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NEGLIGENCE: THE END OF THE DOCTRINE OF LAST OPPORTUNITY.

SINCE the coming into operation of the Contributory Negligence Act, 1947, which reproduces the statute of a similar name passed in England in 1945, the doctrine of "last opportunity" has ceased to be of any practical effect in New Zealand, if, indeed, it had not ceased to exist before that statute became law. That is the effect of the judgment of the Court of Appeal (Bucknill, L.J., Evershed, L.J. (as the Master of the Rolls then was), and Denning, L.J.) in *Davies* v. *Swan Motor Co. (Swansea), Ltd. (Swansea Corporation and James, Third Parties)*, [1949] 1 All E.R. 620. We shall refer later on to the questions of law discussed in their Lordships' judgments.

I.

For the past thirty years, though more frequently in the years about the middle of that period, the Courts in New Zealand were confronted by counsel in running-down cases with the doctrine of last opportunity. This proposition of law seems first to have seen the light of day in *Salmond on Torts*. There, the learned author, after discussing the topic of contributory negligence, and the rule in *Davies* v. *Mann* as qualifying the principle that the contributory negligence of the plaintiff is a good defence, went on to say* :

> Clearly, therefore, something more than a mere opportunity of avoiding the accident by reasonable care is required in order to bring the rule in *Davies* v. *Mann* into operation. It is not easy, however, to state either on principle or authority precisely what this additional element is.
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> 3. Subject to certain qualifications it would seem that the true test is the existence of the *last* opportunity of avoiding the accident; that when an accident happens through the combined negligence of plaintiff and defendant, the defendant is liable if, but only if, he had a later opportunity than the plaintiff of avoiding it by reasonable care.

And the learned author, in concluding this discussion, said :

> 6. Accepting the foregoing conclusions, the rule in *Davies* v. *Mann* may be formulated thus: The contributory negligence of the plaintiff is no defence if the defendant had a later opportunity than the plaintiff of avoiding the accident by reasonable care, and at that time either knew or ought to have known of the danger caused by the plaintiff's negligence.
>
> 7. Combining this rule with the general principle of contributory negligence we reach the following result: *When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care, and who then knew or then ought to have known of the danger caused by the other's negligence.*

(The italics are the author's in both citations from his work.)

The foregoing "theory" or "principle" or "doctrine" so formulated was a very useful one for counsel to put before the Court, in cases appropriate for them to do so, in the days when some slight divergence from the duty owed by the plaintiff to the defendant in a running-down case could defeat the best-founded claim of the plaintiff. But, since the passing of the Contributory Negligence Act, 1947, in New Zealand, rendering the respective degrees of fault apportionable, there is not the pressing need to make the fine distinctions, in facts as well as in law, that previously called in aid the doctrine of "last opportunity," or of "the last clear chance," as it is called in Canadian cases.

In view of the recent interment of the doctrine, there is no point here in detailing the dicta of New Zealand Judges on the question when the doctrine of "last opportunity" was in issue before them: they are available in the *Law Reports* to anyone interested in contrasting the divergent views often expressed on the subject. For instance, Smith, J., in *Bennett* v. *Edmonds*, [1947] N.Z.L.R. 716, 727, said that, where an issue of last opportunity is put, it is for the purpose of ascertaining what was the real cause of the accident; but a reading of all the judgments over the years shows that this view, now considered by the highest authority to be correct, was by no means the prevailing one.

In the most recent judgment dealing with the topic, *Thompson* v. *The King* (to be reported), Stanton, J., said :

> No doubt there are cases when the test of last opportunity obviously will determine the real cause of the accident, but this case was not one of them. Even if it were, there is high authority for avoiding it as the guiding principle, and including it for consideration in what *Viscount Hailsham*, in delivering the judgment of the House of Lords in *Swadling* v. *Cooper* ([1931] A.C. 1), called the crucial question—namely, "whose negligence was it that substantially caused the injury ?"

The learned Judge then cited from *Admiralty Commissioners* v. *North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350, 353, wherein Viscount Simon said :

> The suggested test of "last opportunity" seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their Report :
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> "In truth, there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the

* Pages 38 and 41 of the Second Edition, published in 1910, the earliest edition available at the time this was written.

last opportunity of avoiding the mischief, but whose act caused the wrong ? "

His Honour also referred to another case in the House of Lords, *Grant* v. *Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238, where Lord du Parcq said that less would be heard of the so-called " rule of last opportunity " since the decision in the earlier case in their Lordships' House, just cited.

II.

In *Admiralty Commissioners* v. *North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.* (*supra*), in which a collision at sea was considered in the light of the negligence of both ships up to the moment of the collision, Viscount Simon said that the First Division of the Court of Session were divided in their opinion. The Lord President, Lord Normand, and his colleagues had held that one ship, though at fault in steering a course so close to the other, was not to be regarded as partly responsible for the collision, on the ground that this fault was merely a *causa sine qua non*, and not as contributing to the disaster. Negligence, Viscount Simon observed, whether on land or at sea, does not constitute a good cause of action unless it is a cause of the damage that occurs as the result of it. Lord Normand had considered that the situation was analogous to that dealt with in *Davies* v. *Mann*. Viscount Simon continued :

The principle in *Davies* v. *Mann* has been approved and applied by this House in *Radley* v. *London and North Western Railway Co.* ((1876) 1 App. Cas. 754), and in cases where it is relevant the principle can be applied to collisions at sea, no less than to road accidents. The principle of *Davies* v. *Mann* has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable.

After approving the statement (as quoted above) that there was no such rule, the noble and learned Lord continued :

In *Davies* v. *Mann*, the negligence of the absent donkey-owner, serious as it was, created a static position where nothing that he could do when collision threatened would have avoided the result, whereas the negligence of the driver of the vehicle continued right up to the moment when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause. The negligence of the donkey-owner was, therefore, a fault not contributing to the collision. It was merely a *causa sine qua non*. With the greatest respect, I am unable to see how the doctrine of *Davies* v. *Mann* is applicable here.

Later, at p. 354, Viscount Simon showed the application of *Davies* v. *Mann* when two vessels are about to collide, and said that this was carefully discussed in the English Court of Appeal in *The Eurymedon*, [1938] P. 41, which had not been referred to in the case before their Lordships' House. The *Eurymedon* was a large vessel coming up the Thames at night, and was held to blame for not reducing speed, owing to her failure to appreciate in time that the plaintiff's ship was lying at anchor in an improper position nearly athwart the river. The latter ship was also negligent in continuing to lie where she was ; but it was contended that, on the principle in *Davies* v. *Mann*, the *Eurymedon* should be held solely to blame. The contention failed. Greer, L.J., analysed the *Davies* v. *Mann* principle in a series of propositions of which the fourth (at p. 50) is this :

if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

Viscount Simon continued :

This exactly applies here. I cannot agree with *Lord Normand* that the " negligence of the *St. Rognvald* was in every practical sense antecedent." The case seems to me to fall within the class described ([1922] 1 A.C. 144) by *Lord Birkenhead*, L.C., in *Admiralty Commissioners* v. *S.S. Volute* ([1922] 1 A.C. 129), where the proper conclusion is, as the *Lord Ordinary* (*Keith*) found, that both vessels by faulty navigation contributed to the disaster.

Reference was made in argument to the decision of the Judicial Committee in *British Columbia Electric Railway Co., Ltd.* v. *Loach*, [1916] 1 A.C. 719. There, a waggon was negligently driven on to a gateless level-crossing without considering that a train might be just coming, and the collision occurred because the train approached the crossing at an excessive speed and, owing to faulty brakes, was unable to pull up in time. The Judicial Committee, in a judgment delivered by Lord Sumner, held that the railway company's negligence was the sole cause of the accident, and that this remained true even though the train's inability to stop was due to faulty driving and equipment originating before, but continuing after, the negligence attributed to Loach. The decision supported the view taken by Lord Simon that the *St. Rognvald* could not escape liability.

Lord Porter, at p. 357, said that there are, undoubtedly, cases in which one vessel involved in a collision having been negligent is yet not the cause or one of its causes in the sense in which that word is legally interpreted because the other vessel involved failed by a subsequent and independent fault to avoid the consequences of that negligence. *Spaight* v. *Tedcastle*, (1881) 6 App. Cas. 217, *The Margaret*, (1884) 9 P.D. 47, and *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.*, [1924] A.C. 406, are examples of cases in which this principle has been followed in the House of Lords ; but, to make it applicable, the negligence of the second ship must in truth be subsequent and severable or independent. The approach to the decision in this class of case had, in His Lordship's opinion, never been more accurately stated than in the speech of Lord Birkenhead, L.C., in *The Volute*, [1922] 1 A.C. 136 :

In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B had not been subsequently and severably negligent. A recovers in full . . . At the other end of the chain, A's negligence makes collision so threatening that though by the appropriate measure B could avoid it, B has not really time to think and by mistake takes the wrong measure. B is not held to be guilty of any negligence and A wholly fails . . . In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

Again, at p. 144, Lord Birkenhead said :

Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* ((1879) 4 P.D. 219) rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its pro-

visions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

Lord Porter went on to say that, in *The Margaret* (*supra*), Lord Blackburn expressed the opinion that the rule was the same in Admiralty as in common law, and, whatever may have been the position before the common law was altered, Lord Porter thought that it clearly was the same to-day when the common-law rule had been brought into line with that obtaining in Admiralty; and that, in each, the problem should be approached broadly avoiding those fine distinctions which were apt to be drawn when some slight act of negligence on the part of the plaintiff might defeat his claim altogether. In the present case, there seemed to him to be no clear dividing line between the operation of one act of negligence and the other. Both were, he thought, in operation at the same time and both seemed to him to have contributed to the accident.

Their Lordships reaffirmed the statement of principle as to apportionment of damages, enunciated by their Lordships' House in *The Macgregor*, [1943] A.C. 197, [1943] 1 All E.R. 33, to the effect that the finding of the trial Judge as to the degrees of blame to be attributed to one or more tortfeasor involves an individual choice or discretion and will not be interfered with on appeal except in very exceptional circumstances. Viscount Simon, L.C., approved the language used by Lord Wright in *The Umtali*, (1938) 160 L.T. 114; and Lord Wright himself, at p. 35, said:

> . . . under proper conditions, such as those indicated by the three members of the Court of Appeal in *The Karamea*, [1921] P. 76, the Judge's apportionment might not be interfered with by an appellate Court; but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.

The House of Lords were asked again to consider the question of contributory negligence in *Grant* v. *Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238, a case where a stevedore was injured by falling into a hatch left uncovered by ship-repairers who had just ceased work. This was also a Scottish appeal. The facts are long and involved, and can be read in the report cited. Their Lordships held that the accident was a result of the negligence and breach of statutory duty of both the ship-owner and the repairers, and the repairers could not escape liability by reason of the so-called "rule of last opportunity," as it was still their negligence which directly contributed to the accident. They also held that it is a settled principle that, when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured might recover damages from any one of the wrongdoers, or from all of them.

The late Lord du Parcq, who delivered the principal speech in their Lordships' House, said, at p. 245:

> I regard it as a well-settled principle that, when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them. The *Lord Ordinary's* view was that: "the effect of any negligence of the second defenders was broken by the later negligence of the first defenders." This reasoning seems to me to be akin to that which has led to frequent and determined attempts to establish the so-called "rule of the last opportunity," of which less will be heard since the decision of your Lordships' House in *Admiralty Commissioners* v. *North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.* ([1947] 2 All E.R. 350). I refer especially to the opinion of *Viscount Simon* [*cit. supra*]. With the greatest respect for the *Lord Ordinary's* opinion, I think that his reasoning is fallacious. If the negligence or breach of duty of one person is the cause of injury to another, the wrongdoer cannot in all circumstances escape liability by proving that, though he was to blame, yet but for the negligence of a third person the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender.

Lord du Parcq went on to say that, in the well-known case of *Burrows* v. *March Gas Co.*, (1870) L.R. 3 Exch. 67, the defendant company broke a contract with the plaintiff by supplying him with a defective pipe, but the immediate cause of an explosion which caused damage to the plaintiff was the negligence of a third party, a gas-fitter who, having been called in to look for the source of an escape of gas, searched for it with a lighted candle. The company was held liable. He continued:

> Cases in which independent acts of negligence on the part of two drivers cause injury to a third person must be heard almost daily, and they are not, in my experience, decided by considering whose act of negligence was the last link in a chain of causation. As *Lord Herschell* said in your Lordships' House in *Mills* v. *Armstrong, The Bernina* ((1888) 13 App. Cas. 1, 9): "If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, 'I am not guilty, because but for the negligence of another person the accident would not have happened.'" In the same case *Lord Esher*, M.R., in the Court of Appeal (12 P.D. 58, 61), discussed the question: "what is the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person?" The learned *Master of the Rolls* said that on many points as to such a transaction the common law was clear, and stated the first of these points in these words: "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer."

His Lordship added that it was truly said by counsel for the defenders that the case then before their Lordships would in normal times have been one proper for the consideration of a jury, and he made this caustic comment on Judges' directions to a jury:

> A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims. It would, I think, have been right to instruct them in language similar to that used by *Lord Esher*, M.R., in the passage which I have just quoted.

With the foregoing and other guidance from the House of Lords, the members of the Court of Appeal in *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* (*Swansea Corporation and James, Third Parties*), [1949] 1 All E.R. 620, applied themselves to the important question, how far the doctrine of last opportunity has survived the Law Reform (Contributory Negligence) Act, 1945, or, in New Zealand, the Contributory Negligence Act, 1947. Consideration of this judgment, and its practical application, must await our next issue.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Administrative Procedure in Britain. *27 Canadian Bar Review*, 381.

BRITISH NATIONALITY AND NEW ZEALAND CITIZENSHIP.

Registration of Births and Deaths (Citizenship) Regulations, 1949 (Serial No. 1949/93).

BUILDING.

Building Emergency Regulations, 1939, Amendment No. 7 (Serial No. 1949/97). Amendment of Reg. 4A by omitting from sub-cl. (1) the word "such" before "constructional work."

COMPANY LAW.

Names of Companies. *207 Law Times Jo.*, 240.

CONVEYANCING.

Variation of Marriage Settlements after Divorce or Nullity. (D. Tolstoy.) *12 Conveyancer and Property Lawyer*, 112.

Variations of Settlements on Dissolution of Marriage. *93 Solicitors' Journal*, 212.

CRIMINAL LAW.

Appeals from Conviction—False Pretence—Agency alleged by Accused—Evidence unsatisfactory—Proof of Ingredients of Crime lacking—Verdict set aside—Acquittal entered—Crimes Act, 1908, s. 251. The appellant was convicted of attempted false pretence on a count that he had attempted to obtain money by selling a motor-car, the property of one Fitzgerald, by the false pretence that he was Fitzgerald. The accused swore that he was Fitzgerald's agent, which Fitzgerald did not deny, but said he might have authorized the accused to sell the car. The accused's statement that he had given the proceeds of the sale to Fitzgerald was not denied by the latter. On appeal from the conviction, *Held*, setting aside the verdict of guilty and directing a verdict of acquittal to be entered, That, in view of the evidence, which was unsatisfactory, there must have been substantial doubt on the question of the appellant's guilt, and that there were lacking in the evidence the ingredients of the crime charged—*i.e.*, knowledge of the falsity of the representation, and fraudulent intent. *The King* v. *Hayward.* (C.A. Wellington. June 21, 1949. O'Leary, C.J., Gresson, Hay, JJ.)

Evidence of Other Offences. *113 Justice of the Peace Jo.*, 247.

The History of Probation. *113 Justice of the Peace Jo.*, 292.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Deed of Separation—Limited Period—Expiration of Period—Request for Resumption of Cohabitation refused—Whether Such Refusal constitutes Desertion. *Powell* v. *Powell*, [1949] V.L.R. 112.

Nullity—Jurisdiction—Domicil—Marriage in England—Petitioner domiciled and resident in England at Time of Marriage and resident in England when Petition presented—Husband domiciled and resident in Canada. *Casey* v. *Casey*, [1949] 2 All E.R. 110 (C.A.).

Practice Notes. *93 Solicitors' Journal*, 211, 259.

Res Judicata in Matrimonial Causes. *113 Justice of the Peace Jo.*, 279.

Restitution of Conjugal Rights—Wife's Petition—Husband's Admitted Withdrawal from Cohabitation—Husband not guilty of Conduct equivalent to Desertion—Principles on which Court refuses Decree in such Circumstances—Divorce and Matrimonial Causes Act, 1928, s. 8. The Court has power to refuse a decree of restitution of conjugal rights wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case. This is the test laid down by the Court of Appeal in *Russell* v. *Russell*, [1895] P. 340, which is applicable in New Zealand, notwithstanding the alteration made in the previously existing law by s. 8 of the Divorce and Matrimonial Causes Act, 1928. (*Rose* v. *Rose*, [1932] N.Z.L.R, 561, followed.) (*Walter* v. *Walter*, [1921] P. 302, referred to.) *Kemp* v. *Kemp*. (S.C. Auckland. June 21, 1949. Stanton, J.)

ECONOMIC STABILIZATION.

Economic Stabilization Emergency Regulations—Application to fix Fair Rent—General Lowness of Rent not a "special circumstance"—Anomalous Lowness of particular Basic Rent considered—Irrelevance of Evidence of Unfairness to Landlord of Amount of Rent—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 16. While the anomalous lowness of a particular basic rent, as compared with the general level of rents prevailing in the same locality on September 1, 1942, may constitute a "special circumstance," within the meaning of that term as used in Reg. 16 (2) of the Economic Stabilization Emergency Regulations, 1942, which would enable the Court to fix as fair and equitable a rental exceeding the basic rent, mere general lowness of rents is not a "special circumstance." Moreover, it is irrelevant to an application for the fixing of the fair rent to show merely that the particular basic rent would not, on September 1, 1942, have yielded a fair return to the landlord. (*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, referred to.) *So held* by the Court of Appeal, allowing an appeal against the judgment of *Fleming*, J. Per *O'Leary*, C.J. (*Finlay*, J., concurring), 1. That the "special circumstances" (as those words are used in Reg. 16 (2) of the Economic Stabilization Emergency Regulations, 1942) must be peculiar to the application before the Court; and, unless in the particular case there are such "special circumstances," no increase above the basic rent is permitted. 2. That, while no exhaustive catalogue of possible "special circumstances" can be given, the term "special circumstances," as used in Reg. 16 (2), comprises those circumstances which are not generally occurring, and the term, with that meaning, must be applied to facts, foreseen and unforeseen, as they arise. (*In re Norman*, (1886) 16 Q.B.D. 673, and *Lawson* v. *Chester Master, Cirencester Case*, [1893] 1 Q.B. 245, referred to.) *Semble*, Matters which are commonly considered in assessing the rent to be paid are unlikely to be "special circumstances," although they may be "relevant matters" within the meaning of that term as used in Reg. 16 (1). 3. That improvements would be "special circumstances," because they are particular or special to the particular property under consideration; but rents of comparable properties do not constitute a "special circumstance," as they are a matter that is general to all properties in the neighbourhood. 4. That, if there is a "special circumstance" or "special circumstances," the amount of the increase of rent should be limited to what is attributable to such "special circumstance" or "special circumstances." Per *Kennedy*, J., That evidence directed to show that the rental does not measure up to the rental which, it is assumed, a property should return, or evidence of what amount would be fair as between the landlord and the tenant, is irrelevant to an application under Reg. 15 of the Economic Stabilization Emergency Regulations, 1942, to fix the fair rent. *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* (C.A. Wellington. May 17, 1949. O'Leary, C.J., Kennedy, Finlay, Gresson, JJ.)

FAMILY PROTECTION.

Applications under the Inheritance (Family Provision) Act, 1938. *99 Law Journal* 355.

FIRE INSURANCE.

Procedure in Fire Insurance Claims. (T. N. Phelan, K.C.) *27 Canadian Bar Review*, 408.

HUSBAND AND WIFE.

Husband and Wife—Domicil—Intention to change Domicil of Origin—Residence in New Domicil for only Short Period—Significance of Place of Residence of Wife—Marriage Act, 1928 (No. 3726), s. 76. *Brabender* v. *Brabender*, [1949] V.L.R. 69.

Justices—Wife's Summons for Maintenance—Charge of Adultery by Husband—Need for Particulars of Charge. *Duffield* v. *Duffield*, [1949] 1 All E.R. 1105 (P.D.A.).

Maintenance—Wife's Refusal of Intercourse for Reasons believed by her to be sufficient—Right to Maintenance not forfeited —Destitute Persons Act, 1910, s. 17. A wife who is living in the same house as her husband does not forfeit the right to be adequately maintained by him if she, for reasons which she believes to be sufficient, refuses him intercourse. *Paddison* v. *Paddison.* (Auckland. June 3, 1949. Luxford, S.M.)

JURIES.

Juries Bill, 1949 (England). *113 Justice of the Peace Jo.,* 246.

LANDLORD AND TENANT.

Agreed Period of Notice to Quit. *93 Solicitors' Journal,* 263.

Apportionment. *93 Solicitors' Journal,* 195.

Business Premises. *93 Solicitors' Journal,* 143.

The Cuckoo in the Nest. *93 Solicitors' Journal,* 126.

Damage by Frost. (J. T. Plume.) *12 Conveyancer and Property Lawyer,* 118.

Goodwill—Compensation—" Trade or business "—Solicitor—Agent for Insurance Companies and Building Societies—Relevant Goodwill—Landlord and Tenant Act, 1927 (c. 36), ss. 4 (1), 17 (1). *Stuchbery and Son* v. *General Accident Fire and Life Assurance Corporation, Ltd.,* [1949] 1 All E.R. 1026 (C.A.).

Goodwill: Success of Tenancies. *93 Solicitors' Journal,* 177.

Net Adherent Goodwill. *93 Solicitors' Journal,* 130.

LAND SUBDIVISION IN COUNTIES.

Land Subdivision in Counties Regulations, 1949 (Serial No. 1949/96), as to scheme plans, minimum frontage area requirements, roads and access ways, and appeals.

LAW PRACTITIONERS.

Lien—Charging Order—Money payable on Compromise of Actions—No Application for Charging Order—Garnishee Order *nisi* made in favour of Client's Judgment Creditor—Creditor's Right to have Order made absolute—Solicitors Act, 1932 (c. 37), s. 69—R.S.C., Ord. 45, r. 5—Code of Civil Procedure, R. 328. *James Bibby, Ltd.* v. *Woods (Howard, Garnishee),* [1949] 2 All E.R. 1 (K.B.D.).

New Horizons for the Bar. (Hon. R. F. Bradford.) *27 Canadian Bar Review,* 318.

LICENCE.

The Duration of Licences. (E. O. Walford.) *12 Conveyancer and Property Lawyer,* 121.

MAORIS AND MAORI LAND.

Maori Land Court—Jurisdiction—Lease—Insufficient Quorum of Assembled Owners passing Resolution—Confirmation by Court —Lease executed by Board Pursuant to Resolution—Court acting within its Jurisdiction—Confirmation not examinable by Supreme Court—Maori Land Act, 1931, ss. 418 (7), 435 (7) (13)—Maoris and Maori Land—Practice—Certiorari sought against Maori Land Court—Court or Judge cited as Defendant—Impropriety of Court or Judge defending Action. An action to challenge the validity of a lease of Maori land, executed by a Maori Land Board pursuant to a resolution of assembled owners confirmed by the Maori Land Court, on the ground that there were not a sufficient number of owners present or represented to make up the quorum of five prescribed by s. 418 (7) of the Maori Land Act, 1931, cannot succeed, because, under s. 50 of that statute, orders made by the Maori Land Court, within its jurisdiction and competence, are not examinable by the Supreme Court. (*Pateriki Hura and Ngaroimata Mootu* v. *Native Minister and Aotea District Maori Land Board,* [1940] N.Z.L.R. 259, and *New Zealand Waterside Workers Federation Industrial Association of Workers* v. *Frazer,* [1924] N.Z.L.R. 689, followed.) (*In re Karena, Mihi Wira Rapana* v. *Holland and Public Trustee,* [1926] N.Z.L.R. 177, doubted.) Moreover, s. 435 (13) of the Maori Land Act, 1931, prevents the invalidation of a lease, valid on its face and executed in pursuance of a resolution confirmed by the Maori Land Court, even if it were proved that there had been a breach of the provisions of s. 435 (7) in the holding of the meeting of owners and the passing of the resolution. (*Te Wata Taunoa* v. *Davey,* (1914) 17 G.L.R. 114, referred to.) *Semble,* The Native Land Court or a Judge should not defend proceedings questioning the validity of an order made by the Court. (*Wi Kupe* v. *Acheson,* [1923] G.L.R. 10, applied.) *Tonga Awhikau* v. *Werder and Another.* (S.C. New Plymouth. May 31, 1949. Stanton, J.)

MOTOR-VEHICLES.

Taking and Driving Away of Motor-vehicles: A Question of Venue. *113 Justice of the Peace Jo.,* 294.

NEGLIGENCE.

Dangerous Article—Inflammable Material—Delivery by Defendants to Plaintiffs by Mistake—Explosion caused by Cigarette of Plaintiffs' Employee—Liability of Defendants. Five packing-cases containing dangerously inflammable celluloid film scrap were delivered in error by a carter employed by the defendants to the plaintiffs' premises. No warning of their dangerous contents was given by the carter, by the delivery note, or by labels on the cases, but the plaintiffs' foreman recognized the material as inflammable and dangerous when some of it was taken out of one of the cases. He warned the two workmen in charge of the cases not to smoke near them, instructed them to replace the scrap and remove the cases to the yard, and telephoned to the firm who had sent them and arranged to deliver them to their proper destination 150 yards away. Before the cases were removed, a typist employed by the plaintiffs negligently set light to it with a cigarette and it exploded, causing serious damage. *Held,* That the defendants were negligent in not taking proper precautions when dealing with such dangerous material; there had been no negligence by the plaintiffs or their servants apart from the typist; and, as she had not intended to injure her employers' premises, or do more than perpetrate a joke, her behaviour was not such a conscious act of volition as to relieve the defendants from liability for their negligence. (Dictum of *Lord Dunedin* in *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins,* [1909] A.C. 646, applied.) *Philco Radio and Television Corporation of Great Britain, Ltd.* v. *J. Spurling, Ltd., and Others,* [1949] 2 All E.R. 131 (K.B.D.).

As to Effective Cause of Injury, see *23 Halsbury's Laws of England,* 2nd Ed. 590–596, paras. 843–845; and for Cases, see *36 E. and E. Digest,* 24–34, Nos. *118–205.*

Hazards of Sport. *93 Solicitors' Journal,* 174.

Landlord—Liability—Gratuitous Installation of Domestic Boiler—Boiler in Dangerous Condition—Tenant's Daughter injured by Explosion. *Ball* v. *London County Council,* [1949] 1 All E.R. 1056 (C.A.).

Invitee—Duty of Occupier—Protection against " unusual danger "—Workman slipping from Staging. A welder had been employed for some months in welding strips of steel on the ribs of a trawler lying in a wet dock. The contractors (to whom the welder's employers were subcontractors) had provided a staging on which the welder could work, comprising four boards, 5 ft. apart, each about 20 ft. long by 11 ins. wide and 3 ins. deep, supported on iron beams or angle-irons, 3½ ins. by 3 ins., across the fish house (part of the hold) in which he worked, at a height of 5 ft. 5 ins. The only means of getting from one board to another was by stepping on an angle-iron. When handing a tool-box to a fellow-welder on the adjoining board, the welder put one foot on the angle-iron, but his foot slipped and he fell astride the angle-iron, sustaining injuries. In an action by the welder for damages for negligence against the contractors, *Held,* That the duty owed by the contractor as invitor to the welder as invitee was to prevent damage from unusual danger, and " unusual danger " meant a danger unusual from the point of view of the particular invitee and not appreciated by him, acting reasonably and exercising due care for his safety, in the circumstances in which he was availing himself of the invitation; the welder had been engaged in similar work all his life, and had worked on the staging for some weeks before the accident, using the angle-iron when stepping from one board to another; the danger, therefore, was known to him, and one usual in his daily work; it was immaterial whether or not he had freely and voluntarily, expressly or impliedly, agreed to incur that danger; and, consequently, he could not succeed. (*Indermaur* v. *Dames,* (1866) L.R. 1 C.P. 274, and *dictum* of Phillimore, L.J., in *Norman* v. *Great Western Ry. Co.,* [1915]

1 K.B. 596, applied.) *Horton* v. *London Graving Dock Co., Ltd.*, [1949] 2 All E.R. 169 (K.B.D.).

As to Duty to Invitees, see *23 Halsbury's Laws of England*, 2nd Ed. 600-609, paras. 851-858 ; and for Cases, see *36 E. and E. Digest*, 41, 42, Nos. *247-258*.

Railways — Level-crossing — Duty of Train-driver — County Court—Appeal—Verdict against Weight of Evidence—Duty of Full Court—Setting aside Verdict—County Court Act, 1928 (No. 3663), s. 74 (3). *Baker* v. *Victorian Railways Commissioners*, [1949] V.L.R. 85.

Road-surface being sealed with Bituminous Emulsion—Driver of Motor-car coming around Bend in Road striking Bank owing to Greasy Nature of Surface—Duty of Party spraying Road to protect Users of Highway—No Warning Sign given—Plaintiff entitled to Damages—Practice—Pleadings—Defence of Contributory Negligence—Statement of Defence with Particulars to be filed—Magistrates' Courts Rules, 1948, r. 113 (5). When the plaintiff was driving his motor-car on a public highway, the defendant's workmen were engaged in spraying upon the road-surface a sealing coat of bituminous emulsion. As the plaintiff came around a bend in the road, he saw the defendant's sprayer, and also a car overturned on the road, whereupon he applied his brakes in order to stop, but was unable to stop, and he consequently struck the bank and the overturned car. His inability to stop was due, he alleged, to the greasy nature of the surface of the road, caused by the material being sprayed on it. In an action to recover damages, the plaintiff based his claim upon negligence and nuisance. The evidence established that the freshly sprayed emulsion made the road greasy and dangerous. *Held*, 1. That the duty of the defendant in the circumstances was to use due care to see that the public using the road were not injured by reason of its interference with the surface. (*Shoreditch Corporation* v. *Bull*, (1904) 68 J.P. 415, followed.) 2. That one means of discharging that duty was to place on the road a sign giving reasonable warning of the existing danger ; and, having regard to the circumstances, the obscure bend, the downhill grade, and the greasy surface caused by the defendant's operation, the placing of some warning sign in the middle of the road at the bend was a reasonable precaution, and the defendant company was negligent in failing to take that precaution. (*Penny* v. *Wimbledon Urban District Council*, 1899] 2 Q.B. 72, referred to.) *Semble*, It is desirable that a defendant, relying on the defence of contributory negligence, should file a statement of defence, as provided by R. 113 (5) of the Magistrates' Courts Rules, 1948, giving particulars of the contributory negligence. *Taylor* v. *Bitumix, Ltd.* (Rotorua. April 26, 1949. Paterson, S.M.)

Tram-car—Starting-signal given by Unauthorized Person—Conductor absent from Platform—Injury to Plaintiff. As the plaintiff was attempting to board a tram-car belonging to the defendant corporation at a request stopping-place, an unauthorized person (a passenger) gave the driver the starting-signal by ringing the bell. The car started when the plaintiff had one foot on the step of the car, and she fell and was injured. At the time of the occurrence, the conductor was on the upper deck of the car, collecting fares. *Held*, That, as there was an appreciable time while the car was halted at the stopping-place, during which the conductor, in breach of his duty and without sufficient excuse, was absent from the platform of the car, from which he should have given the starting-signal, and as he might have foreseen that an unauthorized person might ring the starting-bell if he absented himself from the platform, the conductor was negligent, and the corporation was liable to the plaintiff. *Davies* v. *Liverpool Corporation*, [1949] 2 All E.R. 175 (C.A. Tucker, Somervell, and Denning, L.JJ.).

As to Duties of Carriers of Passengers, see *23 Halsbury's Laws of England*, 2nd Ed. 656, 657, paras. 926, 927 ; and for Cases, see *8 E. and E. Digest*, 80-85, Nos. *554-585*.

PARTNERSHIP.

Partner—Person "holding out"—Debts incurred after Dissolution—Liability of Retiring Partner—Unauthorized Use of Retiring Partner's Name—Partnership Act, 1890 (c. 39), ss. 14, 36 (1) (3)—Partnership Act, 1908 (N.Z.), ss. 14, 39 (1) (3). *Tower Cabinet Co., Ltd.* v. *Ingram*, [1949] 1 All E.R. 1033 (K.B.D.).

POLICE OFFENCES.

Idle and Disorderly Person—Habitually Consorting with Reputed Thieves—Defendant proved as having, during Three Weeks, played in Billiard-saloon with (inter alios) *Persons convicted of Dishonesty—Ingredients of Offence—"Consorting"—Police Offences Act, 1927, s. 49.* The defendant was charged, under s. 49 (*d*) of the Police Offences Act, 1927, with being an idle and disorderly person, in that he is a person who habitually consorts with reputed thieves. During the three weeks the Police had the defendant under observation, he was spending all his time playing snooker or Kelly pool with anyone who was willing to have a game with him, playing three games with one N. (who had twenty-five convictions for offences involving dishonesty between 1929 and 1938), three with A. (against whom three convictions for theft had been recorded between 1943 and 1945), and one with W. (who had been convicted of a number of offences under the Gaming Act, 1908, but not for any offence involving dishonesty.) *Held*, 1. That, to obtain a conviction for vagrancy on the ground that the defendant had habitually consorted with reputed thieves, within the meaning of s. 49 (*d*) of the Police Offences Act, 1927, the prosecution must prove more than constant companionship : it must prove facts from which it can reasonably be inferred that the purpose of the companionship was the furtherance of some nefarious object or objects. (*O'Connor* v. *Hammond*, (1902) 21 N.Z.L.R. 573, followed.) 2. That, in the particular circumstances, the defendant's acts did not amount to consorting, much less to habitually consorting, with reputed thieves within the meaning of s. 49 (*d*). *Fell* v. *Gauntlett*. (Auckland. April 29, 1949. Luxford, S.M.)

Obscene Language—Track running on Private Property from Main Highway to Dwellinghouse—Track used by Public—Only Access to Dwellinghouse—"Public place"—Police Offences Act, 1927, s. 40 (m). On an information charging the defendant with using obscene language within the hearing of a public place, to wit, the side road leading to Carter's Mill houses, *Held*, That, though the track ran through private property and was from 100 yds. to 150 yds. from the main highway, as it was open to and was used by the public, and, in fact, it was necessary that certain sections of the public should use it as the only means of access to the dwellinghouse, it was a "public place" within the definition of "public place" in s. 2 (as extended by s. 40 (*m*)) of the Police Offences Act, 1927. (*Taylor* v. *Seymour*, (1915) 34 N.Z.L.R. 919, distinguished.) *Police* v. *Forbes*. (Taumarunui. June 2, 1949. Coleman, S.M.)

Obstruction of Police Officer in Execution of his Duty—Police Entry into House of Third Person to arrest Suspected Criminal—Refusal of Admittance—Right to break in to execute Warrant—Justification—Obstruction by Lie told to Police Officer to facilitate Escape of Suspected Criminal—Police Offences Act, 1927, s. 76. When a Police officer is pursuing a suspected criminal, and a person tells him a lie for the purpose of facilitating the criminal's escape from arrest, that of itself constitutes the offence of obstructing the officer in the execution of his duty within s. 76 of the Police Offences Act, 1927. (*Bastable* v. *Little*, [1907] 1 K.B. 59, applied.) If a constable in possession of a warrant of arrest, reasonably believing that the person to be arrested is in the house of a third person, is refused admittance on signifying to those in the house the cause of his coming and requesting them to give him admittance, he may break into the house to execute his warrant. The justification of the constable is not dependent on the result of the offender's being in the house, and he is protected if he acts on fair and reasonable ground of suspicion, having previously been refused admittance. (*Thomas* v. *Sawkins*, [1935] 2 K.B. 249, followed.) When, therefore, a householder, who knew that he had been harbouring a man who was wanted on warrant for an indictable offence, and who was in the house but had just gone away from it, prevented a Police officer from entering his house, he did not act in protection of his rights, but for the sole purpose of enabling the wanted man to make good his escape ; and he was guilty of wilfully obstructing the officer in the execution of his duty. *Dwan* v. *Mathews*. (Auckland. June 3, 1949. Luxford, S.M.)

POST OFFICE SAVINGS-BANK.

Post Office Savings-bank Regulations, 1944, Amendment No. 2 (Serial No. 1949/92), Acknowledgement of deposits, other than in depositor's book, abolished.

PRACTICE.

Modern Appeal in Civil Cases. (Hon. C. H. O'Halloran.) *27 Canadian Bar Review*, 259.

TENANCY.

Dwellinghouse—Application to fix Fair Rent—Anomalous Position as to Basic Rent—Increased Value a "relevant matter"—Rent fixed in Time of Depression and since remaining Constant

a "*special circumstance*"—*Tenancy Act, 1948, s. 9.* There had been a substantial increase of value over cost of both the land and the several dwellings thereon, the subject of an application to fix the fair rent, since their construction in the period 1934-1936. Those values were stabilized as at December 15, 1942; and, in the event of a sale, the landlord company could make an approved sale at an enhanced value, which must be accepted as the present market value. After purchase, the new landlord would be entitled to apply for and obtain a fair rent based on his stabilized purchase price. If one of the houses were sold, it could immediately be placed on a rental basis different from its neighbour of similar and contemporaneous construction. On application to fix the fair rent of each dwelling respectively, *Held*, 1. That, on the above-stated facts, an anomaly was created and the increase in value must, therefore, be a "relevant matter" as that term is used in s. 9 (1) of the Tenancy Act, 1948. (*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, applied.) 2. That the "special circumstances," as that term is used in s. 9 (2) of the statute, must include all relevant matters; and it had been proved to the satisfaction of the Court that the dwellinghouses had been erected in a time of depression and then let at a rental fixed during that time, which had remained constant for twelve years or more. 3. That, in the "special circumstances" of the case, it was fair and equitable, under s. 9 (2) of the statute, to fix a fair rent in excess of the basic rent in the amounts stated in the judgment. *Rental Homes, Ltd.* v. *Smith.* (Auckland. March 3, 1949. H. Jenner Wily, S.M.)

Dwellinghouse—Application to fix Fair Rent—"Relevant matters" enumerated—General or Local Increase in Value—"Special circumstances"—Tenancy Act, 1948, s. 9. Any general or local increase in value of a dwellinghouse is now a relevant matter in all applications to fix the fair rent under s. 9 of the Tenancy Act, 1948; and, subject, under s. 9 (2), to proof by the landlord to the satisfaction of the Court, it may be a "special circumstance" in the particular case. (*Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* (*supra*), distinguished.) In determining "relevant matters," under s. 9 (1) of the Tenancy Act, 1948, the Court, after having regard to the general purposes of the Economic Stabilization Act, 1948, and any improvements to the property, may include comparable rents, return on capital invested, and other considerations weighed in the assessment of rent, such other relevant matters as the particular circumstances of each case produce, and (in relation to dwellinghouses) the relative circumstances of the landlord and of the tenant. (*Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* (*supra*), and *Jewellers Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.*, [1949] N.Z.L.R. 204, applied.) (*Rental Homes, Ltd.* v. *Smith* (*supra*), referred to.) In the present case, there can have been little, if any, variation in values of the dwellinghouses between September 1, 1942, and December 15, 1942. The valuation for probate purposes in 1942 was £1,350, and, when valued on March 31, 1948, under the Valuation of Land Act, 1925, the valuation was £1,790, which was accepted as correct by both parties to the application to fix the fair rent. Valuations of land were stabilized and controlled as at December 15, 1942, by the Servicemen's Settlement and Land Sales Act, 1943, and the fair rent agreed to on April 19, 1943, was based on the erroneous valuation for probate purposes. On an application to fix the fair rent as on the new valuation, *Held*, That the increase in value as shown by the new valuation was a "special circumstance" within the meaning of those words as used in s. 9 (2) of the Tenancy Act, 1948; and the fair rent should be assessed, on the usual basis, on the valuation of £1,790. *Griffin* v. *Chance.* (Auckland. July 7, 1949. H Jenner Wily, S.M.)

WILL.

"All nephews and nieces of my late sister L."—Intention of Gift to Children of L. *Re Birkin (deceased)*, [1949] 1 All E.R. 1045 (Ch.D.).

Annuity—Payment out of Income—Surplus after Payment of Annuity—Whether Intestacy as to Surplus—Power of Trustee to pay Income to Person aged Twenty-one Years having Contingent Interest therein—Implied Trust for Accumulation—Whether "contrary intention" excluding Power of Trustee within meaning of s. 3 of Trustee Act, 1928. *In re Watts, Trustees Executors and Agency Co., Ltd.* v. *Watts*, [1949] V.L.R. 64.

CONSTITUTIONAL LAW: THE COMMONWEALTH.

The Prime Ministers' Declaration.

By H. V. Hodson.*

When India and Pakistan and Ceylon gained their full independence in 1947, the nature of the British Commonwealth changed. Previously, all its independent members had been nations wholly or largely of British stock, bound by blood and common history as well as by constitutional ties. Now, the Commonwealth was to include countries of different race, different history, and a totally different outlook on the British connection. Many people in Britain and the old Dominions thought this combination could not possibly last, and many hankered to get back to the old close family group, bound by an innate loyalty to the British Crown.

But this was not a general or a lasting attitude. The ideal of the Commonwealth was, after all, a grand one—an intimate, united, yet worldwide group of nations of various races, closing the gulf that threatened most dangerously to yawn between peoples of different colour as the older imperialism disappeared. What a gift it would be to enemies of democracy and peace if the Commonwealth split up! In the new Asiatic Dominions, the disadvantages of cutting adrift seemed more formidable the closer they were looked at.

From many points of view, the best course, had it been possible, would have been to leave matters as they were. The constitutional links of the Commonwealth, bound up with the idea of allegiance to the Crown, might be distasteful to the sentiment of peoples who had struggled painfully to be rid of British rule, but in practice they left national sovereignty and independence unaffected. Whatever was out-of-date about them might have been left to disappear in the course of time, like the dead wood from a growing tree. But India was too far committed to a republican form of government to turn back even if she had wished. Nor need we regret that the issue was thus forced.

Sooner or later some change in form would have proved necessary to match the altered form of the Commonwealth, and it is well that the problem of making it should have been faced now, before goodwill had been eaten away by misunderstanding or political agitation.

Nevertheless, it was a hard problem. For, although the mere fact of its having a President instead of a Governor-General as its formal head would not seem to disqualify a country from continuing to belong to a group of equal sovereign States, the more the problem was looked into, the more important the common Crown seemed to be to the very nature of the Commonwealth. The Commonwealth is not an alliance: it is not an external association at all, but an organic unity.

*By courtesy of the High Commissioner for the United Kingdom.

Its essence is that its member nations and peoples are not foreign to each other, but in all kinds of affairs have relations among themselves different in quality from their relations with foreigners and with foreign countries. This essential character of "unforeignness" was tied up with the existence and the free acceptance of a common monarchy. Thus all the citizens of the Commonwealth countries were subjects of the same King.

The Monarch has no powers independent of the free Governments by whom he is advised. But the very fact that those Governments are completely separate underlines the importance of the Crown as a unifying link. Hence the question of having a republic in the Commonwealth was more than a mere juggle with formulae. It involved the question: Did the republic, like the rest, continue to seek and accept the organic unity of the whole association, and was it ready to symbolize that fact in an appropriate relationship with the Crown?

India, through her remarkable Prime Minister, Pandit Nehru, answered "Yes," and so a solution to the conundrum has been found. The declaration of the Prime Ministers, observe, does not say, "We have persuaded India to accept a formula which will enable her to stay in the Commonwealth if she pleases." On the contrary, it says, in effect: "India herself spontaneously wants to remain a full member, and accepts the King as the symbol of this free association, and, as such, as the head of the Commonwealth; and the rest of us agree that, accordingly, she remains an equal member with ourselves."

The declaration clearly affirms that this makes no difference to the relationship of the other members to the Commonwealth and the Crown. No doubt they could, if they so choose, later follow India's example. But, in the meantime, for them the nexus remains in allegiance to the Crown as the head of their own States as well as the head of the Commonwealth.

That it should have expanded from a liberalized British Empire to a free association of nations of different race and history is a matter for pride among ourselves and inspiration for the world.

Some may feel that the price paid in the risk to our cohesion and solidarity is perilously high. Only time can tell what the eventual outcome of the latest constitutional change may be. It is as yet only a form of words, the undertaking of an experiment, an act of faith. But, for my part, I would far prefer a Commonwealth of willing partners, eager to make the most of an association that they have voluntarily adopted and accepted, to one in which the forms of membership were irksome to some of its members, a handicap to their full participation, and a potential political issue between their Governments and Oppositions.

To have settled this matter without bringing the King and the Throne, standing as they do above our differences and disputes, into our politics is itself a great achievement. From the Crown, nothing has been lost that had not already departed. On the contrary, its stature has been enhanced and ennobled by the emergence of the King as the head of a free Commonwealth of Nations of different race and clime, choosing their own forms of government and spanning the world with friendship and joint endeavour for peace and welfare.

INDEFEASIBILITY OF LAND TRANSFER TITLE.

Morrison v. Song Hing considered.

By E. C. Adams, LL.M.

To the New Zealand conveyancer, perhaps the most interesting case reported recently is the judgment of Hutchison, J., in *Morrison* v. *Song Hing*, [1949] N.Z.L.R. 101, and it is fitting that the case should have been heard in the same Supreme Court centre as the *locus classicus, Assets Co., Ltd.* v. *Mere Roihi*, [1905] A.C. 176; N.Z.P.C.C. 275—the town of Gisborne.

A truer appreciation of the importance of *Morrison* v. *Song Hing* will be gained by a brief consideration of a few elementary but fundamental principles of Land Transfer law, and one of these is clearly explained by that great Australian lawyer, Mr. Justice Isaacs (as he then was), in *Commonwealth* v. *State of New South Wales*, (1918) 25 C.L.R. 325.

State registration—*i.e.*, the Torrens system, which prevails in New Zealand—is something more than non-interference with rights. It—*i.e.*, the registration—confers title. It sometimes confers better title than the transferor possessed: *Gibbs* v. *Messer*, [1891] A.C. 248, 254. If the State in doing this deprives another of any interest in the land, it compensates him, and for this purpose supplies an assurance fund: *Williams* v. *Papworth*, [1900] A.C. 563. (In New Zealand, the Land Transfer Assurance Fund was quietly liquidated by the Legislature in the hungry early 'thirties, and the Consolidated Fund is now liable.) It is, therefore, quite different from a transaction dependent for its result merely on the agreement and acts of the parties themselves. It is not the parties who effectively transfer the land, but it is the State that does so, and, in certain cases, more fully than the party could. In short, a transferee seeking registration of a transfer seeks to have his position affirmed by the State.

As their Lordships of the Privy Council point out in *Waimiha Sawmilling Co., Ltd.* v. *Waione Timber Co., Ltd.*, [1926] A.C. 101; N.Z.P.C.C. 267, in New Zealand, the indefeasibility-of-title principle is attained by ss. 58 and 197 of the Land Transfer Act, 1915, and it is always necessary to consider these sections together.

In s. 58, there are embedded a few statutory exceptions, which have been found very necessary in practice; ss. 70 and 72 also render a certificate of title, in certain circumstances, void or void as to part. The issue of a certificate of title limited as to title and/or to parcels also eats into the concept of indefeasibility, but, in a consideration of *Morrison* v. *Song Hing*, we need not consider these special statutory limitations.

To comprehend adequately the principle of indefeasibility of title conferred by registration of title under

the Land Transfer Act, we must always get back to *Mere Roihi's* case (*supra*), and a point to remember is that the New Zealand Courts and the Privy Council itself have consistently refused to whittle down the fundamental principle enunciated in that case. In ascertaining what really was decided by the Privy Council in *Mere Roihi's* case, we cannot do better than study carefully the later Privy Council case of *Waimiha Sawmilling Co., Ltd.* v. *Waione Timber Co., Ltd.* (*supra*).

As their Lordships have pointed out, s. 58 provides in plain language that, *except in the case of fraud*, the registered proprietor holds freed from everything except what is notified on the Register, subject to three exceptions. These three exceptions are:

(a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and

(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor by wrong description of parcels or of boundaries.

Section 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud.

The cardinal principle of the Act is that the Register is everything. Nothing can be registered the registration of which is not expressly authorized by statute, or by an enactment having the force of a statute.

Everything which is registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or, in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, the right to be registered.

Fraud means actual fraud, *dishonesty of some sort*, not what is called constructive or equitable fraud—an unfortunate expression, as pointed out by their Lordships of the Privy Council, and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. (This is the particular point—the question of constructive fraud—on which the recent decision of Hutchison, J., now under consideration in this article, will, I submit, be a most useful precedent in the future).

Fraud means fraud of the person claiming under the instrument, and not the fraud of the person alienating. A purchaser's title, for instance, is indefeasible, even though the Registrar may not have issued a new certificate of title in favour of the purchaser, or completed registration in his favour, before proceedings have been taken to upset the purchaser's title: *Essery* v. *Essery*, [1947] 2 W.W.R. 315: see 24 N.Z.L.J. 47. But at that stage a person claiming from such purchaser would not be protected, if *Clements* v. *Ellis*, (1934) 51 C.L.R. 217, was correctly decided.

To return again to the *Waimiha Sawmilling Co.* case, if the designed object of a transfer is to *cheat* a man of a known existing right, that is fraudulent, and so also fraud may be established by a dishonest *trick* causing an interest not to be registered, and thus *fraudulently* keeping the Register clear. The act must be dishonest, and *dishonesty must not be assumed* solely by reason of knowledge of an unregistered interest.

In the *Waimiha Sawmilling Co.* case, one of the points raised by the plaintiffs, who tried to upset the title of the registered proprietor, was that, as at the date of the registration of the transfer in favour of the registered proprietor, litigation was pending and affecting the property, and that the title was necessarily subject to whatever rights the plaintiffs would be held to possess, if the litigation resulted in their favour. But that point was completely demolished by cold logic. "Litigation is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor, knowledge that steps are being taken to assert that interest can have no more serious effect."

It must be remembered, however, that the rule of indefeasibility of title established by the Land Transfer Act and explained and applied in such cases as *Mere Roihi's* case (*supra*) does not apply against any estate or interest which is not capable ultimately of being registered under that Act. This important point is brought out in *South-Eastern Drainage Board (South Australia)* v. *Savings Bank of South Australia*, (1939) 62 C.L.R. 603, where the highest Court in Australia held that a mortgage duly registered in 1912 was nevertheless subject to a statutory land charge created in 1908, because the statutory charge was not registrable. (Such a case would have to be decided differently in New Zealand, for the Statutory Land Charges Registration Act, 1928, now authorizes (and in practice compels) the registration of statutory land charges.) Thus, Land Transfer land is subject to the rule in *Tulk* v. *Moxhay*, (1848) as reported in 1 H. & Tw. 105; 47 E.R. 1345, because restrictive covenants, except fencing covenants under the Fencing Act, 1908, are not registrable under the Land Transfer Act. Thus, also, Land Transfer land continues to be subject to prescriptive easements existing before the land is brought under the Act, because such prescriptive easements are not registrable: *Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37. This important point is clearly brought out in *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542, 551, where Finlay, J., said:

> It [*i.e.*, a right of renewal in a lease] is, in other words, an integral part of the estate shown by the Register as vested in the lessee. Its registration is, I think, in consequence authorized under the Land Transfer Act.

If an estate or interest can be registered or validly included in a registered Land Transfer instrument, then questions of competing validity with registered estates or interests must be decided in accordance with the special provisions of the Land Transfer Act itself, as interpreted by the Courts. If, on the other hand, the estate or interest in competition cannot ultimately be registered under the Land Transfer Act, then its relative validity must be determined in accordance with the general law: *Staples and Co., Ltd.* v. *Corby and District Land Registrar*, (1900) 19 N.Z.L.R. 517.

Another important point is that the doctrine of indefeasibility of title has not been permitted by the Courts to deprive them of their jurisdiction in Equity to decree specific performance of enforceable contracts entered into by registered proprietors, or to enforce trusts created by them, the latter being termed in one leading case (*Barry* v. *Heider*, (1914) 19 C.L.R. 197, 216) "conscientious obligations entered *into by them*."

I have italicized those words, because *Mere Roihi's* case (*supra*) clearly shows that the principle of indefeasibility of title conferred by registration under the Land Transfer Act cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice. " But if the alleged *cestui que trust* is a rival claimant, who can prove no trust apart from his own alleged ownership, it is plain that to treat him as a *cestui que trust* is to destroy all benefit from registration."

As Adams, J., said in *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, 1223 :

> The power of the Court to enforce trusts, express or implied, and performance of contracts upon which title has been obtained, or to rectify mistakes in carrying the contract into effect as between the parties to it, has been repeatedly exercised. In the case of a trust, the certificate of title is not affected by its enforcement. In the rectification cases there is privity of contract; no consideration has passed in respect of the interest, which was wrongfully retained, and I see no reason to doubt that the power to order rectification may be put upon the ground of an implied trust.

And Sir Charles Skerrett, C.J., said, in delivering the judgment of the Court of Appeal in *Tataurangi Tairuakena* v. *Mua Carr*, [1927] N.Z.L.R. 688, 702 :

> The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest.

In *Taitapu Gold Estates, Ltd.* v. *Prouse*, [1916] N.Z.L.R. 825, the vendors had agreed to sell to the purchasers certain parcels of land, reserving to themselves, however, the right to the minerals below the surface of the land. In the transfer from the vendors to the purchasers, the reservation of the minerals was inadvertently omitted. The purchasers, denying mistake, claimed that, as they had acquired *without fraud* a certificate free from exceptions or reservations, they were entitled to retain it. But the Court ordered them to retransfer the minerals to the vendors.

In *Tataurangi Tairuakena* v. *Mua Carr*, [1927] N.Z.L.R. 688, the Maori tenants in common of a block of Maori land were duly incorporated under the provisions of the Maori Land Act, 1909, and a committee of management of three persons appointed. A lease for ten years was granted by the committee to *one of their number*. The Court of Appeal held that, although the lease had been confirmed by the Maori Land Board and registered under the Land Transfer Act, the lessee had not acquired an indefeasible title by registration under the Land Transfer Act, because he held in a *fiduciary* capacity.

A few modern examples of the application of the general principle that a person getting registration in his favour under the Land Transfer Act obtains, in the absence of fraud, an indefeasible title, may conveniently be cited.

In *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, it was held by the Court of Appeal that a local body, which had had a Proclamation registered in its favour, obtained an indefeasible title even if the Proclamation itself was invalid.

In *Mereana Perepe* v. *Anderson*, [1936] N.Z.L.R. 47, Fair, J., held, with regard to a lease of Maori land, that registration under the Land Transfer Act precluded the raising of any questions as to the validity of the lessee's title. He said, at p. 50 :

> It was held by the Court of Appeal in *Harris* v. *McGregor*, (1912) 32 N.Z.L.R. 15, approving of the decision in *Wolters* v. *Riddiford*, (1905) 25 N.Z.L.R. 532, that registration under the Land Transfer Act of a lease of a similar kind conferred on the lessee a " complete and irrefragable title " notwithstanding that upon the face of it the lease was contrary to law, and the confirmation order purporting to have been made was ineffectual.

In *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542, Finlay, J., extended the doctrine of indefeasibility of title to a renewal clause in a registered lease, such renewal clause *being in contravention of statute law*. In this case, the application of the principle of *Mere Roihi's* case has, perhaps, reached high-water mark : see the article by the learned Editor in (1945) 21 NEW ZEALAND LAW JOURNAL, 183.

In *Percy* v. *Youngman*, [1941] V.L.R. 275, A, an infant (the *factum* of infancy not being disclosed on the Register Book), transferred to B. It was held that, when A attained his majority, he could not compel B to retransfer to him, B thus getting an indefeasible title.

In *Rotorua and Bay of Plenty Hunt Club (Incorporated)* v. *Baker*, [1941] N.Z.L.R. 669, the Supreme Court held that a purchasing clause contained in a registered lease executed by the registered proprietor's attorney was indefeasible, even though the right of purchase may have been *ultra vires* the power of attorney. This is a very useful and convenient ruling in practice, for powers of attorney are deposited in the Lands Registry Office, and District Land Registrars judicially determine whether or not a proposed dealing is *intra vires* the power of attorney ; a person dealing with the attorney should be entitled to treat the District Land Registrar's determination as final, as regards his own rights under the instrument. A contrary decision may well have made many titles under the Land Transfer Act uncertain. The great desideratum is *certainty* of title.

We have previously noticed that under the Land Transfer Act the Register Book is everything ; the Privy Council terms that a cardinal principle. From this, there has been laid down (also by the Privy Council) a sub-rule—namely, that, in order to secure an indefeasible title, a person must contract or deal with the registered proprietor himself or his attorney : he must deal on the strength of the Register Book. For example, if John Smith of Auckland, settler, is the registered proprietor of Blackacre, a person who gets and registers a transfer from the wrong John Smith will not get an indefeasible title. Similarly, he will not get an indefeasible title if the transferor forges John Smith's name : *Gibbs* v. *Messer*, [1891] A.C. 248, and *District Land Registrar* v. *Thompson*, [1922] N.Z.L.R. 627.

But a person who gets registered by an instrument which, even under the Land Transfer Act, is voidable at the suit of the wrongly-deprived registered proprietor, can himself confer an indefeasible title on a person who gets his title registered before the Register Book is rectified. The reason for this apparent anomaly is that such last-mentioned person has himself contracted or dealt with the land on the faith of the Register Book itself ; this reason is clearly brought out by Salmond, J., in his dissenting judgment in *Boyd* v. *Mayor, &c., of Wellington* (*supra*).

We are perhaps now, after this digression, in a better position to appreciate the recent decision of Hutchison, J., on indefeasibility of title under the Land Transfer Act.

In *Morrison* v. *Song Hing*, [1949] N.Z.L.R. 101, B purchased from A, the registered proprietor under the Land Transfer Act, by sale-and-purchase agreement, a freehold property, subject (*as stated in the agreement*) to a tenancy to C for one year, expiring on November 28, 1947, of part of the land. On June 30, 1947, B became registered proprietor of the land. Although warned not to do so by B, C subsequently removed buildings affixed to the soil. B first heard of C's claim to remove the buildings immediately before October 15, 1947.

It was held that B was entitled to damages from C for the value of the buildings removed by C, and also to general damages for the high-handed manner in which they were removed.

The crux of His Honour's decision is that B took the property, subject to a tenancy to C, which the agreement stated to be for one year expiring on November 28, 1947. That fact, in His Honour's opinion, did not put B on inquiry as to whether buildings which were part of the freehold were removable by C. Moreover, even if B were put on inquiry, the fact that he did not inquire would at the most amount only to *constructive* fraud, and that, as pointed out by their Lordships in *Mere Roihi's* case (*supra*), would not disentitle B to the protection of s. 58 of the Land Transfer Act, 1915, under which B's title was indefeasible.

In short, so it appears to the writer, C could not prove that B had been guilty of actual dishonesty, and actual dishonesty must be sheeted home to the registered proprietor in order to deprive him of the protection afforded by s. 58 of the Land Transfer Act.

The first thing the student should note, I think, is that C could have protected his rights by registration of a lease in his favour or by caveat. The right to remove buildings is a common clause in a lease, and a clause conferring such a right would never be refused registration under the Land Transfer Act. On the contrary, C took no action under the Land Transfer Act to protect his rights.

But, if C's right against the land had not been capable of being protected by registration under the Land Transfer Act, then the decision would have had to be the other way. If the land had not been under the Land Transfer Act, again B would have lost the case, for, in either of these instances, the general law, and not the special provisions of the Land Transfer Act, would have applied. It is to be noted that the agreement for sale and purchase was expressly made subject to the lease from A to C, and that would undoubtedly have put B on inquiry as to the terms of that lease. Under the " old system," the lease could not have been registered, because it was for a term less than seven years. Under the general law, a purchaser who has notice of a tenancy has notice of the tenant's rights: *Garrow's Real Property in New Zealand*, 3rd Ed. 158. And the position in Equity appears to be that notice of an instrument is notice of its contents: *13 Halsbury's Laws of England*, 2nd Ed. 107.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The Annual Meeting of the Council of the New Zealand Law Society was held on March 18, 1949.

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

The Hon. Mr. Justice Hay.—The following resolution was carried:

> The Council of the New Zealand Law Society respectfully tenders to the Honourable Mr. Justice Hay its congratulations on his appointment to the Supreme Court Bench and trusts that he will have a long and happy period of judicial service.
>
> The Council desires also to express to him its deep gratitude for the invaluable service that he has rendered to the profession as a member of the Management Committee of the Solicitors' Fidelity Guarantee Fund for fifteen years and as a member of the Disciplinary Committee and of the Conveyancing Committee.

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

> At the Annual Meeting of this Society held on February 21 several members spoke of the debt we owe to the Standing Committee of the New Zealand Law Society for what they have done in the interests of the profession. All delegates could not fail to be impressed with the wonderful work done by them, particularly in connection with recent legislation, and it was resolved that a letter be sent asking you to convey to them the thanks and appreciation of this Society.

The following letter was received from the Southland District Law Society:

> Reference was made at my Annual Meeting held last week to the work carried out by the Standing Committee in Wellington, and the following resolution was carried unanimously:
>
> " That this meeting of members of the Southland District Law Society, recognizing the vast weight of work carried 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."

Election of Officers.—President: Mr. P. B. Cooke, K.C., the only nominee, was re-elected. *Vice-President*: Mr. A. H. Johnstone, K.C., the only nominee, was re-elected. *Hon. Treasurer*: Mr. A. T. Young, the only nominee, was re-elected. *Management Committee*: Messrs. A. H. Johnstone, K.C., D. Perry, D. R. Richmond, and A. T. Young, the only nominees, were elected. (Mr. E. P. Hay had resigned.) *Audit Committee*: Messrs. H. E. Anderson and J. R. E. Bennett, the only nominees, were re-elected. *Conveyancing Committee*: Messrs. J. R. E. Bennett, A. B. Buxton, and S. J. Castle, the only nominees, were elected. (Mr. E. P. Hay had resigned.) *The New Zealand Council of Law Reporting*: Messrs. A. M. Cousins and L. P. Leary were appointed members of the New Zealand Council of Law Reporting for a term of four years from March 7, 1949. *Disciplinary Committee*: Messrs. P. B. Cooke, K.C., H. R. Biss, L. D. Cotterill, W. H. Cunningham, M. R. Grant, A. N. Haggitt, J. B. Johnston, and L. P. Leary, the only nominees, were appointed the members of the Disciplinary Committee. (Mr. E. P. Hay had resigned.) *Library Committee*: *Judges' Library*: Messrs. T. P. Cleary and F. C. Spratt, the only nominees, were re-elected. *Rules Committee*: The President said he had been one of the nominees of the Society on the Rules Committee for about fifteen years, and that, in view of the demands made on his time by the general work of the Society, he asked to be relieved from acting as one of

its nominees on the Rules Committee. The Council expressed to the President its appreciation of his long service on the Rules Committee and its thanks for the work he had done on it. Messrs. W. J. Sim, K.C., T. P. Cleary, and W. P. Shorland, the only nominees, were nominated as members of the Rules Committee.

Habeas Corpus Procedure.—The Council had referred to the Law Revision Committee a suggestion from the Hamilton District Law Society that the Infants Act, 1908, or the Guardianship of Infants Act, 1926, be suitably amended to simplify the procedure necessary to obtain the custody of an infant when the question arises otherwise than in a matrimonial cause. A reply was received from the Secretary of the Law Revision Committee that a draft Bill giving effect to the Society's recommendation had been promoted by the Committee, and had been prepared and approved by it.

Actions Against the Crown.—The Secretary of the Law Revision Committee reported that a draft Bill covering actions against the Crown, with new procedure clauses, was still under consideration by the Committee.

Insurance.—The Secretary of the Law Revision Committee wrote that it had agreed that no further action be taken with regard to the proposal to provide by legislation that disclosures to an insurance agent be deemed to have been disclosures to his company.

Death Duties:—Valuation of Growing Crops.—The following letter was received from the Hawke's Bay Society:

> Members of my Society have been circularized with copies of a letter addressed by the Assistant Commissioner of Stamp Duties, Napier, to me as follows:
>
> "In this District the question of growing crops is often a material one, and difficulty has been experienced in arriving at a reasonable basis of computing the value of such crops for death and gift duty purposes.
>
> "The District Valuers have now been instructed by the Valuer-General of Land to furnish particulars of all growing crops when making revaluations of land, showing the areas and type of crop and indicating its probable value.
>
> "In order to supply the particulars that are required by the Valuers it will be necessary in the future to see that the second and third columns of the sixth and twelfth Schedules are completed in all cases. Would you please convey this requirement to the members of your Society.
>
> "An application for a revaluation made before the accounts in the estate are filed must be accompanied by the relevant sixth or twelfth Schedule, showing the required information.
>
> "It would be of great assistance to the District Valuers if applications for new valuations of lands are lodged as soon after the date of death or the date of the gift as possible."
>
> At the last meeting of my Council this matter was discussed. The feeling was that the inclusion of growing crops as an addition to the value of the land was objectionable in principle because the land is valued, having regard to the fact that it will grow crops which, until severed, remain part of the land. There are periods in the year when the land carries no crops; it may, for instance, be lying fallow, during wihch period its value would be less than the Government valuation by reason of the fact that it has no grass or other growth on it and rates and interest on the value are accruing.
>
> Assuming, however, that the value of growing crops can properly be included as an addition to the value of the land, my Council is strongly of the view that the valuation should show separately the amount added as the value of the crops.
>
> It is pointed out that crops are subject to the risk of partial or complete destruction from various causes and, unless the value of the land is shown separately from the value of the growing crops, the question of an appeal against any valuation would be rendered difficult.
>
> My Council, therefore, asks that the New Zealand Law Society consider this aspect of the matter with a view to making representations to the appropriate authorities.

It was resolved that the Standing Committee make representations to the Commissioner of Stamp Duties to the effect set out in the letter from Hawke's Bay. The following report was received from Messrs. J. R. E. Bennett and G. C. Phillips:

> We report having interviewed the Deputy Commissioner of Stamp Duties herein as instructed by the Council.
>
> The Deputy Commissioner assured us that when valuations of land are made for death-duty or gift-duty purposes, the value of growing crops is not included in the figures. District Valuers have, as is indicated by the circular submitted by the Hawke's Bay Society, instructions to furnish particulars of all growing crops when making revaluations of land, showing the area and type of crop, and indicating its probable value. The details are called for to ensure that all the property liable to assessment of duty is known to the authorities and to provide a check on the valuations of crops submitted to them. In practice, it was stated that these figures are furnished separately and are not included in the valuation of land figures.
>
> Attention was drawn to s. 2 of the Valuation of Land Act, 1925, as amended, which provides that "land" shall include "trees."

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

> Further to our letter of February 19, 1948, by s. 9 of the Finance Act, 1948, officers of the Corporation may be authorized to execute documents on its behalf. The Corporation has now given authority to its local Managers so that the request contained in your letter of October 2, 1946, may be complied with.

International Bar Association.—The following letter was received from the Secretary-General of the International Bar Association:

> The House of Deputies at our recent Hague Conference directed the Secretary-General to communicate with member organizations early in 1949 in order to obtain the nomination for Vice-President of the International Bar Association which, under Art. VII, s. 1, of the Constitution, each member organization is entitled to make, and to confirm nominations previously made. Would you be good enough to advise me at your early convenience of the Vice-Presidential nomination of your organization.
>
> The Executive Council is now scheduled to meet on April 23 and 24, 1949. At this meeting the place and time of The Hague Conference of the Legal Profession will be decided.
>
> The Secretary-General's proposed Report of the second Conference held at The Hague will also be submitted to the Executive Council for approval and it is expected that copies thereof will be distributed shortly thereafter.

It was resolved that, under Art. 7, s. 1, of the Constitution, the Council nominates Mr. P. B. Cooke, K.C., the President of the New Zealand Law Society, as Vice-President of the International Bar Association.

Juries Act, 1908.—The following letter was received from the Auckland Society:

> My Council has had brought to its notice some of the provisions of the Juries Act, 1908. By ss. 14 and 16 of that Act the Constables have in effect only the month of February for preparing their jury lists. Inquiries of the Police officers and from Court officials show that this is a highly inconvenient period for fixing the lists, and all inquiries showed that some period in the winter months would be more suitable and that this would enable the Constables to make a much more satisfactory and exhaustive survey of their respective Districts. My Council, after consideration, has recommended that the matter be placed before the Statutes Revision Committee for its consideration, with the suggestion that all dates mentioned for the dealing with jury lists be fixed for six months later in each year.
>
> A further question was also considered and that was the position of jurors who applied for and obtained exemption. At present, such a juror's name is not returned to the ballot-box for the remainder of the jury year. It is considered that, since reasons for exemption are usually temporary, the name should go back for balloting. This involves an amendment of s. 69, so that the parchment with the juror's name is returned to the box marked "Common Jurors in use" instead of into the box marked "Common Jurors in reserve."

It was resolved that representations be made to the Law Revision Committee on those lines.

The Secretary of the Law Revision Committee wrote that the Committee had approved the Law Society's recommendation.

Property Law Act, 1908.—The Secretary of the Law Revision Committee wrote as follows:

> It has been recommended (*a*) that s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, be repealed; (*b*) that it be provided that the notice required by s. 68 of the Property Law Act, 1908, and the notice required

by s. 3 of the Property Law Amendment Act, 1939, may be combined in one notice if the mortgagee so desires; (c) that the Court having jurisdiction to make orders under s. 8 of the Property Law Amendment Act, 1939, for directions as to service of notices; or orders dispensing with notices by the Supreme Court, or, where the amount secured is £2,000 or less, the Magistrates' Court.

Evidence Act, 1908.—The following letter from the Under-Secretary of Justice had been circulated to District Societies for their views:

> One of the matters which came before the Law Revision Committee at its recent meeting was a representation that the above section should be amended so as to make the spouse of an accused person a compellable witness for the prosecution in relation to crimes involving the graver types of assault against the children of the accused. It was contended in support of the submission that the Police were frequently frustrated in inquiries and prosecutions for this class of offence through the inability of the wife or husband to give evidence.
>
> While it was not prepared to adopt this suggestion, the Committee was nevertheless in favour of recommending legislation to provide that a wife or husband of a person accused of a crime within the class suggested should be a competent but not a compellable witness either for the prosecution or the defence and without the consent of the accused.
>
> Two alternative methods of achieving this result were then considered. The first was to adopt with such modifications as may be necessary the Criminal Evidence Act, 1898 (U.K.), and the second was to follow Cl. 10 of the Crimes Amendment Bill recently introduced in the Parliament of Victoria. The text of the latter clause (except for the parentheses which are inserted for convenience of reference) is as follows:
>
> "10. Notwithstanding any Act or rule of law to the contrary, where—
>
> "(a) A person is charged with any offence referred to in s. 40 (rape), s. 41 (attempt, or assault with intent to commit rape), s. 42 (unlawful carnal knowledge of girl under ten years of age), s. 43 (attempt, or assault with intent carnally to know girl under ten), s. 44 (carnal knowledge of girl between ten and sixteen), s. 48 (carnal knowledge of female over ten by father or ancestor), or s. 51 (indecent assault of female) of the principal Act, and
>
> "(b) The person against whom or in respect of whom the offence is alleged to have been committed is a girl under the age of sixteen years who is—
>
> "(i) A daughter or grand-daughter of the person charged or of his wife, whether such relationship is or is not traced through lawful wedlock; or
>
> "(ii) Under the care and protection of the person charged or his wife—
>
> then the wife of the person charged shall be a competent but not a compellable witness for the prosecution without the consent of the person charged."
>
> Before it passes any definite resolution on this matter, the Committee desires to have an expression of the opinion of your Society: (i) whether it agrees generally that the Committee's present proposal should be adopted; and, if so, (ii) which, if either, of the alternative methods is favoured.
>
> Would you please be good enough to ask your Committee to give its consideration to the matter with a view to letting me have the Society's comments in time for the Law Revision Committee's October meeting.

After some discussion of the matter, it was resolved that the Council favour the Law Revision Committee's recommending legislation to provide that a wife or husband of a person accused of a crime within the class suggested should be a competent but not a compellable witness either for the prosecution or the defence and without the consent of the accused. It was also resolved that the Council recommend that Cl. 10 of the Victorian Crimes Amendment Bill be followed.

The Secretary of the Law Revision Committee wrote as follows:—

> It was recommended that an amendment of the Evidence Act, 1908, on the lines of Clause 10 of the Crimes Amendment Bill, 1948 (Vic.), should be enacted.

LAND VALUATION COURT.

Summary of Judgments.

No. 6.—*In re* L. and I.

Costs—Compensation Award—Committee's Order for Costs—Award of Costs within Discretion of Committee—Amount dependent on Particular Circumstances.

In this case, appeals have been lodged both by the claimant and by the Crown in respect of an award of costs to the claimant of one hundred guineas together with witnesses' fees and expenses to be settled by the Registrar. The case is one in which the original claim was for £15,697 as against an offer by the Crown of £9,795. The Committee, after a hearing, awarded the sum of £12,877, being an increase of £3,082 over the amount offered by the Crown.

June 16, 1949. The Court said: "We have nothing before us to suggest that any other factors were considered by the Committee, or ought to be considered by the Court, in respect to costs, besides the figures which are above mentioned. We therefore deal with the matter on the assumption that the proceedings followed the normal course of a contested compensation claim involving the amounts in question.

"The principles which the Court proposes to follow in respect to the award of costs in compensation claims have been set out in our decision in *No. 5.—In re G., Ante*, p. 205. We there pointed out that the award of costs is a matter within the discretion of the Committee or of the Court respectively, and that the award of costs in any particular case must be dependent upon its particular circumstances. It has recently been necessary for the Court to fix costs in respect of four other successful claims for compensation in the Canterbury district, and, by comparison with the amounts allowed by the Court in those cases, and without attempting by implication to suggest that the amount allowed in any one case is necessarily to be governed by the amounts allowed in others, we think it proper to say that, upon the information before us, we think the Committee's award of one hundred guineas in the present instance is somewhat on the high side.

"The present issue, however, relates, not to the question whether the Court, if sitting as a Committee in the first instance, would have awarded one hundred guineas, but to whether the Court on appeal should interfere with the Committee's decision. This is a matter on which we are of opinion that we should be guided by authority. *26 Halsbury's Laws of England*, 2nd Ed. 96, para. 181, summarizes the principle which is applicable to the case in the following terms:

> "When a Judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, there is no ground for appeal.

One of the authorities quoted in support of this principle is *Donald Campbell and Co., Ltd.* v. *Pollak*, [1927] A.C. 732, where it was held by *Viscount Cave*, L.C.: 'an appeal from a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a *bona fide* appeal on merits; but . . . when it is alleged that the Court . . . has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard' (*ibid.*, 747, 748).

"In the present case, the Committee's award of compensation has been accepted by both parties, and there is no suggestion that the Committee misdirected itself in law as to the award of costs. In the circumstances, and notwithstanding that the Court, had it been dealing with the matter in the first instance, might have awarded a somewhat smaller sum, we find no justification for interfering with the Committee's proper exercise of its discretionary power to award costs, and both appeals will accordingly be dismissed."

PRACTICAL POINTS.

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

1. Sale of Land.—*Title subject to Part XIII of Land Act, 1924—Whether necessary to make Contract subject to Limitation of Area.*

QUESTION : My client, A, is about to sell his farm to B. I notice that the certificate of title for same is subject to Part XIII of the Land Act, 1924. I notice also that by s. 175 (8) of the Land Act, 1948, it is provided that, as from the commencement of that Act, any private land which is then subject to the provisions of Part XIII of the Land Act, 1924, shall cease to be so subject. Am I correct in assuming that it will not be necessary to make the contract subject to any statutory provisions as to limitation of area ?

ANSWER : The answer depends on the origin of A's title. If it was subject to Part XIII because it was alienated by the Crown since 1907, it will not be necessary to make the contract subject to any provision as to limitation of area. But, if the title was subject to Part XIII because, being formerly Maori land, it became European land since the coming into operation of the Native Land Act, 1909, then the land is still subject to the restrictions imposed by s. 248 of the Maori Land Act, 1931, and the contract must be made subject thereto; if not so made subject, B could repudiate the contract: *Schollum* v. *Francis*, [1930] N.Z.L.R. 504, and *Rayner* v. *The King*, [1930] N.Z.L.R. 441.

X.1.

2. Crown Lands.—*Sale of Crown Lease—Consents required.*

QUESTION : A is the registered proprietor of a deferred-payment licence issued under the Land Act, 1924. He is about to sell it to B for a pecuniary consideration. Will the consent of the Land Valuation Court be necessary ?

ANSWER : The consent of the Land Valuation Court will not be necessary, unless as a part of the same transaction A is also selling other land to B. But what will be necessary will be the *prior* consent of the Commissioner of Crown Lands under s. 89 of the Land Act, 1948. (Note the definition of "licence" in s. 2 of the Land Act, 1948 ; and see also s. 43 (2) (*i*) of the Servicemen's Settlement and Land Sales Act, 1943.)

If, however, other land is included in the contract, then the consent of the Land Valuation Court will be necessary, and an additional consent under the Land Act will not be necessary : see Servicemen's Settlement and Land Sales Amendment Act, 1946, s. 11.

X.1.

3. Land Valuation.—*Partition of Farm—Land fronting Highway less than Chain in Width—Necessity to dedicate Strip—Whether Consent of Land Valuation Court necessary—Stamp Duty and Registration Fees payable.*

QUESTION : A and B, two brothers, own a farm as tenants in common in equal shares. They have subdivided it into two Lots of approximately equal area and value. They are now in a position to take separate titles, A to get Lot 1, and B Lot 2. Each Lot will have a road frontage, but unfortunately the public road is only one half-chain in width at this locality. (*a*) Will A and B have to dedicate as a public highway a strip one quarter-chain in width ? (*b*) Will the consent of the Land Valuation Court be necessary to the transaction ? (*c*) What will be the stamp duty payable ? (*d*) What will be the registration fees payable ?

ANSWER : (*a*) The word "sale" has an extended and artificial meaning in ss. 125 and 128 of the Public Works Act, 1928, and the Supreme Court has held that it includes a partition : *Knight* v. *Wellington District Land Registrar*, (1907) 27 N.Z.L.R. 243. Therefore, the necessary strip must be dedicated as a highway unless this side of the existing road is exempted from s. 128 of the Public Works Act, 1928, either under that section or under the recent amendment, the Public Works Amendment Act, 1948, s. 25. (*b*) If, as it is assumed, no consideration by way of equality is passing between A and B, the consent of the Land Valuation Court does not appear necessary. The right to partition is inherent, and in the Servicemen's Settlement and Land Sales Act, 1943, there is no artificial or extended definition of "sale" as in ss. 125 and 128 of the Public Works Act, 1928. A partition of land is not a sale of land within the popular meaning of sale. (*c*) The stamp duty payable will be 15s. if both sides of the partition are included in the one transfer, and there is no reason why two transfers should be drawn : s. 102 of the Stamp Duties Act, 1923, and *Adams's Law of Stamp Duties in New Zealand*, 125, 126. (*d*) The registration fee will be £1, plus £2 new title fee.

X.1.

4. Bills of Sale.—*Transfer of Goods subject to Instrument by Way of Security—Consent of Grantor—Fresh Instrument from Transferee.*

QUESTION : We are acting for a grantee of an instrument by way of security over a motor-lorry. The grantor has asked for the grantee's consent to his selling the lorry to a third person. Is it necessary or desirable for the existing instrument to be discharged and a new instrument to be taken from the purchaser ? The margin of security is such that the grantee would be content to rely on the present grantor's personal covenant and the actual value of the lorry.

ANSWER : There might be a difficulty if the transferee of the motor-lorry were adjudicated bankrupt. Section 61 of the Bankruptcy Act, 1908, makes provision that the property of the bankrupt passing to the Assignee and divisible amongst his creditors comprises, *inter alia*, "any goods at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt by the consent and permission of the true owner, under such circumstances that the bankrupt is the true owner thereof: Provided that this paragraph shall not . . . (ii) Prejudice or affect any *bona fide* instrument affecting goods duly registered under any Act providing for the registration thereof" (s. 61 (*c*) (ii)).

This provision would appear to protect the instrument, although it is obvious that the Legislature would never have intended to protect an instrument in circumstances such as you outline. And, in a negative way, s. 18 (2) of the Chattels Transfer Act, 1924, expressly gives a protection which would appear to fall short of that provided by s. 61 (*c*) (ii), in that the chattels are probably only taken out of the possession, order, and disposition of the original grantor by registration.

The same difficulty might have arisen had the original grantor, instead of desiring to sell the lorry subject to the instrument, bailed it.

In cases similar to the above, perhaps *ex abundanti cautela*, the usual practice is to take a fresh instrument from the transferee, making it collateral with the existing instrument, and having the latter registered for four months as a protection under s. 79 (2) of the Bankruptcy Act, 1908, and, in the case of the grantor desiring to bail the chattel, the bailment is drawn with the grantee of the instrument by way of security as bailor, and the grantor as a confirming and requesting party, and the bailment is then registered. It is thought that the action mentioned would, in either case, take the chattel out of any danger of passing in bankruptcy.

A.2.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Safety Measures.—In *Giant Colour Co., Ltd.* v. *Kac*, heard before Northcroft, J., at Wellington earlier this month, the defendant, an industrial chemist from Lithuania, drew a rebuke from the Bench on the manner in which he was answering questions in cross-examination, whereon he remarked that he was nervous because counsel had in front of him the defendant's book of private formulae, and he was afraid that counsel would copy them out. "The danger would be greater," said counsel drily, "if I could understand them." Avory, J., when at the Bar, suffered a similar suspicion in the famous probate action known as the *Druce-Portland* case. One of the witnesses claimed to have gone to England from Christchurch in order to give evidence, packing ten letters (seven of which she said were from Charles Dickens), but these had been snatched from her in the street by a mysterious stranger. She had saved, however, a brooch, which she alleged the Duke of Portland had given her. "I'm wearing it," she said, "and I'm not going to take it off. I have had a number of things stolen already." With great reluctance she handed it to her own counsel, asking for an assurance that he would not hand it to Avory, to whom he had asked her to entrust it for examination. At this stage the Magistrate took a hand. "If you will allow Mr. Avory to see it," he pleaded, "I will personally go surety for him."

Farm Tenancies.—The position of the small tenant-farmer against whom possession is sought is far from satisfactory in New Zealand at the present time. He is deprived of the protection of the Fair Rents Acts by reason of the fact that any area greater than two or three acres brings the tenure outside the definition of "dwelling," and, if the use to which he puts the land is primarily agricultural, or if he keeps bees or poultry, he puts himself beyond the Economic Stabilization Act, 1948. On the other hand, the English Agricultural Holdings Act, 1948, gives security of tenure by restricting the operation of notices to quit, to which, in the first instance, the Minister of Agriculture must give his consent. He has to be initially satisfied that the tenant has been guilty of bad husbandry or that the interests of the industry as a whole require that he should be ejected from his holdings. With certain exceptions, the tenant can object to the notice to quit, where this is permitted, within one month of receiving it. Another ground is that possession is desirable for the purposes of agriculture experiment or research, but the landlord under that ground has apparently to prove something more than a desire to pursue private and personal experimentation.

Surprising the Witness.—The other day, in one of our Courts, counsel, with an air of minor triumph, asked a witness whether he would be "surprised to know" that such-and-such was the fact. Unfortunately, counsel had been himself misinformed by his client, and the witness, who seemed to know the real situation, replied that he would, indeed, be "surprised to know anything of the sort." Scriblex, having had his share of embarrassments of this kind, felt tempted to solace counsel by telling him of the habit of Sir John Coleridge in the *Tichborne* case of asking Orton whether "he would be surprised to hear" this or that. It is said that the actual form of the question was fixed in consultation with Bowen, the object being to prevent the crafty claimant from guessing what answer was the proper one to give, in the light of the questions that followed. Its repetition, however, some hundreds of times caused it to become a popular catchword and pass into then current speech. An ironical corollary is to be found in the story of Coleridge, leaving the Court in a towering rage towards the end of this marathon trial. He took a hansom cab, and, at the end of the journey, tendered the cabby a shilling as the fare. "Sir," said the cabby, "would yer be 's'prised to 'ear' that its heighteenpence?" Sir John's response to the question was, to say the least, unsporting. Claiming to be personally affronted, he gave the Jehu in charge—and there he remained until able to convince the Police that the identity of the famous fare was unknown to him and "no 'arm was intended."

Counsel's Fees.—When members of the profession meet to-day, one of the most frequent topics is the problem of the "overhead," which is assuming the unpleasant characteristics of a juggernaut. Consequently, the following observations ((1949) *207 Law Times Jo.*) of that urbane and former Master, Sir William Ball, are worthy of consideration:

> Apart from taxation there is something else, characteristic of the times in which we live, to which those who would interfere with the right of counsel to name his own fee ought (in my view) to have regard. There has been a universal rise in wages and salaries of all kinds. Every artisan has had his wages increased: in some cases doubled if not more than doubled. Professional men have put up their fees. An anaesthetist, for example, who would have charged £2 2s. in 1939 is now charging £8 8s. Why should he not? And we have but recently heard that the Civil Servant in the higher grade is to have a substantial addition to his salary. Why should those who practise at the Bar not be entitled to vary their charges according to the exigency of the times?

Scriblex directs them to the attention of such Registrars as consider that they should stem the rising cost of living by assessing the value of the services of counsel to the litigant who employs him.

Volenti non fit Injuria.—Scriblex is indebted to *Courier* for this story of Sergeant A. M. Sullivan, K.C., last of the old Sergeants-at-Law of the Irish Bar, who at the age of seventy-eight has now decided to retire from active legal practice. The story, which will appeal at least to the common-law advocate, concerns his appearance for an Irish labourer injured at work and refused compensation. Unsuccessful in every Court, the plaintiff reached the House of Lords, where considerable argument centred round the *Volenti non fit injuria* doctrine. The appellant, a native of remote Ballygullion, had insisted upon being present, and had sat throughout "as expressionless as an Irish potato." During the third day, one of the Law Lords cut Sullivan short with: "But surely your client must be taken to have heard of the doctrine *volenti non fit injuria?*" "My Lord," replied Sullivan, gravely, "in Ballygullion they talk of little else."

Continued from cover i.

LEGAL ANNOUNCEMENTS

LEGAL NOTICE.

NOTICE is hereby given that the legal firm of Messieurs GIFFORD AND ROBINSON, Barristers and Solicitors, Napier, has been dissolved by mutual consent as from the 30th June, 1949. Each partner will carry on the practice of his profession on his own account, in the same premises as from the above date.

The Waipukurau Branch will be closed, but Mr. Robinson will visit Clive as formerly.

T. H. R. GIFFORD.
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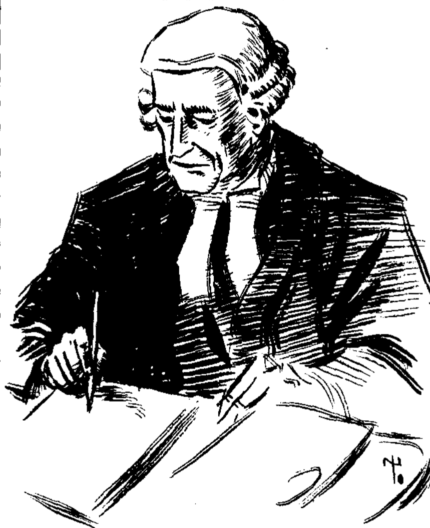

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