New Zealand
Law Journal
Incorporating " Butterworth's Fortnightly Notes."
VOL. XXVI. TUESDAY, NOVEMBER 21, 1950. No. 21.

CRIMINAL LAW: CONFESSIONS.

III. The New Section.

WITH the background afforded by judgments of high authority on the common-law rule regarding the admissibility of confessions and on that rule as modified by statute, we now come to s. 20 of the Evidence Act, 1908, which, by the operation of s. 3 of the Evidence Amendment Act, 1950, has now been repealed (and which, for brevity, we shall term " the old section ") and replaced by the new s. 20 (which we shall term " the new section ").

It is important, at the outset, to see in which respects the new section differs from the old. This involves the ascertainment of how or to what extent, if any, the common-law rule has been abridged by it; and, before considering the new section, we must find what was the mischief that it was intended to remedy: *Heydon's Case*, (1584) 3 Co. Rep. 7a; 76 E.R. 637.

The old section, s. 20 of the Evidence Act, 1908, was as follows:

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

As we have indicated, the judgment of the Court of Appeal in *R.* v. *Phillips*, [1949] N.Z.L.R. 316, held that s. 20 of the Evidence Act, 1908 (the old section), did not cover all the possible categories of inducement by a person in authority which may, at common law, render a statement not a voluntary one; and that the common law, except so far as it is excluded by the section, still remained. Consequently, the words of the old section, " promise or threat," had to be strictly interpreted; and, where, as in that case, the inducement held out to an accused person by a person in authority was an improper inducement, but was neither a promise nor a threat, the statement was one which was not voluntary, and so not possible of admission, notwithstanding the provisions of s. 20; and so it came within the common-law rule.

In other words, if it was proved that a promise or a threat had been made to the accused person, and the Judge was of opinion that the inducement was in fact " likely to cause an untrue admission of guilt," he could reject it. But, if he was of opinion that the promise or threat was *not* " likely to cause an untrue admission of guilt," he could admit it. But, as *Phillips's* case showed, if there had been an inducement *not amounting to a promise or a threat*, the common-law rule as to voluntary confessions applied, and the statement was inadmissible whether or not the Judge was of opinion that such inducement, not amounting to a promise or threat, was in fact not likely to cause an untrue admission of guilt.

It followed that, as the law was found in *Phillips's* case, a statement obtained by means of a promise or a threat could be admitted(if the Judge was of opinion that it was not likely to cause an untrue admission of guilt), while, if the same statement was not obtained by a promise or a threat, but was obtained by some other inducement, even though it was some less severe form of coercion or influence than a promise or a threat, or it was an implied promise or threat, it was protected by the common-law rule from admission, since (*a*) it was not admissible at common law, as it was not a free and voluntary statement; and (*b*) it was not within s. 20, as it was not a " promise or threat " to which the qualification of that section alone applied.

The intention of the Legislature, in framing the new section, was to end that unsatisfactory situation.

From the earlier parts of this article, it has been seen what the common-law rule as to confessions by accused persons really is to-day. It is simply and, as has been held, comprehensively enunciated in *Ibrahim* v. *The King*, [1914] A.C. 599, 609, and may be summarized as follows:

> At common law, no statement made by an accused person is admissible:
>
> (*a*) Unless it is shown by the prosecution to have been a voluntary statement.
>
> (*b*) To be a voluntary statement, it must be proved that it has not been obtained from the accused either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The Effect of the New Section.

We now come to a consideration of the new s. 20 of the Evidence Act, 1908, which is as follows:

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

In view of the rewording of the section, the position regarding the admissibility of confessions now seems to be this:

(*a*) If a confession is a free and voluntary one, it is admissible at common law, and is not affected by the new section.

(*b*) If it is proved that the confession has been obtained by the exercise of "violence or force or other form of compulsion," it is inadmissible at common law, and is outside the new section.

Apart from the foregoing, (*a*) and (*b*):

(*c*) If it is proved that a confession has been induced by "a promise or threat or any other inducement," it is inadmissible at common law; *but*

(*d*) the confession is admissible under the new section if the Crown proves to the satisfaction of the Judge or other presiding officer "that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made."

Briefly, because we propose to amplify the preceding classification, the main modification of the common law appearing in the new section is that a confession is not to be rejected for want of voluntariness because "a promise or threat or any other inducement . . . has been held out to or exercised upon the person confessing," if it is proved to the Court's satisfaction that those means were not "in fact likely to cause an untrue admission of guilt to be made."

The words "promise or threat or any other inducement" seem, *in themselves* (and without the limitation shortly to be mentioned), merely to be a paraphrase of the common-law rule where it mentions "fear of prejudice or hope of advantage"; and the words "or any other inducement" do not appear to carry any further the comprehensive and succinct words "fear of prejudice or hope of advantage," which seem to cover every form of inducement. ("Inducement": the action of inducing or moving by persuasion or influence; an incentive; "to induce": to lead (a person) by persuasion or some influence or motive that acts upon the will to some action, condition, belief, etc.; to lead on, move, influence, prevail on (any one) *to do* something: *5 Oxford English Dictionary*, Pt. II, 229, 230).

It is important to observe, however, that the new section distinctly limits the nature of the inducement by excluding from the operation of the section an inducement that consists of "the exercise of violence or force or other form of compulsion"; and, to this extent, at least, it is declaratory of the common law.

In *R.* v. *Gardner*, [1932] N.Z.L.R. 1648, 1660, 1661, 1664, Sir Michael Myers, C.J., and Herdman, J., interpreted the words "promises or threats" as used in the old section as including not merely promises or threats, but also implied threats or promises or the equivalent of threats and promises; but this interpretation was rejected in *R.* v. *Phillips*, [1949] N.Z.L.R. 316. Now, in the new section, since the words "or any "other inducement" have been added to the words "promise or threat," it is safe to say that a "promise" is an inducement, a "threat" is another inducement, and the now-added words "or other inducement" include implied promises or threats or the equivalent of promises or threats (not being violent or coercive inducements).

The Onus of Proof.

The common-law rule explicitly puts on the prosecution the onus of proving that a confession is voluntary (in the widest sense of that word): "it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary": *Reg.* v. *Thompson*, [1893] 2 Q.B. 12,18. The new section does not shift that onus, except to amplify it, in relation to the exception it creates, to the extent that the prosecution must prove to the satisfaction of the Court that there is nothing in any way relating to the statement to prevent the Court's coming to a concluded judgment that "the means by which the confession was obtained" (whatever they were, short of the exercise of violence or force or other form of compulsion, which, as we hope to show, are outside the new section) were not "in fact likely to cause an untrue admission of guilt to be made."

If that be the true interpretation of the new section, it modifies the common-law rule by allowing the voluntariness of the statement to be qualified by an antecedent "promise or threat or any other inducement" held out or exercised upon the person confessing, without affecting the admissibility of the confession so long as the Judge or other presiding officer is "reasonably satisfied" (by affirmative evidence by the Crown) "of the fact" (*cf.* Lord Wright in *Liversidge* v. *Anderson*, [1942] A.C. 206, 271; [1941] 3 All E.R. 338, 380) that none of those particular forms of inducement, or any inducement at all, was *likely* to cause the accused to make an untrue admission of guilt.

Further Examination of the New Section.

For the purposes of the section, it is not necessary that the "promise or threat or other inducement" should be made in words. As Sir Michael Myers, C.J., said in *R.* v. *Gardner*, [1932] N.Z.L.R. 1648, 1660,

> the whole of the circumstances must be considered, and if in the result the answers elicited indicate that they were obtained under such pressure as might be reasonably calculated to induce the person questioned to state what was not true, the evidence should be rejected. The statement made by the prisoner may, in fact, be perfectly true, but that is not the point to be considered . . . all that need be shown is that "the inducement was in fact *likely* to cause an untrue admission of guilt to be made."

And, at p. 1664, Herdman, J., said that a promise or threat need not be express: it may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case.

There is nothing in the new section (or in the old section) as to the "promise or threat or other inducement" being held out, as the common-law rule puts it, "by a person in authority." But the general tenor of the new section makes that implicit, since only the inducement held out by a person in authority is likely to be in issue. If, however, the accused was influenced by any other person in a way that was likely to cause him to make an untrue admission of guilt, and that unlikely fact was proved, it would seem there is nothing in the section to limit application to a person in authority. But in *Phillips's* case, Mr. Justice Kennedy, at p. 349, expressed the view that, if the inducement has been held out by a person not in authority, evidence of a subsequent confession is admissible.

There is no apparent difference between the new section and the old in the change of the language from "the Judge or other presiding officer *is of opinion*" to "the Judge or other presiding officer *is satisfied*." Both mean "according to the judgment of the Judge or other presiding officer": *Ormerod* v. *Todmorden*

Joint Stock Mill Co., Ltd., (1882) 8 Q.B.D. 664, 679, per Brett, L.J. (as Lord Esher then was). Of course, the Judge or other presiding officer must hear evidence; and the manner of the hearing of the evidence on which he has to be satisfied is set out in the judgment of Gresson, J., in *R.* v. *Phillips*, [1949] N.Z.L.R. 316, 320, and approved, in the Court of Appeal, by Sir Humphrey O'Leary, C.J., and Hutchison, J.

The words "in fact," which appeared in the old section, are retained. Those words were interpreted by the learned Chief Justice in *Phillips's* case, at p. 339, as meaning, in the context, "really" (the word used in an earlier enactment), and he added that to use the words as showing the question to be one of fact was a misuse of the term. It seemed to His Honour that the admissibility of evidence must ultimately be a question of law. On the other hand, Mr. Justice Kennedy, at p. 349, observed that the Judge's opinion that an inducement was likely to cause an untrue admission of guilt was a conclusion or judgment on the facts, and it may not be questioned on a case stated under s. 442 of the Crimes Act, 1908. His Honour did not have to consider the position on an appeal under the Criminal Appeal Act, 1945, which, no doubt, was in the mind of the learned Chief Justice. On this point, Finlay, J., found it unnecessary to express an opinion.

The Exercise of Violence or Force.

In *R.* v. *Gardner*, [1932] N.Z.L.R. 1648, 1651, Smith, J., said that the obtaining of a confession by violence, including therein a violent method of procedure, was not governed by the old section (in which there was no mention of "the exercise of violence or force or other means of compulsion"), because that section was limited to cases where a promise or threat had been made. He held that a statement obtained by a violent procedure on the part of the Police was inadmissible in evidence for the Crown, because a statement was not voluntary if it was obtained by any sort of violence: *R.* v. *Wong Chin Kwai*, (1908) 3 Hong Kong L.R. 89, approved by the Privy Council in *Ibrahim* v. *The King*, [1914] A.C. 599, 613.

In that case, while Smith, J., held that the confession was not affected by the old section, he said that, if he were wrong in that view, the whole procedure could be regarded as amounting to a threat within that section. In the Court of Appeal, the Chief Justice and Mr. Justice Herdman held that the circumstances in that case amounted to a threat, and were such as were in fact likely to cause an untrue admission of guilt.

Coming now, on this point, to the new section, it will be observed that the words in parentheses ("(not being the exercise of violence or force or other form of compulsion)") leave that ground, inherent in the common-law rule, unaffected, and exclude that definite ground of inadmissibility from the ambit of the new section, thus making it unnecessary to interpret the circumstances of violence or violent procedure as a "threat," as Sir Michael Myers did in *Gardner's* case, or as Smith, J., did in the same case as an alternative to the absolute rejection of a statement as inadmissible on the ground that the confession was obtained by a procedure which had to be regarded, for the purposes of the case, as a violent procedure, thus resulting in the antithesis of a voluntary statement.

The distinction between a confession obtained by "a promise or threat or any other inducement" and a confession obtained by violent means is important in view of the language of the new section. Confessions induced by violence are inadmissible, irrespective of the new section, as not being free and voluntary: *R.* v. *Wong Chin Kwai*, (1908) 3 Hong Kong L.R. 89 (cited with approval in *Ibrahim* v. *The King*, [1914] A.C. 599, 613). On the other hand, if a confession is proved to have been obtained by "a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion)," it is admissible if the Crown proves to the satisfaction of the Judge or other presiding officer that, to quote the new section, "the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made."

Applying *R.* v. *Phillips*, [1949] N.Z.L.R. 316, and *Cornelius* v. *The King*, (1936) 55 C.L.R. 235, to the new section, it is clear that, as the common-law rule as to the admissibility of confessions is in force in New Zealand, a confession is not voluntary if it is extracted by "violence or force or other form of compulsion." Once that is shown, then, under the new section, it is immaterial whether or not *those means* were in fact likely to cause an untrue admission of guilt to be made: the confession is clearly not voluntary, and cannot be received in evidence.

What, then, is meant by a confession that is obtained by an inducement amounting to "violence or force or other form of compulsion"?

In his recent work, *Garrow's Criminal Law in New Zealand*, 422, the learned author, Mr. C. E. Evans-Scott, says that the types of wrongful inducement may be divided into two main classes:

(1) Coercion (either physical or mental).—Into this class fall cases where statements are obtained by actual physical violence, threats of violence, threats of arrest or imprisonment, violent or oppressive procedure, or "third degree" methods.

"If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary": per Dixon, J., in *McDermott* v. *The King*, 76 C.L.R. 501, 511.

Illustrations of this form of inducement are—Actual physical violence—*R.* v. *Aird*, [1949] V.L.R. 1; a threat of arrest or imprisonment—*R.* v. *Parratt*, 4 C. & P. 570, *R.* v. *Richards*, 5 C. & P. 318, and *R.* v. *Luckhurst*, Dears. 245; a violent procedure such as taking a youth from his bed at night and interviewing him in the early hours of the morning—*R.* v. *Gardner*, [1932] N.Z.L.R. 1648; taking a statement from a man in an exhausted condition—*R.* v. *Burnett*, [1944] V.L.R. 115. For further illustrations, see *9 Halsbury's Laws of England*, 2nd Ed. 205, 206.

(2) Improper Influence.—Into this class fall cases where statements are obtained by actual promises of advantage or where accused may have been caused, either intentionally or unintentionally, to think that he will gain an advantage from making a statement or suffer prejudice if he does not or where there have been any unfair, dishonest, or fraudulent practices: see *R.* v. *Johnston*, 15 I. C.L.R. 60.

Illustrations of this form of inducement are—Telling a prisoner that it would be best for him if he would tell how the crime was transacted—*R.* v. *Warrington*, 2 Den. 447; or that it would be the right thing for him to make a statement—*R.* v. *Thompson*, [1893] 2 Q.B. 12; or that the best thing he could do was to make a clean breast of it—*R.* v. *O'Keefe*, 14 N.S.W. L.R. 345; or saying to him "This is your last chance—tell me everything"—*idem*; or causing him to think that there was a strong case against him and that he may be charged with a less serious offence if he makes a statement—*R.* v. *Phillips*, [1949] N.Z.L.R. 316. For further illustrations, see *9 Halsbury's Laws of England*, 2nd Ed. 205, 206.

While, sometimes, the question whether a statement is to be regarded as a voluntary confession must be decided as a matter of degree, and, always, its admissibility under the common law, as qualified by the new section, must depend on the facts as proved affirmatively by the Crown, the above summary is useful, although it was written before the new section was enacted.

Any confession coming within the first category (coercion, either physical or mental) is clearly inadmissible under the common law, and it is outside the new section: *Reg.* v. *Thompson* (*Ante*, p. 305).

But whether a confession brought about by an inducement which comes within the second category (improper influence) is admissible depends on whether the Crown can prove affirmatively that the influence was "a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion" and that "the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made." If the Crown can prove that, then the confession is not to be rejected as inadmissible. If the Crown's proof cannot go so far, then the improper influence renders the confession in admissible under the common-law rule.

THE COMMON-LAW RULE AS NOW IN FORCE.

In *Phillips's* case, the learned Chief Justice, at p. 344, summarized the position at common law when the old section was enacted when he said,

> the common law appears to be that evidence of a statement or confession by the accused is admissible only if the prosecution proves to the satisfaction of the Judge that it was made perfectly voluntarily. Further, the evidence is inadmissible if it is the result of an inducement made by some person in authority, and inducements are not restricted to promises or threats. The inducement need not be of such a character as is likely to cause an untrue confession.

This was still the position at common law when the new section was passed. To what extent has it been qualified or affected by the new section?

As all their Honours in *Phillips's* case pointed out, there is no material difference between the old section and the corresponding Victorian section which was under notice by the High Court of Australia in *Cornelius's* case, in which the joint judgment of the majority of the Court, in part cited *Ante*, p. 307, makes it plain that the common-law rule on the subject of confessions was qualified only to the extent declared by the statutory enactment referred to: and see also the judgment of Smith, J., in *R.* v. *Gardner*, [1932] N.Z.L.R. 1648, 1649, 1651, 1653, and the judgment of Sir Frederick Jordan, C.J., in *R.* v. *Jeffries*, (1946) 47 N.S.W.S.R. 284, 289.

Applying these dicta, the conclusion is inescapable that the new section leaves the judgments in *Phillips's* case as they were, with the minor difference that the qualification of the common law effected by the new section relating to "a promise or threat or any other inducement" now extends to an implied promise or threat, or the equivalent of promises or threats. The new section makes it clear, however:

(*a*) That any such promise or threat or any other inducement must stop short of being "the exercise of violence or force or other form of compulsion"; and, in addition,

(*b*) That the Court must be satisfied by the Crown that the means—namely, the promise, or threat, or other inducement—by which the confession was obtained were not really likely to cause an untrue admission of guilt to be made.

We therefore conclude that the common-law rule as to the admissibility of confessions—which may broadly be expressed by saying that the confession must be voluntary—is in force in New Zealand, subject only to the qualification, as set out in the last paragraph above, enacted by the new s. 20 of the Evidence Act, 1908.

THE INDEPENDENCE OF THE JUDGES.

The Evil of Appointing them to Commissions.

In 1660, Sir Matthew Hale, on his appointment as Chief Baron of the Exchequer, said: "I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions." More recently, in September, 1945, the late Chief Justice Harlan F. Stone of the United States Supreme Court, in declining to accept the chairmanship of the Atomic Energy Commission, remarked that:

> the duties of a Justice of the Supreme Court of the United States are difficult and exacting. Their adequate performance is in a very real sense a full-time job. I have accepted the office, and acceptance carries with it the obligation on my part to give whatever time and energy are needful for the performance of its functions.

Both are quoted with approval in the report of the United States Senate Committee on the Judiciary (dealt with in an article in *33 American Bar Association Journal*, 792), discussing the vexed question of the appointment of members of the judiciary to governmental boards, inquiries, &c. The Committee were definitely adverse to the practice, save perhaps in limited and extremely urgent circumstances. The question has recently been given attention in Canada, and this article, setting forth (as it does) the views of the United States Senate on the point, is well worth attention.

To begin with, such appointments remove members of the Bench from their proper sphere of activity and increase the burden on the remaining Judges. And, the Committee asks, how would the people regard a judiciary whose members were Judges to-day, high public officials in the executive branch to-morrow, and Judges again when this mission is ended?

The report points out that, on occasion, judicial and executive functions may be improperly merged; non-judicial activities may produce dissension or criticism, and may be destructive of the prestige and respect of the judiciary; and, finally, a Judge, on resumption of his regular duties, may conceivably be called upon to justify or defend what he has done in the performance of a non-judicial duty.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1950.

No. 42. Cemeteries Amendment Act, 1950.
No. 43. Joint Family Homes Act, 1950.
No. 44. Dietitians Act, 1950.
No. 45. Co-operative Dairy Companies Amendment Act, 1950.
No. 46. Imprest Supply Act (No. 5), 1950.

ANNUAL HOLIDAYS.

Worker taking whole of Annual Holiday before Conclusion of Qualifying Period—Worker voluntarily terminating Employment before Completion of That Period—Tacit Undertaking on Worker's Part to complete Year of Qualifying Service—Employer's Right to deduct Proportionate Part of Holiday Pay from Pay before Worker's Termination of Service—Annual Holidays Act, 1944, s. 3. Section 3 of the Annual Holidays Act, 1944, contemplates continuity of employment with one employer throughout the full year of qualifying service; and the employer, when agreeing to the taking of a holiday wholly in advance under the provisions of s. 3 (2), is justified in treating the completion of the year's service as an implied condition upon which he is entitled to rely before concurring in the proposal. A worker was employed by the defendant Board as a hydraulic crane driver, and, for the purposes of the Annual Holidays Act, 1944, his qualifying year of service was to end on October 9, 1949. He took the whole of his two weeks' annual holiday in advance during the fortnight commencing March 21, 1949, and was paid two weeks' ordinary pay before the commencement of that holiday. On June 16, 1949, he voluntarily terminated his employment. At the end of the last complete pay period before that date, the Board deducted the sum of £5 2s. 1d. from moneys then due to the worker, and the justification for such deduction was claimed to be the fact that the worker had failed to complete his year of qualifying service for an annual holiday to the extent of 115 days (the period from June 16, 1949, to October 9, 1949). The Inspector of Awards claimed to recover to the use of the worker the sum of £5 2s. 1d. It was common ground that the terms of the worker's contract of service included the following: "(*a*) Subject to agreement between the employer and worker, the taking of annual leave in advance of the date of completion of the qualifying year of service. (*b*) The payment in advance of the worker's ordinary pay for the period of such annual holiday. (*c*) A right on the part of the employer to make a deduction from the wages of the worker who has taken his annual holiday in advance in the event of termination of the contract of service before the date of completion of the qualifying year of service." Clause 6 of the New Zealand Harbour Boards' Employees' Award, 1949, provided as follows: "6. (*a*) Except where otherwise provided, workers shall, after the completion of each year of service, be entitled to two weeks' holiday on ordinary pay. In the case of shift-workers and workers who are required to work on Saturdays or Sundays at less than the penalty rates specified in cls. 4 (1) and 5 (*c*), three weeks' holiday on ordinary pay shall be allowed. (*b*) In the event of any of the holidays specified in cl. 5 (*b*) hereof occurring during the period of the annual holidays, such day or days shall be added to the annual holiday. (*c*) Should any worker be discharged or leave the service before his annual holidays are due, he shall be entitled to a holiday payment on a *pro rata* basis of the service rendered in that year. (*d*) The annual holidays shall, as far as practicable, be arranged to be taken between September 1 and May 31 in each year. Workers shall be given at least fourteen days' notice prior to the date of going on annual holiday." The worker's ordinary pay for the two weeks during which he took his annual holiday amounted to £16 4s.; and the deduction of £5 2s. 1d. represented 115-365ths of that sum. *Held*, 1. That the provision in the contract of service imposing upon the worker the obligation to make a refund in certain circumstances is not inconsistent with the Award, for the reason that the Award is silent on the question of annual holidays in advance and in regard to deductions from wages. 2. That, in considering whether the worker was entitled, under his contract of service as deemed to be modified by the Award, to a total benefit that is more favourable to the worker than the total benefit provided by the Annual Holidays Act, 1944, s. 3 thereof, for the purposes of this case, was the appropriate section. (*Australian Mutual Provident Society* v. *Evans*, [1948] G.L.R. 531, *Leonard* v. *Auckland Electric-power Board*, [1950] N.Z.L.R. 534, and *Hanson* v. *Devonport Steam Ferry Co., Ltd.*, [1950] N.Z.L.R. 573, referred to.) 3. That, upon the assumption that s. 3 of the Annual Holidays Act, 1944, applied to the worker (but without deciding that point), as there is a tacit undertaking on the part of the worker to complete his year of qualifying service, the steps taken by the Board to adjust the financial position between it and the worker were permissible, as there was nothing in the Annual Holidays Act, 1944, or in the Award to prohibit such a course, and the manner in which the adjustment was made was reasonable and equitable. *Brayshay (Inspector of Awards)* v. *Wellington Harbour Board*. (Ct. Arb. Wellington. October 31, 1950. Tyndall, J.)

COMMON LAW.

Blackstone in Retrospect. (Prof. H. G. Hanbury.) *66 Law Quarterly Review*, 318.

CONTRACT.

Memorandum of Contract. *100 Law Journal*, 619.

CONVEYANCING.

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

COSTS.

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

The Court's Discretion. *94 Solicitors Journal*, 483.

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

CRIMINAL LAW.

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

The Award of Compensation in Criminal Proceedings. *94 Solicitors Journal*, 604.

DAIRY COMPANIES.

Co-operative Dairy Companies Amendment Act, 1950, transfers from the Minister of Stamp Duties to the Minister of Justice the power to appoint members of the Co-operative Dairy Companies Tribunals. The provision is consequential on the transfer of the office of the Registrar of Companies to the Department of Justice. Section 3 validates surrenders of shares accepted by companies which become registered under the principal Act on or before October 20, 1951, the purpose being to validate surrenders of shares accepted by some companies in the mistaken assumption that they were entitled to do so under the provisions of Part III of the Dairy Industry Act, 1908.

DEATH DUTIES.

Deduction for Continuing Annuity. *94 Solicitors Journal*, 494.

DEFAMATION.

Defamation. (Prof. E. C. S. Wade.) *66 Law Quarterly Review*, 348.

DIVORCE AND MATRIMONIAL CAUSES.

Standard of Proof in Matrimonial Cases. *94 Justice of the Peace Journal*, 533.

The Duty of Disclosure in the Divorce Court. *210 Law Times*, 147.

FAMILY PROTECTION.

Claim by Daughter excluded from Will for Allegedly Undutiful Conduct—Onus of Proof considered—Duty of Court to consider whether Exclusion justified—Appellate Court itself to determine whether Applicant entitled to Order and Nature and Quantum of Provision to be made—Proper Approach to Such Determination—Family Protection Act, 1908, s. 33. Where a testator has alleged a reason (such as undutiful conduct) for the exclusion of a child from his will, the varying ways of regarding the onus of proving that the child's character or conduct was such as to entitle or to disentitle such child to the benefits of the provisions of the Family Protection Act, 1908, are but a part of the consideration the Court must give to all the circumstances. A mere allegation by a testator as a reason for exclusion of a child should not be accepted as precluding the making of an order, merely because the applicant fails to establish that the allegation is false. (*In re Duncan*, [1939] V.L.R. 355, *In re Scott, Scott* v. *Union Trustee Co. of Australia, Ltd.*, [1950] V.L.R. 102, *In re Ruxton, Ruxton* v. *Trustees Executors and Agency Co., Ltd.*, [1946] V.L.R. 334, and *In re K.*, [1921] St. R. Qd. 172,

referred to.) There is a primary onus resting upon an applicant to satisfy the Court that there has been a failure of moral duty on the part of the testator. Where a testator has treated one of his children very differently from the others (as was done in this case), the Court has necessarily to consider whether there is anything in that child's circumstances or conduct to justify complete exclusion. If reasons are given by the testator reflecting on the character or conduct of that child, the Court must, in considering the sufficiency or otherwise of the reasons, endeavour to decide upon the truth or otherwise of the allegations. The reasons given by a testator for excluding a child (or a widow) go no further than to concentrate attention on the question whether there is or has been character or conduct operating to negative the moral obligation that would otherwise have lain upon the testator. If the Court is unable to arrive at the truth or falsity of the allegations, so that they must be regarded as neither proved nor disproved, but merely as unproven, then s. 33 (2) of the Family Protection Act, 1908, which authorizes the Court to "refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order," has no application. It is incumbent on the Court of Appeal itself, in an appeal from an order made by the Supreme Court refusing an order for provision out of the testator's estate, to determine whether the appellant is entitled to such an order, and, if so, the nature and quantum of such provision. (*Rose* v. *Rose and Rose*, [1922] N.Z.L.R. 809, followed.) The first inquiry in every case must be what the need of maintenance and support is, the second, what property the testator has left. The amount to be provided is not to be measured solely by the need of maintenance; it would be so if the Court were concerned merely with adequacy, but the Court is to consider what is *proper* maintenance, and, therefore, the property left by the testator has to be taken into consideration. (*Bosch* v. *Perpetual Trustee Co., Ltd.*, [1938] A.C. 463; [1938] 2 All E.R. 14 (approving dicta of *Sir Robert Stout*, C.J., in *In re Allardice, Allardice* v. *Allardice*, (1910) 29 N.Z.L.R. 959, 970, and of *Salmond*, J., in *In re Allen, Allen* v. *Manchester*, [1922] N.Z.L.R. 218, 220) followed.) *So held* by the Court of Appeal, reversing the judgment of *Hutchison*, J., [1950] N.Z.L.R. 512. *In re Green, Zukerman* v. *Public Trustee*. (C.A. October 13, 1950. Northcroft, Finlay, Gresson, JJ.)

HOUSING IMPROVEMENT.

Housing Improvement Regulations, 1947, Amendment No. 1 (Serial No. 1950/194), lay down the procedure to be followed for the institution of appeals against notices given by local authorities requiring owners of houses to carry out repairs, alterations, or works, or partly to demolish or to pull down houses. In so far as these Regulations do not extend, the ordinary procedure of the Court is to be followed. One month from the date of coming into force of the Regulations is allowed for proceeding with appeals of which notice was given to local authorities before that date.

HUSBAND AND WIFE.

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

INCOME-TAX.

Husband and Wife. *100 Law Journal*, 625.

Maintenance Orders and Tax. *94 Solicitors Journal*, 606.

INDUSTRIAL CONCILIATION AND ARBITRATION.

Award—Breach—Agreement creating Relationship of Owner and Independent Contractor—Both Parties bound by Award—Agreement bona fide *and neither Device to conceal Real Nature of Arrangement nor in Breach of Award—Industrial Conciliation and Arbitration Act, 1925, s. 111.* The defendant Club was an incorporated society and an original party to the Otago Golf Clubs' and Bowling Clubs' Greenkeepers' Award, 1949, and, as such, bound by such of the provisions thereof as applied to bowling-clubs. From October 11, 1948, to April 30, 1949, the club employed F. as its servant as greenkeeper at a weekly wage of £1. On or about June 27, 1949, the club entered into an agreement with F. for the execution by him for one year (for a total remuneration of £52) of work of a nature substantially similar to that previously performed by him as the Club's servant, and duties similar to the duties of greenkeepers defined by cl. 15 of the Award. Clause 6 of the agreement was as follows: "It is hereby expressed agreed and declared that the relationship between the club and the greenkeeper is that of owner and independent contractor and not that of master and servant and the club doth hereby acknowledge that except for the purposes of cl. 5 hereof the club shall not have any right of control or superintendence over the greenkeeper as to the time occupied by him in the execution of his work hereunder or as to the manner of such execution." In an action by the Inspector of Awards claiming a penalty in respect of an alleged breach of the Award, in that the Club had entered into an agreement with F. with the intention of defeating the provisions of the Award, contrary to the provisions of s. 111 of the Industrial Conciliation and Arbitration Act, 1925, *Held*, That the true intention of the parties to the agreement was to establish the relationship of owner and independent contractor, and that that intention had been effectively and faithfully recorded in the agreement; and, consequently, it was not entered into in contravention of s. 111 of the Industrial Conciliation and Arbitration Act, 1925. (*Inspector of Awards* v. *Langham*, (1943) 43 Bk. of Awards, 321, followed.) *Jackson* (*Inspector of Awards*) v. *Kaikorai Bowling Club, Inc.* (Ct. Arb. Dunedin. October 31, 1950. Tyndall, J.)

INVITOR.

The "I think" Doctrine of Precedent: Invitors and Licensors. *66 Law Quarterly Review*, 374.

JOINT FAMILY HOMES.

Joint Family Homes Act, 1950: see the article by Mr. E. C. Adams, *post*, p. 333.

LAND AGENTS.

Rights of Estate Agents and Their Commission. *210 Law Times*, 136.

LANDLORD AND TENANT.

Central-heating System maintained by Landlord. *94 Solicitors Journal*, 609.

How did Mr. Pickwick's Tenancy determine? *94 Solicitors Journal*, 549.

Suspension of Order for Possession. *94 Solicitors Journal*, 575.

LAW PRACTITIONERS.

Legal Aid: The Scheme in England. *94 Solicitors Journal*, 587.

The Legal Aid Regulations. *94 Solicitors Journal*, 541.

LOCAL AUTHORITIES.

Audit and Inspection of Accounts—Duties of Audit Office—Local Body's Balance-sheet—Crown not Estopped from disputing Figures in Approved Balance-sheet—Malpractice, Collusion, or Negligence on Part of Local Body's Servants not Defence to Audit Office for Breach of Duty—Local Body not estopped from claiming against Audit Office for Loss due to Negligence of Its Servants—Quantum of Damages awarded against Crown—"If possible"—Public Revenues Act, 1926, s. 68 (2)*—Municipal Corporations Regulations, 1921* (1921 New Zealand Gazette, *2245*), *Reg. 36.* Under the Municipal Corporations Regulations, 1921, read with s. 68 of the Public Revenues Act, 1926, the duties of the Audit Office are to make an annual inspection and examination of the books and accounts of a borough if possible, and, on receipt of a balance-sheet and statement of accounts, it must, as required by Reg. 36, examine and certify the same as soon as possible after April 30 in each year. That duty of the Audit Office is to be considered and determined in the light of all the circumstances then existing, including the facilities available to it in the form of trained staff. The test is whether the Audit Office has taken all reasonably practicable and available means to have an audit completed as soon as possible. (*Attwood* v. *Emery*, (1856) 1 C.B. (N.S.) 110; 140 E.R. 45, *Hydraulic Engineering Co., Ltd.* v. *McHaffie, Goslett, and Co.*, (1878) 4 Q.B.D. 670, and *Verelst's Administratrix* v. *Motor Union Insurance Co., Ltd.*, [1925] 2 K.B. 137, applied.) (*Hulthen* v. *C. A. Stewart and Co.*, [1903] A.C. 389, referred to.) There is no absolute duty imposed by statute or regulations on the Audit Office to make interim and periodical inspections of the borough's accounts during the year, but circumstances might arise which would justify a local body in asking for an inspection of its accounts, or knowledge might come to the Audit Office which would require it to make an interim inspection. An auditor is liable for the losses sustained by the employer after the auditor, but for his lack of care and skill, should have discovered a defaulting employee's dishonesty and warned the employer; and the duty of the Audit Office is to conduct an audit as carefully and as skilfully as a private auditor. (*McBride's, Ltd.* v. *Rooke and Thomas*,

[1942] 3 D.L.R. 81, and *Todd Motor Co.* v. *Gray*, [1928] G.L.R. 208, followed.) The Crown is not estopped by the Audit Office's approval of a local body's balance-sheet from disputing the correctness of the figures therein prepared by the local body's officers; but strict proof on the part of the Crown is required when it seeks to show that an audited balance-sheet was not correct. (*Robertson* v. *Minister of Pensions*, [1948] 2 All E.R. 767, and *Keighery* v. *Millar*, [1942] V.L.R. 43, followed.) As an auditor is engaged for the purposes (among others) of detecting irregularities on the part of employees, he cannot avoid liability for an established breach of his duty by showing that there had been malpractice, collusion, or negligence on the part of his employer's servants. (*London Oil Storage Co.* v. *Sear*, (1945), reported in *Dicksee on Auditing*, 565, and *Leeds Estate, Building and Investment Co.* v. *Shepherd*, (1887) 36 Ch.D. 787, followed.) (*Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* (*Swansea Corporation and James, Third Parties*), [1949] 1 All E.R. 620, and *International Laboratories, Ltd.* v. *Dewar*, [1933] 3 D.L.R. 665, distinguished.) (*Patent Safety Gun Cotton Co.* v. *Wilson*, (1880) 49 L.J.Q.B. 713, referred to.) *Quaere*, Whether the breach of a statutory duty imposed on the Audit Office by the Public Revenues Act, 1926, gives rise to a right of civil action by the local body which is damnified by the breach. (*Cutler* v. *Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544, followed.) The suppliant Corporation employed a cashier who had been in its service between six and seven years. In September, 1946, he stole the sum of £50 9s. His thefts were not detected, and in May, 1948, they had reached a total of £17,541 14s. He then made a full confession, and gave details of his conduct which enabled all defalcations to be traced and identified. By statute, the Audit Office is the auditor of the Corporation's accounts, but it was seriously in arrear with its work. The accounts for the year ending March 31, 1945, were not completely audited and certified until March, 1947, and those for 1946 until April, 1947. No work was done on the 1947 or 1948 accounts until December, 1947, when only a small amount of work was done. In May, 1948, an Audit Inspector commenced work on the accounts. Within a few days of his doing so, he noticed cases of spread bankings and alterations and erasures in cash-books and other entries. He called on the cashier for an explanation, and the latter admitted his guilt, and gave details of his conduct which enabled all the defalcations to be traced and identified. The Corporation received £106 from the cashier, and £750 under a fidelity guarantee insurance policy. After deducting both these amounts from the total defalcations, it claimed, by petition of right, that amount, which, it alleged, was lost by it in consequence of the failure of the Audit Office to carry out its duty of auditing the Corporation's accounts, on the grounds of delay in making the audit and negligence in its performance during the period preceding the discovery of the thefts. The Crown disclaimed all liability, alleging that it had done all that it was liable to do; and it relied on the further defence that it was not responsible for any act or omission which occurred more than twelve months before the date on which the petition was lodged—namely, November 24, 1948. *Held*, 1. That the Audit Office took all reasonably practicable and available means to have the audits of all boroughs in the relevant period completed as soon as possible; and no breach of duty on its part was established by reason of the delay in either the commencement or the completion of the suppliant Corporation's accounts for the years ending March 31, 1947, and March 31, 1948. 2. That the suppliant Corporation's audit was only in progress when the frauds were discovered, and the question was not, as in other cases, whether the auditor had been guilty of negligence in a completed audit, but was whether the Audit Office had been guilty at any (and, if so, at what) particular date in the course of the audit. (*Armitage* v. *Brewer and Knott*, (1945), reported in *Dicksee on Auditing*, 755, referred to.) 3. That the Audit Office had been negligent in that its officers had not, at the latest by March 31, 1948—when another accounting period had concluded—seen and appreciated the irregularities in the suppliant Corporation's books and put an end to them; and that created a *prima facie* liability for the losses which occurred after that date, and the measure of damages was the amount of the loss which had occurred after that date. 4. That the duty of the Audit Office was to conduct an audit as carefully and skilfully as a private auditor, if employed for a similar purpose, would be required to do; and, as the Audit Office should, on that basis, have discovered the existing irregularities by March 31, 1948, the suppliant Corporation (on the assumption that a breach of statutory duty by the Audit Office would give it a right of action in damages) was entitled to recover the amounts stolen after that date. 5. That, although there were some grounds for allegations that the suppliant Corporation had itself, by its members and servants, been guilty of negligence in failing to discover and prevent the defalcations, and such grounds might be considered as having been established, these did not constitute a defence on which the Audit Office could rely; nor was the Corporation estopped by such negligence from claiming recovery of any loss. (*Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay and Co., Ltd.*, (1906) 95 L.T. 444, applied.) 6. That the suppliant Corporation was entitled to recover the amount of the loss which occurred after March 31, 1948—namely, the sum of £5,645 14s. (as reduced, after hearing further evidence, from the original amount of £8,164 11s. 8d., found by the learned Judge at the hearing of the action). 7. That the acceptance by the Audit Office as correct of the figures in the suppliant Corporation's balance-sheet could not be used as a representation made by the Audit Office to the suppliant Corporation that those figures were correct; that, in any case, the suppliant Corporation had not acted on the certificate of the Audit Office to its detriment; and that the Crown was not, therefore, estopped from challenging the correctness of those figures. *New Plymouth Borough* v. *The King*. (S.C. New Plymouth. February 20, 1950. Stanton, J.)

MINING.

Mining Regulations, 1926, Amendment No. 11 (Serial No. 1950/200), make minor amendments to the Mining Regulations, 1926, in relation to the safety appliances to be kept on dredges, the office-hours and holidays of Warden's Courts, and the subjects for examinations of mine managers' certificates and battery superintendents' certificates.

MISTAKE.

The Effect of Mistake on Contract. *94 Solicitors Journal*, 482.

MORTGAGORS AND TENANTS RELIEF ACTS.

Mortgages—Interpretation of Order of Court of Review for Debt to be payable out of Proceeds in event of Sale of Land—Supreme Court ordering Sale—Liability to be Subject of Specific Application to Court of Review to interpret Its Order—Statutes Amendment Act, 1939, s. 49. In an action for partition, it was alleged by the defendant that the plaintiff was indebted to the defendant in the sum of approximately £3,000, conditioned to be payable pursuant to an order of the Court of Review under the Mortgagors and Lessees Rehabilitation Act, 1936, in the event of the land (the subject of the action for partition) being sold at a price more than sufficient to cover the liabilities for the time being owing in respect thereof, and that there were then no liabilities; and the defendant counterclaimed for a direction that the defendant was entitled, upon any partition, to a first charge to secure the moneys subject to the Court of Review's order. The Court directed a sale of land on the defendant's application. *Semble*, Even assuming that the Supreme Court had jurisdiction to interpret the order of the Court of Review, the liability of £3,000 should be the subject of a specific application to the Court of Review pursuant to s. 49 of the Statutes Amendment Act, 1939. *Pillar* v. *John Odlin and Co., Ltd.* (S.C. Wellington. November 14, 1950. Hay, J.)

NUISANCE.

The Categories of Nuisance. *100 Law Journal*, 591.

PROBATE AND ADMINISTRATION.

Points in Practice. *100 Law Journal*, 620.

Practice—Letters of Administration with Will annexed—Sole Executrix and Donee predeceasing Testator—Grant of Letters of Administration with Will annexed—Code of Civil Procedure, R. 531J. Where a testator survives the sole executrix and donee under his will, the Court will grant letters of administration with will annexed, and not letters of administration as on an intestacy. A will must be proved whether or not it contains any operative disposition. (*In re Vogel*, (1910) 13 G.L.R. 117, and *In re Coleman*, [1920] G.L.R. 446, not followed.) (*In the Goods of Jordan*, (1868) L.R. 1 P. & D. 555, *In re Ford, Ford* v. *Ford*, [1902] 1 Ch. 218, *In re Cuffe, Fooks* v. *Cuffe*, [1908] 2 Ch. 500, and *Public Trustee* v. *Sheath*, [1918] N.Z.L.R. 129, referred to.) *Semble*, The Supreme Court, on an application for probate or administration, will not inquire into questions of lapse or into any other matter bearing on the question whether a will, on its face capable of having legal operation, is or is not operative to create beneficial interests. The position is different where a purported will is inoperative owing to the absence of testamentary power, and, in such a case, the collateral questions must be dealt with, the document not being a will at all unless they are answered in a certain way. (*Re*

Houston, [1928] G.L.R. 96, referred to.) (*In the Goods of Graham*, (1872) L.R. 2 P. & D. 385, mentioned.) *In re Young (deceased)*. (S.C. Wellington. October 3, 1950. F. B. Adams, J.)

TRANSPORT.

Traffic Regulations, 1936, Amendment No. 8 (Serial No. 1950/189). Regulation 2 (1) makes provision for the installation of additional types of traffic-control lights at places other than intersections or pedestrian crossings. The additional types may be either a flashing red light, which is a signal requiring traffic to stop, or a flashing amber light, which is a signal requiring traffic to proceed with caution. The effect of Reg. 2 (2) is to apply the provisions of the principal Regulations relating to parking of vehicles to motor-cycles and two-wheeled trailers. Regulation 3 amends the provisions of the principal Regulations as to penalties consequentially on the introduction of the new Part VI relating to ridden horse traffic. Regulation 4 adds a new Part VI to the principal Regulations, and makes provision for the traffic rules to be observed by ridden horse traffic and persons leading horses on roads.

VENDOR AND PURCHASER.

Printed Conditions of Sale in Relation to Land. *100 Law Journal*, 592.

WILL.

Devisees and Legatees—Gift to "my grandnieces and grandnephews"—None at Testator's Death—Living Nieces and Nephews—Words in Will bearing Primary Meaning—Extrinsic Evidence as to Testator's Meaning or Intention Inadmissible—Lapse of Bequest—Evidence—Extrinsic Evidence of Testator's Meaning and Intention—Surrounding Circumstances—Conditions in which Evidence of Surrounding Circumstances Admissible. The intention of the testator is to be collected from a consideration of the whole will, with any evidence properly admissible. The Court, in construing a will, is bound, in the first instance, to read the will, giving the words used their primary and proper meaning. The Court is then entitled to look at the surrounding circumstances. If the surrounding circumstances are such that the words of the will are not apt to apply to any of the circumstances, then extrinsic evidence of the testator's intention may be admitted. Surrounding circumstances would include the testator's domestic or marital position, and, where a testator has made a bequest to grandnieces and grandnephews, the fact that he had nieces and nephews who could be expected to have children, and the fact that, at the time of making the will, the testator had no grandnieces or grandnephews, but that he might well have some before he died. Surrounding circumstances would not include, at least when considering the primary meaning of the will, evidence of expressions of intention on the part of the testator *dehors* the will. (*In re Hodgson, Nowell* v. *Flannery*, [1936] Ch. 203, followed.) (*Re Birkin, Heald* v. *Millership*, [1949] 1 All E.R. 1045, and *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A.C. 529, referred to.) The testator, by his will, after making a number of specific bequests, gave the residue of his property in trust to pay his debts and funeral and testamentary expenses "and to pay and divide the balance amongst my grandnieces and grandnephews and if more than one in equal shares." At the date of his death, the testator had no grandnieces or grandnephews. He had twenty-two nieces and nephews, the oldest of whom was twenty-three years of age. At the time of the execution of the will, the testator was fifty years of age, with life expectancy of twenty years. On originating summons to determine questions arising out of the will, *Held*, 1. That, as the gift on the face of it was clear and unambiguous, the natural meaning of the words of the will could not be ignored by looking outside it to extrinsic circumstances; and the words in their natural meaning were sensible with reference to surrounding circumstances, there being a probability that there would be grandnieces and grandnephews living at the testator's death. (*In re Ridge, Hancock* v. *Dutton*, (1933) 149 L.T. 266, and *In re Edwards, Jones* v. *Jones*, [1906] 1 Ch. 570, followed.) 2. That, accordingly, no extrinsic evidence was admissible to show that, by the terms used, the testator intended to mean his nieces or nephews or to show that, for him, the terms meant nieces and nephews; and thus to affect the unequivocal language used in the will. (*Hill and Simmons* v. *Crook and Crook*, (1873) L.R. 6 H.L. 265, *Dorin* v. *Dorin*, (1875) L.R. 7 H.L. 568, *In re Pearce, Alliance Assurance Co., Ltd.* v. *Francis*, [1914] 1 Ch. 254, and *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A.C. 529, followed.) 3. That, there being no grandnieces and grandnephews alive at the date of the testator's death, there was a lapse and a consequent intestacy, with the result that the testator's mother was entitled to the balance of the estate by virtue of s. 6 (1) (*d*) of the Administration Amendment Act, 1944. *In re Hurring, Davidson and Another* v. *Hurring and Others*. (S.C. Dunedin. August 31, 1950. O'Leary, C.J.)

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

WORKERS' COMPENSATION.

Assessment—Reference to Medical Referee—Permanent Physical Non-Schedule Injury—Court finding Possibility that Medical Referee will estimate Injury at Not Less than Ten Per Cent. Total Incapacity—Court bound to refer Case to Medical Referee—Workers' Compensation Amendment Act, 1947, s. 41 (3). Where, on an application to have compensation in respect of a permanent physical non-Schedule injury assessed under s. 41 (3) of the Workers' Compensation Amendment Act, 1947, the Court finds a possibility that the medical referee will estimate the injury at not less than 10 per cent. of total incapacity, the Court is bound to refer the case to a medical referee (unless the parties themselves approve a medical practitioner for the purpose). (*Fenton* v. *Thomas Borthwick and Sons (Australasia), Ltd.*, [1950] N.Z.L.R. 224, referred to.) *Thurlow* v. *Union Steam Ship Co. of New Zealand, Ltd.* (Comp. Ct. Auckland. September 13, 1950. Ongley, J.)

Assessment—Worker under Twenty-one Years at Time of Accident—Farm-hand engaged on Seasonal Threshing Work—Temporary Total Incapacity—Permanent Partial Incapacity—Method of assessing Compensation—Reduction of Earning-power not confined to Particular Job on which Minor working at Time of Accident—Workers' Compensation Act, 1922, s. 9—Workers' Compensation Amendment Act, 1936, s. 8—Workers' Compensation Amendment Act, 1944, s. 69. In assessing compensation in respect of a minor under s. 9 of the Workers' Compensation Act, 1922 (as amended by s. 8 of the Workers' Compensation Amendment Act, 1936, and s. 69 of the Workers' Compensation Amendment Act, 1944), the Court has to find what the plaintiff would probably have been able to earn if he had been twenty-one years of age at the time of the accident and what he would probably be able to earn when he attains that age; and that method of assessment applies to the period of total incapacity and the consequent greater-loss period. The Court, in the case of a minor, is not bound to confine the reduction of earning-power to the particular job or class of job in which he was working at the time of the accident in order to ascertain what the minor will probably be able to earn when he attains twenty-one years. On January 11, 1947, the plaintiff, a farm-hand, started work as a threshing-mill hand for the defendant for whom he had worked in the previous season. He attained the age of eighteen years on January 21, 1947. He was earning seasonal pay at £10 15s. 6d. per week. Nine days later, his right wrist was caught between the belt and a pulley on the machine, and he alleged that he was totally incapacitated to January 30, 1949. He was permanently partially incapacitated as the result of the accident. Counsel agreed that the plaintiff's compensation was to be assessed under s. 9 of the Workers' Compensation Act, 1922 (as amended). It was not proved that, at twenty-one, the plaintiff will not be able to do the work of a threshing-mill hand, but he will be handicapped in that job because of the long hours. For ordinary farm work, he would have been able to earn £5 to £6 a week and keep, if he had been twenty-one at the time of the accident. *Held*, 1. That, under s. 9 of the Workers' Compensation Act, 1922 (as amended), the plaintiff should be treated as an adult farm-worker who had suffered a loss of earnings as such. (*Ball* v. *William Hunt and Sons, Ltd.*, (1912) 5 B.W.C.C. 459, and *Grace* v. *Auckland Gas Co., Ltd.*, (1913) 15 G.L.R. 442, referred to.) 2. *Dubitante*, That s. 7 of the Workers' Compensation Amendment Act, 1936, did not apply, as the Court had to find notional earnings at twenty-one; and, in relation to the defendant, the plaintiff had no actual earnings at twenty-one. 3. That, allowing for time off and holidays, the plaintiff's loss was £2 15s. per week for three months' seasonal work, and (putting his reduction of earning-power for general farm work at 33⅓ per cent.) £2 per week for eight months of the year, an average of £2 4s. 6d. a week; and his weekly compensation should be based on that amount, and assessed on the basis of his partial recovery at twenty-one. (*Marshall* v. *New Zealand Coal and Oil Co., Ltd.* (*No. 2*), [1920] N.Z.L.R. 644, applied.) *Quaere*, Whether s. 7 of the Workers' Compensation Amendment Act, 1936, applied; and whether or not the job on which the plaintiff was employed when hurt (the threshing-mill job) was the basis of the plaintiff's compensation. *Falvey* v. *Walsh*. (Comp. Ct. Blenheim. May 5, 1950. Ongley, J.)

CONSTITUTIONAL LAW.

AN EFFECTIVE SECOND CHAMBER.

A New Legislative Council for New Zealand.

By D. J. RIDDIFORD.

There is a large measure of agreement on both sides of the House of Representatives that some form of second chamber should be established in the place of the Legislative Council; but, when one is faced with the task of working out what that should be, there are perplexities enough to daunt the boldest. Sir John Marriott, in the conclusion to his standard work *Second Chambers*, says:

> Experience, no less than philosophy, has declared unmistakably in favour of the bicameral system. But to devise a good second chamber; to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform—this is a task which has tried the ingenuity of constitution-makers from time immemorial.

Lord Birkenhead in a speech in the House of Lords on House of Lords reform pithily stated the difficulty:

> The matter is extremely simple, so long as you confine yourself to instructive and pleasant generalities . . . It is perfectly easy to utter generalities which, because they are generalities, will command general assent, sometimes even enthusiastic general assent. But this question is not going to be solved by generalities but by a plan, by a scheme; and although I am well aware that detailed objections can be taken to every one of the proposals which I put forward, and although I am not even myself wedded to them and have put them forward as being rebuttable by argument . . . I do at least put them forward as a basis of discussion.

It is therefore advisedly that I approach this subject with caution, and I put forward certain proposals, in Lord Birkenhead's words, purely as a basis of discussion and as "being rebuttable by argument." The task is worth the toil, since I believe that almost any form of effective second chamber, provided it does not defeat the first end of government, which is to govern, is better than a unicameral system.

I. SIR FRANCIS BELL'S ACT.

In getting away from generalities to the discussion of an actual scheme, the proper starting-point is the Legislative Council Act, 1914, commonly called Sir Francis Bell's Act, which provides for the election of members of the Legislative Council, and requires only a Proclamation to bring it into operation. The original date for it to come into operation was January 1, 1916, which was postponed on account of the 1914-1918 war. The Legislative Council Amendment Act, 1918, provided for its commencement on a date to be appointed by Proclamation. Such a Proclamation was issued and published in the *Gazette* on January 8, 1920, but was cancelled by the Legislative Council Amendment Act, 1920, which provides that the date for the commencement of the Act is to be appointed by a further Proclamation. The further Proclamation has never been issued, and there the matter rests.

In Bell's Act, the members would be elected by proportional representation from four electoral divisions into which the North and South Islands would be divided, the total number of members being twenty-four at the first election and forty at subsequent elections. The term of office was to be until the dissolution or expiry of Parliament next to take place five years from the date of election. The effect would be to have the term of office of the Legislative Council members overlapping that of those of the House of Representatives. The Legislative Council would have power to reject all Bills except those declared by the Speaker of the Lower House to be Money Bills; the latter it would have to pass without amendment within one month of their being sent up. If the Legislative Council failed to pass a public Bill, or passed it with amendments to which the House failed to agree, the Governor-General would have power to convene a sitting of both Houses of Parliament, and, if the Bill should not be affirmed by a majority of those then sitting, the Governor-General would have power to dissolve both Houses simultaneously.

Sir Francis Bell's Act cannot be lightly dismissed. It is on the statute-book, and it undoubtedly received the careful consideration, aided by the mature wisdom, of one who was not only a great lawyer but also a true statesman. It takes the discussion several stages further, and the subject can be taken up where this Act leaves it. The Reform Government had every opportunity of observing the advantages and the defects of the State and Commonwealth Parliaments of Australia, and no doubt it noted them. The Federal Constitution of Australia came into being in 1900, after ten years of inter-Parliamentary conventions, Prime Ministers' conferences, and referenda. The need for a second chamber as the guardian of State rights was always recognized; as with the American Senate, equal representation is given to all States in the Australian Senate. The Australian Senate undoubtedly fulfils the main function of a second chamber as a bulwark against revolution and a check on the despotic tendencies of the Lower House. It has power to reject or amend any Bill, except a Money Bill where it is limited to a rejection without amendment, but it may:

> at any stage return to the House of Representatives any proposed law which the Senate may not amend; requesting by message the omission or amendment of any items or provisions therein.

In fact, it can completely thwart the Lower House. The mode of election is as democratic as it is for the Lower House; it can and does maintain that it is as representative of the people as is the other place. It frequently happens that a stalemate results, which can be resolved only by the risky procedure of a double dissolution. The voting for the Senate is by a *scrutin de liste*, each voter having as many votes as there are places to be filled, which, as the voting is over a whole State, gives an enormous advantage to well-organized party machines. The result is that the types of politician that enter the Senate are the same as those entering the House of Representatives, but usually slightly older, and grateful, therefore, to be relieved of the cares of nursing a constituency. The Senators

are elected for six years, half retiring every three, so that the party defeated at a General Election is frequently able to frustrate the legislative programme of the victorious party. It may well be that to-day we have too much legislation, *ut olim flagitiis sic nunc legibus laboramus*, and the Australian Constitution certainly dams the torrent of laws. In practice, however, this exasperating method of counteracting the swing of one pendulum by setting another in motion at a different moment tends to bring all government into contempt. As Lord Bryce put it:

> All those checks and balances in the English and American constitutions by which the censors of democracy used to set such store have been dwindled down to one only—*viz.*, the existence of two chambers.

Sir Francis Bell's Act would not, in my submission, overcome the defect that the members of the Upper House would be of exactly the same type as those of the Lower. The Act relies only on proportional representation for its differentiating basis, but, in electorates too large for individual personalities to count, electors would, it seems to me, vote by the ticket. Individuals not belonging to the two main Parties could get in only if supported by considerable publicity. While Sir Francis Bell's Act would produce a better Upper House than would the Commonwealth Senate, the two bodies would differ in degree, but not in kind.

II. Indirect Election.

Another method of selection, that of indirect election, deserves serious consideration, since in a number of countries it has been found to be a satisfactory way of getting a differentiating basis. It was the method of election for the French Senate in the Third Republic, which lasted from 1875 until 1940. Election to the Senate was vested in an electoral college in each Department and Colony, and the college was composed of (i) Deputies for the Department; (ii) General Councillors of the Department; (iii) the Arrondissement Councillors; and (iv) delegates elected from among the voters of the Commune by each municipal council. Besides the power of rejecting or amending all legislation, it had the added power of being able to prevent a dissolution of the Chamber of Deputies before the expiration of its term, because only on its advice could the President dissolve the Chamber of Deputies. This power was largely responsible for the instability of French Ministries, since in such a contingency as would elsewhere force the Executive to appeal, or threaten to appeal, to the electorate for a fresh mandate, the Senate could refuse its consent and bring about the downfall of the Ministry. But, as a bulwark against revolution and as a revising chamber, not only in the details of legislation but also in the underlying principles, it was an effective second chamber, and was a more dignified assembly than was the Chamber of Deputies. Sir John Marriott in the last edition (1927) of his book wrote:

> On the whole, however, it is an effective second chamber, and one of the latest commentators on the French Constitution, while admitting that the resistance of the Senate to certain factory reforms has aroused the rancour of the Socialist Party, declares that there is no longer any real demand for its suppression.

The war brought the Third Republic into disrepute, and in the new Constitution the powers of the Senate have been reduced. The First National Constituent Assembly provided for no Senate in the Constitution of April 15, 1946; it provided only for a Council of the French Union and an Economic Council. The First Constitution was submitted to the people by a referendum, and was rejected, the only Constitution ever to be rejected by the French people. The Second National Constituent Assembly was then convened, and the Constitution of September 28, 1946, was drawn up and approved by the people. The present Constitution retains the Economic Council and the Council of the Union, but in addition it provides for the Council of the Republic, or second chamber. The Council of the Republic is elected indirectly, but, while possessing freedom to debate on and amend measures passed by the National Assembly, the powers of the Council are subordinate to the National Assembly. Unfortunately, I have no fuller information about the new French second chamber.

It would clearly be a mistake to disregard the opinions of competent judges on the Second Chamber of the Third Republic, who for the most part considered it satisfactory, simply because now, in the aftermath of defeat and national humiliation, a new chamber has been set up. The principal defect, however, of indirect election is that it is apt to infect local bodies with the virus of party politics. Lord Bryce's comment, in *2 Modern Democracies*, 443, is of interest:

> Election by colleges drawn from local authorities has given to France a capable Senate, but it has brought party politics into the popular elections of these authorities themselves. Candidates seeking to enter a Departmental Council announce themselves as party candidates, and party organizations work for them, so each local body comes to be divided on partisan lines prescribed by national issues which have little or nothing to do with its proper functions. As in the United States the choice of Federal Senators by State Legislatures helped to stamp upon those bodies almost from the first a partisan character, so the Departmental Councils in France are now more affected by national party influences than they might have been if a share in electing the Senate had not been assigned to them.

This defect, perhaps inseparable from indirect election, does not finally condemn such a method for New Zealand. It is true that the method is treated with scorn by some English writers, but chiefly because of the invidious contrast between hereditary peers and the local worthies of sufficient seniority on a Council to obtain the reward of a seat in a second chamber. Lord Birkenhead is particularly scathing:

> Then it is sometimes said that it might be possible that a method of indirect election should be adopted, that your Lordships, in other words, instead of sitting here because you are the sons of your fathers, would be sitting here because you had attracted the favourable attention of some county council.

No one in New Zealand would consider it a humiliation to be chosen in such a manner, but there would, I think, be a tendency to elect safe and perhaps unexciting councillors to the New Zealand Senate. On the other hand, the abstractions by which national politics are confused, and by which so much heat is engendered without corresponding light, would be submitted to practical examination in the pedestrian affairs of local bodies, and the training would be of value. In New Zealand, many people have deplored the disappearance of the old Provincial Councils; the division of the country into Provinces was not artificial; it was natural, due to the more or less simultaneous but separate colonization of the different localities, together with the difficulty of communications in an elongated and mountainous country. The effect of election by local bodies would be for the elected members to regard themselves as ambassadors from their locality, responsible, not to an amorphous entity such as an electorate, but to a small and critical

City or Borough Council. The regional spirit, natural to the country, would find a healthy expression, and would vary the uniformity all too evident to-day throughout New Zealand; but it would be unlikely to be carried too far. It is not only to France we should look, for Sweden has a second chamber elected indirectly, which meets with general satisfaction.

III. Occupational Representation.

I have left to the last the consideration of a subject which requires careful thought and examination. It has been a question for some time past whether Parliament is competent to deal with the complex problems of the modern state. This question has arisen in an acute form in England, because to-day, in a highly industrialized society, Parliament is expected to solve economic problems which were formerly held to be outside the sphere of politics. In the time of Gladstone and Disraeli, Parliament left trade and commerce to the manufacturers, and concerned itself with such matters as the Disestablishment of the Irish Church, or the question of who was to have the vote, but economics were seldom discussed. To-day, on the other hand, economics are the staple matter of politics, but very few of the Members have the necessary qualifications to handle the various economic problems of the day. The Labour members were wont to rely on nostrums provided by theorists outside Parliament, but, now they are in power, the insufficiency of slogans to cure economic ills is becoming all too obvious, while on the Conservative benches the approach is apt to be too academic or is based on experience derived exclusively from a single field of business. It is not only in economics that the insufficiently representative character of Parliament, together with its technical incompetence, is shown. To-day, the real forces in the nation's life are under-represented. The result is that the debates in Parliament become meaningless, while the real issues are decided by experts outside. To-day, it is said, England has become a managerial state, its destiny being controlled by managers. The danger is obvious, since, where public questions are not discussed in open debate, public policy becomes the prey of sectional interests. Christopher Hollis in a recent book (*Can Parliament Survive?*) states that one solution of the problem is to have a second chamber with a vocational basis of selection. He writes:

> There is no reason why the holders of certain distinguished posts—Bishops and representatives of all religious bodies, Lord Mayors perhaps, Vice-Chancellors or representatives of the Universities, and so on should not be *ex officio* members. Yet, whatever elements of this sort it may be found desirable to include in the new House of Lords, the main body of the membership must certainly be nominated, and it is desirable that the nomination should not be by the Prime Minister but by some panel of Members of the House of Commons, drawn in proportion to the Members in that House, or some similar body, with an undertaking that the nominees should be persons of distinction and that, so far as they had party affiliations, the purpose should be to preserve an approximate balance between the parties.

While the question of the competence of Parliament to deal with the problems of the day does not arise so acutely in New Zealand as in Britain, yet it is present, although in a somewhat different form. Let us take an average, and therefore a fictitious, Member of Parliament; he is hard-working, he has won the good opinion of his fellows, and he has achieved eminence in his trade (or Trade Union), profession, or calling. Knowing the needs and wishes of those he represents, he is fully qualified to perform most of the business of a Member. Fortunately, the internal economy of New Zealand is relatively simple; there are only a few problems which cannot be mastered by hard work and common sense, and the average M.P. is fully able to cope. But New Zealand, unfortunately, is not isolated economically from the rest of the world, its prosperity being dependent on the overseas prices of its raw materials. It is essential, therefore, that persons with special qualifications to advise on the current world economic trends should have seats in Parliament. To take the matter of the bulk purchase agreements affecting our meat, butter, and cheese: never in Parliament, so far as I am aware, has the question as a whole been discussed. How many Members of Parliament, for instance, knew that the germ of the idea was in the bilateral trade agreements which Dr. Schacht, the German Minister of Finance, concluded with the Balkan countries before the war? This is but one instance, but it shows, I submit, the value of having in Parliament persons with special qualifications, not only in economics, but also in other fields.

IV. Eire and Vocational Representation.

Eire is the first country, so far as I am aware, to have attempted to choose the members of its second chamber on a vocational basis. Its Senate (or Seanad) was designed originally to give protection to the southern Unionist minority, but, although this was its original purpose, expression was given to the idea of vocational representation, and, in spite of several amendments to the constitution of the Senate, the idea has lived on. The Seanad was first set up by the Irish Free State Constitution Act, 1922, which formed part of the treaty made with the Irish delegation, headed by Arthur Griffith and Michael Collins. On behalf of the British Delegation, the signatories were Lloyd George, Austen Chamberlain, Lord Birkenhead, Winston Churchill, L. Worthington-Evans, Hamar Greenwood, and Gordon Hewart. Article 30 is as follows:

> Seanad Eireann shall be composed of citizens who shall be proposed on the grounds that they have done honour to the nation by reason of useful public service, or that, because of special qualifications or attainments, they represent important aspects of the nation's life.

These words are the felicitous expression of the qualifications for members of a Utopian second chamber. There were to be sixty members, and the term was for twelve years, with a quarter elected every three years. Voting was to be by proportional representation, with the whole of the Free State as one electoral area. The panel for election was to consist of three times as many persons as those to be elected, two-thirds of whom were to be nominated by Dail Eireann, voting by proportional representation, and one-third by Seanad Eireann, voting by proportional representation. The method of proposal and selection for nomination was to be decided by the Dail and the Senate respectively, with special reference to the necessity for the representation of important interests and institutions in the country.

Apart from Money Bills, where the delaying power was limited to twenty-one days, the Senate could delay Bills for 270 days, but any Bill "passed or deemed to have been passed may be suspended for ninety days on the written demand of two-fifths of the members of the Dail Eireann or the majority of the Seanad Eireann," and such a Bill would then be submitted to a referendum. Only Money Bills and Bills declared by

both Houses to be necessary for public peace, health, or safety could not be suspended and then submitted to the people by a referendum. Amendments to the Constitution had to be affirmed by a majority of votes on the register and by two-thirds of the votes recorded.

Cosgrave, in the early days of the Free State, honoured the spirit of the article in the Constitution which described the type of citizens who were to compose the Senate, and that body, so my American authority reads, commanded respect, " though the obtaining of a conservative personnel was," so my authority adds, " the heart of the matter."

In 1928, the Dail and the Seanad secured almost complete control over the filling of vacancies by introducing constitutional amendments by which each nominated one-half of the candidates, which equalled twice the number of vacancies. Presumably the Dail and Seanad candidates received the support of the party machines, so their election was a foregone conclusion. In 1927, de Valera's Fianna Fail party had decided to take seats in the Dail, and henceforth both parties worked hard, and succeeded, in getting into the Seanad the full quota of candidates allowed to each by proportional representation. In 1932, de Valera replaced Cosgrave, and a long-drawn-out contest with the Seanad followed, ending in its abolition in May, 1936, presumably constitutionally, although my American authority does not say so.

I do not wish at this point to weary the reader by pointing a moral, but it must be insisted that the mere fact that a dispute occurs between an Upper and a Lower House does not necessarily condemn a Constitution; such disputes are inevitable where an effective second chamber exists, and the country may thereby be saved from evils which are worse. The original Seanad existed for fourteen years, and for four years resisted de Valera, a man who in earlier days was not regarded as a highly constitutional person. It might well be claimed that it did a great service to Ireland.

For two years there was no Seanad, but de Valera appointed a Commission to consider a new Seanad shortly after the old one went out. Two years later, it produced an interesting and highly original scheme, which, in the form in which it was finally adopted, became the Constitution of 1937. Space will allow only a brief account of its provisions. The new Seanad had sixty members, eleven nominated by An Taoiseach (the Prime Minister), three to be elected by the National University, and three by the University of Dublin. The remaining forty-three were to be elected from panels of candidates representing certain group interests. After nomination by the panels, the candidates were to be elected by electoral colleges consisting of the Dail and of other electors chosen by County Councils and County-borough Councils. The following were the electoral panels: Culture and Educational; Agricultural; Labour; Industrial and Commercial; and Administrative.

The Seanad may delay a Bill for ninety days, and a Money Bill for twenty-one days only. Its power to call for a referendum is restricted; it may do so if a majority of the Senate and one-third of the members of the Dail support the action, and the President must then decide, in consultation with the Council of State, whether the Bill contains " a proposal of such national importance that the will of the people ought to be ascertained."

The present Senate is obviously weak, and its power to call for a referendum has gone; but, if this were restored, it could again be effective. Of interest to us, however, is the scheme for occupational representation, which should be studied carefully.

V. Suggestions for A New Upper House.

This is a brief conclusion, and, owing to the difficulty of getting the most up-to-date information, in places it is a superficial survey of possible second chambers for New Zealand; but I shall end with a few suggestions. It seems to me that a modern second chamber, in a country where the Cabinet and not the presidential system prevails, should have a delaying power only; in New Zealand, it should be at least one year, except for Money Bills, where the power to delay should be, say, twenty-eight days. It should have an absolute power to veto all Bills to prolong the life of the Lower House. There should be a written Constitution, which could be amended only after a referendum, with special rules as to the type of majority in such cases. The written Constitution should provide for the manner of determining electoral boundaries and the mode of election generally. The Upper House should have power in certain cases to call for a referendum.

Undoubtedly appointment to the Upper House, except perhaps to a very limited extent, should be taken out of the hands of the Prime Minister, and its numbers should be limited by the Constitution. While fully realizing the difficulties, I would suggest that the whole question of vocational or occupational representation should be fully explored. In New Zealand, it might well be found that, with our homogeneous population, and without the deep-seated enmities that exist elsewhere, an assembly might be brought into existence capable of rising superior to the party spirit. Anyway, it would be worth trying.

If no feasible plan can be found, I regard staggered and indirect election as the best alternative. A strong Royal Commission is required to work out a solution. It will not be easy; constitution-making never is; but an effective second chamber is an essential safeguard of democracy.

DOMINION LEGAL CONFERENCE, 1951.

Plans for the Legal Conference to be held next year in Dunedin on March 28, 29, and 30 are well advanced, and the Otago District Law Society hopes that there will be many visitors to Dunedin at that time.

A circular is at present being sent out to all practitioners, calling for a reply from all who intend to be present at the Conference. It will be of the greatest assistance to the Joint Secretaries if this reply, for which a form is attached to the circular, is returned without any delay. Easter is particularly early next year, and it is of more importance than usual that all the information required should be received early in December.

Please give the matter thought now.

THE JOINT FAMILY HOMES ACT, 1950.

By E. C. ADAMS, LL.M.

Few statutes passed by the New Zealand Parliament in recent years have created more interest among the members of the legal profession and the general public—especially married people—than the Joint Family Homes Act, 1950. Now the new Act is modelled on Part I of the Family Protection Act, 1908 (formerly the Family Protection Act, 1895), of which during the half century of its existence probably not more than a score of settlors have availed themselves, despite the fact that the family home was protected from creditors and was totally exempt from stamp duty and death duty.

Why is there this difference in the attitude of the public towards these two Acts? The explanation appears to be this: the Family Protection Act tied up the family home until the settlor died and until all his children had attained the age of twenty-one years or died under that age. Under the Joint Family Homes Act, 1950, on the contrary, the family home is not (except in a very modified manner) tied up at all.

A home, therefore, which is settled under the new Act is not a real family home to the same extent as one which is settled under the Family Protection Act: under the new Act, there is no protection for the children of the marriage, and during the subsistence of the marriage both spouses may concur in effecting a valid alienation of, or other dealing with, the home, and, on the death of one, the surviving spouse has full rights of disposition and becomes the sole beneficial owner of the home. What then is the great advantage in settling a home under the Joint Family Homes Act, 1950? The answer is that, to the extent of £2,000, the family home is protected from creditors, the settlement of the land as a family home is exempt from gift duty, and, on the death of one spouse, the survivor is exempt from death duty except to the extent that the value of the succession exceeds the sum of £2,000. In an age in which taxes have become terrific, these indeed are liberal exemptions from taxation. Section 16 of the Joint Family Homes Act, 1950, for example, reads as follows:

> 16. Where any joint tenant of any joint family home dies during the lifetime of the other joint tenant—
>
> (*a*) The succession within the meaning of the Death Duties Act, 1921, of the surviving joint tenant in the estate of the deceased joint tenant shall not include the interest to which the surviving joint tenant is entitled as successor to the joint family home except to the extent that the value of that interest exceeds two thousand pounds; and
>
> (*b*) No estate or succession duty shall be payable in that estate in respect of that interest to the extent that it is excluded from that succession.

Procedure to settle a home under the new Act follows very much the procedure under Part I of the Family Protection Act, 1908. As the settled home is protected from creditors to the extent of £2,000, creditors may object to an application by lodging a caveat. The form of application remains to be prescribed by Regulations, but it may be reasonably anticipated that these Regulations will be modelled on those made under the Family Protection Act, 1895: see *1896 New Zealand Gazette*, 717.

Under Part I of the Family Protection Act, 1908, the value of the land which can be settled is limited to £1,500: if the value of the land with all improvements thereon exceeds £1,500, it cannot be settled under that Act. To-day, as most homes in New Zealand are worth much more than £1,500, that Act has become almost a dead letter. The new Act sets a much more up-to-date limit of £4,000. Section 3 provides that a husband and wife or either of them may settle land, the value of which does not exceed £4,000, as a joint family home, if they reside and have their home in a dwellinghouse on the land, if the dwellinghouse and land are used exclusively for residential purposes and are not used by any person for business purposes or occupied by any person who pays rent to the husband or wife, and if the settlement will not defeat creditors when it is made. The settlement must be made by the registered proprietor or proprietors—that is to say, the estate or interest settled must be owned by one of the spouses or by both. "Land" is widely defined as including all estates and interests, whether freehold or chattel, in real property. Thus, a leasehold estate could be settled, but, as "registered proprietor" means the person registered as proprietor of land under the Land Transfer Act, 1915, or the person entitled to the land under any instrument registered under the Deeds Registration Act, 1908, a family home held as a mining privilege under the Mining Act, 1926, could not be settled under the Joint Family Homes Act, 1950.

To the real-property lawyer, the most important and interesting section is s. 7, which sets out the effect of settling land as a joint family home. This section provides that, on the registration of a joint family home certificate, the land shall vest in the husband and wife as legal and beneficial owners *as joint tenants*, subject, however, to all mortgages, charges, incumbrances, estates, and interests then affecting the land; and, if the husband and wife are not already registered proprietors of the land as joint tenants, the land shall thereupon vest in them as joint tenants without transfer or conveyance, but subject to all mortgages, charges, incumbrances, estates, and interests then affecting it.

Section 7 further provides that while the certificate as to registration as a family home remains uncancelled, the husband and wife shall have equal rights to the ownership and possession of the land, and the land shall devolve on the death of one of them to the survivor.

As to the powers of disposition of, and dealing with, a joint family home, the same section further provides that the husband *and* wife, or the survivor of them, may at any time sell, mortgage, lease, or otherwise dispose of the land, and (subject to the qualifications specified) the land, whilst it remains a joint family home, shall be protected against creditors to the extent of £2,000. *Unlike the position under an ordinary joint tenancy, neither has power to sell or deal with his or her undivided interest while both are living.*

What the New Zealand Legislature has done, therefore, is to create in the realm of property law another new species of joint tenancy. I say *another* advisedly, because joint proprietors under the Land Transfer Act, 1915, registered with "no survivorship," cannot

deal with their interests separately, and even a transmission by survivorship on the death of one of the joint proprietors so registered requires the consent of the Supreme Court: *In re Denniston and Hudson*, [1940] N.Z.L.R. 255. But these special "no survivorship" provisions of the Land Transfer Act, 1915, are in protection of trusts, and the joint proprietors are trustees, whereas under the Joint Family Homes Act, 1950, the spouses are the beneficial owners, and at common law and in equity one beneficial joint owner can alienate or otherwise deal with his interest in his lifetime: *Hagan* v. *Public Trustee*, [1934] G.L.R. 89. It is in this respect, therefore, that a substantive rule of law has been modified; but the other characteristic of a joint tenancy—the inability of a joint tenant to will the property and the vesting of the property in the survivor (the *jus accrescendi*)—as previously noted, is expressly preserved by the statute.

Provisions for the cancellation of a joint family home are contained in s. 8. A joint family home may be cancelled in any of the following circumstances:

(i) Where the husband and wife or the survivor of them applies for a cancellation.

(ii) Where they have both died or ceased to be the owners of the land, or where the survivor ceases to be owner.

(iii) Where the Court so orders under s. 11 (which makes provision in the event of divorce or separation), or under s. 14 (which deals with the rights of creditors where the value of the joint family home exceeds £2,000).

(iv) Where the land to which the certificate relates has ceased to be used exclusively for residential purposes, and the husband and wife have both ceased to reside and have their home in a dwellinghouse or in any part of a dwellinghouse on the land, and it is unlikely that they will again take up residence and make their home in a dwellinghouse or in any part of a dwellinghouse on the land, or that either of them will do so.

(v) Where, in the opinion of the District Land Registrar or Registrar of Deeds, the certificate should not have been issued.

Against the decision of the Registrar to cancel under (iv) or (v) above there is a right of appeal to the Magistrates' Court.

Section 9 provides that the cancellation of a joint family home certificate terminates the settlement in respect of that land, and that, where the husband and wife are both living and are joint owners of the land when the certificate is cancelled, the land shall revest in the settlor or settlors, subject, however, to all existing interests in the land, such as mortgages, charges, liens, and incumbrances.

Sections 12 and 13 (following ss. 18 and 19 of the Family Protection Act, 1908) provide that a joint family home may be taken under any Act authorizing the compulsory taking of land—*e.g.*, the Public Works Act, 1928—and, further, that a joint family home is not relieved from liability in respect of fencing, drainage, water supply, electricity, rates, taxes, and liens under the Wages Protection and Contractors' Liens Act, 1939.

Part I of the Family Protection Act, 1908, is not repealed; but, in practice, it has become a dead letter, for the reasons given in the article in (1949) NEW ZEALAND LAW JOURNAL, 266.

The Learned Profession of the Law

The justification of a profession lies in its successful balancing of the claims of the client "to get his money's worth" with the claims of the profession to maintain its standards and with the claims of the public, which are sometimes forgotten in the contest. Such things are never ideally balanced in human affairs, and a powerful profession, just as much as a powerful craft or guild or union, is constantly exposed to the temptation of preferring its own standards and principles for not much better reason than that they are its own. Of course, our profession has known that temptation and I have no doubt that sometimes it has succumbed to it. But I think one or two things are worth saying as a pendent to that. Firstly, this is not a period, so far as my experience goes, in which lawyers are indifferent to the social obligations of their profession. Rather the reverse: there is more danger that some of the vital elements of professional life may be lost through a failure to appreciate in time what are the conditions upon which a profession exists. Secondly, the lawyer's calling has drifted a long way from the calling of the doctor or the priest. Looking back over a long period one may regret that the lawyer, on the whole, has been such a successful man. None the less, these three callings are still, pre-eminently, the "confessor" callings. Their work lies among the troubles, the estrangements, and the disasters of men and women like ourselves, and, all professional successes apart, the lawyer's skill, just as much as that of the others, has as its purpose to bring aid and comfort to those in distress. Such callings are essentially those which need both the restraint and the support of professional standards. (The Rt. Hon. Lord Radcliffe, "Some Reflections on Law and Lawyers," (1950) *10 Cambridge Law Journal*, 361, 373.)

Are Judges Human?

That Judges are human and share the virtues and weaknesses of mortals generally—that fact you may think so obvious as scarcely to deserve discussion. Why then do I discuss it? Because, among American lawyers, until fairly recently, that fact was largely taboo. To mention it, except in an aside and as a joke, even in gatherings of lawyers, was considered bad taste, to say the least. That taboo dominated most legal education during the nineteenth century and the early part of the twentieth. Above all, it controlled what lawyers said to non-lawyers in publications and in public addresses. The Bar spoke to the laity as if the human characteristics of Judges had little or no practical consequences. And when, not very long ago, some few of us ventured to violate that taboo, a considerable part of the legal profession called us subversive, enemies of good government, disturbers of "law and order."

No doubt, some of the lawyers who to-day support that taboo do so because, somehow, either they believe, more or less, that Judges are superhuman or that the human-ness of Judges has virtually no effect on how Courts decide cases. Such self-deceivers are not hypocrites but unquestionably sincere men. They come within my category of the second class of wizards. The same cannot be said, however, of some of those lawyers who deplore the public revelation that Judges are not demi-gods or, at any rate, do not serve as almost flawless conduits of the Divine. The deplorers, fully cognizant of the realities of Court-house government, want to conceal it from the public. Their attitude is basically anti-democratic. (Judge Jerome Frank: *Courts on Trial*, 1949.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Scots Viewpoint.—The prospect of our having a visit next year from a sitting English Judge recalls the fact that some seventeen years ago that eminent Scots jurist Lord Salvesen, a member of the Privy Council, spent some months looking about New Zealand, He expressed himself then as somewhat alarmed at our habit of granting divorces after three years' separation, which he regarded as an over-extension of marital relief and as practically amounting to divorces by consent. Our rate at that time was equal to that of Scotland, with a population over three times as great as our own ; and this was so although, for four hundred years, every poor person there was entitled to obtain the services of a solicitor and barrister without charge. One wonders what comment he would have made had he foreseen the gargantuan outpourings of our law-making machine. "Unfortunately," he observed in an article in the *Juridical Review*, "our Parliament never seems to have any time to deal with questions of social reform of real importance to the law and to society. Only those things that concern a great number of voters in their constituencies appear to interest our Scottish members."

Knight Bruce, L.J.—Among the many law students who have recently requisitioned the quietest cubicles and the best seats in our metropolitan law libraries, is there one who can boast the memory of Knight Bruce, one of the great Victorian Lords Justices of the Court of Chancery ? Legend has it that as a mere child of seven he had the ability to continue any passage in Shakespeare of which he was given the first words. This retentive memory stood him in good stead at the Bar, where it was said he had the ability to argue cases on appeal, involving complicated dates and figures, merely on his recollection of the facts as mastered by him on the original hearing, sometimes after as long an interval as two years. He was even more renowned, however, for his epigrammatic style and his constant flow of humour. In *Walker* v. *Armstrong*, (1856) 8 De G.M. & G. 531, the plaintiff, who was a Naval officer, prayed the Court to reform a settlement into which he had entered upon the basis of exceedingly bad legal advice. Knight Bruce's judgment commences as follows :

> This litigation owes its origin to the manner in which a series of professional gentlemen in the North of England permitted themselves to transact, or in more accurate phrase to entangle and perplex, some legal business entrusted to their care. These licensed pilots to steer a post-captain through certain not very narrow straits of the law, and with abundance of sea-room ran him aground on every shoal they could make.

Manifestations of Marriage.—At the Leeds Assizes recently, a frustrated wife claimed damages against defendants (who had negligently injured her husband) in respect of the interference with her right to her husband's consortium. One of the results of his physical incapacity caused by the negligence was that he became incapable of sexual intercourse, and it was claimed that, in consequence, she had suffered in health. It was held by Croom-Johnson, J., that the defendants were under no duty to take care in relation to the plaintiff, and were therefore not liable to her in respect of their negligence. This ground for their decision is more readily understandable than the Court's view that, on the analogy of the law relating to the enticement of a spouse, the defendants were not liable for the plaintiff's loss of consortium because they were unaware that her husband was married, their interference with her rights in relation to her husband being innocent and unintentional, and there being no deliberate act on their part which was intended to interfere with such rights : *Best* v. *Samuel Fox and Co., Ltd.*, [1950] 2 All E.R. 798. Wives who wish to ensure preservation of possible claims for damages for loss of consortium, using that term with no narrow puritanical refinement, would do well to insist upon some outward manifestation on the part of husbands of their married state. The wearing of a ring, unless through the nose, would create the same difficulties of visual recording as does the Unidentified Motorists Agreement (between the Government and the tariff companies), which insists, as a condition precedent to financial recovery, that the injured pedestrian in his last flash of consciousness must note that the non-stop vehicle has a current number-plate. It can scarcely be expected that the haggard look, shabby appearance, or irregular gait are likely to be regarded as positive proof of the married state of those who demonstrate them. Nevertheless, if the Courts can find a formula for the recognition of insanity, it should not hesitate to lay down what amounts, or ought to amount, to matrimonial *scienter* on the part of tortfeasors.

Indecent Publications.—

Inspector (to witness) : You have given evidence that you see nothing immoral in these pictures of nude women, but would you be prepared to show them to your lady friends ?

Witness (indignantly) : I have no lady friends. I am a married man !

Pro bono publico.—

Counsel : When counsel for the defendant says that the plaintiff presented his case with obvious insincerity, I can only assume he is seeking to appeal to a wider audience than this Court, and I can only reply that never has a case been brought that has shown such a grave and flagrant breach of natural justice.

Callan, J. : I should be glad if you would let me know when you finish replying for this wider audience. I can then commence to take notes.

Here and There.—The Attorney-General has recently stated in the House of Commons that the only fees paid to the Law Officers in connection with the proceedings against war criminals in which they had been concerned arose out of the case before the International Tribunal of Nuremberg. The fees amounted to £52,396.

Replying to the toast of "The Guests" at the Annual Dinner of the Hardwicke Society, held in the Middle Temple Hall in July, Lord Reading quoted a tag from Roman Law—*In medio tutissimus ibis*—as signifying : "You will be quite all right if you stick to the Middle Temple."

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

(*Concluded from p. 321.*)

Oil Fuel Committees.—The following letter was received from the Commissioner of Transport:

"I should like to express my thanks to the officials of your organization who acted as Certifying Officers during the period of petrol rationing, and I should be grateful if you would mention my appreciation to all those concerned.

"Their co-operation was unstintingly given and played a considerable part in helping to make the rationing procedure operate smoothly with the minimum inconvenience to applicants for petrol.

"Their duties were not always easy or pleasant, and the abolition of petrol rationing is a relief to the whole country.

"May I also express my appreciation of your own assistance in this matter."

It was resolved to forward a letter of appreciation to Mr. S. J. Castle for his services in dealing with the oil-fuel rationing arrangements.

Land Transfer Amendment Bill.—The President reported that he had, with Mr. Buxton, made representations to the Statutes Revision Committee opposing the provision of cl. 2 for the constitution of new Land Registration Districts by means of Order in Council, reaffirming the views expressed by the Society on this matter from time to time. A protest was also made against cl. 6 amending s. 154 of the Land Transfer Act, 1915, which enabled a caveat to lapse in fourteen days where the caveat had been lodged before on behalf of a beneficiary. It was asked that the period be extended to allow one month, or preferably three months, if possible, for this class of caveat.

Tenancy Amendment Bill: Capital Punishment Bill: Property Amendment Bill.—It was considered that these Bills did not call for any action.

Infants Amendment Bill.—The grounds on which representations were made to the Statutes Revision Committee were based on the following report, which was adopted by the Standing Committee, and representations were made to the Statutes Revision Committee:

"1. The proviso to para. (*b*) of the proposed s. 21 (2) as set out in s. 2 of the Bill: In my view this proviso has the effect of putting on inquiry every adopted child who is contemplating marriage; and the vast majority of adopting parents like to feel that the adopted child has severed once and for all every association with the natural parent or parents. The proposed proviso, in my view, throws on the adopted child contemplating marriage the obligation to make sure that the proposed spouse is not a natural relative within the prohibited degrees of consanguinity; and, if perchance it later turns out that the spouse is within those degrees, the marriage may turn out to be void. I fully appreciate and agree with the principle of public policy which prohibits marriage within the specified degrees of consanguinity, but, in my view, the possibility of any case occurring of an adopted child wanting to marry a natural relative within the prohibited degrees of consanguinity is in fact so remote as to be negligible. And that evil is far less than the evil which results from requiring an adopted child to make such inquiries as to his or her origin and natural relatives before embarking upon marriage. Many—if not the majority of—adoptions are of illegitimates, and are undertaken to provide the child with a name, a home, and proper family life. The adopting parents in such cases prefer that all associations with the natural parents are terminated by the adoption order, and do all in their power to render it unnecessary for the child to inquire as to its natural parents. That practice seems to be in the interests of the natural parents, who have to face only once and for all time the parting with their children.

"Under the original s. 21 (before it was amended by s. 27 of the Statutes Amendment Act, 1949), the particular point is not expressly mentioned, and the general provision that the child for all purposes, civil and criminal, be deemed in law to be the child born in lawful wedlock of the adopting parent did not render it necessary in law for the adopted child to inquire as to its origin and natural relatives.

"In my opinion, that original provision was preferable to the position which arises under the proviso introduced in 1949 and continued in the new Bill.

"Admittedly, under the original Act, an adopted child had the right to take property as heir or next-of-kin of its natural parents; but only in very exceptional cases would that right arise; and that provision of the Act did not require almost *every* adopted child to inquire as to its origin, as this new proviso does.

"2. The provisions of para. (*e*) of the proposed s. 21 (2): To ascertain its nationality or citizenship, an adopted child would, under the provisions of this paragraph, require to ascertain the identity, citizenship, and nationality of its natural parents.

"In my view, that is objectionable, for the reasons already given in this memorandum.

"But I am also of opinion that it is inadvisable for an adopted child—who for almost all other purposes is deemed to be the child of the adopting parent as if born to that parent in lawful wedlock—to have a nationality or citizenship different from that of its adoptive parent.

"I submit that the whole purpose of the law relating to adoptions is the strengthening of the bonds of family life; and it provides a convenient method of providing a name and a family for a child who would otherwise go through life with the stigma of illegitimacy. Any provision of the law which tends to draw any distinction between the adopted children and the natural children of the same parents is to be deprecated."

Property Law Amendment No. 2.—Mr. Spratt reported that this Bill had been submitted by the Hon. H. G. R. Mason for the Society's views. The Conveyancing Committee had very carefully perused the clauses, and he had, with Mr. Buxton and Professor Williams, appeared that morning before the Statutes Revision Committee and made certain suggestions. It was thought, however, that the Bill was a good one.

Magistrates' Courts Bill.—The President reported that he was present when this Bill was before the Statutes Revision Committee, and had expressed the view that the proposed amendment in regard to the right of appeal was a proper one.