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INFANTS AND CHILDREN: NEW LEGISLATION.

THE Statutes Amendment Act, 1949, makes two changes of importance in the law relating to infants and children in this country.

The first is the repeal of s. 21 of the Infants Act, 1908, which Herdman, J., in *In re A Deed of Trust, Peddle* v. *Beattie*, [1933] N.Z.L.R. 696, 704, described as "undoubtedly difficult to construe"; and which has proved a fruitful source of legal problems since its enactment.

The second improvement is the provision of simple machinery for giving effect to orders for guardianship made under the Guardianship of Infants Act, 1926, which, in this respect, was, as the Maoris described the pre-1840 British Resident, "a man-of-war without guns" to enforce those orders.

I. The Effect of an Adoption Order.

(a) *Before the Enactment of a new s. 21 of the Infants Act, 1908.*

Since the enactment of the Infants Act, 1908, there have been numerous and conflicting decisions upon s. 21 of that Act, relating to the effect of adoption; and the draftsmanship of the section was open to criticism. Its difficulties have, from time to time, been set out in articles in this Journal, as, for example, in Vol. 10, p. 134, and Vol. 19, p. 152. It is not our purpose here to review the various judgments of the Courts on the interpretation of s. 21, because, by s. 27 of the Statutes Amendment Act, 1949, s. 21 of the Infants Act, 1908 (as amended by s. 42 of the Child Welfare Act, 1925), has been wholly repealed.

There were many reasons why this troublesome section should be repealed. But the necessity became a compelling one in view of the fact that s. 21 was almost obsolete, because the Administration Amendment Act, 1944, has repealed, in New Zealand, the old Statute of Distributions (22 Car. 2, c. 10), and altered the rules as to succession of real and personal estate on intestacy.

The general tendency of the law in this country in recent years has been for an adopted child to be taken into the adopting parent's family for all purposes, and it has long been felt that s. 21 of the Infants Act, 1908, should be amended accordingly. Apart from that, the language of s. 21 has caused considerable difficulty since the creation of the statutory trusts set forth in s. 7 of the Administration Amendment Act, 1944.

The Administration Amendment Act, 1944, in s. 12, repealed Part III of the Administration Act, 1908, which dealt with the distribution of intestate estates. In that Part, s. 51 provided that, where a female illegitimate child died intestate, leaving no husband or legitimate children or their issue her surviving, but leaving illegitimate children or their issue, such illegitimate children or their issue should succeed to her estate in all respects as if such children were legitimate; and, if she left no legitimate or illegitimate children or their issue, and no husband, then her mother, or, if she were dead, her mother's next-of-kin, under and according to the Statute of Distributions, should succeed. Section 52 provided that, where any woman died intestate, leaving no husband or legitimate children or their issue her surviving, but leaving illegitimate children or their issue, such illegitimate children should succeed to her estate in all respects as if such children were legitimate. These repealed sections were, where the intestate died after 1944, replaced by s. 8 of the Administration Amendment Act, 1944, which went considerably further than the corresponding English statutes, and than the now-repealed provisions of ss. 50, 51, and 52 of the Administration Act, 1908.

In an article in this place in Vol. 21, p. 72, written in April, 1945, after the passing of the Administration Amendment Act, 1944, we pointed out that an illegitimate child who has been adopted cannot now take or share in the intestate estate of such child's mother because of the proviso to s. 8 of the Administration Amendment Act, 1944, and the repeal by s. 12 of that Act of s. 52 of the Administration Act, 1908.

Section 8 of the Administration Amendment Act, 1944, which replaced ss. 50, 51, and 52, is as follows:

> For the purposes of the foregoing provisions of this Act the relationship of a mother to her illegitimate child and of an illegitimate child to its mother shall be deemed to be a legitimate relationship, whether or not the child is a legitimated person:
>
> Provided that this section shall not apply in any case where the child has been adopted, whether in New Zealand or elsewhere.

It will be noticed that this section does not confine itself to the illegitimate child and his mother, though it takes away rights from illegitimate children who have been adopted; it includes the unadopted illegitimate child as the notionally legitimated child of his mother for all purposes of the descent and distribution of intestate estates, and of the statutory trusts set out in s. 7 (1) of the Amendment Act, 1944. It will be noticed that the proviso in s. 8 negatives the operation of s. 8 where an illegitimate child has been adopted. It takes away from such a child all rights of succession derived through the natural parent.

The adopted illegitimate child of a woman is also precluded, by the proviso to s. 8 of the Administration Amendment Act, 1944, from participating in the

intestate estates of other relatives of the mother, though such child would be entitled to participate if no adoption had taken place. In view of the very limited rights, if any, given to an adopted child to share in the estates of the lineal and collateral relatives of the adopting parent, the provisions of s. 8 may require reconsideration. In effect, the proviso to s. 8 is a declaration that, where an illegitimate child has been adopted, he remains—for the purposes of the descent of intestate estates—illegitimate so far as his natural parent is concerned. Since the adopted child remains illegitimate in status *qua* his natural mother, her issue and relatives cannot share in the child's estate, even though no spouse or issue of the intestate child, or his parents by adoption or their relatives, become entitled to the estate. In other words, the Crown will take the estate as *bona vacantia*. Moreover, such illegitimate child cannot participate in the estate of another illegitimate child of his mother where the mother has predeceased the intestate, for the illegitimate child who has been adopted is given no right similar to that taken away by the repeal of ss. 50 (3), 51 (2), and 52 of the Administration Act, 1908.

The amendment or replacement of s. 21 of the Infants Act, 1908, has been urged in several articles in this JOURNAL, notably in one by Mr. J. H. Carrad in 1934 (Vol. 10, p. 134), and in this place in 1945 (Vol. 21, p. 73) after the passing of the Administration Amendment Act, 1944. The Law Revision Committee gave careful consideration to the matters raised in these articles, sought and obtained expert opinion, and suggested a complete replacement of the section. Accordingly, s. 21 of the Infants Act, 1908, was repealed, and a new s. 21 was substituted by s. 27 of the Statutes Amendment Act, 1949, which came into force on January 1, 1950.

(*b*) *Since the Enactment of a new s. 21 of the Infants Act, 1908.*

The old and the new sections, for comparison's sake, are set out hereunder.

INFANTS ACT, 1908.

Section 21 (now repealed):

21. (1) Such order of adoption shall confer the name of the adopting parent on the adopted child, [with such proper or Christian name as the Judge, on the application of the adopting parent, may fix]; and the adopted child shall for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges, and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parent:

Provided that such adopted child shall not by such adoption—

(*a*) Acquire any right, title, or interest in any property which would devolve on any child of the adopting parent by virtue of any deed, will, or instrument prior to the date of such order of adoption, unless it is expressly so stated in such deed, will, or instrument; nor

(*b*) Be entitled to take property expressly limited to the heirs of the body of the adopting parent, nor property from the lineal or collateral kindred of such parent by right of representation; nor

(*c*) Acquire any property vested or to become vested in any child of lawful wedlock of the adopting parent in the case of the intestacy of such last-mentioned child, or otherwise than directly through such adopting parent.

(2) Where such order of adoption has been made, the adopting parent shall for all purposes, civil, criminal, or otherwise, be deemed in law to be the parent of such adopted child, and be subject to all liabilities affecting such child as if such child had been born to such adopting parent in lawful wedlock; and such order of adoption shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents, except the right of the child to take property as heir or next-of-kin of his natural parents directly or by right of representation.

Section 21 (new: see s. 27 of the Statutes Amendment Act, 1949):

21. (1) Every order of adoption shall confer the name of the adopting parent on the adopted child, with such proper Christian name as the Judge, on the application of the adopting parent, may fix.

(2) Upon an order of adoption being made the following provisions shall have effect for all purposes, whether civil, criminal, or otherwise, namely:—

(*a*) The adopted child shall be deemed to become the child of the adopting parent, and the adopting parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock:

Provided that this paragraph shall not apply for the purposes of any deed, instrument, will, or intestacy where the order of adoption is made after the date of the deed or instrument or after the date of the death of the testator or intestate, as the case may be, unless, in the case of a deed, instrument, or will, express provision is made to that effect:

(*b*) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents:

Provided that the provisions of this paragraph shall not apply for the purposes of any enactment relating to forbidden marriages or to the crime of incest:

Provided also that this paragraph shall not affect any vested or contingent right of the adopted child or any other person under any deed or instrument executed before the date of the order of adoption or under the will or intestacy of any person who has died before that date, unless, in the case of a deed, instrument, or will, express provision is made to that effect:

(*c*) The relationship to one another of all persons (whether the adopted child, the adopting parent, the existing parents, or any other persons) shall be determined in accordance with the foregoing provisions of this section so far as they are applicable.

Before giving any detailed consideration to the new s. 21, it must be emphasized that its general purpose is to assimilate the adopted child (whether legitimate or illegitimate at birth), for all legal purposes, to the family of the adopting parents, "forsaking all others" in natural relationship to him or her. This object is affirmatively put in the forefront of the first parts of s. 21 (2), paras. (*a*) and (*b*), which clearly state the effect of an adoption order. The adoptive parents are, in law, the parents of the adopted child as if he had been born of them in lawful wedlock; and he ceases to be the child of his natural (or any earlier adoptive) parents.

Under the now repealed s. 21 (1), an adopted child was, for all purposes, deemed in law to be the child born in lawful wedlock of the adopting parent; but such adopted child was not, by such adoption, *inter alia*, entitled to take property from the lineal or collateral kindred of such parent "by right of representation." By s. 7 of the Statute of Distributions, 1670, no repre-

sentation was admitted among collaterals beyond brothers and sisters; but, under the statutory trusts, issue "take" through all degrees, according to their stocks, in equal shares if more than one, the share their parent would have taken, and, though this might be held to give a "right of representation," the new s. 21 (2) of the Infants Act, 1908, clears up the position.

The Court of Appeal interpreted the ambiguous wording of para. (*a*) of the proviso to the former s. 21 (1) to mean that the words "devolve . . . by virtue of any deed, will, or instrument prior to the date of the order of adoption" referred to priority in date as between the deed, will, or instrument, and the order of adoption: *In re Jackson, Holmes* v. *Public Trustee*, [1942] N.Z.L.R. 682, approving *In re Horiana Kingi, Thompson* v. *Erueti Tamahau Kingi*, [1937] N.Z.L.R. 1025, and *In re Beatty, Beatty* v. *Beatty*, [1939] N.Z.L.R. 954. In the new s. 21 (2) (*a*), the word "prior" has gone; and the position is simplified, and the effect of those judgments is modified, by the clearly expressed language of the proviso to the new subs. 2 (*a*). The rights of an adopted child existing before the order of adoption under or in respect of any deed, will, instrument, or intestacy are preserved, notwithstanding the order of adoption:

> where the order of adoption is made after the date of the deed or instrument or after the date of the death of the testator or intestate, unless, in the case of a deed, instrument, or will, express provision is made to that effect.

This proviso ensures that, if, for example, a child is adopted *after* the date upon which his natural grandfather had made provision for him by a deed or instrument, or the grandfather had made testamentary provision for him and had died before the order of adoption was made, or the child became entitled under an intestacy before he was adopted, the child's rights are not affected, unless there is some disentitling provision depriving him of those rights in the deed, instrument, or will, which is to become operative if or when he should be adopted.

The converse appears in s. 21 (2) (*c*), whereby a child's adoption does not affect any vested or contingent right of the adopted child *or any other person* under any deed or instrument executed *before* the date of the order of adoption or under the will or intestacy of any person who has died *before* that date; unless express provision has been made in a deed, instrument, or will disentitling the child from participating in any benefit thereunder if he should be adopted later.

Next, by virtue of paras. (*b*) and (*c*) of the proviso to the old s. 21 (1), the adopted child could acquire property only "directly through" the adopting parent, but not through the intestacy of the children born in wedlock to such adopting parent; and he could not take property expressly limited to the heirs of the body of the adopting parent, or property from the lineal or collateral kindred of the parent by right of representation. On the other hand, under the old s. 21 (2), the adopted child retained the right to take property as heir or next-of-kin of his natural parents directly or by right of representation, because the former s. 21 (2) provided that an order of adoption should terminate all the rights and legal responsibilities and incidents existing between the child and his natural parent, except the right of the child to take property as heir or next-of-kin of his natural parents directly or by right of representation. As the right of representation did not extend beyond the children of brothers and sisters, apparently an adopted child could not participate in an intestate estate as a child of his natural parent where such parent was not a brother or sister or near relative of the intestate. Moreover, as Mr. J. H. Carrad pointed out in an article in this JOURNAL (Vol. 10, p. 134), nephews and nieces do not take by right of representation where all the brothers and sisters of the intestate have predeceased the intestate: they take *per capita* in their own right, according to their degree of relationship.

All these provisions become obsolete and their effect wholly disappears as from January 1, 1950, with the enactment of the new subs. 2, which, for all purposes of the civil law, takes the child completely out of his natural family (or adoptive family under any earlier order of adoption). This confirms his assimilation to the family of his adoptive parents under the current order of adoption. The natural relationship is retained only (*a*) in relation to the forbidden degrees of kindred in respect of marriage; and (*b*) for the purposes of the criminal law, to determine the natural relationship between a person indicted for the crime of incest and his victim.

In view of the repeal of the Statute of Distributions by s. 12 of the Administration Amendment Act, 1944, there is now no "right of representation" within the meaning of that expression as used in the now repealed s. 21. Section 7 of that statute, which declares the statutory trusts on which is effected, in the circumstances detailed, succession to the property of an intestate, uses, in subs. 1 (*a*), the words "such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken." This section must be read, and the statutory trusts therein must be applied, as the new s. 21 (2) (*c*) declares, in the light of the relationship created by the order of adoption in terms of the new s. 21. Subsection 2 (*c*) of that section enacts:

> The relationship to one another of all persons (whether the adopted child, the adopting parent, the existing parents, or any other persons) shall be determined in accordance with the foregoing provisions of this section so far as they are applicable.

In passing, attention is drawn to the correlation of the new s. 21 of the Infants Act, 1908, with the provisions of the Administration Amendment Act, 1944. As we have already pointed out, the latter statute, by s. 12, repealed s. 52 of the Administration Act, 1908. An illegitimate child of a woman, after he has been adopted, is now precluded, by the proviso to s. 8 of the Administration Amendment Act, 1944, from participating in the intestate estate of his mother or of any relatives, though, if no adoption order in his regard were in force, he would be entitled to participate therein. Now, the rights of an adopted child who was born illegitimate to share in any intestacy are, with the exceptions already noted, to be ascertained by reference to the provisions of the new s. 21 of the Infants Act, 1908; and, when so ascertained, they are to be regulated by the provisions of s. 7 of the Administration Amendment Act, 1944, read with the proviso to s. 8 thereof.

Paragraph (*c*) of subs. 2 of the new s. 21 will probably require references to the Courts for interpretation as to its meaning, intent, and effect. The subsection opens with the statement that:

> Upon an order of adoption being made the following provisions shall have effect for all purposes, whether civil, criminal, or otherwise.

What are "the following provisions"?

Paragraph (*a*) says that the adopted child becomes the child of the adopting parent, and the latter be-

comes the parent of such child, and a proviso excludes the application of the provision in certain cases, if the date of the order of adoption is subsequent to certain other dates. Paragraph (*b*) says that the adopted child ceases to be the child of his existing parents, and that they cease to be his parents. The second proviso to this paragraph preserves any rights acquired by the child before the making of the adoption order.

The only persons referred to in paras. (*a*) and (*b*) are " the adopted child," " the adopting parents," and the " existing parents " of such child (natural or by adoption). Paragraphs (*a*) and (*b*), therefore, contain no express statement as to the " following provisions " previously referred to as coming into effect upon the making of an adoption order. Consideration must, therefore, be given to the possibility that such " following provisions " are limited in operation to the adopted child and his adopting parent and existing parents. The exclusion by para. (*a*) of the child's right to take under a will which comes into operation by reason of the testator's death before the date of the adoption order indicates that the testator referred to cannot be the adopting parent, and implies, therefore, that the adopted child is intended to take under the wills of other persons (relatives of the adopting parent) if they die after the date of the adopting order, and if such order has created a relationship to such persons which will bring the child within the dispositions of such persons' wills.

Moreover, as an intestate who died before the date of the order of adoption could not be the adopting parent, there arises a like implication that the intestacy referred to in para. (*a*) must be that of someone other than such parent.

Paragraph (*c*) is probably intended to give an adopted child all the rights to participate in intestate estates which he would have if he were a natural child of the adopting parent; but the paragraph merely refers to " the relationship " of persons, and says it is to be determined in accordance with the prior provisions of the section. In other words, the paragraph does not expressly say that rights to property shall be ascertained or determined on the basis of such relationship.

Apart from para. (*c*) and the provisos to paras. (*a*) and (*b*), are all the property rights of the adopted child to be found in the general provisions that he becomes, for all purposes, the child of the adopting persons (s. 21 (2) (*a*)) and ceases to be the child of his natural parents (s. 21 (2) (*b*)) ? Furthermore, can an adopted child take property expressly limited to heirs of the body of the adopting parent—*i.e.*, entailed property ? Will the adopted child lose the right to take property expressly limited to heirs of the body of his natural parent ? These are questions to which the Court alone can give an answer.

The Destitute Persons Act, 1910, by ss. 4 and 12, appears to have impliedly amended, and certainly modified, s. 21, so far as maintenance of destitute persons by near relatives was concerned.

Section 4 (5) provided that, for the purposes of the Destitute Persons Act, 1910, an adoption should not be deemed to create or to have created any relationship between the person adopted and the relatives of the adoptive parent, or to destroy or to have destroyed any natural relationship existing between any persons. And s. 12 of the same statute provided that a liability of the natural father of a child should not be affected by the adoption of the child, but that an affiliation or maintenance order could be made against him in the same manner as if no such adoption had taken place; but a Magistrate could, in his discretion, having regard to all the circumstances, refuse to make an affiliation or maintenance order against the natural father of a child so adopted. Both these amendments further show the intention of the Legislature to ensure that an adoption order shall assimilate the adopted child to natural membership of the family of the adoptive parents.

Apparently, under ss. 4 and 12 of the Destitute Persons Act, 1910, orders for maintenance of an adopted child, whether legitimate or illegitimate, could be made against either the adoptive parent or the original parent, or both. The idea was apparently that the means of all persons connected with the adopted child should be exhausted before the State was called upon to support it. No doubt, in view of Social Security, and because of the complete severance of the legal nexus between the adopted child and his original parent, the notion of this dual liability has had to be reconsidered; and ss. 4 (5) and 12 of the Destitute Persons Act, 1910, have been wholly repealed by s. 27 (2) of the Statutes Amendment Act, 1949.

II. Summary Enforcement of Guardianship Order.

In a strongly-contested application for the custody of a child (*Re Carroll*, [1931] 1 K.B. 317), Lord Justice Scrutton, who presided, in delivering the judgment of the Court said that he thought the other members of the Court (Greer and Slesser, L.JJ.) ought to agree with the decision of the Divisional Court, and that the appeal should be dismissed; but, he added, as his brethren were of a contrary opinion, the appeal would be allowed. And then he added, as Lord Justice Slesser (the main protagonist of the contrary view) tells us in his autobiography: " And the infant will be handed over in the Chambers of my brother Slesser at 3 p.m. this afternoon."

Unfortunately, no such summary procedure has been available in New Zealand for the obtaining of the custody and possession of a child, when an application has been made and granted that a writ of habeas corpus should issue. This defect in our legislation has now been remedied by s. 20 of the Statutes Amendment Act, 1949, which adds a new section (s. 6A) to the Guardianship of Infants Act, 1926.

The procedure that was necessary to obtain the custody and possession of a child, outside of divorce or destitute-persons proceedings, was by way of habeas corpus. On four occasions in this procedure the matter had to be dealt with by a Judge. A motion for a rule *nisi* with supporting affidavits was filed. A Judge in Chambers granted a rule *nisi*, in which there was fixed a date for showing cause against the making absolute of the rule. On that date, the Judge decided who was entitled to custody; and, if the claimant were entitled to custody, a rule absolute for the issue of a writ of habeas corpus was directed to issue. If the child was not then delivered to the claimant, the writ of habeas corpus was issued, directing the person in possession of the child to bring the child before a Judge on a certain date. This writ had to be served on the parties, with a notice to the person in possession of the child showing the date of the return of the writ. If that person did not then bring the child before the Judge, as directed, a motion for attachment had to be filed and served. Upon the hearing of the motion of attachment, the Court had to decide whether the person having possession of the child

should be imprisoned for contempt; but, if that person were imprisoned but did not then deliver the child to the party entitled to its custody, there was no further procedure available to obtain possession.

In a typical case, the motion for a rule *nisi* was filed in January; a rule absolute was made in August, and the children were not handed over. In that month, a writ of habeas corpus was issued, but the person in the possession of the children had disappeared with the children, and there was no procedure for a Court or judicial officer to be directed to deliver the children to the person entitled, under the judgment of the Court, to have custody.

The procedure so outlined was an expensive one; the disbursements alone, up to the point of applying for attachment, were over £5.

At the instance of the Hamilton District Law Society, the Council of the New Zealand Law Society referred the matter to the Law Revision Committee; and s. 6A of the Guardianship of Infants Act, 1926—as added by s. 20 (1) of the Statutes Amendment Act, 1949—is the result. This section is as follows:

> (1) In any case not provided for under the Divorce and Matrimonial Causes Act, 1928, or the Destitute Persons Act, 1910, an application for or in respect of the guardianship or custody of any infant may be made to the Supreme Court by motion, or, where a Magistrates' Court has jurisdiction, may be made to a Magistrate, and on any such application the Court may make such order as it thinks fit.
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> (2) For the purpose of enforcing any order for the guardianship or custody of an infant made in any Court, whether under the Divorce and Matrimonial Causes Act, 1928, or under the Destitute Persons Act, 1910, or otherwise, the Judge or Magistrate making the order or any other Judge or Magistrate, as the case may be, may at the time of making the order or at any time thereafter issue a warrant authorizing any constable or Child Welfare Officer, or any other person named in the warrant in that behalf, to take possession of the infant and to deliver him to the person entitled to his custody under the order.
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> (3) For the purpose of executing any such warrant any constable or Child Welfare Officer, or any other person named in the warrant, may enter and search any place, with or without assistance; and every person who resists or obstructs any person in the execution of the warrant, or who fails or refuses to afford to any person engaged in the execution of the warrant immediate entrance to any premises or to any part thereof, commits an offence and shall be liable on summary conviction to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding one month.

From the foregoing section it will be seen that any application in respect of the guardianship or custody of a child, in cases not arising in divorce or destitute-persons proceedings, may be made to the Supreme Court by motion. The Court has a wide discretion as to the making of an order on such an application. When an order for the guardianship or custody of an infant is made in any Court and in any proceedings—under the Divorce and Matrimonial Causes Act, 1928, or under the Destitute Persons Act, 1910, or otherwise—the Judge or Magistrate who makes the order may issue a warrant authorizing a constable or Child Welfare Officer, or any other person named in the warrant, to take possession of the infant and deliver him to the person entitled to his custody under the order. This warrant may be issued at the time of making the order, or at any time after the making of the order, so as to ensure that, if any difficulty arises after the order for custody has been made, the way is open for the issue of a warrant by the Judge or the Magistrate who made the order for custody.

By subs. 2 of the new s. 6A, an application for custody may be made by the father of any infant; heretofore, such an application could be made only by the mother of an infant.

THIS JOURNAL'S QUARTER CENTURY.

WITH its last number, published on December 20, 1949, the NEW ZEALAND LAW JOURNAL completed a quarter of a century of publication.

The policy of the JOURNAL from the day of its inception may be expressed comprehensively in five words: *Service to the Legal Profession.* This has been the essential principle that has guided its editors and contributors, and towards this ideal all their efforts have been directed. The fostering of the traditions of the learned profession of the law; the promotion of its interests; the willing assistance given to members of both its branches by the provision of useful and up-to-date professional equipment in the form of early reports of the more important judgments of our superior Courts and of overseas decisions of general interest; and the supplying of expert commentary upon practical matters bearing directly on the daily work of advocate or conveyancer—all these have been kept in the forefront of this periodical's activities. Appreciation of its beneficial service, often expressed by members of Bench and Bar, has given valued encouragement to all who have been responsible for its production in its twenty-five years of existence. Such testimony, too, is ample endorsement of its aims.

That there has been a progressive extension of the usefulness of the JOURNAL is due to the associated and individual co-operation of the members of the profession throughout the Dominion. To all of them our thanks are due. In particular, we are grateful to those of them who have contributed articles of such great usefulness. As a result, the past volumes of the JOURNAL contain many valuable articles on subjects of practical use and interest, supplying matter that cannot as yet be extracted from within the covers of standard text-books. Moreover, with the assistance of our readers, the JOURNAL has ever been in the forefront of legal reform, and many suggestions which germinated in these pages found fruition in the Statute Book.

The extent to which a professional periodical such as this can give service is the ratio of its worth. With the realization of what this implies, the present Editor, speaking with the full authority of its publishers, reiterates that a policy which has proved so advantageous to those whom the JOURNAL is honoured in serving will conscientiously be maintained. That its usefulness may be even further extended in the second quarter century of its publication is our hope and aim.

While asking for the freest criticism of our own efforts, we express the hope that the JOURNAL will long continue to breathe the real spirit of the legal profession that has long been one of its particular glories. If the JOURNAL, with the co-operation it seeks from every member of the profession, can assist towards a continuance of this traditional spirit among us, they and we will together in the years to come be performing a further duty, not only to their professional colleagues, but also to the wider public of the Dominion at large, whom it is their duty and their privilege to serve.

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Recent Developments in Quasi-contracts. *208 Law Times Jo.*, 215.

CONTROL OF PRICES.

Price Tribunal—Nature of Functions—Making of Price Orders legislative—Procedure in making Price Order judicial—Party's Right to be heard before Price Order made—Limitations on Such Right—Tribunal violating Principles of Natural Justice in refusing Hearing in Certain Circumstances—Control of Prices Act, 1947, ss. 3, 5, 10, 15, 39 (1). The functions of the Price Tribunal as regards the making of Price Orders are legislative, because a Price Order is legislative in form, in substance, and in effect, as it prescribes what the law shall be in future cases arising under it. (*Ex parte Coorey*, (1944) 45 N.S.W.S.R. 287, and *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, applied.) (*Rola Co. (Australia) Pty., Ltd.* v. *Commonwealth*, (1944) 69 C.L.R. 185, referred to.) The Price Tribunal in its procedure is required to act judicially; and, in so acting, it must act in good faith and fairly listen to both sides. This involves giving a party the opportunity of adequately presenting his case, when he has intimated to the Tribunal that he desires a hearing by the Tribunal of matters not previously brought to its notice. When, therefore, a party's attitude has been strongly put forward, when he has dissociated himself from the bulk of those in the same line of business in any agreement with a proposed Price Order, and when he has sought an opportunity to be heard, he should be given that opportunity. Where, as in this case, the fact that a party was advised that his request for a public hearing had been declined until the Price Order had been made, amounted to a violation by the Price Tribunal of a fundamental principle of natural justice, he was entitled to a writ of certiorari to quash that Price Order. (*General Medical Council* v. *Spackman*, [1943] A.C. 627; [1943] 2 All E.R. 337, and *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q.B. 431, referred to.) (*Local Government Board* v. *Arlidge*, [1915] A.C. 120, and *The King* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334, considered.) (*In re Gosling*, (1943) 43 N.S.W.S.R. 312, distinguished.) *F. E. Jackson and Co., Ltd.* v. *Price Tribunal (No. 2)*. (S.C. Wellington. December 14, 1949. Hutchison, J.)

CONVEYANCING.

Contractual Incidents in the Sale of Land. *99 Law Journal*, 663.

Conveyances by a Surviving Joint Tenant. *208 Law Times Jo.*, 206.

Mortgage by Way of Defeasance of Life Insurance Policy. (Precedent.) *2 Australian Conveyancer and Solicitors Journal*, 178.

On Taking Instructions for Drafting Wills. *208 Law Times Jo.*, 220.

Professional Trustee Charging Clauses. *208 Law Times Jo.*, 286.

Surrender of Life Interests in Settled Land. *99 Law Journal*, 677.

Surrenders of Life Interests. *208 Law Times Jo.*, 243.

Voluntary Settlements for the Benefit of Descendants. *208 Law Times Jo.*, 255.

CRIMINAL LAW.

Sentence—Corrective Training—Preventive Detention—Previous Convictions—Conviction in Northern Ireland—Convictions in Scotland and Abroad—Criminal Justice Act, 1948 (c. 58), ss. 21 (1) (2), 23 (1). In the notice of intention to prove three previous convictions served on the appellant under the Criminal Justice Act, 1948, s. 23 (1), a conviction in Northern Ireland was included. Quarter Sessions held that this conviction could not be taken into account, and imposed a sentence of imprisonment, instead of one of preventive detention under s. 21 (2). *Held*, That a conviction in Northern Ireland could not be a previous conviction within s. 21 (2), and, therefore, the appellant could not have been sentenced to preventive detention. *Per curiam*, A conviction in Northern Ireland is not a previous conviction for the purpose of founding a sentence of corrective training under s. 21 (1). Convictions in any of the Dominions or Colonies, in a foreign country, or before a court martial are not "previous convictions" within either s. 21 (1) or s. 21 (2). A previous conviction in Scotland on an indictment can, however, be proved: see s. 80 (2) of the Act. *R.* v. *Murphy*, [1949] 2 All E.R. 867 (C.C.A.).

DEED—RECTIFICATION.

No Relief required as between Parties—Rectification to secure Reduction of Tax payable by Party to Deed. In October, 1940, the parties were divorced, and, after discussion in regard to the maintenance of the wife, a deed was drafted by her solicitors in which the husband was expressed to covenant to pay "such a sum after deduction of income-tax at the rate of not more than 7s. 6d. in the £ as shall represent £1,000 per annum." The husband by his solicitors altered the draft so that the covenant provided that the husband should pay "£1,000 per annum free of British income-tax up to but not exceeding 7s. 6d. in the £," and on April 16, 1942, the deed was executed in that form. The husband made the payments to the wife on the basis of freedom from tax at 7s. 6d. in the £ until the Inland Revenue authorities refused to allow deductions against his sur-tax on account of these payments, on the ground that, under R. 23 (2) of the All Schedules Rules in the Income Tax Act, 1918, he had no right to make the payments under the deed without deducting the tax. On March 30, 1948, the parties executed a supplemental deed, whereby it was agreed that the deed of April 16, 1942, should be treated as rectified by the substitution in the husband's covenant of the words, "such an annual sum as after deduction of British income-tax at a rate up to but not exceeding 7s. 6d. in the £ will leave the sum of £1,000 per annum," for the words "£1,000 per annum free of British income-tax up to but not exceeding 7s. 6d. in the £." The husband now sought rectification of the deed of April 16, 1942, by the insertion therein of the words substituted by the supplemental deed, his object being to place himself in a position in which he would be entitled to claim deductions from sur-tax as against the Revenue authorities. *Held*, That, in view of the supplemental deed of March 30, 1948, there was no issue between the parties as to their rights *inter se*, and the Court would not grant the discretionary remedy of rectification. (*Burroughes* v. *Abbott*, [1922] 1 Ch. 86, distinguished.) (*Jervis* v. *Howle and Talk Colliery Co., Ltd.*, [1936] 3 All E.R. 193, approved and distinguished.) Decision of *Harman*, J., [1949] 1 All E.R. 755, affirmed. *Whiteside* v. *Whiteside*, [1949] 2 All E.R. 913 (C.A.).

As to Rectification for Mistake, see *23 Halsbury's Laws of England*, 2nd Ed. 140-143, paras. 197-200; and for Cases, see *35 E. and E. Digest*, 91-95, Nos. *11-36*.

DESTITUTE PERSONS.

Appeals in Maintenance Cases. *23 Australian Law Journal*, 391.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion: Imposition of Condition as to Resumption of Cohabitation. *208 Law Times Jo.*, 239.

Evidence—Desertion—Divorce Suit on Ground of Desertion—Petitioner's Adultery during Desertion Period—Onus of Proof of Respondent's Knowledge of Such Adultery and Other Spouse's not being affected by it—Divorce and Matrimonial Causes Act, 1928, s. 10 (b). Where the petitioner for a decree, on the ground that the other spouse had deserted him and that such desertion had continued for three years and upwards, has, during that period, committed adultery, the onus of proving want of

knowledge on the part of the other spouse of such adultery, or that the other spouse, with knowledge of such adultery, was not affected by it, is on the petitioner. If these matters are left in doubt, the petitioner has not discharged the burden of proof, and they must be resolved against him. (*Handcock* v. *Handcock*, [1949] N.Z.L.R. 435, applied.) (*Williams* v. *Williams*, [1943] 2 All E.R. 746, referred to.) *Handcock* v. *Handcock*. (S.C. Wellington. December 2, 1949. O'Leary, C.J.)

Matrimonial Causes Rules, 1943, Amendment No. 1 (Serial No. 1949/191). Particular attention is drawn to RR. 2 and 3 of this Amendment, which alter the practice previously existing. Section 6 of the Statutes Amendment Act, 1949, abolished the separate affidavit verifying any petition mentioned in s. 45 of the Divorce and Matrimonial Causes Act, 1928. Rule 4 of the principal Rules is accordingly revoked, and the following Rule is substituted: "4. (1) The affidavit required under section 45 of the Act (as amended by section 6 of the Statutes Amendment Act, 1949) to be appended to any petition shall comply with the provisions of that section in the manner indicated in Form No. 2 in the Schedule hereto. No filing fee shall be payable in respect of the affidavit. (2) In the case of any petition to which the said section 45 does not apply, the petition shall nevertheless be separately verified by affidavit." Form No. 2 in the Schedule to the principal Rules is revoked, and the following form is substituted: "Form No. 2. AFFIDAVIT VERIFYING PETITION. I, A.B., of the City of Wellington, merchant, make oath and say as follows:—1. That so much of the foregoing petition as relates to facts within my knowledge or to my own acts and deeds is true, and so much thereof as is statement of belief or relates to the acts and deeds of any other person I believe to be true. 2. That no collusion (*if adultery is alleged add*, or connivance) exists between me and my said wife. Sworn at, &c."

Restitution of Conjugal Rights—Petitioner's Conduct—Standard of Conduct warranting Refusal of Decree—Divorce and Matrimonial Causes Act, 1928, s. 8. The standard of conduct upon the part of a petitioner which will warrant the refusal of a decree of restitution of conjugal rights need not amount to a matrimonial offence. The test to be applied is that the wife must prove some "grave and weighty matter" to justify a cessation of cohabitation. While the reasons which provoke a wife to leave her home must be grave and weighty, they can properly be regarded as such if they find their justification in conduct upon the part of the husband which can reasonably be said to be unbearable, or in conduct so unreasonable that a reasonable wife could regard it as too insufferable to be borne. (*Russell* v. *Russell*, [1895] P. 315, and *Fisk* v. *Fisk*, (1920) 122 L.T. 803, followed.) (*Holborn* v. *Holborn*, [1947] 1 All E.R. 32, and *Jackson* v. *Jackson*, (1932) 146 L.T. 406, applied.) (*Kemp* v. *Kemp*, [1949] N.Z.L.R. 648, referred to.) *Carswell* v. *Carswell*. (S.C. Auckland. December 21, 1949. Finlay, J.)

ELECTRICITY.

Electricity Control Regulations, 1949 (Serial No. 1949/190). These Regulations authorize the General Manager of the State Hydro-electric Department, established under the Electricity Act, 1945, to exercise all such powers, privileges, and rights as may appear necessary to enable him to carry out all or any of the functions of the Department specified in s. 3 (2) of the Electricity Act, 1945.

EXECUTORS AND ADMINISTRATORS.

Claims—Incidence of Proposed Order in Plaintiff's Favour falling on Charities and Residuary Legatees—Opportunity given them to be heard before Order made—Law Reform (Testamentary Promises) Act, 1949, s. 3 (6). Where the Court intends to make an order under the Law Reform (Testamentary Promises) Act, 1949, and the incidence of the order must fall upon legacies to charities or upon the residue, and neither of those interests was before the Court at the hearing of the action, the charities and residuary legatees should be given the opportunity to be heard, if they should so desire. *Smith* v. *Malley*. (S.C. Christchurch. December 12, 1949. Northcroft, J.)

FACTORIES.

The Fencing of Dangerous Machinery. *208 Law Times Jo.*, 254.

FIRE INSURANCE.

Insurance and The Mortgagee. (A. C. Heighington, K.C.) *27 Canadian Bar Review*, 879.

HUSBAND AND WIFE.

Divorce—Choice of Matrimonial Home—Mutual Obstinacy—Decree on Grounds of Desertion refused—Walter v. *Walter, The Times*, October 22, 1949.

IMPRISONMENT FOR DEBT.

Imprisonment for Debt Limitation (Magistrates' Courts) Rules, 1949 (Serial No. 1949/188). These Rules, which will come into force on February 1, 1950, revoke the Imprisonment for Debt Rules, 1916, the Orders in Council made in 1920, and in 1928, amending the Table of Fees, and also the Magistrates' Courts Fee Rules, 1946 (Serial No. 1946/198). The new Rules are to be read with and are deemed to be part of the Magistrates' Courts Rules, 1948. New forms are provided, and a new Table of Fees is prescribed. *Note*:—The procedure is simplified, the forms are shortened, and the procedure where the debtor is at a distance is altered so that the hearing must take place in the Court nearest to the debtor's residence unless he lives within thirty miles of the home Court. Although the hearing may take place at a distance, the order comes back to the home Court for enforcement, so that the judgment is not removed at any stage.

INCOME-TAX.

Family Partnership Agreements and Taxation. (P. R. Adams.) *2 Australian Conveyancer and Solicitors Journal*, 161.

Points in Practice. *99 Law Journal*, 662.

Retiring Allowances and Pensions paid to Employees and Their Dependants. (J. A. L. Gunn.) *2 Australian Conveyancer and Solicitors Journal*, 171.

Taxation of Farmers (in Canada). (Molyneux L. Gordon, K.C.) *27 Canadian Bar Review*, 898.

INTERNATIONAL LAW.

The Legal Department of the United Nations: A Survey and a Criticism. (Alan Renouf.) *27 Canadian Bar Review*, 939.

LAND SALES.

Illegal Transaction—Certificate of Immunity to Witness "required" to give Evidence—Certificate available only to Witness "required" by Magistrate to be Examined—Witness giving Evidence voluntarily not entitled to Certificate—Order granting Certificate appealable—Servicemen's Settlement and Land Sales Act, 1943, ss. 44, 68—Servicemen's Settlement and Land Sales Amendment Act, 1946, ss. 2, 3, 4—Magistrates' Courts Act, 1947, s. 71—Magistrates' Courts Rules, 1948, r. 75. An appeal lies, under s. 71 of the Magistrates' Courts Act, 1947, from an order by a Magistrate under s. 4 (2) of the Servicemen's Settlement and Land Sales Amendment Act, 1946, which may, as a separate and substantive right, be the subject of an originating application pursuant to r. 75 of the Magistrates' Courts Rules, 1948; and the provisions of the Justices of the Peace Act, 1927, relating to appeals, have no relevance. Section 3 of the Servicemen's Settlement and Land Sales Amendment Act, 1946, relates to the type of case where the authorities have some reason to suspect, from information received, that an offence has been committed, and the purchaser in the transaction is required to give evidence. *The King* v. *Scott, Ex parte Scott*, [1927] S.A.L.R. 492, distinguished.) The word "required," where used in the expression "required to be examined as aforesaid" in s. 3 (1) of the Servicemen's Settlement and Land Sales Amendment Act, 1946, has the same meaning as it bears in the preceding s. 2 (1), which provides that a Magistrate, in any proceedings before him for an offence against the Servicemen's Settlement and Land Sales Act, 1943, may *require* any person to be examined as a witness; and this is more than the attendance of a witness under a subpoena issued in the ordinary way by one of the parties. Where, therefore, a purchaser instigated a prosecution against a vendor for such an offence, and made himself a willing witness (although under a subpoena), he was not entitled to a certificate under s. 4 (1) of the Amendment Act, 1946, as such a certificate could not validly be given to a person who was not required by a Magistrate to be examined as a witness. *Semble*, It is not "just and equitable," within the meaning of those words as used in s. 4 (2), that the discretion conferred thereby on a Magistrate should be exercised in favour of a person who was not under any compulsion to make an illegal payment, but who voluntarily came forward and disclosed the facts of the illegal transaction to which he was a party, thereby expecting to get immunity from prosecution,

and to establish a ground for claiming a refund. *In re An Application by Tait.* (S.C. Wellington. December 2, 1949. Hay, J.)

LANDLORD AND TENANT.

Consent to Alienation: Scope of Statutory Proviso. *93 Solicitors Journal*, 739.

Lease—Assignment—Withholding of Consent—Reasonableness—Prevention of Creation of Statutory Tenancy—Tenant in Possession at Date of Assignment. By an agreement, dated March 1, 1946, the landlord let to the tenant a flat to which the Rent Restrictions Acts applied for a term of three years expiring on February 28, 1949, the tenant covenanting, *inter alia*, not to assign the premises without first obtaining the written consent of the landlord "which consent shall not be unreasonably withheld." On December 16, 1948, the tenant applied to the landlord for a licence to assign, but this was refused, on the ground that, as the lease had only a few weeks to run before expiry, an assignment would in all probability result in the creation of a statutory tenancy. On January 24, 1949, the tenant assigned the residue of the term and went out of occupation of the premises. The landlord claimed possession. *Held*, (i) That the fact that, in the present case, the residue of the term was to be measured in weeks, and not, as in *Swanson* v. *Forton*, [1949] 1 All E.R. 135, in days, did not make the refusal of the landlord to consent to the assignment unreasonable. (ii) That whether or not the tenant was in occupation when he assigned was immaterial, and, therefore, the landlord was entitled to possession. *Dollar* v. *Winston*, [1949] 2 All E.R. 1088 (Ch.D.).

Restrictions on Assignment in Leases. *208 Law Times Jo.*, 305.

LAW PRACTITIONERS.

Survey of the Legal Profession in Canada. *27 Canadian Bar Review*, 951.

LEGAL AID.

Poor Persons Legal Assistance in Australian States. *23 Law Institute Journal*, 180.

LICENSING.

Local Licensing Trusts Regulations, 1949 (Serial No. 1949/189). After the Licensing Control Commission has authorized the grant of a licence within a locality or area, these Regulations make provision for any local authority to apply, under s. 53 of the Licensing Amendment Act, 1948, for the grant of a licence in that locality or area to be conducted by a local Trust to be formed to conduct the premises; and as to the manner in which such applications are to be dealt with by the Licensing Committee; and also as to the taking of a poll.

Offences—Sale and Supply of Liquor at Unauthorized Times—Evidence—Analysis of "Other fermented, distilled, or spirituous liquor" Necessary—Analysis of Specified Liquors Unnecessary—"Intoxicating liquor"—"Liquor"—Licensing Act, 1908, s. 4—Licensing Amendment Act, 1948, s. 94. The plain meaning of the definition of "intoxicating liquor" or "liquor" in s. 4 of the Licensing Act, 1908 (as amended by s. 94 of the Licensing Amendment Act, 1948), is that the words "which on analysis is found to contain more than three parts per centum of proof spirit" are attached only to the preceding words "or other fermented, distilled, or spirituous liquor," and not to the earlier specific words, "spirits, wine, ale, beer, porter, cider, perry." (*Cudby* v. *Davies*, *Cudby* v. *Boyd*, [1949] N.Z.L.R. 1044, considered and in part followed.) (*Russell* v. *Gale*, (1928) 40 C.L.R. 587, applied.) (*Graham* v. *Adams*, [1945] N.Z.L.R. 147, distinguished.) *Wyatt* v. *Brabet.* (S.C. Napier. September 29, 1949. O'Leary, C.J.)

MAORIS AND MAORI LAND.

Bed of Wanganui River—Vested in Crown excepting where Subject to Express Crown Grants—Limit of Jurisdiction of Maori Land Court to determine whether Any Land is European Land or Maori Land—No Jurisdiction to determine Questions of Law not being Investigation of Title—Excess of Jurisdiction in Investigation of Title—Right of Crown to seek Prohibition—Coal-mines Act, 1925, s. 206—Maori Land Act, 1931, s. 50—Maori Purposes Act, 1939, s. 3 (1) (b). The bed of the Wanganui River for such of its length as is capable of being used for navigation is vested in the Crown by virtue of s. 206 of the Coal-mines Act, 1925; excepting in such cases where such bed has been expressly granted by the Crown. Section 50 of the Maori Land Act, 1931, leaves untramelled the right of the Crown to seek a writ of probibition against the Maori Land Court, or the Maori Appellate Court at any stage of proceedings, such as in respect of an application for investigation of title which involves an excess of jurisdiction. (*Broad* v. *Perkins*, (1888) 21 Q.B.D. 533, applied.) (*Skipton Industrial Co-operative Society, Ltd.* v. *Prince*, (1864) 33 L.J.Q.B. 323, referred to.) Where Land Transfer titles are in existence with regard to all or most of the lands forming the bank of a river, and the claim on the part of the Crown is that the registered proprietors are presumptively entitled, by virtue of those titles, to half the river bed, the appropriate tribunal to decide the matter, which is one of law and not of fact, is the Supreme Court, and not the Maori Land Court, as the question in issue was not an investigation of title by the Maori Land Court in the ordinary sense. (*Dicta* of *Edwards*, J., in *Nireaha Tamaki* v. *Baker*, (1901) N.Z.P.C.C. 371, applied.) (*Tamihana Korokai* v. *Solicitor-General*, (1912) 32 N.Z.L.R. 321, distinguished.) (*Waipapakura* v. *Hempton*, (1914) 33 N.Z.L.R. 1065, referred to.) *Semble*, 1. The doctrine *ad medium filum* applied to the orders of the Maori Land Court in so far as they affected riparian lands bounded by such parts of the river as were non-navigable. 2. Section 3 (1) (*b*) of the Maori Purposes Act, 1939, which gives the Maori Land Court jurisdiction, *inter alia*, to determine whether any land is Maori land or European land, is to be read as not conflicting with the Land Transfer Act, 1915. (*In re Taare Waitara, Beere* v. *Bates*, [1930] N.Z.L.R. 601, applied.) *The King* v. *Morison.* (S.C. Wellington. September 27, 1949. Hay, J.)

MILITARY LAW.

Reform of Military Justice. *208 Law Times Jo.*, 227.

MONEY-LENDER.

Loan on Security of Motor-car—Repossession of Car on Default in Monthly Instalments—Sale at Undervalue—Charge for Repossession Excessive—Borrower entitled to Difference between True Value and Sale Price and to Reduction of Repossession Fee and Selling Commission—Memorandum giving Particulars of Transaction—Borrower not prejudiced by Omissions—Money-lenders Amendment Act, 1933, s. 8. The defendant company was a registered money-lender. In August, 1947, the plaintiff borrowed from it a sum of £164 10s. 9d., and, as security, gave an instrument by way of security over a motor-car. In June, 1948, the defendant company seized and repossessed the car, consequent on default's having been made in payment of monthly instalments. It subsequently sold the car for £240, though the worth of the car, at the time of sale, was £300. In an action by the plaintiff, it was alleged that the interest charged, the amounts charged for repossession fee, selling commission, and legal fees, were all exeessive, and that the security was unenforceable, and the sale illegal, because of the defendant company's failure to send to the plaintiff a note or memorandum of the contract, in accordance with the provisions of s. 8 of the Money-lenders Amendment Act, 1933. The plaintiff asked that the transaction be reopened, and that accounts be taken, and that judgment for the difference between the fair value or the car at the time of sale and the amount found to be due at the taking of accounts. In the Magistrates' Court, the learned Magistrate found that the repossession fee charged had been excessive, and reduced it by £12 10s. On all the other questions, he decided against the plaintiff. On appeal from that determination, *Held*, 1. That the reduction made in the repossession fee was correct. 2. That the learned Magistrate had not applied a wrong principle, and that the exercise of the discretion conferred on him by s. 55 of the Statutes Amendment Act, 1936, had not resulted in an injustice. 3. That the plaintiff was not prejudiced by the omissions in the memorandum supplied to him in pursuance of s. 8 of the Money-lenders Amendment Act, 1933, as it gave the outstanding particulars of the transaction. 4. That the car was sold at an undervalue, as it was worth (and should have brought) at least £260, and not £240; and the plaintiff was entitled to the difference. 5. That 5 per cent. of the sale price was an adequate selling commission for the hurried and, apparently, effortless sale for which £24 was charged. The appeal was allowed, and the learned Magistrate's judgment was varied by ordering the defendant company to repay to the plaintiff a total sum of £44 10s. (which included the sum of £12 10s. allowed by the learned Magistrate). *Guthrie* v. *Financial Services, Ltd.* (S.C. Wellington. December 12, 1949. O'Leary, C.J.)

NEGLIGENCE.

Contribution between Tortfeasors guilty of Wilful Torts or Crimes. *208 Law Times Jo.*, 228, 239.

Contributory Negligence. *23 Australian Law Journal*, 394.

Invitee—Customer in Shop—Duty of Shopkeeper—Slippery Substance on Floor. The plaintiff was shopping in the defendants' shop at a time when there were only a few other customers there, and she slipped on a piece of vegetable matter, fell, and was injured. *Held*, That it was the duty of the defendants to see that the floors of the shop were kept reasonably safe for the use of customers; in the present case, the piece of vegetable matter was an unusual danger, and the burden was on the defendants either to explain how it came to be on the floor or to adduce evidence to show that reasonable steps had been taken to avoid the accident; that burden had not been discharged; and, therefore, the defendants were liable in negligence to the plaintiff. (*Stowell* v. *Railway Executive*, [1949] 2 All E.R. 193, applied.) *Turner* v. *Arding and Hobbs, Ltd.*, [1949] 2 All E.R. 911 (K.B.D.).

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

Some Social Aspects of Claims arising out of Motor Accidents. (J. W. Galbally.) *2 Australian Conveyancer and Solicitors Journal*, 175.

NEW YEAR HONOURS.

Mr. A. H. Johnstone, O.B.E., K.C., Vice-President of the New Zealand Law Society, was created Knight Bachelor.

Mr. W. H. Cocker (Messrs. Hesketh, Richmond, Adams, and Cocker, Auckland), Companion of the Order of St. Michael and St. George.

Mr. C. O. Bell (Messrs. Bell and O'Regan, Wellington), Officer of the Order of the British Empire.

NUISANCE.

Statutory Nuisance. *208 Law Times Jo.*, 217.

OBITUARY.

The Hon. Sir Frederick Jordan, K.C.M.G., Chief Justice of New South Wales, died on November 4, 1949, aged 68 years.

Mr. J. H. Quilliam, formerly of New Plymouth, and a temporary Judge of the Supreme Court from May 14 to December 31, 1938, died at Auckland on December 21, 1949, aged 82 years.

PRACTICE.

New Trial—Misdirection of Jury—Question of Law—No Objection to Direction taken at Trial—Whether New Trial should be granted. Observations on the failure of a party to take objection at the trial to the Judge's summing-up to the jury where a question of law is concerned. Decision of the Supreme Court of Victoria (Full Court), [1948] V.L.R. 215, reversed. *Burston* v. *Melbourne and Metropolitan Tramways Board*, [1949] V.L.R. 310 (H.C. of A.).

RATIONING.

Rationing Emergency Regulations, 1942, Amendment No. 8 (Serial No. 1949/122). Regulation 26A of the Rationing Emergency Regulations, 1942, is amended by inserting in subcl. (3), after the words "to the satisfaction of the Controller or authorized person," the words "or, in the case of a prosecution, to the satisfaction of the Court."

TENANCY.

Alternative Accommodation. *93 Solicitors Journal*, 707.

Dwellinghouse—Eviction—House damaged by Fire—Tenant residing in Tent on Premises and using House for Certain Purposes—Onus on Landlord of proving House uninhabitable and not "Dwellinghouse"—Notice to Quit and Summons for Possession Admissions that House habitable—Eviction of Tenant High-handed and Contemptuous of Tenant's Rights—Exemplary Damages—"Dwellinghouse"—Tenancy Act, 1948, ss. 2, 24 (1) (i). The plaintiff was a tenant of a dwellinghouse, which he had rented from the defendant corporation since 1939, as a weekly tenant. In September, 1948, the plaintiff, in the course of his duties, had to leave New Zealand, but his wife and family remained in occupation of the house. In January, 1949, a fire occurred in the dwellinghouse, and the plaintiff's wife retained possession of the house and land and erected a tent, where she slept with her children, but left some of her furniture and belongings in the house, which she used for various purposes. In March, the defendant corporation endeavoured to procure a builder to effect repairs, without success, and in April called for tenders, as a result of which a contract was let and the work begun in May. On May 24, the defendant corporation sent to the plaintiff a notice to quit, terminating the tenancy on the grounds that the dwellinghouse and premises were "reasonably required for occupation by a person in regular employment of the Council," and, later, issued a summons claiming possession of the premises. Notice of intention to defend the summons was filed, but, immediately before the hearing, the defendant corporation abandoned the proceedings, and the plaint was struck out. On August 2, one of the defendant corporation's officers asked the plaintiff's wife what keys she had to the house, and said she had to remove her property from it. She refused to do this, and then he had new locks put on the doors, since when the plaintiff's wife had not been able to get into the house or to get her things out of the house; this was done, the officer said, by order of the Council. The plaintiff claimed £300 damages for wrongful eviction and trespass. The defendant corporation justified its action, and contended that, by reason of the damage done by the fire, the house had become uninhabitable, and, therefore, lost the essential attribute of fitness for human habitation implied in the definition of "dwellinghouse" in the Tenancy Act, 1948, and that, the contractual tenancy having been determined, the defendant corporation was at liberty to exercise its common-law remedies to obtain possession. *Held*, 1. That the burden of proof that the dwellinghouse had ceased to be a dwellinghouse, and that, because of such alteration in status, it was outside the protection of the Tenancy Act, 1948, was on the defendant corporation, and such onus had not been discharged. 2. That the notice to quit and statement of claim were unqualified admissions by the defendant corporation that the house was, at that time, a "dwellinghouse" within the meaning of the Tenancy Act, 1948, and that it had not lost its status as a dwellinghouse by reason of the fire damage. 3. That the plaintiff was entitled to exemplary damages, upon the ground that the actions of the defendant corporation were high-handed and contemptuous of his rights, and he was entitled to judgment for the full amount claimed, that amount to be reduced to £100 if the defendant corporation restored possession of the house to the plaintiff within fourteen days and abandoned all claims for rent which might be due to it up to the date of possession. *Parsons* v. *Hamilton City Corporation*. (Hamilton. October 28, 1949. Paterson, S.M.)

Notice to Quit—Service—Notice posted by Registered Post but not actually received by Tenant—Rebuttable Statutory Presumption of Delivery—"Shall be deemed to be served"—Tenancy Act, 1948, s. 46 (1). Section 46 (1) of the Tenancy Act, 1948, which is as follows, "Any notice required to be served on any person for the purposes of this Act may be served by delivering it to that person, and may be delivered to him either personally or by posting it by registered letter addressed to that person at his last known place of abode or business in New Zealand. A notice so posted shall be deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered," raises a statutory presumption of delivery, which may be rebutted by the evidence of the tenant that the notice has not been delivered to him. (*Reed* v. *Harvey*, (1880) 5 Q.B.D. 184, referred to.) (*Williamson* v. *Moses*, (1947) 5 M.C.D. 215, distinguished.) *White* v. *Hargreaves*. (Palmerston North. December 20, 1949. Herd, S.M.)

TORT.

Damages for the Consequences of an Unlawful Act; *99 Law Journal*, 703.

TRUSTS AND TRUSTEES.

Powers of Investment in Land. *93 Solicitors Journal*, 738.

WILL.

Devise of "what shall remain." (L. A. Harris.) *2 Australian Conveyancer and Solicitors Journal*, 185.

Conditional Gift—To receive Income so long as married to Present Wife—Whether Condition invalid as being contrary to Public Policy. A testator by his will provided that his son was to receive the income of testator's estate "for such period and so long as he should remain married to his present wife," and on the termination of such period he was to become entitled absolutely, with a gift over in the event of the son predeceasing his wife. *Held* (*Dixon* and *Williams*, JJ., dissenting), That the provision "for such period and so long as he should remain married to his present wife" was not invalid as being contrary to public policy. Decision of the Supreme Court of Victoria (*Lowe*, J.) *sub nom. In re Ramsay (deceased)*, [1948] V.L.R. 347, affirmed. *Ramsay* v. *Trustees Executors and Agency Co., Ltd.*, [1949] V.L.R. 309 (H.C. of A.).

Validity of Gift to Trustees as Trustees. *23 Australian Law Journal*, 473.

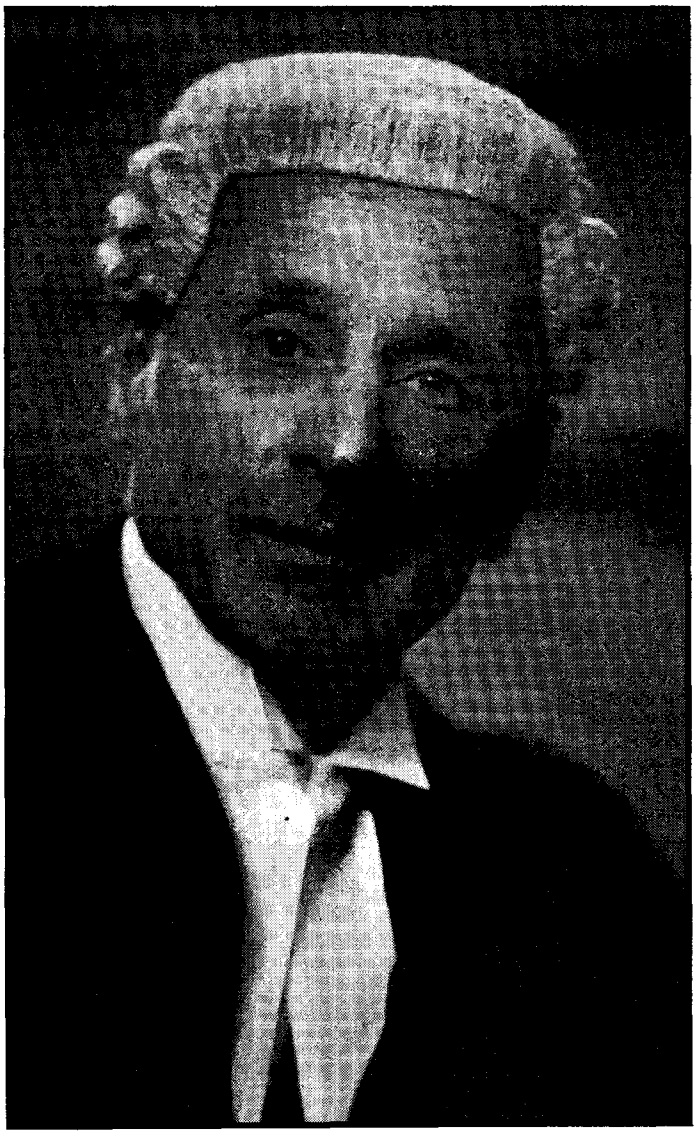
THE NEW ATTORNEY-GENERAL.

The Hon. T. C. Webb takes Office.

The new Attorney-General, the Honourable Thomas Clifton Webb, is a New Zealander born of farming stock, a product of our State primary and secondary schools, and a man who has had to make his own way in life. He has done so unobtrusively, until gradually his solid qualities of common sense, moderation, and reasonableness have earned him public recognition, and now the leadership of the legal profession and influential membership of Mr. Holland's Cabinet.

Mr. Webb first impresses you by his earnestness and sincerity. Although he holds certain strong convictions, his is no closed mind. He has revealed this capacity to explore all the facts and reach an independent decision during his membership of Parliament. It has earned him the respect of the Labour Party as well as that of his own.

The Attorney-General's first reaction, when a certain course of action is urged on him, is to ask why. The question has sometimes surprised those who have expected him to follow unhesitatingly a conservative line. Mr. Webb may be justly called a liberal. He can see the other fellow's point of view, and, if he believes it reasonable and right, Mr. Webb has never been afraid to adopt it and take a new, and even unpopular, course.



Spencer Digby, photo.

The Hon. Mr. T. C. Webb.

Mr. Webb was born in 1889 at Te Kopuru, a small township in Northern Wairoa. He is proud of his forebears, his grandfather, Mr. T. S. Webb, being associated with the Cobden-Bright Movement before he came to New Zealand in the middle of the last century. Both grandfather and father devoted much of their time to public service, and set an example which the Attorney-General was only too anxious to follow when the exigencies of a legal practice would allow him.

Mr. Webb does not appear to have had any great material advantages in his youth, although he had the inestimable benefit of parents determined to give him a sound general education. He is one of the many men of distinction in the public life of the Auckland Province who were educated at the Auckland Grammar School. He was a student of this school from 1903 to 1905, and in later life was a President of the Old Boys' Association. In 1906, Mr. Webb entered a legal office in Dargaville.

Some idea of the way Mr. Webb has made his way in life can be gathered from the difficulties surrounding his studies. There was no coach in Dargaville, no fellow-student. The young law clerk studied by correspondence under the tuition of the late Mr. P. H. Watts, of Hamilton. Every morning he cycled seven miles to his office, but only after arising at 5 a.m. and helping to milk the cows; then he went back in the evening on his bicycle to study by lamplight. He was admitted a solicitor in 1910 by the late Mr. Justice Edwards, and then spent two and a half years in Auckland in the office, first of Messrs. Nicholson and Gribbin, and then of the late Mr. Andrew Hanna. During 1911 and 1912 he attended the Auckland University College, and in 1913 commenced practice on his own account in Dargaville.

In spite of the demands both of study and of his work, Mr. Webb took a prominent part in sport. His is still a name to conjure with for the many who remember Rugby before 1914. He represented Northern Wairoa and was a member of the Auckland team in Ranfurly Shield matches in 1912 and 1913. His team mates included Victor Macky, who scored all three tries in the celebrated game when Auckland confounded the prophets by defeating Wellington in 1912, Karl Ifwersen, and Joe O'Leary, brother of the Chief Justice. After retiring from play, Mr. Webb was a prominent referee and took an active part in the administration of Rugby football.

During the First World War, Mr. Webb was for two and a half years in the Army. After returning from active service, Mr. Webb resumed practice in 1919 in Dargaville in the firm of Messrs. Nicholson, Gribbin, Webb, and Ross. He so continued until this arrangement was amicably and amiably terminated in 1927, when Mr. Webb commenced practice in Auckland, with Mr. Ross remaining in association with him in Dargaville, and subsequently in Whangarei. The

present firm in Auckland is Webb, Ross, and Griffiths.

This is a brief account of some aspects of Mr. Webb's life. It would be incomplete without reference to Mrs. Webb, who before her marriage was Miss Lucy Nairn, a schoolteacher. Mr. Webb likes to call her his severest critic. She has taken an active part in various women's organizations, and unquestionably has materially influenced and helped the development of his career. Mr. and Mrs. Webb have two children, both girls, one of whom is married.

Mr. Webb served the customary apprenticeship for Parliament by taking part in local politics in Northern Wairoa. He is a prominent member of the Presbyterian Church in Auckland. In 1943, he entered the House as the National Party member for Kaipara. His seat is now Rodney, and can properly be described as "safe." During all his years in Opposition, Mr. Webb was hard-working. He took, of course, a particular interest in the affairs of his own profession, spoke with growing authority on external affairs, and obviously was very much in the confidence of his leader, the present Prime Minister.

The new Attorney-General is a modest man, who will not allow office to turn his head. All his brethren who have dealt with him professionally know his fair dealing, his intellectual integrity, his sane, level-headed ability, and his capacity for work, including, be it noted, his promptitude. He has enjoyed an extensive conveyancing practice, varied by numerous appearances in Court. There are no loose ends in what he does. He has a neat, well-ordered, and inquiring mind.

Mr. Webb will unquestionably make a good Attorney-General. He is imbued with the principles of our profession, and is determined to uphold them. He will be a capable guardian of the profession. He will not neglect law reform, and certainly will not lag in this field behind his predecessor. Mr. Webb has many friends, both in the law and without it. They have complete confidence in him as he assumes the duties of his high office.

THE BRITISH COUNCIL AND THE LAW.

Assistance for Practitioners visiting Great Britain.

[*Specially written in London for the* NEW ZEALAND LAW JOURNAL.]

The purpose of the British Council as described in its Royal Charter of incorporation is:

> promoting a wider knowledge of Our United Kingdom of Great Britain and Northern Ireland and the English language abroad, and developing closer cultural relations between Our United Kingdom of Great Britain and Northern Ireland and other countries for the purpose of benefiting the British Commonwealth of Nations.

The Council is concerned, not only with foreign countries, but also with the Dominions and the Colonies, and its duties in these respectively, as may be supposed, are widely different. One of the Council's most important tasks is to arouse the interest of persons specially concerned with science, medicine, agriculture, music, drama, the fine arts, law, &c., in the practice of, and research in, such subjects in the United Kingdom. Where, as in New Zealand, neither interest nor knowledge is lacking, the Council can still perform a useful function in giving information on recent developments and trends of thought in the United Kingdom on these subjects, and in giving assistance to professional men and women visiting this country.

The Council benefits from the advice of a Law Advisory Committee, under the chairmanship of a Lord of Appeal, Lord Porter, and composed of distinguished members of the profession. Both branches of the profession in Scotland are represented, and the Secretary of the Law Society is also a member.

The British Council has also a Law Department. In addition to its main duties, which are to advise the Council about its own legal matters and questions, this Department seeks to encourage overseas an interest in, and a knowledge of, English law, in the belief that our law is peculiarly characteristic of the English way of life, and that an increased interest in it overseas will be calculated to further friendly relations between the United Kingdom and other countries. The Council is convinced that citizens of the Dominions, sharing with their English colleagues, as they do, a common legal tradition, will welcome an activity of this kind, which cannot but strengthen the bonds between the United Kingdom and other parts of the Commonwealth. The work of the Department in this regard falls broadly into four categories—*viz.*, (i) advising and arranging legal appointments for lawyers and law students from overseas visiting the United Kingdom; (ii) advising on the choice of British lawyers invited to go abroad on lecture visits under the auspices of the Council; (iii) answering inquiries on matters of English law raised by lawyers and legal institutions abroad; and (iv) advising on the choice of law books and periodicals for Council libraries and law libraries abroad.

An important part of the Council's work in regard to making English law and the English legal system better known abroad relates to assistance given to overseas legal visitors. These visitors are of various kinds. Some are postgraduate students with scholarships given by the Council or by overseas Governments, who follow their studies at Universities or in other learned institutions. Some are the holders of Fellowships given by the United Nations or one of the U.N. Specialized Agencies, for the Council is the recognized agency for the administration of these Fellowships in the United Kingdom. Other lawyers come to attend short courses which are organized by the Council on a wide variety of topics, such as local government, rehabilitation of the disabled, or juvenile delinquency; though the subject-matter of the courses is rarely legal, a considerable number of overseas lawyers attend them. Alternatively, visitors may be either overseas lawyers who have been invited to this country as official British Council Visitors or "casual" legal visitors. Such "casual" visitors may wish to study some aspect of English law for their own purposes—*e.g.*, to obtain material for a thesis for a University degree—or, as is also the case with some "official" visitors, they may come to this country charged by their University or other official or professional organization with the task of obtaining informa-

tion about a particular legal matter, or they may wish, while spending a holiday in this country, to take the opportunity of seeing something of the English legal system in operation.

The assistance rendered to overseas visitors by the Council will necessarily vary according to the visitor's requirements. It may be, for instance, that the visitor wishes to devote the whole of his stay to gaining a general picture of the English legal system at work. In such a case, the Council would seek to arrange for him to attend sittings of the criminal Courts from the Magistrates' Courts through the Courts of Quarter Sessions, Assizes, and Criminal Appeal up to the House of Lords on the rare occasions when an appeal on a criminal matter falls to be determined by that body, and, on the civil side, from the County Court through the High Court and the Court of Appeal to the House of Lords. Visitors from the Dominions will be particularly interested to attend a sitting of the Judicial Committee of the Privy Council, where they may hear appeals from decisions originally given in their own Courts. When attending these Courts, a visitor will not only have an opportunity of hearing the proceedings, but, through the offices of the Law Department, may be able to meet the officials of the Court and discuss with them points of difficulty, and may also, if he is sufficiently eminent, be invited by the Judge to sit with him on the Bench. Again, in cases where a visitor's qualifications indicate that his interest is a serious one, the Department may find it possible to arrange for him to visit the various penal institutions in this country, such as prisons, Borstal institutions, and the like. Finally, the Department arranges for such visitors to meet their "opposite numbers" in the world of law teaching and practice.

A visitor's stay in Britain is normally limited to a few weeks, and, therefore, steps are taken to ascertain, if possible before his arrival, what aspects of English law are of particular interest to him, so that arrangements can be made for him to meet those leading authorities and to visit those appropriate Courts or other institutions which will enable him to derive most benefit from his stay. There is hardly any limit to the aspects of English law about which visitors may wish to inform themselves. For example, one Council visitor, a barrister and law teacher in a Continental University, was charged by his University with the task of visiting this country for the purpose of obtaining information concerning the teaching and practice here of the law relating to civil aviation, in order that his University might be able to decide upon the character of a projected course of lectures on International Aviation Law to be given in their Faculty of Law. Arrangements were made by the Council for this visitor to meet the leading teachers of civil aviation law in English Universities, the leading English practising lawyers specializing in that subject, and the appropriate officials in the Ministry of Civil Aviation.

In another case, a Continental Professor of Law visited the United Kingdom on behalf of a Commission appointed to consider the reform of legal education in his own country. Whilst in the United Kingdom, he was enabled to consult the leading members of the Faculties of Law in the principal British Universities, to attend the annual meeting of the Society of Public Teachers of Law, and to consult officials of the Law Society's School of Law (for the academic training of solicitors), the Council of Legal Education (for the academic training of barristers), and the University Grants Committee for information concerning the salaries of law teachers.

Another aspect of English law in which overseas visitors are particularly interested is that relating to juvenile delinquency and the treatment thereof. Visitors interested in this subject may be afforded facilities through the Department to attend sittings of the juvenile Courts, to visit the various institutions and allocation centres, and to meet Probation Officers, officials of the Government Departments concerned with juvenile delinquency and of societies such as the Howard League for Penal Reform, the Institute for the Scientific Treatment of Juvenile Delinquency, and others concerned with the causes and treatment of juvenile delinquency.

Inquiries which the Department receives from lawyers and legal institutions abroad cover the widest possible range of subjects, such as the treatment of juvenile delinquency, the law relating to animal welfare, copyright, the Poor Law, election law, the law relating to penal reform, the Scottish law relating to the devolution of real property on intestacy, proposals for the codification of English law, the law relating to the censorship of films, income-tax law, and administrative law, to mention only a few examples. Inquiries of this nature may emanate from individual lawyers or official bodies, such as legal societies or bodies connected with Ministries of Justice of countries overseas. They are naturally inquiries of an academic or general nature, and not related to the conduct of individual proceedings or matters, where the normal professional channels are appropriate.

It will be seen from this short account that the work of the Department in relation to lawyers overseas falls into two related categories. It provides a service whereby such lawyers may obtain information about English law which is of immediate and direct value to them. At the same time, believing that a knowledge of English law is indispensable to full appreciation of the English way of life, it seeks to take advantage of every opportunity to foster an interest in it abroad, both amongst lawyers and amongst laymen.

The Lawyer's Duty to the State

(1) He owes a duty to the State, to maintain its integrity and its laws and not to aid, counsel, or assist any man to act in any way contrary to those laws.

(2) When engaged as a public prosecutor his primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused.

(3) He should take upon himself without hesitation, and if need be without fee or reward, the cause of any man assigned to him by the Court and exert his best efforts on behalf of the person for whom he has been so assigned counsel.

(4) It is a crime against the State, and therefore highly non-professional in a lawyer, to stir up strife or litigation by seeking out defects in titles, claims for personal injury, or other causes of action for the purpose of securing or endeavouring to secure a retainer to prosecute a claim therefor; or to pay or reward directly or indirectly any person for the purpose of procuring him to be retained in his professional capacity. (From the Canons of Ethics of the Canadian Bar Association.)

FENCING AGREEMENTS.

Registration under the Land Transfer Act.

By E. C. Adams, LL.M.

As pointed out by Sir Michael Myers, C.J., in *Nunn* v. *McGowan*, [1931] N.Z.L.R. 47, 51, at common law an owner of land cannot bind his successors in title to repair and maintain a fence. His covenant remains merely a personal one, and its breach gives rise to a right to damages only against him personally and not against subsequent owners of the land.

Before the year 1881, there were, however, various Fencing Ordinances in force in the various Provinces of New Zealand, but in that year all previous provisions were repealed, and the Fencing Act, 1881, was enacted. Section 34 of that Act provided that the Act did not affect any covenant or contract made between occupiers of adjoining lands, but apparently there was then no specific provision for registration, although, if the land was under the " old system," fencing agreements could have been registered under the Deeds Registration Act, 1908. So far as land under the Land Transfer Act was concerned, this defect in the law (and it was a most serious one) was disclosed by *Wellington and Manawatu Railway Co., Ltd.* v. *Registrar-General of Land*, (1899) 18 N.Z.L.R. 250, where Edwards, J., in a judgment remarkable for its lucid and concise exposition of the fundamental principles of the Land Transfer Act, held not only that fencing covenants were not registrable under that Act, but also that they should not be included in instruments under that Act. This defect was removed by the Fencing Act Amendment Act, 1904, which came into operation on August 26, 1904, and that Act was consolidated in 1908, and the present provision is now contained in s. 7 of the Fencing Act, 1908, which provides that every covenant or agreement made or entered into between owners of adjoining lands for the purpose of modifying or varying the rights and liabilities conferred or imposed upon them by the Act (*a*) shall run with the land whether assigns be named therein or not ; and (*b*) shall, where the land affected or any part thereof is subject to the provisions of the Land Transfer Act, be deemed to create an interest in land within the meaning of that Act and shall be registrable accordingly, subject, however, to the proviso that the assigns shall not be bound unless the covenant or agreement is registered.

Under the Fencing Act, 1908, " occupiers "—which term includes owners (who are in occupation or entitled to occupy)—of land not divided by a sufficient fence are liable to contribute in equal shares to the erection of a fence between such lands. Where any fence is out of repair, the adjoining occupiers are to bear the cost of repairing the same in equal proportions : s. 31. If any fence is damaged or destroyed, by sudden accident or other cause, and requires immediate repairs, either of the adjoining occupiers may repair the same without notice and recover half the cost thereof from the other occupier, except where such sudden accident results from his own neglect or fault : ss. 33 and 34.

This statutory right conferred on every occupier (as defined) of land to compel the adjoining occupier to contribute equally to the erection and maintenance of a boundary fence may be contracted out of, and, where an owner so contracts himself out of the benefit of this statutory right, his land becomes a quasi-servient tenement, and the fencing agreement is a blot on his title, probably giving a purchaser from him the right to rescind the contract of sale if this blot is not disclosed in the contract. It is, then, rather remarkable that, although s. 10 of the Land Transfer Amendment Act, 1939, makes express provision for the expunging from the Register Book of spent fencing covenants where application on that behalf is made by the owner to the District Land Registrar, in practice very few of these applications are made.

As pointed out by Blair, J., in *Nunn* v. *McGowan*, [1931] N.Z.L.R. 47, 64, ever since the coming into operation of the Fencing Act Amendment Act, 1904, it has been the almost invariable practice of persons *subdividing* their land to make it a condition of the sale that the subdivider shall not be liable to be called upon to contribute to the cost of erection or maintenance of any dividing fence between the land sold and the land retained, but that this provision shall not enure for the benefit of a purchaser of adjoining land. Most of the fencing covenants and agreements to which Land Transfer titles are subject have so originated. It is customary for the covenant to be in favour of the vendor, his heirs, executors, administrators, or assigns.

But it is not necessary that a fencing covenant or agreement should be embodied in a memorandum of transfer under the Land Transfer Act. At any time, owners of adjoining lands may agree to modify or vary their statutory rights and liabilities. Section 7 of the Fencing Act, 1908, does not provide for any particular form or wording. Any covenant or agreement, in whatever form, is registrable, provided that it modifies or varies the rights and liabilities conferred or imposed on owners by the Fencing Act itself. It appears desirable, however, that such instrument should be in the form of a deed, and attested with the requi ites of a deed as provided by s. 26 of the Property Law Act, 1908. In the following precedent, the draftsman has endeavoured to follow as closely as possible the form of a Land Transfer instrument, and probably the instrument would be construed as a deed : *Domb* v. *Owler*, [1924] N.Z.L.R. 532. With commendable skill, he has harmonized the Fencing Act with the Land Transfer Act.

Precedent.

Memorandum of Fencing Agreement for Registration under the Land Transfer Act.

WHEREAS A.B. of Wanganui farmer being registered as the proprietor of an estate of freehold in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon in all that piece of land situate in the Land District of containing [*Set out here area*] be the same a little more or less being [*Set out here official description of land*] and being the land comprised and described in Certificate of Title Register Book Volume Folio Registry

SUBJECT to [*Set out here registered encumbrances, &c., to which the land is subject*]

AND WHEREAS C.D. of Wanganui farmer is registered as the proprietor of an estate of freehold in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon in all that piece of land situate in the Land District of containing [*Set out here area*] be the same a little more or less being [*Set out here official description of land*] and being the land comprised

and described in Certificate of Title Register Book Volume Folio Registry

SUBJECT to [*Set out here registered encumbrances, &c., to which the land is subject*]

AND WHEREAS the said lands are adjoining AND WHEREAS land of a sandy nature and impracticable for fencing is on the boundary of the said adjoining lands AND WHEREAS the said A.B. and C.D. have pursuant to section 22 of the Fencing Act 1908 agreed upon a line of fencing on the land of the said C.D. the said line of fencing being more particularly shown on the plan drawn hereon and coloured red AND WHEREAS a sufficient fence has now been erected on the said line of fencing AND WHEREAS the said A.B. and C.D. pursuant to section 7 of the Fencing Act 1908 are desirous of having this agreement registered NOW THEREFORE THIS INSTRUMENT WITNESSETH:

1. The said A.B. and C.D. agree that the said fence shall be a sufficient fence within the meaning of the Fencing Act 1908 and that they shall pursuant to the provisions of the Fencing Act 1908 and its amendments each be liable for the repair upkeep maintenance and replacing of the said fence as if it were erected on the said boundary between the two said lands.

2. If the said fence requires replacing shifting or repairing owing to sand movements or to other forces of nature the said A.B. shall nevertheless be liable for his half share of the cost of such replacing shifting or repairing.

3. If for his own requirements the said C.D. desires the said fence removed and a fence in lieu thereof erected on the said boundary between the two said lands the said C.D. shall be entitled to remove the said fence and erect a sufficient fence on the said boundary and the said C.D. shall be responsible for and shall assume full liability for and shall pay the full cost of the erection of the fence on the said boundary.

IN WITNESS whereof the parties hereto have hereunto signed their names this day of one thousand nine hundred and forty-nine.

SIGNED by the abovenamed A.B. in the presence of:— } A.B.
E.F.,
Solicitor,
Wanganui.

SIGNED by the said C.D. in the presence of:— } C.D.
G.H.,
Solicitor,
Wanganui.

Correct for the purposes of the Land Transfer Act.
E.F.
G.H.
Solicitors for the Parties.

SUMMARY OF RECENT LAW.

Supplementary to pp. 6–9.

NUISANCE.

Negligence—Sport—Cricket—Injury from Ball hit from Ground into Highway. During a cricket match, a batsman hit a ball which struck and injured the plaintiff, who was standing on a highway adjoining the ground. The ball was hit out of the ground at a point at which there was a protective fence rising to 17 ft. above the cricket pitch. The distance from the striker to the fence was about 78 yards, and that to the place where the plaintiff was hit some 98 yards. The ground had been occupied and used as a cricket ground for about ninety years, and there was evidence that on some six to ten occasions in a period of thirty-five years a ball had been hit into the highway, but no one had been injured. The plaintiff claimed damages from the defendants, as occupiers of the ground, in nuisance, and, alternatively, negligence. *Held*, (i) That the fact that occasionally a ball had been hit into the highway did not create a sufficient interference with the use and enjoyment of the highway to constitute a nuisance. (*Castle* v. *St. Augustine's Links, Ltd.*, (1922) 36 T.L.R. 615, distinguished.) (ii) (*Somervell*, L.J., *dissentiente*), That, there being a foreseeable risk of a ball's being hit into the road, the defendants were under a duty to take reasonable care to avoid injury to anyone on the road; they had failed to carry out this duty; and, therefore, they were liable in negligence to the plaintiff. Per *Jenkins*, L.J., The case is, I think, one to which the doctrine of *res ipsa loquitur* can be fairly applied: *Byrne* v. *Boadle*, (1863) 2 H. & C. 722. The plaintiff is struck and injured by a cricket ball hit out of a ground occupied and controlled by the defendants. Surely that circumstance in itself suffices to place on the defendants the burden, at least, of showing either that the event was one which they could not reasonably have foreseen as a consequence of their use of the ground for cricket, or that the event was one which they had taken all reasonably practicable steps to prevent. This burden the defendants have, as it seems to me, wholly failed to discharge. Decision of *Oliver*, J., [1949] 1 All E.R. 237, reversed. *Stone* v. *Bolton*, [1949] 2 All E.R. 851 (C.A.).

As to Degree of Care Ordinarily Required, see *23 Halsbury's Laws of England*, 2nd Ed. 571-587, paras. 825-840; and for Cases, see *36 E. and E. Digest*, 16-21, Nos. *68-101.*

TENANCY.

Dwellinghouse—Alternative Accommodation—"Suitable to the needs of the tenant and his family"—"Family"—Inclusion of Married Sons and Their Wives living with Tenant—Lodger—More than One House as Alternative Accommodation—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (3). By s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, it is provided: "(1) No order or judgment for the recovery of possession of any dwellinghouse to which the principal Acts apply . . . shall be made or given unless the Court considers it reasonable to make such an order . . . and . . . (*b*) the Court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order . . . takes effect . . . (3) . . . accommodation shall be deemed to be suitable if it consists . . . (*a*) of a dwellinghouse to which the principal Acts apply . . . and is, in the opinion of the Court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—(i) similar as regards rental and extent to the accommodation afforded by dwellinghouses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the Court, similar to those of the tenant and his family; or (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character." The landlord claimed possession of a dwellinghouse to which the Rent Acts applied, and offered accommodation in other houses to the tenant as alternative accommodation. With the tenant, a widow, were living her two married sons and their respective wives, a married daughter who was separated from her husband, and a lodger. *Held*, That s. 3 (3) laid down the conditions which must be satisfied if the provisions as to alternative accommodation in subs. 1 were to be fulfilled, and did not merely afford a guide as to what normally would be suitable; the word "family" within the meaning of s. 3 (3) included, in addition to the daughter, the tenant's sons and their wives; and, in the circumstances, the alternative accommodation offered was not suitable. (Dictum of *Wright*, J., in *Price* v. *Gould*, (1930) 143 L.T. 334, applied.) *Quaere*, (i) Whether the lodger should be included in the term "family." (ii) Whether the Court was bound by *Sheehan* v. *Cutler*, [1946] K.B. 339, to hold that in no case could two dwellinghouses constitute suitable alternative accommodation within the meaning of s. 3 (3). *Standingford* v. *Probert*, [1949] 2 All E.R. 861 (C.A.).

As to Statutory Tenants, see *20 Halsbury's Laws of England*, 2nd Ed. 334, 335, paras. 400, 401, and *1948 Supplement*; and for Cases, see *31 E. and E. Digest*, 575, 576, Nos. *7226-7255*, and Supplements.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Trials—and Results.—There is a biography of an eminent English K.C. published during recent years in which the author leaves the impression that his subject never won a case. In his *Autobiography*, Sir Patrick Hastings, for his part, leaves readers who have no personal acquaintance with him in some doubt as to the framework upon which his great reputation was built. In his new book, *Cases in Court* (Heinemann, 1949), however, the defect of his earlier one is amply repaired. Here, on his retirement from the Bar, he deals in a clear and entertaining fashion with a large number of trials in which he has appeared, and the results provide an impressive record. The six cases of libel and slander demonstrate both the difficulty and the range of this rapidly-expanding field of law. Included in it are *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, (1934) 50 T.L.R. 581, and *Laski* v. *Newark Advertiser*. But no doubt the highlight, at least financially, is the story of the Courtauld arbitration with the British Government, in which Sir Patrick recovered for his client £27,125,000 on a claim for £30,000,000. Still, on the other hand, there are not many counsel who could boast, as the Attorney-General no doubt did, that he had saved *his* client the best part of three millions.

Error in personam.—A learned contributor has written: "I think Scriblex is in error in saying that F. E. Smith never lent his name or personality to any of our New Zealand causes. My recollection is that he appeared in the Privy Council as counsel for the appellant in *Massey* v. *New Zealand Times Co., Ltd.* I know that another name appears in the report in (1912) N.Z.P.C.C. 503. What happened was, if my memory is right, that other counsel was retained and signed the appellant's case that is required to be filed in the Privy Council, but was unable to attend, and F.E. actually held the brief at the argument."* The "other counsel" concerned appears to be Danckwerts, K.C., famed for his fiery temper and his "broad beam." So far as Scriblex is concerned, he relies by way of defence on his recollection of Lord Birkenhead's *Volute* rule—*viz.*, that there has been "a sufficient separation of time, place or circumstance" to excuse his error, and that no further action lies.

Dr. and the Law.—"In Central Europe a law graduate is called 'doctor,' and many European jurists stick to the confusing habit of writing 'Dr.' in front of their names, even in the United States, where a doctor deals in the manifold aberrations of body and mind, but not a legal one. When I came to this country," writes Joseph Wechsberg, in *Sweet and Sour* (Michael Joseph, 1949), "some people persisted in calling me 'doctor,' which caused bystanders to take me aside and ask my medical advice, one young lady going so far as to remove part of her dress so I could put my ear to her ribs and listen to her bronchitis." In England, the Bar Council has ruled that the degree of Doctor of Laws does not confer any right of precedence in Court, and holders of legal degrees entitling them to the use of the prefix "Dr." are not so addressed in Court. In 1935, this ruling was adopted by the New Zealand Law Society.

The Smart Junior.—R. H. Hine in his *Confessions of an Uncommon Attorney* relates the incident of the "careful" Hawkins being accosted by the always impecunious Sergeant Ballantine, who said: "Look here, Hawkins, why do you take such care of your money? It can't be of much use to you in this world, and you can't take it with you to the next. Even if you could, it would only *melt*." This story recalls that Ballantine and his son, Walter, were both briefed to act for a lovely young widow, who, despite her humble origin, had been wedded by an exceedingly wealthy old man, and, better still, shortly afterwards left with the life interest in his fortune. The elder Ballantine was early in the case smitten with her charms, and, seeing the opportunity to repair his own shattered finances, exerted himself to such good purpose in defending an action taken by the relatives that an advantageous settlement was obtained, whereby she became absolutely possessed of a large sum. To his consternation, however, he found that his junior had not been inactive; and, a few days after the conclusion of the litigation, he read in a newspaper that Walter had become the second husband of the attractive client. Whether they lived happily thereafter is unknown, but the records show that the unfeeling son steadfastly refused to relieve the financial necessities of his sorrowing father.

Jury Troubles.—In *R.* v. *Neal*, [1949] 2 All E.R. 438, the appellant was charged at Quarter Sessions on an indictment containing counts for both felony and misdemeanour. He was acquitted on all charges of felony, but convicted on eight charges of misdemeanour, and sentenced. After the summing-up had been concluded and the jury had been given in charge of the bailiff, the Recorder gave them permission to leave Court to have luncheon together, and they did so. The Court of Criminal Appeal, however, considered that the permission given the jury to leave the Court and the bailiff after they had been charged was so serious an irregularity and departure from recognized legal procedure that the appellant's conviction must be quashed. Greater care was exercised in connection with a certain Grand Jury in Ireland by Mr. Baron Smith, a stickler for forms and ceremonies. The members of this jury, thinking that the Judge could have no further use for their services, slipped off to dine with the High Sheriff. Hearing of their departure, Baron Smith instantly sent messages to summon them back. They were just about to sit down at table, but they rose and hurried back to the Court-house. When they had all taken their places in the jury box, the Judge politely said: "Gentlemen, I now dismiss you for the night."

Jottings.—"Important as it is that justice should be done, and still more so that justice should appear plainly to be done, the most important element of all is that the Law should appear to everyone as their one protector against most if not all their social ills."

—From *Cases in Court.*

* The names of counsel appearing in each appeal in *New Zealand Privy Council Cases* (as well as other details to complete each report) were compiled for the publishers by the Privy Council office.—Ed.

PRACTICAL POINTS.

1. Charitable Trust.—*Bequest for Philanthropic Purposes—Void for Uncertainty—Trustee Amendment Act, 1935, s. 2.*

QUESTION: An intended testator of a benevolent nature is intending to leave the residue of his estate to such "philanthropic purposes" as his trustees in their absolute discretion should think fit. He purposes to give his trustees a free hand, as he cannot make up his mind what persons or objects he would like to benefit. Is such a bequest valid as the law stands at present in New Zealand? Reference is made to s. 2 of the Trustee Amendment Act, 1935.

ANSWER: Such a bequest is void for uncertainty, and is not saved by s. 2 of the Trustee Amendment Act, 1935: *In re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451, and *In re Ashton, Gordon* v. *Siddall*, [1950] N.Z.L.R. 42.

The gift will be good if the word "charitable" is substituted for the word "philanthropic": *In re Smith, Campbell* v. *New Zealand Insurance Co., Ltd., and Attorney-General*, [1935] N.Z.L.R. 299; aff. on app., [1937] N.Z.L.R. 33. To make certain that no succession duty will be payable, it would be wise to limit the charitable purposes to New Zealand: *Adams's Law of Death and Gift Duties in New Zealand*, 119, 205, and *Weston and Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 316.

X.1.

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2. Death Duties.—*Separate Life Insurance Policies taken out by Two Parties—Cross-assignments of such Policies by them—Premiums paid out of Partnership Funds—Death of One Partner—Liability of Policies to Death Duty.*

QUESTION: Two brothers, A and B, had been farming in partnership for upwards of twenty years, and all farming land and live and dead stock and their trading bank account were held by them as tenants in common in equal shares. The brothers had separate assets by way of Savings-bank accounts and shares acquired by equal drawings from the partnership accounts. The brothers were both bachelors, and lived together.

On the same date in 1944, each insured his own life for £1,000, the premium for A being £160 per annum and for B £140 per annum. The first and subsequent premiums were paid by one cheque drawn on the partnership account. No partnership books of account were kept.

Each partner, when furnishing his individual income returns, claimed as a deduction the premium paid on his own life each year from 1944 to 1949, inclusive.

In 1948, A absolutely assigned the policy on his life to B, and contemporaneously B assigned the policy on his life to A. A died in April, 1949.

Upon proof of A's death, the insurance company paid the proceeds of the policy on A's life to B.

The Commissioner of Stamp Duties contends that A, subsequent to the assignment, continued to pay the premium on his own life, upon the grounds (i) that the same method of payment was adopted after the assignment—namely, that a cheque for the aggregate premium was drawn from the partnership account; and (ii) that A in his individual income-tax return claimed exemption in respect of the premium (£160) payable under the policy on A's life.

(*a*) Are the whole or part of the proceeds of the moneys payable under the policy on A's life assigned to B in 1946 assets in A's estate by virtue of s. 5 (1) (*f*) of the Death Duties Act, 1921?

(*b*) Is the surrender value (at the date of A's death) of the policy on the life of B assigned to A in 1948 an asset in A's estate?

ANSWER: As the facts are complicated, and there is no reported case on all fours, the opinion of counsel should be obtained.

It may be stated, however, that, before the policy on A's life is brought into A's estate for death-duty purposes, the Stamp Duties Department must prove that there was some element of gift from A, when the cross-assignments were effected: *Adams's Law of Death and Gift Duties in New Zealand*, 52. Presumably this could be proved, because, at the date of the assignment, A's policy would be worth more than the one on B's life, A having a shorter expectancy of life, it being assumed that A was the elder brother.

By analogy with such cases as *Lord Advocate* v. *Fleming*, [1897] A.C. 145, and *Lord Advocate* v. *Inzievar Estates, Ltd.*, [1938] 2 All E.R. 424, it is considered that, both before and after the assignment, the premiums on the policy on A's life were contributed equally by A and B. The premiums were paid out of partnership moneys, and these moneys presumably belonged equally to A and B. Under s. 5 (1) (*f*) of the Death Duties Act, 1921, it is the *de facto* position which must be looked at. Their income-tax returns are irrelevant. It is therefore suggested (though somewhat tentatively) that only half of the policy moneys payable on A's death comes into his estate for death-duty purposes.

With regard to the policy on B's life, that comes in, under s. 5 (1) (*a*) and s. 16 (1) (*a*) or (*b*), in A's estate for death-duty purposes, and the measure of value is the surrender value as at A's death: *Adams's Law of Death and Gift Duties in New Zealand*, 51, 52.

X.2.

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3. Death Duties.—*Residue to be solely liable for Death Duty—Notional as well as Actual Estate involved—Drafting of Appropriate Clause.*

QUESTION: My client is making his will, and desires that the residue of his estate should bear the full burden of *all* death duty in his estate. His estate for death-duty purposes will comprise several substantial gifts and settlements which will be exigible for death duty under ss. 5 (1) (*c*) and 5 (1) (*j*) of the Death Duties Act, 1921. How should the necessary clause be drafted?

ANSWER: As recent cases show—*e.g.*, *In re Rayner, Daniell* v. *Rayner*, [1948] N.Z.L.R. 455—such a clause requires careful drafting, and, moreover, owing to the present very high rates of death duty, the testator should be advised of the effect of his desire; if carried out, it might, in the circumstances, throw an intolerable burden on the residuary legatee.

However, if the testator desires such a direction, one could not do better than follow the advice of Sir Michael Myers, C.J., in the last part of his judgment in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639, 650, 651. It appears, therefore, that it would suffice, if there were a specific direction, "to pay all death duties payable in respect of my *dutiable* estate out of residue," or a direction "to pay out of residue all death duties payable in respect of my estate (including death duties payable on my death in respect of any gifts or settlements which I may have made in my lifetime)."

X.1.

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4. Land Transfer.—*Title—Boundary Non-navigable Stream—Presumption* ad medium filum aquae.

QUESTION: My client has a Land Transfer title. On one side it is bounded by a non-navigable stream, according to the diagram on the certificate of title; the green wash on the diagram ends at the bank of the stream. In the body of the certificate of title, the land is described as "Lot No. on deposited plan No. ." I have ascertained that the area mentioned in the certificate of title is satisfied without including any part of the bed of the stream. Does my client's title extend to the centre of the stream? Has my client riparian rights over the stream?

ANSWER: The title extends to the middle of the stream unless the stream is shown as a separate lot on the subdivisional plan or unless the transfer under which your client or his predecessors in title claim specifically excluded the bed of the stream: *Strang* v. *Russell*, (1905) 24 N.Z.L.R. 916, *Wellington District Land Registrar* v. *Snow*, (1909) 29 N.Z.L.R. 865, and *The King* v. *Morison, Ante*, p. 8. The fact that the area is satisfied without including any of the bed of the stream is immaterial: *Wellington District Land Registrar* v. *Snow*, (1909) 29 N.Z.L.R. 865. Whether or not your client's title extends *ad medium filum aquae*, he will enjoy the usual riparian rights over the stream unless some special statutory provision deprives him of them or unless he or his predecessors in title have at any time released them.

X.1.