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NEW LEGISLATION OF INTEREST TO PRACTITIONERS.

WHILE this year's legislation did not make any fundamental changes in the law, it contains some amendments that are of interest and importance to the practising solicitor.

Notice to Quit.

The amendment of s. 16 of the Property Law Act, 1908, to overcome the effect of the judgment of Mr. Justice Finlay in *Hodge* v. *Premier Motors, Ltd.*, [1946] N.Z.L.R. 778, was dealt with by Mr. E. C. Adams at some length in a recent issue of this JOURNAL (*Ante*, p. 366). This amendment should have reached the Statute Book some time ago, as, immediately following that judgment, the New Zealand Law Revision Committee recommended the amendment for early enactment; but, for some reason or other, the amendment was omitted by the higher authority that controls the determination of legislation to be considered by Parliament, and only under strong urgings by the Attorney-General and the Committee did it appear this year.

Infants and Children.

The law relating to the guardianship of infants, and the rights and limitations regarding the succession to property by adopted children, are in the forefront of this year's statutory amendments. Section 21 of the Infants Act, 1908, which has caused considerable difficulty in the past, has been repealed; and a new s. 21 is substituted by s. 27 (1) of the Statutes Amendment Act, 1949. This amendment received considerable attention from the Law Revision Committee, who consulted experts in this branch of the law; and it is hoped that the new amendment will prove satisfactory both to practitioners and to the parties likely to be concerned. This amendment does not come into force until January 1, 1950.

The Guardianship of Infants Act, 1926, has been amended by the addition of a new section, which simplifies the procedure for the taking possession of an infant the subject of an order for guardianship or custody, thus obviating the cumbersome proceeding by habeas corpus that was previously necessary.

These alterations in the law of infants and children will form the subject of an extended article in the January issue of this JOURNAL.

Juries.

The law relating to the machinery for the selection of jurors and the compilation of jury lists has been amended as the result of representations made to the Law Revision Committee by the New Zealand Law Society, following suggestions made by the Auckland District Law Society, and after that Committee's careful consideration of the position. By ss. 14 and 16 of the Juries Act, 1908, the constables who compiled the jury lists had, in effect, only the month of February for preparation of those lists. This has proved a very inconvenient period for fixing the list, as so many people are absent from their homes in the holiday period, and it was felt that some period in the winter months would enable constables to make a more satisfactory and exhaustive survey of their respective districts. It was suggested that all the dates mentioned for dealing with the jury lists should be postponed six months in each year. Another difficulty was that the first Friday in April, fixed for the meeting of the Justices, frequently fell in the Easter holiday period; in fact, the date frequently fell on days on which the Court offices were not open.

By s. 29 (1) of the Statutes Amendment Act, 1949, s. 14 of the Juries Act, 1908, is accordingly amended by omitting from subs. 1 the word "January," and substituting the word "July." The effect of this amendment is that the Jury Officer of each jury district will, before the last day of July in each year, issue his warrants to constables within his district to prepare and make out a list of men, residing within the limits mentioned in the warrant, qualified and able to serve on juries. The Jury Officer will, before October 23 following, deliver the list to the Sheriff of the district within which the jury district for which such list has been prepared is situated.

Section 18 of the Statutes Amendment Act, 1943, which amended s. 16 of the principal Act, is consequentially repealed, in so far as it affects the Form in the Second Schedule to the principal Act.

Another suggestion made to the Law Revision Committee related to the position of a juror who applies for and obtain exemption. The practice was that such a juror's name was not returned to the ballot-box for the remainder of the jury year. It was considered that, since reasons for exemption are usually temporary, the name should go back for balloting. This involved an amendment of s. 69 of the Juries Act, 1908. On an estimate, about four hundred jurors in a jury year are excused from service. Although it was found in practice that about 80 per cent. of the reasons for their being so excused would obtain throughout the jury year, while in the remaining 20 per cent. the reasons for exemption would be temporary, s. 69 was amended by adding the following proviso:

> Provided that, if any juror who attends as aforesaid is exempted by the Court on application in that behalf from serving as a juror, the parchment bearing the number by which the name of that juror is designated shall be returned by the Sheriff to the box marked "Common Jurors in Use."

This was effected by s. 30 of the Statutes Amendment Act, 1949.

Rules of Court.

The power to make Rules of Court, given by s. 3 of the Judicature Amendment Act, 1930, has been extended to empower the Governor-General in Council, with the concurrence of the Chief Justice and any four or more of the other members of the Rules Committee, to make rules of procedure in the Supreme Court or the Court of Appeal, not only in relation to the Acts mentioned in the Schedule to the Judicature Amendment Act, 1930, but also in relation to any other Act.

Mortgagors and Lessees Rehabilitation.

By s. 36 of the Statutes Amendment Act, 1949, the period for making applications to the Court of Review to interpret or amend orders by virtue of s. 49 (1) of the Statutes Amendment Act, 1939 (which is read together with and deemed part of the Mortgagors and Lessees Rehabilitation Act, 1936), has been further extended to include applications made not later than December 31, 1950.

Tenancy.

The Tenancy Act, 1948, has been amended by s. 56 of the Statutes Amendment Act, 1949, by the addition of the following section:

> 15A. No Court fees shall be payable in respect of any application made to the Court to fix the fair rent of any dwellinghouse or property, or in respect of any appeal to the Court of Appeal against an order of the Supreme Court fixing any such fair rent as aforesaid, or in respect of any document filed for the purposes of any such application or appeal.

Section 31 of the Tenancy Act, 1948, which created an offence on the part of any person obtaining possession of any dwellinghouse or urban property except pursuant to a Court order or with express or implied consent of the tenant, has been amended by inserting in subs. 1 the words "or any part of any dwellinghouse or urban property," so that the section extends to wrongful eviction of the tenant from any part, as well as the whole, of any dwellinghouse or urban property, as those terms are defined in s. 2 of the Act.

Promises of Testamentary Provision.

As was pointed out in this place in an earlier issue during the present year, the Law Revision Committee had anticipated the decision of the Court of Appeal in *Nealon* v. *Public Trustee*, [1948] N.Z.L.R. 324, by recommending a complete overhaul of s. 3 of the Law Reform Act, 1944, in order that its intention in originally framing that section should be carried out by the Courts. Its recommendation now appears in statutory form as the Law Reform (Testamentary Promises) Act, 1949. We shall return to this enactment in an early issue next year, in which we shall give it more detailed consideration. Suffice it to say here that the new Act is in substitution for s. 3 of the Law Reform Act, 1944, and that section is accordingly repealed.

It is, however, of present interest to practitioners to know that by s. 7 (2) it is provided that, if, before October 20, 1949 (the date of the passing of the new Act), any action under the now repealed s. 3 was pending or in progress on that date, or any appeal had been brought in any such action but had not been finally determined, the action or appeal may be continued and completed as if the new Act had been passed before the action was commenced. The new Act is accordingly retrospective, and applies to proceedings commenced before October 20, 1949, as well as to proceedings commenced after that date.

Dairy Companies.

A new statute of particular importance to country practitioners and their clients is the Co-operative Dairy Companies Act, 1949. This has been comprehensively dealt with by Mr. E. C. Adams, who was a member of the special Committee appointed to consider amendments to the Companies Act in relation to co-operative dairy companies.

Future Improvements in the Law.

The Law Revision Committee has in hand a complete re-enactment of the Land Transfer and Property Law legislation, as well as a general consideration of the law relating to trustees and to settled land. These matters are in the hands of separate committees of experts, comprising lawyers and Departmental senior officers, and draft bills to assist them have been prepared. While no drastic amendment in these branches of law is envisaged, it is felt that the time has come for a general consolidation, in relation to each topic, to be effected on modern lines.

The Committee has in hand a comprehensive Bill fixing anew the limitations of time within which actions may be brought and notices of action given, and also setting out limitation periods in relation to property law. Its aim is to bring all these limitations into a few defined periods, so that they will become common knowledge in all manner of events, without the present divergences to be found in obscure sections of isolated statutes.

A new Crown Proceedings Bill is also engaging the attention of the Committee. While the recent new English legislation sets out for the first time to enact matters that have long been statutory in this country, a number of its procedural provisions are worthy of adoption here. Such a Bill will, accordingly, incorporate the Crown Suits Act, 1908, and its amendments, with the added new matter.

From the foregoing, it will have been seen that the Law Revision Committee has, in 1949, as in previous years, something on the Statute Book as evidence of its activities and recommendations. It is hoped that, as the result of its consideration, its recommendation of new legislation, on the lines indicated, will bear fruit in the coming year.

The Law Revision Committee is grateful to practitioners throughout the Dominion, who, both through their official representatives in the District and New Zealand Law Societies and individually, have brought before it matters for consideration and eventual action. The Journal is authorized to express the Committee's hope that this co-operation will continue. While the Committee may, in some instances, inaugurate amendments of obvious and pressing importance, its efforts must necessarily be incomplete without a constant stream of suggestions from those in practice in different parts of the Dominion, who, as in the past, can supply from their store of knowledge and experience material for the general improvement of our statute law. This valuable assistance contributes to the common good, though, as our esteemed and much appreciated contributor, Scriblex, pithily remarked in our last issue: "Work of this kind, faithfully performed by zealous practitioners, is not always fully recognized by the public at large."

SUMMARY OF RECENT LAW.

ACTS PASSED IN 1949.

PUBLIC ACTS: Agricultural Emergency Regulations Confirmation. Anzac Day. Appropriation. Canterbury Agricultural College Amendment. Coal-mines Amendment. Co-operative Dairy Companies. Counties Amendment. Education Amendment. Education Lands. Emergency Regulations Amendment. Finance. Finance (No. 2). Fire Services. Forests. Friendly Societies Amendment. Gaming Amendment. Government Railways. Government Service Tribunal Amendment. Imprest Supply. Imprest Supply (No. 2). Imprest Supply (No. 3). Imprest Supply (No. 4). Industrial Relations. Land and Income Tax Amendment. Land and Income Tax (Annual). Law Reform (Testamentary Promises). Licensing Amendment. Licensing Trusts. Local Legislation. Maori Purposes. Medical Practitioners Amendment. Military Training. Military Training Poll. Minimum Wage Amendment. New Zealand Counties Association. Occupational Therapy. Patriotic and Canteen Funds Amendment. Physiotherapy. Rabbit Nuisance Amendment. Radioactive Substances. Reserves and Other Lands Disposal. Samoa Amendment. Social Security Amendment. Statutes Amendment.* Supply Regulations Amendment. Transport. Transport Licensing Amendment. War Pensions Amendment. War Pensions and Allowances (Mercantile Marine) Amendment. Whaingaroa Domain Disposal. Wool Labelling. Workers' Compensation Amendment.

* THE STATUTES AMENDMENT ACT, 1949, affects the following: Annual Holidays Act, 1944, s. 13; Auckland University College Amendment Act, 1923, s. 4; Board of Trade Act, 1919, ss. 30, 31; Cinematograph Films Act, 1928, First and Second Schedules; Divorce and Matrimonial Causes Act, 1928, s. 45; Electoral Act, 1927, ss. 28, 68, 223A; Electricity Act, 1945, ss. 3, 22A; Explosives and Dangerous Goods Act, 1908, ss. 2, 15; Factories Act, 1946, s. 4; Food and Drugs Act, 1947, ss. 3, 6; Forest and Rural Fires Act, 1947, ss. 40, 40A; Guardianship of Infants Act, 1926, ss. 6, 6A; Harbours Act, 1923, s. 166; Harbours Amendment Act, 1948, s. 9; Health Act, 1920, s. 40; Immigration Restriction Act, 1908, s. 2A; Industrial Conciliation and Arbitration Act, 1925, ss. 2, 134; Industrial Conciliation and Arbitration Amendment Act (No. 2), 1937, s. 3; Infants Act, 1908, s. 21 (new section substituted, as from January 1, 1950) (Child Welfare Act, 1925, s. 42, and Destitute Persons Act, 1910, s. 12); Judicature (Statutes Amendment Act, 1947, s. 28); Juries Act, 1908, ss. 14, 16, 19, 25, 26, 28, 29, 69, Second Schedule (Statutes Amendment Act, 1943, s. 18); Land Act, 1948, ss. 122, 125; Land Transfer Act, 1915, s. 116; Land Transfer Amendment Act, 1925, s. 4; Land Valuation Court Act, 1948, s. 26; Marketing Amendment Act, 1937, s. 6A; Masterton Licensing Restoration Act, 1947, s. 6 (Statutes Amendment Act, 1948, s. 28); Mortgagors and Lessees Rehabilitation (Statutes Amendment Act, 1939, s. 49, and Statutes Amendment Act, 1947, s. 45); Municipal Corporations Act, 1933, s. 308; New Zealand Council of Law Reporting Act, 1938, s. 12; New Zealand Institute of Architects Act, 1913, s. 37; New Zealand Society of Accountants Act, 1908, s. 34; Opticians Act, 1928, s. 6; Police Offences Act, 1927 ss. 4A, 54A; Post and Telegraph Act, 1928, s. 194; Post and Telegraph Amendment Act, 1944, s. 2; Post and Telegraph Amendment Act, 1947, s. 3; Poultry-runs Registration Act, 1933, s. 12A; Prisons Amendment Act, 1919, s. 2A; Property Law Act, 1908, s. 16 (Magistrates' Courts Act, 1947, ss. 31, 32); Public Reserves, Domains, and National Parks Act, 1928, s. 98A Royal Society of New Zealand Act, 1933, ss. 3, 4, 5, 6, 7, 8, 11; Scaffolding and Excavation Act, 1922, s. 3; Scientific and Industrial Research Act, 1926, s. 12; Shops and Offices Act, 1921-22, s. 35; Shops and Offices Amendment Act, 1927, s. 19; Superannuation Act, 1947, s. 3; Tenancy Act, 1948, ss. 15A, 31; Undesirable Immigrants Exclusion Act, 1919, s. 2A; Valuation of Land Act, 1925, s. 44; Valuation of Land Amendment Act, 1933, s. 4; Workers' Compensation Act, 1922, s. 3, First Schedule; Workers' Compensation Amendment Act, 1936, s. 4; Workers' Compensation Amendment Act, 1947, s. 46A.

LOCAL ACTS: Auckland Harbour Development. Balclutha Borough Council Empowering. Bluff Harbour Board Empowering. Christchurch Tramway District Amendment. Dunedin City Empowering. Dunedin City (Forestry) Empowering. Hutt Valley Drainage Amendment. Lower Hutt City Empowering (Community Centres). Lyttelton Harbour Board Loan. Napier Harbour Board and Napier Borough Enabling Amendment. Riccarton Bush Amendment. Thames Borough Council Empowering. Whangarei Milk Authority Empowering.

AGENT.

Commission—Estate Agent—Contract to pay Commission "in the event of business resulting"—Need for Conclusion of Binding Contract—Prospective Purchaser of Property introduced—Contract for Sale subject to Purchaser's "being able to arrange a mortgage." Estate agents wrote to the owner of a hotel inquiring on behalf of a client whether he was prepared to dispose of his interest in the property, and adding: "We are not being retained in this matter, and presume that in the event of business resulting we can look to you for the usual scale commission authorized by the recognized institution." In his reply the owner said: "Last paragraph of your letter quite understood." The firm introduced to the owner one G., who signed an agreement under which he undertook to buy the property for £35,000 subject to his "being able to arrange a mortgage" of £25,000 if the owner were not desirous of lending that sum on first mortgage debenture of a proposed private company secured on the premises at 4 per cent. per annum interest. The owner subsequently changed his mind, and paid G. £1,550 in order to be released from the agreement. The estate agents claimed commission from the owner. *Held*, That the words "in the event of business resulting" imported that a right to commission would accrue only when the agents introduced a person who entered into a binding contract to purchase the property, and, as the agreement with G. amounted at most to a contract that he would use his best endeavours to raise the necessary money, a binding contract to purchase had not been concluded, and the agents were not entitled to the commission. (Dictum of *Lord Russell of Killowen* in *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E.R. 46, applied.) (*Dudley Bros. and Co.* v. *Barnet*, [1937] S.C. 632, not followed.) *Murdoch Lownie, Ltd.* v. *Newman*, [1949] 2 All E.R. 783.

As to Remuneration of Agents, see *1 Halsbury's Laws of England*, 2nd Ed. 256-263, paras. 431-436; and for Cases, see *1 E. and E. Digest*, 488-503, 508-518, Nos. *1664-1728, 1753-1801.*

CONVEYANCING.

Grants of Rights-of-way. *99 Law Journal*, 649.

Joint Banking Accounts. *99 Law Journal*, 552.

DAIRY INDUSTRY.

Dairy Factory Managers Regulations, 1941, Amendment No. 2 (Serial No. 1949/177). Regulations 4 : 1, 4 : 2, 6 : 4, 6 : 5, and 11 : 1 are amended as from December 8, 1949.

DEATHS BY ACCIDENTS COMPENSATION.

Death of Passenger in Aircraft Disaster—Claim by Dependant against National Airways Corporation—Claim limited to £5,000 by Regulation—Regulation Validly made—Discretion to make Regulation properly exercised—Reasonableness not reviewable—New Zealand National Airways Act, 1945, ss. 17, 34—New Zealand National Airways Regulations, 1947 (Serial No. 1947/18), Reg. 3 (2) (3)—Practice—Pleadings—Statement of Claim—Amount claimed in Excess of Statutory Limitation—Order to amend by Reduction of Claim to Statutory Maximum—Time for filing Statement of Defence consequentially extended—Carriers—Carrier's Liability—National Airways Corporation—Carrier of Passengers by Air—Limitation of Liability by Regulation—Unaffected by Carriers Act, 1948—Carriers Act, 1948, s. 8. An action by the widow and executrix of the victim of an air disaster, claiming £15,000 damages, was brought by virtue of the New Zealand National Airways Act, 1945, and the Deaths by Accidents Compensation Act, 1908. Regulation 3 of the New Zealand National Airways Regulations, 1947, after restricting claims by providing that no claim may be made against the National Airways Corporation in respect of accident or death except by passengers, or, in the case of death of a passenger, by or for the benefit of the wife, husband, parent, and child of the passenger, or by the personal representative of the passenger, provides: "No claim in respect of the matters aforesaid made by or for the benefit of any of the persons aforesaid shall be made for a larger sum than £5,000." Regulation 3 (3) modifies this limitation as follows: "The Corporation may by express contract in writing, on payment of such additional fare or other consideration as may be determined by the Corporation, agree that, notwithstanding the foregoing provisions of this regulation . . . (*b*) A claim such as is referred to in these regulations may be made for a larger sum

than £5,000." No express contract to the contrary had been entered into. On a summons by the defendant Corporation for an order that the writ of summons be set aside, or, alternatively, that the plaintiff be compelled to amend the statement of claim by reducing the amount claimed (£15,000) to the sum of £5,000, and for consequential orders as to time for filing a defence, *Held*, 1. That Reg. 3 of the New Zealand National Airways Regulations, 1947, is valid, as it was validly made under s. 34 of the New Zealand National Airways Act, 1945; and, as the discretion of the Governor-General in Council to make Regulations had been properly exercised, the Regulation was not open to review as to reasonableness. (*F. E. Jackson and Co., Ltd.* v. *Collector of Customs*, [1939] N.Z.L.R. 682, followed.) (*Blackwood and Ibbotson* v. *London Chartered Bank of Australia*, (1874) L.R. 5 P.C.C. 92, applied.) 2. That s. 8 of the Carriers Act, 1948, did not nullify the New Zealand National Airways Regulations, 1947, as the Corporation was not affected by that Act. As the claim was one for an amount greater than Reg. 3 permitted, the plaintiff was ordered to amend her statement of claim by reducing the amount claimed (£15,000) to the sum of £5,000, and a further order was made fixing the time for the defendant Corporation to file a statement of defence. *Stephens* v. *New Zealand National Airways Corporation*. (S.C. Wellington. October 14, 1949. O'Leary, C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Costs—Security for Wife's Costs—Payment by Wife of Deposit to Solicitors for Prosecution of Suit—Subsequent Application for Security for Costs—Amount ordered against Husband—Deduction of Amount of Deposit from Amount of Security. A wife, cross-petitioner in a divorce suit, applied to the Registrar for an order that the husband should find security for her costs. She had already deposited with her solicitors £35 in respect of costs for the prosecution of her suit. The Registrar estimated the amount of the costs at £75, and, although aware of the sum deposited by the wife, ordered the husband to give security for that amount. *Held*, That the amount to be secured by the husband should be reduced by that of the wife's deposit—namely, to £40. *Luff* v. *Luff*, [1949] 2 All E.R. 753.

As to Security for Wife's Costs, see *10 Halsbury's Laws of England*, 2nd Ed. 724-727, paras. 1107-1115; and for Cases, see *27 E. and E. Digest*, 421-424, Nos. *4277-4307*.

Points in Practice. *99 Law Journal*, 648.

ECONOMIC STABILIZATION.

Business Premises—Goodwill—Lessor Former Owner of Business—Sale by Purchaser from him of Business and Goodwill of Lease—Vendor required to obtain Extension of Lease and of Lessor's Restrictive Covenant—Lessor stipulating for Same the Payment to Him of Half of Amount received by Vendor for Goodwill—Such Payment not "fine, premium, or other sum in addition to the rent"—Payment for Genuine Goodwill—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 20 (1) (a). The defendant carried on the business of a storekeeper from 1914 until, by agreement in December, 1945, he sold the business to the plaintiff, with the stock in trade and goodwill thereof. The purchase price was the value of the stock in trade. The agreement provided that no price was to be paid for goodwill, and that the defendant was to let the shop premises and fittings for a term of three years less three days; and he also agreed to enter into a restrictive covenant not to carry on, or be concerned in carrying on, the business of a general storekeeper, &c., in the town district of K., or within ten miles thereof, during the term of the lease. A lease dated July 4, 1946, was executed by the parties, and contained a covenant by the lessee not to carry on, in the demised premises, any business other than that of grocer, &c., and a covenant not to assign, &c., without the consent of the lessor. By agreement dated March 23, 1948, the plaintiff agreed to sell the business with its goodwill and stock in trade, the price being £400 for the goodwill of the business and the goodwill of the lease, which was due to expire on December 31, 1948, and the stock in trade was to be taken over at valuation. The plaintiff also assigned to the purchaser the benefit of the restrictive covenant contained in the agreement under which he bought from the defendant, and the monthly tenancy of a dwellinghouse occupied by the plaintiff. It was a condition of the agreement that the purchaser should obtain a new lease of the premises from the defendant for a further period of two years less one day from January 1, 1950, upon the same terms as the existing lease, and that the vendor should obtain an extension, for the term of the new lease, of the restrictive covenant on the part of the defendant contained in the original agreement between him and the plaintiff. When the defendant was approached for his consent, as lessor, to the assignment of the lease, and for the grant of a new lease and for an extension of the restrictive covenant, he stipulated that he should receive half the goodwill to be received by the plaintiff; and this was agreed to, subject to the amount being half the goodwill after deduction of the agents' commission. Possession was taken by the purchasers on April 23, and, on May 4, the plaintiff paid the defendant £157 10s., the new lease and the restrictive covenant having been then executed. In an action by the plaintiff, claiming to recover from the defendant the sum of £156 9s. 6d. in consideration of the renewal or continuance of a tenancy, being the amount required and accepted by the defendant, contrary to the Economic Stabilization Emergency Regulations, 1942, *Held*, That the transaction had to be looked at as a whole, and that, accordingly, the payment sought to be recovered by the plaintiff from the defendant was not a "fine, premium, or other sum in addition to the rent," as those words are used in Reg. 20 (1) (*a*) of the Regulations, as the payment in issue was for a genuine goodwill, notwithstanding that it had some relationship to the assignment of a tenancy. (*Toogood* v. *Commissioner of Stamps*, (1905) 25 N.Z.L.R. 471, applied.) (*Inland Revenue Commissioners* v. *Muller and Co.'s Margarine, Ltd.*, [1901] A.C. 217, referred to.) *Chilcott* v. *Oldbury*. (Te Awamutu. December 6, 1949. Paterson, S.M.)

INCOME-TAX.

*False Return of Income—Taxpayer's Honest Belief that Income from Illegal Source need not be returned—No Defence—*Mens rea*—Land and Income Tax Act, 1923, s. 149* (b). It is no defence to a charge of wilfully making a false return of income under the Land and Income Tax Act, 1923, that the defendant, in ignorance of the law, honestly believed that his income from an illegal source (here, bookmaking) need not be returned. *Oborn* v. *King*. (S.C. New Plymouth. December 2, 1949. Stanton, J.)

Payment received by Company as Compromise of Arrears owing under Sale of Standing Timber—Payment to be made by Instalments—Instalment paid in Company's Tax-year assessed for Income-tax Taxable as Recompense for Loss of Profit—Land and Income Tax Act, 1923, s. 79 (1) (a) (f). By an agreement dated January 26, 1943, the company agreed to sell all the timber growing, standing, or being upon an area of 500 acres, part of the land owned by the company. This agreement was for a term of ten years from January 1, 1943. The purchaser fell into arrears with the terms of this agreement, and the demands made on him by the company were compromised by an agreement whereunder the purchaser agreed to pay to the company the sum of £8,250 in respect of his prior breaches, the sum of £3,250 being based on the estimated value of the excess increase of wood content of the growing trees up to December 31, 1947, over the increase which would have accrued to the purchaser had there been no default; and the sum of £5,000 was a compromise based on the estimated value of the excess increase in such wood content from December 31, 1947, to the date of the expiration of the agreement over the increase which would have accrued to the purchaser had there been no default. The sum of £1,250 was payable on or before December 31, 1947, and the balance by equal quarterly payments. It was common ground that all sums payable under the original agreement were assessable income. In the company's income year ending March 28, 1948, the sum of £1,250, on account of the sum of £8,250, was paid by the purchaser, but was not included by the company in its income for that income year. The Commissioner of Taxes, however, included that amount in the company's income, and assessed income-tax and Social Security charge thereon. The company objected to the assessment of any part of the £8,250 as assessable income; but the Commissioner disallowed such objection. On appeal from such disallowance, *Held*, 1. That the test to be applied to any payment is not the method of calculating the payment or the actual method of payment by lump sum or instalments; and that the fact that the payment is in settlement of damages for breach of a contract is in itself relevant in interpreting its nature. 2. That, as, on the facts, the substantial nature of the payment showed that it was received by the company in the ordinary course of its business as a recompense for loss of profit, it was part of the company's revenue. (*Burmah Steam Ship Co., Ltd.* v. *Commissioners of Inland Revenue*, (1930) 16 Tax Cas. 67, followed.) 3. That, accordingly, the company was liable for income-tax on the whole of the sum of £8,250 under the provisions of s. 79 (1) (*a*) (and possibly of s. 79 (1) (*f*)) of the Land and Income Tax Act, 1923, and the assessment by the Commissioner by income-tax and Social Security charge on the sum of £1,250, received in the

income year as part of the sum of £8,250, was correct. *Matakana Afforestation, Ltd.* v. *Commissioner of Taxes.* (Auckland. December 1, 1949. Wily, S.M.)

LANDLORD AND TENANT.

Derogation from Grant—Implied Covenant—Common Scheme—Top Floor of House let as Residential Flat by Oral Tenancy Agreement—Other Floors originally let as Flats by Written Agreements containing Similar Covenants as to User—User as Private Dwelling only—Whole House, excepting Top Floor, converted into Hotel—Rights of Tenant of Top Floor. In June, 1937, F. became the tenant of 86, Lancaster Gate, and, by the agreement, dated December 20, 1937, granting him the lease, he agreed, *inter alia*, (*a*) not to use the premises for any purpose other than that of a private dwellinghouse, except in accordance with the provisions of two licences which permitted their user as a private residential club, (*b*) not to allow on the premises any sale by auction or entertainment to which the public could obtain admittance, and (*c*) not to cause or suffer to be done on the premises any act which might be an annoyance, damage, or disturbance to the superior landlords or their other tenants or neighbours. F. retained the ground floor and basement of the premises for use as a club, and sublet the other floors as flats, and in 1940 he granted a tenancy of the top floor to the plaintiff at a rent of £60 a year. All the tenancies, except that of the plaintiff, were by formal written agreements containing covenants in substantially similar terms, and among the covenants by the tenants were (*a*) "Not to allow any sale by auction on the premises nor exhibit on any part thereof any sign . . . that apartments are to be let . . . but shall use the same as a private dwelling only," and (*b*) "Not to do or suffer to be done any act or thing which may be or grow to the annoyance of the landlord or other occupants of the said premises . . . or which may be contrary to the terms of the lease under which the landlord holds the property." Although there was no written agreement in regard to her tenancy, the plaintiff alleged that, in taking the tenancy, she had relied on a statement, made to her by F. during the negotiations, that he required the tenants to use their flats for residential purposes, as he proposed to maintain the house for private residents. In November, 1946, F. sold his interest in the whole house to the defendants, who were already conducting a hotel in the next house. The whole of No. 86 was empty at the time, except for the first floor and the premises occupied by the plaintiff on the fifth floor. In 1947, the defendants began to use No. 86 as part of the hotel, and in June, 1948, they incorporated the whole house, except for the top floor into the hotel. By the erection of a door, the premises occupied by the plaintiff were turned into a self-contained flat by the end of 1948. In an action by the plaintiff in the County Court claiming damages and an injunction to restrain the defendants from using the premises, or any part of them, for any purpose other than that of private residence, or in such a manner as might be detrimental to the quiet enjoyment by her of her flat, *Held*, (i) That the user of the lower part of the house was merely an interference with the plaintiff's convenience, amenity, or privacy, and was not of such a serious nature as to frustrate the use of the premises for the purpose for which they were demised; and, therefore, the fact of the incorporation of the premises in a hotel did not amount to a derogation from the grant made to the plaintiff.

(ii) That, in any event, the question whether particular circumstances amounted to a derogation from the grant as distinct from a mere interference with amenities was a question of fact, and there was evidence on which the County Court Judge could decide in favour of the defendants.

(iii) That, even assuming that there had been a statement of intention by F., during the negotiations for the tenancy, that he would not permit the user of any of the other floors of the premises except as private dwellings, a covenant to that effect could not be implied in the tenancy agreement between F. and the plaintiff.

(iv) That a letting scheme could not be inferred in regard to the house in question, which was originally built as one dwelling, and never physically split into separate dwellinghouses; the covenants in the written agreements between F. and the other tenants of the house were inserted, not by reason of a letting scheme, but to ensure, so far as possible, that the terms of the head lease were not infringed; and, therefore, the plaintiff's claim failed. (*Newman* v. *Real Estate Debenture Corporation, Ltd., and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131, distinguished.) *Kelly* v. *Battershell and Another*, [1949] 2 All E.R. 830 (C.A.).

MARRIED WOMEN.

Restraints upon Anticipation. *93 Jolicitors Journal*, 522.

MASTER AND SERVANT.

Injury to Workman—Liability of Employer—Garage Fitter—Need to provide Goggles—Workman with only One Eye—Injury to Other Eye. A workman who, owing to a cataract, only had the use of one eye, was employed as a fitter in the garage of the defendant Borough Council. On the day in question, while he was using a hammer to remove a bolt on a vehicle, a chip of metal flew off and entered his good eye, so injuring it that he became totally blind. The defendants did not provide goggles for the workman to wear while he was engaged in such an operation. *Held*, That the operation on which the workman was engaged was not a dangerous operation, and there was no general duty on the defendants to provide goggles for their workmen; the fact that the consequences of an accident to an eye would be more serious to him than to a man with normal sight did not impose a greater duty on the Borough Council to provide protection for him than the duty owed by them to other employees; and, therefore, the Borough Council could not be held liable for the injury. *Paris* v. *Stepney Borough Council*, [1949] 2 All E.R. 843 (C.A.).

As to Master's Duty at Common Law, see *22 Halsbury's Laws of England*, 2nd Ed. 187-194, paras. 313-328; and for Cases, see *34 E. and E. Digest*, 194-220, Nos. *1580-1824*.

PRACTICE—DISCOVERY.

Production of Documents—Production before Delivery of Statement of Claim—Exceptional Circumstances—R.S.C., Ord. 31, r. 14 (cf. *Code of Civil Procedure, R. 163*). R.S.C., Ord. 31, r. 14 (which, in effect, is the same as R. 163 of the Code of Civil Procedure), provides: "It shall be lawful for the Court or a Judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just." On December 24, 1947, according to the plaintiffs' case, certain goods were warehoused in the plaintiffs' name, the defendants holding the documents of title thereto endorsed in blank as fiduciary agents to sell the goods on behalf of the plaintiffs. By January 19, 1948, all the goods had been sold, and the proceeds, amounting to £15,619 10s. 10d., were received by the defendants and paid into their banking account, being there mixed with their own moneys. Various sums were paid to the plaintiffs, leaving, according to the plaintiffs, £9,269 0s. 1d. to be accounted for. The plaintiffs had been informed that on March 26, 1948, the defendants had withdrawn from the banking account £15,510 in notes, which had been paid to W. for a certain purpose. W. absconded with the money, and in due course the Police recovered £10,800 of the notes and they were handed to the liquidator of the defendant company, or to the company itself, which had meanwhile gone into liquidation and was insolvent. The plaintiffs claimed in the action a declaration that they were beneficially entitled to a charge for £9,269 0s. 1d. on the £10,800 recovered, in priority to all interests of the defendants, or, alternatively, that they were entitled, to the exclusion of the defendants, to £9,269 0s. 1d., part of the said £10,800. To be able to trace items through the defendants' banking account, the plaintiffs now sought, before delivering a statement of claim, discovery of the bank pass-sheets of the account from December 24, 1947, to March 27, 1948. *Held*, That, if the order for discovery were not made, it was almost certain that substantial amendments would be required later of the statement of claim, because only the defendants knew what dealings there had been with the money of which they were alleged to be trustees, and the circumstances were exceptional, warranting the exercise of the Court's jurisdiction under r. 14. (*Gale* v. *Denman Picture Houses, Ltd.*, [1930] 1 K.B. 588, distinguished.) *Speyside Estate and Trust Co., Ltd.* v. *Wraymond Freeman (Blenders), Ltd.*, [1949] 2 All E.R. 796.

RAILWAYS.

Appeal Board—Jurisdiction—Transfer of Member of Railway Service from One Position in Service to Another without Promotion—No Appeal therefrom. The New Zealand Railways Appeal Board has no jurisdiction to entertain an appeal against a transfer of a member of the Railway Service from one position to another without promotion. (*New Zealand Public Service Association (Inc.)* v. *Robertson*, (1914) 33 N.Z.L.R. 1514, referred to.) As the acquiescence of the General Manager of Railways in such appeal proceedings could not confer on the Board a jurisdiction

that it did not have, he is not precluded from later raising the defence that he was not bound by its decision. (*Farquharson* v. *Morgan*, [1894] 1 Q.B. 552, followed.) (*London Corpn.* v. *Cox*, (1867) L.R. 2 H.L. 239, and *Broad* v. *Perkins*, (1888) 21 Q.B.D. 533, distinguished.) *Harris* v. *General Manager of Railways.* (S.C. Wellington. October 27, 1949. Hay, J.)

SOCIAL SECURITY.

Special Damages for Loss of Earnings—No Deduction of Social Security Charge by Employer. The Social Security charge should not be deducted by the employer where the amount of special damages for loss of earnings is agreed upon, and it must not be deducted by any tribunal assessing the amount of such special damages. (*Billingham* v. *Hughes*, [1949] 1 K.B. 643; [1949] 1 All E.R. 684, followed.) (*M'Daid* v. *Clyde Navigation Trustees*, [1946] S.C. (Ct. of Sess.) 462, and *Blackwood* v. *Andre*, [1947] S.C. (Ct. of Sess.) 333, referred to.) *Ramstad* v. *Union Steam Ship Co.* (S.C. Wellington. November 29, 1949. O'Leary, C.J.)

TENANCY.

Urban Property—Dwellinghouse—Shop with Living Quarters—Proper Classification of Premises—Test of Substantial User—Distinction from Corresponding English Legislation—"Dwellinghouse"—"Urban property"—Tenancy Act, 1948, ss. 2, 3 (1), 9 (1). In any proceedings under the Tenancy Act, 1948, the Court must consider what are the real, main, and substantial purposes (*a*) of the premises, and then (*b*) of the tenancy created over those premises, so that the property may be placed in its correct class under s. 3 (1). (*Hilderbrandt* v. *Read*, [1946] G.L.R. 321, referred to.) ((*Drum* v. *Coleman*, [1947] N.Z.L.R. 175, distinguished.) To do this, the Court must determine, first, if the substantial user of the property is for the purpose of a dwellinghouse, and, having so determined, then, under s. 2 (3), it may not exclude such premises as not being a dwellinghouse by reason only of the fact that some part is used for shop or office, or for business, trade, or professional purposes. It then becomes a matter of fact in each case as to what is the substantial user. If the property is substantially used as a dwellinghouse for a home, then the carrying on of a shop or office in the premises does not affect its classification as a "dwellinghouse." If, however, it is determined on the facts that the substantial user of the property is for a shop or office, then the fact that it is also used for dwelling in does not affect its classification as "urban property." About 1929, the landlord company built a two-story building, comprising a block of six shops on the ground floor. Each of five of these shops had a living-room, kitchenette, laundry, and lavatory downstairs, and further living-accommodation above it, consisting of three bedrooms, a living-room, and a bathroom. The sixth shop had no living-accommodation. The tenant of one shop commenced his tenancy about May, 1946, by the purchase, with the landlord company's approval, from the previous tenant of the business then conducted in the shop. He stated that he wanted the business and the shop, and the balance of the premises as his home. Since his purchase, he had resided in the residential portion of the premises with his family, and he had carried on the business in the balance of the premises. The shop area was less than one half of the total area so occupied. In July, 1948, an order was made, on the landlord company's application, under the then Fair Rents Act, 1936, and was dealt with as if the premises were a "dwellinghouse" under that statute; and the basic rent was increased for a period of one year. On an application by the landlord company to fix the fair rent in excess of the basic rent of the demised premises, *Held*, That the premises were substantially business premises, or "urban property"; and, consequently, the tenant could not plead hardship under s. 9 (1) of the Tenancy Act, 1948, or plead an estoppel in perpetuation of an excess or want of jurisdiction in relation to the determination of the earlier application in fixing the fair rent. Distinction between the provisions of the Tenancy Act, 1948, and the corresponding English legislation discussed. *Giles* v. *Brays Properties, Ltd.* (Auckland. November 3, 1949. Wily, S.M.)

THE COURTS' CONTROL OF ADMINISTRATIVE DISCRETION.

The purpose of this article is to examine in brief the extent to which the Courts will upset the exercise by an administrative authority of a statutory power because they disapprove of the motives or purposes of the authority.

In *Westminster Corporation* v. *London and North Western Railway Co.*, [1905] A.C. 426, Lord Macnaghten suggested that there were three grounds on which the exercise of administrative power might be attacked—*viz.*, (i) *ultra vires*, (ii) proof of bad faith, and (iii) that the exercise was "unreasonable." In other formulations, *ultra vires* is used to cover all these three grounds. Thus, Warrington, L.J., in *Short* v. *Poole Corporation*, [1926] Ch. 66, 91, said:

> references in the judgments . . . to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which if proved to exist might establish the *ultra vires* character of the act in question.

What is of practical importance is to discover the circumstances in which the Courts will interfere with the exercise of a statutory discretion. The attitude of the Courts does, in fact, change with remarkable speed on such subjects as these, but it is suggested that the following rules are deducible from the cases, and are currently applied.

First, where the purposes for which the particular power to act is given are expressly laid down in the statute, and it is proved that the purpose of the particular action before the Court was not the statutory purpose, the action may be declared invalid. This is clearly a simple case of *ultra vires*.

In *Smith* v. *Macnally*, [1912] 1 Ch. 816, the managers of a school dismissed a teacher without reference to the local authority, whose consent was (by statute) necessary unless the dismissal was on grounds connected with the giving of religious instruction. It was found that the dismissal was not in fact on these grounds, although the managers had stated that it was. An injunction was granted by the Court of Appeal to restrain the managers: see also *Hanson* v. *Radcliffe Urban District Council*, [1922] 2 Ch. 490.

Secondly, the same rule applies where the statute lays a general duty on the administrative authority, delimiting the purposes for which the powers are granted. In *Short* v. *Poole Corporation* (*supra*), the authority were charged "to maintain and keep efficient all public elementary schools within their area," and had power to dismiss teachers. The authority dismissed the plaintiff because they considered that, as a married woman, she could not effectively and satisfactorily also perform her duties as a teacher, and that it was unfair to retain her in view of the large number of unmarried teachers seeking appointments. The Court of Appeal held that the dismissal was in

performance of the statutory charge, and, therefore, valid. Similarly, *Fennell* v. *East Ham Corporation*, [1926] Ch. 641.

Thirdly, statutory phrases, when defined, are often found to carry implications of motive; when other motives actuate the exercise of the power, it may be found that the exercise is *ultra vires*. An example makes this clear, and may be found in the well-known case of *Roberts* v. *Hopwood*, [1925] A.C. 578. A metropolitan borough council was empowered to pay such wages as it might think fit to its servants. The district auditor disallowed the large amounts paid, as being contrary to law, and the surcharge was upheld by the House of Lords. It is submitted that the correct view of this decision is that, since the amounts paid were, in part, not referable to services rendered but were in the nature of gifts, they were not "wages" within the meaning of the empowering statute. It is true that some of the judgments indicate that the payments were contrary to law because of the motives which lay behind them. Lord Greene, M.R., in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation*, [1947] 2 All E.R. 680, 684, said: "the substance of the decision [in *Roberts* v. *Hopwood*] was that, in fixing the £4 a week as wages, they had acted unreasonably." Clearly, if they had not fixed the sum as wages, it is immaterial whether or not they acted reasonably. What is important, however, is not whether *Roberts* v. *Hopwood* can be logically explained on the view suggested, but how the Courts to-day regard that decision. If Lord Greene's lead is followed (and much criticism of the case has been made since 1925), it seems likely that *Roberts* v. *Hopwood* will become one of those decisions which are "distinguished" out of existence. In *Re Walker's Decision*, [1944] K.B. 644; [1944] 1 All E.R. 614, a council was limited in its payments to *reasonable* remuneration; a payment of children's allowances as part of the remuneration was upheld by the Court of Appeal. du Parcq, L.J., said that *Roberts* v. *Hopwood* made it clear that:

> a local authority cannot be said to be acting in the lawful exercise of its discretion to fix wages when it grants to its employees, *nominally as wages*, amounts arrived at arbitrarily.

(The italics are mine.) Lord Goddard (then Goddard, L.J.) said:

> It is the amount of wages to which regard must be had and not the motive which led to that amount being paid.

Fourth, in interpreting the statutory power, certain motives may be excluded by implication; no statute will empower an authority to use the given power for corrupt purposes or in bad faith. If the power is so used, the exercise is *ultra vires* the statute. The best example of this is *Sydney Municipal Council* v. *Campbell*, [1925] A.C. 338. The appellants had power to acquire compulsorily land required for the purpose of extending streets, or for improving or remodelling any portion of the city. The Privy Council, having accepted that the real purpose of the Council was to acquire the respondent's land because of its probable increase in value, dismissed the Council's appeal from the grant of an injunction.

We must now examine the real difficulty. The question is: Where an authority is not acting *ultra vires* in any of the ways described above, will the Courts nevertheless restrain its actions on the ground that the exercise is "unreasonable"?

If the contention advanced in this article is correct, they will not. The *Wednesbury* case (*supra*), which was decided in 1947, poses the problem. The defendants, the Wednesbury Corporation, as the authority, were empowered by statute to grant cinema licences "subject to such conditions as the authority think fit to impose." The condition imposed was that no child under fifteen should be admitted, whether accompanied by an adult or not. The plaintiffs argued that this condition was unreasonable, and, in consequence, *ultra vires*. The Court of Appeal dismissed the appeal. Lord Greene emphasized that it was the statute that had to be regarded. He said, at p. 682:

> If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters.

The exercise of discretion can only be challenged in the Courts (p. 682) "in a very limited class of case." His Lordship concluded his judgment by saying, at p. 685:

> The power of the Court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.

Lord Greene added a rider to these general propositions when he said, at p. 683:

> Theoretically it is true to say—and in practice it may operate in some cases—that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere. That, I think, is right, but that would require overwhelming proof.

There is an obvious difficulty here, for the question is one of degree only.

The Courts have at some point to draw a line between actions they may personally consider unreasonable, but with which they will not interfere, and actions which are "so unreasonable that," &c. Like all such lines, it must be arbitrary. Nevertheless, it seems clear that it must be drawn, if only to protect schoolmistresses from dismissal on the grounds (in the much-quoted example) that they have red hair. On the other hand, the Courts appear to feel that, where a Minister is empowered by statute to act, provided he "is satisfied," they have no jurisdiction to go behind the expression of the Minister's satisfaction, however overwhelming the proof: *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851, and *Re Beck and Pollitzer's Application*, [1948] 2 K.B. 339.

The principle may be restated in this form: the Courts will interfere with the exercise by an administrative authority of a statutory power where the purposes of the authority are other than those expressly stated in the statute, where the authority acts corruptly or in bad faith (thus contravening the implied terms of the statute), or where the exercise is so unreasonable that no reasonable authority could ever have come to it. The Courts will not interfere because they think the exercise unreasonable, socially undesirable, or economically disastrous.

J. A. G. G.

LAWYERS IN LITERATURE.

By F. J. Foot.

Usually lawyers are badly treated by writers of fiction. Surtees uses them only to write unpleasant and menacing letters to the dupes of shady foxhunting horse-dealers. Otherwise, he avoids them. But to Surtees I would forgive anything.

Those in Dickens are best known, and they are, one and all, a very rum lot. They are caricatures, like most of Dickens' folk—inimitable caricatures, but still caricatures.

Dickens had worked in a solicitor's office, and his sketches of lawyers and their surroundings are highly amusing and free from technical blunders, but they depict a disreputable set, and two novels will do to illustrate. Dodson and Fogg are cunning sharpers, and proud of it. Even Mr. Perker is hardly reputable. Making all due allowance for the burlesque handling, and even buffoonery, of the early chapters of *Pickwick Papers*, still Perker's role of agent in the Eatanswill Election is not in the best tradition of his calling. It will be remembered that, an hour before the close of poll, Mr. Perker solicited a private interview with the unpolled electors. His arguments were brief but satisfactory. They went in a body to the poll, and, when they returned, the Honourable Samuel Slumkey was returned also.

Mr. Spenlow is a humbug, Mr. Wickstead a weak dipsomaniac, Uriah Heep a scoundrel, Solomon Pett a rogue.

Of the Bar, Sergeant Buzfuz is the best known representative—too well known to need description.

The generality of barristers are " an extensive variety of nose and whisker," in Dickens' cheerful and disrespectful phrase.

Of Thackeray I cannot profess to speak, though I remember the lawyer in *Pendennis*, " by profession a serious man." I may be wrong, but I do not think lawyers moved in high enough circles for these novels.

Is it true of lawyers, as of Governments, that the people get what they deserve ? Mrs. Bardell deserved little better than Dodson and Fogg. Plenty of other examples will occur to the reader.

Anthony Trollope, the greatest of Victorian novelists, is kinder to the profession. In *The Eustace Diamonds*, Mr. Camperdown is a model of all a family lawyer should be—discreet, tactful, businesslike, and firm. His mere reputation and known high standard of conduct convince people who do not know Lady Eustace that she is untruthful when she says her husband gave her the diamonds. Those who do know her are already convinced, of course. Lady Eustace also gets the lawyers she deserves in Messrs. Mowbray and Mopus. The barrister, Frank Greystoke, is a decent fellow, if rather selfish and unreliable.

In *The Warden*, there is a very brief but unkind picture of an Attorney-General, Sir Abraham Haphazard, K.C., "a man to use and then have done with—a man whom you would ask to defend your property, but to whom you would be sorry to confide your love." He is provided during a short chapter as a foil to the gentle and high-principled Warden. Sir Abraham is as much a politician as a lawyer, and Trollope had little time for politicians.

Mr. Chadwick is an ecclesiastical lawyer (not the Mr. Chadwick who is steward to the episcopal estates in *The Warden*, but his nephew, who briefly appears in *The Last Chronicle of Barset*). He is prudent and discreet. He is almost famous, because he has avoided open quarrel with Mrs. Proudie. Mr. Toogood, in the same novel, is a practical man. Trollope-lovers will readily forgive me if I discourse a little about him. He is a busy London solicitor, and he is consulted very late in the Crawley case. He makes the first useful suggestion towards ending a woeful situation. Mr. Crawley, a desperately poor and respectable clergyman, is accused of stealing a cheque. He protests his innocence, but either cannot afford to employ counsel or will not do so. He has undoubtedly cashed the cheque, and cannot remember where he got it. He is committed for trial by the Magistrates on overwhelming evidence. In this situation, his friend, Mr. Harding, calls on Mr. Toogood, who points out that theatrical managers have to make do with what wardrobe they have, and lawyers must do the same thing.

" Not with your clothes, Mr. Toogood ? "

" Not exactly with our clothes—but with our information."

" I do not quite understand you, Mr. Toogood."

" In preparing a defence, we have to rummage about and get up what we can. If we can't find anything that suits us exactly, we are obliged to use what we do find as well as we can. I remember when I was a young man, an ostler was to be tried for stealing some oats in the Borough ; and he did steal them too, and sold them at a rag shop, regularly. The evidence against him was as plain as a pikestaff. All I could find out was that on a certain day a horse had trod on the fellow's foot. So we put it to the jury whether the man could walk as far as the rag-shop with a bag of oats when he was dead lame—and we got him off."

" Did you though ? " said Mr. Harding.

" Yes, we did."

" And he was guilty ? "

" He had been at it regularly for months."

" Dear, dear, dear ! "

Toogood suggests Crawley perhaps got the cheque from the Dean, who is abroad in Italy. Toogood sends to him, and the mystery is solved. The real thief, of course, was Jem Scuttle, who had decamped to New Zealand. (Trollope, of course, meant to say Australia.) Mr. Toogood is a fact-finding solicitor, preparing his case from unpromising material.

Robert Louis Stevenson is reasonable about lawyers. Mr. Rankeillor in *Kidnapped* is a solid, reliable man. If he is on the " honest " side in politics, well, so were many others, with less excuse. There was no percentage in being a Jacobite in 1751, and Mr. Rankeillor could look after his own interests as well as those of his clients. But, on the occasion of Uncle Ebenezer's unmasking, his pawky joke on Alan Breck Stewart's Royal name was in very bad taste, although Stevenson does not seem to notice it.

In more modern times, Soames Forsyte as a man and a husband is no ornament to the profession. I speak of the earlier novels, for Galsworthy mellowed

towards him later on. One should not waste much sympathy, however, on his first wife, Irene—a colourless character, who made of marriage a sort of mercenary contract and then defaulted in her bargain.

Arnold Bennett's *Whom God hath Joined* is all about lawyers, their clerks, and their offices. This is probably the best novel about lawyers in our time, and the settings and scenes and characters are extremely faithful, especially as to the unexpected pitfalls in divorce. You will recall that the lawyer petitioner was illegitimate, and had, through his mother, a Scottish domicil. His wife, the respondent, was unkind enough to call attention to this hitherto unnoticed lack of jurisdiction, and he had to start all over again in a Scottish Court.

One cannot call Ormond Burton's fine book *In Prison* a novel, but it is worth remarking that it is a lively and accurate panorama of New Zealand Courts, higher and lower. In the circumstances, one cannot expect the picture to be genial, but it does not lack charity, or, to say the same thing, understanding.

ACCRETIONS TO LEGAL MORTGAGES.

By E. C. Adams, LL.M.

As a general rule, a legal (as distinguished from an equitable) mortgage may be effected only over property of which the mortgagor has the legal title. A person cannot mortgage what he does not own; if the legal ownership is not vested in him, he cannot mortgage the legal title. This rule is based on logic, but, in modern commerce, it has its inconvenient results, especially with regard to mortgages of leases containing rights of renewal or rights of purchase.

Some of the exceptions to the above rule are set out below—all the creation of statute except the last, which is based on the common law as borrowed from Roman law. These exceptions may conveniently be considered under the following headings:

A. General provisions in Land Transfer Act.

B. Mortgages affecting new leases.

C. Mortgages affecting small areas incorporated in Crown leases or licences.

D. Mortgages affecting freehold acquired by Crown lessees or lessees of Maori land.

E. Directions in Governor's warrants.

F. Proclamations affecting road deviations.

G. Accretion to mortgagor's land.

A. General Provisions in Land Transfer Act.

Section 5 of the Land Transfer Amendment Act, 1939, is a general provision, which may be availed of if there is no other special statutory provision applicable. The important point is that, under this section, the lessee himself must make the necessary application to the District Land Registrar, whereas in the special statutory provisions hereinafter mentioned the District Land Registrar is expressly or impliedly commanded by the Legislature to bring the mortgages forward on to the freehold titles or new leases, thus constituting the mortgages of the old leases legal mortgages of the freehold or of the new leases. For the provisions of s. 5 to apply, the new lease must be in renewal of, or in substitution for, the old lease, and must be registered not later than one year after the expiry or surrender of the old lease. If the conditions of s. 5 are complied with, the new lease is deemed to be subject to all incumbrances, liens, and interests to which the old one was subject.

Section 4 of the Land Transfer Amendment Act, 1939, makes provision for the registration of a memorandum of extension of a registered lease before its expiry. Such an extension is, in fact, a new lease, and the statute directs that, upon the registration of the memorandum of extension, the estate of the lessee shall be deemed to be subject to all incumbrances, liens, and interests to which the lease is subject at the time of the registration of the memorandum of extension.

With regard to ss. 4 and 5 of the Land Transfer Amendment Act, 1939, the reader is referred to an article by the writer in (1947) 23 New Zealand Law Journal, 277, 290.

B. Mortgages affecting New Leases: Special Statutory Provisions.

The following list is not to be regarded as exhaustive, although an endeavour has been made to bring it up-to-date. It refers to the Land Act, 1948, which brings within its scope leases and purchases of land formerly held under the following Acts—*e.g.*, Thermal Springs District Act, 1910, land which has become the property of the Crown under s. 76 of the Public Trust Office Act, 1908, land which has become the property of the Crown as *bona vacantia*, land purchased for general settlement by the Board of Maori Affairs under the Maori Land Act, 1931 (other than a road), land which has become the property of the Crown under the Land Subdivision in Counties Act, 1946, the Discharged Soldiers Settlement Act, 1915, the Land for Settlements Act, 1925, the Small Farms Acts, the Education Reserves Act, 1928, the Hutt Valley Land Settlement Act, 1925, and the Deteriorated Lands Act, 1925.

In the case of Crown and other similar leases, and mortgages to certain Government Departments, there are special statutory provisions that, where a renewal of an existing lease, or a new lease, is granted on the expiry or surrender of the existing lease, for that purpose the new lease shall be subject to all existing incumbrances, liens, and interests registered against the expired or surrendered lease, and that the District Land Registrar shall record on the new lease all such incumbrances, liens, and interests in order of their registered priority. The following are some of the principal classes of lease and mortgage provided for, with the statutory authority:

Crown Leases and Licences.—Section 114 (2) of the Land Act, 1948, provides as follows:

> Where a lessee or licensee surrenders his lease or licence and, pursuant to any right, power, or authority conferred on him by any Act for the time being in force, receives in exchange therefor a new lease or licence under this Act, or where a lessee purchases on deferred payments the fee-simple of land previously held by him on lease, or where on the expira-

tion of any lease or licence the lessee or licensee is granted a renewal thereof, or a new lease or licence of the same land, pursuant to any right, power, or authority, the new lease or licence shall in each case be deemed to be subject to all existing encumbrances, liens, and interests (if any) registered against the surrendered or expired lease or licence, as the case may be, and the District Land Registrar shall record on the new lease or licence all such incumbrances, liens, and interests accordingly in the order of their registered priority.

Maori Land Act, 1931, s. 471 (5) (c).—On the surrender of a lease under s. 471 (5) (*b*), the Land Board may grant a renewable lease or licence of the whole or any part or parts of the land in the surrendered lease: all incumbrances to be brought down: Maori Land Act, 1931, s. 471 (5) (*c*).

Maori Land Board Leases.—Where a Board is acting under the provisions of the Public Bodies' Leases Act, 1908, and a new lease is granted on the surrender of an existing lease: Maori Land Act, 1931, s. 102.

Maori Township Leases.—Where the holder is granted a renewed lease after the land has been acquired by the Crown: Maori Purposes Act, 1931, s. 26.

State Advances Act, 1913, s. 39.—Mortgages issued in favour of State Advances Superintendent. This provision enures for the benefit of the State Advances Corporation: Mortgage Corporation of New Zealand Act, 1934-35, s. 37 (1).

State Advances Corporation Mortgages.—See s. 36 of the State Advances Act, 1936, similar in its effect to s. 39 of the State Advances Act, 1913 (*supra*).

Westland and Nelson Coalfields Administration Act Leases.—Where certain new leases are issued on surrender of the existing lease: Westland and Nelson Coalfields Administration Act, 1926, s. 9.

West Coast Settlement Reserves Act Leases.—Where a new lease is granted to a lessee on the surrender of an existing lease: Maori Purposes Act, 1931, s. 6 (*b*).

West Coast Settlement Reserves Amendment Act, 1948.—Substituted Maori leases: s. 23.

Coal Act, 1948, s. 42 (11).—Persons claiming existing coal leases or prospecting or mining rights entitled to lease or licence under principal Act.

C. Mortgages affecting Small Areas incorporated in Crown Leases or Licences.

Section 113 of the Land Act, 1948, reads as follows:

(1) Where land is incorporated in or is excluded from a lease or licence which is registered in the Land Transfer Office, the Commissioner shall prepare and sign a certificate setting forth such particulars with respect to any alteration in area, rental value, rent, purchase-money, instalments of purchase-money and interest, or other matters as he may deem necessary in the circumstances of the case. The certificate shall have endorsed thereon or attached thereto a plan of the lands affected, and shall be produced to the District Land Registrar, who shall thereupon endorse on the relevant lease or licence a memorial of the same.

(2) Where any land is incorporated in a lease or licence as aforesaid, the land so incorporated shall, on the endorsement on the lease or licence of an appropriate memorial by the District Land Registrar, be held by the lessee or licensee on the same tenure and subject to the same terms and conditions as those on which the land with which it is incorporated is held.

(3) Any land so incorporated in a lease or licence shall be subject to the same reservations, trusts, rights, titles, interests, and incumbrances as those to which the land with which it is incorporated is subject.

D. Mortgages affecting Freehold acquired by Crown Lessees or Lessees of Maori Land.

In the case of Crown leases and in that of certain leases of Maori land, there are special statutory provisions *that a freehold estate acquired by the lessee* shall be subject to all existing encumbrances, liens, and interests: Maori Townships Act, 1910, s. 22 (2), added by ss. 25 and 26 of the Maori Purposes Act, 1931.

Crown Leases.—Section 114 (1) of the Land Act, 1948, reads as follows:

Where a lessee or licensee acquires an estate in fee-simple in land previously held by him under lease or licence which was subject to any incumbrance, lien, or other registered interest, the District Land Registrar, before issuing the certificate of title in respect thereof, shall make all entries necessary in order to record on that certificate every then existing incumbrance, lien, and interest, in the order of their registered priority; and the estate in fee-simple shall be subject thereto in like manner as if they had been created in respect of that estate.

N.B.—Section 114 (1) above embraces purchases under the various Acts referred to in the explanatory paragraph to B above (mortgages affecting new leases).

E. Directions in Governor's Warrants.

The Statutes Amendment Act, 1940, s. 48, provides that the Governor-General may direct titles granted in lieu of compensation to be made subject to existing incumbrances.

N.B.—The consent of the grantee and the incumbrancee is necessary.

F. Proclamations affecting Road Deviations.

Section 29 of the Public Works Amendment Act, 1948, repeals s. 12 of the Land Act, 1924, and its Amendments, but it repeats its provisions as to the bringing forward of incumbrances on new leases issued in substitution for leasehold land taken for road. It also repeats the provision that, if freehold land is taken in exchange for a road, the land will be granted and all incumbrances brought forward *if incumbrancees and owner consent.*

Section 29 (4) reads as follows:

All lands disposed of under this section by way of lease or licence in exchange for lands held under lease or licence from the Crown shall be deemed to be incorporated in that lease or licence from the Crown, and shall, subject to any consequential adjustment of rent, be held on the same tenure and upon the same terms and conditions, and be subject to the same rights, titles, interests, and incumbrances, as the other land comprised in that lease or licence.

Subsection 15 reads as follows:

On the issue of a certificate of title for any land granted or otherwise disposed of subject to any registered incumbrance, lien, or interest as aforesaid, the District Land Registrar or the Registrar of Deeds shall enter in the appropriate Register and record on any relevant instrument a memorial setting out the effect in the circumstances of the *last preceding* subsection.

G. Accretion to Mortgagor's Land.

Land which is mortgaged may have a movable boundary—*i.e.*, the land may be bounded by the sea, by a river, or by a stream of running water. The mortgage will extend to such boundary as it may from time to time be, unless it changes gradually. If the change is gradual and imperceptible, so as to extend the boundary outwards, there will be an accretion to the land, and the mortgage will extend to such accretion, unless the accretion has been specifically excluded therefrom: *Mercer* v. *Denne*, [1905] 2 Ch. 538, and *Coulson and Forbes on Waters and Land Drainage*, 5th Ed. 41. Similarly, if the mortgage is a mortgage of a lease of such land, the lease will include the accretion, and, therefore, so will the mortgage.

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. 16.—T. BOROUGH TO C.B. OF A., LTD.

Jurisdiction—Glasgow Lease—New Term—Valuation of Improvements—Amount payable to Outgoing Tenant—Matter to which Court must have regard where Transaction within its Jurisdiction—Land Valuation Court Act, 1948, s. 23 (2)—Servicemen's Settlement and Land Sales Act, 1943, s. 43 (2).

Appeal by the Commercial Bank of Australia, Ltd., relating to an application for consent to a contract for the lease of a town property by the Tauranga Borough Council to the Bank. The property in question, which was owned by the Borough Council, had previously been leased, by virtue of the Council's powers under s. 153 of the Municipal Corporations Act, 1920, for a term of twenty-one years from January 1, 1927, this lease, at the time of its expiry on January 1, 1948, being vested in a Mrs. C. A. B.

As the lease to which consent was now sought was of the kind frequently described as a Glasgow lease, and as the terms upon which the right to the lease had been secured by the Bank were in part determined by the provisions of the previous lease, it was necessary to refer to that lease in some detail. In particular, it was necessary to have regard to the provisions of cl. 9 thereof, which read as follows:

"At any time not more than twelve or less than six months before the expiration of the term hereby granted the lessee if the lessee has observed performed and kept all covenants conditions and agreements on the part of the lessee to be observed performed and kept may by notice in writing addressed to the Town Clerk Tauranga in a registered letter require the lessor to offer the said land for lease by auction for a further term of twenty-one years commencing at the expiration of the term hereby granted in accordance with provisions of the Second Schedule in the Public Bodies' Leases Act 1908 and upon the service of such notice and provided no notice of determination under cl. 12 hereof has been given all necessary valuations shall be made and a lease of the said land for a further term shall be offered at public auction in accordance with the provisions of the Second Schedule of the Public Bodies' Leases Act 1908 and all provisions of the said Second Schedule shall be binding on the lessor and the lessee. The lease to be so offered by public auction shall be for a term of twenty-one years from the expiration of the term hereby granted and shall contain the like covenants and conditions (including this present provision for offering a renewed lease by auction and the provision for determination of the right of having a renewed lease offered by public auction as provided in cl. 12 hereof as herein contained and implied) and the cost of any valuation under the said Second Schedule of the Public Bodies' Leases Act 1908 shall be borne equally by the lessor and lessee."

By virtue of this clause, Mrs. B. became entitled on the expiration of her lease to certain legal rights, and the Borough Council became contractually bound to follow the procedure set out in the clause and in the Second Schedule to the Public Bodies' Leases Act, 1908, in respect of its further dealings with the land comprised in the lease. Mrs. B. gave due notice before the expiration of her lease requiring the Council to offer the land for lease by auction for a further term, and, upon the receipt of this notice, the Council proceeded in accordance with the provisions of the Second Schedule above-mentioned. The Schedule provided for the making of two valuations, one of the buildings and improvements on the land demised and the other of the fair annual ground rent of the land for the ensuing term. It provided for the valuations to be made by two indifferent persons, one appointed by the lessor and the other by the lessee, and declared that the provision for such valuations was a submission to arbitration within the meaning of the Arbitration Act, 1908, and that the decision of the arbitrators or of their umpire should be binding on all parties. In accordance with this procedure, valuations were made, the improvements being assessed at £1,915 and the ground rent at £44 per annum. The Schedule proceeded that the right to a lease of the land for a further term, and with covenants and provisions similar to those in the former lease, should then be offered by the lessor at public auction at the upset annual rental of the land as determined by the arbitrators, and provided that, if any person other than the lessee became the purchaser at the auction, that person should within two calendar months pay to the lessor in trust for the lessee the amount so determined as the value of the buildings and improvements. The amount so paid was then payable by the lessor on demand to the outgoing lessee. The Schedule provided that the lessee should be entitled to bid for the new lease at the auction, but that the lessor should be bound to accept the highest bid made at the auction if that bid were not less then the annual ground rent as valued. It finally made provision for the reversion of the land and improvements to the lessor if no bid equal to, or greater than, the upset rental was received at auction, and for the lease to be offered again at auction in the event of the purchaser's failing to complete in accordance with the conditions of sale.

The auction being duly held, both Mrs. B. and the Bank were bidders, but the new lease was ultimately secured by the Bank upon a bid of £84 per annum, and a contract was entered into between the Council and the Bank. The parties were at first in doubt as to whether the consent of the Land Valuation Court would be required, but eventually applied for consent, and the matter came before the Hamilton Land Valuation Committee. After a hearing, the Committee consented to the proposed lease, subject to the rent being reduced to £68 per annum, but held it had no jurisdiction to review the amount which had been fixed by the arbitrators for the outgoing lessee's improvements. From this order the Bank and the Crown appealed, both contending that the value of the improvements should have been reviewed by the Committee, so as to ensure that the amount to be paid did not exceed the fair value of the buildings and improvements assessed in accordance with the provisions of the Servicemen's Settlement and Land Sales Act, 1943.

November 28, 1949. The Court said: "It is desirable at this stage to note that the contract with which we are now concerned is one between the Tauranga Borough Council and the Commercial Bank of Australia, Ltd., and comprises an agreement for a lease at a rental of £84 per annum and in accordance with the conditions of sale and the draft lease attached thereto. The conditions of sale recite that, in accordance with the requirements of the Second Schedule to the Public Bodies' Leases Act, 1908, the value of the improvements has been fixed at £1,915, and provide that the successful bidder shall pay that sum to the lessor's solicitors before being let into possession. When payment has been made, Mrs. B. will be entitled to recover the amount from the Borough Council under the terms of the previous lease. It is by virtue of her rights under that lease, however, and not of any legal rights under the present contract, that Mrs. B. will ultimately receive the assessed value of the improvements. In the present proceedings, Mrs. B. is neither an applicant nor a party to the contract, but the substantial question before us is whether a sum of money to which she will ultimately be entitled is subject to review or reduction. She is, therefore, a person interested in the hearing, and, as such, entitled, by virtue of s. 23 (2) of the Land Valuation Court Act, 1948, to be heard.

"A preliminary ground of appeal relied on by the Commercial Bank relates to the validity of the provisions in her lease on which Mrs. B.'s rights depend, and to the validity of the valuation of improvements made thereunder. Mr. *Cooney*, for the Bank, contended that the Borough Council had exceeded its powers under s. 153 of the Municipal Corporations Act, 1920, when it purported to import into Mrs. B.'s lease the provisions of the Second Schedule to the Public Bodies' Leases Act, 1908. He questioned the validity of the valuation of improvements made in pursuance of those provisions,

and submitted that a fresh valuation would now have to be made in accordance with s. 158 of the Municipal Corporations Act, 1933. He therefore claimed the value of the improvements to be at large, and invited the Court to disregard the assessment of the arbitrators and to proceed with an entirely new assessment. We cannot lose sight, however, of the fact that the Bank appears in these proceedings as the purchaser of a lease at auction on terms which provide for a specific sum to be paid for improvements. When it asks us to disregard that sum and to fix some other sum, the Bank in effect seeks to impugn the validity of the contract to which it is a party and seeks consent. It is clear, of course, that, if the contract is in any respect defective, it is not within the jurisdiction of this Court to rectify it. It is equally clear that it is no part of the Court's duty to inquire into possible grounds of invalidity which are not patent on the face of the contract itself: *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688. We accordingly assume, for the purpose of this application, that the original lease was validly granted, and that both the Borough Council and Mrs. B. are bound by the terms thereof. For similar reasons, we assume the validity and propriety of the valuations made in accordance with the provisions of the original lease which are binding on the Council and on Mrs. B., as parties to the lease, and on the Bank, by virtue of the conditions of sale. In so far, therefore, as it relies upon any supposed invalidity in the contract, the Bank's appeal must fail.

"These considerations, however, do not preclude the Crown from contending (with the concurrence of the Bank) that the value of the improvements as fixed by the arbitrators is subject to review by this Court when its consent is sought to a transaction to which the Servicemen's Settlement and Land Sales Act, 1943, applies. The Crown claims that the buildings and improvements constitute an interest in land, and that it is the duty of the Court to determine their fair value and to limit the amount payable for them to a fair value assessed in accordance with the terms of the Act. In elaboration of this view, the Crown submits that the payment of £1,915 for the lessee's improvements constitutes the consideration for the sale of an interest in land, or, in the alternative, that it is one of the terms of the contract to which consent is sought, and, accordingly, is brought within the jurisdiction of the Court by subs. 3 (*b*) of s. 50 of the Servicemen's Settlement and Land Sales Act, 1943.

"The first of these alternative submissions is not, in our opinion, sound. We find no evidence of any sale by Mrs. B., whose rights in respect of her improvements are founded on the terms of her expired lease. Nor does the contract provide for a sale of the improvements by the Borough Council to the Bank, or for a lease of the improvements, save in so far as, being affixed to the land, they pass with a lease of the land itself. We think our proper course is to regard the transaction as that which, freed from technicalities, it appears to be—namely, a lease at a rental fixed by reference to the value of the land alone, with a collateral covenant by the new lessee to pay the outgoing lessee the compensation for improvements to which she is entitled in accordance with her expired lease. This view justifies the alternative submission of the Crown—namely, that the Bank's agreement in respect of the improvements is a term of the transaction, and is, accordingly, a matter to which the Court must have regard by virtue of s. 50 (3) (*b*).

"It does not follow, however, that the Court should, in these circumstances, review the amount payable for improvements, or that it is entitled to claim jurisdiction as to the amount so payable. The Servicemen's Settlement and Land Sales Act, 1943, does not purport to control all transactions which may be associated with sales or leases of land or interests in land. In s. 43 (2) of the Act is to be found a list of transactions which are exempted from the provisions of the Act. By virtue of the exemption of any transaction entered into before its commencement, the Act has no application to the lease of 1927 on which Mrs. B.'s rights are founded. It follows that the Court has no jurisdiction in respect of the rights and obligations under that lease of the parties thereto. Under the lease, Mrs. B. is entitled to have the value for what are termed "lessee's improvements" assessed as therein provided, and the Tauranga Borough Council is contractually bound to stipulate on the grant of a new lease for the amount so assessed to be paid for Mrs. B.'s benefit by the new lessee. We have no jurisdiction to deprive Mrs. B. of her rights under her former lease, or to relieve the Council of its contractual obligations to Mrs. B. thereunder. A refusal of the present application would render it impossible for the Council to perform its obligations and for Mrs. B. to enjoy her vested rights under a lease to which the Land Sales Act has no application. Notwithstanding, therefore, that the Court is entitled to have regard to those terms of the present contract which require the Bank to pay £1,915 for the outgoing lessee's improvements, and that that sum may differ from the amount which might have been fixed in other circumstances by the Court, we are satisfied that it is not within our jurisdiction to review an assessment made by arbitration under a lease to which the Servicemen's Settlement and Land Sales Act, 1943, has no application.

"In substance, therefore, both appeals fail, but, as the effect of the Committee's decision may not be entirely clear, the following order is substituted for that made by the Committee:

"'Consent is granted to the transaction in accordance with the conditions of sale, but subject to the special condition that the rental is reduced to £68 per annum.'"

No. 17.—O. to W.

Sale by Auction—Final Bid greatly in Excess of True Value—Purchase not Bona fide*—Conditional Consent not given as of Right—Suggested Ballot between Willing Buyers at Approved Reserve Price—Servicemen's Settlement and Land Sales Amendment Act, 1946, s. 14.*

Appeal relating to an acre of residential land and certain buildings at Rotorua which were offered for sale by auction on behalf of a deceased estate. At the auction, intending purchasers were urged to refrain from carrying the bidding to extravagant heights, and, in the main, they complied with this request. After the bidding had reached £3,500, however, two bidders carried it on by small bids—sometimes not exceeding £1—until a figure of £5,010 had been reached, when the property was knocked down to the purchaser. The true value of the property as at December, 1942, did not exceed £2,425. On these facts being disclosed to the Committee, the application was refused, upon the ground that there was no genuine agreement between the parties to buy and sell at the price stated, and that the purchaser's bid of £5,010 was not a genuine offer to buy at that amount. Both vendor and purchaser appealed.

November 24, 1948. The Court said: "It is obvious that the appellants were not entitled to have the sale approved at the price stated. The issue before us is whether they were entitled to require the Committee to fix a basic value and to consent to the sale subject to the price being reduced accordingly. We are of opinion that a Committee's power to make a conditional order (where the facts show that the applicants are not entitled to unconditional consent) is a discretionary power, and that it is not competent for parties to require a conditional consent to be granted as of right.

"It is customary and proper for consent subject to a reduction in price to be granted when the contract appears to be *bona fide* and to be one to which no objection can be raised save as to price. The present is not such a case. A bidder at auction who relies on the fact that he is assured of having the contract price reduced to the basic value under the Land Sales Act, and who carries on the bidding to absurd lengths until he has outdistanced all other bidders, and has become the buyer at a price which he has no intention of paying in full, is not, in our opinion, entitled to the benefit of a conditional grant of consent. It became clear, shortly after the Land Sales Act came into operation, that, unless such conduct by unreasonable bidders could be restrained, the sale of land by auction would become farcical and impracticable. In an attempt to restrain such conduct, the practice followed by the Hamilton Committee in the present case has frequently been adopted, and by inference received the approbation of the Court as long ago as in *No. 76.—B. Estate to T. Co-op. Co., Ltd.*, (1946) 22 N.Z.L.J. 120.

"The vendors might have avoided the unhappy results which have ensued from their attempted sale, by an application under s. 14 of the Servicemen's Settlement and Land Sales Amendment Act, 1946, which was enacted to obviate the necessity for the offering of trust property by auction and to protect trustees from the risk of an abortive sale. If, however, a sale by auction were preferred, the present position might have been eliminated had the conditions of sale been so drawn as to provide that, on reaching a suitable reserve price, the bidding should cease, and all persons present and willing to buy at that price should then be given an opportunity of participating in a ballot for the property.

"We have little sympathy for a purchaser seeking to secure a property for less than he has bid for it at auction by a method amounting, in our opinion, to an abuse of the procedure of the Land Sales Court, and we think the Committee did right in refusing to facilitate his acquisition of the property by giving its conditional consent to the transaction. Both appeals are, accordingly, dismissed."

THE JUDICIAL COMMITTEE.

Its Diminished Scope.

The recent decision of the Judicial Committee in the Australian Banks case, holding that they had no jurisdiction to hear the appeal from the High Court of the Commonwealth unless that Court granted a certificate that the case was fit for appeal to His Majesty in Council, draws attention to the narrow limits which are placed to-day on appeals to His Majesty from the Courts of the British Commonwealth.

New Zealand has preserved more fully than Canada and Australia the right of appeal. This was laid down in the original Federal Constitutions of those other Dominions.

So far as the law goes, an appeal can still be brought from the Supreme Courts of the States of Australia as well as from the High Court of the Commonwealth. In practice, however, few such cases are carried to the Privy Council; and in cases from the High Court itself the important constitutional questions between the Federal and the State Government are, in practice, barred by the condition of a certificate from the High Court.

The Dominion Parliament of Canada, which has already abolished the right of appeal in criminal cases, is now considering a Bill that proposes to do away completely with appeals from all Canadian Courts to His Majesty in Council.

In South Africa the right of appeal has been almost eliminated since the Union was formed. The Act of the British Parliament of 1909, which created the Federation, laid down that there shall be no appeal as of right from the Supreme Court of South Africa or from any Division thereof to the King in Council. But it left intact the Royal Prerogative to grant special leave of appeal from the Appellate Division, subject to the right of the African Parliament to make laws limiting the Prerogative. In practice, it is only in the rarest cases that leave to appeal is granted. Lord Haldane indicated in *Whittaker* v. *Durban Corporation*, (1920) 90 L.J. P.C. 119, that it would be exercised only on some grave ground.

The main source of appeals to the Judicial Committee for many years was the Indian Empire; and, to-day, still the majority of appeals comes from the two Dominions, India and Pakistan. The right, however, has been considerably restricted in India by the sovereign independent State, and is likely to be more restricted in the future. The Government of India Act, 1935, gave power to the Indian Federal Legislature to limit appeals from the High Courts of India to the Privy Council; and the India Independence Act, 1947, empowers both Dominions to enact legislation limiting or abolishing completely the right of appeal from their Courts. An Act of the India Legislature in 1948 transferred the appeals from the High Courts in India to the Federal Court; and no further recourse is allowed to His Majesty in Council. It is only judgments of the Federal Court itself in civil and constitutional cases which remain subject to appeal.

The Judicial Committee may still hear appeals from the High Courts in Pakistan, as well as from the Federal Court which has been set up in the Moslem Dominion, and, by an interesting anomaly, it may hear appeals in criminal cases from either Dominion if it judges itself that there has been some departure from the broad principles of natural justice in the Indian Courts.

No appeals, of course, can be brought from Burma, which is now a foreign country. The position is the same with Palestine, which, while it was under the British Mandate, supplied, after India, the largest number of appeals.

It is, then, from New Zealand, the Crown Colonies, and the Protectorates and Trust Territories (the former Mandates) that the bulk of the work of the Judicial Committee will come in the future. It can no longer be the supreme authority on the Constitutions of the nations of the British Commonwealth, and it will not be for long the supreme judicial authority to interpret the law of India. But it still has a function of the highest value: to see, in the first place, to the maintenance of a standard of justice in those countries not yet ripe for independence which are under British administration; and, in the second place, to assure a certain uniformity of interpretation of English law in the wide colonial realm where British justice is applied. Apart from these considerations, there is no sign in this Dominion of any change in legal or public opinion as to the value of a final Court of Appeal of such eminence; in fact, occasions may arise when its retention as part of our judicial system may be of paramount importance.

Of the Administrators of Justice

THERE are also attornies and barristers, whom we shall now proceed to give a bird's-eye view of. Every man may appear by his attorney, except an idiot, who must appear in person, for the law regards an idiot as one who is naturally qualified to enter personally into a lawsuit. What an attorney is, everybody who has got an attorney will no doubt be aware, but those who are ignorant on the point may feel assured that ignorance is unquestionably bliss, at least in this instance. We, however, are far from intending to stigmatize all attornies as bad—and the race of roguish lawyers would soon be extinct if roguish clients did not raise a demand for them. No man need have a knave for his attorney unless he chooses; and, when he goes by preference to a roguish lawyer, it must be presumed that he has his reasons for not trusting his affairs to an honest one.—Gilbert Abbott à Beckett: *The Comic Blackstone* (1856 Ed.).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Points of View.—H. R. C. Wild in his interesting review of Major-General Sir Howard Kippenberger's *Infantry Brigadier* (*Ante*, p. 368) says that the book shows that the author remains an infantryman at heart, and "bears witness to his conviction that it is the infantryman who in the end wins the battle." This reminded Scriblex that, in a recent article on Winston Churchill, the American foreign correspondent Virginia Cowles says that, after the General Elections of 1945, when Tory spirits were greatly depressed, while the Socialists were joyfully forecasting a twenty-years régime, for Labour, friends sought to induce Churchill to relinquish his leadership of the party and to use the House merely as a platform for speeches on world affairs. "I do not see why I should give up my horse," he said stubbornly. "It may not be a very good horse, but at least it is better than having to be in the infantry."

Recovering Smartly.—Scriblex is indebted to *The Tablet* (London) for two legal stories which he welcomes to this column. The first concerns Lord Chancellor Westbury when he was trying an equity suit and castigated the trustees, informing them that, if they had taken the most ordinary precautions, had consulted any reputable firm of solicitors, or taken counsel's opinion, they would never have got into the mess they were in. This was a bit too much for counsel for the trustees. Amongst the documents handed to him was an opinion from Westbury himself, given some years back, but recommending the very course of action he had himself censured so severely from the Bench. Not wishing to read the opinion aloud, counsel nevertheless thought Westbury ought to see it, and passed it up to him. The Lord Chancellor went through it gravely, then shook his head. "It is a mystery to me," he said, "that a barrister capable of penning such an opinion as this could have risen to the eminence he has!"

Felo de se.—The second story deals with an Irish Coroner holding an inquest upon a man who had shot himself. The jury was not particularly bright, and, in order to impress their duty upon them, he kept repeating that it was a case of *felo de se*, as plainly he thought it was. The term, however, left the jury in considerable confusion. It was clear to all of them, said the foreman, during their deliberations, that the man had obviously shot himself, while, on the other hand, the Coroner, who was an educated man whose opinion they ought possibly to follow, had assured them on a number of occasions that the dead man fell in the sea. After three-quarters of an hour, the jury returned and handed up the following verdict: "Found drowned."

The Floral Touch.—A learned contributor has drawn the attention of Scriblex to *Mine Host London*, by William Kent, F.S.A. (Nicholson and Watson, 1948), which contains a chapter on the visit of César de Saussure to London between 1725 and 1728. At p. 94, there is an interesting account of his visit to Westminster Hall, then used as the Law Courts:

> On the western side at one end of the Hall are the two principal tribunals of justice. One of these is the High Chancellor's Court, where he is the sole Judge, though he occasionally consults some of his several assistants. The second tribunal is that of the King's Bench, composed of four Judges. There is a third magistrates' Court at the other end of the hall, composed of four Judges, where civil lawsuits are pleaded. A curious custom is that of the Lord Chancellor and other Judges carrying large nosegays of flowers in their hands, the reason of this apparently being that the scent of the flowers is expected to help them to keep awake during the pleadings.

Our contributor regards this as an unkind cut, intentionally made by de Saussure, and considers that flowers were introduced in the eighteenth century "to counteract the fetid odours of prisoners who had come from the noisome cells of Newgate Gaol." Scriblex recollects that about 1750 an outbreak of gaol fever polished off a Lord Mayor, two Judges, and several members of the Bar. Men of science being sought to find an antidote to the "closeness and stench" of the Old Bailey, it was decided that every part of the Court and Gaol should be cleansed with vinegar. The treatment of prisoners was "*ejusdem generis*"; and, in addition, herbs were plentifully scattered about the Court. For the Judges, bunches of rue were provided, and they remain the bouquets of to-day.

Wig Note.—Having duplicated his order for a wig, a practitioner who received two from England recently advertised in this Journal that one was for sale. Moved by curiosity as to the result of the notice, Scriblex caused inquiries to be made, and learnt that the advertiser received many replies for his (now) expensive piece of hirsute adornment. Some of the craftsmen in the tonsorial art of wig-making, because of their association with barristers, who at one time would have their wigs periodically powdered, picked up odd bits of legal phraseology. One of these wig-makers, named Danby, whose headquarters were in the Temple, was once asked by a visiting barrister if the little boy who was running about his shop was his, and he replied cautiously: "To the best of my knowledge and belief he is." "And what are you going to make of him?" he was then asked. "Well," was the considered reply, "if he turns out in the efflux of time to be a smart, clever youth, I shall train him up for my own profession; but, if, as seems not unlikely, he turns out to be the reverse of this, I shall send him to the Bar!"

The Effect of Insanity.—Denning, L.J., in his judgment in *White* v. *White*, [1949] 2 All E.R., 339, 351, points out that, in the case of torts such as trespass and assault, it is settled law that a person of unsound mind is responsible for wrongful conduct committed by him before he was known by the injured person to be of unsound mind, even though it had since become apparent that such conduct was influenced by mental disease which was unrecognized at the time, and this was so even if the mental disease were such that he did not know what he was doing or that what he was doing was wrong:

> The reason is that the civil Courts are concerned, not to punish him, but to give redress to the person he has injured.

This was laid down long ago, not only by the Full Court in *Weaver* v. *Ward* ((1616) Hob. 134), but also by such great authorities as *Lord Bacon,* in *7 Bacon's Works* (Spedding Ed.), 348, and *Sir Matthew Hale* (1 Hale P.C. 15). It has ever since been accepted as the law not only in this country—see per *Kelly*, C.B., in *Mordaunt* v. *Mordaunt* (L.R. 2 P. & D. 109, 142)—but also in the United States (*Williams* v. *Hayes*) ((1894) 42 Am. St. Rep. 743); in Canada (*Taggard* v. *Innes*) ((1862) 12 C.P. 77); and in New Zealand (*Donaghy* v. *Brennan*) ((1901) 19 N.Z.L.R. 289) where all the English authorities are collected.

Donaghy's case, which has stood without qualification since 1901, involved an action for £1,000 damages for "personal injuries to the plaintiff caused by the defendant assaulting him on March 11, 1900, at Onehunga by shooting him." The opinion of the Court of Appeal was that insanity is not a defence in an action claiming damages for assault. The query was raised as to whether it would be a defence in the case of a wrong of which an essential ingredient is intention or malice, but a specific intent to injure (as Denning, L.J., found) is not an essential ingredient in cruelty. In *White* v. *White*, the wife, according to the medical evidence, hated the sight of her husband, and attacked him constantly with violence, obscenity, and an obsessional malice that left nothing to chance. It was held by Bucknill and Asquith, L.JJ., that the wife (who had been committed to a mental asylum) knew what she was doing and knew that she was doing wrong, and that the husband was entitled to a decree in divorce based upon her cruelty.

Receiving Note.—In the much-quoted case of *R.* v. *Schama*, *R.* v. *Abramovitch*, (1914) 11 Cr.App.R. 45, it was laid down by a Court of five Judges, which included Lord Reading, L.C.J.:

> Possession of property recently stolen where no explanation is given is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen, but, bearing in mind that the onus is always on the prosecution, if the prisoner gives an explanation which raises a doubt in the minds of the jury whether or not he knew the property was stolen, the ordinary rule applies, the case has not been proved to the satisfaction of the jury, and he is entitled to be acquitted.

Where, however, in *R.* v. *Garth*, [1949] 1 All E.R. 773, the Deputy Recorder directed the jury that, if the prisoner gave an explanation of his possession of the stolen goods "which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted," Lord Goddard, L.C.J., observed on appeal that this was stating the law too favourably, because any explanation might be true. The proper direction, he said, was:

> If the prisoner's account raises a doubt in your minds, then, of course, you ought not to say that the case has been proved to your satisfaction.

But if, inquires Scriblex (in querulous mood), the jury think the prisoner's account might possibly be true, does not that mental attitude postulate a doubt in their minds as to whether it *is* true, in which event the prisoner ought to be acquitted. Or perhaps Scriblex has merely bewildered himself. Of that (as has been well said elsewhere) there is no manner of doubt, no possible, probable shadow of doubt, no possible doubt whatever.

Driving Note.—Scriblex passes on the story of the man, wearing a hearing aid, who recently engaged a taxi. The driver displayed considerable interest in the gadget. "Are those things any good?" he inquired. The passenger replied that he would be lost without it. "It must be rotten to be hard of hearing," said the driver sympathetically. "Oh, well," he added with a touch of philosophy, "nearly all of us have got something wrong, one way or the other. Take me, for instance; I can hardly see."

From My Notebook.—"The zeal and arguments of every counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character, as a man of honour, experience, and learning, but also by considerations affecting the general matter of justice": *per* Lord Langdale, M.R.

Portrait of a Nineteenth-century Lawyer

Mr. Furnival practised at the common-law bar, and early in life had attached himself to the Home Circuit. I cannot say why he obtained no great success till he was nearer fifthy than forty years of age. At that time I fancy that barristers did not come to their prime till a period of life at which other men are supposed to be in their decadence. Nevertheless, he had married on nothing, and had kept the wolf from the door. To do this he had been constant at his work in season and out of season, during the long hours of day and the long hours of night. Throughout his Term times he had toiled in Court, and during the Vacations he had toiled out of Court. He had reported volumes of cases, having been himself his own shorthandwriter—as it is well known to most young lawyers, who as a rule fill an upper shelf in their law libraries with Furnival and Staples' seventeen volumes in calf. He had worked for the booksellers, and for the newspapers, and for the attorneys—always working, however, with reference to the law; and though he had worked for years with the lowest pay, no man had heard him complain. That no woman had heard him do so, I will not say; as it is more than probable that into the sympathizing ears of Mrs. Furnival he did pour forth plaints as to the small wages which the legal world meted out to him in return for his labours. He was a constant, hard, patient man, and at last there came to him the full reward of all his industry. What was the special case by which Mr. Furnival obtained his great success no man could say. In all probability there was no special case. Gradually it began to be understood that he was a safe man, understanding his trade, true to his clients, and very damaging as an opponent. Legal gentlemen are, I believe, quite as often bought off as bought up. Sir Richard and Mr. Furnival could not both be required on the same side, seeing what a tower of strength each was in himself; but then Sir Richard would be absolutely neutralized if Mr. Furnival were employed on the other side. This is a system well understood by attorneys, and has been found to be extremely lucrative by gentlemen leading at the Bar.—Anthony Trollope: *Orley Farm.*

PRACTICAL POINTS.

1. Tenancy.—*Dwellinghouse — Attempted Assignment without Landlord's Consent—Subsequent Determination of Tenancy by Notice to Quit—Landlord's Right of Ejectment against Assignee.*

QUESTION: A let a dwellinghouse with only one set of conveniences to B for himself and his family, by verbal agreement in January, 1948. B shortly afterwards requested A's approval for an assignment of the tenancy, which was refused. A little later, A, the landlord, found a number of people in her house, and, when she objected, they claimed to be friends of B who were staying with him. At this stage, notice terminating the tenancy was given to B, and since then A has called regularly to collect the rent, which has been handed to her by these additional people in the house, but on inquiry she has always been assured that B, the tenant, was still residing there, but was away at his employment. A now finds that B has not been there for some considerable time, that extra cooking appliances have been installed in the house without her authority, and that it is now let in three separate flats. The woman who has been handing her the rents in the tenant's name now claims to be the tenant, but at present she is not even occupying a portion of the house herself.

Could you advise whether, in these circumstances, any assignment of the tenancy early in 1948, or any sub-letting as above, is permitted by law, and what action A, the landlord, can take to compel these unauthorized persons to vacate her property.

ANSWER: Assuming that the tenancy in favour of B was properly determined by a valid notice to quit, the people now in occupation are trespassers, and are not entitled to the protection of the Tenancy Act, 1948. A can take legal action for possession accordingly: see *Bilderdeck* v. *Manson and Barr, Ltd.*, [1948] N.Z.L.R. 58, (1948) NEW ZEALAND LAW JOURNAL, 23, and s. 43 of the Tenancy Act, 1948.

X.2.

2. Tenancy.—*Tenant occupying Part of Dwellinghouse and boarding Landlord—Death of Landlord—Tenant holding over—Refusal of Landlord's Trustees to accept Rent—Court holding Tenancy to be subsisting—Recovery of Rent from Tenant.*

QUESTION: An elderly gentleman, A, arranged with a family, B, to occupy a small portion of his house for a nominal sum, B being under an arrangement to board and maintain him. A died, and B and his family remained in the house and occupied the whole of it. In view of the circumstances, the trustees would not accept any rent, but took action for possession on the grounds that no rent was payable and that B was a trespasser. This failed, the Magistrate holding that B was a tenant. B occupied the house for some time after this, and has now eventually vacated. The trustees feel that B, having occupied this property for well over a year since the death of A, should pay a reasonable rent. He has refused to pay this, and they desire to take action against him.

Could you advise whether, by claiming in a previous action that B was not a tenant, and by refusing to accept rent, the trustees are estopped from now claiming same, and also whether the decision of the Magistrate in the previous case will support a legal claim for this rent.

ANSWER: In the circumstances, as the Magistrate has held that B was a tenant, it must be assumed that an implied term of that tenancy was payment by B of a reasonable rent. The trustees are not estopped from claiming rent, unless B can prove that he has suffered loss through the refusal of the trustees to accept rent when it was offered to them by B, and that does not appear probable.

X.2.