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THE TENANCY AMENDMENT ACT, 1950.

IMPORTANT changes in the tenancy legislation are made by the Tenancy Amendment Act, 1950, which came into operation on September 18. Owing to the difficulty many practitioners find in obtaining copies of the new statute, which, at the time of writing, has not been printed in the usual form for distribution, we take the opportunity to inform them of the range of the amendments and the content of the new provisions in our current statutory law of landlord and tenant. The amending statute forms, as it were, an instalment of decontrolling provisions, which is given us in a manner similar to that in which tenancies are being decontrolled gradually under the Rent and Interest Restrictions legislation in England, which, however, is not comparable with our Tenancy Act, 1948.

Definitions Amended.

"*Court.*"—The definition of the term "the Court" in s. 2, with its references, according to the amount of rent involved, to a Magistrate's Court, and the Supreme Court respectively, is revoked, and the following definition is substituted by s. 14 of the Amendment Act, 1950, in respect of any proceedings commenced on or after September 18, 1950:

> "The Court" means a Magistrate's Court.

Subtenancy.—The following new definition is inserted in s. 2 of the principal Act:

> "Tenancy" includes a subtenancy; and "to let", "letting", "landlord", and "tenant" have corresponding meanings.

"*Dependant*", "*Serviceman.*"—Both these definitions in s. 2 (1) have been repealed by s. 19 (1) (*a*) of the Amendment Act, 1950.

Jurisdiction for Fixing Fair Rent.

Section 14 of the principal Act gave the Court of Appeal jurisdiction to hear an appeal from any order of the Supreme Court fixing the fair rent of any property at an annual rent of more than £525. That section is now repealed. The only Court now having jurisdiction to fix the fair rent of a property is the Magistrates' Court, consequent on the repeal of the definition of the term "the Court" and the substitution of the new definition, as above. The new s. 14, substituted by s. 15 (1) of the Amendment Act, 1950, provides by subs. 1 a right of appeal to the Supreme Court from an order fixing the fair rent or the basic rent of any dwellinghouse or "property" (as defined in s. 2) where the rent so fixed is over £525 a year; and the decision of the Supreme Court is to be final. Subsections 2 and 3 of s. 15 are consequential in character, while subs. 4 preserves existing rights in respect of proceedings commenced in a Magistrates' Court or in the Supreme Court before September 18, 1950.

The new s. 14 is as follows:

> 14. Where a Magistrate's Court has made an order fixing the fair rent of any dwellinghouse or property, and the fair rent so fixed or the basic rent of the dwellinghouse or property exceeds an annual rent of five hundred and twenty-five pounds, any party to the proceedings may appeal to the Supreme Court in accordance with the provisions of Part V of the Magistrates' Courts Act, 1947 (except section seventy-one), and those provisions shall apply accordingly:
>
> Provided that the determination of the Supreme Court on any such appeal shall be final.

Consequential amendments are made by s. 15 of the Amendment Act, 1950, as follows:

> (2) Section thirteen of the principal Act is hereby amended by omitting the words "to the Court of Appeal".
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> (3) Section fifteen A of the principal Act, as inserted by section fifty-seven of the Statutes Amendment Act, 1949, is hereby amended by omitting the words "to the Court of Appeal against an order of the Supreme Court", and substituting the words "to the Supreme Court against an order of a Magistrate's Court".
>
> (4) This section shall not apply in respect of any proceedings commenced in a Magistrate's Court or in the Supreme Court before the passing of this Act.

Exemption of Approved Tenancies.

Section 48 of the Tenancy Act, 1948, exempted from the provisions of that statute agreements made with servicemen and with short-term tenants, that had the approval of a Rents Officer. That section is now repealed. It is replaced by a new s. 48; but every agreement approved in writing under the now-repealed section before September 18, 1950, is to have effect and be exempt from stamp duty as if that section had not been repealed.

As will be seen, the new s. 48 and the four sections after s. 48 remove from the several classes of tenancies the restrictions imposed by Part III of the Tenancy Act, 1948, on the recovery by a landlord of possession, and those imposed by ss. 41, 42, and 43 of that statute. Section 41 protects the wife or husband or the family of a tenant in the case of the tenant's death; and, in the case of the tenant's desertion or separation, the spouse left in possession of the premises is similarly protected. Section 42 makes tenancies binding on the mortgagee of a dwellinghouse or urban property,

and on every person claiming under or through any such mortgagee. Section 43 is the section which sets out the conditions to be implied in every tenancy of a dwellinghouse, except in so far as they are expressly negatived by agreement in writing.

The new s. 48 is as follows :

48. (1) Where, in the case of the letting of any dwellinghouse or urban property, the landlord and the tenant, by agreement in writing dated bfore or after the commencement of this section (but not before the first day of March, nineteen hundred and fifty), and incorporating the terms and conditions of the tenancy, have agreed that Part III and sections forty-one, forty-two, and forty-three of this Act shall not apply to the premises so let or to any part thereof in respect of that tenancy, and a copy of the agreement has been deposited with a Rents Officer before the date of the commencement of the tenancy, and the agreement has been approved in writing before or after that date by a Rents Officer, the agreement shall have effect according to its tenor.

(2) The copy of any such agreement deposited with a Rents Officer, whether before or after the commencement of this section, shall be exempt from stamp duty.

(3) The fact that any such agreement has been approved in writing by a Rents Officer, whether before or after the commencement of this section, shall be conclusive evidence that this section applies to the agreement and that the agreement has been duly made and deposited under this section.

Service Occupancy.

There was no definition in the Tenancy Act, 1948, of what was meant by the term " service occupancy," and there was some vagueness about s. 2 (5), which provides that no person who occupies any premises by virtue of a contract of service with a person from whom he holds the premises is to be deemed a tenant thereof. A service occupancy was not a " letting," but its terms had to be proved to take it out of the operation of the statute. Now, by the new s. 48A, the restrictions on recovering possession from a tenant are not to apply where, after September 18, 1950, any dwellinghouse is let to a worker by his employer and the letting is consequent upon or incidental to the contract of service and the tenant has subsequently ceased to be employed by the landlord.

The new section is as follows :

48A. Where an agreement is entered into at any time after the commencement of this section for the letting of a dwellinghouse to a tenant who has entered into or works under a contract of service with the landlord and the letting of the dwellinghouse is consequent upon or incidental to the contract of service, Part III and sections forty-one, forty-two, and forty-three of this Act shall not apply to the premises or to any part thereof in respect of that tenancy after the tenant has ceased to be employed by the landlord.

Properties Let on behalf of Mental Patient.

By the new s. 48B, the restrictions on the committee of a mental patient, as a landlord, in recovering possession from a tenant are not to apply to any tenancy of a dwellinghouse or urban property forming part of the estate of a mental patient who, at the time when he became a Mental Hospital patient, or became mentally defective, was occupying the premises. The text of the new section is as follows :

48B. Where an agreement has been entered into at any time after the commencement of this section for the letting of any dwellinghouse or urban property forming part of the estate of any person who was at the time of the agreement a patient under the Mental Defectives Act, 1911, and who at the time when he became a patient or became mentally defective was occupying the premises, Part III and sections forty-one, forty-two, and forty-three of this Act shall cease to apply to the premises or to any part thereof in respect of that tenancy when—

(*a*) The premises are required by the patient for his own occupation ; and

(*b*) The landlord has served on the tenant notice that the premises are so required.

Decontrol of Tenancies of Dwellinghouses on Tenant's Transferring or Subletting.

The restrictions on recovering possession are to cease to apply where the tenant of a dwellinghouse has transferred or sublet his tenancy and neither he nor his family occupies any part of it as a dwellinghouse. Short-term subletting of a tenant's permanent home during the temporary absence of the tenant does not bring this new section (s. 48C) into operation. The new section is as follows :

48C. (1) Where a tenancy of any dwellinghouse to which Part III of this Act applies has been transferred by the tenant (whether directly or by means of the creation of a subtenancy or subtenancies) and no part of the dwellinghouse is occupied as a dwellinghouse by the tenant or by the wife or husband or family of the tenant, Part III and sections forty-one, forty-two, and forty-three of this Act shall cease to apply to the premises or to any part thereof in respect of that tenancy from the commencement of this section or from the date on which the dwellinghouse or the last part thereof ceased to be so occupied, whichever is the later :

Provided that this subsection shall not apply in any case where the tenant, being in occupation of the dwellinghouse or any part thereof as his permanent home, has agreed to sublet it for a term not exceeding one year and intends to resume his occupancy as aforesaid at the end of that term.

(2) Nothing in this section shall be construed to restrict or take away any rights of any subtenant under section forty of this Act.

Decontrol of Urban Properties after Transfer or Subletting by Tenant.

Where an urban property is transferred or sublet by the tenant, then, by virtue of s. 48D, the restrictions on the landlord's recovery of possession cease at the end of six months from the date of the transfer or subletting, or on September 18, 1951, whichever is the later, unless the landlord consents to the retention of the restrictions or the Court so orders. The section effecting this conditional restriction is as follows :

48D. (1) Where at any time after the commencement of this section a tenancy of any urban property to which Part III of this Act applies is transferred by the tenant (whether directly or by means of the creation of a subtenancy or subtenancies), Part III and sections forty-one, forty-two, and forty-three of this Act shall cease to apply to the premises or to any part thereof in respect of that tenancy at the expiration of six months from the date of the transfer of the tenancy or twelve months from the commencement of this section (whichever period is the later to expire), unless, before the date of the transfer,—

(*a*) The landlord has consented in writing to the continued application of those provisions ; or

(*b*) The Court has ordered that those provisions shall continue to apply.

(2) The Court may make an order that the said provisions shall continue to apply in any case where the Court is satisfied that it is fair and equitable to make the order, having regard to the circumstances leading to the proposed transfer.

(3) Nothing in this section shall be construed to restrict or take away any rights of any subtenant under section forty of this Act.

Goodwill Payments.

The prohibition against the demand by a landlord or his agent or acceptance of any payment for goodwill from the tenant or outgoing or incoming tenant in consideration for grant, renewal, termination, or continuance of any " property " (as that term is defined in s. 2 of the principal Act) is removed by the omission

of the words " or property " in s. 19 (2) of the principal Act, and by the repeal of s. 19 (2) (*b*) and the whole of s. 19 (3) and s. 19 (4); but note the retention of the words " or property " in subs. 5.

Section 19, *as so amended*, is now as follows:

19. (1) Every person commits an offence against this Act who stipulates for or demands or accepts, for himself or for any other person, any bonus, fine, premium, or other consideration (not being commission lawfully payable to a land agent) in consideration of obtaining or offering to obtain or doing anything for the purpose of obtaining any dwellinghouse or property for the occupation of any other person.

(2) Every person, being the landlord of any dwellinghouse . . . or acting on behalf of the landlord, commits an offence against this Act who, in consideration of or on the occasion of the grant, renewal, termination, or continuance of a tenancy of the premises, stipulates for or demands or accepts, whether from the tenant or from any outgoing tenant or incoming tenant, any consideration other than the rent.

(5) Every person commits an offence against this Act who stipulates for or demands or accepts, for himself or for any other person, as a condition of the tenancy or the transfer of the tenancy of any dwellinghouse or property, payment for the furniture or fixtures, or other effects of the premises, or for any other chattels, of any sum in excess of the fair selling value thereof.

Recovery of Possession by Trustee for Beneficiary.

A new paragraph is added to s. 24 (1) to enable a landlord who is a trustee to recover possession, under that section, for occupation of any dwellinghouse by a beneficiary or beneficiaries under the trust, with the same conditions as to relative hardship and alternative accommodation as in the case of a landlord seeking possession for his own occupation.

The new paragraph is as follows:

(*gg*) In the case of a dwellinghouse, that the landlord is a trustee, and that the premises are reasonably required by a beneficiary under the trust or by two or more beneficiaries under the trust for his or their own occupation as a dwellinghouse.

Consequential amendments are made to s. 25 (1) and s. 30 (1).

Nuisance or Annoyance.

A new provision is made by the addition of a new subsection to s. 24, which has the effect of extending a landlord's right to recover possession on the ground set out in s. 24 (1) (*c*) if he fails to prove his right to possession on that ground to the satisfaction of the Court. In such event, the Court may, in its discretion, if the circumstances warrant it, order that the restrictions on recovering possession are to cease after six months from the making of the order. The Court is not to make an order if the landlord's conduct has contributed to the circumstances complained of; and any order made for possession may be revoked on the tenant's application as long as he applies within five months of the date of the order and proves that the condition of nuisance or annoyance has been improved.

The new subsection is as follows:

(4) On the hearing by any Court of any application by the landlord of any dwellinghouse or urban property for an order to which subsection one of this section applies, on the ground specified in paragraph (*c*) of that subsection, if the Court is not satisfied that that ground has been established but is satisfied that the circumstances are such that it is just and equitable to do so, the Court may in its discretion order that, at the expiration of six months from the date of the order, this Part and sections forty-one, forty-two, and forty-three of this Act shall cease to apply to the premises or to any part thereof in respect of the tenancy, and every such order shall have effect according to its tenor:

Provided that the Court shall not make any such order if the Court is satisfied that the conduct of the landlord has been a factor contributing to the circumstances complained of:

Provided also that the Court may revoke any such order, upon application made by the tenant not later than one month before the expiration of the said period of six months, if the Court is satisfied that since the making of the order the circumstances complained of have so changed that it is just and equitable to revoke the order.

Recovery of Dwellinghouse by Landlord for Own Occupation.

A further amendment of s. 24 of the Tenancy Act, 1948, is made by the addition of subs. 5. This subsection eases the restrictions on a landlord in respect of the recovery of possession of a dwellinghouse on special conditions. These apply when the landlord or his or her wife or husband has (if a man) attained the age of sixty years, or (if a woman) the age of fifty-five years and requires the dwellinghouse for his or her own occupation. He must have owned the premises for three years before he serves on his tenant a notice to quit, and he must give the tenant six months' notice of intention to apply for possession. But, to obtain an order, he does not have to establish that his hardship is relatively greater than that of the tenant, and he has not to provide suitable alternative accommodation under s. 25. This modification, in regard to landlords of the ages mentioned, is subject to the establishment of the conditions, summarized above, appearing in paras. (*a*) to (*c*) of the new subsection, and the further condition, in para. (*d*), that on August 1, 1950, the landlord did not have suitable and adequate living accommodation in premises owned by him. The new subsection is as follows:

(5) Subsection two of this section and section twenty-five of this Act shall not apply to any application for an order in respect of any dwellinghouse on the ground specified in paragraph (*g*) of subsection one of this section where—

(*a*) The landlord or any one of the landlords for whose occupation the premises are required, or his or her wife or husband, has attained the age of sixty years (in the case of a man) or fifty-five years (in the case of a woman); and

(*b*) The landlord has, or, as the case may be, the landlords have, after the commencement of this subsection, served on the tenant not less than six months' notice of the landlord's intention to make the application on that ground; and

(*c*) The landlord has been the landlord or, as the case may be, the landlords have been the landlords of the premises throughout the period of three years immediately preceding the date of service of the notice; and

(*d*) The landlord or, as the case may be, the landlords or any one of them did not on the first day of August, nineteen hundred and fifty, have adequate and suitable living accommodation in premises owned by the landlord or, as the case may be, by the landlords or any of them.

Section 25 is further amended to reduce to three years from five years the period during which a landlord must own a dwellinghouse before he can obtain possession of it for his own occupation without being obliged to provide suitable alternative accommodation or to prove greater hardship.

Section 11 of the Amendment Act, 1950, accordingly provides as follows:

11. Section twenty-five of the principal Act is hereby amended by omitting from the proviso to subsection one the words "five years," and substituting the words "three

years", and also by omitting the word "owned" wherever it occurs in that proviso, and substituting in each case the words "been the landlord or one of the landlords of".

Recovery of Urban Property for Landlord's Occupation.

If a landlord has owned an urban property for two years and requires it for his own occupation, he may, at any time after September 18, 1950, give his tenant a year's notice of his intention to apply for possession under s. 25 (1) (*h*); and, on the expiry of the notice, he may recover possession without having to prove greater hardship or to provide alternative accommodation. The Court may extend the period, on the tenant's application, by adjourning the proceedings (with a limit of six months) if it considers it just and equitable to do so. The tenant will still have the advantages given him by s. 24 (2), which gives the Court a discretionary power to refuse possession, after considering the relative hardship of the parties and all other relevant matters. The foregoing modification is effected by adding the following proviso to s. 25 (1):

> Provided also that this subsection shall not apply to any application for an order in respect of any urban property on the ground specified in paragraph (*h*) of subsection one of the last preceding section made by a landlord who has after the commencement of this proviso served on the tenant not less than one year's notice of the landlord's intention to make the application on that ground, and has been the landlord or one of the landlords of the premises throughout the period of two years immediately preceding the date of service of the notice; but in any such case the Court, in addition to its other powers, shall have power, upon application made by the tenant, to adjourn the proceedings for any period not exceeding six months if the Court considers that in the circumstances of the case it is just and equitable to do so; but nothing in this proviso shall be construed to limit the operation of subsection two of the last preceding section.

Alternative Accommodation.

Where alternative accommodation is offered to the tenant by the landlord whenever the landlord is required by the statute to provide it, that accommodation is to be deemed suitable unless the Court is satisfied that it is inadequate for the needs of the tenant, or is of an unreasonably low standard, or for any special reason is unsuitable for the tenant. The manner in which the onus of proof is thus shifted to the tenant is the enactment of a new subs. 4 to s. 25. That subsection is as follows:

> (4) In any proceedings to which this section applies, where the Court is satisfied that any alternative accommodation is or will be available for the tenant as aforesaid, that accommodation shall be deemed to be suitable unless the Court is satisfied that it is inadequate for the needs of the tenant, or is of an unreasonably low standard, or is for any special reason unsuitable for the tenant.

Hotel Premises and Camp Sites Excluded.

By amending the definition of "property" in s. 2 of the principal Act, and by making other consequential amendments, licensed premises are removed from its operation. This has been effected by s. 16 of the Amendment Act, 1950, in the following manner:

> (*a*) By adding to the definition of the term "property" in subsection one of section two the words "and does not include any premises in respect of which a publican's licence, an accommodation licence, or a tourist house licence is in force under the Licensing Act, 1908, or any hotel maintained by a Licensing Trust constituted under any Act":
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> (*b*) By omitting from subsection two of section nine the words "(not being licensed premises)":
>
> (*c*) By repealing subsection three of section nine:
>
> (*d*) By repealing the proviso to subsection one of section sixteen.

A new section (s. 3A), inserted by s. 17 of the Amendment Act, 1950, excludes the letting of a camp site for a term up to six weeks from the provisions of the principal Act. The new section is as follows:

> 3A. (1) Where an agreement has been entered into at any time after the commencement of this section for the letting of a camp site for a term not exceeding six weeks, this Act shall not apply to the premises so let or to any part thereof in respect of that tenancy.
>
> (2) For the purposes of this section the term "campsite" means a camp site within the meaning of the Camping Ground Regulations 1936, whether or not a living place has been erected or placed thereon.

Consequential Amendments.

The remaining paragraphs of s. 19 make the following consequential amendments of the principal Act: s. 24 (1) (*n*) and the whole of s. 28 are repealed; and s. 30 (1) is amended by omitting the words "(*l*) and (*n*)", and substituting the words "and (*l*)", and by omitting the words "purchaser or serviceman", wherever they occur in the subsection or in the proviso thereto, and substituting in each case the words "or purchaser".

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

The Assumption of Authority by Crown Servants. *100 Law Journal*, 493.

COMPANY.

Winding-up—Jurisdiction—Company not carrying on Business in England, but having Substantial Assets there—Companies Act, 1929 (c. 23), s. 338 (1) (2)—Election—Application for Order that Winding-up Invalid—Previous Application for Leave to Appeal out of Time against Rejection of Proof—Consent to Adjournment of Application for Leave pending Decision on Application for Order that Winding-up invalid. In 1932, a Russian bank, which had been dissolved by decree of the Soviet régime in 1918, and which, while it had not a specific place of business in England, had transacted business there through a representative and had large assets there, was wound up by an order of the Chancery Division under the Companies Act, 1929, s. 338 (1). In 1943, K., on behalf of a partnership firm, which had been dissolved and of which he had been a partner, sought to prove on behalf of the partnership firm in the liquidation against that bank for a sum which he alleged was the balance due to the firm from the bank. In 1949, the liquidator of the bank, by leave of the Registrar under s. 191 of the Act of 1929, issued the writ in the present action against the surviving partners of the partnership firm, claiming payment of a consolidated balance of moneys alleged to be due to the bank on various accounts. On January 9, 1950, the liquidator served notice on the said defendants rejecting the proof which K. had put forward in 1943. On January 25, 1950, the defendants applied for leave to appeal out of time against the rejection of the proof, but the hearing of an appeal to the Judge against the dismissal of the application by the Registrar was by consent adjourned, pending the determination of the present application. On March 8, 1950, the defendants issued this summons for an order dismissing or staying the action or to have the name of the bank struck out, on the ground that the bank was non-existent and that the action had been commenced without authority. The defendants argued that the winding-up was a nullity because the bank had never had a place of business nor carried on business in England except through agents. *Held*, (i) That, by applying for leave to appeal out of time against the rejection of their proof in the winding-up and having the appeal to the Judge on that question adjourned

until the outcome of the present proceedings was known, the defendants had not made any such election as would be inconsistent with and preclude their asserting in the present proceedings that the winding-up order was invalid. (*Evans* v. *Bartlam*, [1937] 2 All E.R. 646, applied.) (ii) That, as the bank had assets in England and there were persons submitting to the jurisdiction who were interested in the proper distribution of the assets, and there was no machinery under Russian law for the due distribution of the English assets, the primary conditions for the exercise by the Court of its discretionary winding-up jurisdiction under s. 338 (1) (*d*) (i) of the Act of 1929 existed; that jurisdiction was not limited by s. 338 (2) of the Act, which must be regarded as expository only; and it was not also necessary to show that the bank carried on business directly and from some established, or specified, place or places in England. (*Re Lloyd Generale Italiano*, (1885) 29 Ch.D. 219, explained.) (*Russian and English Bank and Florance Montefiore Guedalla* v. *Baring Bros. and Co., Ltd.*, [1936] 1 All E.R. 505, and *Re Russian and English Bank*, [1932] 1 Ch. 663, applied.) (Dictum of *Cohen*, J., in *Re Tovarishestvo Manufactur Liudvig-Rabenek*, [1944] 2 All E.R. 560, considered.) Decision of *Harman*, J., [1950] 2 All E.R. 105, affirmed. *Banque des Marchands de Moscou* (*Koupetschesky*) (*in Liquidation*) v. *Kindersley and Another*, [1950] 2 All E.R. 549 (C.A.).

As to Companies which can be Wound up under the Companies Act, 1929, see *5 Halsbury's Laws of England*, 2nd Ed. 844-848, paras. 1461-1467; and for Cases, see *10 E. and E. Digest*, 816-817, 1206-1208, Nos. *5317-5324*, *8535-8553*.

CONVERSION.

Handbag containing Sum of Money left on Shop-counter by Customer—Handbag found by Another Customer and handed to Shop-assistant—Handbag and Contents given by him to Stranger dishonestly claiming It—Shop-owner liable for Conversion—Term "gross negligence" discussed—Negligence—Contributory Negligence—Damages awarded Handbag-owner for Conversion of her Handbag and Money Contents—Negligence in leaving Handbag on Shop-counter First Step in Causation of Her Loss and contributing to it to Greater Extent than Shop-owner's Conversion—"Fault"—Reduction of Damages for Conversion by Three-fourths—Contributory Negligence Act, 1947, s. 3 (1). The plaintiff visited the defendant's department store, made a purchase, and left. Soon afterwards, she missed a handbag, which she had been carrying, and which contained £422 10s. in notes and some Social Security papers. She at once returned to the store, where she was told that it had been handed by a floorwalker to a woman who had claimed it as her own after giving a description of the outside of the handbag. Through advertising, the plaintiff found that a Mrs. McLean, who had seen a handbag lying unattened on a counter, had handed it to the shop-assistant. The plaintiff did not recover her handbag or its contents. She claimed from the proprietors of the department store a sum equal to the amount of money in the handbag, alleging negligence as a bailee, or, alternatively, conversion. The jury, in answer to issues put to it, found that the plaintiff had lost a handbag containing £422 10s. in the defendant's store and that it was handed by the defendant to another person; that the defendant's servant was negligent in delivering the handbag to a person other than the plaintiff, but that it was not grossly negligent. After argument subsequent to the trial, *Hutchison*, J., dismissed a motion for nonsuit. On a motion for judgment for the defendant, it was held that the defendant was an involuntary bailee, and was not liable for conversion simply on account of having given the handbag to the wrong person, but that its liability, if any, must depend on negligence; that the responsibility of a gratuitous bailee was conveniently expressed as liability only for gross negligence; and that, since gross negligence had been negatived by the jury, the defendant was entitled to judgment. On the plaintiff's appeal from that determination, *Held*, *per totam curiam*, That, in the circumstances, the respondent having voluntarily assumed possession or custody of the appellant's handbag (for it was under no obligation to do so), and thereby the responsibility of delivering it to its true owner, its duty was to hold it for her, and to deliver it only to her; but, as the respondent, on claim being made for the handbag by a person who was not the true owner, delivered it to her, after a perfunctory investigation unattended by any attempt to check her claim by referring to the handbag's contents, this was necessarily a denial of the true owner's title; and the respondent was liable to the appellant for the value of the handbag's contents, on the basis of conversion. (*Stephens* v. *Elwall*, (1815) 4 M. & S. 259; 105 E.R. 830, *Winter* v. *Bancks*, (1901) 17 T.L.R. 446, *Hollins* v. *Fowler*, (1875) L.R. 7 H.L. 757, *Hiort* v. *Bott*, (1874) L.R. 9 Ex. 86, and *Caxton Publishing Co., Ltd.* v. *Sutherland Publishing Co., Ltd.*, [1938] 4 All E.R. 389, followed.) (*Baldwin* v. *Cole*, (1704) 6 Mod. 212; 87 E.R. 964, *Keyworth* v. *Hill*, (1820) 3 B. & Ald. 685; 106 E.R. 811, and *England* v. *Cowley*, (1873) L.R. 8 Ex. 126, applied.) *Held*, per *Northcroft* and *Gresson*, JJ. (*Finlay*, J., dissenting), That the Contributory Negligence Act, 1947, applied, as the negligence of the appellant in leaving her handbag with its valuable contents on the store-counter was the first step in the causation of her loss, and to this negligence was added the wrongful act of the respondent in delivering the bag to the claimant who made off with it; but the negligence of the appellant in fact contributed to that loss, and to a much greater extent than the conversion by the respondent; and her damages should, accordingly, be reduced three-fourths. *Helson* v. *McKenzies* (*Cuba Street*), *Ltd.* C.A. Wellington. Northcroft, Finlay, Gresson, JJ.)

COSTS.

Fixed Costs. *94 Solicitors Journal*, 415.

DAMAGES.

Special Damages: Deduction of Expenses. *100 Law Journal*, 495.

DEATH DUTIES.

Value of Shares for Estate Duty Purposes. *94 Solicitors Journal*, 414.

DEATHS BY ACCIDENTS COMPENSATION.

Dependants—Apportionment—Class Fund established by Order making Provision for Wife and Sons of Deceased—Residue to be apportioned on Younger Son attaining Eighteen Years—Widow dying after Younger Son attained That Age, but before Final Apportionments—Court bound in making New Order to take Such Facts into Consideration—Apportionment of Fund on basis of Losses suffered by Dependants, but taking into Consideration Amounts already paid to Them—Deaths by Accidents Compensation Act, 1908, s. 6. An order, which was made in 1944, apportioning damages under s. 6 of the Deaths by Accidents Compensation Act, 1908, established, for the benefit of the wife and dependent sons of the deceased, a class fund of the kind declared by the Court of Appeal in *Public Trustee* v. *Heffron*, [1946] N.Z.L.R. 683, to be contrary to the provisions of that statute. In terms of the order, one-third of the moneys, after payment of funeral expenses and costs, was paid to the widow, and the remaining two-thirds of the residue and the income therefrom were held for the maintenance, education, advancement in life, or benefit of the widow and her two dependent sons until the younger should attain the age of eighteen years. Upon the younger's attaining that age, the Public Trustee was to apply to the Court to determine to or among which of the beneficiaries the balance of the moneys then remaining was to be paid or divided. The widow died in June, 1949, at which date the younger son had attained eighteen years of age. In 1950, on a motion by the Public Trustee asking for directions, *Held*, 1. That, in view of the decision in *Public Trustee* v. *Heffron*, [1946] N.Z.L.R. 683, the Court was required to make a belated apportionment *nunc pro tunc*, and had to consider the circumstances of the widow and two dependent sons for whom the action was brought from the time they suffered injury by the loss of the deceased up to the present time. 2. That, where the facts are known—such as the death of the widow and the ending of the son's dependency—the apportionment must be made in relation to those facts, and not on the basis of the probabilities existing at the date of the death of the deceased. (*Phillips* v. *Kershaw, Lees and Co., Ltd.*, (1920) 13 B.W.C.C. 211, and *Williamson* v. *John I. Thornycroft and Co., Ltd.*, [1940] 4 All E.R. 61, applied.) 3. That the apportionment of the residue should be based upon the same consideration as would have applied had it been an apportionment of the original fund, taking into consideration the amounts already received by the original dependants. Consequently, as the widow's period of dependency was 2,160 days, and the respective periods of dependency of the sons were 1,263 and 1,992 days, and as the injury to the widow would be at a rate of twice that suffered by each son, the original sum and interest, after deducting all costs and charges, was divided in 7,575 portions, of which the widow's estate was reallotted 4,320 and the sons 1,263 and 1,992 respectively, less the moneys already received by each of them. *Reeve* v. *The King*. (S.C. Greymouth. September 11, 1950. Northcroft, J.)

DIVORCE.

Maintenance—Assessment—Factors to be considered—Conduct of Parties—Matters excluded from Consideration—Not brought forward at Trial—Inconsistency with Decree—Matters calculated to produce Different Result at Trial—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1). The wife obtained a decree *nisi* of dissolution of the marriage on the ground of desertion. The husband did not put in an answer or defend the proceedings, but his solicitors wrote to the wife's solicitors during the pendency of the petition saying that it was the husband's intention on the wife's application for maintenance to put forward the conduct of the parties during their married life as affecting the proper proportion of his income which the Court should order as provision for the wife. Affidavits were, accordingly, filed in the maintenance proceedings dealing with quarrels and unhappiness and the wife's lack of co-operation and refusal to be reconciled, on which matters the husband asked leave to cross-examine her. The Registrar refused, on the ground (*inter alia*) that the matters mentioned had not been put forward at the trial. *Held*, That the correct principle in maintenance proceedings was that the husband was estopped from asserting matters inconsistent with the decree, and also, for reasons of public policy, he was prohibited from asserting matters known to him which would reasonably have been expected, if proved, to provide an effective answer to the petition or to produce a different result at the trial—*e.g.*, mutual decrees instead of a decree to the petitioner, or a discretionary decree instead of one as of right. (*Lindsay* v. *Lindsay*, [1934] P. 162, and *Robinson* v. *Robinson*, [1943] 1 All E.R. 251, applied.) *Quaere*, Whether the last prohibition extended to matters of which the husband was ignorant at the time of the trial, but which he might have known but for his own carelessness. *Duchesne* v. *Duchesne*, [1950] 2 All E.R. 784 (P.D.A.).

As to the Conduct of Parties, see *10 Halsbury's Laws of England*, 2nd Ed. 788, 789, para. 1249; and for Cases, see *27 E. and E. Digest*, 501, 502, Nos. *5,361-5,378*, Digest Supplement, and Second Digest Supplement.

INCOME-TAX.

Profit on Isolated Purchase and Sale—Business and Stock-in-trade—"Business"—Land and Income Tax Act, 1923, ss. 2, 79—Land and Income Tax Amendment Act, 1925, s. 5—Land and Income Tax Amendment Act, 1939, s. 16. The trustees of a settlement purchased a grocery business after business hours on one day and sold it to a company before business hours on the following day. The sale to the company was made at an increased price of £5,000, which was satisfied by allotting to the trustees 5,000 fully-paid shares in the company. Of the £5,000, a sum of £1,612 represented profit on sale of the stock-in-trade. The transaction was an isolated one by the trustees. The Commissioner of Taxes assessed the trustees for income-tax on the profit on the stock-in-trade. On appeal from this assessment, *Held*, allowing the appeal, 1. That the words "carried on" in the definition of "business" in s. 2 of the Land and Income Tax Act, 1923, imply a repetition of acts. 2. That the trustees did not carry on the business merely by virtue of owning it overnight. 3. That, where no trade is carried on, a profit made on the sale of articles is, in general, not assessable. 4. That the amendments relating to profit on sales of trading stock effected by s. 7 of the Land and Income Tax Amendment Act, 1924, and s. 16 of the Land and Income Tax Amendment Act, 1939, do not apply if the person selling the stock does not carry on a business. *S.* v. *Commissioner of Taxes.* (Wellington. September 11, 1950. Thompson, S.M.)

INSURANCE.

Public Risk Policy—Local Authority and All Its Officers indemnified against Legal Liability—Such Policy limiting Amount Payable if Assured similarly indemnified otherwise—Another Policy indemnifying One Such Officer only—Action for Negligence sustained against Him—Limitation in First-named Policy ineffective—Rateable Contribution. The plaintiff was the insurer of a local body (herein called "the Board") under a policy for £2,500 indemnifying not merely the Board but also its officers in respect of its and their legal liability for negligence. The defendant had issued a policy of indemnity of £1,500 similarly insuring one of the Board's officers (herein called "the officer"). An action had been commenced against the Board as first defendant and the officer as second defendant alleging negligence on the part of the officer. The Board had served on the officer a notice pursuant to R. 99 N of the Code of Civil Procedure claiming to be indemnified by him against the claim of the plaintiff in that action on the ground that the allegation of negligence related solely to acts and omissions of the officer. The action was compromised by the present plaintiff and defendant, as insurers under their respective policies, by paying the plaintiff £784 2s. 4d. in full satisfaction of his claim and costs, each insurer meanwhile paying half of that sum until questions arising between them should be determined. In relation to the compromise, the present plaintiff incurred costs amounting to £88 2s. 2d. in addition to the sum of £392 1s. 2d.; and it brought the present action to recover the sum of £480 3s. 4d. from the present defendant. (No objection was taken by the plaintiff on the ground that the officer had rendered his indemnity void by taking out another policy for the same risk.) *Held*, 1. That the officer was entitled to an indemnity under the Board's policy, because, by reason of the typed endorsement of the policy, it was made a contract of indemnity of officers of the Board, including the officer in question, by extension of the Board's own indemnity so as "to include indemnity in respect of the legal liability of the Assured's officers"; but that this was subject to the proviso of the endorsement on the plaintiff's policy which purported to limit the indemnity of the officer to the excess beyond any amount for which he might be insured otherwise. 2. That the plaintiff, as insurer of the Board, was not entitled to disclaim indemnity to the officer, as the officer was also an assured under the policy, and was not, therefore, a third party within the contemplation of the doctrine of subrogation. (*Castellain* v. *Preston*, (1883) 11 Q.B.D. 380, distinguished.) 3. That, in the event of a claim for negligence being sustained against the officer, both the plaintiff and the defendant contracted to indemnify him for that loss; the risk in both policies was the same; and the policies differed only as to amount and perhaps as to conditions. (*North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.*, (1877) 5 Ch.D. 569, distinguished.) 4. That the purported limitation, by the proviso of the endorsement on the plaintiff's policy, of liability by the plaintiff only beyond "the full amount of the indemnity otherwise provided" was not effective; and the plaintiff was accordingly liable to contribute rateably with the defendant. (*Gale* v. *Motor Union Insurance Co.*, *Loyst* v. *General Accident, Fire and Life Assurance Corporation*, [1928] 1 K.B. 359, *Weddell* v. *Road Transport and General Insurance Co., Ltd.*, [1932] 2 K.B. 563, and *Austin* v. *Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E.R. 243; aff. on app., [1945] 1 All E.R.3 16, followed.) *Semble*, The defendant did not counterclaim for the further amount to which it was entitled in excess of the one-half contributed by the plaintiff in settlement of the original action, but (as was admitted), if the defendant's contention was upheld, it was entitled to the excess on the rateable proportion of five-eighths and one-eighth. *State Fire Insurance General Manager* v. *Liverpool and London and Globe Insurance Co., Ltd.* (S.C. Dunedin. September 1, 1950. Northcroft, J.)

LANDLORD AND TENANT.

Measure of Damages for Breach of Covenant to Repair during Period of Requisition. *24 Australian Law Journal*, 157.

LAW PRACTITIONERS.

Professional Conduct in Advocacy. *94 Solicitors Journal*, 467.

MINES, MINERALS, AND QUARRIES.

Jurisdiction—Special-site Licence—Application for Special-site Licence in respect of Land subject of Occupation Lease under Land Act, 1924—Such Land not Unalienated Crown Land—Water-race Licence—Application for Water-race Licence in respect of Pond left in Tailings from Old Mining Operations—Such Pond not "Water-race"—No Jurisdiction to grant Either Application—Mining Act, 1926, ss. 109, 144. The grant of an occupation lease under the Land Act, 1924, is an alienation of the land concerned. Consequently, a Warden has no jurisdiction under s. 144 of the Mining Act, 1926, to grant a special-site licence over such alienated Crown land in a mining district. Consequently, where the purpose of the proposed water-race was irrigation, and the special-site licence was required to house an electrical pump for the purpose of pumping water from the dredge hole to fill the proposed race, the dredge hole or pond being situated on land held on occupation licence by an objector, *Held*, That the Warden had no jurisdiction to grant either application. *In re Butt's Application.* (Roxburgh. September 6, 1950. Dobbie, S.M.)

NEGLIGENCE.

Wife's Loss of Consortium—Injury to Husband causing Sexual Incapacity—Tortfeasor's Liability to Wife. By reason of the negligence of the defendants, the plaintiff's husband sustained

physical injuries, one of the results of which was that he became incapable of sexual intercourse, and, in consequence, the plaintiff suffered in health. There was no evidence that the defendants knew that the plaintiff's husband was a married man. In an action by the plaintiff claiming damages from the defendants in respect of the interference with her right to her husband's consortium, *Held*, (i) That the novelty of the action was no bar to it provided that it was only a new instance of a principle known to the law and not new in principle. (Principle laid down by *Ashhurst*, J., in *Pasley* v. *Freeman*, (1789) 3 Term. Rep. 63, applied.) (ii) That, on the analogy of the law relating to the enticement of a spouse, the defendants were not liable for the plaintiff's loss of consortium, or for interference with her right to such consortium, because they were unaware that her husband was married, nor had they committed any deliberate act which was intended to interfere with her right. (*Place* v. *Searle*, [1932] 2 K.B. 497, and *Newton* v. *Hardy*, (1933) 149 L.T. 165, applied.) (iii) That, although the violation of a legal right committed knowingly gave a cause of action, any interference by the defendants with the plaintiff's rights in relation to her husband was innocent and unintentional, and, therefore, was insufficient to support an action. (*Lumley* v. *Gye*, (1853) 22 L.J.Q.B. 463, distinguished.) (iv) That the defendants were under no duty to take care in relation to the plaintiff, and, therefore, were not liable for the consequences to her of their negligence. *Best* v. *Samuel Fox and Co., Ltd., and Another*, [1950] 2 All E.R. 798.

As to Right of Consortium, see *16 Halsbury's Laws of England*, 2nd Ed. 610-612, paras. 956-960; and for Cases, see *27 E. and E. Digest*, 78-83, Nos. *607-649*.

Work on Land under Statutory Authority—Entry on Land by Contractors under Contract with Ministry—Negligence of Contractors—Liability of Ministry—Defence (General) Regulations, 1939, Reg. 50 (1). The plaintiff was the owner of a field on which a firm of contractors, in performance of a contract between them and the Ministry of Fuel and Power, acting in conjunction with the Minister of Works, entered to do work in connection with the making of boreholes or trial holes to see whether workable seams of coal lay under the land. The Minister of Works, as a competent authority under Reg. 49 (1) of the Defence (General) Regulations, 1939, had authorized the entry of the contractors on the field under Reg. 50 (1) of the Regulations. Owing to the negligence of the contractors in leaving a heap of timber lying in the field, a horse belonging to the plaintiff, which was grazing there, was injured. In an action against the Ministries and the contractors for damages for negligence, *Held*, That the Ministries, having availed themselves of the power given in Reg. 50 (1) to do work on the land, had a duty to the occupier of the land not to cause unnecessary danger or damage to him, and they could not escape from the responsibility of seeing that duty performed by delegating it to a contractor, and, therefore, both Ministries were liable to the plaintiff in damages. (Dicta of *Lord Greene*, M.R., in *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council*, [1945] 2 All E.R. 460, and *Lord Blackburn* in *Dalton* v. *Angus*, (1881) 6 App. Cas. 829, applied.) *Darling* v. *Attorney-General and Another*, [1950] 2 All E.R. 793.

For the Defence (General) Regulations, 1939, Regs. 49 (1), 50 (1) as amended, see *40 Halsbury's Complete Statutes of England*, 1357, 1358.

PROBATE AND ADMINISTRATION.

Will—Execution—Whether Acknowledgment by Testator of His Signature "in the presence of" Both Witnesses required—Wills Act, 1928 (Vict.), s. 7 (Wills Act, 1837, s. 9). The deceased was an employee in a large city store. One morning he approached a fellow-employee, A., and told him that he had made his will and wanted A. and P. to act as witnesses. Some time later the same morning, A. saw the deceased speak to P. and saw them go together to a window-ledge in the store, where he saw P. take a paper fron the testator and write upon it. He could not see what was on the paper or hear what was said, but he was standing about 15 ft. away and had an uninterrupted view of the deceased and P. Immediately afterwards, the deceased came over to A. and told him that P. had signed his will and that he wished A. to do likewise. They went together to a counter behind a partition. Here deceased produced his will, which bore his own signature and that of P. P. was then in the vicinity but not actually present. A. thereupon signed the will. According to P., the deceased approached him and said "You know my signature?" (or "my writing"), and, when P. said "Yes," deceased said, "I'll get you to witness my will." The will was produced, with the signature of the deceased upon it, and P. signed his name at a window-ledge. Deceased then picked up the will. P. did not see A. in the vicinity at the time. *Held*, That, as the deceased had not acknowledged his signature in the presence of A. and P. at the same time, the will had not been executed in accordance with the provisions of s. 7 of the Wills Act, 1928 (Vict.) [which reproduces s. 9 of the Wills Act, 1837], and was, accordingly, invalid. *Semble*, It is not necessary for the two attesting witnesses to a will to sign the will in the presence of each other. (*Casement* v. *Fulton*, (1845) 5 Moo. P.C. 130, commented upon.) *In the Will of Morgan*, [1950] V.L.R. 335.

RIVERS.

Prevention of Pollution. *94 Solicitors Journal*, 416.

SEA CARRIAGE OF GOODS.

Bill of Lading—Delivery of Cargo in Damaged Condition—Damage by Water—Suction-pipe running through Hold allowed to freeze before Loading—Ice in Fractured Pipe melting after Commencement of Voyage—"Act, neglect, or default . . . in the management of the ship"—Shipowner not excused from Liability by Exceptions in Bill of Lading—Water Carriage of Goods Act, 1936 (Canada), Schedule, Art. III, rr. 1, 2, Art. IV, rr. 1, 2 (a). The Schedule to the Water Carriage of Goods Act, 1936 (Canada), is in almost identical terms with the Schedule to the Carriage of Goods by Sea Act, 1924 (Gt. Brit.) (and with the Schedule to the Sea Carriage of Goods Act, 1940 (N.Z.)). A shipment of paper, consigned to the plaintiff, was loaded at the port of St. John in Canada in the defendant company's ship on the day after she had come out of dry dock. It was delivered to the plaintiff in New Zealand in a damaged condition, alleged to be due to the defendant's negligence, in that a suction-pipe running through the hold in which the cargo was stowed had been allowed to freeze up while filled with water when the vessel was in the port of St. John for loading; that the pipe-line split; and that, upon the ice in the pipe melting after the ship had left St. John, the water from leaks in the suction-pipe flooded No. 1 port hold in which the cargo was stowed and caused the damage. Alternatively, it was alleged that the cargo was stowed in that hold while the pipe was in a fractured condition. In an action in which the plaintiff company claimed as damages the value of its loss, *Held*, 1. That, on the evidence, the chief engineer of the ship, at least, should have recognized the dangers inherent in the low temperature while the ship was in dry dock, and should have seen that the pipe-line running through the hold was drained; and he should have foreseen the possibility of the fracture; alternatively, the evidence adduced by the defendant had not discharged the burden which rested upon it under Art. III, r. 1, of the Schedule to the Water Carriage of Goods Act, 1936 (Canada), which was applicable to the contract, of proving the exercise of due diligence on its part to make the ship seaworthy. 2. That the negligence of the defendant was in breach of its duty under Art. III, r. 1, before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy, properly equip the ship, and make the hold in which the plaintiff's cargo of paper was carried fit and safe for its reception, carriage, and preservation. *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.*, [1929] A.C. 223, and *Foreman and Ellams, Ltd.* v. *Federal Steam Navigation Co., Ltd.*, [1928] 2 K.B. 424, followed.) (*The Glenochil*, [1896] P. 10, distinguished.) (*Suzuki and Co.* v. *T. Benyon and Co.*, (1926) 31 Com. Cas. 183, referred to.) 3. That, consequently, the defendant was not protected by Art. IV, r. 2 (*a*) (which is an exception to Art. III, r. 2, and not to Art. III, r. 1), as the words "neglect or default in the management of the ship" refer to matters directly affecting the ship as a ship after it has commenced the voyage. 4. That, in order to invoke the protection of Art. IV, r. 1, there must be due diligence on the part of the "carrier," which term, as used therein, includes not only the owner, but also his servants or agents. (*Smith, Hogg and Co., Ltd.* v. *Black Sea and Baltic General Insurance Co., Ltd.*, [1940] A.C. 997; [1940] 3 All E.R. 405, followed.) (*The Vortigern*, [1899] P. 140, *Steel* v. *State Line Steamship Co.*, (1877) 3 App. Cas. 72, and *Gilroy, Sons, and Co.* v. *W. R. Price and Co.*, [1893] A.C. 56, applied.) 5. That, accordingly, the defendant company was liable, owing to its failure to exercise due diligence to make the ship seaworthy before its departure from St. John and to make the holds fit and safe for the carriage and preservation of the plaintiff's cargo of paper. *B. J. Ball (New Zealand), Ltd.* v. *Federal Steam Navigation Co., Ltd.*, (S.C. Wellington. August 29, 1950. Fair, J.)

TENANCY.

Member of Tenant's Family. *94 Solicitors Journal*, 415.

CONSTITUTIONAL LAW: SOME ASPECTS OF CHANGE.

By A. C. BRASSINGTON.

(*Concluded from p. 268.*)

During the last century, English writers on the constitution have frequently used such phrases as " our constitutional and legal progress," our " primary institutions," " the principles of early times," or " the simpler principles of our earliest forefathers," " the essential privileges of our countrymen," and " fundamental securities against arbitrary power." The constant repetition of these phrases has created a legend around the topic of constitutional law. The legend is easy to expound, and the mental reaction of the listener is still one of acceptance. A pleasurable emotion is aroused, as the old phrases evoke the familiar responses. The legend contains much truth; but doubt is arising in the minds of some of the believers, and strange whispers may be heard in the temple of the law. One penetrating voice has recently been heard, that of the late Lord Atkin[9] in his strong dissenting judgment in the case of *Liversidge* v. *Anderson*, already referred to. Lord Atkin said, at p. 244; 361:

> I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the Executive . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.
>
> I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the Minister.

Those who are not familiar with recent studies in constitutional law should understand that a more critical approach is replacing the attitude of veneration previously adopted, and that little is now taken for granted, or assumed to be fundamental. This approach tends to lessen the importance previously accorded to the study of the past, with the result that once favourite topics of constitutional law (such as the history of the Commune Concilium Regni or the Witenagemot) are now in limbo. The student of law, no longer interested in them, rightly concentrates his attention upon recent statutes and law reports. He is no antiquary—the danger is that he may some day be said to be no scholar. In this respect he is accompanied only too often by the political scientist, the economist, and the administrator. It is perhaps the insecurity of life that has caused all of them to peer ahead into the future, and to grudge the time for a backward glance.

Let us now return to our study of constitutional law at the point at which we began—namely, the absence in English law of a written constitutional code. We have seen that the law governing such a vital matter as freedom of assembly is to be found in judicial decisions relating to highways, trespass, and nuisance, and in statutes, and in the by-laws of local authorities. We are left in some doubt as to the present state of the law, and are uneasy as to possible developments both in England and in New Zealand. It may be interesting now to consider what the average New Zealander thinks about constitutional law, and the powers of the Courts and the Legislature. When one inquires, one usually finds in this country amongst members of the public the belief that there is some document called the Constitution, under which Judges can prevent Parliament in England, or in New Zealand, from passing laws, or can prevent laws already passed from being enforced. This belief is probably derived from reports in our newspapers of decisions of the Courts in Australia, and in the United States of America, declaring certain laws to be " unconstitutional," and is usually expressed when private rights are affected by legislation of a socialistic character. The person affected by the legislation is astonished when he learns of the power of our Parliament, and of the incapacity of the Courts to act as a check upon the Legislature. The same person may then express regret that we do not possess a written constitution like that of the Commonwealth of Australia or the United States of America, and that nothing can be done, except possibly at the ballot-box, to curb the Government of the day. To such persons the following remarks may provide an answer.

Numerous causes combined to make it almost inevitable that the United States of America should have a federal constitution. Federation seemed best also to the States which compose the Commonwealth of Australia. Yet in both countries there have been times when the constitution has shown signs of strain under almost intolerable political and economic difficulties. This is more particularly the case in the United States, where the powers of the Courts to declare laws to be unconstitutional have been the cause of much discontent. In Australia, the Full Bench of the High Court has recently declared invalid s. 48 of the Banking Act, 1945, a Federal Act which sought to compel city and municipal councils to trade with the Commonwealth Bank to the exclusion of private trading-banks.[10] The echoes of this decision are yet in our ears. The Speaker of the Federal House of Representatives, Canberra, was recently reported as saying in the Federal House, in a speech referring to the Judges, that he had:

> a fundamental objection to senile people being in a position where they could defy the will of the people . . . If ever there was a political decision given by the High Court it was the recent decision on the 1945 Act. Every anti-Labour leader in Australia to-day is pinning his faith on this fact, and publicly stating that as soon as this Bill is proclaimed it will be fought in the High Court. This clearly indicates that anti-Labour forces believe the High Court's last bank decision was a political one, and that, no matter how far it stretches the legal imagination, the High Court

[9] Died 1944. As to Lord Atkin, see memorial tributes by Lord Wright and Professor H. C. Gutteridge, K.C., in (1944) *60 Law Quarterly Review*, 334, 340. For an interesting postscript to *Liversidge* v. *Anderson*, see (1944) 20 NEW ZEALAND LAW JOURNAL, 243.

[10] *Melbourne Corporation* v. *The Commonwealth*, (1947) 74 C.L.R. 31.

is there for the convenience of the anti-Labour parties, to destroy this Government's legislation.[11]

The Commonwealth Premier, Mr. Chifley, is reported as having said on the same day, in the Federal Parliament, that the Labour Government's policy was to fix the retiring age for High Court Judges. He claimed that the High Court itself, and not the Constitution, had appointed the High Court Judges for life. " Eminent constitutional lawyers have told me that the judgment of the Court in the banking case has taken the Court back to the outlook of twenty-five years ago," said Mr. Chifley. Earlier, the Leader of the Opposition (Mr. R. G. Menzies) had said that the attack by the Speaker (Mr. J. S. Rosevear) on the High Court was " an incitement to the foulest and most revolutionary elements in the country." A rigid constitutional code fails to commend itself to us when it produces conditions leading to such attacks on Judges, by persons so highly placed. We in New Zealand have witnessed no such attacks upon our Judges; neither can we imagine such occurrences in Westminster, where the Mother of Parliaments holds absolute authority.

Power to declare a statute unconstitutional is now admitted to reside in the judiciary of the United States. This power was in earlier times a matter of dispute, but was claimed in the clearest language by Chief Justice Marshall in 1803 when he held that " the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void.[12] This decision angered the Republicans, and the Supreme Court moved cautiously in the succeeding years, until in 1827 Mr. Justice Washington asserted:

> It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.[13]

This self-denial on the part of the judiciary probably " appeased " those who might otherwise have taken a strong stand on the question of the powers of the Judges. Having, after the passage of years, secured its own power, the judiciary then began to show much less " decent respect " to the Legislature, until in 1930 the late Mr. Justice Holmes, in the last of his dissenting judgments, protested against the disregard by the Court of its functions. He said:

> I have not yet adequately expressed the more than anxiety that I feel at the ever-increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.[14]

In 1936, Mr. Justice Stone in a dissenting judgment referred to the " personal economic predilections " of members of the Court as being the basis of some of their decisions.[15]

There is no space here for more than a brief indication of the nature of the problem that at some time of crisis, when grave issues are involved, may confront the Federal Governments in the United States of America, or the Commonwealth of Australia. In these countries, because of the separation of the legislative, executive, and judicial functions, a legal situation may occur in which the governmental power of the elected representatives of the people cannot function. At such a time, the Courts, by declaring a law to be unconstitutional, may prevent the exercise of governmental power. The rigidity of the written constitution can then be overcome only by amending it: but there appears to be increasing difficulty in securing a constitutional amendment without the use amongst the masses of the people of dangerous methods of propaganda, and of political devices of doubtful morality. At such times the Federal form of government lacks the concentration of absolute power of the Parliament at Westminster—a lack which could well lead to grave dangers both at home and abroad. In the jungle of modern power-politics a State must be capable of speedy and efficient action in order to survive; delay and legal incapacity are such serious handicaps upon the exercise of sovereign power as to offer tempting advantages to aggressive enemies. Nor can propaganda from abroad be lightly estimated by any Federal government seeking the support of its electorate to a constitutional amendment. Such a government engaged in some vital constitutional struggle might well be overthrown, with the connivance of a foreign power, using the methods of propaganda and well-timed political manoeuvre.

It must be conceded to the English parliamentary system that it has great capacity for rapid and effective action when occasion demands. It is flexible and can quickly adapt itself to novel conditions; it is not subject to legal restraints. Against the danger of sudden and far-reaching change can be balanced only the commonsense, steadiness, and political training of the electorate, and the high standard of Parliamentary ethics. For it must not be forgotten that the Member of Parliament is not a delegate for the majority of the electors who voted for him, but is a representative of the nation, and should act in what he considers to be the best interests of the people as a whole:

> A British Government is not merely responsible to those who have appointed it or keep it in office in the sense in which an agent is responsible to his principal. It is an independent body which on taking office assumes the responsibility of leading and directing Parliament and the nation in accordance with its own judgment and convictions. Members of Parliament are no mere delegates of their constituents, but, as Burke pointed out, representatives of the nation, responsible, in the last resort, to their own conscience.[16]

Rightly or wrongly, most of us believe that at times of national crisis our legislators, both in Great Britain and in New Zealand, are moved by the highest motives to act in what they consider to be the interests of the nation.

Nor need we fear unduly the powers of Parliament so long as we understand and uphold our rights as citizens. When we no longer trouble to understand our rights or to translate understanding into action, then charters, statutes, or other writings will prove to be but historical records of the measure of our decline.

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[11] *Christchurch Press*, November 15, 1947.

[12] *Marbury* v. *Madison*, 2 Cranch, 137. And see *Kent's Commentaries on American Law*, Lecture XX, *Bryce's American Commonwealth*, Part I, Ch. XXIV, and *Hockett's Constitutional History of the United States, 1776-1826*.

[13] *Ogden* v. *Saunders*, (1827) 12 Wheat. 213, 270.

[14] *Baldwin* v. *Missouri*, 281 U.S. 586, 595. This was a case dealing with State legislation. The Fourteenth Amendment provided (*inter alia*) thst no State should deprive any person of life, liberty, or property without due process of law.

[15] *Morehead* v. *New York, Ex rel. Tipaldo*, 298 U.S. 587, 633.

[16] L. S. Amery, *Thoughts on the Constitution*, 31.

The following quotation from a recent constitutional study gives an illustration of present and future problems in Great Britain :

> The conditions created by war, rumours of war, and the aftermaths of war will presumably not last for ever, and social and economic theories are usually transient and inevitably modified in the light of experience. What balance of powers among the authorities within the Constitution will become stabilized in normal circumstances no one can pretend to say, for no one can predict what circumstances will become normal in the second half of the century. It is a manifest lesson of all our history—and indeed of any history—that an excessive growth of executive power is inimical to the liberties of the individual citizen, but whether the modern electorate is as yet sufficiently experienced in the wise exercise of its sovereign power to apply that lesson remains to be seen. The elasticity of the English Constitution is one of its greatest merits, but it is also a source of some danger, for the ease with which the Constitution can be amended and modified tends to obscure the significance and consequences of changes which may be slight in themselves, but which may be of profound accumulative effect. Knowledge as well as eternal vigilance is the price of liberty.[17]

We in New Zealand have recently acquired full power to amend our Constitution.[18] There is now nothing in law to prevent us from abolishing the Legislative Council, the office of Governor-General, and the right of appeal to the Privy Council. In law, we now have sovereign power to direct our own affairs. We may soon feel uneasy in our new legal status, and shall no longer be able to look to the Mother Country in quite the same way as in the past. We used to feel some assurance against too radical change, in the belief that the Imperial Parliament, or the Crown through the office of Governor-General, or the Privy Council, could in a dimly formulated way secure us against rash or hasty legislation. Whatever ill-defined legal security of this description we may have possessed no longer exists. Our House of Representatives has power to make itself supreme, if it decides to take the appropriate measures. It is true that in England the House of Commons has, or could legally acquire, the same supremacy, and that we in New Zealand have the same unwritten safeguards as Great Britain. These safeguards are the commonsense of the electors, their general political traditions and experience in self-government, and all those intangibles that are to be found amongst free men. It may be remarked in passing, that there is no evidence of any widespread interest in New Zealand in questions of constitutional law, probably because most people continue to believe that the " Old Country " still controls on our behalf these somewhat mysterious matters ; but a powerful political party with a working majority in the House of Representatives could remove from New Zealanders this comforting thought. This country faces the same problem as all others—that is, how to safeguard material and economic existence while preserving the rights of individuals and concepts of personal liberty. In the times of doubt and stress in which we live, and in which the lives of our children are cast, we and they will retain liberty only by upholding the tradition of the rule of law, and the equality of all men before the law—a tradition that has come to us through the courage of individuals, and by no easy path.

[17] *Chrimes's English Constitutional History*, 188.

[18] The New Zealand Constitution (Amendment) Act, 1947.

THE LAND TRANSFER AMENDMENT ACT, 1950.

By E. C. Adams, LL.M.

As conveyancing is an important branch of almost every solicitor's practice, a short account of the Land Transfer Amendment Act, 1950, recently passed by Parliament will doubtless prove of interest to readers of this Journal.

Creation of New Registration Districts.

In New Zealand, there is a Land and Deeds Registry Office in the capital town of each of the former Provinces, and also in Gisborne. Thus, there are Deeds Offices (as they are usually called by the public) at Auckland, Gisborne, Napier, Wellington, New Plymouth, Nelson, Hokitika, Blenheim, Christchurch, Dunedin, and Invercargill. In a few years' time, there will also be one at Hamilton, the centre of a flourishing farming district. It is the intention of the Government to subdivide the present Auckland Land and Deeds Registration District into two, the new Districts will be North Auckland, being that part of the present registration District north of Mercer (excluding the Coromandel Peninsula), and South Auckland, being that part of the present District south of Mercer and including also the Coromandel Peninsula. The Auckland Land District was divided into two about thirty years ago, and it is proposed to make the two Auckland Registration Districts coincident with the present North Auckland Land District and South Auckland Land District. Coincidence is necessary because, in the matter of records, the Survey Department is inextricably connected with the Land and Deeds Registry Office.

Although the Land Transfer Act, 1915, provided for the abolition, or amendment, of existing Land Registration Districts, it did not authorize the constitution of new Districts. When the Gisborne (then called Poverty Bay) Registration District was cut out of Hawke's Bay in 1898, a special Act had to be passed, the Poverty Bay Land and Deeds Registration Districts Act, 1896.

Section 2 of the Land Transfer Amendment Act, 1950, enables new Land Registration Districts to be created by Order in Council. Section 3 is a mere machinery one, providing for two methods of transferring the Land Transfer Register from the old to the new District.

The decentralized land registration system of New Zealand may be usefully compared with the highly centralized ones of New South Wales and Victoria. Each of these thickly populated States has only one Land Titles Office, those being situated respectively at Sydney and Melbourne. But in New Zealand we are not nearly so decentralized as they are in Germany and Austria, where there is no parcel of land distant more than fifteen miles from a Registry Office. Decentralization, of course, tends to the public convenience. There is, for instance, a saving of agency charges, and, in a small office, there is rarely a congestion of business leading to vexatious delays in the completing of land transactions. On the other hand, of course, centralization means cheaper administrative costs for the Government.

Separate Dealings by a Tenant in Common.

Section 4 gives the Registrar a discretion as to whether a new title is to be taken out when a tenant in common separately deals with his interest. Before the Act was amended in this respect, a separate title had to be taken out (unless the land was Maori land); now, a separate title need not be taken out unless the Registrar or the registered proprietor requires it.

Creation of Executory Estates under the Land Transfer Act, 1915.

Section 5 remedies an omission which appears to have passed unnoticed for seventy-five years or so. It amends s. 87 of the Land Transfer Act, 1915, and expressly authorizes the creation of legal or registered estates by way of executory limitation in respect of land which is subject to the Land Transfer Act, 1915, thus bringing the Land Transfer Act into line with s. 37 of the Property Law Act, 1908, which provides that every right of entry, contingent remainder, and every contingent or executory or future estate, right, or interest in property, may be conveyed by deed. Section 87 of the Land Transfer Act, 1915, is the one which authorizes the creation of legal estates by way of limitation—*e.g.*, life estates, remainders (vested or contingent), estates tail. It appears as if those who originally framed the Land Transfer Act forgot the difference between a contingent remainder and an executory estate. As students of real property, we have all had to learn this difference; but the distinction is a fine one, and I think that few of us now could explain the difference off-hand.

An estate by way of executory limitation is a *future* interest in property which arises when property vested in one person is to become divested and vest in some other person in certain specified circumstances. The example given in the Explanatory Note to the Bill caused some amusement in the Legislative Council. The example given was this: A transfers property to B, with a proviso that, if within six months he does not marry C, the property shall go over to D. If B fails to marry C within six months, the interest of D arises, and puts an end to B's interest. The interest of D, in these circumstances, is an executory limitation. The Hon. Mr. Polson, Leader of the Council, said: "No marriage, no land, and the romance is shattered." At which the Hon. Sir William Perry drily observed: "Fancy associating a Land Transfer Bill with romance."

It was held in *In re Panapa Waihopi*, [1929] N.Z.L.R. 815, that a person having an executory estate in land under the Land Transfer Act, 1915, could lodge a caveat; but in that case the executory devise was equitable merely, the trustees not being bare trustees, and, accordingly, the succession order should have issued in their names. But, where the executory estate is registered under s. 87 of the Land Transfer Act, there is no need to lodge a caveat. Upon the determination of the prior determinable estate, the owner of the executory estate would register a transmission in his favour: *In re Land Transfer Act, 1908, Ex parte Matheson*, (1914) 33 N.Z.L.R. 838.

Before leaving this section of the Land Transfer Act, it may be apposite to point out two matters—namely, (i) that a future estate cannot be registered under the Land Transfer Act if it contravenes the rule against perpetuities; and (ii) that it was held in *In re Going, Pickering* v. *Izard*, [1937] G.L.R. 26, that, when an executor has completed his administration, the life-tenant and remainderman may compel him to transfer the land to them for their respective estates pursuant to s. 87.

Variation of the Covenants in a Registered Mortgage.

Section 6 of the Amendment Act, 1950, authorizes the registration under s. 104 of the principal Act of a memorandum varying, negativing, or adding to the express or implied covenants, conditions, and powers in a registered mortgage, even though the principal sum, the rate of interest, and the date of repayment remain unaltered. This brings the variation of mortgages into line with the variation of leases: see s. 36 of the Statutes Amendment Act, 1947.

As pointed out in the leading case of *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, a mortgage under the Land Transfer Act, 1915, may be varied by another mortgage, or by the short form provided for by s. 104. The modern practice is to employ the short form under s. 104 wherever possible. But, whatever method is employed, the variation will not be binding on a mortgagee under a mortgage registered subsequently to the mortgage varied, but before the variation, unless he consents to the variation in writing on the new mortgage or the Memorandum of Variation, as the case may be. This important condition set out in s. 104 should not be overlooked by conveyancers. What is the legal effect of such a consent? To quote from the judgment of the Court, delivered by Hosking, J., in *Goldstone's* case, at p. 506:

> In practical effect, therefore, the priority of the intermediate mortgagee is displaced by his consent to the extent of the terms he has consented to.

The Lapsing of a Caveat to protect a Trust.

Section 7 of the Land Transfer Amendment Act, 1950, removes a privilege from lapse hitherto enjoyed by caveats protecting a trust: such a caveat, if not withdrawn by the caveator, could be removed only by order of the Supreme Court or a Judge thereof. Now, however, a caveat in support of a trust (except a Registrar's caveat) will lapse on notice to the caveator by the Registrar of a proposed dealing, unless the caveator within fourteen days gives the Registrar notice that he is seeking the aid of the Supreme Court to extend his caveat and serves on the Registrar an order extending the caveat within a further fourteen days. The previous privilege of a caveat protecting a trust would not have been so inconvenient in practice had it extended only to express trusts; but unfortunately it extended to implied and constructive trusts. Again, it was not always easy to determine whether or not a caveat did protect a trust, and this led to disputes between solicitors and the Registry officials—*e.g.*, *Cromwell Borough* v. *Skinner*, [1950] N.Z.L.R. 765.

Surveys and the Land Transfer Act.

Section 8 of the Amendment Act, 1950, amends in important respects s. 178 of the Land Transfer Act, 1915, which gives the Registrar power to ask for a plan of survey in certain cases—*e.g.*, where a registered proprietor transfers *part* only of the land in an ordinary certificate of title. In *Williams* v. *Gisborne District Land Registrar*, (1907) 26 N.Z.L.R. 1081, it was held that, if the Registrar accepts for registration a memorandum of transfer of the balance of the land

contained in a certificate of title without requiring a survey plan to be deposited, he has waived his right to call for such a plan, and that he must either issue to the registered proprietor a new certificate for the balance of the land or return to him the original certificate partially cancelled. This defect in Land Transfer law was remedied by the Land Transfer Amendment Act, 1913.

Subsection 1 of s. 8 of the new Amendment Act, 1950, fills up another apparent gap, and expressly authorizes the Registrar to call for a plan of survey where a lease, mortgage, or other dealing is presented for registration against *part* only of the land comprised in an ordinary certificate of title.

Subsection 2 of the same section adds new subss. 2 and 3 to s. 178. These contain a most important departure from Land Transfer principles, which ought to prove of great benefit to landowners. Before this amendment was passed, a Registrar had power to call for a survey in the cases set out in s. 178, and this power was necessary if the new certificate was to be a fully-guaranteed one as to parcels, unless the State was itself prepared to bear the cost of the survey. But, once a certificate of title was fully guaranteed as to parcels, there was no power for the Registrar, even at the request of the parties, to issue a certificate limited as to parcels. The result was that often it was found that the cost of a survey exceeded the value of the land. This unfortunate state of affairs often meant either that intended transactions went off or that they were effected off the Register. Now the Registrar has been given a discretionary authority to waive a survey and to issue a certificate of title limited as to parcels where, in his opinion, *having regard to the value of the land*, the deposit of a plan of survey would cause hardship to the landowner. There is this very necessary safeguard—namely, the Registrar cannot issue a title limited as to parcels in lieu of an ordinary certificate of title unless every mortgagee or lessee of the land consents thereto.

The new s. 178 (3) clarifies the law with regard to subdivisions of land comprised in a certificate of title limited as to parcels. It is now expressly provided that a Registrar cannot require a new survey where *part* only of land limited as to parcels is being dealt with. Section 14 of the Land Transfer (Compulsory Registration of Titles) Act, 1924, provides that, whilst a certificate of title is limited, every certificate of title issued in lieu thereof for the whole or part of the land will also be limited. Subdivisions of land comprised in certificates of title limited as to parcels are, in short, put on the same footing as subdivisions of land under the "old system," and this appears logical and just, for the State has compulsorily brought the land under the Torrens system. The position, therefore, is that, although the Registrar cannot, where the land is limited as to parcels, require a plan of survey (which might involve the owner in considerable expense), he can require the land dealt with to be reasonably identified by a plan or map.

Revision of Land Transfer Fees.

As there has been practically no change in the fees charged under the Land Transfer legislation since it first came into force in 1871, I do not think that any practitioner will be surprised to learn that the State has now assumed power to alter the fees by Regulation. Section 9 of the Amendment Act, 1950, now gives power for the fees to be increased by Order in Council. All previous Regulations purporting to prescribe fees have been validated.

ADMINISTRATIVE TRIBUNALS.

Their Inherent Defects.

The Master of the Rolls, Sir Raymond Evershed, in an address delivered before the University of London, last March, and now published under the title, *The Court of Appeal in England*, warns the profession against administrative tribunals. This is what he said:

"There has grown up during the last generation or two a tendency for Parliament to provide for the determination of questions that may arise between one citizen and another or between a citizen on the one hand and a Department of the State on the other, by some officer of the Department concerned or some lay tribunal established *ad hoc* for the purpose. You will, I hope, acquit me of making any imputation against the probity or conscientiousness of those who constitute such tribunals, or of suggesting that many of such matters are not properly submitted to the arbitrament of ministerial deputies; for the problems in question may well be administrative problems not capable of being tried by any principle or standard comprehended by the law. But there are, I am afraid, some other instances—questions submitted to statutory tribunals which could and should be tried by the King's Courts according to the ordinary law of the land. The justification for such extra-judicial tribunals may be founded on the delays and costs of the ordinary procedure. But the results in course of time may be calamitous. Not only should the King's Courts be readily accessible to every citizen, but the law of the land should, if it is to command public support and respect, be constantly adapting itself to the moral and social standards of the day. There is, said that great American Judge Cardozo, a constant assumption that 'the natural and spontaneous evolutions of habit fix the limits of right and wrong.' There is no great harm in a system of law being slightly old-fashioned, for it will thereby be a symbol of stability. But it must not get wholly out of sympathy with the tenets of the age. If to an increasing degree questions arising out of the common experiences of life are taken out of the scope of the jurisdiction of the ordinary Courts, the law will cease to be a living thing, will cease to command the faith and respect of those whom it should serve.

"Those who practise the law have behind them great traditions. They glory—and rightly so—in their learning and independence. Other tribunals, however well-intentioned, can never be wholly free from persuasions and influences from which the lawyer is exempt. In theory, a decision based on what is thought in all the circumstances to be fair and morally just is well

enough. But a return to palm-tree justice is a return in fact to savagery. However easy it may sound to pronounce in favour of moral justification, nothing is in fact more difficult. For who can safely say that he has grasped all the facts and all the circumstances relevant to a moral judgment ?

" To the younger among you, therefore, to those whose right and duty it will be to run the race and carry the torch aloft, I commend this solemn reflection. Render unto Caesar the things that are Caesar's, but by all means in your power contrive that all properly triable questions between man and man or between individual citizens and Departments of the State be determined in the King's Courts according to the ordinary law of the land and according to the ancient judicial oath, without fear or favour, malice or ill will."

DANGEROUS PREMISES.

By A. L. HASLAM, B.C.L., D.Phil. (Oxon.), LL.M. (N.Z.).

An eminent divine of last century recorded on a certain occasion that one step was enough for him. The same brief distance was too much for the unfortunate plaintiff in *Jacobs* v. *London County Council*, [1950] 1 All E.R. 737. On the fatal day, she intended to visit a shop on the ground floor of a tenement owned by respondents and let to various tenants. She was unaware that the dedicated highway stopped some feet short of the shop-front. The intervening space was indistinguishable in paving from the adjoining footpath, and the casual passer-by could not detect the boundary. At a point some 2 ft. inside the forecourt, the plaintiff caught her foot on a stopcock, which projected slightly above the surrounding paving-stones. The respondent Council had retained occupancy of the forecourt. Mrs. Jacobs framed her action in negligence, as invitor of defendants, or, alternatively, in nuisance. She was acquitted of contributory negligence. Nevertheless, the House of Lords affirmed the Court of Appeal in depriving her of the verdict awarded her in the County Court.

Lord Simonds, with whose opinion all their Lordships expressed formal concurrence, decided that the plaintiff entered the respondents' premises as a licensee. Her attempt to secure the higher measure of protection afforded to invitees was barred by the *ratio decidendi* in *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74. Lord Simonds, if one may say so, was prepared to accord this much-discussed authority a respect that many lesser tribunals have conspicuously withheld in the intervening quarter-century. In Lord Simonds' view, *Fairman's* case finally determined the status of a tenant's invitee *quoad* the landlord. Since Mrs. Jacobs crossed into the forecourt for the purpose of visiting one of the shops, she could claim from the landlord only the restricted privileges of a licensee. On the facts and pleadings as presented, her action accordingly failed.

Mrs. Jacobs' alternative claim on the grounds of nuisance was equally unsuccessful. As she had deliberately, if unwittingly, left the public road at the time of her accident, she could not be heard to complain of injury as a user of the highway. The latter distinction confirms a recognized limitation on the class of torts falling under the vague generic heading of nuisance.

It is the first ground of Lord Simonds' decision which gives more food for thought. We may crave leave to wonder whether Lord Atkin, Lord Macmillan, or Lord Simon would have displayed the same reverence for precedent. In *Read* v. *J. Lyons and Co., Ltd.*, [1946] 2 All E.R. 471, Lords Simon and Macmillan made short work of a House of Lords decision which had long been regarded as the purest unsullied example of liability without fault : *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465, 477. There are grounds for suggesting that since *Read* v. *Lyons* the former doctrine of *Rylands* v. *Fletcher* has become a branch of the law of negligence, where it was not already covered by the principles of nuisance. Such a development has vindicated Sir John Salmond's objection to *Rylands* v. *Fletcher* on which he commented in the Preface to his *Law of Torts*, 6th Ed. :

> No decision . . . has done more to prevent the establishment of a simple, uniform, and intelligible system of civil responsibility.

The reforming vigour of Lords Atkin and Macmillan in *Donoghue* v. *Stevenson*, [1932] A.C. 562, gave the principles of negligence a healthy and much-needed extension. May it, therefore, not be all the more regrettable that their Lordships in *Jacobs'* case declined an opportunity of modernizing that particular aspect of negligence which pertains to dangerous premises ? While the hierarchy of entrants is perhaps too well-established to be abolished in one decision (even of their Lordships' House), a widening of the category of invitees would have demonstrated the aptitude of the judicial process to formulate principles conforming to contemporary ideas.

LEGAL LITERATURE.

The Court of Appeal in England, by the Rt. Hon. Sir Raymond Evershed, Master of the Rolls. London : University of London : The Athlone Press. Price 2s. 6d. net.

This is the text of a lecture delivered by His Lordship before the University of London on February 2, 1950. It is extremely interesting in its historical aspect, and also in regard to proposals for future procedural changes now being considered by a committee of which the Master of the Rolls is Chairman. His Lordship enlivens his lecture with many touches of sparkling wit.

This lecture is of particular interest in New Zealand where opinions differ so much as to the constitution of the Court of Appeal.

The Office and Duties of the Director of Public Prosecutions, by Sir Theobald Mathew, K.B.E., M.C., Director of Public Prosecutions. London : University of London : The Athlone Press. Price 1s. 6d. net.

This is the text of a lecture delivered before the University of London on March 9, 1950, by the Director of Public Prosecutions, in which he states the origin of his office and the practical work done by him in the course of his duties " by evolving a system upon which our individual liberty and security depend ultimately not upon an Executive, however benevolent, nor upon a judiciary, however wise, but upon the active support and the final judgment of our fellow-citizens."

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

(*Concluded from p. 272*).

Hospitals and Charitable Institutions Amendment Act, 1932, s. 15.—The Auckland delegates who were asked at the March meeting to collate the reports from District Societies submitted the following report:

'(i) When the Auckland report of August, 1949, was adopted by the Council it was decided that the wider questions arising out of the operation of the Social Security Act, 1938, referred to in the Otago Report of August 31, 1949, should be further considered by the Council. At the meeting on March 17, 1950, the Council had before it reports from the Wanganui and Hamilton Societies and a letter from the Taranaki Society. It was then resolved that the other District Societies should be given a further opportunity to consider the matter, and that the Auckland delegates should then collate all the reports and prepare a report for the next meeting of the Council.

"(ii) The Otago Report suggested:

"(*a*) That s. 15 of the Hospitals and Charitable Institutions Amendment Act, 1932, be repealed.

"(*b*) That amendments to the law should not be limited to anomalies arising out of the working of the Contributory Negligence Act, 1947.

"(*c*) That the charges on amounts recovered as special damages whether by action or as a result of compromise should be limited to the sums actually recovered.

"In elaboration, the Otago Society contended that the Social Security Act establishes the principle of free hospital treatment, the cost of which is borne by the whole community, including insurance companies, employers, and all others who have to meet accident claims, and that the present provisions are tantamount to depriving them of the benefit of the Social Security Act with regard to free hospital treatment. It was further pointed out that, in addition to the difficulties now arising on account of the apportionment of damages under the Contributory Negligence Act, the present statutory provisions have always introduced a serious complication in cases where liability is disputed but the parties are willing to effect a compromise. Substantial claims by Hospital Boards aggravate the problem, particularly where the claim for damages may be so doubtful that it should be compromised.

"(iii) The Wanganui Society in its report, dated February 22, 1950, expressed the view that the answer to the three Otago suggestions appeared to depend on a matter of principle, and until this is settled it is not possible to suggest how the legislation should be amended. The fundamental question seemed to be whether there should be a difference in cases where the injury arises through the negligence of another party or through the combined negligence of the injured person and another party. The Wanganui Society felt that this question was not properly one on which it should express an opinion, as it is a matter of policy for the Government for the time being.

"(iv) The Hamilton Society in its report dated February 28, 1950, suggested that there are so many complications arising from the legal aspect of the Hospitals and Charitable Institutions Act, 1932, and the sections of the Social Security Act, 1938, that a full investigation by leading counsel should be made and an opinion obtained, and that this question should be considered on receipt of this opinion. The Marlborough Society agreed with the views expressed by Hamilton.

"(v) The Taranaki Society in its report, dated February 22, 1950, advised that an action bearing on the proposed amendment was to be heard at the May sittings of the Supreme Court at Wellington and accordingly recommended that further consideration of the proposed amendment be deferred until the case was decided. Messrs. have forwarded a copy of the statement of claim in this action, together with a covering letter.

"(vi) Since the last meeting of the Council the Canterbury Society expressed the view that it is a matter for Government policy and not for an expression of opinion from lawyers.

"(vii) The Marlborough Society has expressed the view that Hospital and Social Security charges should not be recoverable as part of the claim but should be borne by the Social Security Fund; but that if this proposal is not acceptable a plaintiff should pay what he recovers and no more.

"(viii) The Wellington Society have adopted a report which reached us on the 2nd instant. They are of opinion that s. 15 (1) of the Hospitals Amendment Act, 1932, should be amended so that the charge thereby created should be a charge only on moneys actually recovered by way of special damages in respect of the hospital account or may be deemed to have been so recovered having regard to any settlement of the claim.

"They are also of opinion for reasons which are set out in the opinion that s. 15 should be repealed.

"They raise a further question—*viz.*, that of costs in cases where a plaintiff has suffered a reduction in damages by reason of the Contributory Negligence Act.

"They refer to the recent judgment in *Petersen* v. *The King*, [1950] N.Z.L.R. 691, which they consider to have been rightly decided, and conclude by recommending that no action be taken in the direction of amending the law in respect of costs.

"(ix) It should be mentioned that the Social Security Amendment Act, 1949, contains two amendments which are relevant to the matters which have been under consideration. Section 19 amends s. 74 of the principal Act by adding the following subsection as subs. 2:

'(2) For the purposes of this section the expression "compensation or damages" includes any *ex gratia* payment made in settlement of or on account of a claim for compensation or damages.'

"Section 30 amends s. 81 of the principal Act, and reads as follows:

'Section eighty-one of the principal Act (which restricts the right to benefits where damages are recoverable) is hereby amended by omitting from subsection one the word "if" and substituting the words "to the extent to which."'

"The amendment to s. 74 would appear to indicate that Government policy was in favour of ensuring that any payment in settlement of or on account of a claim for compensation or damages should be subject to the charges in favour of the Department when any benefit had been granted to the injured party under the Act. The amendment to s. 81 ensures that the charge in respect of medical, surgical, hospital, or pharmaceutical treatment, &c., shall not exceed the amount recovered in respect of these items: see para. 2, Otago Report. Subsection 4 of s. 81, however, remains unaltered, and reads:

'Nothing in this section shall affect the rights conferred on any Hospital Board by section fifteen of the Hospitals and Charitable Institutions Amendment Act, 1932, but no payment shall be made to a Hospital Board under this section unless the Minister is satisfied that no moneys have been or can be recovered by the Board under that section.'

"The delegates of the Auckland Society are of opinion:

"(*a*) The Council should not press for the repeal of s. 15 of the Hospitals Amendment Act, 1932. It is clearly a question of Government policy whether the State should undertake not only to provide free hospital treatment for sick and injured persons but should also relieve negligent persons from their ordinary liability to pay the cost of such treatment.

"(*b*) The amendment to the Contributory Negligence Act, 1947, proposed in the Auckland report of August 19, 1949, would meet most cases. The Otago suggestion would only be of importance in the case of settlements out of Court. No doubt there are from time to time cases which are settled on a reduced basis where a plea of contributory

(*Concluded on p. 288*).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Chancery Courts.—"I have been brought up (professionally) at the Chancery Bar," says Sir Raymond Evershed, M.R., in a recent address on the Court of Appeal in England. "If you will allow me to tell you a secret, of which you must on no account breathe a word to anyone, I believe that the Chancery Bar and the Chancery Bench are the superiors of their fellows in the other Divisions, both in beauty of mind and beauty of form. This you might think a heresy, for is not the English common law among the greatest of our glories? Moreover, it was in or about the year 1868 that Charles Dickens had revised the first publication of *Bleak House*. In that famous and blistering commentary on contemporary Chancery procedure Dickens had improved upon the Shakespearean law's delays by substituting the Chancery for the law. Yet, so far as concerns the Court of Appeal, it was to the Chancery procedure that the legislators of 1873 turned for their precedent. The Chancery Appeal Court of 1873 of which James and Mellish, L.JJ., were the Judges became the model for the new Court of Appeal and the Court of Appeal of 1950 remains true to its original of a hundred years ago." Students of Dickens will agree that he evokes legal atmosphere to a greater extent in *Bleak House* than in any other of his books—to an extent, indeed, that makes it of unique interest to the legal historian. There is no finer bit of descriptive writing in the whole of his works than in the memorable opening chapter in which he pictures the High Court of Chancery on a raw afternoon at Lincoln's Inn at the very heart of the fog:

> "On such an afternoon, if ever, the Lord High Chancellor ought to be sitting here—as here he is—with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon, some score of members of the High Court of Chancery Bar ought to be—as here they are—mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might."

Little remains to-day of the abuses for which *Jarndyce* v. *Jarndyce* served as an example, or of the "bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to Masters, Master's reports, and mountains of costly nonsense" piled between the Registrar's table and the silk gowns.

Marriage in England.—In 1948, there were 18,431 maintenance or separation orders made in England. Thus it is not surprising that there should have appeared in *The Times* of July 6 a letter signed by a number of distinguished persons quoting Denning, L.J., in *Hosegood* v. *Hosegood*, [1950] W.N. 218, to the effect that it might be a good thing if the Court was at liberty to grant a divorce after long years of separation, even if the separation was originally by agreement or for some cause short of cruelty. Lord Gorell, as far back as *Dodd* v. *Dodd*, [1906] P. 189, pointed out that permanent separation without divorce encouraged immorality. Recognition of this important fact has had a marked effect upon the administration of divorce law in this country. As might be expected, the *Times* letter did not escape the vigilant eye of the veteran George Bernard Shaw, who, a week later, wrote that divorce of the separated should be made compulsory, and secret so far as the names of the parties are concerned. He went even further, and recommended that the Home Office should have compulsory power to cancel marriages in certain cases. Why, he asks, should a marriage licence be held more sacred than a driving licence? But, after all, these sentiments on Shaw's part have nothing new about them. As long ago as his *Getting Married* (in which the girl refuses to be married because she cannot endure masculine untidiness), he claimed that divorce was a civic duty when a marriage had lost the inward and spiritual grace of which the marriage ceremony is the outward and visible sign.

Counsel and Opposite Parties.—"A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence and prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking on his own behalf." This is one of the canons of the American Bar Association, and it deals clearly and concisely with a most important phase of the duty of the *nisi prius* advocate.

True but Strange.—In *Gardiner* v. *Sevenoaks Rural District Council*, [1950] 2 All E.R. 84, "premises" are held to include a cave enclosed by a wooden door, while a 70 ft. Viking yacht (costing £12,500, with a paid crew and used for entertaining on pleasure cruises) is regarded by Vaisey, J., as falling under "articles of personal use" within the meaning of the Administration of Estates Act, 1925: *In re Chaplin, Royal Bank of Scotland* v. *Chaplin*, [1950] 2 All E.R. 155.

Thrust and Parry.—Last month the death of Sir Albion Richardson, K.C., recalled to the *Law Times* his famous encounter with Darling, J. At the time, he was a junior and unknown to Darling, who was senior Judge of the King's Bench Division and a member of the Privy Council. The Judge kept calling him "Mr. Richardson," until his attention was drawn to the fact that counsel before him was Sir Albion Richardson. "Ah," he remarked in a superior tone, "in my day it was not the custom to knight junior barristers." "No, my Lord," was the reply, "nor was it the custom to make a puisne Judge a member of the Privy Council." "A knightly thrust," the Judge is said to have exclaimed, in great good humour. Actually, Richardson was a solicitor until he was thirty-eight, and was knighted at the end of World War I for his services as Chairman of the Appeals Committee for the County of London.

NEW ZEALAND LAW SOCIETY.

(*Concluded from p. 286*).

negligence could not be raised. It seems to us that it is doubtful whether it would be worth while devising legislation to meet such cases. Plainly the matter would have to be approached in a different way by amending separately the provisions of the Hospitals Amendment Act, 1932, and the Social Security Act, 1938.

"(*c*) We do not consider that it would be reasonable to require Hospital Boards and the Social Security Department to accept the basis of settlement agreed upon by the parties without their approval or consent. It is felt that the suggested amendment to the Contributory Negligence Act, 1947, meets the position fairly reasonably."

It was resolved that the Auckland report should be adopted and that it should be sent to the Law Revision Committee.

Family Protection Act, 1908.—The following letter was received from the Law Revision Committee:

"One of the items which was on the list of business for consideration by the Law Revision Committee at its meeting of March 23, was the proposal that stepchildren be admitted as possible claimants under Part II of the Act.

"As the report which had been requested from your Society had not been received, it was decided to defer the item for consideration at the next meeting, the date for which has been fixed tentatively for July 20."

In response to the request of the Council at its last meeting, Taranaki collated the District Societies' reports and forwarded a copy of its resumé.

Mr. Weston said that, since sending this to the New Zealand Society, the Council of the Taranaki Society wished to amend its recommendation and suggested that the solution proposed by the Auckland Society in its report should be adopted—*i.e.*, that the word "stepchildren" should be added to the definition and that the matter be left to the discretion of the Court.

It was resolved to adopt the above suggestion and to recommend to the Law Revision Committee that s. 33 of the Family Protection Act, 1908, be amended by providing that "stepchildren" be included in the persons entitled to receive the benefit of the Act.

Costs on Counterclaim in Magistrates' Court.—The following letter was received from Auckland:

"I enclose a copy of a report adopted by my Council at its last meeting, and I would be glad if this could be placed before your Council at its coming meeting for its consideration."

Enclosure.

"Messrs. have written asking the Society's assistance to secure an amendment to the Magistrates' Court Rules, 1948, 5th Schedule, Items 1 and 2.

"Provision is made in the Rules for a solicitor's fee to be allowed for drawing a statement of claim, but there is no similar provision in the case of a counterclaim. In the result, where a plaintiff is given judgment on a claim and a defendant counterclaims, the former carries costs of drawing and filing the document but the latter does not. We think that there is no justification for treating the two matters dissimilarly, and in the result the Society should ask for an amendment to cover the point.

"It is suggested that at the same time the Regulations might be examined to see that they are in line with the County Court Rules on other matters as well—*e.g.*, third-party costs, and other interlocutory matters, &c."

It was resolved that representations should be made to have the Magistrates' Court Rules amended accordingly and that the matter be left to the Standing Committee to take the necessary action.

PRACTICAL POINTS.

1. Executors and Administrators.—*Infant Beneficiaries coming of Age—Estate Assets fluctuating in Value—Basis of Payment to Such Beneficiaries.*

QUESTION: As members of a class of infants successively come of age and are entitled to be paid their share of the estate, on what basis of capital value should they be paid when the estate assets fluctuate in value?

A left his estate to his four children upon their respectively attaining the age of twenty-one years. The estate consisted of a dairy-farm, stock, and cash, and the trustees have been carrying on the farming business very profitably for the estate under the powers of the will.

The eldest child has now attained the age of twenty-one and desires to be paid his share. The trustees can pay him his share out of cash available, but are in doubt as to the basis on which to value it. They wish to carry on the farm for the benefit of the remaining three infant children, because the farming business will afford a much better income than if the assets were sold and the proceeds invested.

On what basis of valuation are legatees' shares payable as they successively attain twenty-one? Does the final value of each legacy become calculable only when the assets are actually realized?

ANSWER: In the normal course of administration, the eldest child would be entitled only to his share of the cash held by the trustees, and not to an additional payment representing the estimated value of his share in unrealized assets. In other words, the final value of each share is not ascertained until the assets are realized or effectively appropriated to a beneficiary or beneficiaries. If the trustees are duly authorized to carry on the farming business, either under the will or by an order under s. 98 of the Trustee Act, 1908, the eldest child should not have any right of action against them by reason of the resultant delay in the ascertainment and payment of the balance of his share.

If the trustees had the estate assets valued so that the value of the adult son's share could be calculated, he might agree to accept payment of the sum so computed in full satisfaction of his rights under the will. Provided he had been supplied with adequate information, such an agreement would be binding on him. The trustees would, however, run the risk that, if the assets later decreased in value, they might be held liable to the other beneficiaries. Such a transaction involves, in effect, an appropriation of the unrealized assets as parts of the contingent shares of the infant beneficiaries, and the trustees might not have power to make such an appropriation. Presumably in this case the will contains no express power of appropriation. In England, there is a power of appropriation under s. 41 of the Administration of Estates Act, 1925: see *Lewin on Trusts*, 14th Ed. 303 *et seq.*; but corresponding provision has not been made in New Zealand. Even though the will contains no express power of appropriation, yet, if there is a trust for conversion, and the trustees are given sufficiently wide powers of investment to justify investing the proceeds of conversion in the purchase of realty, that might enable them to appropriate the farm lands as parts of the contingent shares of the infant: *In re Wragg, Wragg* v. *Palmer*, [1919] 2 Ch. 58.

In re Gardiner, Gardiner v. *Gardiner*, [1942] N.Z.L.R. 199, might suggest that, if the estate assets were fairly valued, and the adult son were paid his share on the basis of that valuation, the other children would not have any claim against him or the trustees if the value of the assets should drop by the time they were realized. That was, however, a case where the estate assets had been converted into cash, so that the value of shares in the estate had been ascertained, and later investments representing some of the shares depreciated. *Gardiner's* case does not seem to help in the present circumstances, since the farming assets have not been realized, and so the value of the shares in the estate has not been ascertained definitely.

V.2.