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THE DOCTRINE OF EXECUTIVE NECESSITY.

AT common law, a servant of the Crown is a servant at will. Even if there be a contract of service, the Crown's absolute powers of dismissal must be deemed to be imported into it, whatever its terms. It is not for the Court, or a jury, to discuss and decide upon the goodness of the grounds for dismissal, or to consider the question whether there were any grounds for dismissal at all. The Crown's absolute power of dismissal can only be affected by statute; and anything, short of a statute, which purports to restrict it, is void as contrary to public policy.

Such are the principles involved in the subject now to be considered, as they are stated in *Robertson's Civil Proceedings By and Against the Crown*, 359. An example of the application of this doctrine is found in *Finn* v. *The King*, [1933] N.Z.L.R. 1018, where the suppliant's office under the Crown had been abolished by statute, and his claim against the Crown for damages for the wrongful termination of his employment was characterized by Reed, J., as "hopeless."

Authoritative text-book writers have instanced the foregoing rule relating to the employment of Crown servants as one aspect of the wider doctrine of executive necessity—namely, that a contract by the Crown which fetters its executive powers is unenforceable in a Court of law, as it is not within the competence of the Crown to make a contract which would have the effect of limiting its future freedom of executive action.

This view receives support in the judgment of Rowlatt, J. (as he then was), in *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500, 503, where His Lordship said:

> It is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of the community that the Ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable.

In *Robertson* v. *Minister of Pensions*, [1948] 2 All E.R. 767, Denning, J. (as he then was), made some observations relative to the doctrine of executive necessity. The Crown in this case, he said, could not escape liability by praying in aid the doctrine that it could not bind itself so as to fetter its future executive action, since the defence of executive necessity was of limited scope and only availed the Crown when there was an implied term to that effect. This importation of an implied term is not a new requirement of the doctrine of executive necessity. In order to examine the implications of *Robertson's* case, it becomes necessary to deduce from the authorities the application and scope of that doctrine.

Reference may first be made to *De Dohsé* v. *The Queen*, heard and determined by the Court of Appeal in 1885: see 66 L.J.Q.B. 422 *n*. The petition of right set forth certain facts, from which it was sought to be made out that the suppliant, who had been an officer of the British German Legion, raised for the purpose of the Crimean War, had, upon the termination of that war, been engaged for a fixed term of service for seven years to serve with a body of troops formed to proceed to the Cape of Good Hope for service against the Kaffirs. The suppliant sought compensation for the damage sustained by him by the loss of the alleged engagement.

In the course of his judgment, Brett, M.R. (as Lord Esher then was), said:

> It was admitted in argument that if the engagement was for military service, whether as an officer or as a private soldier, for seven years, it would be contrary to public policy—that the Crown could not make a contract for seven years for military service; but it was contended that the engagement in the present case was not an engagement for military service. It was not necessary in the present case to determine whether the doctrine with regard to engagements by the Crown is confined to military service or not. For myself, I take leave to say that I do not accept at all that the doctrine is confined to military service under the Crown. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine applies to all public service under the Crown, because all such service is for the public benefit, and therefore it may be that the Crown has despotic authority to get rid of servants who are employed for public purposes and for the benefit and advantage of the public. But it is not necessary to decide this on the present occasion, because to my mind it is clear on the petition of the suppliant that what was proposed to him, if anything, was military service. The suppliant, therefore, must rely upon a contract to serve as a soldier for seven years. But the law is that no such contract can be made, upon the ground that it would be contrary to public policy. The suggested contract never could be made. Neither the Queen herself nor any servant of the Queen could make it . . . The main point is that no such contract as is alleged could have been entered into by anybody, being a contract against public policy. The law will not entertain such a contract either as made between individuals or on a petition of right. The contract, even if made, was absolutely bad on the ground of public policy. The appeal must be dismissed.

Baggallay, L.J., was of the same opinion; and Bowen, L.J., who agreed, said:

> It seems to me in the first place that the alleged contract is one which no servant of the Crown had authority to make. It would be against policy that any servant of the Crown should have authority to bind the Crown to such a contract. But in the next place, even if such a contract could be made lawfully so as to bind the Crown, there is no shadow of reason for thinking that the allegations in the petition amount to the statement of such a contract. There is no foundation for this petition of right.

The judgment went on appeal to the House of Lords (66 L.J.Q.B. 423*n.*). In his speech, Lord Halsbury, L.C., said:

> The petition of right in itself, most benignantly understood, appears to me to set forth no contract whatever. It is obvious, however, that if there had been any such contract as is sought to be suggested by the argument for the suppliant, it would have been a contract which would necessarily have imported into it the ordinary course of practice by the Crown. I say nothing at the moment as to whether or not, if there had been a departure from that practice, it would have been, as a matter of public policy, binding upon the Crown at all; but even taking the allegations to amount to a contract between the parties, it is left, as it appears to me, without the slightest intimation that there was not imported into the contract an authority to the Crown to reserve to itself the right of dismissal by the Crown . . . Had both those exigencies been supplied—namely, first a contract, and then the insertion in that contract of the right to serve the Crown for a particular period, I think it would have been unconstitutional and contrary to public policy, and a contract which could not have been maintained.

Lord Blackburn and Lord Fitzgerald agreed. Lord Watson said that, in the first place, it appeared to him that no concluded contract was disclosed in the statements contained in the petition of right; and, in the second place, he was of the opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, he was of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country, and could not derogate from the power of the Crown.

The proposition established in *Dunn* v. *The Queen*, [1896] 1 Q.B. 116, is that all persons employed in the public service of the Crown, whether in a military or in a civil capacity, hold their appointments during the will of the Crown, unless there is some statutory provision to the contrary; and that there is as much ground for the possession by the Crown of an unrestricted right of dismissal in the case of civil service as there is in the case of military service.

The suppliant alleged that Her Majesty's Commissioner and Consul-General for the Niger Protectorate had engaged him in the service of the Crown as consular agent in that region for a period of three years certain, and he claimed damages for having been dismissed before the expiration of that period. Day, J., held that contracts for service are determinable at the pleasure of the Crown, and directed a verdict and judgment for the Crown.

In the Court of Appeal, the question was whether he could maintain a petition of right because his appointment was determined before the expiration of its period. In his judgment, Lord Esher, M.R., intimated that what he had suggested in *De Dohsé* v. *The Queen* might have to be decided was now before the Court. His former proposition had been enunciated before that case had gone to the House of Lords, and it seemed to him that the rule, as there laid down, was in consonance with what he had suggested in the Court of Appeal to be the true rule. The Privy Council in *Shenton* v. *Smith*, [1895] A.C. 229, appeared to be equally of the same opinion.

Lord Herschell, at p. 119, said:

> Persons employed, as the petitioner was, in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged to hold office during the pleasure of the Crown. So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at pleasure.

In that case, there was no evidence that the appointer had any authority to employ the petitioner on any other terms than those which applied to the Civil Service generally. Lord Herschell continued:

> It is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown. The cases cited show that, such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the Crown to dismiss its servants.

Gould v. *Stuart*, [1896] A.C. 575, provides an example of this general principle being negatived by a particular enactment. There Sir Richard Couch, delivering the judgment of the Judicial Committee, which comprised also Lords Watson and Hobhouse, said that it was settled law in New South Wales, from which the appeal came, as well as in England, that in a contract for service under the Crown, civil as well as military, there was, except in certain cases where it was otherwise provided by law, imported into the contract a condition that the Crown had the power to dismiss at its pleasure. In their Lordships' opinion, this was an exceptional case, in which it had been deemed for the public good that, by the Civil Service Act, 1884 (N.S.W.), a Civil Service should be established under certain regulations with some qualifications of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them.* These provisions, which were manifestly included for the protection and benefit of the officer, were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure.

In *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500, it appeared that, during the 1914-18 War, a Swedish shipping company, being aware of the liability of neutral ships to be detained in British ports, obtained a contract from the British Government that, if they sent a particular ship, the *Amphitrite*, with a particular class of cargo, she should not be detained. A ship containing cargo of the stipulated kind was sent to a British port. The British Government withdrew its undertaking.

On a petition of right claiming damages for breach of the Government's undertaking, Rowlatt, J., held that the undertaking was not enforceable in a Court of law, because there was no enforceable contract. His Lordship recognized that the Government can bind itself through its officers by a commercial contract, and that, if it does so, it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby

* *Cf.* Public Service Amendment Act, 1927, s. 11.

the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to England with a particular kind of cargo. That, to his Lordship's mind, was not a contract for the breach of which damages could be sought in a Court of law. It was merely an expression of intention to act in a particular way in a certain event.

So much for the decision; but the learned Judge went on to say that his main reason for so thinking was that it was not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arose. It could not by contract hamper its freedom of action in matters which concerned the welfare of the State. He continued:

> Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of the community that the Ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable. Again, suppose that a man accepts an office which he is perfectly at liberty to refuse, and does so on the express terms that he is to have certain leave of absence, and that when the time arrives the leave is refused in circumstances of the greatest hardship to his family or business, as the case may be. Can it be conceived that a petition of right would lie for damages? I should think not.

In *Thomas* v. *The Queen*, (1874) L.R. 10 Q.B. 31, it was held that a petition of right will lie to recover unliquidated damages for the breach of a contract made on behalf of the Crown by a duly authorized agent. But the *Amphitrite* case is not on all fours with that case. That Rowlatt, J., was correct in his view was the opinion of the learned Editor of the *Law Quarterly Review*, when in Vol. 38, at p. 12, in a note on the *Amphitrite* case he said:

> There seems to be no doubt that the Crown is not competent to make a contract fettering its own future executive action. Such a contract is unenforceable, or, rather, voidable at the option of the Crown, so that the owners' case could not succeed.

In *Reilly* v. *The King*, [1934] A.C. 176, which came before the Privy Council on appeal from the Supreme Court of Canada, Orde, J.'s, judgment in the latter Court seemed, according to Lord Atkin, who delivered the judgment of the Judicial Committee, to admit that the relation between the appellant and a statutory board might be at any rate partly contractual; but he had held that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure.

Their Lordships were not prepared to accede to that view of the contract, if contract there were. If the terms of appointment definitely prescribed a term and expressly provided for a power to determine "for cause," it appeared necessarily to follow that any implication of a power to dismiss at pleasure was excluded. That, Lord Atkin said, appeared to follow from the reasoning of the Judicial Committee in *Gould* v. *Stuart* (*supra*), which, though not a case of a public office, could not be distinguished on that ground, since the difference between an office and other service was immaterial. The contrary view would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their employment has been expressed to be dismissal for cause.

The Judicial Committee did not find it necessary in this case to express a final opinion on the theory (accepted by the Exchequer Court of Canada) that the relations between the Crown and the holder of a public office were in no degree constituted by contract. Their Lordships contented themselves with remarking that, in some offices at least, it was difficult to negative some contractual relationship, whether it were as to some salary or terms of employment on the one hand, or duty to serve faithfully and with reasonable care and skill on the other. In this connection, the judgment goes on, it would be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined.

The question was recently considered by Denning, J., in *Robertson* v. *Minister of Pensions*, [1948] 2 All E.R. 767. The claimant in this case was injured by an accident while on military service in December, 1939, and was examined by a medical board, found unfit for general service, and graded in Category B in July, 1940. In response to a letter written to the War Office, he was informed that his disability had been accepted as attributable to military service, and, on the faith of that assurance, he took no steps to obtain independent medical opinion or to secure possession of X-ray plates relating to his condition after the accident. A pensions appeal tribunal found that his disability was not attributable to military service. On appeal from that determination, the question was whether the assurance contained in the letter from the War Office was binding on the Ministry of Pensions.

The entire administration of disablement claims in respect of military service after September 2, 1939, had, in fact, been transferred to the Minister of Pensions; and his Lordship held that the Minister was bound by the War Office letter, one of the reasons being that the letter from the War Office was clear and explicit, and the doctrine of executive necessity did not avail the Crown so as to entitle it to revoke the decision without cause.

The Crown, his Lordship indicated, could not escape liability by praying in aid the doctrine that the Crown could not bind itself so as to fetter its future executive action. The doctrine propounded by Rowlatt, J., in the *Amphitrite* case was unnecessary for the decision, and the cases on the right of the Crown to dismiss its servants at pleasure, which seemed to have influenced Rowlatt, J., were now to be read in the light of the judgment of the Judicial Committee of the Privy Council delivered by Lord Atkin in *Reilly* v. *The King* (*supra*). That judgment, Denning, J., said, showed that, in regard to contracts of service, the Crown was bound by its express promises as much as any subject. The cases where it had been held entitled to dismiss at pleasure were based on an implied term, which could not, of course, exist where there was an express term dealing with the matter. His Lordship added:

> The defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect, or that is the true meaning of the contract. It has certainly no application to this case. The War Office letter is clear and explicit and I see no room for implying a term that the Crown is to be at liberty to revoke the decision at its pleasure and without cause.

In the latest text-book, *Bell's Crown Proceedings*, published last year, before *Robertson's* case came before the Court, the learned author says, at p. 16 :

> It is not certain whether arrears of a pension could be claimed by a petition of right. Robertson [in *Civil Proceedings By and Against the Crown*] thought that probably they could, basing his opinion mainly upon the case of *Oldham* v. *Lords of the Treasury*, which is not separately reported, but is referred to in the report of the case of *Ellis* v. *Earl Grey*, (1833) 6 Sim. 214, 220. The former case, however, seems to be at best an indirect authority, since it was one of an unsuccessful attempt to enforce payment by bill in Chancery, the Court in dismissing the bill remarking that a petition of right would have lain. There has since been no reported case, but in *Murray's Petition of Right*, referred to in Robertson, the fiat was granted, and the claim settled by the Crown. It is submitted that where the pension is due under the provisions of a statute, it could, upon principles referred to above, have been recovered by petition of right as a sum due under a statute, and could be recovered now by an action brought under s. 1 of the Crown Proceedings Act.†

One of the principles of the doctrine of executive necessity is that the Crown's absolute power of dismissal can only be restricted by statute ; consequently, the term of the employment is immaterial. In *Finn* v. *The King* (*supra*), it was contended that the right to compensation must be implied on the principle " that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring a person's rights without compensation unless one is obliged so to construe it," as Lord Esher, M.R. (then Sir William Brett), said in *Attorney-General* v. *Horner*, (1884) 14 Q.B.D. 245, 257.

In *Finn's* case (*supra*), at p. 1026, Reed, J., said :

> This argument, however, begs the question. If there is no right, there can be no interference with or injury to a right. If the suppliant's appointment to his office even for a definite period did not deprive the Crown or Parliament of the right to terminate the employment at any time, what right was there with which there could be any interference ?

It seems that, if the facts in *Robertson's* case are carefully examined, Denning, J., was right when he said of the case before him that the doctrine of executive necessity did not apply to it. The appellant had a right to his pension, as a soldier, while serving, has to his pay.

Reduced to simple terms, the facts show that Colonel Robertson, at all material times, was not a servant of the Crown, as he was not qualified for a pension until he had ceased, by discharge, to be a military officer, as he was permanently unfit for general service. He was entitled to a pension, since his disability was attributed to war service, not under a contract by the Crown, but under conditions laid down by Royal Warrant, and for the payments under which money is provided by Parliament : *34 Halsbury's Laws of England*, 2nd Ed. 777, para. 1094. If he was " entitled," he had a right to a pension ; and the begging of the question posed in *Finn* v. *The King* (*cit. supra*) did not arise. The intervention of a medical board and the administrative functions of the War Office, and, later, the transfer of those functions, under statutory authority, to the Ministry of Pensions, were merely incidental to the determination of the question whether or not Colonel Robertson had a statutory right to a pension ; and it was decided by the competent authority that he was entitled to receive a pension according to the statutory scale.

† 1947 (Gt. Brit.), which corresponds in a general way, apart from procedure, with our Crown Suits Act, 1908, and its amendments.

It seems to us (though Denning, J., did not go into this detail) that there was no contract, in any strict sense, and no material to which the doctrine of executive necessity could be applied. All that the judgment decides is that, as the suppliant had an assurance that he would receive his pension, it could not be held against him that he had no evidence (such as independent medical advice or X-ray plates) to support his claim to it, when his right to it was challenged at a later date. As the learned Judge pointed out, an estoppel, strictly speaking, only applies to representations of fact, and not to the conclusions to be drawn from them ; and here all the facts were known to both parties.

On another ground, too, it would seem that the doctrine of executive necessity had no application to *Robertson's* case, because in *Kidman* v. *Commonwealth of Australia*, [1926] A.L.R. 1, the Judicial Committee, in rejecting a petition for special leave to appeal from the High Court of Australia, held that contracts made by the Prime Minister on behalf of the Commonwealth which involve the expenditure of public moneys are not void, but are merely unenforceable until funds to answer them are appropriated by Parliament. There, as their Lordships, in refusing leave, said, the Legislature had voted moneys for shipbuilding, and out of the moneys so appropriated large sums had been paid to the defendants in respect of their contracts, which they alleged to be void. In *Robertson's* case, it is certain that the Legislature had passed an annual appropriation for pensions, and any contention that the Minister of Pensions could not pay a pension for disability attributable to war injuries would seem untenable.

As Isaacs, J., said in *Commonwealth* v. *Colonial Ammunition Co., Ltd.*, (1924) 34 C.L.R. 198, 224, 225, in speaking of an appropriation by Parliament :

> it thereby neither betters nor worsens transactions in which the Executive engages within its constitutional domain, except in so far as the declared willingness of Parliament that public moneys should be applied and that specific funds should be appropriated for such a purpose is a necessary legal condition of the transaction.

In *Mackay* v. *Attorney-General for British Columbia*, [1922] 1 A.C. 457, 461, the Judicial Committee, in a judgment of the Board consisting of Viscount Haldane, Viscount Cave, and Lords Dunedin, Shaw, and Phillimore, delivered by Viscount Haldane, said :

> The character of any constitution . . . which follows the type of responsible Government in the British Empire, requires that the Sovereign or his representative should act on the advice of Ministers responsible to Parliament, that is to say, should act not individually but constitutionally. A contract which involves the provision of funds by Parliament, requires, if it is to possess legal validity, that Parliament should have authorized it, either directly, or under the provisions of a statute . . . If authority be wanted for this proposition, it will be found in *Churchward* v. *The Queen*, (1865) L.R. 1 Q.B. 173, and in the decision of this Board in *Commercial Cable Co.* v. *Government of Newfoundland*, [1916] 2 A.C. 610.

In passing, it may be recalled that in the *Amalgamated Engineers'* case, (1920) 28 C.L.R. 129, 147, the judgment in the *Commercial Cable Co.'s* case was characterized by Sir Adrian Knox, C.J., and Isaacs, Rich, and Starke, JJ., as " a landmark in the legal development of the Constitution."

It follows that the only source of executive power to make or ratify contracts made by the Executive Government or by a member of the Executive is statute law.

The Executive has no general powers of binding the Crown by agreements made without the authority of Parliament; and, even if a contract is binding on the Crown, there is no way of getting payment unless under an appropriation by Parliament: *Commonwealth of Australia* v. *Colonial Combing, Spinning, and Weaving Co.*, (1922) 31 C.L.R. 421; and see, also, *Attorney-General* v. *Great Southern and Western Railway Co.*, (1925) 41 T.L.R. 576, 581.

If further authority be needed, a converse case illustrates the principle as it was enunciated afresh in the judgment of the Judicial Committee in *Auckland Harbour Board* v. *The King*, [1924] A.C. 318; N.Z.P.C.C. 68, approved by the House of Lords in *Attorney-General* v. *Great Southern and Western Railway Co.* (*supra*), at p. 581. Their Lordships, in a judgment delivered by Viscount Haldane—we are citing from *New Zealand Privy Council Cases*, at p. 75—said:

> It has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced.

Apart from the principles to which we have referred, the question of the limitation and extent of the powers of the Executive is becoming increasingly difficult. The frequency of intervention of the Crown in business, and the trading nature of many Government Departments throughout the British Commonwealth, make important a clear definition of the contractual powers of the Executive. Where the Crown, successful in a plea of executive necessity, repudiates a contract entered into by a Minister as being void, and the Executive refuses to ask the Legislature for an appropriation in its regard, the only remedy that the subject now has is to endeavour to have the matter raised in Parliament, in debate, or by petition, in respect of which, if recommended for consideration, only the Executive can authorize payment. If the Executive refuses to meet what the public thinks is a moral obligation, the only sanction then left for the fulfilment by payment of a contract entered into by a Minister is the sanction of public opinion as expressed in the ballot-box.

SUMMARY OF RECENT LAW.

CHARITABLE TRUST.

Public Charitable Trust—Land vested in County "in trust for the improvement and protection" of a Named River—Nature of Trust and Purposes defined—Reserves and Crown Lands Disposal and Enabling Act, 1896, s. 16.

COUNTY.

Land vested in County in Trust for Special Public Purpose—Rents from Leases of Trust Lands to be expended for Carrying out of Trust—Such Moneys to be kept in Special Account—Moneys Erroneously Expended to be accounted for over Indicated Period—Counties Act, 1920, ss. 2, 137 (2) (b), 138, 140, 150. Certain lands were vested in the Kaikoura County "*for an estate in fee simple in trust for the improvement and protection of the Waimanarara River*"—*i.e.*, the Waimangarara River—by Governor's Warrant of June 19, 1897 (*1897 New Zealand Gazette*, 251), under s. 16 of the Reserves and Crown Lands Disposal and Enabling Act, 1896. These reserve lands, comprising together an area of 567 acres, were leased by the County at rents of approximately £100 per annum; but, since the last big flood in 1941, the rents had been reduced to about £80 per annum. Between 1907 and 1942 the County received, in all, £3,430 in rentals, and spent, in river protection and other work relating to the river, sums totalling about £600. The balance of the rental-money was used for the general purposes of the County. The general state of the river, the effect of floods, and the actual and possible damage to adjacent farm lands are fully described in the judgments. The plaintiff, alleging that flooding, due to a breach in the river-bank, was likely to result in injurious affection of his lands, claimed a writ of mandamus commanding the County (*a*) to remove obstructions in watercourses leading from the river, and (*b*) to give an account to the Court of the sums received by it from and including the year 1935 onwards, and to apply such sums as the Court might think fit to the improvement and protection of the Waimangarara River by taking proper steps to prevent the river-waters from continuing to depart from their natural course. After evidence had been heard and argument submitted in the Supreme Court, an order was made that a writ of mandamus be issued to the County and to the Chairman and members of the County Council to observe the terms of the trusts on which the County held the river reserves in the manner set out in that order. On appeal by the County from that order, and on cross-appeal by the plaintiff against the dismissal of the plaintiff's claim for removal of obstructions from the watercourses, *Held*, by the Court of Appeal, 1. That the County, as trustee, held the reserve lands as a charitable trust for special public purposes, and it was not entitled to deal with them as though it held them as absolute owner. (*Solicitor-General* v. *Wanganui Borough*, [1919] N.Z.L.R. 763, and *Auckland City Corporation* v. *The King*, [1941] N.Z.L.R. 659, followed.) (*Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A.C. 531, and *Lysons* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 738, applied.) 2. That the main object of the vesting of the reserves in the County, and of the trust "for improvement and protection" of the river (a non-navigable one), was the preservation of the state of the then-existing banks, and the carrying out of improvements that might ensure the maintenance of them or the more effective control of the flood waters in the course over which they then passed: such was the nature of the trust that the County was obliged to carry out. (*In re Christchurch Enclosure Act*, (1888) 38 Ch.D. 520, followed.) 3. That the rents derived from letting the reserve lands were required to be expended for the purpose of carrying out the purposes of the trust; as long as income be required to carry out those purposes, it must be preserved and applied to those purposes; and, if it became clear that it was not so required, the directions of the Court should be obtained with regard to it. (*Wilson* v. *Barnes*, (1886) 38 Ch.D. 507, and *Aitcheson* v. *Waitaki County*, (1880) 1 O. B. & F. (S.C.) 52, referred to.) 4. That, when the County has funds in hand to undertake active operations in order to safeguard the river-banks, and, where necessary, to improve the bed of the river, it must perform the trust which has been imposed on it; and, if the County is in doubt as to the nature of its duties and the extent of its powers, the Court can settle a scheme defining those duties and powers in detail. (*In re Bullock-Webster*, [1936] N.Z.L.R. 814, applied.) (*East Suffolk Rivers Catchment Board* v. *Kent*, [1941] A.C. 74; [1940] 4 All E.R. 527, referred to.) 5. That, although the Court had power to see that the trust was carried out, it had not been shown that the County had acted *mala fide*; but, as its decision had been based on a misconception of the trust, founded on an erroneous view of the obligations imposed upon it, it should have the opportunity to decide what works should be undertaken in terms of the trust as defined by the Court; and, in the event of its refusal to carry out its obligations, which should not be assumed, further application could be made to the Court, or action taken under s. 140 of the Counties Act, 1920. (*Attorney-General* v. *Bunny*, (1874) 2 N.Z. C.A. 419, referred to.) 6. That, in addition to the general law relating to trusts, s. 138 of the Counties Act, 1920, required that the rents from the river-reserve lands should not have been used for general purposes. 7. That the County was liable to account for its administration of the trust, and, in the circumstances of this case, the appellant's liability was to be limited to the six years preceding the service of the proceedings, but without any deduction for costs of administration during that time. *Semble*, A special account is, in terms of s. 137 (2) (*b*) of the Counties Act, 1920, required

to be kept for moneys derived from a special trust, such as the one under consideration. The order for mandamus made in the Court below was set aside, and the case remitted to the Supreme Court for it to make a declaration as to the obligations of the appellant County in terms of the judgment of the Court of Appeal, with liberty reserved to make any further necessary application. The respondent's cross-appeal was dismissed. *Kaikoura County* v. *Boyd*. (S.C. & C.A. Wellington. December 17, 1948. Sir Humphrey O'Leary, C.J., Kennedy, Fair, Cornish, JJ.)

COMMON LAW.

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

COMPANY LAW.

The Name of the Company :—

I. Selection of a Name. *92 Solicitors' Journal*, 700.

II. Dispensing with the Word "Limited." *92 Solicitors' Journal*, 713.

III. Change of Name. *92 Solicitors' Journal*, 724.

CONTRACT.

Enforcement of Gratuitous Promises. *207 Law Times Jo.*, 36.

CRIMINAL LAW.

Appeal on the Forfeiture of a Recognisance. *113 Justices of the Peace Jo.*, 88.

Crime and Punishment—A New Approach : *113 Justices of the Peace Jo.*, 3.

Evidence—Confessions by Accused—Common-law Principles Applicable—Evidence Act, 1908, s. 20. The common-law rule as to the necessity of a statement by an accused person being voluntary is in force in New Zealand, and s. 20 of the Evidence Act, 1908, does not cover the whole field of law concerning confessions or statements by accused persons. It only deals with a limited portion of the common law which was operative at the time of the passing of the statute in 1895 from which s. 20 derives. Consequently, evidence of a statement or confession by the accused is admissible only if the prosecution proves to the satisfaction of the Judge that it was made perfectly voluntarily. Further, the evidence is inadmissible if it is the result of an inducement made by some person in authority ; and such an inducement is not restricted to promises or threats, and it need not be of such a character as is likely to cause an untrue confession. Only promises or threats made by a person in authority are covered by s. 20, which does not impose any limitation on the common law, but imposes restrictions only on cases coming within that section—*i.e.*, promises or threats made by a person in authority. *So held* by the Court of Appeal on case stated under s. 442 of the Crimes Act, 1908. *R.* v. *Phillips*. (C.A. Wellington. March 25, 1949. Sir Humphrey O'Leary, C.J., Kennedy, Finlay, Hutchison, JJ.)

Meaning of "Indictable Offence." *113 Justices of the Peace Jo.*, 72.

Trial—Direction—Absence of Detailed Direction as to Essential Elements of Crime Charged—Statutory Definition not essential to Direction—Direction as to who may be Parties to Offence—Desirable but not Essential—No Miscarriage of Justice—Criminal Appeal Act, 1945, s. 4—Crimes Act, 1908, s. 90—Reformative Detention—Prisoner sentenced, in respect to one Crime, to Eighteen Months' Hard Labour—Sentence in respect of other Crime of Six Months' Hard Labour cumulative to be followed by Six Months' Reformative Detention—Both Convictions at Same Sessions—Order in which Sentences to be served—Crimes Amendment Act, 1910, s. 22. Failure to direct the jury as to the essential elements of the crime charged, though important and necessary in some cases, did not result in any substantial miscarriage of justice in the present case, where the crime charged was theft from the person. Failure to direct the jury as to the application of s. 90 of the Crimes Act, 1908, which defines who may be parties to an offence, though such a direction is desirable, did not result, in the present case, in any miscarriage of justice. The prisoner was, at the same sessions, (*a*) convicted of theft from the person and was sentenced to eighteen months' hard labour, to be followed by six months' reformative detention ; and (*b*) convicted of attempted breaking and entering, in respect of which he was sentenced to six months' hard labour, cumulative on the larger sentence. *Semble*, By reason of s. 22 of the Crimes Amendment Act, 1910, the prisoner first serves the eighteen months' hard labour of the first sentence, then the six months' hard labour of the second sentence, and then the six months' reformative detention. *R.* v. *Aitken*. (C.A. Wellington. March 16, 1949. Sir Humphrey O'Leary, C.J., Northcroft, Stanton, JJ.)

Trial—Direction—Carnal Knowledge—Jury warned of Danger of convicting upon Uncorroborated Evidence of Girl of Thirteen Years—Direction that Certain Matters constituted Corroboration—Such Matters supporting Girl's Story but not implicating Accused—Conviction quashed and New Trial ordered—Criminal Appeal Act, 1945, s. 4 (1). The appellant was convicted on an indictment charging him upon two counts with unlawfully carnally knowing a girl of the age of 13 years and 7 months. It was admitted that the direction of the learned trial Judge as to the law relating to corroboration was correct and complete, and could not be impeached. Having warned the jury against the danger of convicting upon the uncorroborated evidence of the girl, he then mistakenly directed the jury that certain matters constituted corroboration, but, while they tended to support the girl's story, they did not implicate the accused. On appeal from the appellant's conviction, *Held*, by the Court of Appeal, That the appeal should be allowed, as it would be dangerous, in the circumstances of the case, to speculate that the jury relied upon that which was claimed to be corroboration, but to which their attention was not drawn, instead of upon that upon which the learned Judge had misdirected them. The conviction was quashed, and a new trial was directed. *R.* v. *Ridgway*. (C.A. Wellington. March 16, 1949. Sir Humphrey O'Leary, C.J., Kennedy, Northcroft, Stanton, JJ.)

CROWN LAND.

Land Act Regulations, 1949 (Serial No. 1949/37), under the Land Act, 1948.

DEATH DUTIES.

Annuities and Estate Duties. *207 Law Times Jo.*, 51.

DESTITUTE PERSONS.

Desertion while under the same Roof. *113 Justices of the Peace Jo.*, 57.

DIVORCE AND MATRIMONIAL CAUSES.

Condonation. *93 Solicitors' Journal*, 33.

Maintenance—Parties living together for Short Period before Husband proceeded Overseas on Active Service—Refusal to return to Wife—Wife and Husband both earning Income—Considerations of Good Sense and Fairness—Order for Maintenance—Divorce and Matrimonial Causes Act, 1928, s. 33 (2). The parties were married, the husband being aged twenty-two years and the wife twenty-four years, while the husband was in the Royal New Zealand Air Force, and they lived together during the sixteen months before his proceeding overseas. He returned to New Zealand two years and three months later, but not to his wife, after informing her that his affection for her had ceased. He did not return to her after she had brought proceedings for restitution, and she obtained a dissolution of the marriage. She was earning £351 per annum, less tax, and the former husband £435 with free board and lodging. On application for maintenance by the petitioner, *Held*, That, on considerations of good sense and fairness, the former husband should pay the petitioner £1 per week. (*Gilbey* v. *Gilbey*, [1927] P. 197, applied.) (*Buzza* v. *Buzza*, [1930] N.Z.L.R. 737, referred to.) *Crist* v. *Crist*. (New Plymouth. March 2, 1949. Gresson, J.)

Settlements in Divorce Practice. *99 Law Journal*, 131.

EASEMENT.

Underground Electric-power Cable laid in accordance with Registered Easement—Landowner instructing Contractor to do Excavation Work, and indicating Approximate Position of Cable—Contractor's Workman, in Breach of Instructions, damaging Cable—Contractor alone liable for Cost of Repairs. McI. was the owner of land, under which was laid an electric-power cable in accordance with an easement registered under the Land Transfer Act, 1915. McI. employed S., a contractor, whose employee, B., was carrying out a bulldozing contract over the cable on an adjoining property, to construct a carriageway or drive on his land. He pointed out to S. the approximate line of the underground cable at a depth of 3 ft., and instructed S. not to excavate to a greater depth than 2 ft. McI. exercised no control or direction over B., who, while the work was in progress, without regard to the probable consequences of his

act, excavated to a depth of approximately 3 ft., in disregard of McI.'s instructions. S. saw the excavation when it was about 3 ft. deep, but allowed B. to continue working, and, while so working, B. cut the cable at an approximate depth of 3 ft. In an action by the Electric-power Board against McI. and S. to recover the cost of repair of the cable, *Held*, 1. That the duty not to interfere with the plaintiff Board's right of enjoyment of the easement owned by it over the land is an absolute one, and breach of such duty is a nuisance, actionable on proof of damage, the manner of doing the act being immaterial; and the Board was entitled to recover the full amount claimed. (*McKellar* v. *Guthrie*, [1920] N.Z.L.R. 729, applied.) 2. That the owner of the land had employed an independent contractor to do the work, which was not inherently dangerous, and he had taken effectual means to prevent any wrongful act on the part of the contractor or his servant from causing damage. (*Bower* v. *Peate*, (1876) 1 Q.B.D. 321, and *Hughes* v. *Percival*, (1883) 52 L.J.Q.B. 719, referred to.) 3. That, as the work done by the contractor would have caused no damage if he had acted on the information given him by the owner of the land, the contractor was alone liable to the plaintiff Board for the damage caused. *Auckland Electric-power Board* v. *McIntosh and Another*. (Auckland. December 2, 1948. Wily, S.M.)

EVIDENCE.

Real Evidence. (G. D. Noakes.) *65 Law Quarterly Review*, 57.

FAMILY PROTECTION.

Time for making Application. *206 Law Times Jo.*, 388.

HABEAS CORPUS.

A Note on Habeas Corpus. (Lord Goddard.) *65 Law Quarterly Review*, 30.

HARBOURS.

Appeal Board—Representative to be appointed by Employees of Harbour Board—Harbour Boards Employees' Union not competent to appoint Representative—Right of Appeal given only to Persons appointed as Officers or Servants of Board by Resolution of Board—Harbours Act, 1923, s. 47—Harbours Amendment Act, 1948, s. 9. The expression "employees of the Harbour Board," where used in s. 9 (4) of the Harbours Amendment Act, 1948, limits those employees to those appointed and employed under s. 47 of the Harbours Act, 1923, by the Harbour Board; and, consequently, it does not include a person appointed by the New Zealand Harbour Boards Employees' Union, which has an entity separate and distinct from its members. The representative to be appointed to an Appeal Board under s. 9 of the Harbours Amendment Act, 1948, by the employees of the Harbour Board must be appointed only by those persons who have been appointed as officers and servants of the Board by resolution duly made under s. 47 of the Harbours Act, 1923; and, consequently, the right of appeal is given only to employees falling within that class. *In re Gordon*. (Auckland. March 3, 1949. Luxford, S.M.)

HOUSING.

Unfitness of Houses for Human Habitation. *93 Solicitors' Journal*, 48.

INCOME TAX.

Trusts and Special Contribution. *99 Law Journal*, 149.

Understatement of Income: Evidence of Misstatements on Other Occasions. *22 Australian Law Journal*, 466.

JUSTICE OF THE PEACE.

The Development of the Jurisdiction of Justices of the Peace: A Noteworthy Centenary. (J. P. Eddy, K.C.) *65 Law Quarterly Review*, 51.

LANDLORD AND TENANT.

Concurrent Leases. *92 Solicitors' Journal*, 727.

Validity of Unauthorized Assignment. *93 Solicitors' Journal*, 54.

LICENSING.

Offences—Sale during Prohibited Hours—Liquor purchased during Afternoon to be called for After Hours—Delivery taken at Hotel at 11 p.m.—Premises open for Sale of Liquor during Prohibited Hours—Licensing Act, 1908, s. 190. W., during the afternoon of the day in question, ordered from the defendant licensee, and paid for, eighteen bottles of beer, the same to be left for him in the hotel meat-safe in the hotel yard, the arrangement being that W. would collect the beer when he delivered meat to the safe later in the evening. The defendant placed the beer in the safe shortly before 6 p.m. Later, about 8 p.m., W., on the telephone, changed his order to a dozen bottles, whereupon the licensee removed six bottles from the safe. W. took delivery of the dozen bottles at 11 p.m. *Held*, That, as the particular beer was not appropriated to the contract of sale until the purchaser took delivery of it, a material part of the contract of sale was performed after closing-hours, and it involved the opening of the premises during prohibited hours, in breach of s. 190 of the Licensing Act, 1908. (*Olson* v. *Cruickshank*, [1924] N.Z.L.R. 900, followed.) (*Noblett* v. *Hopkinson*, [1905] 2 K.B. 214, referred to.) *Bulger* v. *Law*. (Dunedin. February 28, 1949. Willis, S.M.)

LOCAL AUTHORITIES.

Audit—County's Annual Balance-sheet—Settling and Signing of Same not Validation of Expenditure Shown therein—Counties Act, 1920, s. 141 (2). The settling and signing of a County's yearly balance-sheet in terms of s. 141 (2) of the Counties Act, 1920, is not intended to validate, and does not validate, all the expenditure shown therein. (*Cochrane* v. *Controller and Auditor-General of New Zealand*, (1904) 24 N.Z.L.R. 211, referred to.) *Kaikoura County* v. *Boyd*. (S.C. & C.A. Wellington. December 17, 1948. Sir Humphrey O'Leary, C.J., Kennedy, Fair, Cornish, JJ.)

MASTER AND SERVANT.

Vicarious Responsibility. *206 Law Times Jo.*, 358.

NEGLIGENCE.

Road Collision—Both Drivers' Negligence contributing to Accident—Plaintiff negligent in Driving at Excessive Speed—Defendant negligent in not sounding Horn at Bend of Narrow Road—Degrees of Fault 75 per cent. and 25 per cent. respectively—Contributory Negligence Act, 1947, s. 3. In a claim and counter-claim for damages for negligence arising out of a collision between two motor-vehicles on a narrow road, the plaintiff's being a Ford truck and the defendant's a six-wheeled double-axle truck, it was held that the plaintiff was guilty of negligence on the ground that he was travelling at an excessive speed, while the defendant's driver was negligent in failing to sound the horn of the vehicle as it approached the bend of the road where the collision occurred. Both contributed to the accident. The damages found for the plaintiff amounted to £112, and, on the counter-claim for the defendant, £79 16s. 6d. On apportionment of such damages under s. 3 of the Contributory Negligence Act, 1947, *Held*, That, as the plaintiff's speed was the main cause of the damage, the defendant's driver's negligence being of a passive character, the plaintiff was three-quarters to blame, and the defendant's driver was one-quarter to blame. The plaintiff was accordingly entitled to damages in the sum of £112, reduced by 75 per cent., or £28. The defendant was entitled to the sum of £79 16s. 6d., reduced by 25 per cent., or £59 17s. 6d. *Cupples* v. *Transport (Nelson), Ltd.* (Greymouth. February 25, 1949. Ferner, S.M.)

POST AND TELEGRAPH.

Money-order Regulations, 1949 (Serial No. 1949/28). All previous regulations dealing with money-orders are revoked; and these regulations deal with the issue of money-orders and their currency, commission, and charges, payment of money-orders, alteration, transfer, repayment, and renewal of money-orders, with special provisions regarding savings-bank and National Savings money-orders.

PRACTICE.

Calling Fresh Evidence. *207 Law Times Jo.*, 20.

Declaratory Judgment and Injunction as Public Law Remedies. (Arthur Dean, J.) *22 Australian Law Journal*, 446.

Foreign Judgments and the Defence of Fraud. (Zelman Cowen.) *65 Law Quarterly Review*, 82.

Parties—Attorney-General—Proceedings concerning Charitable Trust for Benefit of Public or Section of them—Joinder of Attorney-General — Pleadings — Amendment — Extraordinary Remedy — Mandamus—Proceedings for Mandamus—Court's Power to convert same into Action commenced by Writ. The Court of Appeal, after holding as appears in "Charitable Trust" (*supra*), also held as follows: 1. That the Attorney-General, on the Court's finding that the trust was a charitable trust for public purposes,

should be added as a respondent party; and the Court by consent added him as a respondent *ex relatione* the original plaintiff, and said it was generally desirable that the Attorney-General should be a party at least to any action concerning a charitable trust of substantial value for the benefit of the general public, or a section of them, where, as in the present case, there are in existence many trusts of a similar type. 2. That the Court, being satisfied that the appellant had not been prejudiced by the constitution of the proceedings as an application for a writ of mandamus, could treat them as commenced by writ and grant any relief of the nature fairly covered by the application and the issues mainly raised between the parties, and amend the proceedings accordingly. (*Mansford* v. *Ross*, (1886) N.Z.L.R. 4 S.C. 290, followed.). (*Williams* v. *Mayor, &c., of Wellington*, (1881) N.Z.L.R. 3 C.A. 210, applied.) (*Armstrong* v. *Wairarapa South County*, (1897) 16 N.Z.L.R. 144, not followed.) *Kaikoura County* v. *Boyd*. (S.C. & C.A. Wellington. December 17, 1948. Sir Humphrey O'Leary, C.J., Kennedy, Fair, Cornish, JJ.)

Practice and Procedure, 1948. *99 Law Journal*, 117, 130, 143.

PUBLIC REVENUE.

Income Tax—Valuer's Fee for valuing Company's Assets for Insurance Purposes—Not deductible—Expenditure for obtaining Capital Receipt—Land and Income Tax Act, 1923, s. 80 (1) (b) (2). An amount paid by a taxpayer to an expert valuer for the purpose of valuing its assets for insurance purposes, so as to cover them for their full insurable value, is not an expenditure "exclusively incurred in the production of the assessable income for any income year" within the meaning of s. 80 (1) (*b*) of the Land and Income Tax Act, 1923. (*Williams's Executors* v. *Inland Revenue Commissioners*, (1943) 26 Tax Cas. 28, applied.) *Semble*, Assuming that the insurance premiums paid under a policy of fire insurance are a deductible expenditure, the payment of the valuation fee was a "capital" expenditure within the meaning of s. 80 (1) (*b*) of the statute, in the sense that it was a thing which brought into existence an advantage for the enduring benefit of the taxpayer's business; and was, therefore, not deductible. (*Atherton* v. *British Insulated and Helsby Cables, Ltd.*, (1925) 10 Tax Cas. 155) followed.) (*Vallambrosa Rubber Co., Ltd.* v. *Farmer*, (1910) 5 Tax Cas. 529, referred to.) *A, Ltd.* v. *Commissioner of Taxes*. (Auckland. February 25, 1949. Luxford, S.M.)

RENT RESTRICTION (DWELLINGHOUSE).

Control: Occupation by Licensee. *93 Solicitors' Journal*, 9.

The Tenant and His Family. *93 Solicitors' Journal*, 23.

The Tenant at Will. *93 Solicitors' Journal*, 56.

ROAD TRAFFIC.

Accidents at Pedestrians' Crossings. *207 Law Times Jo.*, 49.

Motor-vehicles—Offences—Drunk in Charge—"State of intoxication"—Motor-vehicles Act, 1924, s. 27 (1). Capacity to drive a motor-vehicle with care and safety negatives intoxication within the meaning of the term "state of intoxication" as used in s. 27 (1) of the Motor-vehicles Act, 1924. To constitute intoxication as the word is there used, there need not be complete intoxication, but merely that the alcohol taken should have rendered the individual "less fit" to drive, or not "drunk" in the ordinary sense, but with mental and bodily faculties, and, in particular, the ability to drive with safety, impaired to a noticeable degree. (*R.* v. *Hawkins*, (1926) 2 N.Z.L.J. 470, *R.* v. *Ormsby*, [1945] N.Z.L.R. 109, and *Smith* v. *Harris*, [1946] G.L.R. 32, followed.) *Wood* v. *Ellis*. (New Plymouth. March 7, 1949. Gresson, J.)

SOCIAL SECURITY.

Social Security Contribution Regulations, 1939, Amendment No. 5 (Serial No. 1949/27). Reg. 16 (1) of the principal regulations, and Reg. 6 (5) of Amendment No. 4 are respectively amended by substituting the word "Ju'y" for the word "May" wherever it occurs Reg. 19 (5) of the principal regulations is revoked, and Reg. 19 (2) (*a*) and (3) are amended.

TRUSTS AND TRUSTEES.

Discharge of Trustees under the Trustee Act. *207 Law Times Jo.*, 52.

Gratuitous Payment by Trustees. *92 Solicitors' Journal*, 711.

Repairs to Trust Property. *92 Solicitors' Journal*, 714.

VALUATION.

Valuers Regulations, 1949 (Serial No. 1949/25), deals with the registration of valuers the annual Practising Certificates of Public Valuers, the examination of valuers and appeals from decisions of the Valuers' Registration Board.

WILL.

Concealed Words in Wills: Recourse to Photography. *93 Solicitors' Journal*, 47.

Construction—Residue of Estate bequeathed "to my executors to be used at their discretion in the business of the firm of" Defendant Company—Company entitled to Residue—Trustees' Discretion referable to Manner of Payment and not Amount. The testator, after making specific pecuniary family bequests, including bequests to each of his executors who were his brother and nephew, and an annuity to his widow, and pecuniary bequests to charities, concluded his will as follows: "The residue of my estate I leave to my executors to be used at their discretion in the business of the firm of J. R. Mills & Son, Ltd., Invercargill." On originating summons for interpretation of the will, and, in particular, as to who was entitled to the residue of the testator's estate, *Held*, 1. That the gift of the residue "to my executors" in the residuary clause was made to them in trust as joint tenants in their official style and capacity, as *indicia* contained in the will showed. (*Saltmarsh* v. *Barrett*, (1861) 3 DeG. F. & J. 279; 45 E.R. 885, applied.) (*Gibbs* v. *Rumsey*, (1813) 2 Ves. & B. 294; 35 E.R. 331, *Re Gracey*, [1929] 1 D.L.R. 260, and *In re Howell, In re Buckingham, Liggins* v. *Buckingham*, [1915] 1 Ch. 241, distinguished.) (*In re Chapman, Hales* v. *Attorney-General*, [1922] 2 Ch. 479, *Fenton* v. *Nevin*, (1893) 31 L.R.Ir. 478, and *Yeap Cheah Neo* v. *Ong Cheng Neo*, (1875) L.R. 6 P.C. 381, referred to.) 2. That the words "at their discretion" in the residuary clause referred to the manner of payment, and not to the amount to be paid to the company named therein; and, consequently, subject to the earlier trusts and the payment of debts and legacies, the company was entitled to the residue of the estate. *In re Mills (deceased), Mills and Another* v. *J. R. Mills and Son, Ltd., and Another*. (Christchurch. February 14, 1949. Fleming, J.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Osteomyelitis of Garre—Worker suffering before Accident from Chronic Non-suppurative Osteomyelitis—Leg Amputated after Accident—"Flare-up" of Garre's Disease Necessitating Amputation not caused by Accident—Workers' Compensation Act, 1922, s. 3. The plaintiff claimed that his right leg was broken by an accident in the course of his employment, and that osteogenic sarcoma developed, and the leg was amputated, first at the mid-thigh and then at the hip joint. At the hearing, plaintiff's counsel admitted that the leg was not broken and that osteogenic sarcoma did not develop, but that it was a case of osteomyelitis of Garre (chronic non-suppurative osteomyelitis), from which disease plaintiff had been suffering before the accident without knowing it. Counsel's submission was that the accident caused a "flare-up," or, more properly, that it turned a Garre's disease that did not need an operation into a Garre's disease that needed amputation. *Held*, on the medical evidence, That there was no evidence of a "flare-up," and, on the other hand, that there was evidence that there was no "flare-up." Plaintiff's case, therefore, failed. *Johnston* v. *Johnston*. (New Plymouth. June 11, 1948. Ongley, J.) (Compensation Court).

NOTE.

Owing to the intervention of the Dominion Legal Conference Number of the JOURNAL, the next ordinary issue will appear on June 7.

If, in the interim, any subscriber wishes to know urgently if there is any recent law on a particular topic, and writes to the Editor accordingly, an endeavour will be made to supply him as soon as possible with the latest available references.

EDITOR.
NEW ZEALAND LAW JOURNAL.

LAND VALUATION COURT.

Summary of Judgments.

The passing of the Land Valuation Act, 1948, and the concentration in the Land Valuation Court of cases under the Servicemen's Settlement and Land Sales Act, 1943, have rendered it necessary to commence a new series like the summary of the judgments previously given by the Land Sales Court, which has ceased to function.

The judgments of the Land Valuation Court 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. All judgments of the Land Valuation Court which are considered to be of value to the profession will appear in this place in future copies of the JOURNAL.

No. 1.—H. TO W. (N.Z.), LTD.

Lease—Option to Purchase at End of Twenty Years—Twenty-five Years' Term—Court concerned only with Fairness and Reasonableness of Terms of Option—Sale Price to be considered at Time of Exercise of Option.

Fair Rent—Allowances and Adjustments in Calculation of Fair Rent—Repairs and Maintenance—Long Term of Lease a Relevant Consideration—Intrinsic Value of Lease—Servicemen's Settlement and Land Sales Act, 1943, s. 55.

Appeal by the Crown against the grant of consent by the Marlborough Land Sales Committee to the lease of a shop property by Mrs. J. H. to W. (New Zealand), Ltd., for a term of twenty-five years at a rental of £475 per annum and with an option to purchase the property at the expiration of twenty years for £9,000.

The terms of the proposed lease were somewhat unusual, and were claimed by the Crown to be onerous. The purchaser intended establishing and carrying on during the term one of its well-known chain-stores, and acknowledged that the present buildings were unsuitable for other than temporary use for this purpose. The agreement imposed a strict liability upon the lessee to maintain the buildings and to reinstate them in the event of fire or earthquake, but provided that the lessee might at any time demolish the present buildings and erect other buildings, and that at the expiration of the term no compensation would be payable for new buildings so erected. It might be for this reason that the lessee was given an option to purchase at the expiration of twenty years at a figure of £9,000.

It was stated, however, on behalf of W. (New Zealand), Ltd., that, in accordance with its customary policy, the entire cost of any buildings it might erect would be written off during the term of the lease, and that, accordingly, it by no means followed that the option to purchase would be exercised, as the company would readily sacrifice the buildings should it deem it desirable to move to another site.

Counsel for the lessor, on the other hand, claimed that a building of the type likely to be erected by the lessee would not be particularly suitable for purposes other than those of a chain-store, and that, in the event of the lessee's failure to exercise the option, no substantial benefit would necessarily accrue to the lessor by reason of being left in possession of the buildings at the end of the term. Although there was some difference of opinion between the valuers, it was clear that the present value of the property, for the purposes of the Land Sales Act, was in the vicinity of £7,000, of which roughly £4,000 was apportionable to the land and £3,000 to the buildings.

The relationship of the rent, the terms of the lease, and the purchase price under the option were fully canvassed by the Crown in its submissions, which might be summarized as:

(i) That, having regard to the basic rent under the Tenancy Act, 1948, and to the onerous conditions of the lease, the rental approved by the Committee was too high; and

(ii) That, having regard to the basic value of the property, the option to purchase should not have been approved at £9,000.

The Court said: "The appeal relates to a single transaction embodied in a single contract, and we have no doubt that the terms of the lease and the amount of the option should properly be considered as component parts of one transaction. On the other hand, it is clear that the consent of the Court is required both to the lease and to the grant of the option as such, and it is therefore convenient for the two matters to be considered separately.

"We propose first to consider the propriety of the proposed rent. It is here pertinent to record that the rent provided by the contract was £520 per annum, but the Committee imposed a condition that it be reduced to £475 per annum, an amount which, we are informed, was acceptable to the parties but is the subject of appeal by the Crown. The determination of the rent by the Committee is of some importance, in that it establishes a figure from which the Court will not depart unless thoroughly satisfied that the Committee's decision was wrong.

"The assessment of a proper rental in the present case may be approached from a consideration of the basic rent under the Tenancy Act, 1948, or from a consideration of the basic value of the land under the Servicemen's Settlement and Land Sales Act, 1943. It is claimed by the lessor and admitted by the Crown that the gross rentals of the property on September 1, 1942, amounted to £624 per annum. £624 per annum would therefore appear to be the basic rent under the Tenancy Act, 1948.

"From this figure, Mr. *Heenan*, counsel for the Crown, makes deductions for rates, land tax, insurance, and maintenance, amounting in all to £201, and calculates that the lessor was in receipt of a net return, including depreciation, of £423. Approaching the matter from the angle of value, and working on a basic value of £6,852, Mr. *Heenan* assesses a fair rental return to the lessor at £422. He accordingly contends that the rent of the property for the purposes of the Land Sales Act should not exceed £423 and that the Committee's assessment of £475 was some £50 too high. Counsel for the parties, however, interpreted the figures somewhat differently. They claimed that a proper apportionment of the basic rent would afford the lessor a net return of £465, and that a proper calculation based upon the basic value of the land would justify the rental of £475 fixed by the Committee. The validity of the Committee's assessment is, therefore, dependent on the propriety of various allowances and adjustments in calculation, and, in particular, upon the amount which should be allowed for repairs and maintenance, having regard to the fairly stringent covenants imposed by the lease. A claim by the Crown that there should be a further reduction on account of the tenant's liability to make good deferred maintenance has not, in our opinion, been established.

"Section 55 of the Servicemen's Settlement and Land Sales Act, 1943, in accordance with which it is now our duty to determine a basic rent in the present case, reads as follows:

> "For the purposes of this Act the basic rent of any land shall be deemed to be such rent as is determined by the Land Sales Committee, having regard to the basic value of the land, the value of the lessee's interest (if any) in the improvements on the land, and all other relevant considerations, including the basic rent or the fair rent (if any) of the land under the Fair Rents Act, 1936, or the Economic Stabilization Emergency Regulations, 1942.

"It has been established that the basic rent under the Tenancy Act, 1948 (which supersedes the Economic Stabilization Emergency Regulations, 1942), is £624 per annum, and that the basic value of the land is in the vicinity of £7,000. From these facts, and for the reasons already set out, it appears clear that the basic rent for our present purposes lies between £423 and £475. The Committee indicates, however, that in arriving at the latter figure it made an allowance of £30 for the long term of the lease. The term of the lease is undoubtedly a relevant consideration to which the Court is entitled to have regard under s. 55, and we are in agreement with the Committee that, where a lessor, by agreeing to a long term, has precluded himself from seeking an increase in rent during

the term, and notwithstanding the probability of a general rise in values, a somewhat higher rental may fairly be allowed than in the case of a short-term lease.

" We accordingly find that the Crown assesses a basic rent at £423 by reference only to past rentals and the basic value of the property, but making no allowance for the length of the term. The parties, on the other hand, claim on the same grounds, but by reference to slightly different figures, that the Committee's assessment of £475 is a proper one. The Committee itself assessed that figure by reference primarily to the intrinsic value of the lease, but giving some weight to the length of the term. Neither in respect of the calculations presented by the Crown nor in respect of the additional sum allowed on account of the length of the lease can we say that the Committee's decision is demonstrably wrong. The appeal as to the basic rent, therefore, fails.

" In arriving at the foregoing conclusions, we have not overlooked the option to purchase. It has not seemed necessary, however, to refer to it specifically, as, in the circumstances, it does not appear to affect the rental which may properly be paid. The position would be otherwise were a substantial sum to be paid under the contract as a consideration for the grant of the option. In the present instance, no consideration is given for the option save as found in the terms of the lease itself.

" The first question which emerged in regard to the option was whether our approval of the grant of an option at £9,000 would entitle the lessor to sell and the lessee to buy at that figure as of right, in the event of the option being exercised, and without a further application to the Court, assuming the Land Sales legislation to be still in operation when the sale is effected. That separate applications to the Court are at present required in the case of the grant of an option, and of the exercise of an option, appears to follow from the terms of the Servicemen's Settlement and Land Sales Act, 1943. By s. 43 of that Act, the consent of the Court is made requisite to any sale or transfer of land and to the grant of an option to purchase or acquire any interest in land. By subs. 2 of s. 43, the exercise of an option granted before the commencement of the Act is exempted from the provisions of the Act but there is no such exemption in respect of a sale or transfer pursuant to the exercise of an option granted after the commencement of the Act. All parties conceded that a separate application to the Court would be necessary in case of a sale pursuant to an option granted with the consent of the Court, and that, on such an application, the Court would not be fettered as to the price or in any other respect. We conceive, therefore, that we are at present concerned only to see that the terms of the option appear to be fair and reasonable. If and when the option is exercised, it will be necessary for the parties to secure any consent which is requisite in accordance with the law as it then stands, and, in the event of the present legislation being still in operation, to justify the sale price and in other respects to satisfy the Court that the sale should be approved.

" In accordance with this view, there would appear to be no necessity for the Court to require the price specified in an option to be restricted to the basic value of the land as at December 15, 1942. The present option cannot be exercised until 1968, by which time existing legislation may have been repealed, or the basis of fixing land values may have been substantially changed. We think it would be unreasonable to attempt to restrict the parties, when in the ordinary course of business taking an option which is not to be exercised until 1968, to the basic value under legislation which may then have no binding force. We conclude, therefore, that, on an application for consent to the grant of an option, the Court is concerned only to be satisfied that, having regard to its terms and to the circumstances of the transaction, and to the general purposes of the Servicemen's Settlement and Land Sales Act, 1943, the option is one which may fairly and reasonably be accorded its approval. The Court is, of course, particularly concerned with the consideration for the grant of the option itself, and with terms and conditions which may appear directly or indirectly to be inconsistent with the purposes of the Land Sales Act. In the case of a short-term option, or one immediately exercisable, it may be found expedient to restrict the price to the basic value, and it is no doubt competent for a Committee in any case to require a price which appears to be unreasonable to be reduced. We think, however, that it is undesirable to attempt any general direction of Committees in cases where consent to an option may be sought. In the present case, it is acknowledged that the basic value of the property as at December, 1942, is in the vicinity of £7,000. The option proposed to be given is for its purchase for £9,000 at the expiration of twenty years. If the consent of the Court is still required, the lessor will have to justify the price when the option is exercised and in accordance with the law at that time. It is neither impossible nor unlikely that the property may be worth £9,000 in 1968. We conceive, moreover, that the giving of the option is primarily for the benefit of the lessee, while the lessor may ultimately be faced with the obligation of transferring her property for less than its full value at the date of sale.

" We have no ground to think that, when judged by ordinary business standards, the grant of this option at the price specified therein is not reasonable or *bona fide*, or that its grant conflicts with the purposes of the Servicemen's Settlement and Land Sales Act, 1943. The Committee's consent is, therefore, confirmed, but the condition imposed whereby the parties are required, on the exercise of the option, to make a fresh application to the appropriate Court, if such a Court be then in existence, is deleted. In the event of the Land Sales legislation or similar legislation still being in operation, such an application will be required as a matter of law, and the imposition of an express condition to that effect is accordingly unnecessary.

" In the result, the Crown appeal fails in both respects, and it is accordingly dismissed."

No. 2.—A. N. & Co., Ltd., to T. E. A., Ltd.

Tenancy—Application of Land Sales Act to Transactions within s. 19 of Tenancy Act, 1948—Land Valuation Court Act, 1948, s. 24—Tenancy Act, 1948, s. 19.

Jurisdiction—Fair Selling Value of Chattels—Inquiry into Replacement Cost of Stock in Trade—Sale of Chattels and Goodwill constituting Single Transaction—Ascertainment of Amount of Additional Consideration (over and above Fair Value of Chattels) to which Approval required—Tenancy Act, 1948, s. 19(3) (i) (ii).

Application by the Wellington Urban Land Valuation Committee, pursuant to s. 24 of the Land Valuation Court Act, 1948, for directions concerning the following matters:

(i) In dealing with applications under s. 19 (3) of the Tenancy Act, 1948, in respect of " consideration " other than for chattels and stock, are the Committee, by virtue of subs. 4 of s. 19, to take into consideration and apply all the provisions and principles of the Servicemen's Settlement and Land Sales Act, 1943, and its amendments—namely, (*a*) the desirability of facilitating settlement of discharged servicemen, preventing undue increases in the price of land, undue aggregation of land, and its use for speculative or uneconomic purposes, and the other provisions of s. 50 of the Act; and (*b*) the basic value of the tenancy as at December 15, 1942?

(ii) Has the Committee any jurisdiction under s. 19 to deal with the fair value of chattels and stock, or is the question of value of these items a matter for redress by the parties themselves before other Courts?

The Court said: " The relevant subsections of s. 19 of the Tenancy Act, 1948, are as follows:

" (3) Every person, not being the landlord of the premises concerned and not acting on behalf of the landlord, commits an offence against this Act who, in consideration of or on the occasion of the transfer of a tenancy of any dwellinghouse or property (whether directly, or by means of the creation of a new tenancy, or otherwise), or in consideration of or on the occasion of the sale or transfer of any business carried on in the premises, in a case to which Part III of the Servicemen's Settlement and Land Sales Act, 1943, does not apply, stipulates for or demands or accepts, for himself or for any other person, from the new tenant or any other person, any consideration other than—

(i) The price of any chattels, not being in excess of the fair selling value thereof or, in the case of stock in trade, of the replacement cost thereof; and

(ii) Such consideration (if any) as may be previously approved for the purposes of this section by the Land Sales Court or the Land Valuation Court.

" (4) The provisions of the Servicemen's Settlement and Land Sales Act, 1943, shall, so far as they are applicable and with the necessary modifications, apply to every application for the approval of the Land Sales Court or the Land Valuation Court under this section as if it were an application for the consent of that Court under Part III of that Act.

" It will be seen that subs. 3 applies only to cases to which Part III of the Servicemen's Settlement and Land Sales Act, 1943, *does not* apply. The jurisdiction conferred on the Land Valuation Court by subs. 3 is, therefore, additional to, and exclusive of, its jurisdiction under the Land Sales Act. It is pertinent to note that in general terms the leases to which Part III of the Land Sales Act applies are those for not less than two years or having not less than two years yet to run. The leases and tenancies affected by subs. 3 of s. 19 of the Tenancy Act, 1948, are, therefore, those for less than two years or having less than two years to run.

" It is pertinent also to remark that in s. 19 alone is to be found reference to the extended jurisdiction conferred upon the Land Valuation Court in respect of such leases and tenancies. The extent of that jurisdiction and the manner of its exercise must accordingly be gathered from the terms of the section, and in particular of subss. 3 and 4 which are above set out.

" The answer to the first question on which directions are sought depends upon the proper interpretation of subs. 4 of s. 19. The subsection applies to applications to the Land Valuation Court under s. 19, and relates, therefore, to applications under the extended jurisdiction conferred on the Court by that section, and made in respect of transactions to which the provisions of the Servicemen's Settlement and Land Sales Act, 1943, would not otherwise have applied. At first sight, subs. 4 might appear to make all such transactions subject to the provisions of the Servicemen's Settlement and Land Sales Act precisely as if they were transactions to which Part III of that Act applied. If such had been the intention of the Legislature, however, we think its purpose would have been effected by the simple means of bringing transactions relating to short-term leases or tenancies within the ambit of Part III of the Servicemen's Settlement and Land Sales Act, 1943. The extension of Part III to transactions not affected by the statute as originally enacted has been undertaken on several occasions, and in particular was effected in respect of certain transactions by s. 8 of the Servicemen's Settlement and Land Sales Amendment Act, 1946, in terms which permit of no doubt as to the intention of the Legislature.

" There are several reasons why we do not think subs. 4 was intended to go so far as to render the Servicemen's Settlement and Land Sales Act, 1943, applicable as a whole to transactions within the ambit of s. 19 of the Tenancy Act, 1948. The first, as we have already indicated, is that, if such were intended, it might readily have been so stated, and with greater clarity. The second is that such a construction would imply that the jurisdiction vested in the Land Valuation Court by subs. 3, and apparently limited to the approval of ' consideration,' was forthwith extended by subs. 4 in a manner requiring the Court to have regard to many other matters. The third is that subs. 4 refers, not to ' transactions,' but to ' applications,' and its terms are more appropriate to a procedural provision than to one affecting and restricting the substantive rights of parties. A further reason is that, in the case of transactions expressly exempted from the operation of the Land Sales Act and controlled by the Legislature only in respect of consideration in the past, amending provisions should not be construed so as to negative such exemption and to change the character of such control, save where the intention to do so is clearly expressed.

" Reading subss. 3 and 4 together, and in conjunction with the balance of s. 19, we are of opinion that the general intention of the Legislature was to place the consideration payable in certain transactions affecting short-term leases and tenancies under the control of the Land Valuation Court and to apply the procedural provisions of the Servicemen's Settlement and Land Sales Act, 1943, to applications in respect of such transactions. We accordingly hold that subs. 4 is procedural in character, and that it is not intended to render the substantive provisions of the Servicemen's Settlement and Land Sales Act, 1943' applicable to transactions to which the consent of the Court is required by virtue of s. 19 of the Tenancy Act, 1948.

" The second question posed by the Committee involves a consideration of paras. (i) and (ii) of subs. 3 of s. 19.

" It appears to be clear that the Land Valuation Court is concerned only with additional consideration which may be payable over and above ' the price of any chattels, not being in excess of the fair selling value thereof or, in the case of stock in trade, of the replacement cost thereof.' It follows that, where the consideration agreed upon is limited to the fair selling value of chattels and the replacement cost of stock in trade, the approval of the Court is not required, and the transaction is outside the jurisdiction of the Court. The Committees' dilemma relates, however, to the case where it is admitted that the consideration exceeds the fair value of chattels and stock in trade, and where, accordingly, the approval of the Court is properly sought in respect of such additional consideration. The issue is whether in such a case the Committee may properly inquire into the value of chattels and stock in trade, or whether it is restricted in its jurisdiction to items of consideration other than amounts appropriated by the parties to chattels or stock in trade respectively.

" The answer to this question is to be found in our opinion in a proper understanding of s. 19 (3) (i), which, by defining the considerations with which the Court is not concerned, indicates by inference that which is properly within its jurisdiction. The submission of counsel for the parties was that any amount set out in the contract as the price of chattels or stock in trade must be disregarded by the Court. This view is, in our opinion, unsound. The consideration with which, by virtue of para. (i), the Court is not concerned is the fair value of the chattels or stock in trade as prescribed therein, and it by no means follows that this will coincide with the price provided for chattels and stock in trade in the contract. From the fact that an application has been made for its consent, the Court may properly assume that there is some additional consideration, over and above the fair value of chattels and stock, to which its approval may properly be given. In considering such an application, it is concerned with the true value of the various items comprised in the sale and for which the total consideration is to be given. The Court is not, in our opinion, bound by any apportionment of the consideration by the parties. The Court is, therefore, entitled to ascertain the fair value of chattels and stock in trade, not for the purpose of approving of such fair value (which it is not required to approve) but for the purpose of ascertaining the amount of the additional consideration to which by virtue of s. 19 (3) its approval is required.

" The exercise of such a power of inquiry is not, in our opinion, precluded by the fact that his remedy, in case of an excess payment by the purchaser, must be pursued in another Court, or by the fact that an assessment of the fair value of chattels or stock in trade in this Court would not in law be binding upon that other Court. The fact that ordinary civil jurisdiction between the parties is not vested in the Land Valuation Court cannot restrict the powers of this Court to pursue such inquiries as it finds to be necessary for the proper exercise of its own jurisdiction.

" Nor is it necessary, in our opinion, for the Court to invoke s. 50 (3) (*b*) of the Servicemen's Settlement and Land Sales Act, 1943, in order to justify such inquiries. An agreement providing for a certain amount to be paid for chattels and another amount to be paid for goodwill nevertheless constitutes a single transaction, and the transaction as a whole is examinable by the Court when it is invited to approve of the additional consideration (over and above the fair value of the chattels) payable thereunder. We think, moreover, that the Court, when dealing with an application under s. 19, is inherently entitled to require the disclosure of related transactions, as it is only after due consideration of all other transactions related thereto, in addition to the principal transaction, that the Court can be in a position to determine whether the consideration referred to in s. 19 (3) (ii) should be approved.

" The Court's directions in respect of the questions referred to it are accordingly as follows :

" (i) The Committee is not required by virtue of subs. 4 of s. 19 of the Tenancy Act, 1948, to take into consideration and apply all the provisions of the Servicemen's Settlement and Land Sales Act, 1943, and its amendments. The duty of the Committee under subs. 3 of s. 19 is limited to an inquiry as to whether any additional consideration (over and above the fair selling value of chattels and the replacement cost of stock in trade) is fair and reasonable in the circumstances of the case. Subsection 4 of s. 19 is intended to provide, that the same procedure, in so far as it is applicable, and with the necessary modifications, shall be followed in the case of applications to the Court under s. 19 as if they were applications under Part III of the Servicemen's Settlement and Land Sales Act, 1943. The value of a leasehold interest, as such, should be assessed having regard to the fact that the value of land is stabilized by the Servicemen's Settlement and Land Sales Act, 1943, as at December 15, 1942. The value of goodwill is not so stabilized, and may properly be assessed as at the date of sale.

" (ii) The Committee has jurisdiction to inquire into the fair selling value of chattels and the replacement cost of stock in trade, for the purpose of ascertaining the amount of the additional consideration to which, by virtue of s. 19 (3) (ii), the approval of the Land Valuation Court is required."

DISTRICT LAW SOCIETIES.

Annual Meetings.

Canterbury District Law Society.

The Society's Annual Meeting was held on March 7.

The President, Mr. L. J. H. Hensley, presided over a meeting of fifty members. He reviewed the year's work of the Council. At his request, members stood as a mark of respect to the late Mr. H. P. Lawry, S. M., and members who had died during the past year.

The President referred particularly to the work of the New Zealand Law Society in Wellington. Quoting from an advance copy of the printed report, which was then shortly to be issued, he stressed the excellent services given by Wellington members in the interest of the profession as a whole, and repeated that, although reference had been made to this subject in previous years, it was not just conventional praise.

Election of Officers.—The following officers were elected: President, Mr. E. S. Bowie; Vice-President, Mr. A. C. Perry; Hon. Treasurer, Mr. C. G. Penlington; Council, Messrs. L. J. H. Hensley, A. L. Haslam, A. I. Cottrell, T. A. Gresson, E. C. Champion, P. Wynn Williams, R. A. Young, and one Timaru member.

Mr. E. S. Bowie, on assuming office, complimented and thanked Mr. Hensley for his services to the Society.

Agency Charges.—By a majority, the meeting was in favour of retaining the present system of agency charges.

Legal Education and Examinations in Law Subjects.—A motion was passed supporting the New Zealand Council in its attitude towards the matter. Members felt that there was considerable danger of the University Colleges taking over complete control of legal education. Every speaker felt that the profession throughout the Dominion should insist on a uniform standard of education, and should prescribe the standard set by having examiners appointed from its ranks.

Christmas Vacation.—The incoming Council was recommended to fix the Christmas holidays to commence on the evening of December 22, with offices re-opening on January 16, 1950.

The meeting concluded after a discussion on the desirability of further social activities. The suggestion of a Law Ball was put forward by the President, and the revival of the old annual picnic, with cricket and tennis matches, was discussed.

Southland District Law Society.

The Annual General Meeting was held on March 7, 1949.

Annual Report and Balance Sheet.—The President, Mr. J. H. B. Scholefield, in moving the adoption of the Annual Report, suggested that the time was soon arriving when the term of office of the President should be for two years instead of one. Both he and previous Presidents had found that it took the first three meetings of the Council of the New Zealand Law Society to get into the swing of things, and it was only by the time the fourth and final meeting came along that they felt they could pull their weight. Larger Societies were, of course, more fortunate, in that they had more than one representative. He explained in some detail the vast amount of work carried out by the Standing Committee of the New Zealand Society. The motion was seconded by Mr. Carswell, and carried.

Standing Committee of the New Zealand Law Society.—Mr. Scholefield moved as follows:

> "That this meeting of members of the Southland District Law Society, recognizing the vast weight of work carried out by the Standing Committee of the New Zealand Law Society, places on record its very high appreciation of their services and of the manner in which they have been performed; and that a copy of this resolution be forwarded to the New Zealand Law Society."

The motion was seconded by Mr. Hanan and carried.

Election of Officers.—The following officers were elected: President, Mr. H. K. Carswell; Vice-President, Mr. C. N. B. French; Secretary, Mr. J. H. B. Scholefield; Treasurer, Mr. J. W. Howorth; Council (by ballot), Messrs. I. A. Arthur, G. C. Broughton, E. H. J. Preston, H. E. Russell, and W. H. Tustin; Hon Auditor, Mr. K. G. Roy; Delegate to Invercargill Chamber of Commerce, Mr. J. G. Imlay; Delegate to Progress League, Mr. W. H. Tustin; and Member of the Council of the New Zealand Law Society, Mr. H. K. Carswell.

Financial Levy.—It was moved by Mr. Carswell and seconded by Mr. Scholefield:

> "That a levy or levies not exceeding £3 in all be authorized in respect of all members of the Society practising on their own account or in partnership, payable at such times and in such manner as the Council may direct."

The motion was carried.

Holidays.—It was moved by Mr. Smith and seconded by Mr. Scholefield:

> "That in future the Easter Vacation and the Christmas Vacation in each year be fixed at the Annual Meeting of the Society."

Mr. M. M. Macdonald moved:

> "That the motion be amended by deleting the words 'Easter Vacation and.'"

The amendment was seconded by Mr. Pryde. On being put to the vote, the amendment was declared lost. The motion was then put to the meeting and carried.

Fixing of Vacations.—It was moved by Mr. Macdonald:

> "That (i) for the Easter Vacation offices close on Thursday, April 14, at 5 p.m. and reopen on Tuesday, April 26, at 8.45 a.m.; and (ii) for the Christmas Vacation offices close on Friday, December 23, at 5 p.m. and reopen on Monday, January 16, 1950, at 8.45 a.m."

The motion was seconded by Mr. Pryde and carried.

(NOTE: The Easter Vacation was extended by one day on account of Anzac Day falling on the Monday following Easter Monday.)

Adoptions.—On the recommendation of Mr. Pryde, the Council was directed to take up the question of trying to obtain some uniformity of practice throughout New Zealand with regard to the requirements of Magistrates as to the witnessing of consents by natural parents.

Magistrates' Court Forms.—The serious shortage of the forms under the new Act and regulations was mentioned, and it was agreed that the Registrar should be interviewed.

There being no further business, the meeting closed with a vote of thanks to the outgoing Council and a vote of thanks to the Chair.

Wellington District Law Society.

The Annual General Meeting of members of the Wellington District Law Society was held on Tuesday, March 1, 1949.

Deceased Members.—Before proceeding with the ordinary business of the meeting, the President, Mr. G. C. Phillips, referred to the loss sustained by the Society through the death of Messrs. H. R. Cooper, A. R. Meek, D. G. Wilson, and E. G. Wright, members standing in silence as a mark of respect.

It was resolved that the best wishes of the Society should be sent to Mr. F. T. Clere and to Mr. H. E. Anderson, who were at present indisposed.

Mr. C. W. Nielsen.—Mr. Phillips drew attention to the fact that Mr. C. W. Nielsen in 1948, completed his fiftieth year since admission to the profession. Unfortunately, owing to ill health, he had since found it necessary to retire from active practice.

Report and Balance Sheet.—Before formally moving the adoption of the Annual Report and Balance Sheet, Mr. Phillips reported that the Council had set up a Committee to deal with the question of food parcels for Britain, that a list of suitable recipients had been obtained from the Secretary of the Law Society in England, and that a circular asking for contributions would be sent out to firms in due course. He also stated that the question of a Memorial to servicemen-members and law clerks who had died in the 1939-1945 War had not been lost sight of, but that the engravers still awaited the delivery from England of suitable metal for the plaque.

In addition to the Library matters mentioned in the Report, Mr. Phillips reported that an order had now been placed for a Digest for the *Dominion Law Reports*, which, it was considered, would be of considerable assistance to those using these Reports.

The President said that the year just ended had been a very full one. A great deal of legislation had been considered by

the Council. The unusually large number of social functions held had given members the opportunity of meeting one another and of strengthening bonds of friendship.

Mr. Phillips referred to the fact that, under the "Oldest Inhabitant" rule, Mr. Bennett would not be eligible this year for re-election to the Council, having served eight years on the Council as a member and officer. Mr. Phillips stated that Mr. Bennett had at all times given unsparingly of his services in the interests of the Council and the profession. As a member of the Council of the New Zealand Law Society for nearly three years, he had given much of his time to the consideration of legislation and other matters arising out of the work of that Society, and had always ungrudgingly given his time and attention to whatever matters were referred to him.

Reference was also made to the assistance given by the Secretary and staff to the President during his year of office.

Mr. Phillips then formally moved the adoption of the Annual Report and Balance Sheet.

Election of Officers.—(*a*) *President.* Mr. W. E. Leicester, the only nominee, was duly elected.

Mr. Phillips then vacated the Chair in favour of Mr. Leicester, who, in thanking the members for electing him to the office of President, referred to the very high standard set by his predecessors, and stated that he would do his best to measure up to that standard in carrying out the duties of the office.

He then referred to the work done by Mr. Phillips as President and as a delegate to the New Zealand Law Society, and stated that, in his opinion, Mr. Phillips had been one of the most conscientious officers the Society had known, as well as being most considerate to and tactful with all with whom he had to deal, and that at all times Mr. Phillips had never spared himself in carrying out the many duties of a very busy and difficult year.

(*b*) *Vice-President.*—Mr. F. C. Spratt, the only nominee, was duly elected.

(*c*) *Treasurer.*—There being only one nominee for Treasurer, Mr. C. A. L. Treadwell was duly elected.

(*d*) *Council.*—As the nominations for the Council exceeded the number required, a ballot was taken. Messrs. W. G. Smith, K. G. Gibson, and R. Gilkison were appointed scrutineers. The ballot resulted in the election of the following members: Messrs. W. R. Birks, E. D. Blundell, R. Hardie Boys, R. L. A. Cresswell, E. T. E. Hogg, I. H. Macarthur, G. C. Phillips, and E. F. Rothwell.

(*e*) *Elected by Branches.*—Palmerston North: Mr. G. I. McGregor was duly elected; Feilding: Mr. J. Graham continues in office; Wairarapa: Mr. R. McKenzie continues in office.

(*f*) *Delegates to New Zealand Law Society.*—Messrs. P. B. Cooke, K.C., W. E. Leicester, G. C. Phillips, and F. C. Spratt, the only nominees, were duly elected.

Mr. Cooke returned thanks on behalf of the delegates. In referring to the work of the New Zealand Law Society during 1948, Mr. Cooke said that, in view of the fact that a much fuller Annual Report than usual would be distributed to all members of District Societies, he did not propose to give a verbal report on this occasion. Mr. Cooke said he would like, however, on behalf of the Standing Committee, to express appreciation of the work done by Mr. Bennett during the years he had been associated with the Standing Committee, and to express regret at the loss of his services.

Christmas Vacation.—It was resolved that the Christmas Vacation would be observed from the usual closing hour on Friday, December 23, 1949, to the usual opening hour on Monday, January 16, 1950.

Post-war Aid Work.—Mr. W. L. Ellingham asked that a motion be passed recording the appreciation of the Society to the members of the Post-war Aid Committee and to Mrs. Gledhill, the Secretary, for the work done by them on behalf of the ex-servicemen members of the Society. The motion was carried with acclamation.

President of the New Zealand Law Society.—On behalf of the profession, Mr. Castle paid tribute to Mr. Cooke for the work done by him in the interests of the profession and in the interests of the public. The motion was carried with acclamation.

LEGAL LITERATURE.

The Tenancy Act, 1948.

The Tenancy Act, 1948, by H. JENNER WILY, S.M. Wellington: Butterworth & Co. (Aus.), Ltd. Pp. xv + 112 (including Index and Table of Cases). Price 16s. 6d., less 1s. 6d. rebate.

There cannot be a legal office in New Zealand that is not beset daily with problems relative to tenancy and its restrictions. The days have passed, it seems, when any text-book on the law of landlord and tenant and the Land Transfer Act could resolve any problem that arose. But nowadays, the common law on the subject, in particular, is beset with obstacles erected by legislation to confuse and, often, to frustrate the exercise of well-established rights.

These difficulties mostly arose from the congeries of enactments and regulations, commencing in 1936, and amended and extended at intervals ever since. The fact that they are now brought together under the one roof of the Tenancy Act, 1948, does not minimize the problems that arise in daily practice in landlord-and-tenant questions.

Practitioners will welcome any guide in this field. And the welcome will be all the warmer when the guide provided is a Stipendiary Magistrate who has, as a substantial part of his duties, the determination of multifarious matters arising under the Tenancy Act, 1948.

Consequently, the appearance of *The Tenancy Act, 1948*, by Mr. H. Jenner Wily, S.M., is welcome indeed. That learned gentleman has not been so long on the Magisterial Bench as to have forgotten the daily needs of busy practitioners, and his present responsible position gives authority to his writings on the subject.

In his preface, the author impresses the fact that his book makes no pretence of being a text-book, and is not offered as such. It consists of the actual text of the Tenancy Act, 1948, with annotations following each of its sections and subsections. The method that has been adopted gives all of the case law interpreting the corresponding provisions as they appeared in the now-repealed legislation that is replaced by the present statute. By this means, the application of those provisions by the various Courts is dealt with in a concise manner.

It is the hope of the author that, by this system of annotation, the work will be a guide and means of quick reference to those who are engaged in matters relating to tenancy. Consequently, while the author has dealt with some hundreds of cases decided in the various Courts in New Zealand, he has selected only the more important English decisions under the Rent Restrictions Acts, which have been in force in Great Britain for a number of years. This is a wise move, because, in New Zealand, the corresponding legislation has diverged at many material points from the original English legislation; and the constant amendment of the latter has taken away such points of resemblance to the New Zealand legislation as previously existed.

The author seems to have accomplished an exhaustive task, and it remains for the practitioner merely to look up the section of the Act with which he is immediately concerned, and he will find under it in smaller type all the cases so far decided which are relevant to the matter in issue. This does not mean, of course, that there is merely a bare list of relevant cases. Quite the contrary. The author has given the pith of each judgment, and, where necessary, illuminating extracts from it. Consequently, his work, which he declines to consider a text-book, emerges as a very useful and handy tool-of-trade to the busy practitioner.

DOMINION LEGAL CONFERENCE, 1949.

PROGRAMME.

CONFERENCE.

WEDNESDAY, APRIL 20:

10 a.m.— Civic Welcome and Opening Ceremony at Assembly Hall, Auckland University College, Princes Street.

10.45 a.m.—Inaugural Address by His Excellency the Governor-General Sir Bernard Freyberg, V.C., G.C.M.G., K.C.B., K.B.E., LL.D., D.C.L.

Guest Speaker: The Honourable Sir David Smith, LL.M.(N.Z.), D.C.L.(Oxon.).

2.15 p.m.— Paper: "Law and the Public Conscience"— A. K. North, K.C., LL.M., Auckland.

Paper: "Commentary on Tenancy Law"— S. R. Dacre, LL.M., Christchurch.

Remit:

"This Conference recommends that the Council of the New Zealand Law Society take steps to ensure that effect be given to the views of the Profession in regard to the conduct of the New Zealand University Examinations in the Law Subjects of the Courses for LL.B., LL.M., and admission as Barrister or Solicitor."

9 p.m.— Conference Ball at Peter Pan Cabaret, Corner of Rutland and Lorne Streets.

NOTE: It is probable that their Excellencies the Governor-General and Lady Freyberg will be present. In this event, decorations should be worn.

THURSDAY, APRIL 21:

10 a.m.— Address: "The Task of the International Military Tribunal at Tokyo"— R. Q. Quentin Baxter, B.A., LL.B., Christchurch.

Paper: "Some Aspects of Office Organization"— H. R. C. Wild, LL.M., Wellington.

2.15 p.m.— Address: "International Bar Associations"— A. H. Johnstone, O.B.E., K.C., B.A., LL.B., Auckland.

Closing Address: P. B. Cooke, K.C., LL.B., President N.Z. Law Society.

8.15 p.m.— (for 8.30) The Conference Dinner at Hotel Trans-Tasman, Eden Crescent.

(Dress for Ball and Dinner: Evening Dress or Dinner Jacket.)

SPORTS DAY.

FRIDAY, APRIL 22:

11 a.m.— Golf Tournament at Middlemore Golf Links (Men).

9 a.m.— Bowls Tournament at Remuera Bowling Greens, Market Road (off Remuera Road) (Men).

10 a.m.— Yankee Tennis Tournament (Mixed), at the West End Tennis Courts, West End Road, Herne Bay.

4 p.m.— Afternoon Tea as guests of The Auckland District Law Society, at Club House, Middlemore Golf Links, followed by presentation of trophies.

LADIES' PROGRAMME.

WEDNESDAY, APRIL 20:

10 a.m.— Civic Welcome, Opening Ceremony, and Inaugural Address at Assembly Hall, Auckland University College, Princes Street.

11.15 a.m.—Morning Tea at the University College Cafeteria.

9 p.m.— Conference Ball at Peter Pan Cabaret, Corner of Rut and and Lorne Streets.

THURSDAY, APRIL 21:

9.30 a.m.— Conducted Tour of Scenic Drive and other points of interest. Buses leave from Universi y College, Princes Street. Morning tea *en route*.

6.30 p.m.— Sherry Party at Reception Hall, Milne & Choyce, Ltd., Queen Street, followed by Picture-theatre Party at Embassy Theatre, at Corner of Lorne and Wellesley Streets.

FRIDAY, APRIL 22:

10 a.m.— Yankee Tennis Tournament (Mixed), at the West End Tennis Courts, West End Road, Herne Bay.

4 p.m.— Closing Function at Golf House, Middlemore Golf Links.

CANTERBURY DISTRICT LAW SOCIETY.

Bar Dinner.

The Canterbury practitioners held a dinner recently at the Winter Garden to welcome home the Hon. Mr. Justice Northcroft, and to mark the conferring by His Majesty the King of a knighthood on one of their number, Sir Arthur Donnelly.

There were over a hundred practitioners present, including representatives from Timaru, Ashburton, and Rangiora. Among the guests were Judge Archer, F. F. Reid, S.M., Rex Abernethy, S.M., and E. A. Lee, S.M. A charming telegram was received from Mr. Justice Gresson and Mr. Justice Hutchison.

The toast of "The Judge" was proposed by Mr. L. J. H. Hensley, the President, in a very witty speech, in which he reported to His Honour the principal events that had occurred in judicial and professional history during his absence in Japan. His Honour, in reply, gave a short account of the work of the International Military Tribunal for the Trial of Eastern War Criminals, of which he had served as a member. He concluded with a graceful expression of thanks and of his pleasure at being home again.

In proposing the health, "Arthur Donnelly," Mr. W. R. Lascelles stated he would Boswell his Johnson by recollections which had gathered around this popular, familiar, and respected personality. He paid a concluding tribute to a fellow-practitioner who had been a loyal and distinguished servant of the King, who had graciously recognized his great public service by conferring a knighthood upon him. Mr. Lascelles also referred to the distinguished administrative service given to cricket in New Zealand by Sir Arthur. In the profession, his breadth of outlook, his wisdom, his helpfulness, and his modesty had been an example to them all; and in public life, whether as a Public Arbitrator or as Chairman of the Bank of New Zealand, he had won the respect of the public generally. His honour and his humanity led them all to rejoice that he had been marked for such a signal and well-merited distinction.

In reply, Sir Arthur expressed his pride and gratitude, especially because of the presence of nearly every member of the profession in Canterbury, and the messages sent by those unable to be present. It was a great personal pleasure to receive such an expression of kindness and goodwill from the men amongst whom he had worked for nearly thirty years. Mr. Lascelles had referred to such help as he (the speaker) had given to the younger members of the profession during his years of practice. He was specially touched by that reference, and assured his hearers that his door was always open to any young men to whom his advice might be of assistance. Sir Arthur subsequently gave an account of his recent visit to England, and recalled memories of the Judges and lawyers whom he had then met.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Spirit-proof.—Beer enthusiasts should note the recent decision of *Richardson* v. *Yugoslav Society Marshal Tito (Inc.)*, wherein Luxford, S.M., in dealing with the definition of "intoxicating liquor" in s. 4 of the Licensing Act, 1908, as amended by s. 67 (4) of last year's Licensing Amendment Act, held that, once the prosecution proves, on an information for selling beer without a licence, that a sale of beer has been so made, the Court, in the absence of any evidence to the contrary, is entitled to enter a conviction, notwithstanding that there is no evidence that the beer contained more than three parts per cent. of proof spirit. In connection with this, the attention of Scriblex was drawn to a case heard before W. L. Simpson, R.M., at Clyde, and reported in 1878 in *3 New Zealand Jurist (N.S.)*, 30. It seems that one Rebecca Hayward was charged with having sold alcoholic liquor, commonly known as whisky, she not being a licensed person. It was contended by her solicitor that it was necessary in the information to allege and prove that the particular alcoholic liquor stated to have been sold came within the definition of alcoholic liquor in the interpretation clause of the Licensing Act, and that there was no evidence of whisky being a distilled spirit. Commenting upon the ingenuity of the defence, His Worship retired for an hour to consider the matter, taking the bottle with him, presumably for safe custody. On his return, he dismissed the information. The selling had been proved, but what was sold was not proved to be distilled spirit; and he could not assume that whisky was a distilled spirit. The flaw, he ruled, was in the information, and he expressed the pious hope that more care in future would be exercised in drawing up informations under the Licensing Acts. To which *The Jurist* editorially replied, with refreshing candour, that, if His Worship could not assume that whisky was a distilled spirit, why did he not send for a policeman or a dictionary? The flaw was not in the information, but in quite another place.

Bad Food.—In view of the high cost of living, small fines seem an inadequate punishment upon purveyors of stale meat, fish, and vegetables. Such dishonest vendors were less kindly treated in earlier time. When, in 1365, one John Russell was stood in the pillory, a notice read that he had exposed for sale thirty-seven pigeons which were "putrid, rotten, stinking, and abominable to the human race, to the scandal, contempt, and disgrace of all the City."

Unnecessary Appeals.—It is to be expected that, with the jurisdiction of the Magistrates' Court considerably extended, the Supreme Court will have to deal with a greater volume of appeals from the lower Court. If this is so, it is important that care should be exercised not to clutter the Supreme Court with appeals on matters of fact or on those which the lower Courts are just as competent to determine. In *Darby and Hannam, Ltd.* v. *W. Barrowclough and Sons* (unreported), an appeal from the judgment of the Magistrates' Court at New Plymouth, which fixed £30 as a reasonable price for a slab for the defendants' shop, Gresson, J., commenced his judgment by saying: "I want to observe, first, that I think it is absurd that the time of the Supreme Court, which cannot cope with the work it has to do, should be taken up over a matter of a few pounds. No question of principle arises to be decided, as far as I can see, and, though the case is expressed to be stated on a matter of law, no questions of law are formulated by the case for the opinion of this Court, and I am not satisfied that there are any questions of law at all." These observations are timely, and have a special application to some of the main centres, where the volume of unheard Judge-alone cases is reaching a substantial total.

Tangled Legislation.—In a recent case, *Southward Borough Council* v. *Nightingale*, Singleton, J., in the course of his judgment, said that, while listening to the argument, he thought of a ditty of many years ago:

> "I thought, when I learned my letters,
> That all my troubles were done,
> But I find I am sadly mistaken,
> They have only just begun."

He added that the sections with which he was concerned were the most complicated set he could remember, and he would recommend that, when someone had time, this branch of the law as to street-trading in London should be overhauled. If that could be done, it would be of benefit to street-traders, it would be of benefit to many local authorities and others who had to administer the Act, and it would be of benefit to the Court. If the process of law-making proceeds at its present rate, some form of simplification is essential. As it is, many practitioners, faced with the necessity of giving an opinion on some technical matter, obtain the assistance of their clients as to where to begin.

The Lay Advocate.—The solicitor who bitterly complained the other day about the Rents Officer who persisted in referring to him in Court as "my learned friend" might be solaced by the story of the High Court Master who was subject to fits. A litigant in person had spent an inordinate amount of time in argument before him upon the facts of his case. Then, producing from his suitcase a large assortment of law reports, he announced that he would now deal with the law. The Master promptly had a fit and bit him in the leg. A reporter at the time observed that this was universally acknowledged to be the most effective way to deal with a layman arguing a point of law.

DOMINION LEGAL CONFERENCE.

Special Issue of the "Journal."

The next issue of the Journal, which will appear on June 7, will contain a full account of the proceedings at the Dominion Legal Conference, to be held in Auckland during Easter Week, details of which appear on p. 94.

The Journal, which will be an enlarged issue, will contain the full text of papers read at the Conference, and reports of the discussions following them, as well as a detailed description of the various gatherings which form part of the Conference programme.