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CRIMINAL LAW: CONFESSIONS.

BY s. 3 of the Evidence Amendment Act, 1950, which became law on September 29, s. 20 of the Evidence Act, 1908, has been repealed, and the following new section has been substituted for it :

> 20. A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

The former s. 20, which the above new section replaces, was as follows :

> 20. A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge or other presiding officer is of opinion that the inducement was in fact likely to cause an untrue admission of guilt to be made.

It will be observed that the new s. 20 re-enacts the section which it replaces, but extends it to cover confessions, sought to be admitted in criminal proceedings, which are obtained by any other inducement except violence or force or any other form of compulsion. It also changes the onus of proof, and, unlike the former s. 20, casts it on the prosecution.

The new form of s. 20 obviously has been enacted to overcome that part of the judgment of the Court of Appeal in *R.* v. *Phillips*, [1949] N.Z.L.R. 316, which held that s. 20 of the Evidence Act, 1908—the now repealed section—did not cover all the possible categories of inducement by a person in authority which may, at common law, render a statement not a voluntary one ; so that, notwithstanding s. 20 of the Evidence Act, 1908, where the inducement held out by a person in authority to an accused person, as in *Phillips's* case, was neither " threat " nor " promise," the accused's statement might still be one which is not voluntary.

As the new s. 20 will, no doubt, raise a number of new questions on the admissibility of confessions in criminal cases, it may be as well to consider just how far the new s. 20 abridges the common law, since the common-law rule, except in so far as it is excluded or the field is covered by the new s. 20, still remains.

Moreover, the question of onus of proof, in regard to the new section, may prove an interesting one.

We propose, therefore, to trace the development of the common-law rule, and to consider the effect of the new section, and the extent to which—having regard to the pronouncements of the Court of Appeal in *Phillips's* case—it has modified the common law.

I. The Common-law Rule.

In Great Britain, the admissibility of confessions in criminal proceedings is, and always has been, a question of common law. In other jurisdictions, to which we propose to refer, the position is still, in the main, one of common law, but with various modifications and exclusions effected by the local statute law.

A comprehensive statement of the law, unaffected by statute, is made in *9 Halsbury's Laws of England*, 2nd Ed. 203, 204, 205, 207, para. 291 :

> All statements relevant to the issue which are made by a party can be proved in evidence against the party who made them, unless they are privileged from disclosure, subject to this exception, that admissions or confessions of guilt made by a defendant before his trial can only be proved against him, if they were made freely and voluntarily in the sense that they were not obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. In giving evidence of such admissions or confessions it lies upon the prosecution to prove affirmatively to the satisfaction of the Judge who tries the case that the admissions were not induced by any promise of favour or advantage or by the use of fear or threats or pressure by a person in authority.
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> By a person in authority is meant any Magistrate, any Police or other officer or person having custody of the defendant, the prosecutor and any person acting on behalf of the prosecutor for the purpose of having the defendant in custody or preferring a complaint against him.
>
> If the inducement is made by a person not in authority in the presence of a person in authority, and is acquiesced in by the person in authority, the confession made in consequence of such an inducement is just as inadmissible as if it had been made by the person in authority.
>
> An inducement made not to the accused himself, but to some one else, with the expectation that it will be communicated to the accused, may have the effect of making a confession inadmissible, unless it is shown that the confession was not brought about by the inducement.
>
> It is for the Judge in each case to decide whether on the facts the confession is or is not admissible.
>
> A defendant may be convicted on his own confession without any corroborating evidence.

One of the most recent enunciations of the common-law rule as to the admissibility of confessions in criminal proceedings is contained in *Phipson on Evidence*, 8th Ed. 248. It is as follows :

> In criminal cases, a confession made by the accused voluntarily is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against, him, and which has been induced by any promise or threat relating to the charge and made by,

or with the sanction of, a person in authority, is deemed not to be voluntary, and is inadmissible.

The most recent statement of the common-law rule—a succinct one—is that which appears in *Shaw's Evidence in Criminal Cases*, 3rd Ed. 32 :

> A confession of guilt, or an admission of facts from which guilt may be implied, by a defendant is not admissible in evidence against him unless it is affirmatively proved that such confession or admission was free and voluntary, that is, was not preceded by any inducement to the defendant, held out by a person in authority, to make a statement. If such inducement is made, and the impression produced by it has not clearly been removed before the statement is made, evidence of the statement is inadmissible.

The rule, however expressed, has been a gradual development. We now proceed to summarize some of the cases which are milestones in that development.

The Earlier Cases.

Although, as their Lordships of the Judicial Committee, in *Ibrahim* v. *The King*, [1914] A.C. 599, said, the above-stated principle is as old as Lord Hale, the first full and clear expression of the common-law rule appears in *The King* v. *Warickshall*, (1783) 1 Leach 263 ; 168 E.R. 234. The prisoner was charged with receiving stolen goods. As a result of a confession ruled inadmissible because it had been obtained by promise of favour, the goods were found in her bed. Her counsel argued that, as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected, " for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction." At pp. 263, 264 ; 234, 235, the Court said :

> Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers ; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it ; and therefore it is rejected.

Wigmore in his well-known text-book states that, up to the middle of the seventeenth century at least, the use of torture in extracting confessions was common, and that confessions so obtained were employed evidentially without scruple : *2 Wigmore on Evidence*, 2nd Ed. 131. Stephens states that the general maxim that confessions ought to be voluntary is historically the old rule that torture for the purpose of obtaining confessions is, and has long been, illegal in England : *1 Stephens's Criminal Law*, 447. " In fact," he says, " it cannot be said that it ever was legal, although it seemed at one time as if it were likely to become legal." Whether or not the use of torture and a rule of evidence really reacted on each other, the basis of the rule as set out in this early case is clear : " Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit " ; that is to say, the consideration is probative value.

In *R.* v. *Thompson*, (1783) 1 Leach 291 ; 168 E.R. 248, the accused was apprehended by a Mr. Cole, who, apparently, being then in authority over him, and being unimpressed with his explanation as to how he came into possession of a stolen bank bill, said : " Unless you give me a more satisfactory account, I will take you before a Magistrate." The prisoner thereupon made a confession, which was rejected upon his trial for the theft of the bank note. Baron Hotham said, at p. 293 ; 249 :

> It is almost impossible to be too careful upon this subject : This scarcely amounts to a threat, but it is certainly a strong invitation to him to confess, and the manner in which it seems to have been expressed renders it more efficacious. The prisoner was hardly a free agent at the time. Suppose Mr. Cole had said to him, " I can hang you ; you had better confess : if you do not I shall carry you before a Magistrate " ; it is certain, that a confession made under such circumstances could not have been received in evidence, but he only said, " Unless you give me a more satisfactory account I shall take you before a Magistrate." Now, what was the understanding of the prisoner's mind upon hearing these expressions ? Why, his answer explains what he conceived to be their meaning ; for he immediately replied, " Why then, Sir," that is, since you will otherwise carry me before a Magistrate, " if you will keep a secret, I will tell you the whole business," and immediately makes the desired confession. I must acknowledge, that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject ; and I am of opinion, that under the present circumstances the prisoner's confession, if it was one, ought not to be received.

In *R.* v. *Kingston*, (1830) 4 C. & P. 387 ; 172 E.R. 752, which has some similarity to the *Phillips* case (*supra*), but was not cited in that case, the accused girl was charged with administering poison with intent to murder. The surgeon who was called in saw the girl and said to her, " You are under suspicion of this, and you had better tell all you know," whereupon she made a statement to the surgeon. Parke, J., having conferred with Littledale, J., held that the statement was not admissible.

In *R.* v. *Dunn*, (1831) 4 C. & P. 543 ; 172 E.R. 817, the accused was indicted for stealing a hymn-book, and a witness, Fieldhouse, proved that the prisoner wished to sell the book to him and that he told the prisoner he had better tell where he got it. The following is taken from the report (p. 543 ; 817) :

> Mr. Justice Bosanquet : You must not tell us what he said.
>
> Scott, for the prosecution : This witness was not a person in any authority.
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> Mr. Justice Bosanquet : Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person.

The evidence was rejected.

Disciplining the Police.

If not inherent in the rule, a consideration distinct from immediate probative value crept in at a fairly early stage. It might be referred to as " disciplining the Police." In the case of *R.* v. *Swatkins*, (1831) 4 C. & P. 548 ; 172 E.R. 819, the accused was charged with setting fire to a stack of barley. A constable called to prove a confession stated that he went into a public house, where he found the prisoner in custody of another constable, who thereupon left the room and the prisoner made a statement. Mr. Justice Patteson said, at pp. 549, 550 ; 820 :

> It appears, that the constable, who had this prisoner in custody, left the room immediately on this person's coming in, and that the prisoner at once began to make a statement. Now, I think, as the witness did not caution the prisoner not to confess, it would be unsafe to receive such evidence. It would lead to collusion between constables.

The statement was later received when it turned out that the prisoner was not then held upon a charge. The concept illustrated here—disciplining the Police—

becomes, as time goes on, an increasingly important one, as will be observed in many of the later cases, and, indeed, it seems, to a great extent, to have played a leading part in the development of the rule. While not related to immediate probative value—*i.e.*, the probative value of a statement that has actually come up for consideration—as a recent writer has said: "it nevertheless has long-range probative value as its object, since the principle involved is to discourage future improprieties on the part of the Police by making their past improprieties ineffectual." The question of substantial inducement, as indicated in the new s. 20 of the Evidence Act, 1908, must always be one of degree; and it would seem that the conduct of the person in authority (almost always a Police officer) must be an important element in assessing the degree of inducement, upon which the confession may fall to be accepted or rejected.

A case cited by the learned Chief Justice in *Phillips's* case, at p. 343, is *Reg.* v. *Baldry*, (1852) 2 Den. 430; 169 E.R. 568, which is frequently cited as marking the turning-point in the trend in favour of exclusion. This was a case in which the accused was tried for administering poison with intent to murder. A constable called to prove a confession said:

> I went to the prisoner's house on December 17. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him.

The confession was admitted, but the trial Judge, Lord Campbell, reserved the question for the Court of Appeal, comprising Lord Campbell, C.J., Pollock, C.B., Parke, B., Erle, J., and Williams, J. The high tide of sentiment in favour of accused persons is well shown in the argument addressed to the Bench, at pp. 432, 433, 434; 569, 570:

> If any inducement—of the slightest description—whereby any worldly advantage to himself as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue . . . The law assumes that a man may falsely accuse himself upon the slightest inducement . . . The law will not measure the force of the inducement; and the law supposes that there are circumstances in which a man will make a false accusation against himself . . . The law is suspicious in the highest degree of confessions; it suspects that it does not get at the truth as to the way in which they are obtained.

Pollock, C.B., after reviewing some of the older cases, said, at p. 443; 573, 574:

> The question now is, whether the words employed by the constable "he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him," amount either to a promise or a threat? We are not to torture this expression, or to say whether a man might have misunderstood their meaning, for the words of the statute might by ingenuity be suggested to raise in the mind of the prisoner very different ideas from that which is the natural meaning. The words are to be taken in their obvious meaning. It is very important for the protection of innocence that any man charged with a crime should be told at the time of his apprehension what that charge is. Attention should be paid to any communication made by him at that time, because generally a prisoner has no means of paying for witnesses. The accused may frequently be in a situation at once to say that he was in such a place and could prove an alibi, and may be able to make some statement of extreme importance, in order to show that he did not commit the crime, or was not the person intended to be charged.

The words "because generally a prisoner has no means of paying for witnesses" appear to be highly significant, and will be reverted to later. Parke, B., said, at pp. 444, 445; 574:

> By the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. *Pitt Taylor*, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every Judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were *res nova* I cannot see how it could be argued that any advantage is offered to a prisoner by his being told that what he says will be used in evidence against him.

Lord Campbell, C.J., concurred in the doubt implied by Parke, B., as to whether (pp. 446, 447; 575):

> If the matter were *res integra* . . . it might not have been advisable to allow the confession to be given in evidence, and let the jury give what weight to it they pleased.

The Judges' Rules.

Although this matter of "disciplining the Police" was not formulated until later, reference may now be made to its ultimate development.

In *R.* v. *Voisin*, [1918] 1 K.B. 531, Lawrence, J., said, at pp. 539, 540:

> In 1912, the Judges, at the request of the Home Secretary, drew up some rules as guides for Police officers. These rules have not the force of law; they are administrative directions the observance of which the Police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the Judge presiding at the trial.

The four rules referred to are set out in *Voisin's* case at p. 539. They have since been added to until they now number nine, and, with instructions in elaboration thereof, appear in *Phipson on Evidence*, 8th Ed. 251, and also in *Shaw's Evidence in Criminal Cases*, 3rd Ed. 36. These rules, which seek to regulate the interrogation of suspected and accused persons, enjoin a caution as soon as a Police officer has decided to prefer a charge, before any questions or further questions are put, and discourage the questioning of a person in custody, even after caution upon the warning that "long before this Rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence."

Background of the Early Decisions.

In an article in *25 Canadian Bar Review*, 822, the authors, Messrs. T. D. Macdonald and A. H. Hart, to whom we are indebted for their careful analysis of the common-law rule, have been at pains to consider the background against which the early decisions were given. They indicate a number of factors that present themselves:

> (*a*) Wigmore refers to "the character of persons usually brought before the Judges on charges of crime" and points out that, having regard to the social cleavages and the feudal survivals of the period, the offenders came chiefly from the lower classes who were characterized by subordination, half respectful and half stupid, toward those in any measure of authority over them and that the situation of such persons charged and urged to confess by their superiors "involves a mental condition to which we may well hesitate to apply the test of a rational principle": *Wigmore on Evidence*, 2nd Ed. 222. (*b*) "Another reason," says Wigmore on p. 222,

" is to be found in the absence at that time of the right of appeal in criminal cases, and the practical creation of the law of confessions by isolated Judges at *Nisi Prius* without consultation and on independent responsibility." (*c*) " A third reason," says Wigmore on p. 223, " and one amply sufficient in itself to account for the narrowness of confession rulings, and for much besides, was the extraordinary handicap placed upon the accused at common law in the shape of his inability either to testify for himself or to have counsel to defend him." (*d*) To these can be added the harshness of the punishments then in effect, and (*e*) the consideration implied in the words of Pollock, C.B. (*supra*), " because generally a prisoner has no means of paying for witnesses." The inference appears to be that in some cases at least, if the case came to trial, the prisoner, through his own lack of means accompanied by his ignorance or lack of counsel, was already lost. In such a position, any gamble upon a promise or half-promise of forbearance or mercy must have been a not unreasonable choice.

In our next issue, we shall consider the development of the common-law rule in *Reg.* v. *Thompson*, [1893] 2 Q.B. 12, and in *Ibrahim* v. *The King*, [1914] A.C. 599. Then we hope briefly to refer to the leading Australian authorities where the rule, as modified by statutory provisions, has been examined and applied. We shall also consider our own leading authority, *R.* v. *Phillips*, in which, in the judgment of the learned Chief Justice, the whole of the law on the question down to last year has been most comprehensively examined. And, then, we hope to examine the new s. 20 of the Evidence Act, 1908, against that background.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1950.

No. 24. Land Transfor Amendment Act, 1950.
No. 25. Magistrates' Courts Amendment Act, 1950.
No. 26. Chattels Transfer Amendment Act, 1950.
No. 27. Property Law Amendment Act, 1950.
No. 28. Tenancy Amendment Act, 1950. (September 18, 1950.)
No. 29. Evidence Amendment Act, 1950.
No. 30. Local Elections and Polls Amendment Act, 1950.
No. 31. Imprest Supply Act (No. 4), 1950.
No. 32. Electoral Amendment Act, 1950.
No. 33. Invercargill Licensing Trust Act, 1950.
No. 34. Harbours Act, 1950.

CHATTELS TRANSFER.

Chattels Transfer Amendment Act, 1950, exempts from the Money-lenders Act, 1908, securities for repairs to customary chattels given to finance corporations who are exempted from the Moneylenders Act, 1908, except for the purposes of s. 3 thereof.

COMPANY LAW.

Points in Practice. *100 Law Journal*, 549.

CONVEYANCING.

A New Decision on the Perpetuity Rule. (*In re Jones*, [1950] 2 All E.R. 239.) *210 Law Times*, 77.

Agreement for Repayment of Loan. *3 Australian Conveyancer and Solicitors Journal*, 102.

Grant of Option in Will for Son to purchase House. *3 Australian Conveyancer and Solicitors Journal*, 97.

Right of First Refusal to Purchase conferred on A Lessee. *3 Australian Conveyancer and Solicitors Journal*, 97.

CRIMINAL LAW.

" Bilking " as Credit by Fraud. *114 Justice of the Peace Journal*, 445.

Probation Yesterday and To-day. *114 Justice of the Peace Journal*, 431.

DEATH DUTIES.

Estate Duty (Disposition or Determination of Life Interests). *100 Law Journal*, 508.

DESTITUTE PERSONS.

Child born Abroad of Foreign Mother domiciled Abroad—Putative Father British Subject domiciled in England—Jurisdiction to make Affiliation Order—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3. A German woman, domiciled in Germany, was delivered in Germany of an illegitimate child, the father of which she alleged was an Englishman domiciled in England. On an application by her for an affiliation order against this man, *Held*, That the order could not be made in respect of a child born abroad of a mother domiciled abroad. (*R.* v. *Blane*, (1849) 13 Q.B. 769, still good law.) *Tetau* v. *O'Dea*, [1950] 2 All E.R. 695 (K.B.D.).

Enforcement of English Guardianship Orders in the Commonwealth. *94 Justices of the Peace Journal*, 413.

Jurisdiction—Order made by Supreme Court for Maintenance of Child over Sixteen Years of Age—Order registered in Magistrates' Court—Maintenance in Arrears—Magistrate's Power to hear Information for Arrears or Application for Variation of Order—Destitute Persons Act, 1910, ss. 39, 61—Domestic Proceedings Act, 1939, s. 17 (2) (7). A Magistrate has jurisdiction to hear an information under s. 61 of the Destitute Persons Act, 1910, in respect of arrears due under a maintenance order made by the Supreme Court and registered in the Magistrates' Court, irrespective of the age of the child in respect of whom the order was made, and irrespective of the amount that was ordered to be paid for the child's maintenance. Similarly, a Magistrate has power to hear an application made under s. 39 to cancel, vary, or suspend any such order irrespective of the child's age or the amount to be paid, and to apply that section to the order made by the Supreme Court just as if he had made it. (*Lloyd* v. *Lloyd*, (1939) 1 M.C.D. 210, overruled.) An information was laid under the Destitute Persons Act, 1910, for arrears of maintenance arising out of an order made by the Supreme Court in 1940 (and afterwards registered in the Magistrates' Court under s. 8 of the Destitute Persons Amendment Act, 1926) whereby the defendant was ordered to pay maintenance for his daughter, who, when the information in respect of the arrears of maintenance was laid, was nineteen years of age, the arrears relating to a period when she was over sixteen years of age. A Magistrate dismissed the information, on the ground that he had no jurisdiction to hear it. On an application for a writ of mandamus commanding him to hear and determine the information, *Held*, That the Magistrate had jurisdiction to hear the information, notwithstanding the age of the child; and a writ of mandamus should issue commanding him to hear and determine that information upon its merits. (*Lloyd* v. *Lloyd*, (1939) 1 M.C.D. 210, overruled.) *Garratt* v. *Garratt*. (S.C. Wellington. September 29, 1950. O'Leary, C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Practice—Custody—Application for Permanent Custody made before granting of Decree nisi—*Interim Order, and not Permanent Order, to be made at Time of making Decree* nisi—*Divorce and Matrimonial Causes Act, 1928, s. 38 (1).* Where, before the hearing of the petition, an application for nterim custody is made under s. 38 (1) of the Divorce and Matrimonial Causes Act, 1928, an order for permanent custody (using that term in contrast to an order for interim custody, which is subject to variation where proper) should not, as a matter of practice, be made before the decree absolute.* (*Hitt* v. *Hitt*, (1915) 34 N.Z.L.R. 309, considered.) In the present case, after the making of the decree *nisi*, the Court made an order for interim custody, without prejudice to the consideration of what should be a permanent order; and the application for permanent custody was adjourned. *Hadwen* v. *Hadwen*. (S.C. Gisborne. September 29, 1950. Hutchison, J.)

* Per *Hutchison*, J., with the concurrence of *Fair*, *Northcroft*, *Finlay*, *Gresson*, and *Hay*, JJ.

Proof of Condonation. *114 Justice of the Peace Journal*, 429.

Restitution of Conjugal Rights—Exercise of Court's Discretion—Valid and Subsisting Deed of Separation—Public Interest not served by disregarding It—No Special Circumstances—Petition

dismissed—Divorce and Matrimonial Causes Act, 1928, s. 8. Section 8 of the Divorce and Matrimonial Causes Act, 1928, confers on the Court a wider judicial discretion than that given it by the principles and rules of the Ecclesiastical Courts (which are still relevant to the exercise of the discretion), in that it confers a greater freedom in refusing decrees as well as in granting them. (*Rose* v. *Rose*, [1932] N.Z.L.R. 561, followed.) A petition for restitution of conjugal rights should be dismissed, where there is a deed of separation subsisting and in force, if there are no special circumstances to justify a departure from the rule as to the exercise of the Court's discretion laid down in *Rose* v. *Rose*, [1932] N.Z.L.R. 561. (*Chard* v. *Chard*, [1939] N.Z.L.R. 380, considered.) *Sadler* v. *Sadler*. (S.C. Palmerston North. October 2, 1950. F. B. Adams, J.)

ELECTIONS AND POLLS.

Electoral Amendment Act, 1950, provides that the quota for electoral districts is to be based upon the total European population, and not on the adult population, as formerly; and the allowance for the adjustment of the quota is altered from "not exceeding five hundred" to "not exceeding seven and a half per cent." All elections are to be held on a Saturday, and Maori elections are to be held on the same day as the European elections.

Local Elections and Polls Amendment Act, 1950, provides that all general elections of members of local authorities are to be held on a Saturday, and, except where otherwise provided, are to be held on the third Saturday in November in the election year. Section 10 of the Local Elections and Polls Amendment Act, 1946, as to the use of Parliamentary electoral rolls, is repealed. Section 2 of the Local Elections and Polls Amendment Act, 1947, is amended to provide that only persons who have not had a reasonable opportunity of voting before commencing work are entitled to time off for voting. Section 5 makes provision for postal voting in certain circumstances, the procedure to be prescribed by regulation.

Local Elections and Polls (Postal Voting) Regulations, 1950 (Serial No. 1950/179).

EVIDENCE.

Evidence Amendment Act, 1950, by a new section (s. 5A) renders the wife of a person charged with certain offences in respect of a girl under the age of sixteen years, who is a daughter or granddaughter of the person charged or of his wife or was, at the time of the alleged offence, under the care or protection of the person charged or his wife, a competent, but not compellable, witness for the prosecution without the consent of the person charged. Section 20 of the principal Act is repealed, and a new s. 20 is substituted, providing that a confession is not to be rejected on the ground that a promise or threat or other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the accused: see *Ante*, p. 289.

EXECUTORS AND ADMINISTRATORS.

Claims—Promise by Mother to leave Estate to Son if He would abstain from marrying during Her Lifetime and remain with Her and render her Services—Mother's Will leaving Son Life Interest only with Remainder to His Children—Promise proved—Promise in Partial Restraint of Marriage, and accordingly Not Void—Court's Discretion exercised in Son's Favour—Mother's Executor and Trustee to hold Her Estate in Trust for Son absolutely—Law Reform (Testamentary Promises) Act, 1949, s. 3 (3). The plaintiff, aged thirty-four years, was the only child of his parents. His father died in 1938 and left what he had to the mother absolutely. The mother died in December, 1949, leaving about half an acre of land on which was built the house in which the family resided, some furniture, and some money, her net estate being worth £1,670. By her will, made on September 27, 1946, the home and the furniture therein may be occupied and used by the plaintiff during his life or for so long as he shall desire, he paying all rates and other outgoings and keeping the buildings and furniture insured and in good repair. Subject to this trust, sale, conversion, and investment were directed, and a life interest in the whole estate was given to the plaintiff, with remainder to his children, and representative grandchildren, and, should no child or grandchild of the plaintiff succeed, there was a gift over to a niece of the testatrix residing in England. The plaintiff claimed that his mother, in making her will as she did, had broken promises which he alleged she made to him in February, 1946, and on other dates thereafter, that she would leave everything to him absolutely if he would abstain from marrying during her life, and would remain with her and render her such assistance as she needed, having regard to her state of health. *Held*, 1. That, where a plaintiff who claims under the Law Reform (Testamentary Promises) Act, 1949, establishes, not merely the making of the promise of a specific property, but also its breach, an order vesting that property in the plaintiff does not follow as a matter of course, as the circumstances of the case must be considered before the Court exercises its discretion in his favour under s. 3 (3). 2. That the mother's promise was not contrary to public policy as being in restraint of marriage, and, therefore, void, as that promise was only a partial restraint of marriage merely incidental to a reasonable agreement for the rendering of services by the plaintiff. (*In re Lanyon, Lanyon* v. *Lanyon*, [1927] 2 Ch. 264, and *Keily* v. *Monck*, (1795) 3 Ridg. App. 205, followed.) 3. That the executor and trustee of the mother's estate holds it in trust for the plaintiff absolutely. *Heathwaite* v. *New Zealand Insurance Co., Ltd.* (S.C. Auckland. October 4, 1950. Callan, J.)

HARBOURS.

Harbours Act, 1950, consolidates and amends the Harbours Act, 1923, and its various Amendments. The main innovation in the new Act is that every Harbour Board is to consist of elected members only. There are to be no nominated or appointed members, and no representatives of payers of dues, and all members are to be elected by the electors of the constituent local authorities.

INCOME TAX.

Income Tax on Directors' Fees. *100 Law Journal*, 513.
Residence and Taxation. *210 Law Times*, 50.

INDUSTRIAL CONCILIATION AND ARBITRATION.

Industrial Dispute—Pilots appointed by Harbour Boards—Jurisdiction of Court of Arbitration to make Award covering Employment of Such Pilots—"Employed"—Harbours Act, 1923, ss. 47, 205—Industrial Conciliation and Arbitration Act, 1925, s. 2—Statutes Amendment Act, 1936, s. 38. The plaintiff Union sought a writ of prohibition restraining the Court of Arbitration from proceeding, in a dispute before it, to make an award covering the employment of pilots by Harbour Boards. The proceedings were removed into the Court of Appeal. *Held, per totam curiam*, That the motion should be dismissed, for the following reasons: Per *O'Leary*, C.J., *Callan*, *Stanton*, and *Hay*, JJ., That, as, under ss. 47 and 205 (3) of the Harbours Act, 1923, Harbour Boards are authorized to employ pilots, and pilots so employed are officers or servants of the Board, the Court of Arbitration has, by virtue of s. 38 of the Statutes Amendment Act, 1936, jurisdiction to deal with a dispute which concerns them, as, for certain purposes—*e.g.*, remuneration, terms of employment, and such like—pilots are servants of the Board; and, considered in relation to the Industrial Conciliation and Arbitration Act, 1925, a pilot is a "worker" as therein defined. (*Fowles* v. *Eastern and Australian Steamship Co., Ltd.*, [1916] 2 A.C. 556, applied.) (*New Zealand Merchant Service Guild Industrial Union of Workers* v. *New Zealand Harbour Boards' Industrial Union of Employers*, [1949] N.Z.L.R. 650, approved.) (*Shaw, Savill and Albion Co.* v. *Timaru Harbour Board*, (1890) 15 App. Cas. 429; N.Z.P.C.C. 180, distinguished.) (*Hedley* v. *Pinckney and Sons Steamship Co., Ltd.*, [1892] 1 Q.B. 58, and *Rix* v. *Controller and Auditor-General*, [1948] N.Z.L.R. 1021, referred to.) Per *Cooke*, J., 1. That the provisions of s. 38 of the Statutes Amendment Act, 1936, and, in particular, its reference to "officers," show that the intention of the Legislature was to bring within the purview of the Industrial Conciliation and Arbitration Act, 1925, those officers and servants who were held in *In re Industrial Conciliation and Arbitration Act, 1908*, (1909) 28 N.Z.L.R. 933, to be outside it. (*Fowles* v. *Eastern and Australian Steamship Co., Ltd.*, [1916] 2 A.C. 556, mentioned.) (*New Zealand Merchant Service Guila Industrial Union of Workers* v. *New Zealand Harbour Boards' Industrial Union of Employers*, [1949] N.Z.L.R. 650, approved.) 2. That the word "employment" in the context which is used in s. 38 of the Statutes Amendment Act, 1936, is apt to describe the relationship between a Harbour Board and a pilot appointed by it under s. 47 or s. 205 of the Harbours Act, 1923, even if that relationship be not a contractual one; and it should so be construed. *New Zealand Harbour Boards' Industrial Union of Employers and Another* v. *New Zealand Merchant Service Guild Industrial Union of Workers and Another.* (C.A. September 15, 1950. O'Leary, C.J., Callan, Stanton, Hay, Cooke, JJ.)

INVERCARGILL LICENSING TRUST.

Invercargill Licensing Trust Act, 1950, reconstitutes the Invercargill Licensing Trust as an elective trust, and consolidates and amends the various enactments relating to that Trust.

JUDICIAL CHANGES.

Lord Justice Tucker has been appointed a Lord of Appeal in Ordinary in succession to the Rt. Hon. Lord Greene, O.B.E., M.C., who resigned his office of Lord of Appeal in Ordinary on the grounds of ill health in May last.

Mr. Justice Birkett has been appointed a Lord Justice of Appeal.

Sir William McNair, Kt., K.C., has been appointed to the King's Bench Division.

JUSTICES.

Evidence—Offence triable Summarily—Accused failing to testify—Reliance—Prima facie *Case made out against Him—Appeal from Conviction—Such Failure taken into Account by Court—Justices of the Peace Act, 1927, ss. 72, 303, 315—Transport—Offences—Offence triable Summarily—Evidence*—Prima facie *Case against Defendant—Defendant's Failure to testify—Reliance—Court may take Same into Account—Transport Act, 1949, s. 40.* In summary proceedings under the Justices of the Peace Act, 1927, and in appeals under that statute, comment on the failure of an accused person to give evidence is permissible, as is the tribunal's taking it into account; but, before any consideration may be given to a failure of the accused to testify, there must be a sufficient *prima facie* case against him. (*Dolling* v. *Bird*, [1924] N.Z.L.R. 545, and *Weston* v. *Cummings*, [1916] N.Z.L.R. 460, referred to.) In addition to the necessity for a *prima facie* case, there is necessity for caution; but the need is met wherever the tribunal is satisfied that the failure to testify is, in the circumstances, a matter that may fairly be considered, and rightly and properly leads to the inference that the accused has failed to testify for the reason that he is unable to give truthfully such evidence as is relevant to the matter in question. It being presupposed that a *prima facie* case is established, such questions can arise only in regard to the weight to be attached to evidence already before the Court; if such evidence includes material that should be capable of contradiction or explanation by the accused, and if there is not sufficient reason for supposing that he is deterred from giving such evidence by anything but inability to give it truthfully, his failure to do so is relevant; and such failure should be taken into account. (*The King* v. *Mareo* (*No. 3*), [1946] N.Z.L.R. 660, referred to.) Thus, where the charge against a defendant under s. 10 of the Transport Act, 1949, is that, while in a state of intoxication, he was in charge of a motor-vehicle on a road, and he does not himself give evidence on matters on which he could have given relevant evidence, the Court, if there is a sufficient *prima facie* case against him, may take into account his failure to testify, and may draw any proper inference from that fact. *Semble*, In the present case, according to the form of appeal, the appellant was convicted on the charge that he "was while in a state of intoxication in charge of a motor-vehicle," and, if the form of appeal correctly described the conviction, it failed to set out any offence, owing to the omission of any words referring to a road. (*Davis* v. *Nuttall*, [1924] N.Z.L.R. 65, referred to.) *Quaere*, Whether the conviction (with which a fine was imposed, the defendant's driving licence was cancelled, and he was disqualified for twelve months) was a nullity. The learned Judge adjourned the appeal until counsel had the opportunity to be heard as to the validity of the conviction. *Nicolls* v. *King*. (S.C. Palmerston North. October 5, 1950. F. B. Adams, J.)

LAND AGENTS.

Agents' Commission. (L. A. Harris.) *3 Australian Conveyancer and Solicitors Journal*, 93.

LAND TRANSFER.

Interest Necessary to support A Caveat against Dealings. (L. A. Harris.) *3 Australian Conveyancer and Solicitors Journal*, 98.

Land Transfer Amendment Act, 1950: see article by Mr. E. C. Adams, *Ante*, p. 282.

LANDLORD AND TENANT.

Assignment and Eviction. (A. J. Scurry.) *24 Australian Law Journal*, 198.

LAW PRACTITIONERS.

The Legal Aid Scheme in England and the Profession. *100 Law Journal*, 536.

MAGISTRATES' COURTS.

Magistrates' Courts Amendment Act, 1950, revokes the procedure on appeals from Magistrates' Courts in s. 76 of the Magistrates' Courts Act, 1947, and restores the procedure followed, on an appeal on a question of fact, before that Act was passed. Under the new s. 76, an appeal will be heard on the Magistrate's notes of evidence, unless the Supreme Court, in its discretion, decides to rehear the whole or part of the evidence.

MUTUAL FIRE INSURANCE.

Mutual Insurance (Personal Accident) Regulations, 1950 (Serial No. 1950/176), authorizing the Otago Farmers' Union Mutual Fire Insurance Association, the Taranaki Farmers' Mutual Fire Insurance Association, and the Wellington Farmers' Union Mutual Fire Insurance Association to establish branches for the insurance of their members against accident and sickness.

NEGLIGENCE.

Res ipsa loquitur: A Pandora's Box of Misunderstandings. (Prof. R. W. Baker.) *24 Australian Law Journal*, 194.

POST AND TELEGRAPH.

Money Order Regulations, 1949, Amendment No. 2 (Serial No. 1950/170), increasing the cost of money-order telegrams from 1s. 2d. to 1s. 6d. if sent at ordinary rate, and from 1s. 8d. to 2s. 2d. if sent urgent.

Telegraph Regulations, 1939, Amendment No. 6 (Serial No. 1950/163). These regulations increase the rates for inland telegrams and make provision for changes in the conditions governing oversea telegrams, with various minor amendments of the main Regulations.

Telephone Regulations, 1950 (Serial No. 1950/162), consolidating and amending all previous Telephone Regulations and making provision for new rates and charges.

PRACTICE.

Appeals to Privy Council—Application for Leave to Appeal—Testamentary Action—Real Issues to be Considered—Directions of Testatrix regarding Disposition of approximately £8,000 held to be Invalid for want of Testamentary Capacity—Interest of Parties asking Leave that Testamentary Document containing Such Directions be upheld—Leave granted as of Right—"Amounts to or of the value of five hundred pounds"—"Great general or public importance"—"Or otherwise"—Privy Council Appeal Rules, 1910, R. 2 (a) (b). On an application for leave to appeal to His Majesty in Council, the judgment appealed from is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal. (*Macfarlane* v. *Leclaire*, (1862) 15 Moo. P.C.C. 181; 15 E.R. 462, followed.) Here, the judgment from which the respondents sought leave to appeal was that of the Court of Appeal, which had deprived them of the benefit of a judgment of the Supreme Court, its effect being to subject the whole of the estate of the testatrix to being disposed of otherwise than in the will propounded by the respondents, so that, in effect, the judgment required them to surrender an estate of the value of £8,000 or thereabouts. On this application for leave to appeal to the Privy Council, the real issue was whether the directions of a testatrix regarding the disposition of approximately £8,000 were valid in law on the ground of testamentary capacity, and the real interest of the respondent was that the testamentary document containing the directions, and propounded by them, should be upheld. In such circumstances, the consequence of a restoration to the respondents of the grant which, by a judgment of the Court of Appeal, was taken from them, was "of a value exceeding five hundred pounds," and there was, accordingly, an appeal as of right under R. 2 (*a*) of the Privy Council Appeal Rules. Alternatively, this is a proper case in which the Court's discretion should be exercised under R. 2 (*b*), as being a case which, by reason of its "great general or public importance" (in that questions of importance and difficulty are raised), ought to be submitted to His Majesty in Council for decision; and, even if the questions were not of great general or public importance (as the Court thought them to be), the questions furnished a sufficient reason for leave being given, upon the basis that the words "or otherwise" are intended to meet special cases, and are apt to comprehend such a case as this. *So held*, by the Court of Appeal, giving the leave sought. *In re White (deceased), Brown* v. *Free* (*No. 2*). (C.A. October 13, 1950. O'Leary, C.J., Finlay and Gresson, JJ.)

Leave to appeal Out of Time. *210 Law Times*, 49.

Originating Summons—Parties—Summons by Mortgagees for Possession—Mortgagor not in Occupation—Person in Occupation under Agreement with Mortgagor—Need to join Occupier as Defendant to claim for Possession by Mortgagees—R.S.C., O. 55, r. 5A (Code of Civil Procedure, R. 550). By a legal charge, dated October 9, 1946, and made between the L. Building Society, of the one part, and S., of the other part, £4,250 was

secured on certain property belonging to S., including premises known as No. 25, E. Avenue. The statutory power of leasing was expressly excluded, except with the consent of the building society to whom S. attorned tenant. The money secured was repayable with interest by monthly instalments. Instalments fell into arrear, and on March 3, 1950, the building society issued an originating summons under R.S.C., Ord. 55, r. 5A, claiming possession of No. 25, E. Avenue, and citing only S. as defendant. In July, 1950, the building society became aware that, although no consent to any lease had been given, No. 25, E. Avenue, was occupied by Mr. and Mrs. G., who claimed that the premises had been let to them (after the date of the legal charge) furnished at five guineas per week. *Held*, That the building society should be ordered to give notice to Mr. and Mrs. G. that the society were applying for an order for possession, and that that order would be made unless within fourteen days an occupier of the premises applied to be added as a defendant. (*Minet* v. *Johnson*, (1890) 63 L.T. 507, applied.) *Leicester Permanent Building Society* v. *Shearley*, [1950] 2 All E.R. 738 (Ch.D.).

PROBATE AND ADMINISTRATION.

Administration—Personal Chattels passing to Surviving Spouse —"Motor-car" not "Personal chattel" if "used exclusively or principally at the death of the intestate for business purposes"—Phrase "at the death of the intestate" not restricted to Actual Date of Death—Administration Amendment Act, 1944, ss. 2 (1), 6 (1). The term "personal chattels," as defined in s. 2 of the Administration Amendment Act, 1944, applies to motor-cars; and, if, at the death of the intestate, a motor-car is used exclusively or principally for business purposes, it is not a "personal chattel", passing to the surviving spouse. The words "at the death of the intestate" in the definition are not restricted to the day of his death, but cover a reasonable time before the day of death, having regard to the possibility of the deceased's changing the use of his motor-car from its use exclusively or principally for business purposes to its use exclusively or principally for private purposes. *Miller* v. *Miller and Others*. (Invercargill. September 4, 1950. O'Leary, C.J.)

Probate—Unattested Documents—Will giving Whole Estate to Named Person "to be distributed as [she] has direction from me"—Executrix, in Application for Grant, swearing Unattested Notes not in Existence when Will executed—Executrix swearing to execute Will and adding Her Desire and Intention to carry out Deceased's Wishes "as expressed in the said notes"—Judge's Requirements in Further Affidavit to be sworn by Applicant before Probate granted—Judge directing Application to be made, subsequently to Grant of Probate, for Directions as to Administration—Code of Civil Procedure, R. 518, First Schedule, Form No. 34. The requirements for an unattested document to be incorporated in a will and included in the probate as part of the will are that any document so to be incorporated must have been in existence at the date of the will, must have been referred to in the will as a document then existing, and must have been described in the will sufficiently to admit of its identification, in which case parol evidence may be admitted to identify it. (*Blackwell* v. *Blackwell*, [1929] A.C. 318, *Re Keen's Estate*, *Evershed* v. *Griffiths*, [1937] 1 All E.R. 452, and *In the Estate of Saxton*, *Barclays Bank, Ltd.* v. *Treasury Solicitor*, [1939] 2 All E.R. 418, referred to.) The testatrix, by her will, gave the whole of her estate to E. (who was appointed executrix) "to be distributed as the said [E.] has direction from me." The executrix, in her affidavit in support of her application for grant of probate, deposed that she found with the will—but after the death of the deceased—an envelope addressed to her, containing unsigned notes in the deceased's handwriting, which appeared to set out the wishes of the testatrix for the disposal of her estate. The executrix swore, too, that "the said notes unsigned and undated were to my personal knowledge not in existence at the time the will was executed and were written out by the deceased some time subsequently and attached to the will before the deceased entered hospital." In her affidavit, she swore (in the form prescribed by cl. 4 of Form 34 of the First Schedule to the Code of Civil Procedure) to execute the will, but she added, as well: "I desire and intend to carry out the wishes of the deceased as expressed in the said notes." In a minute on the application for grant of probate, *Held*, adjourning the application, 1. That, as the applicant had sworn positively that "the said notes" were not in existence at the time when the will was executed, that fact would preclude the incorporation of "the notes" in the will and their inclusion in the probate as part of the will; but she must set out the grounds which enabled her so to swear. 2. That the applicant should state whether she received any oral directions from the testatrix; if so, what they were and when they were given, and whether she undertook to carry them out. 3. That the fact that the executrix had expressed an intention to carry out "the direction" was in itself a circumstance which precluded a grant of probate to her at that stage. (*In re Boyes*, *Boyes* v. *Carritt*, (1884) 26 Ch.D. 531, and *Blackwell* v. *Blackwell*, [1929] A.C. 318, followed.) 4. That, before there could be a grant of probate, the executrix must disavow her expressed intention of carrying out "the direction," supply the further particulars indicated above, and undertake to apply to the Court for directions as to whether under the will she acquires the estate absolutely or on trust; if the former, whether there is an effective trust in accordance with "the directions"; if the latter, for whom she holds the estate; and that, pending the applicant's compliance with those requirements, the application should stand adjourned. 5. That, if and when a grant of probate is made, there must be a subsequent application to the Court for directions as to administration. (*In the Goods of Marchant*, [1893] P. 254, considered.) *In re Karsten (deceased)*. (S.C. In Chambers. Palmerston North. September 1, 1950. Gresson, J.)

The Doctrine of Relation Back of an Administrator's Title. *100 Law Journal*, 535.

PROPERTY LAW.

Property Law Amendment Act, 1950: see article by Mr. E. C. Adams, *Post*, p. 299.

RATIONING.

Rationing Emergency Regulations Revocation Order, 1950 (Serial No. 1950/180), revoking the Rationing Emergency Regulations, 1942, and all Amendments, and all orders made under those Regulations affecting the rationing of various commodities.

SALE OF GOODS.

"Covenants do not run with Goods." *100 Law Journal*, 550.

SHIPPING AND SEAMEN.

Bill of Lading—Delivery of Cargo in Damaged Condition—Damage by Water—Suction-pipe running through Hold allowed to freeze before Loading—Ice in 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), s. 14 (2) (a), Schedule, Art. III, rr. 1, 2, Art. IV, rr. 1, 2 (a). 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 tank 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 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 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.)), and 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., Ltd.* v. *T. Benyon and Co., Ltd.*, (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.

Possession—Tenement comprising Dwellinghouse, Cowshed, and Thirteen Acres in Grass let conjointly under a Separate Tenancy—Tenement not a "dwellinghouse" and "not used exclusively or principally for agricultural purposes"—Tenement within Definition of "urban property"—Order for Possession refused—"Urban property"—"Income"—Tenancy Act, 1948, s. 2 (1). A tenement, which was not in an urban area, comprised a residence, a cowshed, a garage, and other buildings, and 13 acres 37.6 perches in grass, with the exception of about half an acre by the house and a small area used as an orchard. It was divided into six paddocks, and the soil was capable of a high degree of development. The tenant, a land salesman with seven (and later ten) children, had leased the property for five years from April, 1938, and, on expiry of that term, a new lease at the same rental was taken for a term of three years from April 11, 1943. The lessee retained his employment as a land salesman, and he had remained continuously in occupation of the property since he had entered into possession under the first lease. Seven of the children were living at home. The produce of the land was necessary in assisting to support the family. The land was used exclusively for the production of foodstuffs for family use, and at all material times there were two cows, two heifers, and two horses running on it. In an action for possession, the lessee contended that no order for possession could be made if the tenement, at the crucial point of time, were either a "dwellinghouse" or "urban property" as defined in s. 2 (1) of the Tenancy Act, 1948. *Held*, 1. That the tenement was not within the definition of "dwellinghouse," for the reasons (i) that the word "income," as used in para. (*b*) of the definition of "dwellinghouse" in s. 2 (1) of the Tenancy Act, 1948, does not extend to include the value of produce grown upon, or secured by the use of, land and consumed in the house of the tenant himself; and, consequently, as no "income" in the true sense had been derived from use of the land at any material time, para. (*b*) of that definition had no application; and (ii) that the real intention of the parties in making the tenancy contract was that no building or part of one was the dominant or paramount subject of the tenancy. (*Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, and *In re Cuno, Mansfield* v. *Mansfield*, (1889) 43 Ch.D. 12, followed.) 2. That, in determining whether a tenancy is "urban property," the mere use of an area of land, let with a house on it, for some or all of the purposes defined as "agricultural," without more, will not establish its use "for agricultural purposes," which can be established only by determining the nature of the actual, and not the potential, use in the light of all the relevant facts. (*Williams* v. *Perry*, [1924] 1 K.B. 936, followed.) (*Blakey* v. *Brennan*, [1944] N.Z.L.R. 929, and *Dalzell* v. *Smith*, [1946] N.Z.L.R. 421, applied.) (*Livingstone* v. *Barker*, (1947) 5 M.C.D. 352, referred to.) (*Garnett* v. *Fieldsen*, (1947) 5 M.C.D. 176, doubted.) 3. That premises used primarily as a home are not excluded from the definition of "urban property," because the phrase "exclusively or principally" in the definition envisages some, if not some substantial, use for agricultural purposes, so that it becomes a question of the degree of that use which determines whether a property is urban property or not. (*Gidden* v. *Mills*, [1925] 2 K.B. 713, applied.) 4. That the tenement should be regarded as an entity, used by the defendant as a home, consisting of land and residence, as all were let conjointly in terms of the definition of "property" under a separate tenancy, and it was not possible to dissociate the constituent elements. An order for possession was refused. 5. That, accordingly, the tenement was "urban property" within the definition of that term in s. 2 of the Tenancy Act, 1948, as it was not "used exclusively or principally for agricultural purposes" at the material point of time at which the use was to be determined—namely, either when the notice to quit was served or, at the latest, when it expired. (*Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, and *Dalzell* v. *Smith*, [1946] N.Z.L.R. 421, applied.) (*Hyman* v. *Steward*, [1925] 2 K.B. 702, distinguished.) *Houston* v. *Poingdestre*. (S.C. Auckland. August 18, 1950. Finlay, J.)

Tenancy Amendment Act, 1950: see *Ante*, p. 273.

TRANSPORT.

Offences—Negligent Driving causing Injury—Causing Injury while in State of Intoxication—Ingredients of Offences—Whether Causative Act or Omission to be established against Accused must be Negligent—Transport Act, 1948, s. 39 (1)—Criminal Law—Practice—Verdict—Jury asked not to return Verdict on First Count if Prisoner found Guilty on Second—Jury finding Prisoner Guilty on Both Counts—Proper Course to be Adopted. Under the first part of s. 39 (1) of the Transport Act, 1948, it must be proved that the accused recklessly or negligently drove a motor-vehicle and thereby (which means "by such reckless or negligent driving") caused bodily injury to some person. Under the second part of s. 39 (1) (after the word "or"), it must be proved (*a*) that the accused was in a state of intoxication; (*b*) that while in that state he was in charge of a motor-vehicle; and (*c*) that by an act or omission in relation thereto (which means "in relation to the motor-vehicle") he caused bodily injury to some person. Whereas the crime mentioned in the first part of s. 39 (1) can be committed only by the *driver* of a motor-vehicle, the crime mentioned in the second part of the subsection can be committed by a person in charge of the vehicle, whether or not he is then driving it. The words in the second part of s. 39 (1) ("by an act or omission in relation thereto causes bodily injury") settle that something more must be shown than that the accused, while intoxicated, was in charge of a motor-vehicle which has been involved in a happening which has resulted in bodily injury: it must be established by direct evidence or legitimate inference that, while intoxicated and in charge, he, by some act or omission in relation to the motor-vehicle, caused bodily injury. *So held* by the Full Bench of the Court of Appeal (both Divisions sitting together). *Quaere*, Whether the causative act or omission, which must be established against the accused, must be negligent. The prisoner was driving a motor-car at night on a public road when it came into collision with a push bicycle which approached him from the opposite direction, with the result that the rider of the bicycle received injuries from which, later, she died. The prisoner was indicted on two counts—namely, (*a*) that he "did negligently drive a motor-vehicle, to wit, a motor-car, and did thereby cause injury [to the rider of the bicycle]"; and (*b*) that "while in a state of intoxication [he] was in charge of a motor-vehicle, to wit, a motor-car, and by an act or omission in relation thereto did cause injury [to the rider of the bicycle]." There was evidence which, if accepted, justified findings (i) that the prisoner was in a state of intoxication, and (ii) that by negligence he caused the collision (*a*) by driving on the wrong side of the road, and (*b*) by failing to keep a proper look-out. Despite the learned trial Judge's clear advice to the jury to consider the second count first, and his explanation that, if they returned a verdict of "guilty" on the second count, they were not to find the prisoner guilty on both counts, they returned a verdict of guilty on both counts. On case stated by the learned trial Judge for the opinion of the Court of Appeal, *Held*, by the Full Bench of the Court of Appeal, 1. That, having regard to the terms of the summing-up, it would have been proper, and in accord with practice, for the jury, when they returned, to have been asked for a verdict of "guilty" as to that, and for no further question to have been asked them. 2. That, when, as the result of the course taken, the jury found the prisoner guilty on both counts, it would have been competent for the learned trial Judge to have told them that they appeared to have overlooked his explanation to them that a verdict of "guilty" on both counts would be inappropriate; and they could then have been requested to retire again, with a view to saying whether they found the prisoner "guilty" on the second count or on the first only. 3. That, having regard to the course of the trial, the proper course was to quash the conviction on the first count and to order that the conviction on the second count should stand. *Quaere*, Whether both convictions could stand together. *R.* v. *Johnson*. (C.A. October 4, 1950. Fair, Callan, Northcroft, Finlay, Gresson, Hutchison, and Hay, JJ.)

Transport Licensing Regulations, 1950, Amendment No. 1 (Serial No. 1950/165), amending, as from October 1, 1950, the Fourth and Fifth Schedules to the principal Regulations, and substituting new Schedules redefining Passenger Service Districts and Goods Service Districts respectively.

TRUSTS AND TRUSTEES.

Remuneration of Trustee-Directors. *100 Law Journal*, 551.

CONSTITUTIONAL LAW.

THE GOVERNOR-GENERAL'S POWERS.

Suggested Amendments of the New Zealand Constitution Act, 1852.

In pursuance of their election pledge, the National Government introduced a Bill to abolish the Legislative Council, which is now enacted as the Legislative Council Abolition Act, 1950. This Act, which provides that on and from January 1, 1951, the Legislative Council shall be abolished, involves an amendment of the New Zealand Constitution Act, 1852. The fact that New Zealand's basic constitutional measure is being amended raises the question whether the time is not opportune for other sections of this Act to be scrutinized with a view to determining what amendments should be made, having regard to the period that has elapsed and the changes that have taken place in the status of New Zealand since the Act was passed. With an examination of the existing provisions of the 1852 Act are associated three allied questions—the desirability of enacting a written constitution, the contents of any such constitution, and the competence of the General Assembly to pass legislation that would be binding on its successors. Each of these three questions calls for special treatment, and, in passing, the comment is offered that it is by no means clear that the General Assembly is incompetent to prescribe "manner and form" of legislation that would be binding on succeeding Parliaments.[1]

It is my intention to limit myself to an examination of those sections of the New Zealand Constitution Act, 1852, that have remained in force since 1852. When enacted, this Act consisted of eighty-two sections, of which only nineteen now remain in force.[2] These sections call for special consideration, if only because they have remained in force from the date that the Constitution became law.

Section 32, which provides for a General Assembly consisting of the Governor-General, a Legislative Council, and a House of Representatives, is amended with the coming into force of the Legislative Council Abolition Act, 1950. Unless an alternative second chamber is established, the General Assembly will, from January 1, 1951, consist of the Governor-General and the House of Representatives, and New Zealand will become the first Commonwealth country to provide for a national unicameral Legislature. Regret has been expressed that, although there is general agreement on both sides of the House of Representatives as to the value of the functions that can be performed by a second chamber, no basis for agreement has yet been found as to the manner in which such a second chamber should be constituted.

Section 44 empowers the Governor-General to issue Proclamations fixing the time and place for the holding of the General Assembly and to prorogue or dissolve the General Assembly. Section 40 of the New Zealand Constitution Act, 1852 (now s. 3 of the Electoral Act, 1927), authorizes the Governor-General to summon the House of Representatives. By Clause X of the Letters Patent of May 11, 1917, the Governor-General is authorized to exercise the prerogative powers of summons, prorogation, and dissolution of Parliament, but these powers are abridged by the statutory power given by s. 44 of the New Zealand Constitution Act, 1852, and s. 3 of the Electoral Act, 1927.[3] The form of prorogation or dissolution is not prescribed by statute or the Royal Instruments relating to the Office of Governor-General, but it is traditional for the Governor-General to issue a Proclamation notifying the prorogation or dissolution of Parliament.[4] The fact that similar powers are given to the Governor-General by statute and by delegation from His Majesty raises incidentally the need for revision of the Royal Instruments relating to the Office of Governor-General. The Instruments presently in force in New Zealand were issued in 1917; that revision is long overdue can best be demonstrated by reference to the text of the Canadian Letters Patent of 1931, 1935, and 1947. The Canadian Letters Patent of 1947, which replaced the earlier instruments, incorporated in one document provisions formerly contained in the Letters Patent and Royal Instructions, and included clauses appropriate to the status of a Dominion within the Commonwealth as defined by the Imperial Conferences of 1926 and 1930.[5]

Sections 46 and 47 provide for the taking by Members of the House of Representatives and the Legislative Council of the oath of allegiance, or an affirmation in lieu of such oath. The inclusion of such provisions in the Legislature Act would seem appropriate.

Section 53 is the general clause determining the legislative competence of the General Assembly. This section calls for amendment by reason of the abolition of the Provincial Assemblies, the adoption of the Statute of Westminster, 1931, and the passing of the New Zealand Constitution Amendment Act, 1947 (U.K.). A short statement of the complete legislative competence of the General Assembly could conveniently replace the existing provision, which is subject to qualifications that no longer apply.

Sections 54–59 (inclusive) define the powers of the Governor-General with respect to legislation. These provisions were entirely appropriate at the time of their enactment, when the Governor-General was expected to exercise a restraining influence on the policies of Colonial administration, which were conceived to require the guidance of the United Kingdom Government given through the Governor. Those circumstances have long since passed, and the opportunity

[1] References to relevant authorities on this question include *Attorney-General for New South Wales* v. *Trethowan*, (1931) 44 C.L.R. 394, 428, 429, per Dixon, J., *Ndlwana* v. *Hofmeyr*, [1937] A.D. 229, R. O. McGechan, (1944) 20 NEW ZEALAND LAW JOURNAL, 18 *et seq.*, K. C. Wheare, *Constitutional Changes in the British Commonwealth and Empire*, Journal of Comparative Legislation and International Law, vol. 30, pp. 75 ff., esp. p. 82, D. V. Cowen, *The "Entrenched Sections" of the South Africa Act*, reprinted from the *Cape Times*.

[2] These sections are sections 32, 44, 46, 47, 53, 54, 55, 56, 57, 58, 59, 61, 64, 65, 66, 71, 72.

[3] *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508.

[4] See F. W. Maitland, *The Constitutional History of England* (Cambridge, 1931), 393, where it is suggested that an oral prorogation or dissolution would be valid.

[5] The Report of the Imperial Conference, 1926, Cmd. 2768 (1926) and the Report of the Imperial Conference, 1930, Cmd. 3717 (1930).

for amendment of the New Zealand Constitution Act, 1852, might now be taken.

Section 54 provides that all Bills appropriating money must be recommended to the House of Representatives by the Governor-General, and requires that a warrant from the Governor-General is necessary to authorize expenditure of public funds. It is not difficult to find an explanation for the conferment of this power on the Governor-General. It stemmed from recognition of the principle that it is for the Crown —*i.e.*, the Government of the day—to determine the manner in which moneys should be spent, and, at the time of the passing of the Act of 1852, it was desired that the Governor, acting on the instructions of the United Kingdom Government, should possess this power. The Governor-General now acts on the advice of his New Zealand Ministers, but the fact that recommendations as to money Bills must be made by the Governor-General may be thought anomalous; it may be preferable to adopt the procedure that obtains in the United Kingdom, where the Crown's approval of appropriations is given by a Minister.

The power given by s. 54 to the Governor-General in respect of money Bills represents only a part of his legislative initiative. Section 55 provides that the Governor-General may by message transmit draft legislation (including amendments to Bills that have been introduced to Parliament) to either House for consideration, and in fact almost all Government legislation is introduced by message from the Governor-General. In 1852, it was necessary to provide means by which the Governor-General could submit to Parliament for consideration Bills drafted either on his own initiative or on instructions from the United Kingdom Government. What was an appropriate procedure at that time seems quite out of place in modern conditions. It is recognized that the Governor-General, when transmitting draft legislation to either House, is acting on the advice of his New Zealand Ministers, but it would be much more simple and less confusing to the public at home and abroad if Government measures were introduced by motion of a Minister of the Crown, who could, if the Bill involved a charge on the revenue, advise the House that the approval of the Crown had been given to the Bill.

Under s. 56, the Governor-General is given power to assent to, refuse assent to, or reserve or amend Bills transmitted to him by Parliament. In the exercise of his discretion, the Governor-General is required to act in accordance with the provisions of the New Zealand Constitution Act, 1852, and the Royal Instructions, including any that might be issued under s. 57. Apart from s. 65, which will be considered later, there are no longer any Instructions or statutory provisions as to the granting or refusal of assent, so that the Governor-General's discretion is not limited in any way. In terms of the Resolutions of the Imperial Conferences of 1926 and 1930, the Governor-General is, of course, obliged to act on the advice of his New Zealand Ministers. The Imperial Conference of 1930, by adopting the report of the Conference on the Operation of Dominion Legislation, declared that the power of reservation of Bills for the signification of His Majesty's pleasure, though appropriate under the older Colonial system, might be abolished if the Dominions so wished.[6] The power of disallowance by His Majesty provided for in s. 58 is also obsolete, and the Conference on the Operation of Dominion Legislation approved its abolition.[7] Steps to abolish reservation and disallowance and repeal ss. 57 and 59 might well be taken if any revision of the Constitution is undertaken.

Section 56 also gives the Governor-General power to make amendments to Bills submitted to him for assent. It has already been mentioned that, under s. 55, the Governor-General has power to recommend amendments to Bills which have not passed both Houses; the power given by s. 56 permits amendments to be made after the Bill has passed both Houses and is presented for assent. When drafted, s. 56 was intended to ensure control by the Governor over the legislative policy of the Government, and no doubt he found frequent need for the exercise of these powers. Recently, these powers have been used for an entirely different purpose—namely, the correction of oversights in the preparation of legislation—and this use of s. 56 has not gone unchallenged. In 1948, the Hon. R. M. Algie questioned the propriety of introducing amendments by this procedure. It was his opinion that the adoption of the Statute of Westminster, 1931, and the enactment of the New Zealand Constitution Act, 1947, had rendered the exercise of these powers by the Governor-General entirely inappropriate.[8] It is clear that the powers given by s. 56 were designed for quite a different purpose from that for which they have recently been utilized, and that it is of special significance that the Governor-General, whose status in New Zealand is defined by reference to the position of His Majesty in the United Kingdom, should possess powers of amendment of legislation not enjoyed by His Majesty.

Section 61, as to the levying of duties inconsistent with treaties made by His Majesty or on supplies for His Majesty's Forces, is another section that has become inappropriate by reason of the change in New Zealand status since 1852. The limitations on the legislative competence of the General Assembly embodied in s. 61 are inappropriate in present conditions.

Those portions of ss. 64 and 65 that refer to the Schedule to the Act lost their meaning with the repeal of the Schedule. The provisions of ss. 54 and 64, with respect to the issue of moneys on Governor-General's warrant, might well be repealed. The Public Revenues Act, 1926, contains further provisions designed to implement ss. 54 and 64, and the form of the Governor-General's warrant is prescribed in the First Schedule to the Act. Before warrants, which are prepared by the Treasury Department, are submitted to the Governor-General for signature, they are forwarded to the Controller and Auditor-General, who is required to certify thereon that the issue of the sum specified in the warrants is according to law. The action of the Governor-General is thus purely formal, and there seems no justification for placing upon his shoulders the unnecessary duty of signing warrants. Any purpose that these sections may have had to permit the Governor to control payments from the Treasury is surely spent.

The provisions of s. 65, requiring the reservation of Bills altering the Governor-General's salary or the sum appropriated for Native purposes, are dealt with in the Report of the Conference on the Operation of

[6] The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, Cmd. 3479 1929), paras. 26-36.

[7] *Ibid.*, paras. 18-23.

[8] *New Zealand Parliamentary Debates*, 1948, pp. 4304-8.

Dominion Legislation, which stated that there was no difference in principle between discretionary reservation under ss. 56 and 59 and compulsory reservation under s. 65. The abolition by legislation, should Dominion Parliaments so wish, of the power of discretionary or compulsory reservation was approved.[9] The whole of s. 65 might well be repealed, and that portion that relates to the salaries of Judges could be incorporated in the Judicature Act, 1908.

Section 66, as to the appropriation of revenue, and s. 72, as to the disposal of waste lands, are declaratory of the powers of the General Assembly, and would be covered by any restatement of s. 53 as to the legislative competence of the General Assembly. Section 71, which permits the issue of Letters Patent providing for native lands and customs, is inconsistent with the legislative sovereignty of the General Assembly, and should be repealed. There can be no doubt that the Maori people do not feel the need for the preservation by prerogative act of their laws and customs. Sections 80 and 82 are unnecessary, as provisions to the same effect are contained in statutes passed by the General Assembly.

It is obvious that, if any steps are to be taken to write a written constitution for New Zealand, consideration must be given to the amendment of the remaining sections of the New Zealand Constitution Act, 1852. The purpose for which these sections was enacted, while entirely appropriate to the conditions of a Colony, is wholly out of line with the changed status of the Governor-General and the legislative sovereignty now vested in the General Assembly. The powers and authorities exercisable by the Governor-General under this Act are at variance with the status of a Governor-General as defined by the Imperial Conferences of 1926 and 1930. What is needed, in addition to a thorough examination of the New Zealand Constitution Act, 1852, is a revision of the Letters Patent constituting the Office of Governor-General and the Royal Instructions, so as to make those instruments more accurately state the powers and authorities of a constitutional Head of State. The revision of these instruments must precede the drafting of a constitution, as the contents of the constitution will in part depend upon the provisions included in the prerogative instruments relating to the Governor-General.

[9] The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, Cmd. 3479 (1929), paras. 26-36.

THE PROPERTY LAW AMENDMENT ACT, 1950.

By E. C. Adams, LL.M.

This year's Session of Parliament has not been without interest to the conveyancer and the real property lawyer. First we have had a Land Transfer Amendment Act: *Ante*, p. 282. This has been followed by a Property Law Amendment Act, containing some very interesting provisions.

Magistrate's Court may authorize Entry on Adjoining Land for erecting or repairing Buildings, &c.

Section 2 of the Property Law Amendment Act, 1950, amends the principal Act by adding a new section, s. 16A, which provides as follows:

> 16A. (1) The owner of any land may at any time apply to a Magistrate's Court for an order authorizing him, or any person authorized by him in writing in that behalf, to enter upon any adjoining land for the purpose of erecting, repairing, adding to, or painting the whole or any part of any building, wall, fence, or other structure on the applicant's land, and to do on the land so entered upon such things as may reasonably be considered necessary for any such purpose as aforesaid.
>
> (2) On any such application the Court may make such order as it thinks fit. Any such order, or any provision thereof, may be made upon and subject to such terms and conditions as the Court thinks fit.
>
> (3) Every application under this section shall be made by originating application in accordance with the rules of procedure for the time being in force under the Magistrates' Courts Act, 1947. The Court, for the purposes of hearing and determining the application, shall have all the powers vested in it in its ordinary civil jurisdiction.
>
> (4) For the purposes of this section, the term "owner," in relation to any land, means any person registered under the Land Transfer Act, 1915, as the proprietor of an estate in fee simple in the land or as lessee or mortgagee of the land, or any person who is for the time being entitled to receive the rent of the land, whether on his own account or as agent or trustee for or mortgagee of any other person, or who would be entitled so to receive the rent if the land were let, or any tenant of the land bound by any express or implied covenant to keep any building thereon in repair.

This is a novel provision, rendered necessary because of the severe view which English law has always taken of the civil wrong or tort of trespass to land, and because most people have always found this Christian commandment the most difficult to obey: "Love thy neighbour." Where houses and other buildings are built on or near the common boundary, an unpleasant occupier of land can make it very awkward for his neighbour who wants to maintain and repair his own property—to paint his house, for instance.

In *Entick* v. *Carrington*, (1765) 19 St. Tr. 1030, Lord Camden, L.C.J., delivering the judgment of the Court, said, at p. 1066:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing.

To constitute trespass, according to *Salmond on Torts*, 6th Ed. 222:

> The slightest crossing of the boundary is sufficient—*e.g.*, to put one's hand through a window, or to sit upon a fence. Nor, indeed, does it seem essential that there should be any crossing of the boundary at all, provided that there is some physical contact with the plaintiff's property.

One point to be noted in this new section is the wide definition of the term "owner." The draftsman appears to have made the definition very comprehensive, and the Legislature appears to have put unpleasant and unreasonable neighbours in their proper place. Obviously, it would not have been sufficient to confine relief to the owner of the freehold.

Court may grant Special Relief in Cases of Encroachment of Building.

Section 3, in substituting s. 16B of the Property Law Act, 1908, repeals s. 97 of the Judicature Act, 1908, which is the provision which gave relief to an

owner who had built on his land but encroached on to his neighbour's land, the encroachment being unintentional and not due to gross negligence. The ambit of that section has been greatly extended by the new s. 16B. The Court may now make vesting orders, and create easements, and adjust mortgages, encumbrances, and leases, and, even where the encroachment has been intentional or due to gross negligence in the first instance, it may grant relief to a subsequent owner, who did not erect the building, where, in the circumstances, the Court thinks it just and equitable that relief should be granted.

The necessity for this legislation arises from the rule of law that fixtures follow the title to the land, "as the shadow follows the substance." If A builds on B's land, B gets a good title to the building too, the well-known maxim being *Quicquid plantatur solo, solo cedit.* There are some equitable exceptions to this rule of the common law. There is, for instance, the doctrine of standing by enunciated by Lord Cranworth, L.C., in the leading case of *Ramsden* v. *Dyson, and Thornton*, (1866) L.R. 1 H.L. 129, 140, 141, cited by Ostler, J., in *Bassin* v. *Feely*, [1935] G.L.R. 165, 167 :

> If a stranger begins to build on my land supposing it *to be his own*, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

I think that in the case of innocent encroachment it would be difficult to prove that the owner of the land encroached upon knew what the exact title boundary was, and thus knew that there was encroachment when the building was being erected; in practice, these errors are often not apparent until a surveyor resurveys the land, and even surveyors cannot always agree as to the true title boundaries.

Ameliorating legislation of the nature of s. 3 of the Property Law Amendment Act, 1950, is particularly necessary where, as in New Zealand, the title boundaries of land are State-guaranteed; under the "old system," in cases of disputes as to boundaries the Courts devote much importance to the possessory boundaries. Theoretically, at least, they cannot do that where the title is an ordinary fully-guaranteed Land Transfer one. And, as, under the Land Transfer system, no title may be obtained by adverse possession, therefore there is no healing effect of time by operation of the Limitation Acts.

In South Australia, the problem has been treated differently. There, the Registrar has been recently empowered to amend the title boundaries in accordance with the possessory boundaries, after having served certain notices on the registered proprietors.

This apparently comprehensive section of the Property Law Amendment Act, 1950, reads as follows :

> 3. (1) The principal Act is hereby further amended by inserting, after section sixteen A (as inserted by the last preceding section), the following section :—
>
> "16B. (1) Where in any action or other proceeding in the Supreme Court relating to land it appears to the Court that any building, whether erected by the defendant or by any of his predecessors in title, upon any land adjoining the plaintiff's land encroaches upon any part of the plaintiff's land (that part being referred to in this section as the piece of land encroached upon) and it is proved to the satisfaction of the Court by or on behalf of the defendant that the encroachment was not intentional and did not arise from gross negligence, or, in any case where the building was not erected by the defendant, it is, in the opinion of the Court, just and equitable in the circumstances that relief should be granted to the defendant, the Court, instead of ordering the defendant to give up possession of the piece of land encroached upon, or to pay damages, or instead of granting an injunction, may in its discretion make an order—
>
> "(*a*) Vesting in the defendant or any other person any estate or interest in the piece of land encroached upon; or
>
> "(*b*) Creating in favour of any person any easement over the piece of land encroached upon; or
>
> "(*c*) Giving the defendant the right to retain possession of the piece of land encroached upon.
>
> "(2) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the piece of land encroached upon, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, or contract affecting or relating to that piece of land.
>
> "(3) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by the defendant or any other person of any sum or sums of money, or the execution by the defendant or any other person of any mortgage, lease, easement, contract, or other instrument, or otherwise.
>
> "(4) Every person having any estate or interest in the plaintiff's land or in such adjoining land as aforesaid, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, or contract affecting or relating to any such land, shall be entitled to be heard in relation to any application for or proposal to make any order under this section. For the purposes of this subsection the Court may, if in its opinion notice of the application or proposal should be given to any such person as aforesaid, direct that such notice as it thinks fit shall be given to that person by the defendant.
>
> "(5) Any Magistrate's Court shall have jurisdiction to exercise the powers conferred upon the Supreme Court by this section in any case where the value of the land to which the action or proceeding relates, without the buildings thereon, does not exceed the amount to which the jurisdiction of the Magistrate's Court is limited in civil cases :
>
> "Provided that a defendant intending to invoke the powers given to a Magistrate's Court by this subsection shall give notice of his intention to the other party before the hearing, and the other party shall thereupon be entitled as of right to have the action or proceeding transferred to the Supreme Court, or to appeal to the Supreme Court against any order purporting to be made by the Magistrate's Court under this section.
>
> "(6) Every order vesting any estate or interest in any person under this section shall, for the purposes of the Stamp Duties Act, 1923, be deemed to be a conveyance, and shall be liable to stamp duty accordingly.
>
> "(7) Any order under this section may be registered as an instrument under the Land Transfer Act, 1915, or, as the case may require, the Deeds Registration Act, 1908."
>
> (2) Section sixteen B of the principal Act, as inserted by this section, is in substitution for section ninety-seven of the Judicature Act, 1908, and the said section ninety-seven is hereby repealed.

Despite the comprehensiveness of the section, it will still be most unwise for one to build on another's land. The maxim *Quicquid plantatur solo, solo cedit* has not yet been deprived of all its sting.

Very little authority will be found on s. 97 of the Judicature Act, 1908 (originating more than forty years ago in s. 7 of the Law Amendment Act, 1904). Probably the reason for this is that, when the owner of the land encroached upon is told by his legal adviser of the rights which his neighbour can invoke under the statute, he is more inclined to make peace with his neighbour, who in his turn is probably advised to offer to purchase the strip of land on to which the offending building encroaches. I should say that in all proba-

bility there will, for a similar reason, be little authority on s. 3 of the Property Law Amendment Act, 1950.

Mortgagees may combine Notice of Default and Notice of Intention to call up Principal Sum.

The Hawke's Bay District Law Society recently pointed out (see (1948) 24 New Zealand Law Journal, 259) that, by reason of the Supreme Court ruling in *H.* v. *I.*, [1940] N.Z.L.R. 235, where a mortgage had been adjusted by the Court of Review under the Mortgagors and Lessees Rehabilitation Act, 1936, before a mortgagee could exercise his power of sale on default of the mortgagor, two notices had to be served by the mortgagee on the mortgagor, one under s. 7 of the Mortgagors and Lessees Rehabilitation Act, 1936, and another under s. 3 of the Property Law Amendment Act, 1939. Although the contents of the notices were similar in both cases, unless two properly intituled notices were sent or unless both Acts were referred to in a combined notice, the notice was insufficient if the mortgage had been adjusted by the Court of Review. As Ostler, J., pointed out in the case just cited, for some reason best known to itself, which the Courts must presume to be a good reason, the Legislature had directly provided that the rights given to mortgagors of adjustable mortgages by s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, should be kept alive, and that, in addition, mortgagors should have the rights given by s. 3 of the Property Law Amendment Act, 1939.

The Hawke's Bay District Law Society further pointed out that, where the mortgage was overdue, s. 68 of the Property Law Act, 1908, required a three months' notice to the mortgagor. This very unsatisfactory position has now been tidied up by the Legislature. Section 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, has been repealed, and the three months' notice required by s. 68 of the Property Law Act, 1908 (where the mortgage is overdue), may be combined in the notice required by s. 3 of the Property Law Amendment Act, 1939. Sections 4 and 5 of the Property Law Amendment Act, 1950, read as follow:

> 4. Section three of the Property Law Amendment Act, 1939, is hereby amended by inserting, after subsection two, the following subsection:—
>
> "(2A) In any case to which the provisions of this section and of section sixty-eight of the principal Act apply, the three clear months' notice of intention to call up and compel payment of the principal sum required by the said section sixty-eight and the notice required by this section may be combined in one document. Where those notices are so combined, the notice required by the said section sixty-eight shall be deemed to have been given to the mortgagor at the time when the document containing the combined notices has been served on him in accordance with section eight of this Act."
>
> 5. Section seven of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, and subsection nine of section three of the Property Law Amendment Act, 1939, are hereby repealed.

Directions as to Service of Notices under the Property Law Act.

Before the passing of s. 6 of the Property Law Amendment Act, 1950, applications for directions as to service of notices under the principal Act—for example, where the person to be served is not known or cannot be found—had to be made to the Supreme Court. Section 6 now gives jurisdiction in such cases to Magistrates' Courts where a sum of money not exceeding £2,000 is involved.

To sum up, it may be said that every section of the Property Law Amendment Act, 1950, will be found by practitioners to be beneficial, not only in conveyancing, but also in the substantive law of real property—thus a convenience to themselves and advantageous to their clients.

LEGAL LITERATURE.

Garrow's Criminal Law in New Zealand.

A Reply to the Reviewer.

In the thorough and careful review of this book at p. 240, *ante*, the following passage appears:

> "The chief criticism to which the work is open, in the opinion of this reviewer, is the excessive reliance that is placed on decisions at common law. The recurring citations from the Report of the Criminal Code Commission serve to remind the reader of many changes deliberately introduced into the law when the Code was enacted, but the changes may well be greater than the Commission itself realized. A statute is a verbally authoritative form of law-making; and its construction, where the language has a natural meaning which involves no ambiguity or uncertainty, is not governed by the previous state of the law, even though no change was premeditated. It is consequently necessary to examine the statutory provisions closely before prior or subsequent English decisions can be confidently cited in illustration of the meaning and operation of the Act. The author, however, frequently cites these decisions when it is clearly questionable whether the common-law rule has not been modified, abrogated, or superseded by the statute."

Without wishing for one moment to suggest that the book does not merit criticism, I feel bound to point out that the above passage is a criticism, not so much of the book, as of the work of a most eminent Commission.

In writing the work under review, the author had continuously before him the Report of the Criminal Code Commission and the Marginal Notes made by that Commission on the various sections in the Draft Code which formed the basis of our Crimes Act. It is abundantly clear from the Report of the Commission that, in the main, the Draft Code embodied the existing law found either in then current statutes or in decisions on common law. At p. 15 of the Report, the Commission states:

> "We now proceed to explain and remark on the different provisions of the Draft Code, and to point out where they are intended to codify the unwritten law, and where to digest the statute law, *indicating in each case those provisions which either alter or modify the existing law*, and generally comparing the Draft Code and the Bill as we proceed."
>
> The italics are mine.

Not only does the Report contain many passages indicating the extent to which the Draft Code differs from the existing law, but also the Marginal Notes alongside the various sections in the Draft Code indicate wherever a change is made in the law. These passages from the Report and the Marginal Notes are set out following the corresponding sections in the book under review. When the reviewer says, "but the changes may well be greater than the Commission itself realized," this means, of course, that, apart from the cases where the Commission deliberately changed the law, there may be other cases in which it did so unintentionally. In other words, the Commission in those cases failed accurately to state the existing law. This is, of course, a criticism of the Criminal Code Commission.

C. E.-S.

HOSPITAL BILLS AND CONTRIBUTORY NEGLIGENCE.

Wellington Hospital Board v. Wilson Considered.

By A. K. Turner.

A case which may give rise to some difficulties in the profession is *Wellington Hospital Board* v. *Wilson*, [1950] G.L.R. 327, the headnote of which reads as follows :

> Where special damages are reduced by operation of the Contributory Negligence Act, 1947, the recipient is not entitled as of right to the hospital benefit under ss. 80, 81, and 92 of the Social Security Act, 1938, and is liable for payment of the full hospital charges.

It does not appear that s. 30 of the Social Security Amendment Act, 1949, was at any time quoted in the course of the argument or referred to by the learned Judge. It is submitted that the case is wrongly decided, and that, in the light of s. 30 of the Social Security Amendment Act, 1949, the case cannot stand. The true position would (it is submitted) appear to be that the Hospital Board is entitled to claim from the successful plaintiff a refund of only so much of the hospital expenses as he actually recovers by way of special damage, whether by litigation or by settlement, and that, as regards the balance of the Hospital Board's bill, this must be a proper charge upon the Social Security Fund.

The original section on which the *Wellington Hospital Board* case was decided is s. 81 of the Social Security Act, 1938. Subsection 1 of this provides as follows :

> If, in respect of any injury, any person has recovered or is entitled to recover any compensation under the Workers' Compensation Act, 1922, on account of the expenses of any medical or surgical attendance, or has recovered or is entitled to recover special damages in respect of any medical, surgical, hospital, or pharmaceutical treatment, or the supply of any medicines, drugs, materials, or appliances, he shall not be entitled as of right to claim any medical, hospital, or pharmaceutical benefits under this Part of this Act in respect of the same matter.

So long as the old law of contributory negligence applied, no hardship was brought about by this section, since a plaintiff necessarily recovered either the whole of his hospital bill or nothing. With the passing of the Contributory Negligence Act, 1947, however, a different situation arose. Under that Act, a plaintiff might recover, whether by litigation or by settlement, a proportion only of his hospital bill. On the strict wording of s. 81, if he recovered, he was disqualified from charging his hospital bill on the Social Security Fund, and the *Wellington Hospital Board* case decides that, even if he recovered part only, the total disqualification would still exist.

What does not appear to have been argued in the *Wellington Hospital Board* case, however, is that s. 30 of the Social Security Amendment Act, 1949, appears to have been passed expressly to meet this position. It deletes the word "if" at the beginning of s. 81 of the 1938 Act and substitutes the words "to the extent to which." Section 81, as thus amended, therefore, now reads as follows :

> *To the extent to which*, in respect of any injury, any person has recovered or is entitled to recover any compensation under the Workers' Compensation Act, 1922, on account of the expenses of any medical or surgical attendance, or has recovered or is entitled to recover special damages in respect of any medical, surgical, hospital, or pharmaceutical treatment, or the supply of any medicines, drugs, materials, or appliances, he shall not be entitled as of right to claim any medical, hospital, or pharmaceutical benefits under this Part of this Act in respect of the same matter.

It may be that, by reason of the date of the accident or of the date of the litigation in the *Wellington Hospital Board* case, it was considered that the Social Security Amendment Act, 1949, had no application to the particular set of facts in dispute. Be that as it may, that Amendment Act was not cited, and the report in the *Gazette Law Reports*, which purports to set out a general statement of the present law, must, it is submitted, be regarded as misleading.

It is submitted that the law since October 21, 1949, has not been as set out in the *Wellington Hospital Board* decision, and that, in cases where a plaintiff obtains judgment for a proportion only of his special damages, or settles a case on the same basis out of Court, he is bound to refund to the Hospital Board only the proportion of his hospital bill that he actually recovers, the balance of his hospital bill remaining a proper charge on the Social Security Fund.

OBITUARY.

Mr. S. H. Moynagh (Wellington).

The many friends of Mr. Stephen Hugh Moynagh will regret to hear of his death in Wellington on September 30. He was born in Dundalk, Ireland, in 1883. His father was for many years Crown Solicitor for the County of Louth, and he grew up in the atmosphere of the law. Educated in Dundalk and in Dublin, he was admitted as a solicitor of the Supreme Court of Ireland in 1905. He practised with his father until the latter's death in 1912, and then he himself carried on the practice.

On the outbreak of war in 1914, Mr. Moynagh joined the Dublin Fusiliers, but was discharged as medically unfit. Thereupon, he took part in the recruiting campaign in Ireland, and was commissioned. At the end of 1916, he came to New Zealand, where he did war work until the Armistice. He was a member of the staff of Messrs. Meek and von Haast for some time. He then went to Nelson, where he practised for twelve years. He was a member of the Nelson City Council, and took part in other civic activities.

As Mr. Moynagh's health was failing, he took employment in legal offices in Wellington and in Auckland. For the last ten years of his life he was Research Assistant to the Hon. the Attorney-General, for the most part with the Hon. H. G. R. Mason. He was in very indifferent health for the past year.

On one occasion, Mr. Moynagh stood for the South Armagh seat in the Parliament at Westminster, and, in litigation following the declaration of the poll, gave his name to a leading case on a point of third-party procedure mentioned in the *Red Book*. In politics, he was a loyal follower of Mr. T. M. Healy, K.C., M.P.

Mr. Moynagh was a great reader, and his interesting contributions to this Journal over the years of its existence, including one from his pen in August of this year (*Ante*, p. 216), showed his keen appreciation of all that was good in the general literature of the law. He was also a keen gardener, and took an interest in dramatic and in musical developments. As his early life was spent in the best Dublin society, he had a first-hand knowledge of many who, to us, are but names. He had a charm of manner that made him a delightful companion, as so many fellow-members of his profession remember. He was always welcome among them, and his keen wit and sparkling (if sometimes mordant) humour enlivened many a gathering. As a raconteur of legal stories from two hemispheres, he had no rival.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

The Wayward Jury.—The "luck of a Chinaman" might equally be the "luck of an Irishman" if *R.* v. *Taylor*, [1950] N.I. 57, is any criterion. This is a case heard by the Court of Criminal Appeal in Northern Ireland. On the third day of the trial for murder, the Court permitted the jury to go for a drive. In company with a Sergeant and two Constables, it spent a pleasant evening touring about in an omnibus. However, the taint of travel remained in its blood, and on the fourth day, without anyone's leave, it set out again on a similar expedition, taking refreshments (of a nature unspecified) in a public house with one or more attendant Constables and detouring on the return journey so as to see the junction of a particular road from which a witness had said that she saw the accused emerging. Upon conviction, the accused appealed, on the ground that the jury's separation during adjournments (it had on both occasions split into two parties) was improper. The Crown argued that no miscarriage of justice had been shown to have occurred. This submission was rejected by the Court, which held that one of the protections given by law to persons tried on capital charges was that the jury should not be allowed to mingle with the public during adjournments, and that this had been violated. "The remarkable fact," says Porter, L.J., in his judgment, at p. 78, "is that in the whole range of our law reports from the earliest times to the present day there does not appear to be a single case relating to the keeping or the separation of jurors during the course of a trial in which there occurred anything approaching the number of deviations from the normal and recognized practice which took place in the present case." As the Court had no power to grant a new trial in the circumstances, the conviction was quashed and the accused acquitted.

Betting Note.—Every now and again, one of the braver bookmakers (with or without the handicap of the Gaming Act being pleaded against him) appears in the role of plaintiff in an action for money "lent by him as a commission agent"; and, where the temerity of the defendant is greater than his conscience, the bookmaker returns home a sadder and poorer man, at least to the extent of costs payable or incurred. The propriety of such an action is at least doubtful, although, so far as Scriblex is aware, no precise rule has ever been laid down in New Zealand in regard to it. In view of the betting millennium which the "off-course" scheme is about to introduce, it is of interest to note that, in a memorandum submitted by Goddard, L.C.J., on June 16, 1950, to the Royal Commission on betting, lotteries, and gaming, the following passage occurs:

> Attempts are made now from time to time to obtain judgment for betting debts by endorsing writs for "an account stated." They seldom come to trial, and, on one occasion when such a case did come before me, I said that, in my opinion, all persons concerned in issuing a writ of this description when the consideration was in fact nothing but a betting debt were concerned in what amounted to contempt of Court. If ever another case of that description comes before me, I intend to have steps taken so that the matter may be brought before the Court and judgment given as to whether it is contempt or not. For myself, I have no doubt that it is.

The Art of Debate.—Admirers of the learned Dr. Johnson will agree that, when he died, at the age of seventy-five, he ended his long reign as the greatest debater in England. It is more problematical, however, whether they will agree with the opinion of T. H. White, who in his *The Age of Scandal* (Jonathan Cape, 1950) asserts that the feat by which he established that claim for ever was the retort with which he once defeated a Thames bargee on his own water. As is well known, there was formerly a rude custom for those who were sailing upon the Thames to accost each other as they passed in the most abusive language they could invent, generally, however, with as much satirical humour as they were capable of producing. A fellow having once attacked him with some coarse raillery, Johnson answered him thus: "Sir, your wife, *under pretence of keeping a bawdy house*, is a receiver of stolen goods."

Justification.—Reference in the newspapers to the action of the Speaker (Hon. Mr. Oram) in merely calling "Order" when one of the debaters in the House became heated and used the word "damn" reminds Scriblex of the tale of two Judges who used to play cards on Circuit. During one very exciting game, one of their Lordships called the other "a damned cheat." A quarrel then ensued, and the matter was referred to the arbitration of a well-known barrister. He ordered the omission of the "damned."

Condonation.—As judgments swell to such vast masses that they constitute a veritable sea of legal troubles, it is pleasurable to be able to record (without presumption, it is hoped) occasional examples of literary merit and lucid expression. Such an instance is to be found in *Beale* v. *Beale*, [1950] 2 All E.R. 539, in which Denning, L.J., says, at pp. 539, 540:

> *Beard* v. *Beard* ([1946] P. 8) and *Richardson* v. *Richardson* ([1950] P. 16) establish the proposition that condonation is conditional forgiveness, the condition being that the guilty party should henceforth behave properly. He is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached where, by his good behaviour, the guilty party has proved himself worthy of the trust and confidence of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, and the time may come when the proper inference is that the forgiveness is no longer conditional but has become absolute.

From my Notebook.—"Gross neglect or chronic discord is not yet a ground for divorce . . . If the door of cruelty were opened too wide we should soon find ourselves granting divorce for incompatibility of temperament. That is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled": Denning, L.J., in *Kaslef ky* v. *Kaslefsky*, [1950] 2 All E.R. 398.

Butt rot is the basis of a decision of the House of Lords in *Caminer and Another* v. *Northern and London Investment Trust, Ltd.*, [1950] 2 All E.R. 486, in which it is held that, in the absence of evidence that the respondents had failed in their duty to take reasonable care in the management of their premises, they were not liable where an 130-year-old elm tree, neither topped nor pollarded, had fallen on the appellants while they were passing in their motor-car.

PRACTICAL POINTS.

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

1. Company Law.—*Partnership—Steps to convert Partnership into Private Company.*

QUESTION: A, B, and C are partners under a written agreement for partnership entered into for a period of five years, three of which have yet to run. They now wish to form their business into a private company. Is the partnership dissolved by operation of law upon the company's incorporation, or should a formal agreement for dissolution of partnership be entered into? If such an agreement is necessary, should it be entered into immediately before or immediately after the incorporation of the company?

ANSWER: The most practical way in which to form the private company is to follow the lines of the preliminary scheme for the conversion of a partnership business into a private company given in *4 Encyclopedia of Forms and Precedents*, 2nd Ed. 50, and to use the Conditional Agreement Precedent in *1 New Zealand Supplement*, 95 (Precedent No. 46 (*a*)), with the necessary modifications, as the basis of an adopting agreement for execution by the company after its incorporation: and see the notes on p. 99. Although it is doubtful whether an agreement for dissolution of the partnership is necessary in such a case, a recital of the partnership agreement and a setting out of the terms of dissolution may be included in the preliminary agreement for the sale of the partnership assets to the company to be formed; and, as in the precedent, the intended shareholdings of the respective parties in the company can likewise be defined. A clause can fix as the date of the dissolution of the partnership the date of the execution of the adopting agreement. Z.2.

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2. Partnership.—*Land in Name of One Partner only—Proposed Transfer of One Moiety to Other Partner—Liability to Stamp Duty—Whether Consent of Land Valuation Court necessary.*

QUESTION: Two brothers entered into partnership about forty years ago and purchased a farm property with their joint moneys, the transfer being taken in the name of one of them only. They have since carried on their farming business on the said land, treating it as belonging to the partnership. In fact, that has been understood throughout. The registered proprietor, although he has not executed a declaration of trust, admits that he is actually a trustee for his brother in respect of one moiety of the land. The partners now wish to partition this and other land now in their joint names.

Is it possible for the registered proprietor of the land, that was purchased in the name of one partner only, to transfer a half-share therein to the other partner, pursuant to a declaration of trust made now, and, if so, what stamp duty would be payable on the declaration of trust and on the transfer? Would the District Land Registrar register the transfer?

The second partner paid his share of the purchase-money on the original purchase, and was entitled at that time to require the transfer to be taken in their joint names. Would it be possible for the present registered proprietor to transfer one moiety to his partner by way of partition?

Would any proof of the second partner's having paid his share of the original purchase-money be required other than the declaration of the registered proprietor recited in the transfer of the moiety, declaration of trust, or transfer effecting the partition? Would the consent of the Land Valuation Court be necessary to the partition?

ANSWER: A pure question of fact is involved. If the facts, as stated in the question, can be established to the satisfaction of the Assistant Commissioner of Stamp Duties, little difficulty should be experienced in transferring an undivided moiety to the other partner. It is usual for partnership property to be held in the joint names of the partners, but occasionally in practice the title to partnership land is found in the name of one partner only. There is no doubt that the Stamp Department would endeavour to ascertain the *source* of the purchase-money for the purchase of this land, and it would not be bound to accept a declaration of trust executed now. It is suggested that the land-tax papers as filed by the partnership might throw some light on the point. If the Stamp Department is not satisfied with the evidence brought forward to establish that the land was partnership property, the Commissioner of Stamp Duties could have an inquiry under s. 67 of the Stamp Duties Act, 1923, or s. 64 of the Death Duties Act, 1921.

It is suggested that, if the facts are established to the satisfaction of the Stamp Department, a declaration of trust is unnecessary, as that apparently would involve payment of declaration-of-trust duty under s. 101 of the Stamp Duties Act, 1923, whereas a transfer putting an end to a trust, and merely reciting it, would not be liable to *ad valorem* duty: *Adams's Law of Stamp Duties in New Zealand*, 124.

The District Land Registrar would be bound to register such a transfer, if otherwise in order.

If the facts, as stated, are established, the consent of the Land Valuation Court would not be necessary, unless in the proposed partition something of value was paid by one partner by way of equality. The previous alleged purchase forty years ago by the partnership would not come under the Servicemen's Settlement and Land Sales Act, 1943, for that Act does not apply to transactions antecedent to its commencement.

X.2.

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3. Executors and Administrators.—*Transmission—Transfer to Trustees of Beneficial Owner—Transaction originally in Breach of Part VIII of Land Act, 1924—Disclosure of Trust—Stamp Duty.*

QUESTION: In 1915, X desired to purchase a certain farm property, the title to which was subject to Part XIII of the Land Act, 1908. By reason of his other holdings, X was unable to make the necessary declaration under that Act, and the land was purchased in the name of Y, X's sister. Y died in 1931, and transmission has been registered in the name of her executor, Z, who died in 1947. X died in 1937. There is no formal declaration of trust or other written evidence that Y held the property in trust for her brother X, although the Stamp Office were advised of the position when stamp accounts were filed in Y's estate.

It is now desired that the executors of Z's estate take steps to place the property in the name of the trustees of X's estate. Presumably the declaration for transmission from Z to his executors cannot assert or disclose a trust, and, if this is the case, could Z's executors (when the title is in their names) execute a declaration of trust in favour of the trustees of X's estate and then transfer the land to the trustees pursuant to the declaration of trust? Secondly, would it be possible to avoid payment of *ad valorem* duty in the transaction? The value of the property is at least £15,000.

ANSWER: The declaration for transmission from Z to his executors presumably should disclose the trust: note the wording of s. 123 (2) of the Land Transfer Act, 1915.

The transfer from Z's executors to the trustees of X's estate appears registrable. Part XIII of the Land Act, 1908, was replaced by the Land Act, 1948, and, in any case, s. 375 of the Land Act, 1924, does not appear to be a bar to registration. A transaction contravening Part XIII was held to be illegal, but not invalid: *Official Assignee of Bowen* v. *Watt and Lowry*, [1925] N.Z.L.R. 896. If a declaration of trust is drawn, apparently it will be liable to *ad valorem* stamp duty at half the conveyance rates: s. 101 of the Stamp Duties Act, 1923. If no declaration of trust is drawn, but the trust is determined by the transfer from Z's executors to the beneficiaries direct, *ad valorem* duty may probably not be payable: *Adams's Law of Stamp Duties in New Zealand*, 124. But the question would suggest that the time has not yet arrived to determine the trust, in which case it appears impossible to avoid payment of duty under s. 101.

X.2.