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THE BENCHERS OF THE INNS OF COURT.

THE Chief Justice, the Rt. Hon. Sir Humphrey O'Leary, K.C.M.G., is the only living New Zealander who is an Honorary Bencher of one of the Inns of Court. On only one other New Zealander, the late Sir Michael Myers, G.C.M.G., has that high honour been conferred.

In a recent letter to us, the Rt. Hon. Lord Greene, who, to everyone's regret, was compelled by ill-health earlier in the present year to resign his appointment as Lord of Appeal in Ordinary, said that it had given them at the Bench of the Inner Temple great pleasure to elect Sir Michael Myers, " who was undoubtedly a great Judge," as an Honorary Bencher. Lord Greene observed that, through an oversight, no mention was made of it in the tributes to the former Chief Justice recorded in this JOURNAL.

In his letter, Lord Greene said that the election of anyone as an Honorary Bencher is " *the greatest honour which can be paid to a lawyer by an English Inn of Court.*" This honour was conferred by the Bench of the Inner Temple on Sir Michael Myers in 1944 and on Sir Humphrey O'Leary in 1948. On their election, they each joined a distinguished company in that Society, whose ranks include His Majesty the King, Lord Simon, Lord Roche, Lord Wright, Lord Greene, Lord Macmillan (honorary), Lord Merriman, Lord Goddard (the Lord Chief Justice of England), Lord Oaksey, Lord Porter, and Sir John Latham (the Chief Justice of Australia) (honorary).

In adding to the ancient Roll of Masters of the Inner Temple two New Zealanders, whose whole life in the law was spent in their native land, the Benchers not only honoured them, but, in their persons, they also honoured the New Zealand Bar itself. The election of each of them was, accordingly, an event of historic significance in professional annals. " Such an election is deemed a high honour ; it lasts for life ; and it introduces the chosen one into the highest society of the legal world."[1] Thus, the late Sir Arthur Underhill echoed the words of an order of the Masters of the Bench of the Inner Temple made nearly three and a half centuries earliier. In the thirty-eighth year of Queen Elizabeth's reign, Edward Coke, Attorney-General, being Treasurer, the standard of excellence for election as a Bencher of that Inn was determined once and for all : " That no Benchers be called but such as be fittest both for their learning, practice, and good and honest conversation, and that they call not to the Bench too often, but very sparingly."[2]

[1] *Change and Decay*, 55.
[2] *Inderwick's Early History of the Inner Temple*, 414.

The word " Inne " was anciently used to denote town houses in which great men resided when they were in attendance at Court ; and it is frequently used by medieval poets to describe a great mansion anywhere. The four Inns of Court—the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn—stand upon a footing of equality. No precedence, priority, or superior antiquity is conceded to, or claimed by, one Inn beyond another—*Nihil prius aut posterius, nihil majus aut minus.* They form together one university ; their powers, jurisdiction, and privileges are coequal, and upon all affairs of moment the Benchers of the four Inns meet in conference. They are now what they were when Shirley dedicated to them his masque, *The Triumphs of Peace*—" the four equal and honourable Societies of the Inns of Court." Beaumont, who was of the Inner Temple, dedicated his masque " to the anciently allied houses of Gray's Inn and the Inner Temple, the Inner Temple and Gray's Inn," the repetition being intended to obviate any notion of priority or pre-eminence.[3]

The history of the Inner Temple would appear to commence with the last years of the thirteenth century, " the greatest of the centuries."

In the fourteenth century, however, we have but the scantiest records of them, as the late Sir William Holdsworth has said. Chaucer speaks of the Temple in connection with the law. Of the Manciple *of a Temple* he says :

> " Of maysters hadde he moo than thries ten,
> That were of lawe expert and curious ;
> Of which there were a doseyn in an hous."

Chaucer's evidence is the more valuable if it be true that he was himself a member of the Temple. In Speght's edition of Chaucer (1574), it is stated that he was of the Inner Temple on the authority of " Master Buckley," who, as chief butler of the Inner Temple, had access to records which are now lost : *Calendar of Inner Temple Records*, ii, viii ; if this be so, Chaucer's reference to " a Temple " would be strong evidence that in his day the Societies were not divided.[4]

Speaking as Treasurer of Lincoln's Inn at a dinner to representatives of the Canadian Bar in July, 1931, the late Sir Frederick Pollock said of the four Inns of Court :

> The history of the Inns of Court is little known, I am told, amongst our learned brethren overseas ; I would not myself answer for the majority of our own Bar knowing much of it.

[3] *Pearce's Guide to the Inns of Court*, 61.
[4] *2 History of English Law*, 494, 495.

> Our guests in this hall, or some of them, ask in effect, having already perceived that the Inns of Court are in many ways peculiar bodies, when the Society of Lincoln's Inn came into being, and how it became what it is. Now the four Inns are so much alike that to ask these questions concerning one is to ask them concerning all. If a categorical answer is demanded, the only safe one is that nobody knows . . . We do not know by whom, in what manner, with what consultation and negotiation, or within many years at what time, the scheme was worked out which I assume to have existed in rough outline about the end of the thirteenth century. Details are wholly wanting; I suppose it was nobody's business to preserve any record or memoranda. Quite possibly there was no formal writing at all, but only informal understanding. [After discussing the development of the legal profession, the learned author and historian proceeds:] On the whole then, the constitution of the Inns of Court was settled about the middle of the fourteenth century on the lines which in all essentials are much the same to-day.[5]

A judicial view of the origin of the Inns of Court may be found in the judgment of Mathew, L.J., in *Smith* v. *Kerr*, [1902] 1 Ch. 774, 782:

> They had their beginning in an ordinance and Commission issued by King Edward I in 1290 at the time when the clergy were forbidden by the canons from taking part as advocates in civil suits. It had become necessary in the interest of the public to obtain the assistance of laymen who were trained lawyers and who were competent to take the part of their clerical predecessors in conducting the business of the Court of Common Bench, which was then permanently settled at Westminster. The Commission required the Chief Justice of the Common Bench and his fellow-Justices to bring together from the provinces men "of the best and most apt for their learning and skill," who should be near the Court at Westminster. Under the Commission, and to fulfil its purpose, the Inns of Court and Inns of Chancery were established to provide for the legal education of students. The Inns of Chancery were affiliated with the Inns of Court and afforded instruction, as Sir J. Fortescue says, in "the nature of original and judicial writs, which are the very first principles of the law." After a short stay in the Inn of Chancery the student desirous of practising at the Bar passed on to one of the four Inns of Court.

The Benchers, or Masters of the Bench, are the seniors among those called to the Bar by the four Inns, in each of which they are entrusted with the government and direction. They are guided by no statute or constitution. They rule according to the codified customs of their particular Society. Their number has been maintained through the centuries by intermittently co-opting the ablest members of the Inn. From among their number in each Inn a Treasurer is chosen to hold office for a year, and to preside at the Bench Council or at the high table in Hall. The appointment of a Bencher is usually made according to his priority of call to the Bench. Last year, the Treasurer of the Inner Temple was His Majesty the King, the Deputy-Treasurer being the Rt. Hon. Lord Merriman, President of the Probate, Divorce, and Admiralty Division. The present Treasurer is Mr. P. E. Sandlands, K.C. Sometimes a stuff gownsman is Treasurer.

The authority of the Benchers over their Inn has been authoritatively stated as follows:

> In the orders of the Lord Chancellor and all Judges, in the 16 Car. 11, repeating the orders of the 12 Jac., and 6 Car. 1, it is ordained: "For that all government is strengthened or slackened by the observing or neglecting of the reverence and respect which is to be used towards the governors of the same, therefore it is required that due reverence and respect be had by the utter-barristers and younger sort of gentlemen, to the Readers, Benchers, and Ancients of either house." They also direct: "That the Innes of Chancery shall hold their government subordinate to the Benchers of every of the Innes of Court to which they belong, and that the Benchers of every Innes of Court make laws for governing them, as to keeping commons, and attending and performing exercises according to former usage. And in case any attorney, clerk, or officer, of any court of justice, being of any of the Innes of Chancery, shall withstand the directions given by the Benchers of the court, upon complaint thereof to the Judges of the court in which he shall serve, he shall be severely punished, either by forejudging from the court, or otherwise, as the case shall deserve." Benchers were to be chosen for their "learning, honest behaviour, and good disposition," and were to be "such as for their experience be of the best note and ability to serve the kingdom."[6]

No member of the Bar acquires by seniority a right to be elected a Bencher. On an appeal to the Judges brought by one Try, in 1689, complaining that he had been twice passed over in elections to the Bench of his Inn, the Judges held:

> The call to the Bench was no matter of right in any person, but was in point of government only, and that it was discretionary, and both persons and time ought to be left to the judgment of the Bench, in whom the government of the Society resided, and unless the appellant had been called and then disbenched no cause need be assigned the Bench refused the appellant.[7]

It was during the eighteenth century, the late Sir William Holdsworth has told us, that it was finally settled that the government of the Inns is vested in the Benchers, and that the other members of the Inns have no share in it. This freedom of action, which the Benchers thus secured, led to the growth of the rules as to the precedence of Benchers, as to persons qualified to become Benchers, and as to the position of the Treasurer and other officers of the Inns.

We can learn all about the powers of the Benchers from *2 Halsbury's Laws of England*, 2nd Ed. 477; but it may be interesting to know the nature of the legal status of their respective Inns. Lord Mansfield, C.J., delivering the judgment of the Court in *The King* v. *The Benchers of Gray's Inn*, (1780) 1 Doug. (K.B.) 353, 354, 355; 99 E.R. 227, 228, after consultation with the other Judges, said:

> The original institution of the Inns of Court nowhere precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning . . . in every instance, their conduct is subject to [the control of the Judges] as visitors. From the first traces of their existence to this day, no example can be found of an interposition by the Courts of Westminster Hall proceeding according to the general law of the land; but the Judges have acted as in a domestic forum.

When elected by the existing Benchers, all Benchers rank according to the date of invitation to the Bench, so that, as the late Sir Arthur Underhill said, a junior barrister may rank in his Inn above a Lord Chancellor or any other Judge, or even a Privy Councillor. He proceeds:

> They occupy the "high table" in hall—(indeed, three Benchers are required to attend at every dinner according to a rota). They hold councils about twice every term and pass divers resolutions relating to the government of the Inn, and, most important of all, they have the power to disbar a barrister, or even a fellow-Bencher who has been guilty of irregularity or crime. I rejoice to say that the need for this does not often occur.[8]

The first election of an Honorary Bencher was made by the Inner Temple in 1761, when Sir John Cust, the Speaker, was elected. He chose to be considered only as an honorary member, not liable to be elected

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[5] *48 Law Quarterly Review*, 163, 165, 166.

[6] *Pearce's Guide to the Inns of Court*, 425, 426.

[7] *Book of Orders of Gray's Inn*, 1666 to 1730, fo. 305.

[8] *Change and Decay*, 55.

Treasurer, but to pay all his commons then due and growing due.[9]

The association of distinguished members of the Bar in the Dominions, who were not originally members of the Inns of Court, was initiated by an election by Gray's Inn, at the time of the Imperial Conference of 1907. The first of such Honorary Benchers was Mr. Alfred Deakin, of the Victorian Bar, and Sir Wilfred Laurier, of the Quebec Bar, the then Prime Ministers of Australia and Canada, respectively. Since that time, a galaxy of legal talent from overseas has become Honorary Benchers of the several Inns. Among them (to confine our attention to the Inner Temple) are the present Chief Justice of Australia, Sir John Latham, and his predecessor, Sir Isaac Isaacs; Sir Maurice Gwyer, formerly Chief Justice of India; and Sir Michael Myers, and the present Chief Justice of New Zealand.

[9] *Middle Temple Bench Book*, 35.

Scotland is also represented among its Honorary Benchers in the person of Lord Macmillan.

In one of his most charming essays, *The Old Benchers of the Inner Temple*, Charles Lamb recalled his childhood memories of the Temple. We cannot do better here than quote his conclusion, wherein he apostrophizes "New Benchers of the Inner Temple" in these words:

> "May the Winged Horse, your ancient badge and cognisance, still flourish! so may future Hookers and Seldens illustrate your church and chambers! so may the sparrows, in default of more melodious quiristers, unpoisoned hop about your walks! so may the fresh coloured and cleanly nursery-maid, who, by leave, airs her playful charge in your stately gardens, drop her prettiest blushing curtsey as ye pass, reductive of juvenescent emotion! so may the younkers of this generation eye you, pacing your stately terrace, with the same superstitious veneration with which the child Elia gazed on the Old Worthies that solemnized the parade before ye!"

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Rates and Bankruptcy. *209 Law Times*, 310.

BILLS OF EXCHANGE.

Set-off against Claim on Bill of Exchange. *209 Law Times*, 312.

CIVIL AVIATION.

Air Navigation Regulations, 1933, Amendment No. 16 (Serial No. 1950/116), adding, relating to operational requirements, Reg. 6A (weather conditions), Reg. 6B (requirements for alternate aerodromes), Reg. 6C (category of alternate aerodrome), Reg. 6D (aerodrome meteorological minima), Reg. 6E (let-down procedure), and Reg. 6F (fuel requirements).

CONTRACT.

Work to be done for Particular Purpose—Implied Warranty that Work reasonably fit for That Purpose—Proof of Such Purpose—Onus of Proof of Breach of Warranty—Distinction between That Class of Contract and Contract to do Work according to Given Plan. Where a person agrees to do work for another to answer a particular purpose, there is an implied warranty that the work is reasonably fit for that purpose. (*Hall* v. *Burke*, (1886) 3 T.L.R. 165, and *G. H. Myers and Co.* v. *Brent Cross Service Co.*, [1934] 1 K.B. 46, followed.) (*Dodd and Dodd* v. *Wilson and McWilliam* (*Willington Medicals, Ltd., Third Party*), [1946] 2 All E.R. 691, referred to.) The purpose need not appear in the contract to carry out the work, but may be proved by evidence in writings or conversations at the time of, or before, the making of the contract; and the onus of proving a breach of the warranty lies on the person for whom the work is done. (*Gillespie Brothers and Co.* v. *Cheney, Eggar and Co.*, [1896] 2 Q.B. 59, and *Manchester Liners, Ltd.* v. *Rea, Ltd.*, [1922] 2 A.C. 74, applied.) The implied warranty is not prevented from arising by the fact that the person who agreed to do the work for a particular purpose had not done such work previously, or that he had so informed the other party. (*Hall* v. *Burke*, (1886) 3 T.L.R. 165, applied.) Another class of contract is that in which one person agrees to do work for another by merely following a given plan; but the mere fact that a contract for work to be done contains a specification does not necessarily show that such contract belongs to that class. *Semble*, In order to bring a contract for work to be done for another within the latter class of contract, it is not essential that the specification should have been supplied by the party for whom the work is done; it may be obtained from a third party, or supplied by the party to the contract who is to do the work. In an action in the Magistrates' Court, in which the plaintiff company sought to recover the price of an asphalt floor for the purpose of roller-skating laid down by it for and at the request of the defendant, judgment was given for the defendant. On appeal from that decision, *Held*, dismissing the appeal, That the contract between the parties was one in which the appellant had agreed to construct the floor for the respondent for the particular purposes of roller-skating, and the respondent had discharged the onus of proving that the floor was not, in an ordinary business sense, fit for that purpose. *Manawatu Asphalts, Ltd.* v. *Rae*. (S.C. Palmerston North. June 23, 1950. Cooke, J.)

CONVEYANCING.

Consideration and Equitable Assignment of Choses in Action. *94 Solicitors Journal*, 280, 297, 315.

Interruption of Public Right-of-way. *94 Solicitors Journal*, 364.

Medical Partnerships. (N. Leigh Taylor.) *14 Conveyancer*, 38.

CRIMINAL LAW.

Appeal against Sentence—Principles on which Court of Appeal may alter Sentence—Sentence to be based on Trial Judge's Appreciation of Degree of Seriousness in Particular Case—Criminal Appeal Act, 1945, s. 3 (a). The Court of Appeal will not alter a sentence unless it is manifestly excessive in view of the circumstances of the case or it is wrong in principle. (*R.* v. *Shershewsky*, (1912) 28 T.L.R. 364, and *R.* v. *Gumbs*, (1926) 19 Cr. App. R. 74, followed.) Facts vary so much in all cases that it is only by looking at the particular circumstances of the particular case that a true appreciation of the degree of seriousness of the case is obtained. It is on this appreciation that the sentence should be based. In this respect, the learned Judge who tries the case is in an outstanding position, and, in reviewing his sentence, the Court of Appeal must have great regard to the special knowledge he would have of the facts of the case and of all the relevant circumstances. The Court will not interfere with the discretion of that Judge merely on the ground that it might have passed a somewhat different sentence. *So held* by the Court of Appeal, refusing an application for leave to appeal against a sentence of twelve years' imprisonment with hard labour for manslaughter. *R.* v. *Brooks*. (C.A. Wellington. July 17, 1950. O'Leary, C.J., Callan, Stanton, Hay, Cooke, JJ.)

Receiving—Recent Possession of Stolen Property—Direction to be given to Jury. On an appeal against a conviction of receiving stolen goods, *Held*, That, where the only evidence on such a charge is that the accused person was found in possession of property recently stolen, the jury should be directed that they may infer guilty knowledge (*a*) if the prisoner offers no explanation to account for his possession, or (*b*) if they are satisfied that the explanation he does offer is untrue, but, if the explanation offered is one which leaves the jury in doubt whether he knew that the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty. *R.* v. *Aves*, [1950] 2 All E.R. 330 (C.C.A.).

As to Possession of Goods Recently Stolen, see *9 Halsbury's Laws of England*, 2nd Ed. 555, 556, para. 944; and for Cases, see *15 E. and E. Digest*, 972, 973, Nos. *10,861-10,879*.

DEATHS BY ACCIDENTS COMPENSATION.

Death of Passenger in Aircraft Disaster—Claim by Dependants against National Airways Corporation—Claim limited by Regulation to £5,000—Regulation validly made—Such Claim to be made in One Action on behalf of All Dependants of Deceased Passenger—New Zealand National Airways Act, 1945, ss. 17, 33, 34 (1)—New Zealand National Airways Amendment Act, 1948, s. 13 (2)—New Zealand National Airways Regulations, 1947 (Serial No. 1947/18), Reg. 3 (2). The New Zealand National Airways Regulations, 1947, were validly made under the first limb of s. 34 (1) of the New Zealand National Airways Act, 1945, and Reg. 3 (1) falls within the purpose for which those Regulations were contemplated; and s. 13 (2) of the New Zealand National Airways Amendment Act, 1948, supports that conclusion. (*Carroll* v. *Attorney-General for New Zealand*, [1933] N.Z.L.R. 1461, and *Attorney-General* v. *Clarkson*, [1900] 1 Q.B. 156, followed.) (Dictum of *Callan*, J., in *F. E. Jackson and Co., Ltd.* v. *Collector of Customs*, [1939] N.Z.L.R. 682, approved.) (*Chester* v. *Bateson*, [1920] 1 K.B. 829, *Attorney-General* v. *Horner*, (1884) 14 Q.B.D. 245, *Newcastle Breweries, Ltd.* v. *The King*, [1920] 1 K.B. 854, and *Attorney-General for Victoria* v. *Melbourne Corporation*, [1907] A.C. 469, referred to.) The limitation of liability to £5,000 imposed by Reg. 3 (2) on a claim made for damages in respect of the death of a passenger by, or for the benefit of, the person or persons specified therein, having regard to the terms of the Deaths by Accidents Compensation Act, 1908, applies to the claim made in one action in the name of the executor, or other person authorized by s. 10 of that statute, on behalf of all dependants of the deceased passenger for whose benefit an action may be brought. (*Public Trustee* v. *Heffron*, [1946] N.Z.L.R. 683, applied.) *So held* by the Court of Appeal, discussing an appeal from the judgment of *Sir Humphrey O'Leary*, C.J., *sub nom. Stephens and Another* v. *New Zealand National Airways Corporation*, [1950] N.Z.L.R. 168. *Jeune* v. *New Zealand National Airways Corporation*. (C.A. Wellington. June 9, 1950. Northcroft, Finlay, Hutchison, JJ.)

DIVORCE AND MATRIMONIAL CAUSES.

Evidence—Privilege—Letter by Husband to Probation Officer—Probation Officer consulted by Wife, but not accepted as Conciliator by Husband. On the hearing of a petition by a wife for divorce on the ground of the husband's alleged cruelty and desertion, the wife sought to adduce in evidence a letter which the husband had written to a Probation Officer in answer to a letter written to him by the Probation Officer after he (the Probation Officer) had been consulted by the wife with a view to effecting a reconciliation between the parties. The husband objected to the evidence being given, on the ground that the letter was privileged, but it was argued that it should be admitted, since the husband had not accepted the Probation Officer as a conciliator. *Held*, That the letter was privileged, and should not be admitted. (*McTaggart* v. *McTaggart*, [1948] 2 All E.R. 755, applied.) (*Bostock* v. *Bostock*, [1950] 1 All E.R. 25, doubted by *Denning*, L.J.) *Mole* v. *Mole*, [1950] 2 All E.R. 328 (C.A.).

As to Communications "Without Prejudice," see *13 Halsbury's Laws of England*, 2nd Ed. 703-705, para. 774; and for Cases, see *22 E. and E. Digest*, 375-378, Nos. *3836-3860*.

Maintenance—Amount—Wife's Earning-capacity—When to be taken into Account. A wife, who had obtained a decree of divorce on the ground of her husband's adultery, applied for an order for maintenance. Her husband was employed at a salary of £735 a year. There were two children of the marriage, one of whom was an infant aged four and a half years and in the custody of the wife. The wife, aged forty-one, had no means of her own and was not trained for any work, and during the period of the marriage, which had existed for twenty years, she had not been required to earn any money. After the divorce, as a temporary measure, she obtained board and lodging with a friend who owned a school, where she assisted in cooking meals and her child obtained free education. It was contended for the wife that, in arriving at the amount of maintenance ordered to be paid to her, *Willmer*, J., wrongly attributed a notional earning-capacity to her and based his calculation on the husband's earnings plus that notional figure. *Held*, That the question whether the earning-capacity of a wife is to be taken into account in assessing maintenance depended on the facts of each case, and no general rule could be laid down. In the present case, where the wife had never been required to earn money during her married life, where she had to look after a young child, and where she had no normal trade or calling, her earning-capacity should not be taken into account. Per *Denning*, L.J., If a wife does earn, her earnings must be taken into account; if she is a young woman with no children and obviously ought to go out to work in her own interest, but does not, her potential earning-capacity ought to be taken into account; if she has worked regularly during the married life and might reasonably be expected to work after the divorce, her potential earnings ought to be taken into account. Except, however, in cases such as those, it does not as a rule lie in the mouth of a wrongdoing husband to say that the wife ought to go out to work simply in order to relieve him from paying maintenance. *Rose* v. *Rose*, [1950] 2 All E.R. 311 (C.A.).

As to the Amount of Maintenance, see *10 Halsbury's Laws of England*, 2nd Ed. 790, 791, paras. 1252, 1253; and for Cases, see *27 E. and E. Digest*, 502-504, Nos. *5379-5396* and Digest Supplement.

Nullity—Conflict of Laws—Marriage of British Subject in Russia—Validity—Requirements of Soviet Law not observed—No Intention by Soviet Officials that Ceremony should be Effective Marriage—Mistake—No Right to Consortium—*Wife forbidden to leave Russia—Avoidance for Failure of Condition.* The husband, while serving in the Royal Navy, met his wife, a Russian subject, at Archangel, and they agreed to marry with the intention of living together in England. On October 16, 1945, they went through a ceremony of marriage before a Russian official. No consent to the marriage was asked for or given, the parties did not make the declarations, and the official did not ask the questions, required by the Soviet Marriage Code, but a marriage certificate was issued and the marriage was registered. Two days later, the husband left Russia. In April, 1947, marriages between Russian citizens and foreigners were forbidden, and the Russian Government prevented the parties from making a matrimonial home together by refusing to allow the wife to leave Russia or to permit the husband to go there. It was contended on behalf of the husband (i) that the marriage was void or voidable because of the failure to comply with the *lex loci celebrationis*; (ii) that there was a want of consent because the parties entered into the marriage in the mistaken belief that the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it existed before the marriage, or that the husband would be permitted to go and see his wife; (iii) that, under English law, marriage imposed a duty on the spouses to live together, whereas the Russian Code did not impose such duty, and, therefore, the marriage did not comply with the essentials of marriage as understood by English law; and (iv) that the subsequent Russian Government ban preventing the spouses from living together frustrated the marriage. *Hodson*, J., held that the marriage had not been invalidated for want of formalities. The husband appealed. *Held*, (i) That several formalities essential to a valid marriage in Russia had not been observed, and, as, in the circumstances, it appeared clear that the Soviet officials did not intend the ceremony to be an effective and valid marriage, and so intentionally omitted to comply with those formalities and to fulfil other requirements of the Code, the absence of the formalities resulted in the marriage not conforming with the *lex loci celebrationis* and so being invalid. Decision of *Hodson*, J., [1949] 2 All E.R. 959, reversed on this point. (ii) That, although the Soviet Code laid down that the keeping of a common matrimonial home should be fixed by mutual agreement, and that a change of residence by one spouse did not impose a duty on the other to follow, there was no evidence to support the proposition that the present marriage, according to the law laid down by the Russian Courts, involved so great a denial of the elementary principle of *consortium* as would justify the English Court in saying that it was no marriage at all. (iii) That there was no ground for holding that the parties married under a mistake because they believed that the Soviet practice of granting permission to wives of foreigners to leave Russia would continue to exist as it had existed before the marriage took place, because such beliefs and hopes about the future conduct of the Soviet Government could not be classified as mistakes of fact or mistakes as to the nature of the transaction into which the parties were entering. Decision of *Hodson*, J., [1949] 2 All E.R. 959, affirmed on this point. Per *Denning*, L.J., Assuming that the marriage was not invalid for want of formalities, it was voidable by reason of a condition that had failed. A marriage of persons with different domicils might be voidable for failure of a condition imported by the personal law of one of the parties if they married on the basis of that law. It was a condition of the marriage in dispute that the parties should be allowed to live together. That condition had been destroyed by the subsequent action of the Soviet Government, and, consequently,

as an essential condition of the marriage had failed, the marriage was voidable in the English Court on that ground. *Kenward* v. *Kenward*, [1950] 2 All E.R. 297 (C.A.).

As to the General Principle of Validity of Marriage in English Law, see *6 Halsbury's Laws of England*, 2nd Ed. 283-294, paras. 340-348; and for Cases, see *11 E. and E. Digest*, 417-420, Nos. *835-864*, Supplement, and Second Digest Supplement.

FACTORY.

Premises used for Repair of Vehicles—"Running repairs" and "minor adjustments"—Factories Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 67), ss. 25 (3), 151 (1) (vi). A repair shop at a tram-car depot was used for carrying out repairs to tram-cars, including the fitting into them of replacements of damaged parts made elsewhere and substantial repairs from time to time resulting from collisions, which sometimes involved keeping vehicles a considerable time. *Held*, That a place in which vehicles might be kept a considerable time for repairs after collisions could not be said to be used only for "running repairs or minor adjustments" to vehicles within the meaning of the Factories Act, 1937, s. 151 (1) (*vi*), which meant repairs arising in the course of ordinary running and adjustments necessary from time to time when nuts worked loose, electrical equipment required small corrections, small parts, or fuses, and so forth. The depot was, therefore, "premises in which the . . . repair of . . . vehicles" was carried on within s. 151 (1) (*vi*), and so constituted a factory for the purposes of the Act. *Griffin* v. *London Transport Executive*, (1950) 114 J.P. 230 (K.B.D.).

HUSBAND AND WIFE.

Gift—Wife allotted Three Shares in Company in which Husband held All Shares except Four—Presumption of Gift to Wife—Evidence Insufficient to raise Preponderance of Probabilities whether Wife Donee or Trustee of Shares—Presumption not rebutted. When all the shares in a private company are owned by one man, with the exception of three owned by his wife and one by his son, there is a presumption that the husband made a gift to his wife of those shares. If, after the death of both husband and wife, the evidence is insufficient to raise a preponderance of probabilities in favour of the wife's being either a donee or a trustee, the presumption of a gift by the husband to the wife has not been rebutted. (*In re Eykyn's Trusts*, (1877) 6 Ch.D. 115, and *Gascoigne* v. *Gascoigne*, [1918] 1 K.B. 223, followed.) In the present case, the liquidator of the company, who was in doubt concerning to whom he should pay an amount due in respect of the shares in the wife's name, paid it to the husband's executors, receiving in respect of such payment an indemnity from them. In an action by the wife's executor against the liquidator for that amount and interest, *Held*, 1. That, on the evidence, the defendant had not rebutted the presumption of gift of the shares to the wife, and the claim for the amount succeeded. 2. That the claim for interest failed, because, in any event, it would not be equitable to allow interest in respect of the whole period because of the delay in bringing the claim to Court, and, here, the defendant liquidator was not shown to be guilty of conduct subjecting him to that kind of penalty. (*Knowles* v. *Scott*, [1891] 1 Ch. 717, applied.) *Burtt* v. *English*. (S.C. Hamilton. June 30, 1950. Callan, J.)

Income from Wife's Investment of Her Own Moneys in Husband's Name—Receipt of Such Income by Husband—Spouses living together—Wife's Consent inferred from Circumstances or Conduct of Spouses—Principles applicable. If a husband and wife are living together and the wife is entitled to the income of a fund that is her separate property, and she allows her husband to receive such income and expend it at his pleasure, she will not be entitled to recover it back from him or his estate. *Edward* v. *Cheyne* (*No. 2*), (1888) 13 App. Cas. 385, *D'Albedyhll* v. *D'Albedyhll*, (1886) N.Z.L.R. 5 S.C. 24, *Elder's Trustees and Executor Co., Ltd.* v. *Gibbs*, [1922] N.Z.L.R. 21, and *Jenkin* v. *Commissioner of Stamp Duties*, [1949] G.L.R. 65, followed.) That principle depends upon the consent or acquiescence of the wife, and such consent or acquiescence may be inferred from the circumstances of the case or the conduct of the spouses. (*Dixon* v. *Dixon*, (1878) 9 Ch.D. 587, and *Edward* v. *Cheyne* (*No. 2*), (1888) 13 App. Cas. 385, followed.) Moreover, the principle applies even though the investment be in the name of the husband as trustee for the wife. (*Caton* v. *Rideout*, (1849) 1 Mac. & G. 599; 41 E.R. 1397, and *Edward* v. *Cheyne* (*No. 2*), (1888) 13 App. Cas. 385, followed.) The principle is not limited to cases where the income is expended by the husband for the joint purposes of husband and wife. Even if such a limitation did exist, the onus of proving that the husband did not expend the income for their joint purposes would be on the wife, if she wished to repel the application of the principle. (*Hutchison* v. *Hutchison*, (1843) 5 D. (Ct. of Sess.) 469, applied.) It was a proper inference from the admitted facts of the present case that the investment in 1937 by a wife of the sum of £1,640 in a mortgage (in which her husband invested £3,360) was an investment of the wife's money in her husband's name, and that her husband was a trustee of the sum of £1,640 for her. The husband and wife lived together. The principal sum was repaid in October, 1947, and of this the wife received the whole of her capital sum of £1,640, but she did not at any time receive any of the interest paid by the mortgagor. The husband died in November, 1947, and the wife in May, 1949. In an action by the executor of the wife against the executors and trustees of the husband's estate to recover the amount of the interest alleged to have been received by the husband on behalf of the wife, *Held*, 1. That, as, on the facts, no agreement between the husband and his wife as to payment of interest to her had been proved, and the husband received his wife's share of the interest and did not pay it to her, in view of the absence of any definite and formal claim for interest until May 6, 1948, it was a proper inference that the wife allowed her husband to receive her share of the interest and to expend it if and as he wished. 2. That, as the husband and wife were living together, that inference brought into play the principle applied in *Edward* v. *Cheyne* (*No. 2*), (1888) 13 App. Cas. 385, and the plaintiff's claim accordingly failed. *Buckley* v. *Foster*. (S.C. Palmerston North. June 19, 1950. Cooke, J.)

INCOME-TAX.

Executors and Remuneration of the Deceased. *94 Solicitors Journal*, 330.

Lump-sum Payments and Taxation. *209 Law Times*, 295.

INDUSTRIAL CONCILIATION AND ARBITRATION ACTS.

Union Membership—Manner in which Scope of Union's Membership determinable—Union Rules—Registrar's Certificate of Registration of Amendment—Validity examinable in Proceedings at Suit of Attorney-General—"Related industries"—"Technician"—Industrial Conciliation and Arbitration Act, 1925, ss. 5, 13, 27—Industrial Conciliation and Arbitration Amendment Act, 1937, ss. 2, 3. The name of a union was "The Wellington District Hotel, Restaurant and Related Trades Employees' Industrial Union of Workers," and its membership rule provided, *inter alia*, as follows: "4. (*a*) Any person employed or to be employed in the Wellington industrial district . . . (*e*) As a domestic worker in a hospital or other similar institution, other than a member of the professional or clerical staff, shall become a member of the Union." On November 15, 1949, the rules were amended. By that amendment, the word "Hospital" was inserted in the name between the word "Hotel" and the word "Restaurant." Subclause (*e*) of r. 4 (*a*) was deleted, and there was substituted the following new subclause: "(*v*) In a hospital or similar institution, as a porter, orderly, male nurse, male nurse trainee; or as a technician or attendant in a theatre, mortuary, X-ray department, massage department, clinic, laboratory, dispensary, or plaster department; or as a worker required to dispose of sputum, or to clean sputum containers; or as a domestic worker, other than a member of the clerical staff, or a worker at present covered by the rules of another industrial union." In an action, the Attorney-General, on the relation of certain persons employed in hospital work (a registered male nurse, a pupil male nurse, a bacteriologist, a bacteriological trainee, and a laboratory assistant), claimed that the amendment was *ultra vires* the Union and contrary to the provisions of the Industrial Conciliation and Arbitration Act, 1925, and its Amendments, and that the recording of it by the Registrar of Industrial Unions was unlawful. In another action, heard with the first-mentioned one, the plaintiff was the New Zealand Hospital Boards' Industrial Union of Employers, the first defendant being the Registrar of Industrial Unions, and the second defendant the New Zealand Federated Hotel, Restaurant and Related Trades Employees' Industrial Union of Workers. Other defendants were the Wellington Union and the Canterbury and Auckland Unions which had made amendments to their rules similar to those made by the Wellington Union, and those had also been recorded by the Registrar. On the question whether the amendment was *intra vires* or *ultra vires* the Union, having regard to the terms of the Industrial Conciliation and Arbitration Act, 1925, and its Amendments. *Held*, 1. That the scope of the membership of an industrial union of workers must be determined either by reference to s. 2 (1) (*a*) of the Industrial Conciliation and Arbitration Amendment Act, 1937, exclusively of s. 2 (1) (*b*), or *vice versa*, including in each case related industries. 2. That,

inasmuch as the primary object of a hospital is different from that of a hotel, restaurant, boardinghouse, or other similar institution, the fact that domestic workers are employed in each case does not make the operation of hospitals a "related industry" (within the meaning of that term as used in s. 5 of the Industrial Conciliation and Arbitration Act, 1925) *vis-d-vis* the others; but that domestic workers in a hospital may properly be included in a Union of workers in hotels, restaurants, and related trades. 3. That, although under s. 3 (3) of the Industrial Conciliation and Arbitration Amendment Act, 1937, the Registrar's certificate of registration of an amendment to the rules of a union is stated to be conclusive, the validity of the registration is examinable in appropriate proceedings at the suit of the Attorney-General. (Dicta of *Lord Parker of Waddington* in *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406, 439, 440, and of *Sir Michael Myers*, C.J., and *Ostler* and *Kennedy*, JJ., in *In re Otago Clerical Workers' Award, Otago and Southland Stock and Station Agents' Clerical Employees' Trade Union* v. *Otago Clerical Workers' Industrial Union of Workers*, [1937] N.Z.L.R. 578, 607, 630, 642, adopted and followed.) *Attorney-General* v. *Smith* (*Registrar of Industrial Unions*). *New Zealand Hospital Boards Industrial Union of Employers* v. *Smith* (*Registrar of Industrial Unions*). (S.C. Wellington. July 3, 1950. Hutchison, J.)

JUDICIAL CHANGES.

His Honour Sir Robert Kennedy, who has been a member of the Supreme Court Bench since 1929, has resigned.

Mr. F. B. Adams of Dunedin has been appointed a Justice of the Supreme Court.

Lt.-Col. Patrick Redmond Barry, M.C., K.C., and Mr. Terence Norbert Donovan, K.C., have been appointed Justices of the High Court of Justice, in the King's Bench Division and in the Probate, Divorce, and Admiralty Division, respectively.

LAND AGENTS.

Land Agents' Commission. *100 Law Journal*, 381.

When has an Estate Agent earned his Commission? *94 Solicitors Journal*, 293.

LANDLORD AND TENANT.

Covenant to deliver up in Repair. *209 Law Times*, 264.

Perpetually Renewable Leases and Options to Renew. *209 Law Times*, 297.

Relief against Forfeiture on Distress. *94 Solicitors Journal*, 331.

LAW PRACTITIONERS.

Costs: Company Formation. *94 Solicitors Journal*, 296.

Costs: Companies' Winding-up. *94 Solicitors Journal*, 314, 329.

Costs: Trustees. *94 Solicitors Journal*, 363.

MINES, MINERALS, AND QUARRIES.

Licence in respect of Water—No General Right given to Crown to apply for Such Licence—Renewal of Licence—Notice given before or after Expiration of Licence—Time for marking out Water-race—"Any licence heretofore granted"—Mining Act, 1926, s. 177. There is nothing in s. 177 of the Mining Act, 1926, to restrict the words "mining privilege in respect of water" to a mining privilege authorizing the use of water exclusively for mining purposes. The section applies to a renewal where notice is given before the expiration of the licence, as well as to an application made after expiration; and the water-race may be marked out on behalf of the Crown after the receipt of the notice of application and before the expiry of the licence. Section 177 gives no general right to His Majesty to apply for a mining licence in respect of water, because his general power to apply, in the circumstances mentioned in that section, is given only to the Minister or his authorized representative on behalf of His Majesty. *In re Mooney's Application.* (S.C. Dunedin. June 22, 1950. Kennedy, J.)

NEGLIGENCE.

Application of the Contributory Negligence Act to Liability for Dangerous Premises. (Glanville L. Williams.) *13 Conveyancer*, 415.

PATENTS.

Patents Amending Regulations, 1950 (Serial No. 1950/124), relating to Convention applications for the grant of patents, and, by amending Reg. 15, bringing it into harmony with Art. 4, para. D 3, of the International Convention for the Protection of Industrial Property.

PROBATE AND ADMINISTRATION.

Grant to Single Administrator. *209 Law Times*, 309.

PUBLIC REVENUE.

Government Stores Regulations, 1950 (Serial No. 1950/120), creating a Government Stores Board, Advisory Committee, and Supplies and Tenders Committee, generally to co-ordinate, supervise, and effect the purchase of stores for Government Departments.

SHIPPING AND SEAMEN.

Ship Desertion—No Appeal from Conviction with Fine under Five Pounds or Imprisonment not exceeding One Month—Shipping and Seamen Act, 1908, ss. 132 (a), *330—Justices of the Peace Act, 1927, s. 315—Justices of the Peace Amendment Act, 1946, s. 2.* Section 315 of the Justices of the Peace Act, 1927, as amended by s. 2 of the Justices of the Peace Amendment Act, 1946, confers no right of appeal against a conviction of the offence of ship desertion under the Shipping and Seamen Act, 1908, and a sentence of one month's imprisonment for such offence, as the latter statute, by s. 330, provides that there shall be an appeal only when the amount of the fine inflicted exceeds £5 in amount or the period of imprisonment exceeds one month. (*Weston* v. *Fraser*, [1917] N.Z.L.R. 549, referred to.) *Apted* v. *Beswick.* (S.C. Wellington. July 20, 1950. Fair, J.)

STATUTE.

Interpretation—Power to make Regulations—Regulations made limiting Liability in Claims in Respect of Passenger's Death—Subsequent Amendment Act applying to Such Regulations—Assumption by Legislature of Existence of Power to make Such Regulations—Legislative Declaration of Previous Intention—Regulations valid—New Zealand National Airways Act, 1945, s. 34—New Zealand National Airways Amendment Act, 1948, s. 13 (2). Per *Finlay*, J., That s. 13 (2) of the New Zealand National Airways Amendment Act, 1948, though not purporting to be retrospective, is a legislative pronouncement that Regulations limiting the amount which could be claimed in respect of the death of a passenger are Regulations of a type and character which were in the contemplation of the Legislature and authorized by it when it passed s. 34 (1) of the principal Act; alternatively, it is a declaration that, when the Legislature passed the principal Act, it intended to give a power to limit by Regulations claims to damages in respect of death. (*Attorney-General* v. *Clarkson*, [1900] 1 Q.B. 156, approved in *Attorney-General for Victoria* v. *Melbourne Corporation*, [1907] A.C. 469, followed.) (*Archibald* v. *Commissioners of Stamps*, (1909) 8 C.L.R. 739, and *Hedderwick* v. *Federal Commissioner of Land Tax*, (1913) 16 C.L.R. 27, referred to.) Judgment of *Sir Humphrey O'Leary*, C.J., reported *sub nom. Stephens* v. *New Zealand National Airways Corporation*, [1950] N.Z.L.R. 168, affirmed.) *Jeune* v. *New Zealand National Airways Corporation.* (C.A. Wellington. June 9, 1950. Northcroft, Finlay, Hutchison, JJ.)

TENANCY.

"Let as a separate dwelling": The Tests. *94 Solicitors Journal*, 299.

Proof of Nuisance or Annoyance. *94 Solicitors Journal*, 316.

Service Occupancy. (K. F. Simpson.) *14 Conveyancer*, 36.

TRAFFIC.

Proof of Speeding. *100 Law Journal*, 383.

Speed Limit Prosecutions. *94 Justices of the Peace Journal*, 309.

TRANSPORT.

Transport Licensing Exemption Order, 1950 (Serial No. 1950/112), exempting from licensing under Part VI of the Transport Act, 1949, goods services carried on exclusively for purposes of painting, repair, or maintenance of petrol-pumps and underground equipment.

TRESPASS.

Entry as of Right. (G. W. Paton.) *24 Australian Law Journal*, 47.

TRUSTS AND TRUSTEES.

Powers—Direction to Trustees to use Surplus of Estate "for such charitable purposes as [they] may in their absolute discretion think fit"—Trustees' Desire to pay Part of Such Moneys for Purposes of Organization not a "Charity" and having Some Political Objects—Trustees' Power limited to Expenditure of Moneys for Oraganization's Charitable Purposes—Agency of Such Organization for Application of Moneys for Charitable Purposes a Moral Necessity—Valid Delegation of Trustees' Ministerial Duty. Trustees who have an absolute discretion to expend trust moneys "for such charitable purposes as they think fit" may pay such money to an organization (not a "charity" in its legal sense) for its charitable purposes notwithstanding that all its objects are not charitable and that it has purposes that are primarily and dominantly political. The trustees, in paying such moneys to that organization for application by it to its merely charitable purposes within the law as it stands, are not delegating their discretion, but are properly availing themselves of its agency. (*Speight* v. *Gaunt*, (1883) 9 App. Cas. 1, followed.) *In re Davis, Hannen* v. *Hillyer*, [1902] 1 Ch. 876, applied.) (*Knowles* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 522, referred to.) (*Re Partanen*, [1944] 2 D.L.R. 473, distinguished.) Observations on the objects and purposes of the New Zealand Alliance for the Suppression of the Liquor Traffic and of the New Zealand Bible-in-Schools League. *In re Williams (deceased), Gardiner* v. *Attorney-General and Commissioner of Stamp Duties.* (S.C. Napier. June 19, 1950. Hutchison, J.)

Trusts for Non-charitable Purposes. (D. C. Potter.) *13 Conveyancer*, 418.

VENDOR AND PURCHASER.

Options to Purchase. *100 Law Journal*, 368.

Options. (Russell Fox.) *24 Australian Law Journal*, 50.

WILL.

Alterations in Wills. *100 Law Journal*, 257.

Condition—Certainty—To J. "if he shall occupy my freehold property." A testatrix, who died in 1935, by her will devised her freehold house, "Saint Johns," to W. during his life and after his death to J. if he should survive her and attain the age of twenty-five years. She also bequeathed certain chattels on trust to permit W. to have the use thereof during his life and, on his death, in trust for J. "if he shall attain the age of twenty-five years and shall occupy my freehold property 'Saint Johns.'" The testatrix also bequeathed a fund for the upkeep of "Saint Johns" on trusts similar to those to which the chattels were made subject. In September, 1944, J. died, having attained the age of twenty-five years, but never having occupied "Saint Johns." In December, 1948, W. died. *Held*, That the requirement that J. "shall occupy my freehold property" was a condition which was void for uncertainty, because it was impossible to ascertain the nature of the occupation necessary to fulfil it. (*Re Coxen*, [1948] 2 All E.R. 492, distinguished.) *Re Field's Will Trusts, Parry-Jones and Another* v. *Hillman and Others*, [1950] 2 All E.R. 188.

Delusions and Testamentary Capacity. *209 Law Times Jo.*, 136.

STAMP DUTIES AND LAND TRANSFER DEPARTMENTS.

Administrative Changes.

Perhaps the two Government Departments with which solicitors come into contact most frequently are the Stamp Duties Department and the Land Transfer Department. It will therefore probably be of interest to members of the profession to learn that changes have recently been made in the administration of these Departments.

For about seventy-five years, these two Departments have been under the one Departmental head, the Commissioner of Stamp Duties (the head of the Stamp Duties Department), who was also the Secretary for Land and Deeds (the administrative head of the Land Transfer Department).

These two Departments for many years have had offices in Auckland, New Plymouth, Wellington, Napier, Gisborne, Nelson, Hokitika, Blenheim, Christchurch, Dunedin, and Invercargill. In the four chief centres (Auckland, Wellington, Christchurch, and Dunedin), there have been separate District Stamp Offices and separate District Land Registries; but in each of the other seven towns there has been a combined Stamp and District Land Registry, the person occupying the position of Assistant Commissioner of Stamp Duties being also District Land Registrar.

Although both Departments have been accustomed to deal almost exclusively with solicitors and their clerks, in reality the Departmental functions have been entirely different, and their union had no logical basis. The Stamp Duties Department is essentially a branch of what in England is termed the Inland Revenue Department: it deals with such complex and contentious matters as the collection of stamp, gift, and death duty, amusements tax, and annual licence duty. The Land Transfer Department, on the other hand, deals with the highest and most difficult form of registration—the registration of title to land; it is a branch of conveyancing. By reason of its association with the Stamp Duties Department, the Land Transfer Department has rather incongruously been under the Ministry of Finance.

The Stamp Duties Department has recently been amalgamated, for administrative purposes, with the Land and Income Tax Department, and remains with the Ministry of Finance.

The Land Transfer Department has been attached, for administrative purposes, to the Justice Department, and has been placed under the Minister of Justice. This corresponds to the practice in New South Wales and Victoria. The Under-Secretary for Justice has been appointed Secretary for Land and Deeds.

One of the functions hitherto performed by the Stamp Duties Department—namely, the registration of companies—has been transferred to the Land Transfer Department—an arrangement which also corresponds to that in New South Wales and Victoria. As a consequence, the Registrar-General of Land (the legal head of the Land Transfer Department) has been appointed Registrar of Companies, and each District Land Registrar has been (or shortly will be) appointed an Assistant Registrar of Companies. It is pointed out, however, that consents under the Finance Emergency Regulations, 1940 (No. 2)—*e.g.*, consent to form a company with a capital exceeding £10,000—must still be obtained through the Commissioner of Stamp Duties, for that is essentially a function of the Ministry of Finance.

These re-arrangements will make little difference in

the work of solicitors and their clerks.

The Head Office of the Companies Department has been shifted to the fourth floor of the State Fire Building, Lambton Quay, Wellington, Post Office Box 5069, and its code telegraphic address is " Landeeds."

In Christchurch and Dunedin, the company work has already been taken over in the Land Transfer office. In Auckland and Wellington, the change-over has been deferred, pending the acquiring of necessary accommodation in the Land Transfer offices in those cities.

SCROGGS AND JEFFREYS.

Two Chief Justices of England.

By S. H. MOYNAGH.

Two books fairly recently published have floodlighted the lives of two of the most infamous and inhuman Judges who ever tarnished the administration of justice in any country. They were contemporaries during a portion of the period during which they sat as Judges, and, in a sense, one was the complement of the other. The first book, *Judge Jeffreys*,* is really a second edition of the original, which was published in 1940, and a second edition was rendered necessary owing to the destruction by enemy action of the plant from which it was printed. The author, Dr. H. Montgomery Hyde, D.Litt., in his preface to the second edition tells us that copies of the first edition are extremely rare, and that a reprint was impossible. The second book is Jane Lane's *Titus Oates*,† which was published last year.

Both Judges were typical products of their age, an age in which the passport to success at the Bar was the extremely convenient absence of any form of conscience and the readiness to befoul any natural dignity of mankind by the basest subserviency if it led to any success. Not all were affected. Conscience might lead Saint Thomas More, Lord Chancellor, to martyrdom by way of Tower Hill; but the want of it was to lead Sir William Scroggs to the Chief Justiceship of England and George Jeffreys to the Woolsack and the House of Lords. In each case, however, it proved that the path through the Via Sacra led to the dreaded Tarpeian Rock.

The only two characteristics this pair shared in common were their readiness to prostitute to an almost incredible extent the administration of justice at the bidding of their respective royal masters, Charles the Second and James the Second, and their ignominious dismissal from office at the demand of the awakened conscience of the people of England. Otherwise they were as far apart as the poles.

Jeffreys was from Wales, and was of a good family. Scroggs was from Oxfordshire, and was from a family of poor repute. Jeffreys was one of the most handsome men in England until the disease from which he suffered imprinted the grave seal on his countenance. Scroggs was " a man with a brazen face, coarse manners, and a brutal tongue." Modern research has proved that Jeffreys could be called a sound lawyer in cases where no statecraft was involved. Scroggs, according to the *Dictionary of National Biography*, " possessed little reputation as a lawyer." So far as is known, Jeffreys' life was chaste: Scroggs' promiscuity was notorious. His public life could not stand examination even allowing for the tolerance of the times in this respect. Scroggs existed from about 1623 to 1683 and Jeffreys from 1645 to 1689. By a curious coincidence, they were both buried in the same church, but enemy action intervened, and frustrated any plans they might have had for mutual assistance and support on the morning of the last Great Assize.

During the occupancy by Scroggs of the position of Chief Justice, there occurred in England one of the worst visitations that can beset any country—mass hysteria. Many of us can remember and appreciate the dangers it caused at the commencement of the first World War. At this time, it was a complex that the handful of Catholics that survived in England after the Henrican and Elizabethan persecutions were conspiring to assassinate Charles the Second and by force restore the old faith. Of course, in this nefarious plan the Jesuits were the chief designers, and expert advice as to the execution of the plan was expeditiously (for the times) and piously supplied from Rome. One at this distance of time cannot credit how the conscience of the people could have been so chloroformed by the tales of this stupendous plot, for Carte in his *Life of Ormond* estimates that the proportion of the alleged plotters in the whole of England to those of non-Catholic belief was scarce " one Papist to a hundred Protestants." But there was a fanatical element at that time in England, with its five and a half million population, mostly survivors of those who took an active part in the Cromwellian turmoil, which existed in well-defined strata through the entire population. They were mostly Dissenters, who regarded the Church of England as merely a branch of the Church of Rome, and hated it just as intensely. In the higher ranks of the people were the nobility created by Henry and Elizabeth, whose fortunes consisted of confiscated monastic property, and who were fearful of deprivation. Against this seething mass of ill will the Catholics themselves were hopelessly divided. Some hoped by the scrapping of certain dogmatic principles to secure the liberty of living in at least comparative peace; and also there was the increasing personal hostility to Charles the Second, largely fanned by the public misconduct and greed of his harem of mistresses.

With the stage set as somewhat briefly described, in 1649 (also memorable as the year of the execution of Charles the First) was first heard the puling in Rutlandshire of a male child, afterwards to be known in history as Titus Oates, and destined, as Miss Lane writes, to initiate " the writing of the darkest chapter in the history of English Justice "; and she adds that " the birth of this obscure baby preceded a series of judicial

* *Judge Jeffreys*, by H. Montgomery Hyde, D.Litt. London: Butterworth & Co. (Pub.), Ltd. 25s.

† *Titus Oates*, by Jane Lane (Mrs. Elaine Dakers). London: Andrew Dakers, Ltd.

murders without parallel in the story of these nations." He was ever a disagreeable type, as the extant portraits of him show; he was known to his playmates as "Filthy Mouth," and, as a scholar, at no period of his life did he advance much beyond illiteracy. We cannot now follow the development of the character of Oates (which belongs to other chroniclings). We begin with his discovery of the alleged "Popish Plot" and the trials as a result of his discovery, over which Scroggs presided. Suffice it to say the rumblings of an empty stomach and the disagreeable but positive results of accusations of homosexual activity swept away any preconceived religious tendencies he may have possessed, and Oates was in turn an Anabaptist, an Anglican Chaplain in the Navy (from which he was dismissed with ignominy), and a pseudo-Catholic. The Baptist Conference publicly repudiated any connection whatever with Oates.

The strain and stress of war finds many unexpected victims, and in many cases these results are transmitted to succeeding generations who were not involved in actual conflict. If this statement be axiomatic—and I think it is—the Civil War between Charles and Parliament must have left a permanent legacy of ill-balanced mentality in many in England. All over the country appeared fanatics preaching against the "Roman Religion" and stirring up the people to an insane fear of it and all that it stood for. These folk did not all come from the ranks of the illiterate and thoughtless, for one of the most zealous, and, on account of his rank and wealth, one of the most dangerous, was Anthony Ashley Cooper, to be in time Earl of Shaftesbury. He had spent some time in the Tower as a prisoner, and was quite obviously ill-balanced and eccentric. There is no doubt that it was the active support by Cooper of Titus Oates and his alleged discoveries that supplied Lord Chief Justice Scroggs with employment for two blood-stained years during which he presided at the trials of those denounced for complicity in the Plot.

Another of the "Saviours of England," as Oates and his coterie were affectionately termed, was one Dr. Israel Tongue, who was really the founder of the Plot. This man was of peculiar temperament, and was a dabbler in the black arts of alchemy and astrology, but, after joining forces with Oates, he became a raging lunatic on the subject of the Plot, and was prepared to support his ravings by any perjury, forgery, publication, or sermon. By the time he met Tongue, Oates had been dismissed from the Catholic Church, and was reduced to a state of destitution when they joined forces. Tongue readily summoned up Oates' character, his use as an accomplice, and the value he would be in obtaining corroborative evidence in the contemplated treason trials he intended launching at a propitious moment.

So the position was that the two chief fanatics, Shaftesbury and Tongue, became obsessed with the idea of the Plot, and marching *pari passu* with them was Oates, valuing nothing of any man's life or reputation. He was in time to persecute with merciless severity the very people who had by their alms saved him from hunger and released him from prison.

As a result of this combination, in 1678 the people of England were lashed into fury by the revelation of an alleged Popish Plot to restore the Catholic religion in England, and no obstacle, even to the murder of the King, was to prevent its accomplishment. The intensity of this outburst of fury was entirely unknown in the England of Henry VIII and Elizabeth, for, no matter what the private religious convictions (or the entire absence of any) of these monarchs may have been, the deaths of the Recusants, as they were then called, were attended by no scenes such as desecrated the deaths of those who died for alleged complicity in the Plot. No one was safe from the trio's vengeance, not even the Queen, and a shocked House of Commons was constrained to listen to Oates standing at the Bar of the House and bellowing (for he never talked beneath a roar): "I, Titus Oates, accuse Catherine, Queen of England, of high treason." Catherine of Braganza just escaped—nothing more.

However, there were other victims, and Miss Lane at the conclusion of her erudite and fascinating biography writes:

> To great men like the five Lords, as to humble men like Stratford and Medburne, his bare word had brought death, imprisonment, and ruin. But for him Lord Stafford would not have lost his head on Tower Hill, nor Archbishop Plunkett have endured the anguish of the quartering-block at Tyburn. Through his agency hundreds of loyal Englishmen had been driven into exile, thousands of families had lost their livelihood, numberless innocents had succumbed to the filth and fetters of a jail. His voice, that peculiar affected voice, uplifted in accusation, had instituted a period of terror unparalleled in the history of a great and ancient people; Judges had listened to it in respectful silence.

Yes, there is the explanation. Mr. Justice Scroggs, judicial bully, and subservient slave to the most fickle of the worthless Stuarts, was the cause. His voice lives in the record of his trials. In his second trial, he addressed Oates, who was giving evidence against Coleman, a Jesuit Priest: "Take your own way and your own method." All legal form being thus dispensed with, Coleman was sentenced to the dread ordeal of hanging, mutilation, disembowelling, and quartering, and this dispensation so graciously given by Scroggs was never in any of the subsequent trials mitigated or withdrawn.

Again, at the trial of the Jesuits, a question as to the evidence to be given by Oates was involved, as he had previously been indicted for perjury. One of the witnesses for the defence produced a copy of this indictment, when Scroggs, seeing the effect it would have on the jury, intervened, and refused to allow it to be read, saying: "Truly I do not think it sufficient evidence or fit to be read."

Thus was the conviction of the prisoner secured.

All the accused were not ecclesiastics. There was a barrister called Langhorne, who defended himself with ability, to the great embarrassment of Oates. Miss Lane records the scene:

> Soon came from Titus a bleat for help: "My Lord, I desire of your Lordship, please, that Mr. Langhorne may ask the Court, and the Court ask me, for I know the Court will be so kind as to ask me, such questions as are reasonable and proper for me to answer.

Scroggs immediately agreed, and by this method the value of the cross-examination was destroyed and the unfortunate Langhorne sacrificed.

I do not propose to continue abstracting all the *obiter* of Scroggs in these trials. It would be wearisome—in fact, nauseating. A few will suffice. Addressing Father Marshall, a Benedictine monk who was on trial before him, he thundered:

> I do believe it is possible for an atheist to be a Papist, but it is hardly possible for a knowing Christian to be a Christian and a Papist. Therefore never brag of your religion, for it is a foul one and so contrary to Christ as it is easier to believe anything than to believe an understanding man may be a Papist.

This cannot be regarded as an outstanding example of judicial impartiality, but, as many Judges past and present have done, and in future will do, he overcharged the jury, and, to his intense and visible chagrin, the prisoner was acquitted. And so we leave him with this from the *Dictionary of National Biography*:

> His behaviour on the Bench compared unfavourably with that of Jeffreys—in time he was undoubtedly one of the first Judges who ever disgraced the English Bench.

And now Jeffreys. In his foreword to Dr. Montgomery Hyde's book, the Rt. Hon. Sir Norman Birkett says this:

> The career of Judge Jeffreys is of absorbing interest not only to lawyers but to all who have any concern at all with human affairs—the life of Jeffreys is woven into English history.

It is strange that this career of Jeffreys' should be so outstandingly anathematized by the English people. There have been Judges in Scotland and in Ireland just as sadistic and inhuman as he was. Probably his treatment of Lady Alice Lisle at her trial provides the solution. Unlike Scroggs, and possibly because he held office during the reign of James, he was touched only slightly by the Catholic trials—that is, in comparison with Scroggs. This particular blood lust had liquefied itself before Scroggs died or Jeffreys ascended the Bench; but he was the arch-prosecutor of the Dissenters.

His early education was good. He spent some time at Shrewsbury, and later he was a pupil at the famous St. Paul's School at London, from which he went to Westminster. Whilst still a boy, many marked signs of the intemperance for which he was after to become so infamous were discovered, and a story was circulated that his father expressed his fear that "he would expire with his shoes and stockings on." There was more truth in his suggestion than either his father or the boy knew, and, were it not for the fact that death interposed his shield between the stricken Judge and the outraged people of England, it would have been most painfully verified, for he just escaped lynching.

The first of his political trials took place early in 1677. A certain Muggleton was convicted of publishing a blasphemous book. It was merely a case of exhibitionism on the part of a fanatic who was clearly more than a little mad. The prophet was convicted and the usual fine imposed, with the additional penalty of a period in the pillory. Jeffreys addressed the prisoner thus:

> You rogue that stands there. You impudent rascal, sirrah, that hath such confidence to stand in the presence of the Court to justify so much blasphemy. Sirrah, the Court has been much too favourable to such a villain as thou art, who has been guilty of the blackest deed that was invented by any rogue except thyself. Deeds arising from the very blackest of darkness itself—and, considering all thy villainy, the Court has been too favourable to proposing a sentence. You are to stand three days in the pillory in three principal places in the City of London; and your blasphemous books are to be divided into three parts and those with fire to be consumed before thy face; and you are to pay a little fine, but five hundred pounds. It is but a little one considering your villainy; and you must give security for your good behaviour during your life and such as not of your gang.

Quite sufficiently comprehensive for a maiden effort, and Muggleton's friends were roused. They obtained a writ of habeas corpus from one of the Chief Justices, which Jeffreys tried to make ineffective. Muggleton was a sturdy and deep-thinking litigant, and, not to be outdone in any form of politeness, recorded his opinion that Jeffreys:

> was recorded in the tables of Heaven for a reprobate devil and he shall be recorded here on earth to the end of the world a damned devil.

Thus was penned the first of a series of extremely unfavourable biographical notices of this Judge, which was continued in full spate to the present time.

There is no doubt that Jeffreys was insane, but whether his insanity was congenital or derived from the disease from which he suffered will now probably never be ascertained. Our phychiatrical knowledge is now sufficiently advanced to justify us in thinking that a man who could use the following terms in sentencing a woman to flogging for a mere case of shoplifting was mentally deranged:

> Hangman, I charge you to pay particular attention to this lady: scourge her soundly, man! Scourge her until the blood runs down. It is Christmas, a cold time for madam to strip; see that you warm her shoulders thoroughly.

This quotation is from *Macaulay's History of England*, and is now almost worn bare by repetition.

But his undying fame must always be associated with the "Bloody Assizes." However, it is not quite fair that Jeffreys should have to carry the whole load of execration for these, for there were four other Judges appointed to go Circuit with him in the counties where Monmouth's rebellion had the greatest following. These must equally share the odium. Modern historical research has, it is submitted, proved conclusively that the total number of executions has been greatly exaggerated. There were about 2,600 prisoners to be tried, and it has now been ascertained that the number executed was in the vicinity of about 170. It must be remembered that over 1,300 had been found guilty, sentenced to death, and reprieved, but Jeffreys' memory was ruthlessly handled by the Whig historians.

Time and space will not permit an adequate discussion of the case of Lady Alice Lisle, which has always been regarded as the most fiendish episode in Jeffreys' career. At the time of her trial for sheltering fugitives from Monmouth's army, she was over seventy years of age. She was quite decrepit, and practically slept all through the hearing of the charges against her. Jeffreys bullied such witnesses as had the courage to testify for her by such expressions as:

> You impudent rascal; you blockhead; lying Presbyterian knave; thou wicked wretch; thou art a strange, prevaricating, shuffling, snivelling, lying rascal.

These tactics prevailed, and, after a short retirement of a quarter of an hour, the jury returned a verdict of guilty. After receiving the verdict, Jeffreys addressed the jury thus:

> Gentlemen, I did not think I should have any occasion to speak after your verdict; but, finding some hesitancy and doubt amongst you, I cannot but say I wonder it should come about, for I think in my conscience the evidence was as full and plain as could be, and, if I had been amongst you, and she had been my own mother, I had found her guilty.

Women convicted of treason in those days were burned at the stake, and this sentence was passed on this old lady in her dotage. But what is really more demonstrative of Jeffreys' mentality is that he ordered that form of execution that very afternoon. She was, as a gesture of clemency, given a short respite of time (in order to try to induce her to inform on others) before execution, and was then beheaded. It is said of her death scene that "she was old and dosy and died without much concern."

Jeffreys was next made Lord Chancellor, as a reward from James for his conduct of the Bloody Assizes. He was then only forty, and the youngest Lord Chancellor ever appointed, but his tenure of office was short. James fled the kingdom, and William of Orange came over, and the Chancellor's power, for good or evil, vanished. He tried to escape, having disguised himself as a common sailor, and having even shaved off his eyebrows. He left the ship by which he intended to escape, and came ashore for food. However, a warrant was issued for his arrest, and he was apprehended. The rage of the people was so pronounced that, if a special guard had not been provided, he would have been torn to pieces by the mob. In April, 1689, he died miserably in the Tower.

And so we take leave of them. Of Scroggs it has been written :

> His behaviour on the Bench compares unfavourably with that of Jeffreys, and he was undoubtedly one of the worst Judges that ever disgraced the English Bench.

Of Jeffreys it has been written :

> He has been mourned by few, since his reputation for bloodthirstiness is probably unrivalled in our judicial annals.

They are an unpleasant, revolting study, which is quite redeemed and sweetened by the learning and charm of the two works that so delightfully present them to us as outstanding actors in the judicial arena of their times.

EARTHQUAKE INSURANCE CONTRACTS.

The Average and Excess Clauses.*

By J. L. Inkster.

(*Concluded from p. 206.*)

I have mentioned previously that I consider there is a weakness in our Average Clause when it comes to its application to shock damage.

The original Earthquake Clauses stipulated that, in the event of loss or damage by earthquake, the Average Clause was to be applied in the same manner and in all respects as if the happening of the earthquake were the breaking out of fire. The present clause says that the insurance shall be subject to the terms, provisions, and conditions of this policy so far as they are applicable. The conditions apply to a fire policy, and it would seem that reference should be made to the Average Clause applying in case of earthquake shock damage.

The Australian Companies Average Clause reads as follows :

> If the property hereby insured shall, at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril hereby insured against, be collectively of greater value than the sum insured hereon, then the insured shall be considered as being his own insurer for the difference and shall bear a rateable proportion of the loss accordingly. Every item, if more than one of the policy, shall be separately subject to this condition.

The Australian Companies Average Clause could with advantage, I think, be adopted in this Dominion, or, alternatively, the words " at the breaking out of " any fire " could be replaced by the words " at the " time of any loss." The Earthquake Endorsement used in Australian policies is to-day practically the same as we used at the time of the Napier earthquake.

We now turn to Endorsement (B), which applies when the fire policy is not subject to Average. The Apportionment of Loss Clause in this Endorsement reads :

> It is further declared and agreed that in the event of loss or damage by fire occasioned by or through or in consequence of earthquake or of loss or damage directly caused by earthquake this company shall not be liable to pay or contribute in respect of such loss or damage beyond the proportion which the sum insured against the risks covered by this endorsement shall bear to the total insurance against ordinary fire loss.

This proviso used in place of the Average Clause does not alter the basic principle of settlement—namely, that of making the £50 deduction the final calculation. The difference lies in the application of this clause, the liability of the insurer being determined on the basis of the amount insured against earthquake over the amount insured against fire, of the whole loss sustained, subject to the limit of the insurer's liability. After the amount of the insurer's liability is thus ascertained, the excess of £50 is then finally deducted from the amount of the assessed claim.

Our examination of the above Earthquake Endorsement shows that, when a loss against earthquake shock occurs which falls within the terms of the earthquake contract, the final amount of loss agreed upon between the insured and his insurer should be paid in full less the amount of the excess *but not exceeding the amount insured less the excess.* In earthquake fire claims, the excess of £50 is, of course, not deducted.

In the United States in the Deductible and Apportionment of Loss Clause provision of the Earthquake Assumption Endorsement for dwelling-property used for attachment to fire policies not subject to Average, it is stipulated that the company shall not be liable for a greater proportion of the loss or damage in excess of a certain percentage than the amount of fire insurance bears to the whole amount of fire insurance covering such property, whether valid or not, or by solvent or insolvent insurers, or whether or not all of the fire insurance, by extension or otherwise, covers against loss by earthquake, nor for a greater proportion of any loss by earthquake than the amount of the policy bears to the total amount of earthquake insurance thereon other than that portion of any earthquake insurance written to cover the amount deducted through operation of the Deductible Clause therein.

* Other than those under the Earthquake and War Damage Act, 1944.

In the United Kingdom, Lloyd's also have a proviso eliminating the Average Clause from earthquake policies if the amount insured against earthquake is equivalent to, or greater than, the sum insured under the fire insurances. The proviso to this effect is stated in Lloyd's Form Y Earthquake Form as "Fire Insurance values or Subject to Average."

In the United Kingdom, settlement of overseas earthquake claims is based on trade custom, and the practice of deducting any excess from the final figure of a claim is an accepted principle, which applies to all types of insurance contracts containing Average and Excess Clauses, such as Earthquake, Goods in Transit, All Risks, and certain Aircraft Insurance Contracts. This is also the practice in Australia, when the Average Clause and Deductible Franchise appear in "all risks" insurances.

Settlement of earthquake shock claims under Lloyd's Earthquake Policy (Form Y) has always been in accordance with this procedure, and, while there is a variation in the wording of Lloyd's form, the basic principle of settlement remains the same. The Excess Clause in Lloyd's form reads as follows:

> In the event of such loss or damage directly caused by earthquake, this policy only to be liable for the amount by which such loss or damage during any one period of forty-eight consecutive hours exceeds . . . but this condition does not apply to claims for loss or damage by fire caused by earthquake.

In Lloyd's form, the Average Clause reads as follows:

> This policy is subject to the Condition of Average, that is to say, if the property covered by this insurance shall at the time of any loss be of greater value than the sum insured hereby, the assured shall only be entitled to recover hereunder such proportion of the said loss as the sum insured by this policy bears to the total value of the said property.

There has been much experience in earthquake insurance and settlement of earthquake claims in the United States. The Deductible and Average Clause (Cl. 4) in the United States Standard Bureau Earthquake Policy Form is worded as follows:

> This policy does not cover or become insurance against any portion of loss or damage by earthquake which shall be less than [*not less than 5 per cent.*] per cent. of the actual cash value of the above-described subject of insurance at the time of such loss or damage; nor shall this company be liable for a greater proportion of the loss or damage in excess of such percentage than the amount hereby insured bears to per cent. of [*difference between per cent. deductible and 100 per cent.*] per cent. of the actual cash value of the above described subject of insurance at the time such loss shall occur, nor for a greater proportion of such excess than the amount of this policy shall bear to all earthquake insurance (other than that portion of any earthquake insurance written to cover the amount deducted through the operation of the Deductible Clause herein) whether valid or invalid or by solvent or insolvent insurers.

In these Clauses, emphasis is on the fact that the coverage constitutes excess insurance over and above the amount of the Deductible. The following is an example of settlement under these Clauses.

If a building valued at $10,000 is insured for $7,500 with the 90 per cent. Average Clause and with the 10 per cent. Deductible and a loss of $5,000 occurs, 10 per cent. or $1,090 is deducted from the value of the building, leaving a value of $9,000, so far as the insurance policy is concerned. Insurance to the extent of $8,100 would have to be carried, to comply with the condition of the 90 per cent. Clause. In the case of a loss of $5,000, the basis of settlement would be:

$\frac{7,500}{8,100}$	of $5,000 =	$4,630
	Less $1,000	$1,000
		$3,630

A legal opinion recently obtained by the Fire Companies Adjustment Bureau of San Francisco from their attorneys bears out the contention that the above example is correct, thus confirming that the insurance is excess insurance over and above the amount of the Deductible. The attorneys in their opinion state that they have no doubt that their analysis of these Clauses would be sustained in the event of litigation. There has never been a Court case on the Earthquake Insurance Clauses in the United Kingdom or the United States.

An interesting feature in the underwriting of earthquake insurance in the United States is that the deductible or excess may be insured under a separate policy at a higher rate, and such insurance shall not rank for contribution.

A typical policy insuring the deductible contains fourteen provisos. Clause 5 stipulates that in no event shall underwriters thereon be liable thereunder for an amount exceeding their proportion of the amount by which such loss or damage shall exceed $50; and Cl. 6 states that the insurance shall be considered "deductible earthquake insurance" written to cover the amount deducted through the operation of the Deductible Clause or the deductible features of the Deductible and Apportionment of Loss Clauses as contained in any other earthquake insurance.

My final remarks on the Earthquake Clauses will deal with their origin, for which we will have to look to the practice of marine insurance. Those familiar with marine insurance claims on hulls will know that in the Institute Time Clauses (Hulls) there is a clause reading "Warranted free from Particular Average" (partial loss) under 3 per cent. unless the vessel shall "have been stranded," &c. This is known as the 3 per cent. franchise, and, if the assessed damage or particular average to the hull exceeds 3 per cent., then there is a claim against the underwriters for the full amount payable under the policy, and the 3 per cent. franchise is not deducted. If, however, the Institute Time Clauses—Hulls Excess (All Claims) (excluding Total or Constructive Total Loss) are attached to the marine policy, and the vessel is not insured to its full value, then the insured has to bear a proportion of the loss proportionate to his underinsurance so that the contract is subject to Average. Settlement in such cases is based on the application of Average in respect of particular average claims, and, when this calculation has been made, an agreed percentage (known as the deductible excess) or deductible franchise of the whole value of the steamer, &c., is finally deducted from the claim—*i.e.*, the final amount of loss agreed upon between the insured and the underwriters.

In marine insurance claims on hulls, the insured bears the full amount of the deductible in every case except total or constructive total loss.

The trade custom of deducting the excess from the final figure of a claim in respect of non-marine insurances containing Average and Excess Clauses has followed underwriters' practice in settlement of marine insurance claims in deducting in the same manner any deductible excess which may be applied to a marine policy.

COMPANIES: CHANGE OF NAME OF COMPANY.

By E. C. Adams, LL.M.

Before the coming into operation of the Companies Act, 1933, a company could change its name only with the approval of the Supreme Court. One effect of the Companies Act, 1933, has been to facilitate and cheapen the procedure. Section 32 (1) of the Act now provides that a company may, by special resolution, and with the approval of the Registrar signified in writing, change the name.

Morison's Company Law in New Zealand, 11, has the following comment on this provision:

> This provision which is new, substitutes the approval of the Registrar for that of the Court. The Act does not lay down any rule for the guidance of the Registrar, but it is apprehended that he must have regard to the provisions of s. 30. He is not expressly empowered, as was the Court under the old legislation to make inquiries or direct notices or to hear other parties.

Section 30 provides that the name adopted by a company must not be identical with the name of any other company, or so nearly resemble it as to be calculated to deceive. Except with the consent of the Court, no company may be registered by a name which, in the opinion of the Registrar, is contrary to public policy. Certain words, such as "Building Society," are expressly forbidden. Certain other words, such as "Royal," "State," "Bank," or "Stock Exchange," may be used only with the consent of the Governor-General in Council.

As pointed out by *Morison*, the new name is not effective until it is entered on the Register: *Shackleford, Ford, and Co., Ltd.* v. *Dangerfield*, (1868) L.R. 3 C.P. 407. The mere passing of the resolution is not sufficient; after it has been passed, the Registrar must signify his approval in writing. Section 32 (5) requires that notice of the change in name is to be published in the *New Zealand Gazette* at the expense of the company. In practice, this is done by the Assistant Registrar of Companies.

The first step in the procedure is for the company to obtain the consent of the Registrar of Companies to the proposed name through the Assistant Registrar of Companies. If the matter is urgent, approval may be obtained by telegraphing the Registrar at Wellington. When the approval of the Registrar to the proposed new name has been obtained, the company should then pass the necessary special resolution (or, in the case of a private company, make the necessary entry in the minute-book) changing the name. A responsible officer of the company should then make a statutory declaration setting forth:

(i) The terms of the special resolution (or, in the case of a private company, the entry pursuant to s. 300 (1) and (3) in the minute-book).

(ii) The fact that no alteration of the business for which the company was incorporated is intended.

(iii) The reason for the change.

It may be pointed out here that it is essential that the statutory declaration should have the form of jurat prescribed by the Justices of the Peace Act, 1927: "And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Justices of the Peace Act, 1927": see, in this connection, *R.* v. *Habgood*, [1934] N.Z.L.R. 73. It is astonishing how often in practice this jurat is omitted.

A suitable form of declaration is given in the following precedent.

The declaration should be delivered to the Assistant Registrar of Companies, who will forward it to the Registrar. If the Registrar is satisfied that everything is in order, he will signify his approval in writing, and the Assistant Registrar will issue a new certificate of incorporation and advertise notice of the change of name in the *New Zealand Gazette*.

The fees payable are as follow: (*a*) stamp duty on declaration, 3s.; (*b*) registration fee of resolution, 5s.; (*c*) advertising in *New Zealand Gazette*, 5s.; (*d*) new certificate, 5s.: Total, 18s.

PRECEDENT.

3s. Stamp.

CHANGE OF NAME OF A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1933.

STATUTORY DECLARATION.

IN THE MATTER of the Companies Act 1933
AND
IN THE MATTER of Limited.

I A. B. of Wellington merchant do solemnly and sincerely declare as follows that:

1. I am a director of the above-named company.

2. The said company resolved on June 6, 1950, as a special resolution by an entry in the minute-book of the company that the company change its name from Limited to Limited.

3. No alteration of the business for which the company was incorporated is intended.

4. The company desires to change its name for the reason that all the shares in the company have been transferred to me and my brothers and it is desired to have our names directly associated with the company.

AND I MAKE this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act 1927.

DECLARED at Wellington this 16th day of June 1950 } A. B.

BEFORE ME:

C. D.,
A Solicitor of the Supreme Court of New Zealand.

An Intellectual Adventure

The main lesson which the true Liberal must learn from the success of the Socialists is that it was their courage to be Utopian which gained them the support of the intellectuals and therefore an influence on public opinion which is daily making possible what only recently seemed utterly remote. Those who have concerned themselves exclusively with what seemed practicable in the existing state of opinion have constantly found that even this has rapidly become politically impossible as the result of changes in a public opinion which they have done nothing to guide. Unless we can make the philosophic foundations of a free society once more a living intellectual issue, and its implementation a task which challenges the ingenuity and imagination of our liveliest minds, the prospects of freedom are indeed dark. But if we can regain that belief in the power of ideas which was the mark of Liberalism at its greatest, the battle is not lost. The intellectual revival of Liberalism is already under way in many parts of the world. Will it be in time? (F. A. Hayek: "The Intellectuals and Socialism." *University of Chicago Law Review*, Spring, 1949.)

OBITUARY.

Mr. P. W. Dorrington (Dannevirke).

The sudden death of Mr. P. W. Dorrington of Dannevirke, who collapsed and died in the robing-room of the Supreme Court at Palmerston North on July 14 at the conclusion of a day in Court, came as a great shock to his many friends in the profession.

The late Mr. Dorrington was a member of the Hawke's Bay District Law Society, but, as the Supreme Court was in the course of a special sitting at Palmerston North, tributes to his memory were paid there.

There was a large attendance of practitioners before His Honour Mr. Justice Gresson on the morning of July 17.

The first speaker was Mr. A. E. Lawry, who represented the Hawke's Bay District Law Society. He said that, in the unavoidable absence of the Society's President, Mr. J. H. Holderness, and the Vice-President, as the immediate past President of the Hawke's Bay District Law Society, the sad privilege had devolved upon him to represent the Society, and to pay tribute in Court to Percy Walter Dorrington, who was laid to his last rest in Dannevirke, on the previous day. Mr. Lawry continued: "This Court was one in which he practised extensively, and he was as well known to all in this large gathering as to the practitioners in his own district. I feel that I speak for everyone present when I say that his tragic death in this building last Friday was a sad blow to us all.

"After studying law at Otago University, Mr. Dorrington's first contact with practice was in the office of Mr. Bundle—later the well-known learned Magistrate—and then he left the cradle of our profession, the South Island, and joined the staff of Messrs. de Latour, Barker, and Stock in Gisborne. Early in 1914, he purchased from the late Mr. Pat. Fitzherbert the latter's practice in Dannevirke where he commenced, with a partner, under the style of McCarter and Dorrington. Shortly thereafter, he acquired the interest of Mr. McCarter, and, with the exception of the years of his military service in the First World War, Mr. Dorrington has since practised continuously in Dannevirke.

"He associated himself with public life in his town, and was a very well known and highly respected citizen. He was one of those who form part of the backbone of our profession—a country lawyer; but he was probably the best-known country lawyer in this Island. Not only did he practise extensively in this Court, but he also practised in the Supreme Courts at Napier and at Wellington, and was widely known and thoroughly liked and respected from the East Coast to the West.

"Mr. Dorrington was a friend and champion of our Maori people, and was jealous of the rights and privileges of the Maori. I met him frequently in the course of his extensive practice before the Maori Land Court, and can say that by his death the Maori people have lost a leading advocate and a staunch friend.

"He loved the law, and he lived for it. As a lawyer he was sound, and in practice he was persistent and fearless. I have enjoyed his personal friendship for over thiry years, and know that in the course of his busy and exacting practice he never spared himself in the interests which were entrusted to him. He worked early and late, without qualified assistance until some three years ago, when Mr. Poole, who has recently become his partner, joined him, and so afforded him some much-needed relief. He looked forward to the time when he could enjoy some respite; and I venture to say that, had he been fortunate enough to have been joined by Mr. Poole at an earlier date. we would not have been mourning his loss to-day. To Mr. Poole, his partner since last April, and his junior in the difficult and protracted case now in the course of hearing before this Court, we offer our sincere sympathy, and Mr. Poole may be assured of all the sympathetic help which is his due in his present immediately pressing tasks.

"It was on Dominion Day of 1931, when Mr. Dorrington was one of a group of lawyers visiting Palmerston North, that the germ of an idea came into being to establish an annual golf tournament for the relaxation and rejuvenation of Judges, Magistrates, and members of the profession. In the years which have followed, our deceased friend has been a committeeman and an annual contender for the title of 'The Devil's Own.' His familiar figure will be sadly missed at this event in the years that lie before us.

"In his private and family life, his affections and those of his beloved wife were wrapped up in their only son. It was a matter of great pride when their son qualified in medicine.

"To all of us Mr. Dorrington was our 'learned friend,' but, above and beyond these familiar words, he was our valued and respected friend. Like many another here to-day, I have lost a close and beloved friend, and will cherish the memory of that friendship. On behalf of the Society I represent, I publicly pay tribute to the memory of Percy Walter Dorrington, and convey the sympathy of the Hawke's Bay District Law Society to his widow and son."

Mr. B. J. Jacobs, speaking on behalf of the practitioners of Palmerston North, began by saying that it was indeed a moving experience for him, and, he was certain, for every member of the Palmerston North Law Society, to be present and to listen to the words of Mr. Lawry on behalf of the members of the Hawke's Bay Law Society in regard to the late Mr. Dorrington and his tragic passing. It was the speaker's task—an exceedingly sad task—to add what little was possible on behalf of the members of his own Society, and to express their deep and sincere sympathy with Mrs. Dorrington and her son. Mr. Jacobs proceeded:

"The associations between the late gentleman and ourselves of Palmerston North have been of so intimate a character that it comes almost as a shock to us to be reminded, as we have been, that he did not actually belong to us in Palmerston North.

"Perhaps in the first flush of our realization that Percy Dorrington is no longer with us it is not altogether unnatural that we should think of his genial nature, his bright personality, his friendly disposition. At the same time, I am certain that deep in the hearts of each and every one of us is the sure knowledge that we have lost a close personal friend. He was generous and courteous to his juniors, as he was to his equals. He was fearless in his advocacy. He was just. He could not descend to the doing of anything that even savoured of being unfair. He could not stoop to take a mean advantage of an adversary. His word was his bond. He possessed the highest principles and the loftiest ideals of the profession of his choice. His death leaves a gap it will be difficult to fill.

"I think it is fair to say that every avenue in life provides opportunities for success. However, it is not so easy to achieve that success and at the same time to earn and retain the esteem, the respect, and the affection of those with whom one has been working. This was vouchsafed in the highest degree to him whose loss we now mourn. To us in Palmerston North he was ever known affectionately as 'Dorrie.' So he will remain in our memories, and, just as often as those of us who are left forgather during Dominion Day week-end at Hokowhitu, just so often shall we conjure up happy though silent recollections of Dorrie in his play hours as we now speak of him in his work hours."

Mr. J. R. E. Bennett, of Wellington, said that the members of the Bar practising in Wellington and the Hutt Valley desired to associate themselves with the tributes to the late Mr. Dorrington which had just been paid on behalf of practitioners from Hawke's Bay and from Palmerston North.

"Although Wellington members did not meet Mr. Dorrington to the same extent as did those practising nearer to Dannevirke, nevertheless, many of us were in touch with him in the course of practice, and also saw a good deal of him during his not infrequent visits to our City," Mr. Bennett continued. "I personally was privileged to know him intimately. His integrity was undoubted, and he was a jealous guardian of the rights and privileges of the profession.

"Mr. Dorrington was a man of great industry, who did not spare himself in his work for his many clients. We all know that especially during recent war years he carried a very heavy burden, and found difficulty in obtaining adequate assistance in his practice.

"The late Mr. Dorrington's name will always be affectionately remembered as one of the originators of the Devil's Own Golf Tournament held annually on the links at Hokowhitu. This tournament has attracted practitioners from many districts of the North Island and also from the South Island, and there is no doubt that it has done a very great deal towards promoting understanding and fellowship among members of the profession.

"Mr. Dorrington will be greatly missed by practitioners from all over the southern half of the North Island. To his widow and son I extend, on behalf of practitioners from Wellington city and the Hutt Valley, our very sincere sympathy in their tragic loss; and to his partner we also extend our sincere sympathy."

His Honour Mr. Justice Gresson, addressing the members of the legal profession who were present, said:

"Your attendance, and what has been said by senior cousel—no doubt on behalf of all of you—is an outstanding testimony to the regard in which Percy Walter Dorrington was held by you who were his professional brethren, or his friends, or had contacts of one sort or another with him.

"My own association with this district is too recent for me to have been otherwise than but slightly acquainted with him. But, during the lengthy hearing of the case now before the Court, in which he was leading counsel for the plaintiff, I have been able to perceive his genial good nature and happy large-heartedness, and to note, too, how thoroughly he had marshalled the mass of material with which the case is concerned, and prepared it for its presentation.

"His sudden death, whilst engaged on this task to which he had devoted so intense and laborious an effort, is indeed a tragedy. I share your distress, and I join with you in your expression of sympathy for his widow, his son, and his relatives."

The Court then adjourned for half an hour.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Wills and Swills.—Scriblex is indebted to an Auckland correspondent who has passed on to him, culled from the last will and testament of a testator who died in North Bend, Coos County, Oregon, U.S.A., the following clauses:

> It is my request that I have a Masonic burial from the nearest Masonic Lodge to the place of my death and that my body be buried in the ocean approximately ten miles off shore in the usual way that such burials are performed and that six pall-bearers accompany my body to the burial place and that each be provided with a bottle of whisky [*sic*] if the same can be had.
>
> I give and bequeath the sum of one dollar and no more to each person who, under the laws of the State of Oregon should have been named in this my last will and testament and whom I have not herein specifically provided for.

Judging from the second proviso of the will, says our correspondent, it would seem that the testator wished no moaning at the Bar when his corpse put out to sea, while the third proviso might be considered in New Zealand a naive, if ineffective, attempt to circumvent our Family Protection Act. The "*sic*" (*ante*) is also a nice touch; but as to whether this refers to the ten-mile journey out to sea or to the possibility that the whisky cannot be procured the will itself is not clear.

Old and New.—In an article entitled "The Common and the Civil Law—A Scot's View," Lord Justice Cooper, Lord President of the Court of Session of Scotland, has recently written in *63 Harvard Law Review*, 468:

> This at least is incontrovertible, that lawyers of every modern state must recognize and take up the challenge presented to them by the social and economic revolution which is upon us, and must not lag one inch behind the demands of progressive society. What forms these demands may yet take we cannot foresee, but they will certainly be demands for something different from what the legal profession has been supplying for generations. Public respect for law, without which law cannot exist and civilization itself is threatened, depends upon the law's ability to satisfy the average man's feeling for common justice visibly done; and we may have to forget a lot and discard much of our old legalism if we are to satisfy this test.

So much for the sociological education of lawyers. But the same was said of Judges by Sir Raymond Evershed, M.R., at the last Lord Mayor's Dinner in London. In the near future, the law of the land, he said, as it was administered by Judges, would have to be brought into closer touch and truer relationship with all those activities which now sometimes tended to fall outside its scope.

The Harassed Taxi-man.—No one should object if one Clark, an English taxi-driver, decides to make, at least temporarily, a slight increase in fares. He was summoned before Justices on five informations under the Motor Spirit (Regulation) Act, 1948, for having commercial petrol in the tanks of five motor-vehicles. The prosecution was stopped, on the ground that the samples were not properly taken. The matter then went to the Divisional Court, which found that the samples were properly taken and remitted the case to the Justices to hear and determine. They then heard and dismissed the summonses, their view that his contention of innocence should be accepted being based on his evidence, his demeanour in the box, and the unchallenged evidence of his good character. On appeal, the matter went again to the Divisional Court, when, after hearing argument, the Lord Chief Justice directed that the case be re-argued before a Court of five Judges. Here, the majority (Byrne, Morris, and Finnemore, JJ.) dismissed the appeal, the minority (Lord Goddard, L.C.J., and Humphreys, J.) holding that no reasonable Bench of Magistrates would have come to the conclusion that the accused had discharged the onus that was put upon him. The case seems to demonstrate that a man's character can be white though his petrol may be red.

The Telling Point.—In an instalment of his personal history written for *Life*, the Duke of Windsor says that he came to respect a really first-class speech as one of the highest of human accomplishments. No one that he knew, he says, seemed to possess that rare and envied gift, the art of speaking well, in so high a degree as Mr. Winston Churchill, who, on one occasion, gave him some advice that the young practitioner feeling his way in the criminal Courts might find invaluable. "If you have an important point to make," Churchill advised, "don't try to be subtle or clever. Use a pile-driver. Hit the point once. Then come back and hit it again. Then hit it a third time—a tremendous whack."

From Frederick Pollock.—"Now to say that law is for practical purposes more certain without a code than with one seems to me sheer paradox. Compare the Indian Penal Code, with the amazing muddle English criminal law has drifted into through (amongst other causes) the combined meddling and timidity of the Legislature."

"Some of the elaborate rules for the judicial interpretation of statutes cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of Judges is to keep the mischief of its interference within the narrowest possible bounds."

"I assume you [Mr. Justice Holmes] are not quite of Blackburn's mind, who, when he retired, said 'Damn the law,' and read nothing but French novels."

PRACTICAL POINTS.

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

1. Company Law.—*Articles of Association—Proposed Company*—Bona fide *Farmers to receive Preferential Dividend—Legality of Such a Provision in Memorandum of Articles.*

QUESTION: It is desired to ensure as far as possible that only *bona fide* farmers for the time being in a specified County may be shareholders in an intended company, whose main object is to quarry, crush, and sell agricultural lime.

Could the intended company by its articles provide that shareholders for the time being who are not *bona fide* farmers in such County shall receive a dividend of, say, half the rate of the other shareholders, if the necessary provision is made in the memorandum of association?

ANSWER: There appears to be no objection to the proposed course. The term "*bona fide* farmer" would require very careful definition.

It would be advisable to make provision in the articles for rebates to the shareholders who purchase lime from the company, so as to reduce dividends to a minimum. It must be pointed out, however, that provision for a differential payment has this advantage; such a provision could not be altered except with the unanimous consent of all shareholders who would be detrimentally affected by the alteration: *Geary* v. *Melrose Co-operative Dairy Co., Ltd.*, [1930] N.Z.L.R. 768.

X.2.

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2. Mortgage.—*Land Transfer—Mortgagor in default—No Power in Mortgagee to grant Option to Prospective Purchaser.*

QUESTION: Several years ago, A mortgaged a parcel of land under the Land Transfer Act, 1915, to B. A is well in default, both as to payment of interest and as to payment of principal. Can B now grant a valid option to purchase to C, a prospective purchaser, after B has given the necessary notice required by s. 3 of the Property Law Amendment Act, 1939? There is no express power given to the mortgagee in the mortgage instrument to grant options.

ANSWER: The mortgagee has no power to grant an option. The granting of an option is not the exercise of power of *sale*: *Re McFarland*, [1916] G.L.R. 699; *cf. Public Trustee* v. *Morrison*, (1894) 12 N.Z.L.R. 423, a lease containing a *compulsory* purchasing clause, which is essentially different from an option, which is unilateral merely.

X.1.

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3. Mortgage.—*Memorandum of Mortgage under Land Transfer Act—Possibility of Absence of Personal Liability.*

QUESTION: Is it possible to register a mortgage under the Land Transfer Act, 1915, securing a principal sum and interest thereon, without any person's being personally liable thereon? Attention is drawn to s. 88 of the Land Transfer Act, 1915.

ANSWER: Such a mortgage although rare in practice is possible: see *Smith* v. *France and Attorney-General*, [1924] N.Z.L.R. 462, 464.

Section 88 of the Land Transfer Act, 1915, deals only with a *transfer* of land subject to a mortgage, and is not in point. In any case, as Smith, J., said in *A.* v. *D.*, [1936] N.Z.L.R. s. 45, s. 49, "s. 88 is not designed to create a liability to pay a principal sum where a transferor is not liable to pay it."

X.1.

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4. Mortgage.—*Guarantee of Payment—Admissibility of Inclusion in Memorandum of Mortgage of Guarantee by Third Party.*

QUESTION: W. is mortgaging her house property to C. to secure a loan. The title is under the Land Transfer Act, 1915. C. will not advance the money unless H., the husband of W., guarantees payment of the principal sum and interest. Is it permissible to include the required guarantee clause in the memorandum of mortgage? Will the guarantee be liable to stamp duty?

ANSWER: It is permissible to include a guarantee in a Land Transfer mortgage, the reason being that the guarantee does not render the instrument not a mortgage or affect the title to the land: *Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Hosken (Registrar of Titles)*, (1912) 14 C.L.R. 286, and *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, 500.

If embodied in the mortgage itself, the guarantee will not be liable to stamp duty. If it is endorsed on the mortgage as a separate instrument, it will be liable to duty of 3s.: *Adams's Law of Stamp Duties in New Zealand*, 57, 59, 60.

X.1.

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5. Mortgage.—*First Mortgagee exercising Power of Sale—Registration of Subsequent Charge by Electric-power Board—Priorities* inter se.

QUESTION: In 1930 A mortgaged a parcel of Land Transfer land to B. It was a first mortgage. Five years later, an electric-power board registered a charge under the Statutory Land Registration Charges Act, 1928. The mortgagor has been in default for many years, and, after giving the necessary notice under s. 3 of the Property Law Amendment Act, 1939, the mortgagee is about to exercise his power of sale. Can the mortgagee confer a clean title on a purchaser freed from the power-board charge? If not, what is the best course to pursue?

ANSWER: It is assumed not only that the charge was registered subsequent to the mortgage but also that the charge arose subsequently. The mortgagee cannot confer a clean title on the purchaser except by paying off the charge, and it is recommended that the mortgagee should pay off the charge with the proceeds from the sale: *Wanganui-Rangitikei Electric-power Board* v. *The King*, [1933] N.Z.L.R. 1005. It will be observed that the decision in that case would have been different had the mortgagee not been the Crown. The point is that a statutory charge such as a power-board charge is deemed to improve every person's estate and interest in the land, and in this case the power board did what the law required and duly registered its charge in accordance with the Statutory Land Charges Registration Act: *Mayor, &c., of Wellington* v. *Attorney-General*, (1913) 33 N.Z.L.R. 394, 400; and see the article in (1940) 16 N.Z.L.J. 295. See also s. 7 of the Land Transfer Amendment Act, 1939.

X.1.

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6. Tenancy.—*Flat—Occupants of Adjoining Flat causing Noise by having Late Parties—Whether "Nuisance or annoyance"—Tenancy Act, 1948, s. 24 (1)* (c).

QUESTION: Our client is annoyed by the occupants of another flat in the same building having parties, to which a number of people come and from which they go until the early hours of the morning. The landlord, who does not live on the premises, says this is not a nuisance. What is the correct meaning of the term "nuisance" or "annoyance," in relation to a tenant's conduct, in s. 24 (1) (c) of the Tenancy Act, 1948?

ANSWER: The term "nuisance" bears its ordinary legal meaning: see *Redman's Law of Landlord and Tenant*, 8th Ed. 382; and, as to "annoyance," *ibid.*, 373. The "nuisance" or "annoyance" must *in fact* be a nuisance or annoyance to the adjoining or neighbouring occupiers, and that must be proved: see *Wellington City Corporation* v. *Ah Ting*, (1944) 4 M.C.D. 163; and see *Frederick Platts and Co., Ltd.* v. *Gregor*, (1950) 209 L.T. 234.

B.1.