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PRACTICE: "VIEW" BY A JURY.

DIFFERENT considerations apply to a view of the *locus in quo* by a jury and to a view by a Judge. Here, we propose to consider the position in New Zealand regarding a view by a jury.

In civil proceedings only, R. 478 of the Code of Civil Procedure applies. This, so far as relevant to the matter under consideration, is as follows:

> The Court, on the application of any party to an action, on such terms as may seem just, may make any order for the . . . inspection of any property being the subject of such action, and for . . . the purposes aforesaid may authorize any person or persons to enter upon or into any land or building in the possession of any party to such action, and . . . may authorize any samples to be taken, or any observation, measurement, or plans to be made, or experiment to be tried, which may seem necessary or expedient for the purposes of obtaining full information or evidence.

The corresponding English rule is R.S.C., O. 50, r. 3: *1948 Annual Practice*, 926; and, by O. 50, r. 5, it is applied to a view by a jury (*Ibid.*, 928, 929). Its extent is explained in *Stoke* v. *Robinson*, (1889) 6 T.L.R. 31; but it does not extend to include a method of manufacture: *Tudor Accumulator Co., Ltd.* v. *China Mutual Steam Navigation Co., Ltd.*, [1930] W.N. 200; as, *per* Greer, L.J., a view is limited to the inspection of some physical thing.

Under R. 479 of the Code of Civil Procedure, an application for an order to view may be made to the Court by any party. If the application is by the plaintiff, it may be made at any time after the issue of the writ of summons; and, if it is by the defendant, it may be made at any time after he has filed his statement of defence. As a rule, the application should be made by notice, but it may also be made *ex parte* on cause being shown: *Hennessey and Co.* v. *Rohmann, Osborne, and Co.*, (1877) 36 L.T. 51.

An application can be made in Court, and it is usually made before or during the trial of the action by agreement between the parties; but it will not be made where a party has neither possession of nor property in the subject-matter of the view, or the person having such possession or property is not before the Court: *Reid and Glasgow* v. *Powers*, (1884) 28 Sol. Jo. 653; *Garrard* v. *Edge and Sons*, (1889) 58 L.J. Ch. 397.

In *Frank Harris and Co., Ltd.* v. *Rora Hakaraia*, (1914) 33 N.Z.L.R. 1074, 1088, the Court of Appeal, in a judgment delivered by Edwards, J., said that R. 478 of the Code of Civil Procedure appeared sufficient authority for a view (or inspection) by a jury in civil proceedings, and it would be as well to adopt the express English rules upon this subject—a matter which has so far escaped the notice of the Rules Committee.

The provisions of ss. 127 to 139 of the Juries Act, 1908, apply to both criminal and civil proceedings.

Section 127, the terms of which seem somewhat archaic, is as follows:

> When a view is desired in any case, either civil or criminal, depending in the Supreme Court, either party may obtain a rule or order of such Court containing the usual terms, and commanding the Sheriff to have six or more (or, in case of a jury of four, three) of the jurors named in such rule or order, or in the panel thereto annexed (who shall be mutually consented to by the parties, or, if they cannot agree, shall be nominated by the Sheriff), at some place to be named in such rule or order, and at some convenient time before the trial.

Section 128 provides that two persons (known in England as "showers") are to be appointed by the Court to show to the jury the real or personal property:

> the view of which may be proper or necessary in order to the better understanding of the evidence that may be given on such trial, or material to the proper determination of the question in dispute.

The last-mentioned section is copied from s. 23 of the Juries Act, 1825 (6 Geo. 4, c. 50) (*10 Halsbury's Complete Statutes of England*, 51, 54), but the words "or material to the proper determination of the question in dispute" are not included in the English section.

In the judgment of the Court of Appeal, delivered by Edwards, J., in *Frank Harris and Co., Ltd.* v. *Rora Hakaraia* (*supra*), at p. 1088, the Court said:

> We are not prepared to say what the Legislature may have intended by these words, but we are satisfied that the intention was not to give the jury power, as the result of a view by some of them, to disregard the sworn evidence of the witnesses at the trial. To effect such a startling revolution in the law of evidence express and unequivocal words would, in our opinion, be necessary.
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> These provisions of the Juries Act, 1908, have been in force since the Act of 1868, but they have never, so far as we are aware, been used. If used they would be mischievous, and they should be repealed. Orders for a view are frequently made by consent of the parties, but always for a view by the whole of the jury. Where cases are tried before a Judge alone an inspection by the Judge is also a common occurrence. Rule 478 of the Code of Civil Procedure appears to be a sufficient authority for such inspection either by the jury or by the Judge, but it would be as well to adopt the express English rules upon this subject.
>
> In our opinion there is no reason to doubt that a view, whether by a jury or by a Judge, is, as was laid down by the Court of Appeal in England in *London General Omnibus Co.* v. *Lavell* ([1901] 1 Ch. 135) "for the purpose of enabling

the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." In the judgment in an American case, *Keller* v. *Harrison* ((1913) Am. Ann. Cas. 300, 303), a number of cases are cited which show that in this respect the rule is the same in the United States as in England. If it were otherwise it would certainly never be safe to order a view by a jury.

In *Hakaraia's* case, it was held that a Court can order a new trial upon the ground that the verdict of the jury is against the weight of evidence, notwithstanding the fact that the jury have viewed the subject-matter. It was further held that a view is for the purpose of enabling the jury to understand the questions raised and to follow and apply the evidence, and they are not entitled, as a result of the view, to disregard the sworn testimony of the witnesses at the trial. In that case, on an appeal from the order of Chapman, J., on a motion for a new trial on the ground that the answers of the jury to the issues submitted to them were against the weight of evidence, there was adduced a large body of expert evidence that the battle-scenes, as executed by the appellant company on the base of a monument, the cost of which was in issue, were not merely contemptible in design and execution, but they were depicted on material of a flimsy and perishable character ; and there was no evidence to the contrary. To meet this point, the appellants' counsel relied upon the inspection of the monument by the jury, and he contended that upon that inspection the jury were justified in ignoring the evidence of the witnesses and in finding that the monument, including the battle-scenes and statue, had been erected in accordance with the contract. He relied upon this point on the case of *Butchart* v. *Dodds*, (1874) 12 N.S.W. S.C.R. (L.) 371. The judgment of the Court, referring to that submission, said :

> In *Butchart* v. *Dodds*, the question for the determination of the jury was as to whether or not a road or street laid out by a private person on the subdivision for sale of the whole of a parcel of land possessed by him had been dedicated to the public as a highway. There was evidence which was held by the Court to be sufficient to go to the jury that the land had been so dedicated. Amongst the facts in dispute was whether or not the strip of land alleged to have been dedicated had at any time been fenced upon both sides, and it was alleged that the post-holes were still visible. The jury viewed the locality, and found that the land had been dedicated as a road. *Sir James Martin*, C.J., thought that an inspection of the locality might assist the jury in coming to a conclusion as to whether or not the strip of land had been fenced on both sides, and he treated their inspection of the locality as being in the nature of an aid to otherwise flimsy evidence. Mr. Justice *Cheeke* did not mention the view in his judgment. The only expression of opinion which seems to really assist the argument of counsel for the appellants is that of Mr. Justice *Hargrave*, who said, " In addition to other evidence the jury had a view of the *locus*, and I know of no authority for granting a new trial after a view has been had and there has been no misdirection on the part of the Judge."
>
> The judgments in this case were unconsidered, and did not depend upon any principle which can be extracted from the observation which we have quoted from Mr. Justice *Hargrave's* judgment. We cannot regard that observation as being an authority in support of the proposition for which counsel for the appellants has contended, nor do the provisions of ss. 127 to 139 of the Juries Act, 1908, support that proposition.

The Court, finding that it had power to enter such judgment as should have been entered by the learned Judge in the Court below, varied his judgment by directing judgment to be entered for the respondent (defendant).

In *Pinner* v. *Martin's Boot and Shoe Stores, Ltd.*, [1941] N.Z.L.R. 55, Sir Michael Myers, C.J., in his judgment, referred to that part of the judgment in *Frank Harris and Co., Ltd.* v. *Rora Hakaraia* (*cit. supra*) where the Court said that the view, whether by a jury or a Judge, is " for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." Upon that statement, the learned Chief Justice, at p. 70, l. 31, observed :

> With the greatest respect, this does not seem to me to be an entirely satisfactory or sufficient statement, but I admit the difficulty of more precise expression and the still greater difficulty of the tribunal—particularly if it be a jury—being kept within the limits intended to be laid down.

In *Pinner's* case, at p. 74, Blair, J., said that the Court of Appeal in *Hakaraia's* case had observed that R. 478 of the Code of Civil Procedure appeared to be sufficient authority for inspection either by the Judge or jury. He continued :

> I confess to doubts as to whether R. 478 applies to jury views, but the Court of Appeal was speaking of consent views, and such in civil actions would really not need a Rule to support them because the consent would be sufficient in itself.
>
> If consent be the basis, and in practice it is, then the purpose and limitations of the view could always be the subject-matter of consent. The view could be limited to the inspecting of one article or one part of an article or it could be limited to inspection of only one of, say, half a dozen articles relative to the claim. I can see no reason why the jury's view could not be for the purpose of verifying from personal observation whether the evidence of one side or the other was true.
>
> It frequently happens that in accident cases and such like, working models made to scale are produced to show the operation of a particular machine or device. I confess I cannot see why it can be suggested that different principles are to apply to evidence given by an expert witness demonstrating in Court with a working scale model and the same witness demonstrating or explaining in Court but without a model and the jury then being taken to the place where the actual machine is operating and the jury then seeing it in operation. In each case the jury would be entitled to act upon the evidence of their own eyes, helped of course by expert evidence in explanation.

In His Honour's view, *Hakaraia's* case went no further than to lay down a proposition applicable to cases circumstanced as that was, and it could not be taken as an authority that in no case can a jury act upon the evidence of its own eyes. He proceeded, at p. 76 :

> The purpose of an inspection must depend upon the object of the parties in their agreement to have an inspection. Suppose in a case there is conflict of testimony as to whether there is a lamp-post at a particular corner. If the parties agree that there should be a view, then obviously the purpose of that view is to enable the jury from the evidence of its own eyes to say which party is speaking the truth. What possible use would it be for a Judge to direct a jury that in such a case they were not to depend on their own eyes but were to use a view to enable them " to follow the evidence, and apply the evidence " ? Many cases come before the Courts relating to machinery or to water and drainage where plans are produced. Many people of a high degree of education are quite unable to follow plans of machinery or plans showing the contour of lands or roads. But with the aid of such plans explained by experts upon the ground itself, or in front of the actual machine, juries or Judges are enabled to follow the plans. That is the typical case where the purpose of a view is to enable a jury to follow evidence which otherwise it could not follow at all.

His Honour said that *Hakaraia's* case was one where experts—artists, they were—had given evidence as to the artistic value of a large work of sculpture. The inspection in that case by no possible conception could be treated as an agreement by the parties to accept a jury of laymen as being by some system of magic converted into a jury of sculptors. In the omnibus case, the Judge was in effect invited to look at the

rival omnibuses so as to see how each was lettered and painted; but to one at least of the parties it was plain that the Judge's function was to listen to the evidence and apply that to the evidence of his own eyes derived from the inspection, and then decide the question whether the defendant's omnibus had actually deceived the omnibus-using public or was calculated so to do. What the learned Judge did in that case was to satisfy himself from personal inspection and nothing else that, as got up, it was calculated to deceive him.

His Honour, at p. 77, concluded:

> *Hakaraia's* case decided, and if I may with respect say so correctly decided, that a jury, because it had a view of something the nature of which depended solely on the evidence of experts, did not thereby become a jury of experts entitled entirely to ignore undisputed expert evidence. But my complaint is that it is quoted as an alleged binding authority for the proposition that it is not competent for a Judge or a jury upon a view to rely upon the evidence of his or its own eyes, and that all a jury is entitled to do upon a view is "to follow the evidence and apply the evidence." Those words have a meaning in a limited class of cases, but in the majority of cases those words if put to a jury as the limit of their functions on a view would be meaningless.
>
> There have been and still will be cases where the only purpose of a view is to enable a jury to follow the evidence. *Hakaraia's* case was one of these, and cases involving the following of the operations of elaborate machinery or processes are other examples. But there are innumerable cases where the purpose of a view is to decide a simple question of fact, such, for instance, as a question as to whether point X can be seen when standing at point Y, which are eminently cases where the sole purpose of a view is for the jury to decide upon the evidence of its own eyes.

Those observations are not in accord with authority in England or in Canada, as we shall see later.

There has been no amendment of the sections in the Juries Act, 1908, to which the Court of Appeal in *Hakaraia's* case took exception; and they have remained a dead letter ever since.

The usual procedure in New Zealand is to apply, during the course of the trial, for a view; and such an application, if unopposed, is usually granted by the presiding Judge. It is rarely opposed.

Before passing on to some considerations relating to a view by a jury in a criminal trial, we may look at s. 131, which is as follows:

> The proceedings upon such rule or order [for a view by a jury in either a civil or criminal case depending in the Supreme Court] shall be the same as the proceedings heretofore had in England under a writ of view, or as near thereto as may be.

At common law, there was no power enabling a Court of Assize to order a view, except by consent, even in a civil case. The "proceedings heretofore had in England" are proceedings before the date of the passing of the Juries Act, 1908, which became law on August 4, 1908, though the sections in that Act now under notice had been first enacted as ss. 30 to 32 of the Juries Act, 1868; but see s. 8 of the Acts Interpretation Act, 1924.

The common law was supplemented by the Statute 4 and 5 Anne, c. 16, which in terms applied "in any action" at Westminster (which phrase would ordinarily not relate to a proceeding by indictment), and authorized the Court to order special writs commanding the selection of six out of the jurors therein named to whom the matters controverted should be shown by two persons appointed by the Court: *cf.* ss. 127 and 128 of the Juries Act, 1908 (*cit. supra*).

Lord Mansfield stated the Rules for Views in a memorandum appended to *R.* v. *Strong*, (1757) 1 Burr. 251, 253, 254; 97 E.R. 299, 300, 301, as follows:

> Before the 4 and 5 Anne c. 16, s. 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or Judge, at the trial, "that the nature of the question made a view not only proper but necessary": for, the Judges at the Assizes were not to give way to the delay and expense of a view, unless they saw that the case could not be understood without one. However, it often happened in fact, that upon the desire of either party, causes were put off for want of a view, upon specious allegations from the nature of the question, "that a view was proper"; without going into the proof, so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which, the 4 and 5 Anne, c. 16, s. 8, empowered the Courts at Westminster to grant a view in the first instance, previous to the trial . . . Nothing can be plainer than the 4 and 5 Anne, c. 16, s. 8. The Courts are not bound to grant a view of course; the Act only says "they may order it, where it *shall* appear to them that it will be proper and necessary" . . . We are all clearly of opinion that the Act of Parliament meant a view should not be granted, unless the Court was satisfied that it was proper and necessary. The abuse to which they are now perverted makes this caution our indispensable duty: and therefore, upon every motion for a view, we will hear both parties, and examine (upon all the circumstances which shall be laid before us on both sides) into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice.

The Juries Act, 1825 (6 Geo. 4, c. 50) (*10 Halsbury's Complete Statutes of England*, 50), by ss. 23 and 24 provided that in any case civil or criminal wherever

> it shall appear . . . that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial,

an order may appoint six or more, to be named by consent, or, upon disagreement, by the Sheriff, and the place in question shown them by two persons appointed by the Court; and

> those men who shall have had the view, or such of them as shall adpear upon the jury to try the issue, shall be first sworn,

and only so many added as are needed to make up twelve.

The Common Law Procedure Act, 1852 (15 and 16 Vict., c. 76) (*10 Halsbury's Complete Statutes of England*, 67), by s. 114, provided that an order of a Judge for a view was sufficient without the issue of a formal writ of view.

Such was the procedure in England "under a writ of view," which s. 131 of the Juries Act, 1908, states is to be the procedure in respect of a view in New Zealand, "or as near thereto as may be."

The whole question of a revision of ss. 127 to 139 of the Juries Act, 1908, is long overdue; and it is hoped that the Law Revision Committee will extend to them some of their commendable oversight.

As we have seen, ss. 127 to 139 of the Juries Act, 1908, apply to criminal as well as to civil proceedings; and, in New Zealand, the Court may order a view at any time, even though the evidence on one or both sides has been closed, if in the opinion of the Court or Judge such a course is necessary for the attainment of justice: s. 139.

When a view is allowed in a criminal case, the same rules will, in general, prevail as are observable in civil proceedings: *1 Chitty's Criminal Law*, 483. In *Reg.* v. *Martin and Webb*, (1872) 12 Cox C.C. 204, it

was held that the Judge may adjourn the Court to enable the jury to have the view, even after the summing-up. The jury may not communicate with witnesses during such a view: *Ibid.*, 207. In fact, the application for the view may be made at any time before the verdict: *Bowen-Rowlands on Criminal Proceedings*, 2nd Ed. 252.

In England, the right to order a view was conferred by the Juries Act, 1825 (6 Geo. 4, c. 50), on "any of the Courts of Record at Westminster, or in the Counties Palatine, or Great Sessions in Wales."

In *Reg.* v. *Whalley*, (1847) 2 Car. and Kir. 376; 2 Cox C.C. 231, which was a trial for rape, the prisoner's counsel made application, under s. 23 of the Juries Act, 1825 (from which the cited sections of our Juries Act, 1908, derive), that the jury should see the place where the offence was said to have been committed, and urged that the place was so near to the Court that the jury could have a view without inconvenience. The learned trial Judge allowed the view, though the prosecutor did not consent. Graves, who wrote the fourth edition of *Russell on Crimes* which O'Hagan, J., in *Reg.* v. *Fanning*, (1866) 17 I.C.L.R. 289, 305, termed "the latest and most authoritative text-book on crimes," said that, under the Juries Act, 1825, it was doubtful whether, in a criminal case at the Assizes, there could be a view without the consent of the prosecutor; but in *Reg.* v. *Whalley* the Court seems to have considered there was jurisdiction at common law for the Court to order a view: *Odgers on Evidence*, 384. If that be so, then s. 139 of the Juries Act, 1908, is no more than declaratory of the common law.

In Canada, the English statutes to which we have referred are in force with respect to views by juries. A very clear exposition of the proper practice appears in the latest Canadian case on this point, *Sederquest* v. *Ryan*, [1939] 4 D.L.R. 52, 54, where Grimmer, J., said:

> The established rule of law in respect to "views" is that no evidence shall be given on either side before the jury, the view being only an aid in applying the evidence. In several United States Courts as a matter of procedure "view" has been described as a method conducted in the absence of the Court, as an aid in the ascertainment of the truth from the physical act of inspection which does not require the exercise of the judicial powers of the Court at the time for its proper performance. The purpose of the view has been defined as being merely to make the jurors comprehend more clearly, by the aid of physical objects, the evidence already received, or in other words that it is only to aid in applying the evidence given on the trial.

His Honour then cited *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135, 139, and the statement of Lord Alverstone, L.C.J., made with the approval of the other members of the Court (*cit. supra*).

Again, in *Bennett* v. *Smith*, (1877) 17 N.B.R. 27, 33, Wetmore, J., with the approval of the Court, stated:

> The rule of law is no evidence shall be given on either side before the jury of view. The view is only to aid in applying the evidence given on the trial.

The practice in the United States is the same: see *Chute* v. *State of Minnesota*, (1872) 19 Minn. 271, 281, *Brakken* v. *Minneapolis and St. Louis Railway Co.*, (1881) 29 Minn. 41, 43, and *Close* v. *Samm*, (1869) 27 Ia. 503, 507.

In respect of a view by a jury, there does not appear, in the English or Canadian reports or our own, to be any case which holds the contrary to *London General Omnibus Co.* v. *Lavell*. It has always been held that the object of a view by a jury in a case, civil or criminal, is that expressed in the original statute, 4 Anne, c. 16, s. 8, "in order to their better understanding the evidence."

As we have seen, s. 131 of the Juries Act, 1908, provides that the proceedings on a view shall be the same as the proceedings had in England before 1908 under a writ of view, or as near thereto as may be.

From what has been said above, it appears that, whatever may have been the rule at common law, as to which there seems to be some doubt, the modern practice of view began in 1705 with the statute of 4 Anne, c. 16, which, by s. 8, provided for a view by the jury of "messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trial of such issues." Twenty-five years later, the statute 3 Geo. 2, c. 25, followed, and then the Juries Act, 1825, which, by s. 23, made a similar provision with the same object "in order to their better understanding the evidence that may be given upon the trial" in any civil or criminal case; and, subject, in civil cases, to R. 478 of the Code of Civil Procedure, s. 131 of the Juries Act, 1908, should, we submit, be so read.

In a later issue, we propose to consider a view by a Judge, and also the position of Magistrates in respect of a view.

SUMMARY OF RECENT LAW.

ANNUAL HOLIDAYS.

Offences—False Statement on Worker's Holiday Card—Worker charged with making False Statement by altering Date to obtain Payment before Due Date—Offence of False Statement applicable to Employers only—Annual Holidays Act, 1944, s. 13 (1) (b)—Justices—Information charging Offence under Annual Holidays Act, 1944—Form of Procedure for recovering Penalty prescribed by that Statute—Information under Justices of the Peace Act, 1927, not applicable—"Other form or mode of procedure"—Justices of the Peace Act, 1927, s. 389—Annual Holidays Act, 1944, s. 13 (3). A worker was charged with making a false statement, with intent to deceive, by altering the date of employment for the purpose of obtaining payment before the due date. He had received a worker's holiday card from his employer, and altered the card so that the period of employment appeared to have occurred in 1947 instead of in 1948, with the result that he had received payment about five months before the date fixed by statute. *Held*, 1. That the provisions of s. 13 (1) (*b*) of the Annual Holidays Act, 1944, are directed to employers who fail to fulfil their obligations under s. 5 (3) of the statute, and they have no application to a worker who, having received a holiday card, makes an alteration thereto in circumstances which may amount to commission of the crime of forgery. 2. That s. 13 (3) of the Annual Holidays Act, 1944, prescribes a form or mode of procedure other than is prescribed by the Justices of the Peace Act, 1927; and that s. 389 of the Justices of the Peace Act, 1927, had no application to the offence charged. *Walton* v. *Monohan*. (Auckland. August 1, 1949. Luxford, S.M.)

CONFLICT OF LAWS.

Points in Practice. *99 Law Journal*, 410.

CONTRACT.

Imperfect Contract ("subject to contract"). *93 Solicitors' Journal*, 382.

Imperfect Contract ("to be agreed"). *93 Solicitors' Journal*, 398.

CONVEYANCING.

Defective Execution of Powers. *93 Solicitors' Journal*, 402.

Infants' Settlements. *12 Conveyancing and Property Lawyer*, 181.

Right of Support. (J. F. Garner.) *12 Conveyancing and Property Lawyer*, 280.

CRIMINAL LAW.

Recognizance—Estreatment of Bail—Court's Power to mitigate Debt—Satisfaction entered for Part of Amount of Recognizance—Crown Suits Act, 1908, s. 7. Section 7 of the Crown Suits Act, 1908, is intended to give to the Court the powers previously exercised by the Court of Exchequer, including the power to mitigate debts arising upon recognizances, and to enter satisfaction of part of the judgment for the amount of the recognizance. (*R.* v. *Cartman*, (1823) 11 Price 637; 147 E.R. 589, applied.) (*In re King and Scott*, [1931] N.Z.L.R. 162, *R.* v. *Sangiovanni*, (1904) 68 J.P. 55, and *R.* v. *Stewart*, (1931) 23 Cr.App.R. 82, referred to.) *R.* v. *Fox and Another*. (S.C. Wellington. July 15, 1949. Gresson, J.)

DESERTION.

Termination—No Intention by Deserting Spouse to resume Matrimonial Home—Wife living as Fellow-lodger in Same House as Husband. Desertion, once established, continues until it is proved to have been brought to an end; the original desertion in the present case was not brought to an end by the parties merely living in the same house in the circumstances in which they did, which showed no intention by the wife to resume a matrimonial home; and the husband was entitled to a decree on the ground of desertion. (*Hopes* v. *Hopes*, [1948] 2 All E.R. 920, discussed and distinguished.) *Bartram* v. *Bartram*, [1949] 2 All E.R. 270 (C.A.).

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

DESTITUTE PERSONS.

Blood-groups and Disputed Parentage. (R. L. Denton.) *27 Canadian Bar Review*, 537.

Maintenance Orders (Facilities for Enforcement). *93 Solicitors' Journal*, 381.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion without Cause. *93 Solicitors' Journal*, 367.

"Mental Cruelty." *93 Solicitors' Journal*, 400.

Recent Developments in Nullity of Marriage. (R. H. Graveson.) *12 Conveyancing and Property Lawyer*, 185.

Wilful Refusal. *93 Solicitors' Journal*, 400.

EASEMENTS.

Easements, Rights, and Privileges. (J. F. Garner.) *12 Conveyancing and Property Lawyer*, 202.

ESTOPPEL.

Negotiations leading Other Party to Contract to suppose Strict Rights thereunder waived—Inequitable to allow Enforcement of Such Rights—Practice—Injunction—Questions for Decision in Action at Law—Equitable Jurisdiction invoked—Terms of Contract as to Notice—Enforcement of Exact Compliance inequitable. If parties who have entered into definite and distinct terms involving certain legal results afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. (*Hughes* v. *Metropolitan Railway Co.*, (1877) 2 App. Cas. 439, followed.) (*Birmingham and District Land Co.* v. *London and North Western Railway Co.*, (1888) 40 Ch.D. 268, referred to.) Where purely equitable jurisdiction is sought to be invoked by seeking merely a writ of injunction, notwithstanding that there are questions which require to be decided in an action at law, it is inequitable, having regard to the correspondence and course of dealing between the parties, that exact compliance with the terms of their agreement as to notice should be asserted by the plaintiff by means of an injunction against the defendant, founding the right to this on no other basis than the allegation that the defendant's term had come to an end. *Walker* v. *Akatarawa Sawmilling Co., Ltd.* (S.C. Wellington. April 13, 1949. Gresson, J.)

EXECUTORS AND ADMINISTRATORS.

Powers and Duties of Co-executors. (H. Walker.) *23 Australian Law Journal*, 123.

FAMILY PROTECTION.

Applications out of Time. (D. H. Laidlaw.) *23 Australian Law Journal*, 120.

INCOME-TAX.

Additional Assessments. *93 Solicitors' Journal*, 383.

LAND AGENTS.

Agents' Commission. *93 Solicitors' Journal*, 384.

LANDLORD AND TENANT.

Dangerous Addition to Premises. *93 Solicitors' Journal*, 385.

Tests of Exclusive Possession. *93 Solicitors' Journal*, 269.

LAW PRACTITIONERS.

The Legal Profession and Income-tax. *23 Australian Law Journal*, 117.

MAGISTRATES' COURTS.

Practice—Change of Parties—Judgment against Deceased Person—Application for Order substituting Deceased's Widow as Defendant—Proceedings not pending at Time of Death of Deceased—Correct Form of Application indicated—Magistrates' Courts Rules, 1948, rr. 65, 67, 239. The plaintiff obtained judgment against M. on December 5, 1944. M. died on April 25, 1948, and letters of administration were granted to his widow. On application by the plaintiff, under rr. 65 and 67 of the Magistrates' Courts Rules, 1948, for an order substituting the widow as the defendant, *Held*, dismissing the application, That rr. 65 and 67 apply only to proceedings which are pending at the time of the death or bankruptcy of a party, and not to proceedings which have been the subject of the final judgment before such death or bankruptcy. *Semble*, As the purpose of r. 239 of the Magistrates' Courts Rules, 1948, is to enable a party claiming the right to enforce a judgment to have that right established when applying for leave to enforce that judgment, an application under that rule was available to the plaintiff. *Galloway* v. *Maunder*. (Auckland. August 1, 1949. Luxford, S.M.)

PRACTICE.

Interrogatories—Leave sought to deliver Interrogatories—Interrogatories numbering over One Hundred and Fifty—Court not bound to sift Mass of Interrogatories and reshape Form of Particular ones—No Answer that some Admissible if standing alone—Leave refused as Abuse of Practice—Code of Civil Procedure, R. 155—Motion—Applications to Court to be made by Motion and not Summons—Code of Civil Procedure, R. 394—Summons—Affidavit in Support made by Party's Solicitor—No Reason given for not being made by Party—Contravention of Rule—Code of Civil Procedure, R. 156. An application to the Court for an order giving leave to deliver interrogatories should be made by motion. *Semble*, It is desirable that the procedure of application by summons to a Judge in Chambers should, even if justified only on practice, continue; and that litigants should employ this form of application unless it is preferred to obtain a Court order, when application should be made by motion; the order made thereon will be a Court order, and a dissatisfied party's remedy is only by way of appeal to the Court of Appeal, whereas a Judge's order can be conveniently, expeditiously, and inexpensively reviewed by the Court. An application to the Court, on behalf of a plaintiff, supported by an affidavit of the plaintiff's solicitor, without any reason being given for its not having been made by the plaintiff himself, contravenes R. 156 of the Code of Civil Procedure. (*Ereni te Awe Awe* v. *Moffatt*, (1912) 31 N.Z.L.R. 966, applied.) Where leave is sought to deliver a large number of interrogatories (in the present case, 153), it is not incumbent on the Court to sift and sort the mass of interrogatories, and, where called for, to reshape the form of particular interrogatories. Where interrogatories are in such a form, in respect to their length and character, that the Court, looking at them as a whole and taking a general view of them, comes to the conclusion that they are an abuse of the practice as being prolix or unnecessary,

it is no answer to say that there are in the set of interrogatories, here and there, some which might be admissible if they stood alone. (*Oppenheim and Co.* v. *Sheffield*, [1893] 1 Q.B. 5, followed.) Consequently, where leave was sought by the plaintiff to deliver 153 interrogatories, it was held that the allowance would throw an unreasonable burden on the defendants, and the summons was dismissed without prejudice to the plaintiff's right again to deliver a set of interrogatories more limited in character, more circumspectly worded, and not exceeding the legitimate requirements of the occasion. *Shore* v. *Thomas and Others*. (S.C. Wellington. March 31, 1949. Gresson, J.)

Statement of Claim—Disallowance of Plaintiff's Proposed Interrogatories as a Whole, without Prejudice to Further Application to deliver More Limited Set of Interrogatories—Happenings to which Interrogatories related pleaded in Amended Statement of Claim as Allegations—Paragraphs relating to Plaintiff's Belief and Opinions disallowed—Remainder of Statement of Claim to stand. In New Zealand, the rules of procedure do not expressly insist on pleadings being confined to issuable matter; but what is evidentiary only, and not a necessary constituent of the cause of action, should not be pleaded, and the pleadings should be limited to allegations of the primary facts constituting the alleged cause of action.

(*Dansey* v. *McDonald*, [1920] N.Z.L.R. 825, *Dominion Mortgage and Finance Co., Ltd.* v. *Cleave*, [1916] N.Z.L.R. 1152, and *Thynne* v. *Bank of Australasia*, [1918] N.Z.L.R. 863, followed.) (*Julian* v. *Bell*, [1935] G.L.R. 560, referred to.) An amended statement of claim comprised twenty-six pages and sixty-two paragraphs, most of which had subparagraphs, so that the number of allegations was over 180. It contained numerous allegations, which, in substance, had been the subject-matter of proposed interrogatories the administration of all of which had been disallowed (see *Shore* v. *Thomas*, *ante*, p. 245). On motion to strike out the amended statement of claim on the grounds (*a*) that the administration of the interrogatories was disallowed on the ground that they were oppressive and unnecessary; (*b*) that it contained numerous allegations of an evidentiary and argumentative nature only; and (*c*) that it was so prolix and vexatious that it would be embarrassing and oppressive to require the defendants to plead thereto, *Held*, 1. That, although the interrogatories had been disallowed as a whole, all had not been held to be objectionable, and the plaintiff was not precluded from pleading as assertions the happenings to which the interrogatories related, merely because these interrogatories had been disallowed in their entirety as a set (but without prejudice to his right again to apply to deliver a set of interrogatories more limited in character and more circumspectly worded). (*Shore* v. *Thomas*, *Ante*, p. 245, referred to.) 2. That, as, out of a great number and variety of happenings, the plaintiff hoped to establish bias or the appearance of bias on the part of the defendants, and had put in issue a great number of facts and the knowledge of the defendants and what they said and did in relation to those facts, with a view to there arising therefrom a necessary inference of bias or appearance of bias, the pleadings could not be treated as vexatious, oppressive, or unduly burdensome. 3. That the statement of claim contained allegations of fact which could be admitted or denied; but that its length did not, in itself, afford any warrant for striking it out; and that, of the many facts alleged, it was not practicable to say what were major facts and what were minor facts. 4. That the plaintiff's reliance on the cumulative effect of all that he had alleged gave all the facts he had stated a relevance. The learned Judge was, therefore, not prepared to strike out the amended statement of claim; but he held that some paragraphs—more particularly those relating to the belief and opinions of the plaintiff and of others, which he did not regard as having any or sufficient relevance—should be deleted. *Shore* v. *Thomas and Others* (*No. 2*). (S.C. Wellington. June 21, 1949. Gresson, J.)

PUBLIC REVENUE.

Social Security—National Security Tax—Medical Practitioner on War Service Overseas—Prisoner-of-war for Three Years—Formerly practising in New Zealand and returning to his Home there—Income other than Military Pay derived from New Zealand—Liability for National Security Tax thereon during Period overseas—"Ordinarily resident in New Zealand"—Finance Act, 1940, s. 17—Social Security Act, 1938, s. 110. The word "resides" or "residence" in Income Tax Acts is used in its common sense; and it is essentially a question of fact whether a man does or does not comply with its meaning. It connotes residence in a place, with some degree of continuity—apart from accidental or temporary absence—so that physical absence is not destructive of the idea of a person being "ordinarily resident" in the place where his home is situate. (*Inland Revenue Commissioners* v. *Lysaght*, [1928] A.C. 234, *Rogers* v. *Inland Revenue Commissioners*, (1879) 1 Tax Cas. 225, and *Young* v. *Inland Revenue Commissioners*, (1875) 1 Tax Cas. 57, followed.) (*Cohen* v. *Commissioner for Inland Revenue*, 13 S.A. Tax Cas. 362, and *Levene* v. *Inland Revenue Commissioners*, [1928] A.C. 217, referred to.) Consequently, where a taxpayer, whose home had always been in New Zealand, served overseas on war duties while his family home was maintained in New Zealand, and returned to New Zealand, he was "ordinarily resident in New Zealand" for the purposes of s. 17 of the Finance Act, 1940, during his absence overseas; and he was accordingly liable for National Security tax during that period on his income (other than military pay which was exempted from tax). *Slater* v. *Commissioner of Taxes*. (S.C. Wellington. June 22, 1949. Northcroft, J.)

PUBLIC SERVICE.

General Regrading—Appeal against Personal Grading maintainable—Indirectly an Appeal against Maximum Salary payable—No Right of Appeal against Regrading of Other Officers—Public Service Act, 1912, s. 17—Public Service Amendment Act, 1927, s. 17. Every officer employed in any Department of the Public Service to which the Public Service Act, 1912, applies has a right of appeal against his or her regrading effected pursuant to s. 17 (1) (*a*) of that statute. But such an officer cannot, by virtue of s. 17 of the Public Service Amendment Act, 1927, appeal against the regrading of any other officer of the Public Service carried out pursuant to s. 17 of the Public Service Act, 1912; his appeal is limited to a right of appeal in his own case. (*The Duke of Buccleuch*, (1889) 15 P.D. 86, *London Brick Co., Ltd.* v. *Robinson*, [1943] A.C. 341; [1943] 1 All E.R. 23, and *Reg.* v. *Tonbridge Overseers*, (1884) 13 Q.B.D. 339, applied.) *Semble*, In so far as the maximum salary payable to the officer is dependent on that grading, he has indirectly an appeal as to the maximum salary payable in respect of the position which, for the time being, the officer is holding. *Bartlett* v. *Bolt and Others*. (S.C. Wellington. July 15, 1949. Gresson, J.)

Transfer of Officer from One Department to Another Department—Purpose of Public Service Legislation—Duty of Public Service Commission in respect of Efficient and Economical Working of Departments—Transfer of Officer to ensure Efficiency in Departments—No Interference by Court—Public Service Act, 1912, ss. 12 (1A), 51, 60—Public Service Amendment Act, 1927, ss. 8, 11—Public Service Amendment Act, 1946, s. 25, and Schedule. The scheme and purpose of the Public Service Act, 1912, and its Amendments, is to place the management of the Public Service in the hands of the Public Service Commission; and to make that body responsible for its efficient and economical working. (*Barnes* v. *The King*, [1933] N.Z.L.R. s. 117, referred to.) The Public Service is established and maintained in the public interest; and, if the presence in it of one of its officers is thought by the Public Service Commission to be prejudicial to the public interest, it is the duty of that body to remove the prejudice by dismissal or by transfer to an innocuous position. If the Commission does not consider it is necessary to terminate the officer's employment, it may take such action as, in the language of s. 12 (1A) of the Public Service Act, 1912, "it thinks fit to ensure efficiency . . . in the Departments under its control"—that is to say, it may transfer the officer to a Department in which his presence will not impair efficiency. If, however, the officer is dismissed under s. 51 of the Public Service Act, 1912, and his dismissal arises upon any of the matters of charge or complaint set out in s. 11 of the Public Service Amendment Act, 1927, then the machinery of that section must be employed. (*Boyes* v. *Carlyon*, [1939] N.Z.L.R. 504, distinguished.) *Deynzer* v. *Campbell and Others*. (S.C. Wellington. July 28, 1949. Northcroft, J.)

ROAD TRANSPORT.

Taxicab—Taxi-driver refusing to accept Hiring when on Duty and Disengaged—Passenger alighting from Train and endeavouring to engage Taxi-driver for Himself and Other Passengers—Other Passengers or Luggage not present—No Offence—Taxicab Regulations, 1939 (Serial No. 1939/218), First Schedule, Cl. 4. A train-passenger alighted from a carriage when it was opposite a taxicab alongside the station platform, and required the taxi-driver to accept him and two passengers still in the railway-carriage. The taxi-driver refused until the other passengers and the luggage arrived. Another person then hired the taxi, and was driven off. On an information against the taxi-driver, alleging that he had failed, in breach of his licence, to accept a hiring of his taxicab at a time when on duty and disengaged, *Held*, dismissing the information, That the taxi-driver had not committed a breach of the Taxicab Regulations,

1939, as he was not required, under Cl. 4 of the First Schedule to the Taxicab Regulations, 1939, to accept any hiring before he had had an opportunity of seeing the persons to be carried as passengers and any luggage accompanying them. *Bland* v. *Parsons*. (Auckland. July 29, 1949. Luxford, S.M.)

SHIPPING AND SEAMEN.

Bill of Lading—Exceptions—Loss of Shipped Goods in Transit—Inherent Defect—Onus of Proof—Loss of Brandy in Cask—Shipowner proving prima facie *Loss due to Excepted Cause—Onus then shifted to Shipper to show Shipowner's Negligence—Carriage of Goods by Sea Act, 1924 (13 & 14 Geo. 5, c. 22), Schedule, Art. IV, para. 2* (m) (q). An onus does not lie on the shipowner to bring itself affirmatively within one of the exceptions set out in Art. IV of the Schedule to the Carriage of Goods by Sea Act, 1924. Once the shipowner shows that, *prima facie*, it is within the exception, then the onus is shifted to the owner of the goods to take the case out of the exception. Consequently, in the case of the loss of the contents of a cask, it is not necessary for the shipowner, in order to escape liability under para. 2 (*m*), to prove that there is any inherent defect, quality, or vice in the container that would cause it to leak. (*F. O. Bradley and Sons, Ltd.* v. *Federal Steam Navigation Co., Ltd.*, (1927) 137 L.T. 266, and *John Burns and Co., Ltd.* v. *Canadian Explorer* (*Captain and Owners*), [1928] N.Z.L.R. 767, followed.) (*Commonwealth and Dominion Line, Ltd.* v. *Laery, Beveridge, and Co., Ltd.*, [1928] N.Z.L.R. 141, distinguished.) A cask of French brandy was consigned to the respondent company from London to Port Chalmers in the appellant company's ship *Mahana*, and its contents were missing or lost upon delivery of the cask at the port of destination. The shipping company proved, at least *prima facie*, that there was nothing connected with the voyage of the ship or the stowage of this particular cargo to account for the leakage of the cask. It showed that the cask, when landed, had an abnormal shrinkage or warping of the head which three expert witnesses testified to be due to the condition of the wood itself, and not to external damage, and to be in itself sufficient to cause the leakage. In the Magistrates' Court, judgment was given in favour of the respondent company for the value of the contents of the cask. From this decision, the appellant company appealed on law and fact. *Held*, 1. That the facts proved were ample to show that *prima facie* the loss arose from some inherent defect, quality, or vice in the goods, as the cask was shown *prima facie* to have an inherent defect sufficient to account for the leakage of the liquor, as the liquor could not be dissociated from the cask in which it was contained; so *prima facie* bringing the appellant company within the exception set out in para. 2 (*m*) of Art. IV of the Schedule to the Carriage of Goods by Sea Act, 1924 (13 & 14 Geo. 5, c. 22). (*F. O. Bradley and Sons, Ltd.* v. *Federal Steam Navigation Co., Ltd.*, (1927) 137 L.T. 266, applied.) 2. That the onus was then shifted to the shipper of the cask to establish negligence on the part of the shipowners. (*John Burns and Co., Ltd.* v. *Canadian Explorer* (*Captain and Owners*), [1928] N.Z.L.R. 767, applied.) 3. That, as the evidence for the shipper had failed to establish any facts as to the cause of the loss of the brandy which were consistent with negligence on the part of the shipowner or its servants, the appellant company could not be held responsible for the loss. *Shaw, Savill, and Albion Co., Ltd.* v. *R. Powley and Co., Ltd.* (S.C. Dunedin. April 1, 1949. Hay, J.)

STATUTES.

Safeguards in Delegated Legislation. (R. C. Fitzgerald.) *27 Canadian Bar Review*, 550.

TENANCY.

Business Premises—Fair Rent—Valuation inconclusive of Amount of "basic rent" or Fair Rent—Court's Consent not precluding Tenant from applying for Fixation of "fair rent"—Determination of Fair Rent dependent on Property being Same Property as let on September 1, 1942—Variation in Terms of Lease since that Date not preventing Premises from being Same Property—Ascertainment of Fair Rent—Comparative Method and Capital Value Method considered—Tenancy Act, 1948, ss. 6, 8 (1), 9 (2)—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Regs. 6 (2), 14, 15. The "basic rent" of urban property, ascertained and fixed by the Land Valuation Court under s. 55 of the Servicemen's Settlement and Land Sales Act, 1943, is inconclusive of the amount of the "basic rent" or "fair rent" to be determined under the Tenancy Act, 1948. Consequently, the consent to a lease of urban property by the Land Sales Court (or the Land Valuation Court) does not preclude the lessee from invoking Reg. 15 of the Economic Stabilization Emergency Regulations, 1942, or s. 8 (1) of the Tenancy Act, 1948, which replaces it. (*No. 108.—B. to R.*, (1947) 23 N.Z.L.J. 267, approved.) An application for the fixing of the fair rent of urban property may, therefore, be made in such a case under s. 8 (1) of the Tenancy Act, 1948, for the fixing of the fair rent of the premises, and, in those proceedings, by s. 9 (2), the starting point is the "basic rent" (as that term is defined in s. 2 (1), and in s. 2 (4) where relevant). In deciding whether the rent as at September 1, 1942, is the basic rent, the important consideration is whether the property the subject of the application is the same property as was let at that time. (*Brand* v. *Zavos*, [1948] N.Z.L.R. 1, referred to.) Alterations in the terms of a lease from those in an earlier lease do not prevent the property from being the same property as was let under the earlier lease, though such alterations of terms may amount to a "special circumstance," and the granting of a new lease for a long period is a "special circumstance" of importance within Reg. 6 (2) of the Economic Stabilization Emergency Regulations, 1942 (and s. 9 (2) of the Tenancy Act, 1948), but the Land Valuation Court's approval of the terms of the lease is a "relevant matter" within s. 9 (1), but not a "special circumstance" within s. 9 (2). (*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, applied.) On the hearing of an application to fix the fair rent of urban property under s. 9 (1) of the Tenancy Act, 1948—which is in substantially the same terms as Reg. 16 (1) of the revoked Regulations, except for the omission from the subsection of the words "or to any general or local increase in values since the 1st day of September, 1939"—the Court is to have regard to the general purpose of the Economic Stabilization Act, 1948, and, after taking into consideration all relevant matters (which do not include, in the case of property other than a dwellinghouse, the relative circumstances of the landlord and tenant), is to fix as the fair rent such rent as, in its opinion, it would be fair and equitable for the tenant to pay. (*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, and *Jewellers' Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.*, [1949] N.Z.L.R. 204, applied.) *Semble*, In the case of shops, while no rigid rule may be laid down, the comparative method, involving the consideration of rentals paid for other similar premises, is preferable, as the primary consideration, to the capital-value method for ascertaining the fair rent, but subject to all other considerations, including, where helpful, a check by the capital-value method. (*Service Buildings, Ltd.* v. *Todd Motors, Ltd.*, [1947] N.Z.L.R. 661, and *R. Hannah and Co., Ltd.* v. *Gladstone, Ltd.*, Unreported: Fair, J.: Gisborne, March, 1948, referred to.) *Humphreys Furniture Warehouse, Ltd.* v. *Cuthbert*. (S.C. Gisborne. June 13, 1949. Hutchison, J.)

Dwellinghouse—Landlord seeking Possession for his Own Occupation as Dwellinghouse—Intention to demolish and reconstruct Home for himself on Same Section—"Reasonably required"—No Offence if, on obtaining Order for Possession, he left Premises vacant or demolished them—Tenancy Act, 1948, ss. 24 (1) (g) (m), *30*. A landlord claimed possession of a dwellinghouse on the ground that it was reasonably required by the landlord for occupation by himself and his family. It was stated in evidence that it was the landlord's intention to demolish the house, which was in a bad state of repair, and to build a modern house on the site. It was the landlord's intention to occupy parts of the dwellinghouse during the demolition, and part of the new house as it was completed. On motion for nonsuit on the grounds that the plaintiff was not claiming possession under s. 24 (1) (*g*) ("the premises are reasonably required by the landlord . . . for his . . . own occupation as a dwellinghouse"), but under s. 24 (1) (*m*) ("that the premises are reasonably required by the landlord for demolition or reconstruction"), and that the landlord had to provide alternative accommodation before being entitled to an order, *Held*, 1. That the words "the premises are reasonably required by the landlord . . . for his . . . own occupation as a dwellinghouse" are words of wide import, and their meaning cannot be confined within narrow limits; and every case must be considered upon its own facts and surrounding circumstances. 2. That, if a landlord who genuinely intends to reside in the dwellinghouse of which he seeks possession, and who, therefore, *prima facie* reasonably requires the premises for his own occupation as a dwellinghouse, also intends, on getting possession, to reconstruct, alter, or add to the premises, that fact in itself does not rebut the presumption that he reasonably requires the premises for his own occupation as a dwellinghouse: the test is the genuine intention of the landlord to occupy the house himself. (*Nevile* v. *Hardy*, [1921] 1 Ch. 404, followed.) *Semble*, A landlord who obtains possession of a dwellinghouse under s. 24 (1) (*g*) of the Tenancy Act, 1948, for his own occupation commits no offence under s. 30 of the statute if he leaves the premises vacant or reconstructs them. Observations on

the importance of family considerations when weighing relative hardship. *Clements* v. *Glazer*. (Hamilton. June 24, 1949. Paterson, S.M.)

Dwellinghouse—Possession—Deceased Tenant having Brother living with her at Time of her Death—Brother remaining in Tenement under Assignment of Tenancy by Deceased's Executrix—Brother's Occupation not "without right, title, or licence"—Tenancy Act, 1948, ss. 40, 41 (1)—Magistrates' Courts Act, 1947, s. 31 (1) (b). The terms of a tenancy included, *inter alia*, the provision that "the tenant shall not assign this tenancy in whole or in part; or sublet the premises or any part thereof; or accommodate boarders." The tenant died, leaving a will, under which the executrix sold the deceased's furniture in the dwellinghouse, and, by deed, assigned the tenancy to G., the deceased's brother, who resided with her at the time of her death; and he refurnished the house and continued to live there. Notice to quit was given to G., on the ground that he occupied the tenement without right, title, or licence. In an action for recovery of the tenement, *Held*, 1. That the provisions of s. 41 (1) had no application to the facts, even assuming that G. was a member of the deceased tenant's family residing with her at the time of her death, as the deceased's estate and interest in the tenancy passed, on her death, to her personal representative only. (*Thynne* v. *Salmon*, [1948] 1 All E.R. 49, followed.) 2. That, as the executrix assigned her tenancy before it had been determined, G. was in possession by virtue of that assignment, and was not in possession of the tenement without right, title, or licence. (*Bilderdeck* v. *Manson and Barr, Ltd.*, [1948] N.Z.L.R. 58, and *State Advances Corporation of New Zealand* v. *Andrew*, (1948) 5 M.C.D. 519, referred to.) *State Advances Corporation of New Zealand* v. *Gifford and Another*. (Auckland. August 1, 1949. Luxford, S.M.)

TRANSPORT LICENSING.

Transport Licensing Amendment Act, 1949, No. 3. Tramway fares, tolls, and charges for carriage of passengers or goods by trackless trolley-omnibuses, to be fixed by the Transport Charges Committee. Tramways Act, 1908, Second Schedule, amended. Tramways Amendment Act, 1910, s. 2, amended. Auckland Transport Board Act, 1928, s. 59 (o) (xii), amended.

WILL.

Attestation—Evidence—Adverse Evidence of Attesting Witnesses—Admissibility of Further Evidence—Wills Act, 1837 (c. 26), *s. 9*. In a probate action, the two attesting witnesses gave evidence that they had subscribed their names to the will before the testator appended her signature, in which case the will would not be validly attested. The propounders of the will tendered evidence to show that the evidence given by the attesting witnesses was erroneous, but the plaintiff contended that the evidence of the attesting witnesses was conclusive. *Held*, That the object of the Legislature in imposing the strict formalities required by the Wills Act, 1837, s. 9, was the prevention of fraud, and the duty of the Court was to see that no fraud was perpetrated; the exclusion of further evidence could only increase the possibility of the perpetration of fraud; and, therefore, it was competent for the propounders of the will to call further evidence. (Dicta of *Lord Penzance* in *Wright* v. *Rogers*, (1869) L.R. 1 P. & D. 682, applied.) *Re Vere-Wardale (deceased)*, *Vere-Wardale* v. *Johnson and Others*, [1949] 2 All E.R. 250.

As to Presumption and Proof of Due Execution of Will, see *34 Halsbury's Laws of England*, 2nd Ed. 65, 66, paras. 83, 84; and for Cases, see *44 E. and E. Digest*, 280-285, Nos. *1122-1171*.

Codicil—Attestation—Blind Man as "witness"—Wills Act, 1837 (c. 26), s. 9. *Re Gibson (deceased)*, [1949] 2 All E.R. 90 (P.D.A.).

Gift—Uncertainty of Object—Direction to set aside Fund to provide £2 per Week to be paid to "the cause for which appeal broadcast on Sunday." *Re Wood (deceased)*, [1949] 1 All E.R. 1100 (Ch.D.).

WOOL DISPOSAL.

Wool Disposal Regulations, 1947, Amendment No. 2 (Serial No. 1949/101). Reg. 10 amended. Amendment No. 1 (Serial No. 1947/141) revoked.

HENRY SAMUEL CHAPMAN: A COLOURFUL CAREER.

Twice Judge of New Zealand Supreme Court.

By Bernard Magee.

To people interested in the history of New Zealand's judiciary, the name of Sir Frederick Revans Chapman, who died in June, 1936, stands high. The memory of his father, twice appointed Judge of our Supreme Court, and for a period Attorney-General for Victoria, Australia, and whose association with New Zealand dates back 102 years, has to the majority of people passed into oblivion.

Henry Samuel Chapman was a remarkable man, who impressed the force of his personality on several countries. His career showed that he was tenacious in what he believed to be a righteous cause, and that the frenzy of opponents failed to deflect him from his firm resolve to pursue it. He was a man who would sooner be right than hold high office in violation of his own conscience.

The late Mr. Justice Alpers, in his *Cheerful Yesterdays*, spoke of his journalistic side-lines as checking the tendency to dogmatism so prevalent in the teaching profession, of which he was a member. He gave it as his opinion that journalism forced him into the school of the world.

Mr. Justice Chapman was active in journalism while practising the law. This undoubtedly prevented him from becoming a prey to the dogmatism that the practice of the law imposes. He was identified in several countries with movements the espousal of which demanded some courage, and his association with reformers of a century ago must have brought on him considerable odium.

Henry Samuel Chapman was born at Kennington, London, in 1803. He was educated privately at Bromley, Kent, and on the Continent of Europe. Going to Canada later, he was brought into contact with French Canadians, and became conversant with the French tongue. Thus, young Chapman became proficient in the German and French languages. He commenced a commercial career in London with Esdaile's Bank.

Later, he joined a Dutch financial agency, and in 1882, when he was only nineteen years of age, his employers sent him to Holland on a business mission. While there, he seized the opportunity of mastering the Dutch language. Still in his 'teens, he went to Canada in 1823, and set up business as a merchant in Quebec, with connections in New York and England. There he spent ten years of his life. Frequent visits to his native England kept him in touch with the trend of business and politics and with his friends, one of whom was the eminent economist John Stuart Mill, whose economic theories are still widely held.

While in Canada, young Chapman developed Liberal ideas, and became an associate of John A. Roebuck, who espoused the cause of Canada's being accorded a greater measure of self-government. In this, Roebuck found an able lieutenant in Chapman. Having a flair for journalism, Chapman established the first daily newspaper in Canada, the *Montreal Daily Advertiser*. In the conduct of the paper, he was assisted by Samuel Revans, who later came to New Zealand and took up his residence in Wellington.

His editorial work on the journal brought him into contact with Papineau, the Liberal leader, whose resort to an armed rising against British rule was strongly reprobated. An allegation was made that Chapman was implicated in the rebellion, but such methods of obtaining self-government for Canada were alien to him; in fact, at the time of Papineau's rising, Chapman had left Canada two years earlier.

His journalistic venture was not attended with financial success, and, having disposed of it, Chapman returned to England in 1834. There he represented the Canadian Liberal Party, and served it well by his writings and pamphleteering in the cause of Colonial reform. He had become acquainted with Cobden about 1832, and was prominent in the anti-Corn Law agitation that stirred England over a century ago. During his five years' residence in England before 1840, he was closely identified with the reformers of the time, and assisted them by his writings. However, he found time to study for the Bar, and was called at the Middle Temple in 1840.

Though he built up a fairly good legal practice, his journalistic work was his larger source of income. His ability was recognized by his appointment to several Royal Commissions on industrial matters. One of these was for studying the conditions under which the Yorkshire wool handloom weavers worked. This gave him an insight into the wool industry, and, as a result of his knowledge, he was invited to write an article on the subject for the *Encyclopaedia Britannica*, the accompanying drawings being his work also.

Edward Gibbon Wakefield's scheme for colonizing New Zealand attracted Chapman's attention, and he established *The New Zealand Journal* in 1840. It is of great historical value, as it records the relations of the New Zealand Company with the Colonial Office as well as recording the transactions of the Company and a varied assortment of news concerning New Zealand. Copies of the *Journal* are treasured in the Hocken Library at Dunedin. Chapman edited and controlled the paper till 1843. The state of Mrs. Chapman's health at the time was causing him concern, and he contemplated coming to New Zealand. The offer by the Secretary for the Colonies (Lord Derby) of an appointment as Judge in the Southern division, which included Nelson and Wellington, determined him to throw in his lot with the infant Colony.

Mr. and Mrs. Chapman sailed for New Zealand in June, 1843, on the *Bangalore*, which also included among its passengers Captain Fitzroy, the new Governor of New Zealand. The journey occupied six months, the vessel making a call at Sydney. On arrival at Auckland, the Governor and Judge took their oaths on December 26, 1843. Chapman took up his residence at Karori, Wellington, where he remained for nine years, carrying out his judicial duties in a manner that established the high traditions of New Zealand Supreme Court Bench procedure that have never been departed from. That the new Judge entered upon his duties with lofty ideals may be gathered from the fact that, apart from his judicial obligations, he was responsible, in collaboration with the Chief Justice of New Zealand, Sir William Martin, for the 1852 Report on Supreme Court Procedure for New Zealand.

Chapman possessed stamina to a remarkable degree. On one occasion, when he was obliged to meet the Chief Justice in Taranaki to confer on legal procedure, the vessel in which he sailed was unable to land him at New Plymouth, and he was carried on to Kawhia, an out-of-the-way place then inhabited by Maoris. From there he walked back to New Plymouth, a distance of about 150 miles. Later on, he footed it to Wellington, another 230 miles.

In 1852, the convict Colony of Van Diemen's Land was stirred to protest against its being made the dumping ground for criminals from the Old World. The Governor (Sir William Denison) and the Colonial Office were loath to abandon the practice of transportation there. The Colonial Office offered Mr. Justice Chapman the post of Colonial Secretary, and, much against his own inclination, he sailed for Tasmania to take up the appointment. On the question of the continuance of transportation, Chapman, taking the view of the colonists, declined to vote, much to the disgust of officialdom. The Governor resented strongly the attitude of the new Colonial Secretary, so much so that Chapman proceeded on leave to London to put the case as he understood it before the Colonial Office. He was apparently unable to convince them, with the result that he lost his position. He later, however, had the consolation of seeing transportation to Tasmania abolished and responsible government conceded to that Colony as well as to Victoria.

That Chapman's services were appreciated by the Home Government was shown by the offer made to him of the Governorship of the West Indies. This he declined, and he returned to Victoria and set up a legal practice in Melbourne. He took an active part in politics, and, as in Canada and England, he inclined to reform in Government methods. He became a Member of the Legislative Council of Victoria, and in 1855 sought to have the ballot system of voting established, which was eventually done, in the teeth of strong opposition. Incidentally, it may be mentioned that one of those who voted in favour of Chapman's plan was Vincent Pyke, who was later to become a big figure in New Zealand politics.

In the Victorian goldfields at the time, seething discontent among the miners at what they considered harsh conditions, bearing unduly on them, culminated at Ballarat, when the gold-diggers rebelled, and a pitched battle, known as the battle of the Eureka Stockade, took place between the miners and the Armed Forces. Captain Wise, five soldiers, and thirty diggers were killed, and a large number on both sides were wounded. Chapman defended many of the 125 prisoners taken and put on trial, and gained their acquittal.

In 1857, he became Attorney-General in the O'Shanassy Ministry, which portfolio he held for three years. Forsaking politics, he later became a temporary puisne Judge, and later returned to the practice of law,

as well as indulging in journalism and lecturing in law at Melbourne University.

In 1864, he was offered an appointment to the New Zealand Supreme Court Bench, which he accepted, and he took up residence in Dunedin. Apart from his judicial duties, he led a full life. Many cultural movements had his support, the Otago University and the Otago Institute benefiting by his experience and knowledge. In 1875, he retired from the Bench, but his usefulness was not over. He became interested in a Maniototo sheep run, and was a director of the Victoria Insurance Company.

While in Dunedin, tragedy was Chapman's portion. In 1866, when the vessel carrying his wife, two sons, and a daughter returning from England was in the Bay of Biscay, it foundered, when Mrs. Chapman and her children were drowned. Two hundred and twenty people perished, including Captain Martin, Dr. Woolley (a member of Sydney University), and G. V. Brooke (the tragedian). Two years after the disaster, Mr. Justice Chapman, while in Victoria, married the daughter of an Irish clergyman, the Rev. T. C. Carr, and then went to England, returning to New Zealand in 1870. On December 27, 1881, he died, and thus was terminated an extraordinary career of adventure and usefulness.

THE VALUATION OF BOOK DEBTS.

And the Deduction of Debts for Death-duty Purposes.

By E. C. Adams, LL.M.

The interesting case of *Angell* v. *Commissioner of Stamp Duties*, [1946] N.Z.L.R. 721, deals with the above points of death-duty law and practice, and, if analysed carefully, can be based on the cardinal principle of death-duty law, that the assessment of duty must be made on the state of facts existing *at the instant of deceased's death*, and not on the state of facts existing subsequently, such as at the date of assessment.

The leading New Zealand case, illustrating this basic principle, is *In re Estate of Jackson*, (1901) 19 N.Z.L.R. 566, which was upheld by the Privy Council *sub nom. Jackson* v. *Commissioner of Stamps*, [1903] A.C. 350; N.Z.P.C.C. 592. This was a case under the Deceased Persons' Estates Duties Act, 1881, and the Amendment Act, 1885, under which a widow had certain exemptions. Testator gave his widow only a life interest in the residue of his estate, and from and after her decease the residue was to go to such person or persons as she should appoint by deed or will, and, in default of appointment, to certain persons and institutions named in the will. Shortly *after* deceased's death, but before the estate had been assessed for death duty, she executed a deed of appointment of the whole of the residue in her favour. It was held that she had not become absolutely entitled to the residue by virtue of deceased's will, and, therefore, was not entitled to the exemption conferred by the Amendment Act, 1885. Assessment had to be made on the property existing at the time of the death of deceased, and as on the state of facts *then existing*. It was only by an event subsequent to death (the appointment by deed) that she had become absolutely entitled to the residue.

Under the present Act, *In re Estate of Jackson*, *supra*, would be decided differently, for we now have provisions dealing with contingencies: ss. 14 and 21 of the Death Duties Act, 1921. Although no certain opinion can be given as to the full ambit of these contingency provisions, they certainly include something contemplated by a testator as affecting a succession conferred by his will. But, except where express provision is made to the contrary, this cardinal principle of death-duty law applies, and in practice is continually being applied in such matters as the valuation of assets for death-duty purposes, in the deduction of debts owing by deceased for the purpose of computing the final balance of his estate, and in the valuation of life estates and interests and annuities for succession-duty purposes.

As to the valuation of assets, let us take, as a rather extraordinary example, Part I of *Shrimpton* v. *Commissioner of Stamp Duties*, [1941] N.Z.L.R. 761, which discloses a very ingenious attempt to use a novel statute, the Mortgagors and Lessees Rehabilitation Act, 1936, to relieve an estate from a certain amount of death duty otherwise payable. By a *consent* order, two mortgages owing by deceased's widow to deceased were reduced by the Court of Review, and it was contended by his executors that death duty in respect of those securities was payable only on the sums so reduced. *It was admitted that the object of the executors in consenting to the order was to reduce the amount of death duties payable by the estate.* But two important points were insuperable by the executors, the first being that, *when deceased died*, the Mortgagors and Lessees Rehabilitation Act, 1936, had not been passed, and the second being that the revenue authorities are not bound by an order of the Court made where they have had no opportunity of being heard. (This second point was clearly explained by Sir Michael Myers, C.J., at p. 783, when delivering judgment in the Court of Appeal.) On the first point, Ostler, J., in his characteristic clear and concise style, said, at p. 769:

> The statute is clear that the assets of a deceased person must be valued for death-duty purposes at the date of his death. That is the value upon which duty must be paid. The Crown acquired a statutory right to that duty before Mrs. Shrimpton acquired any statutory right by the subsequent legislation, and, even though that right may be retrospective, it cannot defeat the statutory right already acquired by the Crown. The Commissioner is claiming no more than his statutory right, and notwithstanding that the value of the estate has, with the consent of the appellants, been subsequently reduced, he is entitled by law to charge duty upon its value at the date of the testator's death.

As at deceased's death, the widow had sufficient assets to pay the mortgage debts in full, although the Government valuation of the lands covered by the mortgages was considerably less. Therefore, death duty was properly payable as at their full face value.

Perhaps the most frequent application of this guiding principle of death-duty law is found in the method of valuing life estates and interests, and annuities. The

general rule as laid down in *Weldon* (*Commissioner of Taxes for Victoria*) v. *Union Trustee Co. of Australia, Ltd.*, (1925) 36 C.L.R. 165, is that they should be valued on an actuarial basis. As pointed out, however, by Williams, J., in the later Australian case of *Trustees Executors and Agency Co., Ltd.* v. *Commissioner of Taxes* (*Victoria*), (1941) 65 C.L.R. 33, 40, where the life is, at the *material instant of time*—note this phrase, the "material instant of time," which is the date of death of the deceased person whose estate is being assessed)—subject to some disability which destroys the probability that it will run its normal course, the estate or interest or annuity should not be valued in accordance with the actuarial tables, but on the basis of its actual or probable duration. For example, if the life tenant or annuitant at the *material instant of time* is suffering from an incurable mortal disease, such as pernicious anaemia, advanced tuberculosis, or cancer, it would be reasonable to make the valuation in accordance with its actual duration. In this case, both the deceased and the widow, the life tenant under his will, were involved in the same motor accident: the deceased died instantly, and the widow survived only half an hour. It was held that, for death-duty purposes, the interest of the widow was practically valueless, for, in such circumstances, no person would have entertained the purchase of her interest. *Weldon's* case, on the contrary, was the *normal* one of an annuitant dying fortuitously or without any known cause. (Although she survived the deceased for twelve weeks only, the Crown was wrong in submitting that it could value the annuity on the basis of its actual duration.) It is abundantly clear from the authorities that the onus of proving that the life tenant or annuitant was in danger of an early death at the *material instant* lies on the person setting it up: that is one reason why, in the great majority of cases, in practice recourse must be had to the actuarial tables.

In *Angell* v. *Commissioner of Stamp Duties*, [1946] N.Z.L.R. 721, deceased, who died on March 21, 1942, was a doctor, who, "it appeared, devoted himself to his patients rather than his own affairs." It appeared from memoranda left by him that at his death he was owed no less than £12,000, by his patients. In order to unravel deceased's affairs, the administratrix employed an accountant, whose fees amounted to £734 8s. 9d. At the date of the hearing of the case, book debts to the value only of £3,954 8s. 7d. had been paid, and it was estimated that an additional sum of £46 7s. 6d. would be received, making a total of £4,000 16s. 1d., and this sum was adopted by the Commissioner of Stamp Duties in valuing the book debts owing to the estate. But the administratrix claimed that from this there should be deducted the accountant's fee of £734 8s. 9d. The Court rejected this claim, holding that the expenditure of this sum was not a debt incurred by deceased, but was in reality an administration expense, and, as such, was barred by s. 11 of the Death Duties Act, 1921. Johnston, J., thought that, if such a claim were allowed, expenses of litigation to recover moneys owing to an estate, and all legal costs, could also be so deducted. He said, at p. 724:

> It is clear, in my opinion, that, without expression in the statute that such an expenditure as is in question here must be deemed to have taken place and incurred in deceased's lifetime, it cannot be described otherwise than a cost in administration of the estate and excluded from computation in assessing the value of the estate.

The point decided is consistent with the rule laid down in such cases as *Elder's Trustee and Executor Co., Ltd.* v. *Deputy Federal Commissioner of Taxation*, (1934) 51 C.L.R. 694, and *Kirkcaldie* v. *Commissioner of Stamp Duties*, [1933] N.Z.L.R. 241, that it is the *gross* value of an asset, and not its net after deduction of costs of realization, which has to be brought to account for death-duty purposes.

But from this sum of £3,954 8s. 7d., which the administratrix had with so much difficulty collected from deceased's patients, there arose another *casus belli* between the Commissioner of Stamp Duties and the administratrix: in respect of this sum, she was properly assessed with income-tax amounting to £801 19s. 4d., and she claimed that this should be deducted in assessing the dutiable estate of the deceased, whether technically as a deduction from the value of the said book debts or otherwise. The Court rejected this claim also. It is indeed difficult to see how *trustee's income-tax* could ever be regarded as a debt owing by deceased as at the date of death. As Johnston, J., pointed out in *Angell's* case, at p. 724:

> The point at issue seems to me to be, not the definition of what a debt is, but whether it was a debt owing by deceased at his death. If it was a contingent debt capable of estimation, it would be deductible; *but a debt contingent at the date of death presupposes liability at the date of death*, and here there is no liability.

With regard to income-tax and its relation to death duty, it must be pointed out in passing that, were it not for the special provisions of s. 21 (2) of the Land and Income Tax Act, 1923, which provides that the tax so assessed shall be deemed to be a liability incurred by the deceased taxpayer in his lifetime, income-tax assessed *after* deceased's death in respect of income derived by deceased during his lifetime would not be deductible for death-duty purposes at all, for, as pointed out by Ostler, J., in *Conway* v. *Commissioner of Stamp Duties*, [1932] N.Z.L.R. 1260, it is not a debt which was owed by deceased at his death. It may also be observed that the amount of tax deductible for death-duty purposes is not necessarily the amount originally assessed. Assessments of income-tax are subject to appeal, and the amount deductible is what ultimately is held to be payable: to that limited extent income-tax is a *contingent* debt for death-duty purposes: *Scott Fell* v. *Federal Commissioner of Taxation*, (*1944*) *18 Australian Law Journal*, 215.

This cardinal principle of death-duty law, which I have endeavoured to explain in the foregoing parts of this article, like all inflexible rules of law, does not always achieve ideal justice. For example, in *Angell's* case, *supra*, the taxpayer appears to suffer an injustice. She had to employ the accountant to collect the book debts, and what she received from the estate was so much less than it would have been had deceased been more businesslike: to that extent, hers was a *damnosa haereditas*; and the income-tax which it was held she could not deduct was in fact payable in respect of services rendered by deceased during his lifetime. The estate of a sheepfarmer, for instance, who happens to die when sheep are in great demand and the market price very high, pays more death duty than the estate of another sheepfarmer, who dies (perhaps only a short time before or afterwards) when, perhaps owing to a drought, there is a glut on the market. It would be fairer in practice if some sort of mean value could be adopted.

But sometimes in practice the Crown suffers when the principle is applied. Thus in *Scott Fell* v. *Federal Commissioner of Taxation*, *supra*, deceased during his lifetime had been assessed for income-tax in the huge sum of £179,156. Objections against the assessment in accordance with statute were disallowed. Subsequently, under a *discretionary* statutory authority, a Board reduced the tax payable to £8,571. It was held that the full sum of £179,156, and not £8,571, was deductible, because, at the date of death, deceased actually owed that sum. The *ratio decidendi* was that there was no obligation on the part of the Board to reduce the debt. It follows that, if A dies owing B £10,000, that sum is deductible for death-duty purposes, although his legal personal representatives may afterwards succeed in persuading B to reduce the debt: the compromise would be an event *subsequent* to date of death, and having no relevance to the imposition of death duty.

UPON A VIEW OF THE BODY.

An Unnecessary Ceremony.

"*Super visum corporis*," as the dear old law books say.

We still retain the custom (or should one say the privilege) for our Coroners that they shall upon inquest "view the body." A delightful Jerry Cruncher aroma always seems to surround these Coroners, and their really valuable work tends to be obscured in the minds of lay persons by that ancient grisly duty of seeing the corpse—beg pardon, we mean body.

One is moved to inquire whether there is any real necessity for preventing this ancient—one may fairly say, archaic—rite.

As lately as 1926 in England, the practice of viewing the body has been held as an essential to a proper inquest: *R.* v. *Haslewood, Ex parte Margerison*, [1926] 2 K.B. 468. In that case the Coroner was late, through no fault of his own, poor fellow, and forgot the duty laid upon him under the statute of 1887, which says very definitely that the Coroner and the jury shall view the body. The Court did not discuss the reason for the law. It merely supported the old authorities on the matter, said that not to view the body rendered the inquest no inquest, and ordered a proper inquest. The facts of the case were that the father of the boy who had constituted the "body"—I was going to say "raised a stink," but it might be better to use the phrase "made a fuss." He complained that a serious miscarriage of justice had occurred, since a serious error in the evidence of the doctor would not have passed unnoticed had the Coroner held his view. The verdict had been suicide. I have not been able to ascertain if, on the subsequent view and proper inquest, any different verdict was arrived at, but I should think it unlikely.

Perchance a Coroner viewing a body may notice something about it that may be useful to him in weighing evidence at the inquest. Such cases must, however, be few and rare, in the light of the advance of medical science. Take the case of a man or woman who has come to a sudden unaccountable end. An inquest is necessary. Now, it has been held that the "view" must not be a mere casual view: *R.* v. *Ferrand*, (1819) 3 B. & Ald. 260, 264; 106 E.R. 659, 660. One suspects that in these days the view by the Coroner is more often than not a most casual one; and who can blame him for that? I should point out in passing that a proper view involves a naked view, particularly if there is no obvious wound or any mark of violence. To the mind untrained in medicine or pathology, what possible information does such a view convey? None of real value, I suggest. Suppose a case of poisoning. No view will help to establish the cause of death. Heart failure is the same. Only a post-mortem, and possibly also a close analysis of organs and the like at the hands of qualified experts will reveal the cause of death. The same may be said, I think, in the majority of cases.

The oldest practice seems to point to the inquest having been carried out with the naked body in full view of the Coroner and the jury. That did not long prevail; nor does the law ever seem to have required it. Years ago we amended the law in New Zealand, and abolished the necessity for the jury to view the body. Nor does the view help the Coroner in the matter of identity of the deceased. That is established by the evidence of those who know or knew the dead.

What, then, are the origin and the reason for the practice of viewing the body?

The office of Coroner is a very ancient one. It was not formerly so confined in its duties as it is to-day. The chief duty of a Coroner in New Zealand is that of holding inquests *super visum corporis*, though by statute he is given the same powers as belong to the office in England. In England also his principal work is that of conducting inquests upon the dead. But he also conducts inquests upon treasure trove, and (in London) upon outbreaks of fire. On occasions, too, he acts as Sheriff, and he also has certain duties in respect of outlawry.

Unless ambergris comes within the definition of treasure trove, I am not aware of any inquests concerning treasure trove in New Zealand. It is well-known that there have been many heated post-mortems in New Zealand concerning ambergris, or alleged ambergris. Perhaps if there had been inquests with a view of the body in such cases, many claimants might have been saved time and expense. I understand that ambergris has a distinct aroma, but whether the Coroner would notice that upon a view I do not know. Outlawry has, of course, long been abolished here, except among schoolboys.

Let us get back to the history of the ancient office. From a perusal of the Introduction to Vol. 9 of the Selden Society Works (*Select Coroners' Rolls*), one finds the origin of the Coroner's office ascribed to the Articles of Eyre, 1194. No reference need be made to the Articles, because everyone knows about them. But the learned author traces the origin somewhat further back. Some have the temerity to suggest they go back as far as Alfred—that is, Alfred the Cake-maker, and All That. Now, Alfred had, they say, appointed Coroners for all counties. They were men of rank. But, when a "common merchant" happened to get an

appointment, he was promptly removed, because they were regarded as unveracious fellows, and poor stuff.

However, we do know from the records that in 1194 Geoffrey Fitz-Peter William de Stuttville and colleagues, itinerant Justices in Eyre, had an inquest before them wherein one Hugh de Severbi accused a gentleman rejoicing in the name of Alured de Glentham and a common fellow called Jord Jordan of killing Severbi's brother. I will not weary you with the account of the inquest, but the quaintly worded record is not without interest to any who may be interested in matters of antiquity.

By the time of the Great Charter (1255, is it not ?), the Coroner was apparently getting a bit out of hand, since that historic document curtailed his doings somewhat, though it did not deny him the pleasure of his " view " : see Ch. 17.

Then came the Statute of Westminster the First (temp. Ed. III). It made some attempt to improve the class of gentry holding the honourable office, for it enacted " Forasmuch as mean persons and indiscreet now of late are commonly chosen to the office of Coroner, whenas it is required that persons honest loyal and wise shall occupy such office," and went on to provide that for such office should be chosen " sufficient men . . . of the most wise and most loyal knights." There was very good reason for this wise piece of legislation, as I shall presently show.

But first let us hark back to the Statute 4 Ed. I, commonly called the Statute De Officio Coronatoris. There we shall find all about the appointment, the jurisdiction, and the duties of the distinguished office. It is of the latter I would speak. The statute provided, *inter alia* :

> The Coroner upon information shall go to places where any be slain or suddenly dead or wounded and shall forthwith command four of the next town or five or six to appear before him and when they are come thither the Coroner *upon the oath of them* shall inquire in this manner : that is to wit if they know where the person is slain ; whether it were in any house field bed tavern or company and who were there.

The italics are mine. He was also to inquire who were culpable " either of the act or of the force," and those found culpable by inquisition were to be delivered to the Sheriff and committed to gaol.

> Also all wounds ought to be *viewed* the length breadth and deepness and with what weapons and in what part of the body the wound or hurt is and how many wounds and who gave them.

All this information was to be enrolled and much more. For Mr. Coroner also delved into the matter of appraising the value of the land and chattels of any found culpable, and delivered them into the safe custody of the whole township, which became answerable. Thereupon they were at liberty to bury the body. Perhaps it was a bit more expeditious than if it had been referred to a Land Sales Court. The poor Coroner and his worthy men also had to value the carts, horses, boats, weapons, &c., whereby any were slain (deodands), and deliver them to the township for accounting purposes. This is probably the early forerunner of certain Schedules under the Death Duties Acts, which are the joy of auctioneers, valuers, and Stamp Commissioners. The statute also dealt with the matters of treasure trove and so on mentioned above.

Hawkins of beloved fame (*3 Pleas of the Crown*, Ch. 9) points out that it is remarkable that the statute does not say expressly that the Coroner shall take his inquest on a view of the body, or that an inquest otherwise taken by him shall be void. Yet he says it is agreed by all authorities that a Coroner has no power to take an inquisition without a view of the body, and such an one is void : *R.* v. *Bunney*, 1 Salk. 190 ; 91 E.R. 172. That was a real deader. A certain Bonney (or Bunney) had " drownded hisself." The Coroner held his " inkwitch," and that *super visum corporis*. He decided (no doubt humming to himself " My Bonney lies under the ocean ") that Bonney, at the time he went below, was *non compos mentis*, but nevertheless *felo de se*. It is doubtful if the view in any way assisted him in arriving at the above conclusion, but he did view the body, and poor Bonney was laid away. Then, some two years later, some unkind gentleman, suspecting that all was not well with Bonney, moved another gentleman, the Great Almoner—no doubt a generous chap—and he ordered that B. be uplifted. This was done, and again the Coroner (the same one again) " *super visum*-ed " the remains. Thereupon, Bunny was again returned to his coney garth. Alas ! The Coroner had not done with him yet. A very nasty person in some way related to B. complained that the second *visum* had been " obtained by practice "—*i.e.*, the jury had been " rigged " at the instance of the administrator—and, in any event, it was said, the practice of taking up a body after so long a time was itself evidence of " practice." In an attempt to restore Bunney to his native heath once more, this nasty person filed a motion for *melius inquirendem*. In other words, he wanted a better look at the body.

The Coroner was easily able to dispose of the allegation of practice, since, when he was invited by the Great Almoner to disinter the body for the second sight, he had been disturbed at the thought, and had applied to the learned Attorney-General for advice. The Attorney-General said he could, and he did. But the record shows that :

> It was agreed by all that it was not to be justified to take the body out of the grave after it had been buried above a year for it was a common nuisance and insufferable.

So a third sight was not vouchsafed unto the nasty one, despite his lament, which doubtless went to the air of " Bring back my Bonney to me."

May I suggest, then, that the two principal reasons underlying the practice of " viewing the body " were these :

(i) The Coroner and his jury or men of the village were the judges of fact, and, in the absence of skilled men of medicine to help them, the appearance of wounds or marks of violence, or of burning or drowning may well have enabled them to determine the cause of death. In this connection, it must be remembered that, apart from those who practised witchcraft, or the use of what are called simples or herbs, neither medicine nor surgery had made much progress. He who had his elementary smithy " under the spreading chestnut tree " was in all likelihood the local dentist, but he couldn't have been much more.

(ii) The assessment of value of lands and chattels by the Coroner was an important part of his function, and of real value to the Crown, because in many instances the lands and chattels became forfeit to the Crown, and were generally a source of revenue. The Crown has always been an ardent gatherer of money, and, though I would not suggest that either the Crown or the Coroner was as ruthless as the modern tax-gatherer, they set him a fairly generous example. Hence the necessity

for "honest loyal and wise men" to fill such posts, because the temptations of the office must have been very great.

And now, having weighed up all the above, again I ask: Is it necessary to preserve this archaic ceremony of viewing the body? My reply is very definitely "No." One last word. On occasions, on many occasions, the necessity for a view even to-day is a costly matter for the State. Where people have come to a tragic end, their bodies sometimes lie in difficult and inaccessible places. The cost of transporting them to the Coroner, or the Coroner to them, all mounts up, and in many cases serves no real purpose. Let us, then, do away with it.

A. CROWNER.

PRACTICAL POINTS.

1. Destitute Persons.—*Wife's Maintenance—Security lodged with Public Trustee—Decree Absolute filed in Magistrates' Court—Procedure to obtain Return of Security—Destitute Persons Act, 1910, s. 30—Domestic Proceedings Act, 1939, s. 17 (4).*

QUESTION: A maintenance agreement provided for separation and maintenance. By consent, a separation order was made simultaneously, providing for security of £400 to be deposited with the Public Trustee. A decree *nisi* was made on the agreement, and the decree absolute by consent provided for maintenance. The decree absolute has now been registered in the Magistrates' Court. The Public Trustee declines to return the security.

(i) Must the husband apply under s. 30 (8) of the Destitute Persons Act, 1910, or has the effect of the subsequent orders, including the wife's election to accept a Supreme Court maintenance order, rendered the original order null and void, so that the Public Trustee can be sued for wrongful retention of the moneys?

(ii) Does the amount of the security have any bearing on the matter?

(iii) If the security is returned, can the wife make a fresh application for security if the maintenance is kept up-to-date?

ANSWER: (i) By going to the Supreme Court and obtaining a maintenance order there, the former wife has abandoned her rights under the Magistrate's order: see *Burke* v. *Burke*, [1934] N.Z.L.R. 978, 981, l. 20. This being so, the security is no longer required, the defendant being no longer obliged to make payments under such order; accordingly, the husband should apply under s. 30 (8) of the Destitute Persons Act, 1910, for an order directing the deposit or the residue to be repaid by the Public Trustee to the applicant; the former must repay the same accordingly, if the order be made. It would appear that the Public Trustee requires this step to be taken, as otherwise the order still stands.

(ii) As to the amount of the security (£400): Presumably there are two orders, as the maximum amount is £200 for an order: s. 30 (4). One order, it would appear, relates to the wife, and the other to children. If £400 were ordered as security, there would be an excess of jurisdiction in respect of one order of an amount of £200. However, as set out above, immediate steps should be taken to obtain an order for refund.

(iii) It appears that it is now too late for the wife to apply for fresh security. Security is a matter to be taken into account when the Court considers the application for maintenance: *Chichester* v. *Chichester*, [1936] P. 129, 134; [1936] 1 All E.R. 271, 273, and *Shearn* v. *Shearn*, [1931] P. 1, 4. So far as security is concerned, it is immaterial whether or not the husband pays maintenance. It appears that she has lost the right now to apply to the Supreme Court for security; and the Magistrate, now that the order has been removed into the Magistrates' Court, can only cancel, vary, or suspend the same or grant execution, notwithstanding the generality of the terms of s. 17 (2) of the Domestic Proceedings Act, 1939. It is not competent for a Magistrate to order security to be given; that is a matter for the Supreme Court at the time of the making of the order. If it is not competent for the Supreme Court, in the circumstances, to order security, it does not appear competent for a Magistrate to do so. Section 17 (4) should be looked at in this connection.

It would clear the air if an application were made, not only to revoke the order directing security, but also to revoke the original order made by the Magistrate.

C.2.

LEGAL LITERATURE.

Evidence.

Garrow and Willis's Principles of the Law of Evidence in New Zealand, Third Edition. Pp. xx + 268 (including Index). Wellington: Butterworth and Co. (Aus.), Ltd. Price: 31s.

The Second Edition of this work was published in 1944. The Evidence Amendment Act of the following year altered the existing law in various directions, notably by adding an elaborately worded (but withal limited) exception to the hearsay rule, and abrogating entirely the much-discussed principle laid down in *Russell* v. *Russell*, [1924] A.C. 687. In rewriting this volume for the Third Edition, the learned author has made notable additions to the earlier text and referred the reader to a number of new cases. The general arrangement is clear and easily followed. There is a useful index, and the type and format are a credit to the publishers. The local statute law and relevant decisions are available here, as nowhere else. On the other hand, it seems a pity that the learned author did not write a text-book of moderate length that would have covered the subject adequately both for the student and for the practitioner. The author's share in the latest volume makes one regret (with due respect) the surviving influence of Professor Garrow's original notes. The dehydrated texts of *Phipson's Manual* and *Stephens's Digest* are such unpalatable fare that one may venture to hope for a Fourth Edition attaining the proportions of a full-length treatise.

The young lawyer might have profited from an introductory chapter on the basic need for rules of evidence, with some explanation of the historic background of the subject as we now know it. At the risk of appearing critical of a work which contains an amazing amount of material in a small compass, at least one reader would have been interested in Mr. Willis's views on the application (if any) to New Zealand of *Hobbs* v. *Tinling*, [1929] 2 K.B. 1, on the question of cross-examination as to character in defamation proceedings. Does the learned author regard the decision in *R.* v. *Gibbons and Hamilton*, [1944] N.Z.L.R. 465, as altogether satisfactory?

Since the book went to press, the cataloguing of similar facts laid down by the Court of Criminal Appeal in *R.* v. *Sims*, [1946] 1 All E.R. 697, has been disapproved by the Judicial Committee in *Noor Mohamed* v. *The King*, [1949] 1 All E.R. 365. Our own Court of Appeal in *R.* v. *Phillips*, [1949] N.Z.L.R. 316, has formulated a far-reaching construction of s. 20 of the Evidence Act. Doubtless Mr. Willis will be dealing with the implications of these cases in the next edition.

The foregoing are, perhaps, trivial comments. All readers will have cause to be grateful to Mr. Willis for the preparation of this work, which securely takes its place as part of the legal literature of the country.

—A. L. H.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Compulsory Third-party Insurance.—The new Transport Bill repeals the Motor-vehicles Insurance (Third-party Risks) Act, 1928, and re-enacts it as part of this comprehensive measure, which seeks to gather together the threads of all transport troubles, civil and criminal. Many who have suffered injury in motor-vehicle accidents during the past twenty-one years in this country have had reason to bless this piece of legislative sagacity. Whether or not the blessing was, in fact, conferred is a more arguable point. It set an example in the Southern Hemisphere that the Australian States followed somewhat tardily. Tasmania was first in the field with its Traffic Act, 1935; and in the next year Queensland passed the Motor-vehicle Insurance Act, 1936, and South Australia the Road Traffic Amendment Act, 1936. Then came the Motor-car (Third-party Insurance) Act, 1939, of Victoria; the Motor-vehicles (Third-party Insurance) Act, 1942, of New South Wales; and the Motor-vehicles (Third-party Insurance) Act, 1943, of West Australia. Four of these States, however, had less faith than we have had in the suitability of a common jury for the class of case to which they have application, and abolished jury trials: Tasmania (s. 73), South Australia (s. 70), Queensland (s. 12), and West Australia (s. 16). It seems that there juries *know* that defendants are insured.

The Reasonable Man.—The sweeping majority in favour of conscription expressed in the recent referendum may well be taken by admirers of our jury-system as a vindication of the reasonableness of the "man in the street." There is a passage in Horace Twiss's *Life of Lord Chancellor Eldon* that is apposite:

> I went, with Mr. Pitt, not long before his death, from Roehampton to Windsor. Among much conversation upon various subjects, I observed to him that his station in life must have given him better opportunities of knowing men than almost any other person could possess; and I asked him whether his intercourse with them, upon the whole, led him to think that the greater part of them were governed by reasonably honourable principles, or by corrupt motives. His answer was, that he had a favourable opinion of mankind upon the whole, and that be believed that the majority was really actuated by fair meaning and intention.

In passing, Scriblex recalls an amusing story of Eldon, who, as a poor youth, had eloped with the daughter of a rich banker. Entering the Middle Temple as a student, he found that the Vinerian Professor required a deputy, and he took the job at £60 a year. His work was simply to read out the Professor's lectures. On opening the manuscript of the first of these, he announced, to his own discomfiture, that it was upon the Statute of Philip and Mary which had been passed to punish men who enticed away heiresses and clandestinely married them.

Judicial Age.—Surprised comment that Mr. Justice Humphreys sat recently, at the age of eighty-two, to hear the Haigh "acid-bath" murder case, recalls some observations of Lord Hewart, L.C.J., when expressing his views in opposition to the judicial age-limit (72) before the Commission for the Despatch of Business of Common Law in 1935. "Take my friend, Mr. Justice Avory," he said. "He is now, I think, in his eighty-fourth year. He sits by my side day by day in Crown-paper cases, and in the Court of Criminal Appeal. I safely say: if in doubt, look it up in Mr. Justice Avory. He is an encyclopaedia of knowledge, not only in criminal law, but in all the law with which Crown-paper cases have to do. If he had been retired or had retired at the age of seventy or seventy-five, his great knowledge and wisdom would have been lost to this country for years." Some twenty years or so earlier, Lord Alverstone told the King's Bench Commission that a Judge's last ten years were his best years; while Lord Phillimore, when nearing the end of his distinguished career, said: "The work I do is so hard that, if I were a younger man, I could not do it." To return, however, to Humphreys, J., it is of interest to note that Sir Patrick Hastings, K.C., describes him as almost, if not quite, the best criminal Judge he has known.

On Freedom of Speech.—"With effervescing opinions, as with the not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to the air."—Mr. Justice Holmes in a dissenting judgment.

From My Notebook.—"We are quite prepared to accept the views expressed by the Field-Marshal [Smuts] as to the most effective and satisfactory methods of achieving the objects of the testator, but the question is not what persons of sound judgment would consider to be the best manner of application. It is how, on the true construction of the gift, it would be permissible to apply the trust funds. In answering this question it is, we think, impossible to limit the permissible methods of application on the lines indicated in the affidavit": Lord Greene, M.R., in *Re Strakosch (deceased), Temperley and Another* v. *Attorney-General and Others*, [1949] 2 All E.R. 6, 7, 8. (The terms of the disposition comprehended amongst its purposes "the appeasement of racial feeling"; and it was held that this was a political cause, which did not have as its dominant motive the desire to profit people who would not otherwise be profited, and was, therefore, not charitable.)

"The general test, which has been laid down for many years, is that if the owner of a house, who allows other people to live in it, lives on the premises and manages the premises himself, or if the owner has a servant resident on the premises to manage them on his behalf, the other people living in the house are lodgers; whereas if he does not live in the house but lets the whole house out to various people it is a letting out of the house in tenements and the persons occupying the tenements are not lodgers but tenants": per Lord Goddard, L.C.J., in *Honig* v. *Redfern*, [1949] 2 All E.R. 15, 17.

"Bankruptcy in my family was not a misfortune, it was a habit, and, moreover a habit which occurred with remarkable regularity. Looking back into the past, I am forced to the conclusion that my youth could properly be described as a paraphrase of the elementary definition of an island; I was an item completely surrounded by insolvency": Sir Patrick Hastings, in his *Autobiography* (Heinemann, 1948).