Tribunal) the request of Messrs. Butterworth & Co. (Aust.), Ltd., to increase the subscription rate of the New Zealand Law Reports to £3 15s. per annum, this amount being subject to the usual rebate of 11s. (provided by the Council of Law Reporting) to each subscriber taking out a practising certificate.

Ruling: Place for Completion of Conveyancing Transaction.—The following matter was submitted by the Wellington Society for a ruling:

"The Council of this Society would be glad to have a ruling in the following matter:

"'O. is the registered proprietor of freehold land situate in Masterton which is mortgaged, firstly to the State Advances Corporation (M.1), secondly to M.2 in Masterton, and thirdly to M.3, also in Masterton. O. has moved his residence to Petone and sells the property to M.1, who requires the discharge of the second and third mortgages to be made available for the settlement in Wellington.

"'At the request of O.'s solicitors the solicitors for M.2 and M.3 sent the second and third mortgages to their Wellington agent with instructions to settle and collect his agency charges in each case from O.'s solicitors. O.'s solicitors refused to pay him.

"'O.'s solicitors contend that, as the purchaser required settlement in Wellington, he is not liable to pay the agency charges of M.2 and M.3.

"'M.2 and M.3 claim that they are entitled to have their money paid to them *in full* without deduction of expenses or exchange which should properly be borne by O., the mortgagor.

"'The second and third mortgages are in the usual form, and contain no stipulation as to the place of repayment.'"

The Conveyancing Committee had furnished the following report:

"After perusing copies of the correspondence submitted herein, it would appear that some confusion has arisen as to the real point at issue. In consequence, we suggest that undue consideration has been given to the facts outlined in Ruling No. 181, dealing with 'Place for Completion of Conveyancing Transactions,' which, in the opinion of the Committee, applies only in cases where registration is necessary to pass title, and title is intended to pass on settlement.

"In our opinion, it is Ruling No. 180 (and in particular cl. 2 thereof) which should be applied in this case, although Ruling No. 180 must be read subject to Ruling No. 181 when title is intended to pass on settlement.

"From the facts outlined in the correspondence, the solicitors for the second and third mortgagees are concerned only with the repayment of their clients' mortgages, and have no other interest whatsoever in the transaction. The only obligation placed on a mortgagee by the Land Transfer Act on repayment of his mortgage is to hand over the mortgage and a release. No title passes. Accordingly, the solicitors for the second and third mortgagees are entitled to stipulate that the mortgages should be repaid at their office—*i.e.*, at Masterton—there being no provision in the mortgage for payment at any specified place, or to other than the mortgagee.

"However, in order to facilitate a settlement of the *whole* transaction, which in the particular circumstances was to be effected in Wellington, the relative mortgages (with appropriate releases) were forwarded to the Wellington agent of the solicitors for the second and third mortgagees, and, in our opinion, he is entitled to make what, in this case, amounts to a reasonable charge of 10s. 6d. in respect of each release."

It was resolved that the report be adopted and that it be included in the Rulings and Decisions of the Society.

Law Practitioners Emergency Regulations, 1940 (Serial No. 1940/289). The President drew attention to the fact that the above regulations were revoked under the Emergency Regulations Amendment Act, 1948, the Act coming into force on December 31, 1948.

International Bar Association.—The President welcomed the Vice-President on his return to New Zealand and said that the members of the Council and he himself were delighted to have again the benefit of his views and experience in the conduct of the Society's affairs. He asked the Vice-President to give the Council a further account of the proceedings at the Conference of the International Bar Association, at which the latter had been one of the Society's delegates.

The Vice-President gave a further interesting report of his visit to the Hague, supplementing the particulars already given in his previous report, which had been circulated to District Societies.

It was resolved to thank Sir David Smith and Mr. A. H. Johnstone for their distinguished service in representing the Society at the Conference of the International Bar Association.

State Advances Corporation: Signing Releases of Mortgages.—Mr. Bennett drew attention to the fact that provision had now been made by legislation for Branch representatives to sign releases of mortgages.

Standing Committee.—The Vice-President referred to the immense amount of work done by the Standing Committee this year and to the high quality of that work, and in particular to the work done whilst Parliament was in session.

The remarks of the Vice-President were supported by Mr. Deaker and Mr. Jeune.

On the motion of the Vice-President, a vote of thanks was carried with acclamation.

The President thanked the Council on behalf of the Standing Committee.

Legislation.—Reports concerning matters of legislation dealt with by the Council will appear in the Annual Report of the New Zealand Law Society.

RETIREMENT OF MR. J. CARADUS.

Commissioner of Stamp Duties and Registrar-General of Land.

Opportunity was recently taken by the members of the Wellington District Law Society to farewell Mr. J. Caradus, who has just retired from the public service after forty-two years' service.

Mr. Caradus, after being educated at the Auckland Grammar School, joined the Civil Service in 1907, as a cadet in the Land Transfer Department, Auckland, under the late Mr. Edwin Bamford, then the District Land Registrar. Early in his career, he qualified as a solicitor, and his undoubted ability was soon recognized, he being appointed an Assistant Land Registrar at Auckland in 1916. Three years later, he was transferred to Blenheim as District Land Registrar and Assistant (then termed Deputy) Commissioner of Stamp Duties. He held these dual positions successively at Nelson and New Plymouth.

In 1937, he was appointed District Land Registrar, Wellington, and Registrar-General of Land, consequent on the retirement of the late Mr. J. J. L. Burke.

In 1944, his brilliant career in the Civil Service culminated in his appointment as Commissioner of Stamp Duties, he thus becoming the administrative and legal head of two very technical and specialized Departments which have daily contact with members of the legal profession—the Land Transfer and Stamp Duties Departments.

He brought to his high offices profound knowledge of the work of both Departments, gained by his long and unrivalled experience, and an innate ability for sound administration. His personal attributes which endeared him to solicitors were unfailing courtesy, a willingness to assist, and clarity of reasoning and expression. Never wasting time over the irrelevant or trivial —*de minimis non curavit*—he always stuck steadfastly to the main point at issue, and won the admiration of all for his downright practical efficiency.

Mr. Caradus will be long remembered and greatly missed by solicitors and fellow civil servants, who all wish him a long and happy retirement.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

On Both Sides.—A partner in a well-known English firm of solicitors which specialises in New Zealand work has just spent a few weeks' holiday in the Dominion, and paused here sufficiently long to throw some light for Scriblex upon an interesting state of affairs. He and his partner are both members of the New Zealand Bar. In their capacity of solicitors, they can (and often do) act for conflicting interests in litigation, since their function is to brief counsel, not to put opposing views to any tribunal. As members of the New Zealand Bar, they are entitled to appear as counsel before the Privy Council in cases involving questions of New Zealand law: indeed, according to the Board, whose opinion they sought on the point, there is no objection to their appearing before that august tribunal as opposing counsel in cases sent from here to them as solicitors. So far, however, this intriguing situation has not arisen.

The Late Bird.—While Fair, J., sentenced prisoners and dealt with banco matters in the Supreme Court recently, counsel waiting patiently in another room for Christie, J., to take undefended divorce cases were given the explanation that the latter had arranged for the use of the former's judicial robes. "Gentlemen, I owe you an apology for keeping you waiting so long," said Christie, J., with his customary courtesy, on arrival. "Like the bird in the fable, I have been waiting for my plumes."

Thicker than Water.—Expert evidence in a new form is reported from Masterton, where a Maori was charged in the Magistrates' Court with false pretences. Counsel for the accused called as a witness to character another Maori, whose natural eloquence had been enhanced by experience as a local party organizer. Asked for his opinion of the accused's character, he burst for ten minutes into a spate of volubility that left the Magistrate almost exhausted. "Is that all?" he inquired. "Only one thing more will I say," replied the witness, pointing to the man in the dock. "He is my brother-in-law!"

Compliment.—A neat, if somewhat unusual, compliment to the former forensic talents of a sitting Judge is paid to Sir Norman Birkett by Sir Patrick Hastings, K.C., in his *Autobiography*. "If ever it had been my lot to take a lady for a stray week-end, and at the conclusion of the entertainment I had decided to cut her into small pieces and place her in an unwanted suitcase—a form of procedure by no means unknown to him—I should unhesitatingly have placed my future in Norman's hands, relying confidently upon his ability to satisfy a country jury (*a*) that I was not there, (*b*) that I had not cut up the lady, and (*c*) that, if I had, she thoroughly deserved it." Scriblex notices that Birkett, J., has a revealing article in *The Saturday Book* (*No. 8*), in which he confesses that the turning-point of his life was provided by those majestic lines of Milton, "And that one talent that is Death to hide, Lodg'd with me useless," and led him to forsake the financial security of his father's large drapery establishment for a Cambridge education and long years spent in the dust and heat of the Courts.

Sir Patrick Hastings, K.C., on—

The Bar.—"Any young man who needs to be advised to go to the Bar is practically foredoomed to failure from the outset, but on the other hand if he goes, not because he is advised one way or the other, but simply and solely because he has made up his mind to be a barrister however much discouraged and even snubbed by wiser heads than his, then not only will he spend his life in work that he will love but he is practically certain of at least some measure of success. The Bar is often thought to be a profession that requires extreme intellectual brilliance, but it is nothing of the sort. It only requires ordinary intelligence, inflexible honesty, and above all a determination to succeed. I have known and loved many members of my profession, but I have met outside it many others of equal if not greater brilliance; I have defended some of them and occasionally they required a great deal of defending": *Autobiography*: William Heinemann, Ltd., 1948.

The Drama of Litigation.—"I watched witnesses trying to tell the truth and witnesses trying to lie; all of them facing, with more or less success, a more or less skilful cross-examination. I saw keen intellects endeavouring to out-match opponents of equal merit; I saw drama in every form. To a person who hoped some day to be fighting a case, perhaps of that very sort, the interest was absorbing, and I am almost ashamed to confess that it is an interest which I have never lost. To this day if I were idle I think I should choose to spend my time at a trial. As places of entertainment I have never quite understood why the Royal Courts of Justice are not more generally patronized; people who are content to pay twelve shillings and sixpence to see unreal drama portrayed upon the stage would never dream of crossing the Strand where, without any payment, they can see a picture of real life presented to them every day": *Autobiography*: William Heinemann, Ltd., 1948.

Findings are Keepings.—In *Hibbert* v. *Mc Kiernan*, [1948] 1 All E.R. 860, 861, Lord Goddard, L.C.J., referred to a line of cases with regard to the title to chattels found on the land of a person who is neither the finder nor the original owner, the most conspicuous of which are *Bridges* v. *Hawkesworth*, (1851) 21 L.J.K.B. 75, *Elwes* v. *Brigg Gas Co.*, (1886) 33 Ch.D. 562, *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q.B. 44, and *Hannah* v. *Peel*, [1945] 2 All E.R. 288. He continued: "The first three of these cases have long been the delight of professors and text-writers whose task it often is to attempt to reconcile the irreconcilable. It is, however, right to say that in recent years both the Corpus Professor of Jurisprudence at Oxford and the Professor Emeritus of English Law at Cambridge have expressed the opinion that *Bridges* v. *Hawkesworth* was wrongly decided. If it was, the difficulty largely disappears, but that much battered case has lately been reinvigorated by the decision of Birkett, J., in *Hannah* v. *Peel*, and I am glad to think that, for the reasons I am about to give, it is still for wiser heads than mine to end a controversy which will no doubt continue to form an appropriate subject for moots till the House of Lords lays it to rest for all time."

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. Land Transfer.—*Mortgage—Principal Overdue—Mortgagee exercising Power of Sale—Mortgagor Dead—Mortgagor's Will not proved—Procedure.*

QUESTION: A mortgage under the Land Transfer Act has been running on overdue since 1930, interest being accepted up to date. The mortgagor died in 1935, leaving a will which has never been proved. The mortgagee now wishes to exercise her power of sale.

(*a*) Is it necessary for notices to be served under both s. 68 of the Property Law Act, 1908, and s. 3 of the Property Law Amendment Act, 1939?

(*b*) If both notices are required, can they be served at the same time? And can they be combined in the one document?

(*c*) Will service of all necessary notices on the executor and sole beneficiary of the unproved will be sufficient? (*Note*: It is expected that such executor will co-operate in the matter, as it is not desired to apply for probate after the long lapse of time.)

(*d*) What evidence (if any) will the District Land Registrar require as to compliance with the statutory provisions regarding notice?

ANSWER: (*a*) Yes; notices under both sections are necessary: (1948) 24 NEW ZEALAND LAW JOURNAL, 259.

(*b*) Both notices may be served at the same time. Although it would be preferable to have separate notices, it has been suggested that they could be combined in the one notice properly intituled in the two matters, if three months' notice is given throughout: *Ibid.*

(*c*) Service onthe executor and beneficiary will not be sufficient, because the will has not been proved. An order for substituted service or for directions will be necessary with regard to both s. 63 of the Property Law Act, and s. 3 of the 1939 Amendment: see s. 8 of the Property Law Amendment Act, 1939.

(*d*) The District Land Registrar will probably require a statutory declaration establishing that the provisions of s. 3 of the Property Law Amendment Act, 1939, have been complied with.

X.2.

---

2. Subdivision of Land in a Borough.—*Long-term Agreement for Sale and Purchase—Approval of Subdivision Some Years ago—Delay in Completion of Plan—Necessity for New Approval.*

QUESTION: Ten years ago my client subdivided his land situated in a Borough, and duly obtained the unconditional consent of the Borough Council to same. One allotment was sold to a purchaser under an agreement for sale and purchase, the purchase-money being payable over a period of ten years. The purchaser is about to pay his last instalment, and is seeking a conveyance of his allotment. Unfortunately, there has been a long delay in completing the survey, and the plan is just about to be submitted to the Land Transfer Department for checking and deposit after checking has been completed. Is the approval of the Council ten years ago now stale, and will a fresh approval be now necessary?

ANSWER: Unfortunately for your client the law has recently been altered. Fresh approval is now necessary: s. 36 (2) of the Municipal Corporations Amendment Act, 1948.

X.2.