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LAW PRACTITIONERS: REFUSAL OF ADMISSION TO A COMMUNIST.

A MATTER of interest to practitioners everywhere was the recent litigation in the Supreme Court and Court of Appeal in Vancouver, which followed the refusal of the Benchers of the Law Society of British Columbia to admit as a barrister and solicitor an applicant who was qualified by examination, but who, on his own admissions, was a Communist or Marxian Socialist.

The conditions of admission to the profession in British Columbia differ only in detail from those in force in New Zealand under the Law Practitioners Act, 1931, and the Rules made thereunder. In British Columbia, the call to the Bar and the admission as a solicitor is made by the Benchers of the Law Society (who correspond to the Council of a District Law Society in this country). Here, the actual order of admission of a candidate for entry into the profession is made by the Supreme Court or a Judge thereof "if satisfied that such candidate is duly qualified and is of good character and a fit and proper person to be admitted." But, as a preliminary to such admission, the applicant must obtain from his District Law Society a certificate that he is of good character and is a fit and proper person to be admitted. This certificate, which is signed by the Secretary, is in the following form :

> I hereby certify that the Council of the . . . District Law Society has made full inquiry as to the character of . . . an applicant for admission as a . . . and is satisfied that the said applicant is a person of good repute and that the said Council does not know of any objection on the grounds of character to his application for admission being granted.

The applicant must produce other evidence of good character. He is not admitted to practice until he has sworn, before the Judge who is taking his application, the oath of allegiance and the oath of admission. These are as follow :

> I . . . of . . . do swear that I will be faithful and bear true allegiance to His Majesty King George the Sixth his heirs and successors according to law. So help me God !
>
> I . . . of . . . swear that I will truly and honestly demean myself in the practice of a solicitor according to the best of my knowledge and ability. So help me God !

The Benchers of the Law Society of British Columbia are an administrative body entrusted by the Legal Professions Act, 1936, of that Province with the admission of candidates to both branches of the profession. They may call to the Bar and admit as a solicitor of the Supreme Court of British Columbia any person being a British subject of full age and good repute who has satisfied educational, office service, and age requirements in relation to each branch of the profession respectively. The relevant parts of the barrister's and solicitor's oaths (which are the same) are as follow :

> I, A.B. do sincerely promise and swear . . . that I will be faithful and bear true allegiance to His Majesty King George VI as lawful Sovereign of Great Britain . . . and of this Dominion of Canada, and that I will defend him to the utmost of my power against all traitorous conspiracies or attempts whatsoever which shall be made against his person, Crown, and dignity, and that I will do my utmost endeavour to disclose and make known to His Majesty, his heirs, or successors, all treasons or traitorous conspiracies and attempts which I shall know to be against him or any of them; and all that I do swear . . . without any equivocation, mental evasion, or secret reservation. So help me God !

Thereafter, the following admonition is put to the barrister :

> You are called to the degree of barrister to protect and defend the rights and interests of such persons as may employ you. You shall conduct all causes faithfully and to the best of your ability. You shall neglect no man's interest, nor seek to destroy any man's property. You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the King's interests and your fellow-subjects' you shall uphold and maintain according to the constitution and the laws of this Province.

To which the barrister is required to answer :

> All this I swear . . . to observe and perform to the best of my knowledge and ability. So help me God !

THE FACTS.

With that background, we now proceed to the facts.

On July 30, 1948, Mr. W. J. G. Martin, a graduate of the Faculty of Law of the University of British Columbia, applied to the Benchers of the Law Society of British Columbia for call to the Bar and admission as a solicitor. Martin was born in Canada, of Canadian parents; he is a married man with two children, and during the late war served in Canada with the Royal Canadian Air Force for some three years. The train of events about to be described arose from the fact that he was also reputed to be a Communist. He had been, and was at the time of his application, a member of the Labour Progressive Party.

Martin was questioned by the Benchers when he made his application, and on two later occasions. On all

three occasions, he was represented by counsel. Finally, on October, 30, 1948, the Benchers refused Martin's application. The Benchers' reasons were supplied to him in writing, and are reported *sub nom. Re Legal Professions Act, Re Martin*, [1949] 1 D.L.R. 105. The following are extracts from that report:

When in the course of giving evidence before the Benchers Mr. Martin was asked if he was a Communist, he was at first evasive. Later, in the presence of counsel, he gave the following answers to questions:

I ask if you are a Communist?—When I refer to myself as a Communist, which I do sometimes loosely, I mean a person who proscribes (subscribes?) generally to the political and economic theories of Marx.

You don't have to answer this, but are you a Marxian Communist?—I am a Marxist, yes . . .

Are you a Marxian Socialist?—Yes, sir . . .

The party was formed in June, 1943, and the *Canadian Tribune* is the official organ?—I don't know that it is the official organ.

(Quoting) "On August 21 men and women of the left wing labour movement from every part of the country will gather in Toronto to establish a new political party of Communists in the Dominion. The decision to hold the constituent convention for the organization of the Party was made this week at a conference, held at the Carlsrite Hotel. Present at the conference, at the invitation of Communist leader Tim Buck, were prominent Communists from different parts of the country." And so on. You haven't any doubt, have you, that it is the successor to the old Communist Party under a new name?—Haven't any doubt it is the successor to the old Communist Party, but I wouldn't say there is an unbroken thread of development.

So the L.P.P. in Canada occupies the same position as the Communist Party does in the United States?—I would say generally yes . . .

Mr. Martin, I gathered from what you said that your opinions and beliefs, if carried into effect, would involve the establishment of a dictatorship of a class in this country?—Yes, and I think I defined what I meant by that, perhaps crudely, but I think I got across the general idea when I was questioned before.

The Reasons for Refusal of Admission.

The Benchers then proceeded to set out their reasons for their decision. They said:

The Communist manifesto of Karl Marx and Frederick Engels as published in the *Canadian Tribune* of March 15, 1948, contains the following declarations of statements:

"You are horrified at our intending to do away with private property. Precisely so: That is just what we intend."

"In short, the Communists everywhere support every revolutionary movement against the existing social and political order of things.

"In all these movements they bring to the front, as the leading question in each, the property question, no matter what its degree of development at the time."

"The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution."

The Benchers drew attention to the fact that adherence of the L.P.P. to the doctrines of that manifesto was indicated in an article in the *Pacific Tribune* (the L.P.P. paper in Vancouver) in its issue of February 20, 1948, the writer being Tom McEwen, the editor of the paper:

The L.P.P. is not vacating the electoral field, nor is it surrendering revolutionary Marxism for social democracy in calling for election of a C.C.F. Government. Its task as a Marxist party is to weigh carefully all the conditions of the period, and to present the only possible solution existing at the moment to pull Canada back from the edge of the abyss.

In continuing their reasons, the Benchers said:

The applicant has adduced evidence in the form of statements, letters, and statutory declarations which allege that Mr. Martin is a man of good repute and is a fit person to be called to the Bar and admitted to the practice of a solicitor in British Columbia. While one might question the qualifications for the purpose of those who have made the declarations and written the letters which state the opinion that Mr. Martin is a fit person to be called to the Bar and admitted as a solicitor, the evidence clearly indicates that the personal morals of Martin cannot be questioned, that he was a hard worker at the University and conscientious in his work.

The applicant is a member of the Labour Progressive Party, which is well known as a party of Communists. He is, on his own admission, a Communist or Marxian Socialist. His party leader is one Tim Buck, who was convicted for subversive activities, and Martin was at one time closely associated with one Evans, also convicted for subversive activities.

Some effort was made by the applicant to argue that his beliefs and, in fact, the beliefs of the Communists in British Columbia do not entail adherence either to the Marxist doctrine of the overthrow of constituted authority by force or to the subversive doctrines and activities of certain Communists in Canada. The Benchers, having seen and heard the applicant giving his evidence, do not believe that, Communist as he is, he can be credited with either the desire or the ability to remain a Communist and deviate from Communist policies and activities to the extent which would be necessary for him to deviate in order to comply with the terms of the oaths which would be required to be taken by him as a barrister and solicitor.

Mr. Martin stated that he could conscientiously take such an oath, as, although he adhered to Communism, he would oppose the use of violence to bring about the overthrow of governments. The Benchers, in view of his subscription to, and general acceptance of, the Marxist manifesto, said they found it difficult to believe in his sincerity or intellectual honesty. They added:

Their opinion is that, in spite of his statements to the contrary, he would be taking the oaths unscrupulously. An applicant who takes such an oath unscrupulously is, in their opinion, not a person of probity or of good repute, regardless of the general opinion as to his character held by persons who know vaguely of his beliefs. Such persons cannot be expected to be aware of the incompatibility of those beliefs with the requirements of the oaths to be taken by a barrister and solicitor in the Province of British Columbia.

The Benchers continued their statement of reasons as follows:

The history of the Communists in Canada, in Britain, and in the United States during the last three or four years has shown that the doctrines of Communists are dictated from abroad, and involve traitorous conspiracies and attempts against those countries. The mere statement of willingness on the part of an avowed Communist to take the oaths—lip service to the letter of the law—is not sufficient to justify his acceptance as a person who, in truth, would carry out in its true meaning the requirement of the oaths. The sophist, having in his mind justified his adherence to the subversive doctrines of Communism, can always justify to himself the lesser matter of the violation of an oath.

In consideration of the application, the Benchers have had in mind the fact that the loyalty of a Communist is not to his own country or to the democratic system of that country, but [is] to the subversive doctrines and dictates of a foreign power.

This matter has become a matter of such general repute in Canada, and has had such wide publicity in the Press and otherwise, that the Benchers may take full notice of it.

At p. 75 of the report of the Royal Commission (Spy Inquiry) issued on June 27, 1946, the policy of loyalty to Communism as against loyalty to country is strikingly stated:

"The indoctrination courses in the study groups are apparently calculated not only to inculcate a high degree of 'loyalty to the Party' and 'obedience to the Party,' but to instil in the mind of the adherent the view that loyalty and obedience to the leadership of this organization takes precedence over his loyalty to Canada, entitles him to disregard his oaths of allegiance and secrecy, and this destroys his integrity as a citizen."

The disclosures which appeared in that report; the reports of the trials which followed thereafter; the statement of Premier Spaak of Belgium on September 28, 1948, addressing the Russians in the United Nations Conference when he said, "We fear you because in every country represented here you maintain a fifth column the like of which even Hitler never knew"; the warnings of Foreign Minister Bevin before the United Nations on September 27, 1948, to the same effect; the statement of Mrs. Eleanor Roosevelt, an outstanding libertarian and Chairman of the United Nations Human Rights Commission: "Members of the Communist party . . . teach the philosophy of the lie . . . Because I have experienced the deception of the American Communists, I will not trust them"; the realization of our Labour Unions that Communism and Democracy cannot exist together as indicated by the removal of Communist elements dedicated to the destruction of that which made the Labour movement possible; the warning issued recently by the Assistant Commissioner of the R.C.M.P. at the Convention of Chief Constables of Canada that they must close their ranks to counteract the subversive influences of Communists; the announcement on March 15 by the Prime Minister of Great Britain that the British had decided not to employ anyone known to be a member of the Communist Party in work "vital to the safety of the State"; are all matters which the Benchers as an administrative body should consider in making their decision. To be considered also is the fact that the Communists of Russia through their actions in Germany and indeed in all the countries of the world are to-day keeping the world in a state of turmoil which threatens to break down the moral fibre of our civilization, and the further fact that the Western Powers, including Canada, are suffering from their aggressive action to the extent that the threat of war is always in the minds of the people. This is the background against which this application to the Benchers as an administrative body made by an avowed Communist must be considered.

It was suggested in counsel's argument that the Labour Progressive Party was a legal political party in Canada, and that consideration, on this application, of the applicant's adherence to Communist doctrines was an improper consideration of his political beliefs. The Benchers commented on this submission:

Political parties as such are not bodies known to law. The fact that the Government because of reasons of policy has not proceeded against Communists is not to give the so-called Labour Progressive Party any stamp of approval of legality. In the view of the Benchers, the Labour Progressive Party is an association of those adhering to subversive Communist doctrines. It is not in the ordinary sense a political party at all, inasmuch as a Canadian political party must of its nature owe allegiance to the Canadian democratic system. A party which adheres to revolutionary Marxism cannot owe allegiance to Canada, and, therefore, is not a political party, in the sense that political parties are known in democratic countries.

It was contended on behalf of the applicant that hardship would result to him if his application were refused after he had completed a course in law at the University of British Columbia lasting some three years. The Benchers' reply to that submission was that, apart from the fact that any hardship was of Mr. Martin's own creation, it should be made clear that the Benchers in the execution of their duty had to have due regard for the public interest, without being swayed by consideration of hardship on individuals.

The Benchers concluded their statement of reasons as follows:

In the case of the Martin application, the only requirement is that the Benchers exercise their discretion honestly in the public interest and upon considerations of good sense. They are not otherwise fettered.

The Benchers have had the advantage of observing the demeanour of the applicant in giving evidence, and of hearing full argument on his behalf. They have given full consideration to such evidence and argument. They have been mindful of the fact that the adherence of the applicant to the doctrines mentioned must be considered in relation to time and place, and in relation to the public interest. Their decision, in the light of all the foregoing facts and circumstances, is that at this time in Canada the applicant (*a*) is not a fit person to be called to the Bar or admitted as a solicitor of the Supreme Court of British Columbia, and (*b*) has not satisfied them that he is a person of good repute within the meaning and intent of the Legal Professions Act.

Mandamus Refused.

On February 14, 1949, Martin applied to the Supreme Court of British Columbia for a writ of mandamus to require the Benchers to call and admit him. His motion came on before Mr. Justice Coady, who refused the application: *In re Martin*, [1949] 2 D.L.R. 559. In the course of his judgment, that learned Judge said:

Here the applicant had petitioned the Society to be called and admitted, and that petition the Benchers had to consider and pass upon. The burden of establishing that the applicant was a fit person and a person of good repute was on him. His establishing of that to the satisfaction of the Benchers is a *sine qua non* to his call and admission . . .

The fourth submission of counsel is based upon this—that the effect of what the Benchers have done is to deny the applicant's constitutional rights as a citizen. The Benchers, it is submitted, penalized the applicant for his beliefs and opinions and ideologies which happen to be in conflict with those held by them. It is further argued that the applicant's social, political, and economic views are no concern of the Benchers, who have no right to inquire into them, and that the Benchers by so doing have allowed extraneous and alien matters to affect their decision. Good repute, it is contended, is not a matter that can be established by inquiry into one's beliefs and opinions, but has reference rather to overt acts. With the merits of these submissions I do not propose to deal. To quote the language of *Sloan*, C. J. B. C., in the *Sunshine Valley Co-op.* case, [1949] 2 D.L.R. 51, 54: "Whether its decision was right or wrong on the merits is not, I think, our concern. It is the prerogative of the Council to make the decision one way or the other, provided its discretion is exercised within the limitations imposed by law and is not actuated by indirect or improper motives or based upon irrelevant or alien grounds, or exercised without taking relevant facts into consideration."

The transcript of the evidence before me indicates that all of these matters now so forcibly urged by counsel were by him ably presented to the Benchers and were before them for consideration, and the reasons given for the decision indicate that they have not overlooked consideration of them. It is not for the Court to substitute its views for that of the Benchers.

Appeal to Court of Appeal.

The Legal Professions Act of British Columbia made no provision for an appeal from the refusal of the Benchers to call and admit an applicant; but, at the sittings of the Provincial Legislature in 1949, an Amendment to the Act was passed giving a specific appeal to the provincial Court of Appeal (13 Geo. VI, c. 35, ss. 2, 3). Martin thereupon appealed to the Court of Appeal. Upon the recommendation of the Attorney-General, Mr. Gordon S. Wismer, K.C., his costs of appeal were defrayed by the Provincial Government.

The appeal was argued before the Court of Appeal (all five Judges being present) at its Sittings in January, 1950, by Mr. J. S. Burton, counsel for Martin, and Mr. Alfred Bull, K.C., counsel for the Benchers. On April 26, 1950, the Court of Appeal unanimously upheld the decision of the Benchers: *Martin* v. *Law Society of British Columbia*, [1950] 3 D.L.R. 173. The Judges of the Court of Appeal delivered separate judgments. The learned Chief Justice (Sloan, C.J.) concluded a succinct judgment in these words:

It must be borne in mind that the Benchers are essentially an administrative, and not a judicial, body. In the exercise of their administrative functions they have, within the Legal Professions Act, a wide discretion, and that discretion extends to determination of the qualifications and disqualifications of those who seek the privilege of becoming a member of the legal profession.

In this particular case, the applicant is a Communist. The Benchers, considering the ideological values and motives and loyalties of an adherent of that alien philosophy, reached the conclusion that such a person was unacceptable for the reasons given, refusing his application to become a member of the Bar of this Province.

I have given careful consideration to those reasons of the Benchers. In my opinion, they reflect the exercise of a proper discretion according to law. I may also add that I am in agreement with the reasons of the Benchers and with their conclusion.

Mr. Justice O'Halloran, in the course of a scholarly and comprehensive review of the philosophy of Communism, said :

Counsel for the respondent Law Society in answer confined his brief submission to what he described as the common-sense realities of the present day. He said in effect that, particularly since the end of the European war in 1945, the United States, Britain, and Canada have had a diverse variety of experiences with Communists at home and abroad. They have had revealing encounters with the machinations of Communist agents and doctrinaire sympathizers, open and underground, and with the activities of Communists in the role of "intellectuals" and advanced libertarians, often specially trained for the purpose, posing as the defenders of personal liberties and promoters of peace and goodwill among nations. Communists and their sympathizers have been astute to find their way into so-called peace, youth, cultural, student, welfare, and various other societies and organizations, and there skilfully indoctrinate the young, the impressionable, and the irresponsible with theories designed to weaken and destroy the foundations of our free society . . .

But recognition of that defence to the full extent it may warrant points up most vividly the danger of allowing a Communist to occupy any position of trust or influence.

Marxism exercises a strange power over its adherents. . . . Communism is a complete philosophy of life. . . . No person in our day who is not blind to realities can fail to recognize the strange but menacing potentialities present and future that the Marxist philosophy engenders . . .

Karl Marx in his *German Ideology* (4 Marx, Sochineniya 65 (Moscow 1933)) had written : "Only in the *collective* can the individual find the means of giving him the opportunity to develop his inclinations in all directions; in consequence, personal freedom is possible only in the collective."

I dismiss the appeal on the broad ground (although narrower grounds may be found) that a Marxist Communist cannot be a loyal Canadian citizen ; at best his loyalty must be divided between Canada and the Communist leadership outside Canada which is engaged ideologically through him (whether he knows it or not) and others of like indoctrination in promoting disruptively in Canada and other countries what Lenin called "the class struggle of the proletariat" for the world revolution.

Mr. Justice Robertson, in an incisive review of Communism, the activities of Communists in Canada, and their objectives and underlying principles, said :

Everyone knows that many Trade Unions are expelling Communists from their organizations. I think that neither the Government of Canada, nor that of the United States, nor that of England knowingly would employ a Communist.

Experience gained from the prosecution and conviction of such men as Fuchs and May in England and Boyer in Canada, all of whom had taken the oath of allegiance to His Majesty, leads to the belief that Communists' protestations of loyalty are not to be accepted, and that they consider their first obligation to the Communist Party. Under these circumstances, it is not to be expected that an avowed Communist is to be believed who denies that he personally adheres to all the principles of that Party, one of which is stated in the Communist manifesto—*viz.*, that their ends can be attained only by the forcible overthrow of all existing social conditions ; coupled with a warning to the ruling classes to tremble at a Communist revolution.

Mr. Justice Smith took the view that the Benchers had wide discretionary powers, and, in the circumstances, had exercised their powers in a proper manner. In conclusion, he said :

In my view, an organization that aims at the overthrow of the Government by force is unlawful at common law. Even if it were not, still, membership in that is something that the Benchers are entitled to treat as making an applicant an undesirable member of their Society.

In connection with this point, it was argued for the appellant that no man can be penalized for "mere opinions" without any overt act, and that the Benchers could not exclude a man because of his "politics." I quite agree with the latter point, so long as the man belongs to a company whose objects are wholly lawful. But advocating the overthrow of the Government by force is not a matter of politics at all ; it is in the nature of conspiracy. If a man joins a body that is in effect conspiring against the Government, he goes beyond mere opinion ; his very joining is an overt act. . . .

I agree with the views of the Benchers. But that is not necessary for my decision. . . . And I find that I cannot say that their refusal to admit the appellant is either against all reason or against the public interest. Therefore, I see no ground for interfering with their decision.

The concluding paragraphs of Mr. Justice Bird's judgment were :

Communism and all that pertains to that philosophy I think is now recognized as having a connotation equivalent to Fifth Column. It is common knowledge that Governments on this continent, public and private organizations, more particularly among Trades and Labour Unions, alive to the danger of Communist infiltration and influence, are now alert to the menace, and are actively moving towards its elimination.

In these circumstances, I consider that the decision of the Benchers was right, and that the findings made by them disclose a lawful and proper exercise of the discretion and public responsibility imposed upon them under the Legal Professions Act.

Conclusion.

In addition to the oath required of lawyers, the following is prescribed in the Code of Ethics adopted by the Canadian Bar Association :

[The lawyer] owes a duty to the State to maintain its integrity and its law and not to aid, counsel, or assist any man to act in any way contrary to those laws.

The immediate past President of the Canadian Bar Association, Mr. Stanley H. McCuaig, K.C., put it very well in his address before the American Bar Association in St. Louis last September, when he said :

We belong to a profession which is the custodian and upholder of almost all the rights and privileges which in our day constitute peace, order, and good government : independence of Bench and Bar, the right to enjoyment of life and property, free speech, a free Press.

Lawyers are singled out from the other professions. The Legislature in British Columbia, as in New Zealand, requires that a lawyer, before admission to practice, must take an oath of allegiance. In no other civil profession is such an oath required as a prerequisite to practice. This singularity arises from the fact that legal practitioners, from their admission to practice, are officers of the Court, and are recognized as an essential part of the administration of justice.

It must always be remembered that no one has a legal right to be called to the Bar or to be admitted as a solicitor. There is no such right of admission : there is a privilege. But that privilege is conferred only when there is compliance with the conditions of admission to the profession laid down by the Legislature in the relevant statute.

Martin's case forced on the authorized body charged with the admission of candidates for the legal profession in British Columbia the issue of discharging the two functions entrusted to them : the duty to the individual and the duty to society. The Benchers took the view that the public interest was paramount, and must prevail. And, in that exercise of the power conferred on them, they were supported by the Courts.

Continued from cover i.

LEGAL ANNOUNCEMENTS.

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SUMMARY OF RECENT LAW.

ANIMALS.

Horses—Damage by Trespass—"Unfenced land"—"Land . . . not fenced"—Onus of Proof that Land Unfenced or Insufficiently Fenced—Statutes Amendment Act, 1939, s. 32—Impounding Act, 1908, s. 5. The words "unfenced land" in s. 5 of the Impounding Act, 1908, and the phrase "land . . . not fenced," as used in s. 32 of the Statutes Amendment Act, 1939, have the same meaning—namely, land not enclosed by a sufficient fence. (*Olsen* v. *Bailey*, (1888) 6 N.Z.L.R. 713, followed.) In s. 5 of the Impounding Act, 1908, the onus of proof that the land is unfenced or insufficiently fenced is on the party pleading that section. In s. 32 of the Statutes Amendment Act, 1939, the onus of proof that the cause of damage by trespassing cattle (including horses) was not the insufficiency of the fence lies on the occupier, the plaintiff. *Stephens* v. *Webster*. (Palmerston North. September 1, 1950. Herd, S.M.)

BANKRUPTCY.

Bankruptcy Law and Practice. *94 Solicitors Journal*, 733, 750.

CONVEYANCING.

Appointment of Trustees for Sale. *101 Law Journal*, 33.

Assignment of Contract with Consent of Vendor substituting Sub-purchaser for Purchaser (Precedent). (H. J. Lane.) *3 Australian Conveyancer and Solicitors Journal*, 119.

When is a Will made? *94 Solicitors Journal*, 736.

COSTS.

Admiralty. *94 Solicitors Journal*, 735, 751.

CRIMINAL LAW.

The Presumption of Innocence. *210 Law Times*, 237.

DESTITUTE PERSONS.

Estoppel in Maintenance Cases. *101 Law Journal*, 31.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Separation caused by Act of Husband—Supervening Animus deserendi *on Wife's Part—Constructive Desertion on Her Part from Date of Commencement thereof—Examination of Events subsequent to* De facto *Separation permissible—Proof of Her Intention at Time of* De facto *Separation and of Her Supervening* Animus deserendi*—Divorce and Matrimonial Causes Act, 1928, s. 10* (b). A *de facto* separation may take place without there being an *animus deserendi*; but, if that *animus* supervenes, desertion will begin from that moment, unless there is consent by the other spouse. All that is required to establish desertion is the presence of a supervening *animus deserendi* (a matter to be inferred from the words and conduct of the deserting spouse), a continuance of the *de facto* separation, and the absence of consent by the other spouse. (*Pardy* v. *Pardy*, [1939] P. 288; [1939] 2 All E.R. 258; [1939] 3 All E.R. 779, followed.) It is accordingly permissible to examine the course of events subsequent to the *de facto* separation in order to determine, not merely whether those events may furnish evidence of an intention at the time of the *de facto* separation, but also whether there was a supervening *animus deserendi* on the part of a spouse who did not possess such an intention at the time of the *de facto* separation. (*Franklin* v. *Franklin*, [1934] N.Z.L.R. 900, and *Buchler* v. *Buchler*, [1947] 1 All E.R. 319, applied.) Thus, a husband was held to have proved desertion on his wife's part where it was clear that his wife's behaviour justified his reasonable suspicions that she had committed adultery, and it was marked by a persistence regardless of consequences and accompanied by continued refusal to discontinue her conduct, so as to show an intention on her part to break off matrimonial relations, or, what is equivalent, an intention to persevere in behaviour which, independently of actual adultery, would make it intolerable to a self-respecting husband to remain. (*Dearman* v. *Dearman*, (1916) 21 C.L.R. 264, applied.) *Bodell* v. *Bodell*. (S.C. Palmerston North. December 7, 1950. F. B. Adams, J.)

Nullity — Polygamous Marriage — Petitioner domiciled in England—Marriage in Egypt with Moslem domiciled in Egypt—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 1 (1) (2). In 1938, the wife, an Englishwoman domiciled in England, went through a ceremony of marriage according to Moslem rites at Alexandria, Egypt, with the husband, who was a Moslem by religion and domiciled in Egypt. According to the marriage contract, the husband was entitled to have more than one wife, but he had not, in fact, married a second time. The parties lived together in Egypt until June, 1946, when the wife left the husband and returned to England, where she had since resided. It was established that the ceremony constituted a valid marriage according to the law of Egypt. On April 27, 1950, the wife petitioned for a decree of nullity on the ground that, at the time of the ceremony, when she was domiciled in England, she was incapable of contracting a polygamous marriage, and, therefore, the marriage was void *ab initio*. *Held*, That, in spite of its extended jurisdiction under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (2), the Court could not entertain a petition seeking relief from a polygamous marriage, since a party to such a marriage was not entitled to an adjudication in accordance with the matrimonial law of England. (Observations of *Lord Penzance* in *Hyde* v. *Hyde and Woodmansee*, (1866) L.R. 1 P.D. 133, 137, 138, applied.) *Risk* (*otherwise Yerburgh*) v. *Risk*, [1950] 2 All E.R. 973.

As to General Principles of Validity of Marriage in English Law, see *6 Halsbury's Laws of England*, 2nd Ed. 283-290, paras. 340-344, and 1950 Supp.; and for Cases, see *11 E. and E. Digest*, 413-420, Nos. *800-864*, and Second Digest Supp.

Petitioner's Application for Decree Absolute: Solicitor's Duty. *210 Law Times*, 253.

Restitution of Conjugal Rights—Sincerity of Petitioner—Tests of Sincerity—Onus of Proof on Petitioner—Divorce and Matrimonial Causes Act, 1928, s. 8. The onus of proof of sincerity in a suit for restitution of conjugal rights rests on the petitioner, and he must affirmatively satisfy the Court of his sincerity. (*Harnett* v. *Harnett*, [1924] P. 41; aff. on app., [1924] P. 126, *Cronk* v. *Cronk*, [1922] N.Z.L.R. 435, and *Clark* v. *Clark*, [1946] N.Z.L.R. 41, referred to.) A petitioner in divorce is not to be regarded as insincere merely because he contemplates or intends divorce proceedings if a decree for restitution of conjugal rights by his wife is disobeyed; *aliter*, if his real hope and desire is that the decree will be disobeyed, and that he will thus acquire a right to a divorce. (*Morris* v. *Morris*, [1924] N.Z.L.R. 1101, followed.) (*Kemp* v. *Kemp*, [1949] N.Z.L.R. 648, referred to.) In the present case, the learned Judge dismissed the petition, for the reason that, on the evidence, he was not satisfied as to the petitioner's sincerity in the appropriate sense of that term. *Young* v. *Young*. (S.C. Palmerston North. December 19, 1950. F. B. Adams, J.)

EXECUTORS AND ADMINISTRATORS.

Order of Application of Assets: Payment of Legacies. *210 Law Times*, 199.

Will conferring Power of Appointment on Testator's Daughter—Exercise by Her of Power of Appointment to Non-objects of Power as well as to Objects—Such Exercise Partly Excessive and Void, but to That Extent Severable and Valid in Relation to Objects of Power—Rule against Perpetuities—Donees of Power alive when Appointment created—Vesting not remote. By his will, William Liverton, who died on November 16, 1931, gave, devised, and bequeathed the residue of his estate upon trust for his children (including Agnes Jane McKenzie) "who had or should attain the age of twenty-one years or marry in equal shares." By cl. 2 of the first codicil to his will, he directed: "I declare and direct that my trustees shall not pay over the share to which my daughter Agnes Jane McKenzie shall become entitled of and in my residuary estate in pursuance of cl. 15 of my said will but shall retain and hold the same upon trust to invest the same in or upon any of the investments or securities authort ized by my said will and to pay the income arising from such moneys share and investments to my said daughter Agnes Jane McKenzie during her life and upon the death of my said daughter to hold the capital of the said share in trust for all or such one or more of the children or remoter issue of my said daughter (such remoter issue being born in her lifetime or within twenty-one years after her death) in such proportions and for such interests and in such manner generally as she shall by will or codicil appoint and in default of appointment or so far as such appointment shall not extend in trust for all and every of the children of my said daughter who shall attain the age of twenty-one (21) years or marry and if more than one in equal shares as between themselves and also the issue then living who shall attain the age of twenty-one years or marry of any child of my said daughter who shall have died in her lifetime such issue through all the degrees to take *per stirpes*

and if more than one in equal shares as between themselves such share or respective shares only as his her or their parent or respective parents would have been entitled to if she or they had lived and attained the age of twenty-one years and failing my said daughter leaving issue who shall take a vested interest under the preceding trust then after the death of my said daughter the said moneys share and investments shall be held in trust for such person or persons as she shall by will or codicil appoint and in default of any such appointment in trust for her statutory next-of-kin as if she had died a spinster and intestate and such share had formed part of her personal estate." Mrs. McKenzie (hereinafter referred to as the testatrix) survived the testator, but died on November 5, 1945, leaving a will which, after the appointment of her executor and trustee, provided: "I give devise and bequeath the whole of my estate both real and personal of whatsoever nature and wheresoever situate unto my trustee upon trust to sell call in and convert into money the same or such part thereof as does not consist of money and with and out of the proceeds of such sale calling in and conversion and of such part of my personal estate as consists of money to pay my just debts funeral and testamentary expenses and all estate and succession duties and to stand possessed of the residue and also of all property over which I have a power of appointment upon trust (*a*) To invest the same and to pay the income arising therefrom equally among my sons Alfred John, Robert Ivan and Clarence William during their lives and (*b*) Upon the death of any of my said sons to hold an equal third share of the income and capital for all or such one or more of the children of such deceased son who shall atain the age of twenty-one (21) years or marry under that age in such proportion as my said sons shall by will or codicil appoint and failing appointment or so far as such appointment shall not extend in trust for all the children of such deceased son as shall attain the age of twenty-one (21) years or marry under that age and if more than one in equal shares provided always that if any of my said sons shall die without leaving a child who shall attain the age of twenty-one (21) years or marry under that age I direct that the share of the income and capital hereinbefore given shall accrue for the benefit of the children of my other sons *per stirpes* and I further direct that my trustee may postpone the sale calling in and conversion of my real and personal estate or any part thereof for so long as it thinks fit notwithstanding that the same may be of a wasting speculative or reversionary nature." The testatrix left her surviving her three children, one of whom was married and had no children; the second was married and had one child, born on December 14, 1949, as well as a child by adoption under an adoption order made on February 7, 1949; and the third, a son, was unmarried. On originating summons to determine questions arising in the administration of the estate of W. A. Liverton, deceased (hereinafter referred to as "the original testator"), *Held*, 1. That it was a material consideration, and a circumstance entitled to considerable weight, that the will of the testatrix was executed on February 6, 1932, not long after probate had been granted (on December 1, 1931) of the will of the original testator under which a power of appointment was conferred upon her; but that the nature and extent of the free property of the testatrix was of no assistance to ascertain the intent prompting the words of her will made thirteen years before her death. (*In re Ackerley, Chapman* v. *Andrew*, [1913] 1 Ch. 510, and *In re Holford's Settlement, Lloyds Bank, Ltd.* v. *Holford*, [1945] Ch. 21; [1944] 2 All E.R. 462, applied.) (*In re Mackenzie, Thornton* v. *Huddleston*, [1917] 2 Ch. 58, referred to.) 2. That notwithstanding the failure of the testatrix to observe the terms of the power of appointment given to her in the trust declared by her in respect of "property over which I have a power of appointment," she intended to exercise the power of appointment granted to her by the will of W. A. Liverton. (*Re Milner, Bray* v. *Milner*, [1899] 1 Ch. 563, applied.) 3. That, as it was competent for the testatrix to appoint to all or such one or more of her sons "in such proportions and for such interests and in such manner generally" as she desired, her appointment of a life interest to each of her sons in the capital was valid; but the power of appointment as to the ultimate disposition of the corpus, given by the testatrix to her sons, was an attempt to create new powers in persons who were merely objects of the power; and it was ineffective, in that persons not objects of the power were included within the class as defined by her. 4. That the testatrix's gift over in default of an exercise by her sons of the power of appointment took effect notwithstanding her invalid attempt to delegate her power; and, while it was not void *in toto*, it was excessive and void in so far as it purported to appoint to persons who were not objects of the power. (*Williamson* v. *Farwell*, (1887) 35 Ch.D. 128, applied.) 5. That the gift over, being partially in excess of the power, was severable and valid so far as it operated in favour of persons who were objects of the power, so as to take effect in their favour notwithstanding the inclusion of non-objects. (*In re Witty, Wright* v. *Robinson*, [1913] 2 Ch. 666, applied.) 6. That the appointment by the testatrix for such children of her sons as should attain twenty-one years or marry, though it was not possible as at her death to ascertain the number of this class, did not offend against the rule of remoteness of vesting, inasmuch as the interests of such children would be vested, and the amount and number of their aliquot shares be definitely fixed, not later than the expiration of twenty-one years from the death of the last survivor of the testatrix's sons, all of whom were alive at the death of the original testator by whose will the power was created. (*Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199, applied.) (*In re Paul, Public Trustee* v. *Pearce*, [1921] 2 Ch. 1, referred to.) 7. That, accordingly, the combined effect of the two wills was that the corpus was divisible into three equal shares; and each such share was to be divided according to the number of the children of each of the sons of the testatrix respectively who should attain the age of twenty-one years or marry, and each child of such son, who was living at her death or should be born within twenty-one years after her death, was entitled to one such share, and the remaining shares were to be divided equally between the three sons of the testatrix pursuant to the provisions of the will of the original testator applicable in default of appointment. *In re Liverton, New Zealand Insurance Co., Ltd.* v. *McKenzie*. (S.C. Wellington. September 21, 1950. Gresson, J.)

FACTORY.

Fencing—"Securely fenced"—Test—Fencing giving Security from Reasonably Expected Dangers—Factories Act, 1937 (c. 67), *s. 13 (1).* (*Cf. Factories Act, 1946* (*N.Z.*), *s. 41.*) By the Factories Act, 1937, s. 13 (1): "Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced." A machine was guarded by a rail about 4 ft. above the floor of a factory occupied by the defendants, but a pulley-wheel, shaft, and pinion were above this rail. A circular wire mesh guarded the pulley-wheel, shaft, and pinion, but only from a frontal approach, leaving the sides open, and there was a shelf about 9 in. above the top of the pulley-wheel. The plaintiff, a boy of seventeen, employed by the defendants, placed a ladder against a rotating shaft which was at the top of the machine and above the shelf, and climbed up it to collect any material there might be on the shelf. The ladder began to slip sideways, and, in trying to clutch some means of support, the plaintiff received injury, owing to his hand being crushed between the pulley-wheel and the pinion. He claimed damages from his employers for breach of their statutory duty under s. 13 (1) to fence securely. *Held* (*Denning*, L.J., *dissentiente*), That the test whether machinery was "securely fenced" within the meaning of s. 13 (1) was whether it was so fenced as to give security from such dangers as might reasonably be expected. In the present case, the machinery was securely fenced according to that test. (Dicta of *Lord du Parcq* in *Carroll* v. *Andrew Barclay and Sons, Ltd.*, [1948] 2 All E.R. 391, and *Lord Normand* in *Lyon* v. *Don Brothers, Buist and Co., Ltd.*, [1944] S.C. (J.) 5, applied.) *Burns* v. *Joseph Terry and Sons, Ltd.*, [1950] 2 All E.R. 987 (C.A.).

As to Fencing of Machinery, see *14 Halsbury's Laws of England*, 2nd Ed. 594, 595, paras. 1130, 1131; and for Cases, see *24 E. and E. Digest*, 908-910, Nos. *65-76*, Digest Supp., and Second Digest Supp.

GIFT.

Some Exceptions to the Rule relating to Gifts. (L. A. Harris.) *3 Australian Conveyancer and Solicitors Journal*, 113.

HUSBAND AND WIFE.

Loss of Consortium. *101 Law Journal*, 3.

JUDICIAL CHANGES.

Lord Justice Bucknill, who was appointed to the High Court in 1935, and has served on the Court of Appeal since December, 1945, resigned on January 12.

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

Mr. S. E. Karminski, K.C., who is forty-eight years of age, has been appointed a Judge of the High Court.

LAND TRANSFER.

Mortgage—Mortgagee's Remedies Statute-barred—Discharge by Court—Mortgage registered under Deeds Registration System—Land subsequently brought under Land Transfer Act—Default by Mortgagor continuing for over Twenty Years—Mortgaged Land transferred by Mortgagor—Application by His Successor in Title for Order discharging Mortgage—Court's Discretion as to Limitation of Time—Court exercising Discretion to discharge Mortgage—Statutes Amendment Act, 1936, s. 43. In September, 1929, P. executed a deed of mortgage in favour of S. to secure the sum of £100, subject to a deed of mortgage to the State Advances Superintendent for £1,000. P. covenanted to pay the principal sum by equal monthly payments of interest and in reduction of principal. Later, the mortgaged land was brought under the Land Transfer Act, 1915. P. ceased to make payments under the mortgage on March 7, 1930, and since then no payment had been made and no acknowledgement of liability under the second mortgage had been given. In June, 1934, P. abandoned the mortgaged property and gave possession to the first mortgagee. On June 21, 1949, the executor of S., who had died, transferred the second mortgage to C., Ltd., and on May 5, 1950, that company served on P. notice of default under s. 3 of the Property Law Amendment Act, 1939. On October 13, 1950, P. transferred the mortgaged land to H., in consideration of the covenants implied by s. 88 of the Land Transfer Act, 1915; and the transfer was registered on October 18, 1950. On November 1, 1950, H. issued a summons calling on C., Ltd., to show cause why an order should not be made directing the discharge of the second mortgage. *Held*, That, if the land had not been brought under the Land Transfer Act, 1915, the second mortgagee's interest in the land would have been extinguished and his remedy for the mortgage debt by action, suit, or other proceeding would have been barred on April 1, 1950; but, as the land had been brought under the Land Transfer Act, 1915, the principle of extinction of title by prescription did not apply; and the Court, under s. 43 of the Statutes Amendment Act, 1936, had power, exercisable at its discretion, to make an order directing the mortgage to be discharged. (*Campbell* v. *Auckland District Land Registrar*, (1910) 29 N.Z.L.R. 332, distinguished.) (*Samuel Johnson and Sons, Ltd.* v. *Brock*, [1907] 2 Ch. 533, referred to.) *In re A Mortgage, Pearce to Sansom.* (S.C. Auckland. December 5, 1950. Callan, J.)

LANDLORD AND TENANT.

Date of Expiry in Notice to Quit. *94 Solicitors Journal*, 719.

Dilapidations: Nominal Reversions. *94 Solicitors Journal*, 700.

Entry and Agreements for Lease. (E. O. Walford.) *210 Law Times*, 187.

Implied Reservation of Advertisement Rights. *94 Solicitors Journal*, 738.

Irreparable Houses. *114 Justice of the Peace Journal*, 615.

Land Sales—Lease invalidated by Servicemen's Settlement and Land Sales Act, 1943—Tenant in Occupation of Property—Rent paid and accepted—No Implied Tenancy—No Valid Tenancy to determine—Order for Possession—Servicemen's Settlement and Land Sales Act, 1943, s. 46. A., the owner of a farm property, entered into an agreement to lease to R., who took possession, paid some rent, and, later, gave an irrevocable order in A.'s favour on his milk cheques for payment of rent and other moneys which he owed to A. The lease was drawn by R. with the intention of defeating s. 46 of the Servicemen's Settlement and Land Sales Act, 1943, which makes such a transaction unlawful and void unless consented to by the Land Valuation Court. A. gave R. notice to quit and deliver up the property, and, on his refusing to do so, brought an action for an order for possession. It was admitted by both parties that the transaction was invalidated by the statute. *Held*, 1. That a fresh agreement to lease could not be inferred from the putting of the "tenant" into possession, the payment and acceptance of rent, and the acceptance of the order on the dairy company for payment of rent, as these facts arose out of, and were referable to, the invalid transaction embodied in the agreement to lease, which was of no effect; and an implied tenancy inconsistent with the agreement could not be set up. 2. That there was no tenancy at all, and, consequently, s. 16 of the Property Law Act, 1908, was not applicable. (*Mansion House Kawau, Ltd.* v. *Stapleton*, [1948] N.Z.L.R. 1015, referred to.) An order was made for possession, subject to the owner of the land giving notice of his consent to the cancellation of the order on the dairy company; and mesne profits, at a reduced amount owing to the circumstances of the case, were allowed. *Allan* v. *Reid.* (S.C. Auckland. December 12, 1950. Stanton, J.)

Statutory Tenancies. *24 Australian Law Journal*, 282.

Succession by Definition to Tenancy. *114 Justice of the Peace Journal*, 600.

LAW PRACTITIONERS.

Legal Aid in Operation. *94 Solicitors Journal*, 748.

Solicitor's Lien on Documents. *100 Law Journal*, 716.

MAGISTRATES' COURTS.

The County Court Judge's Notes. *210 Law Times*, 236.

MASTER AND SERVANT.

Factories—Safe System of Working—Servant unnecessarily deviating from Approved System and suffering Injury—No Breach of Statutory Duty on Employer's Part—Employer not liable—"Employed"—Factories Act, 1946, s. 46 (1). The duty cast on an employer by s. 46 of the Factories Act, 1946, has to be considered in relation to the circumstances of each particular case. An employer on whose part there has been no breach of such duty is not to be held liable for injury suffered by an employee—which was not occasioned by any defect in the system of operation or in the procedure adopted for doing the work, but which was due solely to the employee's unnecessary departure from the system, with a grave risk of injury—by reason of his having undertaken unaided to do something required by the system of work to be done by two men, and which he was under no obligation or duty to his employer to do. (*Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57; [1937] 3 All E.R. 628, *Speed* v. *Thomas Swift and Co., Ltd.*, [1943] K.B. 557; [1943] 1 All E.R. 539, *Colfar* v. *Coggins and Griffith (Liverpool), Ltd.*, [1945] A.C. 197; [1945] 1 All E.R. 326, and *Winter* v. *Cardiff Rural District Council*, [1950] 1 All E.R. 819, applied.) *Williams* v. *B.A.L.M. (N.Z.), Ltd.* (C.A. Wellington. November 3, 1950. Fair, Northcroft, Gresson, JJ.)

Master's Liability for Servant's Crime. *210 Law Times*, 282.

MINING.

Coal-mine Lease—Application for New Lease to replace Existing Lease about to expire by Effluxion of Time—No Power to grant Application—Original Application for New Lease to be made—Coal-mines Act, 1925, s. 15—Coal Act, 1948, s. 31. The effect of the repeal (by s. 31 (2) of the Coal Act, 1948) of s. 15 of the Coal-mines Act, 1925, is that, pursuant to s. 31 (1) of the Coal Act, 1948, the terms of a coal lease or other coal-mining right is not now limited, but remains to be fixed by the Warden with the approval of the Minister. There is no longer any power to grant a new lease to replace a coal lease for any portion of the unexpired period of sixty-six years fixed therein as its complete term. The lessee, if he desires to obtain a further lease, must make an original application, which entails all the statutory requirements and obligations attendant on it; so that, on the expiry of the current lease, the land is open for marking out by any prospector or miner, and the lessee has no priority in any application made by him to obtain the grant except such as may exist in fact. *In re Jelley and Hewison's Application.* (Cromwell. December 5, 1950. Dobbie, S.M., Warden.)

NEGLIGENCE.

Contractor's Negligence: Liability of Principal. *210 Law Times*, 189.

PRACTICE.

Costs—Payment into Court—Sum awarded less than Sum paid into Court—Right of Defendants to Costs after Date of Payment in—Discretion of Court—R.S.C., Ord. 22, r. 6 (Code of Civil Procedure, R. 224). In an action for damages, brought by the plaintiff in respect of personal injuries which she had suffered in a railway accident, the defendants admitted liability and paid money into Court. At the trial, the plaintiff recovered a less amount than had been paid in. The Judge gave the plaintiff the costs, notwithstanding the payment into Court of a sum in excess of the amount of damages awarded. He gave no reason for penalizing the defendants in costs, considering that the matter was in his absolute discretion. On appeal, *Held*, That a defendant who has paid money into Court which exceeds the sum awarded to the plaintiff is a "successful party" within the meaning of the principle laid down by *Viscount Cave*, L.C., in *Donald Campbell and Co.* v. *Pollak*, [1927] A.C. 809, 811, and is entitled to be paid his costs as from the date of payment in. *Findlay* v. *Railway Executive*, [1950] 2 All E.R. 969 (C.A.).

Discovery and Privilege. *210 Law Times*, 210.

PROBATE AND ADMINISTRATION.

Grant of Administration in Special Circumstances. *210 Law Times*, 281.

Letters of Administration—Application by Widow for Letters of Administration—Young Children interested in Substantial Estate—Desirability of considering whether Infants will be Adequately Protected—Copies of Papers to be served on Public Trustee—Grant in Discretion of Court—Administration Act, 1908, ss. 21, 22, 24—Public Trust Office Act, 1908, s. 14—Statutes Amendment Act, 1945, s. 3—Code of Civil Procedure, RR. 531, 531C, 531F, 531G. It is for the Court to determine whether it is for the benefit of the estate of an intestate person to grant letters of administration to the widow or to another applicant; and it is for the Court to decide whether the grant should go to the Public Trustee or to the other applicant. (*In re Dickens*, (1912) 32 N.Z.L.R. 374, considered.) While a grant is commonly made to a widow as of course, yet the Court has power to direct that notice of her application be given to the Public Trustee to enable him to consider whether he should apply for a grant. (*In re Craig*, (1911) 30 N.Z.L.R. 1212, considered.) (*In re Robinson*, [1936] N.Z.L.R. s. 3, *In re Nicholas*, (1908) 11 G.L.R. 298, and *In re Trimble*, (1913) 16 G.L.R. 345, referred to.) Priority in point of time of application is irrelevant, and neither the Public Trustee nor anyone else has any legal priority, but, on competing applications, the matter is one for the Court to decide in the exercise of its discretion. *Semble*, 1. It could be regarded as dangerous to appoint a widow the sole administratrix of a substantial estate in which valuable interests must be held in trust for infants over lengthy periods. 2. Although an administration bond is required, it may be insufficient in amount to protect the infants, and the prospective sureties might be unable to ensure due administration of the estate; and those sureties are themselves entitled to some measure of protection. A man died intestate, leaving a widow, and three children aged twelve, six, and three years. His estate was sworn at under the value of £4,000. His widow applied for a grant of letters of administration to her as sole administratrix. *Held*, 1. That, if the Public Trustee should apply for a grant of administration, then, under s. 14 of the Public Trust Office Act, 1908, neither he nor the widow would have any prior right to a grant, but the Court should decide between the competing applications in its discretion. (*In re Dickens*, [1912] 32 N.Z.L.R. 374, discussed.) 2. That the application should be adjourned to enable copies of the papers to be served on the Public Trustee. *Semble*, An alternative course would be for a trust company to apply for administration. *In re Egen (deceased)*. (S.C. In Chambers. Wellington. December 15, 1950. F. B. Adams, J.)

Points in Practice. *101 Law Journal*, 5.

RATES AND RATING.

Water Rates—Ordinary Supply of Water—Hotel Premises within Meaning of "Dwellinghouse"—Municipal Corporations Act, 1933, s. 82. The word "dwellinghouse," as used in s. 82 of the Municipal Corporations Act, 1933, means, in relation to the ordinary supply of water, a place in which people live, and in which, in consequence, they require water for the normal purposes for which water is required in the ordinary course of living. Consequently, hotel premises in which a manager and his wife are required to reside, and which provide board and lodging for a limited number of the travelling public and a home for two staff members, constitute a "dwellinghouse" for the purposes of s. 82 of the Municipal Corporations Act, 1933. (*West Middlesex Waterworks Co.* v. *Coleman*, (1885) 14 Q.B.D. 529, referred to.) *New Zealand Breweries, Ltd.* v. *Auckland City Corporation*. (S.C. Auckland. December 20, 1950. Finlay, J.)

ROAD TRAFFIC.

A Call for Higher Penalties. *114 Justice of the Peace Journal*, 614.

TENANCY.

Emergency Forces Tenancy Regulations, 1950 (Serial No. 1950/229), make special provision as to the circumstances in which a landlord may obtain an order of a Court for the recovery of possession of premises from a tenant where servicemen or their families are concerned. They are similar to the provisions formerly contained in s. 28 of the Tenancy Act, 1948 (now repealed). That section applied to servicemen of the Second World War and was limited to dwellinghouses. Under these Regulations, which extend to urban properties as well as to dwellinghouses, a serviceman is a person who, after August 28, 1950, has served outside New Zealand in any New Zealand or Commonwealth force during a United Nations emergency, or has undergone training in New Zealand for such service. The Regulations will cease to apply one year after the end of the serviceman's whole-time service or his death on service, whichever is the later. Regulation 4 provides that a landlord who is not a serviceman or the wife or widow of a serviceman cannot obtain an order for possession against a tenant who is a serviceman or the wife or widow of a serviceman on any ground except (*a*) failure to pay the rent, or failure to comply with the conditions of the tenancy; or (*b*) failure to take reasonable care of the premises, or committing waste; or (*c*) creating a nuisance or annoyance to the neighbours. This Regulation does not apply to any dwellinghouse unless it is the tenant's ordinary residence. Regulation 5 provides in effect that, where a landlord who is a serviceman is seeking to recover possession of premises vacated by him for the purposes of his service, from a tenant who is a serviceman or the wife or widow or a dependant of a serviceman, the landlord need not provide alternative accommodation or prove greater hardship, but the Court will decide the case according to the relative hardship of the parties. Regulation 6 makes similar provision for cases where the landlord is the wife or widow of a serviceman, and the tenant is a serviceman or the wife or widow or a dependant of a serviceman. Regulation 7 provides in effect that, where the landlord is a serviceman and the tenant is not a serviceman or the wife or widow or a dependant of a serviceman, and the premises were vacated by the landlord for the purposes of his service, an application for an order for possession is to be decided without reference to any question of relative hardship or greater hardship or alternative accommodation. Regulation 8 makes similar provision for cases where the landlord is the wife or widow of a serviceman and the tenant is not a serviceman or the wife or widow or a dependant of a serviceman.

TRANSPORT.

Heavy Motor-vehicles—Offences—Use outside District of Borough of Vehicle with Excessive Air Pressure in Tyres—Mechanical Device used to ascertain Such Pressure—Evidence of Correct Use and Reliability thereof—Mens rea—*Tyres not in Issue*—*"District of any borough"—Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26), Regs. 6, 18.* In a prosecution charging the defendant with operating a heavy motor-vehicle when the air pressure in the pneumatic tyres fitted to the rear wheels exceeded 75 lb. per square inch, contrary to Regs. 6 and 18 of the Heavy Motor-vehicle Regulations, 1950, and in similar cases where, of necessity, a mechanical device must be used to ascertain the pressure within the tyres, it is sufficient to show that the instrument was used correctly and that from its nature and history the Court may reasonably rely upon it. (*Penny* v. *Nicholas*, [1950] 2 All E.R. 89, applied.) In such a case, the operator of the heavy-vehicle cannot be excused because he had no guilty intent. (*R.* v. *Ewart*, (1905) 25 N.Z.L.R. 709, distinguished.) The words "the district of any borough" in Reg. 6 of the Heavy Motor-vehicle Regulations, 1950, do not refer to anything more than the area within the borough boundaries. *Gould and Co., Ltd.* v. *Cameron*. (S.C. Timaru. December 21, 1950. Northcroft, J.)

VALUATION OF LAND.

West Coast Settlement Reserves—Cancellation of Leases and Grant of Substituted Leases—Special Valuation—Principles on which Such Valuation to be made—West Coast Settlement Reserves Amendment Act, 1948, s. 6—Statutes Amendment Act, 1950, s. 38. The Valuer-General, in causing to be made the special valuations which s. 6 of the West Coast Settlement Reserves Amendment Act, 1948, directs to be made for the purposes of that statute, is required to disregard s. 45 of the Statutes Amendment Act, 1948. (*Barker* v. *Edger*, [1898] A.C. 748, and *In re Bwllfa and Merthyr Dare Steam Collieries (1891), Ltd., and Pontypridd Waterworks Co.*, [1902] 2 K.B. 135, applied.) Section 28 of the Statutes Amendment Act, 1950, which repeals s. 45 of the Statutes Amendment Act, 1948, makes it clear that, in the case of special valuations to be made under s. 6 of the West Coast Settlement Reserves Amendment Act, 1948, the principle of the basic value does not apply; and it leaves unchanged the previous legal position affecting the special valuations already made. *Quaere*, Whether the Valuer-General is under a duty, or is empowered, to recall, and to cancel or correct, special valuations already made under s. 6, and to proceed in accordance with the West Coast Settlement Reserves Amendment Act, 1948, in all respects as if such valuations had not been made, in cases where (*a*) objections to those valuations have been duly lodged, and (*b*) objections have not been lodged within the time limited by s. 8 of that statute. *Maori Trustee* v. *Valuer-General and Others*. (S.C. New Plymouth. December 18, 1950. Hay, J.)

CASE AND COMMENT.

Another Case on Possession: Helson *v.* McKenzies (Cuba Street), Ltd., [1950] N.Z.L.R. 878.

By A. G. DAVIS, Professor of Law, Auckland University College.

In *Pollock and Wright's Possession in the Common Law*, 40, the learned authors say:

> A case like this [*Bridges* v. *Hawkesworth*, (1851) 21 L.J.Q.B. 75] illustrates the importance both of grasping the preliminary conception of facts, and of keeping it clear from the supervening questions of right. The finder's right starts from the absence of any *de facto* control at the moment of finding. And decisions which seem contradictory must not be pronounced to be really so before we have attended to the possibility of differences of fact, which though minute in themselves may be material in their consequences.

It is submitted, with the greatest respect, that failure to attend to differences of fact, as counselled by the learned authors, led Finlay and Gresson, JJ., into error in the recent case of *Helson* v. *McKenzies (Cuba Street), Ltd.*, [1950] N.Z.L.R. 878.

The facts in that case (as stated by Gresson, J., at p. 880, and repeated here at length because of the importance of their detail) were that the plaintiff visited the defendant's store one afternoon, carrying at the time two handbags, one of which contained a large sum of money and papers relating to her Social Security benefit, while the other contained some loose money and sundry odds and ends. She made a small purchase, for which she paid from the bag containing the loose money, spent some time in the shop, and then left. Soon afterwards, she missed the bag containing the large sum. Upon returning to the defendant's shop and making inquiries, she learned that a bag had been picked up but that it had been claimed and handed over. Through advertising, she got in touch with a Mrs. McLean, whose evidence was that, while she was in the shop on the afternoon in question, she had noticed a handbag lying on the counter and had handed it to the shop-assistant behind the counter; she had seen it lying there for about five minutes, could see it was lying unattended, thought that, if she did not pick it up, somebody else would, and decided "the best thing to do was to hand it in." The shop-assistant deposed to a lady's having handed her a bag, saying it had been left on the counter; the assistant merely put the bag on a slide under the counter. Later, she handed it to Mr. Mosely, a floorwalker, who, before he could carry out his intention of taking the bag to the office, was asked by a Mr. Taylor, another floorwalker, if he had had a bag handed to him. Upon Mr. Taylor's directing him to the person inquiring, he moved up to her, keeping the bag out of sight, and asked her to describe it and state where she had lost it. Upon receiving a description which tallied with the bag, and details of the inquirer's purchase, and having no doubts at all in his mind as to her being the owner, he pulled it out from under the counter and handed it to her. Needless to say, the anxious inquirer, who then disappeared from the scene, was not the plaintiff.

Upon these facts, the plaintiff claimed from the defendant a sum equal to the amount of money in the handbag, alleging negligence as a bailee, or, alternatively, conversion. With the claim for conversion, on which the plaintiff succeeded (the damages being reduced in accordance with the Contributory Negligence Act, 1947), this article is not concerned. What is of moment is the correctness of the finding of Finlay and Gresson, JJ., that the appellant (the plaintiff) had no cause of action on the basis of bailment.

It must be pointed out that, even if the finding had been otherwise, the damages awarded to the plaintiff would have been no greater. The present discussion is consequently academic. But claims based on the doctrine of possession, which was the basis of the plaintiff's claim in bailment, involve so many intricate points of law that no apology is made for carefully considering that aspect of the case.

Dealing with the contention that the defendant was a bailee of the bag for the plaintiff, Finlay, J., said, at p. 905:

> If a contract of bailment is to be implied . . . such implication can be made only if the owner and the involuntary bailee are alone concerned. Clearly, as I think, the intervention of the rights of any other party will prevent the Court's making any such implication, and here rights—and, incidentally, obligations—of a kind which it is not necessary to analyse too closely had accrued to the original finder.

It is submitted, with respect, that, for reasons which will be elaborated later, Finlay, J., erred in treating Mrs. McLean as a finder in law, and, as such, endowed with rights and burdened with obligations. In law, it is submitted that Mrs. McLean's actions did not result in the "intervention of the rights of any other party" between the plaintiff and the defendant.

Later, at p. 905, the learned Judge said:

> *Bridges* v. *Hawkesworth* ((1851) 21 L.J.Q.B. 75) is declaratory of the rights of a finder: *Isaack* v. *Clark* ((1615) 2 Bulst. 306, 312; 80 E.R. 1143, 1148); and *Newman* v. *Bourne and Hollingsworth* ((1915) 31 T.L.R. 209) of his obligations.

His Honour went on to say that the judgment in *Bridges* v. *Hawkesworth* must, despite the fact that it had not gone unquestioned, be accepted by the Court of Appeal as declaratory of the law.

But, if, as is submitted, Mrs. McLean was not a "finder" in the sense in which the word is used in the authorities, then the decisions to which Finlay, J., referred are not conclusive of her position, though one would hesitate to call them irrelevant.

Again, Finlay, J., said, at p. 906:

> Both rights and obligations, therefore, accrued to the finder when she took possession of the bag, and they so accrued immediately on her taking it into her custody and possession.

It would appear that His Honour, in the last phrase of this sentence, is treating "custody" and "possession" as synonymous terms, which they are not. But, even if—in view of the fact that in the earlier part of the sentence the learned Judge says "she took possession of the bag"—the word "custody" is treated as surplusage, it is submitted, again with the greatest respect, and for reasons which will be given later, that in law Mrs. McLean never had possession of the bag.

Gresson, J., was even more definite as to Mrs. McLean's status. He said, at pp. 914, 915:

> Mrs. McLean noticed the bag and picked it up, and thereby acquired actual possession, and a limited right to possession both in fact and in law good against everyone not having a better title.

As mentioned above, this statement, it is submitted with respect, is an incorrect legal analysis of Mrs. McLean's action. At no time did she acquire possession in law of the bag.

Continuing the narrative, His Honour said, at p. 915 :

> Mrs. McLean then delivered the bag to the respondent's employee, in order that, if possible, the true owner might be ascertained and the bag restored . . . Thereby the respondent acquired possession, but only as a bailee for a limited purpose; and, if the efforts on the part of the respondent had failed to discover the true owner and the respondent had continued in possession, Mrs. McLean might subsequently have demanded that the bag should be redelivered to her.

Whether His Honour meant by the use of the word " might " that Mrs. McLean would have had a legal right to redelivery of the bag or whether by that word he meant that she would in fact have made a claim to the bag in that event is not clear. But it is submitted that, in those circumstances, Mrs. McLean would have had no claim to redelivery of the bag, as she never had any title to it.

His Honour quoted the judgment in *Bridges* v. *Hawkesworth* (*supra*) at length, and, after referring to later cases in which that decision had been referred to, treated *Bridges* v. *Hawkesworth* as good law. (It may here be interpolated that, for the purpose of this article, the writer accepts the decision in *Bridges* v. *Hawkesworth* as good law.)

It is submitted that Mrs. McLean was not a " finder " of the bag, with the rights and obligations attaching to such a person, because she never had possession of the bag in law. *Salmond's Jurisprudence*, 3rd Ed. 245 (for which Sir John Salmond himself was responsible), says :

> [Possession] involves, therefore, two distinct elements, one of which is mental or subjective, the other physical or objective. The one [the *animus possidendi*] consists in the intention of the possessor with respect to the thing possessed, while the other consists in the external facts in which this intention has realized, embodied, or fulfilled itself . . . Neither of these is sufficient by itself. Possession begins only with their union, and lasts only until one or other of them disappears.

Discussing the nature of the *animus possidendi*, the same learned author says, at p. 246 :

> The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object.

Does the evidence in the instant case show that Mrs. McLean had this necessary *animus ?* It is submitted that it does not : " she . . . thought that, if she did not pick it up, somebody else would, and decided ' the best thing to do was to hand it in.' " This evidence does not show any intent on Mrs. McLean's part to appropriate to herself the exclusive use of the bag. The evidence is rather the other way. That she had no intention of making any claim to the bag is shown by the fact that she did not leave her name or address with the shop-assistant. It was only by means of an advertisement that the plaintiff got into touch with her.

Mrs. McLean's intention, as manifested by her actions, is similar to that of a person who sees lying on the floor of a shop an article which has rolled from the counter on to the floor and picks up the article and hands it to the shop-assistant. Could it be said that that person has, even momentarily, possession of the article ? Surely not.

Another point may be raised. As Coke, J., said in *Isaack* v. *Clark*, (1615) 2 Bulst. 306, 312 ; 80 E.R. 1143, 1148 :

> for he which findes goods is bound to answer him for them who hath the property ; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody.

The last sentence is particularly relevant. Mrs. McLean exercised her election not to take the bag into her custody ; instead, she handed it in. Such an action, it is submitted, negatives any *animus* on her part necessary for her to have possession of the bag.

Further, as Coke, J., says (*supra*), the finder of goods is bound to answer him for them who hath the property. If the shop-assistant to whom Mrs. McLean handed the bag had been dishonest and had misappropriated the bag and its contents, would Mrs. McLean have been liable to the plaintiff ? The answer is in the affirmative only if Mrs. McLean had had possession of the bag, as the Court held. But it is submitted that, on the facts as found, the answer must be in the negative. This is another reason why Mrs. McLean cannot be said ever to have had possession of the bag.

So much for the theory. Nor does the authority on which Gresson, J., chiefly relied—*viz.*, *Bridges* v. *Hawkesworth* (*supra*)—support any argument that Mrs. McLean had any title to the bag. The facts of that case must be carefully stated. They are reported in 21 L.J.Q.B. 75, 76, and more fully in 15 Jur. 1079, 1080.

Combining the facts as contained in the two reports, one may state them as follows : As the plaintiff, a commercial traveller, was leaving the shop of Byfield and Hawkesworth, he picked up a small parcel which was lying on the floor. He immediately showed it to the shopman and opened it in his presence, when it was found to contain a quantity of Bank of England notes to the amount of £65. (The *Law Journal* report says £55, but that point is immaterial.) The defendant, who was a partner in the firm of Byfield and Hawkesworth, was then called, and the plaintiff told him he had found the notes and asked him to keep them until the owner appeared to claim them. It was found that, when the plaintiff handed the notes over to the defendant, he did not intend to give up any title to them that he might possess. This last point is reinforced by counsel for the appellant, who, in argument, said (according to the *Law Journal* report, at p. 76) :

> It is expressly found [by the County Court Judge] that the plaintiff by handing the notes to the defendant for the purpose of discovering the owner and inserting advertisements, did not intend to abandon his right to them in case the true owner did not appear.

The *Jurist* reports counsel as saying, at p. 1080 :

> Having found them, he delivered them to the defendant for a special purpose only, and never intended to part with his property therein.

In his judgment, Patteson, J. ((1851) 21 L.J.Q.B. 75, 78), adverts to the same point :

> the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff,

The plaintiff was held to be entitled to the notes as against the defendant.

In many ways, therefore, the position of Bridges differed from that of Mrs. McLean :

(*a*) Bridges asked Hawkesworth to keep the notes until the owner appeared to claim them. He manifested an *animus possidendi*. Mrs. McLean made no such request to McKenzies' shop-assistant. She did not, by her words, manifest any such *animus*.

(*b*) Bridges did not intend to give up any title to the notes that he might possess. Mrs. McLean made no claim of title whatever.

(*c*) Bridges delivered the notes to the defendant for a special purpose only. Mrs. McLean handed the bag to the shop-assistant for the general purpose of its being delivered to the true owner.

(*d*) The steps taken by Hawkesworth were taken by him as agent for Bridges. Nowhere in the judgments of the Court of Appeal is it suggested that what McKenzies did was done by them as agent for Mrs. McLean.

The two cases are, therefore, clearly distinguishable on the facts, and the judgment in *Bridges* v. *Hawkesworth* is not an authority for the proposition that the defendant became a bailee, not for the plaintiff, but for Mrs. McLean.

It is submitted, with great respect, that the interpretation of *Bridges* v. *Hawkesworth* given by *Pollock and Wright's Possession in the Common Law* is, to put it at its best, misleading. The learned authors say, at p. 39 :

> The plaintiff in the cause noticed the parcel, picked it up, and thereby acquired possession both in fact and in law, and a limited right to possession, good against every one not having a better title.

It is submitted that the mere picking up of the parcel did not give the plaintiff possession. That was the *corpus*. The *animus*, which had also to be present to give the plaintiff possession, was manifested by his subsequent acts and words. *Corpus* and *animus* did not combine to give Bridges possession until he made a claim to the notes, as he did by his request to Hawkesworth.

An analogy may be drawn with the Roman-law method of acquisition of title to a *res nullius* by the *jus gentium* method of *occupatio*. Title was not acquired merely by taking physical possession of the *res nullius*. There had to be, in addition, the intention of becoming the owner. : *Lee's Elements of Roman Law*, 125. All writers on Possession, with the possible exception of Ihering, stress the necessity for the union of *corpus* and *animus* to constitute possession in law. On the facts as found in *Helson's* case, Mrs. McLean lacked *animus*. She could not, therefore, be said to have had possession of the bag. She was merely an intermediary, with no claim in her own right. Consequently, there could not be the relationship of bailor and bailee between her and the respondent. Such a relationship did, however, exist between the appellant and the respondent. On this basis, it is respectfully submitted, the appellant's claim in bailment should have been decided.

A PUBLIC HIGHWAY IN NEW ZEALAND.

As defined by Statute.

By E. C. ADAMS, LL.M.

(*Concluded from p. 14.*)

The definition of "road" in s. 110 of the Public Works Act, 1928, reads as follows :

> Throughout this Act the word "road" means a public highway, whether carriage-way, bridle-path, or footpath; and includes the soil of—
>
> (*a*) Crown lands over which a road is laid out and marked on the record maps :
>
> (*b*) Lands over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication :
>
> (*c*) Lands taken for roads under the provisions of this Act or any other Act or Provincial Ordinance formerly in force :
>
> (*d*) Lands over which a road has been or is in use by the public which has been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, not being more than didty links on either side of the middle-line thereof, and a sufficient plan whereof, approved by the Chief Surveyor of the land district wherein such road is situate, has been or is hereafter registered by the District Land Registrar or the Registrar of Deeds of the district against the properties affected by it; and the said Registrars, or either of them, are hereby authorized and required to register any such plans accordingly, anything in any other Act notwithstanding, when presented for registration by or on behalf of the Minister :
>
> (*e*) Lands over which any road, notwithstanding any legal or technical informality in the taking or construction thereof, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority, and a sufficient plan whereof is registered in manner provided in the last preceding paragraph :
>
> and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culvert , drains, ferries, forsd, gates, buildings, and other things thereto belongins, upon the line and within the limits of the road.

Paragraph (*c*) of the definition is as follows :

> (*c*) Lands taken for roads under the provisions of this Act or any other Act or Provincial Ordinance formerly in force.

Paragraph (*c*) does not appear to require any comment. The instruments taking the roads under these provisions are usually registered against the title.

Paragraphs (*d*) and (*e*) are very useful provisions for legalization of roads, which should be availed of by local bodies far oftener than is the practice; again, the expense of obtaining a satisfactory diagram appears to be the stumbling-block :

> (*d*) Lands over which a road has been or is in use by the public which has been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, not being more than fifty links on either side of the middle-line thereof, and a sufficient plan whereof, approved by the Chief Surveyor of the land district wherein such road is situate, has been or

is hereafter registered by the District Land Registrar or the Registrar of Deeds of the district against the properties affected by it; and the Registrars, or either of them, are hereby authorized and required to register any such plans accordingly, anything in any other Act notwithstanding, when presented for registration by or on behalf of the Minister.

Unfortunately, it is clear from the leading case of *Kirkwood* v. *Wilson*, (1908) 27 N.Z.L.R. 1051, that registration of a plan under this paragraph (at least where the land is under the Deeds Registration Act) is not conclusive proof that the road is a public highway. It is only *prima facie* evidence that the land shown on the plan registered under the Deeds Registration Act, 1908, is a public road. Apparently registration under the Land Transfer Act, 1915, will have no higher effect. This opinion I express with a due consideration of *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, where the Court of Appeal held that registration under the Land Transfer Act, 1915, of a void Proclamation purporting to take land for the purposes of a tramway, and declaring the land "shall vest in the Mayor, Councillors, and Citizens of the City of Wellington," indefeasibly vested the land in the Corporation. In *Boyd's* case, the land purported to be vested in the Corporation, whereas the case of a map registered under para. (*d*) of s. 110 of the Public Works Act, 1928, appears to be treated by the Supreme Court as of merely evidential efficacy, for the Court based its ruling on the doctrine of implied dedication. As stated in the last paragraph of the headnote, where it can be clearly shown that, with regard to the owner of the land, the *animus dedicandi* has never existed, user by the public and the expenditure of public moneys will not operate to make the land a public highway under para. (*d*).

Paragraph (*e*) of the definition is as follows:

(*e*) Lands over which any road, notwithstanding any legal or technical informality in the taking or construction thereof, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority, and a sufficient plan whereof is registered in manner provided in the last preceding paragraph.

When granting land, the Crown often had the right to lay out roads over such land. The principal point to be observed is that, where a right is reserved in a Crown grant to resume a part of the land granted for the purposes of a road, the right can be exercised only under the direct authority of the Governor, as representing the Crown, or under the authority of some person or body to whom there has been some general statutory transfer or delegation of the Governor's powers. Thus, when the Governor is authorized to take and lay down a road, it is a proper mode of procedure on his part by warrant, to authorize a surveyor to lay off the road; but a Government official cannot so authorize a surveyor. The surveyor also is entitled to employ his assistant in so doing: *Bary* v. *Wairau Road District*, (1897) 16 N.Z.L.R. 12; aff. on app., (1897) 16 N.Z.L.R. 379, and *Georgetti* v. *Wangachu Highway Board*, (1882) 6 N.Z.L.R. 645.

As to the meaning of the words in para. (*e*) "*legal or technical informality*," see also *Bary* v. *Wairau Road District* (*supra*), where Denniston, J., said, at p. 382:

A pretended taking under a usurped and absolutely non-existing right cannot be called a legal or technical informality.

Before we consider s. 174 of the Municipal Corporations Act, 1933, it may be convenient here to point out that streets shown on deposited plans of Maori townships are public: see s. 12 of the Maori Townships Act, 1895, and s. 10 of the Maori Townships Act, 1910.

The definition of "street" in s. 174 of the Municipal Corporations Act, 1933, reads as follows:

(1) "Street" means the whole of any land which is within a borough, and which—

(*a*) Immediately before the date of the constitution of the borough was a public highway under the control, as such, of any Borough Council, County Council, Road Board, or Town Board; or

(*b*) Immediately before the inclusion of any area in the borough was a public highway within that area; or

(*c*) Is laid out by the Council as a public highway after the date of such constitution; or

(*d*) In the case of a borough originally constituted before the first day of January, nineteen hundred and one, has actually, and whether legally or not, been maintained and controlled as a public highway by any one or more of such local authorities and used by the public for twenty years immediately preceding the first day of January, nineteen hundred and one; or

(*e*) In the case of a borough originally constituted on or after the said first day of January, nineteen hundred and one, has actually, and whether legally or not, been maintained and controlled as a public highway by any one or more of such local authorities and used by the public for twenty years immediately preceding the date of such constitution.

We will first consider para. (*a*):

(*a*) Immediately before the date of the constitution of the borough was a public highway under the control, as such, of any Borough Council, County Council, Road Board, or Town Board.

This merely expresses the old maxim, "Once a highway, always a highway." A highway can be closed only by formal process. The public acquires rights in a highway, and not even the local authority in whom the highway is vested, or under whose control it is, can by any certificate, admission, or release deprive the public of these rights: *Cherry* v. *Snook*, (1893) 12 N.Z.L.R. 54, and *Leather* v. *Registrar-General of Land*, [1933] G.L.R. 342.

Thus, also, the Crown cannot grant to a private person land which it has previously dedicated to the public as a highway. Accordingly, a grant of land from the Crown (even when the title is under the Land Transfer Act, 1915) must be taken to be subject to a highway which has been previously dedicated to the public, even though it is not noticed in the grant: *Mackay* v. *Lynch*, (1885) N.Z.L.R. 3 S.C. 425, and *Richardson* v. *Sowman*, [1929] G.L.R. 85.

An example of a highway coming within para. (*a*) is *Mayor, &c., of Onslow* v. *Rhodes*, (1904) 23 N.Z.L.R. 653. (The Borough of Onslow has now been included in the City of Wellington.)

Paragraph (*b*) provides as follows:

(*b*) Immediately before the inclusion of any area in the borough was a public highway within that area.

This paragraph is of frequent operation in New Zealand, especially in the four main cities, which have absorbed many districts formerly included in a County. The importance of this in practice is that it is much easier to prove implied dedication of land in a County than in a City, Borough, or Town District, the point being that the restrictions against dedication of a highway which have appeared in the various Municipal Acts (and which are pointed out by the Court in *Wellington City Corporation* v. *A. and T. Burt, Ltd.*, [1917] N.Z.L.R. 659) do not apply to land situate in a County.

Paragraph (*c*) is as follows:

(*c*) Is laid out by the Council as a public highway after the date of such constitution.

In connection with this paragraph, it is well to point out that, by s. 193 of the Municipal Corporations Act, 1933, the Council can lay out a public street only by special order.

Paragraphs (*d*) and (*e*) provide as follows:

(*d*) In the case of a borough originally constituted before the first day of January, nineteen hundred and one, has actually, and whether legally or not, been maintained and controlled as a public highway by any one or more of such local authorities and used by the public for twenty years immediately preceding the said first day of January, nineteen hundred and one; or

(*e*) In the case of a borough originally constituted on or after the said first day of January, nineteen hundred and one, has actually, and whether legally or not, been maintained and controlled as a public highway by any one or more of such local authorities and used by the public for twenty years immediately preceding the date of such constitution.

Paragraphs (*d*) and (*e*) may conveniently be considered together. These are very useful paragraphs in practice, and, if these paragraphs did not exist, it would be very difficult to prove that many streets in cities, boroughs, and town districts were public highways.

It seems pretty certain that in these paragraphs the period of twenty years refers to the period of maintenance by the local authority as well as to the period of user by the public.

Dealing with the corresponding para. (*d*) in the 1920 Act, Reed, J., in the unreported Nelson case of *Mayor, &c., of Nelson* v. *Hayes*, said:

As already pointed out, the defendants, in order to prove that Victoria Heights and Queen's Road are streets within the meaning of the Municipal Corporations Act, 1920, must bring the case within s. 171 (1) (*d*) of the Act. It is, of course, common ground that the Borough was originally constituted before January 1, 1901. Has, then, this road been (i) maintained and controlled as a public highway by the Borough, and (ii) used by the public for twenty years immediately preceding January 1, 1901? There is no evidence that, after the roads were first constructed in the year 1872, any private person ever at his own expense did any work on these roads, and there is evidence that within four months after the constitution a private person, Mr. Lucas, looked to the Council to do the necessary repair work on the roads. There is ample evidence that from that time on the Council from time to time expended the moneys of the ratepayers in necessary repairs. The amounts spent, it is true, were small, but this was a sparsely populated district, and large expenditure could not be expected. The important point is that there is not a suggestion that the Council ever repudiated its liability to maintain the roads. When assistance was asked for, its public works committee or engineer inspected and reported as to the requirements and assistance, small though it might be, was granted. It is quite immaterial whether or not such expenditure was legal; all the section requires is that the roads are actually maintained. The standard of maintenance need not, in this case, be considered. In some cases, it might be material. For example, in a thickly populated part of the borough, where the surrounding public streets were asphalted, the mere occasional filling in of a hole for the protection of the public, or the construction of a drain in the interests of the public health, might be held to constitute the maintenance of an unmetalled right-of-way. But in this case there is no suggestion that the maintenance of the roads in question was so inferior as to warrant the conclusion that the Borough had not maintained them. I am satisfied that, from the date of the formation of the Borough, the roads were maintained by the Borough. That they were also controlled by the Borough cannot be seriously denied, in the face of the solemn pronouncement by the Council in 1904 that the Nelson City Council was the local authority having control. The Council could not have control unless the roads were public streets, and, if they were at the time public streets, then nothing had been done since, nor could be, to divest them of that status. That the public made use of the streets for more than twenty years before 1901 I have already held to be proved. I think, therefore, that defendants have proved that Victoria Heights and Queen's Road are streets within the meaning of the Municipal Corporations Act, 1920. A number of authorities were referred to during the course of the argument, but they principally deal with the question of an *implied dedication*. *In the view I take, the question need not be considered*, the whole point being whether the streets in question come within the definition, which is entirely a question of fact.

There remains to be considered in connection with these paragraphs the leading case of *Wellington City Corporation* v. *A. and T. Burt, Ltd.*, [1917] N.Z.L.R. 659. This case concerned a cul-de-sac in the City of Wellington. It does not appear that there was any evidence put before the Court that the cul-de-sac had been used by members of the public as distinguished from the owners, lessees, and occupiers of the adjoining lands, and their friends and others having business with them, who used it as a means of approach to the nearest highway. The Court of Appeal then went on to say that the Corporation could not, by spending money on portions of the land, transform such portions of land into streets, in violation of the plain words of the statute. The legal position apparently was this: the Corporation could not, by expenditure of money on and maintenance of the cul-de-sac, transform it into a street, unless the other condition required by paras. (*d*) and (*e*) also existed—*i.e.*, that the cul-de-sac had been used by the *public* for twenty years.

CORRESPONDENCE.

An Effective Second Chamber.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

Mr. Riddiford's article, "An Effective Second Chamber," combining topicality and profundity, was valuable.

During the week in which its second part appeared, the last-minute rush of hasty legislation, which Oppositions damn and Governments cannot avoid, was on.

Amidst that hurry, one's belief in the need for a revising chamber was renewed by the sight of the Legislative Council, on its last day of life, saving a clause from ambiguity. It probably saved several, but in legislation it is not the spectator who sees most of the game.

But the need for a revising chamber is not an issue. I am writing to call attention to another obvious fact, the relevance of which to the second chamber question may escape attention.

Whenever in New Zealand two or three are gathered together in one occupation, they set up a vocational organization. Even the aerial top-dressers already have one functioning.

The inference is that a vocational Upper House would accord with a New Zealand trend or habit of thought. If so, it would command a respect and have a vitality which no chamber will if its constitution is less the product of environment.

Yours, etc.,
A. W. FREE.

LEGAL AID AND ADVICE IN ENGLAND.

A Layman's View of the Benefits of the New Scheme.

By Ernest Watkins.*

The need to seek the aid of the law in remedying a wrong comes infrequently to most people, but, when that need does arise, it is usually desperate and urgent. It is also, so experience almost everywhere has shown, expensive. The administration of the law is a constant struggle between the need to keep the cost of legal proceedings from being an effective barrier to the Courts and the need to provide a fair standard of remuneration for those who practise the law as their profession.

In Britain, a new system of legal aid in non-criminal cases came into operation in October, 1950. It was an extension of a scheme dating back to 1914, but the 1950 plan had many new features; notably, it has made legal aid based on grants from the public funds available much more widely than ever before.

Under the original Poor Persons Aid Scheme, only those with an income of not more than £104 a year (later increased to £208 a year) and capital assets of not more than £50 were eligible for help. If an applicant's means fell within those limits, he or she could apply to a local committee of lawyers for aid. This committee had both to check the applicant's means and to satisfy themselves that the applicant had some grounds for making or defending a claim. If the applicant passed both tests, he was sent to a practising lawyer in his locality, one who had agreed to give the necessary professional help without fee. Equally, the applicant was freed from liability to pay the normal Court fees. The system, in fact, was largely operated by the legal profession as an act of charity, and the only money the applicant had to find was that needed to pay any witnesses' travelling and other expenses at the trial.

Extension to Armed Forces.

During World War II, this system was extended for men and women in the Armed Forces, very largely by the efforts of the Law Society (the professional association of the solicitors' branch of the profession in the United Kingdom). It provided free legal aid for men and women under the rank of sergeant, and the wartime committees dealt with cases at the rate of some 4,000 each year. By the end of the war, as an experiment, the Law Society's organization began to deal with civilians' cases as well.

All this experience showed both that there was a real social need for a legal-aid service much wider than that which had existed previously and that the necessary organization could be built up within the legal profession itself. But, equally, it was clear that, if the system were to be extended, it neither could nor should set out to rely entirely on the free services of the legal profession itself. As a result, the present scheme was worked out in 1946 and 1947; only financial considerations held up its start until 1950.

The 1950 scheme brought in under the Legal Aid and Advice Act, 1949, is available for a much wider range of the population. The income-limit was raised to £420 a year, and this figure was to be "disposable" income—that is, the income left in the applicant's hands after providing for the support of his family. The capital limit is now £500, and that, likewise, excludes the value of the house the applicant lives in, if he owns his own home.

The second major change is that the applicant may be required to make a contribution to the costs of the proceedings, from his earnings or from capital or from both. The third major change is that the lawyers who agree to work within the scheme will be paid; they will not have to give their services. In Britain, the fees payable to lawyers are all fixed by statutory regulation. When working within the scheme, they will be entitled to 85 per cent. of the fees they would normally receive for the work they actually do. Any practising lawyer is free to work within the scheme or not.

So far, rather more than half (8,500 out of some 16,000) of the solicitors' branch of the profession have put forward their names for inclusion within the panel, and some 1,500 out of 1,900 practising members of the other branch of the profession—the members of the Bar.

How The Scheme Operates.

An applicant for aid first calls at his district office of the Law Society's organization, where he must give details of both his means and his claim. These are investigated by the local branch of the National Assistance Board, but, in cases of urgency, the applicant can be given help at once, without having to wait for these inquiries to be completed.

The merits of the claim itself are investigated by a local committee of lawyers. Their task is difficult. Obviously, it is not for them to say that the applicant can be helped only if his case is a certain one. That kind of decision is for the Courts themselves. On the other hand, they should not allow an entirely hopeless case to be taken to Court with the aid of public money. But, so far, there has only been one public report of any adverse comment by a Judge on the kind of case allowed to go forward by any one of these committees.

It is too early yet to judge of the volume of work that comes within the scheme or what type of case will be the most frequent. Over 9,000 applications were received in the first month of operation, but this figure may fall after the first rush. So far, matrimonial disputes head the list in subjects. The other most frequent claim is one for damages for injuries received in traffic accidents.

Inevitably, such a scheme as this will be compared with the National Health Service in Britain. It has some resemblances, but the differences are important. One is that the majority of those being helped will be paying something towards the cost. The National Health Service is completely free to the user. Another is that the lawyers taking part are paid a fee based on their normal charge for the work actually done, and not a flat rate per head, as doctors are. A third difference is that the scheme is operated entirely by the legal profession itself, through its own professional associations. Having taken the initiative in fostering the plan, they now reap the benefit of a very real independence in its operation.

*Mr. Watkins is a noted English broadcaster and feature-writer.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

In the House of Lords.—Of the twenty-two cases in the current list for hearing in the House of Lords, six are from the Court of Session in Edinburgh. One of the most unusual, *Preston-Jones* v. *Preston-Jones*, (1949) 65 T.L.R. 620, has twice perplexed the Court of Appeal with the question whether a man should be saddled with a child born 360 days after his last act of intercourse with his wife. Bucknill and Asquith, L.JJ. (Denning, L.J., dissenting), considered that at least he should be given the opportunity of refuting the theory of his paternity, which the Commissioner propounded without medical evidence. In the meantime, the child in question is in his fifth year, and will soon be old enough to express his own opinion . . . Cricketers are keeping their fingers crossed over *Bolton* v. *Stone*, [1949] 2 All E.R. 851, which, if the decision in the Court below is accepted, will require batsmen with the ability to hit "sixes" to take out a special policy against claims by unseen pedestrians . . . In this august atmosphere, also, we find, in the person of a sergeant (sentenced to two years' imprisonment), the suppliant in a petition of right—probably, since the coming into force of the Crown Proceedings Act, 1947, the last of its kind. The events (which preceded this Act) related to his actions in Cairo when he jumped on trucks loaded with prohibited goods and, by his presence and the prestige of his battledress, lulled the Police into a dream-world in which they imagined that all was well. The Crown impounded his bank account, and this, with its tax-free credit of £13,000, showed that his ingenuity and misdirected efforts had not gone unrewarded. He wants his money back, and will no doubt press the argument that he never earned it within the scope of his authority as a soldier of the King. It is hard to see how, morally, his ill-gotten gains were ever the property of the Crown. . . . Another case, *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.*, does not seem to have been reported. It concerns the interesting question whether a trust for the education of children of employees, or former employees, of a company is a charity.

Voluntary Searchers.—The recent eight-day search for the young deerstalker lost on the Tararuas calls attention to that fine body of trampers and rescuers prepared at considerable loss and inconvenience to form search parties at short notice and endure rigorous weather conditions without thought of reward and too often without public recognition. At the present time, there is before the House of Commons the Lancashire County Council (General Powers) Bill, which provides:

> The Council may defray such reasonable expenses as may be incurred in the rescue or succour of persons in distress on the hills, coast, or other parts of the county.

It seems that during the season climbers are frequently lost in the Lake District and on the Pennine slopes, where there is danger from accident or exposure, and the local people in the district do not hesitate to form parties, often at considerable risk to themselves. The County Council has apparently a precedent in a Private Bill promoted by the Cumberland County Council in 1948, which enables that County to refund to rescuers out-of-pocket expenditure or loss of wages when their efforts to assist have been carried out in working-hours. No doubt most searches are carried out in these Counties, as in similar circumstances in New Zealand, during most atrocious weather, and it hardly seems likely that those who normally cluster round the wireless will alter their status as listeners merely for the prospect of actual remuneration.

Good Sense and Courage.—"To belong to a body of professional men who have their own standards and their own mutual respect for each other is the kind of thing which may help you when you come up against those situations—which all professional men do come up against—where, apart from a clear understanding and mastery of the art, one needs two things: one is courage—for it is not so easy always to stand up to a powerful client—and the other is the sense that, beside one, are men who see why courage is a right thing, and will stand by one when one has to exercise that courage." These observations are made by Sir Arthur Fforde, now Headmaster of Rugby, in an address to the Chartered Accountants' Students' Society. Once a partner of a leading firm of London solicitors, Sir Arthur served as a member of the Council of the Law Society, and, during the war, as Under-Secretary of the Treasury. He related the professions of law and accountancy by describing both as "partly sciences, partly arts, and partly mysteries."

Lavatorial Repairs.—Scriblex is unable to say whether at any stage of the case to the Court of Appeal the services of Chic Sale (*The Specialist*) were called upon in *J. F. Perrott and Co., Ltd.* v. *Cohen*, [1950] 2 All E.R. 939. Here, the tenant Cohen entered into a lease in 1936 which was to expire in 1948. From its commencement, he took possession of certain lavatories that were adjoining and belonged to the landlords. These were not included in the lease. In 1943, the landlords wrote to him pointing this out and asking him to come to some arrangement if he wished to continue to use them. He declined, on the ground that they were included in the lease. The landlords took no further step, and Cohen continued to use them (the lavatories) until the end of the term, when the landlords sued him for breaches of his repairing covenants, including in their claim items for non-repair of the lavatories. The tenant, with some ingenuity and cunning, contended that there had been no *consensus ad idem* between the landlords and himself as to whether the lavatories actually were included in the lease, and that he was therefore not liable. The Court considered, on the contrary, that, as the landlords had acquiesced in the *de facto* encroachment by the tenant, the lavatories must be treated as part of the premises, and the tenant must, accordingly, be liable in damages for breach of repair. In the opinion of Denning, L.J., the Court was entitled to treat the estoppel here as if it were a cause of action—a course invariably followed in cases of waiver. The view of the landlords, no doubt, was that the tenant had no right to blow hot and cold and so confuse them, *qua* lavatories, that they didn't know whether they were Cohen or coming.

PRACTICAL POINTS.

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

1. Mortgage.—*Discharge—Moneys owing under Land Transfer Mortgage repaid—Mortgagee deceased—No Discharge executed—Administration of Mortgagee's Estate taken out—Procedure to clear Title of Mortgage.*

QUESTION: Our client A owns a freehold property which is subject to three mortgages to B, C, and D, respectively. The third mortgage (to D) was repayable by instalments, and A fully repaid this mortgage, but did not get a release signed by the mortgagee. D died less than two years ago, leaving a will under which executors were appointed, but he left no estate and his will was never proved, and we understand D's executors are not anxious to prove the will and register transmission against the mortgage even if A pays all costs. We did not act for D. The provisions of s. 117 of the Land Transfer Act, 1915, do not apply. Could the provisions of s. 21 of the Trustee Act, 1908, be made to apply? The property is not a very valuable one, and it is desired to keep expenses as low as possible.

ANSWER: Sections 51, 52, 53, and 117 of the Land Transfer Act, 1915, are not applicable to the facts.

If the mortgage moneys have been repaid for twenty years, then the Supreme Court may make an order under s. 43 of the Statutes Amendment Act, 1936.

If the period of twenty years has not elapsed, then a petition may be presented to the Supreme Court for the appointment of a new trustee and for an order vesting the mortgage in the mortgagor, who may then get it off the title by merger or express discharge. The appropriate sections of the Trustee Act, 1908, are ss. 41 and 43: see *In re Park*, (1907) 10 G.L.R. 111, *Re Chrystal*, (1910) 13 G.L.R. 118, and *In re A Mortgage, McDonald to Martin, Ex parte McDonald*, [1933] N.Z.L.R. 602.

Section 21 of the Trustee Act, 1908, is not applicable, because this apparently is a Land Transfer mortgage, and, under the Land Transfer Act, 1915, land is not *conveyed* by way of mortgage, a Land Transfer mortgage operating as a charge merely.

Reference should be made to an article by Mr. E. C. Adams, in (1942) 18 NEW ZEALAND LAW JOURNAL, 115.

X.2.

2. Mortgage.—*Right to repay Principal in Stated Amounts on Quarter Days—Three Months' Notice of Payment to be given—Subsequent Release of Sections and Part Proceeds applied to Reduction of Principal—Whether Interest thereon payable in Lieu of Notice.*

QUESTION: A holds a mortgage over B's land. This mortgage contains provision enabling B to repay the principal in sums of £25, or multiples thereof, on quarterly interest days (March 1, June, September, and December) subject to three months' prior notice or to payment of three months' additional interest in lieu of notice.

Last May, A released several sections from the mortgage to enable B to sell same subject to A's receiving half the net proceeds from the sale of such sections in reduction of principal. In July, A received a cheque for half the net proceeds, and the receipt of this cheque was the first intimation A received of the amount of such proceeds. Can A require B to pay interest on such proceeds up to September 1?

ANSWER: The answer to this question would appear, ultimately, to depend on the construction of the agreement pursuant to which A released the sections.

Prima facie, it would appear that this was an agreement independent of the provision in the mortgage for the giving of the notice or the payment of interest in lieu of notice, and the consideration for the release of the sections would be the promise of B to pay half the proceeds to A in reduction of the principal.

In the absence of further information, particularly as to any agreement applying the provision in the mortgage to the payment of half the proceeds from the sale, we consider that A could not ask for any additional interest in lieu of notice before application of the proceeds in reduction of principal under the mortgage.

A.2.

CHRISTCHURCH'S OLDEST PRACTITIONER.

Mr. A. J. Malley.

On January 20, a greatly loved member of the profession in Christchurch, Mr. A. J. Malley, senior partner of the firm of Messrs. A. J. Malley and Son, celebrated his eightieth birthday. He is the oldest practitioner in the city, and, in an interview with the *Star-Sun* (Christchurch), he said he had no intention of retiring.

Mr. Malley said that he looked with a tinge of regret at the changes which had taken place in Christchurch since he was a boy. The years have treated him kindly, for he is nimble, keenly alert, and quick to draw on a rich store of reminiscences.

Admitted as a solicitor in December, 1896, Mr. Malley has been in practice for more than half a century. He considers that the practice of the law has grown steadily more difficult since 1914, with the addition of "irritating regulations."

Mr. Malley thinks it a pity that in its growing pains the city has swallowed the smaller land holdings, the fine orchards, and the old "Paddy's Market" which flourished in Victoria Square.

Born in an Armagh Street cottage in 1871, on the present site of the Centennial Pool, he moved further down Armagh Street to Linwood with his parents at the age of twelve. The eight years he spent in that locality have left a vivid memory of a large tract of land overrun with broom 6 ft. to 8 ft. high.

"Our amusements in those days were very limited, and were confined mainly to the Avon River. The Avon then was fairly deep, and, being uncontaminated by sewage, offered good fishing for herrings and flounders. A favourite spot was the bridge in East Belt (now Fitzgerald Avenue)," said Mr. Malley.

An idea of the depth of the Avon at that time is given by the fact that a small steamer, fitted with a glass bottom for observation, made excursion trips as far as North Brighton. Lack of patronage from the sparse population forced it out of business, however, and the river remained a happy hunting-ground for fishermen.

"In the 1890's, I remember the fine apple, plum, and cherry orchards which dotted Christchurch, but they have long since vanished."

Rowing enjoyed pride of place among pastimes in those early days, he said, and the standard was definitely on a par with that of the present day.

"The necessaries of life, of course, were very cheap indeed. I recall the old identity of the market-place selling juicy legs of prime mutton at 1s. each.

"That was before the advent of the freezing-works, and I suppose the rest of the carcass was thrown away. Large flounders were 1s. each, oranges and lemons 1s. a dozen, and a 4 lb. loaf of bread as little as 4½d."

Sport has always held Mr. Malley's interest. In his young days, he was no mean performer with the Papanui Athletic Association and Papanui Football Club, and he recalls many athletes whose times were little inferior to those recorded at the Centennial Games. He is a member of the Sumner Bowling Club, and enjoys nothing more at week-ends than meeting other solicitors on the rinks, although he admits wryly that "most of them show more proficiency at the game."