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PRACTICE: "VIEW" BY A JUDGE.

WHERE cases are tried before a Judge alone, an inspection by the Judge is not an unusual occurrence. As the Court of Appeal said in *Frank Harris and Co., Ltd.* v. *Rora Hakaraia*, (1914) 33 N.Z.L.R. 1074, 1088, R. 478 of the Code of Civil Procedure appeared to be a sufficient authority for such inspection, either by the jury or by the Judge ; but the Court of Appeal said that it would be well to adopt the express English rules upon this subject. That case, and *Pinner* v. *Martin's Boot and Shoe Stores, Ltd.*, [1941] N.Z.L.R. 55, are the two New Zealand leading cases on the point ; but, as we shall see, neither is very satisfactory or conclusive on the nature or extent of a view by a Judge. We have, therefore, to go further afield to get a clearer conception of the Judge's proper function in the case of a view, and of its limitations.

To commence with the much-followed *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135,; this was an action for an injunction to restrain an omnibus proprietor from running any omnibus printed and lettered in such a manner as to form a colourable imitation of the painting and lettering of the plaintiffs' omnibuses, and for damages.

At the trial before Farwell, J., upon the plaintiffs' counsel opening the case, the learned Judge proposed that he should view two rival omnibuses of the plaintiffs and the defendant that were standing in the courtyard of the Royal Courts of Justice. Thereupon, with the consent of the parties, His Lordship viewed the two omnibuses, and, on returning into Court, stated that he was satisfied upon the evidence of his own eyesight alone, without any further evidence, that the defendant's omnibus was so painted and lettered on the side-panels as to be calculated to deceive the casual passenger. Relying upon His Lordship's conclusions of fact, plaintiffs' counsel called as their only witnesses the plaintiffs' panel-painter and their secretary to prove that there was a reasonable probability of deception, and they offered no evidence of actual deception. The defendant then called witnesses to rebut the plaintiffs' case, and, in the result, the learned Judge granted to the plaintiffs a perpetual injunction. From this decision, the defendant appealed.

In his judgment, Lord Alverstone, L.C.J., said that the judgment of the Court below could not stand. It seemed to him to have proceeded upon the theory that the plaintiffs were entitled to succeed on the simple proof of colour and design of their own omnibus, and on the learned Judge's viewing the defendant's omnibus and the plaintiffs', and comparing them. That, in the opinion of the learned Lord Chief Justice, was not sufficient to justify the plaintiffs in obtaining either an injunction or damages. He said that their Lordships were asked to say that the learned Judge was right in coming to the conclusion that, because he thought the two omnibuses so resembled one another that they might be mistaken the one for the other, there was sufficient evidence to support an injunction in an action for deceit. He continued, at pp. 138, 139 :

> In the first place, it appears to me that if such a view were to prevail, a very undesirable and erroneous practice might grow up with reference to the viewing or seeing by the Judge of the subject-matter of the action, or anything relating to the subject-matter of an action. It is quite true that by r. 4 of O. 50 it is provided that the Judge may " inspect any property or thing concerning which any question may arise " in the action ; but I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea, that the Judge is entitled to put a view in the place of evidence.
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> A view, as I have always understood, *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.** Of course, it is quite possible there may be cases in which all the circumstances connected with the matter in dispute are of such common knowledge, and are so well known to the tribunal that it may be said no evidence is necessary ; as for instance, the common case of the make-up of an article which is intended to be sold in shops, though in that case I think that if the Judge, in consequence of there being differences between the two articles, could not say they were identical, he ought not to grant an injunction without evidence before him that the article in dispute was so made as to be calculated to deceive people. Of course I need scarcely say it is not necessary to show actual deception, because a thing may be calculated to deceive, and a plaintiff may be justified in coming and stopping the practice before the actual deception has taken place.
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> This case seems to me a case of all others in which evidence should be given of the character which I have indicated. Here, we have two omnibuses running side by side, and competing for the custom of the road, but the two are not identical. If the London General Omnibus Company found their action upon the ground that the alleged infringing omnibus is calculated to deceive, some evidence ought to have been given to justify the learned Judge in coming to the conclusion he did, beyond the mere view.

Lord Alverstone then considered *North Cheshire and Manchester Brewery Co., Ltd.* v. *Manchester Brewery Co., Ltd.*, [1899] A.C. 83 ; and he pointed to the observation of the Lord Chancellor that he himself should not have required any evidence in that case ; and that he perhaps, in one respect, went further, for in the earlier part of his judgment he said that the particular question whether the resemblance in name was likely to deceive could not have been put to witnesses, because it was the very question which the Judge had to decide. The learned Lord Chief Justice then continued, at p. 140.

* The italics are ours.

> But I am satisfied, myself, that the Lord Chancellor did not mean to lay down any general rule that no evidence that a particular thing was calculated to deceive was ever to be required. In that case evidence had been given, and it was merely a case of the comparison of two names, which may be said to speak for themselves. In the present case, the Court has to make itself acquainted with, or to make an assumption as to what are, the habits of people travelling in omnibuses, and the matters which it may be important to them to observe; and in my opinion it is quite impossible to arrive at a correct conclusion by simply looking at the two omnibuses, without any evidence at all to lead the Court to the conclusion that passengers would be misled by this or that alteration or resemblance.

Rigby and Vaughan Williams, L.JJ., agreed. The former said that sound ground for differing with the learned Judge was to be found in the fact that he had no evidence before him that persons had been actually deceived. Their Lordships had no direct evidence to deal with, but only a conclusion arrived at by a comparison of the two omnibuses, and that was not sufficient. Vaughan Williams, L.J., said that, whether the action before the Court were considered as one of deceit or as brought against the defendants for having trenched upon the private rights of the plaintiffs, the conclusion arrived at by the learned Judge below could not be justified, because there can be no doubt that, if there is no proof of the actual deception of the public in the sense of that section of the public which uses omnibuses or are interested in that matter, it must be proved that there is a reasonable probability of deception, or, as it is sometimes expressed, it must be proved that there is a resemblance which is calculated to deceive. He continued:

> In my judgment there is no proof in this case of that which it was necessary to allege and prove. It may very well be that in some cases no proof may be required beyond that of the mere resemblance; and the case in the House of Lords of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* ([1899] A.C. 83) was an example of that sort, because what was there complained of was the taking of a similar name; and it is quite plain that in such a case the similarity is one which would appear to the ear quite independently of the proof of surrounding circumstances, or the proof of the experience of those who had come commercially in contact with the name. But that is not a case in any way resembling the present. The resemblance complained of here is the want of difference of appearance in the details, and it is said that there is such a want of difference that those using the omnibuses are likely to be deceived.

In such a case, the learned Lord Justice said, it is obviously possible to give evidence of persons who have been in the habit of using the omnibuses and of persons who have, as officers, either of the plaintiff company or of private omnibus proprietors, been in the habit of checking the user of the omnibuses and seeing the passengers as they get in and out of the omnibuses and hearing complaints of deception. He went on to say that in such a case, if there has been deception, it is possible to give evidence of it; and, when a case comes before the Court in which it is possible to give such evidence, and in which such evidence would obviously be material and important, one draws the very strongest inference from the fact that no such evidence is called or tendered. He concluded, at p. 142:

> In my judgment, this being a case in which the circumstances were such that it was possible to give evidence that the resemblance or want of difference was calculated to mislead—a case indeed upon which it was perfectly impossible for anyone to form an accurate judgment unless there was some such evidence—in such a case it seems to me, with all deference to the learned Judge, that his conclusion was not one which can be supported, namely, that merely upon the evidence of the secretary and the painter there was reasonable probability of deception.

The appeal was allowed, and the action was dismissed.

The seeming exception to the general rule is found in patent and trade-mark cases, and it seems established that it applies only in one particular to those. Thus, in *Thomas Bear and Sons (Indian), Ltd.* v. *Prayag Narain Jagennath*, (1940) 58 R.P.C. 25, a trade-mark case, their Lordships of the Privy Council considered *London General Omnibus Co., Ltd.* v. *Lavell* (*supra*), which was a question of evidence only; and, in particular, the view, as taken by the learned Judges in India, that it was for the Court to decide whether the use of a trade-mark on goods not closely similar in quality to the appellants' goods would be likely to deceive. In their judgment, at p. 30, their Lordships said that they must repeat that this question is one of fact on which evidence is essential. They differentiated it from the question whether a particular mark or name is an imitation or a colourable imitation of a mark or name used by the plaintiff. There, they said, the Judge has before his eyes the materials for a decision, and in some cases it cannot be doubted that the Judge can himself decide on the degree of resemblance or on the materiality of alleged differences of the marks or words: *North Cheshire and Manchester Brewery Co., Ltd.* v. *Manchester Brewery Co., Ltd.*, [1899] A.C. 83, and *Payton and Co.* v. *Snelling, Lampard and Co., Ltd.*, (1900) 17 R.P.C. 628, 635. Their Lordships said that, if the decision of the Court of Appeal in *London General Omnibus Co., Ltd.* v. *Lavell* (*supra*), or any of the dicta in that case, is contrary to these decisions, it cannot be relied upon in passing-off or patent cases. They added that, on the other hand, there are many trade-marks and passing-off cases which cannot be decided by a visual comparison of the rival marks or names, and must depend on the evidence of witnesses. That, indeed, is nearly always the case when there are factors involved other than the mere resemblance of the marks or words.

In the first of the New Zealand cases, *Frank Harris and Co., Ltd.* v. *Rora Hakaraia* (*supra*), the Court of Appeal, in their judgment delivered by Edwards, J., said that, in their opinion, there was 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 *Lavell's* case, at p. 139:

> for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence.

If the rule were otherwise, it would certainly never be safe to order a view by a jury.

In *Pinner* v. *Martin's Boot and Shoe Stores, Ltd.* (*supra*), Sir Michael Myers, C.J., said, at pp. 70, 71:

> 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. However that may be, in my opinion a view by the Judge after the verdict of the jury and for the purposes of an application which may involve a challenge of that verdict is a course that it is better as a matter of practice to avoid. If a Judge holds a view on his own account after the verdict of the jury for the purpose of such an application or an application for a new trial—especially if, as the learned Judge says happened in this case, he has summed up strongly against the claim—there is always the risk of his being unconsciously affected by the interpretation that he himself places upon what he sees.

In *Pinner's* case, there was a motion for nonsuit, or, in the alternative, for judgment for the defendant company in an action for damages brought against it by the plaintiff. The action was tried before Ostler, J., and a jury of four. His Honour gave judgment for the defendant company *non obstante veredicto*. The plaintiff

was a young woman who had been engaged as a seller of shoes as senior assistant in the shop of the defendant company, which sold women's shoes exclusively. On the evening in question, she mounted a ladder, and, while on the top rung but one, the foot of the ladder slipped away, causing her to fall and injure a leg, and it was in respect of this injury that she claimed damages from the defendant company, alleging that her injury was caused by its negligence. In the course of his judgment on the motion for nonsuit or, in the alternative, a judgment for the defendant company, Ostler, J., said that one ground of negligence alleged was that the particular ladder used had been allowed by the defendant company to become unsafe, because the strips of rubber with which it was shoed had been allowed to become smooth. He continued, at p. 60 :

> Taking the evidence given on behalf of plaintiff alone on this point, there is no evidence that the rubbers were at any time other than smooth and shiny. I have inspected them, and judging by their appearance and the absence of any friction owing to their continual use on thick carpet, I should say that they always were smooth and shiny, and that their condition to-day is no different from what it was five years ago. But whether that is so or not, there is no evidence that they ever were in any different condition from that in which they are in to-day or were in on the day of the accident. Therefore plaintiff has not only failed to prove the allegation in her statement of claim that the defendant company had allowed the ladder to become unsafe by failing to keep the rubber strips in good order and repair, but she has given no evidence from which such an inference could be drawn by reasonable men.

For this and other reasons, His Honour was of opinion that the evidence produced on behalf of the plaintiff was insufficient to enable any jury reasonably to come to the conclusion that any negligence was proved against the defendant company on any of the grounds alleged in the statement of claim.

From the part of the judgment dismissing the action, the plaintiff appealed. It was contended for the appellant that the learned Judge had a view after the verdict and after the hearing of the motion from which the appeal before the Court lay, and such view was used for a purpose for which it should not have been used. Appellant's counsel said that the effect of this misuse of the view was to nullify the Judge's judgment, and the Court of Appeal must look only to the printed evidence. On the authority of *Hakaraia's* case (*supra*), at pp. 1074, 1087, 1088, he contended that a Judge by a view cannot serve any proper purpose, because a view is solely 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 his judgment, Sir Michael Myers, C.J., said, at pp. 70, 71 :

> The learned Judge adopted the unusual course in this case of personally viewing and inspecting the shop and the ladder, &c., after verdict and for the purpose of the defendant company's application for nonsuit or judgment for the defendant. The jury may (if allowed by the Court), and in this case did, have a view of the shop, but then they are the judges of the facts. No doubt there may be cases, but I should think they must be few, in which it might be necessary for the Judge, where the issues of fact are being tried by a jury, to inspect the *locus* or the property in order that he may understand the evidence and have a proper appreciation of it for the purposes of his summing-up . . . in my opinion a view by the Judge after the verdict of the jury and for the purposes of an application which may involve a challenge of that verdict is a course that it is better as a matter of practice to avoid. If a Judge holds a view on his own account after the verdict of the jury for the purpose of such an application or an application for a new trial—especially if, as the learned Judge says happened in this case, he has summed up strongly against the claim—there is always the risk of his being unconsciouly affected by the interpretation that he himself places upon what he sees.

The learned Chief Justice proceeded to explain *Hakaraia's* case. He said that that action, which was heard in Palmerston North, had reference to the price of a monument erected at Wanganui, and Chapman, J., said that after the trial he went from Palmerston North to the Wanganui Circuit and several times inspected the monument. But then he could not very well avoid seeing it, for it was erected in the public grounds within which the Court-house stands, and he had to pass the monument every time he went to and from the Court. In *Pinner's* case, the view was made at the learned trial Judge's own suggestion, and at his invitation counsel accompanied him. That fact could not affect the position, the learned Chief Justice said, as was shown by the concluding paragraph in the judgment of the Privy Council in *Kessowji Issar* v. *Great Indian Peninsula Railway Co.*, (1907) 23 T.L.R. 530. In his judgment in *Pinner's* case the learned trial Judge had said, speaking of the rubbers on the ladder which he saw at his view :

> I have inspected them, and judging by their appearance and the absence of any friction owing to their continual use on thick carpet, I should say that they always were smooth and shiny, and that their condition to-day is no different from what it was five years ago.

The learned Chief Justice commented, at p. 71 :

> It may be said that the ladder could, and perhaps should, have been brought into Court. But even if it had been brought into Court and anything turned upon the appearance of the rubber the question was one for the jury and not for the Judge.

His Honour concluded by illustrating with certain passages in the judgment the danger of a view, and he observed, at pp. 71, 72 :

> Whether or not the statement is the result of observation or of experiments at the view does not appear, but I can certainly find nothing in the evidence referring to a distance of 2 ft. to 4 ft. I am conscious that in this case the application was not for a new trial, but for nonsuit or judgment for the defendant, but that does not affect the opinion that I have expressed. The question was whether there was evidence to go to the jury, and that had to be decided upon the evidence actually before the Court. If there was no evidence, then a verdict for the plaintiff could not be upheld simply because the jury had viewed or inspected the shop, and the subsequent view or inspection by the Judge could not affect the position one way or the other.

In the course of his judgment, Mr. Justice Blair, though his observations do not appear entirely sound in the light of authority, said, at p. 77 :

> I have made very many views in running-down cases, machinery, tunnelling, and drainage cases, and also in cargo stowage and all sorts and kinds of repairing cases. In all these cases there was a conflict of evidence as to whether such or such a thing could happen in such and such a way, or that it had been done in such and such a way, and the purpose of the view was to enable me to see with my own eyes which version—the plaintiff's or the defendant's—was correct. I certainly had evidence to help me to reach a sound conclusion, but there were instances where some of the evidence was designed not to help but to hinder. In giving judgment in all such cases I have never had the slightest hesitation in stating the result of the inspection from the evidence of my own eyes. That is what the jury would do in this case, and it is what I would have done had I been trying it as a Judge of the facts.

This, it would seem, is perilously close to usurping the jury's functions, and it seems, in essence, to be contrary to the view of their Lordships of the Privy Council in *Kessowji Issar* v. *Great Indian Peninsula Railway Co.* (*supra*), where, at p. 531, the suggestion had come from the Bench :

> that we [that is, the trial Judge and counsel] should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries.

Their Lordships did not approve of such a " suggestion." They said :

> Even if it had been tentatively carried out, it did not necessarily follow that the Court would cast to the winds the legal evidence in the case, and decide on impressions arising on the concerted representation. It would be too strict to hold that it was the duty of counsel, at their peril, to restrain Judges within the *cursus curiae*, and to insist on their abstaining from experiments which to some might prove too alluring to admit of adherence to legal *media concludendi*.

At p. 78, Mr. Justice Blair proceeded to say that the learned Judge in the Court below had gone to have a view after the verdict had been given and after he had heard the appellant's motion for nonsuit or other alternative relief. Such an application involved a consideration and appreciation of the evidence, and Blair, J., said he could see nothing objectionable in his so doing. His Honour was on sound ground if he meant that Ostler, J., had gone so as to have a proper understanding of the facts when a phase of the case arose when it was desirable, in his opinion, that he have a better understanding of them. The question of nonsuit would involve a due appreciation of all the evidence. Blair, J., concluded by sounding this warning, at p. 78 :

> But there is always the risk that the trial Judge may not derive the same impressions from his view as were derived by the jury from its view. And the law is that once there is a case to go to a jury, then, provided there is any evidence to justify the jury's view on the facts, the jury's finding on that point cannot be disturbed.

Mr. Justice Kennedy, at p. 82, said :

> The learned trial Judge had to deal with a motion for nonsuit and he had to decide accordingly whether there was evidence proper to go to the jury. The question was precisely the same whether it was determined before the verdict of the jury or, whether being reserved, it fell for determination after the jury's verdict had been given. It was, I thought, conceded that the Judge might properly take a view before the jury's verdict to enable him to understand and apply the evidence, but it was submitted that he should not view after verdict. In each case the Judge has to consider the evidence, and I see no reason why he should be deprived of the benefit of more thoroughly understanding the evidence by having a view because verdict has been given. So far as I am aware the books contain no cases laying it down that the Judge shall refrain from a view in cases tried before a jury, and I myself see no sufficient reason why it should be said that he should never view once the jury's verdict has been given.

It will be seen that the learned Judge's expression of opinion was strongly based on authority, and he merely drew the conclusion that, within the limits laid down, a right of a view by a Judge was not to be qualified by any question as to the precise time at which it should take place.

The Canadian practice as regards a view by a Judge appears in *R.* v. *Kaplansky, Sachuk, and Seniloff*, (1922) 69 D.L.R. 625, 629, 630, where Riddell, J. (as he then was), after reference to the Statute 4 Anne, c. 16, and the other English statutes to which we have referred, said, at p. 630 :

> All the evidence is before " the Court and jury sworn " ; it is the right and duty of the Judge to see and hear all the evidence : it is his right and it may be his duty to comment upon any part of the evidence. There is no law permitting the Judge to have a view : and if he had a view the trial would be abortive : *Regina* v. *Petrie*, (1890) 20 O.R. 317. To make an object of which a view is had evidence, it would be necessary to bring it before the Court in the Court-room or for the Court to be adjourned to the place where the object was. The latter I should have done had I been asked, but I was not asked. The matter, probably, was too trivial to justify the able and experienced counsel for the prisoner making such a request . . .
>
> Authority is the same way. So far as I know, it has been uniformly laid down in the English Courts and our own, that " a view . . . 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 " per *Lord Alverstone*, C.J., in *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135, at p. 139.

There have been two recent judgments of the Full Court of New South Wales on the question of a Judge's view, and they bring the law and practice up-to-date. We submit them as giving a clear summing-up of all the leading authorities. They will be considered in the concluding part of this article in our next issue.

SUMMARY OF RECENT LAW.

AGRICULTURE.

Agricultural Workers (Orchardists) Extension Order, 1949 (Serial No. 1949/117), revokes the Agricultural Workers (Orchardists) Extension Order (No. 2), 1947, and applies generally the conditions of employment of agricultural workers employed in orchards as contained in the Schedule to the Order. The provisions of the Order relating to wages are deemed to have come into force on June 1, 1949.

Agricultural Workers (Tobacco-growers) Extension Order, 1949 (Serial No. 1949/116), revoking the Agricultural Workers (Tobacco-growers) Extension Order (No. 2), 1947, as from August 11, 1949, and applying to the agricultural workers employed in the tobacco industry in the Nelson Industrial District the conditions of employment contained in the Schedule to the Order, the provisions of which relating to wages are deemed to have come into force on June 1, 1949.

Dairy Factories (Licensing) Regulations, 1936, Amendment No. 1 (Serial No. 1949/114), amending Regs. 2, 4 (2)–(5), and 7 (7) of the principal regulations.

Dairy-produce Regulations, 1938, Amendment No. 4 (Serial No. 1949/115). These regulations make considerable amendments to the Dairy-produce Regulations, 1938, including a new definition of " standardized cheese-factory."

ARBITRATION.

Arbitrator—Matters decided by Umpire outside Terms of Reference—Admission and Acceptance of Evidence thereon—Legal Misconduct—Award set aside in Part. Clause 22 of a share-milking contract contained a reference to arbitration in the following form : " If any dispute doubt or difference shall arise between the parties hereto either concerning the construction of this agreement or relating to the subject-matter hereof such dispute doubt or difference shall be referred to the arbitration of one arbitrator if the parties can agree upon one and if not then to two arbitrators and an umpire in accordance with and subject to the provisions of the Arbitration Act, 1908, or any statutory amendment or modification thereof for the time being in force and the provisions of this clause shall be deemed to be a submission to arbitration within the meaning and subject to the provisions of the said Act." In cl. 2 of that contract, the share-milker undertook to supply a dairy herd of not less than 100 good milking-cows and heifers, and warranted that all the cows would be milking not later than October 20 during the current year of the contract. The owner claimed that the share-milker had failed to carry out the terms of this clause, and she claimed damages for the breach. This claim, with others, was referred to arbitration ; and, in reply to this claim, the share-milker submitted evidence and claimed that the purchase of the dairy herd by the share-milker from one Kelly was a condition precedent to his obtaining the share-milking agreement. This was followed by evidence to the effect that the share-milker was given insufficient opportunity to inspect the dairy herd he purchased from Kelly ; that, in general, the herd was of poor quality ; and that his butterfat production was low throughout the term of the contract on account of the poor quality and condition of the dairy herd purchased from Kelly. The owner objected to the admission of this evidence, but the umpire held it to be relevant, and he overruled an objection on behalf of the owner to its admission, and admitted it in evidence. This was confirmed by a letter, which the umpire wrote to the owner's solicitors about a month after the award was made. On motion to set

aside the award on the ground of legal misconduct on the part of the umpire, it was contended that the letter could not be looked at for any purpose whatsoever. *Held*, 1. That the principle that, in applications based on error on the part of the arbitrator, such error must be apparent on the face of the award, or in some contemporaneous document so closely connected with it as to form part of the award, does not apply in cases based on such causes as excess of jurisdiction or misconduct of the arbitrator. (*Attorney-General for Manitoba* v. *Kelly*, [1922] 1 A.C. 268, distinguished.) 2. That the umpire's decision that the transactions between the share-milker and Kelly were within the reference could not be accepted as authority for their inclusion in the proceedings, and, as this was legal misconduct, the award could not stand. (*Walford, Baker and Co.* v. *Macfie and Sons*, (1915) 84 L.J. K.B. 2221, and *May* v. *Mills*, (1914) 30 T.L.R. 287, applied.) *Semble*, The award could be allowed to stand as regards all other items, and be remitted to the arbitrators and umpire for reconsideration of the owner's claims under cl. 2, omitting any consideration of matters relating to the purchase of cows from Kelly. *In re An Arbitration between Moore and MacGregor.* (S.C. Auckland. July 18, 1949. Stanton, J.)

CONVEYANCING.

Bequests of Businesses. *207 Law Times Jo.*, 355.

Right-of-way and Excessive User. *99 Law Journal*, 424.

CORONERS.

Jurisdiction—Application for Fire Inquest—Arson not suspected—No Death occurring from Fire—No Jurisdiction to hold Inquest—Coroners Act, 1908, s. 5 (6)—Fire Brigades Act, 1926, s. 65. A coroner has no jurisdiction to hold an inquest into the cause and origin of a fire, where the local Fire Board refuses to act pursuant to s. 65 of the Fire Brigades Act, 1926, and there has been no suspicion of arson, and no death resulted from the fire. (*The Queen* v. *Hocken, Ex parte Jenkins*, (1876) 1 N.Z. Jur. N.S. (S.C.) 121, distinguished.) *In re An Application by Donaghy's Rope and Twine Co., Ltd.* (Dunedin. August 18, 1949. Willis, S.M.)

CRIMINAL LAW.

Evidence—Accused's Identity admitted—Evidence admissible to prove Identity given at Trial—Such Evidence irrelevant—Disallowance on That Ground—Appeal against Conviction—Evidence before Jury including Evidence later held to be Inadmissible—Other Evidence whereon Jury might convict—Such Verdict not Inevitable—Conviction quashed—New Trial ordered. Where an accused person has admitted his identity with the person against whom allegations of crime were made, evidence which is admissible to prove identity should be disallowed, not as a matter of discretion, but as irrelevant. (*Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, and *Noor Mohamed* v. *The King*, [1949] 1 All E.R. 365, followed.) (*R.* v. *Cole*, (1941) 28 Cr.App.R. 43, and *R.* v. *Rogan*, [1916] N.Z.L.R. 265, applied.) (*Thompson* v. *The King*, [1918] A.C. 221, and *R.* v. *Sims*, [1946] K.B. 531; [1946] 1 All E.R. 697, referred to.) *R.* v. *Horry.* (C.A. Wellington. July 8, 1949. O'Leary, C.J., Gresson, Hutchison, JJ.)

If there is evidence (apart from the evidence heard by the jury, but afterwards held to have been inadmissible) upon which a jury might, if it thought fit, convict the accused of the offence charged, but it is not possible to hold that a jury would inevitably have done so (in the sense that, in the absence of any doubt on the part of the Court, a reasonable jury, properly directed, would have returned the same verdict), the conviction should be quashed and a new trial ordered. (*Stirland* v. *Director of Public Prosecutions*, [1944] 2 All E.R. 13, and *R.* v. *Haddy*, [1944] 1 All E.R. 319, followed.) *R.* v. *Horry.* (C.A. Wellington. July 8, 1949. O'Leary, C.J., Gresson, Hutchison, JJ.)

DEEDS REGISTRATION.

Deeds Register Office Regulations, 1949 (Serial No. 1949/112). As from September 1, 1949, every Deeds Register Office will be open to the public daily, except on Sundays, Saturdays, and holidays, from 9 a.m. to 4 p.m. No instrument can be received for registration or deposit except between the hours of 10 a.m. and 0.30 p.m., and between 1.30 p.m. and 3 p.m. Deeds Register Office Regulations, 1937, Deeds Register Office Regulations, 1942, and Regs. 2 and 3 of the principal regulations are revoked.

EXECUTORS AND ADMINISTRATORS.

Probate, Administration, and Death Duties. *99 Law Journal*, 425.

FOOD AND DRUGS.

Cream—Milk-vendor Supplier of Milk and Cream to Milk-producers Company—Milk and Cream by Arrangement supplied by Vendor direct to Company's Customer—Vendor charged with aiding and abetting Offence by Company of supplying Sub-standard Cream—Information amended to Offence by Vendor of selling Same—Same Milk deficient in Two Respects—One Offence only to be charged—Foods and Drugs Act, 1947, s. 6 (2). The defendant was charged, on four separate informations, with aiding and abetting a company in the commission of offences contrary to the Food and Drugs Act, 1947, in selling cream deficient in the prescribed fat content. He was a supplier of milk and cream to the company under a contract. The company, in turn, was supplier to the Waikato Hospital Board by direct delivery to its hospital, by arrangement between the company and the hospital. Payment for such supply was made by the company to the defendant in terms of the contract between them; and the company received payment from the Hospital Board for the amount agreed on between it and the Board. Charges made against the company, relating to the offences in respect of which the defendant was charged with aiding and abetting, had been discontinued. Each information was in the form " did aid and abet the commission of the following offences namely " (that the company did sell, &c.). *Held*, 1. That, where the food in issue had not at any time been in the possession or control of the principal (the company), the agent, who at all material times had had the actual possession of such food, should be directly charged; and the penalty would fall where the actual guilt lay. 2. That, accordingly, the informations should be amended to " did sell." (*Parr* v. *Surgenor*, [1923] N.Z.L.R. 1229, as explained in *Duncan* v. *Graham*, [1941] N.Z.L.R. 535, applied.) *Semble*, The informations charged the defendant with separate offences where, in fact and in law, only one offence was disclosed, as the fact that the milk was deficient in two respects does not make two offences, but only the one offence—namely, a sale of cream which did not comply with the prescribed standard. (*Smith* v. *Hickson*, [1930] N.Z.L.R. 43, distinguished.) *Parker* v. *Jones.* (Hamilton. August 12, 1949. Paterson, S.M.)

Milk—Samples taken from Individual Cans—Milk in Cans not to be sold for Human Consumption until blended with Other Milk—Milk in One Can not of Required Standard—Milk taken not a True " Sample "—Food and Drugs Act, 1947, s. 6 (2)—Food and Drug Regulations, 1946 (Serial No. 1946/136), Reg. 99 (1). The respondent was a bulk supplier of milk to the Milk Marketing Division. A Health Inspector took certain samples of milk separately from two cans being driven from the defendant's farm by his share-milker. He took one sample from a 20-gallon can, and one from a 5-gallon (or 10-gallon) can only partly filled. Before taking the specimens, the Inspector did not mix the contents of both cans. In respect of the sample from the smaller can, the Analyst's report showed that the milk contained added water, and was deficient in milk solids other than milk fat. It was admitted that the sample from the larger can was above quality. In the Magistrates' Court, where the respondent was charged with selling milk which did not comply with the standard prescribed by Reg. 99 (1) of the Food and Drug Regulations, 1946, he deposed that he did not sell to individuals, but only in bulk, and that, before human consumption was to take place, the milk in the cans was to undergo a mixing together. The learned Magistrate dismissed the information. On appeal from that determination, *Held*, dismissing the appeal, 1. That only when the bulk of the milk had been created did the milk to be sold for human consumption come into existence, and only then (and not before) could the Inspector select samples as he chose. (*Lawry* v. *West*, (1947) 73 C.L.R. 289, followed.) 2. That the sample taken by the Inspector from one of the cans was not a true sample of milk, sold or to be sold for human consumption, and it was not proved that the milk, when blended, was not up to the necessary standard. (*Bridges* v. *Griffin*, [1925] 2 K.B. 233, distinguished.) *Reed* v. *Jamieson.* (Palmerston North. June 23, 1949. Cornish, J.)

IMPRISONMENT FOR DEBT LIMITATION.

Enforcement of Proceedings on Judgment Summons—Debt over Six Years Old and No Payment made—Leave necessary before Judgment Summons issued—Magistrates' Courts Act, 1947, ss. 79 (1), 80 (1) (e). A judgment summons may not be issued where the judgment debt was six years old and no payment had been made thereunder at any time, until leave of the Court to enforce such judgment has been obtained under s. 80 (1) of the Tenancy Act, 1948, as the term " enforced," where used in s. 79 (1) of that statute, refers to the whole of the proceedings under the Imprisonment for Debt Limitation Act, 1908.

(*Paterson's Tyre Service, Ltd.* v. *Evenden*, [1940] N.Z.L.R. 165, and *Taylor* v. *Taylor*, (1941) 2 M.C.D. 274, referred to.) *Birkenhead Borough* v. *Kimberly*. (Auckland. August 2, 1949. Wily, S.M.)

Judgment Summons—Reinstatement of Judgment Summons struck out for Non-appearance of Parties—Applicability of Magistrates' Courts Rules, 1948—Application for Reinstatement to be made thereunder—Magistrates' Courts Rules, 1948, rr. 4 (1), 200, 226 (1) (a). There is no provision in the rules under the Imprisonment for Debt Limitation Act, 1908, for the reinstatement of a judgment summons which has been struck out for non-appearance of either of the parties. An order can, however, be made for reinstatement of a judgment summons by virtue of r. 4 (1) of the Magistrates' Courts Rules, 1948, under r. 226 (1) (*a*), and, if it is made within seven days, the judgment summons may be reinstated. *Dunderdale* v. *Dowd*. (Auckland. August 11, 1949. Wily, S.M.)

JURISDICTION.

Supreme Court—Order sought on Originating Summons—Ineffectiveness of Order if made—No Jurisdiction to make Ineffective Order—Executors and Administrators—Private International Law—Administration of Assets available for Payment of Debts—Testator domiciled in South Africa—Mortgage Debt on Real Property in New Zealand—Originating Summons asking if Such Property to be transferred to Named Devisees subject to Mortgage or Mortgage Debt repayable out of Assets available for Payment of Debts—Such Assets in South Africa, where Executor domiciled—Ineffectiveness of Order on Such Summons—Property Law Act, 1908, s. 109. Effectiveness of an order is a paramount element in the existence of jurisdiction. Consequently, the Supreme Court of New Zealand cannot make an order controlling funds in the hands of an executor in South Africa and being property situate there; and, further, it cannot act *in personam* in respect of that executor in his administration of such funds in South Africa. A testatrix domiciled in South Africa left assets there available for the payment of debts. Her executor was domiciled there. She also owned a property in New Zealand, which was subject to mortgage. This was given to two grandchildren by her will, which was resealed in New Zealand. The law of South Africa requires that encumbrances charged on devised properties must be discharged at the cost of that part of the testator's estate which is liable for the payment of debts. An originating summons asked whether the property in New Zealand was to be transferred to the persons entitled subject to the existing mortgage, or whether the mortgage must first be discharged out of that part of the residuary estate which was available for the payment of debts, according to the law in New Zealand. *Held*, dismissing the summons, 1. That what was involved was the administration of the assets of the testatrix available for the payment of debts—namely, the disposition by her executor of funds which were not in New Zealand, but were wholly and exclusively in South Africa. (*Trotter* v. *Trotter*, (1828) 4 Bli. N.S. 502; 5 E.R. 179, referred to.) 2. That the testatrix must be presumed to have had in mind the *lex domicilii*, that being the system of law under which she lived and with which she was to be expected to be familiar; but, as there was not "any contrary or other intention" in her will, within the meaning of s. 109 of the Property Law Act, 1908, there was nothing in New Zealand law to prevent full effect being given to the intention of the testatrix that the mortgage on the New Zealand property should be discharged out of that part of the testatrix's estate available for the payment of debts. 3. That the property which would be affected by an order that the Supreme Court in New Zealand might make on the originating summons was not within that Court's jurisdiction; and, in any event, any such order would be ineffective and nugatory, as the executor must execute the trusts imposed on him in accordance with the law to which both he and the funds which such an order was sought to affect were subject. (*In re Hewit, Lawson* v. *Duncan*, [1891] 3 Ch. 568, applied.) (*In re Butchart, Butchart* v. *Butchart*, [1932] N.Z.L.R. 125, distinguished.) *In re Voet, Goudvis* v. *Turnbull and Others*. (S.C. Auckland. June 27, 1949. Finlay, J.)

LAND TRANSFER.

Land Transfer Regulations, 1948, Amendment No. 1 (Serial No. 1949/111). As from September 1, 1949, the hours during which the Land Transfer Office will be open will be from 9 a.m. to 4 p.m. Regulation 7 of the principal regulations is accordingly revoked.

LANDLORD AND TENANT.

Land Sales—Lease "for the term commencing on" December 6, 1943, "and expiring on" December 5, 1946—Term "not less than three years"—No Consent of Court obtained—Lease void—Servicemen's Settlement and Land Sales Act, 1943, s. 44. A lease of land expressed the term of lease to be "for the term commencing on the sixth day of December, 1943, and expiring on the fifth day of December, 1946." Such a term must be construed as a term of "not less than three years" within the meaning of s. 44 of the Servicemen's Settlement and Land Sales Act, 1943, and declared to be unlawful by s. 46 of that statute. (*Clayton's Case*, (1585) 5 Co. Rep. 1a; 77 E.R. 48, and *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378, followed.) Consequently, the lease was void and of no effect, and neither party could enforce any of its provisions. (*Mansion House Kawau, Ltd.* v. *Stapleton*, [1948] N.Z.L.R. 1015, applied.) *Mardon* v. *Welsh and Another*. (Invercargill. December 20, 1948. Harlow, S.M.)

LAW PRACTITIONERS.

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

LICENSING.

Licensing Regulations, 1949 (Serial No. 1949/113). These regulations, which came into force on August 12, 1949, are in three Parts. Part I deals with licences, including the cancellation, or surrender, of unnecessary licences, the issue of new publicans', tourist-house, and wholesale licences, tourist-house licences, workers' canteen licences, wine-cellar licences, and cancellation of licences by Licensing Committees, and the procedure on appeals to the Licensing Control Commission. Part II deals with applications for club charters under Part IV of the Licensing Amendment Act, 1948. Part III deals with applications for an extended-hours permit under s. 107 (1) of the Licensing Amendment Act, 1948, while Part IV prescribes the proceedings of the Licensing Control Commission and of Licensing Committees, and the form of notices, applications, and other documents.

Offences—Sale and Supply of Liquor at Unauthorized Time—Evidence—Analysis of "spirits, wine, beer, ale, porter, cider, perry" Unnecessary—"Intoxicating liquor"—"Liquor"—Licensing Act, 1908, s. 4—Licensing Amendment Act, 1948, s. 94. The words "spirits, wine, ale, beer, porter, cider, perry" in the definition of "intoxicating liquor" or "liquor" in s. 4 of the Licensing Act, 1908 (as amended by s. 94 of the Licensing Amendment Act, 1948), must be construed according to their ordinary popular meaning, and the words "which on analysis is found to contain more than three parts per centum of proof spirit" qualify only the words "other fermented, distilled, or spirituous liquor." In prosecutions such as those which were the subject of these appeals—a sale by a licensee contrary to s. 190 of the Licensing Act, 1908, and supply of liquor contrary to s. 205 (*e*) thereof—the question whether what was sold or supplied was spirits, wine, ale, beer, porter, cider, or perry is a question of fact to be determined on the evidence as any other question of fact is determined; it is equally a question of fact whether what was sold or supplied was "fermented, distilled, or spirituous liquor which on analysis is found to contain more than three parts per centum of proof spirit," to be determined, however, only on the results of an analysis. *Cudby* v. *Davies: Cudby* v. *Boyd*. (S.C. Palmerston North. August 16, 1949. Gresson, J.)

MAGISTRATES' COURT.

Appeal—Notice of Appeal—Application for Extension of Time in which to lodge Security—Time for lodging Such Application—Seven Days plus One Month—Extension of Time Discretionary—Magistrates' Courts Act, 1928, s. 164 (d)—*Statutes Amendment Act, 1938, s. 37 (1).* The words "further time" in para. (*d*) of the proviso to s. 164 of the Magistrates' Courts Act, 1928 (substituted by s. 37 (1) of the Statutes Amendment Act, 1938), must be read with the earlier word "such," and, when so read, they refer back to the first part of the section, which says "within such further time not exceeding one month after the expiration of such seven days as may be allowed by the Court or by a Magistrate on application made either before or after the expiration of such seven days"; and, continuing, "and also within such seven days or further time gives security to abide the event of the appeal, in such form and to such amount as may be approved by the Court or a Magistrate, not being less than will be sufficient to cover the costs of the appeal." Judgment was given against the defendant in the Magistrates' Court on November 8, 1948. The solicitor then acting for the defendant thereupon asked the

learned Magistrate to fix security for appeal. The Magistrate declined to do so until the notice of intention to appeal was lodged. On November 15, 1948, notice of intention to appeal was lodged, and up to that time the amount of security had not been fixed. On November 19, the defendant's solicitor was advised by the Magistrates' Court Office that security for appeal had been fixed at £10 10s. The solicitor lodged the security for appeal on December 10, 1948, which was twenty-four days after the last day of the seven days within which the notice of appeal should have been lodged. On December 21, the defendant's solicitor was advised by a clerk at the Magistrates' Court that a formal application for extension of time for lodging security was necessary; and the defendant's solicitor then filed such application. The plaintiff's solicitor had written to the Magistrates' Court consenting to an extension of one month from November 15. On an application for a writ of mandamus to the Magistrate to hear and determine and grant the application for extension of time for lodging security, *Held*, 1. That, when the application for extension was lodged on December 21, 1948, the seven days plus one month had already expired on December 15. (*Quarterman* v. *Parcell*, [1936] N.Z.L.R. 798, applied.) (*Dowdeswell* v. *Francis*, (1874) 30 L.T. 607, referred to.) 2. That the defendant's solicitor, by filing notice of appeal on the seventh day after the final determination in the action, put it out of his power to find security within the required seven days; but he did not lodge his security until December 10, which was twenty-four days after the expiration of the seven days; and he had not then applied for an extension of time in which to lodge security. 3. That a Magistrate cannot be ordered to grant an application for extension, because that is a matter for his discretion. 4. That, no application having been made until after the expiration of the maximum time that could have been allowed, no order could be made directing the learned Magistrate to consider and determine the application. *Semble*, The application would have had to be made on a day sufficiently before December 15 to enable the learned Magistrate to make the order within that time. *Williamson* v. *Bedingham and Another*. (S.C. Auckland. April 5, 1949. Hutchison, J.)

Practice—Change of Venue—Contract, made in Wellington, to print in Auckland Material for supply to Libraries in Wellington—Defendant residing in Wellington—Plaintiff carrying on Business and residing in Auckland—Action for Balance owing under Contract commenced in Auckland—Change to Wellington sought by Defendant—Requirement of Proof that Case could be "more conveniently or fairly heard" in Wellington—Magistrates' Courts Rules, 1948, r. 175. The fact that an action has been commenced in a wrong Court does not entitle a defendant, as of right, to an order under the Magistrates' Courts Rules, 1948, changing the venue of the hearing to the Court in which the action should have been commenced. An applicant for a change of venue must, in compliance with r. 175, establish that the case can be more conveniently or fairly heard in the Court to which the change is sought. *Library Covers (N.Z.), Ltd.* v. *Thomas*. (Auckland. July 29, 1949. Luxford, S.M.)

MASTER AND SERVANT.

A Safe System of Work. *93 Solicitors' Journal*, 399.

Industrial Relations Act, 1949, provides for the improvement of industrial relations, and provides for the setting up of an Industrial Advisory Council, and local and special advisory councils, and provides also for the establishment, on a voluntary basis, of Works Committees representative of workers and employers in relation to any industries or undertakings. A Conciliation Commissioner may call compulsory conferences whenever he has reasonable grounds for believing that a strike or lockout exists or is threatened in any district in which he exercises jurisdiction. Freezing Industry Emergency Regulations, 1940 (Serial No. 1940/312), and Amendment No. 1 (Serial No. 1942/133) continue in force for the purposes of s. 7 of the Industrial Relations Act, 1949, as if they had been made under that Act; and the Emergency Regulations Continuation Act, 1947, is amended accordingly.

MINIMUM WAGE.

Minimum Wage Amendment Act, 1949. This Act came into force on September 1, 1949. Section 2 (2) and (3) of the principal Act (as substituted by the Minimum Wage Amendment Act, 1947) is repealed, and a new and increased minimum wage for workers is substituted. For male workers, the minimum rates of wages are (*a*) payment by the hour or by piecework, 3s. 3d. an hour, or an amount equivalent thereto, having regard to the rate of production of the worker; (*b*) payment by the day, £1 6s. a day; and (*c*) in all other cases, £6 5s. a week. The corresponding minimum rates of wages for females are 2s. 2d. an hour, 17s. 4d. a day, and £4 3s. a week. The Minimum Wage Amendment Act, 1947, is repealed.

MORTGAGE.

Sub-mortgages: Their Creation, Realization, Transfer, and Discharge. (H. Woodhouse.) *12 Conveyancing and Property Lawyer*, 171.

NEGLIGENCE.

Road Collisions—Off-side Rule—Motorist, in entering Intersection, relying on Compulsory Tram-stop in relation to Approaching Tram—No Justification for placing Trust in Compulsory Stop Sign and not watching Tram's Movement—Extent of Duty of Tram-motorman. A motorist entering an intersection, before which there is a compulsory tram-stop, cannot disregard an approaching tram, because such a stop is purely a tramway matter; and the motorist is not justified in placing his whole trust in the fact that there is a compulsory stop sign at the corner, and not looking to see what the tram is doing while he travels across the intersection, including the crossing of the tram-lines. In such a case, the question whether the tram-car stopped at the stopping-place is not material. A tramway motorman approaching an intersection is negligent if he takes no precautions, if the possibility of the danger emerging is reasonably apparent; but, if the possibility of danger emerging is only a mere possibility, which would never occur to the mind of a reasonable man, there is no negligence in taking no extraordinary precautions. (*Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391, and *London Passenger Transport Board* v. *Upson*, [1949] 1 All E.R. 60, followed.) (*Buckley* v. *The King*, [1945] N.Z.L.R. 531, applied.) (*Algie* v. *D. H. Brown and Son, Ltd.*, [1932] N.Z.L.R. 779, referred to.). *Wellington City Corporation* v. *Palliser*. (S.C. Wellington. July 11, 1949. Hutchison, J.)

Road Collisions—Right-hand Rule—Motorist swerving in Hope of avoiding Accident—Failure to apply Brakes—Driver on Intersection with Rule in Favour bound to take Proper Steps to avoid Accident—Traffic Regulations, 1936 (Serial Nos. 1936/86, 1943/199), Reg. 14 (6). It is not negligence if a motor-driver, in an emergency, decides to swerve to the one side or the other, or to keep a straight course when the course he takes seems to him, on reasonable grounds, to be the proper one at the time, even if the course chosen afterwards turns out, in the light of events, to have been an unfortunate one. When danger threatens on a road, a swerve may be desirable; but there may be cases where braking is much more than desirable, and may be essential, leaving no choice between using the brakes and not using them if one is to act reasonably. The deceased was riding his bicycle east in A. Street, and the defendant was driving her motor-car north in H. Street. The motor-car and the bicycle collided near the eastern corner at the right-angle intersection. The defendant saw the deceased, swerved to the right, and, immediately before the collision, swerved back again towards the left. In an action by the widow of the deceased against the defendant, the allegations against the deceased were that he failed to give way to traffic approaching from the right, failed to keep a proper lookout, rode too fast in the circumstances, and generally rode his bicycle without proper precautions. The allegations of negligence against the defendant were substantially failing to keep, as far as practicable, to the left after reaching the intersection, failing to keep a proper lookout, failing to stop or reduce speed when she saw, or ought to have seen, the cyclist. The jury found that the death of the deceased was due to the negligence of both the deceased and the defendant. On motion for non-suit, pursuant to leave reserved, on the ground that there was no evidence of negligence on the part of the defendant, *Held*, 1. That, while the person with the off-side rule in his favour is not bound to assume the possibility of another vehicle on his left crossing the intersection, he is bound to take proper steps if, in fact, he sees one doing so, or if, as a reasonably prudent driver, he ought to see and appreciate that one is doing so. (*Hobman* v. *The King*, [1949] N.Z.L.R. 41, and *Buckley* v. *The King*, [1945] N.Z.L.R. 531, followed.) 2. That, if there was evidence on which the jury might properly hold that there was negligence on the part of the person in whose favour the rule operates, it is for the jury to say whether, in fact, there was such negligence. 3. That, on the evidence, the jury were entitled to form a view that the defendant saw the deceased before, even well before, she reached the middle of the intersection, and that the defendant made no use, or no important use, of her brakes; consequently, the jury were entitled to take the view that, if the defendant had made effective use of her brakes after she saw the cyclist, she would

have been able to stop the car or so to reduce its speed (with such swerve as she could make) as to avoid the collision. *Christison* v. *Whitcombe*. (S.C. Palmerston North. July 19, 1949. Hutchison, J.)

PRACTICE.

Appeals to the Court of Appeal—Appeal at Time of Hearing of Academic Interest only—No Practical Result if Appeal determined—Appeal dismissed—Charging Order—Order as of Course without Motion—Inapplicable to All Judgments—Test as to Judgment for Payment of Money—Code of Civil Procedure, R. 314—Accounts—Order for Taking of Accounts—Interlocutory, not Final, Judgment—Code of Civil Procedure, R. 118. When the determination of an appeal to the Court of Appeal has become of academic interest only, and its determination would have no practical result, it should be dismissed. (*Glasgow Navigation Co.* v. *Iron Ore Co.*, [1910] A.C. 293, *Sun Life Assurance Co. of Canada* v. *Jervis*, [1944] 1 All E.R. 469 and *Sutch* v. *Burns*, [1944] 1 All E.R. 520, n., followed.) On appeal from the judgment of *Sir Humphrey O'Leary*, C.J., reported [1949] N.Z.L.R. 52, the Court of Appeal, in dismissing such appeal for the reason given above, expressed the opinion that the appeal must have been dismissed on its merits. Rule 314 of the Code of Civil Procedure does not apply in respect of all judgments. If the test be that the judgment must be a final one, then the order made under R. 118 for the taking of accounts was not, by any proper test, a final one; but, if there be a further or alternative test that the judgment must be one for payment of money, the order in question was not such. In any event, whichever is the appropriate test, the judgment failed to satisfy it, and the charging order *nisi* was properly discharged by the learned Chief Justice, and the appeal on its merits should be dismissed. Appeal from the order of *Sir Humphrey O'Leary*, C.J., reported [1949] N.Z.L.R. 52, dismissed. *King* v. *Lewis*. (C.A. Wellington. June 29, 1949. Kennedy, Northcroft, Stanton, JJ.)

Discovery of Documents relating exclusively to Party's Own Case. *99 Law Journal*, 396.

Interrogatories—Interrogated Party not bound to procure Information from Persons not under His Control—Questions whether Party interrogated requested Press to publish its Proceedings allowable—Interrogation of Party as to Matters of General Public Knowledge involving Making of Inquiries—Interrogation as to Meaning of Party's Admitted Statements, written or verbal—Disallowed as Questions not properly Subjects of Interrogatories. A party interrogated is not bound, for the purpose of answering, to procure information from others who are not his agents or servants, or are not acting as such. (*Crozier* v. *Wishart Books, Ltd.*, [1936] 1 K.B. 471; [1936] 1 All E.R. 1, followed.) The fact that the party interrogated may have access to files containing the information sought, but solely for the purpose of allowing the other party to inspect such files, does not justify any departure from the above-stated rule. A question directed to a party (a statutory body) asking whether or not it desired or requested the publication in the Press of its proceedings, discloses, in view of the allegations made, a proper subject for interrogation. An interrogatory, which, if admissible, would involve the interrogated party in the making of inquiries on matters of which he may not have knowledge, and which are, in any event, matters of general public knowledge and of no difficulty of proof, should be disallowed. An interrogatory asked what the chairman of the defendant body had meant, and what precisely he had intended to be understood to mean, by a statement that he had made at one of the meetings of that body. This statement had been admitted in the statement of defence, but its meaning, as alleged in the statement of claim, had been denied. The Court, following authority on the point, could disallow the question on the ground that it was one which could not properly be asked by way of interrogatory. (*Renwick* v. *Renwick*, [1918] N.Z.L.R. 615, *Heaton* v. *Goldney*, [1910] 1 K.B. 754, and *Spiers and Pond, Ltd.* v. *John Bull, Ltd., and Odhams, Ltd.*, (1916) 114 L.T. 641, applied.) *Shore* v. *Thomas and Others (No. 3)*. (S.C. Wellington. August 3, 1949. Hutchison, J.)

Summons for Particulars. *207 Law Times Jo.*, 340.

PUBLIC HEALTH.

Demolition Order—Court bound to make Order on Proof that Premises unfit for Use or Occupation—"May make an order"—Health Act, 1920, s. 48. The words "may make an order" in s. 48 of the Health Act, 1920, are enabling only; but, where the legal right of the applicant for a demolition order has been established, it is the duty of the Court, notwithstanding the permissive words of the section, to make such demolition order. (*Sheffield Corporation* v. *Luxford*, [1929] 2 K.B. 180, followed.) (*Re Newport Bridge*, (1859) 2 El. and El. 377; 121 E.R. 142, and *Julius* v. *Lord Bishop of Oxford*, (1880) 5 App. Cas. 214, applied.) (*Campbell* v. *Dominion Building Society*, [1932] N.Z.L.R. 1666, referred to.) The mere fact that a local authority invokes s. 47 of the statute, when it could, alternatively, have proceeded under s. 40, does not justify the Court in refusing to make a demolition order under s. 48, if it is proved that the premises are, in fact, unfit for use or occupation. Notwithstanding the mandatory nature of s. 48, a certain discretion is therein given the Court by the words "within such time as may be specified in the order." *Dunedin City Corporation* v. *Samson*. (Dunedin. August 8, 1949. Willis, S.M.)

TENANCY.

Business Premises—Term of Lease expired—Subtenant not Tenant of Landlord by Effluxion of Time—Distinction between Position of Statutory Tenant and Tenant whose Tenancy is determined—Different Status of Subtenants in Such Cases—"Tenant"—"Determined"—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184), Regs. 21B, 21E. Regulation 21B of the Economic Stabilization Emergency Regulations, 1942, does not confer any express interest or estate upon a tenant holding over, but it gives him a right not to have an order of possession made against him except upon certain specified conditions; and thereby, in effect, it confirms and continues possession by the tenant after the determination of the contractual tenancy; so that, *inter alia*, the tenant's obligation to deliver up possession at the end of subtenancy does not continue to apply. Accordingly, the tenancy of a tenant holding over is not determined on the mere expiry of the term, without more. Moreover, Reg. 21B does not make a change in the position of the tenant; and his subtenant does not become the tenant of the landlord on the termination of the tenancy by the mere effluxion of time. (*Barton* v. *Fincham*, [1921] 2 K.B. 291, followed.) (*Cruise* v. *Terrell*, [1922] 1 K.B. 664, referred to.) Regulation 21E applies only when the tenancy of the tenant is determined on any of the grounds set out in the regulation, or is determined in fact on the expiry of the term with concurrence of delivery up of possession, so far as may be with the effluxion of the term. The general result in such cases is that direct relations are established between the landlord and the subtenant; and the latter's interest becomes that of tenant to the landlord. (*Reynolds* v. *Bannerman*, [1922] 1 K.B. 719, and *Barton* v. *Fincham*, [1921] 2 K.B. 291, followed.) (*Crook* v. *Whitbread*, (1919) 88 L.J. K.B. 959, applied.) *Ballantyne* v. *Paterson*. (S.C. Dunedin. February 4, 1949. Kennedy, J.)

Dwellinghouse—Fixation of Fair Rent—Tenant's Application—Relative Circumstances of Parties a Relevant Matter—Different Considerations on Landlord's Application—Tenancy Act, 1948, s. 9 (1) (2). Under s. 9 (1) of the Tenancy Act, 1948, the relative circumstances of the parties is a relevant matter to be pleaded by either party on an application for the fixation of the fair rent of a dwellinghouse; and, when so pleaded by one party, the circumstances of both parties must be weighed by the Court in determining what, in its opinion, would be fair and equitable for the tenant to pay. (*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, applied.) *Semble*, Where the landlord applies for an increase of the basic rent, he is bound by the provisions of s. 9 (2) of the Tenancy Act, 1948, as to proof of special circumstances; and, in such a case, the relative circumstances of the parties would not be a "special circumstance," particularly where the basic rent is the original contractual rent. On an application by the tenant for the fixing of the fair rent, *Held*, That, where the landlord proved material hardship, and the tenant admitted that he was able to pay the contractual rent, and that he had had knowledge of the landlord's circumstances at the time of entering into the contract of letting, which circumstances had not materially changed, the existing basic rent was held to be the fair rent. (*Sievwright* v. *Wellington College and Girls' High School Governors*, [1944] N.Z.L.R. 523, applied.) *Dingle* v. *Boys*. (Auckland. August 9, 1949. Wily, S.M.)

Notice to Quit—Rent paid and accepted for Ten Months thereafter—No New Tenancy created in That Period—Notice to quit not expended or ended on Expiry of Six Months from Date thereof—Tenancy Act, 1948, s. 43 (3). Where there is no evidence of any conduct of the landlord, express or implied, which would create a new tenancy between the parties, but there is evidence of the mere acceptance of rent by the landlord from his statutory tenant for upwards of six months from the date of the notice, the notice to quit is not expended or ended, and is a good and

valid notice to quit on which to ground an action for possession. (*Bourke* v. *Allender*, (1949) Unreported, Wellington, July 19, not followed.) (*Scott* v. *Coe*, (1943) 3 M.C.D. 281, *Davies* v. *Bristow*, [1920] 3 K.B. 428, *Benninga* (*Mitcham*), *Ltd.* v. *Bijstra*, [1945] 2 All E.R. 433, *Braithwaite and Co., Ltd.* v. *Elliott*, [1946] 2 All E.R. 537, *Lowenthal* v. *Vanhoute*, [1947] K.B. 342; [1947] 1 All E.R. 116, *Levy* v. *Kesry*, [1945] N.Z.L.R. 209, and *Player* v. *Boughtwood*, [1946] G.L.R. 65, referred to.) *Gray* v. *Sriells*. (Auckland. August 18, 1949. Wily, S.M.)

TRUSTS AND TRUSTEES.

Powers—Shares in Company given in Trust for Sons "in equal shares as tenants in common"—Power to sell Shares—Two Sons requiring Distribution of Shares in specie—*Two Other Sons wanting Trustees to sell Shares and divide Proceeds—Lack of Special Circumstances to justify Order for Sale—Court's Power to direc Trustees to bring about Distribution of Shares.* The residuary estate of a testator was held on trust, in terms of his will, for each of the testator's four sons "in equal shares as tenants in common absolutely." Included in the assets of the residuary estate were 11,995 shares in a private company of 12,000 £1 shares, of which 11,995 were held by the testator, one share by each of his four sons, and one share by his son-in-law. Two sons wanted the 11,995 shares sold and the proceeds equally divided between the four brothers, and two sons wanted a division of the shares *in specie* between the four brothers. The latter asked that the £1 shares be subdivided into 5s. shares, when an equal division into four parts would become possible. A power to sell the shares was expressly given by the testator to his trustees to be exercised "at their own absolute and uncontrolled discretion without being compelled so to do." No trust for sale of the shares was contained in the will, and no express direction to sell them, and the general effect of the will was to convey the impression that the testator hoped that there would be no sale by the trustees at any time, but that the shares would go to his four sons equally. The trustees were not in agreement whether they should exercise the discretionary power of sale conferred on them, and the four residuary beneficiaries were equally divided whether it should be exercised. On an application to the Court to order the exercise of the discretionary power, *Held*, 1. That each of the brothers had a *prima facie* right to have the shares which belonged to him transferred to him, and such right did not depend on an appropriation having been made; and that the words in the will "as tenants in common" did no more than emphasize, from abundance of caution, that the four brothers were not to be joint tenants. (*In re Marshall, Marshall* v. *Marshall*, [1914] 1 Ch. 192, and *Re Sandeman's Will Trusts, Sandeman* v. *Hayne*, [1937] 1 All E.R. 368, applied.) 2. That at least as strong special circumstances should be shown to justify an order compelling an unwilling trustee to join in exercising a discretionary power of sale as are required to justify an order permitting trustees to exercise a discretionary power of retainer and postponement, so as to oust the *prima facie* right of a beneficiary absolutely entitled to a transfer *in specie* of his shares; and no such special circumstances were here shown to exist, the reasons advanced being insufficient to justify an order for a sale, and insufficient to justify refusing a transfer *in specie* to a beneficiary, who was *prima facie* entitled to such a transfer, and who sought it. 3. That the Court had power to direct the trustees to bring about the subdivision of the shares. (*In re Marshall, Marshall* v. *Marshall*, [1914] 1 Ch. 192, and *Re Sandeman's Will Trusts, Sandeman* v. *Hayne*, [1937] 1 All E.R. 368, considered.) Observations as to the method of effecting such a subdivision, and on the possible necessity of an alteration of the company's articles. The judgment is reported on this point only. *Seagar and Another* v. *Seagar and Others*. (S.C. Auckland. April 27, 1949. Callan, J.)

Powers—Trust to set aside and appropriate Specified Amount for Investment and pay Income to Daughter during Her Lifetime—Trustee empowered, in Event of Capital being Insufficient, to appropriate That Sum, to pay Interest calculated thereon to Daughter for Life or until Sum set aside—Incidence of Such Payment—"Empower." The testator, by his will, created a trust from and after the death of his widow, who died in July, 1933, "to set aside and appropriate out of my estate the sum of five thousand pounds (£5,000) to be invested in the Common Fund of the Public Trust Office," to be held upon trust to pay the income thereof to his daughter during her lifetime. By cl. 4 (*g*) of his will, the testator empowered his trustee in the event of there not being sufficient capital in his estate to set aside such sum of £5,000 at the first period of distribution (on the death of the survivor of the testator and his wife) "to pay out of the income arising from my residuary estate to my said daughter if she shall be living at the first period of distribution interest at the rate of six pounds (£6) per centum per annum on the said sum of five thousand pounds (£5,000) during her lifetime until such sum is set apart and invested in the Common Fund of the Public Trust Office." On originating summons to determine, *inter alia*, whether the testator's daughter was entitled, as of right, to receive, out of the income from the residuary estate of the testator, payment of interest on the sum of £5,000 which the testator had directed to be set aside and appropriated out of his estate, until that sum was so set aside and appropriated, or until the beneficiary sooner dies, less payments made to her on account of such interest; and to determine the incidence of the income payable to the daughter in respect of that period, *Held*, 1. That the word "empowered" conferred upon the trustee a power, coupled with a duty; and it was meant to be exercised. (*Tempest* v. *Lord Camoys*, (1882) 21 Ch.D. 571, and *Brown* v. *Higgs*, (1803) 8 Ves. 561; 32 E.R. 473, referred to.) 2. That, in the event of there not being sufficient capital to set aside the £5,000 upon the death of the widow, the trustee was under the duty to pay to the testator's daughter, out of the income arising from the residuary estate, 6 per cent. per annum on that sum, until it should be set apart and invested in the Common Fund of the Public Trust Office. 3. That the incidence of the payment to be made under the empowering clause in cl. 4 (*g*) of the will is that it is an indefinitely cumulative charge on all the income of the residuary estate, until fully paid. (*In re Rose, Rose* v. *Rose*, (1915) 85 L.J. Ch. 22, *Breach* v. *Public Trustee*, [1940] N.Z.L.R. 365, *In re Coller's Deed Trusts, Coller* v. *Coller*, [1939] Ch. 277; [1937] 3 All E.R. 292, *In re Howarth, Howarth* v. *Makinson*, [1909] 2 Ch. 19, and *In re Mason, Mason* v. *Robinson*, (1878) 8 Ch.D. 411, referred to.) *In re Jex-Blake* (*deceased*), *Public Trustee* v. *Gaddum and Others*. (S.C. Wellington. August 1, 1949. Gresson, J.)

VENDOR AND PURCHASER.

Land Sales—Application for Consent before Land Sales Court—Vendor meanwhile undertaking to accept Price as approved by Court and undertaking to pay Purchaser Interest on Deposit pending Completion—Such Undertaking not brought to Court's Notice—No Consideration for Such Undertaking—No Breach of Act or Regulations vitiating Sale-and-purchase Contract—Servicemen's Settlement and Land Sales Act, 1943, ss. 50 (3), 68—Servicemen's Settlement and Land Sales Amendment Act, 1946, s. 8. A vendor, having duly filed with the Land Valuation Court an application for its consent to a transaction, does not commit any breach of the Servicemen's Settlement and Land Sales Act, 1943, or the regulations made thereunder, when he subsequently (while waiting for the application to be dealt with) assures the purchaser, whether verbally or in writing, without any further consideration than already appears in the filed contract, that he will accept the price fixed by the Court. An arrangement was made between a vendor and his purchaser that the former would accept the price fixed by the Land Sales Court, before which an application for consent to the sale was pending, and he gave the purchaser a right to interest on the deposit of £300, which right was not given him under the sale-and-purchase contract. The purchaser alone benefited by the arrangement, which was no more than an undertaking, without any consideration not already appearing in the contract. This arrangement was not brought to the notice of the Land Sales Court. It was contended (*inter alia*) for the purchaser, defendant in an action for specific performance of the contract, that, as this arrangement had not been put before the Court, the whole contract was thereby vitiated. *Held*, 1. That the provision of interest, while new, was a benefit, and not a detriment, to the purchaser (the person to be protected), did not tend to increase the purchase price, was not in breach of the principles of economic stabilization, and was not a "relevant consideration" within s. 50 (3) of the Servicemen's Settlement and Land Sales Act, 1943; and, further, it was trifling, and was fairly covered by the maxim *De minimis non curat lex*. 2. That the arrangement was not a "related transaction" within the meaning of s. 50 (3) (*b*), and there was nothing in it that was inconsistent with the application before the Court. The judgment is reported on this point only. *Kingsbeer* v. *Clark*. (S.C. Palmerston North. June 10, 1949. Hutchison, J.)

WORKERS' COMPENSATION.

Employers' Liability Insurance Regulations, 1949, Amendment No. 1 (Serial No. 1949/120), amending the principal regulations by revoking the First Schedule and substituting a new First Schedule as set out in the regulations. This Schedule gives in detail Employers' Liability Insurance rates for some hundreds of occupations and employments, and is deemed to have come into force on April 1, 1949.

FAMILY PROTECTION: FAMILY HOMES.

Freedom from Death Duties and Protection from Creditors.

By E. C. ADAMS, LL.M.

An esteemed correspondent has written to the learned editor of this JOURNAL pointing out that, although ss. 3–31 of the Family Protection Act, 1908, make provision for the settlement of a family home of a property not exceeding £1,500 in value, he has over a period of nearly thirty years in practice never seen these sections of the Act taken advantage of. The writer of this article during a period of about forty years has encountered not more than two cases of a family home duly constituted under Part I of the Family Protection Act, 1908. Part I of the Family Protection Act was made applicable to dwellings purchased under the Housing Act, 1919, by s. 26 of that Act, although the writer knows of no instance where it has so been applied in practice.

The genesis of this Part of the Family Protection Act is the Family Homes Protection Act, 1895, and probably since that year not more than a dozen family homes have been registered in the whole of New Zealand; they are even rarer in the Dominion than estates tail.

The Act, therefore, has fallen far short of the sanguine expectations of its founders—the Liberals of the early 'nineties—for the 1895 Act is headed: "*An Act to make Provision for securing Homes for the People.*" A dozen family homes in more than half a century is not much of an achievement. Yet in moral sentiment the Preamble of the 1895 Act is excellent:

> Whereas it is desirable to make provision for securing homes for the people, and to prevent such homes from being mortgaged or sold for debt or otherwise.

It is difficult to imagine a more praiseworthy aim than that—*the securing of homes for the people.*

Besides being immune from sale for debt or otherwise, a family home has this great advantage—it is not liable on the death of the settlor to death duty, for s. 30 reads as follows:

> No duty under the Stamp Duties Act, 1908, or under the Death Duties Act, 1908, shall be payable in respect of any settlement under this Part of this Act, or in respect of the transmission of any share or interest in the settled land to any member of the family, so long as the family home continues to be registered.

A settlement comprising a family home not made under the Family Protection Act, on the other hand, is caught for death duty under s. 5 (1) (*j*) of the Death Duties Act, 1921, no matter how long the settlor may survive the settlement, if he reserves any *life* interest or *life* benefit to himself; if he does not reserve any such right, it will nevertheless be caught under s. 5 (1) (*c*), unless the donee assumes possession to the entire exclusion of the settlor at least three years before the settlor's death: *In re Shrimpton, Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, 765. This immunity from death duty would be an inestimable benefit in these modern days of very high death duties.

Why, then, has Part I of the Family Protection Act, 1908, been so little availed of? Why has it proved so unpopular to solicitors? We all have to learn about the Act in our student days, and it must be unpopular with members of the legal profession, for so few of their clients have taken advantage of it. Why have the various Governments, which have been in office in New Zealand since 1895, not publicized its advantages to the people of New Zealand, most of whom must never have heard of its existence?

The chief reason, I think, is the deep dislike of our citizens of the indefinite tying up of their landed property. As a nation, it must be admitted that we are very fond of buying and selling real estate. When we purchase or build a home, we are not imbued with the determination to make it our home for life; the prospect of selling it some time in the future at a profit is perhaps a more pleasing one. On its registration under Part One of the Act, the family home is held for the personal use and occupation of the settlor and his *family* until the period of distribution: "*family*" means the wife and children, or the husband and children, of the settlor. Until the period of distribution no alienation or dealing, or attempted alienation or dealing, by the settlor or his family shall have any force or effect except as provided in s. 21 or s. 22. Section 21 merely gives the settlor or the surviving spouse the right to regulate the occupation during the subsistence of the land as a family home. Section 22 enables the settlor to determine the distribution of the family home after it ceases as a family home *among his family* (including a child of a deceased child) in such manner as he thinks fit. Section 20 enacts that the period for distribution of a family home shall be the date of the death of the settlor, or the time when all the children of the settlor have attained the age of twenty-one years, or died under that age, *whichever event last happens.* It is this postponement of the distribution of a family home and its inalienability meantime which appears to have made these provisions unpopular. There appears to be no reason to think that the other characteristic of a family home—namely, its freedom from execution by bankruptcy or otherwise—has proved unpopular.

Perhaps another reason why the procedure of a family home has been adopted so seldom is the publicity which an application to the District Land Registrar for the issue of a family home certificate of title necessarily entails. Regulation 4 made under the Act (*1896 New Zealand Gazette*, 717) provides that, as soon as may be after the receipt of an application, the District Land Registrar shall cause the same to be notified in the *Gazette*, and shall require the applicant, at his own cost, to insert the like notice in such newspapers published in the district or districts within which the applicant has during the twelve months immediately preceding such application resided or carried on business as the District Land Registrar shall direct. Section 7 of the Act provides that any person claiming to be a creditor of the applicant, or claiming any estate or interest in the land, may, within twelve months after the date of the first publication of such notice, lodge with the District Land Registrar a caveat forbidding the granting of the application. The applicant may summon the caveator to attend before the Supreme Court or a Judge thereof to show cause why the caveat

should not be removed. This is publicity indeed, and may involve the applicant in the cost of Supreme Court proceedings, but it is difficult to see how this publicity could be avoided. When once registered as a family home, it is free from the claims of the settlor's creditors and those of his family, and it is only just that the creditors should have an opportunity of objecting to an application which, if granted, will reduce the assets available to the creditors of the settlor and of his family.

Our correspondent suggests that, if there are any practical difficulties which have been experienced in practice, and which prevent the full implementation of the Act, then the attention of the Law Revision Committee could be drawn to these, with the object of overcoming them.

One great difficulty which immediately presents itself to one's attention is the limit of value placed on a family home by the Act: £1,500 was the limit placed by the 1895 Act, and £1,500 still remains the limit in this year of grace 1949. If the value of the land (with all improvements thereon) exceeds £1,500, it cannot be settled as a family home under the statute. This limit may have been sensible in 1895, but in the year 1949 it is an absurd limit. It is well nigh impossible nowadays anywhere in New Zealand to secure a permanent home, worth settling as a family home, for such a small sum as £1,500. In the year 1895, a skilled journeyman carpenter probably considered himself fortunate if he received a regular wage of ten shillings per day; then there was no forty-hour week, and no fancy rates for Saturday-morning work. It is respectfully submitted that the limit of £1,500 should be increased to at least £3,000.

It is difficult to see in what other way Part I of the Act could be improved.

Our correspondent continues:

> For instance, under s. 20, the period for distribution is the date of death of the settlor or when the youngest child attains the age of twenty-one years, whichever last happens. It appears to me that provision might be made by an Amendment of the Act for a family home to be settled on a husband and wife, even if there are no children, for, although a husband can leave his widow a comparatively large sum, including, of course, a home, without attracting death duties, a similar state of affairs does not exist where the wife dies and leaves the widower perhaps the family residence, which has been placed in her name for her better protection. I can picture an elderly man and wife enjoying the age benefit, and occupying a home which is the property of the wife. The wife dies and leaves the home to her husband, who is faced with a liability for up to, say, £75 for estate and succession duty.

But I cannot read into the Act any provision that only a man or a woman with children can register their home as a family home. Section 3 states that "*Any owner of land*" &c. may settle such land as a family home subject to the provisions of the Act. Regulation 1 stipulates that every application shall be in the Form A in the First Schedule, and nowhere in Form A has the applicant to state whether or not he or she has any children.

Section 17 states that the effect of registration as a family home shall be to settle the land in manner following:

> (*a*) For the personal use and occupation of the settlor and his *family* until the period for distribution hereinafter mentioned:
>
> (*b*) For distribution at the period for distribution amongst the *family* of the settlor then living, or, if he has no *family*, then amongst those who would be entitled in case of his intestacy, if the land were not subject to this Act.

By the definition in s. 2, "family" includes the wife and children of the settlor.

Indeed, it appears to me that there is nothing to prevent a bachelor or a spinster from registering his or her home as a family home. Section 22 (2) provides that, if at the period of distribution no child or grandchild of the settlor takes any share or interest in the family home, then the widow or surviving husband shall take the whole.

In the example given by our correspondent, therefore, there is, as I read the statute, nothing to prevent the wife from settling her home as a family home. If she dies first, the husband will become solely entitled to the home, on which he will pay no death duty. If he dies first, then the home will devolve on the wife's next-of-kin according to the Administration Amendment Act, 1944, when she dies; apparently she would lose the right of testamentary disposition of the family home, and that may conceivably be considered a practical disadvantage.

THE OFFICE OF MASTER OF THE ROLLS.

The promotion of Lord Greene to the House of Lords has led to the appointment of a new Master of the Rolls. Sir Raymond Evershed now holds an honourable office which has subsisted for many centuries.

At first the "master" was principal Clerk of the Chancery, and, as such, had charge of the records of the Court, especially of the register of original writs and of all patents and grants under the Great Seal. Until the end of the fifteenth century, he was called either the clerk or keeper of the rolls, but the earliest mention of him as Master of the Rolls is in an Act of 1495. About that time, however, the chief clerks of the Chancery came to be called masters in chancery, and the clerk, master or keeper of the rolls was always the first among them. In the course of time, he gradually assumed jurisdiction in the Court of Chancery.

Before the office of Vice-Chancellor came into existence, the "master" was often spoken of and acted in theory as such. He sat only when the Lord Chancellor was not sitting, and held his Court in the evening from six o'clock to ten o'clock. In 1838, the custody of the records was restored to him. Since the Judicature Acts, of course, he has always sat with the Lords Justices, presiding over one Division of the Court of Appeal.

Assuredly a great position, it has always been filled by men of outstanding ability.

Amongst the most conspicuous was Sir George Jessel. According to *10 Dictionary of National Biography*, 805:

> [he] brought to the practice of the law the aptitudes of a man of business; a logical faculty naturally acute and sharpened

by a severe discipline, a knowledge of English none the less wide because he had found time to master the general principles of the Roman law . . . Only in a sense (he once said in the House of Commons) was it true that our common law was not based on the Roman law, for we had now the Roman law as the Turks used the remains of the splendid temples of antiquity. We had pulled out the stones and used them in constructing the buildings which we called our own.

It was characteristic of him that he never reserved judgment when at the Rolls Court, not even in the great Epping Forest case, the hearing of which had lasted twenty-three days; only twice, and then only at the request of his colleagues, in the Court of Appeal. Jessel had boundless confidence in his own opinion. "I may be wrong," he said once when Solicitor-General, "and sometimes am, but I never have any doubts."

The great Sir George is now beyond living memory; but there are many still alive who have seen Lord Esher* presiding in the Court of Appeal. Of him it is written in *22 Dictionary of National Biography*, 265:

as a Judge his most salient characteristic was a robust common sense, which predisposed him to make short work of legal and equitable technicalities when they seemed to militate against substantial justice.

The biographer, however, proceeds, "But this admirable quality was united with a criticism of justice which was unduly elastic," and goes on to point out that his judgments were not always unimpeachable. But which great Judge has always been affirmed on appeal?

Coming closer to our own time, many still at the Bar in England remember, and often quote from the judgments of, Lord Cozens Hardy, a master of Equity who, although he was a Liberal in politics, was appointed when Lord Halsbury was Lord Chancellor. Lord Sterndale, too, was Master of the Rolls, having been a Judge, a Lord Justice of Appeal, and, finally, President of the Probate, Divorce, and Admiralty Division.

* Pron. "Eesher."

Is it any wonder that a man of his wide experience in many Courts became a great Master of the Rolls?

And, finally, a respectful word about Sir Raymond Evershed's immediate predecessor, who is now promoted to share in the labours of the ultimate tribunal.

Everyone who has had occasion to refer to his numerous judgments—the Law Reports are replete with them—will have been struck by the extraordinary fertility of his mind, and by the fact that, following the example of Sir George Jessel, Lord Greene seldom put his judgment into writing. But it is notorious that he never allowed any judgment orally delivered to go forth until he himself revised the transcript of the shorthand note. An amazing memory he has, and always has had. It has been said that those who had charge of his early education noticed that the little boy had a fine memory, and took care to cultivate it. Told to read the page of a book once through, he would be asked half an hour later to repeat what he had read, and could generally discharge his task with but few mistakes.

Sir Raymond Evershed, M.R., who is regarded with esteem and affection by the whole profession in England, will be a worthy successor to those who have preceded him in his great office.

One word in conclusion. The title "Master of the Rolls" has often baffled those who are unfamiliar with legal history. In the latter part of the eighteenth century, there was heard a pleasantry of which we have heard echoes in our own time. In those days, a debating society called the Robinhood used to meet near Temple Bar. Its president was a baker by trade. Oliver Goldsmith, having heard him "give utterance to a train of strong and ingenious reasoning," exclaimed to Derrick: "That man was meant by nature for a Lord Chancellor.' Derrick replied: "No, not so "high; he is only intended for Master of the *Rolls*!"

LAND VALUATION COURT.

Summary of Judgments.

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

The judgments of the Land Valuation Court are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values. All judgments of the Land Valuation Court which are considered to be of value to the profession will appear in this place in future copies of the JOURNAL.

No. 7.—B. to T.

Urban Property—Business Premises—Lease with Option to purchase at Approved Price—Exercise of Option disputed—Application by Lessee, ex parte, for Consent to Sale—Consent granted by Committee without hearing Evidence—Committee acting within Its Jurisdiction—Costs awarded against Appellant Lessor—Servicemen's Settlement and Land Sales Act, 1943, s. 50 (1).

Appeal from the order of a Land Valuation Committee.

In May, 1948, the respondent agreed to buy a business from the appellant and to take a lease of her premises for a term of five years, with an option to purchase at the expiration of the term and subject to three calendar months' notice. The agreement was approved by the Land Sales Court, and a formal memorandum of lease which incorporated the option to purchase was duly executed. In 1947, the respondent expressed a wish to exercise the option immediately, but this was not acceptable to the appellant. On May 26, 1949, the respondent addressed to the appellant's solicitors a letter which set out that, as mentioned in correspondence in 1947, the respondent desired to purchase the property in pursuance of the option. The letter also made reference to an application to the Land Valuation Court and to the preparation of the documents in connection therewith. The appellant disputed the validity

of the respondent's purported exercise of his option to purchase, and refused either to make, or to join in, an application to the Land Valuation Court. The respondent thereupon filed an application purporting to be made as purchaser in respect of a sale of the land concerned in the option. The application was supported by an extract from the lease setting out the terms of the option and by a copy of the letter directed to the appellant's solicitors on May 26, 1949. The Land Valuation Committee, though aware that the appellant was not a party to the application, was of opinion that, in the absence of opposition from the Crown, it should be granted, and it was granted accordingly, without a hearing.

An appeal was lodged by the appellant, the respondent issued a writ in the Supreme Court for specific performance of the alleged contract, and the appellant moved to set aside the writ, on the ground (*inter alia*) that no final order of the Land Valuation Court had been made approving of the exercise of the option or consenting to the alleged transaction.

August 5, 1949. The Court (per *Archer*, J.), after stating the facts, as above, said: "The grounds of appeal in this Court are threefold:

"(i) That the appellant, being a party interested in the alleged transaction, was not heard before the Committee.

"(ii) That the alleged exercise of his option by the respondent was patently defective, and, accordingly, no transaction existed to which consent could properly be granted.

"(iii) That, if any transaction had in fact been entered into, it contravened the provisions of s. 44 or s. 45 of the Servicemen's Settlement and Land Sales Act, 1943, and was, accordingly, unlawful.

"As to the first of these grounds, it is clear that the Committee made its order without hearing evidence and by virtue of s. 50 (1) of the Act. The extent of a Committee's jurisdiction under this subsection was considered in *No. 120.—A. to F.*, (1947) 23 N.Z.L.J. 308, where the Court held that a purchaser is not entitled to be heard in derogation of his contract. In that case, however, the Committee had before it a contract of sale executed by the purchaser and a statement and declaration by virtue of which the purchaser had made himself a party to the application. In the present case, the application was by the respondent alone, and the Committee might properly have inferred that the appellant was not a willing party thereto. We think that, in such circumstances, it was undesirable to deal with the matter under s. 50 (1), and that the Committee should have given the appellant an opportunity of being heard. This defect has been remedied, however, before this Court, as the appellant does not desire to call evidence, and her case has now been fully covered in argument.

"On his second ground of appeal, counsel relies on *No. 129.—S. to McK.*, (1948) 24 N.Z.L.J. 84, and cases there cited, to establish that the existence of a transaction within the ambit of s. 43 (1) of the Servicemen's Settlement and Land Sales Act, 1943, is a necessary prerequisite to the exercise of jurisdiction under Part III under the Act, and that the Court is entitled to refuse its consent to a contract which is clearly unenforceable or void. He claims that, as a purported exercise of the option to purchase, the respondent's letter of May 26, 1949, is patently defective, in that it is addressed to the appellant's solicitors instead of to the appellant in person, and in that it is clearly out of time. To justify the dismissal of an application on this ground, however, the alleged invalidity must be conclusively established. In substance, the issue now before us is whether consent should have been refused under the principle set out in *No. 108.—B. to R.*, (1947) 23 N.Z.L.J. 267, or granted in accordance with *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688. We think the Committee did right in granting consent in accordance with the latter decision. The overriding principle is that this Court should not be asked to determine disputed questions of validity which fall properly within the jurisdiction of other Courts. In the present case, a refusal of consent might so operate (and it would admittedly be so argued by the appellant) as to deprive the respondent of his right to claim relief in the Supreme Court. The grant of consent assists neither party on questions of validity, but leaves both parties free to enforce their supposed rights in the civil Courts. Proceedings have in fact been commenced by the respondent in the Supreme Court, and the appellant by her counsel acknowledges that her purpose in this appeal is to render such proceedings ineffectual. We do not accept the submission that the contract alleged by the respondent is necessarily and conclusively invalid. In principle, and upon the merits of the case, and for the same reasons as in *In re A Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744, and in *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688, the consent of the Court should be granted so as to enable the validity of the transaction to be litigated in the proper forum.

"The third ground of appeal is based on the fact that neither in the lease nor in the respondent's purported exercise of his option is it expressly provided that the transaction is entered into subject to the consent of this Court. This is purely a technical objection, and appears to be entirely without merit, but it raises, in somewhat unusual circumstances, the question whether, in order to secure conditional validity for a transaction under s. 45 of the Land Sales Act, it must be expressly provided in the relevant documents that the transaction is entered into subject to the consent of the Court. This matter received consideration in *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688, where it was held to be a sufficient compliance with the section if the contract were so worded that, upon a fair construction of its terms, it would be reasonable to hold that the parties intended the transaction to be entered into subject to the consent of the Court. In the present case, the initial agreement, made in 1944, was expressed to be subject to the consent of the Court, and consent to the lease and to the option was duly granted. No complaint can be directed to the terms of the option contained in the lease, as the consent of the Court to that transaction had already been obtained. In *No. 1.—H. to W. (N.Z.), Ltd.*, (1949) 25 N.Z.L.J. 89, we held that a separate application for consent would be required in the case of a sale pursuant to an option granted with the consent of the Court; but it was not necessary in that case to consider to what extent it would be incumbent on a party exercising an option to provide (in order to secure the benefit of s. 45) for the transaction to be subject to the consent of the Court. The letter written by the respondent's solicitors on May 26, 1949, refers to an application to the Court, and to the preparation of documents in connection therewith. We conclude from its terms that the respondent intended his purchase pursuant to the option to be subject to such consent. The question whether this alleged transaction is unlawful by reason of its failure to comply with s. 44 or s. 45 of the Servicemen's Settlement and Land Sales Act, 1943, is one going to the validity of the matter, and, accordingly, within the jurisdiction of the Supreme Court. If the proceedings now before that Court are persevered with by the parties, the issue will no doubt be dealt with in its most appropriate forum. In order to enable the matter to be determined there, we think our proper course is to confirm the consent granted by the Committee.

"To summarize the position in the widest terms, we find here an application, by a person claiming to have exercised an option, for the consent of the Court to the transfer pursuant thereto of certain land. There being no objection on the grounds of price or of aggregation or upon any other ground with which the Servicemen's Settlement and Land Sales Act, 1943, is specifically concerned, we are of opinion that the Committee did right in granting the application. We have already indicated that the appellant should have been given an opportunity to be heard, but her objections as presented to this Court should not, in our opinion, have prevailed. If there are good reasons (as is alleged) which entitle the appellant to repudiate the transaction, they will no doubt be relied upon in the proceedings pending in the Supreme Court, but they do not appear to be of such a character as to disentitle the respondent to a grant of consent in this Court. The appeal will accordingly be dismissed.

"The respondent invited us to direct that the sealed order of the Court be ante-dated to a date seven clear days after the date of the Committee's order. This application owes its origin to one of the defences raised in the Supreme Court proceedings, but we do not think we should attempt to influence proceedings in another Court, while we doubt if we have power to ante-date an order of this Court in the manner suggested. The respondent has also applied for costs. The grounds of appeal had little to commend them on the merits, but issues of an unusual and interesting character have been raised, and we are not prepared to characterize the appeal as frivolous or vexatious, or, in all the circumstances, to award costs against the appellant."

RETIREMENT OF MR. B. L. DALLARD.

Law Revision Committee's Tribute.

At the meeting of the New Zealand Law Revision Committee on August 11, the Chairman, the Hon. H. G. R. Mason, K.C., Attorney-General, reported that the Committee unfortunately would be losing Mr. B. L. Dallard, the Under-Secretary for Justice. Unhappily from Mr. Mason's point of view, according to the calculations of the Public Service Commission Mr. Dallard's retiring-time had come, and this would be the last time the Committee could hope to see him.

Mr. Mason felt the Committee knew the immense help Mr. Dallard had been to it in every sort of way, not only personally but in all contacts with many people and organizations in the way of obtaining reports and consultations. Mr. Mason was sure the Committee would wish to put on record some expression of appreciation. There were no words capable of expressing his own appreciation of everything that Mr. Dallard had done under every heading, as an immensely competent and very loyal head. Mr. Dallard's general activities had shown that *ex officio* he had been very useful.

Mr. Sim, K.C., paid a tribute to Mr. Dallard's services, and proposed the following motion :—

> " That the Committee place on record its appreciation of the great assistance given to it by Mr. Dallard as Under-Secretary of Justice and as a member of the Committee. The Committee desired to record that the efficiency of its work had been substantially due to the management and presentation of matters before the Committee by the Department of Justice under Mr. Dallard's direct supervision."

Mr. A. C. Stephens (Dunedin) stated that he personally would like heartily to support what Mr. Sim had said. Mr. Dallard's contribution had been quite outstanding and remarkable. He thought it would be a great loss for the Committee not to be able to have the advantage of Mr. Dallard's point of view on matters coming under its notice, and suggested that Mr. Dallard might be able to help the Committee in the future. In the meantime, he wished most heartily to second the motion Mr. Sim had proposed.

Mr. C. G. E. Harker, M.P., endorsing the remarks of previous speakers, sincerely trusted that Mr. Dallard would be prepared to tell the Committee that it might call on his services in the future, on occasions. He felt there would be many occasions when the Committee would be glad to have Mr. Dallard's assistance.

The Solicitor-General, Mr. H. E. Evans, K.C., was very pleased to support the motion and the remarks made by Mr. Harker. He too hoped Mr. Dallard's assistance would be available to the Committee.

The motion was unanimously carried.

Mr. Mason had great pleasure on behalf of the Committee and of himself in expressing the matter in the terms of the resolution. The Committee felt most sincerely appreciative of everything Mr. Dallard had done in relation to it. Mr. Mason was sorry the Committee was losing Mr. Dallard, and he hoped Mr. Dallard would find himself able to help the Committee on occasion, as had been expressed.

In thanking the Chairman and members for their remarks, Mr. Dallard said that he was deeply touched by their resolution and their all too generous references to his work. He continued : " I have been associated with the Committee since its inception, and have always been intensely interested in the matter of law reform. Most of the credit for the Department's share in the Committee's activities is, of course, due to my officers, Messrs. Butcher and Bain in particular. I can lay claim only to the spreading of the infection of enthusiasm.

" I appreciate the honour you do me in asking me to help the Committee after I retire. My particular bent lies in matters pertaining to criminal and commercial law, and I shall always be happy to place my services at the disposal of the Committee at any time."

PRACTICAL POINTS.

1. Death Duties.—*Payment by Deceased's Employer to Deceased's Widow—Whether Liability to Death Duty.*

QUESTION : A recently died. E and F, his employers, forwarded to A's widow a cheque for £500, saying it was in recognition of long and faithful service to the firm. Is this sum of £500 liable to death duty in A's estate ?

ANSWER : The payment appears to have been purely *ex gratia*. If so, it is exempt from death duty.

It would not be liable to death duty unless E and F were legally liable to make such payment and the widow had a legally enforceable right to sue E and F for same : *Public Trustee* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 467, and *Re Miller's Agreement, Uniacke* v. *Attorney-General*, [1947] 2 All E.R. 78.

X.1.

2. Vendor and Purchaser.—*Drainage Rights—Agreement for Sale and Purchase—Reservation of Drainage Rights to Vendor—Protection of Vendor on Transfer to Purchaser.*

QUESTION : In an agreement for sale and purchase of a parcel of land under the Land Transfer Act, 1915, there is the following provision : " The vendor reserves the right to drain water from the land retained by him into the existing drain running from a point through the land hereby agreed to be sold and connecting with the main municipal drain on Road. PROVIDED that the vendor and the purchaser will equally share the cost of maintaining the said drain for a distance of two chains from the common boundary between the properties and a covenant to this effect will be inserted in the transfer for the benefit of the vendor his executors administrators and assigns and the occupiers and the owners for the time being of the lands retained by him."

May this covenant be inserted in the memorandum of transfer ? If not, may a caveat be lodged to protect the vendor's interest ?

ANSWER : The provision could not be inserted in the transfer in the form of a covenant, but it would be easy to put it in the form of an easement, and the easement could be created by way of reservation in the transfer. The provision as to mutual maintenance of the drain could be in the form of a covenant ancillary to the grant of easement. The position of the drain should be fixed to the satisfaction of the District Land Registrar. The easement should be expressed to be appurtenant to the residue of the land in the vendor's certificate of title.

The vendor could lodge a caveat to protect his interest, but the creation and registration of an easement is much the preferable course : *Wellington City Corporation* v. *Public Trustee, McDonald, and District Land Registrar, Wellington*, [1921] N.Z.L.R. 423.

X.1.

3. Death Duties.—*Insurance Policy taken out by Husband in favour of Wife—Assignment of Policy to Son—Payment of Premiums thereafter by Son—Liability to Death Duty in Husband's Estate.*

QUESTION : Several years ago, A took out an insurance policy for £4,000 on his own life *for the benefit of his wife*. A has hitherto paid all the premiums thereon.

A and his wife propose to assign the policy to their son.

If the son *thereafter* pays all the premiums *for three years* before A dies, will the policy, or any portion of it, require to be included in A's dutiable estate for death-duty purposes ?

ANSWER : The point is that the wife was a nominee for the purposes of s. 5 (1) (*f*) of the Death Duties Act, 1921, and a proportionate part of the proceeds, equal to the proportion which the premiums paid by A bear to the total premiums paid by A and the son, must be brought to account for death-duty purposes in A's estate. If A paid six premiums and the son nine, then six-fifteenths, equalling two-fifths of the total proceeds from the life-insurance policy, must be brought to account : *In re MacEwan (deceased), Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] G.L.R. 92 ; and see *Adams's Law of Death and Gift Duties in New Zealand*, 53, 55, and the cases there cited.,

X.1.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Hospital Fees.—The Wellington Hospital Board has requested the Law Society to draw the attention of practitioners to the desirability of approaching the Board, where a reduction of hospital charges is sought upon a compromise settlement, before, and not after, the settlement. On the other hand, the Council of the Law Institute of Victoria has written to various Public Hospitals seeking their co-operation to prevent the abuse that has arisen from the practice of certain solicitors of employing members of the staff of some hospital as agents who attract work to the solicitor from amongst hospital patients and receive a commission. The Council requested the issue of an instruction that, if a patient wanted to consult a solicitor, he should be advised to select one from the telephone list, and not from the personal recommendation of some member of the staff. One hospital, however, claimed some merit in the staff recommendation method, pointing out that it kept a selected list of certain solicitors who invariably looked after its interests in collecting and remitting fees due under the Motor-car (Third-party Risks) Act. It complained that the majority of solicitors were lax in regard to protection of hospitals when they made final settlements on behalf of clients. In New Zealand, in view of the statutory charge on special damages in favour of Hospital Boards, laxity on the part of the plaintiff's or claimant's solicitor might possibly lead to an action for indemnity at the suit of some defendant who had a natural disinclination to paying twice.

The Perils of Dining.—Arthur Ward, K.C., a member of Lincoln's Inn, and Recorder of Coventry, makes a welcome addition to the historical and biographical side of the law with his *Stuff and Silk* (Gansey Publications, 1949), in which he deals interestingly with the different Assizes of England. In dealing with Circuit work of the last century, he writes that the mere fact that a counsel had been seen in conversation with a solicitor in an Assize town, unless both were engaged on a case there, would have been considered gross "huggery"—a term that seems to elude the legal dictionaries, but whose meaning is implicit. Suspicion and disfavour were the lot of any counsel nodding, bowing to, or shaking hands with a solicitor during an Assize, while to dine with him was a dastardly crime almost beggaring description. He relates that on one occasion eminent counsel had a brief delivered for a civil action for hearing at the Derby Assizes, then being held. He attended a large dinner-party, at which there chanced also to be present a leading local solicitor who had instructed his opposing counsel. Hearing of this social engagement, his instructing solicitor demanded the return of his brief—and it *was* returned.

Consolidations.—The proposed Transport Bill will, if passed, serve a useful purpose in collecting into the one measure motor-vehicle user in various phases of law—criminal, commercial, and civil. In England, this process will now be controlled by the Consolidation of Enactments (Procedure) Act, 1949. The Marriage Bill, introduced by the Lord Chancellor in the House of Lords in June, is the first occasion upon which the Act has been used. Legislation forbidding marriage within prohibited degrees goes back to 28 Hen. 8 (1536) and the ecclesiastical Licences and Dispensations Act of the same year, while forms and ceremonies of marriage were dealt with by Lord Hardwicke's Act, 1753. Although there have been various repeals and re-enactments in the Marriage Acts, 1907-1931, various marital odds and ends have been wont to turn up in unexpected places, like those sections of doubtful parentage that, in this country, have been unexpectedly fathered from time to time by over-virile Finance Acts. The profession cannot be otherwise than favourable towards any steps that put a form of check upon statutory complexity, leading, as it does, to uncertainty in advising.

Damages and Taxes.—The decision in *Billingham* v. *Hughes*, [1949] 1 All E.R. 684, appears to add another anomaly to those already existing in the controversial field of damages. Here, the Court of Appeal has decided that a surgeon, who had suffered personal injury as a result of negligence, is entitled to recover the whole amount of his prospective future earnings without deduction of that tax which he would have been called upon to pay—in other words, he is in this regard much better off than he would have been had the accident not occurred. Although in Scotland there are two decisions, one each way (*M'Daid* v. *Clyde Navigation Trustees*, [1946] S.C. (Ct. of Sess.) 462, and *Blackwood* v. *Andre*, [1947] S.C. (Ct. of Sess.) 333), the Court of Appeal considered that its findings were in line with existing practice, and that it had no concern with the incidence of taxation in assessing damages payable to an injured taxpayer. But one does not have to look very far into our own law on this topic to find that curious situations can arise. Take the case of a retired man and his wife living upon the interest derived from his investments. If the husband is killed as the result of negligence on the part of another, and the wife becomes entitled to his estate as sole beneficiary, it is presumably open to her to establish that she has no longer the benefits of her late husband's personal income, since the capital which produced it has passed to another—a fact that can, should the plaintiff so desire, remain in a mysterious, undisclosed, and undisclosable state, since, under s. 7 of the Law Reform Act, 1936, in assessing damages, no gain consequent on the death of the deceased is to be taken into account, nor can the plaintiff be cross-examined in regard thereto: *Alley* v. *Alfred Buckland and Sons, Ltd.*, [1941] N.Z.L.R. 575.

From My Notebook.—In reply to a recent question in the House of Commons in England concerning covenants for leases in inns prohibiting or restricting the reception of coloured travellers, the Attorney-General said that it might well be that such covenants were void as being contrary to the rules of public policy upheld by the English Courts; but, in any case, the legal duties falling upon an innkeeper were not affected by the colour of the traveller.

It was evident from the discussion on the second reading of the Juries Bill in the House of Lords that the distinction between "special" and "common" juries would soon no longer exist, and that few tears would be shed over the matter. Lord Goddard hotly rejected the contention, however, that special juries had a habit of favouring one section of the community more than another. "It is a complete libel," he said. "It would be just as sensible and just to say that common juries favoured the other."