New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXVI. TUESDAY, NOVEMBER 7, 1950. No. 20.

CRIMINAL LAW: CONFESSIONS.

IN our last issue, in discussing s. 3 of the Evidence Amendment Act, 1950, which repealed s. 20 of the Evidence Act, 1908, and substituted a new section for it, we considered the common-law rule in Great Britain as to the admissibility of confessions in criminal proceedings as exemplified in the earlier cases in which the rule became formulated. We now propose to consider the development of the rule in the later leading English cases.

The Thompson Case.

The next milestone is *Reg.* v. *Thompson*, [1893] 2 Q.B. 12, which, as the learned Chief Justice pointed out in *R.* v. *Phillips*, [1949] N.Z.L.R. 316, 342, 343, is largely the basis of the statement cited above from *Halsbury*. The accused was tried for embezzling funds belonging to the Kendal Union Gas and Water Company, his masters. The chairman of the company gave evidence that he had told the prisoner's brother: "It will be the right thing for [Marcellus] to make a clean breast of it." The witness added:

> I won't swear I did not say "It will be better for him to make a clean breast of it." I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken.

After the interview, the company chairman charged the accused with embezzlement, and one of the directors told the prisoner that he was in a very embarrassing position, to which the prisoner replied: "I know that; I will give the company all the assistance I can." He said in answer to the chairman's charge: "Yes, I took it; but I do not think it is more than £1,000. It might be a few pounds more." Subsequently, the prisoner made out a list of moneys which he admitted had not been accounted for by him. This list, with the above statements, was admitted in evidence. The prisoner was convicted, and the acting chairman of Quarter Sessions stated a case for the opinion of the Court of Queen's Bench, the question being whether the evidence of the confession was properly admitted. The judgment of five Judges quashing the conviction was delivered by Cave, J., who said, at pp. 15, 16, 17, 18, 19:

> Many reasons may be urged in favour of the admissibility of all confessions, subject of course to their being tested by the cross-examination of those who heard and testify of them; and Bentham seems to have been of this opinion (*Rationale of Judicial Evidence*, Bk. v, ch. vi, s. 3). But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his *Law of Evidence* (8th Ed., Part 2, ch. 15, s. 872), "Before any confession can be received in evidence in a criminal case, it must be shown to have been voluntarily made; for, to adopt the somewhat inflated language of Eyre, C.B., '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': *Warickshall's* case (1 Leach. C.C.R. 263, 4th Ed.). The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the Judge, who will require the prosecutor to show *affirmatively*, to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who, *in the event of any doubt subsisting on this head*, will reject the confession" . . .
>
> If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to Magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, Was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible . . .
>
> I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. *It is remarkable* that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession;—a desire which vanishes as soon as he appears in a Court of justice. In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate; but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by Magistrates.

The Canadian authors to whom we have referred have the following comment to make on this judgment. They say, with all deference to the learned Judge, that it would appear to be remarkable neither that evidence of a confession is rarely given when the proof of the accused's guilt is otherwise clear and satisfactory—why should the prosecution embark upon such a superfluous and hazardous project?—nor that the desire to confess has vanished by the time (the words "as soon as" are presumptive and misleading) he appears in a Court of justice. It is not uncommon knowledge that the time immediately following the

commission of an offence or its detection finds the offender in a state of mind compact of fear, remorse, confusion, or one or more of them, which influences him towards disclosure. In many cases, the factor may be the inherent instability that underlies the commission of the offence. By the time the trial has come up, the prisoner has come to accept his position, has reorientated himself upon the basis of it, and wishes to make the best of it; and has probably been informed by counsel that, without the confession, there is no case against him; so that a favourable outcome of the issue will not merely be to leave him as he was before it, unconvicted, but will be to put his continued freedom beyond peradventure. That the accused frequently regrets and repudiates his initial candour can scarcely be surprising. Yet to fail to take advantage of the criminal at the time he is most vulnerable, by discouraging him from speaking, is to pay too much attention to the "sporting instinct" to which reference is made in *Wigmore on Evidence*, 2nd Ed. 180, and not enough to the interests of the public. The detection and punishment of crime are not a game, and the person responsible for an offence is entitled to no advantage of a sporting chance. That he is entitled to a rigid application of the principle that he *may not be induced to make evidence against himself* is beyond the necessity of statement.

The Ibrahim Case.

Ibrahim v. *The King*, [1914] A.C. 599, was an Indian case in the Privy Council. The judgment was delivered by Lord Sumner. The appellant was a private in the 126th Baluchistan Infantry. Some ten or fifteen minutes after a native officer had been shot and killed, Major Barrett, in command of the detachment, having been summoned, arrived, and, finding the private already in custody, said, "Why have you done such a senseless act?", to which the private replied: "Some three or four days he has been abusing me; without a doubt I killed him." It was argued that the accused's statement was inadmissible (*a*) as not being a voluntary statement, but obtained by pressure of authority and fear of consequence; and (*b*) in any case, as being the answer of a man in custody to a question put by a person having authority over him as a commanding officer and having custody of him through the subordinates who had made him prisoner. Their Lordships in their judgment said, at pp. 610, 611:

> The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a Police Force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.
>
> It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. "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 evidence of guilt, that no credit ought to be given to it": *R.* v. *Warickshall* ((1783) 1 Leach 263). It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice: *Reg.* v. *Baldry* ((1852) 2 Den. Cr. C. 430, 445). Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

The appeal, in so far as it affects the present consideration, was upon the ground that there was a grave miscarriage of justice by reason of the wrongful admission of evidence. Their Lordships' Board came to the obvious conclusion that the preponderance of unquestioned evidenee was so great and it was so highly improbable that the jury could have been influenced at all by the confession, that it could not be concluded that there had been any miscarriage of justice. Furthermore, custody and questions by superior military officers may possibly pose some considerations of policy different from those in the case of Police. But, even allowing for these factors, the case is, having regard to the decision and the eminence of the tribunal, of the highest general authority. After a lengthy review of cases, the judgment on the point whether questioning by a person in authority (and in circumstances where there was no caution) vitiates a confession went on to say, at p. 614:

> The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred . . . If, as appears even on the line of authorities which the trial Judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shown to have been exercised improperly.

The conviction was upheld. The case is also noteworthy for the statement of the rule (at pp. 609, 610) in terms that have since been often quoted:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as *Lord Hale*.

II. The Common Law modified by Statute.

In several of the States of Australia, as well as in New Zealand, the common-law rule regarding the admissibility of confessions has been modified by statute.

As appears from the judgments of the learned Chief Justice and of the other Judges in *R.* v. *Phillips*, [1949] N.Z.L.R. 316, s. 20 of the Evidence Act, 1908, before its amendment, was in practically the same wording as that of s. 141 of the Evidence Act, 1928 (Vict.), which is as follows:

> No confession which is tendered in evidence shall 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 really calculated to cause an untrue admission of guilt to be made.

The original New Zealand provision, s. 17 of the Evidence Further Amendment Act, 1895, was taken from the Victorian section, which had been passed in 1856. On the repeal of the Evidence Further Amendment Act, 1895, by the Evidence Act, 1905, the provision was re-enacted in s. 20 of that Act, except that the words "in fact likely" were substituted for the original words "really calculated"; and the section was so worded in s. 20 of the Evidence Act, 1908, when *Phillips's* case came to be decided. In his judgment, at p. 340, the learned Chief Justice said:

> It was, I think, assumed in New Zealand, as apparently it was in Victoria, that the section was an accurate expression of the common law, which it was thought dealt only with confessions, and that "threats and promises" were the only kinds of inducements which could be taken into consideration. This was not the full sweep of the common law, as I will show later

The Court of Appeal so held.

The Cornelius Case.

The leading case on the interpretation, scope, and effect of the Victorian section, which, as we have seen, is practically the same as was our s. 20 of the Evidence Act, 1908, before this year's amendment, is *Cornelius* v. *The King*, (1936) 55 C.L.R. 235, which came before the High Court of Australia. As the learned Chief Justice pointed out, the very question that arose in that case, which was an appeal from the Full Court of Victoria, arose in *Phillips's* case.

In *Cornelius's* case, a confession was made by an alleged murderer, and the appeal was based on the ground that the confession was improperly received in evidence—that is to say, it was not in fact a voluntary confession. The High Court of Australia held that, when a confession is tendered in evidence, its voluntary character must, apart from s. 141, appear before it is admissible. The trial Judge must determine whether a confession is voluntary, and (under that section), if a promise or threat has been made, whether it was really calculated to cause an untrue admission of guilt. Where the admissibility of a confession depends on matters of fact, the Judge must determine the question on the evidence.

After the passing, in 1857, of the section which afterwards was enacted in New Zealand and later became s. 20 of the Evidence Act, 1908, in *R.* v. *Douthwaite* (*The Argus*, November 23, 1858), Stawell, C.J., speaking for the Full Court, said, after stating the terms of the section:

> The Judge is, therefore, to decide in each case whether the inducement was really calculated to cause an untrue admission to be made. If, in his opinion, it was so calculated, the evidence should be rejected; if not so calculated, it should be received. It was urged on behalf of the prisoners in the present case, that the Legislature never could have intended the Judge to enter into a metaphysical discussion as to what amount of influence might or might not have been exercised on the mind of each prisoner, and that the section in question was intended to provide for extreme cases only, in which the threat or promise was of too trifling or insignificant a character to induce an untrue admission of guilt to be made. We are of opinion, however, that the terms of the clause do not admit of doubt or justify us in limiting its application as contended for. The duty, onerous and responsible as it may be, is now cast on the Judge in every case of determining from the evidence as to the effect of the alleged inducement upon each particular prisoner.

In *Cornelius* v. *The King* (*supra*), the joint judgment of Dixon, Evatt, and McTiernan, JJ., said that that, no doubt, correctly stated the effect of the provision. It proceeded, at p. 246:

> When it appears that, but for a particular promise or threat made by a person in authority, the prisoner's confession would be voluntary, it becomes necessary for the Judge at the trial to decide whether the promise or threat in question was really calculated, that is, really likely, to cause an untrue admission of guilt to be made. But a promise of advantage and a threat of harm are not the only matters which may deprive a statement of its voluntary character. For instance, a confession which is extracted by violence or force, or some other form of actual coercion is clearly involuntary, and, therefore, cannot be received in evidence. The enactment does not relate to such cases.

It followed that the High Court of Australia decided that the common-law rule as to the necessity of a statement's being voluntary is still in force in Victoria, subject to the statutory exception in s. 141 of the Evidence Act, 1928 (Vict.), and that that statute does not cover all possible cases.

Our Court of Appeal, in *Phillips's* case (*supra*), followed *Cornelius* v. *The King* (*supra*), and held that s. 20 of the Evidence Act, 1908, 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; and that the common law, except so far as it was excluded or the field was covered by s. 20, still remained; and, on the facts of *Phillips's* case, where the inducement held out by a person in authority to an accused person was neither threat nor promise, the statement could still be one which was not voluntary, notwithstanding s. 20 of the Evidence Act, 1908. As Mr. Justice Kennedy put it, at p. 350, the result of the statute is not, however, that, unless the inducement is a threat or promise, the resulting statement is always to be regarded as voluntary. On the contrary, the common law, except so far as it is excluded or the field is covered by s. 20 of the Evidence Act, 1908, still remains.

The High Court of Australia approved the statement of that learned jurist, Brandeis, J., in delivering the judgment of the Supreme Court of the United States in *Wan* v. *United States*, (1924) 266 U.S. 1, 14, 15, where he said:

> the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to Police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.

A good example of the nature of compulsion which disqualifies a statement from the requisite of voluntariness appears in *R.* v. *Burnett*, [1944] V.L.R. 115, which was again decided on s. 141 of the Evidence Act, 1928* (Vict.), which, as we have seen, was reproduced (with slight variation) as s. 20 of the Evidence Act, 1908, before this year's amendment. An accused person, having fainted on two occasions shortly after his arrest, was later questioned by Police officers while he was still in an exhausted condition, and he thereupon made certain verbal and written statements by way of confession. It was held by O'Bryan, J., that the statements were inadmissible in evidence, as the Court could not be satisfied that the confessions were of a

* The latest case on this section is *R.* v. *Lee*, noted in *24 Aust. Law Journal*, 223 (September 21, 1950), in which the High Court of Australia allowed an appeal by the Crown from the quashing by the Court of Criminal Appeal in Victoria of the convictions and death sentences of three persons, and restored the trial Judge's judgment admitting certain confessions as evidence under s. 141.

voluntary character. In the course of his judgment, His Honour said, at pp. 115, 116 :

> In our statute provision is made that no confession which is tendered in evidence shall be rejected on the ground that a threat or a promise has been held out to the person confessing, unless the Judge or presiding officer is of the opinion that the inducement was really calculated to cause an untrue confession to be made. But in *Cornelius* v. *The King* ((1936) 55 C.L.R. 235), it was decided (see particularly the joint judgment of *Dixon, Evatt,* and *McTiernan,* JJ.) that that does not relieve the prosecution from proving, in the first instance, that the confession which is tendered is voluntary in character. I read from the judgment ((1936) 55 C.L.R. 235, 248) : " When a confession is tendered in evidence, its voluntary character must, apart from s. 141 of the Evidence Act, 1928, appear before it is admissible." A confession may cease to be voluntary for various reasons. A person may be threatened, or an inducement held out, or the whole surrounding circumstances may be such as to lead to the conclusion or to a lack of satisfaction that the person making the confession was acting voluntarily. A man's mind can be overborne in a variety of ways. Persons who are sick, or in ill health, or in a debilitated condition may [be], and I would add in most cases are, very much more easily overborne than a person who is in robust health.

After referring to the condition of the accused when he was being interrogated by the Police, His Honour said, at p. 117 :

> I think it is unsafe for any Court to act upon what this man said in that state and in those circumstances. I am far from being satisfied, in those circumstances, that this confession was voluntarily obtained. This Court, acting in its civil and equitable jurisdiction, if it had to consider a gift made under like circumstances, would be slow to conclude that the transaction was of a voluntary nature. Still more important is it that in the conduct of a criminal trial one should be careful to see that statements which are said to have been volunteered by the prisoner were obtained in circumstances in which it is clear that the prisoner was exercising his own free will in saying what he had to say and was not coerced in any way. In this case, I am far from being satisfied that this was the case.

In *Phillips's* case, in referring to other Australian statutory modifications of the common-law rule, at p. 342, the learned Chief Justice said :

> The Victorian statute is, as I have pointed out, similar to ours. The New South Wales statute is wider, in that it has " untrue representation " in addition to the words " threat or promise," yet in *Attorney-General of New South Wales* v. *Martin* ((1909) 9 C.L.R. 713) it was held by the High Court that the common-law rule as to the admissibility of confessions was in force in New South Wales, notwithstanding the statutory provision. The common-law rule is broadly expressed by saying that the confession must be voluntary.
>
> I think the law is the same in New Zealand.

It is clear that the common-law rule, as enunciated in early times and as developed in the judgments of the highest authority, but modified by the terms of s. 20 of the Evidence Act, 1908, was, in the light of the cited authorities, in operation in New Zealand when *R.* v. *Phillips* (*supra*) came to be decided by the Court of Appeal. With that background, in our next issue we propose to consider the new s. 20 of the Evidence Act, 1908 (as inserted by s. 3 of the Evidence Amendment Act, 1950), and to endeavour to ascertain how far the judgment of the Court of Appeal in *R.* v. *Phillips* has been affected by it.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1950.

No. 35. Political Disabilities Removal Amendment Act, 1950.
No. 36. Gaming Amendment Act, 1950.
No. 37. Coal Mines Amendment Act, 1950.
No. 38. Taupiri and Renown Coal Companies Act, 1950.
No. 39. New Zealand Army Act, 1950.
No. 40. Royal New Zealand Air Force Act, 1950.
No. 41. Servicemen's Settlement Act, 1950.

COAL MINES.

Coal Mines Amendment Act, 1950, makes provision for the restoration to private owners of the property and the unworked coal vested in the Crown by Part I of the Coal Act, 1948, and other amendments.

Taupiri and Renown Coal Companies Act, 1950, provides for the vesting in the Crown of all privately owned shares and payment therefor, and for the dissolution of the named companies and the vesting of the assets and liabilities thereof in the Crown for State coal mines.

CONVEYANCING.

Tax-free Annuities. *94 Solicitors Journal,* 500.

COSTS.

Divorce. *94 Solicitors Journal,* 512, 528, 546.

The Higher Scale. *94 Solicitors Journal,* 498.

CRIMINAL LAW.

Competency of Witnesses in Criminal Trials. *94 Solicitors Journal,* 560.

DEATH DUTIES.

Estate Duty: Deduction for Continuing Annuity. *94 Solicitors Journal,* 494.

Estate Duty—Joint Tenancy—Interest of Deceased in Joint Tenancy not subject to Estate Duty—Death Duties Act, 1921, s. 5 (1) (g) (h). Section 5 (1) (*h*) of the Death Duties Act, 1921, does not apply to the interest of a deceased person held in joint tenancy at the time of death, for the reason that the trigh of severance, which subsists during the continuance of the joint tenancy, is a right attaching to the estate itself, and cannot properly be regarded as a power or authority conferred by a donor. (*Commissioner of Stamp Duties* v. *Pratt,* [1929] N.Z.L.R. 163, applied.) (*In re Scott,* [1901] 1 Q.B. 228, *Attorney-General* v. *Quixley,* (1929) 98 L.J.K.B. 652, and *In re Parsons, Parsons* v. *Attorney-General,* [1943] Ch. 12 ; [1942] 2 All E.R. 496, distinguished.) (*Ochberg* v. *Commissioner of Stamp Duties,* (1949) 49 N.S.W. S.R. 248, referred to.) Moreover, the interest of a deceased person who did expend his own moneys in the acquisition of property held, at his death, in joint tenancy is not within s. 5 (1) (*g*) of the Death Duties Act, 1921, as the word " provided " in the context of that paragraph connotes something active rather than passive ; and, once the reality is established that someone other than the deceased purchased or provided the interest of the deceased, the words " purchased or provided " are fully satisfied and exhausted. (*Commissioner of Stamp Duties* v. *Russell,* [1948] N.Z.L.R. 520, followed.) *So held* by the Court of Appeal, dismissing an appeal from the judgment of *Hutchison,* J. *Held* further, per *Hutchison,* J. (the point not being taken in the Court of Appeal), That, where there is only one transaction by which a person, with his own money entirely, purchased a property in the names of himself and another as joint tenants (the sale-and-purchase agreement being simply preliminary to the transaction), if the contributing party dies first, s. 5 (1) (*e*) of the Death Duties Act, 1921, applies ; but, if the non-contributing party dies first, s. 5 (1) (*e*) does not apply, so that one-half of the value of the property held by him in joint tenancy is not to be brought into his dutiable estate. (*Attorney-General* v. *Gretton and Shrimpton,* [1945] 1 All E.R. 628, applied.) *In re Going (deceased), Commissioner of Stamp Duties* v. *Public Trustee ; In re Todd (deceased), Commissioner of Stamp Duties* v. *Public Trustee.* (C.A. October 13, 1950. O'Leary, C.J., Stanton, Hay, Cooke, JJ.)

DEFENCE.

New Zealand Army Act, 1950, provides for the constitution, administration, organization, and discipline of the New Zealand Army.

Royal New Zealand Air Force Act, 1950, provides for the constitution, administration, organization, and discipline of the Royal New Zealand Air Force.

DESTITUTE PERSONS.

Separation and Guardianship Orders—Jurisdiction—Complaint alleging Failure to Maintain—Omission of Words "wilful and without reasonable cause"—Such Omission not affecting Jurisdiction—Supreme Court, on Appeal, directing Making of Maintenance, Separation, and Guardianship Orders—Question of Access to be determined by Magistrate—Destitute Persons Act, 1910, ss. 17, 18—Infants Act, 1908, s. 6—Guardianship of Infants Act, 1926, s. 7—Justices of the Peace Act, 1927, s. 325—Statutes Amendment Act, 1949, s. 20 (2). There is jurisdiction under s. 18 of the Destitute Persons Act, 1910, to make a separation or guardianship order where the only allegation in the complaint was in regard to failure to maintain under s. 17 (1) (*a*), notwithstanding that the complaint did not allege that the failure to maintain was "wilful and without reasonable cause" (though it is desirable that, in such a case, the complaint should specifically so allege). (*Judd* v. *Judd*, [1933] N.Z.L.R. 1029, discussed.) The word "wilful" in s. 18 (4) connotes that the failure to maintain was intentional, and not due to accident, mistake, or any cause beyond the husband's control. On the Supreme Court's allowing an appeal from the dismissal by a Magistrate of a complaint alleging wilful failure to maintain and asking for maintenance, separation, and guardianship orders, the making of an order as to access by the father of the child in respect of whom the Supreme Court has directed the making of (*inter alia*) a guardianship order may properly be determined in the Magistrates' Court, since that Court may exercise the jurisdiction conferred on the Supreme Court by s. 6 of the Infants Act, 1908, and, on a father's application, by virtue of s. 20 (2) of the Statutes Amendment Act, 1949. (*Reefman* v. *Reefman*, [1929] N.Z.L.R. 58, and *In re Reid, Reid* v. *Reid*, [1941] N.Z.L.R. 566, referred to.) *Scherf* v. *Scherf*. (S.C. Palmerston North. September 22, 1950. F. B. Adams, J.)

Wilful Neglect to provide Reasonable Maintenance. *114 Justice of the Peace Journal*, 484.

DIVORCE AND MATRIMONIAL CAUSES.

Alimony and Maintenance—Influence and Effect of Remarriage of Husband on Orders for Permanent Maintenance—Neither Party describable as "guilty"—Divorce and Matrimonial Causes Act, 1928, s. 33. Where neither party to a divorce can fairly be described as "guilty," and the male spouse has remarried, his primary duty is the obligation to provide for his first wife, and the obligations accruing from his second marriage must not be discharged or allowed so to be in any substantial sense at the expense of his first wife. (Judgment of *Smith*, J., in *Coutts* v. *Coutts*, [1948] N.Z.L.R. 591, 614, followed.) (*Burton* v. *Burton*, [1928] N.Z.L.R. 496, and *Richards* v. *Richards*, [1942] N.Z.L.R. 313, distinguished.) (*Jackson* v. *Jackson*, [1928] N.Z.L.R. 88, referred to.) *Lyne* v. *Lyne*. (S.C. Auckland. October 11, 1950. Finlay, J.)

Connivance—Suspicion of Adulterous Association—Watching and Eavesdropping—Opportunity created for Adultery—No Intention to promote or encourage Adultery—Motive only to obtain Evidence. The husband petitioned for dissolution of his marriage on the ground of his wife's adultery. Suspecting an adulterous association with the co-respondent, he asked her about it, but she denied that the co-respondent had any hold over her. Not satisfied with this answer, the husband arranged a speaking apparatus and spyhole so that he could hear conversation between his wife and the co-respondent when they were alone together in the kitchen, so that he might ascertain what happened between them. What he saw and heard confirmed his suspicions, and he engaged inquiry agents and made an excuse to absent himself from the house so that the agents could watch. The agents saw the wife committing adultery during the husband's absence. There was no evidence to show that the husband had done anything to bring about the illicit association between his wife and the co-respondent, nor that he desired it. *Held*, (i) That, once a husband suspects that an adulterous association between his wife and another man has started, he is not guilty of connivance simply because he watches for proof of adultery, or even creates an opportunity for it, for he is not consenting to the inception of adultery, but is seeking for proof of its repetition. To obtain the proof, he may even acquiesce in the continuance of the adultery, but that is not connivance, for, in connivance, it is essential that there should be a corrupt intention. (ii) That, on the evidence, the husband did not intend to encourage or promote an adulterous association by absenting himself on a false excuse, but was merely seeking proof of what already he rightly believed to exist, and, therefore, he was entitled to a decree. (*Churchman* v. *Churchman*, [1945] 2 All E.R. 190, applied.) (*Manning* v. *Manning, Fellows* v. *Fellows*, [1950] 1 All E.R. 602, distinguished.) *Douglas* v. *Douglas*, [1950] 2 All E.R. 748 (C.A.).

As to Connivance, see *10 Halsbury's Laws of England*, 2nd Ed. 674-676, paras. 995-999; and for Cases, see *27 E. and E. Digest*, 326-332, Nos. *3052-3122*, and Digest Supp.

Practice—Petition—Notice to Respondent—Amendment—War Marriage—Errors in Petition and Notice to Respondent—Non-compliance with Rules—Amendment "merely verbal"—Amendment allowed without Reservice of Proceedings—Court ordering Service of Sealed Copy of Order—Service of "True copy" not Non-compliance with Any Rule—Code of Civil Procedure, RR. 599, 604—Matrimonial Causes Rules, 1943, RR. 27, 28, 74—Matrimonial Causes (War Marriages) Act, 1947, s. 3—Practice—Rules—Non-compliance—Proceedings not rendered void, except where Expressly so Provided—Code of Civil Procedure, R. 599—Matrimonial Causes Rules, 1943, R. 74. Rule 599 of the Code of Civil Procedure is applicable to every rule (including the Matrimonial Causes Rules, 1943) with reference to which there is no express provision that non-compliance is to render the proceedings void; and its beneficial operation should not be curtailed by any technical consideration as to whether it may be applied to proceedings other than those in which a foundation has been laid for the exercise of the jurisdiction invoked in such proceedings. (Dictum of *Edwards*, J., in *Hannan* v. *Ikaroa District Maori Land Board*, (1912) 32 N.Z.L.R. 657, 660, considered.) (*Blank* v. *Blank*, [1949] N.Z.L.R. 306, *Dickson* v. *Law and Davidson*, [1895] 2 Ch. 62, and *Palmerston North City Corporation* v. *Manawatu-Oroua Electric-power Board*, [1934] N.Z.L.R. 1100, referred to.) (*Petty* v. *Daniel*, (1886) 34 Ch.D. 172, mentioned.) The onus is on the party claiming that the proceedings are rendered void by non-compliance with a rule or rules to show that the proceedings should, on that ground, be set aside wholly or in part; but this is to be done only where justice requires it. A failure to serve on the respondent a sealed copy of the Court's order fixing the time for filing an answer, and, instead, the service of a "true copy" of the order, is not non-compliance with any rule as contemplated by R. 599, but is non-compliance with an order of the Court, and, in reliance on R. 604, the petitioner may be permitted to proceed notwithstanding the possible irregularity. A petition dated December 15, 1947, by a wife for dissolution of marriage was served on the respondent in the United States of America on April 9, 1948, together with an order, dated February 26, 1948, fixing sixty days as the time for filing an answer, directing service of a sealed copy of the order, and including the notice, when service is overseas, required by R. 8 of the Matrimonial Causes Rules, 1943. The respondent did not file an answer or give an address for service. The petitioner included the following as the ground on which the divorce was sought: "On or about August 20, 1944, the petitioner's said husband wilfully deserted the petitioner without just cause and for six months and upwards—namely, from that date down to the present time—has continued to desert the petitioner without just cause." The petition should have referred to the period of desertion as twelve months. Regulation 6 of the Matrimonial Causes (War Marriages) Emergency Regulations, 1946, as amended, which was applicable when the petition was sent to England for signature, shortened the period of desertion to six months; but s. 9 (1) of the Matrimonial Causes (War Marriages) Act, 1947, revoked those Regulations as from August 25, 1947, and, by s. 8, increased the shortened period to twelve months. The petition was filed on January 23, 1948. The word "until" had been omitted from the second paragraph of the notice required by R. 8 of the Matrimonial Causes Rules, 1943, and set out in Form No. 3 in the Schedule thereto. *Held*, 1. That an amendment of the petition by substituting the word "twelve" for the word "six" was "merely verbal" within the meaning of R. 27 of the Matrimonial Causes Rules, 1943; and such amendment might properly be made and reservice of the petition dispensed with under R. 28. (*Patrick* v. *Patrick*, [1921] N.Z.L.R. 514, followed.) (*Neale* v. *Neale*, (1913) 16 G.L.R. 315, referred to.) 2. That the irregularity in the notice could be dealt with under R. 599 of the Code of Civil Procedure, applicable in divorce, as such irregularity did not render the proceedings void; and the petition should be permitted to proceed notwithstanding the irregularity, as there was no likelihood that the respondent had been misled or prejudiced. In exercise of the jurisdiction conferred by s. 3 of the Matrimonial Causes (War Marriages) Act, 1947, a decree *nisi* was granted upon the ground of divorce authorized by s. 8 thereof. *Johnston* v. *Johnston*. (S.C. Palmerston North. September 22, 1950. F. B. Adams, J.)

EXECUTORS AND ADMINISTRATORS.

Claims—Promise to reward Children for Services by making Testamentary Provision in lieu of Wages—Promise Established—Principles on which Quantum arrived at—Appeal from Supreme Court—Discretion of Court of Appeal—Law Reform (Testamentary Promises) Act, 1949, ss. 3 (1), 7 (2)—Practice—Appeal to Court of Appeal—Law Reform (Testamentary Promises) Act, 1949—Discretion of Court of Appeal substituted for That of Supreme Court—Court of Appeal unfettered by Opinion of Court below. Where a claim under s. 3 (1) of the Law Reform (Testamentary Promises) Act, 1949, has been established, but no amount was specified in the promise to make testamentary provision for the claimant, the quantum need not be arrived at by a meticulous monetary calculation. The right to claim where (as here) no testamentary provision has been made arises only "to the extent to which the deceased has failed . . . otherwise [to] remunerate the claimant," which requires consideration of what "other remuneration" has in fact been given; but that does not make that other remuneration necessarily the decisive factor where no amount was specified in the promise, once it is held that the other remuneration fell short of the promise. In such a case, the amount of the other remuneration is still a matter that goes to the reasonableness of the award as being one of the circumstances of the case, but it is not the only circumstance to be considered, although necessarily an important circumstance, and one to be carefully estimated and considered. Such other remuneration does not include all payments made to (in this case) a child, but only such payments as, on a broad view, can fairly be considered to be something that represented in whole or in part payments or gifts in recognition of the services for which remuneration was promised. In an appeal against a judgment under the Law Reform (Testamentary Promises) Act, 1949, in a case where no amount of money has been specified in the promise and all the circumstances of the case have to be considered, the discretion of the Court of Appeal is substituted for that of the Supreme Court; so that the Court of Appeal is free to deal with the whole matter as the interests of justice demand. In exercising its discretion, the Court of Appeal will give due weight to the opinion of the Supreme Court, but it is not fettered in any way by that opinion. (*Rose* v. *Rose and Rose*, [1922] N.Z.L.R. 809, applied.) The Court considered proper and adopted the suggestion of counsel for the parties (other than the deceased's widow and counsel for the infant grandchildren of the testator) that the order of the Court should fall rateably upon the deceased's estate—that is to say, in proportion to the value of the respective successions under the deceased's will and codicils. *Gartery* v. *Smith.* (C.A. October 13, 1950. Fair, Finlay, Hutchison, JJ.)

FAMILY PROTECTION.

Jurisdiction—Shares in New Zealand Company—Testator domiciled in New South Wales owning Such Shares—Application by Daughter for Provision out of Same—Shares movables—No Jurisdiction to entertain Application—Family Protection Act, 1908, s. 33. Shares in a New Zealand company owned by a deceased person not domiciled in the Dominion are movables, and, as such, are not assets of which the Supreme Court of New Zealand can dispose by an order under the Family Protection Act, 1908. Consequently, as shares in a New Zealand company which were owned, at the time of his death, by a deceased person domiciled in New South Wales are considered to be movables according to New Zealand law, the Supreme Court has no jurisdiction to entertain an application made under the Family Protection Act, 1908, by a daughter of the deceased for provision for herself out of those shares. (*In re Butchart, Butchart* v. *Butchart*, [1932] N.Z.L.R. 125, and *In re Roper*, [1927] N.Z.L.R. 731, followed.) (*In re O'Neill, Humphries* v. *O'Neill*, [1922] N.Z.L.R. 468, applied.) (*In re Hoyles, Row* v. *Jagg*, [1911] 1 Ch. 179, *Pain* v. *Holt*, (1919) 19 N.S.W.S.R. 105, and *In re Sellar*, (1925) 25 N.S.W.S.R. 540, referred to.) *In re Terry (deceased), Terry* v. *Guardian, Trust, and Executors Co., Ltd.* (S.C. Auckland. October 4, 1950. Stanton, J.)

The Inheritance (Family Provision) Act, 1938 (Eng.). *94 Solicitors Journal*, 484.

GAMING.

Gaming Amendment Act, 1950, increases the number of totalizator licences, and provides for a temporary levy on totalizator investments to provide for capital expenditure and for the distribution to racing clubs of the surplus funds of the Totalizator Agency Board.

HIGHWAY.

Drunk in charge of "Carriage"—Inclusion in "Carriage" of Bicycle—Licensing Act, 1872 (c. *94*), *s. 12.* The appellant, while pushing his pedal bicycle along a road, was drunk and incapable of having proper control over the bicycle. He was arrested without warrant and charged with "being drunk in charge of a bicycle on a highway, contrary to s. 12 of the Licensing Act, 1872," which provides that "every person . . . who is drunk while in charge on any highway or other public place of any carriage . . . may be apprehended," and shall be liable to a penalty. *Held*, That the word "carriage" in s. 12 was wide enough to include a bicycle, and, therefore, the appellant was guilty of an offence under the section. (*Taylor* v. *Goodwin*, (1879) 4 Q.B.D. 228, and *Cannan* v. *Earl of Abingdon*, [1900] 2 Q.B. 66, applied.) *Corkery* v. *Carpenter*, [1950] 2 All E.R. 745 (K.B.D.).

HUSBAND AND WIFE.

The Matrimonial Residence: In Relation to the Wife and Third Parties. *94 Solicitors Journal*, 496.

INDUSTRIAL CONCILIATION AND ARBITRATION.

Court of Arbitration—Jurisdiction—Award providing for Payment for "Suburban work"—Carpenters entitled thereunder to Payment if Work done in Part of Employers' Premises other than Carpenters' Shop therein—Award intra vires *Court of Arbitration—Question of Unfairness or Hardship in Particular Applications of Award appropriate for That Court to deal with—"Industrial matter"—Industrial Conciliation and Arbitration Act, 1925, ss. 2, 75.* The following clause was inserted by the Court of Arbitration in the New Zealand Carpenters Award, 1947: "10. (*a*) 'Suburban work' shall mean work (other than country work) performed elsewhere than at the shop of the employer and irrespective of where the engagement takes place. Workers employed on suburban work distant more than one and a half miles from the central points hereinafter specified shall either proceed to and from such work or they shall be conveyed to and from such work at the expense of the employer, as the employer shall determine. Time reasonably occupied by the workers in travelling or time occupied in conveying the workers to and from such work beyond the central point or from the worker's home, whichever is the less, shall be allowed and paid for by the employer. No worker residing less than one and a half miles from the place where the work is to be performed shall be entitled to the allowance mentioned in this clause. For the purpose of this clause all distances shall be measured by the usual and most convenient mode of access for foot passengers." The plaintiff company sought a writ of prohibition restraining the Court of Arbitration from further proceeding to exercise any jurisdition in an action pending in that Court, wherein the Inspector of Awards at Auckland claimed a penalty for an alleged breach by the company of the New Zealand Carpenters Award, 1947, for failing to pay a carpenter employed by it travelling-time and fares as prescribed by cl. 10 (*a*) of that award, as set out above. The motion for a writ of prohibition was removed to the Court of Appeal. *Held*, by the Court of Appeal, 1. That the provision for payment of travelling-time and fares in cl. 10 (*a*) of the award is an "industrial matter," as defined in s. 2 of the Industrial Conciliation and Arbitration Act, 1925, as the payment of travelling-time is a term and condition of the worker's employment, and not an extension of his working-hours, and the Court of Arbitration had jurisdiction to deal with it. (*New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, applied.) (*Jebsen* v. *East and West India Dock Co.*, (1875) L.R. 10 C.P. 300, referred to.) 2. That, even if the result of cl. 10 (*a*), in application to the particular facts of the present case, may seem difficult to justify, it is within the power of the Court of Arbitration to say when a worker shall have travelling-allowances, and, if, in particular cases, there is hardship or even unfairness, that is a matter particularly appropriate for the Court of Arbitration to deal with; and the Court of Appeal has no right to intervene. Motion for writ of prohibition dismissed. *Wilson and Horton, Ltd.* v. *Hurle.* (C.A. October 13, 1950. Callan, Stanton, Hay, Cooke, JJ.)

INFANTS AND CHILDREN.

Custody—Access to Grandparents—Grandparents of Child's Deceased Father seeking Access to Such Grandchild from Remarried Mother—Principles on which Court's Discretion exercised—Guardianship of Infants Amendment Act, 1927, s. 3. The object of s. 3 of the Guardianship of Infants Amendment Act, 1927, is to enable persons whose child has died to have access to the issue of such child, such issue being assumed to be in the custody of the surviving parent; and, in considering applications under that section, a Court should apply the same principles as are usually applied in settling disputes as

to access between parents. The power given to the Court by s. 3 is to be exercised discretionally according to the particular circumstances of each case in which its interference is invoked; and, in considering the question of access, the Court is to have regard, first, to the welfare of the infant, and, next, to the conduct of the parties, and to their wishes. (*Re J. H. and L. J. Thomson* (*Infants*), (1911) 30 N.Z.L.R. 168, and *B.* v. *B.*, [1924] P. 176, applied.) *Asher* v. *Wilkes*. (S.C. Auckland. September 29, 1950. Stanton, J.)

Custody and Maintenance—Application to Justices by Mother for Order against Father—Venue—Child living out of England—Power of Justices to make Order. On the complaint of the mother of an infant, Cheshire Justices made an order under the Guardianship of Infants Acts, 1886 and 1925, giving her the custody of the child and ordering the father to pay maintenance. The mother lived in Cheshire in the district where the order was made, the father lived in Oxfordshire, and the child lived with a relative of the mother in Northern Ireland. *Held*, (i) That proceedings under the Guardianship of Infants Acts, 1886 to 1925, other than any taken in the High Court, must be brought in the area where the respondent lived, and, therefore, the Cheshire Justices had no jurisdiction to make the order, and an order for *certiorari* to quash it must be made. (ii) That, although the Justices had jurisdiction to make an order under the Acts when the child was living outside the jurisdiction of the English Courts, such an order should only be made in most exceptional circumstances. (*Harris* v. *Harris*, [1949] 2 All E.R. 322, applied.) *The King* v. *Sandbach Justices, Ex parte Smith*, [1950] 2 All E.R. 781 (K.B.D.).

LANDLORD AND TENANT.

Consents to Assignments of Tenancies. *100 Law Journal*, 578.

Rescission after Completion. *94 Solicitors Journal*, 514.

LAW PRACTITIONERS.

The Legal Aid Regulations, 1950 (Eng.). *94 Solicitors Journal*, 541.

LICENSING.

Licensing Control Commission—Appeals—Wholesale Licence—Extent of Rights of Appeal—"Party"—"Parties"—Licensing Act, 1908, s. 103—Licensing Amendment Act, 1948, ss. 64, 65. The grant or refusal of both publicans' and wholesale licences is still the exercise of a discretion by licensing committees under s. 103 of the Licensing Act, 1908. The right of appeal against the decision of a licensing committee upon several applications for new publicans' licences is confined to those applicants whose licences have been refused by the committee upon one or more of the grounds set out in ss. 64 (1) (*a*) and 65 (1) (*a*). Section 65 (2) does not confer any general right of appeal against every other decision of a licensing committee which is not a decision coming within ss. 64 (1) and 65 (1). The words "parties" or "party" in the phrases "parties to the proceedings" and "party to the proceedings" used in s. 65 (2) and s. 65 (3) respectively do not include all the applicants for a particular licence, but are confined to an individual applicant appealing, and to those who are objectors to his application. *In re Certain Licensing Appeals.* (Licensing Control Commission. Wellington. October 12, 1950.)

MONEY-LENDERS.

Cash-order Business—Substance of Transactions Loans with Interest—Person conducting Such Business a "money-lender," and required to register as Such—Money-lenders Act, 1908, ss. 2, 4 (1) (a). The appellant was charged on an information alleging that, being a "money-lender," as defined in the Money-lenders Act, 1908, he failed to register himself as a money-lender as prescribed by s. 4 (1) (*a*) of that statute. The appellant carried on at Hamilton, under the name of "Waikato Cash Orders," a business commonly known as a "cash-order" or "cash-coupon" business. He issued to customers orders which, on presentation to the traders named therein, would be accepted at their sale value in exchange for goods. At the time when he issued the orders, he received from his customers payments in cash equal to 10 per cent. of the value of the orders, and he thereafter collected from them the full face value of the orders by weekly payments of 5 per cent. thereof, spread over a period of twenty weeks. At the end of each trading-month, the traders who had accepted these orders in payment of goods supplied to the persons presenting them rendered their accounts to the defendant, and received payment less an agreed discount of 5 per cent. The learned Magistrate convicted the appellant of the offence charged, and ordered him to pay the costs of the prosecution. An appeal from the conviction on a point of law was removed into the Full Court for hearing and determination. *Held*, dismissing the appeal, 1. That whether a person is a "money-lender" within the meaning of that term as defined in s. 2 of the Money-lenders Act, 1908, is a question of fact, to be determined in each case by its circumstances, the proper method of approach being to consider the realities and the substance of the transactions. (*Kirkwood* v. *Gadd*, [1910] A.C. 422, and *Olds Discount Co., Ltd.* v. *Playfair, Ltd.* [1938] 3 All E.R. 275, followed.) (*Tanner* v. *Hare*, (1910) 30 N.Z.L.R. 431, referred to.) 2. That any argument based on the form of actions arising out of breaches of the transactions had no validity. (*Brittain* v. *Lloyd*, (1845) 14 M. & W. 762; 153 E.R. 683, referred to.) 3. That the facts that the cash-order system had been in existence for a long period and had become an established commercial service and that, though it had been operating for many years in England and New Zealand, there had previously been no prosecution of a person carrying on that class of business under virtually corresponding statutes are not factors that should be taken into account in the course of the Court's duty to enforce the provisions of the Money-lenders Act, 1908. (*Transport and General Credit Corporation* v. *Morgan*, [1939] Ch. 531; [1939] 2 All E.R. 17, distinguished.) 4. That the substance of the transactions into which the appellant entered with his customers, in the circumstances set out above, was that the customer bought and paid for the goods with the appellant's money, and that the money was in substance a loan, for which a stipulated and agreed additional sum by way of interest, or the equivalent of interest, had to be paid; and, consequently, the appellant's business was that of "money-lending," as defined in the statute. (*Allchurch* v. *Popular Cash Order Co., Ltd.*, [1929] S.A.S.R. 210, applied.) (*White* v. *Anderson*, (1912) 164 Mo. App. 132, referred to.) *Goldberg* v. *Tait*. (F.C. Wellington. September 15, 1950. O'Leary, C.J., Callan, Stanton, Hay, JJ.)

PATENT.

Agreement by Owners of Patent—Rights to sell Plant and Machinery—Construction—Implied Licence to use Patented Process—Duration of Periodic Payments in Nature of Royalty—Royalty not Payable after Expiry of Last Patent to Survive—Patents, Designs, and Trade-marks Act, 1921-22, s. 43 (3). The appellant, as the Custodian of Enemy Property, had become entitled to the rights previously vested in a German company arising out of an agreement, made in 1929, which subsisted between that company and the respondent company. The agreement provided for the sale and purchase of certain plant, and the purchase price therefor was expressed as being a payment of £68,500 and "a royalty of one shilling per ton on all raw coal charged to the retorts." The company paid this royalty for many years, but in 1946 it stopped paying it. The German company was, to quote the agreement, "the owner of the exclusive rights for New Zealand of the patents and processes involved in the Lurgi carbonising plant." The agreement itself contained no specific provision as to how long the royalty payment was to continue; but there was a provision entitling the respondent company to commute further payments for a lump sum, but this was an option only: it was not exercised by the respondent company, and had lapsed. The letters patent relating to the plant mentioned in the agreement expired on October 23, 1944; and other letters patent, also relating to the plant, became void respectively on May 21, 1932, November 9, 1934, and October 29, 1935. On originating summons to determine certain questions arising out of the construction of the agreement, and, in particular, whether the royalty was still payable by the respondent company, notwithstanding the fact that the letters patent had expired or become void, it was held by *Stanton*, J., that the royalty was no longer payable. On appeal from that determination, *Held*, by the Court of Appeal, dismissing the appeal, That the royalty was not payable, at the latest, from October 23, 1944, when the last of the patents to survive expired, for the reasons: 1. That, as the agreement contained no express grant of licence, the royalty mentioned in cl. C (*c*) of the agreement (which is fully set out in the judgment of *Callan*, J.) was the price of the implied licence to use the patents; and, as such implied licence did not survive the expiry of the last patent to survive, since no patent was any longer involved, then, on such expiry, no royalty continued to be payable. (*Mills* v. *Carson*, (1892) 10 R.P.C. 9, *Lines* v. *Usher*, (1897) 14 R.P.C. 206, and *Cummings* v. *Stewart*, (1912) 30 R.P.C. 1, distinguished.) 2. That, under the agreement, there was allocation of the total price among the items sold, and there was nothing except the implied licence to which the royalty could be referable, so that the term "royalty" was inapt to describe instalments of a price

for property purchased, dependent on the use which the purchaser made of what had, unreservedly, become his own property. 3. That the stipulation in Part Three, cl. A (*a*), of the agreement—namely, that, on payment of £12,000 in commutation of royalty, the company would be entitled to use the plant and process—indicated or implied that the payments before commutation were by way of royalty for the use of the process, since this confirmed the view that the royalty was the price of the implied licence, and not just a part of the whole price, left uncertain in amount. 4. That the word "royalty" was an apt word to describe a periodic payment exacted by an owner in return for leave given by him to another to use the owner's property, or to exercise rights which belong to the owner. 5. That s. 43 (3) of the Patents, Designs, and Trademarks Act, 1921-22, applies only where there is ground for holding that the existence of a patent has influenced the conduct of him who has taken a lease or licence from the patentee; so that, in the event of the foregoing construction of the agreement being wrong, s. 43 (3) did not apply, as the purchaser's promise to make the payments, which were called "royalty," had nothing to do with the existence or non-existence of patents. Judgment of *Stanton*, J., affirmed. *Public Trustee* v. *Waikato Carbonisation, Ltd.* (C.A. September 15, 1950. O'Leary, C.J., Callan and Hay, JJ.)

PRINCIPAL AND AGENT.

Accounts—Action by Agent on Commission Basis for an Order for taking Accounts between Himself and His Principal—Principal an Accounting Party—Order for Taking Accounts—Code of Civil Procedure, R. 118. The plaintiff was employed by the defendant as a salesman or commission agent to obtain contracts for advertisements on library covers, published and distributed by the defendant. Plaintiff was paid exclusively on a commission basis, and he paid his own expenses. He was employed for a period of over four years. He said that he had never had a settlement with the defendant up to any particular date, but that he had been paid irregular amounts from time to time, and that deductions had been made by the defendant which he did not understand or authorize, and he was unable to say what amount was owing to him, although he believed it to be considerable. In an action in the Magistrates' Court, the plaintiff sought an order for the taking of accounts between himself and the defendant, and judgment for such amount as might be found due to him. The defendant had the action moved into the Supreme Court, and it contended that it was not "an accounting party," and that the plaintiff had no cause of action against it. *Held*, That the defendant was an accounting party, and the plaintiff, as an agent, had a right to have an account taken. (*Padwick* v. *Hurst*, (1854) 23 L.J. Ch. 657, and *Kemp* v. *Goldberg*, (1887) 36 Ch.D. 505, distinguished.) The defendant was ordered to prepare and file in the Court an account covering the period of the plaintiff's employment with it, and showing the commissions to which the plaintiff became entitled and the payments made by the defendant to the plaintiff and the present state of accounts between the parties. This account was to be filed and a copy served on the plaintiff's solicitors within fourteen days from the delivery of judgment. *King* v. *Library Covers (N.Z.), Ltd.* (S.C. Auckland. October 6, 1950. Stanton, J.)

PRIVY COUNCIL.

The Shrinking Jurisdiction of the Privy Council. *100 Law Journal*, 496.

SALE OF GOODS.

Non-delivery—Conditions in regard to Sale by Dealer imposed by Manufacturer after Date of Contract between Dealer and Customer—Customer required to enter into Covenant against Resale—Refusal by Customer to enter into Covenant—Dealer's Failure to deliver Car—Liability of Dealer. In May, 1946, the plaintiff entered into an agreement with the defendants, motor-car dealers, for the purchase of a new Bentley motor-car, for which he paid a deposit. It was a term of the agreement that: "The sellers will use their best endeavours to secure delivery of the goods on the estimated delivery dates from time to time furnished, but they do not guarantee time of delivery, nor shall they be liable for any damages or claim of any kind in respect of delay in delivery." On August 15, 1946, the British Motor Trade Association made a rule that, on the sale of a new motor-car, its members should obtain a covenant by the retail purchaser against resale within a period of six (later amended to twelve) months. On March 28, 1947, the manufacturers of Bentley motor-cars wrote to the defendants saying that they had decided to adopt the Association's scheme and that the supply of a new Bentley car would be conditional on the retail purchaser's executing a covenant against resale. The plaintiff refused to execute the covenant, on the ground that it was not part of his original agreement, and, as a result, the defendants failed to supply him with a car. In an action by the plaintiff for damages for breach of contract, the defendants contended (*a*) that, having regard to the circumstances, a reasonable time for delivery had not elapsed, and (*b*) that it would be against public policy to supply the plaintiff with a car without obtaining the covenant from him. *Held*, That a reasonable time for delivery had elapsed, and the defendants were in a position to deliver the car, had they wished to do so, long before May 12, 1948, when the writ in the action was issued, and that, as the agreement between the plaintiff and the defendants had been entered into before the covenant scheme was in existence, the question whether it was contrary to public policy for the defendants to sell the car to the plaintiff without obtaining a covenant from him against resale did not arise, and, therefore, the defendants were liable to the plaintiff in damages for breach of contract. *Monkland* v. *Jack Barclay, Ltd.*, [1950] 2 All E.R. 715 (K.B.D.).

SERVICEMEN'S SETTLEMENT.

Servicemen's Settlement Act, 1950, consolidates and amends the law relating to the acquisition of land for the settlement of discharged servicemen, and to the control of sales of farm land. It repeals the Servicemen's Settlement and Land Sales Act, 1943, and its Amendments, and makes new provision for the taking of land for settlement of discharged servicemen, and for the payment of compensation therefor. Part II of the Act controls the sales of farm land, and prohibits any transaction to which that Part of the Act applies, unless the consent of the Land Valuation Court has been given to it.

TENANCY.

Recovery of Premiums from Lessors. *94 Solicitors Journal*, 501.

Service Occupancy—Test whether Premises occupied under Tenancy or Service Occupancy—Duration of Service Occupancy—Position of Service Occupant after Ending of Employment—Tenancy Act, 1948, ss. 2 (5), 31 (1) (b). The test as to whether premises are occupied under a tenancy or under the kind of licence known as a service occupancy is that, if a servant is required to live therein for the proper performance of his or her duty, no tenancy at common law is constituted. (*Ramsbottom* v. *Snelson*, [1948] 1 K.B. 473; [1948] 1 All E.R. 201, followed.) (*Betts* v. *Brookfield*, [1947] N.Z.L.R. 170, *Macann* v. *Annett*, [1948] N.Z.L.R. 116, *Doyle* v. *Farrell*, [1948] N.Z.L.R. 588, and *Smith* v. *Olliver*, (1950) 26 N.Z.L.J. 199, referred to.) Section 2 (5) of the Tenancy Act, 1948, indicates a legislative intention that persons who occupy premises by virtue of a contract of service (and who would not, therefore, be tenants at common law) are not to become tenants by virtue of the statute. (*New Plymouth City Council* v. *Barber*, [1950] G.L.R. 331, referred to.) Section 31 (1) (*b*) of the Tenancy Act, 1948, has no application to cases where there is no tenancy; and, if the section be ambiguous, it ought not to be interpreted so as to take away such common-law rights as are not clearly taken away.* Where there is a mere licence or service occupancy ancillary to the employment, the licence ends when the employment ends, and, from that moment, service occupiers or licensees become mere trespassers; and no legal wrong is inflicted by the owner of the premises in putting their furniture out and in refusing to allow them to enter the premises again. (*Lake* v. *Campbell*, (1862) 5 L.T. 582, followed.) *Semble*, Whenever there is any doubt about the status of the occupier of premises, and such occupier may prove to be a tenant, self-help is perilous; and, if a tenancy should be established, the putting outside of the tenant's furniture would be a ground for punitive or exemplary damages. *Snell and Another* v. *Mitchell and Another*. (S.C. Auckland. September 26, 1950. Callan, J.)

*See, now, s. 48A (added by s. 3 of the Tenancy Amendment Act, 1950).

Surrender of Controlled Tenancy. *94 Solicitors Journal*, 530.

WILL.

Attestation Clause in A Will. (L. A. Harris.) *3 Australian Conveyancer and Solicitors Journal*, 101.

Extrinsic Evidence and the Original Contents of Testamentary Documents. *94 Solicitors Journal*, 529.

The Execution of Wills. *100 Law Times*, 507.

CONSTITUTIONAL LAW.

AN EFFECTIVE SECOND CHAMBER.

Reasons for its Existence.

By D. J. RIDDIFORD.

I.

On January 1, 1951, the Legislative Council created by the New Zealand Constitution Act, 1852, will cease to exist, and from that date New Zealand will be governed by a unicameral Legislature. The abolition of the Upper House cannot be passed over in silence, as it means the removal from our constitution of what has been, since the fourteenth century at least, apart from a comparatively brief period under Oliver Cromwell, an essential part of the constitution of England, and, after the Act of Union, of the United Kingdom. The change, it is true, could be called the removal of an empty shell which had long ceased to have any constitutional significance, for, from the time of the premiership of Ballance in the early 'nineties, the victorious party at a General Election has always appointed enough new members to the Upper House to ensure the passage of all the Government's measures. The Legislative Council has debated, in matters of detail amended, but always passed the Government's legislation. It was no longer a bulwark of the constitution, but its departure calls for more than a passing sigh, for form has its place in the endless adventure of governing men, just as words have. Our respect for law, order, and authority is associated with the forms and ceremonies that vest them. The abolition of the Upper House, with powers nominally equal to the Lower, calls for a review of the reasons why a second chamber has so long been considered necessary. The empty form we can doubtless do without; now is the time to consider whether an effective second chamber should be established in its place.

We are accustomed to hear that its principal function is as a revising chamber, and no one could without ignorance deny that it has done a useful service in pointing out the flaws and omissions in Parliamentary Bills. Indeed, without the Upper House, either it will be necessary for the House of Representatives to spend far more time in analysing Bills, or else special machinery will have to be set up. Unquestionably, an Upper House has a daily function to perform when Parliament is sitting which a Lower House, occupied by many other activities, would find it difficult to carry out.

The function of an Upper House as a revising chamber is, however, secondary; this duty could be performed by some other body. Its primary function, its real purpose, is to be an essential check or balance in a stable constitution, to constitute a bulwark against tyranny or revolution, and to protect the rights of the community as a whole. There is always a danger that one chamber with supreme power will deem law, order, right, and justice to be whatever a Parliamentary majority decrees them to be, with the only check on its absolutism the necessity every three years of facing a General Election; but even this check is illusory, since Parliament may extend its own term of office, which happened here not long ago. Another way it can abuse its power is just before a General Election to alter the method of election when it knows its popularity is waning; this too has happened in New Zealand.

These dangers, seen only in embryo in New Zealand, loom more ominously when we study examples of what has happened in other countries. It is then we realize why it is that, "with rare unanimity," as Sir John Marriott has written, "the civilized world has decided in favour of a bicameral Legislature." Many countries have tried, and then abandoned, a one-chamber constitution.

An instructive example is the unicameral Legislature during the Protectorate of Oliver Cromwell. Charles I was sentenced to death by a special Court of Justice set up by the Long Parliament, which had been unconstitutionally purged by Colonel Pride and reduced to less than one-fifth of its numbers; thereafter it was known as "the Rump." On March 17, 1649, the Rump by an Act abolished the office of King, and then two days later abolished the House of Lords by another Act, which declared in its preamble that the House of Lords was useless and dangerous to the people of England. The Rump had already resolved that, "being chosen by and representing the people," it had "the supreme power in this nation." In fact, never had Parliament less represented the people, but, in the absence of a King, a House of Lords, and a written constitution, there was absolutely no legal check on its irresponsible authority. A very real practical check, however, did exist; the usurped authority of the Rump rested ultimately on Cromwell and the Army. Awed by the military force of Cromwell and the Army, the Royalist majority of the nation were sullen but silent, and the dissatisfaction with the arbitrary rule of the Rump was expressed in petitions from the Army, and by Cromwell himself. Cromwell, addressing his second Parliament, said:

> This was the case of the people of England at that time . . . that if any man had come and said [to Parliament], "What rules do you judge by?" it would have answered, "Why, we have none. We are supreme in legislature and judicature."

In 1651, the Rump pushed on their "Bill for a New Representation," known as the Perpetuation Bill. The House was to be limited to 400 Members, but all existing Members were to retain their seats without re-election, and they were to have a veto upon all new Members. Cromwell, in ungraceful but vigorous speech, said: "You must go; the nation loathes your sitting." He later thus pronounced upon the Perpetuation Bill:

> We should have fine work then . . . a Parliament of four hundred men executing arbitrary government without intermission except some change of a part of them; one Parliament stepping into the seat of another, just left warm for them; the same day that the one left, the other one was to leap in.

Cromwell realized that an assembly can be corrupted by absolute power just as an individual can. At last, in 1653, the Rump was expelled. Cromwell declared that it was "the horridest arbitrariness that ever existed on earth."

During the rest of the Protectorate, various constitutional experiments were tried. The so-called "Barebones" Parliament, a Puritan convention,

named after one of its members, Praise-God Barebones, lasted only a few months. Cromwell and his officers by degrees, but not at once, came to realize that a Parliament as representative as possible—granted, of course, that all Royalists had to be excluded, was a constitutional necessity, and the defects shown by a unicameral Parliament caused them eventually to set up a second chamber. In December, 1653, a Committee of Officers produced a draft constitution embodied in "The Instrument of Government"; Parliament was still to be unicameral, but was to be elected triennially. Power was to be vested in one person, but this "single person" was to have a suspensive veto only on Bills presented to him by Parliament. This single chamber was dismissed at the earliest legal opportunity, as it insisted on questioning Cromwell's authority (January 22, 1655). Then for eighteen months England was ruled by Major-Generals. At the end of that time, Cromwell and many in the country, apart altogether from the Royalists, were convinced of the necessity of returning to a bicameral system. In the "Humble Advice and Petition," presented to Cromwell early in 1657, it was proposed that the Protector should become King, that the Commons should again have control over their own election, and that there should be another House, consisting of not more than seventy and not less than forty members, to be nominated for life by his "Highness," and approved by "this" House. Cromwell, after five weeks' discussion, refused the Crown, but the proposal for a second chamber was carried with unexpected unanimity. Cromwell, in words pregnant with meaning, strongly urged the proposal. "I tell you," he said, "that unless you have some such thing as a balance we cannot be safe. Either you will encroach upon our civil liberties by excluding such as are elected to serve in Parliament—next time for aught I know you may exclude four hundred." Finally, the constitution, with Cromwell filling the office (but without the title) of King, was approved, and the Protector met the new Parliament, with its two Houses, on January 29, 1658. Cromwell was as determined as ever to retain the executive power in his hands, but it is illuminating that, after nine years of experiment, he and the Army came to recognize the necessity for two Houses of Parliament. When the Monarchy was restored in 1660, and Charles II came into his own again, the House of Lords was restored to the full plenitude of its powers, since when England has retained the two-chamber system.

The Cromwellian period is instructive for the student of the two-chamber system, because there the naked principle of the need for a second chamber is clearly demonstrated. In other periods of English history, one has to consider the House of Lords as an expression of the aristocratic principle in English life, not only as a second chamber, and it is not always easy to distinguish the two principles. Just before the Reform Bill was passed in 1832, the election of a very large proportion of the members of the House of Commons was under the control of certain wealthy peers through the system of Rotten Boroughs. Where the real sovereignty in the country lay is difficult to say. The Reform Bill, which provided for the election of the House of Commons on a uniform system and extended the franchise, was passed only because of the threat of revolution. Whether, since 1832, the House of Lords has acted as an ideal second chamber, whatever its value in other respects, is open to serious question. This is worth mentioning as a warning against the indiscriminate acceptance of opinions drawn from English experience either in praise or in condemnation of the two-chamber system. There is no counterpart to the House of Lords in New Zealand, nor has there ever been. But Cromwell was concerned, not with restoring a House of Lords, but with the institution of an effective check on a power-drunk House of Commons, a necessity which he came to realize in a comparatively short space of time. The eight years from 1649 to 1657 are an object-lesson showing that, as Cromwell said, "Unless you have *some such thing* as a balance, we cannot be safe." When considering second chambers, in addition to the House of Lords, other examples must be taken into account in order to deduce their real purpose and essential function.

II.

We are inclined to dismiss the constitutional experiences of France on the ground that she has had too many, but that is to make a fundamental error. The constitutional history of France was orderly to an unexampled degree from 987 until 1789, the year of the French Revolution. From 1789, France provides a most enlightening laboratory of constitutional experiments. It is sufficient to say here that only from 1793 until 1795 was France governed by a unicameral system, but this was the period of the Terror, when several thousand innocent persons were executed. Through all the constitutional changes, the Directorate, the Consulate of 1799, the Napoleonic Empire, the Legitimist Restoration, and so on to the establishment of the Third Republic in 1875, which provided for a Senate, the two-chamber system has been preserved. The experience of the years 1793-1795 was enough to make all sane men realize the dangers of rule by a single unchecked assembly.

If France had but followed the example of America, which had only a few years before established its scientifically-designed Constitution of checks and balances, it is possible that the disorders of 1793 might have been avoided. In regard to the American Constitution, it is easy to say that, while in a federal State a bicameral system is clearly necessary to preserve the liberties of the constituent States, no such necessity exists in a unitary State. That is, in fact, a superficial view. The danger in a federal State of a single chamber invading State rights is merely one example of the danger of any single chamber violating numberless rights as important as, but less well protected than, the rights of a State. If no such danger existed anywhere, there would be no more need for a second chamber in a federal State than in a unitary one.

The federal Constitution of America with its two chambers, equal in authority but with somewhat different powers, has been widely imitated, and, on the whole, with remarkable success. In 1848, after a brief and almost bloodless civil war, Switzerland grafted some of its principles on to her ancient Constitution, with such good results that the Swiss Constitution is a model for the world. It is indeed a matter for wonder that, in all the storms and stresses of colonizing a land of such vast extent as America, more constitutional troubles were not experienced, but let it be remembered that the federal Constitution is grounded on the bicameral system, which exists also in most of the States.

These examples from the history of other countries show the need for a second chamber as a check, in the interest of the nation as a whole, on the excesses of the principal chamber. This need has too often been realized only after the second chamber has been abolished. As Mr. A. C. Brassington ably puts it in this JOURNAL, *Ante*, p. 266, when referring to the powers of Parliament in Britain :

> The Legislature has unfettered power to sweep away prior statutes, remove the safeguards of the independence of the judiciary, and destroy the ancient foundations of the common law.

Earlier, he says, at p. 266 :

> England has no written code, yet there, if anywhere, is a free people, and there the structure of liberty is supported, not by the bricks and mortar of unalterable law, but by the spirit of the people themselves, through their elected representatives in Parliament.

But England still has a two-chamber system, and, if there should be a violation by the House of Commons of the fundamental rights of the people, the voices of the Judiciary who are hereditary peers could be raised in protest in the House of Lords, as could the voices of the Lords Spiritual and Temporal. The House of Lords could delay the measure so that " the spirit of the people " could make its impression on the elected representatives. Without a second chamber, it is only by revolt that the people could defend their liberties against the inroads of a power-drunk Parliament. A written constitution alone is useless ; many of the sections of the New Zealand Constitution Act, our written constitution, are a dead letter—namely, some of the powers of the Governor-General—and all could be repealed by an Act of Parliament. As the only safeguard of our liberties, we are thrown back on the spirit of the people ; but how, in the event of a violation of our liberties by a Parliament which refused to face an election, could this spirit be expressed except by revolt ? Surely no one could regard absolutism tempered by revolt as an ideal constitution ? This danger, which so quickly appears if one analyses a one-chamber constitution in New Zealand, could easily show itself in the form of a strong-willed man at the head of a dominant party in Parliament, he himself dominating that party. He would only have to keep his party sweet, or overawed, with the difficult ones in gaol, and his power would be absolute. What is more, if he postponed elections, it could be permanent, until a successful revolt hurled him from power. That would be dictatorship.

It would be folly for us, with a history of only a hundred years to go by, to say this danger is illusory, especially when we find the world teeming with examples, ancient and modern, of men seizing absolute power and trampling on the liberties of nations who failed to defend them when it was still in their power to do so. An effective second chamber is a cheap price to pay for security against the threat to our liberties of a tyrannical Parliament, nay more, against the danger of dictatorship by a single man.

THE DOCTRINE OF IMPLIED DEDICATION OF LAND AS A PUBLIC HIGHWAY.

By E. C. ADAMS, LL.M.

I suppose that at some time or other almost every practising solicitor in New Zealand has received from the District Land Registrar a requisition something like this : " Please furnish proof that Street or Road is a public highway."

It is not always easy to satisfy such a requisition. If it cannot be satisfied, then it will be necessary to have the land taken under the Public Works Act, 1928, by Proclamation as a road or street. If the evidence in support of dedication as a public highway is in any way uncertain or equivocal, the better course is to get a Proclamation registered, which will put the status of the land beyond all doubt.

Why is such a requisition ever necessary ? This is a matter of history. It was not until the passing of the Public Works Acts Amendment Act, 1900, that it was necessary for a private person subdividing land to provide each allotment with frontage to a public highway, and it was not until that Act that a written registered instrument of dedication of land as a highway was necessary. If only those able lawyers who drew up our first Conveyancing Ordinance in 1842, and simplified the then English system of conveyancing—thus anticipating by eighty years or so several reforms carried out by Lord Birkenhead's Act—had also put their minds to the question of town-planning, and recommended the enactment of provisions similar to s. 20 of the Public Works Acts Amendment Act, 1900, what a multitude of ills we would have avoided in New Zealand ! Except with regard to implied dedication by the Crown, there would have been very few cases of alleged implied dedication of a highway to consider. As it is now, the present position in New Zealand is far from satisfactory. At least two municipalities have had to get Acts of Parliament declaring certain streets and ways in their districts to be public highways. I refer to the Wellington City Streets Act, 1905, and to the Gore Streets Act, 1907. I only wish that some other local bodies would follow suit or take some other way of legalizing their " roads " and " streets " where clear evidence of legalization at present is lacking. However, conveyancing has to go on, and where, to ensure full legal efficacy, dealings with land have to be registered in a public office, the officials should not be too inquisitorial, or ask for impossible modes of proof. When the Public Works Acts Amendment Act, 1900, came into operation, the Land Transfer Department adopted a common-sense, practical way of dealing with this very difficult problem of legality of roads and streets.

In private subdivisions before the coming into operation of the Public Works Acts Amendment Act, 1900, it was comparatively seldom that the " roads " or " streets " shown on the plan of subdivision were formally dedicated by the owner by written deed or transformed into public highways by Proclamation. Indeed, often the documentary title to the freehold of these " roads " or " streets " still remains in the name of the original subdividing owner ; these " roads " or " streets " may or may not be included in a certificate

of title under the Land Transfer Act, but it is immaterial whether the land is subject to the Land Transfer Act, 1915, or is still under the " old system," for the doctrine of implied dedication of a highway prevails even over a Land Transfer title. In *Martin* v. *Cameron*, (1893) 12 N.Z.L.R. 769, the question at issue was whether certain land had been dedicated to the public. The evidence of dedication was a verbal agreement between G. (a predecessor in title of M.) and the Road Board, expenditure by the Road Board, and user by the public, the title to the land being under the Land Transfer Act, 1915, throughout. It was held that the dedication to the public was not affected by the provisions of the Land Transfer Act, 1915. Section 70 of the Land Transfer Act, 1915, reproducing earlier legislation, provides that no right to any public road or reserve shall be acquired, or be deemed to have been acquired, by the unauthorized inclusion thereof in any certificate of title or by the registration of any instrument purporting to deal therewith otherwise than as authorized by law.

It is also to be borne in mind that, even where there is a written instrument executed by the owner purporting to dedicate the " roads " or " streets," the dedication is not complete until the intended act of dedication has been accepted by the public or by some authority having power to accept it on behalf of the public: *Bank of New Zealand* v. *Auckland District Land Registrar*, (1907) 27 N.Z.L.R. 126, and *Howell* v. *District Land Registrar*, (1908) 27 N.Z.L.R. 1074; *cf. Assets Realization Board* v. *Auckland District Land Registrar*, (1906) 26 N.Z.L.R. 473.

Now, what happened when there was a private subdivision of land before the coming into operation of the Public Works Acts Amendment Act, 1900, was something like this. The subdividing owner laid down the " roads " or " streets " on his plan of subdivision for the sole purpose of the sale of his lots, and really did not care in the least whether they became public highways or not. The mere deposit of the plans in the Land and Deeds Registry Office did not make these " roads " or " streets " public highways; at most, the mere deposit was evidence of the *animus dedicandi*: *Bank of New Zealand* v. *Auckland District Land Registrar*, (1907) 27 N.Z.L.R. 126.

Some of these " roads " or " streets " began to be used by the public, as the various lots were sold and built on; then the new owners of these lots would request the local body to construct and maintain these " roads " or " streets." In many cases, the local body did this, and continued to repair these " streets " or " roads " as if they were public highways, and generally regarded them as streets vested in them or roads over which they had control. It is " roads " or " streets " which have been so treated by the local body and used by the public which have become public highways, by operation either of the common-law doctrine of implied dedication or of statutory provisions such as s. 110 of the Public Works Act, 1928, or s. 174 of the Municipal Corporations Act, 1933.

When the Public Works Acts Amendment Act, 1900, came into operation, it became the practice of the Land Transfer Office to accept certificates as to the status of alleged roads or streets from the local body concerned. It ought to be pointed out in passing that these certificates should be given only after a resolution has been passed by the Council, and the certificates should be under the seal of the Corporation: *Parkes and Wright* v. *Wellington District Land Registrar*, (1914) 33 N.Z.L.R. 1449. The Land Transfer Department after 1901 was forced into this position by the dictates of necessity, for the operation of the doctrine of implied dedication depends on evidence and surrounding facts which are seldom at his disposal. But, in cases of genuine doubt as to whether or not there had been dedication, it would have been preferable if the " roads " or " streets " had been duly proclaimed as roads or streets. Subdividing owners and local bodies, however, are often most reluctant to get Proclamations—I suppose on account of the delay and expense involved. A certificate as to the status of an alleged public highway also should not be accepted where the records of the Land Transfer Office show that the land concerned cannot possibly be a public highway—*e.g.*, where the date of the subdivision shows that, in view of the law then in force, the creation of a highway would have been illegal—or where the District Land Registrar has other evidence negativing the existence of a public highway.

Before considering very briefly the doctrine of implied dedication at common law, we may ask: What is a public highway? In *Commissioner for Railways* v. *Dangar*, (1943) 15 L.G.R. 101, Herron, J., said:

> A highway in its widest sense comprises all portions of land over which every subject of the Crown may lawfully pass, and is a term commonly used to describe a way which is open to all the King's subjects as opposed to a road or street which may in some circumstances be used by virtue of a licence personal to the user, or by virtue of an easement, such as occupation roads, which are confined to a limited class and are not " public " roads or thoroughfares.

In a Borough or City, the soil of a public highway is vested in the Corporation: outside a Borough or City, it is vested in the Crown: s. 175 of the Municipal Corporations Act, 1933, and s. 111 of the Public Works Act, 1928.

As to what constituted dedication at common law, the same Judge in the same case said:

> At common law " dedicate " must be taken to mean the act on the part of the owner of opening land to the public for the use by it as a road with the intention of granting an irrevocable licence to use it and the acceptance of the dedication by the public by making use of the way:

And the late Mr. T. F. Martin (the author of *Conveyancing in New Zealand*) once said:

> In order to constitute dedication there must be acceptance by the public as well as an intention on the part of the landowner to dedicate. The acceptance by the public is generally evidenced by their having used the road for a number of years or by the local authority having expended moneys on the road.

As to the requisites of a common-law dedication, see also *Jones* v. *Bates*, [1938] 2 All E.R. 237. The reader will also derive great assistance from two leading articles in (1935) 11 NEW ZEALAND LAW JOURNAL, 137, 153, and the leading New Zealand case of *Attorney-General Ex rel. Waitotara County* v. *Reid*, [1920] N.Z.L.R. 563.

In the application of the common-law doctrine of implied dedication, it must be remembered that the various Municipal Corporations Acts in force from time to time have contained restrictions against the laying-out of streets in Cities and Boroughs, and these restrictions appear to apply also to streets or roads in Town Districts. The doctrine of implied dedication cannot operate if the dedication would have been illegal—for example, the statute in force at the relevant time may have prescribed the minimum width of streets. There can be no dedication (express or implied) if the street is less than such minimum width: *Wellington*

City Corporation v. *A. and T. Burt, Ltd.*, [1917] N.Z.L.R. 659, and *Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37. As the Crown is not expressly bound by the Municipal Corporations Acts, these restrictive conditions probably do not apply to dedications by the Crown. Moreover, a street may have become a public highway before the constitution of the Borough. Thus, in *McLachlan* v. *Hughes*, (1904) 25 N.Z.L.R. 221, dedication of land within the City of Nelson as a public highway was held to be established by evidence of its having been formed as a road before 1867 (the date of the first Municipal Corporations Act) by the then owner when subdividing the land for sale, and of user by the public before and after that date and up to and after the passing of the Municipal Corporations Act, 1876. The road was less than 66 ft. wide, the minimum width prescribed by the last-mentioned Act. There is another Nelson case to the same effect: *Mayor, &c., of Nelson* v. *Hayes* (Unreported). In this case, Reed, J., said:

> In the present case, there was nothing to prevent the roads when first formed from being dedicated, inasmuch as, although under 40 ft. wide, there was no authority bar, the Borough at that time not having been constituted. Section 291 of the Act of 1867 provides that: "No street unless forty feet in width . . . shall after the constitution of the Borough be formed within the Borough." The streets in question, being formed before the constitution of the Borough, were unaffected, therefore, by this legislation, and were open to dedication as streets. And, being so, the expenditure of public money upon them could be legally recognized as evidence of maintenance.

In connection with the last-cited case, it is to be noted that Nelson was constituted a Borough in 1874, and the roads were laid out in 1872.

But it is clear that, if a street or road is laid out within a Borough since the constitution of the Borough, the mere spending of money on it by the Borough will not in itself make it a public highway. As pointed out by Sir Robert Stout, C.J., in delivering the judgment of the Court of Appeal in *Wellington City Corporation* v. *A. and T. Burt, Ltd.*, [1917] N.Z.L.R. 659, 672:

> The Corporation could not, however, by spending public money on portions of land, transform such portions of land into streets in violation of the plain words of the statute.

(The alleged street in that case was not of the prescribed statutory width.)

Another point to be noted in connection with the implied doctrine of dedication is that, if the statute prescribes a certain mode of dedication—*e.g.*, subdivisions of land coming within s. 125 or s. 128 of the Public Works Act, 1928, or s. 9 of the Land Subdivision in Counties Act, 1946—there can be no dedication by any other mode. The statutory provisions dealing with subdivision of land prescribe a written instrument of dedication duly registered under the Deeds Registration Act, 1908, or the Land Transfer Act, 1915. As Edwards, J., pointed out in *Parkes and Wright* v. *Wellington District Land Registrar*, (1914) 33 N.Z.L.R. 1449, there can be no dedication to the public of a highway that is part of a scheme for the subdivision of land otherwise than in accordance with the statutory provisions regulating the question. That is, of course, a scheme of private subdivision of land since the coming into operation of the Public Works Acts Amendment Act, 1900.

Leaving now the question of statutory restrictions preventing the operation of the doctrine of implied dedication, it must be pointed out that, if the land is leased or mortgaged, then there can be no effective dedication without the consent or concurrence of the lessor or mortgagee: *Narracan Shire* v. *Leviston*, (1906) 3 C.L.R. 846, and *Kirkwood* v. *Wilson*, (1908) 27 N.Z.L.R. 1051.

This point is brought out very clearly in the Dunedin Arcade case (*Attorney-General Ex rel. Mayor, &c., of Dunedin* v. *Dunedin Arcade Co., Ltd.*, [1929] N.Z.L.R. 621), where public user of a lane by the public for many years was established, but during the period of public user the land had been leased. It was held that no presumption of dedication from user by the public could be made against an owner who was in effect out of possession or control. The fact that the owner knew of the public user did not constitute dedication, because the owner during the period of public user could not have taken action to exclude the public.

It is laid down in *Kirkwood* v. *Wilson*, (1908) 27 N.Z.L.R. 1051, that a leaseholder cannot dedicate a highway over his leasehold land without the concurrence of his reversioner, and it is doubtful whether a tenant for life has any greater power in this respect than that of a leaseholder. When the doctrine of implied dedication is raised, the nature of the title to the land is, therefore, always relevant. Thus, if the land is Maori land, it may be difficult to establish the doctrine of implied dedication. As is stated in the headnote to *Gibbs* v. *Pickford*, (1913) 33 N.Z.L.R. 481, dedication must be traced to the will of an owner; and, in the case of Maori lands, the ownership of which is in a succession of persons, many of whom may be minors, there is no owner in the sense in which the term is understood when determining whether there has been a dedication by owners. (Compare the rule that there can be no dedication by use of land under strict settlement.) Regarding Maori land, there are many statutory provisions permitting the Crown to lay out roads over Maori land. The present law with regard to road-lines laid out over Maori land by the Maori Land Court is that they do not become public highways until duly proclaimed under the Public Works Act, 1928. That has been the position since the coming into operation of the Maori Land Act, 1909.

With regard to land subject to a mortgage, the Court will sometimes, from the evidence and the surrounding circumstances, infer the concurrence of the mortgagee: *Martin* v. *Cameron*, (1893) 12 N.Z.L.R. 769, and *McLachlan* v. *Hughes*, (1904) 25 N.Z.L.R. 221. But, if the former owner of the fee purports to mortgage the land after the land has been dedicated, that will not destroy the dedication, and the new mortgagee will have no valid security over the highway: *Martin* v. *Cameron*, (1893) 12 N.Z.L.R. 769, and *Hughes* v. *Boakes*, (1898) 17 N.Z.L.R. 113.

It appears to have been thought at one time that a cul-de-sac—that is, a road not leading from one highway to another—could not be subject to the doctrine of implied dedication; but that is not so. Generally speaking, a cul-de-sac requires stronger evidence than a road leading from one public highway to another. As Herdman, J., said in *Walker* v. *Auckland District Land Registrar*, [1923] G.L.R. 456, 460:

> Whilst it is true that it is difficult to make out a case of dedication in the case of a cul-de-sac, there is no doubt that dedication of this type of passage-way can be effected. It is all a matter of proof of adequate user, proof of the expenditure of public money, and proof of the intention of the person in whom the freehold was vested.

And in *Richardson* v. *Sowman*, [1929] G.L.R. 85, Ostler, J., said, at p. 87:

> It was urged on behalf of plaintiffs that as this road is a cul-de-sac, evidence of user alone is not sufficient to establish a presumption of dedication. A passage from *16 Halsbury's Laws of England*, 38, para. 53, was cited in support of this proposition. The cases in that passage all seem to deal with streets and squares in a city. I doubt if they have much application to a rural road in New Zealand.

The reader will find this topic fully discussed in the leading article in (1935) NEW ZEALAND LAW JOURNAL, 153.

Where it is alleged that there has been implied dedication by the Crown, there must be borne in mind s. 172 (1) of the Land Act, 1948, which provides as follows:

> No dedication or grant of a right of way shall, *by reason only of user*, be presumed or allowed to be asserted or established as against the Crown, or as against any person or body holding lands . . . in trust for any public purpose, whether such user commenced before or after the coming into force of this Act.

As against the Crown, therefore, the important thing to be established is the *animus dedicandi*. This section (or, to be more correct, its statutory predecessor) is referred to by Herdman, J., in *Attorney-General Ex rel. Gould* v. *Christchurch City Corporation*, [1929] N.Z.L.R. 381, 393.

In the case of a subdivisional plan deposited under the Land Transfer Act, 1915, the deposit is evidence of an intention to dedicate; what has to be proved in addition is acceptance by the public: s. 179 of the Land Transfer Act, 1915, referred to in *Walker* v. *Auckland District Land Registrar*, [1923] G.L.R. 456.

Although from the surrounding circumstances and evidence the Court will presume the *animus dedicandi*, the presumption will not apply if user can be satisfactorily explained on other grounds; for instance, there is no dedication if it can be established that user was by licence only of the owner: *Leather* v. *Registrar-General of Land*, [1933] G.L.R. 342, *Moore* v. *Meredith*, (1889) 8 N.Z.L.R. 160, and *Kirkwood* v. *Wilson*, (1908) 27 N.Z.L.R. 1051. As set out in the headnote to *Stewart* v. *Wairoa County Council*, (1908) 28 N.Z.L.R. 178, there can be no dedication of a highway to the public without an intention to dedicate, of which uninterrupted user by the public is no more than evidence; and the mere acting by the owner of the soil so as to lead persons into the supposition that the road has been dedicated does not amount to a dedication if there be an agreement which explains the transaction. And in *Sutherland* v. *Cameron*, (1908) 28 N.Z.L.R. 25, it was held that the erection and maintenance for over forty years by the owner of land and his predecessor in title of a gate across a tract which had been fastened during certain seasons, though not always effectively, rebutted the presumption of dedication (even if such a presumption existed). This last case must be compared with *Snushall* v. *Kaikoura County*, (1923) N.Z.P.C.C. 670, where the erection of fences and gates across paper roads by the adjoining owner was ineffectual, because the roads had previously been dedicated by the Crown. Once there has been dedication as a public highway, the land remains a highway until closed by statute or by formal process of law: *Mayor, &c., of Grey Lynn* v. *Assets Realization Board*, (1908) 27 N.Z.L.R. 849.

A very useful case on implied dedication is *Chairman, &c., of County of Castlepoint* v. *Barton*, [1916] G.L.R. 826, which deals with the width of a road in New Zealand once dedication has been established. Surveyed roads in New Zealand open to wheeled traffic are, practically speaking, always one chain in width.

In conclusion, it may be stated that, if the Attorney-General has been represented, a judgment that there has been a dedication as a highway is a judgment *in rem* binding on all the world: *Jones* v. *Bates*, [1938] 2 All E.R. 237.

But, in order to ascertain whether a piece of land in New Zealand has become a public highway, it is often necessary to consider, not only the common-law doctrine of implied dedication, but also at least two statutory definitions. I shall briefly discuss these definitions in a later number of this JOURNAL. Sometimes local statutes and Ordinances also have to be consulted, but such are quite outside the scope of any article for this JOURNAL. The whole subject has become so complicated and complex in New Zealand, and most local bodies in New Zealand are so reluctant to incur the expense of legalization, that I think some tribunal in New Zealand should be authorized (even *proprio motu*) to determine the status of alleged roads and streets and deliver judgments *in rem* which would be binding on all the world. Could not such a jurisdiction be conveniently vested in the Local Body Commission?

OBITUARY.

Mr. H. T. Gillies (Hamilton).

In these pages, in (1946) *22 New Zealand Law Journal*, 149, there is an account of the tribute paid by the Bench and Bar to the long services of Mr. H. T. Gillies in his capacity of Crown Solicitor for the Hamilton Judicial District, from which office he was then retiring after an unbroken service of thirty-six years.

Mr. Gillies died on October 19, aged seventy-six. He was born in Dunedin, and received his education at the Otago Boys' High School and at Trinity Hall, Cambridge. He qualified in law, and, in 1905, went to Hamilton, where he practised until his retirement. The late Mr. Gillies was President of the Hamilton District Law Society for several terms. He was appointed Crown Solicitor in 1910, and, on his retirement, was the oldest Crown Solicitor in the Dominion. He was a keen golfer, and won many trophies; he was five times champion of the Hamilton Golf Club. One of his monuments is the St. Andrew's Golf Course, Hamilton, for the acquisition of which he was largely responsible. Its laying-out was his especial care, and he designed other golf courses in New Zealand. He was a former President of the Hamilton Bowling Club, and was keenly interested in all forms of sport.

He was a brother of Sir Harold Gillies, the famous plastic surgeon. He had been a patient in the Waikato Hospital for over a year before his death. He is survived by his wife, two sons, and two daughters.

Mr. W. J. Gatenby (Auckland).

Mr. William Joshua Gatenby, of Auckland, has died, aged seventy-seven. Born in Leeds, England, Mr. Gatenby came to New Zealand in 1879, and attended Mount Eden and Epsom schools. He secured his later education at Queen's College and Auckland University College. He became a teacher in 1890. After obtaining his Arts and Law degrees, in 1920, he commenced practice in Auckland.

For some years he was a member of the Mount Eden Borough Council and of the Seddon Memorial Technical College Board of Managers. From 1933 he had been a member of the Eden branch of the Labour Party.

Mr. Gatenby was a keen sportsman, and was a well-known Rugby player and referee in his younger days. He was a member of the Mount Eden Bowling Club for thirty-two years, and was elected President in 1942. He was also honorary solicitor of the Club, and was elected a life member two years ago.

He was a life member of the Masonic Institute and of the Lodge Maungawhau. He is survived by two sons and two daughters, all living in Auckland.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Latin Tags.—In the course of his speech in *Smith, Hogg and Co., Ltd.* v. *Black Sea and Baltic General Insurance Co., Ltd.*, [1940] 3 All E.R. 405, 409, Lord Wright, in a distinctly admonitory mood, says :

> Counsel for the appellants has strenuously contended that the master's action, whether or not negligent, was a *novus actus interveniens*, which broke the *nexus* or chain of causation, and reduced the unseaworthiness from a *causa causans* to a *causa sine qua non*. I cannot help deprecating the use of so-called Latin phrases in this way. They only distract the mind from the true problem, which is to apply the principles of English law to the realities of the case . . . English law can furnish in its own language expressions which will more fitly state the problem in any case of this type.

Recently, during a debate in the House of Commons, the Solicitor-General drew attention to an Act of George II which laid it down that Latin should not be used in an English Act of Parliament. A. P. Herbert, however, has taken the Solicitor-General to task in a *Punch* article, entitled " The Cosmic Mess," in which he questions the accuracy of his statement. He points out that the Act in question (4 Geo. 2, c. 26) was not concerned at all with Latin in Parliament, but was concerned with the excessive use of Latin in the Law Courts. Its title is, A. P. Herbert says :

> An Act that all proceedings in Courts of justice within that part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English language.

The point is well taken. The time may come—and perhaps it is not very far away—when the use of Latin, a bugbear to Judges and students alike, may vanish from our midst. Its demise will not be greatly mourned.

The Battle of Words.—In the heat seemingly engendered in the well-publicized action of Donaldson and the Wharf Union, counsel for the principal protagonists (North, K.C., on the one side, Gresson on the other) appear to have descended at times into a marked vernacular. The simplicity of " He hit him " was eschewed in favour of " You clocked him ? " (T. A. Gresson) and the onomatopoetically expressed " You donged him with a gong ? " of A. K. North. Katherine, in *The Taming of the Shrew*, " combed the noddle " of her husband with a three-legged stool, but it is to be assumed that, whichever of the waterside warriors it was who " clocked " the other, the sufferer got struck in the face. In this connection, the use of the term " clocking " in reference to a waterfront difference is picturesque but not inapt. The " dong " (in which the gong played so signal a part) is an expression that had a popular revival in the slang of World War I. For many years, it was a silent partner of the expression " ding-dong." The Highlanders, it will be recalled, were forever " dinging " each other, and a well-known sentiment of North West Scotland was : " We'll ding the Campbells yet." To these somewhat querulous remarks, Scriblex realizes that either counsel may cite *Alice through the Looking-glass* against him :

> " When I use a word," Humpty Dumpty said in rather a scornful tone, " it means just what I choose it to mean—neither more nor less."
>
> " The question is," said Alice, " whether you can make words mean so many different things."
>
> " The question is," said Humpty Dumpty, " which is to be master—that's all."

The Liversidge Case.—This quotation from Lewis Carroll's immortal work was used with satirical effect by Lord Atkin in his dissenting judgment in *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338, 361, when he said that he knew of only one authority that might justify the suggested method of construction. It will be remembered that he alone in the House of Lords held that the onus of proving that the order for detention was justified was upon the Secretary of State, who had to decide, where he had administrate plenary discretion vested in him, whether he had reasonable grounds, and to act accordingly. By the countless hundreds of practitioners who have expressed preference for this famous dissenting opinion the judgment in *Nakkuda Ali* v. *M. F. De S. Jayaratne*, (1950) 66 T.L.R. 214, will be welcomed. In this case, it was provided by the Ceylon Defence (Control of Textiles) Regulations, 1945, that " where the Controller has reasonable grounds to believe . . . [he] may cancel the textile licence." The Privy Council considered that :

> it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of [these] phrases when they appear in statutory enactments.

It treated the requirement in the Ceylon Regulations (" where the Controller has reasonable grounds to believe ") as imposing a condition that there must in fact exist such reasonable grounds known to the Controller before he could validly exercise the power of cancellation. This view clearly limits the application of the *Liversidge* case, as many have unsuccessfully contended was the true position, to that type of regulation where the needs of national safety prevent the Court from going behind what the Secretary of State (or some official similarly placed) honestly thinks that he has reasonable cause to believe. Nevertheless, the principle of hearing the other side is firmly engrained in our system of justice, and, so far, it has worked very well.

Russia and the Law.—Shades of Lenin and Rasputin seemed to have hovered in June over the English Court of Appeal when *Banque des Marchands de Moscou (Koupetschesky) (in Liquidation)* v. *Kindersley*, [1950] 2 All E.R. 549, fell to be decided, and involved consideration of *Re Tovarishestvo Manufactur Liudvig Rabenek*, [1944] 2 All E.R. 556. Sir Raymond Evershed, M.R., sat in this case, which turned upon s. 338 of the Companies Act, 1929 ; but earlier the same month he had had to consider the validity of a marriage contract in Russia in 1945—there being no witnesses, no consent required, no documents to sign, and no questions asked as required by the Soviet marriage code. Actually, the only flaw in the marriage was that, on marriages between Russian citizens and foreigners being forbidden, the parties were prevented from seeing each other, the wife was refused leave to depart and the husband was refused leave to remain. The Court of Appeal held that it was a condition of the marriage in dispute that the parties should be allowed to live together, and, this condition having been destroyed by the subsequent action of the Soviet Government, the marriage was voidable, as an essential condition had failed: *Kenward* v. *Kenward*, [1950] 2 All E.R. 297.

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on September 15, 1950.

The following Societies were represented: Auckland, Sir Alexander Johnstone, K.C., Messrs. T. E. Henry (Proxy), J. B. Johnston, and H. R. A. Vialoux; Canterbury, Messrs. E. S. Bowie and A. C. Perry; Gisborne, Mr. W. C. Kohn; Hamilton, Mr. C. O. Edmonds (Proxy); Hawke's Bay, Mr. J. H. Holderness; Marlborough, Mr. A. C. Nathan; Nelson, Mr. C. M. Rout; Otago, Messrs. A. J. H. Jeavons and G. M. Lloyd; Southland, Mr. G. C. Broughton; Taranaki, Mr. H. S. T. Weston; Wanganui, Mr. G. W. Currie; and Wellington, Messrs. W. H. Cunningham, W. E. Leicester, F. C. Spratt, and H. R. C. Wild (Proxy).

Mr. A. T. Young (Treasurer) was also present.

The President (Mr. W. H. Cunningham) occupied the chair.

Apologies for absence were received from Messrs. C. J. Garland, W. J. King, C. A. L. Treadwell, and the Westland delegate.

International Bar Association.—The following letter was received from Mr. J. Christie:

"I shall be sending to you (as soon as it is typed and checked) an interim report of the third conference of the International Bar Association, which was attended by Mr. Macalister and myself, as the official delegates of the New Zealand Law Society.

"I understand that an official report will be furnished in due course by the Secretary-General (Mr. Amos J. Peaslee of New York)."

War Concessions.—The following letter was received from the Vice-Chancellor of the University of New Zealand:

"The University Senate at its recent meeting considered with great care the submissions made on behalf of the New Zealand Law Society that Latin should not be a compulsory subject for ex-servicemen studying for the Solicitors' and Barristers' qualification. Latin is compulsory for civilian students, and even with the passing of the Statutes Amendment Act, 1943, which empowered war concessions in University courses, it has been compulsory for ex-servicemen students. This compulsion was retained at the insistence of the Council of Legal Education. In August, 1944, the Council of Legal Education reaffirmed the compulsory nature of Latin and advised the University that any kind of concession in Latin must be given 'sparingly.' Since that date, therefore, only two types of concession in Latin have been available to ex-servicemen students. They are 'marks concession' on Latin I Degree results, or, in the case of long service candidates, a pass at Entrance standard (with or without marks concessions) in lieu of a Stage I pass. No student has gained a law qualification without some evidence of a knowledge of Latin.

"The Senate at this late date does not feel justified in altering its qualifications for the Law course when for several years it has insisted on ex-servicemen students (to a total of several hundred) passing the Latin qualification originally insisted on by the Council of Legal Education. Of the ex-servicemen candidates in Law, 146 passed Latin I prior to mobilization; 127 were granted Latin I on a pre-war Entrance qualification; fifteen have been granted Latin I on a post-war Entrance qualification; forty-six were granted a pass in Latin I by a marks concession on pre-war failures in Latin; ninety during or after the War have passed Latin I with or without a marks concession. Of the ex-servicemen still on our books, seventy-eight have not yet qualified in Latin. Of these, forty-five have to pass in Latin I and thirty-three have been given the concession of qualifying on a pass in Entrance Latin. Thus, of the 500 ex-servicemen candidates enrolled, 424 (many of them men of long service) have passed in Latin. The Senate, in view of the Council of Legal Education's insistence on a pass in Latin for over 80 per cent. of the ex-servicemen candidates, does not feel that it is proper now to relax law qualifications for the remainder. I can assure you that this decision was not lightly taken. Senate members approached the problem with a full realization of the difficulties faced by ex-servicemen students. The Senate felt that it would not be adequate merely to forward to you the bare wording of their resolution, and has instructed me to write this letter giving its full reasons for coming to the decision that it did."

It was resolved:

"That this Council feels strongly that the concessions already approved by the Council should be granted by Senate: that the Minister of Education should be approached to see if the matter can be reopened with Senate: and that, if not, the matter should be dealt with by legislation."

In regard to the elimination of Latin from the Law syllabus, it was resolved that the question be referred to District Societies for their consideration, and that they be asked to furnish a report in time for the December meeting of the Council.

Tenancy Act, 1948, s. 15.—The following letter was received from the Auckland Society:

"The above matter was referred by your Council to the Council of this Society for further consideration.

"My Council is of opinion that the procedure on appeals from orders fixing fair rents should be the same as that which it understands will in future be followed on ordinary appeals from the Magistrates' Court. At the present time, under s. 76 of the Magistrates' Courts Act, 1947, all appeals are (generally speaking) by way of rehearing unless the parties otherwise agree. It is understood that it is proposed to amend s. 76 at the present Session of Parliament, and that the effect of the amendment will be that appeals from the Magistrates' Court will in future be decided on the notes of evidence taken by the Magistrate, subject to the power of the Supreme Court to hear additional evidence or to re-hear the whole case.

"It is considered that this procedure should be followed in the case of appeals from fair rent orders, as it ought not to be necessary to rehear the whole matter in the great majority of cases."

It was resolved to approve the recommendation that there should be a right of appeal in the circumstances and that the Standing Committee be asked to take the necessary action.

Registrar of Companies Office.—The following letter had been sent to the Hon. the Attorney-General:

"At the last meeting of the Council of the New Zealand Law Society, concern was expressed by several District Law Societies that in the near future the District Stamp Office and the Office of the Assistant Registrar of Companies might, as the result of their Departments being placed under different Ministers, be separated in fact by moving one or other to another building, so that they no longer functioned side by side as they are doing at present.

"There would be grave inconvenience to practitioners in stamping and registering of company documents if the offices were in fact separated. The President has informed me that both you and the Acting Under-Secretary for Justice assured him that no such separation is at present contemplated.

"As the Council left it to the Standing Committee to make representations, I am merely writing this letter as a record that no action by the Standing Committee is now necessary."

The Hon. the Attorney-General replied as follows:

"I have your letter of the 27th instant in connection with the District Stamp Officers, and have duly noted the representations of your Council."

The correspondence was noted.

Family Protection Act, 1908.—The Law Revision Committee advised that it had been decided to amend the legislation to include "stepchildren" in the definition of "children."

The information was noted.

Sutherland Self Help Trust.—The following letter was received:

"We thank you for your advice of the 21st instant that Mr. W. H. Cunningham, C.B.E., D.S.O., has been appointed the Society's nominee on the board of trustees of the Sutherland Self Help Trust.

"The trustees appreciate very much your Society's action in making this appointment, and look forward with pleasure to making the acquaintance of Mr. Cunningham."

(To be concluded.)